IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 57 of 1983

BETWEEN : BALRAM a.k.a. BALLU s/o Ram Dutt
ABHIMANU a.k.a. MANNU s/o Shiu Lal — Appellants

A N D : R E G I N A M — Respondents

Mr. S. R. Shankar & Mr. Mangal Singh, Counsel for gthe Appellants
Mr. M. Raza, Counsel for the Respondent

J U D G M E N T

The appellants were convicted of growing Indian hemp contrary to section 8(a) of the Dangerous Drugs Act Cap. 114 and on a second count of selling Indian hemp contrary to section 8(b) of that Act. They were both sentenced to two years' imprisonment.

The learned Counsel for the Prosecution Mr. Raza, Principal Legal Officer, has indicated that the Crown does not support the conviction. Indeed, I am most obliged to him for the assistance he has rendered to the Court in the matter.

The learned Counsel for the Appellants, Mr. R. Shankar, and Mr. M. Singh have pointed out that no plea is indicated on the record. It may be that the learned trial magistrate did call upon the appellants to plead. He did not, however, record that he did so, as he is obliged to do, and in the absence of such record the Court can make no assumption in the matter unfavourable to the appellants. "No plea no trial," is an old axiom, and the resultant proceedings were therefore a nullity. The question then arises as to whether this Court should order a re-trial. It has a discretion in the matter. Mr. Shankar points to the fact that the only evidence against the appellants was that of a confession made by each appellant and also the evidence of an accomplice, who testified that the appellants sold him some Indian hemp. Mr. Shankar points to the provisions of section 44 of the Act which read as follows:

> "44. In any proceedings under this Act the production of a certificate purporting to be signed by the Government analyst shall be prima facie evidence of the facts therein stated."

The section provides that it is not necessary for a Government analyst to give viva voce evidence in any proceedings under the Act. If however, the latter's certificate is disputed by other evidence at the trial, then obviously the Government analyst would have to be called. All of this strongly suggests that expert evidence is necessary to establish that the material in question is in fact a dangerous drug. The term "Indian hemp" is defined in section 2 of the Act as meaning,

> "either of the plants Cannabis sativa or Cannabis indica or any portion thereof."

Certainly those terms require expert definition. The question then arises as to whether the court below was satisfied beyond reasonable doubt that the prosecution had proved that the accused grew and sold Indian hemp as defined. The learned trial magistrate dealt with the issue as follows:-

> "Counsel submits 18 FLR must produce analyst certificate but of course that can only apply if it is available, if not, circumstantial evidence must be assessed."

I do not appreciate the significance of the learned trial magistrate's reference to circumstantial evidence: certainly no such evidence of an expert nature was available. I presume that the learned trial magistrate was in the passage above referring to the case of Jennions v R. 18 FLR 61.

In that case Grant J. (as he then was) observed (at p.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 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. It is for this reason that in cases of this nature the substance is sent for examination by a properly qualified analyst and, while it is clear from the record that this was done in this case and that the facts put before the Court were based on an analysis, the analyst's report was not produced to the Court. In any future cases of this nature Magistrates should ensure that analysts' reports are tendered and that accused persons are informed of their contents."

With those dicta I respectfully agree. As I see it, they apply not alone to a plea of guilty, a judicial confession, but also to an extra - judicial confession.

Mr. Shankar submits that the accused persons were illiterate and could not possibly have known as to whether or not the substance which they grew and sold was Indian hemp as defined.

Again the prosecution witness, an accomplice, who testified that one of the accused persons sold him Indian hemp was in a no better position than the the accused persons themselves. Mr. Shankar points out, as indeed has Mr. Raza, that neither of the accused persons were found in possession of Indian hemp upon a search of both of their houses.

At the end of the day the learned trial magistrate was concerned with the probative value of the confessions. There are three tests to be applied in the consideration of a confession. First of all, was the confession voluntary and hence, admissible? Secondly, if voluntary and admissible, would the strict rules of admissibility operate unfairly against the accused person, and should the Court therefore, in the exercise of its discretion, reject the confession? Thirdly, if not so rejected, the Court must eventually consider the probative value of the confession, namely was it true? The accused persons were in no position to offer any expert evidence in the matter and in the circumstances the learned trial magistrate should, on consideration of the probative value of the confessions, have place no reliance thereon.

In all the circumstances, in the exercise of my discretion, I have decided not to order a re-trial. The appeals are allowed. I consider that the convictions and sentences were nullities. Nonetheless for the avoidance of doubt. I order that they be set aside.

Delivered In Open Court At Lautoka This 2nd Day of March, 1984.

(B. P. Cullinan)

Judge