MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Mohtarudin Baki, JCA; Abdul Karim Abdul Jalil, JCA; Rhodzariah Bujang, JCA

Public Prosecutor v Ghanachandran Katharavel

Citation: [2018] MYCA 304 **Suit Number:** Criminal Appeal No. B-05(H)-119-03/2017

Date of Judgment: 18 September 2018

Criminal law – Sentence – Adequacy of the sentence

JUDGMENT

Brief facts of the case

[1] The Public Prosecutor, the appellant in this appeal was dissatisfied with the sentence passed by the High Court on the respondent upon his own plea of guilty to 2 charges, both under section 26A of **Anti-Trafficking In Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM)**. The charges, in Bahasa Malaysia read as follows:

> *"Bahawa kamu pada 6 Mac 2016 di Lapangan Terbang Antarabangsa KLIA, dalam daerah Sepang, dalam Negeri Selangor Darul Ehsan telah menjalankan penyeludupan migran iaitu, Lakeswaran Sivagnam (No. Passport: N3474607) seorang warganegara Sri Lanka, oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 26A Akta Anti Pemerdagangan orang dan Anti Penyeludupan Migran 2007"*

> *"Bahawa kamu pada 6 Mac 2016 di Lapangan Terbang Antarabangsa KLIA, dalam daerah Sepang, dalam Negeri Selangor Darul Ehsan telah menjalankan penyeludupan migran iaitu, Kanistan Poolosingam (No. Passport: N2002744) seorang warganegara Sri Lanka, oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 26A Akta Anti Pemerdagangan Orang dan Anti Penyeludupan Migran 2007"*

[2] The maximum penalty for the charges, upon conviction is 15 years imprisonment and a fine or both imprisonment and fine. The respondent was sentenced by the High Court to 7 years imprisonment for each charge which were ordered to run concurrently. Upon hearing the submission of the learned Deputy Public Prosecutor ("DPP") we decided to allow the appeal. The sentences were varied by us to 10 years imprisonment but despite the learned DPP's urging to order that the

said sentences to run consecutively, we declined to do so and still maintained the concurrent order of the learned High Court Judge. Below are our reasons for deciding so.

The gravity of the offence

[3] In arriving at our decision, we were very much persuaded by the seriousness of the offence, for the facts, as admitted by the respondent himself show these:

> The two victims, migrants from Sri Lanka were caught at the Satellite Building of KLIA by two Immigration Officers on duty that day. They were supposed to depart for Amsterdam via Royal Dutch Airlines on the day and time in question. They both produced Malaysian passports but upon further examination of their bags, Sri Lankan passports with their respective names were found as well as flight tickets from Kuala Lumpur to Colombo with a transit in Singapore. Investigation revealed that these two migrants went through the Immigration checkpoint of KLIA using Sri Lankan passports and showed their flight tickets to Colombo via Singapore. After clearing the immigration, their plan was then to board the flight to Geneva via Amsterdam using the Malaysian passports. All these have been made possible and were facilitated by the respondent who not only arranged for their flight tickets, but also obtained their forged Malaysian passports and he even went to the extent of ensuring an easy passage for them through the immigration until they boarded their flight to Geneva.
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> The respondent was arrested slightly more than a month after the migrants were caught. The two migrants pleaded guilty to a charge under section 419 of the **Penal Code** and have been deported to their country after serving each of their respective sentences of 7 months imprisonment. The depositions of the two migrants implicating the respondent in the crime were tendered together with the other exhibits before the learned High Court Judge as P15 and P16, respectively. It is to be noted that the respondent himself was an illegal immigrant who had been staying in Malaysia for 2 years prior to his arrest.
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> In mitigation, all that the respondent had to say was that he was married with 2 children but both have passed away. As a result of their demise he suffered stress and was asked by his doctor to rest at home. Initially he said he worked at a textile shop in Kuantan but prior to his arrest he was working in "construction" (likely the said industry) in Kuala Lumpur. He pleaded for a lenient sentence.

Sentence of the High Court

[4] The learned High Court Judge, after considering the fact that the respondent's actions have jeopardised the country's well being (kesejahteraan), the fact that the 2 migrants had paid substantial fees to the respondent for the said arrangements, the usual public's as well as the respondent's respective interests and his plea of guilty, arrived at the said sentence of 7 years imprisonment.

Enhancement of the sentence

[5] We need to state at the outset that the respondent was not represented at the appeal hearing

before us. All that he submitted to us was that he committed the crime at the behest of someone else and hoped that the sentences imposed by the learned High Court Judge be maintained. The learned DPP in his written submission basically had two issues with the sentences imposed. First, he said they failed to reflect the seriousness of the offence committed and secondly, since two migrants were involved, the sentences should be made to run consecutively. We paused here to say that it cannot be denied that the offences committed by the respondent fall within the category of a serious offence as defined under section 52B of the **Penal Code** which reads.

> *"The words "serious offence" denote an offence punishable with imprisonment for a term of ten years or more*."

[6] The learned DPP also emphasised the fact that the peace and stability of Malaysian society must be preserved which has been compromised by the actions of the respondent and therefore public interest must be of paramount consideration. He further submitted the fact that the respondent himself was an illegal immigrant was an aggravating factor which the learned High Court Judge failed to consider in this case. That last fact, in our view was indeed a fatal omission by the learned High Court Judge for the respondent have not only blatantly sneaked into our country to work but at the same time had found the ingenuity to use our country as the transit point for other illegals using fake Malaysian passports to go to other countries. In this instant case he was also instrumental in obtaining the fake Malaysian passports for the two migrants and he did these for a huge fee of RM60,000 (for the migrant in the 1st charge) and RM35,000 (for the migrant in the 2nd charge), which sums were mentioned in their respective depositions. Such an action should not move the court to view the offences committed by him lightly especially when no mitigating factors worth considering was raised by the respondent. Thus, although we appreciate the fact that the sentence passed was at the discretion of the learned High Court Judge, the failure to consider the illegal status of the respondent against the backdrop of what he did merits in our view an enhancement of the sentences passed by His Lordship.

Concurrent sentence

[7] However, we were not persuaded by the argument of the learned Deputy Public Prosecutor that the sentences of the two charges should run consecutively because obviously these were committed in the same or one transaction. As stated by this court in **Bachik Abdul Rahman v Public Prosecutor** (2004) 2 CLJ 572.

> *"The combined effect of s. 282 and s. 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see **Ooi Sim Yim v Public Prosecutor [1990] 1 MLJ 88**). The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date, the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than*

*consecutive (see **R v. Saleem [1964] Crim LR 482; R v Walsh [1965] Crim LR 248**). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see **Jayaraman & Ors v. Public Prosecutor [1979] 2 MLJ 236**)."*

[8] The ingredients of one transaction rule as stated above were obviously satisfied in this case. Serving 10 years imprisonment for what the respondent did should serve not only as a painful lesson to the respondent but would also be a deterrent factor, we hope, to like-minded offenders like the respondent.

On the above considerations, the appeal of the Public Prosecutor against the inadequacy of the sentences was allowed in part in that the sentences were enhanced but still to run concurrently.

Date: 18 September 2018

signed

RHODZARIAH BINTI BUJANG
Judge
Court of Appeal Malaysia
Putrajaya

COUNSEL

For the Appellant: TPR Mohd Zain bin Ibrahim, Public Prosecutor

For the Respondent: Attended by the respondent

LEGISLATION REFERRED TO:

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, Section 26A

Penal Code, Sections 52B, 419

JUDGMENTS REFERRED TO:

Bachik Abdul Rahman v Public Prosecutor (2004) 2 CLJ 572