

CRI\T\36\94

IN THE HIGH COURT OF LESOTHO

In the matter between:

R E X

and

EVARISTUS RETSELISITSOE SEKHONYANA

Accused

Ruling on the Application for the discharge
of the accused at the close of the Crown case.

Delivered by the Honourable Chief Justice
J.L. Kheola on the 30th day of May, 1994.

The accused is charged with the offence of contravening section 4 (1) (b) as read with section 3 (1) (i), (ii), (iii) and (iv) of the Sedition Proclamation No.44 of 1938.

In that upon or about 13th day of November, 1993,
and at or near 'Manthabiseng Bus Stop, in the district
of Maseru, the said accused did unlawfully and
intentionally contravene section 4 (1) (b) as read
with section 3 (1) (i), (ii), (iii) and (iv) of the
Sedition Proclamation, No.44 of 1938, in that he
uttered seditious words which were intended and\or
calculated either:

- (a) to bring into hatred or contempt or to excite disaffection against the Government of Lesotho as by law established, and\or
- (b) to excite His Majesty's subjects or inhabitants of Lesotho to attempt to procure the alteration, other than by lawful means the lawful established Government of the country; and\or
- (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Lesotho; and\or
- (d) to raise discontent or disaffection amongst His Majesty's subjects or inhabitants of Lesotho;

when he (the accused) uttered certain words in a speech which he delivered at 'Manthabiseng Bus Stop as aforesaid, and thus did contravene section 4 (1) (b) of the Sedition Proclamation.

Section 3 (1) and (2) read as follows:

- (1) A "seditious intention" is an intention -
 - (i) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, Her heirs or successors, or the Government of the Territory as by law established; or
 - (ii) to excite Her Majesty's subjects or inhabitants of the Territory to attempt to procure the alteration, otherwise than by lawful means, or any matter in the Territory as by law

- established; or
- (iii) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Territory; or
 - (iv) to raise discontent amongst Her Majesty's subjects or inhabitants of the Territory; or
 - (v) to promote feelings of ill-will and hostility between different classes of the population of the Territory.
- (2) In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.

Section 4 (1) reads as follows:

"Any person who -

- (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;
- (b) utters any seditious words;
- (c) prints, publishes, sells, offers for sale; distributes or reproduces any seditious publication;
- (d) imports any seditious publication, unless he has no reason to believe that it is seditious.

shall be guilty of an offence and liable on conviction for a first offence to imprisonment for two years or to a fine not exceeding two

hundred rands or to both such imprisonment and fine, and for a subsequent offence to imprisonment for three years and any seditious publication shall be forfeited to the Crown.

One of the issues that were argued before the Court was whether in the light of the coming into operation of the Sedition Proclamation No.44 of 1938 (the Proclamation) the common law offence of sedition continued to exist. In other words, did the legislature intend to amend the common law in such a way that the common law offence of sedition was abolished?

It seems to me that it will not be necessary for me to make a decision on that point. The Proclamation clearly defines a seditious intention and from that definition one can easily establish what "seditious words" are. In any case if it becomes necessary to define "sedition" the Court can resort to the English dictionaries as well as to the common law definition of "sedition".

At the beginning of the trial the Defence Counsel Mr. Kuny, S.C. made certain formal admissions. He admitted on behalf of the accused that the speech which is annexed to the indictment was made by the accused at a rally at 'Manthabiseng Bus Stop in the

district of Maseru on the 13th day of November, 1993. The rally was attended by the members of the B.N.P. and members of other parties as well as the general public. The admission related to both the English version and Sesotho version of the speech.

After the formal admissions were made the Crown closed its case.

Mr. Kuny applied for the discharge of the accused on the ground that the Crown had failed to establish a *prima facie* case against the accused. He submitted that the Proclamation is a very old piece of legislation which has not taken into account the new changes that have taken place since 1938. One of such changes is the fact that to-day we have a constitution which protects fundamental human rights and freedoms. The section of the constitution which deals with these fundamental human rights and freedoms is entrenched. He submitted that the constitution is the supreme law of the country and that any law that is inconsistent with the provisions of the constitution must be struck down. He submitted that the Proclamation is inconsistent with section 14 of the constitution of Lesotho.

