ANDREW IAN CARTER

v.

THE STATE

[HIGH COURT, 1990 (Fatiaki J) 7 September]

Appellate Jurisdiction

Sentence- possession of dangerous drugs- whether the mandatory sentencing provisions allow for a sentence of imprisonment to be suspended- Dangerous Drugs Act (Cap. 144) Dangerous Act (Amendment) Decree 4/1990 Section 8.

The Appellant was convicted of possessing Indian hemp and was sentenced to an immediate term of imprisonment. The appeal against conviction was dismissed on the facts but the appeal against sentence was allowed. The High Court HELD: that the wording of the Decree which had amended the Dangerous Drugs Act had to be construed strictly and that the term "custodial" did not mean that a custodial term could not be suspended.

Cases cited:

Ealing LBC v. Race Relations Board [1972] AC 342
Jan Barkat Ali v. R 18 FLR 129
Leveridge v. Kennedy [1960] NZLR 1
L.N.E. Railway v. Barriman [1946] AC 278
O'Keefe v. R (1969) 59 Cr. App. R 91
R v. Justices of the County of London [1889] 24 QBD
Reginald Raynsford v. R (1988) 10 Cr App R 416
Saloman v. A. Saloman & Co. Ltd [1897] AC 22
S.S.: Hontestroom v. S.S.: Sagaporack [1927] AC 37
The India (1864) 33
Warner v. Metropolitan Police Commissioner [1969] 2 AC 256
West Derby Union v. Metropolitan Life Assurance Society [1897] AC 647
Willis v. Willis [1928] P. 10

M. Raza for the Appellant
J. Prakash for the State

Appeal to the High Court against conviction and sentence in the Magistrates' Court.

Fatiaki J:

The appellant was charged and pleaded not guilty in the Suva Magistrates Court to the following offence:

"Statement of Offence"

FOUND IN POSSESSION OF DANGEROUS DRUG: contrary to Section 8 (b) and 41 (2) of the Dangerous Drugs Act Cap 114 as amended by Section 3 of Decree No. 4 of 1990.

Particulars of Offence

ANDREW IAN CARTER on the 7th day of July, 1990 at Suva in the Central Division was found in possession of Dangerous Drug namely 9.1 grams of "Indian Hemp". A

During this trial the prosecution called 3 witnesses, a Customs Officer, the Government Analyst and the Investigating Officer who produced several exhibits including the appellant's police interview record (Ex 2). The appellant in his defence gave sworn evidence. Thereafter on the 24th of July the learned trial magistrate delivered a written judgment convicting the appellant and sentenced him to a term of 3 months imprisonment. B

On the 26th of July this Court granted the appellant conditional bail pending the hearing of his appeal and ordered that the preparation of the Magistrate's Court record of proceedings be expedited. The appeal was eventually heard on the 20th of August. C

The appellant's petition of appeal against both his conviction and sentence raises 4 grounds of appeal as follows:

"(a) That the learned Magistrate erred in law and fact in convicting the Appellant when the evidence as a whole was not sufficient to establish the charge against him having regard to the standard of proof. D

(b) That the learned Magistrate misdirected himself on the issue of Alibi raised by the Counsel for the appeal in the trial by saying:

i) that by merely providing the names and address of the person from whom the accused had said he had purchased the items, does not form an alibi. E

(c) That the Learned Trial Magistrate misdirected himself on the burden of proof when he said:

i) "I find as a fact that because of the accused's past experience in Marijuana I find him guilty as charged." F

ii) That "I do not believe the accused when he said that what he was buying was Kava ..... as the accused must have seen how kava is mixed" when there was no evidence to the contrary.

(d) That the Learned Magistrate misdirected himself when he imposed a 3 months imprisonment on the Appellant by saying that the sentence was mandatory under Decree No 4 of 1990." G

I can quickly dispose of ground (b) which deals with-the alibi defence.

It is clear from the record that the term was first used by the appellant's counsel at the trial during the cross-examination of the Investigating Officer PC1027 John Bernard and later in his closing submissions to the trial magistrate.

