

IBERI SEBAL

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 31 of 2015)**

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(Criminal Appeal No. 8 of 2015)**

Before: Mortimer P, Leonard and Burrell JJ A.

12th November 2015

Headnote: 3 years and 10 months imprisonment imposed after plea on 55 year old man without previous convictions for smuggling 7 people into Brunei with the intention of driving them through Brunei. Prosecutor's appeal and Defendant's appeal dismissed and sentence of imprisonment upheld. Under s.7(1) of the Trafficking and Property Smuggling Order 2004 a fine is mandatory. Appeal allowed on failure to impose a fine.

Criminal Motion No 31 of 2015

Appellant in person

DPP Hjh Atiyyah Azzahra POKLSDSLJ Awg Hj Abas for Respondent

Criminal Appeal No 8 of 2015

DPP Hjh Atiyyah Azzahra POKLSDSLJ Awg Hj Abas for Appellant

Respondent in person

Cases referred:

Maiyadi v Public Prosecutor (Crim. App. No12 of 2012)

Esmediade bin Bujang v Public Prosecutor (Crim.App. No 3 of 2015)

Statute referred:

Section 7(1) of the Trafficking and Property Smuggling Order 2004

Mortimer. P:

On the 20 April 2015 the appellant pleaded guilty before Intermediate Judge Hanani on 7 charges of people smuggling and was sentenced to a total of 3 years and 10 months imprisonment. No fine was imposed on the basis that the appellant was impecunious.

The Appeals

The Public Prosecutor (the DPP) appeals against the sentence contending that 3 years and 10 months imprisonment is manifestly too lenient and that, in any event, section 7 (1) of the Trafficking and Property Smuggling Order 2004 requires the imposition of a fine in addition to imprisonment.

The applicant (Iberi Sebal) applies for leave to appeal against his sentence out of time following the DPP's appeal. As we must hear him on the DPP's appeal we grant him leave. He contends that his sentence was manifestly too harsh.

The Facts

On the 12 April 2014 at about 4 pm Iberi Sebal drove a car into Brunei from Miri in Sarawak through the Sungai Tujoh control post. He had with him in the car 7 members of the same Philippine family. None of them had a passport but using Malay passports belonging to his family he smuggled them through the Sungai Tujoh control post into Brunei and intended taking them into Sabah through the Kuala Lurah control post. The planned destination was Kota Kinabalu.

Having successfully brought them through the control post into Brunei at about 4 pm by 6:30 pm he arrived at Kuala Lurah where the immigration officer noticed that there were more people in the car than the number of passports that had been produced. He examined the car and discovered the 7 Filipino illegal immigrants.

Iberi Sebal admitted at once that he had agreed to take the 7 passengers from Miri to Kota Kinabalu, that he knew they were Philippine nationals, that he knew they had no passports and that he had agreed to assist their unlawful passage through Brunei using passports which did not belong to them. He used passports belonging to his family.

It had been agreed that RM2500 would be paid for the appellant's services of which RM1500 was paid with the balance to be paid on arrival at Kota Kinabalu.

Each charge relates to one illegal immigrant and to one entry into Brunei through Sungai Tujoh.

The Sentences

When passing sentence the judge noted that Iberi Sebal was of good character and 55 years of age. He had been led into the offence by poverty and he was out of work. She also took into account as a serious feature of the case that he had brought 7 people through the control post. She recognised that the clear intention was for the illegal immigrants to pass

through Brunei not to stay. In fact the appellant tried to take them through the Kuala Lurah crossing only 2 ½ hours after entering through Sungai Tujoh.

The judge cited *Maiyadi v Public Prosecutor (Crim. App. No12 of 2012)*. A similar case in this court in which 3 people were being taken out through a border post by an appellant who had no previous convictions. In that case we approved a total sentence of 3 years and 4 months imprisonment with a starting point of 5 years saying that it was a 'moderate' sentence.

The judge correctly recognised that although 7 charges had been preferred this was only one transaction and one charge would have sufficed.

The judge imposed on each charge a sentence of 3 years and 4 months but ordered that on charges 2 to 7 one months imprisonment on each should be consecutive with the remainder concurrent making 3 years and 10 months in all. The starting point for the total sentence is therefore 5 years and 9 months.

The Submissions

Iberi Sebal contends that the total sentence of 3 years and 10 months is manifestly too severe in the particular circumstances of this offence. He relies first upon his good character. He is a first offender aged 55 years and submits that this is a substantial mitigation to which the judge failed to give sufficient weight. Secondly, he says that although he was bringing 7 illegal people into Brunei his clear intention was to take them out again as soon as possible. Had the enterprise been successful they would have only stayed in Brunei for 2 ½ hours. Finally he submits that his family are suffering seriously as a result of his absence.

