

ALI ULLAH
AND
PUBLIC PROSECUTOR

Court of Appeal of Brunei Darussalam
(Criminal Appeal No. 16 of 2020)

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

Headnote: Sentence-appeal dismissed; 3 and ½ years imprisonment and a fine of \$5,000; engaging in the conveyance of two smuggled persons, contrary to section 10, Prevention of People Smuggling Order, 2019.

Appellant in person
DPP Aminudin Zaki Dato Abdul Rahman and PO Siti Khalillah Hussin

Lunn, JA.:

1. The appellant appeals against his conviction after trial by HHJ Masni Pg Hj Bahar in the Intermediate Court on 14 October 2020 of the offence “sometime in February 2020” of engaging in the conveyance of two smuggled persons in the vicinity of the Inland Container Depot at Sungai Tujuh of the Maritime and Port Authority in order to obtain a financial benefit, punishable by section 10 of the Prevention of People Smuggling Order, 2019 and against the sentence of 3 1/2 years imprisonment and a fine of \$5,000. In default of payment of the fine the appellant was ordered to serve an additional sentence of two months’ imprisonment.

The trial

2. At trial, there was no dispute that on the night of 26 February 2020 two Bangladeshi nationals, Bablu Pramanik and Gais Uddin, were arrested by Brunei immigration officers as they made their way along the beach adjacent to and behind the Inland Container Depot at Sungai Tujuh to unlawfully cross the border of Brunei Darussalam into Malaysia, nearby to Miri. Neither of them was in possession of his Bangladeshi passport. Having been convicted of the offence of leaving Brunei Darussalam unlawfully, contrary to section 5(2) of the Prevention of People Smuggling Order, 2019 and sentenced to one months’ imprisonment, the two men gave evidence for the prosecution at the trial of the appellant.

3. It was an agreed fact at the trial that the appellant, a 37-year-old Bangladeshi national, had been resident in Brunei Darussalam working as a construction worker for nine years and who also provided a transportation service for reward in his motor car. The appellant had picked up the two Bangladeshi men from Tutong Bus station at about

18:52 hours on 26 February 2020. He did so on the instructions of Sapon, having contacted one of the men in advance by telephone. Then, as arranged he drove them in his motor car to where they alighted outside the Inland Container Depot at Sungai Tujoh at about 19:50 hours that evening. That place was less than a minute's drive to the Sungai Tujoh Immigration Control Post. The three of them had been followed on that journey by immigration officers in a motor car. They arrested the appellant at the Sungai Teraban petrol station at about 20:05 hours that evening. At 20:05 hours other immigration officers intercepted and arrested the two Bangladeshi men as they walked along the beach towards the Malaysian border.

4. Following his arrest the appellant's mobile telephone was seized. Recordings were made of telephone calls and voice chats on the IMO chat application found on the telephone. On 28 February and 1 March 2020 statements were taken by immigration officers from the appellant.

5. The nub of the evidence of the two Bangladeshi men was that they arranged with others in Miri, including a man called Rafek, to leave Brunei Darussalam and to enter Sabah, Malaysia unlawfully, travelling without their Bangladeshi passports. They intended to go to Miri for employment. Rafek told them that they were to travel by car to the border, from where they were to walk along the beach until they were met by some men. They had been contacted by telephone by the appellant, who was not known to them. In response to his enquiry, if anyone from Miri had contacted him, Bablu, one of the Bangladeshis replied in the affirmative. At his request he saved his IMO call number with which to communicate. They understood that, by arrangement with the others assisting them, he was to transport them on part of their journey. On instructions from Rafek they travelled to Tutong Bus station, where they were told to wait. Subsequently, the appellant met them in his motor car and transported them to where they alighted at the Inland Container Depot at Sungai Tujoh. The whereabouts of the place was unknown to them. On arrival they gave the appellant \$20. Then, Rafek gave them instructions by telephone on where to go. Having made their way to the nearby beach they were walking towards the Malaysian border when they were intercepted and arrested by immigration officers. They intended to go to Miri for employment.

