ESMEDIADE BIN BUJANG

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 1 of 2015)

PUBLIC PROSECUTOR

AND

ESMEDIADE BIN BUJANG (D1)
SANAWADI BIN SANADDIN (D2)

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 3 of 2015)

Before: Mortimer P, Leonard and Burrell JJ A.
28th May 2015

Headnote – Appeal against conviction under s.7(1) Trafficking and Smuggling Persons Order 2004. Meaning of 'unlawful entry' considered. Appeal dismissed. Cross Appeals by Public Prosecutor on Sentence. Consideration of "s.20 Penalties to be cumulative." Appeal allowed. Additional fine imposed

Criminal Appeal No 1 of 2015

Mr. Hj Mohamad Rozaiman bin Dato Haji Abdul Rahman (M/S Rozaiman Abdul Rahman Advocates & Solicitor) for Appellant
DPP Haji Mohd Abd Raafe' Hj Ibrahim for Respondent

Criminal Appeal No 3 of 2015

DPP Haji Mohd Abd Raafe' Hj Ibrahim for Appellant
Mr. Hj Mohamad Rozaiman bin Dato Haji Abdul Rahman (M/S Rozaiman Abdul Rahman Advocates & Solicitor) for Respondent (D1)
Respondent (D2) in person

Burrell, JA.:

On 26th January 2015 following a trial which had been heard over 5 separate days between 24th March 2014 and 6th December 2014 the appellant, Esmediade bin Bujang was convicted by Judge Hanani Metusain in the Intermediate Court of 2 offences under s.7(1) of the Trafficking and Smuggling Persons Order 2004. The incident to which the charges related had occurred on 17th April 2013. Following his conviction the appellant was sentenced to 4 years imprisonment and 3 strokes for each charge to be served concurrently and the strokes to be non-cumulative. On 29th January 2015 the judge declined to make an order to forfeit the car which had been driven by Esmediade as it had been the subject of a repossession order in favour of Baiduri Finance Bank under a Hire Purchase agreement.

There was a second defendant at trial, Sanawadi bin Sanaddin. He also filed a Notice of Appeal but by a subsequent Notice dated 18th May 2015 he abandoned his proposed appeal both against his conviction and sentence. We refer to him in this judgment as D2.

The appellant now appeals against his conviction. In addition the prosecution appeals, pursuant to s.438 O of the Criminal Procedure Code CAP 7 against the judge's refusal to forfeit the vehicle registered number KM 3292. Further, the prosecution appeals the sentence of both defendants contending that the judge was obliged to impose a fine in addition to the imprisonment and whipping, which she failed to do.

Appeal against conviction

The ingredients of the offence which the prosecution were required to prove were set out by the judge in her written judgment as follows:-

s.7 (1) provides as follows:-

> *"Any person who engages in people smuggling, regardless of whether the smuggled person arrives in the receiving country, shall be guilty of an offence and liable on conviction to a fine not exceeding $1,000,000, imprisonment for a term not exceeding 30 years and whipping."*
>
> *"**People smuggling**" means arranging or assisting a person's unlawful entry into any receiving country including Brunei Darussalam, of which the person is not a citizen or a permanent resident of the receiving country, knowing or having reason to suspect that the person's entry is unlawful, in order to obtain financial or other material benefit."*

She was also aware of s.7 (2) of the Order:-

> *"Section 7 (2): "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."

Finally, s.2 of the Order defines "unlawful entry" as:-

"Crossing borders without complying with the necessary requirements for lawful entry into the receiving country."

The Evidence

Much of the evidence was not in dispute and was made the subject of a statement of agreed facts which, in relation to this appellant, we repeat as follows:-

