Haji Abdul Rahman Bin Hj Chuchu

AND

Public Prosecutor

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 3 of 2010)

Mortimer, P.; Davies and Leonard, JJ.A.
2nd December, 2010.

Offence under section 6(c) of Prevention of Corruption Act – appeal against conviction – elements of offence – findings of credit – advantage of trial judge – evidence of good character –meaning of section 53 of Evidence Act

Appeal against sentence – importance of deterrence

Mr. Roy Prabhakaran of Messrs. Sankaran Halim for the Appellant.
DPP Aldila Hj Mohd Salleh for the Public Prosecutor/Respondent.

Cases cited in the Judgment:

R v Aziz [1995] 3 All ER 149 at 156.
R v Vye [1993] 3 All E R 241 at 249.

Davies, J.A.:

The conviction and appeal

The appellant was convicted after a trial in the Intermediate Court on 9 January 2010 on the following charge:

> *"That you, or about 26th of October 1999, in Brunei Darussalam being an agent, to wit, the Director of Forestry Department, Ministry of Industry and Primary Resources, Brunei Darussalam, did knowingly use with intent to deceive your principal, to wit, the Government of His Majesty the Sultan and Yang Di Pertuan of Brunei Darussalam, a document, to wit, a Government of Brunei Darussalam Payment Voucher with Departmental Reference No 17/10/99 dated 25th of October 1999 together with its enclosures namely Indent No is 731501 and Bill No JP/05/99, in respect of which the principal was interested and which contained a statement which was false in a material particular, to wit, that the Forestry Department had purchased one unit of equipment namely a "HUMMINBIRD W 30 Paramount Finders" for the sum of B$1400.00 which to your knowledge was intended to mislead your principal into approving payment for the said equipment and you have thereby committed an offence punishable under section 6(c) of the Prevention of Corruption Act, Chapter 131."*

He was sentenced to six months imprisonment.

He now appeals against that conviction and that sentence.

The appeal against conviction

The elements of this offence

In terms of the above section the Public Prosecutor set out to prove and the trial judge held to be proved, beyond reasonable doubt that:

1. the appellant was the agent of the Brunei Government: *Prevention of Corruption Act*, section 2, definitions of "agent" and "public body";

2. he used three documents, an indent document dated 16 October, 1999, an invoice document dated 23 October, 1999 and a payment voucher dated 25 October, 1999, all documents in which the Treasury Department of that Government was interested, because it was responsible for making a payment on the basis of those documents;

3. with intent to deceive that Department into believing that the equipment the subject of those documents was not a fish finder;

4. which documents contained a statement which was false in a material particular, namely the omission of the word fish;

5. and which statement was, to his knowledge, intended to mislead that Department into approving payment for the fish finder.

These, and these only, were the elements of the charge. We say this because, in the way in which this case was conducted on both sides, it seems that other facts were sought to be proved or disproved as if they, too, were elements of this offence. We therefore make the following points at the outset.

First, it was not necessary, or even relevant to prove that anyone was misled or deceived by any of these documents. We say this because the Public Prosecutor sought to prove that some officers of Treasury were, in fact, deceived into thinking that the equipment described as "Humminbird….finders" was, in fact, a bird finder.

Secondly, it was not necessary to prove, and of marginal relevance only, the purpose for which it was in fact used. The offence was committed, if it was committed at all, at the time the appellant caused these documents to be sent to Treasury.

And thirdly, it was not necessary to prove what the appellant's actual intention was for use of the equipment. For example, if his intention included, or even if his principal intention was to use the equipment for Departmental purposes, but he intended nevertheless to deceive the Treasury into thinking that the equipment was not a fish finder because, if it were so described, Treasury might refuse to pay or delay payment, he would be guilty of this offence.

The principal question

The principal question in this case, here and below, is whether the appellant knowingly submitted to Treasury the indent, the invoice and the payment voucher with the intention of deceiving Treasury into thinking that the equipment described therein was not a fish

finder by falsely describing the fish finder as a "finder" intending to mislead Treasury into making payment thereon.

