Pg Ahmad bin Pg Hj Md Daud

Vs

Public Prosecutor

(High Court of Brunei Darussalam)
(Criminal Appeal No. 29 of 2014)

Pg Hjh Rostaina bte Pg Hj Duraman, J.C.
12th January, 2016.

Appellant convicted of two offences under section 6(a) of the Prevention of Corruption Act Cap.131 and two offences under section 165 of the Penal Code Cap.22 --- whether convictions unsafe and unsatisfactory --- against the weight of the evidence --- whether sentence of 36 months wrong in law and manifestly excessive

Mr. Sheikh Noordin bin Sheikh Mohammad of Messrs Sheikh Noordin Mohammad & Associates for the Appellant.
DPP Shamshuddin bin Hj Kamaluddin for the Respondent.

Cases refer:

Hj Omar Bin Hj Jamil Vs Public Prosecutor, CA No. 38 of 2011.
Pie Bin Chin Vs Public Prosecutor [1985] 1 MLJ 234.

Pg Hjh Rostaina, J.C.:

1. The Appellant was charged with 2 counts under section 6 (a) Prevention of Corruption Act, Cap 131 for accepting gratification and 2 counts under section 165 of the Penal Code, Cap 22 for obtaining valuable things.

The charges are as follows:

1st charge (amended):

That you, sometime in September 2007, at Sungai Tujoh Customs Control Post, Kuala Belait, Brunei Darussalam, being an agent, to wit, Customs Officer with the Royal Customs and Excise Department, did corruptly accept for yourself a gratification, to wit B$100.00 (*Brunei Dollar One Hundred*) from one Kan Tet Hiong (*Malaysian*), as an inducement or reward for forbearing to do an act in relation to your principal's affairs, to wit, to take action against the said Kan Tet Hiong for committing offence under the Customs Order, 2006 relating to fuel smuggling activities, and you have thereby committed an offence under section 6(a) of the Prevention of Corruption Act, Chapter 131.

2nd charge (amended):

That you, sometime in September 2007, at Sungai Tujoh Customs Control Post, Kuala Belait, Brunei Darussalam, being a public servant, to wit, Customs Officer with the Royal Customs and Excise Department, obtained for yourself a valuable thing, to wit B$100.00 (*Brunei Dollar One Hundred*), without consideration or for a consideration which you know to be inadequate from one Kan Tet Hiong (*Malaysian*), who has committed offence under the Customs Order, 2006 relating to fuel smuggling activities, whom you knew to have a connection with the official functions of yourself as Customs Officer whose duty is to enforce the provisions of the Customs Order, 2006 and you have thereby committed an offence punishable under section 165 Penal Code, Cap 22.

3rd charge:

That you, sometime in September 2007, in the vicinity of Boulevard Shopping Mall, Miri, Malaysia, being an agent, to wit, Customs Officer with the Royal Customs and Excise Department, did corruptly accept for yourself a gratification, to wit RM900 (*Ringgit Malaysia Nine*

Hundred) from one Kan Tet Hiong (*Malaysian*), as an inducement or reward for forbearing to do an act in relation to your principal's affairs, to wit, to take action against the said Kan Tet Hiong for committing offence under Customs Order, 2006 relating to fuel smuggling activities, and you have thereby committed an offence under section 6(a) of the Prevention of Corruption Act, Chapter 131.

4th charge (amended):

That you, sometime in September 2007, at Sungai Tujoh Customs Control Post, Kuala Belait, Brunei Darussalam, being a public servant, to wit, Customs Officer with the Royal Customs and Excise Department, obtained for yourself a valuable thing, to wit RM900 (*Ringgit Malaysia Nine Hundred*), without consideration or for a consideration which you know to be inadequate from one Kan Tet Hiong (*Malaysian*), who has committed offence under the Customs Order, 2006 relating to fuel smuggling activities, whom you knew to have a connection with the official functions of yourself as Customs Officer whose duty is to enforce the provisions of the Customs Order, 2006 and you have thereby committed an offence punishable under section 165 Penal Code, Cap 22.

2. In the end result after trial, he was convicted of all 4 charges and a sentence of 18 months imprisonment was passed for each of the charges.

3. It was also ordered that for the 1st and 2nd charge, the sentences were to run concurrently with each other.

4. Similarly, for the 3rd and 4th charge the sentences were to run concurrently with each other.

5. Further, it was ordered that the concurrent sentence of the 1st and 2nd charge were to run consecutively to the concurrent sentence of the 3rd and 4th charge.