He submitted that the speech forming the subject matter of the charge was made by a politician. He conceded that it was forthright and hard hitting. However it was not seditious because what the accused did was to criticize the Government and he genuinely believed that he was exercising his fundamental right of freedom of expression which is protected by the constitution. In order to establish the intention of the accused one must look at the entire speech and not take certain parts of it in isolation.

Section 14 of the constitution reads as follows:

1. Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

- (a) in the interests of defence, public safety, public order, public morality or public health; or
- (b) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraph, posts wireless broadcasting or television; or
- (c) for the purpose of imposing restrictions upon public officers.

Section 14 must be read with section 156 (1) of the constitution which reads as follows:

"Subject to the provisions of this Constitution, the existing laws shall continue in force and effect on and after the coming into operation of this Constitution and shall then have effect as if they had been made in pursuance of this Constitution, but they shall be construed with such modification, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution."

Mr. Mdhluli, the Director of Public Prosecutions, submitted that the Proclamation is not inconsistent with the Constitution of Lesotho. He submitted that certain parts of the speech made by the accused were made with seditious intention.

He referred to the case of Chipembere v. Reginam 1961-63 (2) The African Law Reports (Malawi) 83 at pp. 88-89 where Clayden, F.C. J. said:

"The crime, which is set out in s. 57 (1)(b) of the Penal Code (cap. 23), of uttering seditious words has to be considered with s.56 which deals with what is "a seditious intention" and how it is proved. To be guilty under s.57 a person has to have an intention to be seditious in one or other of the senses set out in s.56(1). But by virtue of s.56(2) that intention may be proved by the Crown in a particular way. The sub-section provides:

"In determining whether the

intention with which.... any words were spoken ... was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances which he so conducted himself.

A sub-section corresponding to sub-s.(2) was considered by this court in Buchanan v. R. (1), in which it was held (1957 R. &N. at 527) that "the word 'deemed' was not meant to allow artificial intention to shut out actual intention" and that the sub-section allowed of "the consideration of evidence outside the publication itself in deciding whether or not there was seditious intention."

The decision of this court on a matter of law has to be made on the following basis. The words charged were said; the circumstances in which they were said found; explanations given by the appellant as to the particular sense in which he used some words were disbelieved and general evidence by the appellant that he did not in the use of the words, or some of them, have actual seditious intention, was disbelieved. This court cannot go behind any of those findings of fact."

The statute with which the Court was dealing seems to have been materially similar to the Proclamation in the present case. The decision of that Court is not binding on this Court but only persuasive.

I shall now quote at length some parts of the

speech made by the accused and then analyze them in order to establish the meaning of the speech and the intention of the accused.

From page 17 to page 21 the speech reads as follows:

"I am grateful that you are not the ones who initiated this matters which I am talking about. The right of every man is to protect himself and to protect his children. The right of every man is to protect himself together with his family. I first started talking about peace. If you are a custodian of peace, and you refuse to maintain peace, you refuse to maintain peace, saying that you are taking orders from government, the very government which says that I am going to kill you - no honourable people, this is stupidity. Now, there is no wisdom in this at all, it is utter stupidity. That is why I said if the LLA is being armed today, being armed with weapons at Security Lesotho - if today it is being said that the LLA should be left alone, they are just dagga

dealers who are carrying AK 47s, I said that if these things do happen, as we see them now and, if no action is taken and these things continue, ladies and gentlemen, I said you should listen to me, I am not speaking from Mpharane, I am not in Mokhotlong. I am speaking here in Maseru. This camera should focus into my mouth.

I said National Party members, wherever you can get a fire-arm, get a fire-arm because I will not be there when you are being attacked. Stand by your corner, where you are standing, I will see where I will position myself at my home. Ladies and gentlemen, I do not usually speak in this manner. Those who know me should know that I am not an irresponsible person, a person without responsibility. But then I ask myself, I say those who have to maintain peace, it is being alleged that they fear donor countries. Is the donor going to give you money when you are dead? Is the donor going to give out money and yet you see here is somebody approaching you furtively. We

say, we said that security forces should support the government, much as we do not like it. The government is secretly plotting against us. I can see who else this government is secretly plotting against. That is why I say, in my position still being the leader of this National Party, I absolve myself of all blame because I do not know the D-Day.

