

IN THE HIGH COURT OF LESOTHO

In the matter between:-

REX

VS

**MARORISOANG MACHELI
SERA TOBA
THABISO MAKATLA**

Review Case No.108/2000
Review Order No.1/2000

CR 336/2000
In the Berea District

ORDER ON REVIEW

This matter is before me on review.

On the 9th August 2000 the three accused appeared before the TY Resident Magistrate **Mr L. Nthabi** facing a charge which read as follows-

“That the said accused are charged with the crime of contravening
Section 3 (2) of the Stock Theft Act No.4 of 2000.

In that upon or about the 10th day of June 2000 and at or near Ha Rankatlo in the district of Berea, the said accused each or other or all of them did unlawfully and intentionally have in their possession two cattle of which there were reasonable suspicion that are stolen stock and failed to give satisfactory account for such possession.” (My underlining)

The three accused pleaded not guilty to the charge. On the 8th September 2000, **Mr Ntlhoki** representing all three accused, filed a “**Notice of Exception**” in terms of Section 160 of the Criminal Procedure and Evidence Act of 1981 which reads:-

“(1) When the accused intends to apply to have a charge quashed under section 159, or to except, or to plead any of the pleas mentioned in section 162, except the plea of guilty or not guilty, he shall give reasonable notice (regard being had to the circumstances of each particular case)-

- (a) to the Director of Public Prosecutions or his representative if the trial is before the High Court; or
- (b) to the public prosecutor if the trial is before a subordinate court; or
- (c) when the prosecution is private, to the private prosecutor,

stating the grounds upon which he seeks to have the charge quashed or upon which he bases his exception or plea.

(2) The notice referred to in sub-section (1) may be waived by the Director of Public Prosecutions or the prosecutor, as the case may be, and the court may on good cause shown, dispense with the notice or adjourn the trial to enable the notice to be given.”

In my view this was a motion to quash the charge and must necessarily have been made before the accused pleaded. Section 159 of the said Act reads:-

- “(1) The accused may, before pleading, apply to the court to quash the charge on the ground that it is calculated to prejudice or embarrass him in his defence.
- (2) Upon the motion under sub-section (1) the court may quash the charge or may order it to be amended in such manner as the court thinks just, or may refuse to make any order on the motion.
- (3) If the accused alleges that he is wrongfully named in the charge, the court may, on being satisfied by affidavit or otherwise of the error, order it to be amended.”

Be that as it may, the argument on the exception was heard by the court on the 14th September 2000 and the matter appears to have been treated by the court under Section 153 of the Criminal Procedure and Evidence Act. It reads:-

- “(1) When the accused excepts only and does not plead any plea, the court shall hear and determine the exception forthwith, and if the exception is overruled he shall be called upon to plead to the charge.
- (2) When the accused pleads and excepts together, it shall be in the discretion of the court whether the plea or exception shall be first disposed of.”

The grounds raised by the exception are the following:-

- “(a) That section 3 (2) of the Stock Theft Act No.4 of 2000 does not create any offence.

In my view this was a motion to quash the charge and must necessarily have been made before the accused pleaded. Section 159 of the said Act reads:-

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The grounds raised by the exception are the following:-

- “(a) That section 3 (2) of the Stock Theft Act No.4 of 2000 does not create any offence.

- (b) That the acts alleged in the charge sheet have not been sanctioned as an offence under the Stock Theft Act No.4 of 2000.”

It is common cause that the accused have been charged under section 3 (2) of the new Stock Theft Act No.4 of 2000 which came into operation on the 3rd April 2000. It reads as follows:

“(2) If, there are reasonable grounds for believing, or there is reasonable suspicion that a person who is found in possession of stock, produce or both has acquired or received the stock or produce unlawfully and is unable to give a satisfactory account of such possession, it shall be competent for any person authorised to do so under the provisions of the Criminal Procedure and Evidence Act 1981, chief or police officer to arrest or cause to be arrested the person without a warrant.”

