RICKY ANAK KALONG … Appellant

AND

JOENNY TATI …Appellant

AND

PUBLIC PROSECUTOR …Respondent

Court of Appeal of Brunei Darussalam
(Criminal Appeal No.2 & 3 of 2021)

Before: Burrell (Pres.), Seagroatt and Lunn (JJA).
17th & 28th June 2021

Headnote: Equivocal pleas: need for interpreters in appropriate language of defendant; statutory minimum sentences; Public Prosecutor and Court to ensure unrepresented defendants understand fully effect of plea to offence carrying such sentences before plea is taken and before mitigation is invited; failure to do so and risk of unfair process; transcripts to record direct speech and not summaries.

Appellant represented by Ho & Lenny Rahman Advocates & Solicitors.
DPP Miss Nor Hafizah binti Ahmad for Public Prosecutor.

Seagroatt, JA.:

JUDGMENT

Both these defendants were charged with separate offences of possession of arms, in effect home-made rifles, without a licence contrary to the Arms and Explosives Act (Chapter 58). The penalty to be imposed was, and is, under rule 17(1) of the Act's Rules, and is a minimum i.e. mandatory term, of 5 years imprisonment (with a maximum of 15 years) and not less than 3 strokes.

In the case of Tati, he was in possession of two home-made rifles, and as far as Anak is concerned he was in possession of one. Kalong is the only appellant but as will be seen later in this judgment this Court had arranged for his co-accused to be present, at this hearing for the reasons expressed there.

On the 14th April 2020 in the evening the two men were in the Paya Gambut forest hunting deer. They were caught on a camera which had been set up in the forest by a research team. The date of their identification and arrest is not contained in the Statement of Facts.

They were first brought before the Magistrates Court on the 7 May 2020 and then on six subsequent occasions before an appearance on the 20th October 2020 when their case was remitted to the Intermediate Court. Not until the 13th October did the Public Prosecutor have the ballistics report, a lapse of five months which in the circumstances is of concern. On reading the report and seeing the photographs of the arms it is difficult to envisage how such a report could take so long. The record of proceedings before the Magistrate states that the charge, initially a joint one, was read and the penalty explained "in the Malay language" but no plea was taken. Both defendants were unrepresented. Not until 27 October 2020 did they appear in the Intermediate Court. There, on that occasion, individual charges were substituted.

Section 175 of the Criminal Procedure Code is quite clear on the procedure to be adopted:

> *"**Charge to be read and explained.***
>
> ***175.** (1) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried.*
>
> ***Conviction on plea of guilty.***
>
> *(2) If the accused pleads guilty to a charge whether as originally framed or as amended under section 178 the plea shall be recorded as nearly as possible in the words used by him and he may be convicted thereon:*
>
> *Provided that before a plea of guilty is recorded the Court may hear the complainant and such other evidence as it considers necessary and shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him."*

There is no room for shortcuts or indirect speech. It is essential that the record be accurate and comprehensive.

The brief form of notes on the the taking of the pleas is as follows:

Court: Charges read in Malay by Eliza. Penalty to be explained.

Def 1: Pleas guilty, penalty understood.

Def 2: Pleas guilty, penalty understood.

Court: Both defendants understand the nature and consequences of their pleas of guilty.
S.175 CPC complied with.
Brief facts read and explained and understood.
They are duly convicted.

Both court records are deficient in failing to comply strictly with section 175 of the Code.

There then follows, after a short exchange between the Court and the DPP, a short passage of mitigation by each defendant in summary form in which, at the end, each asks for a fine instead of imprisonment. The DPP made a submission on sentencing. There is no record then of the Court reminding the defendants that their convictions carry a mandatory minimum sentence of 5 years imprisonment and 3 strokes.

This record, though signed by the judge, was not made by him and clearly lacks detail and is truncated as if hand recorded. It is obviously not verbatim. The defendants were still unrepresented.

There is, additionally, a much more detailed record of those proceedings which appears to be verbatim to some extent but with significant omissions. The record is signed by the judge but it is not his handwritten record. The following are the problematic extracts:

Court: 1st charge (D1 only) – understood charge read and penalty explained in Malay and pleaded guilty.
2nd charge (D2 only) – understood charge read and penalty explained in Malay and pleaded guilty.

This is clearly not a verbatim record but a summary and in our view deficient.

There is no record, verbatim or otherwise of the judge explaining the significance of the mandatory minimum sentence.
The matter of the Statement of Facts and the ballistics report is dealt with in an arguably perfunctory way:

Court: The defendants agrees to the Statement of Facts.

There is no record of this being done properly. The mere mention "brief facts read and explained and understood" is inadequate.

- This appears to be a statement
I'm just skimming through the report. Does the defendant have access to the report?

DPP: No … I can show it to them.

It is apparent that the DPP had not supplied a copy of the ballistics report to the defendants before the pleas were taken.

Court: Yes, just briefly go through it with Madam Interpreter. Just briefly, not word by word. Just show them where the rifle is.

….

Court: Does he confirm? [Presumably to D2]

Def: Yes.

What is he confirming, to whom and in what language? What part, if any, is the interpreter playing in this exchange?

There follows a further exchange between the Court and the DPP on detailed circumstances of the offence before the Court announces "Mitigations". There is no record of how this was explained to the defendants. They both in turn mention their family obligations, and financial circumstances. Then, also individually, they pray for the Court to impose a fine and not imprisonment because of the hardship a term in prison would cause.

Only after that stage does the DPP, having been invited by the Court if she wishes to make any submission, make her first mention of the mandatory minimum sentence.

