Librarian High Court

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
Criminal Appeal No. HAA 014 of 2001L

BETWEEN	:	**HARRIS RAMSWARUP**	APPELLANT
AND	:	**THE STATE**	RESPONDENT

Date of Hearing: 31 May 2002
Date of Judgement: 27 September 2002

G. O'Driscoll for Appellant
J. Waqaivolavola for the Respondent

JUDGMENT

On 16 November 2000 the Appellant appeared before the Nadi Magistrates Court. He was charged with Possession of Dangerous Drugs – contrary to Section 8(b) and 41(2) of the Dangerous Drug Act as amended by various decrees. Another person was also charged for another count of possession. This is not relevant to this appeal. The particulars alleged that on 14/11/2000 the appellant was found in possession of 524.6 grams of Indian Hemp. He pleaded guilty and admitted the facts outlined by the prosecution. He also admitted his previous convictions for 3 related road traffic offences. In mitigation it is recorded: ("1st) Accused unemployed, married with one child. Earlier I was Construction Supervisor. Living with father-in-law. To make a living I indulge in this activity. I repent". The Appellant was sentenced to 5 years imprisonment.

In his Petition of Appeal, which was apparently drafted by another prisoner, the Appellant made various assertions questioning his conviction and sentence. However, when Counsel appeared in the High Court it was stated that the Appeal was only against sentence. At the hearing the submissions were only against sentence.

In his submissions Counsel for the Appellant referred to the case of Andrew Ian Carter v State (Cr. App No. 71 of 1990) and the background to the Amendment decrees – Dangerous Drugs Act (Amendment) Decree No 4 of 1990 and Decree No 1 of 1991. It was the consideration of Decree No 4 of 1990 by the High Court in the above case that led to the amendment decree No. 1 of 1991. This later Decree amended the proviso that a sentence imposed under this section shall be custodial. Instead the new proviso states: "Provided that the provision of section 29 of the Penal Code and any other law shall not apply to any sentence to be imposed under this Act". Learned counsel for the Appellant stated that the decrees remained unchallenged until the Audie Pickering case in 2001. The challenge was based on the human rights conventions. In particular Counsel referred to the International Covenant on Civil and Political Rights (ICCPR) which states that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". He added that section 25(1) of our Constitution applies a more rigorous standard in that it also bans "disproportionately severe punishment".

Learned Counsel for the Appellant submitted that the mandatory custodial sentence of 5 years was in breach of the Appellant's rights under section 25(1) of the Constitution. The Appellant was given the minimum 5 years in a range where 20 years is the maximum. He further argued that the prescribed amounts of drug in the schedule to the Decrees and the relevant sentences were arbitrary. Appellant's counsel conceded that mandatory sentences could be constitutional, referring to the Audie Pickering case (Misc Action HAM 007 of 2001S). However, he argued that there was no basis to indicate why particular amounts were chosen as the basis for the range of sentences. These were contained in Decrees which were not debated in Parliament. Counsel argued that the Decrees removed judicial discretion in the sentencing process. As stated by the Fiji Court of Appeal in State v Chandrika Prasad (FCA, Civil Appeal ABU0078/2000S) Decrees can only be valid as long as they were for good governance of the nation. He argued that there should be judicial discretion in sentencing as the Audie Pickering case has established. The maximum sentences may be kept. However, as in Audie Pickering, there should be no obligation to impose the minimum mandatory sentence. He submitted that the Audie Pickering decision should apply to all amounts, not only the 10 gm or less benchmark stated therein. Learned Counsel submitted that in view of the mitigation; the Appellant had pleaded guilty and this was his first drug offence; the sentence was disproportionately severe punishment.

In response learned State Counsel has argued that the case of Audie Pickering was confined to its own facts. It dealt with a 20 year old first offender. The amount of drugs involved was less than 10 grams. In this case the amount involved is substantial. The facts also indicate that the drugs were bought for the purpose of selling because the Appellant was unemployed. The State further argued that the mandatory sentence decreed was for deterrence. Deterrence is for good governance. There is also a mandatory sentence for murder. This is itself is not objectionable. State counsel also argued that the cruel, inhumane, degrading or disproportionately severe treatment or punishment argument applied to all persons when convicted. Restrictions are placed on all convicted persons who are imprisoned, they lose some rights. Further, that the Bill of Rights provisions are not to be taken in absolute terms. The State concluded that the case of Audie Pickering was distinguishable from the Appellant's situation.

As we shall analyse later the decision in Audie Pickering, confining itself to possession of less than 10 grams, does not help this Appellant. How then can the Court extend the Appellant's argument that judicial discretion should be extended so that there should be no obligation to impose the minimum mandatory sentence? The Court agrees that the amounts of drugs and the corresponding range of sentences, in the Schedule to the Decrees, is arbitrary. In the absence of Parliamentary debate one is not clear of the rationale. What is the deterrence value for different scales? Is deterrence the only major sentencing objective, as argued by the State? This Court was quite persuaded by the arguments of Counsel for the Appellant regarding the arbitrary nature of the amounts and corresponding sentences. The submissions for judicial discretion in sentencing are well taken.

Judicial Independence and the Separation of Powers

The cases discussed in Audie Pickering suggest that judicial opinions indicate that mandatory sentencing is constitutional and does not offend judicial independence. However, Audie Pickering was confined to its particular fact situation. In that case Shameem J. had answered that in respect of the minimum mandatory term of 3 months imprisonment for possession of less than 10 grams ---- section 8(b) of the Dangerous Drugs Act, as amended by the Dangerous Drugs Act (Amendment) Decree No. 4 of 1990

and Dangerous Drugs (Amendment) Decree No. 1 of 1991, is in breach of Section 25(1) of the Constitution. This conclusion was essentially based on the severe disproportionality argument (under section 25(1) of the Constitution), not the separation of powers or other constitutional provisions.