Under the principle of legality (**ius acceptum**) -

“If Parliament wishes to create a crime, an Act purporting to create such a crime will best comply with the principle of legality if it expressly declares (a) that the particular type of conduct is a crime and (b) what punishment a court must impose if it finds a person guilty of the commission of such a crime. (**nulla poena sine lege**).

... However it is not very clear from the wording of the Act whether a section or provision of the Act has indeed created a crime or not. In such a case, the function of the principle a legality is the following - a court should only assume that a new crime has been created if it appears unambiguously from the wording of the Act that a crime has in fact been created. If the Act does not

expressly state that a particular type of conduct is a crime, the court should be slow to hold that a crime has in fact been created. this consideration or rule corresponds to the presumption in the interpretation of statutes that a provision of an Act which is ambiguous must be interpreted in favour of the accused"- **Snyman** - Criminal Law 3rd Ed P.40, **Majola** - 1975 (2) SA 727; **Klopper** - 1975 (4) SA 773. In this regard the judge's function is not to create law but to interpret it (**iudicis est ius dicere sed non dare**).

The learned Resident Magistrate having heard argument, upheld the exception on the main reasoning that Section 3 (2) of the new Stock Theft Act 2000 did not create any offence but merely "empowers a chief or police officer to arrest or cause to be arrested a person without a warrant under some specified circumstances ... and it stops there it is neither an offence to be unable to give a satisfactory account of such possession ...". The accused who had already pleaded were acquitted and discharged. The court could not assume inability to give a satisfactory account of possession to be an offence because the Proclamation that created such offence (Section 16) was repealed **in toto** by the new Act.

Being anxious about the "far reaching repercussions (of his ruling) in cases of unlawful possession of livestock", the learned Resident Magistrate, rightly so in my view, has referred the matter for review. This review presents an issue of great importance because section 3 (2) of the new Stock Theft Act does not specifically state that inability to give a satisfactory account of possession is an offence. It raises the issue **casus omissus**.

The charge has been inelegantly drafted because it alleges that "they failed to give satisfactory explanation for such possession". Under the new section it is the inability

and not failure to give a satisfactory account for such possession that is made an arrestable conduct. In the case of **Mapota Napo vs Rex** - 1971-73 LLR 5, **Roper P** stressed the need for the necessity to frame charges under Stock Theft law correctly (**Mojaki vs Rex** - 1971-73 LLR 53).

In my view the draftsmanship of this section is characterised by inelegance, imprecision and ambiguity. The section does not seem to clearly create an offence and the best way of doing so would have been to use the wording in the old section 16 to the effect that:-

“if such person is unable to give a satisfactory explanation of such possession he is guilty of an offence and liable on conviction to the punishment to which a person convicted of theft of that stock or produce would be liable.” (My underlining)

As **Roper P.** observed in **Napo’s** case (supra) “a reasonable belief that the person has obtained possession of the stock unlawfully gives the chief or policeman power to arrest without warrant.”

“...As an arrest can only be made for some offence, and the only offence created by section (16) is the inability to give a satisfactory explanation”.

The old section 16 of the Stock Theft Proclamation was indeed comprehensive enough to lucidly state:-

“If there be reasonable grounds for believing that any person who is found in possession of stock or produce has obtained the possession of such stock or produce unlawfully or if any such person is proved to have been in possession of such stock or produce unlawfully it shall be competent for any chief or member of the police force to apprehend or cause to be apprehended such person without warrant and if such person is unable to give a satisfactory explanation of such possession he is guilty of an offence and liable on conviction to the punishment to which a person convicted of theft of that stock or produce would be liable.”

(My underlining).

The new Stock Theft Act while repealing the old Proclamation has no principal definition of theft of stock. In the old Proclamation “Theft” embraced besides actual stealing being or having been in unlawful possession and not being able to give a satisfactory account of such possession.

