DALAM MAHKAMAH MAJISTRET DI TEMERLOH

DALAM NEGERI PAHANG DARUL MAKMUR

[NO. KES: CB-83D-262-02/2024]

PENDAKWA RAYA

LAWAN

ABDUL RAHMAN BIN OMAR

GROUNDS OF DECISION

[1] On 16 May 2024, an amended charge (marked as "Lampiran A") was tendered by the prosecution to be read to the accused for an offence under subsection 12 (2) Dangerous Drugs Act 1952 ("DDA").

[2] The amended charge read as follows: -

> "BAHAWA KAMU PADA 06HB FEBRUARI 2024 JAM LEBIH KURANG 9.00 MALAM DI DALAM BILIK RUMAH NO.19 JALAN ALAMANDA 1 TAMAN ALAMANDA BATU 4 JALAN MARAN TEMERLOH, DI DALAM DAERAH TEMERLOH, DI DALAM NEGERI PAHANG DARUL MAKMUR, TELAH DIDAPATI DALAM MILIKAN KAMU DADAH BERBAHAYA JENIS HEROIN DAN MONOACETYLMORPHINES BERAT BERSIH 0.20 GRAM

TANPA MEMPUNYAI KEBENARAN YANG SAH MENGIKUT UNDANG-UNDANG. OLEH YANG DEMIKIAN KAMU TELAH MELAKUKAN KESALAHAN DI BAWAH SEKSYEN 12(2) AKTA DADAH BERBAHAYA 1952 DAN BOLEH DIHUKUM DI BAWAH SEKSYEN 12(3) AKTA YANG SAMA.

HUKUMAN: DENDA TIDAK LEBIH DARIPADA RM 100,000.00 ATAU DIPENJARA TIDAK MELEBIHI 5 TAHUN ATAU KEDUA-DUANYA SEKALI."

[3] The charge was read and explained to the accused. He understood the charge and pleaded guilty.

[4] The court subsequently explained the nature and consequences of his plea to the accused. The punishment under subsection 12 (3) DDA was also explained to the accused to which he understood and maintained his guilty plea.

[5] The facts of the case (tendered as Exhibit P1) were read to the accused to which he understood and admitted. The following exhibits were then tendered and respectively marked: -

Police Report (Temerloh 1011/24) – P2

Chemist Report dated 1.4.2023 – P3

Pictures of the exhibits (admitted by the accused) – P4

[6] Satisfied with the plea of the accused person, I convicted the accused as charged.

SUBMISSIONS BY THE PROSECUTION AND DEFENCE

[7] The learned Yayasan Bantuan Guaman Kebangsaan ("YBGK") Counsel representing the accused, in mitigation, submitted that the accused prayed for a minimal fine, was remorseful for his actions, promised not to repeat the same mistakes in the future and that his plea of guilt had saved time and costs of all parties. The learned YBGK Counsel further submitted that the accused: -

1. is 35 years old;
2. is married with a wife and 2 young schooling children;
3. works odd jobs in the villages;
4. has an estimated income of RM900 monthly; and
5. is the sole breadwinner of the family.

[8] The learned Deputy Public Prosecutor ("DPP") prayed for an appropriate sentence as a lesson to the accused and also to educate the public on the consequences of committing a dangerous drugs related offence.

CONSIDERATIONS BEFORE SENTENCING THE ACCUSED

[9] An instruction has been issued by the Chief Registrar through a letter dated 7 November 2016 with the reference number PKPMP.PKP.100-11/2/18 instructing all courts equipped with an electronic system called the *Case Management System* ("CMS") to keep records of information of cases through an electronic cause book. The usage of CMS in the Temerloh lower courts has been since year 2017. Hence, the cause book in the Temerloh Magistrates' Court is kept electronically.

[10] I had examined the accused's previous convictions through this court's electronic cause book using CMS *sua sponte*. I had done so without any prompting nor request from either the prosecution nor the defence. There were no objections forthcoming from the learned DPP nor the learned YBGK Counsel on this matter.

[11] Perusing through the accused's records on the electronic cause book, I noticed that the accused had a number of previous convictions, particularly previous convictions involving dangerous drugs related offences.

