IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM

CRIMINAL APPEAL NO 12 OF 2000

MERY LAMBE

V

PUBLIC PROSECUTOR

Before: HUGGINS, SILKE AND MOHAMMED SAIED, J J.A.
Date of Hearing: 11 OCTOBER 2000
Date of Judgment: 17 OCTOBER 2000.

J U D G M E N T

SILKE, J.A.

Abdul bin Kintuan (D1) and Mery Lambe (D2) appeared on 6th January, 2000 before Chong J. in the High Court on a joint charge of being in possession of 26.875 grammes of Methylamphetamine contrary to section 6 of the Misuse of Drugs Act Cap. 27 – this figure was later amended to read 26.7938 grammes. We shall call it "Shabu" the term used in Brunei Darussalam.

Abdul (D1) pleaded not guilty and Mery pleaded guilty.

There were a number of related minor charges also laid against the pair: the second, to which they both pleaded not guilty, was a joint charge of being in possession of apparatus intended for the consumption of a controlled drug contrary to section 7 of the Act: the third charge was consumption of Shabu laid again Abdul only and to which

he pleaded guilty the fourth charge was consumption of Shabu laid again Mery alone to which she pleaded not guilty initially.

On the 4th April, the date set for trial, the possession charge against Abdul was withdrawn and he was discharged on that charge.

The joint second charge was also withdrawn and both the accused were discharged on that. The fourth charge was put again to Mery (D2) and to it she then pleaded guilty.

On the third charge Abdul was fined $1,500 or 3 months imprisonment in default. He has not appealed and we are no longer concerned with him.

On the first charge, Mery, the appellant before us, was subsequently sentenced to the minimum sentence provided by law, five years imprisonment: on the fourth charge, she was sentenced to a fine of $1,500 or three months imprisonment in default of payment to run consecutively to the imprisonment imposed on the first charge.

There had been an application by the prosecutor for forfeiture of monies found at the time of the offence in Mery's possession and said to be the proceeds of drug trafficking. This application was under the provision of the Emergency (Drug Trafficking) (Recovery of Proceeds) Order 1996. That these monies were from drug dealing was strenuously denied by Mery. The trial judge, after a trial of the issue, granted the application.

Mery now appeals against the whole of the sentence.

The brief facts presented by the prosecutor at the conviction hearing were that on the 22nd October, 1999 Narcotics Officers led by Hj. Ahmad bin Matassan, Assistant Director of Enforcement, raided an apartment at No 7, 3rd floor, Simpang 250 Kg Panchor Papan, Tutong. Abdul and the appellant were present in the apartment and were

arrested. There was a search and this resulted in the finding of a black bag underneath a bed which contained 13 packets of Shabu.

Another black pouch, labelled "Nike", was also found and this contained bundles of money totalling MR14,800. It also contained a wallet, labelled "Bonia", which itself contained B$21,435 and some jewellery. The monies were the subject of the application for confiscation. The jewellery was returned to the appellant.

Also found were a weighing scales and numerous empty plastic packets.

Both persons were brought to the Narcotic Bureau and there it was alleged that the appellant said the drugs belonged to one Mustapha. She intended to sell them in Brunei. It was also alleged, when that statement of facts was read out in open Court, and this is important in relation to the confiscation order, that the appellant admitted that the money seized was from drug trafficking.

At trial the appellant agreed with all of the facts except those covering the money and the judge recorded her as saying:

> "(1) the drugs belong to Pehin Sahari and not Mustapha.
> (2) M$14,800 belongs to me. I brought about M$16,000 with me. I earned this from prostitution in Limbang.
> (3) of B$21,435 only B$3,000, which belongs to Pehin Sahari, was from the sale of drugs. I earned the rest from prostitution in Limbang"

At the hearing on the 8th of May, 2000 the statement made on 22nd October – the day of arrest – to Narcotics Office Hj Alinor at the Anti Narcotic Bureau was produced as was the record of the relevant entries in the appellant's passport showing her travels to Limbang. This latter showed that the appellant had made eight trips to Limbang between August, 1998 and April, 1999. On three of those occasions she had returned the same day.

In the statement produced the appellant mentioned her period of stay in Brunei of 2 years, her work in Yu Sen Furniture for one year and then her job as an unregistered domestic helper at the home of Mustapha. She had left that employment. Abdul (D1) was her fiancee who had stayed with her in Bukit Beruang and on the night before her arrest, they both had moved to Pancor Papan and stayed in a rented room. She said Sahari had asked her to stay there. She denied knowing the ownership of the black bag found in the raid. She did not admit the money MR$14,800 was hers but she did admit that the money in the Bonia wallet, B$21,435, was hers. She denied ownership of the scales found and she further denied ever taking or selling Shabu. The witness was not cross examined by the appellant who appeared in person as she does before us.

