

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

CRIMINAL APPEAL NO. AAU0016 OF 2006S
(High Court Criminal Action No. HAA 57 of 2005S)

BETWEEN:

ELIKI MOTOTABUA

Appellant

AND:

THE STATE

Respondent

Coram:

Ward, President
Scott, JA
Ford, JA

Hearing:

Tuesday, 20th March 2007, Suva

Counsel:

Appellant in Person
D. Gounder for the Respondent

Date of Judgment: Friday, 23rd March 2007, Suva

JUDGMENT OF THE COURT

The Background

- [1] The appellant, who has handled his own defence throughout, was convicted in the Magistrate's Court at Nausori on 29 December 2003 on one count of being found in possession of dangerous drugs, contrary to section 8 (b) and 4(2) of the Dangerous Drugs Decree No.1 of 1990 as amended. The particulars of the offence stated that

on 5 February 2003 at Korovou he was found in possession of 11.5 g of Indian hemp. He was fined \$100.

- [2] The appellant subsequently appealed to the High Court against both his conviction and sentence. Prior to the hearing he was specifically warned by Justice Winter in the High Court of the risks he took in pursuing the appeal in that the State could seek an increase in the sentence but he nevertheless decided to proceed. The appeal was heard on 3 November 2005.
- [3] On 17 January 2006, the appeal in the High Court was dismissed. The State's application for a review and an increase in the sentence was granted. The sentence of \$100 was quashed and substituted by a sentence of 18 months imprisonment. The sentence was made concurrent with a six-year term the appellant was currently serving for wrongful confinement and rape. He is due to be released from prison in 2010.
- [4] The appellant had raised a number of grounds in his unsuccessful appeal to the High Court. In this Court he was granted leave to appeal on one ground only. That ground was stated as follows:

"That the learned appellate judge erred in finding that a special constable or civilian had the power to arrest the appellant:

(a) Under sections 21 (a) - (d) and 24 of the Criminal Procedure Code as the offence is not a cognizable offence under section 2 and the last part of the First Schedule of the CPC nor is it a felony under section 4 of the Penal Code;

(b) Under section 42 of the Dangerous Drugs Act as that section restricts the power of arrest to a Customs officer or a Police Officer."

The Facts

- [5] The following passage from the High Court judgment sets out the relevant factual background:

"The brief particulars of the offence are that on the 5th of February 2003 at Korovou an off duty police constable saw the appellant inside a carrier van and became suspicious as he saw the person the appellant was talking to holding a two dollar note as though he was trying to buy something from the appellant.

This witness knew the appellant by reputation as a well-known marijuana dealer in Korovou. Based on this information he formed a reasonable suspicion that the offence of drug dealing was being committed and he walked straight up to the van. He saw the appellant put something into his trousers pocket. He asked the appellant to accompany him to the police station. In the middle of that request the appellant quickly jumped out of the van and ran off. The off duty police constable gave chase.

During that chase an independent civilian witness saw the appellant throw something to the ground and this witness pointed the packets out to the off duty police constable. He picked them up and found two plastic bags containing 12 rolls of Indian hemp and four sachets wrapped in foil.

All this happened very quickly as the constable was keen to continue his pursuit of the fast escaping appellant.

Assisted by the van driver the appellant was eventually arrested. He was abusive and struggled as he did not want to be arrested. However, with the assistance of another policeman the appellant was taken by the van to the police station and handed over to the desk office. That officer also received the drug exhibits. Subsequent interviews were largely exculpatory. The appellant refused to sign charge sheets. He was charged and processed.

The plastic packets he threw away during the course of his pursuit were examined by the Government Analyst. He confirmed that there were 12 rolls and four sachets contained inside the plastic weighing 11.5 g. The material was positively identified as Indian hemp."

- [6] Significantly, the person referred to in the above passage as an off duty "police constable" was an off duty "special constable". That was noted elsewhere in his

Lordship's judgment. The appellant had contended in the High Court that his apprehension and arrest by the off duty special constable was in breach of his constitutional rights under section 26 of the Constitution. That submission was rejected. His Lordship ruled:

" Any civilian and that includes an off duty special constable has a right to arrest without warrant any person suspected of committing a criminal offence such as drug peddling. That right is described in sections 21 (a) - (d) and 24 of the Criminal Procedure Code, Cap.17 and section 42 of the Dangerous Drugs Act."