1. "D1 is a 26 year old Bruneian male, who is self-employed.
2. ……
3. On the 17th April 2013 at about 1735 hours, a red Hyundai car with registration number BR 7664 arrived at counter D3 of the Sungai Tujuh Immigration Post (Sungai Tujuh), Kuala Belait. The car was driven by D2 and there was a passenger with the name Rafizan Anak Romeo sitting in front passenger seat. They arrived at counter D3 for immigration inspection to leave Brunei Darussalam.
4. ……
5. ……
6. During the investigations, the immigration officers suspected that the car directly behind D2's car, in the line to exit Brunei (for counter D3) was connected to D2. The said car, driven by D1, was a black Toyota Corolla car with registration no. KM 3292. Sitting in the front passenger seat of the said car was a woman, Suryati Mazsusnti Bibi Nani Nuraini, who was carrying a child Ezmishazmande bin Abdullah.
7. At about 1739 hours of the same day, the immigration officers lead by Immigration Alimon bin Haji Jaafar, conducted an inspection of the said car. D1 was first asked to present the passports of persons in the said Toyota Corolla car to which D1 responded by presenting 3 passports belonging to himself, Suryati Mazsusanti Bibi Nani Nuraini and Eszmishazmande bin Abdullah.
8. As part of the investigation, D1 was then asked to open the bonnet of the car he was driving (KM 3292) and it was discovered that there were tow males lying in the bonnet of the car. Investigations showed that the two males found in the boot were Malik, Indonesian National (Brunei Green IC No: 51-190516) and Juni Agus, Indonesian National (Indonesian NRIC No: 3201290706880001). The two males failed to present their respective passports to the immigration officers when asked.
9. Photographs were taken by immigration officer Sohardi bin Samad during the said investigations and was compiled into a bundle with reference no BPGN/KB/UOPS/ORP34/2013 containing a total of 9 photographs.
10. On the same day at about 2158 hours, D1's statement was recorded by Immigration Officer Hartini bin Junaidi.
11. ……"

The judge summarized the key facts in the appellant's written statement to the police which formed part of the evidence against him.

In particular, Esmediade admitted that he was to be paid $100 per passenger by D2 for bringing two passengers to the border and that the reason he did so was "for the money". He knew the two passengers were concealed in the boot of his car at the border but claimed that he was unaware that they had no passports.

The remainder of the prosecution case came from the 3 passengers, all Indonesian nationals with no passports, who were concealed in the two vehicles at the material time. They had all wanted to leave Brunei and enter Malaysia without passports. They had paid a person called 'Mat' for making the preliminary arrangements. They hid themselves in the two cars driven by the appellant and D2 prior to approaching the border post at Sungai Tujuh. It was the intention of all three to be smuggled out of Brunei.

At the conclusion of the prosecution case a submission of "no case" was made on the basis that the prosecution had failed to prove firstly, the ingredient of "unlawful entry" and secondly the ingredient of "financial or material benefit." The submission did not succeed.

The Appeal

In this appeal, Mr. Rozaiman, who also appeared for the appellant at trial, only pursues the first submission, namely the ingredient of "unlawful entry" in the definition of "people smuggling".

Mr. Rozaiman's sole ground of appeal maybe summarized as follows. The relevant evidence is not in dispute. It is a fact that all parties, namely both defendants and the three Indonesian passengers, had not crossed the immigration check point at the border and were therefore still in Brunei when they were intercepted by the police and arrested. He submits that the ingredient of "unlawful entry" in the offence had therefore not been established and the appellant could not be guilty. He argued that the prosecution must prove that the border (into Malaysia) had been crossed before it could be said that the offence had been committed.

We regret to say that, for the reasons which follow, Mr Rozaiman's sole ground of appeal is clearly without merit and is untenable.

Firstly, the consequence of his argument is that the actus reus of the offence of people smuggling is only complete when, in a case where the foreign nationals are being escorted out of Brunei, they have left the jurisdiction. Thus, he submits, they can never be guilty when still in Brunei. This makes no sense. The legislation contemplates and is drafted so as to control smuggling of people both into and out of Brunei.

Secondly, s.7 (1), the section upon which the appellant was convicted, states that any person shall be guilty of the offence "regardless of whether the smuggled person arrives in the receiving country." This could not be clearer. The section contemplates a situation where an offender has yet to cross the border and has not yet "arrived in the receiving country." The judge referred to this provision in her judgment.

Thirdly, also relied on by the judge in her written reasons, is the fact that the definition of "people smuggling" commences with the words "arranging or assisting a person's unlawful entry into…" It is unreal to contend that the acts relied on in support of the "arranging or assisting" (in this case the transportation of the foreign nationals hidden in the boot of motor cars arriving at the border) only become criminal acts once the enterprise has been successful, in the sense that the foreign nationals have left Brunei and crossed into Malaysia.

