

**SHAHRIZAN BIN MUDANIN**

**AND**

**PUBLIC PROSECUTOR**

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**(Court of Appeal of Brunei Darussalam)  
(Criminal Appeal No. 10 of 2015)**

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**SANTONY BIN ANJIN**

**AND**

**PUBLIC PROSECUTOR**

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**(Court of Appeal of Brunei Darussalam)  
(Criminal Appeal No. 11 of 2015)**

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Before: Mortimer P, Leonard and Burrell JJ A.  
**26<sup>th</sup> November 2015**

*Headnote: Joint charge of people smuggling – the presumption under section 7 (2) of the Trafficking and People Smuggling Order 2004 engaged – neither appellant succeeded in rebutting the presumption. Appeals against conviction dismissed.*

**Criminal Appeal No 10 of 2015**

Mr. Hj Mohamad Rozaiman bin Dato Haji Abdul Rahman (M/S Rozaiman Abdul Rahman Advocates and Solicitor) for Appellant  
DPP Hjh Atiyyah Azzahra POKLSDSLJ Awg Hj Abas (Public Prosecutor) for Respondent

**Criminal Appeal No 11 of 2015**

Mr. Hj Mohamad Daud bin Hj Ismail (M/S Daud Ismail and Company) for Appellant  
DPP Hjh Atiyyah Azzahra POKLSDSLJ Awg Hj Abas (Public Prosecutor) for Respondent

**Mortimer. P:**

On 29 June 2015 the 2 appellants were each convicted after trial by Intermediate Judge Abdullah Soefri of an offence of people smuggling contrary to section 7 (1) of the Trafficking and People Smuggling Order 2004. On 2 July 2015 each was sentenced to 4 years imprisonment with 3 strokes and a one dollar fine with one week imprisonment in default.

### ***The Facts***

On 17 October 2014 the first appellant (Shahrizan) drove his car with the second appellant (Santony) in the passenger seat and a Philippine woman (Siti) on the back seat to the Kuala Lurah control post. The appellants intended to take her from Sabah to Miri to see her ill daughter. Siti had no passport but Shahrizan presented to the immigration officer an Indonesian passport belonging to another person so that she could pass through. Siti had been told by Santony to lie down on the back seat. The officer insisted that she sat up so that he could see her. He realised the passport did not belong to her and arrested all three.

### ***The applicable law***

Section 7 (1) of the Trafficking and People Smuggling Order 2004 (the order) provides:

*“Any person who engages in people smuggling, regardless of whether the smuggled person arrives in the receiving country, shall be guilty of an offence.....”*

By Section 2 of the Order people smuggling is defined as:

*“..... Arranging or assisting a person’s unlawful entry into the receiving country including Brunei Darussalam, of which the person is not a citizen or permanent resident of the receiving country, knowing or having reason to suspect that the person’s entry is unlawful, in order to obtain a financial or other material benefit.”*

Section 7 (2) provides:

*“Where in any proceeding for an offence under subsection (1), it is proved that the defendant arranged or assisted the unlawful entry of any person into any receiving country (including Brunei Darussalam) of which that person was not a citizen or a permanent resident, it shall be presumed, until the contrary is proved, that the defendant did so knowing that such person’s entry was unlawful and in order to obtain a financial or other material benefit.”*

### ***The Evidence for the Prosecution***

In a statement of facts it was agreed that on 17 October 2014 Shahrizan, Santony, and Siti were in Shahrizan’s car. Having successfully passed through a number of border posts from Sabah they came to the Kuala Lurah immigration post. Shahrizan presented 3 passports to the immigration officer. The immigration officer enquired about Siti, the woman passenger who was lying down on the back seat of the car. Siti was found to be using another person’s passport and all 3 were arrested.

Siti, a Filipina, testified at trial that she was in Sipitang in Sabah and had no passport. She wanted to go to Miri in Sarawak to see her ill daughter. She approached the owner of a coffee shop in Sipitang, whom she knows as Jawa, to enquire if there was ‘a car’ which could take her to Miri without a passport.

