CRI/A/1/2001

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

AUPA MOSES DABULA APPELLANT

VS

REX RESPONDENT

REASONS FOR JUDGMENT

I disposed of this matter on 13th March, 2001 and intimated that full reasons for my decision would be filed, in due course. These now follow:

The accused (herein after referred to as appellant) appeared before a Magistrate with First Class Powers charged with a crime of contravening section 3 (a) of the **Dangerous Medicines Act, 1973,** it being alleged that on or about 13th January 2001 and at or near ha-Mothebesoane in the district of Berea, he dealt with 216 bags of dagga weighing 2,247.1kg in mass, without a permit authorising him to do so.

When it was put to him, the appellant pleaded guilty to the charge. The

Public Prosecutor accepted **"the plea of guilty"** tendered by the appellant and proceeded to outline the evidence, in his possession, in accordance with the provisions of the **Criminal Procedure and Evidence Act, 1981** of which S. 240 (1) (b) reads, in part:

> "240 (1) If a person charged with any offence before any Court pleads guilty to that offence or to an offence of which he might be found guilty on that charge, and the Prosecutor accepts that plea the Court may -
>
> (a) .....
>
> (b) If it is a subordinate Court, and the Prosecutor states the facts disclosed by the evidence, in his possession, the Court shall, after recording such facts, ask the person whether he admits them, and if he does, bring in a verdict without hearing any evidence".

It is, perhaps, necessary to mention that when, on 2nd February 2001, this matter was placed before me for hearing, I found that no reasons for judgment had been filed. The proceedings had just been rushed to the High Court without affording the trial Magistrate the opportunity to write reasons for judgment.

It is common knowledge that there are no recording machines for use in the Magistrate Courts. The proceedings are recorded by the trial Magistrate in long hand. After the final addresses by the litigants or their legal representatives, the trial Magistrate considers the evidence, makes findings thereon, applies the law and returns a verdict **impromptu**. Unlike

in the High Court, the trial Magistrate does not always write judgments after the completion of every case. He does, however, deliver **verbal** judgements, in open Court. In this way the trial Magistrate is able to dispose of several cases a day.

However, when an appeal is lodged, it is important that the trial Magistrate reduces to writing the judgment he had delivered **verbally,** in open Court, and the written judgment would form part of the proceedings. It is only in this way that the Appellate Court will be able to know how the trial Magistrate had approached the case.

It was for the above reasons that on 2nd February, 2001, I handed the file, in this matter, back to the Registrar with the directives that the proceedings should be returned to the trial Magistrate for written reasons for judgment, which would form part of the proceedings. The trial Magistrate has now complied with the directives.

In a nutshell, the facts (and these were admitted as correct by the Appellant) disclosed by the outlining of the evidence which the Public Prosecutor had, in his possession, were that on the day in question, 13th January, 2001 the police received information following which they proceeded to a place called ha-Mothebesoane. They found the appellant and a big truck which was loaded with a large number of bags. The registration numbers of the truck were OIL 101-812 and it was pulling a trailer with registration numbers OIL 94-72. According to the explanation of the

appellant, the truck was the property of his employers.

With the permission of the appellant, the police inspected the contents of the bags which were loaded on his truck and found that they were dagga. The police demanded, from the appellant, a permit authorising him to be in possession of the dagga. He failed to produce any such permit. The police took possession of the ignition key of the truck, together with its cargo of dagga which was subsequently weighed and found to weigh 2,247.1kg. They were handed in as exh "1", collectively. The appellant was cautioned, arrested and charged as aforesaid.

The trial Magistrate considered the evidence, outlined by the Public Prosecutor. He returned a verdict of **"guilty as charged"**and, rightly so, in my view, as it will become clear as this judgment unfolds .

