TRUST TERRITORY OF THE PACIFIC ISLANDS

v.

MARIANO R. BERMUDES

Criminal Case No. 306-73

Trial Division of the High Court

Mariana Islands District

July 23, 1974

Prosecution for possession and sale of marijuana. The Trial Division of the High Court, Burnett, Chief Justice, held that the territory could control or

prohibit the possession, use and sale of the drug, criticized stronger penalties for marijuana offenses than for opium and heroin offenses, found marijuana not to be a narcotic and held that the Congress of Micronesia could not give the Director of Health power to determine which drugs would be regulated.

1. **Drugs—Marijuana**

   Trust Territory police powers allow for the controlling, or prohibiting the use, of marijuana.

2. **Police Power—Generally**

   When testing the validity of regulations and acts promulgated in the exercise of the police power within the Trust Territory, the question is not whether a particular exercise of the power imposes restrictions on rights secured to individuals, but whether restrictions so imposed are reasonable.

3. **Police Power—Generally**

   The proper area for exercising the police power is given a broad definition with regard to laws which will inure to the health, morals and general welfare of the public, and with regard to such laws the guarantees of life, liberty and property do not operate as a limitation of the police power.

4. **Legislative Power—Delegation**

   Statute providing that a drug is any nonalcoholic drug containing any substance which significantly affects consciousness, ability to think, critical judgment, motivation, mood, psychomotor coordination or sensory perception and is substantially involved in drug abuse or has substantial potential for such involvement, and that Director of Health shall determine on the basis of current medical knowledge which substances are drugs, is null and void as an unlawful delegation of power from the Congress of Micronesia to the director and a violation of equal protection. (63 TTC §§ 301, 302)

5. **Legislative Power—Delegation**

   The legislature, after having enacted general provisions, may delegate power to an administrative board or agency for it to establish rules and regulations by which the law is to be implemented, but the legislature must enunciate a standard by which the board must be guided and place the standard in the enabling statute, and the standard must be sufficiently definite to both guide the board in implementing the power conferred and to advise those affected of their rights and responsibilities.

6. **Drugs—Marijuana**

   Whatever the state of current medical knowledge, it is a matter for judicial notice that the harm inherent in the possession, use and transfer of marijuana is not greater than that of opium or heroin, and while the debilitative and addictive effects of using the former are strongly discounted, those of the latter have been conclusively proven and universally recognized.

7. Constitutional Law—Due Process—Criminal Offenses

Punishment of up to a year in prison for importation or sale of opium or its derivatives, such as heroin, and of a year in prison and/or a one thousand dollar fine for possession, use or sale of marijuana, exhibits the difference between unrestrained legislative power and that which is within the spirit of constitutional limitations formed to establish justice, and there was an absence of any rational basis for penalizing the marijuana offenses more strongly, and the court could not hold the statutory punishment scheme as being within the limitations of due process. (67 TTC §§ 306, 351, 11 TTC § 1)

8. Drugs—Marijuana

Marijuana cannot properly be classified as a narcotic.

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Counsel for Defendant: BENJAMIN ABRAMS

BURNETT, *Chief Justice*

Defendant is charged with having unlawfully, willfully and knowingly possessed and sold, delivered or otherwise disposed of a drug, to wit: marijuana, in violation of 63 TTC § 303 and Title 7, Trust Territory Code of Public Regulations, Part 161.

Defendant, through counsel, moved to dismiss the charges. The grounds upon which the motion is urged are, first, that the charges against Defendant constitute an unwarranted intrusion into his private life, thereby violating his right to privacy under due process of law, and second, that the statute under which Defendant is charged is an unlawful delegation of authority by the Congress of Micronesia to the Director of Health Services for the Trust Territory.

Movant's first contention is based upon the argument that marijuana is not a harmful drug, that personal use of the drug is within the constitutionally protected area of the right to privacy, and that for the government to prohibit the personal use of marijuana is an invasion of this area of personal liberties and for this to be constitutionally per-

mitted, the government must demonstrate some compelling interest. Movant concludes that no such interest exists upon which to base an absolute prohibition of the personal possession and use of the drug.

