

SPEECH BY

THE HONOURABLE CHIEF JUSTICE
DATO SERI PADUKA MOHAMMED SAIED

OPENING OF THE LEGAL YEAR 2003

THURSDAY, 6 MARCH 2003

Pehin Isa, Mr. Attorney, Your Excellencies of the Diplomatic Corps, distinguished guests, members of the legal profession, ladies and gentlemen.

On behalf of the Judiciary I am pleased to welcome you all here this morning at the inauguration of the Opening of the Legal Year 2003.

In keeping with our tradition I should get the court statistics out of the way before proceeding to some other matters. 16 civil appeals to the Court of Appeal from the High Court and the Intermediate Court were registered during 2002, of which 9 were heard, and of the 15 criminal appeals from the High Court and the Intermediate Court the Court of Appeal disposed of 10 during the last year.

The High Court heard 8 criminal cases of the 15 registered during the last year, and of the 158 criminal appeals registered during 2002 it disposed of 116; 211 civil cases were registered in 2002 of which 33 went to trial, three more than the year before.

In the Intermediate Court 14 criminal cases were registered of which 9 were disposed during 2002, that being 5 less than the previous year, and 128 civil cases were registered in that Court of which 13 were heard in 2002, being 6 less than in 2001.

In the Magistrate's Courts 3406 criminal cases were registered in 2002, that being 503 more than the previous year.

With regard to Bankruptcy matters, 261 notices were received during 2002, that being 89 less than 2001; 181 receiving orders were made in 2002, that is 16 more than the year before; and 78 adjudication orders were made in 2002, that being 47 more than the previous year.

Our three Registrars dealt with some 700 civil matters, about the same figure as in the previous year.

The total revenue collected in 2002 amounted to B\$5.1 million, compared with B\$4.4 million in 2001.

I should like first of all to say a special word of thanks to the police for the very professional and competent Guard of Honour parade they mounted outside the courthouse. It is a time-honoured ceremony and is performed in almost all common law jurisdictions annually at similar functions. Besides the ceremonial part, which attracts members of the public as onlookers enjoying the pomp and glory of the occasion, perhaps the significance of this parade is often overlooked. It highlights not only the seat of justice but also the role that the law enforcement agencies play in ensuring that the laws of the land are not breached. Their efforts in maintaining law and order demand total commitment to their task, which on occasions confronts them with life threatening situations.

Without the contribution of an efficient, honest and committed police force and other agencies concerned with the maintenance of law and order it is difficult to see how any criminal justice system could function effectively in the execution of its functions. We are fortunate in this regard and I should like to recognize publicly their unstinted devotion to their task.

I should not overlook the contribution of the lay court prosecutors in this general task of maintaining law and order in prosecuting those who contravene the law. As we are aware the actions of those who defy the criminal laws upset the peace and tranquility of the society. They do not stop there but, following the worldwide trend, lead our up and coming youth astray taking them into the abomination that is drug addiction.

In this respect the frequent operations of teams of the Narcotics Control Bureau (NCB) and the Customs Department for arresting those involved in dangerous drugs in any capacity, whether as drugs lords who import this commodity through illicit means, their agents who distribute the drugs to suppliers who in turn have their own underlings, commonly known as drug runners or mules, who supply the needs of the consumers. The officers of these two bodies too are threatened with dangerous situations but thanks to their dedication and industry many of such persons are apprehended and brought to justice. Our society recognises their efforts in this field.

It is logical to say that it is the consumers of prohibited drugs who keep this nefarious trade flourishing and profitable. It must be emphasized that parents and principals of schools and teachers as well as employers of any category whether businessmen or householders or heads of institutions who employ workers, particularly young people of either sex, have an important role to play in this exercise in taking steps to detect drug runners and consumers in their workforce. I am certain that the NCB, the Customs Department, and the Immigration Department officers are always ready and willing to offer expert guidance in this regard in setting up the necessary detection systems.

