

Abdul Hafiz Zulfadli Bin Fadzillah

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 7 of 2021)**

Dato Seri Paduka Steven Chong, C.J.

11 November, 2021.

Criminal law – Possession for trafficking of methylamphetamine – Sentence.

Hj Mohammad Daud Bin Hj Ismail (M/S Daud Ismail and Company) for Appellant.
DPP Muhammad Qamarul Affyian Abd Rahman for Public Prosecutor.

Cases cited:

Mohammad Zuraiman Bin Haji Jaman v Public Prosecutor (Criminal Appeal No. 20 of 2018]
Public Prosecutor v Awg Roslan Bin Mohd Yunos [2005] 2 JCBD 175
Maimum Binti Haji Omar v Public Prosecutor [2013] 1 JCBD 154
Sofian Bin Hj Mohammad Suot v Public Prosecutor [Criminal Appeal No. 14 of 2020]
Mohd Rosdy Bin Abdullah v Public Prosecutor [2001] 1 JCBD 186

Steven Chong, CJ:

Introduction

On 29 September 2020 in the Magistrate’s Court the appellant was charged with six counts under the Misuse of Drugs Act: consuming methylamphetamine on 18 December 2012 contrary to section 6(b)(1st Charge); possession of 0.1992 gs of methylamphetamine on 1 July 2013 contrary to section 6(a) (2nd Charge); consuming methylamphetamine on 1 July 2013 contrary to section 6(b) (3rd Charge); possession for trafficking of 1.1689 qs of methylamphetamine on 13 April 2014 contrary to section 3A (4th Charge); possession of drug consumption utensils on 13 April 2014 contrary to section 7 (5th Charge); and consuming methylamphetamine on 17 October 2016 contrary to section 6(b) (6th Charge).

The appellant pleaded guilty to the 1st, 2nd, 3rd, 5th and 6th Charges and was convicted after a trial on the 4th Charge.

On 19 April 2021 Chief Magistrate Pg Masni Binti Pg Hj Bahar sentenced the appellant as follows:

1st Charge: \$1,500 fine or in default 3 months' imprisonment.

2nd Charge: \$1,000 fine or in default one month's imprisonment.

3rd Charge: \$1,500 fine or in default 3 months' imprisonment.

4th Charge: 5 years 6 months' imprisonment and 5 strokes.

5th Charge: \$800 fine or in default one month's imprisonment.

6th Charge: \$1,500 fine or in default 3 months' imprisonment.

As the appellant failed to pay the fines the aggregate sentence was 6 years 5 months and 5 strokes.

In the Skeletal Submissions of the appellant it would appear this is an appeal against the sentence on the 4th Charge only.

The facts

In a nutshell the facts on the 4th Charge were that on the night of 13 April 2014, a team of narcotics officers went to the appellant's house in Kampong Kuala Tutong to carry out a search for drugs. The drugs stated in the charge together with an electronic digital scale, empty plastic packets and cash of \$180 were found in the appellant's bedroom.

The appellant admitted to the narcotics officers that he had consumed methylamphetamine and the drugs found in his bedroom were for trafficking.

The sentence

The Chief Magistrate was alive to the fact that there was a substantial delay in the prosecution of the case but having regard to the gravity of the offence reflected in the mandatory minimum sentence of 5 years' imprisonment and 5 strokes and that this was a conviction following a trial she decided on a sentence of 5 years 6 months' imprisonment and 5 strokes.

The appeal

The issue raised in this appeal concerns the delay in the prosecution.

Counsel for the appellant submitted that the Chief Magistrate erred in not giving sufficient weight to the significant delay which “*caused serious prejudice to the appellant leading to the commission of subsequent offences*” and justified one of the following three orders:

- (a) a probation order;
- (b) a rehabilitation order; or
- (c) an order that the aggregate overall sentence of 6 years 5 months and 5 strokes sentence be reduced to 5 years’ imprisonment and 5 strokes.

