

HAJI MUHAMMAD DHIYALHAQ BIN HAJI ARIFFIN

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 1 of 2019)**

Before: Burrell P, Seagroatt and Lunn JJ A.

Date of hearings: 15 and 23 April 2019

Date of Judgment: 1 May 2019

Headnote: conviction. Trial part-heard before a judge; the use of evidence in the trial before a second judge- section 29 of the Intermediate Court Act. Ruling against the prosecution application to use that evidence, in face of the opposition of the represented applicant; withdrawal of the opposition by the unrepresented applicant. No notes of proceedings describing those circumstances. Conviction unsafe; conviction quashed and; retrial ordered.

Appellant in person

DPP Nor Hafizah binti Ahmad and DPP Pg Hjh Nor'Azmeena binti Pg Hj Mohiddin for Respondent

Lunn, JA.: (giving the Judgment of the Court)

1. By a motion, filed out of time by the applicant's mother on 14 January 2019, it was asserted "I feel my child is not guilty and should not serve a heavy sentence as such. And hope to appeal to ask for a reduction in sentence so that whipping will be removed."

Background

2. On 4 September 2017, the applicant was convicted after trial by Judge Muhammad Faizal of an offence of robbery with a deadly weapon of Wiji Hariyadi ("the victim") causing fear of instant hurt on 16 September 2014 at the Mar'azamala petrol station, Jerudong, in Brunei Darussalam, contrary to sections 392 and 398 of the Penal Code, Cap. 22. On 12 September 2017, the judge sentenced the applicant to 9 years imprisonment with 12 strokes.
3. At the hearing on 15 April 2019, the applicant, who was unrepresented, asserted that he did not commit the offence of robbery. In the brief explanation of his position, he said that he had been present in the vicinity of the robbery innocently. For his part, the applicant's father invited the court to receive

documents in Malay. In those circumstances, the court adjourned the hearing of the application to 23 April 2019 and ordered that those documents and the out-of-court statements of the applicant be translated. Those documents were available to the court at that hearing.

The robbery

4. By a Statement of Agreed Facts, dated 2 November 2016, it was agreed that at about 9:45 p.m. on 16 September 2014 the victim of the robbery, an employee of the Mar'azamala petrol station had been threatened with a parang, about 50 cm in length, by the masked robber, who pointed the parang at his neck and demanded that he hand over the money in his possession. Those monies were the takings of his work at the Mar'azamala petrol station that day. The victim having refused to hand over those monies, the robber used the parang to cut the waist bag secured to the victim's body, in which \$3,900 was contained, and removed it from his possession. Thereafter, the robber ran off, but was pursued by the victim and his fellow employees of the petrol station. In the course of the pursuit, the robber stopped and confronted the victim waving the parang at him to prevent him continuing the chase. Although the victim initially stopped chasing the robber, later he followed him and saw him enter a house in Simpang 709.
5. At the trial before Judge Hanai, Danar Priyo Utomo (PW2), a fisherman, who was outside a Thai seafood restaurant, testified that at about 10:00 p.m. that night he saw a masked fugitive clad in black clothing running, pursued by five persons from the petrol station, enter a house in Simpang 709. Having waited outside the house, about two hours later saw a shirtless man leave the adjoining house and, having climbed over a gate, board a white Kia Sportage motorcar and drive off. He identified photographs of the applicant's Kia Sportage motorcar, by its black bonnet, as the motorcar driven away that evening. Also, (PW3) Sofari Abdul Mufli, who said he was a friend of Danar, testified that he was with dinner outside a house in Simpang 709 when a shirtless man left a house and boarded a year's portage motorcar with a black engine bonnet and drove away.

The two trials

The trial before Judge Hanani

6. Having been charged on 18 September 2014 with that robbery, the applicant's trial before Judge Hanani only commenced on 2 November 2016. He was then represented by Mr Rozaiman Rahman. On that date and 3 November 2016 evidence was received from the three prosecution witnesses, namely (PW1) L/Col 4468, (PW2) Danar Priyo Utomo and (PW3) Sofari Abdul Mufli. All three witnesses were subjected to cross examination on behalf of the applicant. The cross-examination of the third witness was complete, when the proceedings were adjourned to 12 November 2016. However, no further evidence was adduced in that trial. Thereafter Judge Hanani was transferred out of the judiciary.

The trial before Judge Faisal

7. On 5 January 2017, the parties appeared before Judge Muhammed Faisal and the case was adjourned to 23 January 2017. On the latter date, pursuant to section 29 of the Intermediate Court Act, DPP Mohammad Danial, applied for the case “to proceed from where it was stopped.” However, Ms Lenny Rahman, then representing the applicant, objected to the application, indicating that she did so on the basis that, in those circumstances, the judge would not hear the oral testimony of the witnesses. Having reserved his ruling, on 24 January 2017 the judge refused the application of the prosecution and ordered that:

“... all the prosecution witnesses be recalled and give evidence afresh before myself. New trial dates will... be given by me. Prosecution has 7 witnesses including for voir dire. Defendant giving evidence in person. Statement of agreed facts to be resubmitted.”

8. In making that ruling, the judge observed “*without consent from parties, I cannot proceed with this case from where it was left off. There is no discretion for me to make any order.*”
9. Notwithstanding that ruling and those orders, it is clear from the judge’s Judgment that he relied on the evidence given orally before Judge Hanani of the three prosecution witnesses and on the Statement of Agreed Facts. Having adverted to his ruling to the effect that “all the prosecution witnesses had to be recalled”, the judge went on to explain how that had come about:

“There was, however, a further twist in events before trial commenced. Defence Counsel applied on 10 April 2017 to be discharged from representing the defendant. In the same day, after counsel had been discharged, the defendant decided not to recall the previous witnesses but to proceed with the trial from where it was last left off. I granted his application, and proceeded further with the trial in accordance to s. 29 Intermediate Court Act.”

