

Public Prosecutor

AND

Mohammad Halil bin Bujang

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 32 of 2020)**

Hj Abdullah Soefri bin POKSM DSP Hj Abidin, JC
23rd December 2020

*Criminal Law --- possession of Class A controlled drug --- section 6(a) Misuse of Drugs Act ---
Appeal against sentence --- 2nd offender --- Fine imposed --- Appeal allowed --- section 263
of the Criminal Procedure Code invoked.*

Case referred to:

PP vs Mohd Rosdy bin Abdullah (HCCA No.29 of 2000)

DPP Dk Didi-Nuraza binti Pg Hj Abdul Latiff for Public Prosecutor.

Hj Mohamad Rozaiman bin Dato Hj Abdul Rahman of M/S ZICO R.A.R. for Respondent.

JUDGMENT

Hj Abdullah Soefri, JC:

This is an appeal by the Public Prosecutor against the sentence imposed by the Magistrate on the Respondent who was convicted on his own plea on the alternative charge under section 6(a) of the Misuse of Drugs Act, Chapter 27 for the possession of Class A controlled drug, to wit, 7.7885 grams of Methylamphetamine contained in 11.3396 grams of clear crystalline substances. The conviction was entered on 24th August 2020 where the Respondent was imposed with a fine of \$1,000 in default 1 month imprisonment.

The offence was committed on 19th October 2010 and was convicted on 24th August 2020.

The Respondent had previous conviction in 2012 for offences committed in 2007. The Respondent's counsel also confirmed that the Respondent is a second offender.

Being a second offender this will trigger section 29(3A) of MDA, Chapter 27 which are as follows:-

"(3A) 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 (a), to imprisonment for a term of not less than 2 years7."

As I have stated earlier, the Magistrate below imposed a fine of \$1,000 in default 1 month imprisonment.

The Appellant submitted in the appeal that this is wrong in law as the Magistrate below had failed to impose the prescribed minimum sentence and the law does not prescribed an alternative to impose a sentence of fine.

The case of ***Public Prosecutor vs Mohd Rosdy bin Abdullah (HCCA No. 29 of 2000)*** was referred to by the Appellant.

Before me in this present case, I have to determine whether the Magistrate below was right in imposing the fine.

It has been submitted by the Appellant and agreed upon by the Respondent's counsel that the Respondent is a second offender for the offence under section 6(a) of MDA, Chapter 27.

Being a second offender, section 29(3A)(a) MDA is triggered and the Magistrate below must impose at least the minimum sentence prescribe in that particular provision and cannot impose any fine.

The only alternative if the Magistrate believe that the use of section 29(3A)(a) MDA is not appropriate, or decide not to use section 29(3A)(a), the learned Magistrate can exercise his discretion to use section 263 of the Criminal Procedure Code in lieu of imposing mandatory minimum sentence.

The learned DPP in this case has acted commendably in not making an issue and submits that it may be proper to excise section 263 of the Criminal Procedure Code in lieu of imposing the mandatory minimum sentence in fairness to the Respondent.

The probation report prepared by the Jabatan Pembangunan Masyarakat has proposed for NCB intervention so that the Respondent will not repeat the offence again and probation is not appropriate in this matter.

If we refer to *Rosdy's* case, the use of section 263 is in exceptional cases, "*having regard to the character, antecedent, age, health or mental condition of the offender*" or "*any extenuating circumstances under which the offence was committed and not merely because of a lapse between convictions*".

The Appellant after had read the probation report prepared by the Jabatan Pembangunan Masyarakat still maintain their stand that in fairness to the Respondent, it is proper to exercise section 263 of the Criminal Procedure Code.

There is nothing before me that between 19th October 2010 and today, he has bad character or antecedents. In fact from the probation report it was stated that the Respondent has admitted and realised what he did was wrong in law. He was remorseful for what he had done and admitted that he did not involve in drugs supply since 2010. His wife is confident that the Respondent has changed and not involved in the supplying of drugs.

In the circumstances, the appeal by the Public Prosecutor is allowed as the Magistrate below has erred in law by imposing fine on Respondent who is a second offender. The fine imposed is set aside.

This court replaced the fines by invoking section 263 of the Criminal Procedure Code and impose and make an order of conditional discharge, discharging him subject to the condition that he does not commit any offence within 1 year with effect from today (under section 8 of Offences (Probation and Community Services) Order, Chapter 220). If the Respondent breach this condition i.e. if he commit another offence during the period of conditional discharge, he shall be liable to be sentenced for the original offence which in this case under section 6(a) MDA which is a minimum sentence of 2 years.

The fine that has been paid is to be refunded.

Respondent is released on court bail at \$1000 or with 1 local surety.

HJ ABDULLAH SOEFRI BIN POKSM DSP HJ ABIDIN
Judicial Commissioner