IN THE HIGH COURT OF LESOTHO

In the Appeal of :

NQOSA MORIENYANE Appellant

V

R E X Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice B.K. Molai
on the 12th day of January, 1988.

I have already disposed of this appeal on the following reasons.

The appellant appeared before the Resident Magistrate of T.Y. charged with contravening S. 3(a) of the Dangerous Medicines Act No. 21 of 1973, in that on or about 13th July 1983 and at or near Ha Ramakoro - Mapoteng, in the district of Berea he wrongfully and unlawfully dealt in 44 bags of dagga weighing 775,000 grams without a permit.

Although he had pleaded not guilty to the charge the appellant was, at the end of the trial, found guilty as charged and sentenced to a fine of M1,000 plus 3 years' imprisonment. The appeal was against the whole judgment on the grounds that the conviction was against the weight of evidence and the sentence of both fine and imprisonment excessive.

Three (3) police officers testified in support of the Crown case. Although no witnesses were called on behalf of the defence the appellant himself gave evidence on oath It was common cause that on the day in question the police were conducting a house to house search in the village

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when they came to appellant's home. With the appellant's permission a search was carried out in his three (3) huts. It was during the course of that search that 44 bags of dagga were found in one of the huts.

According to the appellant he had told the police officers that the hut in which the 44 bags of dagga were found was used by one Simon whose parents lived at Vereeniging in the Republic of South Africa. He therefore, knew nothing of the dagga found in that hut. That was, however, denied by the police officers who told the court that all that the appellant explained to them was that he and his wife used the three (3) huts. The wife was, however, away in Durban - the Republic of South Africa. The trial magistrate before whom all witnesses appeared and testified accepted the Crown's story as the truth and rejected as false the appellant's version on this point.

If it were true that the appellant told them that the hut in which the 44 bags of dagga were found was used by Simon, I see no good reason why the police officers would deny it. In my view that was an after-thought on the part of the appellant. In any event the trial magistrate was a better judge of that issue and I was not prepared to quarrel with his finding that the 44 bags of dagga were found in the hut used by the appellant and his wife. That being so, the presumption was that the appellant was found in possession of the dagga. If he did not intend possession of the dagga the appellant would have removed it out of his hut. He did not. Wherefor I came to the conclusion that the appellant had the requisite animus possessendi.

It was common cause that when a permit authorising him to be in possession of the dagga was demanded the appellant failed to produce any. The police officers then seized the 44 bags of dagga and brought them to the police station together with the appellant. The dagga was subsequently weighed in the presence of the appellant. It was found to weigh 775,000 grams.

In terms of the provisions of S. 30(1)(a) of the

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Dangerous Medicines Act 21 of 1973, there could be no doubt, therefore, that the appellant was correctly presumed to have been dealing in dagga. He was rightly found guilty as charged and I accordingly dismissed the appeal against his conviction.

As regards sentence, it is significant to note that in mitigation the appellant addressed and invited the Court to take into consideration the factors that he was a married man and had a wife, four school-going children, his aging parents, seven minor brothers and sisters to look after and in 1975 he was involved in an accident as a result of which he was crippled. In his written reasons for sentence there was no indication that the trial magistrate considered any of the factors raised by the appellant in mitigation. All that the magistrate considered in mitigation was that the appellant was a first offender, the quantity of dagga and that the offence with which the appellant was convicted was too prevalent in his district.

In my view the factors to which the court was invited to consider ought to have been properly taken into account in mitigation. As the magistrate did not, we do not know if he would have imposed the same sentence had he considered the factors raised by the appellant in mitigation. This Court was, therefore, at large as regards sentence.

Taking into account all the points raised by the appellant in mitigation as well as the factors considered by the trial magistrate in his written reasons for sentence, I set aside the sentence of M1,000 plus 3 years' imprisonment and substituted therefor a fine of M600 or 3 years' imprisonment in default of payment of the fine.

In the discretion of this Court it was ordered that the appellant be refunded his appeal deposit.

J U D G E.

12th January, 1988.

For Appellant : Mr. Pheko
For Respondent : Miss Nku.