IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0065 OF 2007
(HAC 59 OF 07)

BETWEEN	:	**ASESELA RATU**	*Appellant*
AND	:	**THE STATE**	*Respondent*
Counsel	:	Ms R. Senikuraciri for the Appellant P. Bulamainaivalu for the Respondent	
Coram	:	Byrne, J. A. Pathik, J. A. Goundar, J. A.	
Dates of Hearing & Judgment	:	Tuesday 4th November 2008	

JUDGMENT OF THE COURT

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[1] On the 27th of September 2007 the *Appellant* was charged that contrary to Section 8(b) of the Dangerous Drugs Act Cap. 114 and Section 3 of the Dangerous Drugs Act as amended by Decree No. 4 of the Fiji Republic Gazette No. 10 of 1990 and further amended by Section 2 of the Dangerous Drugs Act Amendment No. 1 of Decree 1991, he trafficked 739.8 grams of a dangerous drug, namely Indian Hemp on the 30th day of December 2003 at Lautoka.

[2] On the 8th of March 2007 the *Appellant* pleaded guilty in the Lautoka Magistrate's Court to this charge and was formally convicted.

[3] On the 12th of March 2007 the learned Magistrate imposed a custodial sentence of 7 years imprisonment on the Appellant.

[4] The *Appellant* then appealed to the High Court against conviction and sentence.

[5] The principal issues before the High Court were as follows:

i) Whether the learned Magistrate had erred in law and in fact in dealing with the Appellant under the repealed Dangerous Drugs Act Cap. 114 and (Amendment) Decrees 4 of 1990 and 9 of 1991 given that the Illicit Drugs Control Act 9 of 2004 had already come into force on the 9th of July 2004?

ii) Whether the learned Magistrate erred in law in sentencing the Appellant to a term of 7 years imprisonment?

[6] The appeal was heard by Govind J. in the High Court at Lautoka on the 27th of April 2007 when he gave judgment on the same day holding that the learned Trial Magistrate was entitled to deal with the *Appellant* under the Dangerous Drugs Act and not the Illicit Drugs Control Act.

[7] Govind J. however held that the learned Magistrate was wrong in imposing a sentence of 7 years imprisonment and substituted a term of

imprisonment for 3 years and 7 months to commence from the date of his original sentence namely 12th of March 2007.

[8] **The Dangerous Drugs Act (Amendment) Decree, 1990**

Section 8(b) of this Decree states that every person found in possession of or who sells or otherwise traffics or engages in the trafficking of any substance referred to in the Third Schedule of the Decree shall, upon conviction, be sentenced to imprisonment where the amount involved exceeds 500 grams to a maximum of 14 years imprisonment and a minimum of 5 years.

[9] By contrast Section 5 of the Illicit Drugs Control Act 2004 provides that any person who without lawful authority

a) .....

b) Engages in any dealings with any other person for the transfer, transport, supply, use, manufacture, offer, sale, import or export of an illicit drug, commits an offence and is liable on conviction to a fine not exceeding $1,000,000.00 or imprisonment for life or both.

Indian hemp, botanically known as cannabis is listed as an illicit drug under the Illicit Drugs Control Act.

[10] The *Appellant* argued that the learned Magistrate erred in law in trying him on a charge that had clearly been repealed before the date on which

he signed the information. He then argued that the learned Magistrate should have applied the Illicit Drugs Control Act and not the Dangerous Drugs Amendment Act because the Illicit Drugs Control Act came into force some two months before the *Appellant* was charged.

[11] In our Judgment these two arguments show a misunderstanding of the facts. The *Appellant's* offence occurred before the Illicit Drugs Control Act came into force. It is not the date of charge that is relevant but the date on which the offence was committed. The offence here was committed while the Dangerous Drugs Act was still in force and therefore, in our Judgment, the *Appellant* was properly convicted.

[12] The *Appellant* submitted that both the learned Magistrate and the State prosecutor should have amended the charge so that it was made under the Illicit Drugs Control Act. This submission amounts in effect to a claim that either the prosecutor or a Magistrate is entitled to amend a charge based on the date not of the offence but of the date on which an amended law came into force. This we have to state is wrong as counsel for the *Appellant* in the end conceded.

[13] She then stated that the learned Magistrate had convicted the *Appellant* under the Illicit Drugs Control Act but this is simply untrue.

[14] In the first paragraph of his remarks on the sentence at page 27 of the Record the learned Magistrate said:

> ***"Also he is charged under the old Dangerous Drugs Decree of 1990 before the new Illicit Drugs Act came into force".***

[15] Clearly the learned Magistrate there is not saying that he is convicting the *Appellant* under the Illicit Drugs Control Act but under the Act under which he was properly charged namely the Dangerous Drugs Decree of 1990.

