IN THE HIGH COURT OF LESOTHO

In the matter of

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

vs

MAGISTRATE FOR THE MASERU DISTRICT 1ST RESPONDENT

MOLETSANE MONYAKE 2ND RESPONDENT

Review Case No 17/2001 CRI/APN/848/00

Review Order No.2/2001 In the Maseru District

ORDER ON REVIEW

On 6th March 2001, I disposed of this matter and intimated that full reasons for my decision would be filed, in due course. These now follow:

This case was placed before me, for review, on the application of the Director of Public Prosecutions (applicant). The application was opposed by only the 2nd respondent. The 1st respondent intimated no intention to oppose the application and it can safely be assumed, therefore, that she is prepared to abide by whatever decision will be arrived at by this court.

It appears, from the record of proceedings, that, on 3rd October 2000,

the 2nd respondent was charged, before the Maseru Magistrate Court, with contravention of Section 3(2) of the **Internal Security (Arms and Ammunition) Act, 1966**, it being alleged that, on or about 28th September, 2000 and at or near Maseru West, in the district of Maseru, he unlawfully and intentionally acquired, purchased or had in his possession an UZI firearm plus 235 rounds of ammunition without a firearm certificate.

When it was put to him, the 2nd respondent pleaded guilty to the charge. The Public Prosecutor accepted the plea of guilty tendered by the 2nd respondent and proceeded to outline the evidence, he had in his possession, in accordance with the **Criminal Procedure and Evidence Act, 1981** of which section 240 (1) (b) provides, 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."

The facts (and these were admitted as correct by the 2nd respondent) disclosed by the evidence outlined by the Public Prosecutor were briefly that on the day in question, 28th September 2001, the police received a certain information following which they proceeded to the 2nd respondent's premises

at Maseru West, here in Maseru. They found him in and, with his permission, carried out a search of the premises. In the course of the search and in the presence of the 2nd respondent, the police found the UZI firearm and its 235 rounds of ammunition. They were contained in a box which was buried in the ground within the premises of the 2nd respondent. In his explanation, the 2nd respondent had bought the UZI firearm and the rounds of ammunition in New York - the United States of America - whilst he was on official visit to that country in 1985.

The police then demanded, from the 2nd respondent, a permit or certificate authorising him to be in possession of the UZI firearm and its rounds of ammunition. He failed to produce any such permit or certificate. Consequently, the police cautioned, arrested and charged the 2nd respondent as aforesaid. They took possession of the UZI firearm and its 235 rounds of ammunition which were subsequently handed in as exhibits at the trial and marked exh. "1" collectively.

The trial Magistrate considered the evidence outlined by the Public Prosecutor and returned a verdict of "**guilty as charged.**" A sentence of a fine of M5,000.00 or a term of 5 years imprisonment, in default of payment of the fine, was imposed. The whole of the sentence was, however, suspended for 3 years on conditions.

I was told, in argument, that it was common cause that the UZI firearm which was the subject matter of the charge preferred against the 2nd

respondent, before the Magistrate Court was a rifle. It is significant to observe that, in terms of section 3 of the **Internal Security (Arms and Ammunition) Amendment Act, 1999**, which came into operation on 28th June 1999, section 3 of the **Internal Security (Arms and Ammunition) Act, 1966** was amended by adding the following subsections after subsection (2):-

> "(3) Notwithstanding subsection (1), no person shall purchase a rifle or have it in his custody or control and any person who has such rifle in his custody or control, shall surrender it to the nearest police station within a period of 6 months from the commencement of this Act.
>
> (4) A person who contravenes subsection (3) commits an offence and is liable on conviction -
>
> (a) in the case of a first offence to a fine of not less that M5,000.00 or to imprisonment for not less than 2 years; and
>
> (b) in the case of second or subsequent offence to imprisonment for a term not less than 2 years."

Assuming that the firearm with which the 2nd respondent was charged, before the Magistrate Court, was a rifle, it seems to me that the correct citation of the section under which he was charged, should have been **"Con. Sec. 3 (3)(4)"** instead of **"Con. Sec. 3 (2)"** of the **Internal security (Arms and Ammunition) Act, 1966.** That error was, however, not fatal to the charge. It was, in my view, cured by the evidence in accordance with provisions of the **Criminal Procedure and Evidence Act, 1981** of which

Sec. 161 reads:-

"161 (1) Whenever, on trial of any charge -

(a) There appears to be any variation between the statement therein and the evidence offered in proof of such statement; or

(b) if it appears that -

(i) any words or particulars that ought to have been inserted in the charge have been omitted; or

(ii) that any words or particulars that ought to have been omitted have been inserted; or

(iii) that there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the necessary amendment in the charge does not prejudice the accused in his defence, order that the charge be amended, so far as it is necessary, both in that part thereof where the variance, omission, insertion or error occurs and in every other part thereof which it may become necessary to amend.

(2) The amendment may be made on such terms **(if any)** as to postponing the trial as the Court thinks reasonable.

(3) Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequence in all respects as if it had been originally in its amended

form.

