**AWG BESAR BIN AWANG SOKIAW**

**AND**

**PUBLIC PROSECUTOR**

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**(Court of Appeal of Brunei Darussalam)**
**(Criminal Appeal No. 15 of 2015)**

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Before: Mortimer P, Leonard and Burrell JJ A.
**24th November 2015**

*Headnote: Appeal against conviction and sentence. Appellant sentenced to 21 years imprisonment and 15 strokes for possession of 48.3911 grammes of Methylamphetamine for the purpose of trafficking contrary to s.3A Misuse of Drugs Act CAP 27. Proper application of legal presumptions under ss 15, 16 and 19 of Misuse of Drugs Act considered. Sentence not manifestly excessive. Appeals dismissed.*

Lt. Col (R) Hj Harif bin Hj Ibrahim (M/S Lt Col (Rtd) Harif Eric) for Appellant
DPP Hjh Farhanah POKPSRDPSS Hj Awg Suhaili for Respondent

**Burrell, JA.:**

This is an appeal against conviction and sentence by Awang Besar bin Awang Sokiaw who was convicted after trial in the High Court by Hairol Arni Majid J on 31st August 2015. Prior to trial there was a co-defendant due to be tried together with this appellant named Mohd Hatta bin Haji Adis. This defendant had died before the commencement of the trial and thus the appellant stood trial alone. The deceased was D1 and the appellant was D2. We refer to them as such in this judgment.

D2 was convicted of possession of 48.3911 grammes of Methylamphetamine for the purpose of unlawful trafficking on 9th January 2013 contrary to s.3A of the Misuse of Drugs Act CAP 27. He was sentenced to 21 years imprisonment and 15 strokes. He had also pleaded guilty to an offence of consumption of a dangerous drug contrary to s.6(b) of CAP 27 for which he received a concurrent sentence of 3 years imprisonment.

***The Facts***

The facts, either as agreed or as found by the judge, may be summarised in so far as they are material to the issues in this appeal, as follows.

On 9th January 2013 several officers from the Narcotics Bureau were in police vehicles when they had cause to prevent a white Mitsubishi Lancer, being driven by D2 and with

D1 in the passenger seat, from leaving a slip road on its way onto the main road. The driver's reaction was to reverse back up the slip road at speed. When it came to a halt D1 fled from the vehicle but was later caught.

D2 continued to attempt to evade the NCB vehicles. After the Lancer had collided with a police car and it was forced to come to a final halt, attempts were made to extricate D2 from the vehicle. This was eventually done but only after D2 had repositioned himself in the rear of the Lancer. Not without a struggle he was subdued and handcuffed.

The vehicle was searched. In the footwell of the rear seats was found a black bag labelled "SNOWORLD". This contained 27 packets containing a substance, later analysed as Methylamphetamine and a second bag labelled "CYBERSHOT" containing a blue plastic straw, a weighing scale and B$1,806 in cash. In the boot of the car was a green bag labelled "ECHOLAC" which contained B$8,860 and SG$100. Empty plastic packets were also seized.

The Government chemist's certificate later showed the total weight of the Methylamphetamine in the "SNOWORLD" bag was 48.3911 grammes which had a market value in excess of B$48,000.

All the evidence relating to the search of the vehicle, the seizure of the exhibits and the analysis of the drugs was unchallenged at trial. The case turned, primarily, on whether or not the prosecution had proved beyond a reasonable doubt that D2 had been in possession of the drugs. His denial of possession was central to his evidence at trial.

His first account of the events of 13th January 2013 came when he gave evidence at trial. He had made no statement, written or oral, concerning his version of events, prior thereto. This particular fact is an issue we address later in this judgment.

His evidence was that he had been asked by D1 to drive him in the Lancer, which it was accepted was both owned and driven by him (D2) at the material time, to Kg Masin to purchase some spare parts in connection with his work. He noticed that D1 was holding the black "SNOWORLD" bag. After the journey for the spare parts they proceeded on, intending to go to D1's house. En route, the confrontation with the NCB cars occurred. He said D1 fled from the car immediately, he did not know why. He said he reversed away out of fear because he did not realize they were NCB vehicles. In the course of a violent attack on him he sought refuge in the rear of the vehicle but was eventually dragged out and detained. He said he was badly assaulted. He knew nothing about the "SNOWORLD" bag nor the "CYBERSHOT" bag. He admitted however that the "ECHOLAC" bag containing B$8,860 and SG$100 belonged to him. He explained that this money was the proceeds from his business in which he rented out 3 boats which he owned. His monthly income from the boats was about $600 a month. The judge rejected this explanation for the money.

***Grounds of Appeal***

***Grounds 1 and 2***

Grounds 1 and 2 state that the judge "erred in fact and in law" in finding that the appellant was, in Ground 1, "in possession" of the SNOWORLD bag and in Ground 2 "in joint possession" of the bag.

The amended 1st charge, in so far as is relevant, states that "both of you....did have in both of your possession 48.3911 grammes of Methylamphetamine.....for the purpose of trafficking."

Why the grounds of appeal make a distinction between "possession" in Ground 1 and "joint possession" in Ground 2 is not understood. Had D1 not died the prosecution would have endeavoured to prove that the ingredient of possession of the bag was proved beyond a reasonable doubt against both of them, in the sense that the bag was under the physical control of them both.

In the absence of D1 at trial the prosecution were required to prove the ingredient of possession against the only person on trial, D2. The element of "joint possession" plays no further part. It was not necessary to prove that D1 was also in possession. He was not on trial and his version of events had never been heard or tested.

