DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN JENAYAH NO. B-09(S)-30-2011

ANTARA

WONG KENG LIANG … **PERAYU**

DAN

PENDAKWA RAYA ... **RESPONDEN**

[Dalam Perkara Mahkamah Tinggi Shah Alam
Rayuan Jenayah No: 41H-228-2010

Antara

Pendakwa Raya … Perayu

Dan

Wong Keng Liang … Responden]

CORAM:

LOW HOP BING, JCA
K N SEGARA, JCA
AZAHAR BIN MOHAMED, JCA

LOW HOP BING JCA
DELIVERING ORAL JUDGMENT OF THE COURT

I. APPEAL

[1] This Appeal, by the Accused against the sentence of five-year imprisonment imposed by the High Court, raises a question of immense public importance, particularly in relation to the fundamental principles of sentencing.

II. SENTENCE AND FACTORS FOR CONSIDERATION

[2] At the outset, we find it necessary to state that the sentence to be imposed on an accused in each particular case must have a direct bearing on:

(1) the specific charge preferred against the accused;

(2) the plea of the accused i.e whether he has pleaded guilty or claimed trial;

(3) the facts admitted by the accused who has pleaded guilty or proved against him where the accused had claimed trial;

(4) the mitigating factors raised for an accused in the court of first instance;

(5) the request of the prosecution in urging the sentencing court to consider an appropriate sentence based on admitted or proved facts;

(6) the maximum sentencing jurisdiction of the court of first instance hearing the particular case;

(7) the exercise of discretion which Parliament has in the specific Act or Acts vested in the sentencing court;

(8) the consideration of all relevant facts and circumstances in imposing an appropriate sentence in each particular case including the balancing of the interest of the public and that of the accused;

(9) the manifest excessiveness or inadequacy of the specific sentence imposed by the sentencing court according to law as enacted by Parliament; and

(10) the aggravating or mitigating factors raised for the prosecution and the accused respectively.

III. FACTUAL BACKGROUND

[3] In the instant Appeal, originating from the Magistrate's Court, the Accused had pleaded guilty without reservation, and indeed unconditionally, to an offence under s.10(a) of the International Trade in Endangered Species Act 2008 ("s.10(a)"), to wit, exporting without

permit 95 Boa Constrictor snakes ("the snakes") which belong to a scheduled species in the Third Schedule, Appendix 2 to the said Act.

[4] In essence, the facts admitted by the Accused revealed that the Accused had failed to show any permit under the said Act to export the snakes which were subsequently seized at the Kuala Lumpur International Airport (KLIA) Terminal. The Accused had wanted to export those snakes to Jakarta, Indonesia via flight MH 727. In short, it was an offence under s.10(a).

IV. MITIGATION

[5] By way of mitigation, the Accused's learned counsel submitted in the Magistrate's Court that:

(1) the Accused has pleaded guilty as a first offender, thereby saving judicial time and the costs of calling witnesses;

(2) The Accused has repented and is remorseful;

(3) The Accused has apologised and promised not to repeat the offence in future;

(4) There are no aggravating factors to merit a heavy sentence;

(5) There is no criminal force used, unlike other serious crimes such as murder, rape, robbery and the like;

(6) The Accused has a permit to import the snakes, but does not have an export permit; and

(7) The snakes were found in good conditions and no loss was caused to anybody.

[6] The learned legal adviser who appeared as deputy public prosecutor for the Wild Life Department argued that:

(1) This is a serious offence involving protected species of wild life and the maximum sentence is either a fine of RM1 million or 7 years imprisonment or both;

(2) Wild life smuggling is serious offence which must be prevented as such activity can bring about the extinction of the species.

(3) Malaysia and other countries have agreed to co-operate and preserve this wild life species and the said Act was to serve this purpose;

(4) Malaysia should not be made a transit point in the eyes of the international community;

(5) **This is the Accused's first case in Malaysia**; and

(6) A deterrent sentence by way of custodial sentence, in addition to a fine, should be imposed so that wild life smuggling is not worth a risk.

V. SENTENCE IMPOSED BY MAGISTRATE'S COURT

[7] The learned magistrate has considered the charge, the Accused's guilty plea, the exhibits, the submissions of learned deputy public prosecutor and defence counsel. He has accepted the Accused's guilty plea, convicted and sentenced him to six months imprisonment from 6 September 2010, in addition to a fine of RM2,000 on each of the snakes, amounting to RM190,000, in default of payment of the fine, 12 months imprisonment.

