

<b>KPL MOHD KHAIRUL MUSADEY BIN MUSA</b>	...	<b>1st Appellant</b>
<b>KPL SHAHLINNORDY BIN SIDUP</b>	...	<b>2nd Appellant</b>
<b>L/KPL FAIZAL BIN ABDULLAH</b>	...	<b>3rd Appellant</b>
<b>L/KPL PG ASMAN BIN PG TEJUDIN</b>	...	<b>4th Appellant</b>

AND

<b>MD HAMIZAN BIN SALIM</b>	...	<b>Respondent</b>
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**(Court of Appeal of Brunei Darussalam)**  
**(Civil Appeal No. 5 of 2015)**

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Before: Mortimer P, Leonard and Burrell JJ A.  
**19<sup>th</sup> November 2015**

*Civil – application to strike out action against naval noncommissioned officers for alleged assault on recruit under training – Constitution, Articles 84 (b) (2) and 84C – Order 18 rule 18(1) and Order 86 rule 4 of Brunei Supreme Court Rules.*

*Held: Statement of claim disclosed reasonable cause of action not barred by constitutional immunity. Alternative version of facts pleaded in Defence no basis for striking out under inherent jurisdiction. Facts a matter for trial judge.*

Ms. Hjh Rokiah Hj Swed and Ms. Syarifah Safinatul Najah Malai Hj Abd Hamid (M/S Abas Serudin & Partners) for Appellant  
Mr. Rudi Lee Kim Boon (M/S Rudi Lee, Annie Kon & Associates) for the Respondent

**Cases referred:**

*Yong Teck Sang v. Pg Hj Abdul Rahman bin PSI Haji Ismail, Civil Suit no. 20 of 2013*

**Leonard, JA.:**

This is an appeal from a refusal to strike out a Writ of Summons and Statement of Claim. The appellants had applied unsuccessfully below for the strike out to be ordered under Order 18 Rule 18(a) and Order 86 Rule 4 of the Rules of the Brunei Supreme Court.

Order 18 rule 18 (1) is, so far as is material, in the following terms.

*“18. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*

*(a) It discloses no reasonable cause of action ...”.*

It is trite that in order to succeed under that provision, the appellants have to show that the respondent’s pleading discloses no reasonable cause of action. Since it is specifically provided in the paragraph 2 of the rule that no evidence shall be admissible on an application under paragraph (1) (a), the Court can look only at the Writ and Statement of Claim to see whether or not they disclose on their face a reasonable cause of action.

The Statement of Claim alleges that the appellants, who were at the time noncommissioned officers in the Royal Brunei Navy, on the 12<sup>th</sup> April 2010 assaulted, beat and physically abused the respondent, who was a naval recruit under training and under their authority, causing severe injuries to his spine and that the respondent thereby suffered various specifically pleaded psychological problems and economic loss. He claims damages. There can be no doubt that the Statement of Claim discloses on its face a reasonable cause of action, as Ms. Rokiah properly conceded in this court. The application under order 18 Rule 18 (1) was bound to fail and merits no further consideration here.

Order 86 rule 4, headed ‘Inherent Powers of the Court’, reads:

*“4. For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.”*

The appellants ask this court to hold that the respondent has made false allegations in order to get round the immunity which they say they enjoy under the Constitution and that the proceedings are barred.

*Article 84 B (2) of the Constitution of Brunei Darussalam provides that*

*“ Any person acting on behalf, or under the authority, of His Majesty the Sultan and Yang Di-Pertuan shall not be liable to any proceedings whatsoever in any court in respect of anything done or omitted to have been done by him in his official capacity:...”*

In order to avail themselves of the protection afforded by that Article, the appellants must show that if they did the acts complained of, they were at the time acting on behalf or under the authority of, His Majesty the Sultan and Yang Di-Pertuan and that what they did was done by them in their official capacity. Whilst they may have been acting in their official capacity immediately before and immediately after the alleged assaults, there is an issue as to whether during the course of the alleged assaults they could have been acting in their official capacity. Such assaults as those alleged are criminal acts and the judge below found that if they committed those acts as alleged

they could not have been acting in their official capacity. Ms Rokiah conceded before this Court that she could not argue that the alleged acts of assault (which are denied) were part of the duty of a public officer but she complained that the respondent should have sought redress through the military disciplinary route. The fact that he could have chosen that route cannot debar the respondent from bringing proceedings in this court.