To support the position that marijuana is not a harmful drug, or at worst no more harmful than tobacco or alcohol, and that its use should be protected by the right to privacy, movant cites a large body of writing, both governmental and private, by experts in the area of drug abuse.

The literature quoted reflects, to a large extent, the changing attitude with which both the medical profession and the government have approached the question of marijuana use. From the days of *State v. Navaro*, (1933) 26 P.2d 955, when marijuana was considered a dangerous narcotic, capable of causing one to become "very crazy" and "especially induced [to commit] acts of violence," we have arrived at a more enlightened view of the drug. The trend of recent consideration of marijuana and its dangers is reflected in the "First Report: A Signal of Misunderstanding" (March, 1973) issued by the National Commission on Marijuana and Drug Abuse. The Commission, appointed by President Nixon, found "little proven danger of physical or psychological harm from the experimental or intermittent use of the natural preparations of cannabis." Further, the Commission found that any psychological dependence on the drug resulted from a pattern of heavy use. The Commission was "unaware of any" such pattern in the United States.

Similarly, Courts have begun to hold a classification of marijuana as a narcotic to be improper. *People v. McCabe*, 275 N.E.2d 407, *State v. Carus* (N.J. 1972) 286 A.2d 740. (Marijuana not a "narcotic drug" within the meaning of a statute prohibiting operation of a motor vehicle on the highway while having in possession any narcotic drug.) Yet, such consideration and treatment of marijuana is not

universal. See *English v. Virginia Probation & Parole Board* (1973) 481 F.2d 188. Still, the trend, evidenced by recent legislative and judicial action, has been to regard the use of marijuana as warranting less severe sanctions than those applied to heroin and other "hard" narcotics.

[1–3] Irrespective of whether this court accepts the notion of marijuana as being a drug no more harmful than alcohol, I am satisfied that the police powers of the government do allow for controlling, or prohibiting, its use. It has long been settled that when testing the validity of regulations and acts promulgated in the exercise of the police power within the Trust Territory, "the question is not whether a particular exercise of the power imposes restrictions on rights secured to individuals, but whether restrictions so imposed are reasonable." *Ngirasmengesong v. Trust Territory*, 1 T.T.R. 345 (1958). And the proper area for exercising the police power is given a broad definition with regard to laws which "will inure to health, morals, and general welfare of people." With regard to such laws the guarantees of life, liberty and property do not operate as a limitation of the police power. *Trust Territory v. Benido*, 1 T.T.R. 46 (1953).

We note that both *Benido* and *Ngirasmenesong* involved public conduct or activity on the part of the defendants in violation of a law promulgated under the police power of a municipality. Whether that power extends to controlling acts done in private is a question which the facts of the present case do not raise. Since the motion to dismiss is granted for other reasons, infra, the right-to-privacy question is one which we need not resolve.

[4] Movants next argue that 63 TTC §§ 301, 302, and 303, and Title 7, Part 162 of the *Trust Territory Code of Public Regulations* should be declared null and void as involving an unlawful delegation of power from the Congress

of Micronesia to the Director of Health Services. We can, and do, agree.

Subchapter II, 63 TTC Chapter 7 (hereinafter, Subchapter II), defines the drugs to be controlled, § 301; delegates to the Director of Health Services (Director) the authority to determine which substances meet this definition, § 302; and sets forth the acts prohibited in relation to these substances, § 303.[1]

[5] The type of authority conferred here has been referred to as the "power to fill up the details." Chief Justice Marshall, *Wayman v. Southard,* 10 Wheat. 42; *United States v. Grimaud,* (1910) 200 U.S. 506, 31 S.Ct. 480. The legislature, after having enacted general provisions, may delegate such power to an administrative board or agency for it to establish rules and regulations by which the law is to be implemented. However, this power is made to strictly depend upon the enunciation of a "standard by which such officers or boards must be guided" contained within the enabling statute. *Senior Citizens v. Department of Social Security,* 228 P.2d (478) (1951).