This Court is open to the argument that mandatory sentencing breaches the Constitutional separation of powers. Sentencing is after all a judicial function. Parliament should not impose its will if by doing so it interferes with the judicial process. Section 117(1) of the Constitution states: **"The judicial power of the State rests in the High Court, the Court of appeal and the Supreme Court and in such other Courts as are created by law".** Section 118 further states: **"The judges of the State are independent of the legislative and executive branches of government"**. The supremacy of Parliament to enact legislation appears to be the basis for allowing Parliament to prescribe penalties. The convention has been for Parliament to set maximum penalties. As all those involved in the criminal justice system recognise the maximum sentences are rarely imposed. D.A. Thomas has stated: "The maximum penalty fixed by statute plays a limited part in the process of defining the scale of sentences applicable to the various forms in which a particular offence maybe encountered" (Principles of Sentencing (2nd Ed) p.30). The argument for Parliamentary supremacy historically came out of essentially the conflict between the sovereign and Parliament as the people's representative. As Shameem J stated in Audie Pickering: "There is an assumption that Parliament speaks for the people and passes laws with the assent of the people. This is the essence of democracy. It is a powerful reason why the judiciary should defer to the will of Parliament". (pp22-23).

However, in Fiji's context the Constitution itself is an Act of Parliament. Unlike all other legislation it proclaims: **"We, the People of the Fiji Islands, Seeking the blessings of God who has always watched over these islands**:

\- - - - - - - - - -

\- - - - - - - - - -

With God as Our Witness, Give Ourselves this Constitution".

These are strong and salutary words. They cannot be taken lightly. Our Constitution itself is clear. Section 2(7) states:

(1) **"This Constitution is the supreme law of the State"**

(2) **"Any law inconsistent with this Constitution is invalid to the extent of the inconsistency"**

Further as far as the Bill of Rights (Chapter 4) is concerned, Section 21(1) a states:

> **"This Chapter binds: the legislative, executive and judicial branches of government"** (emphasis added).

As such Parliament is no longer supreme in its archaic sense. It is as much bound by the Constitution as the judicial and executive branches. If the judicial branch, in applying the Bill of Rights provisions in the Constitution, finds itself constrained in exercising its judicial functions it cannot abdicate its responsibilities by relying on Parliament's law making functions or Parliamentary supremacy. It has to interpret the law as mandated by the Constitution. As a Professor of Law has stated: "Adjudication, as a form of democratic power, stands tinged with incredible popular expectations". An independent and impartial judiciary is integral to democratic governance.

The Parliamentary supremacy argument was adopted by the majority in the Supreme Court in Prem Singh v Krishna Prasad & Others (Civil Appeal CBV 0001/2002S) not to interfere with the privative clause in Section 73(7) of the Constitution itself. However, the more contextual and persuasive interpretation was offered by Justice Sian Elias who was in the minority. The honourable Judge stated:

> "Such obligation to keep the law under review where it affects human rights makes it necessary to be cautious in application of authority lacking any constitutional or human rights context. Reassessment of even apparently settled law may be required, (as in Flickinger v Crown Colony of Hong Kong [1991] 1 NZLR 439). While some assistance by analogy from non-constitutional domestic law may be useful, it is important to keep in mind the very different approach required in respect of constitutions. They must be interpreted generously, in a manner befitting their unique importance in the legal order (Minister of Home Affairs v Fisher [1980] AC 319 at 329; Attorney General of Fiji v DPP [1983] 2 AC 672 at 682) (p12 of the judgment of Elias J).

In the Prem Singh case the Court was considering the interpretation of section 73(7) of the Constitution itself, not some subordinate legislation as we are concerned with here. As Elias J states: "The application of S.73(7) turns on the construction of the Constitution as a whole"(p.20). Further, considering electoral rights as fundamental human rights Elias J stated

> "The Court cannot evade consideration of the proper balance required by the Constitution in the particular case. That requires consideration of the balance between finality and legality in the circumstances of electoral rights" (p.12).

This Court had taken such generous and purposive approach to interpreting the Bill of Rights provisions in granting bail to accused persons awaiting trial for murder (Sailasa Naba & Others v State, Cr. App. No. HAA 0012 of 2001L) and in declaring corporal punishment unconstitutional (Naushed Ali v State, Cr. App. No. HAA 083 of 2001L). Shameem J had also used such an approach in Audie Pickering.

In Audie Pickering the High Court had accepted that "There is ---- a wealth of opinion that the legislature generally has power to impose minimum penalties without offending judicial independence. However, this is not to say that mandatory minimum terms can never be subject to constitutional challenge" (p.12). These challenges invariably emanate out of breaches of fundamental rights. In the context of our Constitution, and its Bill of Rights (Chp.4) provisions the Constitution mandates that: **"In considering the application of this chapter to particular legislation, a court must interpret this Chapter contextually, having regard to the content and consequences of legislation, including its impact upon individuals, group or communities"** (Section 21(4), emphasis added).

The Bill of Rights chapter, inter alia, provides for the rights of persons arrested or detained, and charged. While the State is given the right to arrest and charge persons, what are termed prosecutorial discretions, there are fundamental provisions that need to be followed. Included in such rights are the presumption of innocence (s.28(1)(a)); right to counsel (s.27(1)(c)); to be treated with humanity and with respect for his or her inherent dignity (s.27(1)(f)); to have a fair trial before a court of law, within a reasonable

time (s.29). Another fundamental provision is the right to equality before the law (s.38(1)). It is for the High Court to provide redress if any of the provisions of Chapter 4 are contravened or likely to be contravened (Section 41(1)). As such prosecutoral discretions are balanced by judicial discretion.

The Right to a Fair Trial

The basic question in relation to the Appellant, as the person charged, is whether he had **"a fair trial before a Court of law"** (Section 29(1)). A Court of law has to act judicially, that is, in accordance with judicial process. The judicial process includes: "open and public inquiry.....,the application of rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law followed by an application of that law to the facts" (Re Nolan: Ex parte Young (1991) 172 CLR 460 at 496; Gaudron J).

