Mohd Hamidy Bin Abd Halim (D1)

AND

Public Prosecutor

(High Court of Brunei Darussalam)
(Criminal Appeal No. 9 of 2014)

Hairol Arni Majid, J.
8th April, 2014.

Mr. Sheikh Noordin Bin Sheikh Mohammad (M/S Sheikh Noordin Mohammad & Associates) for Appellant.
DPP Dk. Hazirah Binti Pg Mohd Yusof for Respondent.

Case cited in the Judgment:

Mah Chee Kee v Public Prosecutor (1999) JCBD 287

Hairol Arni Majid, J.:

The Appellant pleaded guilty before the Magistrate Court below to 2 counts of attempted theft and causing mischief with intend to do damage contrary to section 379/511 and section 427 of the Penal Code and was sentenced to 2 months imprisonment and 2 months and 2 strokes respectively, a total of 4 months and 2 strokes. He was unrepresented when he took the guilty plea below. The charges are as follows:

1st Charge

That both of you, in furtherance of your common intention, on 8th January 2014 at about 11.00 p.m., in the vicinity of Simpang 490, Kg. Beribi in Brunei Darussalam, did attempt to commit theft of property, to wit two Kobelco batteries, belonging to Syarikat Kai Wang, and the both of you have thereby committed an offence punishable under section 379 of the Penal Code, Chapter 22, read with section 511 and section 34 of the same.

2nd Charge

That both of you, in furtherance of your common intention, on 8th January 2014 at about 11.00 p.m., in the vicinity of Simpang 490, Kg Beribi in Brunei Darussalam, did commit mischief by causing damage to property, to wit, an excavator, belonging to Syarikat Kai

Wang, amounting to above B$25, to wit B$714 and the both of you have thereby committed an offence punishable under Section 427 of the Penal Code, Chapter 22, read with section 34 of the same.

The Appellant was represented by Mr. Sheikh Noordin and he outlines that his appeal is twofold. Firstly, he appeals against the conviction against the 2nd charge for mischief (section 427) and secondly against sentence on both convictions for theft and mischief.

The facts of the case are these. The Appellant along with a co-defendant drove into an industrial area and forced open the door of an excavator before attempting to steal the battery of the heavy vehicle. They managed to cut the cables attached to the batteries and were about to load them to their car when the police stopped them. The damage to the excavator amounted to B$714.

The Appellant's argument as against the conviction under section 427 is that given the charge is compoundable in law; it appears that the Appellant was not offered any opportunity to do so. Mr. Sheikh Noordin argued that there is nothing in the notes of proceeding to suggest that the Appellant was asked whether he wished to compound the charge by paying the damage amount ($714). Further it was argued that having been arrested and remanded in custody since the date of the offence till sentence, neither he nor his family had the opportunity to negotiate to compound the offence with the complainant.

As regards the appeal against sentences on the two counts, the Appellant submits that the Court bellows failed to consider sufficiently or put any weight on the facts that this was not a full offence but an attempted one. Secondly, the value involved was small in that any damages to the batteries could be fully compensated for, as such no substantive damaged or loss could be attributed to the complaint. Thirdly, the Appellant had pleaded guilty at the very first opportunity and had show genuine remorse being a first offender with previous clear record.

Further, the Appellant submits that the one-week custody detention would have served a sufficient deterrent for the Appellant not to reoffend. As such, the Magistrate should have given the Appellant a second chance with the more appropriate order of probation on the 2nd charge.

Dk. Hazirah appearing for the Respondent/Public Prosecutor concedes that the Appellant was not asked in Court whether he wished to compound the 2nd charge. She informed the Court that there was no induction on the part of the complainant to offer to compound the case albeit that legally the discretion to compound rest on the complainant.

As against sentence, she submits that the Senior Magistrate was conscious of the facts that the Appellant was a 1st offender and had pleaded guilty and took into account of these facts. The sentence imposed was not by any means excessive.

In ***Mah Chee Kee v Public Prosecutor*** **(1999) JCBD 287 Deny's Robert C.J** had the opportunity to deal with the issue of compounding in the case. He states:

> *"COMPOUNDING*
>
> *The complainant has written to the High Court to say "I hereby confirm that I forgive and will not pursue the matter." If this had been presented to the Court at the proper time, it might have been regarded as a compounding of the offence.*
>
> *The Magistrate did not consider whether the complainant was willing to compound the offence.*
>
> *I do not consider that a Magistrate is obliged to do so. If the question of compounding is not brought to his attention, usually because his consent to the compounding is not sought, under section 224 of the Criminal Procedure Code, he is not obliged to enquire. He may properly assume that there has been no agreement as to compounding the offence.*
>
> *A charge under section 323 Penal Code, may properly be compounded, but the Magistrate was not informed of the willingness of the complainant to compound the offence.*
>
> *The complainant was, according to the facts given to the Court, in debt to the defendant, for a substantial period, since April, 1999. After an argument about the debt, the defendant lost his temper and attacked the complainant. He had, therefore, a degree of provocation, though not such as would excuse such an attack.*
> *Both the complainant and the defendant were foreigners. Thus the complainant may well not have known that the compounding was possible. If he had informed the Magistrate that he was willing to compound the offence, the Magistrate may have taken the view that a lesser sentence was justified.*
>
> *I accept that if there is to be any compounding, it should take place, under section 224 CPC, when proceedings are pending before a Magistrate and not on an appeal. Thus, it would be wrong for me to allow a compounding of the offence at the appellate stage."*

While I agree that nothing in section 224 of the CPC require the Court to inquire to about compounding and for that matter compounding should only take place before a Magistrate and not on appeal but the fact of the matter is that the 3rd column of table of offences, Part A of Section 224 specifically states the persons by whom the offences maybe compounded. For offences under section 427, the column states "The person to whom the loss or damage is caused." I believe that the legislative had intended that these offence are to be compoundable as these are considered to be trivial or cases of minor in nature where compounding could be seen to be able to restore the complaint's or victim's position as before albeit they are criminal offences. Good practice dictates that Court

below should inquire further in these cases where there had been attempts at compounding between the parties or whether parties know these are compoundable offences.

There is nothing in the Note of the Proceeding to suggest there was any attempt at compounding or for that matter any inquire by the Court of it. The Appellant was unrepresented when he was produced before the court, the more reason that he and the victim are put to notice of this provision and it's practice. Unless the defendant is represented it is assumed that counsel for the defendant had advised the latter of the provision as such there is no requirement on the part of the Magistrate to require into it.

Base on the foregoing reasons I quashed the conviction on the 2nd charge. Given that the Appellant had served his custodial sentence saved for the whipping, I believe there is no necessity on my part to order a retrial.

This leaves me with the appeal against the sentence on the 1st charge. I'm inclined to agree with the arguments of Mr. Sh. Noordin on the mitigating factors in favour of the Appellant. I believe a fine would have been the appropriate sentence in this case. The Appellant had been remanded for a week prior to the plea taking and I believe the remand would have served as a sufficient deterrence given that he is a first offender, pleaded guilty and as well has shown a genuine remorse.

The fact that the Appellant had served his custodial sentence in this case, I would therefore not order any sentence in substitute and order the defendant to be released forthwith.

DATO PADUKA HAIROL ARNI MAJID
Judge, High Court