Further, such a standard must be sufficiently definite to both guide the agency in implementing the power con-

[1] § 301. "Drug" defined. For the purpose of this Subchapter the term "drug" shall mean any drug, excluding alcoholic beverages, containing any quantity of a substance which significantly affects or alters consciousness, the ability to think, critical judgment, motivation, mood, psychomotor coordination or sensory perception and is substantially involved in drug abuse or has substantial potential for such involvement. Such abuse shall be deemed to exist when drugs are used for their psychotoxic effects alone, and not as therapeutic media prescribed or recommended in the course of medical treatment, or when they are obtained through illicit channels.

§ 302. Procedure. The Director of Health Services shall determine on the basis of current medical knowledge which substances and products are drugs, within the meaning of Section 301 of this Subchapter, and shall compile and publish as part of his rules and regulations a current list of such drugs.

§ 303. Acts prohibited. No person, except a person authorized to import or sell medicines and drugs under the provisions of Section 251, Subchapter I of this Chapter, shall sell, deliver or otherwise dispose of any drug to any other person, nor shall any unauthorized person possess or use any such drug other than for the personal use of himself or a member of his household and prescribed in the course of medical treatment.

ferred and to advise those affected of their rights and responsibilities. *United States v. Rock-Royal Co-Op.*, 307 U.S. 533, 59 S.Ct. 993.

Subchapter II fails to provide such a constitutionally mandated standard and as such constitutes an unlawful delegation of legislative authority.

The Director is authorized by § 302, supra to compile a list of substances which he determines to be drugs "within the meaning of § 301" of the Subchapter. Such determination is to be made on "the basis of current medical knowledge."

But the meaning of § 301, and what substances are intended to be included within it, is far from clear. The use of phrases such as "*significantly* affects or alters the consciousness . . . [and] motivation" and "*substantially* involved in drug abuse or has *substantial* potential for such involvement" creates something other than a standard by which the Director must be bound. (Emphasis added.) Nor does the state of current medical knowledge provide a sufficiently precise standard upon which the Director can base his determinations. As discussed, supra, the medical profession is in a state of flux as to its appraisal of marijuana and is dubious about the substance's role in drug abuse. *Third Annual Report to Congress* (October 1973), National Institute of Mental Health, of the Department of Health, Education and Welfare.

The Subchapter does not with any degree of clarity advise the Director of what the "legislative will" affirmatively requires to be done, nor does it enable those affected to know what will be treated as unlawful if done. Neither can the Court, when reading §§ 301 and 302, determine with any certainty what the legislative intent is, nor, more important, whether it has been followed. There is, for example, no requirement in the law that the substances to be proscribed be determined following public hearings, at

which the state of "current medical knowledge" must be subject to public scrutiny or challenge.

Any authority exercised under such a statute is, in the constitutional sense, misguided. Not only does the Subchapter delegate unbridled authority, but lack of sufficient guidelines for the exercise of the authority represents an "arbitrary quality of thoughtlessness" that is offensive to the equal protection clause. *Norwalk CORE v. Norwalk Redevelopment Agency,* (1968) 395 F.2d 1920.

A further equal protection problem arises with regard to Subchapter II when penalties there prescribed are compared to comparable provisions of 63 TTC Subchapter III. Subchapter III controls the importation and distribution of opium and its derivatives (e.g. heroin). A Subchapter III violation is treated as a misdemeanor which, by virtue of 11 TTC § 1, authorizes a punishment of imprisonment for a period not exceeding one year. However, § 306 of Subchapter II provides a penalty of up to one year in prison, a one thousand dollar fine, or both. Hence, while a violation of the provisions in Subchapter III subjects the offender to the possibility of one year's imprisonment, an offense committed under Subchapter II raises the specter of a more severe penalty in the form of a one thousand dollar fine in addition to the imprisonment.