In a criminal trial the culmination of the judicial process is the finding of guilt or not guilty, and the sentencing of the person charged, if found guilty. The inflicting of punishment is central to judging. It is the judicial process – open and public enquiry, fair trial, the giving of reasons-that gives punishment moral and constitutional legitimacy. Sentencing is central to the exercise of judicial power given to the Courts under our Constitution (Section 117(1). It is clear from jurisprudential literature and to all those involved in judging that sentencing entails some element of discretion. H.L.A. Hart, who believed that judges ought to apply the law, acknowledged that sentencing an offender required discretion. As he stated:

> "To a judge striking the balance among these claims, with all the discretion and perplexities involved, his task seems as plain an example of the exercise of moral judgment as could be; and it seems to be the polar opposite of some mechanical application of a tariff of penalties fixing a sentence careless of the moral claims which in our system have to be weighed". (Quoted in Desmond Manderson and Naomi Sharp: "Mandatory Sentences and the Constitution: Discretion, Responsibility, and Judicial Process" Sydney Law Review, Vol 22 p.607).

The above referenced article by Mandelson and Sharp succinctly articulates the central role of sentencing in the judicial process. The Court has relied considerably on it in analysing how mandatory sentencing undermines the judicial process.

Sentencing is ultimately an intrinsically subjective and discretionary process which requires the exercise of balance and judgment (opcit p.608). Punishment of offenders is generally justified for the following sentencing policy goals:– deterrence, rehabilitation, prevention and retribution. Retribution is increasingly not seen as a legitimate sentencing policy though mandatory sentencing is partially predicated on this philosophy. Sentencing an offender is ultimately based on the individual circumstances of the offender – his or her age, educational background, family circumstances, the gravity and circumstances of the offending etc. For both rehabilitation and deterrence the Courts have to address the needs and problems of the offender before it. Is rehabilitation possible? What level of punishment will be appropriate to discourage the offender and others who may be prone to commit such an offence from engaging in wrongful conduct in future? In sentencing the Court is speaking directly to the offender who is to undergo punishment. It is the stage when it passes a moral judgment on the offender demanding that he or she take moral responsibility from his or her conduct. The Court also takes moral responsibility for its actions by inflicting a just punishment.

The Fiji Times has simply but perceptively captured the essence of sentencing. In an editorial calling for consistency in sentencing it states: "It would, of course, be quite wrong to tie the hands of the magistracy when it comes to sentencing. Magistrates must be given full rein to consider each case before them on its merits. It would be rare to find two cases that are exactly identical. Magistrates look at a range of factors before passing sentences. They look at the criminal history – if any – of the accused, his or her personal circumstances, the severity of the crime and the effect on the victims. All these factors need to be taken into account (The Fiji Times: 17/09/02).

Mandatory Sentencing

Mandatory sentencing breaches sentencing goals discussed earlier. It does not allow for judicial discretion in assessing individualised measures. It does not allow for natural justice to operate. Once guilt is established there is no discretion allowed in sentencing.

An accused mitigation, the circumstances of the offending and his individual circumstances are ignored. One may argue that at this stage a fair trial is subverted. As Manderson and Sharp state:

> "While Parliament is free to impose a framework within which judicial sentencing discretion should be exercised, it is another thing entirely to completely eliminate judicial sentencing discretion. Judges are prohibited from considering both the particular circumstances of the case and the application of various sentencing principles to reach a decision which is just and appropriate in those particular circumstances. And without reference to those principles, the act of sentencing cannot be justified and cannot therefore be described as judicial.
>
> - - - - - - - - mandatory sentencing is a process which cannot be described as judicial, since it lacks any form of justification which it is the purpose of the judicial involvement to bestow. It is not retribution. It is not deterrence. It is not rehabilitation. It bears no relationship to any sentencing principles outlined by the courts. But it is not parliament which is thus being required to behave in an arbitrary manner. It is the courts. And the courts' hard-won legitimacy and authority are therefore jeopardised by legislative fiat" (opcit p.612).

As another judge states:

> "Yet judges must pronounce the mandatory sentence as if their own and with no discretion, so lending the court's odour of judicial sanctity to the legislature's pre-ordained outcome as adjusted by the discretion of the prosecuting executive" (quoted in Mandelson & Sharp (opcit) p.615).

In this Court's view mandatory sentencing undermines the very process of judging. It undermines the judicial process and strips it of its moral, legitimising authority. Two American writers succinctly capture the essence of the dilemma:

> "The judge's power – duty – to weigh all the circumstances of the particular case, and all the purposes of criminal punishment, represented an important acknowledgement of the moral personhood of the defendant and the moral

> dimension of crime and punishment --- By replacing the case – by – case exercise of human judgment with a mechanical calculus, we do not judge better or more objectively, nor do we judge worse. Instead, we cease to judge at all. We process individuals according to a variety of purportedly objective criteria. But genuine judgment, in the sense of moral reckoning, cannot be inscribed---". (K. Stith and J.A. Cabranes: Fear of Judging (1998), quoted in Mandelson & Sharp (opcit) p.616) (emphasis added).

Personal liberty

Section 23(1)(a) of our Constitution states: **"A person must not be deprived of personal liberty except for the purpose of executing the sentence or order of a court ---- in respect of an offence of which the person has been convicted"** (emphasis added).

In a mandatory sentencing regime, especially where a minimum penalty is prescribed by legislation, could one assert that the sentence is that of the Court? It is clear that the sentence is not imposed by the Court but by Parliament. The distinction between legislative usurpation of judicial power or legislative interference of judicial power has been discussed extensively by the High Court of Australia. It was stated in the following terms by McHugh J in Nicholas v The Queen (1998) 193 CLR 173 at 220):

> "Speaking generally, an infringement occurs when the legislature has interfered with the exercise of judicial power by the courts and a usurpation occurs when the legislature has exercised judicial power on its own behalf. Legislation that removes from the courts their exclusive function "of the judgment and punishment of criminal guilt ..... of law of the Commonwealth: will be invalidated as a usurpation of judicial power" (see also Gaudron J in Leeth v Commonwealth (1992) 174 CLR 455 at 502).

