

Jakaria Bin Ahad

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 40 of 2016)**

Hon. Gareth John Lugar-Mawson, Judicial Commissioner.
24th May, 2017.

Headnote - Trafficking in a Class A drug, a probation order coupled with a community service order under the Offenders (Probation and Community Service) Act, Cap 220, is not the appropriate punishment for an offender convicted after trial of trafficking in 18.242 grams of Methylamphetamine (syabu).

Mr Roy Prabhakaran (M/S Yusof Halim & Partners) for Appellant.
DPP Farhanah Bte Pehin Hj Suhaili for Public Prosecutor.

Cases cited in the Judgment:

Maimun binti Hj Omar v PP Criminal Appeal No. 1 of 2013 ([2013] JCBD 154)
PP v Awang Roslan bin Mohd Yunus Criminal Appeal No. 6 of 2005

J U D G M E N T

Hon. Gareth John Lugar-Mawson, J.C.:

Background

1. The Appellant faced two charges, one under section 3A of the Misuse of Drugs Act, Cap 27 of possession of 18.242 grams of Methylamphetamine, a Class A controlled drug for the purpose of trafficking and one under section 6(b) of the same Act for consuming Methylamphetamine. He pleaded guilty to the consumption charge, but claimed trial on the trafficking charge.
2. On 10 August 2016, the presiding Senior Magistrate convicted the Appellant of the trafficking charge and on 13 August 2016, he sentenced the Appellant to 5 years imprisonment and 5 strokes of the cane on the trafficking charge and 3 months imprisonment on the consumption charge. The sentences were ordered to run concurrently, making a total sentence of 5 years and 3 strokes with effect from 13 August 2016.
3. The Appellant appeals against both conviction and sentence.

Facts

4. The facts are straightforward; at around 01.20 hours on 5 February 2008, Narcotics Control Bureau Officers found the Appellant with his car in a car-park near to Masjid Sungai Kebun. The car was searched; in it the officers found 15 packets of suspected methylamphetamine.

5. The Appellant was questioned, according to the arresting officer's note book, when he was asked: "*Are you involved in the use of drugs?*", he replied "*Yes.*" And when he was asked in the next question: "*Using or selling?*", he replied "*Both*". The note book was admitted into evidence. There does not appear to have been a challenge either to the accuracy of its contents, or the admissibility of the Appellant's answers to the officer's questions.
6. Later that morning BND\$2,180 was found at his home, which was some distance from the car-park where the Appellant and the suspected drugs were found.
7. At around 06.30 hours on the same day, the Appellant gave a urine sample; this later proved positive for methylamphetamine.
8. Starting at 06.50 hours on the same day, he was cautioned and gave a caution statement. In it he admitted that the suspected drugs were *syabu*, the local term for methylamphetamine, and that he possessed the 15 packets of it for the purposes of trafficking. He said he was looking after them for a man called Haji Limin.
9. On the same day, (the time was unascertained at trial) the Appellant was taken to RIPAS Hospital. There he was examined by PW14, Dr Nwe Nwe Mynit. Her Report (admitted as P26), against the item "*Other symptoms e.g. slurred speech, disorientation, hallucinations, etc.*" records "*Nil*".
10. The suspected drugs found in the car were submitted for analysis, this confirmed that they were methylamphetamine, a class A controlled drug. Their total weight was 18.242 grammes.
11. At trial, the Appellant admitted possessing the 15 packets of methylamphetamine, but denied that had them for trafficking. He objected to the admission of the caution statement, claiming that when he gave it, he was still suffering from the effects of the *syabu* he had ingested before arrest and that he had made up his answers that he was looking after them for a man called Haji Limin because of those effects. At trial the Appellant said he had made up the story about Haji Limin, who does not exist.
12. It was the Appellant's case that the money found at his home was a loan from his mother to support a chicken retailing business he was then engaged in.