[12] The results of my perusal are as follows: -

Case number	Sentencing date	Offence	Sentence
CB-83RS-29-03/2018	23 March 2018	457 Penal Code	Fine RM4000 i.d 4 months imprisonment + 12 months imprisonment from date of arrest
CB-83D-367-03/2018	25 April 2018	15 (1) (a) DDA	8 months imprisonment from date of arrest + 2 years supervision

CB-83D-789-09/2021	20 October 2021	15 (1) (a) DDA	Fine RM2000 i.d. 6 months imprisonment + 2 years supervision
CB-83D-790-09/2021	7 December 2021	15 (1) (a) DDA	Fine RM2000 i.d. 6 months imprisonment + 2 years supervision

[13] To ensure the veracity of the accused's previous convictions, I read out the list of previous convictions to the accused, which he confirmed as true.

[14] I subsequently sentenced the accused person to a fine of RM10,000 in default 14 months imprisonment. Dissatisfied with the said sentence, the accused filed an appeal.

PRINCIPLES OF SENTENCING

[15] Subsection 173 (b) of the Criminal Procedure Code ("CPC") states that once an accused person pleads guilty to a charge and is convicted on it, the court shall pass sentence according to law. The subsection is reproduced below:-

"173. Procedure in summary trials.

(b) If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded

and he may be convicted on it and the Court shall pass sentence according to law".

[16] The meaning of sentence according to law has been clearly explained in the case of **PP v Jafa bin Daud [1981] 1 MLJ 315**:-

"A "sentence according to law" means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles.".

[17] However, there are many factors that the court has to consider before deciding on an appropriate sentence for an accused person. These factors have been summed up by the Court of Appeal in the case of **Public Prosecutor v Morah Chekwube Chukwudi [2017] 1 LNS 864; [2017] MLJU 958** which states: -

"Jurisprudence relating to sentence

[5] It is well established that there are a number of factors that courts take into consideration before sentencing. Some of them are as follows:

(a) the gravity or severity of the facts constituting the offence;

(b) the circumstances in which it was committed;

(c) the rampancy of such offence in the area;

(d) the offender's previous record;

(e) the offender's contribution and support to his family members;

(f) the offenders means;

(g) the effect of conviction and sentence on his job opportunities;

(h) the age and health of the accused;

(i) whether it is his first offence;

(j) whether the accused had cooperated with the police after the commission of the offence;

(k) whether the accused had pleaded guilty;

(i) status of the accused;

(m) whether there was violence during the crime;

(n) public interest, etc.".

[18] I had considered the factors mentioned above before sentencing the accused. In addition, the factor of rampancy of dangerous drugs related offences in Malaysia in recent times have also been considered.

[19] Nevertheless, this does not mean that the interests of the accused are disregarded. There should be a balance between public interest and the interest of the accused person. To this, the accused's mitigation was taken into consideration.

[20] On the facts of this particular case, it is my opinion that the accused's previous convictions and the suitability of a fine warrant further discussion which I will canvass below.

EVALUATION OF THIS COURT

[21] It is trite that the accused's previous convictions may be considered when meting out a sentence after finding the accused guilty of the charge. The case of **Awang Ahmad Faisal Awang Sohor v PP [2015] 7 CLJ 955** is referred to where Alwi Abdul Wahab JC (as he then was) stated:

> *"[6] In my opinion, there is nothing wrong for the learned Magistrate to take into consideration the accused's previous convictions before passing the sentence. This has been the practice by the court for the past years until now. It would only be reasonable for the court to consider the accused's past record of previous convictions in order to determine the appropriate sentence to be meted out. The sentence given to the accused with previous record of past convictions would certainly be different from the sentence given to the first offender committing similar offence.".*