It is equally clear that counsel's submissions (both in the lower court and on appeal) were based merely on the appellant's police interview answer and sworn evidence that he had bought the offending article from one Ilai at Dravuni Island.

The learned trial magistrate dealt with this submission in his judgment in the following passages where he said:

> "..... learned defence counsel made an issue of the fact that when interviewed by PW3, the accused gave the name and address of the person namely Ilai of Dravuni from where he bought the leaves in question and that it was the duty of the prosecution to negative that statement by tracing the said Ilai and interviewing him. He emphasised that this was an alibi which the accused raised with the Police."

and later,

> "I have considered this argument of the defence counsel and wish to say that, firstly, there is no doubt that it is for the prosecution to prove its case, but the giving of name and address is not an alibi and it does not constitute an alibi within the meaning of the word."

With all due regard to the submissions of learned counsel for the appellant (who was also defence counsel at the trial), this Court entirely agrees with the above observations of the learned trial magistrate.

Evidence in support of an alibi means evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been at the place where the offence is alleged to have been committed at the time of its alleged commission.

In this case it was common ground that the offence was first detected on the 7th of July after the passenger-liner "Fairstar" had berthed at Suva Wharf and during the course of a search by a Customs Officer of the appellant's personal effects in his presence.

Furthermore it does not appear that the appellant's possession of the article immediately before it was seized was ever seriously disputed apart from the chain of official custody after it had been seized.

In the circumstances evidence pointing to the primary source or origins of the article in Dravuni Island in Kadavu is irrelevant nor could such evidence by any permissible stretch of the imagination or the English language be considered as raising an alibi. Quite simply the term has been misunderstood and misapplied.

This ground of appeal must fail and is accordingly dismissed.

In my view it is most likely that the name "Ilai" was mentioned in the context of a defence of mistake of fact which appears to have been the principal defence taken by the appellant in the lower court and which gave rise to the principal argument of learned counsel for the appellant on the 2 remaining grounds of

appeal against conviction.

It is convenient to deal with this argument now, and there is no better reference to the effect of such a defence than Section 10 of the Penal Code Cap 17 which states: A

> "A person who does or omit to do an act under an honest and reasonable, but mistaken, belief in the existence of a state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject." B

In the present case under consideration the appellant clearly raised this defence both in his police interview answers and in his sworn evidence and it was encumbent on the trial magistrate to deal with it. C

This he has more than adequately done in his judgment. After outlining the evidence of the prosecution's witnesses, the magistrate sets out the appellant's evidence and defence counsel's submissions. Then after referring to the comprehensive definition of the phrase be in possession of provided in Section 4 of the Penal Code the learned trial magistrate makes several findings of fact ostensibly based on a careful consideration of all of the evidence and more particularly his acceptance of the prosecution witnesses as witnesses of truth. D

Thereafter the learned trial magistrate rejects the appellant's claim that he had bought kava from Ilai and after setting out his reasons held "……..that the accused did not have a mistaken belief that it was kava and that there were no reasonable grounds upon which he could have so." Needless to say both elements must be present before a plea of mistake of fact can succeed. E

In so holding the learned trial magistrate very obviously based his decision on his assessment of the credibility of the accused.

In such circumstances it is well to bear in mind the observations of Lord Summer in S.S: Hontestroom v. S.S: SaKaporack [1927] AC 37 when he said at p.47: F

> "…… not to have seen the witnesses put appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness had been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone." G

Furthermore in Jan Barkat All v. R 18 FLR 129 it was held:

> "A Magistrate is not obliged to give reasons in his judgment for his acceptance or rejection of the evidence of any particular witness and so long as the evidence to which he has referred and which he accepts is sufficient to establish the ingredients of the offence ....."

Having carefully considered the various findings in the magistrate's judgment together with the evidence of the witnesses in the trial record of proceedings and mindful that there was no prosecution evidence directly contradicting the appellant's claim, nevertheless this court is not convinced that the learned trial magistrate has palpably misused his advantage or come to a wrong conclusion on credibility. This complaint is therefore dismissed.