Movant is being prosecuted under the provisions of Subchapter II. He is therefore placed in jeopardy of receiving a more severe sentence for possession and sale of marijuana than he could receive for importing and selling opium or heroin, acts covered by Subchapter III.

[6] Whatever the state of "current medical knowledge" it is a matter for judicial notice that the harm inherent in the possession, use and transfer of marijuana is not greater than that of opium or heroin. While the debilitative and addictive effects of using the former are strongly discounted, those of the latter have been conclusively proven

and universally recognized. (National Commission on Marijuana and Drug Abuse, "Second Report: Drug Use in America," March 1973).

[7] In view of this fact, the contrast in penalties for the possession and sale of marijuana and the importation and sale of opium or heroin shows, in the words of the Supreme Court:

> . . . more than different exercises of legislative judgment. It is greater than that . . . . It exhibits the difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544.

The constitutional limitations referred to in *Weems* involved primarily the prohibition against cruel and unusual punishment contained in the Eighth Amendment. Yet a finding that the legislature had transgressed these limitations was based upon an equal protection analysis of the challenged penalty in relation to punishments assigned to comparable or greater offenses.

A recent decision of the Superior Court for the District of Columbia found the prescribed punishment for possession of marijuana, identical to that set by the regulation here in question, to violate the Eighth Amendment prohibition against cruel and inhuman punishment.

"The voluminous record of scientific evidence in this case . . . establishes, and the court has found, that marijuana is not a narcotic drug; that the use of marijuana is not addictive; that the use of marijuana has no significant short term or long term harmful effects upon the individual user; that the ordinary use of marijuana does not lead to the commission of crimes or induce acts of violence by the user. Despite these facts, the Congress, in legislating for the District of Columbia, has treated marijuana and its use as though the opposite were true. For purposes of criminal punishment, the Congress has placed the possession of

marijuana on a par with the possession of heroin, cocaine and their derivatives—these latter drugs being narcotics, addictive, harmful to the user, and associated with the commission of crimes, including crimes of violence. . . ." *U.S. v. Grady*, DC Super. Ct., 42 L.W. 2629 (5/17/74) I do not hold that the penalty provided for under Subchapter II constitutes cruel and unusual punishment. However, I do find an absence of any rational basis for classifying the abuse of marijuana as an offense warranting a more severe penalty than the illicit importation and distribution of opium or heroin. When such a situation presents itself, we must respond as did the *Weems* Court:

> In such case, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account,—that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitations, we repeat, but constitutional ones, and what those are the judiciary must judge. 30 S.Ct. 544, at 554.

[8] The control and eradication of narcotics and drug abuse is, of course, a valid state interest. Yet, a legislative classification created to promote such a valid objective must rest upon grounds relevant to its achievement. *Turner v. Fouche*, (1970) 396 U.S. 345, 90 S.Ct. 532. The classification of marijuana as a narcotic has been held to be improper. *People v. McCabe*, 275 N.E.2d 407, *State v. Carus* (N.J. 1972) 286 A.2d 740, supra. We agree with such rulings and do not suggest that the possession or sale of marijuana be treated the same as that of heroin or opium. But neither can we hold as being within the limitations of due

process a statutory scheme which treats prohibited acts involving opium or heroin differently from the same acts involving marijuana for the purpose of penalizing the latter more severely than the former.

The Trust Territory must insure equal protection of the law to its citizens, 1 TTC § 4, and provide the protection of due process pursuant to the definition given to this phrase in the United States. *Ichiro v. Bismark*, 1 T.T.R. 57 (1953). *Purako v. Efou*, 1 T.T.R. 236 (1955).

It is therefore ordered that the motion to dismiss the case of *Trust Territory of the Pacific Islands v. Mariana R. Bermudes*, Criminal Case No. 306-73, is granted on the basis that the challenged statute constitutes an unlawful delegation of the legislative power, is violative of the equal protection clause, and the complaint against the movant is dismissed.