Appeal against conviction

13. Mr Prabhakaran, for the Appellant, in advancing the appeal against conviction, says that the Senior Magistrate erred in admitting the caution statement as he failed to take account of the possibility that, when he made it, the Appellant was suffering withdrawal symptoms from the effects of the methylamphetamine he had taken before arrest and that this rendered his admission in that statement that he was looking after it for Haji Limin unreliable.
14. Mr Prabhakaran also argued that, in his ruling on the admissibility of the caution statement, the Senior Magistrate misstated the effect of Dr Mynit's evidence concerning the Appellant's mental state at the time of she examined him. What the Senior Magistrate said was:

"The Court agrees with the prosecution that if the defendant was in a state of DELIRIUM the doctor who examined him after the statement had been recorded (this) in his (sic) examination report."

15. According to the trial record, Dr Mynit said in her evidence that she examined the Appellant in the morning; she could not recollect the time. That she carried out a '*general examination*' on him; by this she meant:

"Normally we look for at the patient whether stable or not, not in respiratory distress. We check for eyes whether the patient is pale or not. We ask them to open the mouth to check inside. Then we check the heart and lungs. We check for any external injuries at the hands, face."

16. She said that the Appellant: "...didn't say anything about injury or pain", and that her findings were: "*I did not find any abnormality.*" By '*abnormality*' she meant:

"At that time he was stable not in respiratory distress. I did not see any obvious external injury nor abnormality found when examine heart and lungs."

17. She went on to say that, after the examination, she "...filled out the form" and handed it to the NCB officers "...before they left".

18. Although she was not asked, in direct terms: in your opinion, was the defendant delirious, or suffering from withdrawal symptoms? It is clear from Dr Mynit's evidence that when she examined the Appellant, she found nothing physically wrong with him, and this was not challenged. Given that evidence, the Senior Magistrate was perfectly justified in disbelieving the Appellant's claim that, at the time he gave the statement at around 06.50 hours that day, he was suffering from withdrawal symptoms which caused him to make up a story about Haji Limin.

19. An argument was advanced at the hearing of this appeal that the Senior Magistrate erred in relying relied on Dr Mynit's evidence in coming to his decision on admissibility as the doctor's evidence was given in the trial proper and not the voir dire. An examination of the record shows that it was given in the voir dire, before the ruling on admissibility. This renders that argument unsustainable.

20. Mr Prabhakaran further argued that the Senior Magistrate, in coming to his decision, as set out in his Reasons, erred in saying that he agreed with PW1, a Chief Narcotics Officer, that, as the drugs were in small packets and that money was found on the Appellant, this was an indication that the Appellant possessed the drugs for the purposes of trafficking in them. It is pointed out that the money was not found on the Appellant, but in his house and that the Senior Magistrate misstated the evidence on this matter.

21. If the Senior Magistrate was accepting that he agreed with PW1's opinion on this matter, he was in error. It is not for a witness, even though he may be an experienced investigator, to express an opinion on such matters. Inferences, such as this, are for the court as trier of facts to decide, not a witness. I am, however, satisfied, given the strength of the other evidence on which the Senior Magistrate relied in finding the Appellant guilty, that this error and his misstatement of the evidence where the money was found, does not call his decision into question.