The relevant facts

At trial the appellant said that, in September or October 1999, he decided to buy a piece of equipment which he described as an echo sounder, but which was plainly a fish finder, and in October 1999 made a proposal to Treasury to buy the fish finder with funds from Japan International Corporation Agency. The appellant said in evidence that he thought that the equipment could be used to obtain information for development of ecotourism, including sport fishing and that it was principally for that purpose that he sought to acquire it. He thought that it could be supplied by Ace Agencies (B) Co and acquired their catalogue.

That catalogue is in evidence. It is clear from it that the Humminbird Fishfinder is aimed at fishermen, to enable them to catch fish.

He then received, apparently by a facsimile, a quotation from Ace, relevantly in the following terms:

"1) 1 UNIT HUMMINBIRD W 30 PARAMOUNT FISHFINDERS @ $1,400.00

2) 1 UNIT HUMMINBIRD NS25 SONAR GPS WITH C-MAP FOR BRUNEI + FISH FINDER @ $2,850.00

(NS25 - $2,400 C-MAP - $450)"

The quotation was dated 12 October, 1999.

From that quotation he chose the first of those pieces of equipment, the Humminbird W30 Paramount fishfinder at $1400. He then spoke to the person at Ace and asked him not to put the word "fish" in the billing; and then made the following notation on a copy of the quotation, which was possibly a facsimile copy of the quotation or possibly a photo copy of the facsimile copy:

> *"AA, I have discussed with the supplier that the billing would only mention 'Humminbird W30 Paramount finders' = B$1400".*

The appellant admitted in evidence that "AA" was "Administrative Assistant" and that the notation was addressed to his administrative assistant.

The prosecution sought to adduce in evidence what appears to be a photocopy of the copy of the quotation with the notation on it.

The appellant's counsel, at trial, objected to its admissibility on the basis that it was secondary evidence and that the requirements for the admission of secondary evidence of the document, stated in section 65 of the *Evidence Act*, were not satisfied. The trial judge upheld that objection and refused to admit that document.

In our view the judge was wrong in so ruling. Whilst it is plain that this document was secondary evidence it was, in our opinion, admissible pursuant to section 65 (b) which is in the following terms:

> *"65. Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases -*
>
> *……*
>
> *(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;*
>
> *……"*

In the first place, contrary to the submission of counsel for the appellant, the original document, for the purposes of this case, is not the original of the quotation which, as he pointed out, remained in the possession of Ace. It is the copy of that quotation on which the appellant's notation was made. Secondly, the appellant, in his statement in writing to the Anti-Corruption Bureau, admitted the existence and contents of that document. And thirdly that statement was proved against him at the trial.

It follows that the document in question should have been admitted and we now admit it.

The indent dated 16 October, 1999, signed by the Appellant, effectively the Department's order for the fish finder, was consistent with the direction in effect contained in the above notation. It stated:

> *"Please supply one Humminbird W30 Paramount finders - $1,400".*

The invoice from Ace, dated 23 October, 1999, then followed the form of the indent by omitting the word "fish" and the payment voucher to Treasury, dated 26 October, 1999 incorporated the indent by reference. It was also signed by the Appellant and was duly paid.

Although the Appellant's notation on the copy quotation was undated, it might seem, prima facie, that the sequence of events was oral advice to supplier, communication of the notation to the Administrative Assistant, indent, invoice, payment voucher and finally payment. However, in his statement prepared for trial, the Appellant, for the first time, said that indent preceded the notation on the quotation and the discussion therein referred. He said that he had that discussion only after one of his staff, whom he could not remember, told him that there had been a mistake made in preparing the indent, which he, the Appellant, had not noticed, in that "finders" had been used instead of "fishfinders". He then, he said, rang the supplier to tell him to leave out "fish" so as to be consistent with the wording in the indent; and that was the purpose of the instruction to the Administrative Assistant.