Due to the federal nature of the Australian constitution and the tensions between federal judicial power vis-à-vis State, and the lack of a constitutional Bill of Rights Australian courts have not fully addressed the jurisprudence on fundamental rights. However, in

Fiji's case, fundamental rights are constitutionally entrenched. Whether it is usurpation or interference, if legislation breaches a fundamental right it will need to be struck down.

It is quite clear that the Dangerous Drugs Act (Amendment) Decree No 4 of 1990 and Dangerous Drugs (Amendment) Decree No 1 of 1991 both interfere and usurp powers of the judiciary. They interfere with the fair trial provisions of Section 29(1), and Section 117(1) of our Constitution which vests judicial power only in the Courts.

In the case of Kable v DPP (1996) 189 CLR 51 the High Court of Australia dealt with the issue of what is incompatible with judicial power. The NSW legislature had enacted the Community Protection Act 1994 (NSW). This Act aimed at keeping one person, Kable, in prison through preventive detention. The Supreme Court of NSW was empowered to make the order specifying the detention of Kable. The Court had only to be satisfied on a balance of probabilities that Kable was "more likely than not" to commit a serious act of violence. The High Court of Australia declared this legislation invalid since the power vested in the NSW Supreme Court was incompatible with judicial power. As Toohey J stated:

> "---the Supreme Court may order the imprisonment of a person although that person has not been adjudged guilty of any criminal offence. The Supreme Court is thereby required to participate in a process designed to bring about the detention of a person by reason of the Court's assessment of what that person might do, not what that person has done".

The mandatory sentencing schedule under the amendment decrees require the Courts to impose what is pre-determined by the Executive/Parliament. As the NSW Law Reform Commission has argued mandatory sentences are "in effect a sentence imposed by Parliament ----" (quoted in Mandelson & Sharp (opcit p.612). The High Court of Australia has identified the characteristics of judicial power vis-à-vis executive power in the following terms:

> "The power to adjudge guilt of, or determine punishment for, breach of the law, the power to determine questions of excess of legislative or executive power and the power to decide controversies about existing rights and liabilities all fall

> within the concept of judicial power. The Executive Government cannot absorb or be amalgamated with the judicature by the conferral of non-ancillary executive functions upon the courts. Nor can the Executive itself exercise judicial power and act as prosecutor and judge to punish breach of law by executive fiat or decree". (Deane J in Re Tracey; Ex parte Ryan (1989) 166 CLR 518 at 580).

As such one cannot classify the pre-determined mandatory sentence under the Dangerous Drugs Act (Amendment) Decrees as an order or sentence of a Court of law.

Equality before the Law

Section 38(1) of our Constitution guarantees every person the right to equality before the law. What does equality before the law mean? It is well established in the common law and constitutional jurisprudence that everyone is equal before the law. As the High Court of Australia has stated: "The Constitution does not permit different grades or qualities of justice" (Kable, (supra) per Gaudron J p.839). It is also instructive that section 43(2) of our Constitution, which deals with the interpretation of our Bill of Rights, states

> "In interpreting the provisions of this Chapter, the courts must promote values that underlie a democratic society based on freedom and equality --- (emphasis added).

The concern for equality is critical to the just application of our laws. The parity principle is a fundamental sentencing principle. It is an aspect of equal justice. "Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them" (Postiglione v The Queen (1997) 189 CLR 295 at 301). In Leeth v the Commonwealth of Australia (1992) 174 CLR 455) Gaudron J had more succinctly stated the essence of the concept: "All are equal before the law. And the concept of equal justice – a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated a such – is fundamental to the judicial process. Questions of constitutional prohibition aside, if the substantive law assigns significance to some matter that in reality it does not have, it thereby becomes a matter to be taken into account in the way that the law requires. And in that way, the law may treat things which are relevantly different as though they are not

or even treat things that are not different as though they are. ---- in the ordinary course of events, the exercise of that power would involve a failure to treat like offences against the laws of the Commonwealth in a like manner and also a failure to give proper account to genuine difference --- it is clear that a power of that kind is one that treats people unequally. As such its exercise is inconsistent with the judicial process". (at pp502-503). In the above case the Australian High Court was analysing the tensions between Commonwealth and State law, where the minimum term of imprisonment on a federal offender could vary according to the State in which he was tried. In Fiji's case such a situation cannot arise given s.38(1) of our Constitution.

How does the above analysis affect the Appellant. It is best to consider the basis on which the Magistrates' Court imposed the sentence on him, and compare with the case of Dominik Latchman Kumar v State (HAA 0066 of 2001L) which is also on appeal before this Court. This appellant, as stated earlier, was convicted for possession of 524.6 grams of Indian Hemp. He had pleaded guilty on his first appearance in Court. Dominik Latchman Kumar was initially charged for trafficking in Dangerous drugs and alternatively for possession of the same amount. On his first appearance he was represented and pleaded not guilty. He subsequently pleaded guilty to the charge of possession. He was found guilty of 880.5 grams of Indian Hemp. He admitted 3 previous convictions for possession of Dangerous drugs. These were all for lesser amounts where he was sentenced to 3 months imprisonment, concurrent to each other. He was sentenced to 5 years imprisonment.

In mitigation Dominik Latchman Kumar's record states:

> "24 years old, single of Waiyavi Stage II, Lautoka.
> Need short sentence as now know it is a bad thing. I will never keep it in future. Don't want to waste – court's time – sole breadwinner. I smoke drugs all the time. I am carrier driver and someone left in my van. So I kept in house. Aim was to smoke it."

Some written mitigation was also tendered but has not been submitted in the records. The sentencing remarks were brief:

"Convicted as charged.

Deterrence required.

Large amount. Too much drugs around. Clearly clear message to be sent around that drug usage not tolerated. Mercy could be shown usually but large amount involved.

Therefore convicted as charged, 5 years imprisonment."

In relation to this Appellant the sentencing remarks was quiet brief:

"Both accused are repentant. They pleaded guilty. But custodial sentence under the Drugs Act is imperative. --- 5 years imprisonment."

