PUBLIC PROSECUTOR

AND

ZAINI BIN HAJI DAGANG

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 15 of 2013)

Before: Mortimer P, Davies and Burrell JJ A.
28th May 2014

Appeal against acquittal - Conflict between evidence of prosecution witnesses and of defendant – Advantage of trial judge in seeing and hearing witnesses.

DPP Christopher Ng Ming Yew and DPP Dk Didi Nuraza Pg Hj Abd Latiff (Public Prosecutor) for Appellant
Respondent in person

Davies, J.A.:

The respondent was charged with two offences of possession of an offensive weapon in a public place without lawful authority or for a lawful purpose under section 29(1) of the Public Order Act and two offences of criminal intimidation under section 506 of the Penal Code. He was acquitted on each of the offences of possession of an offensive weapon but convicted of each of the offences of criminal intimidation. This is an appeal by the public prosecutor against his acquittal on each of the offences of possession of an offensive weapon.

These charges arose out of two separate incidents, the first on 8 June, 2012, the second on 1 August 2012. Both occurred at a convenience shop in Kg Masin, Brunei. In the first incident the prosecutor alleged that the respondent had in his possession an offensive weapon, a machete, without any lawful authority or solely for a lawful purpose. That was the first offence charged. The second offence was that on that day the respondent committed criminal intimidation by threatening to cause injury to a man, Kabeer, by stabbing the cashier table with the machete, causing dents in the table and saying, in Malay, *"There's a mark. Now call your boss"* with intent to cause alarm to Kabeer. He was acquitted on the first offence. The charge on the second offence was amended to substitute for *'machete' 'a metal rod'*. He was then convicted of that amended charge.

The third and fourth charges arose out of the incident on 1 August 2012. The third offence alleged was that on that day at about 7pm the respondent had in his possession a metal spear 1.67 m long without any lawful authority or solely for a lawful purpose. And the fourth offence alleged was that he committed criminal intimidation by

threatening to cause death to a person Basheer Ahamed by saying *"if your boss doesn't come tomorrow I will kill all of you. You will never see your wife in India. This is the last warning."* while holding the metal spear with intent to cause alarm. He was acquitted on the third charge. The fourth charge was amended to delete the word *"while holding a metal spear (length 1.67 m) in your right hand"* and he was then convicted on that charge.

The respondent was acquitted on charges 1 and 3 because the learned judge was not satisfied beyond reasonable doubt that, on the first occasion, he was holding a machete or that, on the second occasion he was holding a metal spear 1.67 m long. The question before this Court is whether the judge erred in so concluding in each case. We turn now to the first of those.

Charge 1

There were only two eyewitnesses to the events of 8 June, Kabeer and the respondent. Kabeer was a Tamil and gave his evidence through a Tamil interpreter. He said that he was the shop supervisor at the shop at the relevant time. On that day at about 12 noon he was working behind the counter when the respondent came in. He had come in several times in the past asking to see the boss. He said on this occasion that he wanted to see the boss to ask for credit facilities. He was angry and shouted at Kabeer. Kabeer told the court that the respondent took out a knife and stabbed on the cashier counter three times. He said that the knife was more than a foot long including the handle. He was asked:

> *"When you say knife, what's the translation in Malay?"*
>
> *"Pisau"*

We interpose here to say that we understand that *"pisau"* means *"knife"* in Malay whereas *"parang"* means *"machete"*. He referred to the weapon in his evidence later also as a knife.

There then followed the following questions and answers:

> *"Do you recognise this document?"*
>
> *"It is the report of incident which I gave to the police."*
>
> *"Please read the document. According to this, there was glass broken in the shop."*
>
> *"I believe there must have been some misunderstanding with respect to glass because I had never mentioned anything about glass is. Maybe miscommunication."*
>
> *"There it had mentioned use of "Parang". Do you agree?"*
>
> *"Yes I agree."*
>
> *"Why did you say Pisau earlier?"*
>
> *"I'm not sure how to describe the weapon, whether a knife or parang."*

"So the weapon used, what do you think it was used for?"

"I would say used to open coconuts, and a bit old."

The respondent, in his evidence denied that, on that date, he brought with him the weapon charged. He said he brought with him a small metal rod and that he stabbed that metal rod onto the table where it left a mark. In cross-examination he said that he got angry and stabbed the table using the metal rod. It was put to him that he used a machete. He once again denied that.

No weapon, either knife or machete, was ever found.

In acquitting the respondent the learned judge referred to the inconsistencies between the report which Kabeer gave to the police and his evidence; not merely the difference between the descriptions of the weapon but also as to whether glass was broken. These inconsistencies, together with the absence of a weapon, the learned judge said, raised a reasonable doubt in her mind as to whether the respondent was brandishing a machete.

This case depended entirely on the resolution of the competing versions, by Kabeer and the respondent, of what took place on this occasion. In order to convict the respondent the learned judge had to be satisfied, beyond reasonable doubt, that she should accept the version given by a Kabeer, notwithstanding these inconsistencies, that the respondent was carrying a machete, rejecting, in that respect, the evidence of the respondent.