None of this appears in his eight page statement to the Anti Corruption Bureau. On the contrary, in that statement he acknowledged signing the indent; and his only explanation for the notation was "not the intent to hide" and "I did not mean to confuse the Finance". Nevertheless, the evidence stated in the previous paragraph was the Appellant's principal defence as we shall later explain.

The Appellant's evidence to the effect that the omission of "fish" from the indent was caused by an error by one of his staff in preparing the indent was contradicted by Hj Mohamed Jait bin Hitam who said that he prepared the indent document on the basis of

the Appellant's instructions as evidenced by the notation by the Appellant on the copy quotation. His evidence was supported by a notation on the copy quotation, which he said was in his writing, of the indent number and its date. The learned trial judge said that she found Jait a truthful and reliable witness and accepted his evidence. We will refer to that finding and its consequences later.

The Appellant, again for the first time in his statement prepared for trial, said that it was his intention to include in the documents to be submitted to Treasury the copy quotation from Ace which, of course, described the equipment as "fishfinders". Whether that meant the copy on which the notation appeared is not clear.

There was conflicting evidence, as the Appellant acknowledged, as to whether it was common practice to submit a quotation to Treasury, as well as the indent, invoice and payment voucher, when seeking approval for payment. It is, we think, unnecessary to resolve that conflict.

It is not entirely clear whether a copy of the quotation was submitted to Treasury with the indent, the invoice or delivery note and the payment voucher. Each of the indent, the invoice and the payment voucher was produced by Treasury and each was endorsed by Treasury marked "PAID". No copy of the quotation was found in the files of Treasury or of the Appellant's Department. The only copy in evidence was produced by an anonymous source. We would therefore infer that no copy of the quotation was so submitted. And, as will later appear, we also conclude that, contrary to his evidence, the Appellant never intended that it would be.

We should add, because this was relied on in argument and was referred to by the trial judge, that there was some evidence that the fish finder was used by the Appellant for recreational fishing by the appellant; and that there was some evidence that he had used it to test the depth of water. Neither of these pieces of evidence was relevant to proof of this offence for the reason given earlier.

The witness who said that the appellant had used the fish finder to test water depth, Shahril bin Haji Shahbudin, also said that this followed discussion with the Appellant about the need for such an instrument to bring tourists to Selirong Island when the water was low. It is not clear whether this was a discussion before or after the purchase of the fish finder but we are prepared to accept that it was probably before the purchase. For the reason mentioned earlier the Appellant's purpose in purchasing the fish finder is not an element of this offence though it may possibly have some bearing on whether it was his intention to deceive Treasury by omitting the word "fish" from the documents submitted. We will discuss this possible relevance later.

The Appellants contentions and our discussion

The Appellant's principal defence was what he contended was an innocent explanation for the omission, in each of the indent and the invoice of the word "fish". Absent such an explanation, we think that the only rational explanation for those omissions was that the Appellant intended to conceal from Treasury the fact that the equipment which he proposed to purchase was a fish finder because he thought that, if Treasury became aware of that, it might not pay or, at least, not pay without further explanation.

This defence relied on his earlier contested evidence given, for the first time, only in his statement for the purpose of these proceedings; that he was informed by one of his staff, he could not remember whom, that there had been a mistake in the indent in that it had described the equipment as "Paramount finders" rather than "Paramount fishfinders" and that he must have signed off on this indent without appreciating the mistake; and that it was after and because of this that he called the supplier and made the notation to ensure that the invoice and payment voucher were consistent with the indent.

The learned judge's acceptance of Jait as a truthful and reliable witness was made after seeing and hearing Jait gives evidence, particularly under a searching crossexamination. Moreover the fact that Jait saw the copy quotation, with the Appellant's notation thereon, at about the time that he prepared the indent was supported by his endorsement on that copy quotation of the indent number and its date. Once accepted this evidence, alone, was sufficient to destroy the Appellant's explanation.

