

IN THE HIGH COURT OF LESOTHO

In the Appeal of :-

WALTER M. MGITHI
NKOSANA MASINGA.

1st Appellant
2nd Appellant

v.

R E X

J U D G M E N T

Delivered by the Hon. Acting Chief Justice
J.L. Kheola on the 16th day of June, 1986.

The appellants appeared before the Subordinate Court at Mokhotlong charged with the offence of contravening section 3 (a) of the Dangerous Medicine Act No. 21 of 1973, it being alleged that on the 17th March, 1986 and at or near Sani Top Border Post in the district of Mokhotlong, the accused dealt in dagga weighing 949 kilograms without a permit. They pleaded not guilty to the charge but were found guilty as charged and each was sentenced to thirty (30) months' imprisonment. They are now appealing to this Court against both conviction and sentence.

The facts of this case, which are not in dispute, are that on the 17th day of March, 1986 the truck driven by the first appellant was stopped by police at Sani Top Border Post. The second appellant was a

/passenger.....

passenger in that vehicle whose Reg. No. was GYC 946T. The police searched the vehicle in the presence of both appellants and forty-three bags and some small bags of dagga were found. The buck of the truck had a canopy with a partition. The bags of dagga were hidden behind the partition which was sealed in such a way that it was not easy for one to notice that the canopy was divided into two parts. After the police had noticed that there was a partition they asked the appellants to open it. The first appellant told the police that the partition could be opened only by breaking it with a hammer. One of the police officers fetched a hammer from the office and the partition was smashed. The bags of dagga were found.

The two police officers testified that the appellants admitted that the dagga was theirs and that they were transporting it. Their evidence ought not to have been admitted because it was a confession to a policeman which had to be taken down in writing before a magistrate in terms of section 228 (2) of our Criminal Procedure and Evidence Act 1981. I say the statement made to the policeman was a confession because the appellants went further to explain that they had no permit.

At the trial the first appellant deposed that he knew nothing about the dagga found hidden in the truck. He explained that on the night preceding the day on which they were arrested the second appellant took away the truck and went away with it. He did not know what he put in it during the night.

The second appellant admitted that on the night in question he took the truck and drove to some place where he collected the dagga and loaded it on the truck. He said that the first appellant remained at the hotel when he went to collect the dagga and knew nothing about the dagga.

The learned magistrate did not believe the appellants and rejected their story. Miss Nku, counsel for the Crown, did not support the conviction on the ground that there were conflicts in the evidence of the two police witnesses. I agree that there were some minor conflicts which could not have affected the conviction of the first appellant had it not been because of the inadmissible confession I have referred to above.

With regard to the conviction of the second appellant I do not see how he can escape conviction because he made a confession before the trial court.

The appeal by the first appellant against both conviction and sentence is allowed. The appeal by the second appellant against both conviction and sentence is dismissed .

J.L. KHEOLA
ACTING CHIEF JUSTICE

10th July, 1986.

For Appellants - Mr. Matihare
For Crown - Miss Nku.