The Appeal

- [7] It is against that finding by his Lordship that the appellant was granted leave to appeal. The thrust of his submissions before us were that the provisions cited by his Lordship did not give a right of arrest to an off duty special constable and therefore his arrest was unlawful. He further contended that as the arrest was unlawful, the evidence relating to the discovery of the plastic bags containing the Indian hemp was inadmissible.
- [8] Counsel for the State, Mr Goundar, acknowledged that section 26 of the Constitution protected a person against unreasonable search of his person or seizure of his property. He also accepted that section 28(1)(f) of the Constitution gave an accused person the right not to have any unlawfully obtained evidence adduced against him unless the interest of justice required it to be admitted.

Submissions on the Criminal Procedure Code

- [9] Counsel for the State conceded that the off duty special constable had no authority under sections 21 and 24 of the Criminal Procedure Code to arrest the appellant. Section 21 of the Code permits a "police officer" to carry out arrests without a warrant in certain circumstances but in Parshu Ram v R Cr App No.63 of 1982, this Court held that special constables were not police officers. The Court said:

"The scheme of the Act (the Police Act) is, we think, to draw a clear distinction between the Royal Fiji Police Force and the Special Constabulary. It has been found convenient to apply to special constables while on duty certain of the provisions of the Act which relate to members of the Force, but throughout the Act the distinction is carefully preserved. While, for instance, a special constable when on duty is given, by S.55 (1), the same powers, privileges and protection as a police officer, and is liable to perform the same duties, he is not subject to the same restrictions. Section 16 prohibits a police officer from engaging in any other employment or taking part in political activities. It is not surprising that the special constable, whose employment as such is by its nature part-time only, is not made subject to a similar restriction. Section 17 (2) provides that every police officer shall be deemed to be on duty at all times, and this again cannot sensibly apply to a special constable. Without setting them out in detail there are various other provisions in the Act which draw similar distinctions It follows from what we have said the expression "police officer" as it is used in S. 247 (b) of the Penal Code cannot be made to apply to a special constable."

- [10] The other provision in the Criminal Procedure Code relied upon by his Lordship as giving authority to the off duty special constable to effect the arrest was section 24. That section deals with an arrest by a private citizen. Subsection (1) states:

"Any private person may arrest any person who in his view commits a cognizable offence, or whom he reasonably suspects of having committed a felony provided a felony has been committed."

- [11] The term "cognizable offence" is defined in section 2 of the Criminal Procedure Code as:

"an offence for which a police officer may, in accordance with the First Schedule or under any law for the time being in force, arrest without warrant."

- [12] The First Schedule lists the various offences under the Penal Code in respect of which a police officer may arrest without warrant. The offence in the present case, however, is not one created under the Penal Code but the Dangerous Drugs Act. The only situation recognised in the First Schedule to the Code where a police

officer may arrest without warrant under any other law for the time being in force is when the offence is punishable by imprisonment for three years or upwards.

- [13] The offence of possession of Indian hemp, not exceeding 100 g, carries a maximum sentence of 24 months imprisonment. State counsel conceded that against this background, the off duty special constable had no authority to carry out an arrest as a private person under section 24 of the Criminal Procedure Code.

Submissions on the Dangerous Drugs Act

- [14] The second statutory provision relied upon by his Lordship in holding that the off duty special constable had power to arrest without warrant was section 42 of the Dangerous Drugs Act, Cap 114.
- [15] The power to arrest without warrant in section 42 of the Dangerous Drugs Act, however, is restricted to any "Customs officer or police officer" who has reasonable grounds to suspect that a person has committed an offence against that Act. State counsel conceded, given the finding in Parshu Ram that special constables are not police officers, that his Lordship was unable to rely on section 42.
- [16] Although it was not a provision relied upon by his Lordship, Mr Goundar submitted that the off duty special constable had power to arrest without warrant under section 9 (2) of the Dangerous Drugs Act. That provision states:

"Any police officer or constable may without warrant apprehend and detain any person carrying or conveying any raw opium, Indian hemp or coca leaf."