It is quite clear that both Magistrates involved felt constrained and imposed the minimum sentence of 5 years on each accused. However, in a juridical sense this "equal treatment" of 5 years imprisonment was unfair on this Appellant. This Appellant was also 24 years old, according to his Caution interview notes, at the time of sentencing. He had stated he was unemployed and indulged in "this activity" to make a living. He had no previous conviction for any drug offences. He was convicted for possession of 524.6 grams. Dominik Latchman Kumar who was convicted for possession of 880.5 grams, also had 3 previous convictions for possession. The comment of Justice Frankfurter of the US Supreme Court is poignant: "There is no greater inequality than the equal treatment of unequals".

Section 25(1) of the Constitution

In discussing Section 25(1) of our Constitution Shameem J had discussed the case law regarding what constitutes cruel, inhumane, degrading or disproportionately severe punishment. It is clear from the case law that the proportionality of the sentence to the crime is a fundamental principle of justice (State v Makwanyane & Another (1995) 6 B CLR 665, Re B.C. Motor Vehicle Act (1985) 2 SCR 486; Smith v The Queen (1987) SCR 1045). In considering section 25(1) of the Constitution the Courts need to consider not only the type of punishment imposed but also at the degree of punishment. Further, in determining constitutionality "---- both purpose and effect are relevant---, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation" (R v Big

M Drug Mat Ltd. (1985) 1 SCR 295, quoted in Smith v The Queen (supra)). In Smith the Supreme Court of Canada outlined the test for assessing gross disproportionately in relation to provisions similar to our Section 25(1). The Court must consider the gravity of the offence, the personal characteristics of the offender, and the particular circumstances of the case to decide what range of sentences would be appropriate to punish, rehabilitate, deter or protect society from the particular offender. In R v Goltz (1991) 3 SCR 485 the Canadian Supreme Court reconfirmed these test. It further held that the Court can consider whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognised sentencing principles, whether there are valid alternatives to the punishment imposed and whether a comparison with other crimes reveal great disproportionality. While the Canadian Supreme Court did not consider arbitrariness of the sentence as a minimal factor in this Court's view arbitrariness undermines confidence in the sentencing process. The U.S. Supreme Court outlined four relevant principles for considering whether punishment accorded with human dignity: that a punishment must not be so severe as to be degrading to the dignity of human beings, the State must not arbitrarily inflict a severe punishment, a severe punishment must not be unacceptable to contemporary society, and a severe punishment must not be excessive (Furman v Georgia (1972) 408 US 238).

In the Court's view McDermott J in the Constitutional Reference by the Morobe Provincial Government (1985 LRC (Const) 642 put the issue pointedly: "There is a great deal of subjectivity involved with sentencing an offender for a minimum penalty crime ---. What is cruel or inhuman becomes not a matter of cold speculation or impersonal inquiry from a distance, it is something very real ---, when the punishment to be applied is out of all proportion to the offence because one or more factors --- must be disregarded, the resulting cruelty or inhumanity does need definition. It becomes the fact (p694). In essence the minimum mandatory sentences for each category of drugs, under our amendment decrees, would be disproportionate in readily imaginable situations. This is because the decree treats all offences in each category as equally reprehensible up to an arbitrary set level of punishment.

In this appellant's case when all factors are considered, including his sentence in relation to other similar cases discussed earlier, the sentence imposed was grossly

disproportionate. As such in terms of Section 25(1) of the Constitution the sentence was disproportionately severe punishment.

The Dangerous Drug Act (Amendment) Decrees

In analysing Section 25(1) of the Constitution above the Court, following judicial authorities, recognised that both purpose and effect of legislation is relevant in determining constitutionally. In relation to decrees, which have not been subject to Parliamentary scrutiny, there is a higher onus placed on the Courts. In Ghim Li Fashion (Fiji) PTE Ltd v The Commissioner of Inland Revenue (Action no HBC 0403 of 1998) Justice Byrne recognised this onerous responsibility. In referring to the Value Added Tax Decree of 1991 Byrne J stated: "By its very title it will be noted that this law was not passed by Parliament but rather made by some non-elected person or persons who did not have to account to Parliament for his or her actions. That of itself is sufficient reason why its various provisions, insofar as they deal with the duty to pay tax, must be studied most carefully so as to ensure that justice is done to both the Commissioner of Inland Revenue and the person said to be liable to pay tax" (p.21). Further on in his judgment the honourable judge, in recognising the Courts deference to Praliament, stated that "---a judge considering the Value Added Tax Decree should only after much thought defer to the will of the persons responsible for it where it purports to cut down the rights of the ordinary individual (p.5, emphasis added). The Dangerous Drugs Act (Amendment) Decrees enforce criminal sanctions, and more importantly, mandatory minimum terms of imprisonment. As such they require more rigorous scrutiny in relation to any breach of Constitutional rights.

The "Third' Schedule" to the Dangerous Drugs Act (Amendment) Decree 1990 lists the Quantities of Drugs and Penalties on conviction. These are as follows:

Section Creating Offence	General nature of offence	Quantities of Drugs	Penalty
8(b)	Possession of Indian hemp	Not exceeding 100 grams	Maximum of 24 months Minimum of 3 months
		Not exceeding 500grams	Maximum of 3 years Minimum of 12 months
		Exceeding 500 grams	Maximum of 20 years Minimum of 5 years

It is quite clear that the third schedule itself has no sense of parity. For an offence of less than 500 grams, that is, 100 grams to 499 grams, the minimum sentence is 12 months. However, for amounts exceeding 500 grams the minimum is 5 years. As such if a person is found guilty of possession of 499 grams he could be sentenced to a minimum of 12 months. However, a person convicted, for example, with 501 grams would be liable to a minimum of 5 years. A difference of 2 grams could result in disparate sentences of 1 year or 5 years. It is quite clear that this does not make any sense, ignoring whether it makes judicial sense in terms of accepted sentencing principles. The disparity involved is quite stark. The same irrationality is evident between possession not exceeding 100 grams and not exceeding 500 grams. The maximum for not exceeding 100 grams is 24 months and the minimum is 3 months. However, for amounts not exceeding 500 grams (i.e. 100 gms+) the maximum is 3 years but the minimum is 12 months. This is illogical. What it suggests is that a person in possession of less than 100 grams could theoretically be sentenced to a term of imprisonment of 24 months but a person in possession of more than 100 grams could be sentenced to 12 months. This in fact happened in the cases of Kemueli Delai and Jone Nakau discussed below. It is clear that penalty provisions are not drafted logically. They take a mechanistic approach to sentencing. How courts are expected to develop tariffs in such a restrictive and incoherent sentencing regime remains unclear.