6. The total sentence on the Appellant is 36 months imprisonment.

7. He now appeals against both the convictions and the total sentence.

BACKGROUND

8. Briefly, based on a joined operation organised by the Malaysian and Brunei Anti-Corruption agencies known as "Ops Jarum", it led to more than 20 customs officers caught either in hotels at Miri or on the spot at the Sungai Tujoh arrival and exit booths. The Appellant was not amongst those caught red handed. The allegation against the Appellant was only made in the statement recorded from PW4.

9. The Prosecution's case was based on the testimonies of self confessed Malaysian smugglers **PW4 Kan Tet Hiong** and **PW3 Hiew Yen Shang**. By their own admissions, they used nine cars with modified fuel tanks from August 2007 until November 2008 (date approached by the Malaysian anti corruption bureau). They had smuggled large amount of diesel fuel out of Brunei to Miri through the Sungai Tujoh Customs Control post and sold it for undisclosed profits to Timber Operators and Oil Palm Companies in Sarawak.

10. The Prosecution had called for five witnesses. They were the Customs Examiners PW1 and PW2; the Investigating Officer PW5; and the two main witnesses, the two smugglers PW3 and PW4.

11. The Appellant was a Customs officer holding the post of Acting Superintendent from 2004 to 2008 with the Royal Customs and Excise Department. He was stationed at the Sungai Tujoh Customs Control Post, Kuala Belait. He was with the said department since 1985. His duties included banking monies and issuing and signing customs declarations forms. He was also in charged of supervising junior customs officers.

12. The charges of which he was convicted alleged that he corruptly accepted gratifications in the form of money (1st and 3rd charge) and had received a valuable thing (2nd and 4th charge) as an inducement or reward not to take any actions against PW4 Kan Tet Hiong, in relation to his fuel smuggling activities on two separate occasions.

13. After trial the Senior Magistrate made her observation, gave her reasons for convicting the Appellant and for imposing the sentences as she did.

14. I made the general observation that I cannot interfere with the findings of fact by the Senior Magistrate, who had the opportunity of seeing and hearing the witnesses and having a complete overview of the evidence, unless it is apparent that she made some error.

15. The Appellant advances 7 grounds of appeal against convictions. It is also to be noted that most of the points submitted by Mr S. Noordin are I believe to be inter-related. For further clarity they are found in the Appellant's Bundle of Submissions on Appeal against convictions and sentence.

I will deal with the Appellant's grounds of appeal in turn.

Grounds 1, 2, 3 will be dealt with together.

16. It was submitted by Mr S. Noordin that the Senior Magistrate had allowed the evidence of **PW1 Siti Nornazirah binti Md Adzman** and **PW2 Noralizah Binti Tarip**, who were both Customs Examiners with the Royal and Customs Excise Department.

- That all the 4 charges relate to offences in 2007. Whereas both PW1 and PW2 only started working under the Appellant's supervision in 2008.
- There was no evidence to suggest that either PW1 or PW2 were present or witnessed the Appellant did any of the offences. There was no evidence to show that either of them was in Miri in respect of the 3rd and 4th charge.
- That the intention of the Prosecution in calling both PW1 and PW2 was to show that the Appellant was more likely than not to have accepted bribes.

17. He also submitted that the Senior Magistrate was wrong in finding the evidence of both PW1 and PW2 corroborated the evidence of PW3 and PW4.

- There was no evidence to suggest that they knew and had witnessed the Appellant accepting the bribes money or valuable things as referred in the charges.
- They only came to know or work with the Appellant in 2008, whereas the charges relate to the year 2007.

- At no time did they ever tell the court that they knew PW3 and PW4.

18. He further submitted that the Senior Magistrate findings were not supported by preponderance of evidence. She was wrong to find consistency of the prosecution witnesses.

    - That PW3's evidence was essentially heresay and not from his own personal knowledge. He had also suggested reasons why PW3 was making up evidence.
    - That PW4 himself was confused as to which car was used on the day he gave money ($100) to the Appellant.

19. In response, DPP Shamshuddin for the Respondent, submitted that the Prosecution did not seek to admit their evidence under the Similar Fact Evidence rule. It was not considered by the prosecution or the Senior Magistrate.

