Mohammod Iron Mia Md Chan Mia

AND

Public Prosecutor

(High Court of Brunei Darussalam)
(Criminal Appeal No. 23 of 2014

Dato Seri Paduka Hj Kifrawi, C.J.
22nd October, 2014.

Criminal law – Immigration Act – Did without reasonable cause remain in Brunei Darussalam after expiry of visit pass – Meaning of 'reasonable cause' – Section 15(2) Immigration Act.

Criminal Procedure – Evidence – Mistake of fact – Principle governing mistake of fact – Burden of proof – Section 105 Evidence Act (Cap.108) – Section 52 and Section 72 of the Penal Code.

Sentence – whether there was inordinate delay in the prosecution and hearing of the case – Section 263 of the Criminal Procedure Code – Offences (Probation and Community Service Order 2006) – Probation and Community Service Order 2006.

Hj Mohd Rozaiman Bin Dato Hj Abd Rahman (M/S Rozaiman Abdul Rahman) for Appellant.
DPP Suriana Bte Radin for Public Prosecutor.

Cases cited in the Judgment:

Chan Chun Yee v Public Prosecutor [1998] 3 SLR(R) 172 at paragraph 23
Maimum Bte Hj Omar v Public Prosecutor (Criminal Appeal No. 1 of 2013)
Public Prosecutor v Wong Haur Wei [2008] 1 MLJ 670
Virgie Rizza v Public Prosecutor [1998] SGHC 112

J U D G M E N T

Dato Seri Paduka Hj Kifrawi, C.J.:

1. Introduction

The Appellant was charged in the Magistrate's Court as follows:

Charge

That you, from the 23rd day of September 2011 to the 19th day of April 2012, in Brunei Darussalam, not being a person entitled or authorised to remain in Brunei Darussalam, did without reasonable cause remain in Brunei Darussalam after the expiry of your visit pass on 22nd day of September 2011 issued to you, and you have thereby committed an offence under section 15(1) of the Immigration Act, Chapter 17, and punishable under section 15(2)(b) of the same.

Penalty
In the case where he remains unlawfully for a period exceeding 90 days, shall be liable on conviction to imprisonment for a term of not less than 3 months and not more than 2 years and whipping not less than 3 strokes cumulatively.

He pleaded not guilty to the charge. On 16/4/2014 he was convicted after a trial and the Senior Magistrate sentenced him on 23/4/2014 to 6 months imprisonment and 3 strokes of whipping. He appealed against the said conviction and sentence.

2. Appeal

The grounds of appeal forwarded by the Appellant are as follows:

(i) That the learned Magistrate had erred in law and in principle for not applying properly and adequately, the test on 'Mistake of Fact' pursuant to section 76 of the Penal Code.

(ii) That the learned Magistrate had failed to consider the test of good faith as prescribed by section 52 of the Penal Code.

(iii) That the learned Magistrate had erred in law and in principle for applying the test of 'reasonable cause' as the defence raised by the Appellant when it was not put forward by the Appellant.

(iv) That the sentence of 6 months imprisonment and 3 strokes are manifestly excessive and

(v) that the Appellant ought to be granted a probation or community service order pursuant to section 263 of the Criminal Procedure Code.

3. The Law

In general, the burden of proof in a criminal trial is always with the Prosecution that is to prove the charge against the Defendant beyond a reasonable doubt.

However, section 105 Evidence Act (Cap 108) provides:

'When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code (Chapter 22), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances'.

Section 15(1) Immigration Act provides 'It shall be unlawful for any person to remain in Brunei Darussalam after …..the expiration……of any Pass relating to or issued to him unless he is otherwise entitled or authorised to remain in Brunei Darussalam….'

Section 15(2) of the Immigration Act provides that 'Any person without reasonable cause contravene the provision of subsection (1) shall be guilty of an offence..'

Once the Prosecution has proved that the Defendant had remained in Brunei Darussalam after the expiration of the pass that had been issued to him the burden shifts to the Defendant to prove on the balance of probabilities that he had 'reasonable cause' for doing so.

Reasonable Cause is not defined in the Immigration Act.

I agree with the views of Yong Pung How CJ when he said in the case of *Virgie Rizza v Public Prosecutor* [1998] SGHC 112:

"Reasonable cause is not defined in the IA (Immigration Act), and what suffices as reasonable cause must depend on the circumstances of each case. I was of the view that even if the appellant's account of events was true, it would not have amounted to 'reasonable cause'. The appellant alleged that Leong fooled her into thinking she could legally remain in Singapore because of the forged endorsement on the visit pass in her passport and her forged Singaporean identity card. She did not claim to have taken any steps to check her own status. I doubt if such unthinking reliance on others for compliance with the IA can afford a valid defence under s. 15."

