

PUBLIC PROSECUTOR

AND

ARDY SALLEH

**(High Court of Brunei Darussalam)
(Criminal Appeal No 19 of 2015)**

Hairol Arni Majid, J.

6th August 2016

Criminal law and procedure – Section 30(1) of the Misuse of Drug Act – bail application in Magistrate Court – Capital offences – Issues of jurisdiction

DPP Suriana Radin for Appellant

Respondent in person

Cases cited:

Isa bin Tuah v Public Prosecutor (1965-1986) IBLR 385

Mohammad Saiful bin Bujang v Public Prosecutor (Criminal Motion 16 of 2012)

Public Prosecutor v. Mohd Aizamry Nasir and Shah Rosly Mohammad Zieyad Abd Rahman (Criminal Appeal No 13 of 2012)

J U D G M E N T

This is an appeal against the ruling of the Magistrate below for allowing bail to the respondent after the latter had been refused before the High Court earlier. The prosecution appeals on the ground that section 30(1) of the Misuse of Drug Act Chapter 27 does not confer the magistrate, the jurisdiction to hear bail in relation to capital offences.

Background of the case

On the 2nd June 2014 the respondent was brought to the Magistrate Court for him to be remanded under section 22A of the MDA for further investigation.

When the respondent returned on the 16th June 2014, a holding charge was preferred against him under section 5 of the Misuse of Drug Act (MDA) for importing 406.39 grams of Methylamphetamine into Brunei which carries the death penalty. On the same day, the matter was remitted to the High Court before the Chief Justice for a bail application hearing which was denied and the respondent was ordered to be remanded at Jerudong Prison pending trial. At the same time the court was informed that the Analyst Certificate on the offending items is still pending.

On 21st April 2015, the respondent was produced for mention before the Magistrate and the latter was informed by the prosecution that the analyst certificates were not ready and would only be available between August and October 2015. This prompted the Magistrate to grant the respondent bail with the usual conditions attached to it by virtue of section 30 of Misuse of Drug Act against the earlier order of the Chief Justice.

I allowed the appeal and ordered the Magistrate's order to be revoked and the defendant to be remanded as per the earlier order of the Chief Justice. I now give my reasons for doing so.

The issue at hand centers on the provision of Section 30(1) of the Misuse of Drugs Act Cap 27 (MDA) which provides the Magistrate Court jurisdiction to hear and determine case under the Act which reads as follow:

“Jurisdiction of courts and prosecution.

30. (1) A court of a 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.”

Section 347 of the Criminal Procedure Code Chapter 7 (CPC) also provides for bail application for most offences not restricted to offences created by the Penal Code Cap 22. The provision reads as follows:

“Duty and discretion admit bail

347. (1) *When any person other than a person accused of an offence punishable with death, imprisonment for life or imprisonment for 15 years or more is arrested or detained without warrant by a police officer or upon a warrant under which there is no endorsement under section 44 that a security may be taken for his appearance or appears or is brought before a Magistrate or Court, and is prepared at any time while in the custody of such officer or at any state of the proceedings before such Court to give bail, such person –*

- a) Shall, if the case is one in which bail is obligatory, be entitled subject to the provisions of this Chapter to be admitted to bail by any police officer not below the rank of Inspector; or by a Magistrate or Court; and*
- b) May, if the case is one in which bail is discretionary, be admitted to bail in the discretion of such Magistrate or Court or any police officer not below the rank of Inspector;*

Provided that it shall be lawful for any such officer in exercising this discretion to have regard to any instructions in connection therewith which may be issued by the Public Prosecutor for the guidance of police officers;

Provided further that such officer or court may instead of taking bail from such person, release him on his executing a bond without sureties for his appearance as is hereinafter provided.

(2) Notwithstanding anything contained in subsection (1) the High Court may in any case direct that any person be admitted to bail irrespective of the offence of which he is accused.”

The Deputy Public Prosecutor’s argument before me is twofold. Firstly, section 30(1) (MDA) does not confer the Magistrate the jurisdiction to grant or refuse bail for offence which carrying the death penalty. Secondly, the Magistrate erred in law and failed to give due consideration to the issue of the delay in obtaining the Analyst’s Report given that this was beyond the prosecution’s control.

