

Mohammad Norariffin Bin Hamdan

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 17 of 2019)**

Hj Abdullah Soefri bin POKSM DSP Hj Abidin, J.C.

18th August 2020

Criminal law – stay of execution denied – appeal – no exceptional circumstances or no special reasons – dismissed

Cases cited :

Hasren bin Abdul Halimi vs Public Prosecutor (Criminal Motion No.8 of 2006)

Hj Mashud bin Hj Damit v Public Prosecutor (High Court Criminal Appeal No. 11 of 2010)

Sunie bin Timbang And Public Prosecutor (Criminal Motion No.36 of 2018)

Ganesan v P.P [1983] 2 MLJ 369

Yeo See Soon and Another v P.P (1994) JCBD 228

Mr Rozaiman of Zico R.A.R. for the Defendant/Respondent.

DPP Dk Didi Nuraza Latiff for the Appellant/Public Prosecutor.

RULING

Hj Abdullah Soefri, JC:

This is an appeal against the refusal of stay on the defendant's sentence and submitting an application for bail pending appeal pursuant to section 279 and 347 of the Criminal Procedure Code. This matter should not be filed as motion for a stay of execution of sentence pending appeal. The Petitioner submitted that there is a good probable chance of success for the Petitioner's appeal. The Petitioner submitted that during the Defendant's mitigation, the victim who is the Petitioner's daughter told the learned trial judge that though she was hurt, she continue to love the Petitioner and forgiven him.

The Petitioner submitted that the presence of the victim in Court and outpouring her love and affection towards the Petitioner were clearly valid grounds to consider in not imposing a custodial sentence.

Submission of imposing a non-custodial sentence was also made before the trial judge and S.28(2) of the Children and Young Persons Act was also highlighted to the trial judge prior to the sentencing.

The Petitioner also submitted and cited *Hasren bin Abdul Halimi vs Public Prosecutor* (Criminal Motion No.8 of 2006), the length of the term of imprisonment was made in comparison with the length of the time which is likely to take for the appeal to be heard. For this present case, *“as a consequence of the outbreak of Covid-19 affecting both Brunei and United Kingdom, it will cause a considerate delay in hearing the Petitioner’s appeal. There is a real possibility that the length of time pending appeal to be heard may take longer than the anticipated success of a reduced sentence upon appeal. Further there is a good probability that the Petitioner will succeed in his appeal.”*

The Respondent submitted that although a substantial part of the 2 years’ sentence would be served by the time the appeal is heard due to current Covid-19 situation, there is no likelihood of success of merits to the appeal.

Respondent cited the case of *Hj Mashud bin Hj Damit v Public Prosecutor* (High Court Criminal Appeal No. 11 of 2010) whereby the then Acting Chief Justice Steven Chong held that a stay of execution pending appeal should not be granted without *“good cause”*, for example there is a reasonable chance of success in an appeal or if there is an arguable point of law, or if a substantial part of imprisonment would likely be served before the appeal is heard.

On the 30th November 2019, the Intermediate Court sentenced the Petitioner to a total of 2 years’ imprisonment for 3 charges under section 28(1) Children and Young Persons Act with effect from 30th November 2019. The application for stay of execution was denied by the learned Judge on the same date.

Hence the application before me is an appeal against the decision of the learned Judge for her refusal to allow for the stay of execution. The application for stay is pending the appeal against the 2 years’ imprisonment imposed by the learned Intermediate Court Judge before the Court of Appeal.

To grant a stay of execution of sentence pending appeal is at the discretion of the Court. The principles on this matter are well-settled.

The Respondent was correct in submitting that *“a stay of execution pending appeal should not be granted without good cause”* and cited *Hj Mashud’s* case.

Petitioner cited *Hasren bin Abdul Halimi v Public Prosecutor*.

In *Sunie bin Timbang And Public Prosecutor* (Criminal Motion No.36 of 2018), Steven Chong CJ held as follows:

“In R v Gordano (1982) 1 SASR 241, a decision of the Court of Criminal Appeal in South Australia, King CJ said at 242:

There are practical reasons, moreover, why Courts should exercise extreme caution to the grant of bail pending appeal. An Appellate Court does not sentence afresh in the light of the circumstances which have changed since sentence was passed. It should not be placed in the invidious position , particularly of an appeal against sentence if the dismissal of the appeal having the effect of returning to prison a person whose circumstances may have changed

greatly during the period of liberty on bail pending appeal. There is a serious risk of availability of bail leading to a proliferation of unmeritous appeals thereby adding to the strains on the system of justice. Persons undergoing punishment in custody are prone to seize any opportunity to secure release, perhaps leaving the future to take care of itself. Appeals would be launched, irrespective of the prospects of success, simply in order to secure release, or perhaps with a view to creating situation which tend to frustrate justice by making it difficult to return the appellant to prison."

The appeal before me is based on two grounds;

- 1) Good probable chance of success for the Petitioner's appeal whereby the Petitioner submitted that the presence of the victim in Court and outpouring her love and affection towards the Petitioner were clearly valid grounds to consider in not imposing custodial sentence.

The learned Judge in passing the sentence had taken this into consideration;

"Miss X told the Court that despite being hurt by the Defendant, she still misses and loves her father. Yet at the same time, the Defendant's act of violence towards her had left a scar in her life and she is still traumatized by the event."

- 2) Another ground is the length of the time which is likely to take for the appeal to be heard. The Petitioner submitted that he will be released on 30th March 2021 as stated in the Prison Department letter dated 24th June 2020.

Length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard is one of the factors in which the Court should consider in deciding whether to grant or refuse bail pending appeal. (*Ganesan v P.P* [1983] 2 MLJ 369)

In *Yeo See Soon and Another v P.P* (1994) JCBD 228, Roberts CJ stated;

"I do not dissent from the guidelines advanced in the Malaysian case of Ganesan, so long as it is made clear that the granting of bail pending appeal is exceptional and will not be granted unless special reasons can be shown to exist".

In *Sunie bin Timbang*, Steven Chong CJ further held that:

"The High Court of Australia in Hanson and Anor v The Director of Public Prosecutor (Queensland) (2003) (Unreported) also held that the contention there were merits in the appeal would be premature without the benefit of full argument in the substantive appeal and did not demonstrate special or exceptional circumstances to justify granting bail."

Having had said all the above, I agree with the Judge that there is no merits in the application to stay vis a vis no exceptional circumstances or reasons in the case to warrant the granting of bail pending appeal.

The appeal is dismissed accordingly.

HJ ABDULLAH SOEFRI BIN POKSM DSP HJ ABIDIN
Judicial Commissioner