Gentlemen, look for fire-arms wherever you can get them. Now I say ladies and gentlemen I want to ask the gentlemen who are in charge of the Security Forces in this country - LLA arms itself and nothing is being done about it. When Rets'elisitsoe realises that death is imminent to the National Party members, he had to talk to National Party members - He is obliged to say to party members - "Arm yourselves" Ntate Sekautu says his followers should arm themselves. Mofeli will say his followers should take up arms. If you are in charge of the Security forces, you wait until the present situation in Lesotho deteriorates to

the level of the Somali situation and be like... what is his name? Like... Aided, with ten forces within this country. Is that how you members of the Security forces preserve peace in this country? Because in actual fact, if you are afraid of the LLA, we are saying at least the LLA will finish us fighting.

Your conscience through which you can attempt to ensure that there is peace in the country, when there is nonsense, it does not matter whether it is brought by a minister or not. When one breaks the law and creates his own small army, you have to intervene. It is for these reasons that I say National Party members should find a way of saving themselves because I can see it is a hopeless situation.

Ladies and gentlemen, time to speak truths has come, time to speak truths has come and we will speak them in this manner that I am saying them. Those LLA men who are camping at Mokhotlong, those who are

fighting against the Crown, because a policeman is the Crown, even a child-police officer can arrest you because he is respectable he represents the Crown, is it being alleged that these ones are glorious, they cannot be arrested. I will not talk more than this, lest perhaps, I be misinterpreted. But we wanted clarity, so that the day Mofeli defends himself, the day Sekautu defends himself, it will be as a result of this Security forces having abandoned their responsibility. It is the first time - there is nowhere we, as National Party members ever said that we had children in the police force, nowhere did we say we have children in the army. Soldiers are the people who maintain the peace of the country. The police maintain the peace of the country, ladies and gentlemen.

In any event, God's truth, Jesus' truth is that irrespective of one's political outlook whether one is a member of the BCP, nobody wants his child to be killed; whether you are a member of the MFP nobody wants his child to be killed;

whether you are a member of the BNP, nobody wants his child to be killed. Oh commanders we beg you, do not play games with our children, lull them into a false sense of security, until the LLA returns from Pretoria. Do not fool around with our children - We do not want to say so, but we are compelled to say these things, we do not want to talk about. We say we know they are accustomed to taking orders. We plead with the senior officers not to make sacrificial lambs with our issues.

Ladies and Gentlemen, it is with great agony that I say these things. I was a Government minister for years, one of my duties in which I have experience more than any of my colleagues here who have also been government ministers - difficult as it was, was to help the government to have good governance - that is where government is confronted with problems if it is the government, much as we do not like it, we still made an effort to assist it where we could. Each and every one who took an oath before His Majesty, much as we are observing

the oath of secrecy will continue to do so - we remain committed to assisting a government, if it is a self respecting government. But a government which stalks its armed forces, get lost!! forget."

Earlier at page 15 the accused said:

"When we thought about the matter it became apparent to us that Mkhonto'we-Sizwe is going to train with the SADF. That General, who helped to form LLA, Liebenberg, takes these LLA people, the LLA of this congress government of which Ntate Mokhehle swore there at PTS saying that he had disbanded the LLA. He swore before the police there that he had disbanded the LLA - There is LLA secretly being taken to the R.S.A. to train together with SADF and Liebenberg so that before he retires as a General, the LLA should have trained and returned here. When there are soldiers in the country and the police as well, why is there this secret training ladies and gentlemen? Against whom is this clandestine

training directed? Again, who is this person, at whom this secret training is aimed?"

The meaning of the speech by the accused, especially the parts I have quoted above, is very clear. He starts by saying that the L.L.A. is part of the Government of Lesotho. He alleges that members of L.L.A. are being trained by a certain General Liebenberg in the Republic of South Africa. He refutes the statement made by the Prime Minister at P.T.C. that L.L.A. has been disbanded. He then addresses the custodians of peace, the armed forces, and accuses them of being stupid to obey orders from the Government which is going to kill them. The LLA is being armed at Security Lesotho. He then appeals to members of his National Party to get firearms wherever they can get them to defend themselves because he will not be there when the LLA attacks them.

