

Pg Mohd Irwan bin Pg Hj Zainal

AND

Public Prosecutor

**High Court of Brunei Darussalam
(Criminal Appeal No. 18 of 2021)**

Hj Abdullah Soefri bin POKSM DSP Hj Abidin, JC

19th January 2022

Criminal Law - consuming methylamphetomine – second offender – Probation and Community Service Order inappropriate – Appeal against Sentence – section 6(b) of the Misuse of Drugs Act, Cap 27 – Regulation 12(3)(a) of the Misuse of Drugs Regulations 1987

Cases referred to:

Mohammad Dazlyn bin Hj Mohamed Daud vs PP (HCCA No.9 of 2019)

Mohd Rosdy bin Abdullah vs PP (2001) 1 JCBD 186

Juary bin Johari vs PP (CM No.43 of 2020)

Sheikh Noordin bin Sheikh Mohammad of m/s Sheikh Noordin Mohammad & Associates for the Appellant.

DPP Muhammad Qamarul Affyian bin Abdul Rahman for Respondent/Public Prosecutor.

JUDGMENT

Hj Abdullah Soefri, JC:

This is an appeal by the Applicant, Pg Mohd Irwan bin Pg Zainal, against the sentence imposed by the Magistrate Court. The Applicant was convicted on his own guilty plea to *inter alia* one charge under section 6(b) of the Misuse of Drugs Act and one charge under Regulation 12(3)(a) of the Misuse of Drugs Regulations 1987.

Magistrate Kamaliah Fadhilah binti Hj Ibrahim sentenced the Appellant to 3 years imprisonment for offence under section 6(b) of the Misuse of Drugs Act and a fine of \$300 in default 2 weeks imprisonment for the offence under Regulation 12(3)(a) of the Misuse of Drugs Regulations 1987.

The Applicant had a previous conviction in 2015 for the same offence committed in 2014. The Applicant's counsel also confirmed that the Applicant is a second offender. The present offence was committed in 2019.

In light of the Applicant's prior conviction, the Magistrate was required to pass a minimum sentence of 3 years' imprisonment pursuant to section 29(3A) of the Misuse of Drugs Act, which states that:

"If any person convicted of an offence under section 6 is again convicted of a similar offence, he shall be liable (a) in the case of an offence under paragraph (b), to imprisonment for a term of not less than 3 years."

The Applicant's grounds of appeal are threefold: firstly, this was a case of a plea bargain agreed between the Prosecution and Appellant; secondly, the Magistrate failed to take into account the Psychiatric Report prepared by the Appellant's psychiatrist suggesting symptoms of ADD; and thirdly, the Magistrate was unduly reliant on two case authorities (**Mohammad Dazlyn bin Hj Mohamed Daud vs Public Prosecutor** [HCCA No.9 of 2019] and **Mohd Rosdy bin Abdullah vs Public Prosecutor** [2001] 1 JCBD 186).

Additionally, the Applicant also argued that his section 6(b) Misuse of Drugs Act conviction to be regarded as "spent" in accordance with the Criminal Registration Act.

I will deal with each ground in turn.

The Applicant submitted that there was a plea bargain with the Prosecution prior to his guilty plea. It is his argument that the Prosecution did not offer any comment or objection to a Probation Order during mitigation.

During the Applicant's plea mitigation, the following exchange took place:

"Court: The Defence Counsel has submitted a lengthy submission on the mitigation. I will require time to peruse the submission. DPP, the DC has proposed various conditions at para 17. If the court were to consider probation is there anything prosecution wishes to address regarding the conditions."

DPP: Nothing to address."

With regards to this, I have to determine whether the fact that the Prosecution did not offer any comment or objections to a Probation Order is considered highly persuasive or not.

Firstly, the Court has the discretion to make a Probation Order and require the offender to perform community service instead of sentencing him pursuant to section 5 of the Offenders (Probation and Community Service) Order, 2006.

