IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Appellate Jurisdiction

Criminal Appeal No. 111 of 1978

Between

CHRISTINA DOREEN SKIPPER — Appellant

and

R E G I N A — Respondent

Dr. M.S. Sahu Khan, Counsel for the Appellant

Mr. A. Gates, Counsel for the Respondent

JUDGMENT

The appellant, a female, was charged on six counts connected with possession and importation of heroin and Indian hemp. She was convicted on counts III & IV and no finding was returned on the others. The counts in question read as follows:-

THIRD COUNT

STATEMENT OF OFFENCE

Importing Indian Hemp contrary to Section 5 and Section 39(2) (as amended) of the Dangerous Drugs Ordinance Cap.95.

PARTICULARS OF OFFENCE

Christina Doreen Skipper, on the 20th day of July, 1978 at Nadi Airport in the Western Division, imported Indian Hemp.

FOURTH COUNT

STATEMENT OF OFFENCE

Importing Heroin, contrary to Section 14 and Section 39(2) (as amended) of the Dangerous Drugs Ordinance Cap. 95.

PARTICULARS OF OFFENCE

Christina Doreen Skipper, on the 20th day of July, 1978 at Nadi Airport in the Western Division imported Heroin.

The evidence indicated that appellant arrived at Nadi Airport on 20/7/78 about 5.45 p.m. She had 2 suitcases which she said contained clothing but she did not have the keys to them and explained that they were with her husband. Her behaviour and apparent anxiety in regard to the suitcases made the Customs Officer, P.W. 1, suspicious and he decided to search the suitcases.

The suitcases were detained in bond until the following day and the appellant was deprived of her passport. Next day about 10.30 a.m. she appeared at the Customs shed where the bags were opened in her presence and found to contain the alleged dangerous drugs namely 4.4. lbs. heroin and 44 lbs. Indian hemp. The appellant was arrested.

Certificates from the Government Analyst described the white powder contained in the suitcases as giving a positive reaction to heroin tests and that the other substance was leaves of Indian hemp. After being arrested and cautioned she stated that she wished to ring her auntie in New Zealand and gave the aunt's name as Mrs. Scally and telephone number 767179. Her attempt to get through to Mrs. Scally was unsuccessful.

At the trial, P.W. 6, D. Sgt. Murray, from New Zealand stated that he knew the appellant as Susan Florence Rennie whereas she had described herself as Christina Doreen Skipper. P.W. 6 also knew a woman, other than the appellant, who is called Christina Doreen Skipper of Auckland. He also stated that the 'phone No. 767179 is a confidential listing belonging to Maria Scally who has one conviction for a dangerous drugs offence and is on bail pending the determination of a further similar charge.

Dr. Sahu Khan in the court below objected to the evidence concerning Mrs. Scally but the learned magistrate admitted it. The admission of this evidence forms the first ground of appeal. Dr. Sahu Khan took the line that it was evidence of bad character and that the appellant had not put her character in issue and so it was inadmissible and that in any event its prejudicial value outweighed its evidentiary value.

In the course of the appeal, Crown Counsel submitted that the evidence of the 'phone call to Mrs. Scally and of the latter's background was analogous to the introduction of evidence of similar acts. Although it was not in my view evidence of similar acts falling along the lines set out in the speeches of the learned lords in R v. Boardman 1974, 3 W.L.R., 673, it could be regarded as part of the res gestae.

I think that one is entitled to look at the way in which reference to Mrs. Scally entered the picture. At the stage Mrs. Scally was mentioned in the trial there was evidence that the appellant had been found in possession of large quantities of heroin and Indian hemp. What was the reaction of the appellant when the

dangerous drugs were found in her possession? As was re-iterated in R. v. Stor y, 1968, 52. Cr. App. Re., 334 at 337, the reaction of an accused when first taxed with the offence is of vital importance. What was the appellant's reaction? She produced a telephone number of a woman in New Zealand and endeavoured to contact her by 'phone, but was unsuccessful. The woman proved to be Mrs. Scally, who has one conviction for possessing dangerous drugs and who is again charged and on bail for a similar offence. The appellant's reaction was not simply to ring some person in New Zealand; it was to ring a person who has a history of association with dangerous drugs. Had the appellant endeavoured to ring a solicitor, a religious person, social worker, etc. the prosecution may not have tendered evidence of it; it would on the face of it have been a perfectly innocuous 'phone call which would in no way support or detract from the issue as to whether the accused knew there were dangerous drugs in those two suitcases.

