

Saadiah Binti Tudin

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 19 of 2013)**

Before Commissioner James Findlay in Court

Date of Hearing: 28 March 2015.

Date of Judgment: 4 April 2015.

No point of law, evidence or practice involved –not reportable.

Mr Ahmad Zakaria (M/S Ahmad Zakaria & Associates) for the Appellant.

DPP Pg Nina Jasmine for the Public Prosecutor.

J U D G M E N T

Findlay, J.C.:

The appellant was charged with contravening section 6(c) of the Prevention of Corruption Act, Chapter 131 in that on or about 20 July 2007 she knowingly used a document with intent to deceive. She pleaded not guilty to this charge, but after trial was convicted and sentenced to 9 months imprisonment. The appellant appeals against both conviction and the sentence.

This is another case in which justice has been long delayed. As I have said, it is alleged the offence was committed in July 2007, but the trial did not commence for more than 3 ½ years, on 23 January 2010, and the trial was not completed until 9 February 2013. Judgment was given on 11 May 2013.

There are several unsatisfactory features in the prosecution case.

Firstly, the very document alleged in the charge against the appellant was not properly produced in evidence. A copy of this document was produced and admitted into evidence in spite of objections by Mr Zakaria. The prosecutor intimated that the original would be produced in due course, but it never was. The original was available to the prosecutor, so there was no basis upon which secondary evidence of the document could be admissible.

There is, however, a less technical and more serious problem for the prosecution. The only proper way for even the original of this document to be proved and admitted into evidence was by calling the maker of the document. The maker of the document was Dyg Hjh Salmaya

Hj Md Husain. She signed the document twice as the maker. This lady headed the Youth and Children Unit of Radio Television Brunei and the appellant was a clerk working under her.

That it should be the maker who tenders a document in evidence was the very point made by Mr Zakaria in the trial, but his objection was not heeded. Instead, a copy of the document was produced by Hj Sulaiman Bin Hj Labok, who was head of TV Production. He did endorse the document after it was made, but he knows nothing about how the document came to be made and should not have been allowed to produce it. He had no dealings with the appellant and so she could not have intended to deceive him.

There is no unfairness to the prosecution in these points being taken by Mr Zakaria in this appeal. He made his position quite clear during the trial, but the prosecution made no attempt to meet his quite proper objections.

It appeared from the evidence of Suria Fazura Binte Shafie and Siti Norsinah Binte Matasan that the appellant used them to prepare the document, they knowing that the document was false, and that the appellant then presented this document to Salmaya for the claim to be made. That must be the only time when, it is alleged, the appellant used the document with intent to deceive and the only person, at that stage, who could have been deceived was Salmaya. After this stage, the appellant did not use the document, Salmaya did. Accordingly, without the evidence of Salmaya as to what she was told by the appellant about the claim to establish intent to deceive and whether or not she was deceived, the prosecution case fails.

I asked the prosecutor who it was that the appellant was alleged to have intended to deceive. She said it was Radio Television Brunei, but I pointed out that only a human with ears to hear could be deceived on behalf of the corporation. She then said that it was Hj Sulaiman Bin Hj Labok who was deceived, but he was not deceived by the appellant. The only person who could have deceived him was Salmaya and, indeed, that is what he said in evidence. When asked “What did you rely on to admit it was correct and true?”, he said “I relied on the date of the document and to whom it was addressed to. And also on my belief on the Head of Unit”, that is, Salmaya.

Salmaya, as the maker of the document, was never called by the prosecution as it was its duty to do in order to prove its case, but, instead, by a bizarre twist of events, the blame for not calling Salmaya was attributed to the appellant and an adverse inference was drawn from her failure to do so. And this is in spite of the fact that the prosecution well knew that it would be difficult for the appellant to call Salmaya in view of the charges against her. The court also knew of these difficulties. In any event, it is difficult to see what inference of fact could have been drawn from any failure to call Samaya without entering the realm of speculation.

Salmaya was a witness available to both parties. When she was not called by the prosecution, why should an adverse inference be drawn against the appellant rather than the prosecution? In view of Salmaya’s reluctance to appear as a witness and give evidence, the reasonable inference to draw from that was that she had something to hide.

In any event, it was quite unfair to expect the defence to call Salmaya in the circumstances of this case. For the defence to subpoena a reluctant witness, without knowing what that witness would say, would be something that no sensible counsel would do.

Salmaya faced charges similar to that faced by the appellant and alleged to have taken place at about the same time. She was acquitted of these charges on 24 April 2014; that is, after Salmaya was convicted. The prosecution alleged against her that she used documents with intent to deceive, which is the same as the allegation against the appellant. The appellant's defence in her case was that it was Salmaya, her superior, who instructed her to prepare the document. There was evidence in the prosecution case that the payment vouchers were only prepared on the instructions of a clerk's superior. This allegation has a ring of truth about it in view of the fact that the prosecution was alleging that Salmaya did use other documents with intent to deceive. The Magistrate found that the appellant did not raise this defence until the defence stage. This is patently not so. The defence was raised quite clearly in cross-examination of prosecution witnesses by Mr Zakaria.

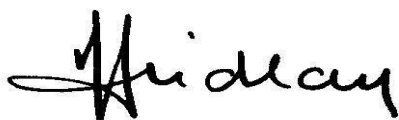
In view of the fact that the prosecutor knew that Salmaya was being tried on similar charges, it is, perhaps, understandable that the prosecution was reluctant to call her as a prosecution witness. I put this to the prosecutor as the reason for not calling Salmaya. Although she denied this, I believe it to be the case. I believe that the prosecution thought, with good reason, that Salmaya could have been an accomplice with the appellant. Nevertheless, this dilemma does not relieve the prosecution of proving its case and, in my view, the prosecution could not do so without the evidence of Salmaya.

The Magistrate relied on the evidence of Suria Fazura Binte Shafie who assisted the appellant to commit this alleged offence. The same applies to the witness Siti Norsinah Binte Matasan. These witnesses were clearly accomplices on the basis of their own evidence.

The appellant's defence was that it was Salmaya who instructed her to complete the form, which she did and she then handed that form to Salmaya, who then completed it by signing it and passing it on for approval. It is so that there was ample evidence to show that the appellant knew the document was false when she handed it to Salmaya, but the prosecution have not proved that there was an intent to deceive her. Indeed, in the circumstances I have already mentioned, it is at least reasonably possible that Salmaya well knew the document was false and there could be no intent to deceive her. If that is so, it was Salmaya who had the intent to deceive Mr Labok and the appellant would be an accomplice to that offence. That, however, is not the charge against the appellant and not one she was called upon to meet.

I have not found this decision to be an easy one. I have no doubt that the appellant has been dishonest in this matter, but she was entitled to be tried on the charge put to her and to have the evidence presented in a proper and fair manner. There were just too many unsatisfactory features in this case to satisfy me that the appellant had a fair trial.

In the result, I find that the conviction is unsafe and unsatisfactory and the appeal succeeds. The conviction and sentence are set aside.



Judicial Commissioner

