

IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 85/2017

THE REPUBLIC

-v-

ASHLEY WAYNE PERNDERGAST

Before: RM Penijamini R. Lomaloma

Republic: DPP John Rabuku

Defendant: Mr. Vinci Clodumar

Date of Hearing: 25th September 2018

Date of Sentence: 27th September 2018

SENTENCE

Catchwords: *Possession of an illicit drug; section 6(a) of Illicit Drugs Control Act; Possession of Anabolic Steroids; sentence*

Introduction

1. The defendant pleaded guilty to one count of Possession of an Illicit Drug Contrary to Section 6(a) and Schedule 1 of the Illicit Drugs Control Act 2004 for possessing 22.3 grams of anabolic steroids on 6th December 2017.
2. He was initially charged with one count of possession of an illicit drug contrary to section 4 of the Act but this was amended by the prosecution on 25th September when the trial was to start and he pleaded guilty the next day after consultation with his pleader.

Agreed Facts

3. The parties filed a statement of agreed facts and since the Forensic scientist who carried out the tests had come at great expense from Fiji to give evidence, I asked that she prepare a supplementary report which the parties agreed to and filed under section 146 of the Criminal Procedure Act to help the Court, the prosecutions and defence counsel in future cases. I also had her sworn in to clarify some matters to help the Court arrive at the sentence. I thank her for her assistance.
4. I received very useful submissions from the DPP and Mr. Clodumar and I thank them for that.
5. The facts are that on the 6th of December 2017, the defendant was working for Wilson Security, providing security for the refugees at the Regional Processing Center in Nauru. The defendant is an Australian national and his work required him to come to work at Nauru for 3 weeks and then return to Australia for 3 weeks. At the Nauru International Airport, customs officers discovered the drugs in his suitcase after becoming suspicious when the scan revealed the presence of several syringes. He declared only the chocolates he had with him and when the search was conducted, he tried to conceal the drugs. A presumptive test was carried out and revealed the presence of an illicit drug.
6. He was charged on 7th December 2017 with under Section 4(a) of the Illicit Drugs Act. He was bailed on 11th December 2017 and returned to Australia in April 2018.

The Tests

7. Presumptive tests are less precise and indicate that an illegal substance may be present. Confirmatory tests provide a positive identification of the substance in question.
8. Further testing was carried out by Miliana Raravuso Wereibauinona, the Principal Scientific Officer at the Forensic Chemistry Unit of the Fiji Police Force. She holds a Bachelor of Technology Degree from Flinders University of South Australia, a Postgraduate Diploma in Science (Chemistry) from the University of the South Pacific and an MBA from the USP and a Certificate in Identification of Cannabis from the Institute of Environmental Science and Research, New Zealand. She has extensive

experience in various institutions as a chemist including the last 6 years as a forensic chemist with the Fiji Police Force.

9. Ms. Werebauinona explained that a presumptive test, as was carried out at the Airport, is a colour test that shows the presence of a specific drug. She explained in Prosecution Exhibit 2 that the confirmatory test is by instrumental analysis on the Fourier Transformer Infra-Red Spectrometer (FTIR) and the Gas Chromatograph Mass Spectrometer (GCMS). Ms. Werebauinona explained that the FTIR is an instrument which subjects the sample to a certain amount of energy and records the levels of energy emitted by that sample by generating a spectrum. This spectrum is unique to different compounds and elements. The spectrum generated is then compared to a library of spectrums to determine the identity of the sample. The FTIR identified the sample as an anabolic steroid.
10. The GCMS is an instrument which separates the elements that make up the sample that make up a mixture or compound. For complex mixtures, known elements of the mixture can be selected and determined by the instrument. The GCMS was used to detect the presence of methamphetamine. This was in minute or trace amounts that could not be measured. The Court will not take account of the presence of methamphetamine because he has not been charged with possession of this substance.
11. The test result shows the presence of 22.3 grams of anabolic steroid.