At page 19 again the accused directs his criticism at the commanders of the armed forces (Security forces) and asks them why they remain doing nothing when the LLA is being armed. He accuses the

commanders of the armed forces of waiting until the present situation in Lesotho deteriorates to the level of the Somali situation. He asks members of the security forces whether that is how they preserve peace in this country. He completes this part of the speech by saying if commanders of the security forces are afraid of LLA, members of his party will be finished by the LLA whilst fighting.

He warns the security forces that when one breaks the law and creates one's own small army, whether he is a Minister or not, the security forces have to intervene. He finally pleads to the commanders of the security forces not to make sacrificial lambs with their (accused's) children who are members of the security forces by lulling them into a false sense of security until the LLA returns from Pretoria. He alleges that they remain committed to helping a government, if it is a self-respecting government. But a government which stalks its armed forces should not be helped.

It seems to me that the parts of the speech made by the accused which have been quoted above, especially the parts which have been underlined, show

that the accused had a seditious intention in terms of section 3 (1) (i), (ii) and (iv) of the Proclamation. It cannot be said that the accused was exercising his rights under section 3 (1) (a) (b) and (c) of the Proclamation. It cannot be said that he was pointing out errors or defects in Government or constitution of the Lesotho as by law established or in legislation with a view to the remedying of such errors or defects. What he was doing was to bring into hatred or contempt or to excite disaffection against the Government of Lesotho as by law established.

The accused was actually *prima facie* exciting His Majesty's armed forces to attempt to procure the alteration otherwise than by lawful means, of the Government of Lesotho as by law established. He was saying that the Government of Lesotho was training the LLA and that after such training the LLA will return to Lesotho and kill members of the security forces. By so doing the accused was obviously bringing into hatred and contempt the Government of Lesotho by members of the armed forces. He was also exciting disaffection by the members of the armed forces against the Government of Lesotho.

The accused was also raising discontent or disaffection amongst His Majesty's subjects or inhabitants of Lesotho. They would feel very unhappily when they heard that the Government of Lesotho was training a secret army in a foreign country for the purpose of killing members of the country's armed forces. Some of His Majesty's subjects have their children in the armed forces.

I shall now deal with that part of the speech by the accused where he discussed the Judiciary. It starts from page 12 to page 14 and reads as follows:

"One fellow man whose name I shall not mention - I am saying these things because I heard it being said that I am backstabbing Government. I am disrespectful, so I will - they force me to say these things that I do not want to say. One man, one fellow man who attends the same church as one of the judges, they met at the court entrance - at the door-way of the judge's office, when our case started - "man, how are you, I have not seen you, I don't even see you in church these days" -

Judge - "I have been out of the country" - "How are you" - "I am fine except for these national party members who bother us with cases" so says the Judge "Except for these National Party members who bother us with cases, they do not only bother us with cases, they are even going to lose this case." Listen, I say it was at the very beginning of the case. I am talking about a big thing. - Minister of Justice, Maope - Commissions are established for a thing like this one that I am talking about - Because I will just be blunt where I have to talk about the truth concerning corruption that exists. "And this is a case they can never win" said the Judge at the beginning, before the case could go any further.

Then this person said to the Judge "Oh, my Lord, I thought you are presiding over this case? He said "Ah man, never mind, you are a colleague, you are my friend, I can tell you bigger things than this - "I want you to know whether you lost the case or you were defeated by dishonesty. I have a case

with one Lesotho newspaper, which was supposed to have proceeded last week, when the court convened, the Judge said - "Oh, I am afraid to hold against this paper, I just held against it last week, when I hold against them, it would seem as if I am persecuting them. Go and ask the lawyer for the newspaper to agree to a settlement out of court" Ladies and gentlemen.

Lesotho has got to a critical period, if even Judges today are afraid to do their duty, that is where we have difficulties. I ask ladies and gentlemen, how are we going to achieve peace for this country. At the time of the sitting of the court, dealing with that case, - I will not say much about it because they say they want to lock me up. At that time, ladies and gentlemen, we learned that there will be judges to be appointed. There is nothing wrong in what I am talking about. Mr. Maqutu, after writing at length about how we had lost elections, I spoke and said, "Mr. Maqutu, you being a person we respect so much, then

involving yourself in political matters, when in future, you are appointed a judge, after saying things like this, how are we going to trust you?" I said that at the time, I think I was right here. We also learned ladies and gentlemen, that there is a judge who is said to be a BCP Judge. I do not know whether Mr. Maqutu is a BCP member, but a person can be judged by his conduct men! The poor fellow is looking for a job as a Judge. Today one who was said to be a Judge belonging to the BCP, who will be appointed for the BCP, we do not know honourable people, it is reported that there are new judges, there are new judges, we ask, ladies and gentlemen, whether this country has reached that stage men and women who have caused elections to be held - This country has reached a stage where even inside the courts of law, where our trust is, because we do not have any trust in parliament. It is just a big choir of men in the parliament which sings a chorus, a song which insults us.