It should be emphasised that the Customs Officials at Nadi could not have been aware of Mrs. Scally's existence until the appellant referred to her. The prosecution, after the appellant's apprehension, were not scouring among the appellant's associates to prove she had friends or acquaintances connected with drug trafficking. Such evidence would clearly be irrelevant and pointing to bad character. Had they been aware of an association between the appellant and Mrs. Scally evidence of the association, would in the ordinary way, be inadmissible to support the contention that she had knowledge of the contents of the suitcases. However, one is entitled to ask what was the appellant's reaction when she was actually caught in possession. Her reaction was to try and contact Mrs. Scally on a confidential 'phone number which was known to the appellant. In the circumstances of this particular case evidence of that reaction and of Mrs. Scally's association with dangerous drugs was admissible to meet a defence of absolute innocence of any guilty knowledge or intention. Ground I fils.

On the second ground of appeal it is alleged that the learned magistrate wrongly commented adversely on the fact that the appellant was travelling under an assumed name. At the Nadi Airport Customs area the appellant gave her name as Christina Doreen Skipper with an address in Sydney and one in Auckland. Her Auckland address was given as 72, West Coast Road, Titirangi, Auckland.

Evidence led by the prosecution showed that a woman named Christina Doreen Skipper lived at 346, Afrana Ave., Glamas, Auckland and she was in Auckland when the appellant was being tried in Nadi Magistrate's Court. At her trial the appellant gave her name as Susan Florence Rennie but it was not until P.W.5, the New Zealand Detective Sergeant had given evidence that she revealed her true identity. The magistrate commented on this and in my view he was entitled to do so as being part of the res gestae. The appellant was travelling under a new passport issued in New Zealand under a false name. She had stated that the 2 suitcases belonged to her husband. The name on the suitcases was B.F. Skipper, 1012, Ocean Road, Manly, Australia, which was given by the appellant as her Australian address.

The appellant did not, (to adopt the expression used by the Court of Appeal, New Zealand, in Queen v. Hill 1955 N.Z.L.R. 1040) give evidence but made an unsworn statement. In it she explained to the magistrate that she had formed an association with a married man, a New Zealander called Skipper; at his suggestion she went to live with him in Sydney in 1977 and that he finally left her in May 1978 but she rejoined him in New Zealand on 21.6.78. In that connection it is noteworthy that the appellant's passport was not issued until 1/6/78. One has to consider her explanation for the use of a false passport, namely that she was adopting her lover's name, against the general background revealed by all the evidence adduced during the trial. She went to Singapore on 2.7.78, Bangkok on 6.7.78, back to Singapore on 16.7.78 in the company of her alleged de facto husband. Then she came to Fiji on 20.7.78 unaccompanied and says that her "husband" had to go to Auckland on urgent business but she brought his clothing in the 2 suitcases to which he retained the keys. It seems strange that he could not carry his own clothing; and that he should not trust her with the keys. Her unsworn statement reveals that they were going to have a holiday in Fiji and he would join her in Nadi in a few days. As against that she stated in her arrival card dated 20.7.78 that she was leaving Fiji on 24.7.78 which does not suggest that she was going to remain here for a holiday. In addition, P.W. 1, Collector of Customs, says she told him her husband had gone from Singapore to Delhi and he re-iterated this in cross-examination which does not tie in with her unsworn statement that he had gone to New Zealand.

P.W. 2 Customs Officer also stated that the appellant told him that

her "husband" had gone to a seminar in Delhi. It would not be surprising if a person conveying large quantities of dangerous drugs assumed a false identity in order to avoid detection later on if the dangerous drugs had to be abandoned en route whilst he escaped. In any event the evidence of a false identity is woven in with other aspects; it is only a link in the chain of evidence which could point to guilty knowledge and is bound up with grounds 4 and 5 which are that the magistrate did not deal with the defence case and treated inconsistencies in the prosecution case too lightly. No particulars were given of either of these grounds of appeal which I now go on to consider.