- [17] State counsel, with commendable diligence, analysed the history of the Fiji Police Force from its establishment under Police Ordinance, No. 30 of 1876. Against that background, he submitted in reference to the wording of section 9 (2):

"If the legislature had intended that the word "constable" as used above means " police officer " then the word "constable" is redundant. As a general principle, the legislature must have intended to give the word "constable" some meaning and effect. The legislature clearly maintained the distinction between constables who were police officers and the constables who were regarded as special constables."

- [18] Whilst on the face of it, there is some force in this submission, the reality is that the forerunner of the Dangerous Drugs Act, Cap14, was the Dangerous Drugs Ordinance No.3 of 1937 and, therefore, the wording used in section 9 (2) (which is identical to the wording in section 9 (2) of the 1937 Ordinance) needs to be considered in the setting of the Police legislation as it stood back in 1937.
- [19] In 1937, the relevant ordinance relating to the Police Force was the Fiji Constabulary Ordinance No.16 of 1905. Under that Ordinance, a force was established called the Fiji Constabulary which was made up of "officers", "non-commissioned officers" and "constables". A number of sections in the Ordinance specifically referred to the different categories of officers, non-commissioned officers and constables. Against that background, one can understand the legislature in 1937 wanting to extend the same powers of apprehension and detention under the Dangerous Drugs Ordinance to both police officers and constables alike and that would seem to be the most likely explanation for the reference in section 9 (2) to "any police officer or constable".
- [20] The post of special constable was first established by the Special Constables Ordinance No.11 of 1912. That Ordinance gave power to any European Magistrate in the Colony to appoint special constables for "the preservation of the public peace and the protection of property" whenever any "tumult, riot or felony" had taken place or was reasonably apprehended.
- [21] The 1912 Ordinance still applied in 1937. Given the limited functions envisaged for special constables, i.e. to preserve the public peace in times of tumult, riot or felony, we cannot accept that the legislature would have intended to extend any

powers of apprehension and detention under the Dangerous Drugs Ordinance to special constables. On the face of it, such a step would have been ultra vires.

- [22] For these reasons, we cannot accept State counsel's submission that the off duty special constable in the case before us had power to arrest the appellant under section 9 (2) of the Dangerous Drugs Act.

Alternative Submission

- [23] Our conclusions that the appellant's arrest was unlawful is not the end of the matter, however. There is a clear line of authority State counsel referred us to which establishes that relevant evidence is admissible even though it may have been obtained improperly or unlawfully. That proposition is subject to the judge's discretionary power of exclusion - Regina v Fox [1986] 1 AC 281; R v Khan [1996] 2 Cr App R 440. Both these cases were cited and followed by this Court in Deo v The State Cr App No. AAU0015/005 and Shiu Chand v The State Cr App No. AAU0016/005.
- [24] We confirm the principle as stated but we also accept the further submission made by Mr Goundar that, even though the arrest may have been unlawful, it cannot be said that the evidence was obtained unlawfully. The point made by State counsel under this head was that the drugs were not seized from the appellant following a search but they were found discarded on the ground.
- [25] Before us, the appellant submitted that the plastic bags found on the ground had not been discarded by him and he knew nothing about them. He accused the police of "fabricating the evidence." Because the appellant was unrepresented, we repeat again in this judgment what we said to him during the appeal hearing, namely, that he can only appeal to this Court on a question of law. The question of law he was granted leave to appeal on related to the lawfulness of his arrest. The matter he sought to raise before us relating to the plastic bags was a question of fact. On that

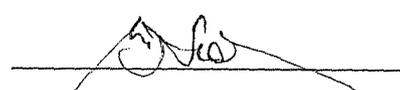
topic the learned magistrate who heard and saw all the witnesses clearly believed the evidence of the lady who witnessed what happened. She worked in a local restaurant at Korovou and she knew the accused. From what we can make out from the record before us, she seems to have given quite unequivocal evidence that she had seen the accused throw the plastic bags to the ground as he was being chased by the off duty special constable. The magistrate accepted that evidence and the appellant must now understand that that is really the end of it.

Order

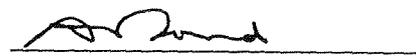
[26] For the foregoing reasons, the appeal is dismissed.



Ward, President



Scott, JA



Ford, JA

Solicitors:

Appellant in Person

Office of the Director of Public Prosecutions, Suva for the Respondent

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