(4) The fact that a charge has not been amended as provided in this section shall not, unless the court has refused to allow the amendment affect the validity of the proceedings thereunder". **(my underlings).**

Assuming the correctness of my view that the error in the citation of the section under which the 2nd respondent was charged, was corrected by the evidence, it follows that when she returned the verdict of "**guilty as charged**", the trial Magistrate was, infact, convicting the 2nd respondent of **contravention of Sec. 3 (3)** and not **Con. Sec. 3(2)** of the **Internal Security (Arms and Ammunition) Act, 1966**.

It was argued that the sentence imposed on the 2nd respondent was mandatory and ought not to have been suspended. I agree that the sentence prescribed by subsection (4) of section 3 of the **Internal Security (Arms and Ammunition) Act, 1966,** as amended by Sec. 3 of the **Internal Security (Arms and Ammunition) Amendment Act, 1999,** is what is commonly known as the "**minimum punishment**" and, therefore, mandatory. However, the mandatory punishment prescribed by subsection (4) of section 3 of the **Internal Security (Arms and Ammunition) Act, 1966**, as amended, is a fine not less that M5,000 or a term of imprisonment not less than 2 years. The trial Magistrate was alive to the provisions of Sub-section (4) of the **Internal Security (Arms and Ammunition) Act, 1966,** as amended, and, for that reason, she imposed a sentence of a fine not less than M5,000.00 or in

default of payment of the fine, a term of imprisonment not less than 2 years. I can find no fault with the trial Magistrate sentencing the 2nd respondent, as she did, in the circumstances of this case.

As regards the question of suspension of the sentence, it is important to observe that Sub-section (2) of section 314 of the **Criminal Procedure and Evidence Act, 1981** empowered the trial Magistrate with a discretion to order that the operation of the whole sentence or any part thereof, be suspended for a period not exceeding 3 years. The Sub-section reads:-

> "314 (2) Whenever a person is convicted before the High Court or any Subordinate Court of any offence other than an offence specified in schedule III, the Court may pass sentence, but order that the operation of the whole or any part thereof be suspended for a period not exceeding 3 years, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with sub-section (3) and (4) respectively, and the order shall be subject to such conditions (whether as to compensation to be made by that person for damage or pecuniary loss, good conduct or otherwise) as the Court may specify therein."

It may, perhaps, be helpful to recall that under the now repealed **Revision of Penalties (Amendment) order, 1988** provision was made for "**minimum punishment**". In that order the legislature specifically made a provision that sections 314 and 319 of the **Criminal Procedure and Evidence Act, 1981** shall not apply. In its wisdom, the legislator has not

made any such provision in the **Internal Security (Arms and Ammunition) Act, 1966,** as amended. Nor is, indeed, the **Internal Security (Arms and Ammunition) Act 1966** one of the offences specified in schedule III of the **Criminal Procedure and Evidence Act, 1981.** Consequently, I take the view that in suspending, as she did, the sentence that she had imposed on the 2nd respondent, the trial Magistrate cannot be faulted.

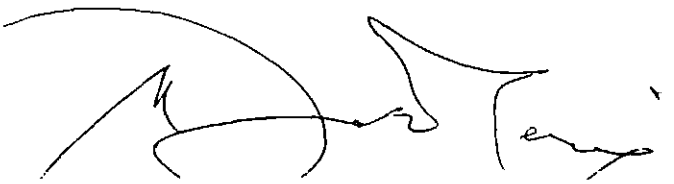
I have been told, in argument, that the learned Magistrate who presided over this case had First Class powers. That being so, sec.66 of the **Subordinate Courts Order, 1988** provides, in part:-

> "66. All sentences in criminal cases in which the punishment awarded is a fine or imprisonment, including detention, in a reformatory, industrial school, inebriate reformatory, refuge, rescue home or other similar institutions,
> (a) .....
> (b) in the case of a Subordinate Court of the First Class, fine of M1,800; and imprisonment for a period of 18 months;
> (c) .....
> Shall be subject in the ordinary course, to review by the High Court, but without prejudice to the right of appeal against such sentence whether before or after confirmation of the sentence by the High Court".

Regarding being had to the fact that the trial Magistrate, who had First Class powers, had sentenced the 2nd respondent to a fine of M5,000.00 or a term of 5 years imprisonment, in default of payment of the fine, it is clear that the proceedings were automatically going to be sent to the High Court for review. There was, therefore, no need for the Director of Public

Prosecutions to bring these proceedings to the High Court, for review, by way of motion application, thus forcing the 2nd respondent to incur unnecessary costs of opposing the application.

From the foregoing, I took the view that the application ought not to succeed and it was accordingly dismissed. The proceedings of the court **a quo** were, on review, confirmed and certified as being in accordance with real and substantial justice.



B.K. MOLAI

JUDGE

9th March, 2001

cc: The Magistrate - Maseru
Director of Public Prosecutions
All Magistrates
All Public Prosecutions
O/C Police - Maseru
O/C Central Prison
CID Headquarters - Maseru
Director of Prison