



# In The Supreme Court of Bermuda

## APPELLATE JURISDICTION 2018: 16

MANDAYA THOMAS

Appellant

-v-

THE QUEEN

Respondent

## EX TEMPORE JUDGMENT (REASONS)

*Appeal against Conviction / Statutory Interpretation*

*Whether Acetyl Fentanyl is a derivative of Fentanyl and a controlled substance  
Construction of Section 3 and Schedule 2(e)(vi) of the Misuse of Drugs Act 1972*

Date of Hearing: 08 January 2019  
Date of Judgment: 08 January 2019  
Date of Reasons: 19 February 2019

Mr. Marc Daniels, (Marc Geoffrey Ltd) for the Appellant

Ms. Jaleesa Simons, (On behalf of the Director of Public Prosecutions) for the Respondent

JUDGMENT delivered by Shade Subair Williams J

### Introduction

1. The Appellant, a female Bermudian national, was convicted in the Magistrates' Court by learned Magistrate, Mr. Khamisi Tokunbo, on Information 15CR00593 for the offence of importation of the controlled drug acetyl fentanyl, contrary to section 4(3)

of the Misuse of Drugs Act 1972 (“the MDA 1972” or “1972 Act”). Having been tried on 27 February 2018 and convicted on 29 March 2018, her sentence hearing was stayed pending appeal.

2. By Notice of Appeal filed in the Supreme Court on 29 March 2018, the Appellant appealed against conviction on the basis that the learned Magistrate erred in finding that acetyl fentanyl was a derivative of fentanyl in accordance with Schedule 2 (e)(iv) of the MDA 1972. The Appellant further pleaded that the learned Magistrate erred in finding that acetyl fentanyl was a controlled drug under the 1972 Act.
3. The appeal was heard before me on 8 January 2019 and dismissed at the conclusion of the hearing. I informed the parties that I would later provide these written reasons for my decision to dismiss the appeal.

### **The Relevant Statutory Provisions**

4. The issues in dispute in this appeal circle around the construction of section 3(1) and Schedule 2 (e)(iv) of the MDA 1972. Section 3(1) defines controlled drugs as follows:

*“3(1) In this Act “controlled drug” means any substance or product for the time being specified in Part I of Schedule 2 and Part II of that Schedule shall have effect with respect to the meanings of expressions used in that Schedule.”*

5. Part I of Schedule 2 provides a list of substances and products which qualify as a controlled drug. At paragraphs (e)(iv) the list of controlled substances includes:

*(e) any compound (not being a compound for the time being specified in subparagraph (a) above) structurally derived from fentanyl by modification in any of the following ways, that is to say-*

...

*(vi) by replacement of the N-propionyl group by another acyl group*

### **The First Set of Trial and Appeal Proceedings**

6. The Defendant was previously convicted on 24 August 2016 having pleaded guilty to this Information before the learned Magistrate Mr. Archibald Warner following his ruling that acetyl fentanyl is, as a matter of law, a controlled substance under the 1972 Act.
7. On the basis of the availability of fresh evidence, the former learned Chief Justice, Mr. Ian Kawaley, quashed the conviction on 5 July 2017 and remitted the matter for

retrial in the Magistrates' Court. At paragraph 2 of the Court's ruling ([2017] SC (Bda) 59 App (28 July 2017)) Kawaley CJ held:

*“Mr. Caines, appearing pro bono, cross-examined the Government Analyst on the basis that the relevant drugs were not controlled under the Misuse of Drugs Act. Legal Aid only became available after conviction and an expert report was obtained which I found could not with reasonable diligence have been adduced at trial and which rendered the conviction unsafe. I accordingly quashed the conviction and remitted the matter for retrial before another Magistrate.”*

### **Summary of the Evidence and Competing Issues Underlying this Appeal**

8. The Respondent was convicted for having imported 92 grams of acetyl fentanyl. The Crown relied on the expert *viva voce* evidence of the former analyst for the Bermuda Government, Dr. Desiree Spriggs of Helix Lab. The Defence adduced a report from Mr. Julian Peter Dunhill of Keith Borer and Associates.
9. On the Crown's expert opinion evidence, the learned Magistrate heard that acetyl fentanyl is structurally derived from fentanyl by replacement of the N-propionyl group by another acyl group. However, the Defence expert evidence suggested that the drugs in question were manufactured in its own right and were not derived from Fentanyl in a chemical sense.
10. On page 4 of Mr. Dunhill's report he opined:

*“The word ‘derivative’ may have different meanings in chemistry and in law. In chemistry, the phrase ‘structural derivative’ describes a substance whose structure is provided by a similar material which could be modified, theoretically (not necessarily in practice) by chemical reaction. Several materials could be chemically derived from the same precursor and could therefore be described as both derivatives and analogues if remaining sufficiently similar to justify the latter. The term has been used historically to describe not just chemically viable changes to precursors but also to those which may only be hypothetically possible, which can be misleading(.) It is this wording which has been adopted into the Misuse of Drugs Act, in order to attempt to control a wide range of structurally similar drugs without specifically listing them individually. It is my understanding that the term ‘structural derivative’, for the purposes of the Misuse of Drugs Act, is synonymous with the term ‘analogue’, and reflects structural similarities between materials, though not requiring the need for the differences between one material and another to be chemically achievable.*