The judge rightly said in his judgment "it is the incumbency on the prosecution to prove that the 2nd defendant had the controlled drug in his possession..."

The judge made a finding that D2 was in possession of the drugs seized. We now examine how he came to this decision. The classic definition of possession is that *"one has in one's possession whatever is, with one's knowledge, physically in one's custody or under one's physical control."* (DPP v Brooks 1974 ALL ER at p842)

In the present case the drugs were in a bag situated in the rear of a vehicle owned by and, at the material time, being driven by the appellant. This much is agreed. The appellant simply denied he had any control over the bag, which was not his, nor did he have any knowledge of its contents.

By virtue of the presumptions in s.16 and s.19 of CAP 27 the onus fell on D2 to satisfy the court on a balance of probabilities that he was not in possession of the drugs seized.

s.19 provides that:

> *"if any controlled drug is found in any vehicle it shall, until the contrary is proved, be presumed to be in the possession of the owner of the vehicle and of the person in charge of the vehicle for the time being."*

The appellant was both *"the owner"* and *"in charge at the material time."*

s.16 provides that:

> *"(1) Any person who is proved to have had in his possession or custody or under his control-*
> *(a)Anything containing a controlled drug, shall, until the contrary is proved, be presumed to have had such drug in his possession*
>
> *(2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug."*

Both these presumptions were triggered by the unchallenged evidence. It was the judge's task therefore to decide whether, on the whole of the evidence including D2's testimony, the presumptions had been rebutted on the balance of probability.
The judge saw and heard D2's evidence and that of his witnesses. He concluded "having dismissed his defence, I am in no doubt that the prosecution has proven its case beyond reasonable doubt." Earlier he had said "I have not been persuaded that the 2nd defendant has been truthful in his testimony. I believe his defence was an afterthought expediently manufactured to suit his defence."

In coming to this conclusion he weighed in the balance and analysed the key factors which had emerged in evidence. In particular, he rejected the claim that D2 was "a mere driver." He noted that he and D1 had been together for a few hours prior to arrest. He accepted the prosecution version of events at the scene of arrest and that D2 was aggressively attempting to evade arrest which was conduct consistent with his knowledge that drugs were in the car. He also had "no hesitation" in disbelieving D2's account for his possession of such a large sum of money.

***Ground 5***

In addition the judge drew an inference against the appellant arising out of the fact that he declined to say anything in answer to the charge when invited to do so. Even when given a second opportunity, on 29th January 2013 he only stated that he "wished only to tell his statement in court." The judge said "I believe any ordinary reasonable person in his position would be readily available to put his side of the story when offered to record the statement, at the very least, the gist of his defence...". The judge also concluded that, given his silence, the appellant was able to, and did, manipulate his defence to take advantage of D1's subsequent death.

The judge's conclusion that the ingredient of possession had been proved beyond a reasonable doubt cannot be criticised. This deals with Grounds 1, 2 and 5 of the Notice of Appeal.

***Grounds 3 and 4***

These grounds state that the judge erred in fact and in law in "its finding of trafficking" and by making a "double presumption of joint possession and trafficking".

These grounds can be disposed of briefly.

The charge is not of "trafficking", it is of "possession for the purpose of trafficking."

The starting point for proof of this ingredient of the offence was the weight of the drugs, over 48 grammes.

s.15 of CAP 27 provides that:

> *"Any person who is proved <u>or presumed</u> to have had in his possession more than (g) 20 grammes of Methylamphetamine ....shall until the contrary is proved, be presumed.....to have that controlled drug in his possession for the purpose of trafficking...."* (emphasis added)

This presumption was therefore triggered and, by the very nature of his defence, the appellant gave no evidence in rebuttal. His evidence was confined to his denial of possession. The judge was nonetheless required to consider all the evidence before relying on the presumption, which he did. He noted further evidence in support of the contention that the possession was for the purpose of trafficking in the siezure from the vehicle of a weighing scale, a blue straw and many empty packets similar to the 27 packets in which the drugs were found.

Both in his written submission and orally before this court Lt. Col (Rtd) Hj Harif, on behalf of the appellant, complained that the judge's decision was flawed because, inter alia, (a) there was "no evidence of trafficking" and (b) the judge should not have relied on a "double presumption." Both these contentions were devoid of merit and such authorities that were advanced in support were of no assistance as they had no bearing on the real issues which the judge had to decide.

First, as already stated, there was no charge of "trafficking" before the court. The proof of "possession for the purpose of trafficking" has already been dealt with above. Secondly, his submission that if the first ingredient, namely "possession", is proved in part by the operation of a legal presumption then it is not lawful to prove the second ingredient, namely "for the purpose of trafficking" by the operation of another legal presumption, is misconceived and wrong. The words of s.15 above, namely "a person who is proved *or presumed* to have had in his possession..." could not be clearer.

For all the above reasons, grounds 1-5 inclusive, of the Notice of Appeal are without any substance.

***Sentence***

In his oral submission Lt. Col (Rtd) Hj Harif seemed reluctant to face the reality that the minimum sentence available to the court for the offence charged was 20 years imprisonment and 15 strokes for quantities over 40 grammes. The appellant was sentenced to 21 years and 15 strokes after trial for 48 grammes. To seriously argue that such a sentence, in the circumstances, was manifestly excessive was baseless.

***Order***

The appeals against conviction and sentence are both dismissed.

**Mortimer, P.**

**Leonard, J.A.** **Burrell, J.A.**