20. In their testimonies both PW1 and PW2 had admitted that the Appellant was one of their In-Charge officers back in 2008. They were stationed at the Sungai Tujoh Customs Control Post and their primary duty was to check vehicles entering and leaving Brunei. They admitted that they were new customs examiners and accepted the bribe money from the Chinese men (fuel smugglers) as advised by the Appellant. They admitted they had allowed the fuel smugglers to enter and exit Brunei without having the cars inspected.

21. As to grounds 2 and 3, DPP Shamshuddin submitted that PW4 informed the court that he only stopped his fuel smuggling activities in November 2008. He submitted that the evidence of PW1 and PW2 corroborated PW3 and PW4 evidence that the Appellant had advised PW1 and PW2 to accept the money. (pg. 27 judgment)

22. During that time (in 2008) PW1 and PW2 were already working at the Customs department. Their evidence corroborated the testimonies of PW3 and PW4 that they paid some money to the customs officers on duty as suggested by the Appellant.

23. PW4 had informed the court that when he handed the money to the Appellant in September 2007, they had discussed his plan to further his

fuel smuggling activities as long as they pay the customs officers on duty at the customs booth. This evidence was affirmed by PW3.

24. Both, PW1 and PW2 testified that it was the Appellant who had advised them to accept the money from Chinese man (fuel smuggler) which they later knew was bribe money for fuel smuggling.

25. I accept the Senior Magistrate did not consider and did not admit PW1's and PW2's evidence on the Similar Fact Evidence rule. Instead, she had considered it as evidence corroborating the testimonies of the Chinese men (fuel smugglers).

26. I accept that their evidence is irrelevant to the charges but the Appellant is not prejudiced by their admission of the evidence because she did not find him guilty of all 4 charges by relying on that evidence.

27. She had relied on that evidence to corroborate the testimonies of the smugglers. The corroboration was in giving of the money.

28. As to the consistencies of the witnesses the Senior Magistrate was in a position to have heard and seen the witnesses giving their evidence. I found she did assess their credibility. She had accepted PW4's explanation as to why he was confused. She did not accept the Appellant as a credible witness.

29. By saying this I have also covered the grounds in 5 and 6.

30. Under ground 4, Mr S. Noordin submitted that the investigation done into the allegations against the Appellant was biased. He was denied of the opportunity of producing certain documentary evidence, which was crucial to his defence such as:

- Non-production of the PW4's 2007 passport; to show his whereabouts especially on 12-13 September 2007 and 22 September 2007 (dates when the Appellant was in Miri). And if PW4 was indeed in Miri as well on those dates.

  That it would be easy for PW5 to obtain such entries from the Malaysian Immigration authorities since the Malaysian Anti Corruption Commission was also helping in the investigations.

- Non-production of the duty roster and the log book had deprived the Appellant of crucial documents for his defence.

31. PW4 had explained that he had lost his passport when he moved house and given that the pages of that missing passport were already full, he decided to have it replaced. The Senior Magistrate accepted this explanation.

32. She had also accepted that PW4 never denied that he smuggled fuel out of Brunei almost every day in the month of September 2007. (pg. 28 judgment). She had accepted that PW4 had handed over money B$100 and RM900 over to the Appellant.

33. PW5 admitted that no inquires were made on any report being lodged on the lost passport nor any formal requests made with the Malaysian authorities on PW4 travels between Brunei and Miri.

34. The Senior Magistrate had accepted PW5's evidence (pg. 28 judgment) that PW5 did not withhold any documents from the Appellant to the extend that some of the documents that the Appellant claimed to be withheld were produced in court and was put to PW5.

35. I accept that the non-production of any documents was not done intentionally.

36. Under ground 5, Mr S. Noordin submitted that the Senior Magistrate was wrong to find the Appellant was on duty in the month of September 2007 based on the testimony of PW5.

- The implication from this is that just because the Appellant was working or on duty in the month of September 2007, then it must follow that PW4 was telling the truth.

- He submitted the Senior Magistrate finding was seriously flawed because there were entries in the duty roster that was produced [ext P8] that showed days when he was off duty.

- That there were serious gaps in the prosecution's case. The missing duty roster, failure of PW5 to obtain PW4's passport entries into Brunei for the same month.

- It was not for the Appellant to fill in these gaps to show that he was off duty or not working on certain dates but for the prosecution to prove by evidence that be was on duty on particular days.

