

PC 5807 Muhd Mu'izwan bin Kamran (D1) Applicant

and

Public Prosecutor

..... Respondent

**(High Court of Brunei Darussalam)
(Criminal Motion No. 25 of 2019)**

Public Prosecutor

..... Appellant

and

**PC 5807 Muhd Mu'izwan bin Kamran (D1) Respondent 1
CPL 4718 Liew Chee Chian (D2) Respondent 2**

(Criminal Appeal No. 7 of 2019)

**Pg DP Rostaina Pg Hj Duraman, J
10th February 2020**

Criminal Law --- Police involved --- voluntarily causing hurt --- contrary to section 323 of the Penal Code, Cap 22 --- Notice of Motion --- leave to appeal against D1's conviction --- Notice of Appeal --- for sentence to be enhanced for deterrent purposes – appropriate sentence

Cases cited:-

*Zulkifli bin Puasa and Others vs PP (1985) 1 MLJ 461
Mohd Shahrin bin Shwi vs PP (1996) 3 SLR 553
PP vs ASP Jokurnain bin Pehin Dato Hj Musa (HCCT No.5 of 1998)
PP vs Othman Hj Saidin (1999) 1 JCB 231
PP vs Insp. Sufian bin Hj Zainal (HCCA No.12 of 2001)
PP vs Loqmanul Hakim bin Buang [2007] 4 SLR (R) 753
Liew Say Koo v PP (HCCA No.3 of 2019)*

DPP Dr Mohd Hussin Ali bin Idris for Appellant/Public Prosecutor.

Pg Muhd Khairul Nizam bin Pg Hj Mohd Yassin of m/s Yusof Halim & Partners for Applicant/Respondent 1 (D1).

Hj Mohamad Rozaiman bin Dato Hj Abdul Rahman of m/s Zico R.A.R for Respondent 2 (D2).

Pg DP Hjh Rostaina, J

JUDGMENT

1. On 28th February 2019, the Magistrate convicted R1 and R2 after trial on the following charges:-

1st charge against D1 only:-

That you, at about 0010 hours on the 14th day of March 2016 in the vicinity of a government office at Jalan Perayaan, Berakas in Brunei Darussalam, did voluntarily cause hurt to one Inayatullah bin Matasin (Male, 21 years old), to wit, by punching and kicking the said Inayatullah and stomping on him multiple times when the said Inayatullah was inside a drain and you have thereby committed an offence punishable under section 323 of the Penal Code, Chapter 22.

2nd charge against D2 only:-

That you, at about 0010 hours on the 14th day of March 2016 in the vicinity of a government office at Jalan Perayaan, Berakas in Brunei Darussalam, did voluntarily cause hurt to one Inayatullah bin Matasin (Male, 21 years old), to wit, by kicking the said Inayatullah and you have thereby committed an offence punishable under section 323 of the Penal Code, Chapter 22.

2. On 5th March 2019, the Magistrate ordered the following sentence: D1: Fine \$2,500 or 3 months' imprisonment in default of payment; and D2: Fine \$800 or 1 month imprisonment in default of payment. He ordered for these fines to be paid by 30th May 2019. Both R1 and R2 have paid their respective fines in full.

General Background

3. The trial involved four policemen (D1 to D4) who **each faced one count under section 323 of the Penal Code, Cap 22**. They were employed with the Royal Brunei Police Force (RBPF) and assigned to the Housebreaking and Car Thefts Unit of the Criminal Investigation Division (CID). They were part of a team of policemen who were accused of voluntarily causing hurt to PW11 namely Inayatullah bin Matasin in the course of arresting him. He had been released on court bail pending sentence after being convicted for several theft offences. As he failed to attend a court proceeding on 10th March 2016, a warrant of arrest was issued against him.
4. The facts revealed that on the evening of 13th March 2016, R1 had received information regarding the whereabouts of PW11. He was told that PW11 would be dangerous as he was armed and under the influence of drugs. That night, all four defendants and other police officers proceeded to the vicinity of the government flats at the Old Airport to observe the area and in order to apprehend PW11. According to R2, D4 told him that the latter saw PW11 below the flats in a car (Ford Figo BS 9133). R2 then ran towards PW11's car and shouted, "Police".
5. Instead of surrendering, PW11 evaded the arrest by proceeding to drive his car and almost ran over R2 who had been yelling several times for him to stop. PW11 sped away

from the area but collided into Cpl 4745 Shuib Miezani's car (Honda Civic BAF 3820). After the collision, PW11 drove for a further short distance and then he fled on foot. R2 and another policeman gave chase. PW11 ran towards the vicinity of the Brunei Research Department (BRD) where he was caught by the BRD's security guards, who then kept him at the BRD's guardhouse. By then, PW11 was visibly weak and exhausted from running. The BRD guards sat him down on the bench and bound his hands behind him and waited for the police to arrive.