VI. DECISION OF HIGH COURT ON APPEAL

[8] The learned Judge of the High Court allowed the Public Prosecutor's appeal, set aside the sentence imposed by the learned magistrate, and substituted it with a five-year imprisonment term, without a fine, and ordered the RM190,000 fine to be refunded to the Accused.

VII. LEAVE TO APPEAL TO COURT OF APPEAL

[9] Accused has obtained leave to appeal to this court as the apex court for appeals from subordinate courts.

VIII. ORDER OF COURT OF APPEAL

[10] In the instant Appeal, we note that the prosecution has preferred the charge against the Accused in the Magistrate's Court. That being the case, the sentencing jurisdiction of the Magistrate's Court under s.87 of the Subordinate Courts Act 1948 applies. S.87 sets the ceiling of five-year imprisonment and a fine of RM10,000 as maximum sentencing jurisdiction of the Magistrate's Court.

[11] In imposing the five-year imprisonment term on the Accused, the learned High Court Judge has indeed awarded the maximum custodial sentence which the Magistrate's Court as the sentencing court can impose according to law. This kind of maximum sentence is legally reserved for the most serious offence, without any mitigating factor. We note that the learned High Court Judge's grounds of judgment did not make any reference to the Accused's guilty plea. The learned Judge does not appear to have been taken this into consideration.

[12] It is trite law that Accused's guilty plea is a mitigating factor: See ***PP v Sau Soo Kim*** **[1975] 2 MLJ 134 per Lee Hun Hoe J (B)**; and ***Melvani v PP*** **[1971] 1 LNS 78** per **Wee Chong Jin CJ** (Singapore) (as then was) who also considered "first offender" as another mitigating factor, as has been done by **Mohamed Azmi J** (later FCJ) in ***PP v Jafa bin Daud*** **[1981] 1 MLJ 315**. As alluded to above, learned deputy public prosecutor has taken the position that "**This is the Accused's first case in Malaysia**".

[13] Generally, the Accused's guilty plea also allows the Court to exercise the discretion to give a discount or reduction of one-quarter or one-third of the sentence which would have been imposed after a full trial: **Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167**, as followed in ***PP v Ravindran & Ors*** **[1993] 1 MLJ 45**.

[14] The sentencing discretion belongs to the court of first instance as the sentencing court: ***Zaidon Shariff v PP*** **[1996] 4 CLJ 441, 445**.

[15] With the utmost respect, the learned Judge has erroneously taken into consideration the following factors:

(1) The squeezing of the snakes into a small bag and torturing them, when the facts admitted by the Accused did not reveal this;

(2) The two allegedly venomous Rhinoceros vipers which were not in the charge preferred against the Accused; and

(3) The Accused's greed in profit-making which was again not part of the admitted facts.

[16] It must be emphasised immediately that the Accused was charged with the offence of exporting the snakes without a permit. That is the gravamen and substratum of the prosecution's case against the Accused who had pleaded guilty to that charge only, and no other.

[16A] We wish to also emphasise that the Accused was not charged with "trafficking" in wild life. He had lawfully imported the animals into the country with a permit. He had not smuggled the animals into the country. There was no evidence to suggest that he would not have been granted the permit to export the animals by the authorities. There was no evidence to suggest that he intentionally did not apply for the permit because he knew that he would not be granted the said permit. (I am grateful to my learned brother **K N Segara JCA** who has suggested this passage for inclusion herein as part of our judgment).

[17] Any other considerations would be outside the ambit of the charge and therefore warrant appellate intervention.

[18] We understand that since 7 September 2010, the Accused has spent his time in prison i.e for 17 ½ months, as there was no stay of execution of the custodial sentence imposed by the High Court.

[19] In the circumstances, on the facts of this case, we are unanimously of the view that the said 17 ½ months imprisonment would serve the interests of justice.

[20] We therefore allow this appeal, set aside the five-year custodial sentence imposed by the High Court and substitute it with a sentence of 17 ½ months i.e the period from 7 September 2010 until today. The Accused would walk out of the court today as a free man. The 17 ½ months would translate into a total period of some 23 months if the one-third remission were to be taken into consideration.

[21] In view of the custodial sentence which the Appellant has served, we affirm the order of the High Court in setting aside the fine of RM190,000 imposed on the Accused as that fine was plainly beyond the RM10,000 maximum fine which the learned magistrate can legally impose.

DATUK WIRA LOW HOP BING
Judge
Court of Appeal Malaysia
PUTRAJAYA

Dated: 22 February 2012

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