CIV/APN/367/91
CRI/A/81/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOHLAKOANA MABEA	FIRST APPLICANT
LETYKA MABEA	SECOND APPLICANT
V	
THE MAGISTRATE OF THE FIRST CLASS FOR BUTHA BUTHE	FIRST RESPONDENT
THE ATTORNEY-GENERAL	SECOND RESPONDENT

Before the Honourable Chief Justice Mr. Justice B.P. Cullinan on the 19th day of December, 1991.

For the Appellants : Mr. M.M. Ramodibeli
For the Respondents : Mr. S.P. Sakoane, Senior Crown Counsel

JUDGMENT

Cases referred to:

(1) Smith v James (1907) T.S. 447;
(2) Lawrance v Assistant Resident of Johannesburg (1908) T.S.525;
(3) Ex parte Kent (1907) T.S.325;
(4) Eliovson v Magid & Anor. (1908) T.S. 558;
(5) McComb v A.R.M. Johannesburg A - G (1917) T.P.D. 717;
(6) Francis & Anor. v R (1919) P.D. 255;
(7) Rascher v Minister of Justice (1930) T.P.D. 810;
(8) Ginsberg v Additional Magistrate of Cape Town (1933) C.P.D. 357;
(9) Attorney-General v Devon (1952)2 SA 328(T);
(10) R v Day & Ors. (1952)4 SA 105 (N);
(11) R v Foley & Ors. (1953)3 SA 496 (E);
(12) Attorney-General v Port (1938) T.P.D. 208.
(13) Lebona v Bereng & Attorney-General C of A (CIV) No.8 of 1987 (7/4/89) Unreported;
(14) Thakeli & Anor. v D.P.P. C of A (CRI) No.6 of 1984; Unreported;
(15) R v Shabani & Others CRI/T/27/91 Unreported;

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(16) Makenete v Lekhanya & Ors. CIV/APN/74/1990 (6/11/90) Unreported;
(17) R v West London Stipendiary Magistrate, Ex parte Simeon (1982) 3 W.L.R. 289;
(18) Curtis v Johannesburg Municipality (1906)TS 308;
(19) R v Margolis & ors. (1936) OPD 143;
(20) DPP v Lamb (1941)2 K.B. 89;
(21) Mischeff v Springett (1942)2 K.B.331;
(22) Buckman v Button (1943) K.B.405;
(23) R v Oliver (1944) K.B.68;
(24) R v Banksbaird (1952)4 S.A. 512 (AD);
(25) R v Mazibuko (1958)4 S.A. 353 (A.D.)
(26) R. v Sillas (1959)4 SA 305 (AD);
(27) R v Loots (1951)2 SA 132 T;
(28) S v Loate (1983)3 SA 400 (TPD);
(29) S v Mpetha (1985)3 SA 702 (AD).
(30) R v Fisher (1969)1 All E.R. 100;
(31) Warburton v Loveland (1832)2 D & CL. (H.L.) 480;

THE FACTS:

The applicants were charged with robbery before the Subordinate Court of the First Class for the Butha-Buthe District.

The offence is alleged to have taken place on 20th February, 1990. The trial commenced on 29th August, 1991. It appears that the learned Attorney for the applicants, Mr. Ramodibeli who represented them in the Court below, had been informed that the trial was commencing on 28th August, on which date he attended Court to learn of the correct date. He requested the Public Prosecutor to advise the Magistrate that he would be obliged to attend Court late the following day, as he had other matters to first attend to in Maseru. The Prosecutor did not so inform the learned trial Magistrate, who commenced the trial.

The applicants pleaded not guilty and thereafter the complainant gave his evidence in chief. It was then that the applicants informed the Magistrate that Mr. Ramodibeli represented them. Shortly thereafter Mr. Ramodibeli appeared. No further evidence was taken, the case being adjourned to 3rd September, 1991, when a further adjournment was granted. At the adjourned hearing Mr. Ramodibeli made application that the proceedings be converted into a preparatory examination, as the learned trial Magistrate, he submitted, lacked jurisdiction to try a case of robbery. The learned trial Magistrate delivered a ruling on 17th September, dismissing the application. The applicants appealed to this Court against that ruling. On 1st November, I dismissed the appeal as I considered that there was no jurisdiction in this Court, on appeal, to consider, what I would term an interlocutory order made by a Magistrate in a criminal trial, reserving my reasons therefor. I indicated however that an application for judicial review would lie under section 7 of the High Court Act and rule 50 of the High Court Rules. The matter came before me again by way of such application on 8th November. On 22nd November, 1991 I granted the application, declaring the proceedings before the learned trial magistrate to be a nullity and setting them aside. I also ordered that the applicants be tried *de novo* before the Chief Magistrate. I reserved my reasons in the matter. It proves convenient to deliver a composite judgment, and the reasons reserved in the criminal appeal and civil application now follow.

THE COURT'S JURISDICTION ON APPEAL:

Section 329 of the Criminal Procedure & Evidence Act, 1981 reads as follows:

> "329. (1) In case of any appeal against a ***conviction or sentence***, which has not been dismissed summarily under section 327, the High Court in its appellate jurisdiction, without prejudice to the exercise by the High Court of its power under section 73 of the Subordinate Courts Proclamation 1938 (now section 72 of the Subordinate Courts Order, 1988) or under section 8 of the High Court Act 1978 -
>
> (a) Confirm the judgment of the Court below, in which case if the accused, having been convicted and admitted to bail, is in court, the court of appeal may forthwith commit him to custody for the purpose of undergoing any punishment to which he may have been sentenced; or
>
> (b) order the judgment to be set aside notwithstanding the verdict, which order shall have for all purposes the same effect as if the accused had been acquitted;
>
> (c) give such judgment as ought to have been given at the trial, or impose such punishment (whether more or less severe than or of a different nature from the punishment imposed at the trial); or
>
> (d) make such order as justice requires.
>
> (2) Notwithstanding that the High Court is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be

> set aside or altered by reason of any irregularity or defect in the record or proceedings unless it appears to the court of appeal that a failure of justice has resulted therefrom." (Italics supplied)

It will be seen that those provisions refer only to an appeal against a conviction or sentence: sections 326 and 327 similarly refer only to an appeal against conviction or sentence. Mr. Ramodibeli submitted that the Court has inherent powers to deal with the matter. It is trite that any superior Court has inherent powers, but I have always understood those powers to relate solely to the exercise of the Court's original jurisdiction. When it comes to the exercise of appellate or revisional jurisdiction, the High Court of Lesotho is strictly a creature of statute, and is bound by the terms of the statute conferring such powers.

It will be seen, however, that the powers under section 329 are specifically stated to be exclusive of the Court's other statutory powers of appeal. The Court's powers of appeal in criminal matters under section 72 of the Subordinate Courts Order, 1988 are again confined to a conviction or sentence, however, and indeed section 72(4) provides that the Court "shall ..... exercise the powers conferred by section 329 of the Criminal Procedure and Evidence Act, 1981". There are nonetheless the provisions of section 8 of the High Court Act which read thus:

"8. (1) The High Court shall be a court of appeal from all subordinate courts in Lesotho with full power -

(a) to reverse and vary all judgments, decisions and orders, civil and criminal, of any of the subordinate courts;

(b) to order a new trial of any cause heard or decided in any of the subordinate courts and to direct, if necessary, that such new trial shall be heard in the High Court;

(c) to send back any case heard and decided in a subordinate court with such instruction as to any further proceedings as the High Court may deem necessary; and

(d) to impose such punishment (whether more or less severe than, or of a different nature from, the punishment imposed by the subordinate court) as in the opinion of the High Court ought to have been imposed at the trial.