[22] Regarding the manner in which previous convictions may be referred to by the courts, I rely on the case of **Tan Shy Wen v Public Prosecutor [2021] MLJU 1849** which revolves around a similar issue whereby the learned Magistrate had considered the accused previous convictions on her own motion. I see no need to further elaborate on what Amirudin Abd Rahman JC has ruled on this

matter. The following are relevant excerpts of his Lordship's judgement: -

> *"CONSIDERATION OF PREVIOUS CONVICTIONS ON THE OWN MOTION OF THE COURT*
>
> *[44] At the outset, based on notes of proceedings of the Magistrate's Court when the Magistrate had acted on her own motion before meting out the sentence is recorded as follows:*
>
> *"Mahkamah: Tan Sey Wen, tahun lepas saya hukum kamu empat kali, tahun 2017 saya hukum kamu satu kali. So lima kali saya sudah hukum kamu untuk sek. 9(1) Akta Rumah Judi Terbuka 1953."*
>
> *[45] The Appellant then nodded and agreed to the statement made by the Magistrate. It is apparent from this that the Magistrate herself had previously convicted the Appellant on the same offence four times in 2019 and one time in 2017. Later in the Magistrate's grounds of judgement it was detailed in depth on convictions made by her previously …*
>
> *[46] In hindsight, the learned Magistrate was well aware of the convictions that she had imposed against the Appellant. Even though the Magistrate had not gone in length, she stated during the proceedings that she had convicted the Appellant accumulatively five times previously in 2017 and 2019 for the same offence. This matter was never denied or*

refuted by the Appellant during the sentencing process before the Magistrate which portrays that the previous convictions were indeed accurate. The Appellant would have denied or refuted or even say that she couldn't recall if what was said by the Magistrate was inaccurate or untrue. Furthermore, this Appellant during this Appeal had never contested the veracity of the five previous convictions as stated in the grounds of judgement of the Magistrate which the Magistrate had considered in sentencing.

…

[52] It is the view of this Court that when the Magistrate had considered the Appellant's five previous convictions, she was merely performing her judicial functions in compliance with section 173(b) CPC in determining the appropriate sentence …

[53] … In determining what amounts to a sentence according to law, the court deciding on the sentence must firstly bear in mind the provisions of the law. When a statute provides for a mandatory sentence then the Magistrate would not have a say or discretion and in contrast, when a statute allows for the discretion of the court to be applied, it must be exercised in considering both mitigating and aggravating factors for example previous convictions, public interest, seriousness, age and plea of guilt, based on the facts and circumstances of the case. ***Thus, that when the Magistrate had made the statement on the previous convictions and granted the Appellant an opportunity to verify the previous convictions, she was purely performing her judicial functions in determining a***

"sentence according to law" to be passed by herself on the Appellant.

[56] … In this case, the Magistrate had performed her duty in recording the particulars of the previous conviction by making a statement and queried the Appellant when the Magistrate was aware that she herself had sentenced the Appellant for the same offences previously. The Magistrate was conscious that she had previously convicted the Appellant and what was the offence involved.

[57] The Appellant in this case shouldn't expect the Magistrate just to disregard the fact that the Magistrate herself had convicted the Appellant before even when the prosecution had failed to prove so. The Magistrate had on her own motion and effort, asked the Appellant to verify the fact that the she herself had convicted the Appellant multiple times previously for the same offence. To compel the Magistrate to neglect this fact would indeed hinder her from performing her judicial functions in meting out a "sentence according to law". What the Magistrate had done was to perform her judicial functions as mandated by law and this Court is of the opinion that the Magistrate had applied her discretion to take judicial notice in this case.

[58] In practice, Magistrate's sitting in his or her circuit would come across frequently where a person who they themselves have previously convicted appears before them yet again and has pleaded guilty and subsequently convicted by them again. Habitual offenders who are

convicted time and time again and dwell in a life of crime should not escape the force of the law just because the prosecution had not produced any records of previous convictions of these offenders. At the end of the day it is the court who is the "guardian of justice".

[59] ***A Magistrate whose duty is to administer justice conscientiously should not sit back and disregard the fact that an offender had previous convictions if this fact was indeed very well within the knowledge of the Magistrate. The law should also not hinder the Magistrate by being rigid and mandate that previous convictions can only be taken into account when it is proved by the prosecution.*** *Such restriction is not within the spirit of the law to expect a Magistrate in such a situation just to disregard previous convictions made by the same Magistrate on the same Accused.*

…

[61] It is the view of this court when the Magistrate had considered the previous conviction of the Appellant, she was invoking judicial notice where a fact which is judicially noticeable need not be proved as provided for by section 56 Evidence Act 1950.

