

IN THE HIGH COURT OF LESOTHO

In the matter between

MOEKETSI HEISI

APPELLANT

and

REX

RESPONDENT

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. GUNI
On the 29th October, 2002

The appellant was charged with and convicted of contravention of Section 3 (1) as read with Section 43 of INTERNAL SECURITY (ARMS AND AMMUNITIONS) ACT NO.17 of 1966 as amended. It is being alleged that the accused did wrongfully and unlawfully have the firearm and ammunitions in his possession to wit .22 revolver serial NO.668747 with 6 rounds without a certificate in force at that time.

Although it is indicated that this statute has been amended, the amendment has not been cited. It was amended by INTERNAL SECURITY (ARMS AND AMMUNITIONS) (Amendment) ACT NO.4 OF 1999. This amendment turned the maximum penalties provided under that statute into minimum penalties. Although the statute which the appellant is alleged to have contravened is not fully cited, including the amendment, there is no complaint regarding this defect. Perhaps because the point concerning defective charge cannot be raised for the first time on appeal. It should be raised timeously so that the defect could be remedied by an amendment without prejudice to any of the parties. VOVA F. NAMEKO and OTHERS Vs REGINA 1956 H.CTLR 48 at 50F. RV HERSCHEL 1920 AD 575. Again that defect is not so material that the accused could have been prejudiced in the conduct of his defence. In fact the accused pleaded guilty to the charge. The public prosecutor having accepted the plea, went on to outline the facts of the case thus:-

“One NO.10583 Tpr Lebina would tell the court that he is a member of LMPS stationed at Mokhotlong. Then on 27/01/02 he left with Sgt. Letsoepa to Botsola Tlokoeng following the information that the accused had illegal firearms and

ammunitions. They searched for accused and found him. They identified themselves as police officers and they also explained the purpose of their visit. The accused then handed over a .22 revolver and 6 rounds to Tpr.Lebina. That is where he sought a licence/certificate for that property. The accused failed to produce any. He then warned him and gave him the charge and arrested him. He kept the gun and rounds described in a charge sheet as exhibits. I hand them in as such. Marked Exhibit "1" collectively. That is all."

The appellant indicated that he has heard the facts as outlined and he accepted them. Therefore that online became the statement of agreed facts. Do they disclose the commission of the alleged offence? What are the essential elements of the offence charged. First of all the accused must be found in possession of the firearm. To be in possession the accused must have the firearm under his full control. MPHUTHI Vs REX 1974-5-LLR at page 423, 426-C. The police officers introduced themselves to the appellant. They explained to him the purpose of their visit. The appellant handed over the firearm. The presumption may safely be made here that the said firearm must have been on the person of the accused. If not, it was within his easy reach. Therefore he was in possession. Secondly, the accused was asked for the licence/certificate in respect of that firearm. In terms of the statute under which the accused was charged, he must have in his

possession the licence/certificate in force at the time he is found in possession of the firearm. The relevant provisions of that statute read as follows:-

“No person shall -----have in his possession any firearm or ammunition -----. Unless he holds a firearm certificate in force at the time”

The appellant does not claim that he is entitled to possess the firearm with or without the certificate. The police demanded production of the firearm certificate. The appellant failed to produce it. That was on the 27th January 2002. When the appellant appeared before court on the 29th January 2002, he did not attempt to produce that certificate. He did not claim to be the holder of the firearm certificate in respect of that firearm and ammunitions. He does not claim the right to possess the firearm with or without the licence/certificate. He was therefore properly convicted.

The appellant was sentenced to two years without an option of a fine for the following reasons. The appellant pleaded guilty to the charge. This plea of guilt was regarded by the learned magistrate as a sign of remorse. She further expressed her gratitude to the appellant

by not wasting the court's time. Dealing with a plea of guilt takes much less time than dealing with a full-blown trial. The appellant is the first offender. This type of an offender is still regarded as a fallen angel and is therefore treated with some leniency. So far, these are the features relating to the offence. They must be considered in favour of the appellant. In addition there are those circumstances which are peculiar to the appellant and relate to his person. These are that he is a married man. He has two wives and two minor children. All those people are dependant upon him. They look up to him for their support and maintenance. Those factors the learned magistrate indicated that she considered them in favour of the accused.

In aggravation of sentences the learned magistrate considered that this type of weapons is common in Mokhotlong. They are being used by people who commit offences such as murder and robbery. The learned magistrate took into account that payment of a fine, by accused who has been convicted of this kind of offence, is easily effected. All these factors were improperly taken into account by the

learned magistrate when assessing an appropriate sentence in respect of this appellant. She is not entitled to merely allege that this type of crime is prevalent in Mokhotlong without providing the statistics to support this allegation. She did not even mention a single case of robbery or murder committed by use of illegal firearm there at Mokhotlong. She could also have made a list of cases involving possession of firearms in contravention of the Internal Security (ARMS and AMMUNITIONS) Act (Supra) which that court has dealt with in two or so years. It was not proper to consider the bare allegation of prevalence of the offence against the accused. The option of a fine is given solemnly for the purpose of affording a convicted person an opportunity to stay out of jail if he or she can pay the fine. The accused person's readiness to pay the fine should not be held against her or him. It is also not proper to consider that other people before him have found money to pay their fine, therefore this accused should not be given an opportunity to pay the fine. The statute under which the appellant was convicted specifically made a provision for the payment of a fine.

Two years term of imprisonment is extremely severe. In PHAPANO KHANYAPA and Another V Rex 1997-1998 LLR and Legal Bulletin Page 8, the court of Appeal set aside the maximum penalty which have been imposed for the commission of an offence of contravening this very same statute. In Khanyapa's case the appellant had used the firearm to commit murder. The court upheld the conviction and sentence in respect of the murder charge. The Honourable Mr. Justice Beck AJA, in his view, the maximum penalty was reserved for extreme contraventions of that statute. The appellant in our present case has not committed any offence with the use of that firearm. He told the court that he acquired that revolver in order to protect himself and his livestock. His intentions were Honourable. Khanyapa attacked and murdered someone but the Appeal court felt that the contravention of this statute in his case was not intended to be met with the maximum penalty provided under this statute. This sentence in the present case must be in the extreme and therefore must be set aside. The sentence of two years imprisonment

without the option of a fine is set aside. It is substituted with a fine of
M400.00

K.J. GUNI
JUDGE



For Appellant - M. Ntlhoki & Co.
For Respondent - Director of Public Prosecutions