IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI) 4/09

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS **APPELLANT**

and

'MAMORONGOE STELLA MOLAPO **RESPONDENT**

Dates: Heard on 26th March 2009
Judgment delivered on 9 April 2009

CORAM: GROSSKOPF JA
MELUNSKY JA
HOWIE AJA

Summary

Criminal Law – Liquor Licensing Act 1998 - penal provision – whether imposition of empowered sentence mandatory. The following principles apply:

In the absence of clear words to the contrary in a penal provision -

(1) *The courts have an unfettered discretion in relation to sentence;*
(2) *There is a presumption against legislative interference with this discretion;*
(3) It must be inferred that the Legislature intended the courts to retain this discretion.

The words "liable to" in section 34(1) (a) of the Liquor Licensing Act 1988 do not mean that the maximum penalty is mandatory: they are standard words used where no minimum punishment is intended and where the court is given a discretion as to sentence.

JUDGMENT

MELUNSKY JA:

[1] The litigation leading up to this appeal commenced on 27 January 2006 when the respondent appeared in the Maseru Magistrate's Court on a charge of contravening section 34 (1) (a) of the Liquor Licensing Act, 8 of 1998 ("the Act") by selling liquor (18 quarts of beer in all) without holding a valid licence. She pleaded guilty, was convicted and was sentenced as follows:

> "five years imprisonment or a fine of M5000 suspended for two years".

No conditions of suspension were specified, contrary to the provisions of section 314(2) of the Criminal Procedure and Evidence Act 1981 ("the Code"). However that may be, the matter went on review to the High Court in terms of Section 65 of the Subordinate Courts Act 1988. The reviewing Judge, Nomngcongo J, while confirming the conviction, altered the sentence to one of a caution and discharge. The altered sentence became the sentence of the Magistrate's Court (See Mothabeng v Rex (1980-1984] LAC 166 at 168E).

[2] On 1 December 2006, some eight months after Nomngcongo J's order, the appellant filed a notice of appeal against the sentence and applied for condonation for the late noting. Condonation was

apparently granted and the appeal was heard by Peete J who, on 15 September 2008, quashed the conviction and sentence and authorised the appellant, if so advised, to lead evidence before the High Court

> "to establish the guilt of the accused and to justify sentence".

The appeal was argued on the grounds that the penalty prescribed by section 34(1) (a) of the Act - M5000 or
imprisonment for five years - was obligatory and that the
imposition of a sentence of caution and discharge was not permissible. It was further submitted by the appellant that it was not even competent for a court to suspend portion of the sentence. Those were the only issues before the Court a quo. Counsel informed us that questions relating to the quashing of the charge, as ordered by Peete J, were not argued before the learned judge. No written judgement of the Court a quo has been supplied to us and we do not know why he made the aforesaid order.

[3] On 26 February 2009 the appellant applied for leave to appeal to this Court against the order. On 9 March 2009 the application was granted. On appeal to this Court counsel for the appellant confined his argument to the submission that the penalty prescribed by section 34(1) (a) was mandatory. He did not persist in his previous contention that it was impermissible for the sentence to be suspended and, in view of the provisions of section 314 (2) of the Code, he was clearly correct in making that concession. On the appellant's behalf, therefore, it was contended that the original sentence imposed by the Magistrate should be restored. The respondent, too, was dissatisfied with Peete J's order: her counsel submitted that the appeal

should simply be dismissed, thus resulting in the Magistrate's Court's sentence, as altered on review, remaining in force. The appeal was therefore argued before us within this narrow ambit.

[4] Section 34(1) of the Act reads:

> "(1) A person who sells or exposes for sale liquor without a licence commits an offence and is liable
>
> (a) on first conviction, to a fine of M5000 or imprisonment for 5 years; and
>
> (b) on second conviction or subsequent convictions, to a fine of M8000 or imprisonment for eight years or both."

The respondent's contention that the sentence in 34(1) (a) was mandatory was essentially based on the following : first, that the word "liable" should be constructed to mean "shall", and second, that section 34(1)(a) has to be read with 34 (1)(b) and that the insertion of the word "and" between the two subsections

> "presupposes that the law maker had intended that the court in the imposition of a sentence/
> punishment would not have discretion".

[5] There is no substance in the aforesaid submissions.

"The first principle", said Smalberger JA who gave the majority judgment in *S v Toms; S v Bruce* 1990 (2) SA 802 (A) at 806 H-I,

> "is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court (cf *R v Mapumulo and Others* 1920 AD 56 at 57). That courts should, as far as

possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for instant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law (*S v Rabie* 1975 (4) SA 855 (A) at 861D; *S v Scheepers* 1977 (2) SA 154 (A) at 158F-G)".

The learned judge went on to say the following at 806 J-807G:

"A mandatory sentence runs counter to these principles. (I use the term 'mandatory sentence' in the sense of sentence prescribed by the Legislature which leaves the court with no discretion at all – either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualisation. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence. As Holmes JA pointed out in *S v Gibson* 1974 (4) SA 478 (A) at 482A, a mandatory sentence

'unduly puts all the emphasis on the punitive and deterrent factors of sentence, and precludes the
traditional consideration of subjective factors
relating to the convicted person'.

Harsh and inequitable results inevitably flow from such a situation. Consequently judicial policy is opposed to mandatory sentences (cf *S v Mpetha* 1985 (3) SA 702 (A) at 710E), as they are detrimental to the proper administration of justice and the image and standing of the courts.