At page 16, line 45, the magistrate said the appellant did not dissociate herself from the 2 suitcases until the morning after their detention when she said they were her husband's. Dr. Sahu Khan stated that she had said from the start that they were her husband's. With respect to Dr. Sahu Khan I do not find his comment supported by the evidence. When the Customs Officers first expressed interest in the suitcases the appellant told them that her husband had the keys to the bags and that they contained used clothing which is not the same as saying that they were her husband's suitcases or that they contained his used clothing. Their evidence-in-chief does not indicate that she at once told them that the cases or contents were her "husband's" and they maintained this in cross-examination. It was, as the magistrate says, not until the following day that on returning to the customs she said the cases belonged to her "husband". But this time it was obvious that the customs officers intended to open them.

The magistrate noted in his judgment that when the bags were unpacked the appellant did not express horror, surprise or indignation at the fact that they did not contain clothing. Her reaction was one of fright and before she had been told that the contents were dangerous drugs she had hurried to the toilet. The magistrate very properly took note of those very significant reactions which were immediately followed by the further noteworthy reaction of trying to ring Mrs. Scally a woman in New Zealand who is known to have been associated with dangerous drugs.

In his judgment the magistrate did not ignore the appellant's unsworn statement. He noted her denials that she had any knowledge that this was Indian hemp and heroin. He no doubt gave such weight to that statement as he considered was justified in all the circumstances.

Grounds 4 and 5 fail and ground number 2.

Grounds 3 and 7 are virtually the same namely that there was not sufficient evidence to prove that the suitcases contained a prohibited import namely Indian hemp and heroin.

With regard to the Indian hemp charge Dr. Sahu Khan drew attention to Section 2 of the Dangerous Drugs Act which defines Indian hemp as - "either of the plants cannabis sativa or cannabis indica or any portion thereof."

He referred to the analyst's certificate which simply describes the substance in the suitcases as Indian hemp leaves, and submitted that this description was inadequate because one could not know from the certificate whether this was cannabis indica or cannabis sativa. However, in my view, whether it is cannabis indica or sativa it is still Indian hemp according to the legal interpretation. The Shorter Oxford English Dictionary describes "cannabis" as meaning hemp or of the nature of hemp; and cannabis (indica)as Indian hemp; and the dried flowering tops of the female plants of cannabis sativa as Indian hemp. It also gives the meaning of "hemp" as cannabis. In H.J. Wallas, Forensic Science, 2nd Edn. p. 126, it is observed that cannabis has many names in many languages; it has 251 synonyms of which the most familiar are Indian hemp, pot, hashish, marijuana and bang. Galister's Medical Jurisprudence and Toxicology, 10th Edn., p. 634, refers to cannabis indica and cannabis sativa as used for producing Indian hemp. It is clear that the expression "Indian hemp" is a common mode of describing either cannabis sativa or cannabis indica when used as a drug. Throughout the Dangerous Drugs Ordinance the expression Indian hemp is used frequently and no reference is made anywhere in the Ordinance to cannabis except in the interpretation section, Section2. In using the expression Indian hemp the Government Analyst was using a term contained in the dictionary (supra) and in medical text books and which is used repeatedly in the Dangerous Drugs Ordinance. His certificate shows it was Indian hemp and the offence as expressed by the Ordinance is importing Indian hemp.

With regard to the heroin charge Dr. Sahu Khan submitted that some heroin preparations are not prohibited and that the Analyst's certificate which simply says "tests for heroin positive"

does not indicate whether the white powder fell outside the permitted heroin preparations. He referred to Section 13 Dangerous Drugs Ordinance, Cap. 95, which lists certain substances which are governed by Part IV of the Ordinance which comprises Sections 13 to 30. Section 13(1)(c) lists morphine and diacetylmorphine (heroin) as being among the substances. Section 14 forbids importation of heroin except in accordance with Sections 22 to 30 of which Sections 24-40 relate to importation. The aforesaid sections 24-30 require the importer to be in possession of an import certificate issued by the Director of Medical Services. With respect to Dr. Sahu Khan I Have found no provision which indicates that there are types of heroin the import of which is not prohibited. In fact Section 30(2) forbids any person other than the Government Pharmacist to import the drugs shown in the second schedule to the Ordinance and heroin is one of the scheduled drugs. Even the Government Pharmacist requires an import certificate from the Director of Medical Services. No one could possibly be in any doubt as to whether the appellant was the Fiji Government Pharmacist.

