

JUNAIIDI MUHTAR ALI

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 51 of 2020)**

Before: Burrell P, Seagroatt and Lunn JJ A.
10th June 2021

Headnote:

Applicant in person
DPP Dayangku Didi-Nuraza binti Pengiran Haji Abdul Latiff of Public Prosecutor for the
Respondent

Cases referred to in the judgment

*Sidek Bin Manjaraf v PP (Criminal Appeal No. 11 of 2017);
Adizan Bin Asri & Others v PP (Criminal Appeal No. 24 of 2018; Criminal
Motion No. 3 of 2019; Criminal Appeal No. 1 of 2019; and Criminal Appeal
No. 25 of 2019)*

Lunn, JA.:

1. The applicant seeks leave to appeal out of time the sentences imposed on him by HHJ Norismayanti on 17 September 2020, following his conviction after trial of an offence on 2 March 2020 of arranging or assisting the unlawful entry into Malaysia Baiq Siti Aysah, a person who is not a citizen or permanent resident of that country, having reason to suspect a person's entry was unlawful, in order to obtain financial or other material benefit, contrary to section 5 (1) of the Prevention of People Smuggling Order, 2019.

Application for leave to appeal out-of-time

2. The applicant did not file his application for leave to appeal until 3 December 2020, more than six weeks out-of-time. He explained that his application was made out of time because it was unable to raise the money to pay the fee to lodge the application.

The trial

3. Evidence at the applicant's trial was received over two days in June 2020. The applicant gave evidence. Final submissions were received on 7 July 2020 and the judge delivered judgment on 14 September 2020, on which date she received mitigation and adjourned sentence to 17 September 2020.
3. There was no dispute at the trial that on the evening of 2 March 2020 Ms Baiq, a citizen of Indonesia, had been found by a customs officer concealed in the boot of a motor car at the Sg Tujoh Control Post in Brunei as the motor car was being driven by Muhammad Serudin Bin Mohammed Yassin towards the crossing into Miri in Malaysia. Ms Baiq was employed as a domestic helper in Brunei. Her passport was kept by her employer. Having been contacted by Ms Baiq in February 2020, the applicant agreed to help her return to Indonesia for monetary payment of \$700. She paid the applicant \$100. The applicant contacted Mohammed Serudin and arranged for him to drive his motor car to transport Ms Baiq across the border into Malaysia for a monetary reward of RM \$250.
3. On 2 March 2020, by arrangement with the applicant, who paid him B\$50, Mohammed Serudin collected Ms Baiq and brought her to the premises at which the applicant resided. Then, he and Ms Baiq drove to the border. However, after he ran out of fuel in that journey, the applicant came to his assistance in refuelling. The judge rejected the applicant's evidence that, having learnt on only 2 March 2020, Ms Baiq did not have her passport he had urged her not to travel but she rejected his entreaties. Specifically, the judge found that as a result the applicant knew that Ms Baiq entry into Malaysia would be unlawful and that he did benefit himself for his role in assisting her to go to Malaysia lawfully.

Sentencing

Mitigation

4. In sentencing the applicant, the judge noted that he was a 33 years-old married man with two children who lived in Indonesia, who invited the court to impose a lenient sentence.

The role of the applicant

5. Of the role of the applicant, the judge said that, absent the applicant's role, the offence may not have been committed. The applicant had arranged not only for the services of Mohammad Serudin to be provided but also had arranged with an agent in Miri to assist Ms Baiq in her onward journey to Pontianak.

The seriousness of the offence

6. Having noted that section 5 (1) of the Order provided for the imposition on a person convicted of the offence of a sentence of imprisonment not exceeding 30 years, whipping and a fine not exceeding \$1 million and not less than \$6,000 in respect of each person, the judge said that the seriousness of the offence was

emphasised by the amendments to the law, which are provided for a minimum fine of \$6,000 in respect of each smuggled person. The judge noted that the decisions of this court for an offence contrary to section 7 (1) of the repealed Trafficking and Smuggling of Persons Order, 2004 reflected the very serious nature of the offence. She noted that in court had said in *Sidek Bin Manjaraf v PP*¹ that the sentence of 6 years imprisonment imposed on and appellant after his conviction after trial for the offence of arranging or assisting the unlawful entry of two Bangladeshi men into Malaysia from Brunei by motor car in one incident, for an offence contrary to section 7 (1) of the Trafficking and Smuggling of Persons Order, 2004 was “**not excessive.**” Further, the judge noted that in this Court’s judgment in *Adizan Bin Asri & Others v PP*² this Court said that the judge had erred in taking a starting point for sentence of 9 years’ imprisonment for an offence contrary to section 7 (1) and, in its place stipulated a starting point for sentence of 7 years’ imprisonment. In that case this court reviewed several judgments of this court in which sentences were imposed for this offence. In the result, the judge said, “*the range of sentences after trial of a series of cases of lesser gravity was 4 to 6 years including strokes. In more serious cases where there is found to be a smuggling scheme and more persons involved the starting point would be seven years.*”

