Zamri Bin Hj Jaludin
Pg Hj Baharuddin Bin Pg Hj Md Tahir

AND

Public Prosecutor

(High Court of Brunei Darussalam)
(Criminal Motion No. 29 of 2020)

Criminal law – Section 165 and section 34 of the Penal Code – sufficiency of evidence of source of money – meaning of common intention

Edward Timothy Starbuck Woolley.
Date of Hearing: 7th March, 2022.
Date of Judgment: 15th March, 2022.

Mr Anlan Hee and Ms Lim Li Chyi (M/S Yusof Halim and Partners) for Appellants.
Mr Shamsuddin Bin Hj Kamaluddin for Respondent/Public Prosecutor.

Cases cited:
Too Yin Sheong v Public Prosecutor [1998] 3 SLR (R) 994
Mahbub Shah v King-Emperor AIR [1945] PC 118
Lee Chez Kee v Public Prosecutor [2008] 3 SLR (R) 447
PP v Alinsug Geb Urbasik Axel & Amjad Nawaz [1995]
PP v Rosman bin Hj Abd Rahman and Razali bin Hj Abang [1997] 1 JCBD 302

JUDGMENT

Woolley, J.C.:

The Appellants in this matter appeal against their conviction and sentence on a charge under section 165 of the Penal Code, Cap 22, read with section 34 of the same, on 14 July 2020 by Magistrate Hazarena bte POKSJ DP Hj Hurairah.

They were also charged under section 6(a) of the Prevention of Corruption Act, Cap 131 but were acquitted of this charge. The Public Prosecutor appealed against this acquittal but has since withdrawn that appeal as well as an appeal against sentence.

The charge under which they were convicted reads as follows:

That both of you, on 30th day of August 2011 sometime in the morning, at Maju Motors Sdn Bhd, Kampong Beribi, in Brunei Darussalam, being agents, to wit, Planning Inspectors with the Town and Country Planning Department, Ministry of Development of the Government of Brunei Darussalam, did in furtherance of your common intention accept a valuable thing, to wit, money amounting to BND$90.00 cash (Ninety Brunei Dollars) without consideration or for a consideration which you both knew to be inadequate from one Chan Key Hong [Brunei NRIC: 00-255522(Y)], whom you both knew to have a connection with your official functions as Planning Inspectors at Maju Motors Sdn Bhd and both of you have thereby committed an offence punishable under section 165 of the Penal Code, Chapter 22, read with section 34 of the same.

Before looking at the grounds of appeal I think it would be useful to consider some of the facts either found by the learned magistrate or not disputed and on which the conviction was based.

It is not in dispute that the Appellants are planning inspectors with the Town and Country Planning Department and, on the morning of 30 August 2011 visited Maju Motors with PW1 (Muhammad Rifaie bin Zaini), another planning officer who was conducting an inspection of a workshop for the first time and who was accompanied by the Appellants, his senior officers, to advise him.

In the course of the inspection the matter of the measurements of an awning was raised by PW1 and made known to the staff of Maju Motors, but they were told by PW4 (Mastikawatey bte Hj Muntol), a staff member of the company, that the awning had been approved. In the course of this PW4 had contacted her employer PW2 (Chan Key Hong) who was not on the premises but told her that he believed that the awning had been approved. During the same telephone call he instructed PW4 to give the planning officers B$90.00 (a) so they would leave and (b) as "sedekah" for Hari Raya. She then took B$90.00 from the petty cash and placed it in a white envelope. She then came out of the office and, saying that it came from her boss, gave it to the 1st Appellant (Zamri bin Hj Jaluddin) who placed it in his file without opening it. He gave evidence that he thought it contained the written approval for the awning. PW1 saw the envelope being given and placed in the file and the 2nd Appellant (Pg Hj Baharuddin bin Pg Hj Md Tahir) saw him holding it.

The planning officers then went to another premises, QAF Motors, and carried out an inspection there. After that was completed and before handing the file regarding Maju Motors to PW1, the 1st Appellant opened the envelope and discovered the B$90.00 in B$10 notes. Keeping B$50.00, he gave the 2nd

Appellant B$40.00, of which he in turn gave B$20.00 to PW1. Apparently, there was no discussion about where the money came from. There is no evidence that the 1st Appellant knew what was in the envelope prior to opening it.