Then came the Assistant Director of the Narcotic Bureau Hj Ahamd bin Matassan.

He stated that in the black pouch -"Nike"- there were several names and phone numbers of persons known to the Bureau.

He tendered a minute from the Intelligence Unit making reference to the persons named. They were under investigation.

Some of the bundles of money had notes attached stating the amount and the word "untong", or "profit". He went on to say that from his experience this meant profit from the sale of drugs. He did not say why this word could be applied only to drug profits and not to profits from any other business.

He made reference to other notes being found attached to currency one of which he said contained the words "$18,200 – $4,000, remainder $14,800 myself" and further said that one bundle of notes had a piece of paper attached containing the name of the appellant and her identity card number.

What he did not say is to what bundles of what currency and where they were found these notes attached. None of these notes appear to have been produced.

Further in the wallet, found in the "Nike" pouch, was a piece of paper showing the conversion of Brunei currency into Malaysian currency and another piece of paper containing names and mobile phone number. The identity of these names was not known.

He gave it as his opinion - a matter really for the judge not the witness - that the cash in the pouch and the wallet was from the proceeds of drug trafficking. He was asked no questions.

The appellant then gave evidence to the effect that she was a 28 years old prostitute from Indonesia that, of the money seized, only B$3,000 related to the sale of drugs, the rest was her earnings from her profession and it had been earned as to MR$14,800 from prostitution in Limbang, starting from 1997, and as to B$18,000 from prostitution in Brunei.

She contested that portion of her statement which recorded her as claiming that the Brunei money in the "Bonia" purse belonged to her.

In cross examination, she stated she did not have a fixed charge for her services. She charged $150 per client and might be paid up to $200. This in Limbang where she worked on her own.

In Brunei, she used a pimp to whom she paid commission. For a full nights booking she would charge $1,500 of which the pimp would get between $300 and $500.

Her work as a prostitute was not full time and her earnings averaged, in Limbang, about $2,000 and in Brunei $1,000 to $1,500 per month.

The trial was adjourned to the 11th May and again to the 17th May and on that day the cross examination of the appellant continued. She spoke of her movements in Brunei and of Pehin Sahari taking herself and Abdul (D1) to the apartment where they were arrested. That belonged to Sahari. He was to bring a "client" from Kuala Belait for her. She repeated that of the money only $3,000 was from the sale of drugs and that belonged to Pehin Sahari. She had been told to keep it for him and she had got it from him on the night before her arrest.

As to her ordinary work she said that in the furniture store she was paid only $30 per month. Her work as an amah was not paid work. She continued to work in the furniture store, while also acting as a prostitute, as she needed a place to stay.

She denied knowing the persons named on the pieces of paper and said the notes attached to some of bundle of cash indicated the profit she had obtained from prostitution less the cost of room rent in Limbang. She denied ever exchanging Brunei currency into Malaysian currency.

No further witnesses were called.

Under the provision of section 3 of the Order, the Court, when an accused before it appears for sentence on a drug trafficking offence - as here -, shall first determine whether he has benefited from drug trafficking. This means: has the accused received in any way any payment or other reward in connection with drug trafficking carried on by him.

Then the Court, if it so determines, decides the amount to be recovered in accordance with section 7 of the Order. Section 7(1) provides that the amount to be recovered under a Confiscation Order shall be the amount the Court assesses to be the value of the proceeds of drug trafficking. The Court must then order the person to pay the amount so determined.

Section 5 permits the Court, in a matter of this kind, to make certain what are termed "assumptions" the first applicable one being in section 5(3)(a)(ii). If any property - and this by definition includes money - appears to the Court to have been transferred to him during the period of six years prior to the charge of trafficking being brought against him that it was received by him as payment or reward in connection with the drug trafficking carried on by him.

We need not concern ourselves with other provisions of the Order.

In making the Order he did, the trial judge considered and took note of the judgment of Lord Lane C.J. in R.V. Dickens (1990) 12 Cr. Appeal Rep. (S) 191 - an appeal against a Confiscation Order.

What the judge had to decide, at the trial of the issue, and bearing in mind that the burden of proof on the prosecution is the civil burden, is did the appellant "benefit" from drug trafficking and, if so, to what extent.

