

Mohd Noor Bin Litoh

AND

Public Prosecutor

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 3 of 2005)

Cons, P., Power and Mortimer, JJ.A.
16th November, 2005.

The Appellant pleaded guilty to 3 charges of Criminal Breach of Trust contrary to S.409 of the Penal Code. On the individual charges, the Judge's approach to sentence was impeccable. However, she then failed to consider whether the total consecutive sentences of 6 years were excessive, having regard to the overall criminality and mitigation. The total of 6 years' imprisonment excessive. Reduced to 4 years.

Appellant in person.

Pg Nina Jasmine Bte PLKDR Pg Hj Bahrin (Deputy Public Prosecutor) for the Public Prosecutor.

Cases cited in the Judgment:

PP v Hj Mohiddin Bin Hj Timbang [1997] JCBD360

R v Barrick (1985) 81 Cr. App. R. 78

R v Bocski (1970) 54 Cr. App. R. 519

Mortimer, J.A.:

On 5 April 2005, the Appellant pleaded guilty to three counts of Criminal Breach of Trust contrary to S.409 of the Penal Code, before Hayati, J. She sentenced him to 1, 2 and 3 years respectively. She ordered these sentences to run consecutively, making 6 years in all. He appeals against the total sentence on the grounds that it is manifestly excessive and he asked that the sentences should be made concurrent pointing out that he has four children, who are at school, his wife is unemployed and her health is poor.

The Facts

The Appellant was an acting Accounts Clerk, Grade II, at the Examinations Department of the Ministry of Education. His duties included collecting cheques from the Treasury, cashing them, and making payments in cash to those entitled.

During 3 periods, which were school examination's period, reflected in the charges, he obtained the money and failed to pay it over to those entitled. In this way, between 16 December 1999 and 29 December 1999, he obtained \$31,290.49. During the period 13 March 2001 and 27 December 2001, he took \$177,824.22 and between January and April of 2002, he took \$117,979.47. Over the whole period between December 1999 and April 2002, he kept for himself \$327,094.18.

No doubt realising that the defaults would soon be discovered, in April 2002 he made an attempt to explain them by reporting to his senior that the previous December, after cashing cheques, he had inadvertently left the money in a shop. A police investigation and an audit followed, but on 10 July 2003, he admitted his story was false and, in due course, he made a full confession. He admitted that he had used the money on cars, motor accessories, on land which he had previously owned, and on gambling.

Each offence carries a maximum sentence of 10 years' imprisonment. In sentencing, the Judge took account of the seriousness of the offences. In particular, that these substantial sums of money had been taken by a government servant in a position of trust. On the other hand, she gave weight to the Appellant's previous good character and the fact that he was a married man with 4 children. Also, that he had lost his employment and will have difficulty in obtaining employment in the future. Most importantly, he had confessed at a reasonably early stage and pleaded guilty, saving much time and expense, and demonstrating his remorse.

In sentencing on the individual offences, the Judge's approach was proper. She took a starting point for the appropriate sentence after trial on each offence and reduced that by a third, or a quarter, for the pleas of guilty and other mitigating factors. So, she reduced her 18 months' starting point on the first charge to 1 year. 3 years on the second charge was reduced to 2 years and 4 years on the third charge to 3 years. She then ordered these sentences to be consecutive, making the 6 years' imprisonment in all.

The Judge referred to the well known passage in *R v Barrick* (1985) 81 Cr. App. R. 78 where the LCJ says:-

"In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. Despite the great punishment that offenders of this sort bring upon themselves, the Court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide."

This passage has been accepted as the proper approach. The more detailed guidelines relating to the amount of money involved are submitted by Madam Jasmine, who appears

for the Public Prosecutor, not to be of assistance here in Brunei. Bearing in mind that the condition here in Brunei are very different from those in the United Kingdom we agree.

Totality

Turning again to the Judge's sentencing. Having decided that the sentences should run consecutively, she ought, but did not, consider the totality of the sentences to determine whether 6 years was excessive, having regard to the overall criminality of the case. As was said in *R v Bocski* (1970) 54 Cr. App. R. 519, "*The final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive.*"

Madam Jasmine who appears for the Public Prosecutor has helpfully referred us to the detail of *Barrick's* case together with a number like cases heard in the Brunei Courts.

The only case cited in which a substantial sum of money was involved (\$170,237.20) is *PP v Hj Mohiddin Bin Hj Timbang* [1997] JCB360 where after trial the Judge passed a sentence of 2 years and 6 months imprisonment. But in that case, there had been very considerable delay between the completion of the investigation and the time when the accused was charged. The individual circumstances of each case relevant to sentence are generally accepted to be enormously variable.

Conclusion

As the judge did not consider totality, it is necessary for this court to do so. Here as we pointed out, the appellant was a public servant in a position of trust. He took money, which he should have handed over to ordinary members of the public. The offences took place over a lengthy period, the amount was considerable and there is no prospect of repayment. On the other hand after initial prevarication he confessed showing remorse and saving much public money and expense. His future prospects are poor.

Taking these matters into account, as well as the cases cited to us, we are of the opinion that the overall criminality of these offences, including the mitigation, does not warrant 6 years' imprisonment, which is, in the circumstances, excessive. 6 years' imprisonment would involve a starting point of about 9 years. The 6 years' imprisonment passed is approximately the level of sentence, which may have been passed after trial.

We therefore allow the Appeal and reduce the overall sentence to 4 years' imprisonment, by leaving the sentence of 1 year in the first charge and 3 years' on the third charge to run consecutively, but ordering that the sentence of 2 years' imprisonment on the second charge to run concurrently with the others.

Appeal allowed