

STATE v WONG KAM HONG and Anor

HIGH COURT — CRIMINAL JURISDICTION

5 FATIAKI J

8 February 2002

[2002] FJHC 273

10 **Criminal law — sentencing — drug trafficking — possession in excess of 300 kg of heroin — deterrent sentence for distributor — Dangerous Drugs Act (Cap 114) ss 41(2), 43.**

15 The 1st Accused Wong Kam Hong was sentenced to 7 years' imprisonment for importing heroin and 5 years' imprisonment for being in possession and attempting to export heroin. The second accused Tak Sang Hao was sentenced to 4 years' imprisonment for being in possession of heroin.

20 **Held** — (1) The 1st Accused knowingly and voluntarily committed the offences with which he has been convicted and given the quantity of heroin involved and his level of involvement in each offence, the 1st Accused must be considered a “*distributor*” for whom a deterrent sentence cannot be avoided.

(2) The 2nd Accused was given some leniency due to his cooperation with the police. Deterrent sentence of 12 years and 4 years made.

Cases referred to

25 *Christina Doreen Skipper v R* (1978) Crim App No 111/1978L, 1978 (unreported), considered.

G. Rice, G. Allan and S. Shah for the State

30 *M. Raza* for the 1st and 2nd Accused

Sentence

35 **Fatiaki J.** Almost twenty five (25) years ago in the only known case in this country involving an importation of about two (2) kg of “*heroin*” namely *Christina Doreen Skipper v R* (Lautoka Criminal Appeal No 111 of 1978, 1978, unreported) and for which the young female courier was originally sentenced to six (6) years' imprisonment but was later reduced on appeal to five (5) years being the maximum sentence that a Magistrate Court may impose for any offence, Williams J who heard the appeal and who described the amount of heroin involved as “*a very large quantity*” observed, in his judgment, about “*traffickers in dangerous drugs especially heroin*” (and I quote):

45 *Such persons have no pity for the unfortunate creatures enslaved by addictive drugs but seek to spread those horrors wider and wider. In fact by their own callous in-difference to the human suffering they create they reap rich harvests from the misery, degradation, and not too slow death which they smuggle in from other parts of the world. Decent women are forced into prostitution and males into serving as homosexual prostitutes to apart from other crimes obtain the means of satisfying their ever increasing craving for the drug which before it kills them transforms them into walking skeletons more like animals than humans. Families of drugs addicts often find that everything they possess has been purloined and sold to buy the drug. More and more nations are increasing the penalties for drug trafficking.*

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Of course it is not the court's duty to extract any form of revenge from these vicious and worst of all criminals. If that were the case an appropriate penalty would be to make them into drug addicts under Moses' law of an eye for an eye and a tooth for a tooth. Nevertheless international society demands that they be punished and that the punishment inflicted should be a deterrent to those tempted to work for dangerous drug organisations. Their profits are so enormous and the vices they control so widespread that one can only hope that under the sanction of punishment potential couriers will hesitate to accept their employment.

This appellants clearly undertook this assignment with her eyes wide open as to what she was doing and to the risks involved.

No doubt she was the tool of other persons but she undoubtedly was prepared to run a big risk. One of the risks could be being apprehended in Thailand or Singapore where drug traffickers can be executed. Likewise they know that in any country the term of imprisonment metered out to drug traffickers is likely to be severe ... She was perhaps very fortunate not to be arrested before reaching Fiji.

As for the existing maximum sentence of 8 years, his Lordship said:

The legislature by Act No 6 of 1978 has amended Section 39(2) of the Dangerous Drugs Ordinance which sets out the penalties with the intention of empowering magistrates to impose up to 8 years imprisonment for drug offences. But Act No 6 of 1978, did not succeed in doing this it simply altered the penalty to one of eight years without extending the magistrate's powers. I understand that the legislature is about to attend to this matter and further enhance the penalties.

Unfortunately since then, nothing has been done to increase the sentencing powers of the courts in so far as it relates to offences involving morphine or heroin. I exclude in particular morphine and heroin because in 1990 the Dangerous Drugs (Amendment) Decree was promulgated.

