CRI/A/13/86

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

MATHAOTE POTO Appellant

v

REX

JUDGMENT

Delivered by the Hon. Mr. Justice J.L. Kheola on the 21st day of April, 1986

The appellant was charged before the subordinate court for the district of Quthing with the offence of contravening section 3(a) of the Dangerous Medicine Act No.23 of 1973, in that on the 31st August, 1985 and at or near Tele Border Post in the district of Quthing the appellant unlawfully and intentionally dealt in dagga weighing 5.100 kg. without a permit. She pleaded guilty to the charge and was sentenced to six (6) months' imprisonment without the option of a fine. She is appealing to this court against sentence.

The facts of this case are that on the 31st August, 1985, the appellant was arrested at Tele River when she was about to cross into the Republic of South Africa. She was carrying a brown shopping bag. When asked what the bag contained the appellant told the police that it contained dagga which she intended to sell in the Republic of South Africa. The police found out that she had no permit authorizing her to deal in dagga.

I confirm the conviction.

The sentence of six (6) months' imprisonment without the option of a fine has given me some concern. The quantity of dagga found in the possession of the appellant was not large enough to justify a sentence of imprisonment without the option of a fine. In addition to that the appellant is a first offender. A sentence of imprisonment without the option of a fine on a first offender should not be imposed unless the amount of dagga involved is so large that it leaves no doubt that the accused person is a big trader in smuggling dagga.

It has also been pointed out by this court that magistrates should always bear in mind the uniformity of sentences. In all cases where people are convicted of dealing in similar quantities of dagga the sentences imposed by the courts must show some degree of uniformity unless the circumstances of a particular case require that it should be treated differently, such circumstances are the age of the accuded, whether or not he or she has any relevant previous convictions. In all the cases in which this court has discouraged magistrates to give the option of a fine, the quantity of dagga was usually large and over one hundred kilograms or several bags of dagga (see Rex v. Sehloho and another, 1981(2) L.L.R. 292, R. v. Hlapho, Review Order No.7 of 1979 (unreported), R. v. James Mafuso, Review Order No.43 of 1979 (unreported).

The appellate court is always very reluctant to set aside the sentence of a lower court because sentence is a matter entirely in the discretion of the trial court. However such a discretion must be exercised judicially. Where the sentence imposed by the lower court

gives a sense of shock or is so severe that a reasonable court would not have imposed it, the appellate court may set it aside. I am of the opinion that the sentence is too severe when one takes into account the amount of dagga found in the possession of the appellant.

The sentence imposed by the court below is quashed. I substitute a sentence of R70.00 or two (2) months' imprisonment.

J.L. KHEOLA
JUDGE

6th May, 1986.

For Appellant - Mr. Ramodibedi

For Respondent - Mr. Mokhobo

CIV/APN/124/86

IN THE HIGH COURT OF LESOTHO

In the matter of :

BEN ALOTSI Applicant

V

ATTORNEY-GENERAL Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng
on the 18th day of April, 1986.

This is an application for mandament van spolie. The Applicant seeks an Order in the following terms:

(a) Directing Respondent in his capacity as the legal representative of Lesotho Government to restore forthwith to Applicant House No. 604/C at Thaba-Bosiu staffing House Maseru and Applicant's property locked therein;

(b) Dispensing the periods of notice required by the Rules of Court;

(c) Granting Respondent further and/or alternative relief, and that Applicant's affidavit attached hereto will be used in support hereof.

In his founding affidavit, the Applicant avers that he was in peaceful and undisturbed occupation of House No. 604/C at Thaba-Bosiu Staff Housing near Lakeside Hotel Maseru Urban Area in the district of Maseru until on or about the 7th April 1986 when Mochochoko and Letsoela of the Conservation Division of the Ministry of Agriculture (who were acting with the scope of their employment with Lesotho) wrongfully and unlawfully took part of his property and left the other in the house.

Thereafter they locked the door of the said house in such a way that he could not gain access thereto. He proceeds to itemize the property which were locked in the said house totally the value of M10,000.00 (Ten Thousand Maloti). There was also a sum of M3,500.00 (Three Thousand and Five Hundred Maloti only) in hard cash in the locked house in a shelf of the headboard. He alleges that by their action the two Government officers mentioned have resorted to self-help or spoliation which action in law is not allowed. The notice required by the Rules of this Court was dispersed with.