…

[70] … it can be concluded that a magistrate may use his judicial knowledge from matters that are made known to him from inside his own courtroom. If a matter has reached the court, he may take judicial notice of it, what more if it reached his own court.".

(emphasis is mine)

[23] Applying what has been ruled in **Tan Shy Wen** (supra), I had examined the accused's previous convictions on my own motion, a practice I regularly apply as one of the measures in determining a sentence according to law. Thus, I was invoking judicial notice of the Temerloh Magistrates Court records via the electronic cause book, accessed through CMS as explained above. As I was invoking judicial notice of fact of the accused's previous convictions, there is no need for it to be proved as provided for by section 56 Evidence Act 1950 [Act 56].

[24] Noticing that the accused has had 3 previous convictions involving the consumption of dangerous drugs from 2018 to 2021, a deterrent sentence was in order. There is a need to distinguish the accused from a first offender. His previous convictions related to dangerous drugs related offences indicate that he is a habitual offender. From the offence of "merely" consumption of drugs, I found that in his subsequent dangerous drugs related offence charged before this court, the accused has progressed to an offence of possession that carries a heavier punishment.

[25] For avoidance of doubt, although I had read out the accused's previous conviction under section 457 Penal Code, I had not taken it into consideration as they are offences of a different nature. The reading of it was merely to confirm that the list of previous convictions stated in the electronic cause book was correct and accurate.

[26] I would like to highlight here that the accused through the learned YBGK Counsel prayed for a sentence of a fine. Careful considerations were given to this request. To this, I refer to the case of **PP v Loo Choon Fatt [1976] 2 MLJ 256** where Hashim Yeop A Sani J (as he then was) states:-

> *"The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused.".*

[27] Examining the penalties for the offence once again, the maximum sentence provided under subsection 12 (3) DDA is a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[28] Previously, the maximum fine for subsection 12 (3) DDA was twenty thousand ringgit (amended to the current one hundred thousand in 1998) and prior to that ten thousand ringgit (amended to twenty thousand in 1972).

[29] Surely this must indicate that the war against drug abuse in this country has been in existence for decades long. Even in the 21st century, words from Hashim Yeop A Sani J half a century ago in **Loo Choon Fatt** (supra) when commenting on the increase of penalties for dangerous drug related offences still rings true to the current drug abuse situation in Malaysia today: -

> *"It is common sense to say that behind these legislative exercises was the government's realisation albeit gradual, of the problem of drug abuse in this country, the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself. The amendments passed by Parliament therefore reflect the public policy. It must be presumed that behind the public policy is the consideration of public interest.*
>
> *The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute. This is not saying that the courts in the treatment of drug offences should at all times be severe. Each case has to be determined on its own merits. But in every case the courts must be realistic and rational.".*

[30] Thus, in deciding a suitable punishment for the accused, another factor to be considered is the suitability of a fine or a custodial sentence.

[31] On this issue, I refer to the case of **Leong Kok Huat v Public Prosecutor [1998] 6 MLJ 406** where Abdul Kadir Musa J simplified that if a fine is sequenced first in the penalties of a particular offence, then a fine is to be considered first. I reproduce his Lordship's words below:-

> *"… the sequence of the three limbs of the 'penalty part' is first, a fine, followed by 'the imprisonment term' and lastly 'the whipping sentence'. By that order, I inferred that it must have been the intention of the legislature to punish the offender like the accused first, by an appropriate fine if the facts against his wrongful act so justified before considering the other alternative penalties.".*

[32] Hence, as the accused prayed for and is willing to pay a fine, then his request should be appropriately considered. Moreover, in a written reply during Answers for Ministers Question Time during the First Meeting, Second Session, Fifteenth Parliament of 2023 (Question No. 660), the Home Affairs Minister, Datuk Seri Saifuddin Nasution bin Ismail said the Malaysian prisons are currently housing 75,187 inmates, surpassing the capacity limit of 65,762 inmates as of 15 September 2022. Taking this into account, I am reluctant to increase the strain on our prison system by sentencing the accused to prison when he prayed for a sentence of fine.