(2) When considering a criminal appeal and notwithstanding that a point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record of proceedings, unless it appears to the High Court that a failure of justice has in fact resulted therefrom."

It will be seen that under those provisions the Court has "full power ... to reverse and vary all judgments, ***decisions and orders*** civil and ***criminal***, of any of the subordinate courts." (Italics supplied). The question arises as to whether the words, "***decisions and orders***", embrace interlocutory decisions and orders. I must confess that at first glance one is inclined to so construe these words, particularly when they are contrasted with the word "judgments", which clearly involves a final order.

In the old case of Smith v James (1) the plaintiff, in order to bring his claim of £110 within the jurisdiction of the particular Magistrate, deducted therefrom £9.12.6, which he alleged was due to the defendant, and indeed abandoned the amount of 7s.6d., reducing the claim to £100. The defendant pleaded the general issue but also specially pleaded that the amount of £9.12.6 was due not to him but another and therefore the Magistrate lacked jurisdiction. The Magistrate dismissed such special plea. Before he could decide on the merits of the general issue, the defendant appealed against the dismissal of the special plea. Innes C.J. (Bristowe & Curlewis JJ. concurring) observed at pp.448/449:

> " It appears to me that the magistrate's decision is not a "final order," from which an appeal will lie to this Court. It only disposed of the first exception, and the magistrate ought to have gone on and decided the matter on the merits. Otherwise, there might be two or three appeals from a magistrate's decision in the same matter. The defendant might file several special pleas and might appeal seriatim from the decision on each of them, leaving the merits still open. But such decisions are really not final orders. A "final order" is one settling the dispute between the parties. Had the magistrate upheld the exception, he would have dealt with the dispute between the parties by dismissing the summons, and that would have been an appealable order. But in the present case he has only determined that he has jurisdiction; and he is prepared to go on and try the dispute; when he has done so an appeal will lie from his decision upon this, as upon any other ground. But it does not lie yet. I think we should make no order now, except that the appellant will have to pay the costs of bringing the matter before us. The

> magistrate will no doubt proceed to hear the case on its merits; and from his final order it will be competent for either party to appeal."

In the case of Lawrance v Assistant Resident Magistrate of Johannesburg (2) the applicant had been charged with a number of offences, some of them alleged to have taken place in Boksburg. The Magistrate overruled an objection that he was not a resident magistrate of the Boksburg district and had no jurisdiction to try the offences alleged to have been committed in Boksburg. The applicant applied for an interdict to restrain the Magistrate from trying these offences. Innes C.J. (Solomon and Curlewis JJ. concurring) observed at p.526:

> "Now the magistrate has decided upon the objection. If he was wrong in overruling it, an appeal will lie to this Court. And as a general rule that is the proper course to adopt in cases of this kind. We laid down that rule in a converse case, which arose in connection with civil proceedings, but I think it should also apply in criminal matters. In Ex parte Kent (3) the principle is thus set out in the headnote: "Where a summons in a magistrate's court is dismissed for want of jurisdiction, the plaintiff's remedy is to appeal against the decision, and not to apply for a mandamus to compel the magistrate to proceed with the case." This is really an appeal from the magistrate's decision upon the objection, and ***we are not prepared to entertain appeals piecemeal. If the magistrate finds the applicant guilty, then let him appeal, and we shall decide the whole matter.*** There has been no authority quoted which would justify our summary interference under these circumstances. it is not necessary to say that the Court will never interfere in the proceedings of magistrates' courts. it is

> sufficient to say that this is not a case in which we feel called upon to do so. The cases quoted with regard to mandamuses appear to have been decided upon altogether different principles. In those cases the Court thought that justice required its speedy intervention. But to compel a magistrate to do his duty, clearly set out in the statute, is a very different thing from interfering with the magistrate's jurisdiction in a matter which upon the face of the documents is rightly and properly before him. Therefore I think the application should not be entertained." (Italics supplied)

In the case of Eliovson v Magid & Anor. (4), decided some days after Lawrance (2), the trial Magistrate, after both plaintiff and defendant had closed their cases, stated that he did not wish to hear counsel for the plaintiff and that he thought the plaintiff was entitled to succeed. Nonetheless, before he had entered formal judgment, he thereafter granted an application by the defendant for a commission to take the evidence of the defendant's father in Palestine, which proposed evidence would in any event have been inadmissible in support of the defendant's plea. The result of the Magistrate's order, which contained no detail whatever as to the commission, was that the matter would be delayed for months. The plaintiff made application for review to the Supreme Court, wherein reference was made to the case of Lawrance (2). Innes C.J. observed at p.561:

> "I am not prepared to say that the Court would never interfere, or has no jurisdiction ever to interfere, in respect

of a separate and self-contained branch of the proceedings, even before the final stage has been reached. Every thing depends upon the circumstances. As a rule it would be very inconvenient to do so; but there may be cases in which such a course would not be inconvenient, but proper, and I think that this is one of them;"

Solomon J. in turn observed at p.566:

"The plaintiff, therefore, is kept out of his judgment for months in order that a futile commission should issue to take evidence in Palestine. Now is there no remedy for that state of things? I should be extremely sorry to think that the Court was powerless to grant relief in such circumstances. *It is clear that there is no remedy by way of appeal; for the plaintiff cannot appeal from the magistrate's order for a commission.* His only possible remedy, so far as I can see, is to come to the Court and ask us by way of review to set aside and correct the proceedings on the ground of their gross irregularity. In my opinion it was a grossly irregular thing for the magistrate to issue a commission to take evidence which was clearly irrelevant to the issues he had to try. Why, then, should the Court not set aside the order for the Commission? The main argument addressed to us on that part of the case was that the Court was powerless to do anything until the case had come to a conclusion; that we could not interfere during the course of the proceedings in the trial; and that we were bound to hold our hands - to sit still and allow a commission to issue to take evidence which is irrelevant, and so waste months during which the plaintiff is kept out of his judgment. I should be very sorry indeed to think that this Court was in such an impotent condition as that."

