CRI/A/67/88

IN THE HIGH COURT OF LESOTHO

In the matter of:

'MATHAABE LETSIE

v

R E X

Before the Honourable the Chief Justice Mr. Justice B. P. Cullinan on the 31st day of May, 1989

JUDGMENT

The accused was convicted by the Subordinate Court of the Second Class for the Maseru District of dealing in a plant from which a prohibited medicine can be manufactured, namely 124 plants of dagga, and was sentenced to a fine of M100 or six months imprisonment in default of payment thereof, "suspended for 1 year conditionally".

In passing, I observe that the provisions of section 314 of the Criminal Procedure and Evidence Act 1981, and in particular subsections (3) and (4) thereof, do not embrace the suspension of a period of imprisonment in default of payment of a fine. The Court may only suspend the operation of a sentence of certain date and duration. Imprisonment in default of payment of a fine is provisional and uncertain:

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it may never take effect if the fine is paid. The Court cannot suspend the operation of a sentence which may never come into operation.

In any event, police found the dagga growing in the front garden of the house occupied by the accused and her hospitalized husband. The dagga was growing prominently in the front rather than the back garden, in full view of the public on the roadway, in front of the house. The evidence established that the police called twice at the accused's home that day. The first time she was not present. The police discovered the dagga on their second visit.

The accused testified that she suspected her brother-in-law of growing the dagga. The evidence indicated that she had a gardner: a reasonable inference is that he grew it.

The learned trial Magistrate relied upon the presumptions in section 30(1) (a) and (b) of the Dangerous Medicines Act. The first of those deals with the possession of dagga exceeding 115 grams in mass which, as I see it, did not apply. In any event "possessions" connotes not merely physical possession, but also the knowledge of the nature of that possessed. Similarly the presumption under section 30(1) (b) concerns the "owner, occupier, manager or person in charge of cultivated land". While the accused could be regarded as part-owner or part-occupier of the land, with her debilitated husband, the presumption nonetheless depends on the fact that the accused "was aware or could reasonably have been expected to have been aware" of the existence of the dagga plants on the land. Here

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the accused was aware of the existence of the plants, but again, as I see it, such awareness, for the presumption to operate, must include knowledge of the nature of the plant. That fact must be proved beyond reasonable doubt before the presumption can operate.

In this respect the learned trial magistrate in a ruling that there was a case to answer, said that

> " In the light of the fact that accused's husband is incapacitated, it would be assumed that any major decisions rest upon the accused in their home, and it is the feeling of this court that accused has been properly charged and she has a case to answer. "

Again in her reasoned judgment the learned trial Magistrate observed that

> " .... it is unlikely that accused could have let this plant which do not even flower in the real sense of the word, and they lack fragrance, to grow in her front yard and to such massive extent".

I do not see that such assumptions were established beyond reasonable doubt. I cannot then see how the statutory presumptions would operate, shifting the onus on to the accused.

I am not satisfied that had the learned trial Magistrate directed herself correctly in the matter that she would inevitably have convicted the accused. It would be unsafe to allow the conviction to stand. The conviction and

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sentence in the court below are set aside and the accused is acquitted.

Delivered at Maseru this 31st day of May 1989.

(B. P. CULLINAN)
CHIEF JUSTICE