Among other things, the "Amendment Decree" introduced a schedule of graduated penalties for offences relating to Part II drugs namely, "Indian hemp"; "Coca leaf"; and "raw Opium" based on the type of offence committed, the nature of the drug involved and the quantity of the drug. Very briefly, the legislature in the "Amendment Decree", distinguished between the "cultivation", "possession" and "trafficking" of the drug, with "trafficking" being considered the most serious offence and "Indian hemp" the least "dangerous" (for want of a better term) drug.

By way of relevant comparison under the "Amendment Decree" an offence of "trafficking in Indian hemp" where the quantity exceeds 100 g (ie 0.1 kg) carries a maximum penalty of twenty (20) years' imprisonment and "trafficking in prepared opium" weighing in excess of a mere 10 g (ie 0.01 kg) carries a sentence of life imprisonment!

I accept that the heroin in this case was not intended for local consumption I also accept that the economy and population of this country has, thus far, spared our people from the human toll and suffering experienced in other more affluent countries with significant numbers of heroin users but there can be no denying that this country has been used and will continue to be used as a "staging-post" or an easy transit point for drug traffickers unless our laws and enforcement agencies are considerably enhanced and strengthened.

In this case this court is dealing with an admitted quantity of well in excess of 300 kg of heroin with an average purity in excess of 70% yet the maximum sentence of imprisonment for an offence involving heroin remains at eight (8) years only.

The quantity of heroin in this case is much much more than “a very large quantity”. In counsel’s words it is “enormous”. Indeed it is in the order of a commercial quantity sufficient to support a profitable “trade” in heroin for an extended period and involving the movement of small quantities at a time. In terms of sheer quantity it is difficult to imagine a worse case than this ever occurring in this country.

On that basis there is much to be said about the urgent need in this country for our legislators to consider the existing penalties for offences involving Part V drugs which include “morphine” and “cocaine”.

While I would not go as far as to say that the existing level of penalties for offences involving heroin is, to adopt State Counsel’s words, “apt to attract rather than deter” traffickers of dangerous drugs nevertheless, consistency alone demands that the existing penalties for offences involving “cocaine” and “heroin” be reconsidered with a view to bringing them in line with those that presently apply to offences involving “Indian hemp”; “coca leaf” and “raw opium”.

Having said that is court is constrained by the maximum penalties provided in s 41(2) of the Dangerous Drugs Act (Cap 114) which provides for eight (8) years’ imprisonment and/or a fine of \$2000 in respect of each of the offences with which both Accused have been convicted.

The learned author of “Principles of Sentencing” 1970 ed in discussing sentencing principles for drug offences wrote (at p 163):

The principal distinctions made by the Court are between the man who has possession of drugs ... primarily as a distributor, the person who possess drugs for his own consumption, and the addict. The distributor invariably attracts a deterrent sentence, whatever the nature of the drug, although sentences are naturally longer in the case of dangerous drugs than those involving amphetamines; the casual user will normally be treated much less severely, but still on a tariff basis, and the addict will be dealt with on an individualised basis wherever possible.

Adopting a similar classification in this case both Accused would be classed as “distributors” for whom a deterrent sentence would normally be appropriate.

Having carefully considered the admitted facts and defence counsel’s comprehensive submissions in that regard I am satisfied that the 1st Accused Wong Kam Hong was the principal operative within this country of an importation of an extremely large quantity of heroin that originated from Myanmar and was directed and financed from Hong Kong where the 1st Accused is normally resident.

As the principal operative in this country the 1st Accused both organised and financed the release and transportation of the two containers from Customs and thereafter the transportation and storage of the cartons containing the heroin by his close friend the 2nd Accused in April 2000. Six (6) months later the 1st Accused with the active assistance of the 2nd Accused personally prepared and packed 35 kg of heroin from the cache stored at 50 Panapasa Road, and transported it to the Suva Yacht Club with the intention of accompanying it to Australia.