In the case of *Chan Chun Yee v Public Prosecutor* [1998] 3 SLR(R) 172 at paragraph 23 Yung Pow How, CJ stated:

"The High Court made the important observation that blind reliance on others for compliance with the Immigration Act could not possibly afford a defence on the facts. The burden has to be on those claiming that they believe that they have a right to enter or remain in Singapore based on visit passes or any other passes issued to them, that they have taken reasonable steps to ensure that their passes are genuine and have made reasonable inquiries to verify their own immigration status. Otherwise the provisions are unworkable, a strict approach is necessary. There are serious social implications of unrestricted immigration which the Act attempts to curb."

Section 76 of the Penal Code provides that, 'Nothing is an offence which is done by a person who is or who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith believes himself to be bound by law to do it.'

Section 52 of the Penal Code provides, 'Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention.'

In *Public Prosecutor v Wong Haur Wei* [2008] 1 MLJ 670, the accused was charged for employing three foreign workers when they were not in possession of valid passes, an offence under the Immigration Act in Malaysia. The accused, in his defence, claimed he was not familiar with the rules and procedures concerning the employment of foreign workers, as they were handled by the agents. The Magistrate acquitted and discharged the accused on the grounds that the accused had a good defence under section 79 of the Penal Code (the same defence under section 76 of the Brunei Penal Code) as the accused was not conversant with the law and procedure in applying for valid passes for foreign workers and that the burden of proof is always on the prosecution as the accused does not have to prove that he was cheated by Christine into believing that the foreign workers had valid passes.

The High Court allowed the appeal by the Public Prosecutor, by setting aside the order of acquittal and discharge and substituted it with a finding of guilty and conviction against the accused. The Court held that the principles governing the defence under section 79, the Appellant must show, *inter alia*, that

(i) the mistake must be a mistake of fact and not mistake of law, as ignorance of the law is no excuse;

(ii) the mistake of fact must be made in good faith. The test is as laid down in section 52 of the Penal Code whether there was due care and attention. The mistake may be a natural one to make and it may be on which reasonable persons often make. The defence is not made out unless it shows on balance of probabilities that the Appellant exercised due care and attention and that it was a reasonable mistake to make;

(iii) where an accused is acting under the instruction of a third person, the accused must prove that he is sincerely mistaken in fact, in thinking that the third person was acting bona fide.

4. Agreed Evidence

During the trial before the Senior Magistrate, the Prosecution and Defence agreed to the following set of facts:

'The Defendant arrived at the Berakas International Airport on 13th October 2010 from Dhaka.

The Defendant was issued a social visit pass to remain in Brunei Darussalam for 14 days from the 13th October 2010.

Prior to entering Brunei Darussalam, the Defendant had a valid Visa to Enter Brunei Darussalam, issued on 10th October 2010 for a short Visit for 14 days.

Subsequently, there were further extensions given on the Defendant's social visit pass:-

On 21st December 2010, a 3 month extension of the Defendant's social visit pass was given until the 21st March 2011; on 19th March 2011, a 3 months extension of the Defendant's social visit pass was given until the 19th June 2011; on 21st June 2011, a 2 months extension of the Defendant's social visit pass was given until the 21st August 2011; and on the 22nd August 2011, a 1 month's extension of the Defendant's social visit pass was given until the 22nd September 2011.

On 19th April 2012 sometime in the morning, the Defendant reported to the Enforcement Section, Immigration Department. He handed over a passport issued by the Bangladeshi Government, number C 1703231 bearing the name MOHAMMOD IRON MIA to the investigation officer by the name Bohran bin Hj Abd Kadir.

A special pass was issued to the Defendant on the 19th October 2012 for him to remain in Brunei Darussalam legally. The last time the Defendant reported himself to the Investigations Unit, Enforcement Section, Immigration Department was on the 31st December 2012.

On the 5th February 2014 at about 2119 hours, the Defendant was arrested in the vicinity of Kiulap by the Immigration officers from the Enforcement Section.

5. The Senior Magistrate in his judgment considered the following:

‘**The Prosecution’s Case**

The prosecution only brought one witness for its case; the Investigating Officer (I/O), Bohran Bin Hj Kadir (PW1).

It is his evidence that he was assigned to investigate the Defendant when the Defendant surrendered himself on the 19th April 2012 at the Enforcement Section, Immigration Department.

The Defendant handed over his passport to PW1 who inspected it. The Defendant’s social visit pass expired on 22nd September 2011. It had expired for 210 days from 23rd September 2011 until the Defendant reported himself on the 19th April 2012.

