

Mohamad Don bin Amat Daud

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 17 of 2019)**

Hj Abdullah Soefri bin POKSM DSP Hj Abidin, J.C.

9th February 2021

Criminal law - Appeal against conviction - section 158 Criminal Procedure Code invoked – failure to abide - section 291 Criminal Procedure Code - Appeal allowed - section 285 Criminal Procedure Code - conviction quash - retrial.

Mr Hj Mohamad Rozaiman bin Dato Hj Abdul Rahman of M/S ZICO R.A.R. for Appellant/Defendant.

DPP Siti Khalillah binti Hj Hussin for Respondent/Public Prosecutor.

Hj Abdullah Soefri, JC:

This is an appeal against conviction by the Appellant on the Magistrate decision which was initially given as an oral judgment on the 7th September 2019 and followed by a full written judgment on the 23rd September 2019.

The Appellant was convicted for an offence under section 323 of the Penal Code. The grounds of Appellant appeal can be summarized:-

1. How was PW2's evidence accepted in the judgment without corroboration from other witnesses? The Court has failed to acknowledge the inconsistencies in the children's evidence;
2. due to no medical evidence corroborating the offences, the alleged incident never occurred. Therefore, Defendant was wrongfully convicted as no hurt was established nor was hurt caused by the Defendant;
3. the issue of whether the charge can be amended after judgment; and
4. the amendment under section 158 of the Criminal Procedure Code did not follow the procedure under section 158(2) of the Criminal Procedure Code.

The Respondent in responding to the Appellant's submissions submit that *"it is trite law and as a matter of fact that the trial judge had the benefit of observing the demeanour of both the prosecution and defence witnesses. Given this advantage, the trial judge had opportunities*

firsthand to see and evaluate the witnesses giving their evidence and the appellant court will not disturb the finding of facts of the trial court unless they are clearly reached against the weight of the evidence”.

The Respondent submits further that the Magistrate had addressed the issues of corroboration and inconsistencies in her judgment under the Court’s finding on pages 9 to 12. She found PW2’s evidence was corroborated by PW3, PW5, and PW6.

As to the lack of medical evidence that the Respondent submitted PW2 was seen by PW6 and he was medically examined on the same day (3rd March 2018) at 1542 hours. PW6’s finding was recorded in P14.

There was no evidence to support that PW2 was suffering chest pain. The issue of chest pain was only raised during the Defence cross-examination on PW6. Therefore, Respondent submits that this issue bears no relevance to the case.

As to the amendment under section 158 of the Criminal Procedure Code, Respondent submitted that the Magistrate was entitled to alter or amend the particulars of the charge as part of her finding during the trial. The Appellant was at no point prejudiced because all along the charge was for causing hurt.

The Respondent further submitted that the Magistrate had only altered or amended the particulars of the charge and did not amend it to a different charge. Therefore, the case quoted has no bearing on the current case and the Magistrate did not convict the Appellant on a substitute charge after the judgment was pronounced. The Magistrate merely gave her full reasoning on a later date.

I will deal with section 158 of the Criminal Procedure Code first.

Section 158 of the Criminal Procedure Code provides as follows:

“1. Any Court may alter or add to any charge at any time before judgment is pronounced or, in the case of trials with the aids of assessors, before the opinions of the assessors are expressed.

2. Every such alteration or addition shall be read and explained to the accused.”

Section 159 of the same provides:

“If a charge is framed or an alteration or addition is made under either section 157 or 158, the Court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried on such charge or altered or added charge”.

From the record on the 7th September 2019 the Magistrate in her notes stated as follows:

“I am going to give my oral judgment today. The Defendant is charged with one count of charge, an offence under section 323 of the Penal Code. I shall give my reasoning for my judgment on the 16th September 2019 at 2 pm.

After reading all the evidence before me, I find the Defendant for voluntarily causing hurt to Syazwan Zulhizam (a 9 years old boy) at Sekolah Rendah Keriam, Tutong on the 3rd March 2018 at about 0930 hours an offence under section 323 of the Penal Code”.

On 23rd September 2019, the Magistrate issued a written judgment and under the heading “section 158 of the Criminal Procedure Code” said as follows:-

“66. The charge preferred against the Defendant reads that the Defendant did voluntarily caused hurt to PW2, to wit by slamming his head onto the table and push his chest.

67. By virtue of section 158 of the Criminal Procedure Code, I hereby alter the charge against the Defendant to one of:

“That you, on the 3rd March 2018 at about 0930 hours, at Sekolah Rendah Keriam Tutong in Brunei Darussalam, did voluntarily caused hurt to one Mr X (Syazwan bin Zulhizam, M 9 years old), to wit, by pushing his head onto the table and pushed his shoulder and you have thereby committed an offence punishable under section 323 of the Penal Code, Cap 22”.

68. I hereby find the Defendant guilty and convict the Defendant for voluntarily caused hurt to one PW2, M 9 years old, by pushing his head onto the table and poking his chest, an offence under section 323 of the Penal Code”.

The question before me now is whether the Magistrate in invoking section 158 of the Criminal Code Procedure in altering the charge against the Defendant abide with section 158(2) and section 159(1) of the Criminal Procedure Code.

There is nothing in the Magistrate notes that after she had invoked section 158, the altered charge was read and explained to the Accused pursuant to section 158(2) and there is nothing in her notes that she called upon the Accused to plead thereto and to state whether he is ready to be tried on the altered charged pursuant to section 159(2).

Further, it is evident that the amendment was made after the judgment was pronounced and section 158 allows the Court to alter the charge at any time before judgment is pronounced (section 158).

Section 291 of the Criminal Procedure Code provides that:

“No judgment or order of a Magistrate Courts shall be revised or set aside unless it is shown to the satisfaction of the Court above that such judgment or order was either wrong in law or against the weight of the evidence or in the case of a sentence, inappropriate in the circumstance of the case”.

In view of the above, I am satisfied that when the Magistrate invoked section 158 Criminal Procedure Code she had failed to abide with the requirements under section 158(2) and section 159 of the Criminal Procedure Code.

Section 285 of the Criminal Procedure Code provides that:

“In an appeal from a conviction, the High Court may –

- (a) dismiss the appeal;*
- (b) quash the conviction and sentence and acquit or discharge the accused;*
- (c) direct that further inquiry be made or order a new trial on the same or an amended charge;*
- (d) quash the conviction and convict the accused of any offence of which the lower Court might have convicted him, and maintain, reduce or increase the sentence or alter the nature of the sentence; or*
- (e) uphold the conviction and maintain, reduce or increase the sentence or alter the nature of the sentence”.*

By virtue of section 285 of the Criminal Procedure Code, I quash the conviction and sentence and order for a retrial on the amended charge.

Appeal is allowed and a retrial is ordered.

HJ ABDULLAH SOEFRI BIN POKSM DSP HJ ABIDIN
Judicial Commissioner