[2010] UKPC 17
Privy Council Appeal No 0001 of 2010

JUDGMENT

Razcoomar Moodoosoodun *v* The State of Mauritius

From the Supreme Court of Mauritius

before

Lord Phillips
Lord Rodger
Lord Walker
Lord Brown
Lord Clarke

JUDGMENT DELIVERED BY
Lord Clarke
on

21 July 2010

Heard on 28 April 2010

Appellant
Gavin Glover
Yanilla Moonshiram
(Instructed by MA Law (Solicitors) LLP)

Respondent
Satyajit Boolell
Mrs G Green-Jokhoo
(Instructed by Royds LLP)

LORD CLARKE

Introduction

1. The application for special leave to appeal to the Judicial Committee of the Privy Council was considered by the Board immediately after the hearing of the appeal in the case of *Gangasing Aubeeluck v The State of Mauritius*. Although the Petition seeks to advance a number of grounds of appeal, both against conviction and sentence, only one ground was advanced at the hearing. It was essentially the same ground as was advanced in the case of *Aubeeluck*, in which judgment is given today. The Board therefore refuses leave to appeal on all the other grounds.

Convictions and sentence

2. On 8 January 1999 the appellant was arrested and charged with two offences, which became counts 1 and 2 on the indictment preferred against him. Count 1 alleged that he did criminally, wilfully and knowingly cultivate 125 gandia plants ranging from 25 cms to 1.5 metres in height and 6 gandia seedlings, contrary to section 33 of the Dangerous Drugs Act 1986 ('the DDA 1986'). It was further alleged that, having regard to the quantity of gandia cultivated, it could reasonably be inferred that he was trafficking in drugs within the meaning of section 38 of the DDA 1986. Count 2 alleged that he was unlawfully and knowingly in possession of 2.1 grams of gandia. Gandia is otherwise known as Cannabis Sativa L.

3. There was considerable delay before the appellant came to trial. He was convicted on both counts, including trafficking on count 1, on 28 December 2006. For the same reasons as in the case of *Aubeeluck*, under the DDA 1986 and section 11(1) of the Criminal Code, the minimum sentence on count 1 was a fine not exceeding Rs 100,000 and penal servitude of not less than 3 years. The Magistrate sentenced the appellant to a fine of Rs 10,000 and to the minimum term of three years' penal servitude on count 1. On count 2 the appellant was fined Rs 5,000. Execution of the judgment was stayed pending an appeal.

Appeal to the Supreme Court

4. On 2 October 2009 the appellant's appeal to the Supreme Court against conviction was dismissed by SB Domah and S Bhaukaurally. So far as the Board can understand it, there was no appeal to the Supreme Court against sentence. On 26

November 2009 the Supreme Court refused leave to appeal to the Privy Council. The matter was subsequently considered by the Judicial Committee, which directed that the matter be dealt with at the same time as or immediately after the appeal in *Aubeeluck* if there was time.

Appeal to the Privy Council

5. In the event the Board heard argument on the application for leave to appeal against sentence immediately after hearing the appeal against sentence in *Aubeeluck*. The argument was sufficiently substantial to enable the Board to determine both the application for leave to appeal and the appeal itself.

6. The basis of the appellant's argument is almost identical to that on behalf of the appellant in *Aubeeluck*. The Board accordingly adopts both its reasoning and conclusions in *Aubeeluck* in this case. The issues are the same, as are the relevant provisions of the Constitution of Mauritius and of the DDA 1986 and the Dangerous Drugs Act 2000 ('the DDA 2000'). Moreover, the Board does not wish to add anything to its discussion in that case of the principles of proportionality, delay and la peine la plus douce.

7. The facts of this case are of course different from those in *Aubeeluck*. However, for similar reasons to those in that case, the Board concludes that, if proper consideration is given to the fact that the minimum sentence of 3 years has no regard (a) to any mitigating circumstances available to the appellant, (b) to the inordinate delay of some 11 years since the offences were committed and (c) to the fact that the position under the DDA 2000 now would be very different from the position under the DDA 1986, a sentence of 3 years would now be wholly disproportionate both to the offence committed and to the circumstances of the case, at any rate as viewed now.

8. It was submitted on behalf of the appellant that the board should quash the sentence of penal servitude and substitute it with an increased fine. However, essentially for the same reasons as in *Aubeeluck*, the Board has concluded that the Supreme Court is in a better position than the Board to assess the just sentence. That is in particular so because the Board knows little or nothing about the mitigation which may (or may not) be available to the appellant.

CONCLUSION

9. For these reasons the Board quashes the sentence of 3 years penal servitude and remits the issue to the Supreme Court for decision. Subject to written submissions,

which are to be remitted to the Board within 21 days, the respondent is to pay the appellant’s costs of this appeal.