

**IN THE COURT OF APPEAL OF MALAYSIA
(SITTING AT KOTA KINABALU)
CRIMINAL APPLICATION NO. S-09(H)203-07/2017**
(In the matter of High Court Sabah And Sarawak At Sandakan Criminal
Appeal No. SDK-42S-6/11-2015)

**PUBLIC PROSECUTOR
v.
ASIA IKHLAS SDN. BHD.**

Coram:	Y.A. DATO' ABDUL RAHMAN BIN SEBLI, HMR
	Y.A. DATUK KAMARDIN BIN HASHIM, HMR
	Y.A. DATUK WIRA KAMALUDIN BIN MD SAID HMR
Charge:	SECTION 20(2) FOREST ENACTMENT 1968
Appellant:	DPP MOHD ZAIN BIN IBRAHIM
Respondent:	EN. GABRIEL HO KEN WUN
Date:	6 JULY 2018

DECISION:

***“This is our unanimous decision. We find no merit in the appeal.
The Appeal is dismissed. The High Court decision is affirmed.”***

CHARGES

" FIRST CHARGE

“Bahawa kamu diantara lebih kurang 15.03.2013 hingga 21.3.2013, tanpa kebenaran atau lesen yang sah di bawah Enakmen Hutan 1968 telah menebang 124 pokok dalam Hutan Simpan Ulu Sg. Millian. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 20(2) Enakmen Hutan 1968 dan boleh dihukum di bawah seksyen yang sama.”

SECOND CHARGE

“Bahawa kamu diantara lebih kurang 15.03.2013 hingga 21.3.2013, tanpa kebenaran atau lesen yang sah di bawah Enakmen Hutan 1968 telah menebang 146 batang balak dalam Hutan Simpan Ulu Sg. Millian. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 20(2) Enakmen Hutan 1968 dan boleh dihukum di bawah seksyen yang sama.”

BRIEF FACTS

[1] Briefly, the area in this case is within Bornion Timber Sdn Bhd Forest Management Unit comprising Ulu Sungai Millian Forest Reserve, which is about 77,000 hectares and part of the Sepulut Forest Reserve of about 30,000 hectares (the FMU). The encroached area internally is classified as compartment 135 (the encroached area). Adjacent to C135 is Saini Kissim's area that is under temporary occupation license ("TOL"), which is approximately 1069 hectares (TOL area). The TOL area was issued to Saini Bin Kissim & 4 others for period from 1.01.2010 to 31.12.2012. Java Timber Sdn Bhd is the registered contractor (main contractor) involved in the felling and removal of timber logs in the TOL area. The main contractor of the TOL area had set up a camp for its workers about 9 kilometers from the FMU.

[2] The main contractor then appointed the Accused (Asia Ikhlas Sdn Bhd) as its sub-contractor to extract timber logs in the TOL area vide a letter dated 16.08.2013 and the Accused pursuant to that letter had constructed a camp for its workers located 3 kilometer from the TOL area. On 31.1.2012, the TOL area expired and the main contractor was in the process of applying for renewal of the license to the TOL area. Due to this, all logging works inside the TOL area had stopped but there were felled logs scattered inside the TOL area awaiting for royalty payment.

[3] There were around 1751 timber logs owned by the main contractor and 1000 timber logs had been paid with royalty whereas the remaining 751 timber logs were pending royalty payment. On 21.03.2013 at around 2.00pm, one Forest Ranger attached to the Tongod Forestry Department (PW10) and his staff (PW12) were doing routine patrol at the TOL area and found that there were newly graded road inside the TOL area. They saw a tractor parked (first tractor) on a hill and another tractor (second tractor) parked near the river with its blade facing the river. About 300 meter from the second tractor, they saw a timber log of about 8 round in size. From the location of the timber log, their vehicle could not move further due to muddy ground and they had to stop and proceeding further by foot for another 250 meters. Towards the end of the newly pushed road, PW10 and PW12 saw piles of timber logs consisting 100 pieces of logs on the encroached area, upon seeing those timber logs PW10 took the GPS reading of the timber logs' location. After that, both PW10 and PW12 left the area to get telephone signal and subsequently sent short messages (SMS) to ADFO Edmund William (PW11), the Assistant Forest Officer for Tongod Forest Department to get the exact coordinate location of those piles of logs. PW11 replied and confirmed that the timber logs were located within Ulu Sg. Millian 80 Forest Reserve which is part of the FMU.

[4] Around 7.00pm on 21.03.2013, PW11 and his team rushed to the location of the piles of timber logs and found that both tractors had been moved up to the hill and they found a timber log lying across the path blocking their way towards the encroached area. Since the obstructing timber logs block their vehicle to go through, PW11 and his team had no choice but to stay overnight at the said spot. The timber log had been removed in the next morning and they proceeded to the encroached are. PW10 hammer marked all the logs with FD38 mark. PW10 then lodged a police report the same day for the forestry department's further investigation. Both tractors were detained on suspicion of being used to extract the timber logs inside the encroached area based on the tractors imprint track found therein in the encroached area. The newly graded road was the only road leading to the encroached area from the TOL area at the material

time. The piles of timber logs inside the encroached area were located 5000 meters from the boundary of the TOL area.