Fourthly, Mr. Rozaiman submits that "crossing borders" in the definition section (s.2) of the Order must be read as "the border having been crossed." We do not agree. "Crossing borders" includes any act in the crossing border process, from the arrival at the check point onwards. The word "crossing" must be given its ordinary and natural meaning. A person sitting in his car in a queue waiting to present his passport at the control kiosk is "crossing the border."

Fifthly, Mr. Rozaiman has referred us to cases which do not assist him. He has referred this court to the English Court of Appeal decision of *Javaheriford v Miller [2005] EWCA 3231* in order to highlight in that case the following:

> *"Entry" is an ordinary word which in certain immigration contexts has a special meaning provided by statute. If a person arrives in the UK by land, he enters it when the Republic of Ireland – UK border is crossed in Northern Ireland. There are special rules for arrivals by the Channel Tunnel rail link. S11 of the Immigration Act gives entry a specific meaning for those who arrive by ship or aircraft. They are deemed not to enter until they disembark. If they enter at a port with a designated immigration area, they are deemed not to enter until they have left that area."(emphasis added)*

It is trite to observe that that case concerned, inter alia, the application of s.25 (1) and (2) and s.11 (1) and (2) of the (UK) Immigration Act 1971.

It involved the movement of a foreign national from Dublin in Ireland to Belfast in the United Kingdom and then, by a sea crossing, to Birkenhead in England. It concerned different statutory provisions and their application to very different facts. It provides no assistance in the application of s.7 of the Trafficking and Smuggling Order 2004, when an Indonesian national is leaving Brunei hidden in a car into Malaysia without a passport.

The same observations maybe made of *R v Eyek [2000] 1 WLR 1389*. If any assistance can be gleaned from the various comments made in R v Eyek they tend to support the respondent's position in our case. In that case the question under consideration was whether "actual entry" is necessary before a person can be guilty of an offence under s.25 (1) of the 1971 UK Act. The court deemed it was sufficient that the person was classified as an "illegal immigrant" and that such a person could be so classified "prior to actual entry."

For the above reasons Esmediade bin Bujang's appeal against his conviction under s.7 (1) of Trafficking and Smuggling Order 2004 is dismissed. In her written decision the judge gave correct rulings on all the above issues.

Cross Appeal by the Public Prosecutor

The Public Prosecutor appeals against sentence on two issues. On conviction D1 (Esmediade) was sentenced to 4 years imprisonment and 3 strokes and D2 (Sanawadi bin Sanaddin) to 5 years and 4 strokes. Neither were fined in addition. The prosecutor had also applied for forfeiture orders in respect of both of the vehicles in which the Indonesian nationals had been concealed at the border. The judge held a separate hearing on the forfeiture issue on 29th January 2015. After hearing submissions she ordered D2's car to be forfeited but made no similar order in respect of D1's vehicle.

The Public Prosecutor now submits:-

i That the penalty section to s.7 (1) required the judge to impose sentences of imprisonment, a fine and whipping upon conviction. She had failed to order a fine when it was mandatory for her to do so.
ii That the judge exercised her discretion erroneously when she declined to forfeit the vehicle being driven by D1 at the material time.

The first issue was not canvassed before the sentencing judge but the second issue was. These are separate and unconnected matters to which we now turn.

(I) Is a fine mandatory in addition to imprisonment and whipping?

s.7(1) states *"…and liable on conviction to a fine not exceeding $1,000,000, imprisonment for a term not exceeding 30 years and whipping."*

s.20 of the Trafficking and Smuggling Persons Order 2004 states:

> *"For the avoidance of any doubt, where more than one penalty is prescribed for an offence under this Order, the use of the word "and" shall signify that the penalties shall be inflicted cumulatively."*

As far as we are aware this issue had only been considered once before. In the case of *Public Prosecutor and Sudjai Sinthorn (High Court of Brunei Darussalam) (Criminal Trial No 6 of 2012).* (a case concerning s.6 of the Order) Stephen Chong J stated:

> *"This is the first conviction of this type of offence in the High Court. The penalty upon conviction is a fine up to $1,000,000, imprisonment for a term not less than 4 years but not more than 30 years and whipping. Section 20 of the Order provides that where more than one penalty is prescribed for an offence under (this Order) the use of the word 'and' shall mean that all penalties shall be inflicted cumulatively. The penalty reflects the seriousness of the offence."*

The issue has not arisen either at first instance or on appeal in a s.7 offence. There have been a number of convictions pursuant to s.7 but this point has not arisen. For example in *Maiyadi bin Marzuki v PP (Criminal Appeal 12/2012)* the appellant had been sentenced to a term of imprisonment and no more and the sole issue before the court concerned the length of that sentence.