Grounds 3 and 7 fail.

Ground 6 complains that the charges were defective by reason of material omissions from the particulars.

The particulars of Count III allege the importation of Indian hemp and make no reference to cannabis sativa or indica but in my view this is not essential. The section forbidding the importation of Indian hemp is Section 4 which uses the expression Indian hemp and makes no use of the word cannabis. The statement of offence places the charge under Section5, but the draftsman obviously made an error when he referred to Secion 5 because that section makes no reference to Indian hemp as such but makes it an offence to import the seed of Indian hemp. No attempt was ever made by the prosecution to prove that the substance in the suitcases was seed of Indian hemp and they were obviously not thinking in terms of Section 5. The substance was described as hemp sticks by P.W.1; P.W.2 said there were 18,450 leafy sticks of hemp; and the Analyst's certificate described it as hemp leaves. At no time during the trial was any reference made to Indian

hemp seed. The appellant could not possibly have been misled into thinking that she was charged under Section 5 for importing Indian hemp seed. In the Magistrate's Court no point was taken by the defence complaining that the statement of offence referred to Section 5 and my attention was not directed to it during the appeal. Clearly the offence was brought under Section4; in fact the "offence stated" for Count III reads -

"Importing Indian hemp." If it had been drafted under Section 5 the "offence stated" would have read "importing Indian hemp seed." It was not necessary for the draftsman to make any mention in the particulars of offence to cannabis. Draftsmen are constantly exhorted to adhere to the words of the section when drafting charges and Crown counsel complied with these exhortations in this case in using the expression, Indian hemp.

In the court below, Dr. Sahu Khan argued that the analyst's report, "tests for heroin positive", was not adequate and that it should be shown that all the white powder in the suitcases was heroin. In the course of my experience I have not come across any similar submission. He intimated that he was adopting the same submission for the purposes of this appeal. He was no doubt suggesting that some chemical compound of heroin although notbeing heroin within the meaning of the Dangerous Drugs Ordinance would still give a positive reaction to heroin. I consider that the argument is not tenable in that heroin is itself a chemical compound of morphine as described in Section 2 of the Ordinance which shows that diacetylmorphine means heroin. A positive reaction to heroin shows the presence of heroin; how could it ever be supposed that it revealed the presence of something that was not heroin. An analyst cannot use pounds of substance when making tests to determine its origin or composition; his test-tubes, and paraphenalia are made for the purpose of working with very small samples. To check every milligram of 4 lbs. of heroin would require an enormous series of tests. Samples which do not give positive reactions as heroin are surely not heroin or do not contain heroin. Section 13(1)(c) uses the expression heroin which also appears in Section 2, the interpretation section. In using the word heroin in the charge the draftsman adopted the words of the Ordinance and of Part IV in particular under which the offence of importing heroin is created.

This ground fails.

Ground 8 alleges that the magistrate erred in holding that the appellant imported the dangerous drugs.

There was ample evidence on which the magistrate could have found, as he did, that the appellant was aware of the nature of the substances she had imported. He referred to her reactions which I have dealt with under earlier grounds of appeal. He was justified in regarding her reactions as a link in the chain of evidence pointing to guilty knowledge.

Part VI of the Dangerous Drugs Ordinance comprises Sections 35 to 42 and covers legal proceedings under the Ordinance. Section 35(3) reads as follows:-

> "The provisions of the Customs Ordinance shall apply to every suit or proceeding under this section."

Crown Counsel submits that Section 35(3) makes the provisions of the Customs Ordinance applicable to offences under the Dangerous Drugs Ordinance of importing dangerous drugs and therefore Section 181 of the Customs Ordinance, Cap. 190, applied to this trial. Section 181 Customs Ordinance places the onus of proving an absence of guilty knowledge on the person charged for offences under the Customs Ordinance. Consequently he argues that the onus is upon the appellant to prove she did not know the cases contained heroin and Indian hemp. If such was the intention of Section 35 of the Dangerous Drugs Ordinance that intention, in my respectful view, is very obscure. It is possible but by no means obvious that Section 35(3) was intended to read -

> "(3) The provisions of the Customs Ordinance shall apply to every suit or proceeding under this part." (i.e. Part VI).

and if it was so worded Crown Counsel's submission would, I think, be valid because Section 39 which falls within Part VI of the Dangerous Drugs Ordinance makes it an offence to contravene the provisions of the Dangerous Drugs Ordinance.

