DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN JENAYAH NO. W-05(H)-11-01/2016 (NGA)

ANTARA

PENDAKWA RAYA - PERAYU

DAN

OZOEGO CHINEDU CHRISTIAN - RESPONDEN

[Dalam Mahkamah Tinggi Malaya di Kuala Lumpur
Dalam Wilayah Persekutuan
Perbicaraan Jenayah No.: 45A-30-05/2014

Antara

Pendakwa Raya

Dan

Ozoego Chinedu Christian]

CORAM:

Mohtarudin bin Baki, JCA

Varghese George, JCA

Ahmadi bin Haji Asnawi, JCA

GROUNDS OF JUDGMENT

INTRODUCTION

1. The Respondent before us had originally been charged, together with two others, for an offence under section 39B(1)(a) of the Dangerous Drugs Act, 1952 (**the Act**) punishable under section 39B(2) of the Act, read together with section 34 of the Penal Code. The Respondent was the second named accused and the charge was as follows:

> *"Bahawa kamu pada 14.12.2013 jam lebih kurang 4 petang, di tepi jalan Desa Bahagia, di hadapan Bangunan Faber Tower, Taman Desa Off Jalan Klang Lama, dalam Daerah Brickfields, Wilayah Persekutuan Bandaraya Kuala Lumpur telah mengedar dadah berbahaya iaitu Methampetamine seberat 5603.4 gram, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama dengan seksyen 34 Kanun Keseksaan."*

2. The trial had commenced and the prosecution had called four witnesses to the stand before an alternative charge was offered to all the accused. The alternative charge was under section 12(2) of the Act, punishable under section 39A(2) of the Act, read together with section 34 of the Penal Code. The alternative charge read:

> *"Bahawa kamu pada 14.12.2013 jam lebih kurang 4 petang, di tepi Jalan Desa Bahagia, di hadapan Bangunan Faber Tower, Taman Desa Off Jalan Klang Lama, dalam Daerah Brickfields, Wilayah Persekutuan Bandaraya Kuala Lumpur, telah memilik dadah berbahaya iaitu Methampetamine seberat 5603.4 gram, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 12(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39A(2) Akta yang sama dibaca bersama dengan seksyen 34 Kanun Keseksaan."*

3. On 18.12.2015 the Respondent pleaded guilty to the alternative charge while the two other accused claimed trial. The Respondent was sentenced to six years imprisonment together with 10 strokes of the cane by the learned Judge.

4. The other two accused were on the same day at the request of the prosecution granted a discharge not amounting to an acquittal (DNAA).

5. The appeal before us was by the Public Prosecutor against the sentence imposed by the learned Judge on the Respondent.

6. Before we dealt with the substantive appeal we heard and disposed an application by the Respondent (Enclosure 9(a)) to include two letters as part of the record of appeal. The learned Federal Counsel for the Appellant had objections to that application. We however allowed the Respondent's application to introduce those two letters, namely;

   (a) a letter of representation dated 19.11.2015 from Solicitors for the Respondent; and

   (b) a further letter dated 30.12.2015 also from Solicitors for the Respondent.

7. The letter of representation referred in (a) was prior to the reduction by the prosecution (the Appellant) of the original charge by way of the offer of the alternative charge made to the Respondent. The letter of 30.12.2015 was subsequent to the sentencing, expressing the Respondent's solicitors' view that no

appeal ought to have been filed by the prosecution considering the particular circumstances of the case, namely, the said letter of representation, the reduction of the charge by the prosecution consequent to that, and, allegedly the outcome of a meeting that the prosecution and defence counsel had with the learned Judge prior to the sentence being handed down by the court.

8. We had allowed both the aforesaid letters to be included as *Rekod Rayuan Tambahan* in the appeal on the grounds that the material therein was relevant to appreciate the background to the reduction of the original charge by the prosecution and the subsequent events. The prosecution also did not deny the existence of those letters.

9. However to be fair to the learned Deputy Public Prosecutor (DPP) Tuan Mohd Nordin bin Ismail, who had the conduct of the prosecution case at that stage, a note must be made here, that the learned DPP had by his *Afidavit Balasan* (affirmed on 29.03.2016) denied that he had personally agreed at any time to the length of the imprisonment to be meted out as punishment; it was also further asserted that the Respondent had on his own volition unconditionally pleaded guilty.

10. We were of the view that no prejudice would ensue to the prosecution if those letters were referred to by the Respondent in the appeal. In any event any construction and/or the weight to be given to the contents thereof remained still within the purview of this court.