The judge did not otherwise refer to any assessment which she made of the credibility of the evidence of Kabeer or of that of the respondent. That does not mean that she did not take those matters into account. And she plainly had the advantage, which this Court lacks, of having seen and heard both witnesses give evidence.

In those circumstances, we are unable to conclude that the learned judge erred in failing to be satisfied, beyond reasonable doubt, that on this date the respondent was carrying a machete.

Charge 3

There were three eyewitnesses to the events of 1 August 2012. Two of these, witnesses for the prosecution at the trial, were employees in the shop. One of them was Ahmad Basheer Ahmad who was behind the cashier counter when the respondent entered the shop at about 7pm on that day. He said:

"…he mentioned that if the owner of the shop did not see him, and if he did not see the boss the next day, "I would kill all of you and you would not be able to go back to India to see your family". He also said that this was the last warning."

"What time was it on the 1st August 2012?"

"I remember it was the fasting month, after the breaking of the fast around 7pm. He came to the shop with a weapon and threatened me and an Indonesian co-worker."

……

"You say the defendant threatened to kill all of you, and that you would not be able to go back to India. Where was he when he said this?"

"He was standing in front of the cashier counter."
……..

"So was the weapon with him from when he first entered into the shop?"

"No, he came into the shop to purchase water, and then went out, and brought the weapon and threatened us if he did not see the boss, he would kill us."

When he threatened you, how was he holding the weapon?"

"He had the weapon in his right hand, and pointed it to us. And made his threat, he was standing on the outside of the shop door…"

It is unclear from these passages whether this witness was saying that the threats were made while the respondent was in the shop at the counter or later from outside the shop, weapon in hand or both.

He was then asked to describe the weapon. He did this by pointing to an exhibit in the court which was a rod, 1.67 metres long, sharpened at one end.

There was evidence that the exhibit had been found on the respondent's premises and that it had been identified by this witness at the police station by being shown it and asked if that was the weapon used on the night. In court he confirmed this.

In his complaint to the police the witness merely described what the respondent was holding as a metal rod, without specifying its length or that it had a pointed end. That description, whilst consistent with the exhibit, was equally consistent with the respondent's version of what he was carrying, to which we refer below.

The other prosecution witness was Aris Giri Prasetyo who was employed in the shop as a shop helper. He said that the respondent came into the shop to buy food. He got angry and asked where the boss was and then made the threats the subject of charge 4 while next to Basheer. He was then asked:

"After he said these things, what happened?"

"He left the shop whilst making same threats and he brought a spear. He threatened us."

"Where did the spear come from?"

"He brought along with him and put it on the bicycle."

"Where was the bicycle?"

"Outside the shop"

"How far will you from the defendant when he was holding the spear and making threats?"

"8 feet"

"Demonstrate what he did?"

"He held the spear on the right-hand and making same threats."

"He was pointing the spear to the cashier?"

"Yes"

"Do you know where the spear is?"

Points to the exhibit

It is also unclear from this witness's evidence whether he was saying that the respondent made the threats twice, once when unarmed in the shop at the counter and again whilst armed when further away.

This witness also appears to have earlier identified the exhibit as the weapon used by being shown it at the police station and asked if it was the weapon.

As with respect to the earlier occasion, the respondent admitted making the threats but said that, when making them, he had in his possession only a short metal rod, not the spear the exhibit in court.

The learned judge was fully justified in failing to accept that the exhibit in court had been satisfactorily identified as the weapon which these witnesses saw on the above date. In showing a potential witness the spear and asking him if that was the spear used on the night in question was to suggest to the witness an affirmative answer. This was an unsatisfactory means of proof and the judge was entitled to so find.

This left a conflict between the evidence of the two prosecution witnesses, on the one hand, and that of the respondent on the other as to whether he had in his possession on 1 August a metal spear 1.6 m long or, as the respondent said, a short metal rod. And, although the learned judge did not specifically mention this, the above uncertainties in the evidence of the prosecution witnesses as to when and where the respondent was when making the threats and whether he was armed at the time may have contributed to her doubt about their evidence.

Again we are faced with the same difficulty, that the trial judge had the advantage, which we lack, of having seen and heard the witnesses. Having regard to that advantage, we cannot be satisfied that the judge erred in concluding that she could not be satisfied beyond reasonable doubt as to the correctness of the version given by these two witnesses.

The appellant then submitted that, the learned judge having failed to be satisfied about the proof of either offence under section 29(1) as charged, should have amended the

charges to allege that the offensive weapon was, in each case, the short metal rod referred to in the evidence of the respondent. There is some merit in that submission.

However the judge may have doubted whether the short metal rod was an offensive weapon or was used in a way likely to cause hurt: Public Order Act, section 2(1). We are unable to conclude that the judge erred in failing to so amend.

Accordingly this appeal must be dismissed.

Mortimer, P.

Davies, J.A. **Burrell, J.A.**