

Public Prosecutor

AND

Hj Anuar Bin Hj Mohd Tahir

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 3 of 2006)**

Cons, P.; Power and Mortimer, JJ.A.

Date of Handing Down Reasons: 20th November, 2006.

Public Prosecutor's appeal against fines totaling \$1,000 imposed for 2 offences of Criminal Breach of Trust contrary to S.406 of the Penal Code on the grounds that they were manifestly inadequate and did not have sufficient deterrent or retributive effect. Conceded that special circumstances justified the imposition of fines rather than a custodial sentence. Substantial mitigation advanced including information about the Respondent's lack of means which was not challenged by the prosecution at trial. In the circumstances the punishment was appropriate if apparently lenient. Appeal dismissed.

Aldila Bte Hj Mohd Salleh (Deputy Public Prosecutor) for the Public Prosecutor.
Defendant in person.

Mortimer, J.A.:

This is an appeal by the Public Prosecutor against the fines passed by the Chief Justice in sentencing the Respondent on 11 October 2005. The Public Prosecutor seeks an increase in the amount of the fines on the grounds that they were manifestly inadequate.

The Pleas and Sentences

The Respondent pleaded guilty to 2 offences of criminal breach of trust contrary to Section 406 of the Penal Code, Cap 22. The first was committed over the period from January 2001 to December 2001 involving a total of \$9,000. The second took place over the period January 2002 to March 2002 involving \$3,400. The total was \$12,400.

On the first count the Chief Justice fined the Respondent \$700 with 6 months' imprisonment in default and on the second he fined him \$300 also with 6 months' imprisonment in default. The sentences of imprisonment were ordered to be concurrent.

The Proceedings

Initially the Respondent was charged with 2 counts of criminal breach of trust as a public servant contrary to Section 409 of the Code which carries a maximum sentence of 10 years' imprisonment. The amended charges under Section 406 do not allege the offences were committed as a public servant and provide for only 5 years' maximum imprisonment. In other respects the particulars of the amended counts were the same.

At the outset the Respondent pleaded not guilty to the more serious charges and his trial began on 20 June 2005. After 5 prosecution witnesses had given evidence and a number of adjournments there were discussions between counsels. Consequently on 27 September 2005 the charges were amended and he pleaded guilty to them.

The Facts

At the time of offences the Respondent was the Village Head or Ketua Kampong. As Village Head he was entrusted to receive and distribute public money for old age pensions and welfare assistance to the inhabitants of the village. Old age pensions could be paid only to the pensioner personally but welfare assistance could be distributed to a representative of the recipient who produced a letter of authority. The Respondent received the sums of money for distribution. He handed over the money against receipts signed or thumb-printed by the recipients and he would countersign them. The Respondent was obliged to keep a careful record supported by the receipts and it was his duty to return money not distributed to the Government.

Entitlement to old age pension ceases on the death of the pensioner and a woman's entitlement to welfare payments ceases if she remarries.

In the case of 4 old age pensioners who had died and one lady who was in receipt of welfare payments but who had remarried, the Respondent kept the money he had received from the Government and returned records which purported to show that the money reflected in the charges had been properly paid out.

On 20 March 2002, a social development worker discovered that one of the pensioners involved had died. The consequential inquiries revealed the offences. On 3 August 2002 the matter was formally reported to the police. A police investigation followed but in spite of the full cooperation of the Respondent he was not charged until 17 August 2004, 2 years later. This delay has not been explained.

The Mitigation

The Respondent's Counsel advanced a substantial mitigation which the Chief Justice considered in detail.

In summary the matters put forward were as follows:

The guilty plea

This was made when the trial had begun and after 5 prosecution witnesses had given evidence. The pleas were made after the counts had been reduced from Section 409 offences with 10 years maximum to Section 406 offences carrying a 5 years maximum. This was the first opportunity he had to plead to the lesser charges.

Previous good character and excellent record

The Respondent is not only a man with no previous convictions but also he has a long and excellent career in government service from July 1957 until 1990. He retired and later he was elected Village Head where he lives. He held the appointment until it was terminated in consequences of this case. As Village Head he received remuneration from the Government for his duties which included the proper distribution of the monies involved in the offences.

In the 1962 Brunei Rebellion he assisted the British Army. He served in the Royal Brunei Armed Forces for some time and between 1970 and 2000 he did public voluntary service in various and significant ways.

His services to the Government and his voluntary service were recognized by the award of a number of medals. The *Pingat Perjuangan* for service in the 1962 Rebellion; the *Brunei Long Service Medal*; the *Pingat Indah Kerja Baik*; and the *Pingat Laila Tugas* for service in the Royal Brunei Armed Forces.

This amounted to a lifetime of honourable public service.