FACTS

11. The essential facts of the case presented by the prosecution before the Respondent was convicted on the alternative charge, as recorded by the learned Judge, was as follows:

> *"[5] Fakta ringkas kes seperti dikemukakan oleh pihak pendakwaan dan diakui benar oleh tertuduh kedua adalah seperti berikut (P26):*
>
> 1. *Pada 14.12.2013 jam lebh kurang 4 petang, Pengadu iaitu Insp Mohd Azrin bin Abd Manan dan anggotanya telah membuat pemerhatian terhadap Tertuduh Kedua iaitu Ozego Chinedu Christian yang berada dengan Tertuduh Pertama dan Ketiga berhampiran sebuah kereta Honda CRV IM4U 1050. Kereta CRV ini berada di tepi jalan Desa Bahagia, hadapan Bangunan Faber Tower, Taman Desa Off Jalan Klang Lama.*
>
> 2. *Tertuduh Kedua telah mengambil satu kotak dari kereta Honda CRV ini dan masukkan dalam sebuah teksi HWE 23.*
>
> 3. *Pengadu nampak Tertuduh Kedua ini melihat sesuatu ke dalam kotak sebelum dimasukkan dalam teksi tersebut.*
>
> 4. *Pengadu kemudian bersama anggotanya terus membuat serbuan dan berjaya menahan Terduduh Pertama dan Tertuduh Kedua selepas mereka cuba melarikan diri.*
>
> 5. *Manakala Tertuduh Ketiga beredar dari tempat tersebut menaiki Honda CRV dan diekori oleh anggota pengadu Sjn Mashud bin Shahid dan berjaya ditangkap di Jalan Vivekananda Brickfields. Tertuduh ini juga dibawa bersama ke tempat Tertuduh Pertama dan Kedua berada iaitu di tepi Jalan Desa Bahagia, hadapan Bangunan Faber Tower, Taman Desa Off Jalan Klang Lama.*
>
> 6. *Pemeriksaan dibuat oleh Pengadu dan anggotanya terhadap kotak yang dirampas dari teksi tersebut.*
>
> 7. *Di dalam kotak tersebut mengandungi satu plastik 7 eleven di mana di dalamnya mengandungi satu kotak Nestle Honey Star, satu kotak Nestle Milo dan juga bungkusan roti Gardenia Butterscotch.*

8. *Turut dijumpai dalam kotak tersebut adalah 8 bungkusan plastik lutsinar mengandungi dadah Methamphetamine seberat 5603.4 gram.*

9. *Siasatan dijalankan oleh Pegawai Penyiasat iaitu ASP Er Sheau Jia dan semua barang kes dadah dihantar untuk analisa kepada Puan Suhana binti Ismail.*

10. *Berdasarkan pengakuan salah Tertuduh Kedua, fakta kes dan siasatan maka Tertuduh Kedua telah melakukan kesalahan yang boleh dihukum di bawah seksyen 39A(2) Akta Dadah Berbahaya 1952".*

THE APPEAL

12. The appeal was against the adequacy of the sentence imposed by the High Court. Basically it was the contention of the learned DPP that the 6 years imprisonment and 10 strokes handed down by the learned Judge was manifestly inadequate. It was urged upon us that the sentence imposed did not reflect the gravity of the offence considering both the particular nature (processed methamphetamine) and the quantity (5603.4 gm) of the drugs involved.

13. It was also contended in the appeal that the possession of the drugs by the Respondent was definitely not for his personal use and the quantity seized was almost 186 times in excess of the threshold of 30 grammes provided in the statute to invoke section 39A (2) of the Act itself. Further, that section, reflecting the seriousness of the crime, called for a punishment of imprisonment for life or for a term which shall not be less than five years and mandatory whipping of not less than 10 strokes. It was also submitted that the trend in the range of sentences imposed under section 39A (2) of the Act was between 10 to 13 years

imprisonment together with, of course, the minimum 10 lashes of the rotan stipulated.

14. It was also submitted that the sentence imposed on the Respondent, if sustained, would send a wrong message to the public. Although the Respondent had pleaded guilty to the charge brought against him and he was entitled to some discount in the punishment to be given for that, the sentence should also reflect the society's abhorrence to such serious crimes and be a deterrent to others with similar propensity to commit such crimes.

15. For the Respondent, our attention was drawn to the fact that the alternative charge was offered to the Respondent after four witnesses for the prosecution had given evidence and after the letter of representation of 19.11.2015 was sent to the Attorney-General's Chambers. What had transpired from the evidence before the court by then was that the source of the drugs was positively shown to have come from the Customs Narcotics Store and it implicated a highly placed Custom Officer who had sold the drugs to the Respondent, and probably to others. Should the prosecution of the Respondent had gone its full way on the original charge, it was bound to aggravate the repercussions and embarrassment caused to the relevant authorities, particularly, in so far as their controls in place, and operations generally, were concerned.

16. It was therefore contended that the circumstances surrounding this case, namely, the antecedents for the offer of the alternative charge and the consequent guilty plea by the Respondent, was unique and exceptional. The learned Judge was aware of this background before he had imposed the sentence. In any event sentencing for any crime, admitted or proved, was always at the discretion of the trial Judge before whom the case was tried and ought not to be interfered readily in appeal, unless it was shown to have been based completely on wrong principles of law.