She negotiated and a payment of \$800 was agreed. Jawa said she would call the person to take Siti. As Siti only had \$150 it was agreed that she should pay the \$150 and the balance of \$650 to Santony on arrival in Miri. She handed the \$150 to a male Iban colleague of

Jawa. Jawa then produced the Indonesian passport to be used as belonging to Siti and handed it to Santony who had not been present at the negotiation.

Santony had his car at the shop. He then took Siti to the place where he lived. Shahrizan was there waiting with his car in a parking lot.

According to Shahrizan, Santony handed him the passport which he put near the gear lever of his car with the other 2 passports. The 3 of them got into the car with Shahrizan driving, Santony in the front passenger seat and Siti on the back seat. When travelling they stayed in these positions throughout.

Santony, in Shahrizan's presence, asked Siti to lie down on the back seat sleeping during the journey as 'it would be better'.

Having used the passport successfully to be allowed through 7 border posts on the way they arrived at Kuala Lurah border post. There Shahrizan presented the 3 passports to the immigration officer including the Indonesian passport which did not belong to Siti.

Siti was lying down on the back seat of the car. The immigration officer wanted to see her and when he did so appreciated that the passport was not hers and all 3 were arrested.

Both appellants deny any knowledge that the Indonesian passport did not belong to Siti and each denies receiving any payment for the journey.

### ***The Presumption under Section 7 (2) of The Order***

There is no dispute that Siti is not a citizen or permanent resident of Brunei Darussalam; that she had no passport; that she tried to enter Brunei Darussalam using another's passport; that Shahrizan drove the car with her as a passenger into Brunei and presented another person's passport to the immigration officer as if belonging to Siti and that throughout Santony accompanied them.

The judge accepted Siti's evidence that Santony asked her to lie down in the back of the car with its implications and that Santony had been handed the Indonesian passport by Jawa so that it could be used on the journey.

The presumption applied in the case of each appellant. In order to avoid conviction each had to satisfy the judge on a balance of probability that in doing what he did to assist Siti through the border post he was acting innocently and in any event not for reward.

In each case the judge considered the evidence before him and held that each had not on the balance of probability rebutted the presumption and established his defence. Each contends, through counsel, that the judge's decision was against the weight of the evidence and wrong.

### ***Both Appellants.***

The central point made by both appellants is that the judge ought not to have accepted Siti's evidence as she was not credible it having been shown in cross examination that some answers in statements attributed to her were inconsistent with her evidence. The judge

accepted there were inconsistencies. The first concerning her age, the second whether or not she was married and third the length of her stay in Sipitang before leaving for Miri.

The appellants' difficulty is that the judge had these inconsistencies well in mind and considered them with care. Having done so he decided that he could accept Siti's evidence and did so. The inconsistencies were obvious but each was peripheral to the issues in the case.

The judge also had in mind that Siti was the only prosecution witness. Even so he decided that he was able to act upon her evidence.

### ***Shahrizan's Appeal***

Mr Rozaiman, who appears for Shahrizan, further contends that the judge, having accepted Siti's evidence, failed to give sufficient weight to the fact that she testified to never having discussed the arrangement for the use of another person's passport and the payment of money with Shahrizan and that he knew nothing of the circumstances. The judge certainly considered this aspect of her evidence and accepted it so far as it goes. The witness could only give admissible evidence that Shahrizan knew nothing of the circumstances so far as she knew; she not having told him, nor discussed it with him, nor heard Santony discuss it with him either.

In further support of his contention that the conviction ought to be quashed Mr Rozaiman asked the court to note paragraph 2 of the statement of agreed facts set out by the judge in his decision. Shahrizan presented the offending passport on behalf of Siti at no fewer than 7 border posts in the course of the journey before arriving at Kuala Lurah and at each the passport had been accepted as that of Siti. It is said this gives considerable support to Shahrizan's evidence that he thought it to be Siti's passport.

### ***Discussion***

In seeking to rebut the presumption under section 7(2) of the Order on a balance of probability Shahrizan gave brief oral and documentary evidence that he was unaware that Siti was using another's passport and that he was to receive no money for the journey.

Both appellants seek support for their evidence that the passport deceived officers at 7 border posts. As neither says he examined the passport and thought for that reason it was Siti's this evidence provides no confirmation of genuine mistake for either of them.

