

CHIEW KWANG MING

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 17 of 2014)

Before: Mortimer P, Leonard and Burrell JJ A.
12th November, 2014

Headnote: Appeal against sentence dismissed. Guidelines for importing Methylamphetamine under Section 5 of the Misuse of Drugs Act approved.

Mr Rudi Lee Kim Boon for the Applicant
DPP Hjh Atiyah Azzahra POKLSDSLJ Awg Hj Abas for Respondent

Cases cited in the Judgment:

Hwong Yu Ping v Public Prosecutor (Criminal Trial Number 24 of 2013)

Roslan bin Mohd Yunos and Public Prosecutor (Criminal Appeal Number 6 of 2005).

Mortimer. P:

On 24 July 2014 the appellant appeared before HHJ Hanani in the Intermediate Court where he pleaded guilty to importing 17.6513 grams of Methylamphetamine. This offence was under section 5 of the Misuse of Drugs Act punishable under section 29 and the 2nd schedule. For this offence he was sentenced to 11 years imprisonment and 10 strokes.

He appeals against this sentence on the grounds that it is wrong in principle and manifestly too heavy.

The Facts

On 19 September 2013 the appellant drove his Toyota car across the border into Brunei at Kuala Belait. He had the 2 packets of drugs the subject of the charge with him. He was stopped by an Officer from the Narcotics Control Bureau and when an inspection was carried out the 2 packets were found in the car. These drugs were later analysed and found to be Methylamphetamine.

The Sentencing

In sentencing the judge took into account detailed submissions on behalf of the appellant and noted in particular that he was a 1st offender, that is he was a 29 years old divorced man with 2 children, that he had been on remand since 19 September 2013 and that he was a foreigner. Under the relevant section of the act the minimum sentence which can be passed for this offence is 5 years imprisonment with 5 strokes. Counsel for the appellant submitted that in all the circumstances of this case the minimum sentence was the appropriate sentence. This the judge was unable to accept and she followed the guidelines in *Hwong Yu Ping v Public Prosecutor (Criminal Trial Number 24 of 2013)* and *Rosian bin Mohd Yunos and Public Prosecutor (Criminal Appeal Number 6 of 2005)*.

In the latter case this court laid down sentencing guidelines for unauthorised possession of Methylamphetamine for the purposes of trafficking contrary to section 3A of the Misuse of Drugs Act. In the former case Steven Chong J correctly noted that those guidelines were in inappropriate where the offence was importation under section 5 of the Act.

Concerning those guidelines he said:

“ Those guidelines cannot apply to a conviction for the import of Methyl amphetamine contrary to section 5 of the MDA since the threshold quantity of Methylamphetamine attracting the minimum sentence of 20 years and 15 strokes for the offence is 20 g – half that of section 3A. Under section 5, a minimum sentence of 5 years and 5 strokes applies where the quantity of Methylamphetamine is below 20 g.

Given the above regime I suggest a pattern of progressive sentences upon conviction under section 5 where the quantity of Methylamphetamine is below 20 g as follows:

- (i) not exceeding 5 g – 5 years and 5 strokes*
- (ii) 6 to 10 g – 6 years and 6 strokes to 10 years and 8 strokes.*
- (iii) 11 to 19 g -11 years and 9 strokes to 19 years and 14 strokes*

The levels of sentences indicated above are appropriate after a contested trial and without previous convictions.”

Judge Hanani could see no reason from either the facts of the case, the circumstances of the offender, the offence, nor the mitigation advanced for departing from them. Having regard to the amount of the drugs she chose a starting point of 17 years with 14 strokes which she reduced by one third for the plea making the sentence of 11 years and 10 strokes which she passed.

The Appeal and Discussion

In support of his submission that the sentence is wrong in principle, Mr Rudi Lee first submits that subcategories of sentencing between the minimum and maximum provided are contrary to the legislative intent of the Act and are an unwarranted limitation upon a judge’s wide discretion on sentencing provided in the act.

Consequently, he continues, sentencing is reduced to an automatic mathematical exercise which undermines the basic principles of judicial sentencing.

Whereas it must be conceded that, on one view, sentencing do fetter a judge's discretion in sentencing they are recognised in this jurisdiction and in many other common law jurisdictions as a means to assist judges to exercise their discretion in a more just and consistent manner. Judges have always found helpful guidance in sentencing from the way in which other judges have exercised their discretion on sentence in similar cases.

However, as Mr Rudi Lee also correctly submits, guidelines are only guidelines. Judges will follow them but must depart from them if there is good reason from either the circumstances of the offender or of the offence for doing so. In which case judges ought to say what those circumstances are and why the guideline is not being followed.

Additionally Mr Rudi Lee advances mitigating circumstances which he rightly asks the court to take into account. In summary these are the appellant's age of 29 years; the fact that he is divorced and has young children; that he is the sole breadwinner for the family; that he has an aged mother who will be left without support; that as a 1st offender he has no previous convictions; that there was a 5 month delay in prosecuting the case because of difficulties with the analyst that he co-operated with the police from the outset; and pleaded guilty at the earliest reasonable opportunity.

Conclusion

We are unable to accept counsel's submissions that guidelines are contrary to the legislative intent. Guidelines are of assistance to judges in exercising their wide discretion in difficult cases. They greatly assist judges in the proper exercise of their wide discretion and lead to greater justice in the conformity of sentences for similar offences.

We have considered the guidelines suggested by Steven Chong J in *Hwong Yu Ping v Public Prosecutor* which were followed by the judge. We consider them to be of considerable help in this type of case. However, as set out they are not comprehensive as they do not cover cases where the amounts involved are between 5g and 6g, between 10g and 11g, and between 19g and 20g. Nor do the sentences proposed run consecutively. We therefore vary the guidelines as follows:

For a conviction under section 5 of the Act where the quantity of Methylamphetamine is below 20g as follows:

- (i) not exceeding 5g – 5 years imprisonment and 5 strokes
- (ii) 5g to 10g – from 6 years imprisonment and 6 strokes to 10 years imprisonment and 8 strokes.
- (iii) 10g to 20g – from 11 years imprisonment and 9 strokes to 19 years imprisonment and 14 strokes.

These levels of sentences are appropriate after a contested trial for a defendant without previous convictions.

Subject to this variation we agree with the suggested guidelines in *Hwong Yu Ping* and approve them as varied.

When she followed these guidelines the judge found nothing in the circumstances of the offence or the offender which justified departing from them. With this we also agree. As often the offender's circumstances are such that as a young man he finds himself facing a substantial sentence of imprisonment with his family facing serious hardship. These are distressing circumstances to which only limited effect can be given on sentence because of the serious public harm brought about by the importation of dangerous drugs. These heavy sentences are intended to deter those such as the appellant who import dangerous drugs into Brunei. The judge sentenced accordingly having taken into account that matters urged by Mr Rudi Lee.

In all the circumstances, the judge properly reduced her starting point by a third for the plea.

The resulting heavy sentence of 11 years imprisonment and 10 strokes is neither wrong in principle nor excessive. The appeal against sentence is dismissed.

Order

The appeal against the sentence of 11 years imprisonment and 10 strokes is dismissed.

Mortimer, P.

Leonard, J.A.

Burrell, J.A.