37. DPP Shamshuddin submitted it was not the prosecution's case that the Appellant was on duty every single day in September 2007. The fact he was on duty on some of the days supported PW4's testimony that he was stopped by the Appellant at the control post.

38. The Senior Magistrate did not based her findings only on PW5's evidence but also on the evidence of PW4. PW4 said, the Appellant stopped him at the Sg Tujoh Customs Control post not long after the Malaysian National Day, where he had accepted B$100 from PW4. This was the first occasion.

39. PW4 also testified that a week later (the second occasion), the Appellant had met with him and PW3 in Miri.

40. She was entitled to accept the evidence of these two witnesses.

41. Under ground 6, Mr S. Noordin submitted that there was no basis upon which the Senior Magistrate could have found the Appellant's defence was one of bare denial as she had stated at pg. 25 of her judgment, *"the defendant's defence is one of bare denial and that the offence did not take place"*.

- There was no evidence to show any of PW4's Brunei registered cars was registered in the Appellant's name unlike the other customs officers.

- The Appellant was not caught on CCTV or implicated during the sting operation.

- In PW4 initial evidence, he had informed the court that when he gave the bribe money of B$100 (1st and 2nd charge), he was using car KL5198. However, KL5198 was only registered on 1 Nov 2007. It could not have been used in September 2007 and it was registered in the name of the brother of another customs officer.

- The Appellant had denied accepting the B$100 and RM900 from PW4 Ah Kan.

- The Appellant also denied he met up PW4 and PW3 in Miri.

- That the Senior Magistrate ought to have given the Appellant the benefit of the doubt especially in view he was deprived of crucial evidence such as PW4's passport, custom log book and duty roster.

42. Mr S. Noordin submitted that PW4 was caught lying on this issue and the Senior Magistrate should have brought into question PW4 whole credibility as a witness. That PW4 is a cunning and calculating person and could not have been mistaken about which vehicle he had used.

43. That the Senior Magistrate was wrong in finding the Appellant's defence was bare denial and accepted the testimony of PW4 despite the inconsistencies in his testimony.

44. I do not think there is merit in this argument. The Appellant was given the opportunity to cross examined PW4. PW4 was recalled and he explained he was not lying instead he was confused because he had used so many cars in his fuel smuggling and he had to recall corrupt incidents involving more than 20 customs officers. Even from the beginning PW4 had testified that the Appellant had obtained bribe money from him on 2 separate occasions in the amount of B$100 and RM900. He even recalled the Appellant's badge number as 241.

45. In ***Pie bin Chin Vs Public Prosecutor*** **(1985) 1 MLJ 234,** forgetfulness and failure to recall exactly certain events which did not seem to be important to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief.

46. The Senior Magistrate had accepted his explanation.

47. The Senior Magistrate was perfectly entitled to come to this conclusion. Notwithstanding the Senior Magistrate made a finding that the Appellant's defence was a bare denial, she did consider the evidence by him (Appellant), evaluated it and came to a finding that she did not believe him.

48. Under ground 7, it was submitted that the Senior Magistrate had not correctly and properly exercised her discretionary power **under section 158 of the CPC, Cap 7** to amend the charges against the Appellant by amending the original dates of the offences from *"sometime in December 2007"* to *"sometime in September 2007"*. That she ought to have found a reasonable doubt in the prosecution case on all the 4 charges and give the benefit of such doubt to the Appellant.

- That the amendment of the dates served to compound the various gaps and inconsistencies in the prosecution's case. PW4 could not recall the date when he gave the money to the Appellant (pg. 25 judgment)

- There was a lack of supporting documents and records to show PW4's entries into Brunei for the month of September 2007.

49. At the time PW4 gave his evidence he could not recall the exact date the offence took place but he recalled the month.

50. The Senior Magistrate was entitled to accept this and she did accept it. She stated, *"the fact remains is that Ah Kan remembers that the incident did take place and how it took place."*

51. Then at pg. 7, 26 of her judgment she described what he had said further. The 2 separate occasions took place in the month of September 2007. He remembered this because the first incident was not long after the Malaysian National Day and the second incident was one week later.

52. Therefore, from the beginning of the prosecution's case, PW4 had stated that the offences occurred in September 2007. The question is whether it was prejudicial to the Appellant to allow this amendment.