A perusal of the cases dealt by this Court from appeals from Magistrates Courts in the Western Division shows the disparities and inconsistencies. The Court has already analysed the disparity in the sentences between this Appellant and Dominic Latchman Prasad. In the case of Josevata Talevakarua v State (Cr App HAA 069/2000L) the Appellant was convicted for possession of 613.0 grams of Indian Hemp. He was a first offender. The Magistrates Court sentenced him to 5 years imprisonment. This was upheld on Appeal. In Eliki Raloka v State (Cr. App HAA 048/2000L) the Appellant was on his own plea, convicted of two (2) Counts of possession. He was a first offender. He was sentenced to 5 years on Count 1 (possession of 1188.6 grams) and 2 years on Count 2 (possession of 276.9 grams). The sentences were to be served concurrently. Due to serious defects in the proceedings the High Court ordered a new trial. In the case of Kamueli Delai v State (Cr App HAA 0063 of 2001L) the Appellant was convicted for the possession of 15.2 grams of Indian Hemp. The appellant was sentenced to 2 years imprisonment. On appeal this was reduced to 18 months. In the case of Sisir Kumar v State (Cr. App HAA 0033 of 2001L) the Appellant was convicted for the possession of 108.9 grams of Indian Hemp. He was sentenced to 2 years imprisonment by the Magistrates Court. He had a previous conviction for possession of Indian Hemp. The sentence was upheld by the High Court. In Jone Nakau v State (Cr. App HBM 031 of 2001L) the Appellant was convicted for the possession of 145.7 grams of Indian Hemp. He was a first offender. He was sentenced to 12 months imprisonment. This was upheld by the High Court. The sentencing in the cases of Jone Nakau (12 months for possession of 145.7 grams) and Kamueli Delai (2 years for possession of 15.2 grams) shows the absurdity of the sentencing regime contained in the amendment decrees.

It is quite clear from a perusal of the Magistrates Court records that there is no consistency of approach to the sentencing of offenders for possession of Dangerous drugs. There is no consideration of mitigating factors nor establishing a sufficiently precise factual basis for sentencing according to appropriate procedural standards (see D.A. Thomas: Principles of Sentencing (2nd Ed.) pp 366 & 367). The crux of the sentencing remarks by Magistrates is on the need for deterrence, prevalence of the offence, and Police fighting a losing battle. The Magistrates essentially follow the minimum mandatory sentence as the starting point without considering the culpability of the offender and other sentencing principles. It is clear that once a conviction is recorded sentencing becomes a mechanistic exercise devoid of judicial discretion.

Apart from the internal inconsistency in the "Third Schedule" sentencing framework the inequality between drug offenders and other offenders is also stark. As Shameem J had noted in Audie Pickering there are no minimum mandatory sentences for rape, manslaughter, theft or robbery with violence. In most cases of rape, dealt by the Magistrates Courts, the maximum sentence on a guilty plea is 5 years. The same is the case for Robbery with Violence, and Act with Intent to Cause Grievous Harm. How then does one justify a sentence of 5 years as the minimum for possession of 500 grams of Indian Hemp? In rape the very dignity of a woman is violated yet there is no minimum sentence. In theft, fraud and robbery with violence the sentencing is not based on the amounts of property stolen or robbed or defrauded. How does one compare and justify the possession of various amounts of drugs attracting different minimum sentences? What if possession is for ones own use? The mandatory setting of minimum penalties precludes the Courts' enquiring into all the circumstances of the offence to arrive at an appropriate sentence.

In this case, for example, the Appellant stated, inter alia, that "he was unemployed, married with one child .... to make a living I indulge in this activity ...". There was no evidence that he actually sold or attempted to sell any of the drugs in his possession. In his caution interview he stated he "wanted to sell it". The offence of selling and trafficking, though part of Section 8(b) carry different penalties. Here again the selling or trafficking in Indian Hemp exceeding 100 grams carries a minimum of 5 years and maximum of 14 years only. As such a person in possession of 500 grams is liable to imprisonment for a minimum term of 5 years, the same as selling or trafficking in the same amount. The maximum for possession is 20 years but for selling or trafficking it is 14 years. How one can reconcile this remains unclear.

In Dominic Latchman Kumar's case he was convicted for possession of 880.5 grams. He said he kept it for his own use. Even if he did, no investigation is apparent in relation to his suppliers or cultivators. However, since there are specific provisions dealing with growing and cultivation of Indian Hemp (section 8(a)) and selling or trafficking (section 8(b)) and the penalties specified are different Courts only have to deal with the offence charged. Where mandatory sentencing is specified a strict interpretation is inevitable. As such a conviction for possession has to be seen as such. Allegations regarding intention to

sell or deal otherwise will not be relevant to sentencing. As D.A. Thomas states: "---the sentencer is bound by the general principles governing the determination of a factual basis for sentence and must not impose a sentence on the assumption that the offender is guilty of a more serious offence than has been proved or admitted. In particular, the sentencer may not sentence the offender as a pusher or supplier, if he has been convicted only of possession of the substance concerned---" (opcit p.183). It is clear from sentencing remarks by Magistrates that assumptions regarding supply or dealing in drugs are made in offences involving possession of more than 100 grams of Indian Hemp.

In comparing the sentence of this Appellant to Dominc Latchman Kumar it is clear there is severe disparity. Not only are the amounts involved significantly different, the mitigatory factors are also different. Since they are both of the same age the resulting disparity amounts to unequal treatment. It is quite clear that the mandatory sentences under the Dangerous Drugs Act (Amendment) decrees stress only the deterrent aspects of punishment. In Audie Pickering, the state had also submitted that deterrence was the "legislative" purpose of the Decree (p.23 of judgment). How this is for good governance, as submitted by the State in this case, remains unclear. In response to the State's deterrence argument the sentiments of Ackerman J in Buzani Dodo v The State (Constitutional Court of South Africa CCT1/01; p31) is worth repeating:

> "Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ----the offender is being used essentially as a means to another end and the offenders dignity assailed". (quoted in Audie Pickering (supra) p.33).