[5]After full trial before the Learned Session Court Judge (LSCJ), the Respondent was found guilty and sentenced to imprisonment for a term of 2 years and fine of RM100,000.00 for the first charge and also was found guilty and sentenced to imprisonment for a term of 3 years and fine of RM100,000.00 for the second charge. In default 6 month's imprisonment for each charge. The imprisonment terms to run concurrently. The two tractors be forfeited to the prosecution.

[6]Dissatisfied with the decision, the Respondent appealed to the High Court of Sandakan Sabah. Consequently, the High Court allowed Respondent's appeal in parts whereby the Honourable Judge set aside the sentence of imprisonment for a term of 2 years and 3 years respectively for 2 charges and also set aside the order in default of 6 months imprisonment for the two charges. Both convictions were affirmed with the fine of RM100, 000.00 each and the forfeiture of the tractors also are affirmed.

[7]The Appellants/Public Prosecutor had filed Notice of Appeal to the Court of Appeal against the sentence by the learned High Court Judge and seeking the Court of Appeal to restore the decision of the LSCJ.

ISSUE

[1]Whether the director can be sent to prison?

Appellant's Contention

- Yes, by invoking section 32(2) of the said enactment:-

“Liability for acts, etc of others.

(1) ...

(2) Where a person convicted of a forest offence is a body corporate, every person who, at the time of the commission of such offence was a director, manager, secretary or other officer of such body corporate or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that such offence was committed without his knowledge or that he exercised all due diligence to prevent the commission thereof”

- **Lembaga Kumpulan Wang Simpanan Pekerja v. Adorna RMIT Sdn Bhd & 9 Ors [2003] 1 LNS 482-**

“Directors are the alter ego of a Company. It is therefore not appropriate for a director to attempt to escape culpability by pleading that he is a sleeping partner or director, or a silent director or a non-active director.”

- **PP v. Lam Tshin Po & 7 Ors [1995] 4 CLJ 624** – the judge has the discretion whether to choose custodial or not base on **section 45(1) of the Interpretation and General Clauses Act 1963:-**

[1] The Court still has a discretion whether to impose a custodial sentence and it is not mandatory because the section of the Forests Enactment must be read subject to s. 45(1) of the Interpretation and General Clauses Act 1963 which states “Whenever in or by virtue of any State law more than one penalty is prescribed for an offence, the use of the word “and” shall signify that the penalties may be inflicted alternatively or cumulatively.”

- There was no error for the LSCJ imposing the imprisonment sentence. The sentence was legal and in accordance with section 20(2) of the said Enactment:-

(2) Unless expressly authorised by or under the provisions of this Enactment, any person who cuts, collects, converts, fells, or removes any forest produce in a Forest Reserve shall be guilty of an offence and on conviction shall be punished with a fine not exceeding five hundred thousand ringgit and to imprisonment for a term which shall not be less than one year but shall not exceed twenty years.

- *The presumption under section 38(8) and 38(8A) also applicable:-*

Presumption and proof.

38. *onus right the* (1) *In any prosecution for a forest offence, the of proving the existence of a lawful authority or legal or the possession of a licence or permit shall lie upon accused.*

(2) *Where in*

(3).....

(4)

offence (8) *Where in a prosecution for a forest under –*

(a)subsection (2) of section 20

(b)

(c).....

against the holder of a licence or licence agreement, his agents or servants, it is alleged that such person did cut, collect, convert, fell or remove any forest produce illegally, it shall be presumed until the contrary is proved that he did cut, collect, convert, fell or remove such forest produce illegally, if it is proved that timber extraction routes, paths or roads exist between the area under his licence or licence agreement and the area in which the illegal cutting, collection, conversion, felling or removal of the forest produce is alleged to have been committed”

“(8A) Where in a prosecution for a forest offence under –

(a) subsection (2) of section 20;

(b) paragraph (b) of subsection (1) of section 23; or

(c) subsection (2) of section 23,

against any person, it is alleged that such person did cut, collect, convert, fell or remove any forest produce illegally, it shall be presumed until the contrary is proved that he did cut, collect, convert, fell or remove

such forest produce illegally, if it is proved that timber extraction routes, paths or roads exist between the place where he is found and the area in which illegal cutting, collection, conversion, felling or removal of the forest produce is alleged to have been committed.”

- Term “any person” is inclusive of the company and a company director may also be criminally responsible for any crime that had been committed by the company.

Respondent’s reply

[2] The director who came during the trial and today is not the same director. Lim Kim Loong was appointed on 17.11.2015 and the past director was Lim Kong Leong, appointed as director on 14.9.2011.

[3] Section 32(2) Forest Enactment did not applicable since the director was not named in the charge. Section 38A and section 38(8) also were not applicable. The charge is on the company. The director should also be charged as accused person otherwise he/she will not be called upon to plead nor have any opportunity of the defence.

[4] There were no charge laid against any individual director, manager secretary e.t.c. under section 32(2) of the said Enactment to show that the individual officer was privy to any act or omission concerned. – PP v. Kasihku Sdn. Bhd [1991] 3 MLJ 116.

Notes: The panel was of the opinion that the directors of the company cannot be sent to prison since there was no charge laid against the directors personally. To make them liable to imprisonment, they must be named in the charge personally.