The illness of his late wife

It was urged before the Chief Justice that his late wife's illness was the prime factor which led the Respondent to commit the offences. She had a serious heart condition. After spending some time in the intensive care unit at the RIPAS Hospital she was transferred to Kuala Lumpur for heart surgery but succumbed and died on 30 June 2002. It was submitted that during her illness the Respondent spent time with her in hospital and during his absence from the village wrongfully allowed 2 Indonesian employees to distribute the money. The Chief Justice did not accept the suggestion by counsel that the Defendant had not personally benefited through the offences.

The Respondent's age and health

At the time he was sentenced the Respondent was 69. He is now 70. A medical report showed that he had been attending the Health Centre since 10 March 2004 and was "a known case of diabetes mellitus and borderline hyperlipidemia". The diabetes had damaged his eyesight and hearing and he was due for eye surgery on the day following his appearance.

He relied upon his advance age and ill health. Counsel for the Public Prosecutor informed this court that his condition was worse at the time of trial than it now appears.

Delay

The 2 years delay between the times when these offences were reported officially in August 2002 until he was charged on 17 August 2004 is unexplained. As the Respondent was fully cooperating with the police and must have known that he was likely to be charged, the prospect of serious punishment would have weighted upon him over that period. There was further delay between August 2004 and June 2005 when the case came to Trial.

The Respondent's lack of means

Finally, to mitigate the level of any fine imposed the Respondent's counsel dealt with his financial situation. Bills were produced which showed that he owed a water bill for \$10,147.23 and an electricity bill for \$5,731.35. His income was a monthly pension of \$817.00 and his old age pension of \$200.00.

Special Circumstances

It is accepted by the Public Prosecutor that there were special circumstances in the Respondent's case which justified the Chief Justice in not imposing an immediate custodial sentence.

The Chief Justice's Reasons

Having reviewed the authorities on sentencing those of advanced age and on delay the Chief Justice concluded,

“I have no doubt that an ordinary informed citizen understanding these matters that I have mentioned and looking at the Defendant's infirmities brought about by his diabetic condition would readily agree that, despite the fact that the total amount involved is \$13,400 (sic), that should in normal circumstances justify a total sentence on the two counts to which he has pleaded, a prison term in the region of 6 to 9 months, but taking a merciful view while sure that the public interest is safeguarded as well, a reasonably sufficient amount of monetary punishment would be proper to meet the ends of justice in this rather unusual case.”

The Public Prosecutor's Submissions

Having reviewed the authorities, in particular upon *R v Barrick* [1985] 81 Cr. App, R 78, DPP Aldila submits as her central argument that having regard to all the circumstances of the case the level of fines imposed did not have any or any sufficient retributive or deterrent effect. For this she relies upon *Public Prosecutor v Mohammed Abdullah Ang Swee Kang* [1987] 2 MLJ 368 in which it was said,

“Any Judge who comes to sentence in a breach of trust case ought always to apply two factors which operate in this type of case: The retributive factor in order to show the Court's disapproval or abhorrence on behalf of the community, of this type of criminal conduct, and the deterrent factor so as to discourage likely offenders.”

In spite of mitigating factors put forward at trial she points out the blatant dishonest disregard of the Respondent's responsibilities and of the law demonstrated by the offences affected public confidence in the system. The Respondent's actions were such a betrayal of trust put in him by the villagers as well as the Government that his actions tended to undermine public confidence in the role of a Village Head. Also, there had been no restitution of any of the amounts misappropriated. For these reasons the fines were manifestly inadequate.

Conclusion

It was necessary for the Chief Justice to assess the proper level of fines to impose. For this he had to rely on the information about Respondent's lack of means to which we have referred. This was not challenged by the prosecution at trial and was accepted by the Judge who sentenced accordingly. There is no suggestion that the information put forward was inaccurate.

In passing we note that if matters such as these put forward in mitigation are not accepted by the prosecution it is necessary for counsel to raise the issue before sentence so that the Judge may deal with it.

This court has had no further evidence upon the Respondent's means. We must therefore rely upon the information put before the Chief Justice. Counsel asks this court to compare the money embezzled with the level of fines to hold that they were insufficient punishment. Although this comparison is relevant in the absence of evidence of means, when there is reliable evidence, the Judge must sentence accordingly. The level of punishment imposed by a fine is dependant upon the wealth or otherwise of the defendant. A small fine upon a poor man may be heavy punishment whereas a substantial fine on a man of means may be trifling.

Bearing in mind his means and the substantial mitigation advanced, this court cannot hold that the fines imposed in this case were other than appropriate punishment upon the Respondent for the offences he committed, even though in the absence of a full knowledge of the circumstances they appear lenient.

For these reasons, the appeal was dismissed.

Cons, P

Power J.A.

Mortimer J.A.