This is one aspect in which society as a whole can and ought willingly participate to assist the authorities in locating and identifying the drug syndicates as well as the pushers and users. Notwithstanding stiff punishments, including the death penalty, prescribed by the law, this business continues and ever increasing distributors and consumers are being arrested and brought to our courts.

According to the statistics prepared by the NCB the total number of arrests for drugs related offences in 2001 was 547 comprising of 490 male persons and 57 females; in 2002 the total figure had gone up to 713,629 being men and 84 women. The statistics show that amongst those arrested in 2001 were 60 government employees and their number rose to 105 in 2002. The highest number of course comprised of the unemployed who in 2001 were 354 and in 2002 their number stood at 435. Age wise those aged 15 and below comprise 30 in 2001 and 17 in 2002, those between 16 and 20, numbered 87 and 110 in those years respectively, and those between 21 to 25 numbered 103 and 182 respectively, for those between 26 and 30 years of age the arrests totalled 137 and 187 respectively and those aged 31 and over the arrests numbered 190 and 237 respectively.

These figures indicate a rise in the arrests in almost all age groups, which confirm the conclusion that so long as there are consumers and users the drug lords behind their syndicates will go on enlarging their operations not only to meet the growing need which may necessitate more runners and mules for distribution purposes, but also to enhance their profits.

The figures particularly of the young people between the ages of 15 to 25, those being the most important years in the life of any young person in their efforts towards achieving a successful career, are particularly disturbing. The public should understand that the lure of the so called designer drugs is such that it is capable of permeating even the most vigilant household with the consequence that families are torn apart. This is one activity about which no one can boast and say, why should I bother; it cannot get to my family or me. As I have said all sections of the community must participate in this continuing struggle before their loved and dear ones are ensnared in the web of this vile and dangerous addiction.

In the lower courts lay prosecutors from different law enforcement agencies conduct prosecutions before magistrates. Prosecuting is no easy task. It requires extensive knowledge of the law as well as expertise to present their case in a convincing manner. Evidence is led through witnesses and not infrequently even trained lawyers have difficulties with witnesses. Many prosecutions which apparently seem certain winners founder simply because the prosecutor lacked the ability of adducing sufficient evidence.

While the contribution of such lay prosecutors is much appreciated it is necessary that they attend regular refresher courses, workshops specially designed for prosecutors and seminars to help them keep abreast with the law and new techniques that help pursue, trace and successfully bring criminals to justice. They handle a great deal of the prosecutions in the Magistracy and on behalf of the public, including us all; we acknowledge with gratitude and appreciation their efforts in that regard.

I referred to new crime fighting techniques. It is absolutely essential that those are made available to our crime busters and prosecutors. It may be costly and expensive, it may necessitate sending our people abroad for training but I say with emphasis and conviction that it would be money well spent.

Those of the public who take interest in reading our decisions reported rather briefly and occasionally sadly incorrectly by the local press might be on some occasions perplexed as to why an accused against whom to their minds and understanding the prosecution had adduced abundant convincing evidence justifying a conviction is acquitted by the court. This has led to all sorts of comments critical of the criminal justice system.

I say that our criminal justice system is time honoured, has been tested over the centuries and has survived with on-going amendments to the laws to meet the demands of changing times and for dealing with more sophisticated and white-collar crimes, but what has not altered an iota are the three fundamental principles upon which the fate of an accused person is decided by our courts, those being first, the presumption of innocence, that is, an accused is presumed to be innocent until proven guilty, the second that the burden that is on the prosecution of proving the accused guilty is proof beyond reasonable doubt, and the third that all are equal before the law and are treated alike by the country's courts, so that the personality of the parties does not matter.

Those three principles, deeply enshrined as they are in our justice system, and a host of other common law countries, ensure that the independence of the judiciary, considered to be the first priority in any legal system such as ours here in Brunei Darussalam and very close to the hearts

and minds of the citizens and, needless to say well guarded and applied without fear or favour by those who administer justice, is upheld.

This is rightly so, as those three constituents for the independence of the judiciary are absolutely necessary for the development and prosperity of the country.

