DALAM MAHKAMAH RAYUAN MALAYSIA

<u>PERMOHONAN JENAYAH NO. S-09-69-1995</u>

DI ANTARA

SAID HASHIM BIN MOHD BASRI ... PEMOHON/PERAYU

AND

PENDAKWA RAYA ... RESPONDEN

[Dalam Perkara Mahkamah Tinggi Sabah Dan Sarawak Di Tawau
Rayuan Jenayah No. T(42) 16 Tahun 1994

Di Antara

Said Hashim Bin Mohd Basri ... Perayu

Dan

Pendakwa Raya ... Responden]

<u>Koram:</u> Mokhtar B. Hj. Sidin, JCA
Hashim B. Dato' Hj. Yusoff, JCA
Abdul Aziz B. Mohamad, JCA

GROUNDS OF JUDGMENT

1. This is an application to reinstate the Notice of Appeal registered as Criminal appeal No. S-09-69-1995 which was dismissed by this Court on 21/02/1995. After hearing arguments from both parties and perusing the material before us, we dismissed the application. We now give our reasons for doing so.

Background

2. On 11/07/1994 the Applicant was convicted by the Sessions Court at Tawau, Sabah and sentence to 18 months imprisonment for the offence of criminal breach of trust. He then filed an appeal through his previous counsel Mr. Sugumar Balakrishnan. At the hearing of his appeal, the learned High Court Judge dismissed his appeal against conviction, but reduced his imprisonment sentence from 18 to 12 months. The Applicant was then given bail of RM5,000.00 with one surety.

3. The Applicant then instructed his counsel to file an appeal to the Court of Appeal against the High Court decision. On 02/02/1995, the Notice of Appeal to the Court of Appeal was

filed. However, thereafter, from 22/01/1995 until December 2005, the Applicant never received any phone call or letter from Mr. Sugumar regarding his appeal to the Court of Appeal. The Applicant said he had on several occasions contacted M/s Sugumar & Co. and was informed to go there. But on each occasion that he went, he was informed that the affidavit which he was supposed to sign was still not ready and he had to wait for them to call him again to sign the affidavit when it was ready.

4. Finally the Applicant received a phone call from M/s Sugumar & Co. asking him to go to the Kota Kinabalu High Court on 21/02/2005 for a 'rehearing' of his case. But when the Applicant went to the Kota Kinabalu High Court on 21/02/2005, he found out that Mr. Sugumar's oral application to discharge himself as the Applicant's counsel was allowed by the Court of Appeal. Thereupon the Court of Appeal dismissed the Applicant's appeal and ordered the Applicant to be sent to prison to serve his sentence of 12 months imprisonment.

5. The main ground of this application for reinstatement of the Applicant's appeal is the poor conduct of his counsel in

handling the appeal. The Applicant says he had not been informed by his previous counsel, Mr. Sugumar as to the progress of his appeal, and that the affidavit which he was supposed to sign to support his appeal was never ready although he was asked to go to M/s Sugumar & Co.'s office for that purpose several times.

6. The learned DPP in objecting to this application for reinstatement informed us that on 23/08/2004 Mr. Sugumar had already made an oral application to the Court of Appeal for an extension of time to file the petition of appeal out of time. On that occasion the Court of Appeal had allowed the oral application and made a peremptory order to allow the Applicant leave to file his petition of appeal out of time by 07/09/2004. However when the appeal came up for hearing again on 21/02/2005, neither the application for leave to appeal nor the petition of appeal was filed. Thereupon the Court of Appeal struck out the appeal because of the Applicant's failure to comply with the Court Order made on 23/08/2004.

7. In the case of ***Jumari Bin Mohamed v PP [1982] 1 MLJ 282***, Mohamed Azmi J (as he then was) said at page 283:-

"The powers, principles and procedure governing the grant of an extension of time to lodge a Petition of Appeal and the permitting of amendments to a Petition of Appeal, came up for determination by the Court of Appeal (the forerunner of the Federal Court) in Veerasingam v. Public Prosecutor. At page 79, Thomson C.J. has this to say:

> *'The only fetter which section 310 places upon the exercise of the discretion which it gives to the judge is that it shall be exercised 'in order that substantial justice may be done'. Clearly, to exercise his discretion properly the judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original Petition of Appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to the original Petition of Appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of Notice to be given. And then he must exercise his discretion as he sees fit in order*

that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other case by some other judge but if he does, he must be careful to look at what that other judge has done merely was an illustration and not as laying down any judicial precedent. ...' "

8. In ***Lim On & Ors v. Allen & Gledhill [2001] 3 MLJ 481*** the appellants had obtained leave to appeal to the Federal Court to determine the following issue: whether it was an abuse of the process of the Court for the appellants to file a fresh suit when the first suit had been set aside for failure to comply with the procedural rules of the Court.

9. The Federal Court in dismissing the appeal held:-

"*(1) The factual circumstances in the instant case clearly indicate that it was not a situation where there was a mere failure on the part of the appellants to comply with the rules of court because there was in existence a specific court order*

directing the appellants to effect the amendments in compliance with the Rules of the High Court 1980. It was in the nature of a peremptory order of the court and the appellants (as plaintiffs) had failed to comply with such a peremptory order.

(2) The appellants ought to have appealed against the decision striking out their first suit for disobedience of the peremptory order. The filing of the second suit, containing as it did, the same issues and reliefs as the first suit, amounted to a deliberate attempt to circumvent the necessary appeal procedure and therefore constituted an abuse of the process of the court."

10. In this instant application the Court of Appeal had already given the Order to the Applicant's counsel on the 23/08/2004, to file the petition out of time by the 07/09/2004. Unfortunately his counsel failed to comply with the said order which lead to his appeal being struck out.

11. Be that as it may, in order that substantial justice may be done in the matter we need to see if there were some other strong grounds or substantial reasons that would justify the appeal to be reinstated. In ***Wong Swee Chin v. Public Prosecutor [1977] 2 MLJ 194***, the Federal Court held that in an application for an extension of time to file a notice of appeal, from the application to application to succeed there must be strong grounds or substantial reasons.

12. In the instant application, the Applicant only averred that he had strong grounds to succeed in the appeal, but did not say what there were. In the case of ***Masnelan Pakpahan v Public Prosecutor [1989] 2 MLJ 362***, Mohd Dzaiddin J (as he then was) in hearing an application for leave to file the petition of appeal out of time held:-

> "*(2) It is insufficient for the deponent to state that he believes there are strong grounds in the appeal on the merits and in law without at least mentioning what the grounds are and the law involved. He ought to have exhibited to his affidavit a proposed petition of appeal.*"

13. For the above reasons, we find that there were no strong grounds for us to consider. The application is therefore dismissed.

Signed.
(DATO' HASHIM BIN DATO' HJ. YUSOFF)
Judge

Date: 8th July, 2009

Hamid Ismail for the Applicant.

Kevin Morais and Kamal Baharin for the Respondent.

Cases referred to:-

Jumari Bin Mohamed v PP [1982] 1 MLJ 282;

Lim On & Ors v. Allen & Gledhill [2001] 3 MLJ 481;

Wong Swee Chin v. Public Prosecutor [1977] 2 MLJ 194;

Masnelan Pakpahan v Public Prosecutor [1989] 2 MLJ 362.