In the context of our Constitution any such sentence of general deterrence would be in breach of Section 27(1)(f) which requires arrested or detained person to be treated with humanity and with respect for his or her inherent dignity

It is apparent that the mandatory sentencing regime was decreed to deal with the mounting drug problem in Fiji. As Shameem J had stated in Audie Pickering that "The "real mischief" under the Drugs Act is not the possession of small amounts of Indian hemp, but the acts of those who financially benefit from and prey upon, the drug dependence of others." The thrust "---is against those responsible for the scourge of drugs in Fiji, not the children and young people who are the victims of the growers, dealers and traffickers". It is quite clear from the cases coming before the High Court that almost 90% of the cases dealt by the Courts concern possession. Very rarely do cases of selling or trafficking or growing and cultivation come before the Courts. This is borne out by statistics compiled by the National Substance Abuse Advisory Council (NSAAC). The figures for 1990 to 1999 are set out below:

DRUG OFFENCES

Year	Found in Possession of Dangerous Drugs	Growing/cultivating Indian Hemp	Supplying/ Giving/ Selling	TOTAL
1990	113	12	12	137
1991	100	12	9	121
1992	205	27	17	249
1993	222	33	16	271
1994	308	42	14	364
1995	302	41	19	362
1996	366	67	22	455
1997	386	55	31	472
1998	426	69	18	513
1999	530	34	4	568

It is clear that mandatory sentencing is not able to tackle the scourge of the drug problem. By dealing only with people in possession of drugs and not dealing with the suppliers or cultivators accentuates the problem. It is the same as not dealing effectively with receivers of stolen property where the young, unemployed youths are used as foot soldiers to commit heinous attacks for the benefit of the hidden criminals. It is also evident from the research by the NSAAC and international experience that mandatory sentencing regimes are not seen as plausible policy option in dealing with drugs, especially cannabis (Indian Hemp).

In the case of The State v Wong Kam Hong and Tak Sang Hao (Cr. Case No 0002 of 2001) the High Court dealt with a case involving heroin in excess of 300 kg. As Fatiaki J stated in this case: "The quantity of heroin in this case in much much more than 'a very large quantity' --- 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" (p.4). Yet despite such a huge quantity of heroin and the distribution involved the maximum sentence, as Fatiaki J commented, "remains at 8 years only". In this case the Court sentenced the accused as follows

Count 1:	Importing heroin	-	7 years
Count 2:	Being in Possession of Heroin	-	5 years
Count 3:	Attempting to Export Heroin	-	5 years

In total the first accused was sentenced to 12 years. As regards the second accused he was convicted for the offence of Being in Possession of Heroin and sentenced to 4 years imprisonment only. The absurdity of the current sentencing regime mandated in the Dangerous Drugs Act is quite evident. The inequities are profound. For persons in possession of 500 grams of Indian hemp which is the least dangerous among the Dangerous Drugs one is liable to imprisonment of 5 years as a minimum. However, for heroin which is the most insidious drug one could get less than 5 years, or theoretically be discharged. Fatiaki J was conscious of the disparities and inconsistencies in the Dangerous Drugs Act. As he commented "---- 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 ---- 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" "cocca leaf" and "raw opium" Fatiaki J did not comment on the mandatory sentencing regime for Indian hemp and some other drugs since the matter was not relevant to the case before him.

The problem with the Dangerous Drugs Act and the Amendment decrees is not purely a matter of consistency of penalties between different drug categories. In relation to Indian

hemp which is the drug in issue before this Court the issues are more complex. This drug is almost exclusively a local drug – its grown locally, supplied and consumed locally. There may be a substantial trafficking overseas but this does not concern the Court in this appeal.

It may be pertinent to begin with the World Health Organisation (WHO) 1997 report

> "--- the hazards linked to the use of any drug are strongly influenced by such factors as the social and cultural context of drug use in the community, the political and economic context, availability of various psychoactive substances, preparation and dose, route of administration, frequency of use, and associated life style. The quantitative risks of cannabis use are largely unknown in the absence of reliable epidemiological studies, and therefore such comparisons tend to be more speculative than scientific.
>
> In addition, since the proportion of the population that uses cannabis regularly over a period of years is currently much smaller than the proportions that use alcohol or tobacco in a comparable way, the magnitude of the public health hazard based purely on such exposure considerations is likely to be lower than that posed by alcohol or tobacco".

It is perhaps in recognition of the complex linkages and a profound understanding of the underlying problem that Fiji's Ministry of Health has embarked on a very pointed T.V. anti-tobacco campaign. The telling commentary is worth repeating:

- Fiji has a drug problem
- The most addictive drug in the world is sold openly in our streets
- This drug kills more than 300 people in Fiji every year
- Nicotine, the drug in cigarettes, is more addictive than marijuana, cocaine and heroin
- Cigarette manufacturers are drug pushers
- They are getting rich by making young people addicted to cigarettes
- Half of all people addicted to nicotine die as a result of their smoking

- Do you really want to be an addict?
- Be smart. Don't start

It is quite evident from the research and materials published by the National Substance Abuse Advisory Council that the mandatory sentencing regime is not arresting the drug problem. The NSAAC is concentrating its resources on counseling, prevention and rehabilitation. The figures published earlier confirm this. Further these do not include the under-reporting and usage not caught by the criminal justice system through lack of Police resources etc. Figures compiled by the NSAAC and Police statistics indicate that in 1999 and 2000 over 50% of the drug offenders were under 25 years of age. Further, Police statistics for 1995 and 1996 indicate that more than 55% of drug offenders are unemployed. The trend would not have altered radically since 1996. It is, therefore, evident that in relation to Indian Hemp we are dealing with a sector of society which is generally impoverished and not influential politically. In relation to the tobacco and liquor companies, those involved in Indian hemp are not articulate nor powerful. However, the problem cannot be wished away. Much soul searching needs to be done. A more holistic approach is necessary in dealing with drugs. It is not the mandate of the Courts to be involved in policy making. This is an area for the legislature. However, the lack of comprehensive policy is no basis for the Courts to compromise their legitimacy and authority in sentencing by undertaking the work of the legislature.