On the other hand the DPP submits that the total sentence of imprisonment was manifestly too lenient. In support he asked the court to note that in *Maiyadi's case* relied upon by the judge there were 3 people being smuggled and the 3 years and 4 months sentence approved by this court was described as 'moderate' whereas in the present case there were 7 people being smuggled. Then he contends that Iberi Sebal played a very active role in the offence because he not only provided transportation but also provided the passports to deceive the immigration officer and received payment.

Finally on the period of imprisonment the DPP submits that as the normally mandatory strokes could not be ordered a longer period of imprisonment should be imposed in lieu to achieve a similar severity of punishment between those above and below 50 years of age.

Lastly the DPP submits that the judge was required by sections 7 (1) and 20 of the Trafficking and Smuggling Persons Order 2004 to impose a fine in addition to imprisonment. On this there can be no dispute; in *Esmediade bin Bujang v Public Prosecutor (Crim.App. No 3 of 2015)* this court decided that the sections require a mandatory fine to be imposed.

Discussion

In sentencing the judge had in mind all the relevant matters in relation to both the offence and the offender. She rightly recognised that this was one offence although charged in 7 counts. Consequently she passed the sentence of 3 years and 4 months on each count which alleged only one smuggled person but then increased that sentence by 6 months to take into account that there were 7 smuggled people. It would have been more appropriate for only one count alleging 7 smuggled people to have been preferred.

Turning first to the submissions of the DPP. Apart from the number of people involved we are unable to accept that the part played by Iberi Sebal aggravated the offence in any way. In arranging passports and transport for payment this is the normal involvement of an accused in such a case. As for the number of people involved the judge properly reflected that in the additional 6 months sentence.

We are unable to accept the submission that he ought to have received additional imprisonment because strokes could not be imposed due to his age. Such would involve passing heavier sentences on certain men and all women because of their age or gender.

As we have indicated we accept the DPP submission that a mandatory fine has to be imposed recognising that in many cases such fines will be meaningless as it is contrary to principle for a judge to pass a fine upon an impecunious person knowing that the consequence will be to serve imprisonment in default.

There are 2 matters raised by a Iberi Sebal which require careful consideration. The fact that he is 55 and a first offender is a very substantial mitigation. It is rare for a person of this age to offend for the first time and he is entitled to credit for the many years of honesty. The judge took this matter into account; the question is whether she gave it sufficient weight.

The second matter is the gravity of the offence. The number of people smuggled is an aggravating factor but the fact that the smuggled people were only passing through Brunei and only spending 2 ½ hours shows it to be a less serious instance of a very serious offence.

Conclusion

In conclusion we are satisfied that this is not a sentence of imprisonment which is manifestly too lenient. It is a very substantial sentence and is in accord with the previous decisions of this court. The prosecutor's appeal on the sentence of imprisonment is dismissed but for the reasons we have given we allow the appeal on the imposition of a fine.

As for Iberi Sebal's appeal the judge clearly had in mind all the relevant matters. She gave appropriate weight to his previous good record and also to the number of people who were smuggled. As we have already indicated the sentence was completely in accord with the previous decisions of this court dealing with sentences on first offenders. This is a heavy sentence for a serious offence and we dismiss this appeal.

The imposition of a fine

It is necessary for this court to allow the prosecutor's appeal in part as the imposition of a fine is mandatory. RM 2,493.30 was found on Iberi Sebal of which RM1,500 was forfeited by order of the judge. The balance was returned to him. As under *s.7(1) of the Trafficking and Property Smuggling Order 2004* a fine is mandatory and he has the money with which to pay a fine, we order that he is fined BN \$100 with one month's imprisonment consecutive to the sentences he is now serving in default of payment within one month.

The forfeiture of the car

The judge ordered that the car used in the offence be forfeited. Iberi Sebal asked that it should not be forfeited as it belongs to another member of the family. We see no reason to interfere with the judge's order and her order stands.

Orders

We make the following orders:

1. The prosecutor's appeal on sentence of imprisonment dismissed but appeal on the imposition of a fine allowed.
2. Iberi Sebal's appeal on sentence and forfeiture of the car dismissed.
3. Iberi Sebal fined BN\$100 to be paid on or before 15 December 2015 with one month imprisonment concurrent with his present sentence in default of payment.

Mortimer, P.

Leonard, J.A.

Burrell, J.A