Then learned counsel for the appellant drew the Court's attention to several discrepancies in the marking and handling of the principal exhibit in the case by the three prosecution witnesses and submitted that this raised a grave doubt about the identity of the exhibit tendered in court.

The learned trial magistrate dealt with this matter in a fairly long passage in his judgment when he said:

> "I further find as fact and beyond reasonable doubt that the plastic bag with contents found by the PW1 (the Customs Officer) on the accused was the same plastic bag with contents which was given to the PW3 (the Investigating Officer) when the (PW1) called him to his office where the accused was present and that it was the same plastic bag with contents which was analysed by PW2 Government Analyst and which was sealed and handed back to PW3 (the Investigating Officer) as an exhibit (Exhibit 3). Although a lot of questions were asked in cross-examination of the said witnesses in relation to the said plastic bag and its contents, there was no question indicating that the accused denied that it was the same plastic bag with contents which was found on the accused. Although the accused is not required to prove anything, he did testify, and in his evidence he did not dispute that the plastic bag produced as exhibit in Court was not the plastic bag and contents found on him on 7th July, 1990 by PW1 (the Customs Officer). In fact when interviewed by PW1 he said "Ilai gave me a small plastic."

In that passage, the learned trial magistrate dealt very fully and comprehensively with this submission of learned defence counsel and although he has not enumerated the precise deficiencies raised, doubtless he was satisfied with the reasons and answers that the prosecution witness gave for them.

Having considered afresh the various deficiencies raised by learned counsel for the appellant relating to the identity and markings on the plastic bag and envelope (i.e. the receptacles) and in particular, the explanations of the witnesses concerned and the "Description of Sample" entered in the Analyst's report (Ex I), this Court is satisfied that there is no merit at all in this complaint which is

accordingly dismissed.

Finally counsel for the appellant complained that the learned trial magistrate had merely paid lip service to the burden of proof in this case. In particular counsel submitted that the trial magistrate thought that the offence was one of strict liability.

With all due respect to learned counsel for the appellant there is no basis whatsoever to support such a submission. In his judgment the learned trial magistrate thrice reminded himself that it was for the prosecution to prove the guilt of the accused and not for the accused to prove anything.

Furthermore there is no warrant for suggesting that the trial magistrate treated the offence in this case as one of strict liability, on the contrary, the passages quoted by the learned trial magistrate from the judgment of Lord Wilberforce in Warner v Metropolitan Police Commissioner [1969] 2 AC 256, clearly shows he was concerned with the nature and extent of the mental element which is required in the word "possession" as alleged in the charge.

Needless to say if the learned trial magistrate had truly treated the present offence as being one of absolute strict liability then he would not have even bothered to consider the evidence relating to the accused's plea of mistake of fact let alone make a finding that "..... the accused knew all along what these dried leaves (Ex 3) were in that he knew they were Indian Hemp."

Indeed if there was anything in counsel's complaint on this score, then the trial magistrate's judgment would have ended shortly after his finding on the third page:

> " ..... that the accused was on the 7th of July, 1990 searched by the PW1 (the Customs Officer) at Suva and in the handbag which he was carrying there was in its side pocket a small plastic bag containing dried leaves and these dried leaves on being analysed by PW2 the Government Analyst were found to be Indian Hemp namely Cannabis Sativa."

Instead, the judgment continues for a further 2 pages. This ground of appeal too fails and is dismissed.

It goes without saying that having dismissed all of the appellant's grounds of appeal against conviction, his conviction for the present offence by the learned trial magistrate remains and is hereby confirmed and upheld.

The remaining ground of appeal is one against the sentence of 3 months imprisonment imposed by the learned trial magistrate. This followed extensive submissions from defence counsel as to the meaning and effect of Decree No 4 of 1990 entitled Dangerous Drugs Act (Amendment) Decree, 1990 (hereafter referred to as the Decree')

In sentencing the appellant in this case the learned trial magistrate referred specifically to the proviso in the new Section 8 substituted by the Decree and

said:

> "This is a mandatory provision. It means what it says and no question of suspension of sentence arises. There is no doubt whatsoever as to the form of the sentence that should be passed. Applying that third schedule of the Act, the accused is sentenced to imprisonment for the minimum period of 3 (three) months."

