

SIDEK BIN MANJARAF

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 11 of 2017)**

Before: Mortimer P, Leonard and Burrell JJA.
16th November 2017

Headnote: Criminal law, sentence, section 7 (1) of the Trafficking and Smuggling of Persons Order 2004, on the facts 6 Years imprisonment and fine of \$5,000.00 after trial not excessive.

Mr Haji Mohamad Rozaiman bin Dato Haji Abdul Rahman (Messrs Rozaiman Abdul Rahman Advocates and Solicitor) for Appellant
DPP Emily Goh for Public Prosecutor

Case cited in the Judgment:

*Maiyadi Bin Marzuki v Public Prosecutor (Criminal Appeal No. 2 of 2012),
Esmediade bin Bujang v Public Prosecutor (Criminal Appeal No. 1 of 2015).*

Leonard, JA.:

On 21st August 2017 after a trial before Judge Masni the appellant, a Malaysian national, was convicted on two charges under section 7 (1) of the Trafficking and Smuggling of Persons Order 2004. The judge found that the appellant and an accomplice had arranged or assisted for two Bangladeshi men to enter Malaysia unlawfully from Brunei on the same occasion on 7 April 2017.

We can think of no good reason why two separate charges were preferred instead of one. In approaching the question of sentence, the judge evidently decided to treat the appellant as if the charges had been consolidated into one. His intention is indicated by the wording of the committal warrant, signed by the judge, the relevant part of which reads:

"1) 6 years imprisonment + F5000.00 i/d 1 month. 2) 6 years + F5000 i/d 1 month, sentence to run concurrently: total sentence 6 years imprisonment + F5000.00 i/d 1 month w.e.f 08.04.2017"

In an attempt to achieve that aim, the judge pronounced the following sentence and ordered that they be concurrent, the offences having been committed on the same occasion.

Charge 1 Six years imprisonment and a fine of \$5,000.00 with one month imprisonment in default of payment.

Charge 2 Six years imprisonment and a fine of \$5,000.00 with one month imprisonment in default of payment.

The difficulty is that since a concept of concurrent fines is unknown to the law the judge, who clearly intended to impose an obligation to pay only one sum of \$5,000.00, actually appears from the record to have imposed an obligation to pay two sums of \$5,000.00.

There was no sentence of whipping, because the appellant was over age.

Both offences having been committed on the same occasion, the sentences of six years were ordered to be served concurrently.

The first ground of appeal was that a sentence of 6 years was manifestly excessive. It was submitted that it is manifestly excessive because in a *Maiyadi Bin Marzuki v Public Prosecutor (Criminal Appeal No. 2 of 2012)*, where an appellant had pleaded guilty to a charge under section 7 (1) of the 2004 Order, the sentencing judge had selected a starting point of five years.

In *Maiyadi*, we expressed the view that the sentence was a moderate one. The respondent has pointed out that *Maiyadi* was the first human smuggling case under section 7(1) of the Trafficking and Smuggling of Persons Order 2004 in this jurisdiction. Persons tempted to commit this type of offence must be deterred. It is important to bear in mind the fact that it is a serious one, involving as it does the violation of national borders. It endangers the security of this country and its neighbours and involves the exploitation of vulnerable people. That is why the maximum penalties prescribed by law are so severe, being imprisonment for not exceeding 30 years, and whipping and a fine. Fortunately Brunei has not suffered large scale illegal immigration, organised for huge profits by sophisticated criminals, well organised and resourced as has happened in some parts of the world. The offences dealt with in Brunei up to now have been relatively small scale, carried out by individuals rather than organised criminals and involving relatively few would-be migrants but if things were to change for the worse, there would be suitable deterrent increases in the penalties appropriate in the light of the facts particular to the case and to the offender.

No two cases are exactly the same. The effective term of 6 years imposed in the present case was in our view not excessive. According to the respondent the present case is the eighth of its kind in Brunei Darussalam since 2012. There is another in our list for this session, bringing the total to 9, so that we have been able to get an impression of the general nature of the usual case of this kind coming before the courts. Whereas in some instances up to now those caught people smuggling were doing so for a small financial reward, sometimes at the behest of a go between who has received a fee from the migrant, here the appellant appears to have dealt direct as a principal with the persons to be smuggled, demanding a fee of \$1,200.00 from one man and \$1,250 from the other.

The second ground of appeal was that the imposition of a fine of \$5,000.00 was manifestly excessive and wrong in principle because a nominal \$1.00 fine had been

considered appropriate in *Esmediade bin Bujang v Public Prosecutor (Criminal Appeal No. 1 of 2015)*. The imposition of a fine in addition to imprisonment is not wrong in principle. It is required by the legislation, as we found in *Esmediade*.

As to the quantum of the fine, that is a matter to be decided on the basis of the particular facts of each case. In some cases it will be obvious that the convicted person will be unable to pay a fine, in which circumstances the mandatory fine should be a nominal one. In others it may be considered that imprisonment is a sufficient penalty so that a nominal fine is appropriate. An important principle is that unless the court has reason to believe that the convicted person has the means to pay a fine it should not impose it with an alternative of prison in default of payment.

In the present case the appellant, who was represented at the trial, twice offered cash bail. He said in mitigation that as a result of the convictions he might have to sell his businesses in Brunei and Malaysia. The evidence showed that he had a least one business in each country. There was no reason to think that he could not pay the fine the judge intended to impose and he did not seek to persuade the judge otherwise. Lack of means to pay was not mentioned in the grounds of appeal. If the prosecution thinks that a fine greater than a nominal one is desirable in a given case and a convicted person claims that he cannot afford to pay more than a nominal sum, it may need to be prepared to assist the court by producing some evidence showing the extent of a convicted person's financial resources. At the hearing of the appeal Mr Rozaiman indicated that his client had sold a Brunei business and did not pay the fine out of the resulting sum of something less than \$13,000.00 because he had other financial obligations. The inference is that the appellant could have paid but chose not to do so.

There is no merit in this appeal. It does, however, give this court an opportunity to make an order achieving a result as near as reasonably possible to that which the judge obviously intended. The sentence on charge 1 will remain as it is. The fine of \$5,000.00 on charge two will be set aside and the imprisonment in default will fall with it. There will instead be a nominal fine of \$1.00 since a fine is a mandatory requirement.

Order

Appeal allowed to the extent that the fine of \$5,000.00 on charge 2 is set aside together with the default order and a fine of \$1.00 substituted. The sentences of imprisonment will be concurrent and the fines will amount in total to \$5,001.00

Mortimer, P.

Leonard, J.A.

Burrell, J.A