

**Public Prosecutor**

AND

**Huseyn Taherzadeh**

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**(High Court of Brunei Darussalam)**  
**(Criminal Appeal No 11 of 2014)**

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Hairol Arni Majid, J.  
**14<sup>th</sup> October 2014.**

*Criminal Appeal – Sentences – Theft – Section 379 of the Penal Code – Section 12 (1) of the Passport Act – Sentencing consideration – foreign defendant – Guilty plea*

DPP Karen Tan Chai Mei for Public Prosecutor  
Mr. Hj. Mohammad Rozaiman bin Dato Haji Abdul Rahman for Defendant

**Cases cited in the Judgment:**

*Public Prosecutor v Donohue Enilia* [2005] I SLR  
*Public Prosecutor v Lisua bin Lee and 2 others* [1990] JCBD 243  
*Sherdali Bin Mohd Ali v PP* [JCBD 2012] vol I 165

**Hairol Arni Majid, J.:**

The appellant was convicted after pleading guilty to 4 counts under section 379 of the Penal Code (theft) and an offence under section 12 (1) of the Passport Act (in possession of a forge passport). He was sentenced to 24 months and 12 months imprisonment respectively. Therefore, a total custodial sentence of 36 months. The Magistrate also made the following orders for compensation against him on his victims in the four theft charges, which are as follows.

*1<sup>st</sup> charge \$1,800 in default 2 months imprisonment*  
*2<sup>nd</sup> charge \$600 in default 1 month imprisonment*  
*3<sup>rd</sup> charge \$300 in default 1 month imprisonment*  
*4<sup>th</sup> charge \$1,000 in default 2 months imprisonment*

Before me, he appeals against his sentences. Briefly, the modus operandi of the offences is that the appellant had gone into the victim's business premises pretending to buy an item from the shop. At the cashier's counter the appellant would first extend his wallet to the cashier indicating that he was unsure and not familiar with the denomination used in Brunei and sought the cashier's assistance with the denominations at the same time requesting to see the largest denomination note available in the cash till. Obliging the appellant, the storeowners and the cashier's produced bundles of large Brunei

denomination notes to the appellant. While the attention of the storeowners and the cashiers was, distracted by the appellant's accomplice who diverted their attention to another item, the appellant pocketed most of the cash and walked out leaving behind some, seemingly without the cash bundle being tampered with. Without the storeowners realizing this, the defendant's accomplices in these instances continued to pay for his purchase and left the premises as if nothing had happened. It was only late in the day when the storeowners and cashier realized they were duped by the appellant and his accomplice after having calculated the sales of the day and finding shortfalls in cash till.

The victims in these cases were Bismi Trading Sdn Bhd, Glitter Roti Butik, Chennum Goldsmith Shop and Hua Ho Department Store.

The appellant a Cypriot had entered Brunei with a forged Cypriot passport under the name of Osman Kelayci. It appears the passport was bought in Thailand and he had used it on his travel to Malaysia, Indonesia and here with the eventual final destination to Australia, where he claims he is seeking for an asylum.

Mr. Rozaiman representing the the appellant, submitted that the sentences for thefts offence were manifestly excessive and the compensation ordered by the Magistrate failed to consider the correct principles and guidelines for imposing the same.

As far as the sentences on the theft offences are considered, I believe the Magistrate had struck a right chord in her consideration of the sentence when she said that the offences were premeditated and the sole purpose of the appellant in Brunei was to commit these offences.

Robert CJ in *Public Prosecutor v Lisua bin Lee and 2 others* [1990] JCBD 243 states:

*"I think a more severe sentence would be appropriate in an attempt to deter others from coming to Brunei Darussalam for short periods and breaking into premises which are valuable."*

I believe the sentence of 6 months custodial each for the theft offences is justified and appropriate in the circumstance of the case and by no mean excessive. The appellant and his accomplice are foreigners and they had gone out of their way to travel abroad with the sole purpose of committing these offences. These are peculiar offence played out with such mastery and skill that in almost all instances these exercises were successful, leaving their victim helpless.

As regards the appeal against the sentence under the Passport Act under section 12 (1) (a), I believe the sentence imposed by the Magistrate was proper albeit somewhat lenient although not inadequate. In *Sherdali Bin Mohd Ali v PP* [JCBD 2012] vol I 165, the Court of Appeal endorses the lower court custodial sentence of 2 years after pleas of guilty for the same offence under section 12 (1) (a) of the Passport Act.

I am in doubt the Magistrate in this case was correct to infer that the appellant had attained a forged passport to facilitate his entry unlawfully into Brunei without their true identity being detected in order to avoid arrest.

As regards the compensation orders, Mr. Rozaiman submitted that the Magistrate had not considered the principles relating to imposition of compensation as enunciated in *Public Prosecutor v Donohue Enilia* [2005] I SLR. The respondent rightly conceded that the Magistrate had not mentioned the principles as far as the imposition of compensation order is concerned. But having scrutinized her judgment, I am in no doubt she had exercised her discretion correctly despite not having considers the principle behind them.

The court in *Donohue Enilia's case* provides for 5 guidelines consideration for making compensation order. Firstly, the amount should not exceed the damaged caused. Secondly, there should be a causal link or connection between the offences committed by the defendant for which he was convicted and the damage or loss in respect of the compensation ordered by the court. Thirdly, such compensation shall only be ordered in clear case where the damage is either proved or agreed. Fourthly, compensation orders should only be made in dealing with straightforward cases. Fifthly, the order must not be offensive and must be realistic in that the court must be satisfied that the defendant has the mean available or will have the means to pay the compensation within a reasonable time.

I am in agreement with the principles enunciated above however, the application should come with the caveat in that the court should not used them as further punishment to enhance the sentence. To do so might cause grave injustice. It should only be in the plainest cases where these can be no doubt that the victims deserves to be compensated that the order be exercised. As well, these orders ought not to be made unless they are simple order and there are no complicating factors involved.

As it is, the compensation orders were made to the victims in the charges. Secondly the amount ordered to be paid represent the amount stolen from them and the total value being not unreasonable. These are straight forward case where the property or money rest only with the appellant and was not converted to other property bringing third party into the matter which would normally makes the issue difficult. In short, I believe the compensation orders were properly made.

For the foregoing reasons, I dismiss the appeal.

**DATO PADUKA HAIROL ARNI MAJID**  
Judge, High Court