When arrested on the 28th October 2000 the 1st Accused had among his personal belongings items which might be collectively described as an “international drug trafficker’s kit”. These include (by the 1st accused’s own admissions), stolen travellers cheques; a false Singapore passport and four (4) sheets of plastic with the impressions of immigration stamps of various countries

imprinted on them to be used “*when (the) need arises*”. Additionally on his earlier travels to Fiji in April 2000 the 1st Accused had used a passport issued in the name of a “*Huang Chin-Kang*”.

He apparently also possesses a Taiwanese passport as well as one from
5 Hong Kong.

I have carefully considered everything that has been urged by the counsel on behalf of the 1st Accused including his lack of relevant antecedents; his age and family circumstances; and his belated guilty pleas.

I am satisfied however that the 1st Accused knowingly and voluntarily
10 committed the offences with which he has been convicted and given the quantity of heroin involved and his level of involvement in each offence the 1st Accused must be considered a “*distributor*” for whom a deterrent sentence cannot be avoided.

The 1st Accused is accordingly sentenced as follows:

15 On *Count 1: Importing Heroin* I impose a sentence of seven (7) years’ imprisonment;
On *Count 2: Being in Possession of Heroin* a sentence of five (5) years’ imprisonment; and

On *Count 3: Attempting to Export Heroin* a sentence of five (5) years’ imprisonment.

20 The sentences on counts 1 and 2 are ordered to be served concurrently but consecutively with the sentence imposed in count 3 making a total effective sentence of $(7 + 5) =$ twelve (12) years’ imprisonment.

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
25 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 a known date of an identifiable quantity of the heroin entirely unconnected to the original movement and possession charged in
30 *counts 1 and 2* and ought properly to be treated differently.

I am fortified in my view by the statement of Williams J in the *Skipper* case (op cit) where his Lordship in imposing consecutive sentences in that case (later upheld by the Court of Appeal), said (at p 12):

35 *Although the appellant in one act imported both kinds of drugs she committed two distinct offences under the (Dangerous Drugs) Ordinances. She could not be charged for a single offence to cover the importation of both the drugs.*

Likewise in the present case the 1st Accused could not be charged with *Attempting to Export Heroin (count 3)* merely because he had imported the heroin into the country.

40 In so far as the 2nd Accused Tak Sang Hao is concerned, by his own description he was the “*caretaker*” of the heroin cache in Fiji during the entire period that it was stored at 50 Panapasa Road and willingly and knowingly undertook the risks involved.

45 Even when the 1st Accused returned to Fiji in early September 2000 the 2nd Accused did not attempt to dispossess himself of the heroin *or* cease his involvement with the 1st Accused. On the contrary, he accommodated the 1st Accused in his home and accompanied him and actively assisted him at 50 Panapasa Road on the 28th of October 2000.

50 I have considered all that has been urged by defence counsel on behalf of the 2nd Accused including that he is a first offender, is married with a small family and was a successful business man; that he pleaded guilty; and, although

originally charged jointly with the 1st Accused on the 3rd count of *Attempting to Export Heroin*, the Director of Public Prosecutions has since dropped him from the 3rd count in the amended *information*.

5 Additionally State counsel very properly drew the courts attention to the early disclosures and voluntary assistance that the 2nd Accused rendered the police in the recovery of the greater part of the heroin cache from 50 Panapasa Road, a house which according to *Antecedent Report* provided, “*was not being targeted*” by the police officers involved in the joint operation.

10 Needless to say the early recovery by the police of the larger portion of the illegally imported heroin in this case was almost entirely due to the 2nd Accused cooperation and assistance. This is undoubtedly a strong mitigating factor not unlike a financial reward to an informer which this court is empowered to award (see s 43).

15 In all the circumstances and given his cooperation with the police, I am able to extend some leniency towards the 2nd Accused and accordingly.

I impose on the 2nd Accused for the offence of *Being in Possession of Heroin*, a sentence of four (4) years’ imprisonment.

Deterrent sentence of 12 years and four years made.

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