Article 84C of the Constitution of Brunei Darussalam provides that –

- (1) The remedy of judicial review is and shall not be available in Brunei Darussalam.*
- (2) For the avoidance of doubt, there is and shall be no judicial review in any court of any act, decision, grant, revocation or suspension, or refusal or omission to do so, any exercise of or refusal or omission to exercise any power, authority or discretion by His Majesty the Sultan and Yang Di-Pertuan, or any party acting on his behalf or under his authority or in the performance of any public function, under the provisions of this Constitution or any written law or otherwise, including any question relating to compliance with any procedural requirement governing such act or decision.*
- (3) In this Article, “judicial review” means proceedings instituted by any manner whatsoever including, but not limited to, proceedings by way of –*
- (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;*
  - (b) an application for a declaration or an injunction;*
  - (c) a writ of habeas corpus; and*
  - (d) any other suit or action relating to or arising out of any act, decision, grant, revocation, suspension, or refusal or omission to do so, any exercise of or refusal or omission to exercise any power, authority or discretion conferred on His Majesty the Sultan and Yang Di-Pertuan, or any party acting on his behalf or under his authority or in the performance of any public function, under the provisions of this Constitution or any written law or otherwise,*

In view of Ms Rokiah’s concession that she could not argue that the commission of assaults of the kind alleged was part of their public duty, Article 84C does not assist the appellants. Even without the concession, we hold that a criminal act cannot be part of the public function of a public officer. In *Yong Teck Sang v. Pg Hj Abdul Rahman bin PSI Haji Ismail, Civil Suit no. 20 of 2013*, a case cited by Mr Rudi Lee for the respondent, Findlay JC made the following observation.

*‘It is argued by the Appellant that the Respondents’ position could lead to the highly undesirable situation that a government servant committing acts of wrongdoing while*

*purportedly acting under His Majesty's authority would be protected. It is suggested that, on this approach, government servants committing acts of corruption would be immune. This, of course, is not so. A government servant taking a bribe for his personal benefit could not say the act was done in his official capacity or he was acting on behalf of His Majesty or under his authority or in the performance of any public function'.*

Assuming that Findlay JC was intending to refer to criminal acts of wrongdoing, as the example he used indicates, we would agree. The same principle applies to criminal assaults. We do not think that he can have had in mind civil wrongs which were not criminal and which might be caught by the Articles cited above.

Inviting the Court to exercise its undoubted inherent powers as described in Order 86 rule 4, the appellants refer to their Defence in which they put forward an alternative version of the facts and say that, on their version, what they did, in their official capacity, was not to assault the respondent but only to order him to do certain physical exercises, so that the action is barred by the Constitution.

It is not necessary for the purposes of this appeal to consider the alternative version of the facts put forward in the Defence and unsupported at this stage by any evidence. It is alleged by the respondent that the third defendant repeatedly struck him with a slipper and then took him to the barracks where the first and fourth defendants repeatedly struck the respondent with a 'military bag' containing a sandbag. The respondent alleges that they also repeatedly slapped and punched him in the stomach, pressed his head into a bending position and repeatedly hit him on his back, causing him extreme pain and dizziness so that he fainted. The second defendant then allegedly revived the respondent, and repeatedly punched him in the stomach and slapped him on the face. The defendants deny the allegations and point to their own version of the facts upon which they would rely to show that they had been public officers acting as such at the relevant time and that the action is therefore barred by the Constitution. Whilst it is common ground that the appellants were public officers, responsible for training the respondent, there is a factual dispute which needs to be resolved before the question of immunity under the Constitution can be decided. Though Ms Rokiah very properly said that if the facts alleged in the Statement of Claim were made out, she could not argue that committing the assaults described could be part of the duty of a public officer, she would argue that if the facts alleged in the Defence were made out, the immunity provisions in the Constitution would apply. When asked by this court who would decide the facts, she said it would be the trial judge. She was right.

In this case, the Statement of Claim discloses a reasonable cause of action. Whether the action will be found to be barred by the Constitution can only be decided by the trial judge after hearing the evidence. There is no basis at this stage for saying that if the trial proceeds, an injustice will be caused or that the action is an abuse of process.

***Order***

The appeal is dismissed with an order nisi that the costs of the appeal be taxed if not agreed and paid by the appellants, the order nisi for costs to be made absolute unless application is made to the court with notice to the other party on or before 12 noon on Saturday the 28<sup>th</sup> of November 2015.

**Mortimer, P.**

**Leonard, J.A.**

**Burrell, J.A**