

Public Prosecutor

AND

Mohd Sofian Bin Mohammad

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 33 of 2020)**

Hj Abdullah Soefri bin POKSM DSP Hj Abidin, J.C.

30th November 2020

Criminal law – appeal against sentence by prosecution – section 6(b) and section 7 of Misuse of Drugs Act – pleaded guilty to both charges – 2nd offence for 6(b) – fined – appeal allowed – Fine replaced with imprisonment of 3 years

DPP Dk Didi Nuraza Latiff for Appellant/Public Prosecutor.
Defendant/Respondent in person

Cases cited :

Reddihardine bin Haji Matali and Public Prosecutor (High Court Criminal Appeal No.24 of 2012)
Nasir bin Jalil v Public Prosecutor (HCCA No 11 of 2005)

RULING

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 to a charge under section 6(b) of the Misuse of Drugs Act, Cap 27.

The said conviction was entered on the 5th August 2020 and the offence was committed on the 21st day of January 2017.

The Magistrate in her Judgment (sentence) acknowledged that the Respondent has “*previous convictions of the same back in the year 2014 to which he was convicted on 2 counts contrary to section 6(b) of the Misuse of Drugs Act, Cap 27 and 1 count contrary to section 7 of the same to which he was imposed with fines*”.

For the appeal before me, the Magistrate below despite acknowledging that the Respondent is a second offender for the offence under section 6(b) and also the requirement under section 29(3A) of the Misuse of Drugs Act whereby it provides for a minimum imprisonment sentence for second or subsequent offender, imposed a fine of \$3000 in default 6 months against the Respondent and was given a grace period until 19/9/2020.

The Magistrate in imposing the fine stated as follows;

“While the law pertaining to subsequent offenders is clear triggering the operation of section 29 (3A) of the Misuse of Drugs Act, Cap 27, where such category of offenders would be subjected to a minimum of 3 years imprisonment, I find the circumstances at hand not to be fitting so as to allow it to be applied. In other words, I consider the delay to be an extenuating factor to not impose the minimum term of imprisonment. In spite of this however, I believe a higher fine is warranted to deter the defendant from re-offending in the future.”

The Appellant submitted that *“the Magistrate had erred in law in failing to impose the prescribed minimum sentence. In light of the Respondent’s previous conviction, the Court was required to pass the minimum sentence of 3 years imprisonment”*.

The appellant further submitted that,

“In this instance, the law does not provide the Court to impose a sentence of fine. If it is inappropriate to impose the mandatory imprisonment sentence, the Magistrate must exercise her discretion under section 263 of the Criminal Procedure Code which provides the Court with an alternative to the imposition of a sentence of imprisonment or fine where it is expedient. However, we humbly submit that the imprisonment is the appropriate sentence in this present case”.

The question now is whether the Court below was correct in imposing a fine as an alternative to the minimum sentence pursuant to section 29(3A) Misuse of Drugs Act?

Being a second offender the Magistrate was correct to say that this will trigger the operation of section 29(3A) of the Misuse of Drugs Act, Cap 27.

However, if the Court below believes that section 29(3A)(b) is not appropriate, the Court could exercise its discretion to invoke section 263 of the Criminal Procedure Code to be dealt with as provided by the Offenders (Probation and Community Service) Act Cap 220.

I agree with the Prosecution (appellant) that the law does not provide the Court to impose a sentence of fine for a 2nd offender.

I find that the Magistrate below has erred when she imposed a fine knowing that the Defendant is a second offender and I agree that upon reading the record of the Magistrate’s sentence, the grounds given to depart from invoking section 29(3A)(b) Misuse of Drugs Act is not justifiable.

In *Reddihardine Bin Haji Matali and Public Prosecutor* (High Court Criminal Appeal No.24 of 2012), Steven Chong Ag C.J (then) held as follows:

“There is a long gap of nearly 12 years between the convictions. However the gap between convictions is not of itself a sufficient reason for not imposing the minimum sentence and it is necessary to consider all the circumstances of the case; (see Mohd Rosdy bin Abdullah v. Public Prosecutor [2001] 1 JCBD 186).”

The Magistrate below considered the delay to be an extenuating factor to not impose the minimum term of imprisonment.

The question is whether the delay of 3 years triggers the alternative. This on its own will not be enough as it is necessary to consider all the circumstances of the case.

The delay was caused by the Defendant himself who had failed to report himself and that he was caught only after an arrest was made on 3rd September 2020 due to a suspicion of being involved in a drug related activity.

In *Nasir bin Jalil v Public Prosecutor* (HCCA No 11 of 2005) whereby the offence was committed on 13/5/2002 and the case was only brought to Court on 28/12/2004 which is more than 2 years. The Appellate Court did not make any comment on this and considered that the minimum sentence is appropriate.

Here before me, I found that the Magistrate below has erred in law in imposing a fine for a second offender. I am satisfied that for the reasons that I have aforesaid above, section 29(3A)(b) should be invoked in this case.

I therefore allow the appeal and replace the fine of \$3000 in default 6 months' imprisonment to an imprisonment sentence of 3 years with effect from 17/12/2020. This is after taking into account that he has pleaded guilty at a first instance.

HJ ABDULLAH SOEFRI BIN POKSM DSP HJ ABIDIN
Judicial Commissioner