[16] **Retrospectivity**

The *Appellant* argued that both the learned Magistrate and the High Court have held that the Illicit Drugs Control Act was retrospective. Apart from not being true, this submission ignores the fact that if the Illicit Drugs Control Act had been made retrospective the *Appellant* would have been liable to a maximum sentence of life imprisonment and not the 14 years provided for by the Dangerous Drugs Act.

[17] Counsel agreed that the normal rule governing retrospective operation of statutes is that the amending statute must contain very clear words stating that its operation is to be retrospective to a particular date. There are no such words in the Illicit Drugs Control Act.

[18] Counsel then submitted that this Court should follow a decision of the High Court of Australia in **Maxwell –v- Murphy** [1956-1957] 96 C.L.R. 261 which she said supported her argument. In our Judgment it does not do so. Counsel failed to draw our attention to the remarks of Dixon C.J. at pp266-267 where he said:

> ***"In the first place it must be borne in mind that at common law the repeal of a statute or statutory provision means that the law must be applied as if the provision had never existed. This is subject to an exception, variously expressed, as to past matters. Lord Tenterden C.J. used the expression***

"transactions past and closed": Surtees –v- Ellison (1). Lord Campbell C.J. said: ". . . all matters that have taken place under it before its repeal are valid and cannot be called in question": Reg. –v- Inhabitants of Denton (2). The phrase of Blackburn J. was "transactions already completed under it" – Butcher –v- Henderson (3).

The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events".

[19] In our Judgment there is no intention shown with reasonable certainty in the Illicit Drugs Control Act to make it retrospective in operation. We therefore reject this argument.

[20] **Sentence**

Govind J. in the High Court said that the learned Magistrate did not state how he arrived at 7 years and that minimum terms have been ruled unconstitutional. The learned Judge did not cite any authority for that statement nor has counsel here been able to refer us to any such authority.

[21] Constitution (Amendment) Act 1997, Section 28(1)(j)

Counsel for the *Appellant* referred to this Section of the Constitution which reads:

> *"Every person charged with an offence has the right:*
>
> *... (j) not to be found guilty in respect of an act or omission unless the act or omission constituted an offence at the time it occurred, and not to be sentenced to a more severe punishment than was applicable when the offence was committed..."*

[22] This helps the *Appellant* to this extent that as he was charged and sentenced under the Dangerous Drugs Act the Court was not entitled to impose the higher penalty of the Illicit Drugs Control Act. We are satisfied however that both the learned Magistrate and the learned Judge of the High Court made errors in law in sentencing the *Appellant.* As the *Appellant* was properly charged under the Dangerous Drugs Act the minimum sentence which the Court was bound to impose was 5 years imprisonment. Here Section 22(3) of the Court of Appeal Act becomes relevant. It is necessary to quote this sub-section in full. It reads:

> *"On any appeal brought under the provisions of this section, the Court of Appeal may, if it thinks that the decision of the Magistrate's Court or of the High Court should be set aside or varied on the ground of*

a wrong decision of any question of law, make any order which the Magistrate's Court or the High Court could have made, or may remit the case, together with its judgment or order thereon, to the Magistrate's Court or to the High Court for determination, whether or not by way of trial de novo or re-hearing, with such directions as the Court of Appeal may think necessary:

Provided that, in the case of an appeal against conviction, if the Court of Appeal dismisses the appeal and confirms the conviction appealed against, it shall not (save as provided in subsection 4), increase, reduce or alter the nature of the sentence imposed in respect of that conviction, whether by the Magistrate's Court or by the High Court, unless the Court of Appeal thinks that such sentence was an unlawful one or was passed in consequence of an error of law, in which case it may impose such sentence in substitution therefor as it thinks proper".

[23] This Court is satisfied that in view of the errors in law made by the Magistrate and the High Court Judge this Court is entitled to apply sub-section 3. The *Appellant* has a number of previous convictions but only one of these, ten years ago in the Lautoka Magistrate's Court, was for selling Indian Hemp for which he was sentenced to 6 months imprisonment. Clearly in our view the sentence of 7 years imprisonment was too high but likewise the sentence of 3 years and 7 months of the High Court was too low. The learned High Court Judge failed to consider the minimum sentence of 5 years directed by the Dangerous Drugs Act.

[24] Accordingly in our Judgment on the facts of this case it is proper to substitute a sentence of 5 years imprisonment for that passed by the High Court and earlier by the Magistrate's Court. The order of the Court therefore is that the appeal is dismissed and that for the sentence of 3 years and 7 months imprisonment imposed by the High Court and 7 years by the Magistrate's Court a sentence of 5 years imprisonment is substituted. There will be orders accordingly.

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Byrne, J. A.

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Pathik, J. A.

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Goundar, J. A.

At Suva

4th November 2008