7. In sentencing the applicant to 5 years’ imprisonment, 3 strokes and to a fine of \$6,000 the judge said that she had regard to the applicant’s involvement, the fact that he had been found guilty after trial and that he was a first offender who expressed remorse. In default of payment of the fine within 2 months, the judge ordered that the judge be imprisoned for 2 months, which sentence of imprisonment she wanted to be served consecutively to the sentence of 5 years’ imprisonment.

The respondent’s submissions

8. DPP Didi-Nuraza Latiff, invited the Court to note that the applicant had not provided any reasons for filing his application out-of-time. On the other hand, she conceded that the applicant was “*likely to succeed*” in his application in respect of the imposition of a sentence of imprisonment in default of payment of the fine which had been imposed on him.
9. Of the applicant’s culpability in the commission of the offence, she submitted that he had played an “*instrumental role*” in the commission of the crime, in particular in arranging for Mohammad Serudin to transport Ms Baiq across the border from Brunei into Malaysia for reward and for arranging her onward travel thereafter to Pontianak. The applicant acted for reward. In all those circumstances, the sentence imposed on the applicant was not manifestly excessive.

The fine and order of imprisonment in default of payment

10. DPP Didi-Nuraza Latiff invited the Court to note that the fine of \$6,000 that the judge had imposed on the applicant was the minimum fine that was required to be

¹ *Sidek Bin Manjaraf v PP* (Criminal Appeal No. 11 of 2017; unreported, 16.11 2017)

² *Adizan Bin Asri & Others v PP* (Criminal Appeal No. 24 of 2018; Criminal Motion No. 3 of 2019; Criminal Appeal No. 1 of 2019; and Criminal Appeal No. 25 of 2019; unreported, 23 April 2019.)

imposed on conviction of the offence. On the other hand, she pointed out that in enquiries made of the applicant by the judge as to his ability to pay a fine, he said that he earned \$450 per month as a delivery driver. He supported his wife and two children on his income. In those circumstances, she suggested that the applicant was unlikely to be able to pay the fine. In that context, she drew the Court's attention to its observation in *Sidak Manjaraf*, namely "unless the Court has reason to believe that the convicted person is the means to pay a fine it should not impose it with an alternative of imprisonment in default of payment."

Discussion

11. With respect to the judge, we are satisfied that she assessed the applicant's role in culpability in the commission of the offence appropriately. Although the applicant acted for reward and although he recruited others to assist in the criminal enterprise, the applicant was not part of a well-organised team involved in the unlawful movement of persons across national borders. Given that the context of the fact that the applicant had not committed previous criminal offences was his evidence that he had lived in Brunei for three years before the commission of the offence, the judge was entitled, she said she did, to give that factor into account. In the result, we are satisfied that the sentence of 5 years' imprisonment and 3 strokes imposed on the applicant was entirely appropriate.
12. On the other hand, we are satisfied that the judge erred in ordering that, in default of payment of the minimum fine of \$6,000 imposed on the applicant, he serve a sentence of 2 months' imprisonment, consecutively to the sentence of 5 years' imprisonment. It was readily apparent from the enquiries made of the applicant that there was no prospect whatsoever of the applicant being able to pay the minimum fine the Court was required to impose on him. The provisions of sections 12 and 253 of the Criminal Procedure Code provide a discretion in the Court as to whether or not to impose a term of imprisonment in default of payment of fine. It is trite that it is wrong to impose such an order on a defendant who does not have the ability to pay the fine imposed on him.

Conclusion

13. We are satisfied that there is merit in the applicant's case and being satisfied with the explanation for the late filing of the appeal, treating the application of the hearing of the appeal, we allow the appeal to the extent that we quash the order that, in default of payment of the fine, the appellant serve a sentence of two months' imprisonment. The fine remains a civil debt enforceable in the usual way. We make no other order.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A