6. The appellant gave evidence at his trial. He said that on the instructions of Sapon he had picked up the two Bangladeshis at Tutong Bus station and transported them to the Inland Container Depot at Sungai Tujoh on 26 February 2020. The journey took about an hour. He did not know that they intended to leave Brunei Darussalam and enter Malaysia unlawfully. He did not know that there was a beach behind the Depot nor did he know that it was close to the border, which he thought was far from there. He was merely performing his job as an informal taxi driver acting at the behest of Sapon. Each of the Bangladeshi men had only a small bag with him. In those circumstances, he did not know or suspect that they were going to cross the border unlawfully. He acknowledged that one of the two Bangladeshis had left \$20 on the car seat when the two men had alighted from the vehicle at the destination. That was to recompense the appellant for his expenses in fuel. After they had alighted, he left. He did not see what they did.

7. On 14 February 2020, he had been contacted by Sapon, a Bangladeshi, for the first time. That was by IMO chat. He asked him to collect the two Bangladeshis and

deliver them to a destination by providing two photographs. One of the photographs was of the Internal Container Depot and the other of the milestone 'Tutong, 77 km, BSB 127'. That was the first time he had contact with Sapon. In cross-examination, he acknowledged that he had saved Sapon's telephone number, under the title Sky News, on his telephone. He did not know that place, so he travelled there with Iqbal where he met a Bangladeshi security guard, Shahlidul. Sapon had told him that Shahlidul worked there. Subsequently, at Sapon's request through the IMO chat app he had picked up and delivered other passengers to the Internal Container Depot, but also to other destinations.

The judgment

8. Having summarised the evidence adduced on behalf of the prosecution and the defence and having noted there was no challenge to much of the prosecution case, the judge said that the issue was whether it was proved that the appellant knew that he was assisting in the smuggling of the two Bangladeshis out of Brunei and into Malaysia in return for the \$20 they gave him.

9. The judge said that, in the context of the offence created by section 5 (1) of the Order, namely of engaging in "people smuggling", section 5 (2) of the Order created a presumption, namely "if it is proved that the defendant arranged or assisted the unlawful entry into any receiving country... 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."

10. In rejecting the appellant's denial in his evidence of that knowledge and finding that she was satisfied that the appellant had conveyed the two Bangladeshis knowing that they were to be smuggled out of Brunei Darussalam, the judge said that there were numerous inconsistencies in the appellant's evidence, his statement to the police and the records of the IMO chats between him and Sapon which led her to find that "the defendant premeditated the offence with Sapon" to assist the two Bangladeshis to be smuggled out of Brunei Darussalam. She did not accept the appellant's evidence that he had first got to know Sapon on 14 February 2020. The IMO chat records did not reflect the initial conversation the appellant said that he had with Sapon in which he had been asked if he provided a taxi service. She believed that he knew him before that date. Similarly, the records did not reflect instructions from Sapon to pick up and deliver passengers to other destinations. Having regard to the IMO chat dialogue on 16 February 2020, together with the photographs sent by IMO chat to the appellant by Sapon on 14 February 2020, she said that she was satisfied that the appellant knew of Sapon's plan to smuggle the two Bangladeshis out of Brunei Darussalam. The appellant's evidence that he had travelled to Kuala Belait on 14 February 2020 in order to check the route was "dubious". Why do so at his own expense? The appellant's evidence that he did not know Shahlidul, the Bangladeshi security guard at the Internal Container Depot, was contradicted by his statement to the immigration authorities.

11. Having noted that the offence, contrary to section 10 was made out, *inter alia*, by engaging in the conveyance of smuggled persons, the judge said that in assisting the transport of the two Bangladeshis from Tutong Bus station to the Inland Container Depot, the appellant had committed the *actus reus* of the offence. Having noted that

there was no dispute that the appellant had received \$20 from the two Bangladeshis, she said that “by virtue of section 5 (2)” she was satisfied that the appellant assisted the unlawful entry of the two Bangladeshis to Miri “knowing that such entry was unlawful in order to gain financial benefits” and was guilty of the offence.

Sentence

12. In sentencing the appellant, the judge noted that the maximum penalty was imprisonment for 10 years and a fine up to a maximum of \$50,000. She acknowledged that the appellant had no previous convictions. However, she said that the offence was serious and required a deterrent sentence. She said that, having regard to the maximum penalty, the complexity of the operation and the appellant’s clear record, the appropriate starting point was in the range of 3 ½ to 4 years imprisonment. She said that the appellant’s role had been to convey the two Bangladeshis to the Inland Container Depot. In the result, she sentenced the appellant to 3 ½ years’ imprisonment and a fine of \$5,000, in default of payment of which she ordered that he serve a sentence of 2 months’ imprisonment.