There followed the case of McComb v A.R.M. Johannesburg &

A-G (5) where an application was made to the Supreme Court for *mandamus* to compel a Magistrate to allow questions in cross-examination of the complainant in a criminal case, which the Magistrate had disallowed. Gregorowski J. observed at pp.718/719:

> "The idea of a trial is that it should be as much as possible continuous, and that it should not be stopped. If this kind of procedure were to be allowed it would mean that a trial may become protracted, and may be extended over a number of months. The magistrate would sit on one day and hear part of the evidence of a witness; then the hearing would have to be postponed till the opinion of the Supreme Court could be taken, perhaps a month or two later. Thereafter the trial would again be continued, after some months, and immediately it is resumed objection might again be raised in connection with some evidence, with an application again to the Supreme Court, and again back to the magistrate. I think that would produce an intolerable condition of things. I do not say the Court may never interfere in the course of a trial before a magistrate. There may be misconduct on the part of the magistrate, or something of that kind. But when a case comes before a magistrate I think he must use his discretion and give his decision. When the matter is finally disposed of by the magistrate the Court has the opportunity of dealing with the case by way of appeal or review. It is distinctly laid down, in the case of appeal, that ***you cannot appeal on an interlocutory matter and before the end of the case*** before the magistrate. There is a decision on that point, which has always been followed in this Court - Smith v. James (1). You cannot appeal, for instance, in regard to the decision of the magistrate on an exception, unless it disposes of the case; you must wait till the whole case is decided. I think exactly the same rule ought to be followed in the case of review. It is possible that there may be a special

> case, as in Eliovson v. Magid (4), where the magistrate has erred in such a way that there is no difficulty in the way of the Court on review putting him right ...." (Italics supplied)

In the case of Francis & Anor. v R (6) an appeal was lodged in the Supreme Court against an interlocutory ruling by a Magistrate in a criminal trial. Dove-Wilson J.P. (Tatham J. and Matthews A.J. concurring) observed at p.256:

> "... what has been called an appeal has been taken to this Court. But the matter is still *sub judice* in the Magistrate's Court. There has been no conviction and there can be no appeal. Consequently we have no jurisdiction and can make no order."

In the case of Rascher v Minister of Justice (7) the applicant sought from the Supreme Court an order of disclosure of the name of the complainant, during the course of the applicant's criminal trial before a Magistrate. Krause J., after considering at pp.819/820 the above dicta in the case of Eliovson (4) and Lawrance (2), observed at p.820:

> "It will ... be seen that a wrong decision of a magistrate in circumstances which would ***seriously prejudice the rights of a litigant*** would justify the Court at any time during the course of the proceedings in interfering by way of review, and that the question of convenience would not necessarily arise where the proceedings attacked are "separate and distinct from the rest of the case." The above principles were laid down in a civil case, and they would apply with greater force where the proceedings are of

> a criminal nature and a miscarriage of justice might result in the circumstances from a wrong decision of the magistrate or where the rights of an accused person are seriously affected thereby." (Italics supplied)

In the case of Ginsberg v Additional Magistrate of Cape Town (8) the Magistrate dismissed an application, before plea, to strike out two counts of criminal *injuria* on the grounds that *crimen injuriae literis* no longer existed in the Cape in view of the provisions of the Libel Act No.46 of 1882. *Mandamus* was sought in the Supreme Court. Gardiner J.P. (Watermeyer and Jones JJ. concurring) observed at p.359 that in view of the provisions of the Criminal Procedure Act 32 of 1917, no appeal lay in the matter, as there had been no conviction. As to the court's power of review he observed at pp.360/361:

> "... that power of review is limited to certain grounds, viz., incompetency of the Court in respect of the cause, incompetency of the court in respect of the Judge himself, malice or corruption on the part of the Judge, gross irregularity in the proceedings, and the admission of illegal or incompetent evidence, or the rejection of legal and competent evidence. None of these grounds appears in the present case. Now, as a rule, the Court's power of review is exercised, only after termination of the criminal case, but I am not prepared to say that the Court would not exercise that power, or, at any rate, a similar power, and grant a *mandamus* even before the termination of a case, if there were gross irregularity in the proceedings. For instance, supposing the magistrate tried a case in the absence of the accused, in circumstances where such a trial is not permitted, I think the Court would interfere even before conviction, or,

supposing the magistrate refused to allow the accused legal assistance for his defence, I think there the Court might interfere. That would be because the magistrate was acting with gross irregularity, and was not fulfilling the functions which had been entrusted to him. But, where a magistrate, in a proper and regular way, ***performs his functions, but comes to a wrong conclusion of law,*** then I do not think that the Court would interfere until a conviction has resulted. In this case, I shall assume, for the purposes of my decision, that the magistrate's decision that there is still a *crimen injuriae literis*, was wrong, but I must not be taken for a moment as laying that down, or indicating even that I think that the magistrate was wrong, but I shall assume that the magistrate was wrong. Even if he be wrong it seems to me that this Court ought not to interfere at the present stage, and that the accused will have his remedy by way of appeal. I come to this decision independently of authority, but, when I look at the practice of other divisions, I find that there is considerable authority in favour of this view. In the case of Lawrance v. the Assistant Magistrate of Johannesburg (2), it was alleged that the magistrate was trying a case which was outside his territorial jurisdiction; application was made for an order interdicting him from proceeding with it, and the application was refused, it being held that the proper remedy was by way of appeal. Now, it seems to me that that was a stronger case in favour of the accused than the present case, that there, if the contention of the accused was correct, the magistrate was acting ***where he had no jurisdiction at all to act***, and that would be a gross irregularity." (Italics supplied)

Gardiner J.P. considered the question of prejudice to the accused, observing at p.361 that,

"... wherever a man is tried for a crime of

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> which he is innocent there would be prejudice, but I do not see any special prejudice in the particular circumstances of this case."

The learned Judge President concluded at p.362 that,

> "I do not see, therefore, that the accused suffers any more prejudice than is suffered by any accused where he is indicted under a charge which may subsequently be found to be bad in law, or one to which an exception ought to have been allowed."

The old "Case Stated" procedure under section 73(7) & (8) of the Subordinate Courts Proclamation empowered the Director of Public Prosecutions to require a Magistrate who "has in any criminal proceedings given a ***decision*** in favour of the accused on any matter of law" to "state a case for the consideration of the High Court" and to "appeal from that decision (stated) to the High Court". At first glance it seems that the sub-section embraces an inter-locutory appeal. Section 73(10) however enabled the Magistrate to "reopen the case" where the appeal was allowed. Section 73(11) enabled the High Court itself to impose sentence. Indeed, all the authorities indicate that such appeal only lay after a final Judgment (acquittal) by the magistrate: see e.g. Attorney-General v Devon Properties Pty Ltd (9), R v Day & Ors. (10), R v Foley & Ors. (11) and see in particular Attorney-General v Port (12) per Millin J. at pp.208/209.

The "Case Stated" procedure under section 73(7) and (8) has now been repealed and in its place is to be found the following

provision under section 72(6) of the Subordinate Courts Order 1988:

> "(6) If the Director of Public Prosecutions or his representative or a private prosecutor is dissatisfied with any ***judgment*** of a subordinate court on any matter of fact or law, he may appeal against such ***judgment*** to the High Court." (Italics supplied)

That clearly embraces a final judgment. On the other hand, the following provision contained in section 73(2) of the Proclamation, is now repeated in section 72(2) of the Subordinate Courts Order 1988, namely,

> "(2) Whenever a criminal summons or charge is dismissed at any stage of the proceedings on exception or on the ground that it is bad in law or that it discloses no offence, the Director of Public Prosecutions may ... appeal against such dismissal."

It might conceivably be said that section 72(2), in comparison with section 72(6), does not embrace a final order, particularly in view of the words "at any stage of the proceedings". In the case of Ginsberg (8) however, Gardiner J.P. at pp.359/36, in considering the virtually identical provisions in South Africa, on which those in Lesotho are based, observed:

> "In other words, where the proceedings are put an end to by a decision of a magistrate's court, an appeal will lie; where the Magistrate holds that the charge is bad, the Attorney-General may appeal,

> because that decision disposes of the charge, but I think one may infer from the ... sub-section ... that where the Magistrate holds that the charge is good, no appeal lies until after conviction."

