

Haji Othman Bin Judin

AND

Public Prosecutor

(High Court of Brunei Darussalam)
(Criminal Appeal No. 48 of 2016)

No new point of law, evidence or procedure – not reportable.

Before Judicial Commissioner James Findlay in Court

Dates of hearing: 11 and 15 February 2017

Date of judgment: 18 February 2017

Mr Roy Rajkumar Prabhakaran of Messrs Yusof Halim & Partners for the Appellant.

Mr Christopher Ng for the Public Prosecutor.

Cases cited in the Judgment:

Adimodamin Bin Haji Moktal v Public Prosecutor (Criminal Appeal 7 of 2011)

Esmidade Bin Bujang v Public Prosecutor (Criminal Appeal No. 5 of 2013)

Hj Mohd Seriwan Bin Hj Sulaiman v Public Prosecutor (Criminal Appeal 6 of 2006)

J U D G M E N T

Findlay, J.C.:

The appellant was on 13 December 2016 convicted and sentenced in the Magistrate's Court to a total of 36 months imprisonment on 10 charges under Section 165 of the Penal Code (Chapter 22). The appellant now appeals against the convictions and sentences.

The matter first came before me on 11 February 2017 as an application by the appellant for bail pending appeal. However, the parties agreed it would be convenient to hear the appeal now.

The charges allege that the appellant accepted services and work from various suppliers on his own property without any consideration. There are several suppliers involved. All the charges allege that the defendant accepted a valuable thing between two dates that were far apart; in one case nearly four years. This gives the impression that the prosecutor was not sure when the offence was committed and may be thought to be vague and embarrassing.

The appellant's first ground of appeal is that there was consideration or that the prosecution has failed to prove that there was no consideration.

The first ground of appeal says that the Magistrate erred because he limited consideration to "just payment", meaning only actual payment. Indeed, this is so. Clearly, the Magistrate found there was no consideration because the appellant only made payment for the services and work after the investigation have commenced.

It is not necessary that there should be some immediate or actual payment for services and work for there to be consideration. Indeed, in most ordinary, every-day transactions, there is no such payment or express promise to pay. When I take my vehicle to a garage for repairs or servicing, there is a necessary inference that I have given a promise to pay for the work, even if nothing at all is said about this.

After some discussion, and some pressure from me, Mr Ng conceded that a promise to pay, express or implied, was sufficient consideration. He agreed that the proper issue before the Magistrate was whether or not there was such a promise in these cases. I suppose the corollary to that would be, if such a promise had been made, whether or not, by agreement, the defendant was released from that promise.

So, the situation is that where the appellant requested the suppliers to provide services or work, if there was no expression promise to pay, it would be a necessary implication, or, if one likes, an implied term of an agreement when the supplier agreed to do as asked, that the appellant would pay. It is for the prosecution to prove that there was no such express or implied promise or that the appellant, when making this promise, had no intention of providing this consideration. Equally, it was for the prosecution to prove that, if such a promise had been made, by agreement, the defendant was released from that promise.

The result of this analysis is that the Magistrate misdirected himself on a fundamental issue. He did not direct his mind at all to the real issue.

The question before me is whether this fundamental misdirection should result in the convictions being set aside, and, if so, whether I should consider the prosecution

case afresh and decide if the prosecution has discharged the onus on the issue as I have defined it. If the convictions are not reinstated after further consideration, the question may arise as to whether there should be a retrial.

Mr Ng concedes that, in the light of the fundamental misdirection, the convictions should be set aside, but he argues that I should consider the matter afresh and restore the convictions.

In a written submission, Mr Ng says "It is not denied that the relevant witnesses called by the respondent during trial gave evidence that they were expecting to be paid and that they were not giving their goods and services for free" This concession is rightly made. And, I would add, there was no evidence to contradict what these prosecution witnesses said and no reason to reject their evidence.

Of course, the corollary to this concession is that it must be so the defendant did not say expressly, or by implication convey, that he was not going to pay because if this were so, the suppliers would not have expected to be paid.

There are, in my view, problems when one considers whether or not to consider that matter afresh with a view to deciding whether or not the convictions should be restored.

Firstly, because the prosecution and the Magistrate were focused on whether or not actual payment had been made, there was not a full and proper enquiry into whether or not there was a promise to pay.

Secondly, what evidence do I consider when deciding the matter afresh? Am I bound by the Magistrate's findings of fact? If so, this would not be a reconsideration of the case, but only a partial one. If I am not bound by those findings, what evidence do I consider?

I am bound to say that I am not happy with some of the Magistrate's findings of fact. In one case, he says that the evidence of one prosecution witness "is not to be believed" without giving any solid basis for this conclusion. In two other instances, he rejects evidence that payment was not due as "irrelevant", when this was clearly not so. He also preferred the evidence of one witness against another where the evidence of the preferred witness was, on the record, unsatisfactory.

The Magistrate noted that the defendant elected not to give evidence. He did not note that, in fact, the defendant's case was advanced by the prosecution witnesses. After considering this aspect of the matter, he decided to "draw an adverse inference from the defendant's silence." I do not know what inference that was; the Magistrate

does not say. Certainly, the Magistrate may not draw the inference of guilt on this basis alone. The usual inference in these cases is that the defendant has no answer to the prosecution evidence. That cannot apply here because the prosecution evidence was the defendant's case.

It is so, of course, that, in some cases, it is quite possible to consider a matter afresh. In *Esmidade Bin Bujang v Public Prosecutor* (Criminal Appeal No. 5 of 2013), the Court of Appeal did so, but there the misdirection related to a stay of proceedings and in *Adimodamin Bin Haji Moktal v Public Prosecutor* (Criminal Appeal 7 of 2011) in which the misdirection related to a previous criminal record. In those cases, there was no difficulty in considering the matter afresh. However, in *Hj Mohd Seriwan Bin Hj Sulaiman v Public Prosecutor* (Criminal Appeal 6 of 2006), in which the shortcoming went to the root of the matter, the Court of Appeal did not consider deciding the matter afresh.

In the case before me, where the misdirection goes to the very root of the prosecution, I cannot see any sensible way in which I am able to consider the matter afresh.

It is just possible, I suppose, to consider the matter afresh on the basis of Mr Ng's concession that the suppliers "were expecting to be paid and that they were not giving their goods and services for free." If this is done, there is all the more reason to decline to restore the convictions because this is the defence case and cannot be rejected.

In the result, the appeal succeeds and the convictions and sentences are set aside. There remains for consideration whether or not I should order a retrial if the prosecution so wishes.

A handwritten signature in black ink, appearing to read 'Hidayat', written in a cursive style.

Judicial Commissioner