The appellant’s grounds of appeal

(i) Conviction

13. Mr Cheok advanced two main limbs of his grounds of appeal. First, that there was insufficient evidence for the judge to be satisfied that the appellant assisted in arranging the two Bangladeshis to cross the border from Brunei Darussalam into Malaysia. Secondly, that there was insufficient evidence that he knew or had any reason to believe that they intended to do so. In his voluminous Grounds of Appeal, Further Grounds of Appeal, Submissions and Further Submissions Mr Cheok took issue with most, if not all of the judge’s findings of fact that were adverse in any way to the appellant, contending that the judge had “erred in fact and law.”

14. Of the first matter, he invited the court to note that the evidence was that the appellant had delivered the two Bangladeshis to the Inland Container Depot. That place was well within the borders of Brunei Darussalam. He invited the court to note that the phrase “unlawful entry” was defined in paragraph 2 of the Order as meaning, “crossing borders without complying with the necessary requirements for lawful entry into the receiving country.” Whilst in the company of the appellant, the two Bangladeshi men had not crossed the border.

15. Thirdly, Mr Cheok submitted that the judge erred in finding of the appellant in respect of the two Bangladeshi passengers, “I am not convinced beyond reasonable doubt that the defendant does not know” that they were trying to smuggle out of Brunei from the place at which they had alighted from his motor car. In so determining, the judge placed a burden on the defendant to prove his case on the standard of beyond reasonable doubt, instead of the balance of probabilities.

16. Mr Cheok took issue with the judge’s finding that there were inconsistencies between the appellant’s evidence and the records of the IMO Chat app. In particular, he said that the judge erred in finding that the first contact between Sapon and the

appellant were the photographs of the Milestone and the Inland Container Depot sent to the appellant on 14 February 2020. It was the appellant's evidence that he had received a telephone call from Sapon. Although the IMO chat records recorded 'Missed' audio calls no record was made of successful audio calls. So, the absence of such evidence did not contradict the appellant's oral evidence of such an earlier contact from Sapon.

17. Of the judge's finding that the appellant knew of Sapon's plan to smuggle the two Bangladeshis out of Brunei Darussalam, Mr Cheok submitted that there was nothing in the photographs that suggested that anyone was going to cross a national border.

(ii) Sentence

18. Of the sentence imposed on the appellant, Mr Cheok submitted baldly that, having regard to all the circumstances, it was excessive.

The respondent's submissions

19. In opposing the appeal against conviction, DPP Aminudin Zaki Dato Abdul Rahman invited the court to conclude that the judge was correct to determine that the offence was made out irrespective of whether the smuggled person arrives in the receiving country. Section 5 (1) of the Order provided that the offence of engaging in people smuggling was made out, "regardless of whether the smuggled person arrives in the receiving country." The offence was made out on the undisputed evidence that the appellant had delivered the two Bangladeshis to the Internal Container Depot. It was not required that the appellant be detained in the act of driving the Bangladeshis to cross the border.

20. For her part, DPP Aminudin Zaki submitted that the judge's statement that she was not convinced beyond reasonable doubt that the defendant did not know that the two Bangladeshis were trying to smuggle out of Brunei had to be viewed in the context of her subsequent finding that she was satisfied beyond reasonable doubt of the appellant's guilt of the offence.

Discussion

21. The judge's statement that she was "not convinced beyond reasonable doubt that the defendant does not know" that the two Bangladeshis were trying to smuggle out of Brunei Darussalam from where he dropped them off at the Internal Container Depot, was an unfortunate way of expressing herself, in particular the use of the double negative. Taken by itself, it might be taken to suggest that the appellant had the burden of proving that he did not have the requisite knowledge. However, clearly it is to be viewed by having regard to the judgment as a whole. Earlier in her judgment, as was to be expected, she had said that the burden of proof "lies with the prosecution" to prove its case beyond reasonable doubt. She reiterated the first limb of that statement in the following paragraph. Further, she said correctly that she should acquit the defendant "should there be any lingering doubts raised by the defence and/or from the evidence given by the prosecution witnesses". Finally, she said, "I am satisfied beyond reasonable doubt that the defendant assisted the unlawful entry" of the Bangladeshis and did so "knowing that such entry was unlawful in order to gain financial benefits." Having

regard to her judgment as a whole, we have no doubt that she approached the issue of the burden and standard of proof, in particular in respect of the issue of the appellant's knowledge, appropriately.