6. It is the Prosecution's case that at the time PW11 was under the control of BRD's security guards and showed no sign of resistance when, during the process of arresting him, R1 rushed out from the car he was in and was the first to reach PW11. He then punched PW11 on the face, PW11 then fell to the ground. R1 then punched and kicked PW11 several times. R1 was quickly followed by R2 who also kicked PW11. The assault continued when PW11 was in a drain where R1 stomped on him. The events that transpired at the vicinity of BRD were captured and recorded on the CCTV exhibit P5. As a result of these assaults, PW11 suffered injuries. The extent of PW11's injuries was recorded in two medical reports i.e. exhibits P10 and P20.

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Reason for delay

7. This is an application by R1 seeking leave to appeal out of time against the conviction in charge 1. Before granting leave the Court must be satisfied both that there is a satisfactory explanation for the delay and that the appeal has a reasonably good prospect of success: See *Zulkifli bin Puasa and Others vs PP (1985) 1 MLJ 461*.
8. Counsel for R1 says that R1 felt aggrieved by the conviction and had wanted to file an appeal against conviction within the time frame. However, as he had already paid the fine imposed on him in full, he was prepared to move on with his life, but because the Public Prosecutor had served the notice to appeal against sentence on him, he decided to file this Motion requesting for leave to appeal out of time.
9. The DPP argued that this is not a satisfactory explanation for the delay. There is a delay of more than one month. Further, R1 had legal representation throughout the trial and

knew about the time frame to appeal: See **section 272 of the Criminal Procedure Code, Cap 7**.

10. I agree and I find there is no satisfactory explanation for the delay.

Merits

11. The important question then is whether R1 has an arguable appeal. In essence, Counsel for R1 complained about the Magistrate's findings.
12. Firstly, the Magistrate did not properly consider that the Prosecution had stated in its charge sheet **there were three particulars of hurt** alleged to have been inflicted on the complainant PW11 by R1. There were:- i) punching and kicking PW11; ii) stomping on him several times when he was in the drain; and iii) hitting him with a PVC pipe covered in foam. The Magistrate had only addressed particulars (i), (ii) and not (iii).
13. Moreover, as to particular (ii) above, Counsel says that the Magistrate's finding was inconsistent and that he erred in concluding at **page 7 of his Judgment that:- "PW2 further saw D1 stomping PW11 in the drain"**. He submitted that PW2 never witnessed R1 stomping on PW11 when he was in the drain. All PW2 saw was PW11 either falling or being pushed into the drain. However, at page 5 of his Judgment, the Magistrate had incorrectly stated that:- ***It was PW5, " – not PW2 – " who had witnessed PW11 being lowered into the drain and being stomped on by D1.***
14. Counsel also complained that there was nothing in the Judgment that discusses the relevance of **section 19(2) of the Criminal Procedure Code, Cap 7**. He assumes that the Magistrate had overlooked this.
15. In his submission, Counsel argued that R1's action of using force on PW11 was lawful and necessary as provided by **section 19 (2) of the Criminal Procedure Code, Cap 7**. It was not denied that the CCTV recording showed a police officer assaulting PW11, but he submitted that in the interest of R1's own safety and to prevent PW11 from running away again, R1 was justified in taking PW11 down at the first opportunity, such as by punching and kicking him. And that R1 was entitled to use all means necessary to

effectively arrest PW11, as provided by **section 19(2) of the Criminal Procedure Code, Cap 7**.

16. This provision was also a crucial aspect of R1's defence, given that there was an arrest warrant issued against PW11. PW11 was under the influence of drugs, (Methylamphetamine), at that time a knife was found in his bag after the arrest. He evaded arrest by crashing into a policeman's car and then fled on foot. It is submitted, that when the police arrived at the BRD area, it was not readily apparent that PW11 had been detained or put under the control of BRD's security guards as these guards were not in uniform.

