



**IN THE DISTRICT COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION**

Criminal Case No. 11 of 2019

BETWEEN: **THE REPUBLIC OF NAURU**
PROSECUTION

AND: **XIAOLONG CHEN**
DEFENDANT

BEFORE: Resident Magistrate Mr. Vinay Sharma

DATE OF HEARING: 8 July 2024

DATE OF RULING: 6 August 2024

APPEARANCE:

PROSECUTION: S Shah

DEFENDANTS: V Clodumar

SENTENCE

BACKGROUND

1. The defendant is to be sentenced for the offence of being found in possession, without lawful authority, of an illicit drug, namely, heroine in contravention of section 6(a) of the *Illicit Drugs Control Act 2004* (“the Act”). The defendant was found in unlawful possession of 23.7 grams of heroin.
2. The defendant is charged as follows:

CHARGE

Statement of offence (a)

UNLAWFUL POSSESSION: *Contrary to Section 6(a) of the Illicit Drugs Control Act 2004.*

Particulars of offence (b)

XIAOLONG CHEN on the 06th day of April, 2019 at Block 29 Room 1, Location at Nauru, without lawful authority, was found in possession of 23.7grams of heroin which is an illicit drug.

3. Initially the defendant pleaded “not guilty” to the charge. A trial was conducted by my brother Resident Magistrate Mr Lomaloma in 2021. However, judgment was not delivered in this matter prior to his departure. The matter was set down for trial de novo from 15 April 2024 to 19 April 2024.
4. On 4 April 2024 the defendant’s client informed the court that his client was taking a progressive approach to this case and had informed the counsel for the Republic accordingly. The trial date from 15 April 2024 to 19 April 2024 was vacated. The defendant’s counsel indicated that there will be a change of plea.
5. On 16 May 2024 the defendant entered a plea of “guilty” to the charge. The counsel for the Republic filed the Summary of Facts and read it out. The defendant accepted the Summary of Facts.
6. On 30 May 2024 the counsel for the Republic filed its Sentencing Submissions.
7. On 05 June 2024 the defendants’ counsel filed the defendant’s Submission on Mitigation.
8. On 8 July 2024 the parties were heard on their respective submissions.
9. The court has considered the sentencing and mitigation submissions and proceeds with

the sentencing.

FACTS SURROUNDING THE CIRCUMSTANCES OF THE OFFENCE

10. The following are the facts surrounding the offence as provided in the Summary of Facts:
- i. *On the 6th of April 2019 police officers received information from the Customs at the Ports Authority on allegation of possession of illicit drugs by two Chinese nationals, namely Xialong Chen.*
 - ii. *Police then executed a search warrant at the residence of the accused person located at Block 29, Room 1, Location, Denig the room was locked with a padlock outside and the accused did not come outside.*
 - iii. *When police returned moments later the door was still locked. They knocked on the door which was opened by the accused.*
 - iv. *The police then conducted their search and found utensils used for drugs, cash and rolled up aluminum foils and white pellets.*
 - v. *These pellets were later tested at the Fiji Police Forensic Chemistry Lab on the 11th April 2012 and found positive for Heroin weighing at 23.7 grams.*

PERSONAL CIRCUMSTANCES OF THE DEFENDANT

11. The following are the relevant personal circumstances of the defendant which is distilled from the document filed by the defendant:
- i. The defendant is 35 years old. He is a Chinese national.
 - ii. The defendant came to Nauru for employment purposes.
 - iii. The defendant's parents live in China. His father is 62 years old and his mother is 56 years old. His mother was recently hospitalized and has recovered.
 - iv. The defendant has been living in Nauru without a valid visa for 6 years. His business visa expired in 2018.
 - v. The defendant wishes to return to China to be with his parents and look after his mother.

AGGRAVATING FACTORS

12. The only aggravating factor in this matter is that the defendant concealed the drugs.

MITIGATING FACTORS

13. The only mitigating factors in this matter are that the defendant is remorseful and does not have any prior criminal record.