53. The amendment to the charge sheet normally involved the exercise of discretion on the part of the trial magistrate.

54. This is provided for **under section 158 of the Criminal Procedure Code Cap 7.** It provides:-

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

55. In light of her findings, she had amended the charges. The Appellant himself had engaged two different Counsels (Mr Hj Zulsukarla and Mr Christopher Sawan) who represented him from the beginning but up until the prima facie findings. There was no objection raised by neither of them nor by the Appellant himself during the trial.

56. In my view the approach taken by the Senior Magistrate was a sound approach. I am satisfied the Appellant was never misled nor prejudiced. I am satisfied that the Senior Magistrate on the evidence before her was justified in finding the Appellant guilty of all the offences.

57. Accordingly, the appeal against the convictions is dismissed.

Grounds of Appeal against Sentence

58. I now come to the appeal against the sentence in all the 4 charges.

59. On the appeal against sentence, Mr S. Noordin submitted that the total sentence of 36 months imposed on the Appellant was clearly wrong in principle and manifestly excessive.

60. That the Senior Magistrate did not take into account the delay in bringing the prosecution and convictions of the Appellant. That the charges were for the year 2007 and was only produced in court some 3.5 years later (2011.) It took from 2007, 6.5 years to be disposed off (2014).

61. He further submitted it did not matter what had caused the delay, as long as it was not caused by the Appellant himself and made reference to the case of ***Hj Omar bin Hj Jamil Vs Public Prosecutor*** **(Criminal Appeal No. 38 of 2011)**.

62. He submitted that the Senior Magistrate had failed to give sufficient weight to the Appellant's mitigation.

63. He suggested that a sentence of 12 months would be sufficient in light of the Appellant's degree of criminality and various mitigating factors.

64. I am only able to interfere with the sentence passed by the trial court if the Senior Magistrate acted on a wrong principle or the sentence passed was manifestly excessive.

65. I am not persuaded that the Senior Magistrate had failed to take into account the delay in bringing the case for prosecution.

66. In her 3 paged Sentencing Order, she had accepted the fact that a large number of Customs officers were investigated (around 20 customs officers), charged with corruption and produced in court. This differs with the facts of the case in ***Hj Omar bin Hj Jamil Vs Public Prosecutor*** **(Criminal Appeal No. 38 of 2011).**

67. In her grounds for sentence, I found she did take into account and gave sufficient weight to the Appellant's mitigating factors when assessing the sentence such as his clear record, long service with the government, his services to charitable causes and others.

68. There were also aggravating features in this case that could not be ignored. That the Appellant was a senior public servant in the rank of Acting Superintendent and he has been in the service of the Royal Customs and Excise Department since 1985 (23 years). He was tasked with enforcing the law but instead he took bribes and allowed fuel to be smuggled out of Brunei. He had also encouraged his junior officers to accept the bribes.

69. It is observed, that corruption offences are treated by the courts as serious in nature as reflected in the penalties.

70. A conviction **under section 6 (a) PCA, Cap 131** attracts a maximum penalty of, fine of $30,000 and imprisonment for 7 years. Whereas, **under section 165 of the Penal Code, Cap 22**, it attracts a maximum penalty of, imprisonment for 7 years and with fine.

71. I bore in mind that the findings of convictions and sentenced passed took place after a trial was conducted.

72. If there was a plea of guilty, a reduction in sentencing is a matter for the court's discretion. According to the circumstances in which the plea is offered, it may attract no discount or a discount of up to third, save where an accused person gives evidence against his colleagues, when a somewhat higher discount may be allowed.

73. In passing sentence, it is necessary, for a court not only to look at the seriousness of a particular offence, but to assess the totality of the sentences which are imposed and be satisfied that it was not unreasonable.

74. In this case, I do not think there is any room for criticism of the individual sentences of 18 months each for the two corruption charges and 18 months each for the two charges under obtaining of a valuable thing without consideration. She had ordered the concurrent sentence of the 1st and 2nd charges were to run consecutively to the concurrent sentence of the 3rd and 4th charges.

75. I found that the Senior Magistrate was correct in ordering for consecutive sentences because the offences took place over two different occasions and at two different places.

76. I do not think that in the circumstances, they can be said to be manifestly excessive.

77. I conclude that there is no reason on which I could interfere with her conclusion.

78. I am satisfied that the sentences are appropriate individually and in totality. The effect of the totality of the sentences being 36 months imprisonment.

79. For the reasons stated above both the appeal against convictions and appeal against sentence are dismissed.

PG HJH ROSTAINA BTE PG HJ DURAMAN
Judicial Commissioner
12th January, 2016