PW1 also recorded the Defendant’s statement that day. Based on the Defendant’s statement, the Defendant paid a man named ‘Ujol’ between $20.00 to $200.00 dollars for each of his social visit pass extension. The Defendant’s passport was only returned to him by Ujol one week before he reported to the investigation unit.

For extension of social visit pass, normally it may be extended for 3 months from the date the person enter the country. Thereafter the pass may be extended for a further 3 months and then 1 final extension of 1 month duration for the applicant to arrange a ticket for his flight back to his home country. Extension of the social visit pass, normally does not exceed one year.

The Defence Case

The Defendant, upon arriving in Brunei, was able to obtain 5 extension of his social visit pass. His final extension expired on the 22nd September 2011.

The Defendant met a Bangladeshi national, Morshad Alam Shahin in September 2011. He told the Defendant that he was able to find him employment as well as arrange for his employment visa as well. The Defendant gave him his passport as well as $2,000.00.

The Defendant waited for one month before asking Morsha Alam Shahin concerning this matter. He informed the Defendant that his employment visa was still being processed by the Immigration authority.

The Defendant followed the matter up continuously with him until April 2012. On or before 19th April 2012, the Defendant met with Morsha Alam Shahin. He told the Defendant that his visa application was not approved and returned his passport.

The Defendant realised that the last stamped authorising the Defendant to remain in Brunei was until 20th September 2011.

The Defendant immediately reported himself to the authority. He was then issued by the Immigration Authority with special pass and reported to the Immigration Department when instructed. His passport was seized by the Immigration Authority.

He then took odd jobs such as grass cutting and working on construction sites in order to earn a daily income.

Then in January 2013, the Defendant was involved in a Police investigation. He informed the Police that his passport was in the custody of the Immigration Department. The Defendant said that he was alleged to be involved in a fight with another Bangladeshi, by the name of 'Mukul'. He posted bail and reported to the police, once a month, to present date.

It was his belief, by reporting once a month to the police station, that he no longer had the need to report to the Immigration Authority.'

6. Conclusion

The Appellant confirmed in his evidence that he relied solely on his friend Morshad Alam Shahin to make arrangement with the Immigration Department to renew his pass and eventually to get a job for him and an employment pass issued by the Immigration Department. From the cases already referred by the Senior Magistrate, the Appellant should not blindly rely on another person for compliance of the Immigration Act.

The Senior Magistrate rightly stated that the Appellant should take the necessary steps personally to check with the Immigration Department concerning his immigration pass. I agree with the DPP that although the Appellant did not rely on the defence of 'reasonable cause' as a defence, the issue of 'reasonable cause' is interrelated with the defence of mistake of fact. In this case, by just relying on his friend to make sure that he is not contravening the Immigration Act, he failed to show reasonable cause, as required by section 15 of the Immigration Act. He could not also raise the defence of mistake of fact because he has to show good faith. This would mean he has to show on the balance of probabilities that he has taken due care and attention when he made a mistake of fact. Again, by simply trusting his friend to renew his pass and not checking personally his immigration status with the Immigration Department, he could not have made a reasonable mistake of fact under section 76 of the Penal Code. The Senior Magistrate rightly mentioned in his judgment the Defendant (Appellant) cannot rely upon section 76 of the Penal Code. He failed to show on the balance of probabilities he had taken due care and attention with regard to his immigration status, by personally checking with the Immigration Department his immigration status, in

particular, he has a right to remain in Brunei Darussalam based on the passes issued to him.

As regards the appeal against sentence, the Senior Magistrate rightly took into consideration that he was a first offender as a mitigating factor. The Appellant complained that the Immigration Department took 2 years to investigate this case after the Appellant surrendered himself. In the case of *Maimum Bte Hj Omar v Public Prosecutor* (Criminal Appeal No. 1 of 2013), there was excessive delay in prosecuting the case and in the hearing. The appeal was heard after more than 10 years since the offences were committed. On the other hand, the Appellant Mohammod Iron committed the offence in September 2011. He was charged on 6/2/2014 and convicted after trial on 16/4/2014 and sentenced on 23/4/2014. I do not think there was an inordinate delay in the prosecution and in the hearing of this case.

A probation or community service order pursuant to section 263 of the Criminal Procedure Code, however, would not be proper for this case. I agree with the Senior Magistrate that this case is a serious offence as it imposes a serious threat to the national security. The Senior Magistrate has rightly passed a custodial sentence and mandatory whipping to deter the Appellant and others in the public interest.

I, therefore, dismiss the appeal against conviction and sentence. The Appellant has to serve 6 months' imprisonment and 3 strokes of whipping with effect from today.

DATO SERI PADUKA HJ KIFRAWI BIN DATO PADUKA HJ KIFLI
Chief Justice