Incidentally the learned magistrate incorrectly alluded to an amendment of Section 41(2) of the Dangerous Drugs Act Caps 114 (hereafter referred to as 'the Act'). If I may say so that general penalty section in the Act was not amended in any way by the Decree and remains intact.

Be that as it may the learned trial magistrate considered that the force and effect of the Decree in so far as it referred to sentences was to deprive and divest the Court of any discretion in the matter.

It was said by this Court in granting the appellant conditional bail pending appeal, " ..... this is the first occasion ..... when the question of sentences under the Decree has come before the Court for its consideration", as such there are no local decisions of any superior court to assist the Court in its unenviable task and duty to interpret the Decree.

Learned counsel for the appellant in his submissions on this ground argued that the learned trial magistrate erred in his reading of the section. Counsel submitted that custodial sentences can be of two types, either a suspended custodial sentence or an immediate custodial sentence and in this regard the Decree did not require the custodial sentence to be immediately effective.

Reference was also made to the provisions of Section 29 of the Penal Code which empowers a court which passes a sentence of less than 2 years imprisonment to suspend it. Similarly counsel argues, Section 28(3) of the Penal Code empowers a court in its discretion to impose a fine instead of imprisonment on a person liable to imprisonment.

In any event counsel strongly urges the Court that any doubt or ambiguity in the section should be construed and resolved in favour of the appellant's liberty.

On the other hand learned State Counsel in supporting the trial magistrate's view referred to the purposeful and obvious distinction drawn by the legislative draftsman between a sentence of "imprisonment" and one that is "custodial".

As for the applicability of Section 28(3) of the Penal Code counsel submits that the mandatory form of words in the Decree clearly excludes the application of the section which refers to "a person liable to imprisonment..." which is the format or expression adopted in all Penal Code offences save for Treason, Instigating Invasion and Murder where the expression is "shall be sentenced to death and shall be imprisoned for life". With this submission I agree.

In learned State Counsel's view the provisions of Section 29 of the Penal Code have no application to the Third Schedule sentences of the Decree under consideration as the discretionary second stage envisaged by the Section has been effectively excluded by the mandatory requirements of the provision under consideration.

Furthermore Counsel points to the existence in the Third Schedule of both maximum and minimum penalties that not only exceed the sentencing powers of a Magistrate Court but also preclude even the High Court from exercising its powers under Section 29 such as for an offence of Possession of Indian Hemp where the quantity of drug involved exceeds 500 grams.

Lord Watson in Saloman v. A. Saloman & Co Ltd [1897] AC 22 at p.38 said:

> "In a court of law or equity, what the legislature intended to be done or not to be done can only be ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication."

It is necessary therefore to begin by looking at the actual wording used in the Decree to determine its meaning. The relevant section reads:

"Section 8 of the principal Act is repealed and the following substituted

"8. Every person -

a) growing opium poppy, Indian hemp or Coca leaf, whether for private use or otherwise; or

b) found in possession of or sells or otherwise traffics or, engaged in the trafficking of any substance to which this part applies,

shall be guilty of an offence and upon conviction shall be sentenced to imprisonment in accordance with the third Schedule of this Act -
Provided that a sentence imposed under this section shall. be custodial."

It is clear from a comparison of the old and the new Section 8 that the Decree introduced 2 things, a new and wider offence of "trafficking" (as newly defined) and a new Third Schedule in which maximum and minimum penalties for offences are set out on the basis of the weight or quantity of dangerous drugs involved.