What perhaps befuddle some minds are those principles, perhaps not the third that is easier to comprehend but the first two certainly do tend to confuse some people. Take for example a case where the prosecution has adduced all the evidence of the surrounding circumstances leading to the commission of a crime which indicates the possibility of the crime having been committed by one or more than one person, and the outcome of the case turns upon tracing evidence at the crime scene of the identity of those responsible for the crime. The scene of crime is such that things have apparently been mandhandled and disturbed, and the probability of finding fingerprints and/or bloodstains, to name just a couple of what is considered as the most important in this respect, looms large but the prosecution has no such evidence to tender.

This may be due to the fact that the investigators lacked the facility or the means of lifting fingerprints and safeguarding the blood stains immediately at the scene or for some other reason they botched up the evidence.

Prosecutions are known to have foundered for this very reason, and the failure of the investigators to explain plausibly and convincingly why no attempt was made to gather fingerprint evidence and the bloodstains from the scene when it appeared probable from the surrounding circumstances that such evidence might have been available. This omission clearly leaves the issue of the identity of the perpetrator in doubt, the benefit of which must go to the accused.

So it is absolutely essential that the investigators have at their disposal all sorts of modern crime detection facilities regardless of the expense, just as it is important for the prosecutors, be they lay prosecutors or qualified professional prosecutors, to have seminars and refresher courses at regular intervals to review the ever increasing crime detection facilities and their own prosecution ability. It is for them to call for those facilities that can be had but are not made available to them.

No one should resent an acquittal, as the courts do not let accused persons walk free without any justifiable reason or explanation. More often than not, they acquit because the prosecution has failed in its duty in discharging its burden of proving the accused guilty beyond reasonable doubt.

To any rational minded person amending the law in any manner because of an acquittal due to deficiency in the prosecution case is tantamount to shifting responsibility, which may seemingly be an easy way out but let me assure you that never can it be a cure all for such deficiencies in the prosecution of criminals.

I should take this opportunity of assuring this assembly and the public that their courts are just as eager as anyone else in ensuring that guilty persons get their just deserts but proving them guilty does not form part of their function. Once this basic premise is understood then the blame should be laid at the door of those whose duty it is to prove guilt according to the law but, for some reason, try as hard as they can they are unable to supply the missing link, and when they fail in discharging their burden acquittals will follow as certainly as night follows day.

There has to be an end to an accused person's dilemma and worry about his freedom; sooner the case is decided one way or the other the better it is for all and everybody concerned. That is where the principle of double jeopardy becomes relevant and this should always be considered seriously before the decision to amend any such law is taken.

May I be permitted to suggest a simple remedy, hopefully without causing offence to any one: why not just take care of the shortcomings and deficiencies in the investigation of crimes system that any prosecutor worth his salt can easily detect while scrutinizing the evidence that he is required to lead in court but leave the law as is, there is nothing wrong with it and it is not the law that is at fault nor is it deficient or lacking in any manner, and the result would be what every one should like to see: an efficient crime detection body and an able prosecuting team, the combined efforts of both will surely lead to the expected result.

While on this topic let me take you back to last legal year opening addresses in this courthouse. The topic that Pehin Isa touched upon was in a way similar to what I have commented on just now, and it arose from the refusal of a couple of applications for the ad hoc admission of some foreign counsel under the provisions of the Legal Profession Act. Pehin Isa very properly and rightly stressed the continued necessity of bringing in foreign counsel, adding the caveat that such ad hoc admissions be confined to appropriate cases, while at the same time describing the protection of the legal profession from foreign intrusion as the "noble goal".

This was, if I may say so, a commendable commentary on the relevant law as it then was, and his comment was in complete harmony with that law. Pehin Isa's caveat recognized the need in accordance with the terms of the law for the continued protection of the legal profession in respect of cases where the required skill and expertise were available locally.

The Court of Appeal in a subsequent appeal repeated that comment of Pehin Isa, and went on to pronounce that the protection of the profession was no longer a primary factor in the consideration of such applications.