In *Re Isa bin Tuah v Public Prosecutor* (1965-1986) IBLR 385 Robert CJ. made the following observation as regards to the tug of war between the two provisions of section 347 CPC and s.30 (1) MDA:

“However if there is a special provision of any other Enactment which permit a Magistrate to grant bail where the maximum penalty for the offence exceeds the limit imposed by section 347(1) of the code, that special provision would override the general one and allow the grant of bail by a Magistrate.”

Steven Chong J. in *Mohammad Saiful bin Bujang v Public Prosecutor* (Criminal Motion 16 of 2012) is in agreement with *Re Isa* and made these following points in his judgment.

“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 provision 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.

The Deputy Public Prosecutor argues that the word “proceedings” under section 30(1) of the Misuse of Drugs Act should be construed to mean “trials” so as to confer jurisdiction on a Magistrate to try all offences under the Misuse of Drugs Act but not to hear a bail application where the offence is punishable with imprisonment for 15 years or more.

In my judgment such a construction in which the definition of “proceedings” is confined to “trials” of offences under the Misuse of Drugs Act is unnecessary and inconsistent with the proper administration of justice. If it is accepted that a Magistrate has jurisdiction to try all offences under the Misuse of Drugs Act (including offences punishable with imprisonment for 15 years or more), there is simply no reason why he/she cannot hear and determine bail applications in respect of the same offences.

The seriousness of a particular offence under the Misuse of Drugs Act will, of course, depend on the facts. As a Magistrate’s power to sentence is limited to the penalties prescribed under section 30, the discretion lies with the Public Prosecutor as to the appropriate court in

which charges are to be preferred and tried: Abd Rahman bin Ariffin v Public Prosecutor [2007] 1 JCBD 183. But once a charge is brought before a Magistrate, even where the penalty for the offence is imprisonment for 15 years or more, he/she has jurisdiction to try the offence and hear and determine a bail application.”

Kifrawi CJ has this to say on the issue in *Public Prosecutor v. Mohd Aizamry Nasir and Shah Rosly Mohammad Zieyad Abd Rahman (Criminal Appeal No 13 of 2012)*.

“Section 30(1) of the Misuse 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 Defendant’s 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.”

No doubt that when legislation has expressly provide in unequivocal terms that certain cause of action is to be followed, then it is not open for the court to question its contention or wisdom by interpreting how the court would want to. It is the duty of the court to interpret and give effect to what in actual effect is intended by the law in regard to the provision as it stand.

While the discretion lies with the Public Prosecutor to decide as to where the proper venue for the indictment and trial should lies, I agree with the Justice’s assessment above on this point that once the charge is preferred in the Magistrate Court notwithstanding that the penalty for the offence exceed imprisonment for 15 years or more, the presiding Magistrate has jurisdiction to try and hear and determine the bail application. Does this include death penalty cases? It appears to be so.

While this may be the case, section 30 however does limit the power of the magistrate to sentence *namely “...not exceeding 10 years imprisonment, a fine of \$20,000 and a whipping of 10 strokes”*. Accordingly, when the section *states “.....jurisdiction to hear and determine all proceedings under this Act and, notwithstanding any provision of any written law to the contrary”* it should follow that the magistrate’s mandate here is purely to hear the bail application hearing only and does not extend to hearing trials which exceed beyond their prescribed penalty limit under section 30.

Having said that, there is this underlying issue of why the magistrate courts are given the jurisdiction to hear and determine all bail proceedings under the MDA which includes death penalty offences but not all the offences under the Penal Code. The obvious question is, by doing so, can the same be construed as derogating the power of the High Court?

Coming back to this instant case, the facts as it stand is that the bail application was first heard before the Chief Justice in the High Court and it was refused. For the Magistrate to subsequently hear the same matter and revoked the bail would implies that the Magistrate Court has the inherent power or jurisdiction of the High Court which it has not. The proper course would have been for the magistrate to refer the matter back to the Chief Justice and for parties to argue before the latter whether there had been a change in the circumstance or for that matter the same warrants reconsideration by the Court.

As regards the issue of the impending delay in obtaining the analyst’s report, I’m in agreement with the prosecution that this was beyond their control. Delay in obtaining the analyst’s certificate should not be a condition precedent in granting bail. As with other factors, it is one of many to be considered together by the court.

Notwithstanding the defendant being local, given the gravity of the offence which carries a death penalty, I am satisfied on the facts presented before me that there is a real risk he may abscond if granted bail.

Dato Paduka Hairol Arni Majid
Judge, High Court