

Nur Era Kasmiran Binti Kamis

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 40 of 2015)**

Dato Seri Paduka Hj Kifrawi, C.J.
30th November, 2015.

Criminal Procedure – retraction of plea of guilty – principles applicable – Section 175 of the Criminal Procedure Code.

Hj Mohammad Daud Bin Hj Ismail (M/S Daud Ismail and Company) for Appellant.
DPP Emily Goh for Public Prosecutor.

Cases cited in the Judgment:

Jee Schow Kung v Public Prosecutor (1979) (1965-1986) 1 BLR
Peterus Shak v Public Prosecutor (1997) JCBD 174

J U D G M E N T

Dato Seri Paduka Hj Kifrawi, C.J.:

1. The Appellant was charged in the Magistrate's Court as follows:-

Charge

That you, on the 3rd October 2015, did abet one Mohammed Yazit Bin Sabagyo [Malaysian Identity Card No: 781025-13-5409] to enter Brunei Darussalam without being in possession of a valid pass lawfully issued to him in contravention of Section 6(1)(c) of the Immigration Act, Chapter 17, to wit, you provided him with a Malaysian Passport No. K0335344 bearing the name of one Mohamad Nazrun Bin Kamis and that you have thereby committed an offence under Section 55(1)(b) of the Immigration Act, Chapter 17 and punishable under Section 55(1)(b)(ii) of the same.

Penalty
Section 55(1)(b) of the Immigration Act, Chapter 17 Imprisonment for a term not less than 2 years and not more than 7 years and whipping with not less than 3 strokes cumulatively. Section 55(3A) – where a person is guilty of an offence under this Act which a mandatory sentence of whipping is prescribed and by virtue of section 258 of the Criminal Procedure Code (Chapter 7) he shall not be punishable with whipping, that person shall, in lieu of whipping, be liable on conviction to a fine not exceeding \$6,000. Section 258 of the Criminal Procedure Code, Chapter 7 – No sentence of whipping shall be executed by instalments, and none of the following persons shall be punishable with whipping: (a) Females (b) Males sentenced to death (c) Males whom the Court considers to be more than 50 years of age.

2. The Appellant (D2) pleaded guilty. The following Statement of Facts were tendered:-

Statement of Facts

1. Both D1 and D2 are Malaysian Nationals.
2. On 3rd October 2015 at about 1704 hours, both Defendants were heading to Miri from Limbang, Sarawak via Kuala Lurah using a white Toyota Vios car bearing registration number QMY3766.
3. Upon entering Brunei Darussalam at the Immigration counter booth of Kuala Lurah Control Post, two passports were given to the Immigration Officer on duty, one of which is a Malaysian passport belonging to one Mohamad Nazrun bin Kamis with passport no. K0379092, whom D1 had falsely represented himself as the said Mohamad Nazrun bin Kamis to the Immigration on duty.
4. Investigation revealed that D1's passport had expired and had left it in his home in Miri, Sarawak.
5. Investigations also revealed that D1 had used the said passport in which he was successful in falsely representing himself to be one Mohamad Nazrun bin Kamis to the Immigration officer on duty when entering Brunei Darussalam via Kuala Lurah Immigration Control Post on 3rd October 2015 at 1704 hours and when exiting Brunei Darussalam via Sg Tujoh Immigration Control Post on 3rd October 2015 at 1920 hours.
6. Upon exiting Brunei via the Sg Tujoh Immigration Control Post on 3rd October 2015, the Immigration Officer at the Immigration Counter booth suspected that one of the passports

that was presented, a Malaysian passport bearing passport no K0379092, under the name of Mohamad Nazrun bin Kamis did not belong to D1 because when D1 was asked the Identity Card number and date of birth of the passport holder, Mohamad Nazrun bin Kamis, D1 could not answer them. D1 and D2 were then detained for further investigations.