When we then had trust that where there is justice, it is in the courts, we are then being hit right here on the noses, with judges who are said to be for the BCP. Then one is stuck, ladies and gentlemen, even if there is only one for the BCP or they are two, because it does not mean that it is all of them. But I say it is the first time I learn that civil servants are being appointed on the basis that they are BCP members even a judge, even if he is the only one to be appointed on the basis that he is a BCP member. I never said there should be elections, I did not say that elections be held, people who called them know themselves. Man and women who ordered Ramaema to call elections for their benefit know themselves. You were putting this country in a predicament so that civil servants could be treated like this, is it not enough? Today even judges, judges are being appointed according to their political beliefs/inclinations, how are your consciences honourable people? Why have you placed this country in this kind of

predicament?"

It seems to me that the first part of the speech where the accused refers to a conversation he had with his "fellow man" is not seditious. Even the second part where he was talking about one of my Brothers cannot be said to be seditious. The third part of the speech was obviously prima facie uttered with seditious intention in terms of section 3 (1) (iii) of the Proclamation. The accused informed his audience that a judge of this Court was to be appointed according to his political beliefs and inclinations. He was being appointed because he is a member of the B.C.P. The accused was a Minister of government for many years. He knows very well that judges of the High Court are appointed by the King acting in accordance with the advice of the Judicial Service Commission which is a non-political body. He knows that political affiliations of a person qualified to be appointed as a judge are never considered. The effect of the speech by the accused is to bring into hatred or contempt or to excite disaffection against the administration of justice in Lesotho. As a result of this statement people who are not BCP members will always feel to be at a terrible disadvantage when they

appear before that particular judge referred to by the accused. They will hate that particular judge and the administration of justice in this country will be adversely affected.

It is common cause that in terms of section 14 (2) of the Constitution of Lesotho the freedom of expression is not absolute. It provides that 'nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraph, posts, wireless broadcasting or television; or

(c) for the purpose of imposing restriction upon public officers.

In the view that I take the Proclamation deals

with or makes provision in the interests of public order. The effect of the speech by the accused was to undermine public order in the sense that he was bringing into hatred or contempt or was exciting disaffection against the Government of Lesotho as by law established. He was exciting the members of the armed forces to attempt to procure that alteration, otherwise than by lawful means, of Government Lesotho as by law established. It is the duty of the armed forces to support the Government of Lesotho and to obey orders by their commanders. The accused is saying that that should stop because the present government is not a self-respecting government.

The accused undermines public order by bringing into hatred or contempt or by exciting disaffection against the administration of justice in Lesotho. He refers to one of the judges of the High Court as a B.C.P. judge. His speech does not fall under the exceptions listed in section 3 (1) (a) (b) and (c) of the Proclamation.

In Chipembere's case (*supra*) the essential elements of the offence created by a statute similar to our Proclamation are:

1. The words charged were said. In the present case the defence admitted the words charged were said;
2. The circumstances in which they were said were found; they were said at a political rally held at 'Manthabiseng Bus Stop;
3. Explanations given by the accused as to the particular sense in which he used some words were disbelieved; and
4. General evidence by the accused that he did not in the use of the words, or some of them, have actual seditious intention was disbelieved.

Regarding items 3 and 4 above that stage has not been reached because this is an application for the discharge of the accused made at the close of the Crown case. At this stage the well-known test is

whether there is evidence on which a reasonable man acting carefully might convict, not should convict. (*R. v. Herholdt and others* (3), 1956 (2) S.A. 722 (W); *R. v. Sikumba*, 1955 (3) S.A. 125 (E); *R. v. Shein*, 1925 A.D. 6,9.).

