

**DARI ANAK BILONG**

**AND**

**PUBLIC PROSECUTOR**

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**Court of Appeal of Brunei Darussalam  
(Criminal Motion No.4 of 2020)**

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Before: Steven Chong C.J., Burrell P and Seagroatt JA  
**5<sup>th</sup> June 2021**

*Headnote: Trafficking and smuggling of Persons Order, 2004; defence of entrapment rejected; omission of mitigation in sentencing procedure; reduction of sentence; sentence to run from date of remand into custody.*

Mr. Haji Mohamad Daud bin Haji Ismail of Messrs. Daud Ismail and Company for the Applicant.  
DPP Mohammad Hussin Ali bin Idris of Public Prosecutor for Respondent

**Cases cited in the judgment**

*Sidek bin Manjarat vs Public Prosecutor (Criminal Appeal No.11 of 2017)*

*Shahrizan bin Musdanin vs Public Prosecutor (Criminal Appeal No.10 of 2015)*

**Seagroatt, JA.:**

This applicant was one of three defendants tried before Judge Radin Safiee on a count of smuggling an Indonesian National into Brunei Darussalam, contrary to section 7(1) of the Trafficking and Smuggling of Persons Order 2004. He was convicted but his two co-accused were acquitted. The offences were committed on the 14<sup>th</sup> September 2018. He was convicted on the 19<sup>th</sup> October 2019 and was sentenced to 5 years imprisonment effective from that date. However, he had been in custody on remand since 15<sup>th</sup> September 2018. He was unrepresented at trial. Mr Mohammad Daud Ismail appears for him on this appeal.

His Notice of Appeal is dated the 30<sup>th</sup> January 2020 which is over 2 months out of time. There is a translation which is dated 20<sup>th</sup> January 2020 which may be a typing error. In any event this would still be out of time. The perfected grounds of appeal submitted by his lawyers are dated the 16<sup>th</sup> March 2020. We follow our established practice of proceeding to consider whether the appeal itself has any merit before making a decision in respect of the late notice.

This appellant had entered a plea of guilty to the offence on an early appearance but it was regarded by the court as a qualified plea and therefore not accepted.

After earlier appearances in court when it was clear that he was pleading not guilty, as were his co-accused, he said at the appearance in the Intermediate Court on the 14<sup>th</sup> January 2019:

*"I would like to change my plea."*

*"(I) plead guilty to both charges"*

After the Statement of Facts was read in Iban he said:

*"In paragraph 5, I disagree that I received payment of RM\$300*

*I only helped Matori. I didn't receive any payment."*

The judge interposed:

*"This is an essential part of the offence.*

*Therefore, I have to ask (you) to go for a full trial and I have to reject (the) plea of guilty."*

His written mitigation in Malay was read in Iban (and in English) and he then said:

*"I really did not intend to smuggle Matori. I didn't talk to him. I only gave him a ride to the border."*

Judge – *"I can see that (he) does not understand the nature of consequences of the plea (to) the 1<sup>st</sup> charge."*

Appellant – *"I don't want to proceed for trial and apply for a lenient sentence."*

The judge then set out that he could not accept the plea of guilty after hearing him say he had no intention to smuggle Matori into the country.

A second charge of trying to smuggle in a quantity of beer was accepted by him unequivocally and his plea of guilty was properly recorded.

The trial proceeded with effect from 15<sup>th</sup> January 2019 in fits and starts until the concluding stage on 24<sup>th</sup> August 2019. It is difficult to see how there could be any justification for extending this simple case over a period of 7 months.

Matori, the Indonesian being smuggled, had earlier been sentenced to 13 months imprisonment and 3 strokes. He gave evidence against this appellant. This included the payment of RM\$300 to him and he identified him as the person telling him to lie down in the truck behind the seats, no doubt to avoid his being seen by an Immigration officer. That of course, was to no avail. When Matori was told to get down from the truck, he ran off.

Although the appellant cross-examined Matori to put his defence to him, he did not himself give evidence. He had made a statement of admission to the police on a question and answer basis which contained the following:-

*"I met an Indonesian man ..... at the parking lot ..... The man directed me to bring an Indonesian man to enter Brunei border with the payment of RM\$300."*

*"The purpose of the payment to bring the Indonesian man until the border of Brunei."*

*"I ordered the Indonesian man to lay at the back."*

*"I wanted to hide (him) from the knowledge of the border of Malaysian and Brunei."*

*"..... I already know that (he) did not have passport."*

*"I know it was against the Immigration Regulation and Act because I have to do it to find sustenance for my family."*

With this body of evidence the judge had little difficulty in finding the prosecution case proved and that the appellant had not rebutted the presumption under section 7(2). Not having given evidence it is difficult to see how he could have laid any ground for this.

This appeal against sentence is largely based upon his claim of financial hardship. Whilst we accept that this is an inevitable consequence of imprisonment he appears to have had steady employment as a lorry driver earning RM\$100 per day which he has thrown away by reason of this smuggling offence. There is no real substance in the argument relating to delay although we have already commented on the extended trial period.

His counsel has raised entrapment as a point of mitigation. There is no basis or substance for this. This is not a case of entrapment.

The judge considered the sentences and circumstances of two decisions of this court. In ***Sidek bin Manjarat vs Public Prosecutor (Criminal Appeal No.11 of 2017)***. The court upheld a sentence of 6 years imprisonment after trial imposed upon a successful businessman, he had one business in Brunei and the other in Malaysia, and had charged \$2,450 to smuggle in two Bangladesh men. There was no reference to that appellant being of good character hitherto.

In ***Shahrizan bin Musdanin vs Public Prosecutor (Criminal Appeal No.10 of 2015)*** the trial judge had imposed a sentence of 4 years and 3 strokes on the appellant who in attempting to smuggle in a Philippine woman by presenting an Indonesian passport purporting to be hers to the Immigration authorities, had managed to get past seven border posts on the strength of the deception. A fee of \$800 was agreed but the bulk of this appears to have been payable only on ultimate success. The appeal was only against conviction and was dismissed. There was no consideration of or comment on the sentence.

The judge chose midway between the two sentences. The deception by using someone else's passport could well be regarded as an aggravating feature in Shahrizan's case.

Although each case has different circumstances we are satisfied that the facts of this appeal cannot be equated with the sentence of 6 years in Sidek's case or that of 4 years in Shahrizan's case. Nor does a slide-role approach to produce the midway sentence of 5 years fairly reflect the criminality in this appeal.

It is clear that the judge made no mention of any mitigation on this appellant's behalf, not having given him the chance to put any forward. The argument that the sentence imposed cannot have reflected any reasonable mitigating factors is a valid one.

He is a 50 years old man with no previous convictions, a relevant factor, and the circumstances of his criminality are arguably less serious than Shahrizan's case, although the judge must have taken the view that they were more serious.

Accordingly we consider a proper sentence to be one of 4 years imprisonment. The sentence shall run from the date of the first remand in custody, 15<sup>th</sup> September 2018.

The application and appeal are therefore allowed.

**Order**

The sentence of 5 years imprisonment is reduced to one of 4 years imprisonment with effect from 15<sup>th</sup> September 2018.

**Steven Chong, C.J.**

**Conrad Seagroatt, J.A.**

**Michael Burrell, P.**