

**YAM Pengiran Indera Wijaya Pengiran
Dr Haji Ismail Bin Pg Haji Damit**

1st Appellant

Wong Tim Kai

2nd Appellant

AND

Public Prosecutor

Respondent

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 11 of 2007)**

Public Prosecutor

**YAM Pengiran Indera Wijaya Pengiran
Dr Haji Ismail Bin Pg Haji Damit**

1st Defendant

AND

Wong Tim Kai

2nd Defendant

**(In the Matter of High Court of Brunei Darussalam)
(Criminal Trial No. 38 of 2004)**

Power, P; Mortimer and Davies, JJ.A.
24th November, 2007.

Appeal against decision by judge holding Notice of Motion was incorrect procedure in an application to recuse in course of criminal trial. Held - Jurisdiction of Court of Appeal is governed by Cap 44 and 45 of Criminal Procedure Code and an appeal in a criminal trial can only be made after conviction.

Mr. Christopher Fernando and Mr Ahmad Basuni Bin Abas of Messrs. Abrahams Davidson & Co. for the 1st Appellant.

Mr Manjit Singh Dhillon and Mr Rudi Lee of Messrs. Fathan Rudi Lee & Associates for the 2nd Appellant.

Mr Andrew Macrae, DPP Aldila Hj Mohd Salleh and Miss Maggie Wong for the Public Prosecutor/Respondent.

Power, P.:

YAM Pengiran Indera Wijaya Pengiran Dr Haji Ismail Bin Pg Haji Damit (D1) and Wong Tim Kai (D2) are the defendants in a criminal trial being heard by the Chief Justice. They seek to appeal against a ruling by the Chief Justice accepting the contention of the Public Prosecutor, that, in an application to a judge to recuse himself in the course of a trial, a Notice of Motion supported by affidavits was procedurally wrong and must be dismissed. He did not, we are satisfied, make any ruling on the application to recuse.

In the course of argument before this court it became apparent that the fundamental matter for our decision was whether there was any right of appeal against such a ruling in the course of a criminal trial. The only right to appeal to this court is set out in Cap XLIV and Cap XLIVA of the Criminal Procedure Code. Cap XLIVA does not concern us here as it deals with appeals by the Public Prosecutor. Cap XLIV bears the heading “*Appeals by Persons Convicted*”. S. 414 states “*a person convicted of any offence after trial in the High Court may appeal to the Court of Appeal against his conviction*”. At first sight s. 414 would appear to be stating that appeals are only open to a person after conviction. However Mr Fernando for D1 contends that s. 430(2) extends the right of appeal to include an appeal from an interlocutory order of the type made by the Chief Justice.

We set out the relevant subsections of s. 430:

“Procedure for appeal. [S 23/91]

430. (1) *A person who wishes to appeal to the Court of Appeal shall give notice of appeal in such manner as may be provided by rules and orders made under section 441.*

(2) *Notice of Appeal shall be given within 28 days from the date of the conviction, verdict or finding appealed against, or, in the case of appeal of an order made or treated as made on conviction, from the date of the making of the order.*

(3) *If sentence was passed more than 7 days after the date of conviction, verdict or finding, notice of appeal against the conviction, verdict or finding may be given within 28 days from the date on which sentence was passed.”*

At first sight this is no more than a procedural section which in no way enlarges the right of appeal given elsewhere under Cap XLIV. The argument otherwise rests on the word “finding” which, it is submitted, gives a substantive right to a person aggrieved by a ruling of the kind given by the Chief Justice. Support for this argument, it is contended, arises from the addition of the words “verdict or finding” after the word “conviction” which word alone is used in S. 414. We do not agree. The word “finding” is used in s.

430(2) not to extend the right of appeal but rather to make it clear that the procedural limit applies to s. 424 which deals with appeals against a finding of insanity.

We are not concerned here with the word “verdict” but it seems that it was added because of the provisions of s. 425 which states that the Court of Appeal may allow an appeal under s. 424 if it is of the opinion that the verdict should be set aside on the ground that it is unsafe and unsatisfactory.

We are satisfied that s. 430 is a procedural section which does no more than stipulate the time for the giving of a notice of appeal in matters where an appeal is allowed by virtue of the preceding sections of Cap XLIV.

We think it proper to indicate also that the above decision would apply equally to any decision, if one should be made, on the recusal application.

The application before us is incompetent and stands dismissed.