When a penalty provision in a statute intends to make whipping mandatory it uses the words "and with" after the imprisonment provision. The word "with" means "together with". As s.7 (1) does not use the word "with" we turn to s.20 for guidance. s.20 tell us that "and" means that "the penalties shall be inflicted cumulatively."

Whilst it is tempting to suggest that the "and" only refers to the penalty which immediately precedes it, namely the imprisonment, and that if it was intended to mandate that all three sentences be passed in every case then "and" would have been inserted twice, namely between the fine and the imprisonment and between the imprisonment and the whipping, we are, somewhat reluctantly, driven to the conclusion that "shall be inflicted cumulatively" must mean "inflicted all together." It is worthy of note that the same formula of words is used in the sentencing provisions in sections 4, 5, 6, 8 and 9 of the 2004 Order but s.11 uses the words "or both" in relation to the fine and the imprisonment.

We are bound to observe that as an attempt to "avoid any doubt" the drafting arguably fell short of its objective. However, we agree with the appellant on this issue. For the provision to have had any other meaning it would have been necessary to include the word "or", as it does in s.11 whereas ss 4-9 inclusive require all three punishments to be imposed.

People smuggling can be very lucrative for the cruel minded greedy criminals who organize it on a large scale. No doubt all three penalties would, for this reason, be appropriate in such cases. The present appeal however is plainly not such a case. The two respondents were going to be paid a modest fee for what amounted to a single taxi ride across the border. Their punishment of 4 and 5 years imprisonment plus whipping sufficiently reflects their wrongdoing. We therefore, in order to comply with the sentencing provisions, allow the appeal but merely add a nominal fine of $1 in each case.

(II) The forfeiture order

Mr. Raafe who has appeared for the Public Prosecutor on all matters relating to both the appeal and the cross appeals but did not appear at trial readily concedes that the decision whether or not to forfeit the vehicles in this case was a matter within the sentencing judge's discretion.

This court is slow to interfere with the exercise of a judge's discretion. The judge gave clear reasons why she refused to make the order in respect of the car driven by Esmediade. She said:

> *"I also heard submission by representative of counsel for Baiduri Finance Bank relating to the black Toyota KM 3292. He produced an HP agreement dated the 1st September 2009. A repossession order was also issued on the 27th November 2013. The repossession order was made as the defendant did not update his monthly payments. The last payment made was on 8th May 2013. The agreement to pay was until 29th August 2016.*

As regards the Toyota KM 3292, it was my view that a Hire Purchase agreement was not in itself a reason against ordering forfeiture. However, in the present case, and even after considering all the factors set out in the case of Yunus bin Deris, I was minded not to make the order. The finance company had been trying to repossess the car earlier, and I was of the view that they should be allowed to enforce the agreement made with the defendant. I ruled that the said car be returned to the company."

Mr. Raafe has referred us to *similar* cases in which vehicles have been forfeited pursuant to s.357 of the Criminal Procedure Code. It is not necessary to set out in full the provisions of s.357 because it is accepted that it confers a discretionary power to forfeit (in this case) a motor vehicle.

The judge decided that the most compelling factor in this case was that the Bank was an innocent third party who had succeeded in getting a repossession order. Whilst other cases in which forfeiture orders have been made are indeed *similar*, they are not the same. In no other case referred to had the owner been an innocent finance company who had taken all the proper steps to secure a repossession order in a timely fashion and the judge, rightly in our view, regarded this as an important consideration when deciding how to exercise her discretion.

We are satisfied that the judge exercised that discretion judicially.

Accordingly, the appeal against the failure to make a forfeiture order in respect of KM3292 is dismissed.

Mortimer, P.

Leonard, J.A. **Burrell, J.A.**