This the judge considered along with the direct and circumstantial evidence that this was an arranged unlawful venture to assist Siti to cross borders, inter-alia into Brunei Darussalam, using a passport which was not hers in return for \$800. Jawa with whom Siti had negotiated agreed to arrange someone to drive her across in the car. Shortly after Santony was present at the coffee shop with his car. Santony then spoke to Shahrizan, a work colleague, who was ready with his car at Santony's residence to drive Siti to Miri. A passport was handed by Santony to Shahrizan and he presented it with the other passports at each border crossing including Kuala Lurah knowing that Siti had been asked to lie down on the back seat with the obvious purpose of keeping out of sight.

Shahrizan's evidence was to the effect that at short notice he heard that Siti wished to go to Miri to see her daughter who was very ill and out of philanthropy and sympathy he decided to drive her all the way with Santony. In a statement made the day after his arrest he suggested that his willingness to do this good deed was because he knew Siti by a Malay nickname translated as 'auntie'. In a statement made the day after his arrest he said, " I have known her for a month now from our workplace. She was my neighbour at the workers quarters where I worked." He referred to 'auntie' in 3 further statements including a statement under section 117B of the CPC but in his oral evidence at trial he explained that Siti was not that person. It was a case of mistaken identity.

He also gave evidence that he received no money for the trip. In a statement made to the police on 28 October 2014 he was asked how much money he brought with him from Sipitang in Sabah. His answer was RM100. This left open the question as to how the petrol was to be paid for. At first he said he thought he had enough petrol because he knew the performance of his car.

Having heard and considered all the evidence the judge was unable to accept on a balance of probability that the reason for him taking the journey was out of sympathy for Siti or that he did not require money for petrol. He found that the presumption had not been rebutted with the consequence that Shahrizan was convicted.

There was no error of the judge and Shahrizan's appeal against conviction is dismissed.

### ***Santony's Appeal***

We have considered and rejected the submission that the judge ought not to have accepted Siti's evidence on the grounds that she was inconsistent and that she was the only prosecution witness.

Mr Daud, who represented Santony, then sought to argue that there was an error of law in the way the charge was framed as a joint offence. This is a submission quite devoid of merit and it is unnecessary to consider it further.

We have referred to Siti's evidence. Shortly after Siti's negotiation for the journey without a passport and for the payment of \$800 was concluded Santony was at the coffee shop with his car. He was handed the passport for use on the trip and then took Siti to meet Shahrizan and accompanied Siti all the way to Kuala Lurah.

The presumption of guilt under section 7(2) of the Order was clearly engaged in his case. Santony chose not to give evidence to rebut the presumption. The judge was invited therefore to find that the presumption was rebutted by a consideration of the whole of the evidence.

Apart from the matters we have already considered it is submitted by Mr Daud that the successful use of the passport through 7 border posts ought to have been accepted by the judge as significant support for Santony's contention made in statements to the police that he had good reason to go to Miri to support his daughter who had been raped; that he had arranged the journey with Shahrizan 2 days before; that he did not know Siti but agreed with the people at the coffee shop to take her to Miri out of sympathy; that he was handed the passport by the man at the coffee shop but never examined it; that he had no reason to

think that it was not Siti's passport; and, he received no money but he was to reimburse Shahrizan for the petrol when he received his wages.

Under section 221 (5) of the CPC it was open to the judge to draw an adverse inference against Santony for his election to remain silent but the judge chose not to do so. Although the judge deals with the matter briefly it is clear that he had in mind all the evidence including the self serving parts of Santony's statements to the police which he did not confirm on oath. In particular he had in mind Siti's clear direct evidence as well as the significant circumstantial evidence implicating Santony.

As he chose to remain silent and not give any sworn evidence to rebut that of the prosecution he held that Santony had failed to rebut the presumption.

Consequently the judge convicted him and there is no sound basis upon which we could hold that the judge was in error in so doing.

For these reasons Santony's appeal against conviction is dismissed.

***Order.***

Each appeal against conviction is dismissed.

**Mortimer, P.**

**Leonard, J.A.**

**Burrell, J.A**