IN THE HIGH COURT OF LESOTHO **CRI/A/102002**

In the matter between:

KELEBONE PALI **1st Appellant**
MAKOALA PPPULE **2nd Appellant1**
PHOMOLO TOOTSE **3rd Appellant**

and

REX **Respondent**

For Appellants : Mr. Molefi

For Respondent : Mr. Mokuku

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 2nd day of December 2002

I now give my reasons for my ruling of the 26th November 2002.

These Appellants, (Accused) were found guilty by the learned magistrate of Leribe for unlawful possession of dagga in July 2002. They were convicted on their own pleas.

Appellants were charged with having contravened section 3(c) of **Dangerous Medicines Act** 21/1973 having dealt with 735 kilograms of dagga

without a permit. This offence attracts a maximum sentence of three years and a fine not exiting one Thousand Maluti.

The Accused were sentenced in the following manner. Accused No.1 to three (3) years imprisonment, Accused No.2 to two (2) years and Accused No.3 to three (3) years (imprisonment). All without an option of a fine.

In mitigation the 1st Accused prayed the Court to be lenient. He was trying to make ends meet and to pay for the coffin of his death sister. Both his parents were late. He was not employed and was sincerely sorry for what he had done. He added that the dagga was his and not that of his assistants, the Co-Accused. He was married with two children. His wife was unemployed.

Accused 2 prayed for leniency because he was unemployed and he struggled to support his children and parents.

Accused 3 asked that it be noted that he was sincerely remorseful. He was trying to make ends meet. He was "unaware" that he was committing a criminal offence.

The learned magistrate then sentenced the three Accused as aforesaid

without giving any reasons therefor. Not speaking for the magistrate's profession this is becoming a rarity. If the magistrate had not given his reason at the time of sentence he could still have indulgently done that before the appeal papers were remitted to the High Court.

Much as the learned magistrate could have still been blamed for not having informed the Accused what the reasons were for these sentences, at the time of delivering the sentences there were several advantages, some of which are demonstrable, if reasons for sentence were given.

Firstly, the learned magistrate would have removed the perception that he acted arbitrarily and his decision was not supported by reasons.

Secondly, he could have been able to justify his conclusion that the Appellants ought not to have been sentenced differently and unequally. For example the Accused could have participated differently in the offence. So would the moral guilt and involvement be viewed differently. If it was so the learned magistrate should have pointed this out in his reasons for sentence. His impartiality and fairness would not be questioned as suggesting discrimination.

Thirdly, he could have explained why there was no need to suspend the

sentence or impose a sentence or option of a fine. It could be that this offence is rampant in the learned magistrate's area of jurisdiction (by way of judicial notice) or some other aggravating factors. That he should have spelt out. I demurred when Mr. Mokuku, Crown Counsel, ventured to suggest that there were special circumstances. I thought that a major principle was involved namely that the magistrate must himself spell out what the circumstances were which influenced him.

Fourthly, it may perhaps be that in the mind of the learned magistrate the offence was so serious judging by quantity of the substance or the innate seriousness of the use of the drug that even first offenders "with no previous convictions" ought to be sentenced to prison to protect the society and serve as clear deterrence. But this the learned magistrate did not say.

Fifthly, it may be that the learned magistrate noted but did not consider that the youth of some of the Accused, the personal circumstances and the remorse shown by some of the Accused. That this aspects did not or ought not to influence his sentence. But his he did not mention.

Sixthly, it could be that inasmuch as the learned magistrate was aware that Accused were first offenders they could not in the circumstances expect a

suspended sentence or option of a fine solely because they are first offenders. See **Mojela v Rex** 1977 LLR 321 at 324. But he did not advise that this crossed his mind. May be it did not.

Having outlined above I concluded therefore on the above grounds that I had to intervene as an appellate court . In varying the above sentences as I will I noted that decisions of this Court have observed that the people who are arrested are almost always fronts for big moneyed sponsors who will be in the background to promote and finance the dealings with the bad drug. That would be a ground for not imposing an option of a fine in proper cases. If this was not a proper case for giving such an option the learned magistrate should have pronounced so.

This Court noted that it is trite law that an appellate court will not readily interfere with punishment imposed by a lower Court in the exercise of its discretion because the responsibility of determining lies squarely on the shoulders of a trial judge or magistrate as the case may be. I was referred to **S v Anderson** 1964(3) SA 694 at 695. That decision ought to say also that once no reasons have been furnished for a sentence it cannot be said that the Court *a quo* exercised its discretion judicially.

Where no reasons are given by a trial Court it will have acted unreasonably and therefore improperly. It cannot be said that that Court, in the circumstances, the Court *a quo* carefully considered after relevant circumstances as to the nature of the offence and the personal at circumstances of the Accused. See **S v Anderson** (supra), **R v S** 1958(3) SA 102 at 104, **S v Redy** 1975(3) SA 757 (AD). There are other reasons why an Appellate Court will intervene.

An appellate Court will also intervene with the trial Court's punishment whether a striking between the sentences which an appeal court would have imposed had it sat as a trial Court. See **Masehloho Kao v Rex** 1993-94 LLR LB 486, 485, **S v Whitebread and Another** 1971(4) SA 613 (AD) at 622. In the latter case the Court had to say:

> "The question which it is it is the duty of this Court to consider is whether having regard to all the circumstances, there exists a "striking disparity" between the sentences which this Court would in the circumstances have imposed are "strictly" inappropriate".

The imposition of a maximum fine can be startlingly inappropriate where the reasons for it are not spelt out. It is the nature of the Court viewing the offences with outrange or the offence being serious in the extreme when a maximum sentence is imposed. The Court will not without any explanation therefore impose such a sentence.

Incidentally an even clearer indication as to the proper attitude of the Court is given in **Masehloho Kao v Rex** (supra) where Mahomed JP when referring to circumstances where in the appellate court can interfered with sentence imposed by the lower court, held as follows:

> "There is a striking disparity between the sentence which was imposed by the trial Court and the sentence which this Court would have imposed if it has set as a Court of first instance. This Court is therefore entitled to interfere with the sentence of the Court *a quo* and to impose a sentence that would give expression both to the objected seriousness of the offence as well as the special personal circumstances of the appellant and the reasons which influenced her conduct." (My emphasis)

Where therefore the learned magistrate gave no expression that he considered other circumstances a clear case is therefore made for the Court's intervention. See also **Semano Monyane v Rex** CRI/A/20/2000 per Guni J 28 December 2000.

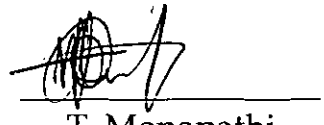
While things such as gross severity of sentence, unreasonableness including misdirection are universally regarded as giving the Court on appeal leave to intervene (**Moroke Letsitsa and Another v Rex** 1980 (2) LLR 804) the absence of reasons for sentence can even be more serious.

I did not therefore see why the Court *a quo* leaned towards a harsher sentence taking into account the personal circumstances of all the Accused.

I had considered the prejudice of sending back the matter in order for the learned magistrate to give his reasons. There would be unnecessary delay. This included, as I was informed by Counsel, that the Accused had already spent about six (6) months in prison.

Consequently I varied the sentence by ordering as follows:

A1 Three (3) years imprisonment or M1,000.00
A2 Two (2) years imprisonment or M1,000.00
A3 Two (2) years imprisonment or M1,000.00.



T. Monapathi
Judge of the High Court