OBJECTIVE SERIOUSNESS OF THE OFFENDING

12. The defendant pleaded guilty to being found in unlawful possession 23.7 grams of heroin.
13. The maximum penalty under Section 6(a) of the Act is a term of imprisonment for 10 years and a fine not exceeding \$50,000. The Act requires that a fine together with a term of imprisonment be imposed on a person found guilty of an offence under Section 6(a) of the Act.
14. In *The Republic of Nauru v Perndergast*¹ the District Court made very useful observations with regard to the classification of illicit drugs and the seriousness of the different types of offending under section 6(a) of the Act. This court in that case adopted the classification of drugs into Class A, Class B and Class C drugs as provided under the Misuse of Drugs Act 1971 (UK). I adopt the same method of classification. Heroin, morphine, cocaine, LSD, opium and ecstasy are classified as Class A hard drugs, and cause the most serious and dangerous harm to persons taking them. It also falls into the category of illicit drugs which would attract the most severe penalties. However, “possession” is also the least serious act prescribed under Section 6(a).
15. The defendant was in possession of 23.7 grams of heroin. The weight of the illicit drug plays a significant role in sentencing. In light of his personal circumstances, aggravating and mitigating circumstances, and his moral culpability, the court finds that the objective seriousness of the current offending is at the mid to higher range of the level of seriousness.

RANGE OF SENTENCES

16. Section 277 of the *Crimes Act 2016* provides for the types of sentences that this court can impose on a person found guilty of an offence:

277 Kinds of sentences

¹ [2018] NRDC 11; Criminal Case 85 of 2017 (27 September 2018) at [19]-[29]

Where a court finds a person guilty of an offence, it may, subject to any particular provision relating to the offence and subject to this Act, do any of the following:

- (a) record a conviction and order that the offender serve a term of imprisonment;*
- (b) with or without recording a conviction, order the offender to pay a fine;*
- (c) record a conviction and order the discharge of the offender;*
- (d) without recording a conviction, order the dismissal of the charge for the offence; or*
- (e) impose any other sentence or make any order that is authorised by this or any other written law of Nauru.*

17. This is the first occasion in which this court would be sentencing a person found guilty of unlawful possession of a Class A illicit drug.
18. This court takes into consideration cases decided by the Supreme Court of Victoria exercising its appellate jurisdiction. In *Dragan Arnatovic v The Queen*² the appellant was sentenced to 2 years imprisonment for possession of 10.4grams of heroin. In *The Queen v Wayne Doble*³ the appellant was sentence to 12 months imprisonment for possession of 1.8 grams of cocaine, 1 month imprisonment for possession of ecstasy residue, and 1 month imprisonment for possession of 0.01 gram of amphetamine. I have taken into account the difference in the legislative provisions in relation to the different types of offending provided for in the Drugs, Poisons and Control Substances Act 1981 (Victoria).

SENTENCING APPROACH AND PRINCIPLES

19. Section 278 of the *Crimes Act 2016* provides the following purposes for sentencing an offender:

278 Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence;*
- (b) to prevent crime by deterring the offender and other people from committing similar offences;*
- (c) to protect the community from the offender;*
- (d) to promote the rehabilitation of the offender;*
- (e) to make the offender accountable for the offender's actions;*

² [2012] VSCA 112

³ [2007] VSCA 47

- (f) to denounce the conduct of the offender; and
(g) to recognise the harm done to the victim and the community.

20. Section 279 of the *Crimes Act 2016* outlines the considerations that the court must take into account when sentencing a person found guilty of an offence. The considerations under this section stems from Section 278 of the *Crimes Act 2016*.
21. Section 280 of the *Crimes Act 2016* provides the sentencing considerations that must be taken into account when deciding whether a term of imprisonment is appropriate.
22. Section 281 of the *Crimes Act 2016* provides the considerations that the court must take into consideration as a far possible when deciding to impose a fine on a person found guilty of an offence.
23. Hunt CJ at CL in the Court of Criminal Appeal of NSW in *R v MacDonell*⁴ stated that:

The sentencing procedures in the criminal justice system depend upon sentencers making findings as to what the relevant facts are, accepting the principles of law laid down by the Legislature and by the courts, and exercising a discretion as to what sentence should be imposed by applying those principles to the facts found.