DPP's submission

Particular (iii) in the charge sheet

17. I turn now to particular (iii) in the charge sheet. The DPP disagreed and submitted that during the trial all three particulars of causing hurt as set out in the charge sheet had been properly considered by the Magistrate. That these questions had been raised in the trial and the evidence had been extensively discussed and argued.
18. I agree with the DPP, although the third particular of hitting the victim (PW11) with *the PVC pipe covered in foam* was not mentioned by the Magistrate in his Judgment, it was nevertheless, adduced during the trial and the pipe was exhibit P40.
19. The DPP drew my attention to the case of ***Liew Say Koo v PP (HCCA No 3 of 2019)*** where at pages 10 to 11, DP Steven Chong, C.J. laid out the principles on appellate intervention. In essence, it is not for an appellate court to reassess the evidence and substitute its own view for that of the trial judge.
20. After the trial, the Magistrate made his findings and gave his reasons for convicting R1 (and R2). I make the general observation that I cannot interfere with the findings of fact of the trial Magistrate, who had the opportunity of observing and hearing the witnesses as well as assessing their credibility and who had – which I do not - a complete overview of the evidence. It is not for me to substitute my view of the evidence for the Magistrate's unless it is apparent that he has made some significant error.

21. It was clear from the Magistrate's Judgment that he concluded the particulars of hurt inflicted on PW11 by R1 were (i) and (ii) above.

Was it PW2 or PW5 who saw D1 stomped on PW11 in the drain?

22. Obviously, the Magistrate believed and accepted the testimony of PW5 who witnessed the stomping on PW11 by R1. In particular, he had dealt with it earlier in his Judgment:-

(i) At page 5 that, **"PW5 witnessed PW11 being lowered into the drain and being stomped on by D1"**.

(ii) Moreover, the CCTV footage (Ext.P5), which the Magistrate found was a true and accurate reflection of what happened at the BRD's vicinity, supports the Prosecution's case.

(iii). Further, the Magistrate had concluded that PW2, PW4 and PW5 were present during the fracas at the guardhouse and that their evidence was clear and had withstood the challenge of cross-examination.

23. I am satisfied that when the Magistrate stated that, **"PW2 further saw D1 stomping PW11 in the drain"**, he made a minor typographical error. Clearly, he meant to say, **"PW5 and not PW2"**.

Section 19 of the CPC, Cap 7

24. The DPP submitted in so far as **section 19(2) of the Criminal Procedure Code, Cap 7** is concerned the Magistrate was aware of this provision and had addressed it at page 2 of his Judgment and, despite being aware of the provision, he still convicted R1 (and R2).

25. I agree. In the circumstances as described by the witnesses for the Prosecution, the actions of both R1 and R2 went far beyond what is sanctioned and permitted by **section 19 of the Criminal Procedure Code, Cap 7**.

Conclusion

26. I will not disturb the conviction against R1. For the above foregoing reasons, I find no merits in the appeal and it is dismissed accordingly.

Criminal Appeal No.7 of 2019

27. I now turn to Criminal Appeal No.7 of 2019. The Public Prosecutor is dissatisfied and appeals against the sentence imposed on both Respondents on the grounds that they are manifestly inadequate and do not reflect the standards expected from police personnel.

Penalty

28. The penalty provided for voluntarily causing hurt under section 323 of the Penal Code, Cap 22 is a term of imprisonment, which may extend to 3 years and fine.

Cases

29. The DPP drew my attention to the principles found in several cases of assault by police personnel which emphasize that a custodial sentence should normally be passed. In the case of ***PP vs ASP Jokurnain bin Pehin Dato Hj Musa (HCCT No.5 of 1998)***, the Defendant was initially charged under section 304 (2) Penal Code and after the trial, it was substituted with section 323 Penal Code. He was sentenced to 12 months' imprisonment. DSP Denys Roberts, C.J. expressed a principle that is applicable in all offences involving members of the RBPF. He stated that it must be made clear to members of the public that any member of the RBPF, who resorts to unjustifiable force will be punished severely for his misconduct, which is inexcusable and undermines the confidence which the public rightly gives to the RBPF.
30. Similar statements are found in the cases of ***PP v Othman Hj Saidin [1999] 1 JCBD 231*** and ***PP v Insp. Sufian bin Hj Zainal (High Court Criminal Appeal No.12 of 2001)***. Both cases involved section 323 offences committed by police personnel.
31. In the former case DP Steven Chong, J (as he was then) found that the charge had been hanging over the Defendant for over 1 year. He was genuinely remorse. He had pleaded guilty at the first opportunity. Despite his limited means, a substantial payment had been made to the complainant in compensation. Taking all these relevant mitigating factors into account, Chong J, fined the defendant \$200, or 2 months' imprisonment in default of payment.