In any event, the explanation that this was simply to achieve consistency in the documents to be submitted to Treasury is rendered irrational by the Appellant's insistence that it was his intention also to submit the quotation, for it included what, according to the Appellant, had been omitted from subsequent documents simply to ensure consistency, namely the word "fish". One can see why, in order to show his desire to make full disclosure, the Appellant said that he intended to include the quotation. But he was confronted with a dilemma: if he did not say that, his intention to conceal was obvious; if he did, his explanation lost any rational force.

It is plain that the Appellant was far from irrational. On the contrary, it appears from the evidence before the Court, especially that of his former employer, Dato Seri Setia Hj Abd Rahman, that the Appellant was both intelligent and shrewd.

We think that the trial judge was right to reject this explanation and to accept the much more convincing explanation that the appellant caused the word "fish" to be omitted from purchase documents to be submitted to Treasury, which did not include the quotation, in order to cause Treasury to pay in ignorance of the fact that the equipment was a fish finder.

The Appellant's counsel contended that, in any event, there are a number of errors in the reasons of the learned trial judge which, together, make it unsafe to uphold this conviction. We must say, at the outset, that there seem to be a number of errors made by the learned judge though not as many as contended for.

First, counsel contended that the learned judge misunderstood the question in issue. We do not agree. After correctly setting out the elements of the offence she said:

> *"In essence, the agent must knowingly use a document with intent to deceive the principal and the said document contains false particulars. It must be proved that the false particulars contained in the document were to the knowledge of the accused and intended to mislead his principal. Therefore, personal knowledge of falsity in material particulars in the document is an essential requirement of the offence."*

We think that is a correct statement of the law.

Secondly, he contended that the judge did not understand the defendant's principal contention. Again we disagree. She referred to the Appellant's evidence that a clerk had inadvertently omitted the word "fish" in preparing the indent and that he had told the supplier and his staff to follow the form of the indent document. And she referred to the Appellant's evidence that it was his intention to include in the documents to be forwarded to Treasury the quotation.

Counsel for the appellant pointed out, correctly, that the learned judge was mistaken as to who the Appellant said had made this mistake; whether it was the clerk who brought it to the Appellant's attention or some other clerk, but this was of no consequence.

The learned judge also erred in saying that the Appellant's notation on the quotation was not intended for the Administrative Assistant but for the supplier. But she did plainly understand, indeed it was common ground, that the Appellant notified both the supplier and his own staff to leave out "fish" from future purchase documents. The only questions in issue, in this respect, were whether this was before or after issue of the indent and whether the omission of this word from the indent was, as the Appellant contended, an error by staff or, as Jait said, on the instructions of the Appellant.

Counsel also criticised the judge's rejection of the uncontradicted evidence of Shahrill without, he submitted, any adequate basis for doing so. The learned judge said:

> *"The defendant further attempted to show that it [the fish finder] was a departmental purchase because the intended purchase was discussed during the Senior Officers' Meeting (SOM). However none of the 1999 SOM minutes of meeting before October, 1999 mentioned anything about the purchase. PW44 Sharill bin Shahbudin, the Senior Forestry Officer, testified thus but when he was shown his error, changed his testimony during crossexamination and said that the intended purchase was discussed during regular informal coffee meetings with the Defendant. The swiftness in which PW44 changed his testimony makes him an unreliable witness."*

We agree with counsel's contention that the reason given by the learned judge for rejecting Sharill's evidence was, without more, an insufficient reason for doing so, given that the evidence was uncontradicted. However, even if that evidence had been accepted, what bearing could it have had on the reason why the Appellant caused the removal of the word "fish" from the documents to be submitted to Treasury?

Given that, in the absence of that evidence, the only rational inference was that he intended to deceive Treasury into believing that the equipment was not a fish finder, the answer must be, we think, that it would have none. Taken at its highest, this evidence would have established only that, before its purchase, the Appellant had in mind using the proposed equipment for departmental purposes. The fact that the fish finder could and might be used for departmental work, and that the Appellant had that in mind, does not render that inference any the less inevitable.