In opposing this application the Respondent alleges that the two Government officers were acting in accordance with law, that is to say Public Service Regulations 1985 (Legal Notice No. 136 of 1985). It is denied that any money was taken from the said house. It is not denied that the said house was entered into in the absence of the Applicant and the property removed pertained to belong to him and the rest were left and locked inside the said house. On the 7th April 1986 Mochochoko alleges that he met Applicant at their offices. At 5 p.m. he, Applicant and one Ramaqele (who has not made any affidavit) proceeded to the house in order that Applicant should point out his property. They then left the house. One Marite was to be called to identify property belonging to the Government.

Letsoela, one of the Government officers took what they were told was the property of Applicant and put it outside. Prior to their removal "repeated" notices to vacate the said premise. The Applicant was finally

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ejected from the said house on the 7th April 1986 pursuant to the provisions of "Legal Notice No. 71 of 1983 of the Public Service (Amendment No.3) Regulations 1983 sub-regulation "D" read together with Regulation 65 of Public Service Regulations 1985 Legal Notice No. 136 of 1985". He further alleges that the Applicant had been given "sufficient written notice to vacate and the procedure for ejectment which followed the terms of the said legal notices."

The Applicant's contention is quite a simple one, namely that when the two officers took possession of the said property, they acted according to the principles of self-help or committed an act of spoliation. He was no longer an officer in terms of the interpretation section of the Public Service Commission Rules 1970 which merely says that an officer means a "Public Officer". The Respondent countered this contention by saying simply that the Applicant's possession was not peaceful.

Section 64(5) (b) says that a dismissed officer from Public Service shall vacate his quarters with effect from the date of dismissal. Section 65(1) deals with procedure to be followed if the officer refuses to vacate the premises.

These sections are clear and unambiguous and must be applied. The question is to whom? They are not of general application. They apply to a particular class of people namely officers in the government service i.e. "Public Officer". Non-public officers are not affected by these regulations. To them the normal procedure which upholds the rule of law must apply. In other words the due process

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of the law must take its course. The principle of self-help is not tolerated. The ordinary courts must hear an application if there is any interference with one's possession, even if it is alleged that his possession is unlawful. It is for this reason that the possession of a property by a thief is protected against the whole world including the owner of the said property. Ownership is not considered where a person has been dispossessed. Possession must first be restored to the dispossessed person.

According to annexures attached to the affidavit of Letsoela many "sufficient written notices were written to the Applicant." Annexure A1 was written to the Applicant is dated 17th December 1984 where it is alleged that Applicant had been dismissed from the Public Service on the 7th November 1984, and that he should vacate the said house. This was one month and ten days after the Applicant's dismissal. The second letter was written to Applicant on the 23rd September 1985 asking the Applicant to vacate the said house (Annexure A2). This is ten (10) months after Applicant had been dismissed from the service. It requested him to vacate the house. The next letter was written on 29th November 1985 (Annexure A3). This is after a year and twelve days after the dismissal of the Applicant. The last letter was written on the 4th April 1986 (Annexure A4).

There must have been a reason for this inordinate delay. The reason, in my view, is that it must have been realised that the Applicant had ceased to be a public officer and hence not amenable to be dealt with in terms of the law which

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is specifically meant to apply to public officers. The section under which the Applicant was dealt with is vicious and oppresive. The ordinary rules of procedure is not to be followed. Certain class of officers of the government are allowed to perform acts of self-help which is totally denied by members of the general public. The Applicant had ceased to be the public officer to whom these regulations are apply. In that even, therefore, the two officers resorted to self-help which they should not have since the normal rules of procedure had now to be followed. The regulations are meant to apply to public officers and to nobody else. However, harsh or cause injustice to those to whom they apply, they have to be followed by those affected by them. (Principal Immigration Officer v Blnila, 1931 A.D. 323 at 336-7). These regulations have to be strictly construed in favour of the person affected by them. I have adopted that approach in this Application.

The Order is hereby granted as prayed with costs.

J U D G E.
18th April, 1986.

For Applicant : Mr. Pheko
For Respondent : Mr. Mpopo.