

Public Prosecutor

Appellant

AND

1. Mohd Aizamry Bin Nasri
2. Shah Rony @ Mohammad Zieyad Bin Abdul Rahman

1st Respondent
2nd Respondent

(High Court of Brunei Darussalam)
(Criminal Appeal No. 13 of 2015)

Criminal Law & Procedure – Jurisdiction of Courts – Capital Offence – Application for Bail – Section 30(1) of the Misuse of Drugs Act.

Dato Seri Paduka Hj Kifrawi, C.J.
10th August, 2015.

DPP Farhanah Bte Pehin Dato Hj Suhaili for the Appellant.
1st Respondent In Person.
Ahmad Zakaria Bin Hj Mohammad (M/S Ahmad Zakaria & Associates) for 2nd Respondent.

Cases cited in the Judgment:

Abd Rahman Bin Ariffin v Public Prosecutor [2007] 1 JCBD 183
Hj Sadikin Bin Hj Ahmad vs. PP (2000) 1 JCBD 349
Mohammad Saiful Bin Bujang v Public Prosecutor [2012] JCBD 269

J U D G M E N T

Dato Seri Paduka Hj Kifrawi, C.J.:

A. The Bail Application

The Respondents, Mohd Aizamry Bin Nasri (D1) (Male, 35 years old, Malaysian), and Shah Rony @ Mohammad Zieyad Bin Abdul Rahman (D2) (Male, 33 years old Brunei Yellow IC 00-288783) were first charged on 27/10/2014 in the Magistrate's Court as follows:

Charge

That both of you, on or about 11th day of October 2014 at about 1737 hours, in the vicinity of Labu Temburong Control Post, in Brunei Darussalam, inside a car bearing registration number BAG 2854, not being persons authorized by the Misuse of Drugs Act, Chapter 27 or the Regulations made thereunder, did import into Brunei Darussalam from Lawas, Sarawak,

Malaysia, a class A controlled drug, to wit, approximately 214.15 grams of Methylamphetamine, in contravention of section 5 of the Misuse of Drugs Act, Chapter 27 read with the Second Schedule of the said Act.

Penalty under section 5 of the Misuse of Drugs Act, Chapter 27
Unauthorised import of Methylamphetamine where the quantity is more than 50 grams is DEATH

They were earlier arrested on 11/10/2014 and brought to Court on 13/10/2014 and remanded under section 22A Misuse of Drugs Act at Central Police Station.

Both the Respondents were remanded every two weeks pending the completion of the Analyst Certificate.

On the 8/12/2014 2nd Respondent who was represented by Mr Ahmad Zakaria applied to the Chief Magistrate to be released on court bail pending the completion of the Analyst Certificate from the Department of Scientific Services (DSS).

The Chief Magistrate denied 2nd Respondent's application for bail. Thereafter, both Respondents were remanded for every 2 weeks pending the completion of the Analyst Certificate.

On 28/3/2015 the 2nd Respondent applied again to the Court for bail. The Chief Magistrate again refused to grant bail, but wanted the DPP to indicate to the Court when the Analyst Certificate could be issued in the next mention date on 9/4/2015.

B. The Chief Magistrate's Decision

On the 9/4/2015, the DPP indicated that the Analyst Certificate would be ready by December 2015. The Chief Magistrate decided to grant bail to both Defendants after taking into consideration the principles relating to bail in the case of *Hj Sadikin Bin Hj Ahmad vs PP* (2000) 1 JCB 349. The Chief Magistrate stated:

'Bail is used to ensure that the defendants will appear in court at the appointed time; to compel the defendants' attendance. The fact that the defendants face serious charges in itself should not be a reason not to grant bail. In this case, the offence falls into the category of non bailable offences where bail is discretionary and not as of right. In reaching my decision, I refer to the case of *Hj Sadikin Bin Hj Ahmad vs PP* (2000) 1 JCB 349 and the principles relating to bail laid down therein.

It is for the prosecution, on the balance of probabilities to establish that bail should not be granted to the defendant. In this case, given the length of time that the defendant has been in remand, without any concrete assurance of when the analysis certificate being ready, it is difficult to sustain any fair reasons for the defendants not now to be released on bail. I am aware that it is not usual practice for defendants in serious cases such this to be released on

bail, but it is not unprecedented. I strongly feel in this case that inability for the DSS to have prepared the analysis report in a timely manner has put the defendants in undue hardship, and abused the judicial process. The defendants have not yet been convicted of any offences and must be treated as innocent persons.

My order is thus as follows:

That the second defendant's application for bail is granted.

That both defendants be released on court bail.

Each defendant to be released on cash bail of \$10,000.00 each and \$20,000.00 in 2 local sureties.

Conditions attached:

- Report to NCB and to the I/O once a week every Monday;
- Passport and travel documents to be impounded;
- Defendants not to approach or interfere with the prosecution witnesses;
- Not to tamper with evidence.'

C. The Appeal

The DPP appealed against the Chief Magistrate's decision. According to the DPP, the Chief Magistrate should consider the seriousness of the case. The Respondents were arrested when they were in possession of the alleged drugs inside a car. The 1st Respondent was the driver of the car and the 2nd Respondent was the front passenger. The DPP submitted due to the gravity of the offence and the strength of the Prosecution's case, there is a real risk that both Respondents will abscond if bail is granted.