There can be no doubt that the dagga, with which the appellant was found in possession of, exceeded 115 grams, in mass. That being so, S. 30 (1)(a) of the **Dangerous Medicines Act, 1973** under which the appellant was charged, clearly provided, in part:

> "30. (1)(a) If in any prosecution for an offence under section 3 it is proved that the accused was found in possession of dagga (also known as **intsangu, matekoane, cannabis or Indian hemp**) exceeding 115 grams in mass, it shall be presumed that the accused dealt in such dagga....." (My underlinings)

I have underscored the words "**shall be presumed**" in the above cited S. 30 (1)(a) of the **Dangerous Medicines Act, Supra,** to indicate my view that because of the quantity of dagga found in his possession, there was a legal presumption that the appellant was dealing in dagga. However, it must be mentioned that mere dealing in dagga is, **per se,** not a criminal offence. The offence is created by dealing in dagga **without** a permit authorising a person to deal in dagga. In the instant case, there was evidence, admitted as correct by the appellant, that when the police demanded from him a permit authorising him to deal in dagga the appellant failed to produce any such permit. In dealing in dagga, as he did, the appellant, no doubt, committed the offence of which he was correctly convicted, under the circumstances.

In fairness to him, it must be mentioned that, at the commencement of the hearing of this matter, Mr. Fosa, counsel for the appellant, told the court that he was abandoning the appeal against the conviction. Only the appeal against the sentence would, therefore, be argued.

Following his conviction, the appellant was sentenced to serve a term of 2 years imprisonment, without an option of a fine. I was told, in argument, that in sentencing the appellant to a term of imprisonment, with no option of a fine, as he did, the trial Magistrate misdirected himself. He should have given the Appellant an option of a fine, in the circumstances of the case. It is important to observe, however, that S.3 of the **Dangerous Medicines Act, 1973** under which the appellant was charged provided, in part:

"3. Notwithstanding anything to the contrary in any other law contained, any person

(a) who deals in any prohibited medicine or any plant from which such medicine can be manufactured; or

(b) .....; or

(c) .....; or

(d) ..... shall be guilty of an offence and liable on conviction -

(i) in the case of a first conviction for a contravention of any provision of paragraphs (a) or (c) to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding three years or to both such fine and imprisonment."
(My underlining)

Again, I have underscored the word **"or"** in the above cited section 3 of the **Dangerous Medicines Act, 1973** to indicate my view that, by the use of the word, the trial Magistrate was given two alternatives. viz. that he could either sentence the appellant to pay a fine or, in the alternative, sentence him to serve a term of imprisonment, with no option of a fine. In his discretion, the trial Magistrate opted for the second alternative i.e a term of imprisonment, with no option of a fine. In my view, in so doing, the trial Magistrate exercised the discretionary powers vested in him, by the provisions of S. 3 (a)(d)(i) of the **Dangerous Medicines Act, 1973.** He could not, therefore, be faulted.

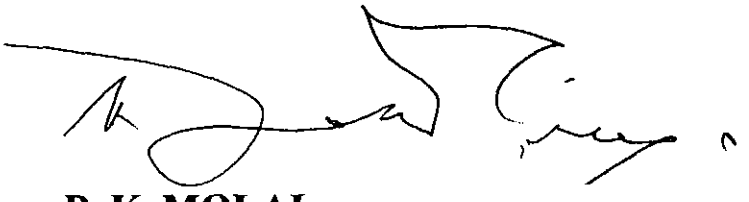
It was further argued that the trial Magistrate had misdirected himself by not considering the mitigation factors that had been raised on behalf of the

Appellant. It will be observed, however, that according to the record of proceedings, the trial Magistrate sentenced the Appellant after he had afforded him the opportunity to address the court in mitigation. Indeed, from para. 5 of his reasons for sentence, the trial Magistrate specifically said, **inter alia!**

> "Despite the prayers advanced by the accused in mitigation regarding his age and work responsibility, the court considered the quantity of dagga involved and the manner in which it was transported, it would not be meeting the ends of justice in the opinion of the correct to give a sentence which is a bluff and slapdash without considering the deterrent effect....."

I fail to understand the purpose of affording the appellant the opportunity to address the court in mitigation if it were not to enable it to assess the appropriate punishment to be imposed on him after taking into account the factors he had raised in mitigation of his sentence. That being so, I had no hesitation in holding that there were no merits in the arguments which I accordingly rejected.

In the result, the view that I took was that the appeal ought not to succeed. It was, consequently dismissed.



B. K. MOLAI

JUDGE

15th March, 2001