Conclusions

It is clear that on a consideration of Section 25(1) of the Constitution the 5 year sentence imposed on this Appellant is disproportionately severe punishment. What then is the appropriate sentence? Learned Appellant counsel had submitted that there should be no obligation to impose the minimum mandatory sentence. In considering the Constitution and especially the Bill of Rights provisions it is clear that the provisions of the Dangerous Drugs Act (Amendment) Decrees contravene certain provisions of the Constitution. In particular, the mandatory sentencing provisions breach the separation of powers doctrine, contained in Section 117(1) of the Constitution, and the independence of the judiciary vis-à-vis the legislative and executive branches, as per section 118 of the Constitution. The setting of pre-determined mandatory sentences further breach the right to a fair trial

before a court of law (Section 29(1)), and the right to equality before the law (section 38(1)). The Court is not persuaded at this juncture to rule that all mandatory sentences are unconstitutional per se. In any case the Court has been asked only to consider the minimum mandatory sentencing under the Dangerous Drugs Act (Amendment) Decrees.

In view of its findings what are the options open to the Court? Section 2(7)(2) of the Constitution states: "**Any law inconsistent with this Constitution is invalid to the extent of the inconsistency**". Section 195(3) further provides:

> "Subject to section 2 written laws referred to in paragraph 2(e) or (f) are to be construed, on and from the commencement of this Constitution with such modifications and qualifications as are necessary to bring them into conformity with this Constitution".

Under s41 the High Court is required to provide redress if any provisions of the Constitution are contravened. The Court, therefore, rules that in relation to the Dangerous Drugs Act (Amendment) Decrees No 4 of 1990 and No. 1 of 1991 as they pertain to the "Third Schedule" offences relating to the Possession of Indian Hemp, the minimum penalties are unconstitutional and invalid. The maximum penalties specified remain. This does not disturb the convention that Parliament sets the maximum penalties for all offences.

However, to protect judicial discretion and to ensure compliance with sentencing principles the proviso: "Provided that the provision of Section 29 of the Penal Code and any other law shall not apply to any sentence to be imposed under this Act" is also struck out. It also follows that the word "immediate" before imprisonment is struck out. The Court recognises that its decision will mean the redrafting of the affected provisions. It is not the role of the Courts to redraft legislation which is the prerogative of Parliament. The effect of the Courts order is to uphold the relevant constitutional provisions discussed above, and to ensure that the judicial process of sentencing drug offenders remains independent and free from outside interference. More importantly, in view of the decision in Audie Pickering and the discrepancies highlighted in Wong Kam Hong and Tak Sang Hao there is an urgent need to reconsider the penalty provisions in the Dangerous Drugs Act to facilitate consistency in approach to sentencing.

The Court is now left to consider the appropriate sentence for this Appellant. Since the amount of Indian Hemp in possession exceeded 500 grams the maximum sentence he is liable for is 20 years. According to D.A. Thomas: "For the purpose of assessing culpability, offenders are divided into categories according to whether they are users or suppliers, and according to the nature of the substance involved" (supra p.183). In this case the drug involved was Indian hemp, the least harmful amongst the prohibited drugs. According to the Ministry of Health T.V. advertisement it is less adductive than nicotine. The amount involved was substantial. While the Appellant stated: "To make a living I indulge in this activity" it is not clear whether he sold any drugs and where his supply was from. As Thomas, quoted earlier, suggests since he was convicted for possession only he has to be dealt for that offence only. For possession of substantial amounts of heroin sentences of 5 years and 4 years were imposed in Wong Kam Hong and Tak Sang Hae (supra). As such a sentence of 3 years would be an appropriate starting point. Given the age of the offender, his circumstance and plea of guilty a discount of 6 months is appropriate. As such the proper sentence for him would be 2½ years imprisonment.

Orders

It is clear from the analysis undertaken above by the Court that the sentencing provisions – Third Schedule – of the Dangerous Drugs Act (Amendment) Decrees (no 4 of 1990 and No 1 of 1991) contravene certain provisions of the Constitution. In particular the mandatory sentencing provisions breach the separation of powers doctrine, contained in Section 197(1) of the Constitution. It further contravenes the independence of the judiciary vis-à-vis the legislature and executive branches, as per section 118 of the Constitution. The setting of pre-determined minimum mandatory sentences also breaches the right to a fair trial before a court of law (Section 29(1) of the Constitution), and the right to equality before the law. (section 38(1) of the Constitution). Pre-determined mandatory sentences, in essence, cannot be classified as an order or sentence of a Court to deprive a person of personal liberty for the purpose of executing the sentence of a court, in respect of an offence of which the person has been convicted, as required under Section 23(1) of the Constitution. It is clear that the effect of the Third Schedule of the Amendment decrees in relation to section 8(b), specifically for Possession of Indian Hemp, the minimum specified sentences are unconstitutional because they offend the

various provisions of the Constitution as specified above. They are invalid to the extent of the inconsistencies. In accordance with its powers under Sections 195(3) and 41(3) of the Constitution the Court declares that the Dangerous Drugs Act (Amendment) Decrees insofar as they relate to the minimum sentences specified for the possession of Indian Hemp, as provided in the "Third Schedule – 8(b), are unconstitutional and invalid.

As regards this Appellant his appeal against sentence is successful. The sentence of 5 years imposed by the Magistrates' Court is quashed. In substitution a sentence of 2½ years is imposed, effective from 16/11/2000, the date of his sentence by the Magistrates Court.

[**Jayant Prakash**]
Acting Puisne Judge

HIGH COURT OF FIJI
LAUTOKA

DELIVERED at Lautoka this 27th day of September 2002