Suffice it to say therefore that all the authorities indicate that appeal only lies against a final order, and that is what I have always understood the position to be. As for section 8 of the High Court Act, 1978, I observe that section 8(1)(b) refers to "a *new* trial of any cause *heard or decided*". Again, section 8(1)(c) refers to "any case *heard and decided*". Section 8(1)(d) contemplates the substitution of a punishment for that imposed by the subordinate court "at the *trial*". Again, section 8(2) contemplates the reversal of a conviction or sentence. The whole tenor of section 8 therefore indicates that it is concerned with a final order. As for the words in section 8(1)(a), "decisions and orders", I observe that a 'decision' or an 'order' in a criminal trial may be final in nature, such as an order of forfeiture or compensation, or costs. There is nothing elsewhere in the section, or in the other legislation considered, or in any of the authorities, to indicate that the particular words contemplate an interlocutory appeal and I can only conclude that the provisions of section 8 deal with an appeal against a final order.

THE COURT'S JURISDICTION ON REVIEW:

I turn then to the High Court's power of review. Sections

66 to 68 of the Subordinate Courts Order 1988 deal with automatic review by the High Court of certain convictions and sentences imposed by Subordinate Courts. Again, section 68(4) enables review of sentences, and hence convictions, "not subject to review in the ordinary course" in any case in a Subordinate Court "brought to the notice of the Judge". Clearly those provisions do not enable any interlocutory review. Section 7 of the High Court Act however reads as follows:

> "7. (1) The High Court shall have full power, jurisdiction and authority to review the proceedings of all subordinate courts of justice within Lesotho, and if necessary to set aside or correct the same.
>
> (2) This power, jurisdiction and authority may be exercised in open court or in chambers in the discretion of the judge.""

The question is, do those provisions enable the High Court to review all decisions of a subordinate court (including a Central and Local Court), civil and criminal, interlocutory and final? Assuming for the moment, without finding, that the present application is well-founded, it seems to me that the revisional powers under section 7 would be rendered nugatory if the Court could not prevent an abortive trial in a Subordinate Court from taking place in the first case. I see no reason whatever why the words

> "... full power, jurisdiction and authority to review the proceedings of all subordinate

> courts of justice within Lesotho, and if necessary to set aside or *correct* the same",

should be given any restricted meaning. I place particular emphasis on the word "correct" and I can only conclude that the above words in their natural and ordinary meaning, enable the High Court to review *all* proceedings, interlocutory and final, criminal and civil of subordinate courts.

THE GROUNDS FOR REVIEW:

The grounds for review were stated by Gardiner J.P. in Ginsberg (8) at p.360 quoted *supra*. That is but one of many judicial statements on the point. They were stated more recently in the Court of Appeal in the case of Lebona v Bereng & Attorney-General (13) at p.13 to be "illegality, irrationality and procedural impropriety".

Review is of course a discretionary remedy, as the authorities above quoted indicate. It is clear therefrom that "as a rule, the Court's power of review is exercised, only after termination of the criminal case". Gregorowski J. indicated he would be prepared to intervene in the case of "misconduct on the part of the magistrate, or something of that kind". Krause J. considered that where a wrong decision of a magistrate might give rise to "a miscarriage of justice", or "where the rights of an accused person are seriously affected thereby", the Court should

intervene. Gardiner J.P. was prepared to intervene if there was gross irregularity in the proceedings. In this respect he considered that if the contention in the case of Lawrance (2) was correct, namely, that the Magistrate lacked jurisdiction, that "that would be a gross irregularity". That of course is the ground of the present application, namely that the Magistrate lacked jurisdiction.

THE GROUND FOR THE APPLICATION:

(a) The Magistrate's Jurisdiction:

I turn therefore to examine that aspect. The Revision of Penalties (Amendment) Order, 1988 was introduced on 14th July, 1988. It provided *inter alia* for a minimum punishment of 10 years' imprisonment without the option of a fine in respect of the offence of robbery. While the Order refers to "the principal law" without stating the specific enactment to which reference is made, the provisions of the Order (reinforced by a specific reference in the marginal notes) can only be regarded as amending the provisions of the Revision of Penalties Proclamation No.17 of 1952.

On 11th May, 1991 the Revision of Penalties (Repeal) Order 1991 was introduced. Section 2 thereof reads thus:

> "2. (1) The Revision of Penalities Proclamation 1952 is repealed.

/...

(2) Notwithstanding subsection (1),

(a) any legal proceedings pending prior to the commencement of this Order may be instituted, continued or enforced;

(b) any penalty or punishment pending prior to the commencement of this Order may be imposed,

as if this Order has not been passed."

In the present case the offence is alleged to have been committed on 20th February, 1990. The applicants were charged and brought before the Magistrate's Court at Butha-Buthe on 31st December, 1990. A number of adjournments took place, mainly it seems because the police had not finished their investigations. Eventually the trial commenced on 29th August, 1991, by which time of course the Revision of Penalties (Repeal) Order 1991 had been introduced.

When Mr. Ramodibeli made application in the Court below that the trial be converted into a preparatory examination, under section 62 of the Subordinate Courts Order, 1988, he made reference to the provisions of section 61 of that Order, under which the jurisdiction of a Subordinate Court of the First Class, in the matter of punishment, was limited to a maximum term of imprisonment for 6 years. Pointing to the provisions of the Revision of Penalties (Amendment) Order, 1988, Mr. Ramodibeli submitted that the trial Magistrate lacked for jurisdiction.

The learned Senior Crown Counsel, Mr. Sakoane, very properly submits that it is trite that if there is no power to punish, then there is no power to try: I agree: that has been said in this Court in a number of judgments. Further, Mr. Sakoane submits that minimum sentence legislation does not *ipso facto* confer any enhanced jurisdiction upon Magistrates' Courts: there must be specific provision enabling any such enhancement. Indeed, in the case of Thakeli & Anor. v D.P.P. (14), to which Mr. Sakoane refers. Schutz P. at p.8 expressed "great surprise" that the contrary proposition could be advanced, an opinion which I respectfully share. For my part I consider that the matter is trite and that merely to state the contrary proposition is to defeat it.

(b) Application of Repealed Law:

The question then arose in the present case as to whether the Revision of Penalties Proclamation 1952, as amended by the Revision of Penalties (Amendment) Order, 1988 still applied. In this respect the learned trial Magistrate's ruling reads thus:

> "1. In terms of the Revision of Penalties (Repeal) Order, 1991 being Order No.11 of 1991 dated the 7th May 1991.
>
> 2. Also in terms of CRI/T/27/91 R V NZABIMANA SHABANI & OTHERS (15) whose facts in issue

> are the allegations of the 20th (February), 1990, the Court is at liberty to exercise its discretion judicially. In that discretion therefore the application is hereby dismissed."