For instance for an offence of Possession of Indian Hemp against Section 8(b) of the Act (as replaced by the Decree) the following penalties are provided:

Section Creating	General Nature of Offence	Quantities of Drug	Penalty
8(b)	Possession of Indian Hemp	Not exceeding 100 grams	Max of 24 months Min of 3 months

Not exceeding 500 grams	Max of 3 years Min of 12 months
Exceeding 500 grams	Max of 20 years Min of 5 years

In dealing with this ground of appeal I am guided by the salutary words of Lord Simon of Glaisdale in Ealing LBC v. Race Relations Board [1972] AC 342 when he said at pp 360:

> "It is the duty of a court so to interpret an Act of Parliament as to give effect to its intention. The court sometimes asks itself what the draftsman must have intended of the legislative initiator (nowadays almost always an organ of the executive); he knows what canons of construction the courts will apply; and he will express himself in such a way as accordingly to give effect to the legislative intention. Parliament, of course, in enacting legislation assumes responsibility for the language of the draftsman."

and later at p.361:

> "Accordingly, such canons of construction as that words in a non-technical statute will primarily be interpreted according to their ordinary meaning or that a statute establishing a criminal offence will be expected to use plain and unequivocal language to delimit the ambit of the offence (i.e. that such a statute will be construed restrictively) are not only useful as part of that common code or juristic communication by which the draftsman signals legislative intention but are also constitutionally salutary in helping to ensure that legislators are not left in doubt as to what they are taking responsibility for."

and finally:

> " ..... the courts have five principal avenues of approach to the ascertainment of the legislative intention: (1) examination of the social background, as specifically proved if not within common knowledge, in order to identify the social or juristic defect which is the likely subject of remedy; (2) a conspectus of the entire relevant body of the law for the same purpose; (3) particular regard to the long title of the statute to be interpreted (and, where available, the preamble), in which the general legislative objectives will be stated; (4) scrutiny of the actual words to be interpreted, in the light of the established canons of interpretation; (5) examination of the other provisions of the statute in question (or of other statutes *in pari materia*) for the illumination which they throw on the particular words which are the subject of interpretation."

To this last passage I would add the rider *'though not necessarily applied in that order'*.

In addition and in deference to the drafting technique adopted by the draftsman in this instance, I have borne in mind the headnote of Leveridge v. Kennedy [1960] NZLR 1 which reads: A

> "Although it is a general rule of statutory interpretation that a proviso is intended to operate by way of qualification on, or exception out of, something which would otherwise be within the ambit of the substantive or enacting provision, the object of that rule is to ensure that effect shall be given to the true intention of the Legislature, and is not designed for the purpose of defeating that intention. It is the substance, and not the form, of the enactment, that is to be regarded. The mere use of the words "Provided that" does not always mean that what follows is a true proviso, for it may add to, and not merely qualify, what has gone before, and so be regarded as a fresh enactment independent of the enacting provision." B C

In similar vein and perhaps more appropriate to this case are the cautionary words of Lord Herschell in West Derby Union v. Metropolitan Life Assurance Society [1897] AC 647 at pp 655 and 656 where the learned judge trenchantly said:

> "I decline to read into any enactment words which are not to be found there, and which would alter its operative effect because of provisions to be found in any proviso. Of course a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and shew when there is doubt about its scope, when it may reasonably admit of doubt as to its having this scope or that, which is the proper view to take of it; but to find in it an enacting provision which enables something to be done which is not to be found in the enactment itself on any reasonable construction of it, simply because otherwise the proviso would be meaningless and senseless, would, as I have said, be in the highest degree dangerous." D E

So too in this present appeal if I accede to the submissions of State Counsel I would be reading into the enactment words to the effect that the sentence of imprisonment must be served at once or immediately not because of their presence in the enacting clause but because of provisions to be found in (the) proviso. i.e. assuming that "custodial" does mean incarceration. F

Finally as the Act is a penal one creating offences and imposing penalties it must be construed in terms of the general rule of construction conveniently summarised in Halsburys Laws of England 4th Edition Volume 44 (1983) p. 560 at para. 910 where it says G

> "It is a general rule that penal enactments are to be construed strictly, and not extended beyond their clear meaning. This general rule means no more than that if, after the ordinary rules of construction have first been applied, as they must be, there remains any doubt or ambiguity, the

person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt.

