

Ivan Tan Eng Chin

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No.14 of 2014)**

Before Commissioner James Findlay in Court

Date of Hearing: 9th March, 2015.

Date of giving Judgment: 12th March, 2015.

Drugs – definition of “cannabis” – meaning of “the resin” - unjustified delay in proceedings

Mr Roy Prabhakaran of M/S Sankaran Halim for the Appellant.

DPP Muhammad Abdul Raafe bin Haji Ibrahim for the Public Prosecutor

Cases cited in the Judgment:

Alcontra v Public Prosecutor [1996] 1 MLJ 209 at 220

Loo Keck Leong v Public Prosecutor [1992] 2 MLJ 177

Maimun Bte Hj Omar v Public Prosecutor Criminal Appeal No 1 of 2013

Mohd Yusof bin Abdul Raub v Public Prosecutor (Criminal Appeal No. 2 of 2014)

Public Prosecutor v Cheaun (HCCT No. 14 of 2006)

Public Prosecutor v Mohammad Khairil Shah Bin Hj Abdul Halim and Anor (HCCT No 4 of 2011)

JUDGMENT

Findlay, J.C.:

The Appellant was charged with an offence under the Misuse of Drugs Act, Chapter 27 in that he possessed cannabis for the purpose of trafficking. This offence took place on 27 April 2009. The trial commenced in May 2011 and was completed on 23 January 2013. This delay in the prosecution and trial of the Appellant is bad enough, but then the Magistrate did not give judgment until 20 February 2014. This delay in giving judgment, without any explanation, is

quite unacceptable. The Magistrate does not give any explanation for this extraordinary delay. If there is such an explanation, such as the Magistrate's illness, I would have expected her to explain the delay for this reason. Parties appearing before our courts in civil or criminal trials are entitled to expect to know their fates within a reasonable time. For the Appellant in this case to have to wait for over a year to hear the verdict in his trial, especially when the prosecution and conclusion of the trial itself had been long delayed, is wrong and contrary to the ordinary principles of justice.

The Magistrate commences her judgment by reciting the charge with which I am concerned and also mentions another charge under the same Act, but no more is said about this second charge. I understand the Appellant pleaded guilty of this offence and was fined \$1,500 or 3 months imprisonment. He paid the fine.

The Appellant appeals against the conviction I have mentioned and also the sentence of 3 years imprisonment and 3 strokes. After hearing counsel on 9 March, I reserved judgment. This is my judgment.

Mr Prabhakaran advances three arguments in support of the appeal against the conviction.

In the first case, he argues that the Magistrate admitted and relied upon hearsay evidence.

This evidence was that the police personnel received information that a Chinese male by the name of Ivan wearing a grey coverall labelled "BMC" had been involved in drug activities in the area concerned. When dealing with this, the Magistrate recited the evidence mentioned above and then said "I believe that the operation was conducted based on a tipoff from the member of the public."

Nowhere in the Magistrate's reasons does she place any reliance on the truth or otherwise of the information I have mentioned. The fact that someone who was not a witness said what I have recited is only hearsay if it is used to infer that what was said was true. In this case, the information was given to show why the appellant was targeted in the investigation, not that the information was in fact true.

Mr Prabhakaran relied upon the Malaysian case of *Alcontra v Public Prosecutor* [1996] 1 MLJ 209 at 220. It is so that dicta in that case state the undesirability of details of information received being given in evidence because this may prejudice the case against the defendant. I agree that it would be wise not to give these details but for it to be said only that the police acted on

information received, without more. However, I do not agree that from the mere fact that such details are given in evidence is sufficient to show that the appellant did not receive a fair trial. The situation might well be different if the trial took place before a jury, but where the tribunal is a trained lawyer, there is no difficulty in that tribunal understanding that the evidence of those details could not in any way be taken as the truth and indicating the guilt of the defendant. In this case, it is quite clear from the Magistrate's reasoning that she did not give any weight to these details in deciding the matter.

Mr Prabhakaran's next argument is that the Magistrate did not consider the presumption of possession separately from the presumption of trafficking. I do not agree with this submission. It is quite clear from the Magistrate's reasons that she considered the presumption separately; indeed, she did so in quite separate paragraphs.

The last argument against the conviction advanced by Mr Prabhakaran is that the prosecution failed to prove that what the appellant possessed and trafficked was cannabis as defined in the Act.

The definition of cannabis has been amended, but at the time of the offence alleged it was "cannabis means any part of any plant of the genus cannabis from which the resin has not been extracted, by whatever name it may be designated."

Mr Prabhakaran argues that the fact that the chemist identified the presence of resin in the cannabis concerned without confirming that the resin was in abundance or that there was a substantial amount of resin was not sufficient to prove that the cannabis was cannabis as defined. He says, in other words, it is for the prosecution to prove beyond a reasonable doubt that there had been no extraction of resin.