Result

12. The results of the tests were tendered as Prosecution Exhibit 1 and showed that the defendant possessed 22.3 grams anabolic steroid. Anabolic steroid is listed in Schedule 1 of the Illicit Drugs Control Act as an illicit drug and I had found the defendant guilty of the offence on 25th September 2018.

The Law

13. Section 6(a) of the Illicit Drugs Control Act provides: -

6 Unlawful possession, manufacture, cultivation and supply

Any person who without lawful authority:

(a) acquires, sells, supplies, possess, produces, manufactures, cultivates, uses or administers any illicit drug; or

(b) engages in any dealing with any other person for the transfer, transport, supply, use, manufacture, offer, sell, agree to sell, offer for sale or have possession for sale, import or export of any illicit drug; is guilty of an offence and is liable to imprisonment for 10 years and fine not exceeding \$50,000.00

THE SENTENCE

14. Sentencing for drug offences requires the Court to look first at the illicit drug to assess its dangerousness, then look at conduct charged contrary to section 6 of the Act, to arrive at the seriousness of the offending. From this, a starting point can be identified and aggravating factors and mitigating factors taken account of in the usual manner.

What is an Anabolic Steroid?

15. An illicit drug is defined in section 3 of the Act as: -

(xiii) 'illicit drugs' mean any drugs listed in Schedule I of this Act or any other drug included in the schedule from time to time by regulation;

16. Schedule 1 of the *Illicit Drugs Control Act 2004*, is headed: -

(FROM SCHEDULE II of the Convention on Psychotropic Substances, 1971)

17. Anabolic steroid is listed in this as a prohibited drug.

18. An anabolic steroid is described in the US National Institute of Drug Abuse as: -

Anabolic steroids are synthetic variations of the male sex hormone testosterone. The proper term for these compounds is anabolic-androgenic steroids. "Anabolic" refers to muscle building, and "androgenic" refers to increased male sex characteristics.... Health care providers can prescribe steroids to treat hormonal issues, such as delayed puberty. Steroids can also treat diseases that cause muscle loss, such as cancer and AIDS. But some athletes and bodybuilders abuse these drugs to boost performance or improve their physical appearance.¹

The UN Conventions

19. It is unfortunate that section 6 of the *Illicit Drugs Control Act 2004* has not given the Court guidelines on the sentences to be passed for each of the various categories of offences, namely possession, supply, production, manufacture, cultivation or administration of illicit drugs. There are also a huge variety of prohibited substances that are listed by their chemical names but whose effect on the human body is not known to the Court. To arrive at a sentence that is appropriate, the Court must inform itself of the type of drug and how dangerous it is compared to other drugs listed in the schedules of the Act. The

¹ US National Institute on Drug Abuse website; /www.drugabuse.gov/publications/drugfacts/anabolic-steroids

only way the Court can do this is to look at structure and history of the legislation for some guidance.

20. The whole area of drug control is based on three UN Conventions which party states then put into force by enacting national laws. The common law is therefore of little assistance in this area as it is based on statutes in those states. However, the principles and policies underlying these legislations may assist as explained below.
21. There are three United Nations Conventions that control the cultivation, manufacture, distribution, and use of drugs, namely: -
 - a. *Single Convention on Narcotic Drugs of 1961,*
 - b. *Convention on Psychotropic substances of 1971; and*
 - c. *The Vienna Convention against the Illicit Traffic of Narcotic Substances of 1988.*
22. The *Single Convention on Narcotic Drugs of 1961* consolidated the existing drug control treaties at the time into one document and was limited to drugs with cannabis (marijuana), coca (cocaine) and opium-like effects. In the 1960s, many new mind altering drugs were in use and resulted in the *Convention on Psychotropic Substances of 1971* designed to control psychoactive drugs.
23. The *Illicit Drugs Control Act 2004* lists substances prohibited by these conventions and the headings specifically refer to the schedules of these 3 conventions in listing the prohibited drugs. It is clear that Parliament has adopted the three conventions although it has not ratified them.