A

Equally, the language of a statute will not be construed as creating a criminal offence at all unless this is its clear result.

For a penalty to be enforced it must be quite clear that the case is within both the letter and the spirit of the statute. The literal meaning of the statute, if it is intelligible, must not be extended on the ground that there B has been a slip or a matter not provided for which should have been provided for, or that the case is so clearly within the mischief that it must have been intended to be included."

As was so poignantly expressed by Lord Simonds in L.N.E Railway v. Barriman [1946] AC 278 at p. 313:

C

"A man is not to be put in peril upon an ambiguity however much or little the purpose of the Act appeals to the predilection of the Court."

In so far as State Counsel's argument of implied repeal or exclusion is concerned I can do no better than to quote the words of Dr Lushington in The India (1864) 33 LJ Adm. 193 (cited in Craies on Statute Law 7th Edition pp 372, 373) when D he said:

"What words will establish a repeal by implication it is impossible to say from authority or decided case. If on the one hand, the general. presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would have been declared in express E terms, so, on the other hand, it is not necessary that any express reference be made, to the statute which it is intended to repeal. The prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one; or if the two statutes together would lead to wholly absurd consequences; or if the entire subject-matter were taken away by the subsequent statute. Perhaps the most difficult case F for consideration is where the subject-matter has been so dealt with in subsequent statutes that, according to all ordinary reasoning, the particular provision in the prior statutes could not have been intended to subsist, and yet, if it were left subsisting, no palpable absurdity would have been occasioned. It must therefore always be a question for the court to decide whether this second rule as to intention is applicable or G not, and in coming to a decision on this point, repeal by implication is never to be favoured."

Needless to say this present appeal falls fairly and squarely within "the most difficult case..." envisaged in the latter part of the above passage. It has not been clearly demonstrated to this Court that in wording the penalty section as it is the legislature must have intended to exclude the Court's general power to suspend sentences of imprisonment nor is there an inevitable absurdity created by its continued existence.

One would have thought that if it was the intention of the framers of the Decree to restrict the Court's sentencing powers in the way suggested by learned State Counsel, then its intention would have been unequivocally expressed, particularly as there has been no suggestion that there was a mischief inherent in the exercise by Courts of its powers under the provisions of Section 29 of the Penal Code.

The part of the section however which is of particular concern in this appeal are the sentencing words:

> " ..... shall be sentenced to imprisonment in accordance with the Third Schedule of this Act - Provided that a sentence imposed under this section shall be custodial."

There can be no doubt at all that the above words are drafted in a mandatory manner but notwithstanding that the question which the Court must answer resolves itself into a fairly simple and narrow one, namely :-

> "Does the adjective 'custodial' in the proviso import into a sentence of imprisonment the necessity that it must be one of immediate confinement or not?"

If the answer is affirmative then the learned trial magistrate is correct. If the question is answered in the negative however then just as clearly the learned trial magistrate has misdirected himself.

In other words is physical confinement or incarceration automatically and irresistibly to be understood as the popular ordinary inherent meaning of the word "custodial"? If yes, then it has a restrictive effect when applied to a sentence of imprisonment, if not, then it adds nothing.

In this latter regard learned counsel for the appellant points to Section 29(3)(c) of the Penal Code where the words "immediate imprisonment" appears. This, counsel submits, is a clear statutory instance furnishing a negative reply to the question posed in the preceding paragraph.

State Counsel in reply sought to gloss over the submission saying that the term there used was "imprisonment" and in any event Section 29 had been implicitly excluded in its entirety by the wording of Section 8 of the Act (as replaced by the Decree.)

In matrimonial cases where the term "custody" is most frequently encountered in a legal context it has been understood not to mean: " actual physical custody but the right to control" (per Lord Hanworth M.R. in Willis v. Willis [1928] P. 10 at p. 15.)

It is also clear that the term "custodial" has been and is commonly used interchangeably with "imprisonment" and, what is more, in the context of suspended sentences.