The trial judge was, on the evidence, entitled to make the assumption that the monies found in the appellant's possession had been received by her as payment or reward in connection with drug trafficking.

But that, of course, is not the end of the matter for, as the trial judge realised, it was open to the appellant to show, again on the balance of probability, that the money seized was not the proceeds of drug trafficking. This she attempted to do by the evidence she gave.

The judge held that she had failed to discharge that burden.

The main issue in this appeal is whether he was right so to do.

Her evidence at trial, in certain aspects, contradicted uncontested portion of her statement. In her statement she had said that she did not admit that the money in the black bag was hers and went on:

"I only admit that the money in the black "Bonia" purse is mine"

In evidence she said that only $3,000 of it was from drug trafficking and that belonged to Pehin Sahari. She had denied taking Shabu but her urine test showed that she had. She made no mention of prostitution.

In disbelieving the evidence of the appellant, and thus finding that she had failed to rebut the allegation, the judge considered carefully everything she said together with the evidence of the prosecution, in particular the notes attached to some of the bundles of cash showing the amount and the profits. He specifically disregarded the evidence concerning the pieces of paper with names written on them of persons being investigated by the Bureau considering their prejudicial effect to outweigh any probative value.

One point does trouble us. In the course of his judgment the judge said this: (P2)

> "Forming part of the prosecutions statement of facts was the allegation that Mery had admitted the money seized was the proceeds of drug dealing. This was strenuously denied by Mery in Court".

As we have said, in the statement of facts read out at the conviction hearing the appellant had admitted "the money" was from drug dealing. Unless she made a statement other than the one of the 22nd October - and none was produced - the only admission she made in this regard was that the money in the "Bonia" purse was hers.

There appeared in the statement of facts read out in open Court after Mery pleaded guilty (P5) the words:

"D2 also admitted that the money seized was from drug trafficking".

We asked Haji Rozaiman, who appeared for the Public Prosecutor both at the trial and before us, how this matter had arisen, given that the only statement before the trial Court, and ourselves, contained no such general admission. He explained that, during an adjournment of the hearing and before the statement of facts was read out in open court, he had interviewed the appellant for the purpose of reading out to her that statement of facts and that it was only then that she made the admission and to the Prosecutor.

The appellant says that she was then making reference only to the $3,000 which she accepts came from drug trafficking but was that of Pehin Sahari.

With respect to Haji Rozaiman, it is unfortunate that all this was not explained to the judge who clearly was under the impression – as was this Court until it heard the explanation – that the admission, first, covered all the money and, second, had been made at sometime in the course of the investigation.

It is highly inadvisable for a prosecuting advocate to interview an accused in this manner though we accept that here it was done with the best of intentions: to read over to the accused the statement of facts which were shortly to be produced in open court.

An accused is entitled to be made aware of that which the prosecution will state to be the facts. This is normally done by having them read out in open court and for the accused then to be given an opportunity to contest all or any one of them before conviction is recorded. It is certainly of help to an accused, and anything which we now say will not, we hope, inhibit the practice, to be made aware, before they are read out, of the contents of a statement of facts but this should be done by seeking the help of the Court interpreter – for the statement is usually in English – to read it over to the accused.

That which happened here makes it necessary for us to consider what, if any, effect the so called admission may have had on the mind of the judge in his assessment of the credibility of the appellant and his belief or non-belief in her evidence. Her credibility was clearly in issue for the issue here was that very credibility.

That having been said, the judge was fully aware of and did give proper consideration to the appellant's strenuous contradiction of the so called admission. He was, as we have indicated, seen to take account of everything the appellant said to him. It was entirely for him to evaluate that evidence as a whole and nothing appears to us to show that he failed in that duty nor, indeed, that the so called admission played any major role in that evaluation.

He was entitled on the evidence overall to come to the conclusions he did.

The sentence of imprisonment on the trafficking charge is the minimum that could be imposed. It cannot be faulted what ever her family circumstances may be.

The sentence on the consumption charge of a fine of $1,500 or 3 months imprisonment is tantamount, in the circumstances, to adding three months to the main sentence. While in no way condoning the consumption of Shabu, we are minded in this individual case to reduce that fine to one of $100 with 14 days imprisonment in default consecutive to the five years term.

We confirm the order of confiscation made under the provisions of the Order.

WILLIAM JAMES SILKE
Judge, Court of Appeal

SIR ALAN HUGGINS
Judge, Court of Appeal

MOHAMMED SAIED
Judge, Court of Appeal

Appellant

In person

DPP Hj Rozaiman

for Public Prosecutor