I consider that in referring to any discretion in the matter of jurisdiction, the learned trial magistrate was there placing a particular interpretation on the use of the word "may", where it appears twice in section 2(2) of the Revision of Penalties (Repeal) Order 1991. The proceedings under consideration were undoubtedly "pending prior to the commencement of (the) Order". The learned trial Magistrate seems therefore to have interpreted section 2(2)(a) and (b) as indicating that in such circumstances any such proceedings "(might) be .... continued .... as if this Order (had) not been passed", or in other words, that at the end of the trial, if the applicants were convicted, the Court, in its discretion might impose the minimum punishment of 10 years' imprisonment: equally in its discretion the Court might decide to impose a sentence less than such statutory minimum, for example, a sentence within the limits of the Magistrate's penal jurisdiction, namely 6 years' imprisonment. The learned trial magistrate in brief seemingly construed subsection (2) of section 2, as conferring upon any Court, in the circumstances of the case before him, a discretion whether or not to impose the minimum punishment.

In arriving at that construction, the learned trial Magistrate followed the dicta of Molai J. in the case of R v Shabani & Ors. (15). The learned Judge was faced with the task of imposing sentence, on the 28th June, 1991, in respect of an offence of rape committed on 10th March 1991, that is, at a time when the 1988 Order prescribed a minimum sentence of 5 years' imprisonment in respect of such offence. In considering section 2 of the Revision of Penalties (Repeal) Order 1991, Molai J. observed thus:

> "I have underscored the word "may" in the above cited section of the Revision of Penalties (Repeal) Order 1991 to indicate my view that the provisions thereof empower the court with a discretion whether or not to impose the penalty which was prescribed by the now repealed Revision of Penalties Proclamation, 1952 i.e. following a conviction the court is no longer bound to impose the minimum punishment but where the circumstances warrant it the minimum punishment can still be imposed in proceedings that commenced prior to the coming into operation of the Revision of Penalties (Repeal) Order, 1991."

Those dicta were expressed, at the close of a trial, when the learned Judge was passing sentence. It does not appear as if he had the benefit of learned submission in the matter. He certainly cannot have had the benefit of the extensive submissions and assistance such as I have had in this case. Suffice it to say that I would, for the reasons which follow, very respectfully disagree with my learned Brother.

The provisions of section 2(2) of the 1991 Order apparently constitute a saving, a saving of the position before the repeal of the 1988 Order, denoted in particular by the use of the commencing words, "Notwithstanding subsection (1) ...", and again the concluding words, "as if this Order (had) ***not*** been passed". Section 59 of the Interpretation Act, 1977, to which Mr. Ramodibeli and Mr. Sakoane refer, reads as follows however:

> "59. Where an act or omission constitutes an offence and the penalty for such offence is varied between the time of the commission of the offence and the conviction therefor, the offender ***shall*** be liable to the penalty prescribed at the time of the commission of the offence." (Italics supplied)

Those provisions clearly preserve the punishment prescribed at the time when an offence is committed. In the present case the penalty has been "varied", to the extent that there is no longer a statutory minimum sentence to be imposed. Section 2(1) of the 1991 Order has in effect repealed such minimum sentence, so that the provisions of section 59 apply. It can be said therefore that there would be no need for sub-section (2) of section 2 of the 1991 Order, that is, if it is to be given the above interpretation which I would place upon it: section 59 preserves the minimum sentence, therefore what need is there for sub-section (2) to do so?

If one takes the opposite view however, namely that sub-section (2) was intended to alleviate the effect of section 59,

then surely the sub-section would have commenced with the words, "Nothwithstanding the provisions of section 59 of the Intepretation Act 1977 ..."? Further, the concluding words, "... as if this Order (had) not been passed", would then make nonsense of the sub-section, as if the 1991 Order had never been passed, the minimum sentence would be preserved for all relevant offences committed subsequent to as well as prior to the 11th May, 1991. Surely if the parliamentary draftsman had wished to avoid the strictures of section 59, sub-section (2), adopting the present format, would have read,

> "(2) Notwithstanding the provisions of section 59 of the Interpretation Act 1977,
>
> (a) *No* legal proceedings pending prior to the commencement of this Order may be instituted, continued or enforced;
>
> (b) *No* penalty or punishment pending prior to the commencement of this Order may be imposed,
>
> as if this Order had not been passed."

Further, had the parliamentary draftsman sought to avoid the strictures of section 59, he would not have adopted the present format, which speaks only of ***pending*** legal proceedings or a ***pending*** penalty or punishment. There could well be a case where an offence had been committed prior to the commencement of the Order but proceedings in respect thereof, much less any penalty,

were not *pending*, possibly because the offence might not even have been detected or investigated, much less that a charge had been preferred in respect thereof. The provisions of section 59 would not therefore in any event be avoided in respect of such offence, which would clearly be an anomalous, indeed an unjust situation.

If the opposite view is taken however, namely, that the parliamentary draftsman wished to preserve the minimum sentence in respect of offences committed before 11th May 1991, it can then be said, as indicated earlier, that there was no need at all for the provisions of sub-section (2). That is so, but for reasons which will later emerge, the parliamentary draftsman used the present format, and if it was his intention to preserve the minimum sentence, then at least it can be said that no anomaly or injustice arises, as section 59 would then operate in respect of offences not affected by the provisions of sub-section (2), namely offences committed prior to 11th May, 1991 in respect of which no proceedings were "pending" on that date. In view of the use of the word "instituted" in sub-section (2)(a), however, it may be that the parliamentary dratsman has given a very wide meaning to the word "pending", in which case the aspect of anomaly or injustice would fall away.

In any event, had the parliamentary draftsman sought to avoid the strictures of section 59, it seems to me that he would have simply expressed sub-section (2) thus:

> "(2) The provisions of section 59 of the Interpretation Act 1977 shall not apply to this Order."

(c) The World "May":

That is not what the parliamentary draftsman said, however. In my judgment he said something to the complete contrary. As I see it, the existing sub-section (2) can be expressed in layman's language, thus:

> "(2) Despite the repeal under sub-section (1) of statutory minimum sentences, a sentence *may* be imposed in legal proceedings which were pending before 11th May, 1991, as if statutory minimum sentences had not been so repealed."

Thereafter the only remaining difficulty is the use of the word, "may", rather than, "shall". Section 14 of the Interpretation Act, 1977 reads thus:

> "14. In an enactment passed or made after the commencement of this Act, "shall" shall be construed as imperative and "may" as permissive and empowering."

Generally speaking therefore, "may" is construed as permissive. Section 2(1) of the Interpretation Act reads thus however:

> "2. (1) Save where the contrary intention appears either from this Act or from the context of any other Act, the provisions of this Act shall apply to this Act and to any other Act in force, whether such Act came or comes into operation before or after the commencement of this Act, and to any instrument made or issued under or by virtue of any such Act."

Thus the word "may" is not necessarily invariably construed as permissive: it depends upon whether or not a contrary intention appears from the context of the Act in which it is used. Indeed, the legal dictionaries devote many pages of script to the use of the words "shall" and "may". I had occasion to consider such aspects in Makenete v Lekhanya & Ors. (16) at pp.31/40 and for the sake of convenience, I adopt what I there said.