The DPP submitted that according to the Clients' Character (TPOR) Department of Scientific Services (DSS), Ministry of Health should take at least 8 months to complete the analysis and issue the Analyst Certificate. If we compare with Singapore, the Health of Science Authority in Singapore will take between 6-8 months in order for an analyst report to be ready.

The Respondents had been arrested on 11/10/2014. The Chief Magistrate granted bail on 9/4/2015. The 2nd Respondent had been detained for about 6 months. The 1st Respondent could not raise bail and he was already detained for about 9 months. The DSS is already in breach of their Clients' Character, because the Analyst Certificate is still not issued. It is already 9 months plus since the Respondents' arrest on 11/10/2014. In my view without the Analyst Certificate this would affect the strength of the prosecution case.

The capital charge faced by the Respondents is not supported by an Analyst Certificate. It is, therefore, unfair for the Respondents to be further remanded without granting bail when there is no Analyst Certificate confirming the nature and quantity of the drugs alleged. The DSS, contrary to their Clients' Character, has failed to issue the Analyst Certificate.

Mr Ahmad Zakaria submitted after the 2nd Respondent was able to raise bail on 25/4/2015, he has been complying with the bail conditions. I agree with him that the Court should also consider this in his favour.

I note, however, that the Chief Magistrate has imposed the same bail conditions despite the fact that the 1st Respondent is a foreigner. I would expect the risk of a foreigner absconding is higher than a Brunei citizen who has a family and relatives in Brunei. The State may incur further costs in getting him arrested in a foreign country and making arrangement to send him back to Brunei. I would, therefore, vary the bail conditions to reflect this.

D. Does section 30(1) of the Misuse of Drugs Act (Cap 27) confers a Magistrate the jurisdiction to grant or refuse bail for an offence under the Misuse of Drugs Act which carries the death penalty?

The DPP also submitted that the Magistrate's Court has no jurisdiction to deal with bail.

Section 30 of the Misuse of Drugs Act states:

"A Court of Magistrate shall have jurisdiction to hear and determine all proceedings under this Act and, notwithstanding any provision of any written law to the contrary, such court shall have power to impose any penalty or combination of penalties provided for an offence under this Act not exceeding respectively 10 years imprisonment, a fine of \$20,000 and 10 strokes of whipping".

In *Abd Rahman Bin Ariffin v Public Prosecutor* [2007] 1 JCBD 183 the High Court Judge Dato Steven stated '*...In my opinion, save for capital offences which must be tried by a court consisting of two Judges, the High Court as provided under section 190 of the Criminal Procedure Code, section 30(1) of the Misuse of Drugs Act confers the Magistrate's Court with jurisdiction to try all other offences including those carrying penalties which exceed the power of the court to sentence.*'

In the case of *Mohammad Saiful Bin Bujang v Public Prosecutor* [2012] JCBD 269 Dato Steven Chong, J. also stated '*...In my opinion section 30(1) of the Misuse of Drugs Act is such a special provision whereby a Magistrate is seized of jurisdiction to hear and determine a bail application notwithstanding that the offence is punishable with imprisonment for 15 years or more. This provision applying specifically to drug offences overrides the general provisions of section 347 of the Criminal Procedure Code, which limits a Magistrate's power to hear and determine bail to offences where the penalty is below 15 years' imprisonment.*'

Section 30(1) of the Misuse of Drugs Act confers the Magistrate's Court the jurisdiction to deal with bail application despite any written law to the contrary (e.g. in particular section 347 of the Criminal Procedure Code). In my opinion, this would then give the Defendants the rights to apply to the Magistrate's Court to be released on bail when charged with any offence including a capital offence.

If this Court were to interpret section 30 Misuse of Drugs Act to mean that the Magistrate's Court has no jurisdiction to deal with bail in a capital case this would restrict the Defendants' rights. I presume it is not the Legislature's intention to restrict the Defendants' rights, to access to justice, especially in

seeking protection from the court as regards an individual's fundamental right to liberty. If the Legislature really intended to restrict the Defendants' rights to apply for bail only to the High Court which has jurisdiction to deal with a capital offence, Section 30 of Misuse of Drugs Act would have clearly provided that only the High Court has jurisdiction to hear and determine a bail application.

For the above reasons, I, therefore, find that the Magistrate's Court has jurisdiction to deal with the bail application notwithstanding the Respondents were charged with an offence punishable with death.

I order that 1st Respondent to be released on cash bail of \$20,000 and \$40,000 in 2 local sureties. (\$20,000 each in cash from each local surety).

2nd Respondent to be released on cash bail of \$10,000 and \$20,000 in 2 local sureties (\$10,000 in cash from each surety) or \$30,000 in cash. The other bail conditions are the same as ordered by the Chief Magistrate namely;

1. Report to NCB and to the I/O once a week every Monday;
2. Passport and travel documents to be impounded;
3. Defendants not to approach or interfere with the prosecution witnesses;
4. Not to tamper with evidence.

The Chief Magistrate's Order is to be varied. The appeal is dismissed accordingly.

DATO SERI PADUKA HJ KIFRAWI BIN DATO PADUKA HJ KIFLI
Chief Justice