TEO BOO MIN

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 23 of 2014)

Before: Mortimer P, Leonard and Burrell JJ A.
11th of November 2014

Sentence – Drug offences – Consecutive or concurrent sentences – Consideration of sentences for simple possession of Class A drugs

Mr P.Roy Rajkumar A/L C.V Prabhakaran and Ms Evelyn Lee Xin Yin for the Applicant
DPP Pg Nina Jasmine PLKDR Pg Hj Bahrin for Respondent

Cases cited in the Judgment:

Public Prosecutor v Norsaidi bin Hj Bankot [2005] JCBD 186
Baharun bin Samsudin v Public Prosecutor [2013] JCBD
Public Prosecutor v Salleh bin Sirat [2013] JCBD
Rasidi bin Daud v Public Prosecutor [2013] JCBD

Burrell, JA.:

On 20 August 2014, the appellant was sentenced to a total of 6 years imprisonment and 5 strokes having earlier pleaded guilty to 5 drug related offences. In outline those offences were as follows:

i Possession of tablets weighing 92.9 grammes containing 4 grammes of a Class A controlled drug, namely MDMA for the purpose of trafficking contrary to s.3A of the Misuse of Drugs Act CAP 27.

ii Possession of 20 tablets weighing 5.5 grammes containing 0.7703 grammes of a Class A controlled drug namely MDA (also known as Tenamphetamine) contrary to s.6 (a) of the Misuse of Drugs Act CAP 27.

iii Consumption of MDMA, a Class A controlled drug contrary to s.6 (b) of the Misuse of Drugs Act CAP 27.

iv Consumption of Methylamphetamine a Class A controlled drug contrary to s.6 (b) of the Misuse of Drugs Act CAP 27.

v Possession of poisons namely 58.7 grammes of crystalline substances containing Ketamine contrary to s.9(1) (b) of the Poisons Act CAP 114.

All these offence were committed on 3 November 2011 when the appellant was stopped by the police when driving his car. The appellant and the car were searched and the drugs referred to in (i), (ii) and (v) were found. Later the same day the appellant gave a urine sample at the police station. The sample tested positive for drugs resulting in the offences at (iii) and (iv) above.

The appellant was remanded in custody from the date of his arrest but he was not sentenced until 20th August 2014 some 2 years and 10 months later. He had originally entered pleas of not guilty to all charges but even this was not until 15th June 2013, 20 months after arrest. His pleas of guilty to the five charges were first entered on 11th August 2014 and he was sentenced on 20th August as follows:

i 5 years and 5 strokes (the minimum sentence permitted by law)
ii 1 year consecutive
iii 1 month concurrent
iv 1 month concurrent
v 1 month concurrent, making a total sentence of 6 years and 5 strokes imprisonment against which he now appeals.

The appeal

The issues on appeal have been helpfully reduced to two questions:

i Were the Judges below correct in making the 1 year sentence on the second charge consecutive to the 5 years on the first?

On behalf of the appellant Mr Prabhakaran submits that they should have been concurrent.

ii Was the 1 year sentence on the second offence (simple possession of 0.77 grammes of MDA) manifestly excessive or wrong in principle?

Mr Prabhakaran submits that no more than about 2 months would have been the correct sentence.

Before turning to these questions we note the mitigating factors which were taken into account at the time of sentencing. The appellant was 31 at the time of the offences and had a clear record. He had been educated in England and Canada. He had recently fallen into bad company which led to these offences which were out of character. He had pleaded guilty and had been in custody since November 2011.

The issues

1. Did the sentencing Judges err when ordering consecutive sentences?

We are not persuaded that the order for consecutive sentences was wrong in principle. It is true that certain features of the seizure of the two quantities of drugs in the 1st and 2nd alternative charges might support a plea for concurrent sentences. For example, they were seized at the same time, when the appellant and his vehicle were searched. However there are important differences as well. They led to different offences under the Misuse of Drugs Act CAP 27. The purpose for the possession was different. In the 2nd charge the purpose was for self consumption whereas in the more serious 1st charge, it was for the purpose of trafficking. Also, they were different drugs. The common name for the drug to be trafficked was "Ecstasy" and the common name for the drug for self consumption was "Ice", some of which was found on his person and some of which was recovered from an envelope inside the vehicle.

Whether or not to mark these differences by ordering consecutive or partially consecutive sentences is a matter within the sentencing Judges' discretion. In exercising that discretion a Judge may also have regard to the overall criminality and the totality principle.

In the present case, where one quantity of drug was for self abuse and the other was to supply to others and where the sentence passed on the latter charge was the minimum permitted by law we are satisfied that the order for consecutive sentences was within the Judges' discretion which was properly exercised.

(2) Was 12 months on charge 2 manifestly excessive?

The maximum sentence under S.6 (a) of CAP 27 is 10 years imprisonment. The appellant had pleaded guilty and was a first offender. We may assume therefore that a sentence of 18 months would have been passed after trial.

Mr Prabhakaran, on the appellant's behalf, has drawn our attention to a number of similar cases concerning small quantities of possession of Class A drugs. We have noted the following:

Public Prosecutor v Norsaidi bin Hj Bankot [2005] JCBD 186
Baharun bin Samsudin v Public Prosecutor [2013] JCBD
Public Prosecutor v Salleh bin Sirat [2013] JCBD
Rasidi bin Daud v Public Prosecutor [2013] JCBD

After careful consideration we accept that 18 months after trial for simple possession of 0.77 grammes of "ice" was too high. We have concluded that 3 months, reduced to 2 months for the plea of guilty, would have been the proper sentence.

We reduce the sentence on the 2nd alternative charge accordingly. We have also noted and taken account of the inexcusable delay, as did the court below, in bringing this matter to a conclusion.

Order

A sentence of 2 months imprisonment is substituted on alternative charge 2 which is ordered to run consecutively to the 5 years and 5 strokes on alternative charge 1. There is no appeal against the concurrent sentences passed on the 3rd, 4th and 5th charges.

The final sentence is 5 years and 2 months and 5 strokes which we order shall run from the date of arrest namely 3 November 2011.

Mortimer, P.

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