DPP: The charge in itself provides a mandatory imprisonment sentence which the minimum of this is 5 years and 3 strokes.

She goes on to cite two cases to illustrate this.

The Court then appears to clarify what it understands to be the prosecution's stance on the matter of sentence:

Court: From your submissions, you're not actually submitting more than the minimum.

DPP: No.

The prosecution then proceeds to do a 'volte face'.

DPP: Perhaps in that scenario ("could have been a danger to others") taking that into account, perhaps a slightly higher imprisonment sentence, should be preferred, considering that a danger could have been post (sic posed?) to the public as well.

We are not impressed by the prosecution's ambivalence or vacillation on this important matter. In her written submission to this Court she does not repeat the argument for a sentence higher than the mandatory minimum.

Before adjourning sentencing to 14 November 2020 the judge said:

> "*I believe that the defendants are aware of the punishments. They have been explained of the punishments?*"

There is no indication in the record of an answer to this question.

He did not however proceed to set this out for them again or remind them of the implications. The second defendant (this appellant) is recorded as saying:

> "*Yes. If the sentence is given today, is it possible not to go to prison today because we did not inform our family*."

It is arguable that this answer by him indicates some understanding of his predicament. However, this is well after his plea and the record of conviction, and the mitigation. In our judgment it does not cure the early omissions and defects. It is not a categoric acceptance that he knew that a fixed prison sentence was unavoidable.

On the next date, 14th November 2020, this appellant was represented by counsel who appears before us today. She raised the matter of her client changing his plea. She was clearly without documents and information to enable her to do so on that occasion. The hearing was adjourned eventually to the 21st December 2020. The Counsel for the appellant argued the circumstances setting out her contention that his plea of guilty was an equivocal plea, relying largely on those parts of the records of the Court proceedings, particularly of the 27th October 2020, which we have already highlighted earlier in this judgment.

She also raised an argument based on the contents of the ballistics report, specifically the terminology used in it to describe the type of weapon identified. She contended that as a result there is ambiguity in the charge as framed. We do not consider that there is any merit in this point.

In part of that printed form of report there is a number of boxes with the type of firearm for the officer to select as the proper description of what he had examined i.e. pistol, rifle, shotgun, machine gun being specific titles for the firearm concerned. The remaining box is marked "other". This clearly means a firearm other than one fitting the technical types denoted on the other boxes. The officer described it in his report as a "home-made rifle" which, was capable of firing some form of ammunition. He rightly concluded that as such, it could only properly be categorised as "other". Since the contents of the technical report were unchallenged, It indisputably, constituted an "arm" in the Arms and Explosives Act. There is no ambiguity. A home-made rifle is an "arm". It is not a "rifle" within the technical meaning. There is no sustainable argument.

The crux of her main argument was this. The defendant spoke and understood Malay Iban which was his native dialect, but not Malay Bahasa because his level of competence in Malay was only lower secondary.

This may well be the valid point but it is only one aspect in the context of the unsatisfactory process which we have already identified.

The judge rejected the arguments advanced on the defendant's behalf. He decided in short that the defendant's understanding of Melayu Bahasa was sufficient for him to have understood all the proceedings and, in effect, that the transcript of the proceedings correctly and, unequivocally reflects this. He accepted the prosecution's argument that the transcripts of the proceedings on the 27 October 2020 properly indicated that the defendant understood all that was correctly translated to him and therefore his plea was unequivocal.

It is important that all arguments do not lose sight of the fact that the appellant was unrepresented until the time came for the judge to sentence him.

Against this background it is incumbent upon the Court and the Public Prosecutor to take the most vigorous steps in the procedure to ensure that the essential matters are explained in a language which he clearly understands and that he acknowledges unambiguously that he has understood. This course must be followed in all cases where an unrepresented defendant pleads guilty and the prosecution and the Court rely upon matters to which they seek his agreement.

It goes without saying that where a conviction for an offence carries with it a mandatory sentence of imprisonment both the prosecution and the Court must explain the implications of a plea of guilty, at least twice – once before the plea is taken and once before mitigation is invited and heard. A clear formula should be recorded such as:

Court: The law requires me to pass a minimum sentence of 5 years imprisonment and 3 strokes on a defendant who pleads guilty or is convicted of the charge you face, namely possession of arms contrary to rule 17(i) of the Arms and Explosives Act.

Do you understand?

Defendant: [Reply – verbatim]

It is also imperative that the recording of proceedings is comprehensive and accurate and takes no shortcuts nor makes any summaries of such important matters. There should be no abbreviation of the reading out of relevant important documents such as the Statement of Facts, if reliance is to be placed upon defendant's agreement to its contents.

We have concluded that in this case those essential steps were not take so as to be able to treat the plea of guilty of this appellant to be unequivocal.

Accordingly we allow the appeal and remit this case for retrial before another judge – we cannot overstress that the obligation to meet these requirements is part of the duty of the Public Prosecutor as well as the Court.

We have also arranged for the other defendant to be present so that he may have the opportunity of appearing before a court, de novo, for the matter of his plea to be reviewed if he so wishes. In view of the way matters were dealt with in the Intermediate Court, and because he is unrepresented, our decision is the same in this respect.

This appeal is allowed. The pleas are vacated.

The case against these defendants will be re-listed for plea at 9.30 a.m. on Monday 19 July 2021 in the Intermediate Court. Bail is extended for both defendants on the same terms as hitherto.

Burrell, P.

Seagroatt, JA. **Lunn, JA.**