Accordingly I do not accept the respondent's submission that there was any onus upon the appellant to prove that she did not know that the cases contained heroin and Indian hemp. The burden of proving guilty knowledge rests upon the prosecution. However, as I have pointed out already, there was ample evidence pointing to guilty knowledge if the magistrate regarded it as credible and he

clearly did so, it was ample without any reference to Mrs. Scally's background.

This ground fails.

Ground IX complains that the sentence is manifestly harsh and wrong in principle.

Dr. Sahu Khan has urged the youth of the appellant and pointed out that imprisonment in a foreign country may involve difficult conditions for her viz. climatically, regarding food, accommodation and so forth than if she were sentenced in her own country. Our prisons are properly supervised and for reasons hereinafter appearing I do not subscribe to that view. It is illuminating to hear such a plea made on behalf of a trafficker in dangerous drugs especially heroin. 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 theworld. 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.

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 if possible 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 appellant clearly undertook this assignment with her eyes wide open as to what she was doing and to the risks involved. She travelled from Singapore to Bangkok and then to Singapore.

Those countries' stamps on her passport could alert customs officers and her baggage could be suspect. It is significant in that respect that she had a new passport issued shortly before she commenced her journeys. An old passport with similar destinations would be even more suspicious. That she knew the risk is apparent from her behaviour at the airport as she waited for the suitcases of dangerous drugs to be conveyed from the aircraft into the arrival shed. She was agitated, puffing her cigarettes frequently, alternately sitting and standing and moving about and even going into an unauthorised area to check on the progress of the suitcases. When the cases arrived she did her best to avoid having them opened by pointing out that they had been "security checked" in Singapore and arguing that there could be no necessity to check them again. Although it was cold she was sweating and had to wipe her face. On the following day when the cases were opened in her presence she burst into tears and had to rush to the toilet before she was challenged with the allegation that the contents were dangerous drugs.

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. Our prisons have medical facilities, and are visited by magistrates. She was perhaps very fortunate not to be arrested before reaching Fiji.

Dr. Sahu Khan pointed out that she could have absconded during the night whilst the suitcases were in bond. But her passport had been taken and it is doubtful whether she could have flown away from Nadi without it.

In my view 6 years imprisonment was by no means severe but on the contrary.

She received 6 years for importing 4.4. lbs. heroin and 3 years for importing 44 lbs. Indian hemp the sentences being concurrent, i.e. 6 years in all.

As it happens the learned magistrate exceeded his powers in imposing 6 years on the heroin charge, count IV. His limit is 5 years under the Criminal Procedure Code and the Dangerous Drugs Ordinance as amended has not extended that power. The legislature

by Act No. 6 of 1978 had 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.

The amount of heroin involved, over 4 lbs. is a very large quantity.

I reduce the sentence on Count IV, regarding the heroin, to 5 years which is the magistbate's legal maximum.

With regard to Count III, the importation of Indian hemp, it should be noted that this is a separate offence under the Dangerous Drugs Ordinance from the importation of heroin. The latter falls under Section 14 and the former under Section 4. Although the appellant in one act imported both kinds of drugs she committed two distinct offences under the Ordinance. She could not be charged for a single offence to cover the importation of both the drugs.

The quantity of Indian hemp, 44 lbs. was again a large amount. Although Indian hemp is a 'soft' drug the amount was so large as to show that it was being moved on a commercial scale. Therefore I do not regard the sentence of 3 years as excessive.

It would not have been an erroneous approach for the magistrate to have made the sentences consecutive as the offences are distinct under the Ordinance. In my view this is the approach required of this Court.

Accordingly I set aside the sentences imposed by the learned Magistrate and substitue the following:-

Count 3 (Indian hemp): Three years' imprisonment

Count 4 (heroin) Five years' imprisonment consecutively.

giving a total of 8 years in all.

LAUTOKA,
23rd October, 1978.

(Sgd) J.T. Williams
JUDGE