The draftsman of Section 3 (2) pruned, for reasons best known to him, the salutary wording which creates an offence i.e. “...he is guilty of an offence and liable upon conviction to the punishment ...”

Extensive interpretation - in the face of these clear omissions - needs to be given to the words employed in the Act.

“Extensive interpretation involves not only assigning to particular words a wider connotation than their ordinary meaning but also reading further words into the Statute by way of implication. The courts do this with circumspection where such implication is necessary in order to give efficacy to what has been expressly provided and to prevent the intention of the legislature from being frustrated”. - **Devenish** - Interpretation of Statutes p.76.

Under the **casus omissus** rule the courts, quite rightly, have declined to fill in omissions in statutes because extensive interpretation, by its very nature, is creative and involves judicial law making and indeed the court comes thereby to the rescue of the draftsman who has produced a statute “which is nothing less than horrific in detail” (**Sir Rupert Cross** - Statutory Interpretation (1976) page 11-12).

When a closer look is given to other provisions of the new Act, one observes that most of them render their contravention an offence (**vide** - sections 4,5,6,8,9 and 10). The question then becomes: why were the words “commits an offence” omitted in Section 3? Section 14 of the Act reads:-

“Unless otherwise provided in this Act, a person who contravenes a provision of this Act commits an offence and is liable to

(a)

(b)

This general penalty does not ameliorate the situation and in fact it creates a dilemma of inviting resort to judicial law making. On the other hand, examination of all provisions of this Act clearly indicates that their contravention constitutes offences whereas section 3 merely empowers a chief or police officer to arrest and is more of a directive provision in nature.

It is trite principle of legality that an accused person ought not to be found guilty of a crime and sentenced unless the type of conduct with which he is charged-

- (a) has been recognised by law (common or statutory) as a crime (**ius acceptum**)
- (b) in clear terms - **ius certum**
- (c) before the conduct took place.

Jurisprudentially section 3 is a provision which involves four types of conduct-

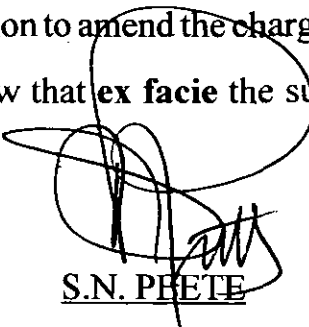
- (a) possession of stock;
- (b) in regard to which there are reasonable grounds for believing that such possession is unlawful
- (c) inability of the possessor to give a satisfactory account of such possession.
- (d) arrest by a chief or police officer.

The provision as it stands does not contain clear prohibition or a criminal norm and sanction. If the legislature inadvertently omits to criminalise a norm, then the legislature itself should correct the error; "it should not be left to the court to

speculate on what the legislature wished to do and then be left to the court itself to create a criminal norm"- **Snyman** supra, page 42; **nullum crimen sine lege** must apply more particularly because section 14 of the Act imposes sanctions - **S. v. Theledi** - 1992 (1) SA 336.

I am cushioned in what I say by the fact that arrest without warrant under section 25 (1) (j) of the Criminal Procedure and Evidence Act is for specific offences e.g. any person reasonably suspected of being or having been in unlawful possession of stock or produced as defined in any law for the prevention of theft of stock or produce.

In my view, the exception was rightly upheld by the Resident Magistrate firstly because even if an offence was created under the new section the charge was materially defective in alleging "failure" and not the "inability". But even if this court were to exercise its judicial discretion to amend the charge to accord with the wording of the subsection, I am of the view that **ex facie** the subsection does not create an offence.

A handwritten signature in black ink, consisting of several loops and a final flourish, is written over the printed name S.N. PRETE.

S.N. PRETE

JUDGE

13th November, 2000

CC: The Magistrate - Berea

O/C Police - Berea

O/C Prison - Berea

O/C Central Prison

CID Headquarters - Maseru

Director of Prisons

Director of Public Prosecutions

All Magistrates and Public Prosecutions