

C of A (CRI) No. 3 of 2004

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

DON PIN HUA

Appellant

and

REX

Respondent

Held at Maseru on 5 October 2004**CORAM:**

Ramodibedi, J.A.

Grosskopf, J.A.

Plewman, J.A.

JUDGMENT**Ramodibedi, J.A.**

[1] The date of 8 November 2002 is one which the appellant, a Chinese national from China, will not forget in a hurry. It is the date on which he suddenly found himself confronted by the full might of the law for his alleged indiscretions which resulted in his subsequent conviction by Butha-Buthe Magistrate's court for contravention of section 82 of the Customs and Excise Act No. 10 of 1982. That section reads as follows:-

"82. Any person who fails to declare any dutiable goods or goods the importation or exportation of which is prohibited or

restricted under any law upon his person or in his possession, or makes any statement for customs or excise purposes as to any dutiable goods or prohibited or restricted goods upon his person or in his possession from which any dutiable goods or prohibited or restricted goods are omitted, shall, if any such goods are discovered to be or to have been upon his person or in his possession at the time of failure, or of the statement, be guilty of an offence and liable on conviction to a fine not exceeding two thousand maloti or treble the value of the goods in question, whichever is the greater, or to imprisonment for a period not exceeding two years, or to both such a fine and such imprisonment, and the goods in question and other goods contained in the same package as well as the package itself shall be liable to forfeiture.”

[2] The charge alleged that on the date in question and at or near Caledonspoort Border Gate in the district of Butha-Buthe the appellant did unlawfully and intentionally fail to declare dutiable goods which he had in his possession and which he had imported or bought from the Republic of South Africa. These goods were:

- “1. (71) boys shirts (with different colours)
2. (60) Ladies bras (with different colours)
3. (3) packets of containing (sic) waterproofs.
4. (5) packets containing face towels.
5. (60) pairs of assorted socks.
6. 12 X 2 piece.
7. A box containing different clothes.”

The estimated value of the goods in question was, so it was admitted, M8,482.00.

[3] The appellant was sentenced to twelve (12) months

imprisonment without an option of a fine. Initially he appealed against sentence only but subsequently amended his grounds of appeal to include an attack against his conviction as well. The appeal was however dismissed by the High Court (Monpathi, J.) and it is against this decision that the present appeal has been filed with the leave of the court *a quo*.

[4] At the outset of the appeal, and acting in accordance with Rule 9 (1) of the Court of Appeal Rules 1980, this Court called upon Miss Makoko for the Crown to address it first. After hearing her submissions, the Court upheld the appeal and ordered that both conviction and sentence be set aside. It was intimated that reasons would be filed on 20 October 2004. The following are the reasons why the appeal was allowed.

[5] As a starting point, it proves convenient to reproduce the solitary ground of appeal raised by the appellant in this appeal. It reads as follows:

“The Crown has failed to prove all the elements of the crime under Section 82 of the Customs and Excise Act No. 10 of 1982. No evidence was brought to prove that the goods which were imported by the Appellant were dutiable (subject to payment of Customs duty) or were goods which (sic) importation was restricted or prohibited.”

[6] The facts of this case lie in a very narrow compass. At the trial, the Crown called three witnesses whose evidence established that on the date in question and at Caledonspoort Border Gate in Butha-Buthe district the appellant failed to declare the goods forming the subject matter of the charge. None of these witnesses, however, testified that the goods in question were “dutiable” or were prohibited or restricted under any law within the terms of the statute in question. There is simply not an iota of evidence in that regard.

[7] It becomes necessary then to examine the provisions of Section 82 of the Customs and Excise Act No. 10 of 1982 as fully set out in paragraph [1] above. In this regard it is salutary to note that the words “dutiable goods” are not defined in the Act but the word “duty” is itself defined in section 2 thereof to mean “any duty leviable under this Act”. The ordinary meaning of the word “duty” in turn, as defined by the Concise Oxford English Dictionary, is “a *payment levied on the import, export, manufacture, or sale of goods.*” On this construction, therefore, the words “dutiable goods” simply mean goods attracting a payment of a levy for import, export or manufacture. It follows, in my view, that it is not all goods or the

importation thereof that are punishable as an offence for non-declaration. On the contrary the section makes it an offence for any person to fail to declare “dutiable goods or goods the importation or exportation of which is prohibited or restricted under any law upon his or in his possession.” (Emphasis added). The underlined words constitute, in my view, essential elements of the statutory offence charged. In this regard it is hardly necessary to state that it is of fundamental importance in our criminal justice system for the prosecution to prove each and every essential element of the charge as a prerequisite for a conviction. It follows that it is not enough for the prosecution, as in this case, to merely rely on the unsubstantiated allegations contained in the charge sheet.

[8] As I have indicated in paragraph [5] above, and as I repeat now, the Crown failed to prove that the goods forming the subject matter of the charge were dutiable. Nor did it prove that the importation of such goods was prohibited or restricted under any law. In fairness to Miss Makoko, for the Crown, she very fairly and properly conceded the point in argument before us.

[9] In the result, it follows that the appeal must be upheld. Both conviction and sentence recorded by the trial court are set aside and replaced with the following Order:

“The accused is found not guilty and acquitted.”

M.M. Ramodibedi

Judge of Appeal

I agree: _____

F.H. Grosskopf

Judge of Appeal

I agree: _____

C. Plewman

Judge of Appeal

Delivered at Maseru this 20th day of October 2004.

For Appellant: Adv. S. Phafane

For Respondent: Miss L. Makoko