32. However, Chong J, expressed the view that offences involving violence on the part of the police with injury to the victim must be treated seriously by the Court, and that **a custodial sentence should normally be imposed** to send a clear message that this sort of behaviour will not be tolerated. He further stated that even if it were to be accepted that there was some degree of provocation, it cannot be strenuously argued that provocation can justify an attack of this kind.
33. In the case of **Inspector Sufian**, where a suspect was hit during a police interview; it was submitted that an act of violence committed by a police officer upon a defenceless member of the public, regardless of his demeanour, should not be condoned.
34. On appeal Leonard, JC expressed that an assault upon a prisoner in a police station by a serving police officer is a serious offence and that **it should normally attract a custodial sentence with a starting point in the region of 4 months' imprisonment**. However, in that case, he increased the **original sentence of a fine of \$250 or 2 weeks' imprisonment in default of payment to a fine of \$5,000 in default 2 months' imprisonment**. He stressed that delay is not necessarily a mitigating factor, but acknowledged the fact that, through no fault of the respondent, a very long time had elapsed between the date of the offence and the hearing (from 1996 to 2001). The Respondent had pleaded guilty, he had started a new life by the time he was convicted, and had gained new employment.
35. In this instant case, the DPP submitted there was no delay by the Prosecution and the trial went ahead, notwithstanding that it was lengthy and went on for 3 years before completion.
36. In the case of **PP vs Loqmanul Hakim bin Buang [2007] 4 SLR (R) 753**, the Court held that public trust and confidence in the police can be eroded if criminal acts of its officers are left unchecked. Deterrence must be the dominant consideration in sentencing where criminal acts are committed by police officers (and members of enforcement agencies) and severe sentences should be imposed in the public interest.

Whether D1's and D2's sentence were inadequate

37. The DPP submitted the conduct of the Respondents could not be condoned and stern sentences were called for to reflect the gravity of the offence committed and to achieve a deterrent purpose. The low fines imposed are not proportionate with the position of both Respondents as members of RBPF as they give a wrong message to the public that the criminal legal system does not apply when it comes to law enforcement officers breaking the law.
38. I agree with the DPP. In my view, what ought to have been given greater weight, in this case, is the fact that both Respondents were experienced policemen, acting in the course of their duties such as to arrest suspects and that in doing so they abused the powers entrusted to them as police officers. They lost sight of one of the key purposes of their appointment, which is to uphold high standards of law and order. See: **Mohd Shahrin bin Shwi vs PP [1996] 3 SLR 553**. The sentences imposed do not reflect the gravity of the offence committed by them. In the absence of strong mitigating circumstances, a deterrent sentence was warranted.
39. The Courts cannot sanction policemen assaulting arrested person(s). In this case, PW11 prior to being arrested, had his hands bound behind his back and was sitting down on at the BRD's guardhouse bench. He was exhausted from running and trying to avoid being arrested. He did not show any signs of resisting arrest, as can be seen from the CCTV footage.
40. I find that the sentences imposed on both Respondents are wrong in principle, manifestly inadequate and unduly lenient. It is regrettable that the Magistrate did not give adequate consideration to whether or not a custodial sentence was appropriate in this case before considering the Respondents' mitigations; given the above reasons, the Respondents' claims at trial and the extent of injuries suffered by PW11.

Mitigation

41. In R1's mitigation, he is aged 29, single and is the eldest out of four siblings. He used to provide financial support to his younger siblings. He served the RBPF for more or less 5 years. Since his suspension from work, he suffered financial setbacks. Upon his

conviction, he was dismissed from the RBPF and he further struggled financially. He had to borrow money to pay for the fine imposed on him. His career prospects have severely been affected and he admitted that it was difficult for him to find employment. It was only recently about one month ago he found employment at a much lower pay than he used to earn. R1 has no prior conviction.

42. In R2's mitigation, he is aged 37, married with two children. He joined the RBPF in 2002 and has served for 16 years. At the time of his suspension, he had achieved the rank of Corporal. He struggled financially due to his suspension from duty for 3 years. On the night of the incident, he was placed in grave danger by the actions of PW11. He has no prior conviction. He regrets his actions and has expressed his remorse. He had paid fully the fine imposed on him. Since the incident, he has moved on with his life and has been fortunate in being reinstated back with RBPF although demoted to the rank of Lance Corporal.
43. Although, the Public Prosecutor was justified in bringing this appeal. I find both Respondents, however, have strong mitigation. Having regard to the fact that the incident occurred in 2016, that it took 3 years to complete the trial; the consequences which the convictions have already had on the Respondents' career prospects; that they were first offenders with impeccable records and that both Respondents have paid their penalties in full; moved on with their lives, and regained employment. I am of the view that it would be unfair to resentence them.
44. In light of the reasons above I am not minded to intervene notwithstanding, both sentences imposed on both R1 and R2 are wrong in principle.
45. In the circumstances, the appeal is dismissed.

PG DP HJH ROSTAINA BINTI PG HJ DURAMAN
High Court Judge
10th February 2020