[33] With regards to the appropriate amount of fine, I refer to the High Court case of **Mohd Sulaiman Bin Miskon V Pendakwa Raya [2020] 1 LNS 1915; [2020] MLJU 1222** where it was decided as the follows: -

> *"Once convicted, a trial court must start with the maximum sentence allowed by law. It must then consider the facts and circumstances of the case, giving "discounts" for less than the most serious manner of commission. The word "discount" is found in the case of MOHD ABDULLAH ANG SWEE KANG v. PUBLIC PROSECUTOR [1987] CLJ Rep 209 where it was held that "A sentencer must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved, which must necessarily vary from case to case apart from other mitigating factors. Unless there is a proper reason for withholding such credits, failure to do so may result in the sentencer not exercising his or her discretion judicially in assessing the level of custodial sentence.".*

[34] Regarding the amount of "discount", I refer to **Mohamad Abdullah Ang Swee Keng v PP [1988] 1 MLJ 167**. Mohamad Azmi SCJ stated as follows:

> *"It is generally accepted that the extent of the reduction on account of plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.".*

[35] The maximum fine provided for under subsection 12 (3) DDA is one hundred thousand ringgit. One-quarter and one-third of this would have been RM25,000 dan RM30,000 respectively. It would be absurd to suggest that the accused would be able to pay this in one lump sum considering his occupation and monthly wages of RM900.

[36] The courts have to be realistic and rational in deciding the appropriate amount of the fine. At this juncture, I refer to the case of **Hossain (M) v PP [2007] 7 MLJ 454** which states: -

> *"[12] When parliament prescribes fine or custodial sentence there is a requirement first to consider whether a fine will be appropriate (see Leong Kok Huat v. Public Prosecutor [1998] 4 CLJ 106). The principles and law relating to fine can be summarized as follows:*
>
> *(i) Any sentence, in particular fine, when imposed must be reflective of the nature and seriousness of the offence, the character and conduct of the accussed, the degree of mens rea, and the financial means of the accused. (See Abu Bakar bin Alif R [1952] 1 LNS 4; ; [1953] MLJ 19).*
>
> *(ii) It is a cardinal rule that fine should not be excessive and should not leave an impression with the accused that he is being persecuted. (See Kaneez Fatima AIR [1953] Hyd 155).*
>
> *(iii) The imposition of a small fine on a rich and influential person or of a heavy fine on a man who has no means is not justified. In R v. Markwick [1953] 37 Cr App R 125, Lord Goddard CJ opined: "persons of means should not*

be given the opportunity of buying their way out of prison."

(iv) *If the offence is not of a gravity to justify imprisonment, the offender should not lose his liberty merely because he is too poor to pay a substantial fine. (See R v. Reeves [1972] 56 Cr App R 366 R v. Hanbury [1980] Crim LR 63).).*

(v) *Where the offence allows for a fine or imprisonment or both, it is lawful to combine a fine and imprisonment. (See RV Fairbarin [1981] Crim LR 190).".*

[37] Taking into consideration the facts and cases discussed above, I concluded that the amount of fine should not only serve as a reminder to the accused not to repeat an offence of this nature again. It should also be balanced against the gravity of the offence as well as the accused's ability to pay it. Moreover, the accused has been in and out of court frequently since 2018. Public interest demands that his previous convictions do not warrant him a sentence that would have otherwise been passed on a first offender.

[38] As such, I found that a fine of RM10,000 in default 14 months imprisonment is appropriate and I sentenced accordingly.

TAN CHIEW KING

Majistret

Mahkamah Majistret Temerloh

17 Julai 2024

Pihak-pihak:

Faizah Khalilah binti Zaberi *(Timbalan Pendakwa Raya)* untuk pihak Pendakwaan

Nor Ezdiani binti Mohd Amari *(YBGK)(Bahari Choy & Nongchik*) untuk Tertuduh