24. Section 278 of the *Crimes Act 2016* adopts the common law principles of sentencing as was found in *Veen v The Queen (No 2)*⁵ with reference to a similar sentencing provision in Australia. In that case Mason CJ, Brennan, Dawson and Toohey JJ in their judgment in the High Court of Australia made useful observations with regard to the interaction between the different sentencing purposes:

*... sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.*⁶

25. Further, the High Court of Australia in *Muldock v The Queen*⁷ reconfirmed the common law heritage of the relevant provision:

⁴ (unrep, 8/12/95, NSWCCA) at [1]

⁵ (1988) 164 CLR 465

⁶ *Veen v The Queen (No 2)* (1988) 164 CLR 465

⁷ (2011) 244 CLR 120 at [20]

The purposes there stated [in s 3A] are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment under the common law [Veen v The Queen (No 2) at 476–477]. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in Veen v The Queen (No 2) [at 476] in applying them. [Relevant footnote references included in square brackets.]

26. Having referred to the cases above on the application of the purposes for sentencing, the court emphasizes on how the principle of proportionality as a fundamental sentencing principle guides and binds the balancing exercise of a sentencer with regard to the various purposes of sentencing referred to in Section 278(b)(c)(d)(e)(f) & (g) of the *Crimes Act 2016*. In this regard Howie J, with whom Grove and Barr JJ agreed, made the following observations in the Court of Criminal Appeal of NSW in *R v Scott*⁸:

There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed. This principle arose under the common law: R v Geddes (1936) SR (NSW) 554 and R v Dodd (1991) 57 A Crim R 349. It now finds statutory expression in the acknowledgment in s 3A of the Crimes (Sentencing Procedure) Act that one of the purposes of punishment is “to ensure that an offender is adequately punished”. The section also recognises that a further purpose of punishment is “to denounce the conduct of the offender”.

27. An example of how the principle of proportionality operates is also found in *Veen v The Queen (No 2)*, *supra* where the High Court of Australia held that a sentence should not be increased merely to protect the community from further offending by the offender if the result of which would be a disproportionate sentence. In that case Mason CJ, Brennan, Dawson and Toohey JJ made the following useful observations at [473]:

It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.

28. Lamer CJ in the Canadian Supreme Court in *The Queen v CAM*⁹ found that retribution

⁸ [2005] NSWCCA 152 at [15]

⁹ [1996] 1 SCR 500 at [80]

in sentencing represents:

...an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct.

29. Howie J in the Court of Criminal Appeal of NSW in *R v Zamagias*¹⁰ made the following useful observations on the interaction of the various sentencing purposes and how the advancement of one purpose may achieve the goal of another:

It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation...

30. In light of the above, the court finds that all of the purposes of sentencing would need to be considered and balanced against each other to reach a sentence which conforms with the fundamental sentencing principle of proportionality. No one purpose has priority over the other. The amount of weight that would be given to each purpose would depend on the circumstances of the offending, mitigating and aggravating factors, and the personal circumstances of the offender.

CONVICTED AS CHARGED?

31. Section 190(4) of the Criminal Procedure Act 1972 provides as follows:

Where the Court has recorded a finding under this Section that an accused is guilty of the offence charged, it shall, after hearing him or her, or his or her legal practitioner if any, as to any mitigating circumstances and any evidence thereof which may be advanced, either convict him or her and pass sentence on, or make an order against, him or her in accordance with the law or, if authorised by any written law to do so, discharge him or her without proceeding to conviction.