There were also a number of criticisms of passages in the learned judge's judgment in which she appears to have speculated as to what might have happened in certain hypothetical circumstances. In one such passage the judge speculated as to how, if there had been an error in the indent as the Appellant said there was, it could have been corrected. It is not permissible for a court to speculate in this way; a judge's role in giving judgment is to find or infer facts from evidence, apply the law to those facts and reach a

conclusion on that application. And it was wrong for the judge to consider that, in some way, these speculations supported the conclusions which she otherwise reached on the evidence. But none of this affected the correctness of the conclusions referred to above.

The Appellant's last criticism of the judge's reasons is of her rejection of evidence of good character on the basis that it is admissible on the question of guilt only where there is a conflict between the evidence of the defendant and that of some other witness. The judge relied for this conclusion on *R v Vye* [1993] 3 All E R 241 at 249.

Again we think this criticism to be justified. Section 53 of the *Evidence Act* provides:

> *"In criminal proceedings the fact that the person accused is of good character is relevant."*

There is nothing in this section which expressly so limits its operation and we do not think that any such limitation should be implied. Nor do we think that the authority relied on by the learned judge or any other authority supports the conclusion reached by the judge.

The learned judge, by wrongly construing the section by finding in it an implicit limit to its operation, plainly erred in law. Section 415 of the Criminal Procedure Code relevantly provides:

> *"(1) Except as provided by this Code, the Court of Appeal shall allow an appeal against conviction if it thinks -*
>
> *……..*
>
> *(b) that the conviction should be set aside on the ground of a wrong decision on any question of law;*
>
> *……..*
>
> *and in any other case shall dismiss the appeal."*

Might the acceptance of evidence of good character, taken together with all other admissible evidence, have led to a verdict of not guilty? If admitted, this evidence would have shown that, prior to these events, the appellant was of good character.

But again we do not think that this, together with all other admissible evidence in the Appellant's favour, could possibly have displaced the compelling inference referred to above. There was simply no rational explanation for what the Appellant did or caused to be done other than an intention to deceive Treasury about the nature and description of the equipment purchased and to cause it to make payment on the basis of that deliberately false statement.

For that reason, we do not think that, within the meaning of section 415 (1) (b) this conviction should be set aside on the ground of that wrong decision on a question of law.

Had the learned judge considered the good character of the appellant, as she was obliged to by section 53 she would have been obliged to consider its relevance to the appellant's credibility and to the likelihood that he would have committed the offence in question: *R v Aziz* [1995] 3 All ER 149 at 156. However, as we have indicated, for the reasons we have given, that consideration could not have displaced the compelling inference of guilt.

The appeal against conviction must therefore be dismissed.

The appeal against sentence

In the appellant's favour these things must be said. First, the offence in this case was, in one respect, a minor one; the value of the equipment, as to the purpose of purchasing which the appellant intended to mislead his principal, was small. Secondly, the appellant was, before the commission of this offence, of unblemished character. And thirdly it took inordinately long to bring this to trial, more than 10 years, during which the appellant's career was suspended and his future uncertain.

On the other hand the appellant was in a position of high responsibility in which he ought to have set an example of honesty and propriety in which he seriously failed. Because of that, had it not been for the second and third matters mentioned in the preceding paragraph, the principle of deterrence would have warranted a sentence of several years imprisonment. It was no doubt because of those matters that the judge imposed the sentence which she did.

We think that, despite the mitigating matters referred to, the principle of deterrence to which we have referred required the imposition of a custodial sentence upon the appellant. In those circumstances, we do not think that the sentence imposed was manifestly excessive.

Orders:

1. Appeal against conviction dismissed;

2. Appeal against sentence dismissed.

Mortimer, P.

Davies, J.A. **Leonard, J.A.**