7. Investigations conducted by the Immigration personnel revealed that the passport that D1 had used belongs to D2's brother. Knowing that D1 did not have a passport, D2 allowed D1 to use the said passport to travel to Miri from Limbang. Both D1 and D2's intention to go to Miri was because D1 had to manage his restaurant business in Miri.
 8. D2 had assisted D1, by providing D1 with the said passport, to falsely represent himself to be one Mohamad Nazrun bin Kamis to the Immigration Officer on duty when entering Brunei Darussalam via Kuala Lurah Immigration Control Post on 3rd October 2015 at 1704 hours and when exiting Brunei Darussalam via Sg Tujoh Immigration Control Post on 3rd October 2015 at 1920 hours.
 9. D1 admitted in his statement that he had used to someone else's passport to enter Brunei Darussalam on 3rd October 2015.
 10. D2 admitted that he had assisted D1 to enter Brunei Darussalam without a valid pass which was lawfully issued to D1 by providing the Malaysian passport under the name Mohamad Nazrun bin Kamis for D1 to use to travel to Miri from Limbang, Sarawak.
 11. On record, both D1 and D2 are first offenders under the Immigration Act.
3. The Appellant was convicted on her own plea of guilty under Section 55(1)(b) Immigration Act Chapter 17 on the 7th October 2015 and was sentenced to two (2) years imprisonment and was fined B\$800.00 before the Honourable Magistrate Madam Azrimah Hj Abd Rahman. The Appellant paid the fines. After the sentencing, the Appellant applied to retract her plea of guilty. The Magistrate rejected her application because the Appellant applied after sentence was passed.
- The Appellant have filed Notice of Appeal against the Conviction and Sentence on the 13th October 2015.
4. The Appellant appealed on the following grounds:
- (i) The Magistrate has erred in law in accepting the plea of guilty of the Appellant. The Statement of Facts disclosed the Appellant has committed another offence and not as charged.
 - (ii) The Statement of Facts was not read and explained to the Appellant. The Appellant should be allowed to retract her plea. From the Notes of Proceeding there was no record at all that the Statement of Facts has been read, explained and agreed without qualification by the Appellant.

5. The Notes of Proceeding are as follows:

“

**Magistrate's Note
(Criminal Case)**

MCCT/BSB/1890/2015

Magistrate's Court at Bandar Seri Begawan

Name of Accused : 1. MOHAMMAD YAZIT BIN SABAGYO [M.36 YRS]
2. NUR ERA KASMIRAN BINTI KAMIS [F.31 YRS]

Charge : As per attached Charge Sheet

Hj Sufri bin Asmadi for PP
D1 and D2 in person and unrepresented

P/O : Apply for charges to be read and plea to be recorded.

Court : Charges and penalty read and explained to D1 and D2 in Malay.

1st Charge : D1 pleads guilty.

2nd Charge : D2 pleads guilty.

D1 : Understood nature and consequences of the plea, therefore S.175 complied with.

D2 : Understood nature and consequences of the plea, therefore S.175 complied with.

P/O : Tender Statement of Facts.

Facts : As per attached Statement of Facts
D1 – Mitigation : I apologize. I pray for forgiveness. I had to go to Miri for work and to see my children. I travelled to Limbang using airplane. When I arrived at the airport, the ticket counter was closed. I have a restaurant in Miri and I needed to go urgently to Miri on that day in order to close my restaurant. I do not have any staff to help me close the restaurant. I pray for us not to be imprisoned and we'll accept fine. I have 2 children aged 5 and 11. I am a divorcee and I have to take care of my children. I've a lot of obligations such as settling my bank account. I promise not to commit the same offence.

D2 – Mitigation : Pray for forgiveness for the offence I have committed. I am a government servant, a teacher. If I were to be sentenced to

imprisonment, I will most likely lose my job and it will be hard for me to seek employment. I need to work because I have a lot of commitment. I have to pay for car loan, investment and personal loan and responsibility to my family. If I lose this job, I will be in financial burden and I do not want my family to settle my debts. That will burden my family. I am the eldest child and I am supporting my siblings who is still schooling and I will have to support family. Most importantly, I need my employment. I pray for reduction in the sentence. If possible I'll like to be sentenced to a fine not imprisonment. If there is any substitute to the sentence for me to continue with my life and work and to enable me to pay the fine.

Court

I will defer the sentence to 7/10/2015 at 2.00 p.m in light of the seriousness of the penalty in this case, I hereby order for D1 and D2 to be remanded at Jerudong Prison.

SIGNED
[AZRIMAH HJ ABD RAHMAN]
Magistrate
5/10/2015 "

6. As regards the Statement of Facts did not disclose the offence as charged, I agree with the DPP para 10 of the Facts confirm facts which support the charge.

As regards the ground that there was no record to state that the statement of facts had been read, explained and agreed without qualification by the Appellant, I can confirm that there was no such record in the typed notes of proceeding signed by the Magistrate. The DPP informed the court that the handwritten notes by the Magistrate did state that the statement of facts was admitted by the Appellant (D2), but this was omitted in the typed written notes which was given to the parties. There is no evidence adduced to explain this omission.

I, however, noted that the Magistrate recorded before the tendering of the Statement of Facts, that the Appellant (D2) understood the nature and consequences of the plea and therefore had complied section 175 of the Criminal Procedure Code.

Section 175 of the Criminal Procedure Code states:

'175 (1) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charge or claims to be tried.

Conviction on plea of guilty

(2) If the accused pleads guilty to a charge whether as originally framed or as amended under section 178 the plea shall be recorded as nearly as possible in the words used by him and he may be convicted thereon:

Provided that before a plea of guilty is recorded the Court may hear the complainant and such other evidence as it considers necessary and shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.'