In the present case I am compelled to the view that the word "may" in sub-section (2) of section 2 of the Revision of Penalties (Repeal) Order, 1991, where it is used for the second time, where the sub-section contemplates the actual imposition of sentence upon conviction, cannot, in the present case, be construed as permissive. It is an obvious contradiction in terms to say that a Court has a discretion in the imposition of a statutory minimum sentence: it is contradictory to say that the imposition of a mandatory sentence is discretionary. If in the present case the word "may" imports a discretion, then the imposition of a minimum sentence of 10 years' imprisonment is no longer mandatory, but becomes discretionary. With the repeal of

the 1988 Order however, the imposition of a sentence of 10 years' imprisonment is, in any event, discretionary. If then sub-section (1) of section 2 of the 1991 Order achieves that purpose, of restoring the Court's discretion, what then would be the purpose of sub-section (2) if it also conveys the same discretion? In such a case the parliamentary draftsman would have achieved his object in sub-section (1) and there would then be no need for sub-section (2).

(d) *Presumption Against Retrospectivity:*

Mr. Ramodibeli refers to the presumption against retrospectivity. Mr. Sakoane also refers thereto. He submits that the presumption is rebuttable but only where there is express provision to that effect or the circumstances are sufficiently strong to displace it, which provision or circumstances are not manifest in this case. He refers to Maxwell On The Interpretation of Statutes 12 Ed. at pp.215/227 and in particular pp.225/227. There is much learned discourse in the matter in the textbooks: see also Craies On Statute Law 7 Ed. at pp.387/406, and Interpretation of Statutes by G.M. Cockram 3 Ed. at pp.124/131. The presumption, when applied to amending or repealing legislation, has been replaced by the provisions of not alone section 59 of the Interpretation Act 1977 but also section 18 thereof (and see also section 13 of the Human Rights Act, 1983). The provisions of section 18 deal specifically with repealing legislation, and which thus:

"18. Where an Act repeals in whole or in part another Act, the repeal *shall* not -

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of the Act so repealed or anything duly done or suffered under the Act so repealed;

(c) affect any right, privilege obligation or liability acquired, accrued or incurred under the Act so repealed;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence ***committed against the Act so repealed***;

(e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment referred to in paragraphs (c) and (d); and any such investigation, legal proceeding or remedy ***may*** be instituted, continued or enforced, and any such penalty, forfeiture or punishment ***may*** be imposed as if the repealing Act had not been passed." (Italics supplied)

Those provisions are virtually identical with those of section 12(2) of the Interpretation Act No.33 of 1957 of the Republic of South Africa and in turn with their ***fons et origo***, the provisions of section 38(2) of the Interpretation Act, 1889 (see now section 16(1) of the Interpretation Act, 1978) of England. Both Mr. Ramodibeli and Mr. Sakoane place reliance on the provisions of section 18(d) in particular. I am of the view,

however, that they do not apply to the present case: they refer to an "offence committed *against* the Act so repealed". In the present case the alleged offence is a common law offence, the repealed legislation, the Revision of Penalties Proclamation 17 of 1952, being no more than legislation, which did not create the offence, but merely provided a punishment in respect thereof. Indeed in the case of R v West London Stipendiary Magistrate, Ex parte Simeon (17) Lord Roskill observed at p.295 that "the Interpretation Act, 1978, so far as relevant, is not concerned with common law offences but only with statutory offences". In any event, section 59 clearly replaces the presumption, where the punishment for an offence has been "varied".

The dicta on the presumption are legion. It was expressed in uncomplicated terms by Innes C.J. in Curtis v Johannesburg Municipality (18) at p.311 thus:

> "'In the absence of express provision to the contrary, statutes should be considered as affecting future matters only and more especially ... they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation'."

From a plethora of dicta it is evident that the presumption operates in favour of the subject. Fischer J. expressed it thus in R v Margolis & Ors (19) at p.144:

> "Now the basis of the rule against the

> retrospective interpetation of a statute is the fear of injustice, and the intention therefore is never imputed to the Legislature of prejudicially affecting vested rights...."

(e) Amelioration of Punishment:

Whether or not however the presumption operates when the amending statute "mollifies the rigour of the criminal law", is a moot point. A number of English war-time cases decided that an accused becomes liable for punishment only upon conviction and thus he is liable for the punishment prescribed at the time of conviction - even if the penalty has been increased after commission of the offence: see DPP v Lamb (20), Mischeff v Springett (21), Buckman v Button (22) and R v Oliver (23). That line of decisions was followed by the Appellate Division in R v Banksbaird (24). The Appellate Division, overlooking Banksbaird (24), subsequently decided in R v Mazibuko (25) that where a penalty was increased, the penalty prescribed at the time of the commission of the offence, before the statutory increase thereof, was applicable. That decision was confirmed by the Appellate Division in R v Sillas (26) per Schreiner J.A. at p.311.

What of the position where the penalty is decreased? Dr. Cockram observes *ibid* at p.126:

> "The question still remains unanswered however, whether an amending statute which reduces a penalty will apply retrospectively

or not."

It is of interest to note that in Mazibuko (25) Steyn J.A. observed at p.357 that different considerations should apply where the penalty was subsequently decreased, rather than increased. Again in Sillas (26). Schreiner J.A. observed at p.311 that,

> "there appears at least to be no authority supporting the view that past offences are presumed to be excluded from the operation of a new law which reduces the penalty."

I respectfully observe that those highly persuasive authorities were nonetheless *obiter*. Further, Dr. Cockram observes *ibid* at p.127 that section (12)(2)(d) of the Interpetation Act 1957 of the Republic of South Africa "makes an accused liable for an act which was punishable when it was committed but which has subsequently totally ceased to be criminal". I respectfully observe that such provisions also preserve the penalty applicable before the repeal. In the case of R v Loots (27) the Supreme Court held that the reduced penalty prescribed at the time of conviction was applicable. Dr. Cockram however observes *ibid* at pp.126/127 that such decision was based "on the now discredited reasoning that the penalty which must be imposed is that which the law provided for at the date of conviction".

In the case of S v Loate (28) Vermooten J. on appeal decided that the Court was not competent to impose a penalty reduced subsequent to conviction, on the grounds that the magistrate was not competent to do so on conviction. Again, in the case of S v Mpetha (29) the Appellate Division did not apply a penalty reduced after the commission of the offence but before conviction. The decision was based however on the fact that the repealing Act did not just re-enact the repealed Act but introduced radical differences in the offence involved: it was also based on the fact that the repealing act did not disclose an intention to accord retroactive effect to its provisions. Van Heerden J.A. (Corbett J.A., as he then was, and Hefer J.A. concurring) at p.707 took cognizance of the above observations of Steyn J.A. in Mazibuko (25) and Schreiner J.A. in Sillas (26), but observed that,

> "in both cases this Court was concerned with amendments to the penal provisions of an existing Act which had not been repealed. "Different considerations" do, of course, apply when new legislation ameliorates a penalty but does not (whether an amendment or a repeal is involved) substantially alter the provisions establishing the offence in question, and I have little doubt that the remarks of STEYN J.A. and SCHREINER J.A. were intended to relate to such a case."

Section 12(2) of the Interpretation Act, 1957 of the Republic of South Africa commences thus:

> "(2) Where a law repeals any other law, then unless the contrary intention appears,

the repeal shall not - ..... etc."

Section 18(1) of the Interpretation Act, 1977 commences with the words,

> "Where an Act repeals in whole or in part another Act, the repeal shall not - .... etc."