*In chemistry, this term has now been replaced by a new term, ‘structural analogue’ which should eliminate the confusion described above, though the wording has not been altered in the Misuse of Drugs Act to reflect this change.”*

11. At paragraph 6 on page 5 of Mr. Dunhill's report he concluded:

*"The term 'structural derivative' however may not have the same meaning in chemistry and in law."*

12. Mr. Daniels submitted that the conclusions drawn by Dr. Spriggs in her evidence were without regard to the chemical methodology employed in manufacturing the acetyl fentanyl. He argued that without evidence identifying the base components of the acetyl fentanyl; it is mere speculation that the drugs seized were structurally derived from fentanyl. Mr. Daniels relied on Mr Dunhill's report at page 4 where he stated:

*"Bearing in mind that the presence of fentanyl has not been reported in the recovered powder, only acetyl fentanyl, I consider that:*

- 1) It is unlikely that the drug detected is present as a manufacturing impurity or a degradation product;*
- 2) It is unlikely that if formed as an impurity, the acetyl fentanyl would have been extracted from a batch of fentanyl for separate use or distribution;*
- 3) Based on the differential ease of these two processes, the powder has been synthesised as acetyl fentanyl in its own right rather than being chemically derived from fentanyl.*

*In this sense, acetyl fentanyl is analogous to fentanyl. Acetyl fentanyl, however, is structurally derived from fentanyl, although it does not have to have been chemically derived from it to be described in this manner."*

13. It is on this basis that Counsel for the Appellant submitted that the expert evidence before the learned Magistrate was more probative of the conclusion that the seized drugs were synthetically constructed and not capable of compliance with the definition requirements of a controlled drug under the 1972 Act.

14. At pages 19 and 20 of an agreed transcript of Dr. Sprigg's evidence she states:

*"Your Worship, to get to acetyl fentanyl, it doesn't have to be, it can be derived from a precursor material, other than the starting phase, which is now being said has to (be) fentanyl. It can be a precursor chemical, it can arise through an impurity in the synthesis of fentanyl. But it is not impossible to convert from fentanyl to acetyl fentanyl but it is just not something that is practically done, because of the difficulty in the steps...."*

*The routes specified in the Dunhill report give rise to acetyl fentanyl would be correct, but the report also states on page 4 that acetyl fentanyl is analogous to fentanyl and acetyl fentanyl is structurally derived from fentanyl, although it does not*

*have to be chemically derived from it to be described in this manner, which is what we are still saying is correct, your Worship. ...*

*For clarification, through the analysis we determined that the substance was acetyl fentanyl, we cannot say how it became what we had in its presence how it was made, but we can say we received a substance that was confirmed to be acetyl fentanyl and falls within the Act under sections, Part, paragraph (1)(e)(vi)”*

15. Mr. Daniels accepted that neither of the experts before the Court was able to factually report on how the seized drugs were prepared. Both witnesses offered an expert opinion based on their observations of the final product. Mr. Daniels argued that because the burden is on the Crown to prove its case, the Court should favour the expert evidence of the defence.

### **Analysis and Decision**

16. I accept that the Crown’s submissions that the MDA 1972 does not govern the chemical process of creating a controlled substance. The Court need only be concerned with the structure of a seized substance. This marks an important distinction between the term ‘chemically derived’ and ‘structurally derived’.
17. Crown Counsel, Ms Simons, promptly dismantled the arguments ably made by Mr. Daniels on her opening submission: “*Processes are not controlled by the Misuse of Drugs Act. Structures and substances are.*”
18. Paragraphs (e)(iv) of Part I of Schedule 2 is a list of substances and products which are defined as controlled substances. Paragraph (e) refers to structural derivatives which I consider to be distinct from chemical derivatives. This distinction is also recognized by the expert opinion evidence of Mr. Dunhill.
19. In my judgment, this Court need not and ought not to be misled into a scientific analysis of how a substance was chemically manufactured. The purpose of the 1972 Act is to outlaw substances and products by reference to its final structure and not its ingredients. This approach might also be illustrated by the long history of this Court’s acceptance of evidence identifying other controlled substances by reference to its final composition as opposed to its creation.
20. As a matter of statutory construction, I find no ambiguity in paragraphs (e)(iv) of Part I of Schedule 2. On a plain and literal construction of these provisions of the MDA 1972, I hold that the meaning of ‘*any compound structurally derived from fentanyl*’ would necessarily include chemical synthetic processes which produce a substance or product which is structurally analogous to fentanyl.

## **Conclusion**

21. For these reasons I dismissed the appeal and remitted the Appellant to the Magistrates' Court to be sentenced.

Dated this 19<sup>th</sup> day of February 2019

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SHADE SUBAIR WILLIAMS  
PUISNE JUDGE