10. Unfortunately, there are no notes of proceedings for 10 April 2017. The court has received no explanation for that lacuna. Obviously, there were several important developments in the case at that hearing. For her part, at the hearing of 23 April 2019, Ms Nor Hafizah said that the respondent had no notes of that hearing either. She explained that such notes as there were in the possession of the respondent had been lost accidentally on the computer used by Mr Mohammad Danial. However, she said that she understood that on 10 April 2017 Mr Mohammad Danial had renewed his application pursuant to section 29 of the Intermediate Court Act. She explained that Mohammad Danial had been transferred to the International Division of the Attorney General’s Chambers and, on 23 April 2019, was outside Brunei.
11. Similarly, there was nothing in the lower court file which directly assisted in clarifying what had happened on 10 April 2017. However, there was correspondence which explained and supported the fact that the hearing took place on that date. By a letter dated 1 April 2017, Ms Lenny Rahman wrote to

the Chief Registrar of the Supreme Court referring, to the fact that the case had been *“fixed for retrial/re-hearing on the 25th until 29 April 2017”* and, having asserted that the applicant had failed to pay legal fees, indicated that Messrs Rozaiman Abdul Rahman were discharging themselves from acting for the applicant and asked that the matter be listed for hearing for a formal discharge. By letter dated 5 April 2018, the Senior Registrar informed the parties that the matter was listed for mention before Judge Muhammed Faisal at 9.00 a.m. on 10 April 2017.

12. In the result, this court is left in a most unsatisfactory position. There is an obvious conflict between the submissions made on behalf of the respondent, namely that DPP Mohammad Danial renewed the application pursuant to section 29 of the Intermediate Court Act and the Judgment, in which the judge stated that it was the applicant’s application which he granted. It is to be noted that the context in which that development took place was, as the judge noted, “after counsel had been discharged.” As noted earlier, in successfully opposing the prosecution’s application Ms Lenny Rahman had provided cogent reasons, although none were required, for her opposition to the prosecution’s application.
13. The considered position taken and secured by counsel representing the applicant was undone in circumstances that are not adequately explained immediately after the applicant became unrepresented.
14. If Ms Nor Hafizah is correct, namely that after counsel representing the applicant had been discharged, DPP Mohammad Danial renewed his application pursuant to section 29 of the Intermediate Court Act, that would have been a most unusual step to have taken by counsel for the prosecution when faced with a defendant now denuded of legal representation. On its face, and we are acutely conscious that we have not heard from DPP Mohammad Danial, it might appear that the prosecution was taking unfair advantage of an unrepresented defendant. That would be inconsistent with a prosecutor’s overriding duties of fairness as a Minister of Justice. Although we raise those concerns obviously, in the most unusual position in which it finds itself, this court is not in a position to reach any resolution of that issue.
15. On the other hand, the judge’s statement that, after counsel had been discharged, “the defendant decided not to recall the previous witnesses but to proceed with the trial from where it was last left off” is wholly unexplained. An explanation is called for in circumstances where a defendant at trial has become unrepresented and apparently resiles from a considered position taken previously by those representing him. How had it come about that the applicant had decided not to recall the previous witnesses? What if anything had been said to him, before he articulated that decision? Obviously, in those circumstances, it behoves the judge to invite such an unrepresented defendant to be cautious before taking any such step. In the absence of any notes of proceedings, this court has no information whatsoever about whether or not those most important matters were addressed and, if so, how they were

addressed. Again, in those circumstances this court is not in a position to reach any resolution of that issue.

The judge's reliance on the evidence given before Judge Hanani

16. In his judgment, the judge acknowledged that he had not “heard personally the testimony of PW1, PW2 and PW3.” Earlier, in addressing the issue of whether or not the prosecution had proved that the robber was the applicant, the judge said of the description of the robber and the car that he used:

“These facts, which are either in the statement of Agreed Facts or evidence of eyewitnesses, are also found in detail in the statement of the defendant, (PE 12 and PE 15 (?) 13). In short, the facts found in his two statements, are very detail, about the commission of the offence, from start to finish, and supported by other eyewitnesses, that I can only come to one possible conclusion, that is the facts in the defendant's two statements are the truth.” [Underlining added.]

17. Then, the judge reiterated his reliance on the evidence of the witnesses who had testified before Judge Hanani but not before him:

“I do feel safe in my conclusions because, their evidence is generally supported by the agreed facts and the statement of the defendant”.

Clearly, in determining that the applicant was guilty, the judge relied on the evidence of witnesses who had testified before Judge Haani, but not before him.

18. In all the circumstances, we have grave concerns that there were substantial procedural irregularities in the conduct of the trial, which go to the heart of the fairness of the trial.

Conclusion

19. In the result, we are not satisfied that the applicant's conviction is safe. Accordingly, we allow the application for leave to appeal out of time and quash the applicant's conviction.

Retrial

20. Ms Nor Hafizah having indicated that were the court to quash the conviction she would seek an order for the retrial of the applicant, we are satisfied that it is appropriate to make that order. We order that the applicant is retried on a charge of robbery with a deadly weapon, contrary to sections 392 and 398 of the Penal code.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A