The first ground of appeal is that there was insufficient evidence on which the learned magistrate could find that the B$90.00 had been received by the 1st Appellant from Chan Key Hong. It was pointed out on behalf of the Appellants that there was no evidence to dispute that of the 1st Appellant that he did not know what the envelope contained, but thought it was the awning approval. Further, there was no evidence that he knew that PW4 was speaking to Chan or what he was saying. However, the evidence from PW4 was that she had said, when handing over the envelope, that it was from her boss. It is therefore likely that, when the 1st Appellant eventually opened the envelope and found the money, he could well have known it came from Chan. As to the 2nd Appellant, there is no evidence that he knew where the money had come from. Mr Shamsuddin for the Respondent can only submit on this that he must have known it came from Maju Motors as that was the only place they were inspecting that day. That is not correct, as it is not disputed that he was only given the money after also visiting QAF Motors, and although he saw the 1st Appellant with a white envelope at Maju Motors, there seems to be no evidence that he was aware the money he was given came from it. This will also be relevant when I look at the issue of common intention later, but for the moment, certainly as far as the 2nd Appellant is concerned, I agree with the Appellants that there is little or no evidence of where the B$40.00 he was given came from.

The second ground is that the charge should not have been framed with the words "*without consideration or for a consideration which you both knew to be inadequate*" as these constitute two different offences and that the learned magistrate was wrong to make the finding she did based on this wording when she found that "*There is no evidence to suggest that consideration was given for the monies or the consideration was inadequate*".

I do not agree with the Appellants' submission that there are two separate offences of receiving money without consideration and receiving money for inadequate consideration. Whether there is consideration or whether there is inadequate consideration are two limbs of proof of the offence, not two separate offences, and the prosecution were quite entitled to phrase the charge as they did. As to the learned magistrate's finding, while it might have been more felicitously worded, her meaning is clear, that there was no evidence of any consideration at all whether inadequate or otherwise.

The last, and main, ground of appeal raised by the Appellants is the issue of common intention.

Section 34 of the Penal Code reads as follows:

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone".

What constitutes common intention has been considered in a number of cases, some of which have been referred to by the Appellants. The first of these is *Too Yin Sheong v Public Prosecutor* [1998] 3 SLR (R) 994 where it was held that common intention implies acting in concert and the existence of a pre-arranged plan, and the plan must precede the act constituting the offence. This followed a Privy Council case *Mahbub Shah v King-Emperor* AIR [1945] PC 118 and the same principle was applied in the case of *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR (R) 447 which confirmed that the similar section of the Penal Code there required proof that the criminal act was done pursuant to a pre-arranged plan before a common intention could be inferred.

The learned magistrate did not deal with this at trial. This is understandable as the question of common intention was apparently not raised before her and there was no reason to consider it an issue. However, the Appellants are perfectly entitled to raise it now.

What then constitutes the criminal act here? It certainly cannot be the receipt of the envelope at Maju Motors as there is no evidence that the 1st Appellant knew what it contained, and there is evidence that he thought it was the awning approval. It can only have been when the envelope was opened by him, he saw the money inside, and decided to keep it. At this stage the 2nd Appellant had had no involvement with the proceedings at all. His only part in this was when he was handed B$40.00 by the 1st Appellant with apparently no explanation.

Mr Shamsuddin has referred me to two Brunei cases on the matter of common intention. The first of these is *PP v Alinsug Geb Urbasik Axel & Amjad Nawaz* [1995] JCBD where Roberts CJ held that section 34 can be established by:

- *the presence of the Defendant at or near the commission of the offence;*
- *the participation of the Defendant in the commission of the offence;*
- *the existence of common intention.*

In *PP v Rosman bin Hj Abd Rahman and Razali bin Hj Abang* [1997] 1 JCBD 302, the Hon Judge Hayati further said:

> "*Common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from the conduct or from circumstances or from any incriminating facts.*"

Neither of these assist me in the circumstances here. It is clear that there has to be some evidence of at least an arrangement between the Appellants before any criminal act is committed. There is no evidence here of any arrangement or agreement at all before or after the discovery by 1st Appellant of the contents of the envelope. It was accepted by the learned magistrate that the giving of sedekah at or near Hari Raya is a customary practice, even if it can constitute an offence if accepted in connection with one's employment. As the 2nd Appellant was well aware of this practice and gave evidence that he did not then know it was against the law, in the absence of any other explanation given at the time, I am not satisfied that it has been proved that the only explanation he could have had for the money was that it came from Chan and Maju Motors.

I am therefore of the view that, not only was there no evidence of a common intention here, it is not clear that the 2nd Appellant knew that an offence was being committed at all.

To establish this charge against the Appellants the prosecution must prove every element of the charge as put to them. This they have failed to do here and for this reason alone I would allow this appeal against conviction in respect of both of them. But I would further add that, in respect of the 2nd Appellant, I am far from satisfied that it has been proved beyond reasonable doubt that he knew where the money came from and for that reason alone the charge against him cannot stand. I therefore allow the appeal and set aside the conviction and sentence in respect of both Appellants.

EDWARD TIMOTHY STARBUCK WOOLLEY
Judicial Commissioner