There is no doubt that Mr Prabhakaran has authority to support his argument. In ***Public Prosecutor v Cheaun* (HCCT No. 14 of 2006)** and ***Public Prosecutor v Mohammad Khairil Shah b Hj Abdul Halim and Anor* (HCCT No 4 of 2011)** Steven Chong J. and Hairol Arni J. found, after careful consideration, that the onus was on the prosecution to prove "that the resin content in the plant material was either 'wholly intact' or the resin 'which remained in the plant material after extraction is not so minute as to amount in reality that common sense to nothing at all and therefore harmless'. The learned judges had plenty of support for their conclusion from cases in Malaysia. In particular, in ***Loo Keck Leong v Public Prosecutor* [1992] 2 MLJ 177**, the court said "to have detected the presence of resin, would not necessarily lead to prove beyond a reasonable doubt in this case that resin had not been extracted" and "the fairer

interpretation of the definition clause in this aspect ought to be that the resin should have been substantially extracted (but not necessarily without a trace in the residue) and not necessarily have the same should have been completely extracted so that the plant material in any particular case for all practical purposes ceases to amount to such a dangerous drug - a harmless substance.”

I have to say that the cases of ***Public Prosecutor v Cheaun* (HCCT No. 14 of 2006)** and ***Public Prosecutor v Mohammad Khairil Shah bin Hj Abdul Halim and Anor* (HCCT No 4 of 2011)** were cases in which the defendant faced the death penalty.

With all the respect I can muster having regard to the eminence of the judges concerned, I am forced to disagree with this approach. To my mind, the definition of cannabis presents no difficulties. The definition says “from which *the* resin has not been extracted”. I emphasise the word “the” which, in my judgment, means from which *all* the resin has not been extracted. The situation would have been quite different if the word “the” had been omitted. In that situation, it could well be argued that the definition meant that no resin had been extracted. I cannot see any justification for reading into the definition words such as “substantially extracted” or that “some resin has not been extracted”. In my view, the words in the definition as it stands speak for themselves.

To my mind, interpreting the definition as meaning that all the resin had not been extracted makes sense in that, if all the resin had been extracted, the plant material was harmless and no regulation was needed. On the other hand, if not all the resin had been extracted, the plant material was not harmless and regulation was required.

I am conscious, of course, that I am departing from a very respectable line of authority, but in all conscience I cannot close my eyes to what I see is the proper conclusion to draw from the clear words of the definition.

In any event, as Mr Raafe argues, the certificate issued by the chemist is conclusive, there being no evidence to the contrary. This certificate states quite clearly that the items possessed and trafficked by the appellant were cannabis.

In support of this, Mr Raafe cites the recent case in the Court of Appeal ***Mohd Yusof bin Abdul Raub v Public Prosecutor Criminal Appeal No. 2 of 2014***. In that case, under the heading of “Non-quantification of the resin”, Burrell JA cites the law regarding the effect of an analyst’s certificate. The Judge then goes on to mention the two Brunei cases I have cited above, but says nothing more about them other than that the “analyst’s evidence had been subject to cross-examination and the certificate challenged and the court perceived deficiencies

in those cases”. Burrell JA states the evidence of the analyst that he “did not have the resources to quantify the resin in the plant material” but says that this did not avail the Appellant because the analyst’s certificate was “conclusive, comprehensive and final.” I should say that, in both of the Brunei cases, there were certificates by an analyst certifying that the plant material was cannabis.

In the result, I find that the Magistrate was right to find that it had been proved that the plant material was indeed cannabis.

In the result, the appeal against conviction is dismissed.

There remains the appeal against sentence. It is conceded by Mr Raafe that the Magistrate misdirected herself in finding that it was necessary for her to find extenuating circumstances before she could make a probation order. This means that the matter of sentence is at large and it is my task to consider the appropriate sentence in the circumstances of this case.

Mr Prabhakaran rightly does not suggest that the offence is anything but serious but points out that the Appellant is a comparatively young man in steady employment and has apparently conducted himself properly since the offence. In other words, it seems clear that the Appellant has rehabilitated himself.

The trial commenced on 5 February 2011 but did not finish until 23 January 2013 and then the Magistrate delayed giving judgment for over a year. There is no need for me to repeat what was said by the Court of Appeal in ***Maimun Bte Hj Omar v Public Prosecutor Criminal Appeal No 1 of 2013*** about the problems caused by inordinate delay in prosecutions. The aphorism “justice delayed is justice denied” is hackneyed but nevertheless true. In that case, the Court of Appeal ordered probation and community service.

The facts in the ***Maimun Bte Hj Omar v Public Prosecutor*** are not, of course the same as in this case but the factors such as stress caused by the delay, particularly the delay in giving judgment after the case had concluded, are the same as is the fact that it seems clear that the appellant has rehabilitated himself. I cannot now see any sensible purpose in sending the appellant to gaol after six years during which he has been on bail and in employment.

Mr Raafe argues that the Appellant has shown no remorse as demonstrated by the fact that he has appealed against his conviction. I do not accept that the fact that the Appellant has appealed against his conviction demonstrates that he is undeserving. The application of the laws is not a perfect system and, for all I know, the Appellant may well feel that he was wrongly convicted.

Before, however, considering probation and community service, I must have a report to tell me if the Appellant is a suitable person for that course of action. Accordingly, I adjourn the hearing of this appeal and order that a report on the Appellant be prepared to advise me. I would be grateful if the report could be furnished before 2 April 2015 when I leave Brunei. I will deliver this judgment at 9 am on Thursday, 12 March 2015 in court.

A handwritten signature in black ink, appearing to read 'Hidley', written in a cursive style.

Judicial Commissioner