The mere fact that the Magistrate noted down that 'Section 175 of the CPC complied' in the notes of proceeding, in my view, would not be conclusive to show that the Appellant had understood the charge and consequences of the plea of guilty.

I do not think the Appellant understood the consequences of her plea. That was why she pleaded for non-custodial sentence. The penalty for the offence is a mandatory sentence of not less than 2 years and not more than 7 years imprisonment and whipping with not less than three strokes. The Court was likely to send her to prison for a minimum 2 years and a fine not exceeding \$6,000 upon conviction when the Court accepted her plea of guilty. There is no record showing the Court has given her such warning after her plea in mitigation.

In ***Peterus Shak v Public Prosecutor (1997) JCBD 174*** Roberts, C.J. stated'However, where a minimum sentence is prescribed for an offence, as it is in many cases, a defendant ought to be warned that one of the consequences of his plea of guilty will be that at least the minimum sentence will be imposed upon him. In this case, the minimum sentence for the import of a Class B controlled drug was a severe one. No doubt this risk was not appreciated by an unrepresented defendant. If he had known that the minimum sentence was 5 years imprisonment and 5 strokes, it is more than likely that he would not have pleaded guilty.'

This was a case where Roberts, C.J. suggested it would be wise if, in future, Magistrates would consider, when taking a plea of guilty, inserting in the record 'Section 175 CPC complied'.

In ***Jee Schow Kung v Public Prosecutor (1979) (1965-1986) 1 BLR*** the High Court allowed the appeal and stated that the Magistrate who heard the Appellant's plea in mitigation should have allowed the appellant to change his plea. Tailor, J. stated; 'Jee Schow Kung was charged in the Magistrate's Court that he consumed a controlled drug, diamorphine, an offence contrary to s.6(b) of the Misuse of Drugs Enactment 1978. The charge was read and explained to him whereupon he pleaded guilty.

The facts of the case as outlined to the learned magistrate were to the effect that at about 3.15 p.m. on 19th May 1979 the accused was arrested. He was sent to the General Hospital where an examination of his urine disclosed the presence of the drug. That in itself is enough to raise a presumption that the accused had consumed the drug. The facts are set out in the record of the case and immediately thereafter the magistrate carefully noted "facts admitted by accused" and convicted the accused as charged.

If I may pause there for a moment to say that the facts as outlined to the accused were simply that he was arrested, sent to the hospital and the drug was found in his urine.

The accused was heard in mitigation. He told the court that he suffered from a leg ailment and had tried many medicines without success. He said:

"I tried medicine mixed with brandy, it did stop my pain. I have already recovered and have not taken this medicine for one month. When I was examined I was told there was poison in my blood. I have stopped taking medicine and have gone to see a doctor. Whether the medicine I got contained morphine or not, I am not sure. But I agree the chemist report is correct in that the urine contained morphine. From now on I shall see a doctor if my leg gives me trouble. I will stop consuming medicine which may contain poison or drugs. I plead for leniency as this is my first offence."

The accused appealed against his conviction. This is the type of case that so frequently happens: an apparently unequivocal plea of guilty, an admission of the facts but a plea in mitigation which, in fact, is a plea of absence of mens rea. In other words it is a contradiction of the plea of guilty already given. It is a position with which judges are frequently faced and when it does happen it indicates that the plea of guilty was not as unequivocal as it first appears.

It is the duty of a judge to ensure that an accused fully understands the offence with which he is charged; and if after a plea of guilty has been entered and while the judge is still seized of the case an accused indicates that he has not understood the charge or that his plea is qualified, the magistrate ought to explain the effect of what the accused has said and afford him the opportunity to change his plea. This is particularly so where an accused is unrepresented.

In the instant case what the accused said could, if believed, rebut the presumption of consumption and have resulted in his acquittal. Justice would not be done nor seem to be done if the conviction were to stand.

When the learned magistrate heard the appellant's plea in mitigation he ought, as he was still seized of the case, have allowed the appellant to change his plea. I allowed the appeal. I now give my reasons. The case will be sent back to the Magistrate's Court for retrial.'

In my opinion, the noting down of 'Section 175 of the CPC complied' would not be conclusive to show that the Appellant had understood the charge and consequences of her plea of guilty if the Appellant's plea in mitigation indicates she has not understood the charge and penalty or that her plea is qualified. The Courts have to be cautious when dealing with unrepresented Defendants.

7. For the above reasons, I, therefore, set aside the conviction and sentence and would order a retrial before another Magistrate. However, the DPP informed me that she is withdrawing the charge and she has no objection for the Appellant to be discharged amounting to an acquittal. I, therefore, discharge the Appellant amounting to an acquittal. I order for the fine paid to be refunded.

DATO SERI PADUKA HJ KIFRAWI BIN DATO PADUKA HJ KIFLI
Chief Justice

www.judiciary.gov.bn