FRANCISCUS HELENA BORREMANS
& LODY WALBURG

A

v.

THE STATE

[HIGH COURT, 1990 (Jesuratnam J) 29 August]

Appellate Jurisdiction

B

Crime: procedure- dangerous drugs- requirement for analyst's certificate- effect of guilty plea to defective chage- value of acceptance by accused of facts beyond their knowledge- Dangerous Drugs Act (Cap 114) Sections 16 and 22.

Crime: offences- dangerous drugs- "extract of Indian hemp"- Dangerous Drugs
C *Act (Cap 114) Sections 4 (2), 8 (b), 15 (1) (b).*

The Appellants were convicted on their own plea of possession of an "extract of Indian hemp commonly known as hashish". On appeal the High Court examined the relevant provisions of the Dangerous Drugs Act (Cap 114) and HELD: allowing the appeals, (i) the Appellants had been charged under the wrong
D provisions of the Act and, (ii) in the absence of an analyst's certificate the offence, notwithstanding the plea, had been insufficiently proved.

Case cited:

Barry Jennions v. Reginam 18 F.L.R 61

E *M. Raza* for the Appellants
J. N. Prakash for the Respondent

Appeals to the High Court against conviction and sentence.

Jesuratnam J:

G In this case the two appellants, who are Dutch nationals, were charged in the Magistrates' Court of Suva on two counts viz. (1) with having imported 16 grams of dangerous drugs namely extract of Indian hemp commonly known as hashish into Fiji contrary to Section 4(2) and Section 41 of the Dangerous Drugs Act and (2) with being found in possession of 16 grams of dangerous drugs namely an extract of Indian hemp commonly known as hashish at Taveuni on
G the 26th of June 1990 contrary to Section 8(b) of the Dangerous Drugs Act (Cap. 114) as amended by Dangerous Drugs (Amendment) Decree No. 4 of 1990.

Both accused pleaded guilty and were convicted and were each sentenced on 4th July 1990 to 6 months' imprisonment on each count, the sentences to run concurrently. They have appealed against their conviction and sentence.

There are listed four grounds of appeal but for present purposes it is sufficient to consider the comprehensive ground which urges that the learned Magistrate erred in law and fact in convicting the appellants.

A

Indian hemp is defined in the Act as *"either of the plants cannabis sativa or cannabis indica or any portion thereof"*. Part II of the Act refers in Section 4(1) to raw opium, cocaine leaf and Indian hemp and resins obtained from Indian hemp and preparations of which such resins form the base. It also penalises in Section 4(2) and Section 8(b) the import, export, or possession of the items listed in Section 4(1) which includes Indian hemp and its derivatives which are specifically named. It is therefore clear that *"extract of Indian hemp commonly known as hashish"* which is the allegation contained in the particulars of offence in the instant case is not a prohibited drug as such under Section 4(2) or 8(b) in Part II of the Act. It may be a dangerous drug but it is not a prohibited drug under Section 4(2) or Section 8(b). A dangerous drug may nevertheless be a permitted drug under certain specified conditions as will be clear from a reading of the provisions of Part V which follow.

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C

I may also state here that there is no report from the Government Analyst as envisaged by Section 44. There is instead a report from the Government Chemist. It states for what it is worth that the substance examined was identified as hashish. It does not say what hashish is or what relationship it bears to Indian hemp. Faced with such inadequacy a resourceful prosecutor had apparently chosen to make good the lacuna by making the necessary missing link a material allegation in the particulars of offence inviting the unwary accused to walk into the trap and constraining an incautious magistrate to accept the fait accompli! Indeed it is such dubious shortcuts that prove to be fatal pitfalls in the end as shown in the instant case.

D

E

If the impetuous prosecutor had paused to read on he would have noticed that Part V of the Act does penalise the unauthorised import or inexcusable possession of items such as "any extract of Indian hemp" although it may not come within the provisions of the amendment Decree No. 4 of 1990.

F

Part V of the Act commencing from Section 15 deals with "medicated opium, morphine, cocaine and certain other drugs". Section 15(1)(b) lists "any extract or tincture of Indian hemp" as being among the items to which Part V applies. The item referred to in the particulars of the charges therefore clearly comes within Section 15(1)(b).

Section 16 penalises the import or export of any of those items except in accordance with the provisions of Section 24 to Section 32 which refer to the manner and form in which licences can be obtained for such import or export.

G

Section 22 penalises the possession of such items without excuse. It states "When any dangerous drug to which this Part applies is found in the possession of any person or kept in any place other than the store as aforesaid, such person or the occupier of such place, unless he can prove that the same was obtained under the

authority of this Act or in accordance with the prescription of a registered medical practitioner or from a person having authority to sell it or was deposited there
A without his knowledge or consent, and also the owner of or any person guilty of keeping the said dangerous drug, shall be guilty of an offence against this Act".

It will therefore be readily seen that if a charge is made under Section 16 or Section 22 of the Act against anyone he is entitled to take up the defences provided in those sections. The pleas of guilty tendered by the appellants will not cure the
B illegality occasioned by the wrong charges having been laid against them. It seems to me that when a wrong charge is preferred against an accused person and he pleads guilty thereto there is no legal meeting point between the charge and the plea. The plea becomes irrelevant. It is beside the point. It is devoid of any legal consequence.

It is needless to say that even if a charge under Section 16 or Section 22 had been
C properly preferred against the appellants a certificate from the Government Analyst would still be necessary to prove that hashish allegedly found in the possession of the appellant was indeed an extract of Indian hemp. That is a *sine qua* non for the success of any prosecution in this case under any section whatever. It is clear that in its absence a conviction under any section is incurably fatal.

D In this context it is worth repeating the following words of caution expressed by Grant J. (later Chief Justice) in the case of Barry Jennions v. Reginam (18 F.L.R 61 at 63).

> "Finally it is an undesirable practice to accept as established by a plea of guilty facts of which an accused may have no personal
> E knowledge. In this case the accused pleaded guilty to possession of Indian hemp but the question of whether or not the substance in question was Indian hemp turns on expert evidence ..... In any future cases of this nature Magistrates should ensure that analysts' reports are tendered and that accused persons are informed of their contents."

G I may add with respect that in my view even if such reports are not brought to the notice of accused persons the Magistrate should bear them in mind when he accepts pleas of guilty from accused persons in offences of this nature particularly where the accused are unrepresented as in this case.

I therefore set aside the convictions and sentences in this case and acquit and
G discharge the appellants.

(Appeals allowed; convictions quashed)