UK and Australian Legislation

24. The United Kingdom and Australia are signatories to all the three UN conventions for the control of drugs and they have enacted laws to put into effect the articles of those conventions.
25. In the UK, illegal substances are classed from A to C under the *Misuse of Drugs Act 1971*, depending on the danger that they pose. An anabolic steroid is a Class C substance. Class A substance carries the most severe penalties, Class B next and Class C the least.
26. In the Australian Capital Territory, Section 172 of the *Crimes Act 1900* makes it an offence punishable by up to 6 months imprisonment and/or a fine or both to possess anabolic steroids. Possession of the more dangerous drugs carry much heavier punishments. In the other Australian jurisdictions, the same scheme of punishments is observed.
27. It is clear that in the UK and in the ACT, anabolic steroids belong to a class of drugs that causes the least harm and therefore attracts lower penalties. I am guided by these conclusions that anabolic steroids must be considered in the lowest category of dangerous drugs under the *Illicit Drugs Control Act 2004*.

Possession & Quantity

28. Section 6(a) of the *Illicit Drugs Control Act 2004* proscribes these acts:

(a) acquires, sells, supplies, possess, produces, manufactures, cultivates, uses or administers any illicit drug; or...

29. For sentencing purposes, possession is the least of the evils proscribed in section 6(a). It should therefore attract a punishment lower than the other offences.

Sentencing Considerations

30. In considering the sentence to be imposed, the Court has to apply the provisions of the Crimes Act 2016 to the facts of this case. Section 279 sets out the factors that the Court must take into account: -

279 Sentencing considerations—general

(1) In deciding the sentence to be passed, or the order to be made, in relation to a person for an offence against a law of Nauru, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

(2) In addition to any other matters, the court must take into account whichever of the following matters are relevant and known to the court:

(a) the nature and circumstances of the offence;

(b) any other offences required or permitted to be taken into account;

(c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—the course of conduct;

(d) any injury, loss or damage resulting from the offence;

(e) the personal circumstances of any victim of the offence;

(f) the effect of the offence on any victim of the offence;

(g) any victim impact statement available to the court;

(h) the degree to which the person has shown contrition for the offence by taking action to make reparation for any injury, loss or damage resulting from the offence or in any other way;

(i) if the person pleaded guilty to the charge for the offence—that fact;

(j) the degree to which the person cooperated in the investigation of the offence;

(k) the deterrent effect that any sentence or order may have on the person or on anyone else;

(l) the need to ensure that the person is adequately punished for the offence;

(m) the character, antecedents, age, means and physical or mental condition of the person;

(n) the prospects of rehabilitation of the person;

(o) the probable effect that any sentence or other order under consideration would have on any of the person's family or dependents;

(p) if the offence was committed by an adult in circumstances where the offending conduct was seen or heard by a child (other than another offender or a victim of the offence) – those circumstances.

Seriousness

31. The objective seriousness of an offending is the starting point in any sentence. This is arrived at by looking at the culpability of the offender and any injury, loss or damage resulting from the offence. This was an intentional act and therefore highest on the culpability scale.
32. The prohibited substance in his possession is an anabolic steroid. Ms. Werebauinona testified that anabolic steroids are prescribed as treatment for testosterone replacement, for weight loss.
33. In my comparative analysis of the offence of possession of anabolic steroids in Australia and the UK, I had found that the substance there belongs to the lowest of 3 classes of drugs and should therefore attract a sentence at the lower end of the spectrum.
34. Both the prosecution and the defence agree that the anabolic steroid possessed by the defendant was for personal use. He was a professional body builder at the time of the offending and used the drug to enhance his body for his sport. He is charged with possession and the Court considers the quantity of drugs found to be small.
35. I find for the reasons given that the seriousness of the offending is at the lower end of the scale.

Aggravating Circumstances

36. The aggravating circumstance of this offending is that the defendant tried to conceal the drug from the authorized customs officers before and during the search of his bag at the airport.

