PUAH HENG YEW

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No.26 of 2016)

Before: Mortimer P, Burrell and Seagroatt JJ A.
17th May 2017

Headnote*: Determination of point of law under section 291A of the Criminal Procedure Code. Charges under section 6 (a) of the Prevention of Corruption Act and section165 of the Penal Code based on the same factual evidence may be tried together as the charges require the proof of different elements. The jurisdiction of Court of Appeal under the section.*

Mr Rudi Lee Kim Boon (Messr. Rudi Lee, Annie Kon & Associates) for Appellant
DPP Aldila Binti Haji Mohd Salleh for Respondent

Cases cited in the judgment:

Mohammed Zuhairie bin Yunos (criminal appeal number 1 of 2011) and section 166 of the Criminal Procedure Code.

Mortimer P:

On the 9 September 2015 the appellant as the 2nd defendant was convicted of 4 charges under section 6 (b) of the Prevention of Corruption Act, Cap 13 and 16 charges of abetting offences under section 165 of the Penal Code, Cap 22 in the Magistrates Court.

He appealed to the High Court against these convictions and on the 17 September 2016 apart from setting aside 2 offences under the Penal Code involving payments for air tickets and a mobile phone on the basis that they duplicated two charges under the Prevention of Corruption Act Findlay J dismissed the appeal.

This Appeal

There is no general right of appeal from a decision of the High Court in appeal from the decision of a magistrate. As this court has no original inherent jurisdiction its jurisdiction depends entirely upon statutory provision. This appeal is therefore brought under the provisions of section 291A of the Criminal Procedure Code which provides:

> *"291A. (1) when an appeal from the decision of a court of a Magistrate in criminal matter has been heard and determined by the High Court and the judge who heard the appeal or the public prosecutor, on his own behalf or on the application of any*

party to the proceedings, has, within one month of such determination or within such further time as the Court of Appeal may permit, signed and filed with the registrar a certificate that the decision of the High Court involves a point of law which it is desirable in the public interest to have determined by the Court of Appeal, such appeal shall be reheard by the Court of Appeal.

(2) ……"

This appeal, and the jurisdiction of the court, is founded upon two certificates signed by Findlay J and filed with the registrar. The first dated 10 November 2016 reads:

"I certify that my decision in this matter involves points of law that it is desirable in the public interest to have determined by the Court of Appeal".

The second more detailed certificate signed and filed by the judge specifies, or purports to specify, the following relevant points of law:

"On application by the 2nd appellant, I found that there are legal issues raised by the appellant which is suitable for determination in the public interest pursuant to section 291A of the Criminal Procedure Code and therefore I issued a certificate on 10 November 2016 to refer to the Court of Appeal the following legal issues:

a. Whether or not the findings of fact of the magistrates court should be reviewed and re-evaluated for being plainly wrong, unjustified by the totality of evidence or failure of the magistrate to provide reason for disbelieving the evidence of the defence.

b. Whether or not the mens rea of the offence of corruption (guilty knowledge) was proven.

c. Whether or not the remaining 14 charges of abetting offences under sections 109 and 165 of the Penal Code, Cap 22 (2 charges were set aside by the learner judge for being duplicitous arising from the same act) should also be set aside.

d. In all of the circumstances, whether my determination of the appeal is correct in point of law".

The jurisdiction of this court in this appeal depends solely upon whether *"the judge who heard the appeal….has …. signed and filed with the Registrar a certificate that the decision of the High Court involves a point of law which it is desirable in the public interest to have determined by the Court of Appeal …"*

This involves a consideration of the certificate. Unless the certificate sets out the point of law involved it has no jurisdiction to entertain an appeal. Similarly there would be no jurisdiction if the point of law specified is not one which it is desirable in the public interest to have determined by this court.

Discussion

The certificate of 10 November 2016 specifies no point of law simply contends that the decision involved some. Clearly this court has no power to hear any appeal on this basis.

The certificate signed on 16 January 2017 purports to set out 4 such points. Of these three in subparagraphs a, b and d are not points of law at all. These are questions of fact depending upon the evidence. Of course all decisions of fact depend upon evidence which in turn is governed by rules of law relating to admissibility and relevance but no relevant point of law is raised on this. The law concerning the approach of an appellate court to appeals on fact is well established, even trite, such cannot satisfy the 'public interest' requirement.

The point of law raised by subparagraph c

Although the point is not set out with any clarity DPP Mme Aldila concedes and we agree that subparagraph c of the notice raises a point of law which it is desirable in the public interest for this court to determine. The point is this whether on the same factual background it is permissible and/or just to charge the defendant with an offence under Section 6 (a) of the Prevention of Corruption Act, Cap 131 and an offence under Section 165 of the Penal Code or an offence of abetting an offence under section 109 and section 165 as in this case.

