

Bui Van Tam

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 16 of 2023)**

Haji Abdullah Soefri, JC
19th October 2023

Criminal Law – Appeal – Magistrate Decision to refuse bail – Offence under Section 3(1)(b) Criminal Asset Recovery Order (CARO) – Conspiracy under section 109 of the Penal Code – gravity of offences – foreign national – full and steady employment in Brunei – not a flight risk – appeal allowed – bail granted

Cases cited:

Public Prosecutor v Mat Salleh bin Hj Aspar (High Court Criminal Appeal No. 4 & No. 8 of 2008)
Hj Sadikin bin Hj Ahmad v Public Prosecutor [2002] 1 JCBD 349

Pg Md Khairul Nizam bin Pg Hj Mohd Yassin (M/S Yusof Halim and Partners) for the Appellant/Defendant.

DPP Syafina binti Abdul Hadzid for the Public Prosecutor.

RULING

Haji Abdullah Soefri, JC:

Introduction

This is an appeal by the Appellant (Defendant) against the Magistrate’s Court’s decision for dismissing the Appellant’s bail application in the Magistrate’s Court Criminal Case No. 357 of 2023.

Appellant’s Submission

The Appellant’s counsel submitted that the case of *Haji Sadikin bin Haji Ahmad v Public Prosecutor (Criminal Motion No. 1 of 2000)* is the often referred case for bail application where the Court listed down factors to be considered in the decision to grant bail.

Gravity of the Offence

The Appellant did not dispute that money laundering is a serious offence.

It is submitted further that the Prosecution has not adduced any evidence that the alleged 'dirty money' that he received had been integrated into a legitimate financial system. The Prosecution has charged him for transferring his own money from his account in Vietnam to another account in Vietnam.

The Appellant submitted that the Magistrate below considered that the Defendant's citizenship was important as he only works here and is a green IC holder. It was submitted by the Appellant that this does not automatically make him a flight risk especially when his country of origin is Vietnam as opposed to Malaysia or Indonesia. He earns a good living here and the money he earns goes to his family in Vietnam where he has a wife and 2 children. Further it was submitted that he has counsel go to show his good character.

It was submitted that the likelihood that the Appellant may attempt to interfere with the only lay witness is not possible because he does not know where she is.

The Appellant submitted that he is employed by Sahid Sdn Bhd with good salary and he has no previous convictions or arrested for any offences.

The strength of the Prosecution's case was touched by the Appellant. The Appellant submitted that there is no evidence shown by the Prosecution that 'dirty money' was deposited into the legitimate financial system and in his statement dated on 6/8/2023 he did state that he did not know if the money was from prostitution. If he had known, he wouldn't have done it.

Another ground that the Appellant raised is the difficulty of preparing the defence case if the Appellant is kept in custody due to the present prison procedure and the need of a Vietnamese interpreter.

The Appellant submits that bail should be granted with strict conditions imposed.

Respondent's Submission

The Respondent in their submission submitted that based on the gravity of the offence, the Appellant is a foreign national with tenuous link to Brunei and based on the strength of the Prosecution's case as some of the factors that can be considered by the Court in granting or denying bail application and submits that the Court below was right to refuse bail because of the risk of the Appellant absconding.

The Law

In ***Public Prosecutor and Mat Salleh bin Hj Aspar (High Court Criminal Appeal No. 4 & No. 8 of 2008)***, Dato Paduka Steven Chong, J, as he was known then, stated as follows:

*“Sections 346 and 347 of the Criminal Procedure Code provide that bail may be discretionary obligatory and, if discretionary, may be granted by a police officer, a Magistrate or the High Court, depending on the nature of the offence and penalty. But these provisions do not specify the circumstances in which bail may be granted or refused. It is necessary therefore to revisit the case of **Haji Sadikin bin Haji Ahmad v Public Prosecutor [2002] 1 JCBD 349** in which Roberts, C.J. gave guidance on the factors to be considered in deciding whether to grant or refuse bail.*

The principles that may be distilled from the Sadikin case are as follows:

i) The onus is on the prosecution to satisfy the Court on a balance of probabilities, having regard to all the circumstances of the case, that bail should not be granted.