The need to avoid statutory law being created by the courts by way of comments in their judgments, by relying on some matter extraneous to the statute, no matter how persuasive it might be, such as for example the expressed view of the legal profession through its spokesman as in the matter under discussion, thereby knocking off the protection of the profession provided to it by the law from its primary position to a lower position as I have explained, has long been recognized by higher courts and has been criticized and disapproved by some astute and more experienced judges, who have consistently advised judicial officers to eschew what has been described as "judicial legislating" by the courts.

With great respect I hold the view that without appropriate legislation the protection that had been provided to the profession could not be relegated or downgraded to a secondary or any inferior position, this for so long as such protection provided by the law was available to it.

I had the opportunity of dealing with another similar application where I was satisfied that the law involved in the case and the facts were such that it fell squarely within the category of appropriate

case, on the basis of which I allowed the application for the ad hoc admission of the foreign counsel of choice of the applicant.

Unbeknown to me at the time I wrote my decision nor when I delivered my judgment the relevant provision of the law which had set the noble goal had already been amended so that the noble goal was no more; the requirement of the case being of such complexity that the skill and expertise required for such complex matter was not to be had locally had been erased from the relevant provision of the law, and along with it also the protection of the local profession from foreign intrusion. The former requirement of the foreign counsel possessing the special skill and qualifications for the purpose of the case is retained, “whether or not such special skill and qualifications are available in Brunei Darussalam.”

The direct consequence of this amendment appears to be that the protection previously enjoyed by the local legal profession is now the other way round and applies to one particular specified class of foreign counsel, so that this jurisdiction is now open and at large to any such foreign counsel, irrespective of the nature of the case or cause, be it a goods sold and delivered case of one dollar, we do have one dollar shops in the town, a simple landlord and tenant matter or a simple assault or theft case etc., the list is endless.

I say with all due respect that the discretion left in the Chief Justice in this matter now is no more than a superficial veneer, for it is simply incredulous that any foreign counsel bearing that particular appendage to his name will lack the particular skill and qualifications for the purpose of most of the mundane cases such as those I have mentioned and many others that form the major part of the local legal practice.

Fortuitously due perhaps to prescience about the impending development, although I hasten to say that I do not lay any claim to being a seer gifted with such unique profound spiritual insight, I had said per curiam in that appropriate case that removal of such protection, which the law provided to the profession, would “stagnate” the legal profession.

I am sure that I am not alone in mourning the removal of the noble goal and the untimely passing away of that protection. I do not think that it is wrong to say that contrary to that recent amendment some other jurisdictions in this region have considered it advisable to continue to retain in their corresponding law a provision similar to our late section of the law before its demise.

I appreciate that the courts have no jurisdiction over official policy matters and such matters as amendment of the existing laws. I see the thick prominent dividing line very clearly, which I cannot and will not overstep. I have stepped back and looked at my comments with studious caution. I am content and satisfied that I have stayed well within my bounds and confines and expressed views about matters that I consider to be of great public interest and importance.

I am of the view, in keeping with the established practice in other common law jurisdictions, that there is a lot to be said in favour of having a consultative system whereby those closely affected by any particular law that is under consideration for repeal or amendment are able to discuss the matter thoroughly before any decision is taken, so that any concerns of the kind I have mentioned do not occur.

Focusing on the situation now confronting the profession it is clear that it falls upon them to stand up to the challenge brought about by the amendment. It is no mean challenge. It is a call for the profession to strive harder in their practice of the law, hone up their expertise and enhance the level of their advocacy skills not only in the laws currently in force but also but also be fully armed with those qualifications to meet the challenges that lie ahead when Brunei Darussalam heralds in the new era of being an off shore investment and financial center in this region. The profession would be well advised to start getting familiar with the intricacies of those new systems and learn as much as possible from the legal precedents and case law of disputes and legal issues that are likely to arise in the operation of such systems from jurisdictions where they have existed for some considerable time now. Such knowledge and expertise gained beforehand will surely stand them in good stead in the future in fighting off any challenges that might be expected from the unchecked intrusion of foreign counsel.