The principles for a Probation Order are set out in the case of **Mohd Rosdy bin Abdullah vs Public Prosecutor** (2021) 1 JCBD 186, which states "all circumstances of the case including the nature of the offence and the character of the offender" must be considered in exercising the discretion.

Further, in the case of **Juary bin Johari vs Public Prosecutor** (Criminal Motion No.43 of 2020), the Honourable Chief Justice held that:

“Ordering probation and community service in the case of a drug abuser is inappropriate as it is neither in his interest nor the public interest in deterring drug abuse”.

In view of the above, the Applicant is 45 years old with responsibilities towards his parents, ex-wife and small children, it is apparent to me that despite the Applicant's previous conviction and rehabilitation, his repeated actions emphasizes that it was not a deterrent to the Applicant from taking drugs again.

The Appellant's counsel noted that the fact that there was a plea bargain by itself is not sufficient for the Magistrate to make a Probation Order. There is nothing before me today that is sufficient to warrant Probation Order as the Applicant's argument is not a matter for the court to consider when dealing with sentencing for a Probation Order and it should not be.

Next, the Applicant has called for weight to be placed in the Psychiatric Reports as the Prosecution did not offer any alternative report. The Applicant argued that the said report serves to explain and understand his condition and why he had turned to Methylamphetamine, as he was deprived of such assistance from a competent authority.

I acknowledge that the Psychiatric Report has indicated that the Applicant shows suggested symptoms of ADD. However, I agree with the Magistrate that there is no express linkage between ADD and the Applicant's use of the drug.

I am in the view that the Applicant clearly understood his action in using the drug, Methylamphetamine, as a form of release rather than medication, from his depression after being dismissed from his high-ranking post in ABDB in 2010. The fact that the Applicant had spent time in Al-Islah for rehabilitation for 3 years and yet still turned to drugs emphasizes my point more.

Therefore, I am satisfied that a Probation Order in this present case would be unsuitable as the Applicant has the tendency to turn to drugs. In serving his sentence, the situation could be prevented and also there is nothing to stop the Applicant from seeking treatment for his condition in prison.

Moving on, the Applicant argued that in arriving at her sentence, the Magistrate was unduly influenced by two earlier decisions in ***Mohammad Dazlyn bin Hj Mohamed Daud vs Public Prosecutor* (HCCA No.9 of 2019)** and ***Mohd Rosdy bin Abdullah vs Public Prosecutor* (2001) 1 JCBD 186**.

The principle in the case of ***Mohammad Dazlyn bin Hj Mohamed Daud vs Public Prosecutor* (HCCA N.9 of 2019)** shows that reformation itself does not warrant Probation Order. I acknowledged that the applicant has shown improvement in his behaviour and has established a healthy relationship with his family but on these grounds alone I do not find it to be so exceptional to depart from the case precedent.

Although the Court sympathized for the Applicant's family and the inevitable hardship they have to endure but this is not a matter which the Court will normally take into account.

Further, the case of ***Mohd Rosdy bin Abdullah vs Public Prosecutor (2001) 1 JCBD 186*** clearly sets out the test for considering Probation Order thus the Magistrate was correct to rely on this case authority.

With regards to the Applicant's "*spent convictions*", I note that the legislation that governs this is under Part IIA of the Criminals Registration Act which states that:

"Part IIA shall commence on a date to be appointed by the Minister, with the approval of his Majesty the Sultan dan Yang Di-Pertuan, by notification published in the Gazette".

Whilst I do agree that there are mechanisms in place for "*spent convictions*" within the Criminals Registration Act, it is simply not enforced yet for this Court to consider.

Thus, for the reasons I have given the sentence of the Court below is neither wrong in principle nor excessive.

Therefore, I dismiss the appeal.

HJ ABDULLAH SOEFRI BIN POKSM DSP HJ ABIDIN
Judicial Commissioner