The 4 charges under the corruption act faced by the appellant were in summary:

1. Receiving gratifications amounting to $1551.81 relating to "E-Speed.

2. Repairs and servicing of motor vehicles in the sum of $1901.50.

3. 6 return air flight tickets amounting to $3620.00.

4. Mobile phone charges amounting to $406.00.

Additionally there were 16 charges under section 109 and section 165 of the Penal Code.

The judge noted that charges 13 and 14 under sections 109 and 165 of the Penal Code relating to the air tickets and mobile phone charges were the same payments as in charges 3 and 4 under the Corruption Act and ruled as follows:

> *"There are 2 charges that in my view duplicate charges against the appellant under section 6(a) of the Prevention of Corruption Act, Cap 131; those relating to the air tickets and the mobile phone charges. Both appellants were convicted of the corruption charges in relation to these 2 transactions. I do not think it fair, apart from any legal objections, that the appellant should be convicted of both charges for the same act. Accordingly, the convictions in relation to the Penal Code offences in respect of these 2 acts are set aside."*

The 7 Penal Code charges relating to the payment for E-speed services and the 7 similar charges relating to car repairs and servicing concern the individual sums charged as total amounts in the first and second charges under the Prevention of Corruption Act. If the judge's ruling is correct it would logically follow that all the Penal Code charges should be set aside on the same basis.

Mr Rudi Lee, who appears for the appellant, supports the judge's reasoning and submits that the remaining Penal Code charges should be quashed.

It is often the practice when charges are made under section 6 (a) of the Prevention of Corruption Act to also charge the equivalent offences under section 165 of the Penal Code. In a number of cases that have come before this court defendants have been convicted of both offences relating to the same facts. Consequently, a point of law which it is desirable in the public interest to have determined by this court arises.

The issue to be determined is within confined compass. If the offences under each statute have the same ingredients so that proof under one must be proof under the other charging both would not only be unnecessary but would be oppressive and an abuse of process. In such circumstances it would be incumbent upon the judge to order a stay at the outset so that the defendant would only be tried on one of the offences.

However, even if the evidence presented on both charges is the same and the ingredients of each offence are different it would be open to the judge to convict or acquit of both or only one depending upon what he finds to be proved. In such circumstances it would be necessary, proper and just to try defendant on both offences at the same time. For the same reason offences are often tried together with lesser alternatives.

See *Mohammed Zuhairie bin Yunos (criminal appeal number 1 of 2011) and section 166 of the Criminal Procedure Code.*

The DPP points out that the ingredients of the two offences under consideration are different.

To establish an offence under section 6 of the Prevention of Corruption Act the prosecution must prove:

1. The defendant accepted the 'gratifications' alleged as defined in section 2 of the Act;

2. That the defendant was an agent at the time as defined by the same section; and

3. That the gratification was accepted (or given) 'corruptly as such inducement or reward as is alleged in the particulars of the offence unless the contrary is proved.'

To establish an offence under section 165 of the Penal Code the prosecution must prove:

1. That the defendant was a public servant;

2. That he accepted or obtained a valuable thing; and

3. No consideration was given or that he knew that any consideration was inadequate; and that the person from whom the defendant accepted the valuable thing was known by him to be, or to be likely to be, concerned in the public servant's official business.

These submissions are correct. The two types of offence are different and require different elements to be proved. In particular corruption does not have to be established in a section 165 offence. Although the evidence presented may seek to establish the same facts the judge may or may not find that the elements of both offences are established.

It follows that on the facts of this case and usually in similar cases, it is necessary, proper and just to charge both types of offence.

It follows that the appellant's contention that the judge was justified in setting aside the two section 165 offences must fail and that in doing so the judge was wrong.

Although the respondent did not itself file a certificate asking for the point of law to be decided in its favour the appeal before us is at large on this issue it is open to the court to make such orders on the appeal as are necessary.

The judge's erroneous order should not be allowed to stand. We therefore allow the appeal, set aside the judge's order and restore the two convictions and sentences concerning the payment for air tickets in the sum of $3620 and the payment for mobile phone services in the sum of $406.

Punishment

The magistrate passed concurrent sentences on the section 165 offences with the offences under the Corruption Act so that no additional punishment was imposed in respect of the section 165 offences which were all based on the same facts as the corruption offences. This was the correct approach. It would have been quite wrong in this case to do otherwise. Whereas this may often be the position this cannot be expressed as a general rule because circumstances, evidence and offences differ so widely.

Order

The judge's order setting aside the appellant's two convictions under section 109 and 165 of the Penal Code concerning the payment for air tickets in the sum of $3620 and the payment for mobile phone services in the sum of $406 is reversed and the two convictions and sentences are restored.

Mortimer, P.

Burrell, J.A. **Seagroatt, J.A**