32. The defendant pleaded guilty to being found in unlawful possession of 23.7 grams of heroin, and therefore, is found guilty as charged.

33. In the current circumstances, there are no facts that would justify discharging the defendants without proceeding to conviction. Therefore, the defendant is convicted as charged.

¹⁰[2002] NSWCCA 17 at [32]

34. The court would consider whether to enter a record of conviction or not later in this sentence ruling.

CONSIDERATION

35. Having considered the various sentencing principles, the court will now consider the applicable factors and circumstances of this case, and apply them to the sentencing principles. In doing so the court has taken account of Section 279 of the *Crimes Act 2016*. Further, the court has also taken into account the time spent in remand custody by the defendant.
36. The court takes into consideration that the offending did not involve violence. However, the misuse of and addiction to Class A drugs causes many social and psychological issues. If the misuse and addiction to Class A drugs is not controlled at an early stage then it is inevitable that the people of Nauru will suffer greatly. Given Nauru's circumstances and the likely harm the misuse and addiction to Class A drugs would cause, the court finds that a term of imprisonment is an appropriate sentence in all cases involving unlawful possession of a Class A illicit drug.
37. The court has considered Section 281 of the *Crimes Act 2016*.
38. In appropriate cases, an early guilty plea would warrant a 1/3 reduction in the sentence. However, in this case the guilty plea was entered at a later stage after more than 2 years. Therefore, the defendant is not entitled to the full 1/3 reduction in the term of imprisonment.

SENTENCE

39. In applying the proportionality test, the court has considered the local circumstances in Nauru. It is an undeniable fact that addiction to illicit drugs causes a lot of social and psychological issues, this court does not need to name them. Unlike countries like the United Kingdom, Australia, New Zealand and even Fiji, Nauru does not have the same level of resources and facilities to deal with the social and psychological issues caused by addiction to illicit drugs. This court finds that when determining what would be a proportionate sentence in a case involving unlawful possession of an illicit drug, it must take this fact into consideration, which in turn would require a sentence that would effectively provide general deterrence while at the same time not being excessively disproportionate.
40. This court strongly denounces the possession and use of Class A illicit drugs, and in such cases the offending would attract harsh sentences aimed at deterrence.
41. The court's starting point for a term of imprisonment for the possession of 23.7 grams of heroin is 4 years. There is no adjustments for aggravating and mitigating factors. If the defendant would have entered an early guilty plea then he would be entitled to a 1 year 3 months reduction. However, under the current circumstances the defendant is

only entitled to a 1 month and 15 days reduction for his guilty plea. From the remaining 3 years 10 months and 15 days, a total of 22 days would be deducted for time spent in remand. Therefore, the defendant is to be imprisoned for a term of 3 years 9 months and 23 days.

42. Section 6(a) of the Act requires that a fine be imposed together with a term of imprisonment. Therefore, the defendant is fined a sum of \$3,000 which is to be paid within 28 days from the date of sentence.
43. This court has considered the defendant's plea for a suspended sentence, and finds that this is not an appropriate case in which a suspended sentence may be made.

RECORD OF CONVICTION

44. The court has considered Section 279 of the Crimes Act 2016.
45. In light of the serious nature of the offending, the court enters a record of conviction against the defendant pursuant to Section 277(b) of the Crimes Act 2016.

ORDERS

46. The following are orders of this court:
 1. That a conviction is recorded against the defendant, namely, Xiaolong Chen.
 2. That the defendant is imprisoned for a term of 3 years 9 months and 23 days with immediate effect; and
 3. That the defendant is to pay a fine of \$3000 within 28 days from 5 August 2024. If the defendant fails to pay the fine within the specified timeframe then he is to be committed to a term of imprisonment for 6 months which is to be served consecutively with the term of imprisonment in District Court Criminal Case No. 42 of 2021.
 4. That the parties are at liberty to appeal the defendant's sentence within 21 days from 5 August 2024.

Dated this 5 day of August 2024.

Resident Magistrate
Vinay Sharma