Reference was made to *Mohammad Zuraiman Bin Haji Jaman v Public Prosecutor* (Criminal Appeal No. 20 of 2018), *Public Prosecutor v Awg Roslan Bin Mohd Yunos* [2005] 2 JCBD 175, *Maimum Binti Haji Omar v Public Prosecutor* [2013] 1 JCBD 154, and *Sofian Bin Hj Mohammad Suot v Public Prosecutor* [Criminal Appeal No. 14 of 2020], where delay in the prosecution or in the trial was a factor taken into account in reducing the sentence or in ordering probation.

My decision

There was indisputably excessive delay in the prosecution of the case. The offence on the 1st Charge was committed on 18 December 2012 and that on the 6th Charge on 17 October 2016. No satisfactory explanation was given as to why the appellant was only charged in the Magistrate’s Court on 29 September 2020.

Nonetheless, I do not accept the submission of counsel for the appellant that this inordinate delay justifies the orders sought. My reasons are as follows.

I begin with the appeal for a probation order to be made. As was made clear by the Court of Appeal in *Mohd Rosdy Bin Abdullah v Public Prosecutor* [2001] 1 JCBD 186, the court in exercising the discretion to order probation must consider “*all the circumstances*” of the case.

Any offence of possession for trafficking of a controlled drug must be treated with the utmost seriousness by the court because of the harm caused to society. The mandatory minimum sentence of 5 years and 5 strokes prescribed for the offence is there for good reason. It is to serve as a strong deterrence. Treating drug traffickers with leniency is inimical to that objective.

There was cogent evidence presented in the trial that the appellant was both a drug abuser and a drug dealer. In my judgment delay in the prosecution in itself cannot justify ordering probation instead of imposing the mandatory minimum sentence as it would send a wrong message to drug traffickers.

I now turn to the appeal for a rehabilitation order to be made. Counsel for the appellant submits that since the Chief Magistrate made a finding that the appellant was an “*active drug user*”, it would be beneficial for him to undergo rehabilitation. The contention is that the sentence of the court below should therefore be substituted with a rehabilitation order.

Counsel for the appellant in advancing that argument appears to have misunderstood the effect of section 29(4) of the Misuse of Drugs Act which provides that where any person is convicted of an offence under Part II (which includes the offences of drug consumption and drug possession for trafficking) the court having considered a medical report if satisfied it is necessary for such person to undergo treatment or rehabilitation shall “*in addition to any punishment it may lawfully impose*” make an order for treatment or rehabilitation or both.

It is important to take note of the operative words “*in addition to any*” in section 29(4) in considering the court’s power to order rehabilitation. Section 29(4) does not confer the court with power to order rehabilitation in lieu of the punishment prescribed for the offence. The court is conferred with power to order rehabilitation if satisfied it is necessary for the offender in addition to the punishment prescribed for the offence.

On record the Chief Magistrate did not consider a medical report to determine whether it was necessary for the appellant to undergo treatment or rehabilitation in addition to imprisonment.

As to the appeal for the sentence of 6 years 5 months and 5 strokes to be reduced to 5 years and 5 strokes this entails ordering: (1) the sentence of 5 years 6 months and 5 strokes on the drug possession for trafficking charge to be reduced to the prescribed minimum sentence of 5 years and 5 strokes; and (2) the default sentences of imprisonment for failure to pay the fines to run concurrently.

Neither of those orders is appropriate notwithstanding the delay element in the case.

Imposing the prescribed minimum sentence for an offence where the offender has been convicted after a trial is wrong in principle. Doing so would disincentivise offenders from pleading guilty. Guilty pleas are to be encouraged as it saves time and expense.

The Chief Magistrate referred to the delay in her sentencing remarks but she did not say she was giving a discount in the sentence to the appellant because of this factor. Nevertheless, bearing in mind the appellant was convicted after a trial the sentence of 5 years 6 months and 5 strokes on the drug possession for trafficking charge is appropriate. But for the delay in the case a sentence of 6 years and 5 strokes would be proper.

In the same vein the court below rightly ordered the default sentences of imprisonment for failure pay the fines to run consecutively as the appellant would have no incentive to make any payment if the sentences were to run concurrently and the imposition of the fines would be otiose: *Hj Roslan bin Hj Hamid v Public Prosecutor* [2010] 2 JCB 149.

Conclusion

For the foregoing reasons the appeal is dismissed.

DATO SERI PADUKA STEVEN CHONG
Chief Justice