It will be seen that the phrase, "unless the contrary intention appears", is not to be found in section 18, but I do not think that anything turns on that, as section 2 of the Interpretation Act, 1977 incorporates that aspect. Both in the Interpretation Act, 1889 and the Interpretation Act, 1957 the phrase, "unless the contrary intention appears", is to be found repeated in numerous provisions throughout. In drafting the Interpretation Act, 1977, no doubt it was considered more convenient to incorporate an omnibus provision in section 2. I observe however that the 1957 Act also incorporates such omnibus provision, in section 1 thereof, which provides that the provisions of the Act shall apply "unless there is something in the language or context of the (particular) law ..... repugnant to such provisions or unless the contrary intention appears therein". It seems to me therefore that the repetition thereafter in the Act of the phrase, "unless the contrary intention appears", is a measure *ex abundanti cautela*.

More importantly, it will be seen that the above provisions

of section 12(2) deal with a complete repeal of a law, whereas those of section 18 above also deal with a partial repeal. It seems to me therefore that in considering the dicta of Steyn J.A. and Schreiner J.A., Van Heerden J.A. was there saying that the provisions of section 12(2) would not apply, unless the complete enactment had been repealed: where but a penal provision therein had been repealed and replaced, section 12(2) would not apply however. In such a case, the question arises as to whether the presumption against retrospectivity applies. In this respect it will be seen that the many dicta concerning the presumption, indicate that it was developed by the courts in order to protect "vested rights". As to the amelioration of a penalty, Galgut A.J.A. had this to say in his dissenting judgment in S v Mphetha (29) at p.719:

> "It is interesting to note that in South African Criminal Law And Procedure Vol. III by Milton and Fuller the learned authors say (at p.15 First Ed.):
>
> "It is submitted that the same equitable principle which requires non-retrospectivity in the case of increased penalties will require retrospectivity in the case of diminution of penalties."

All of the bench in S v Mpetha (29) held that the provisions of section 12(2) were generally applicable, there having been a complete repeal, Galgut A.J.A. however holding at p.719 that a contrary intention appeared and that the Legislature intended that "as far as sentence is concerned the consolidating statute

would have retrospective effect"; in any event he held (Kotze J.A. concurring) that the word "may" in section 12(2)(e) must be interpreted in both places as importing a discretion. The majority held that no "contrary intention" appeared, and that the word "may", where used for the second time, could not be construed as being discretionary, when it came to the imposition of a mandatory minimum sentence of 5 years' imprisonment applicable before the repeal.

(f) Section 59 of the Interpretation Act, 1977:

I will return to that aspect shortly. For the moment, the decision (but not the reasoning) in Mpetha (29) must be distinguished, because in my judgment, for the reasons stated, section 18 of the Interpretation Act, 1977 does not apply. It can then be said, in respect of the presumption against retrospectivity, that in view of the amelioration of sentence, "different considerations" apply, and that the Court should, in cognizance of what was said by Milton & Fuller, apply the equitable principle on which the presumption is based and, seemingly, create a presumption of retrospectivity in the face of diminution of sentence.

Compelling as that proposition may be, this Court is faced with the unequivocal provisions of section 59 of the Interpretation Act, 1977. Indeed, on a fuller consideration of

these provisions, it seems to me that they are designedly additional to those of section 18. It must be remembered that section 18 empowers prosecution, as Dr. Cockram observes, in respect of an act or omission which is, by virtue of repeal, no longer a criminal offence: that, in essence, was the situation in Mpetha (29) and see also R v Fisher (30) and Ex parte Simeon (17), where indeed the House of Lords held that a prosecution in respect of an offence under the Vagrancy Act, 1824, committed before the repeal of the particular offence, was valid. Section 59 however deals with the situation where but the penalty for an offence has been varied, between commission thereof and conviction therefor. Further, and more importantly, it also embraces common law offences where the penalty therefor has been varied, as is the present case. There can be no question therefore, in view of the provisions of section 59, of any presumption in favour of retrospectivity.

The provisions of section 59 are not to be found in the 1889 Act or the 1957 Act. I cannot see that there is any basis for holding that the legislature in passing such provisions had in contemplation the subsequent increase rather than the decrease of a penalty. I cannot see that the rule that penal provisions must be construed strictly in favour of the liberty of the subject applies: the words of the section are clear and explicit: their meaning is plain. As Tindal C.J. observed in Warburton v Loveland (31) at p.489:

> "Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."

In my judgment the provisions of section 59 are such that they could only be avoided by express provision. There is no such provision in the 1991 Order.

(g) Contrary Intention:

It remains nonetheless to consider whether, in respect of the provisions of section 59, any "contrary intention appears" from the context of the Revision of Penalties (Repeal) Order, 1991. Here let me say that I respectfully adopt the following dicta of Van Heerden J.A. in Mpetha (29) at p.709 which are completely applicable to the present case:

> "... from a recognition of the undesirability of a compulsory sentence of imprisonment I cannot deduce an intention that the (repealed penal provision) should be regarded as *pro non scripto* in respect of offences under (the particular section) of the old Act prior to its repeal."

Suffice it to say that I can find no indication of any "contrary intention". Indeed, apart from the aspects which I have already considered, indicating an intention that the 1991 Order should not be construed as having a retrospective effect,

there is the additional aspect of the adoption by the parliamentary draftsman of the latter half of the provisions of section 18(e).

It will be seen that, apart from the opening lines of sub-section (2) of section 2 of the 1991 Order, the remainder thereof is an almost *verbatim* repetition of the latter part of the provisions of section 18(e) which provisions, and those of section 18(d), for convenience I herewith repeat:

> "18. Where an Act repeals in whole or in part another Act, the repeal shall not -
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the Act so repealed;
>
> (e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment referred to in paragraphs (c) and (d); and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed."

As will be seen, I am of the view that the parliamentary draftsman adopted the relevant provisions of section 18(e), in order to apply them to the common law offences specified in the 1952 Proclamation, affected by the 1991 Order, and to confirm the aspect of non-retrospectivity, that is, with respect to legal proceedings which were "pending". It will be seen that the parliamentary draftsman introduced the latter word into the

provisions which he adopted. As to the precise meaning of the word "pending", much has been written; generally speaking a legal proceeding is 'pending' as soon as it is commenced, and remains undecided or is awaiting decision (see Stroud's Judicial Dictionary 3 Ed. and Words & Phrases Legally defined 2 Ed.). It may be therefore that it is a contradiction to speak, as the parliamentary draftsman has done under sub-section (2)(a), of legal proceedings, which are "pending", being "instituted". It matters not, in my view, as to how wide a meaning is given to the word "pending", as in any event the wide terms of section 59 apply. What is more important, for our purposes, is consideration of the reasons for the importation of the relevant provisions of section 18(e) and thereafter the adoption by the parliamentary draftsman of the word "may", contained in those provisions.

It will be seen that in the opening words of section 18 the word "shall" is used. Section 18(d) and (e) then reads, for our purposes, as follows:

> "Where an Act repeals in whole or in part another Act, the repeal ***shall not*** - ... affect any penalty ... or punishment incurred in respect of any offence committed against the Act so repealed; (and) (***shall not***) affect any .... legal proceedings ... in respect of any such ... penalty ... or punishment ...; and any such ... legal proceedings(s) .... ***may*** be instituted, continued or enforced, and any such penalty .... or punishment ***may*** be imposed as if the repealing Act had not been passed."