In *Nyamakazi v. President of Bophuthatswana* 1992 (4) S.A. 540 at pp. 566-567 Friedman, J. said

"I will attempt to formulate a series of rules for the interpretation of a written constitution with a bill of rights, which I do with some reservations because of the complexity of the subject. They are:

(i) The basic question is one of law; does the proposed measure, or one that has been enacted, accord with the constitution, which in this case is the supreme law of the land? If it does, it is valid, lawful and in force. If not the Supreme Court, which exercises a judicial check in terms of the constitution, will strike it down, and declare it *ultra vires* the constitution.

(ii) The method of interpretation or construction is an open-ended process of elucidation and commentary which explores, reads into, derives and attaches significance to every word, section or clause in relation to the whole context. Therefore, interpretation is not a conclusion but a process which searches for the exact meaning of words and use of terms.

- (iii) However the language is construed, its ordinary grammatical meaning cannot be dissolved away;
- (iv) It is recognised and settled that a constitution is to be liberally construed, according to its terms and spirit, to give effect to the intention of its framers, the principles of government contained therein and to the objectives and reasons for its legislation.
- (v) In interpreting a constitution, the ordinary canons and rules of interpretation of statutes must yield to a more liberal construction.
- (vi) A significant synthesis can be arrived at between the apparently conflicting approach of the 'positivist' and 'libertarian' schools in the interpretation of a constitution by what Kentridge JA referred as 'constitution..., embodying fundamental rights, should as far as language permits, be given a broad construction' (the Moagi case supra at 184. The emphasis is mine.) This in my view is the 'golden mean' between the two said approaches.
- (vii) Constitutional provisions which are regarded as far-reaching, and in certain instances as absolute, must receive a more extensive and humanistic interpretation than those of an ordinary statute which is limited.
- (viii) In that constitutions are expected to survive for a lengthy period of time, and because the process of amending or revising is more difficult and onerous

than for an ordinary statute, they are not bound by the strict or confined interpretations applied to the construction of criminal or other statutes.

- (ix) The strict interpretation applied to a contract should not be assigned to a constitution.
- (x) The plain words of relevant clauses of the constitution must be looked at, and the language used must not be given a forced, narrow or technical interpretation which does violence to the language thereof.
- (xi) It must be interpreted in the context, scene and setting that exists at the time, and not when it was passed, otherwise it will cease to take into account the growth of the society which it seeks to regulate.
- (xii) The fundamental human rights contained in a constitution are the moral and legal norms relating to the rights of individuals and the concomitant powers of the Legislature in regard thereto. Therefore, an invasion of those rights that cannot be justified by the limitations imposed must be struck down by the Supreme Court, because a law that ignores the legal and moral standards of a bill of rights cannot be just.
- (xiii) The onus of proving that a violation of a fundamental right is justified, by virtue of the limitations imposed on such rights, rests on the Government or administration.
- (xiv) A 'purposive' construction of a bill of rights is necessary in

that it enables the Court to take into account factors other than mere legal rules. These are the objectives of the rights contained therein, the circumstances operating at the time when the interpretation has to be determined, the future implications of the construction, the impact of the said construction on future generations, the taking into account of new developments and changes in society.

- (xv) Enactments which are discriminatory, or which classify groups or classes for special treatment, must be strictly construed, and may only be justified on the basis of a compelling State or national interest, which must be proved."

I respectfully agree with the learned judge.

The constitution of Lesotho is the supreme law of the land. Any act of Parliament or any law which does not accord with the Constitution must be struck down and be declared as ultra vires the constitution. The issue in the present case is whether the Proclamation accords with the constitution in terms of section 156 (1) of the Constitution. It seems to me that although the Proclamation is an old piece of legislation it is not inconsistent with the constitution of Lesotho. The provisions of section 3(1), (a), (b), (c) and (d) are consistent with the Constitution.

Section 3 ((1) (i) (ii) (iii) (iv) and (v) of the Proclamation accord with section 14 (3) of the Constitution which reads as follows:

"A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the court that that provision or, as the case may be, the thing done under the authority thereof does not abridge the freedom guaranteed by subsection (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2) (a) or for any of the purposes specified in subsection (2) (b) or (c)."

I have come to the conclusion that the Crown has established a *prima facie* case. The application for the discharge of the accused is dismissed.

J.L. Kheola
J.L. KHEOLA
CHIEF JUSTICE