IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0010 OF 2002S
(High Court Criminal Action No. HAC002/2001S)

BETWEEN:

WONG KAM HONG

Appellant

AND:

THE STATE

Respondent

Coram: Tompkins, JA
Henry, JA
Penlington, JA

Hearing: Monday 26th May 2003, Suva

Counsel: Mr. N. Shivam for the Appellant
Mr. G.H. Allan for the Respondent

Date of Judgment: Friday, 30th May 2003

JUDGMENT OF THE COURT

The appellant together with a co-accused was charged with importing into Fiji 357.7875 kilograms of heroin and with being found in possession of the same drug. The appellant was also charged with attempting to export to Australia 35.1947 kilograms of heroin.

The appellant pleaded guilty to all 3 counts. He was sentenced by Fatiaki J on count 1 to 7 years imprisonment, on count 2 to 5 years imprisonment and on count 3 to 5 years imprisonment. The Judge ordered that counts 1 and 2 were to be served concurrently but consecutively with the sentence imposed on count 3 making, a total

effective sentence of 12 years imprisonment. The appellant has appealed against these sentences.

Facts

Heroin was imported into Fiji in late 1999 in two containers. After clearing customs they were taken to premises at 50 Panapasa Road for storage. 35 kilograms were removed for the purpose of export. The remaining heroin was still at the premises when seized by police on 28th October 2000.

The appellant normally resides in Hong Kong. He came to Fiji between 18th and 14th April 2000 and again on 6th September 2000 using a false passport. He said in his statement to the police that his instructions from others in Hong Kong were to arrange for the clearance from customs of the two containers. This he did, assisted by his brother. The appellant first saw the containers in other premises where he identified the cartons that contained the heroin. He was responsible for arranging for the storage and for the rental of the storage premises. He was thus a party to the possession of the heroin at 50 Panapasa Road. The appellant attended at the place of the storage on 27th October 2000 and selected 50 blocks for export to Australia. This amount was found in his possession when he was apprehended at the Suva Yacht Club on 28th October 2000. When apprehended he had in his possession plastic stencils of counterfeit immigration stamps for various counties including Australia, some counterfeit travelers cheques for about $3,000.00 and a false Singapore passport.

The 35.1947 kilograms was of an average period purity of 72.49% or equivalent to 25.5126 kilograms of pure heroin. The prosecution asserted that this amount of heroin has a potential wholesale value of A$50.8 million and a street value of many times this amount. This was undoubtedly an operation on a very large scale.

Sentence in the High Court

In his comments on sentence, Fatiaki J. referred to the seriousness of the offending and in particular the devastating consequences of the use of heroin. He also referred to the maximum sentence for these offences of 8 years, referring to an earlier case in 1978 when Williams J. spoke of the inadequacy of the maximum sentence of 8 years. Fatiaki J. considered it unfortunate that since that time nothing had been done to increase the sentencing powers of the court.

He accepted that the heroin was not intended for local consumption and that the intention was to use Fiji as a "staging post" for drug trafficking. He described, in our view rightly, the quantity of heroin as enormous. He considered that in terms of sheer quantity it was difficult to imagine a worse case than this ever occurring in Fiji. He concluded that this appellant was the principal operative within Fiji for the importation of an extremely large quantity of heroin which originated from Myanmar and was directed and financed from Hong Kong. He referred to the appellant having in his possession what he described as an "international drug traffickers kit" in the form of the stolen travelers' cheques, a false passport, the four sheets of the plastic with the impressions of immigrations stamps and the

Taiwanese passport in addition to one from Hong Kong. He concluded that the appellant was the distributor. A deterrent sentence could not be avoided.

Having imposed the sentences to which we have referred he went on to say

> "In this latter regard, although I am mindful of State counsel's concession that the State is not seeking consecutive sentences on the basis that the offences relate to the "one shipment" of heroin into the country, nevertheless I am firmly of the view that the evidence giving rise to the offence of attempting to export heroin charged in the 3rd count involves a distinct and separate offence arising out of involving the movement on the known date of an identifiable quantity of the heroin entirely unconnected to the original movement and possession charged in counts 1 and 2 and ought properly to be treated differently."

For completeness we record that the co-accused's involvement was considerably less than the appellant's. He was sentenced to 4 years imprisonment, the Judge referring to the recovery of the heroin being due to the co-accused's co-operation and assistance.

The grounds of appeal

First ground of appeal is that the Judge erred in determining that count 3 was a separate transaction from the other 2 counts. In support he submitted that all 3 counts involved the same drugs and that the charges for counts 1 and 3 exist under the same sections in the Dangerous Drugs Act (Cap. 114). The charges in counts 1 and 3, he submitted, are not distinct under the Act.

We do not accept this submission. The Judge was right to regard the attempt to export the heroin as a separate and distinct offence from the charges of importing and

possession. It was separate in time, and involved different amounts of heroin. A sentence on the charge of attempting to export cumulative on the sentence imposed on the other 2 charges was therefore appropriate.

The second ground of appeal was that when the prosecutor came to outline the facts of the sentencing, he failed to mention that the appellant had agreed to plead guilty on the basis that the State would support concurrent sentences for all counts.

In support of this allegation, an affidavit was filed by Gavin Adam Lewis O'Driscoll, a partner in the law firm acting for the appellant. Mr O'Driscoll deposed that shortly before the trial was due to start at a meeting with counsel for the State at which he was present, the arrangement was made upon which the appellant now relies. It was also part of that arrangement that the prosecution would recommend a sentence of 7 years in total.

This was exactly what the counsel for the State did. As is apparent from the passage of the Judge's decision we have set out above, counsel for the State made it clear that it was not seeking consecutive sentences and also he submitted that an appropriate sentence would be a total of 7 years imprisonment. If there were such an arrangement, counsel for the State complied with it.

The total sentence

Although not an express ground of appeal in the notice of appeal, counsel for the appellant also submitted that in all the circumstances of the case the total sentence passed was harsh and excessive.

Accepting as we do that the sentence on count 3 should be cumulative on the sentences on other two, it is still necessary to consider the total sentence imposed in the light of all the circumstance. As the Court of Appeal in New Zealand said in *R.v. Bradley* [1979] 2NZLR 262.

> "Undoubtedly it is crucial in arriving at a sentence for several offences, after considering them individually, to stand back and look in a broad way at the totality of the criminal behaviour ."

The sentence totaling 12 years for offences when the maximum sentence for each offence is 8 years is undoubtedly a severe sentence. But this was a series of offences of such extraordinary seriousness as to call for a severe sentence. The appellant was actively involved in what can only be described as a massive criminal operation involving a huge volume of heroin of enormous value. It was in our view appropriate for there to be imposed sentences of sufficient severity to deter any person minded to use Fiji as a staging post for their criminal activities from doing so.

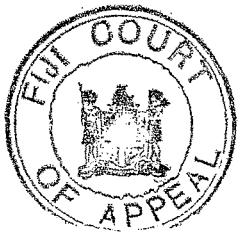
Having considered the totality of the offending, we are satisfied that the sentences imposed were within range of sentences open to the Judge.

We add a further observation. We agree with Williams J and the Judge that a maximum sentence of 8 years for these offences should be reviewed by the legislature. It is a maximum sentence significantly less than is provided for in other jurisdiction with which we are familiar. By way of example, the maximum penalty for the importation of heroin into New Zealand is imprisonment for life.

The result

The appeal is dismissed.

Tompkins, JA



Henry, JA

Penlington, JA

Solicitors:

Messrs. O'Driscoll and Shivam, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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