When the provisions of section 18(d) and (e) are read as a whole, it becomes apparent that the repeal of penal legislation does ***not*** affect the punishment applicable before the repeal. More importantly, when read in that light, it becomes clear that the word "***may***" can only import the discretion which always exists in the institution or continuation of any legal proceedings and again, as to punishment, the uncertainty of the determination of the guilt, that is, the liability to punishment of an accused. Once such guilt is proved however, it becomes obligatory upon the Court to impose any mandatory minimum punishment applicable ***before*** the repeal.

In this respect it is clear that the provisions of section 18 were drafted (in 1889) and indeed imported into Lesotho (in 1942) long before the advent of minimum sentence legislation (with a few important exceptions e.g. in capital cases). The word "may", where used for the second time, no doubt therefore imports the discretion, in a range of punishment, normally vested in the court; the ***range*** of punishment applicable ***before*** the repeal is nonetheless in my view mandatory, bearing in mind of course that the court can always postpone or suspend punishment etc. Where, as in this case, a minimum sentence, rather than a range of punishment, was prescribed before the repeal, that minimum sentence remains mandatory, and when it comes to the actual imposition of sentence, the word "may" can only be construed in a mandatory sense, that is, as far as the statutory minimum punishment is concerned, the court nonetheless retaining

the discretion that it 'may' impose a punishment more severe than the statutory minimum.

In my research I had come across the report of Mpetha (29) rather late in the day. I am gratified to find therein dicta which are entirely in point, and which indicate that I am in good company indeed, in my interpretation of the provisions before me. The relevant dicta of Van Heerden J.A. at pp.708/709 read thus:

> " I turn to s 12 (2) of the Interpretation Act. Counsel for the appellant submitted that because of the use of the word "may" in the concluding phrase of that subsection the Court *a quo* was not obliged to impose a sentence of not less than five years' imprisonment on the appellant. In other words, although s 2 of the old Act was still applicable to the offence committed by the appellant, the Court had a discretion whether or not to invoke its penal provisions.
>
> Unless a contrary intention appears, the repeal of a law does not, in terms of s 12 (2) (*d*) of the Interpretation Act, affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the repealed law. In Mazibuko's case (25) STEYN JA pointed out that liability for a penalty accrues when the crime is committed and not only when the accused is convicted.
>
> .....
>
> It follows that in regard to an offence committed prior to the repeal of a statute, s 12 (2) (*d*) was designed to keep alive the penal provisions of the repealed Act. If, eg, a forfeiture was compulsory, it must be decreed even if the accused is found guilty subsequent to the repeal of the Act providing for the forfeiture.
>
> That being the meaning and effect of para (*d*), the concluding phrase of s 12 (2) "and any such penalty forfeiture or punishment may be imposed, as if the repealing law had

/...

not been passed", is really tautologous and was presumably added in order to leave no doubt as to the Legislature's intention. If the word "may" was intended to confer a discretion where none existed prior to the repeal, there would be an unacceptable conflict between para (*d*) and the concluding phrase. It has to be borne in mind that only in exceptional circumstances are compulsory sentences enjoined by statute. As a general rule a Court is free to impose a discretionary sentence not exceeding a prescribed maximum. Moreover, unless a law provides for a minimum punishment, a Court may in terms of s 297 of the Criminal Procedure Act 51 of 1977 *inter alia* postpone the passing of sentence or discharge the accused with a caution and a reprimand. Hence, the use of the word "shall" instead of "may" in the concluding phrase would have been a rather inept way of conveying the notion that notwithstanding the repeal of a statute a discretionary sentence may still be imposed. And even in regard to a compulsory minimum sentence the word "may" is not inapposite. In terms of s 2 of the old Act a Court, in its discretion, could impose the death sentence or a sentence ranging from five years' imprisonment to life imprisonment. Subsequent to the repeal of the Act these sentences "may" still be imposed in respect of offences committed against s 2.

Finally, it may be pointed out that acceptance of counsel's submission could lead to absurd results. It suffices to postulate the following: Statute A provides for a minimum sentence of one year in regard to a certain offence. Statute B repeals statute A, substantially re-enacts the provisions defining the offence, but prescribes a minimum sentence of two years. According to the submission a Court convicting an accused of a contravention of statute A committed before the repeal may impose a sentence of less than one year imprisonment. The proposition need only be formulated in order to be rejected."

I respectfully agree with and adopt those dicta. The fact

that section 18 of the Interpretation Act 1977 does not apply to this case, to common law offences, is significant. I consider that it is because of that, and the fact that section 59 contained no provisions equivalent to the the latter provisions of section 18(e), that the parliamentary draftsman adopted the said provisions. In brief, the said provisions, applicable only to statutory offences, were thus applied to the common law offences specified in the 1988 Order and affected by the 1991 Order. It will be seen that the provisions of section 18(d) were not adopted, as in that respect no doubt it was considered that the provisions of section 59 were sufficient and further, the phraseology of section 18(d) is inappropriate, as it deals only with statutory offences.

If the word "may", used for the second time in the 1991 Order, is intended to convey a discretion, where none existed before the repeal of the 1952 Proclamation, then, as Van Heerden J.A. put it, "there would be an unacceptable conflict" between the 1991 Order and section 59. Suffice it to say that I am satisfied that, far from there being any "contrary intention", that is, that the provisions of section 59 should not apply, the adoption by the parliamentary draftsman of the particular phraseology in section 18, used to preclude retrospectivity in respect of statutory offences, confirms that the 1991 Order is not to be construed as having a retrospective effect.

CONCLUSION:

That being so, in the present case the minimum sentence of 10 years' imprisonment is prescribed in respect of the offence alleged to have been committed by the applicants. The learned trial Magistrate then lacked jurisdiction to try such offence. One of the grounds for review, as I said earlier, is "illegality". That ground encompasses, as Gardiner J.P. expressed it in Ginsberg (8) at p.360, the "incompetency of the Court in respect of the cause", namely lack of jurisdiction. Indeed Gardiner J.P. was prepared to regard the aspect of a "magistrate .... acting where he had no jurisidction at all to act", as "a gross irregularity", sufficient to warrant the interference of a superior court. I respectfully agree.

Further, as Gardiner J.P. observed at p.361,

> "... wherever a man is tried for a crime of which he is innocent there would be prejudice ..."

In the present case an abortive trial in respect of a grave offence, attracting a minimum sentence of 10 years' imprisonment would be a clear prejudice, serving not alone to give the prosecution "two bites at the cherry", but possibly serving also to prejudice any defence at the subsequent trial.

In all the circumstances I consider that this is a proper

case for the exercise of the Court's discretion in favour of the applicants. I therefore declare the proceedings before the learned trial Magistrate to be a nullity and for the avoidance of doubt I order that they be set aside. I also order that the applicants be tried *de novo* before the Chief Magistrate.

I might add that I am as unhappy with my conclusion as to non-retrospectivity of punishment as was the Appellate Division in Mphetha (29) (see in particular per Corbett J.A. p.706). It is however the Court's function to interpret the law, *jus dicere non dare*. If the legislature considers that any amelioration of sentence should have retrospective effect, then the remedy lies with the legislature.

Delivered at Maseru on the 19th Day of December, 1991.

(B.P. Cullinan)
CHIEF JUSTICE