22. As DPP Aminudin Zaki pointed out, section 5 (2) of the Order provides that the offence of people smuggling is made out whether or not the smuggled person arrives in the receiving country. Section 2 provides that "people smuggling" means arranging or assisting a person's unlawful entry into 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 10 of the Order provides for an offence where, *inter-alia*, the "owner, operator or master" of any conveyance, which includes a "vehicle", engages in the conveyance of smuggled persons. Clearly, there is no merit in Mr Cheok submission that evidence was required of the presence of the appellant as the two Bangladeshis crossed the border from Brunei Darussalam to Malaysia. What was required, was proof that the appellant, as owner or operator of a motor vehicle, had assisted in their unlawful entry into Malaysia for financial reward knowing or suspecting that their entry was unlawful. We are satisfied that there was overwhelming evidence to that effect.

23. In finding that the appellant knew of Sopon's plan to smuggle the two Bangladeshis out of Brunei Darussalam, the judge pointed to the dialogue between them on IMO on 16 February 2020, the fact that Sopon sent a photograph to the appellant by IMO chat of the Inland Container Depot that day, having sent a similar photograph to the appellant by IMO chat on 14 February 2020. In response to the message from Sopon, "...it is hard if just one person doing the sending, better not just one person doing it." the appellant replied in a sequence of messages: "12:33 pm-One person who is Bangladeshi, give him my IMO number, I can talk to him through IMO; 13:05 pm- If talking through IMO, however you communicate with me; 4:21 pm- OK, I am now going, you give me the address. Still far, there is 15 km to go." At 4:37 pm Sopon sent the appellant a photograph of the Internal Container Depot.

24. Relevant to a consideration of the significance of this evidence was the fact that in re-examination the appellant accepted his journey to the Inland Container Depot on 26 February 2020 with the two Bangladeshi men was his fourth such journey. Although he said that it was only on 25 February 2020 that he came to know from Sopon that he lived in Miri, it was the unchallenged evidence of Bablu that when first contacted by telephone by the appellant he had been asked if anyone from Miri had contacted him. He responded in the affirmative. Of course, the appellant said that Sopon had provided him with the contact number of people that he was to pick up.

25. There appears to be some force in Mr Cheok's submission that the judge erred in determining that the absence in the IMO records on 14 February 2020 of audio communication between the appellant and Sopon before the latter sent photographs of the Milestone and the Internal Container Depot contradicted the appellant's evidence of an initial telephone call between the two of them. Whilst the IMO chat app records record 'Missed' calls there is no record of successful audio calls. Nevertheless, the judge's observation that the recorded conversation on the IMO chat app did not seem like an "introduction" conversation remains valid.

Conclusion

26. The prosecution evidence was powerful. The two Bangladeshi men were taken by the appellant in an hour-long journey and delivered to the Internal Container Depot on the night of 26 February 2020. They carried with them only light baggage. The Depot was close by to the border. The appellant admitted that it was the fourth such journey he had made. The record of the dialogue between the appellant and Soapon lent significant weight to the prosecution case. We are satisfied that there is no merit in the appeal, which we dismiss.

Sentence

27. Whilst the appellant's immediate role in the events the subject of the charge was to collect and deliver the two Bangladeshis to the Inland Container Depot, he performed that role as part of a 'team' involved in the operation. Obviously, other team members had other roles to perform. Clearly, he worked closely with Soapon, whom he acknowledged he knew lived in Miri, and who clearly played a pivotal role in the smuggling of the two Bangladeshi men. He liaised with him over a period of 10 days. We are satisfied that the sentence imposed on the appellant was entirely appropriate. We dismiss the appeal.

Michael Burrell, P.

Conrad Seagroatt, J.A.

Lunn, J.A.