The Legislature must be presumed to be aware of these principles, and would normally have regard to them. There is a strong presumption against legislative interference with the court's jurisdiction – see *Lenz Township Co (Pty) Ltd v Lorenz*

> *N0 en Andere* 1961 (2) SA 450 (A) at 455B. Although this was said in the *Lenz* case in a somewhat different context, the principle would apply equally to the court's jurisdiction in relation to the matter of sentence. By the same token the Legislature must be presumed not to intend its enactments to have harsh and inequitable results (cf *S v Moroney* 1978 (4) SA 389(A) at 405C-D). The Legislature is of course at liberty to subjugate these principles to its sovereign will and decree a mandatory sentence which the courts in turn will be obliged to impose. To do so, however, the Legislature must express itself in a clear and unmistakable terms (*S v Nel* 1987 (4) SA 950 (W) at 961B). Courts will not be astute to find that a mandatory sentence has been prescribed. This, however, does not mean that they will disregard relevant principles of statutory interpretation. The warning echoed in *Principal Immigration Officer v Bhula* 1931 AD 323 at 336 (quoting from *Maxwell* 3rd ed at 299) that 'a sense of the possible injustice of an interpretation ought not to induce Judges to do violence to well-settled rules of construction' must not go unheeded".

I agree entirely with the remarks of the learned Judge, whose judgment was concurred in by Corbett CJ and Nicholas AJA.

[6] As a corollary to the principles enunciated above, two rules of construction of penal provisions (set out in *S v Toms; S v Bruce* at 808 B-C and 811 J-812 respectively) need to be emphasized. The first is that when dealing with a penal section, if there are two reasonably possible meanings, the court should adopt the more lenient one. The second, which is closely related to the first, is that in the absence of clear words that a mandatory sentence was intended, it must be inferred that the Legislature intended the court to retain its discretion as to sentence.

[7] In the light of the aforegoing I revert to the arguments put forward on the appellant's behalf. The word "liable" and the expression "liable to" were dealt with extensively in *S v Toms; S v Bruce* at 812 F-814D but I do not consider it necessary to refer to all of the authorities quoted in the judgment. It is sufficient to say that the phrase "liable to" has a well-established meaning, namely "subject to the possibility of" (See *Squibb United Kingdom Staff Association v Certification Office* [1979) 2 all ER 452 (CA) at 459 h). Put differently, a provision that merely provides that a person "is liable to" or even "shall be liable to" a certain penalty ordinarily means that the event has occurred which will enable the penalty to be enforced. As Corbett CJ put it in the same case, at 822 H-I, the phrase "liable to" in statutory

provisions relating to sentence is a

> "standard one, invariably used where no minimum punishment is intended and where the court is given a discretion as to sentence".

These words, added the learned Chief Justice, indicate

> "that the accused, upon conviction, becomes
> exposed to the possibility of sentence within the range of the court's competence. In other words, he becomes the subject of the courts permitted
> discretion in regard to punishment".

It follows that the first argument advanced on the appellant's behalf provides no support for the proposition that section 34 (1) (a) of the Act introduced a minimum sentence.

[8] I have difficulty in appreciating the significance of the second contention put forward by the appellant's counsel, namely that sub-sections 1(a) and (b) of section 34 read together provide an indication that the sentences are intended to be mandatory. Nor is it clear why the word "and" between (a) and (b) assists in the interpretation of section 34 (1). No reasons were advanced in support of counsel's submission and I am unable to conceive of any.

[9] It remains to refer to two sections of the Code. Section 302 (1) provides that a person

> *"liable* to a sentence of imprisonment …. for any period may be sentenced to imprisonment for any shorter period and a person *liable to* sentence of a fine may be sentenced to a fine of any lesser amount" (my emphasis).

This section appears to underscore the principles outlined in this judgment. Furthermore, section 319 provides that a person convicted of any offence, other than an offence specified in Schedule III, may be discharged with a caution or reprimand. Incidentally that was the sentence that the magistrate would have imposed had he not been under the erroneous impression that it was obligatory for him to pass the sentence which he did.

[10] For the reasons given the appeal should be allowed. The effect of such an order will be to restore the sentence of the Magistrate's Court as altered by Nomngcongo J. As that was not the result

intended by the appellant and because some confusion may arise this will be spelled out in the order.

[11] A final comment : due to delays in the appellant's office and the lapse of over 20 months between the noting of the appeal to the High Court and the delivery of the judgement by Peete J (which appears from the chronology of the litigation), it has taken more than three years after the respondent's conviction for the sentence to be finalized. It seems to me that is an unacceptable delay in a straightforward case with a short record and only a crisp legal point in issue.

ORDER

1. The appeal is allowed.
2. The order of Peete J is set aside;
3. The sentence of the Magistrate's Court, as altered on review by Nomngcongo J, is restored;
4. The sentence imposed on the respondent is accordingly one of a caution and discharge.

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L.S. MELUNSKY
JUSTICE OF APPEAL

I agree.

_____
F.H. GROSSKOPF
JUSTICE OF APPEAL

I agree.

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C.T. HOWIE
ACTING JUSTICE OF APPEAL

For the appellant : Adv S. Moshoeshoe

For the respondent : Adv. E. Molapo