Personal Circumstances

37. The defendant is 32 years old and an Australian Citizen. He is married and currently separated. He has no children. He served in the 6th Battalion, RAR from 3rd September 2007 to 2011 and served in Afghanistan from February to October 2010, receiving the Meritorious Citation and the Infantry Combat Badge. Mr. Clodumar highlights that during his tour of Afghanistan, he was surrounded by illicit drugs such as opium, steroids and many other recreational drugs but he did not fall into temptation.
38. The defendant is a noted athlete, having been a professional Thai boxer from which he retired in 2012 due to injuries. Mr. Clodumar submits that the defendant had to undertake regular drug tests for performance enhancing drugs during that time and not once tested positive.

39. In 2014, the defendant switched to body building and competed nationally in Australia and won the Queensland title. Again he was required to undergo regular drug tests for performance enhancing drugs.
40. In 2016, he switched to a new an elite association of body building that did not prohibit performance enhancing substances. He decided to use anabolic steroids to allow him to grow muscles faster and recover from workouts faster.
41. The defendant has been offered a position in Afghanistan to provide security and Mr. Clodumar has asked for a non-custodial sentence. He has asked for a fine without a conviction being recorded against his client.

Mitigating Factors

42. I find the following to be mitigating circumstances:-
 - a. You are a first offender;
 - b. You served your country with honour in Afghanistan;
 - c. You pleaded guilty at the first opportunity;
 - d. You honoured your bail conditions by coming back from Australia for your case;
 - e. You have expressed remorse; and
 - f. You have taken steps to change by leaving the sports where you needed the anabolic steroids.

Imprisonment

43. Section 280 sets out the factors that the Court must take into account when considering a sentence of imprisonment: -

280 Sentencing considerations—imprisonment

A sentence of imprisonment may be imposed on a person only if:

(a) in the opinion of the court:

(i) the person has shown a tendency to violence towards other people; or

(ii) the person is likely to commit a serious offence if allowed to go at large; or

(iii) the person has previously been convicted of an offence punishable by imprisonment; or

(iv) any other sentence would be inappropriate having regard to the gravity or circumstances of the offence; or

(v) the protection of the community requires it; or

(b) a sentence of imprisonment is necessary to give proper effect to sections 278 and 279."

44. You have not shown any a tendency of violence towards other people; you have no previous convictions for a violent offence; and I therefore do not consider you as a threat to the community if allowed to go at large. My assessment of the seriousness or gravity

of the offence is at the lower end of the scale. You are an Australian citizen who is unlikely to ever return to Nauru now that your work here has been terminated.

45. I have taken account of the matters in section 280 and 279 of the Crimes Act and consider that custodial sentence is not necessary in your case.

Type of Sentence

46. Section 277 sets out the sentences available to the Court. I have been urged by Mr. Clodumar not to enter a conviction against the defendant. I do not agree with the submission. This was not a spur of the moment offending. It was deliberate and the defendant had lots of opportunities to realize what he was doing was illegal but he continued to do it. This is something that the defendant should have taken into account before trying to commit this offence.

Deterrence

47. The DPP urged the Court to impose a sentence that would deter members of the Public from dealing with anabolic steroids because of the importance of the sport of body building and powerlifting in Nauru. A sentence to deter members of the public from committing an offence should only be given where there is evidence that the offence is prevalent. This is the first case of possession of anabolic steroids that I have come across here in 18 months. My search of the database has not revealed any such case. I would decline to issue a public deterrence sentence. I do agree that there needs to be a personal deterrent sentence for this offence.

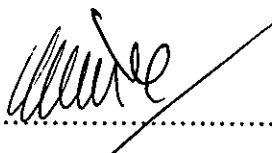
Sentence

48. I have taken account of the purpose of sentencing set out in section 277, 278, 279 and 280 of the Crimes Act 2016 and I consider that a conviction with a fine would be the most appropriate sentence for you. I will give you a stiff fine to make you accountable for the your actions and to denounce your conduct.

Order

49. The defendant is convicted and fined in the sum of \$1,500.00.

50. 14 days to appeal.



Penijamini R. Lomaloma
Resident Magistrate