17. Specifically, Counsel for the Respondent referred us to paragraphs 17 and 18 of the *Alasan Hukuman* of the learned Judge where the court justified why in this particular case, considering the unique surrounding circumstances, the six years imprisonment and 10 strokes of the *rotan* was considered by the court to be adequate.

OUR DELIBERATION AND DECISION

18. We reproduce below paragraphs 17 and 18 of the *Alasan Hukuman* of the learned Judge in its entirety, which encapsulated the reasoning of the court behind the choice of the sentence imposed on the Respondent:

> *"[17] Peguambela turut berhujah secara lisan bahawa terdapat keunikan dalam fakta kes yang tidak disampaikan oleh Tuan Timbalan Pendakwa Raya secara rasmi mengenai* ***penglibatan seorang Pegawai Kanan Kastam dalam kes ini yang telah membekalkan dadah tersebut.*** *Dadah berbahaya yang terlibat datang daripada Setor Kastam dan sekiranya perbicaraan penuh diteruskan akan memalukan sebuah agensi*

penguatkuasaan negara. ***Fakta in tidak dinafikan oleh pihak pendakwaan.***

[18] Saya telah menimbangkan faktor kepentingan awam, mitigasi tertuduh dan hujahan pemberatan oleh Tuan Timbalan Pendakwa Raya sebelum menjatuhkan hukuman minima terhadap tertuduh. ***Walaupun berat dadah berbahaya yang terlibat agak besar (5,603.4 gram) saya berpandangan kepentingan awam dan kredibiliti sebuah agensi penguatkuasaan hendaklah dipelihara dengan memberikan galakan untuk tertuduh mengaku salah dan kes diselesaikan tanpa perbicaraan penuh.*** *Oleh itu hukuman paling minima wajar dipertimbangkan terhadap tertuduh kedua yang telahpun mengaku salah.* ***Bukan sahaja tertuduh kedua telah dapat menjimatkan masa dan perbelanjaan semua pihak yang terlibat, malahan dapat menyelamatkan maruah dan integriti sebuah agensi penguatkuasaan yang sepatutnya menguatkuasakan undang-undang tetapi sebaliknya pegawai agensi tersebut yang telah melanggar undang-undang negara.*** *Faktor khas dan keunikan yang berlaku dalam kes ini mewajarkan kes terhadap tertuduh kedua diberikan kelonggaran dalam pengenaan hukuman yang tidak mengikut trend hukuman semasa.*

19. We have highlighted the salient parts of the learned Judge's reasoning for the sentence that was imposed. It was clear to us that the learned Judge had treated this as a special case and why he had to depart from the normal sentencing trend in similar cases. It was also obvious that the learned Judge did not ignore, nor had failed to direct his mind, to the fact that this was a serious crime involving a sizeable quantity of drugs, whilst considering that the Respondent's guilty plea would save the court's time and other related expenses.

20. Nevertheless, the challenge before the learned Judge, as it would appear was how to balance the normal sentencing considerations applied by the court, as against a peculiar situation obtaining here where the integrity and reputation of an enforcement agency had to be protected as well. It was noted by the learned Judge that in the context of the evidence that had emerged in this case, the accused's guilty plea ought to be encouraged and recognised as meriting special treatment. To reemphasise, the learned Judge said:

> "…***saya berpandangan kepentingan awam dan kredibiliti sebuah agensi penguatkuasaan hendaklah dipelihara dengan memberikan galakan untuk tertuduh mengaku salah dan kes diselesaikan tanpa perbicaraan penuh … Bukan sahaja tertuduh kedua telah dapat menjimatkan masa dan perbelanjaan semua pihak yang terlibat, malahan dapat menyelamatkan maruah dan integriti sebuah agensi penguatkuasaan yang sepatutnya menguatkuasakan undang-undang tetapi sebaliknya pegawai agensi tersebut yang telah melanggar undang-undang negara. …*** "

The learned Judge being the trial judge was himself fully conversant with what had transpired so far in the case.

21. We were satisfied with the adequacy of the sentence imposed on the Respondent as was explained by the learned Judge in the light of the special and unique nature of the circumstances surrounding this particular case. The Respondent had been offered an alternative charge and he had chosen to plead guilty. In any event the sentence imposed (six years imprisonment and 10 strokes) was well within the scope of section 39A (2) of the Act and therefore not illegal.

22. We were not persuaded that we should therefore interfere with and enhance the sentence imposed on the Respondent as urged upon us by the learned DPP. Accordingly we unanimously dismissed the appeal and affirmed the sentence ordered by the learned Judge at the High Court.

Dated: 28.11.2016

Signed by:

VARGHESE A/L GEORGE VARUGHESE

JUDGE OF COURT OF APPEAL

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