

Public Prosecutor

AND

Abdul Akhbar Bin Haji Dunglah

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 31 of 2020)**

Hj Abdullah Soefri bin POKSM DSP Hj Abidin, JC

27th January 2022

Criminal law - Magistrates - Criminal Procedure Code Section 271; Section 284 - Appeal against acquittals - Criminal intimidation - Carrying offensive weapons in public places - Unrepresented accused; Section 220, Criminal Procedure Code, Cap 7; Section 221(5) - Failure to address adverse inference - Failure to take proper advantage of seeing and hearing the witness and to appreciate the weight of the evidence adduced - acquittals not sustainable and unsafe; Section 284(b) Criminal Procedure Code - Acquittals quashed and retrial ordered

Case referred to:

Chan Kin Choi v Public Prosecutor [1991] SGCA 2

DPP Suriana Radin and PO Aeny Zullizam for the Public Prosecutor/Appellant
Respondent unrepresented

JUDGMENT

Hj Abdullah Soefri, JC:

This is an appeal under Section 271 of the Criminal Procedure Code, Chapter 7, by the Public Prosecutor against a Magistrate's order of acquittals. The Appellant claimed that the Magistrate erred in law and facts.

The Respondent, Abdul Akhbar Bin Haji Dunglah, was preferred with two charges, the first charge under Section 506 of the Penal Code, Chapter 22, and another charge under Section 29(1) of the Public Order Act, Chapter 148.

The Respondent has pleaded not guilty to both of the said charges. At all material times, the Respondent was unrepresented.

Briefly, the grounds of Appallent appeal can be summarized:-

For the 1st Charge

1. The court has failed to outline the reason for not accepting PW3's evidence that the Respondent had taken P7 (the machete) out from P8 (the bag).
2. PW3's evidence was subjected to inconsistencies when it does not go against the weight of the evidence nor does in any way detract from the main issue - as to whether the Respondent raised P7 to PW3.
3. How was PW3's evidence that the Respondent's had uttered the word "HA" "HA" does not amount to intention to threaten PW3 under criminal intimidation offences.
4. As the prosecution had tendered the Respondent's statement, P10, the court has failed to assess the weight of the statement properly.
5. The issue whether the evidence of the Investigation Officer ought to be taken into account or not in the court's finding.

For the 2nd Charge

1. Section 29(2) of the Public Order Act provides that the onus of proving that an accused person is carrying or in possession of an offensive weapon solely for a lawful purpose shall lie upon the accused.
2. The issue whether the questions that the Respondent had put to PW3 constitute as "evidence" and should be given full weight to the statement by the court.
3. Due to the Respondent's silence and no witnesses called to support his case, the prosecution should not be deemed to have failed to address the Respondent's intention and what he claimed in his statement.
4. The court has failed to address adverse inference as subject to Section 221(5) of the Criminal Procedure Code.

The Respondent in responding to the Appellant's submission did not say anything and submits that the court was correct in acquitting him.

Section 29(2) of the Public Order Act provides as follows:

“In any prosecution for an offence under subsection (1), the onus of proving that the accused carried such weapon or had it in his possession or under his control solely for a lawful purpose shall lie upon the accused.”

It was undisputed by the Respondent that he had P7, thus the burden was on him that he was in possession of an offensive weapon solely for a lawful purpose. The Respondent elected to remain silent upon being invited to enter his defence and did not call witnesses to support his case.

When this Court asked the Respondent why he elected to remain silent, the respondent replied that he “did not have much to say and what I have said has been said and that I am not guilty and I also do not understand”. He also said that he did not remember that the Magistrate had explained to him the burden has shifted to him to prove that he has lawful possession. He further said “I do not know, I was only asked to give evidence or to remain silence only. I chose to remain silent.”

Where a defendant appears in person, it is desirable for the magistrate to make use of his or her discretion to assist an undefended accused, which is conferred by Section 220 of the Criminal Procedure Code, Cap 7. In this matter there is nothing in the notes to show that the Magistrate had explained to the Respondent that for offence under Section 29(2) of the Public Order Act, that the onus of proving that the accused carried such weapon or had in his possession or under control solely for a lawful purpose shall lie upon the accused.

There is nothing in the Magistrate’s judgment where she had outlined the reason in accepting that the Respondent had P7 for a lawful reason. The only evidence that was provided shows the Respondent’s original intention in having P7 can be found inside his statement, P10, in which he stated that the reason was to take down coconut from his friend’s house. Again, this should not and cannot constitute as “evidence” according to ***Chan Kin Choi v Public Prosecutor*** [1991] SGCA 2.

Furthermore, the Magistrate did not address in her judgment the fact that the Respondent had elected to remain silent.

Section 221(5) of the Criminal Procedure Code provides that:

“The fact that the accused does not give evidence on oath or affirmation may be made the subject of any adverse comment by the prosecution, and the Court may draw such inference therefrom as it thinks just.”

In my judgement, the Magistrate in reaching her findings failed to take proper advantage of seeing and hearing the witnesses and to appreciate the weight of the evidence adduced and thus that the acquittals of the Respondent are unsustainable and unsafe.

In view of the misdirection to which I have referred, I am ordering, under Section 284(b) of the Criminal Procedure Code, a new trial on both charges before a different Magistrate.

HJ ABDULLAH SOEFRI BIN POKSM DSP HJ ABIDIN
Judicial Commissioner