The task of the profession is obvious. I would urge them strongly to demonstrate to the big business houses and those closely involved in the operation of those schemes as well as the public at large that they are capable of handling any legal problems or issues that may arise in any field of the law and once they succeed in gaining the confidence and trust of the people they will have nothing to worry about.

One last matter, actually a warning to the legal fraternity, concerning the practice which seems to be on the increase of turning up in court for the trial of a matter, civil or criminal, only to inform the presiding judge/magistrate that the matter has been settled or that the accused would plead guilty to the charge(s). The usual explanation for this twelfth hour settlement or change of plea is that parties had reached that decision only the previous evening. This has resulted in wastage of court time as it becomes almost well nigh impossible to get another trial afoot with the result that the trial judge/magistrate is left sitting idle.

I wish to take this opportunity to warn litigants and their counsel that this explanation has outlived its credibility. The cause list is prepared in advance of the trial dates and counsel should inform the relevant officer of the court of the possibility of settling the matter or the change of plea or that such decision had already been made well before the trial date. While amicable settlement of civil disputes and pleas of guilty are welcome and to be urged upon the parties, as it is in their own interests, it should be done in a way that court's time is not wasted. If this were done it would be possible for another matter to fill in the vacant slot, thus keeping the court occupied.

Should there be no immediate improvement in this regard I may have to consider alternatives such as those that are in vogue in some of our neighbouring jurisdictions, such as imposing some sort of monetary penalty or disallowing costs. It is to be hoped that better counsel will prevail and such drastic measure will not be necessary.

I do not propose to cover topics that were discussed by me last year. So that they are not relegated to everlasting forgetfulness and eventual oblivion, may I stress yet again the importance of making sufficient provision for legal aid and the public defender scheme. Recently I was faced with a situation, which I thought was very pitiful and it does illustrate the urgency for making provision for legal aid. A brother threatened his old sister with legal eviction from the house that their late father had permitted her to stay in for as long as she wanted. Her brother had been allowed to be

registered as the legal owner of the house for the purpose of raising some funds for the development of his other plots, and now wants her to quit for further development of the land. He was able to engage a lawyer to sue her for possession but she was unable to afford any legal representation. All she wants is that her brother should transfer that piece of land to his own daughter whom she has brought up since her birth.

This is just one example, there might be many others, civil and criminal, where indigent citizens may be able to safeguard their rights and privileges with the assistance of legal aid from being trampled upon by others. I was able to persuade the parties to discuss the matter and try to reach a fraternal settlement. It is an encouraging sign and hopefully they will reach some consensus acceptable to both. However, legal aid remains a matter that calls for immediate consideration.

I am glad to report that the Committee considering the setting up of the Law Society has now concluded its deliberations and submitted their draft constitution to the Honourable Attorney General. Their efforts are appreciated. Mr. Attorney might be in a position to shed some light on further progress of this matter.

Once the Law Society comes into being, I should like to ask them even at this stage in anticipation to commence their duties by considering as a matter of urgency the formulation of a pro bono scheme for the assistance of the less fortunate people as the old lady I mentioned, which should run in tandem with legal aid, whenever that may be available.

We await anxiously news and views about topics that have been raised already, viz. suspended sentences and community service orders, and also about the Government's immunity issue. The Attorney General might also consider setting up the Companies and the Trade Marks registries in the much-awaited new Court building, about which project there should be some comment. We may be able to continue helping out with bankruptcy matters but would need some extra staff to enable us to deal these matters more efficiently and speedily.

It is my bounden duty in the end to convey the gratitude of the Judiciary to all of you for sparing some of your valuable time to come to grace this occasion. Without your participation this annual event would not be such a success as it usually is.

May I invite you to some refreshments in the main lobby on the ground floor after we have listened to some words of wisdom from two other well-known and renowned personalities.

Thank you all very much indeed for your patience with which you have permitted me to share some of my thoughts with you.

I will now request our learned Attorney General to address us and he will be followed by Pehin Isa.