The Court of Criminal Appeal in England where one would have expected a distinction to be drawn if indeed there was an obvious one in existence, has not done so as the following dicta illustrate: per Parker L.C.J in *O'Keefe v. R* (1969) 59 Cr App R 91 at 95:

> " ..... before one gets to a suspended sentence at all, a court must go through the process of eliminating other possible courses ..... and then say to itself: this is a case for imprisonment, and the final question it being a case of imprisonment: is immediate imprisonment required, or can I give a suspended sentence,"

In similar vein but this time using the term "custodial ":

> "The question which the sentencing court has to ask are, first whether a custodial sentence is required; secondly ..... if it is required, how long a custodial sentence, and thirdly, are there any special circumstances ..... which indicate that a sentence of that length should be suspended."

(as quoted in Principles of Sentencing by D A Thomas 2nd Edition p.245). Clearly even a "custodial" sentence can be suspended!

And finally, where "imprisonment" and "custodial" are used together in Reginald Raynsford v. R (1988) 10 Cr App R 416 (Sentencing Series) at p. 417:

> "It is a well established principle of sentencing that the sentencer, when considering a sentence of imprisonment, should ask himself these questions in this order: first, was he obliged to pass a custodial sentence, or was there a non-custodial alternative which would be appropriate in the circumstances? Secondly the sentencer should decide the length of the appropriate custodial sentence and thirdly, he should ask himself could he properly suspend the sentence in whole or in part."
>
> (my underlining)

In my considered view the legislature in passing the Decree has answered for the Court the first 2 questions which a sentencer is obliged to ask himself, but with all due respect to the submissions of State Counsel the Decree is silent on the third question.

In Maxwell on Interpretation of Statutes llth Edition the following relevant passage appears at pp 177 and 178 under the heading:

"New Punishment Imposed

> "It would seem that an Act which (without altering the nature of the offence, as by making it felony instead of misdemeanour) imposes a new kind of punishment, or provides a new course of procedure for which was already an offence, at least at common law, is usually regarded as cumulative and as not superceding the pre-existing law."

Then the draftsman of the Decree has used the phrase "..... in accordance

with....". This is an expression which has received the attention of the Courts in several cases suffice to say that the expression has been consistently interpreted to mean: "in substantial accordance with" (per Mathew. J in R v. Justices of the Couunty of London [1889] 24 QBD 341 at p. 345.)

Here again, an imprecise expression has been used. Can it seriously be said that a suspended sentence of imprisonment is not (substantially) in accordance with the penalty provided in the Third Schedule? I venture to think not. After all, a suspended sentence is a sentence of imprisonment with all its stigma albeit that it does not entail an offender's immediate incarceration.

It might well be as learned State Counsel pointed out that drug offences are increasing at an alarming rate; it might be that there is a growing concern at the spread and availability of dangerous drugs throughout the country and especially involving our young; it might be that the legislature has decided in its collective wisdom to take a hard line deterrent approach to drug offenders.

These may all be good reasons for imposing sentences of immediate imprisonment without exception but in adopting such a draconian measure involving as it does an immediate deprivation of personal liberty, nothing less than the clearest words will suffice.

It is interesting to note how the draftsman of the Criminal Justice Act 1985 (NZ) dealt with a legislative requirement that violent offenders be imprisoned except in special circumstances. In Section 5 of the above mentioned Act the expression is "full-time custodial sentence."

In conclusion if I might be permitted to suggest an alternative wording to the existing "proviso" which puts the meaning and intention of the Decree beyond any doubt, then I would commend the following:

> "Provided that the provisions of Section 29 of the Penal Code shall not apply to any sentence imposed under this Section"

or words to that effect.

For the above reasons the appellant's appeal against sentence succeeds. The sentence of 3 months imprisonment is accordingly quashed and in substitution therefor I impose a sentence of 9 months imprisonment suspended for 3 years with effect from the 24th of July, 1990.

(Appeal against conviction dismissed; sentence varied.)

(Editor's note: this Judgment preceded the Dangerous Drugs Act (Amendment) (No. 1) Decree 4/1991).