Decision

22. The Appellant's appeal against conviction is dismissed.

Appeal against sentence

23. In pursuing the appeal against sentence, Mr Prabhakaran lays great emphasis on the delays in this case. The offence was committed on 5 February 2008, it was not until 20 March 2012 that the Appellant was charged, a delay of just over 4 years. The trial took 3½ years to complete. The Senior Magistrate took 7 months to prepare his Reasons for Judgment, it is only 5½ pages long. DPP Farhanah binti Pehin Dato Hj Suhailli, for the Public Prosecutor, cannot account for any of these delays. She advanced no argument that the Appellant caused them, or contributed towards them in a material way.
24. The most charitable thing that can said about the delays is that they are staggering and unconscionable. The case against the Appellant was a not a complex one, it was a straightforward stop and search anti-drugs operation. The Senior Magistrate recognised this in his Reasons.
25. Mr Prabhakaran argued that the Appellant is entitled to very significant reduction in his sentence because of the delays. He referred me to the Court of Appeal's decision in **Maimun binti Hj Omar v PP** Criminal Appeal No. 1 of 2013 ([2013] JCBD 154), where the Court of Appeal substituted a probation order coupled with a community service order on an offender who had been sentenced to 4 years' imprisonment for 6 forgery offences because of the over 10 years delay it took the authorities to successfully prosecute her.
26. He argues that under the provisions of the Offenders (Probation and Community Service) Act, Cap 220, a probation order coupled with a community service order is permissible for drug trafficking offences. I agree with him that, at law, this is so. From his Reasons for Sentence it is clear that the Senior Magistrate addressed his mind to the possibility of such an order.
27. Mr Prabhakaran argued that the Appellant appears to be a suitable subject for such an order. Before conviction, he was a first-time offender; he married while on bail awaiting trial, and his wife and he have a child; he did not offend while on bail and he has a business renting out beach buggies. I can accept that the delays have caused the Appellant anxiety.
28. The problem Mr Prabhakaran faces in advancing his argument, is that it ignores the serious nature of the offence of possession of a Class A controlled drug which the Appellant was convicted of. It is not my place to preach a sermon on the evils of the international drug trade, or the harm that drugs cause society and those who are foolish enough to consume them, but it clear that, in Brunei, His Majesty's Government regards these matters as so serious that the death penalty is prescribed for those who traffic in large quantities of Class A drugs.
29. It is also the case that, in dealing with Mr Prabhakaran's argument, I must take into account the nature of the drugs the Appellant trafficked in - methylamphetamine. I have handled a sufficient number of drugs cases to know that it is a very powerful drug and highly addictive. It is wholly synthetic and, unlike other 'hard' drugs of abuse such as heroin or cocaine which are derived from natural plant material, it has no medicinal uses whatsoever. For some reason, it is most commonly sold to, and abused by, young people, with all the deleterious results that causes to society.
30. The minimum sentence for the quantity of methylamphetamine the Appellant trafficked in (18.242 grammes) is 5 years' imprisonment together with 5 strokes of the cane, the maximum sentence is 20 years imprisonment plus 15 strokes. The Court of Appeal in **PP v**

Awang Roslan bin Mohd Yunus Criminal Appeal No. 6 of 2005, set tariff guidelines for those judges and magistrates who have the task of sentencing drug traffickers. They are based on the weight of the drugs involved and are for those cases the offender is convicted after trial.

31. For the 18.242 grammes of methylamphetamine in this case, the **Awang Roslan** tariff range, based on weights of over 10 and below 20 grammes, is between 5 to 10 years' imprisonment and 5 to 8 strokes of the cane. Given that the drug's weight in this case is nearer the upper end of the scale, the Senior Magistrate would have been acting well within the tariff had he sentenced the Appellant to 9 years' imprisonment with 8 stokes.
32. Although the Senior Magistrate did not say that this was the case in his Reasons for Sentence, he has effectively given the Appellant a substantial 4 year, 3 strokes discount to reflect the delays. As the Appellant, as was his right, contested the charges, he was not entitled to any permissible discount in the length of his sentence a guilty plea would have entitled him to.
33. I do not believe that this is the case where, because of the delays, I should substitute a probation order coupled with a community service order for the sentence the Appellant received. Given the serious nature of his offence, I do not believe that such an order is appropriate and that I should take the lead from the Court of Appeal in **Maimun** in substituting one. In saying that, I am not saying that forgery is not a serious offence, but in my view such an order is more appropriate for a forger who pleaded guilty than it is for a drug trafficker who was convicted after trial.

Decision

34. The Appellant's appeal against his sentence is dismissed.

HON GARETH JOHN LUGAR-MAWSON
Judicial Commissioner