ii) The factors which the Court should consider include:

“a) the gravity of the offence, as is best shown by the maximum penalty which can be imposed for it (in case in which the death penalty can be given, it is very rare for bail to be given);

(b) the citizenship and place of residence of the Defendant, as these may have an influence on his future conduct;

(c) whether the wife/husband of the Defendant is a Brunei citizen and whether or not any of his children are resident here;

(d) the likelihood that the Defendant may attempt to interfere with witnesses for the Prosecution;

(e) whether or not the Defendant is in employment as, if this is of long standing, this fact is in his favour:

(f) the age of the Defendant and whether or not he has previous convictions, especially those of the same kind as that with which he is charged;

(g) if this is available, the strength of the Prosecution case;

(h) whether the Defendant has previously failed to surrender to custody on a previous occasion on which he was granted bail;

(i) The possibility that the Defendant would commit other offences while on bail;

- (j) *whether the Defendant should be kept in custody for his own protection or welfare;*
- (k) *whether the Defendant can prepare his defence adequately if he is kept in custody;*
- (l) *any other factor which the Court may consider to be relevant.”*

In the same case above, it was also held that;

“.... The application of the balance of probability test simply means, the Prosecution must satisfy the Court that having regard to all the circumstances of the case, it is more probable than not there is a risk that he will reoffend on bail.”

The burden of proof in bail applications was also reiterated by Roberts C.J in *Hj Sadikin bin Hj Ahmad v Public Prosecutor* where he stated as follows;

“Where there is an application for bail, it must be accepted that the Defendant has not been convicted of any offence and is therefore to be treated as an innocent person.

It will then be for the Prosecution, on a balance of probabilities (the lesser burden of proof) to establish that bail should not be granted to the Defendant.”

The question now is whether the Prosecution has established on the balance of probabilities that bail should not be granted to the Defendant.

As stated earlier, Prosecution submitted that the gravity of the offence, the Appellant is a foreign national with tenuous link to Brunei and the strength of the Prosecution’s case as some of the factors that can be considered by the Court and the Court below was right to refuse bail because of the risk of absconding.

Are what the Prosecution has submitted has established on the balance of probabilities that bail should not be granted to the Defendant?

No doubt that the offences that the Defendant are facing are serious offences and this was also accepted by the Appellant.

I will not dwell on the strength of the Prosecution’s case too deeply as this will be dealt with in the trial. However, I will take an overview of the strength of the case as submitted by both parties. I conclude that the strength of the Prosecution’s case cannot be relied on by the Prosecution in establishing that bail should not be granted.

As to the risk of absconding, this is inter-related with the Appellant being a foreign national and has no local ties or weak local ties.

The main objective of granting or refusing bail is to ensure that the Defendant will attend to his trial.

Was the Magistrate below correct to conclude that there is a risk of absconding, based on the fact that he is a foreign national with tenuous link to Brunei?

Taking into account of all the submissions by both parties and taking into account of all the circumstances of the case, I am satisfied that notwithstanding the gravity of the charges, I am not persuaded that the Defendant is a flight risk as he has a steady employment in Brunei.

I therefore allow the appeal against the decision of refusal of bail by the Court below and grant bail to the Appellant on the following conditions:

- 1) The Defendant is to provide \$10,000 in cash.
- 2) To provide two local sureties in the amount of \$5000 each.
- 3) His passport is to be impounded by the Royal Brunei Police Force.
- 4) To report to the Anti-Vice Unit – CID in Gadong to Lance Corporal 5089 Ambran or ASP Hakim Ansyari once every two weeks commencing on the 2nd November 2023 during office hours.
- 5) Not to be arrested for the suspicion of committing any other offences whilst on bail.
- 6) To remain contactable and locatable at all times.
- 7) To update any changes in contact details to the police and for the police or prosecution to update the Court.
- 8) Not to interfere or contact any Prosecution Witnesses or potential Prosecution Witnesses either directly or indirectly or through any representatives.

HAJI ABDULLAH SOEFRI BIN POKSM DSP HAJI ABIDIN
Judicial Commissioner