Public Prosecutor

AND

Hj Ibrahim bin PDASDR Hj Kassim

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 4 of 2006

Power, P.; Mortimer and Litton, JJ.A.
16th May, 2007.

Unless it be on exceptional case imprisonment is appropriate sentence for an offence under s.406 of the Penal Code. R.V. Barrick cited and followed.

M/S Zul Sukarla Partners Law Office for the Defendant.
DPP Pg Nina Jasmine Bte PLKDR Pg Hj Bahrin for the Public Prosecutor.

Cases cited in the Judgment:

Hassan Bin Dollah v PP [1996]1 JCBD 53.
PP v Awang Haji Anuar bin Haji Mohd Tahir.
R.V. Barrick [1985] 81 cr.app.R.78.

Power, P.:

The appellant pleaded guilty to one count under s.406 of the Penal Code when he appeared before Commissioner Hairol in the Intermediate Court on 22nd April 2006.

The Charge

This charge carries a maximum term of imprisonment of 5 years and liability to a fine. It involves dishonest use of property involving a criminal breach of trust. It was an alternative charge to the more serious charge of dishonest use of property involving criminal breach of trust by a public servant under s.409 which carries a maximum term of imprisonment of 10 years. No plea was entered on this more serious charge which the prosecution withdrew.

The Record in the Court Below

The record states:

"Alternative Charge.

Defendant charge read and explained in Malay.

Alternative Charge

That you, between 26th October 1997 and September 1999 at No. 91-G, Kampong Bolkiah "A" in Brunei Darussalam, was entrusted with property, to wit,

> The Widow Welfare fund for Dayang Siah binti Jamaluddin amounting to BND9,030.00

Where you are dishonestly used that property and you have thereby committed criminal breach of trust in respect of such property, and you have thereby committed an offence punishable under Section 409 (sic) of the Penal Code.

Understood charge and pleaded guilty.

Defendant : I plead guilty to the alternative charge."

The record shows that the facts set out below were then read and admitted by the appellant:

"1. The Defendant was employed as a Public Servant as the Village head (or "Ketua Kampong") of Kampong Bolkiah "A" from 1996.

2. Amongst the duties of the Defendant was to distribute allowances to all the Widows in Kampong Bolkiah.

3. One such widow was Dayang Siah binte Jamaluddin, who was receiving the Widow Welfare allowance of B$345 monthly from 1st July 1996.

4. Dayang Siah remarried in September 1997 and duly informed the Defendant that she would not be entitled to the Widow Welfare allowance.

5. The Defendant's duty was to inform the Ministry of Culture, Youth and Sports to withdraw Dayang Siah from the list of those entitled to the Widow Welfare allowance.

6. Instead, the Defendant kept on taking Dayang Siah's allowance and keeping it for his own private use. The Defendant took Dayang Siah's allowance from October 1997 until September 1999, amounting to $9,030.

7. On 4th January 2001, the Defendant informed the Head of Welfare that he had taken the said B$9,030 and wanted to repay the same to the Government of Brunei by way of 10 installments commencing February 2001.

8. On 27th February 2001, a letter was issued by the Ministry of Culture, Youth and Sports to the Commissioner of Police stating that the Defendant had taken Dayang Siah's allowance from October 1997 until September 1999. Based on that letter, the police filed a police report on 15 th March 2001.

9. On 24 th March 2001, the Defendant paid back $1,530 to the Ministry of Culture, Youth and Sports leaving a balance of $7,500.

10. The Defendant was arrested by police and admitted to the offence as charged.

11. The Defendant has no previous convictions in Brunei Darussalam.

12. The Defendant paid the Government of Brunei back $1,000 in December 2005, $500 in February 2006 and $300 in April 2006 leaving a balance of $5,700.

Court : Accept the plead of guilty of alternative charge.

Defendant : Understood and agreed with the brief facts."

In mitigation the appellant said:

"I regret what I have done. I pray for a lenient sentence. I am 63 years old. I will make the effort to pay the amount by February next year.

Married with 2 wives and has 9 children, all are already working. First wife not working while second wife working. I will not repeat this offence again."

The appellant now appeals against both conviction and sentence.

The Appellant's Submission on Conviction

During argument by Mr. Zul for the appellant it became clear that the thrust of the appeal against conviction was that the Judge had not explained the "consequence of his plea" as required by s.175(2) of the Criminal Procedure Code which states that upon a plea the court "shall ascertain that the accused understands the matter and consequences of his plea and intends to admit, without qualification, the offence alleged against him."

Mr. Zul submitted that the record did not show that the appellant was told that he was facing both imprisonment and fine as possible consequences of his plea. He submitted the "at the back of his mind by pleading guilty, he would only face a fine sentence, just like the case of which he was aware of the other former "Ketua Kampong" (Village Head) that is the case of Hj Anuar Bin Hj Mohd Tahir". Mr. Zul relied upon *Hassan Bin Dollah v PP* [1996]1 JCBD 53 where Roberts C.J. dealing with the words

"charges were read and explained to the defendant in Malay" which appeared in the record of proceedings held:

> "The Magistrate may well in the present case, have been satisfied that the defendant had understood the nature and consequences of his plea, but he did not record that this had been explained to the defendant by the Magistrate as I think he is obliged to do, by virtue of section 175(2) C.P.C."

The Court's Decision

This authority would, initially, appear to be on all fours with the present case. However Madam Jasmine, for the Prosecutor, handed up to the court the charge sheet and informed us that prior to plea this had been read in full to the appellant. This not only sets out the charge and the alternative charge but also sets out the penalties of imprisonment and fine which apply to each. This we are satisfied makes it clear that the appellant was prior to his pleas made aware of the possible consequences of that plea. Mr. Zul argued, however, that this did not conclude the matter as the record itself was "ambiguous", that we are bound by the record and that any ambiguity therein should be resolved in favour of the appellant. This argument is without merit as there was, in fact, given that the charge sheet was read to the appellant, no ambiguity. The appellant was, we are satisfied, well aware of the possible consequences of his plea. The appeal against conviction is dismissed.

The Appellant's Submissions on Sentence

In his submission on the appeal against sentence Mr. Zul submits that the Judge did not gave any reasons for imposing a custodial sentence and failed to give weight to the age of the appellant, to the delay between his admitting the offence to the Head of Welfare on 4th January 2001 and his trial on 22 nd January 2006, to his plea of guilty and to his partial repayment of $3,330 leaving balance unpaid $5,700. He relies upon a decision of the Chief Justice in *PP v Awang Haji Anuar bin Haji Mohd Tahir.* There the defendant pleaded guilty to 2 charges under s.406 involving $12,400 committed in circumstances similar to those applying in the present case. The Chief Justice was satisfied that given the amount involved a proper overall sentence could have been 6 to 9 months but was satisfied given the medical condition of the defendant who was 69 years of age and was seriously ill with Diabetes Mellitus and Borderline Hyperlipidemia that "a reasonably sufficient amount of monetary punishment would be proper to meet the ends of justice in this rather unusual case." He imposed an overall fine of $1,000 in default 6 months imprisonment. This sentence was appealed by the Public Prosecutor on the ground that the fines were manifestly inadequate. The Court of Appeal was asked, we stress, only to deal with the adequacy of the fines not with the propriety of a non-custodial sentence. The court considered them lenient but, given the substantial mitigation, declined to interfere. We are satisfied that this decision gives no support for the imposition of non-custodial sentence in the present case.

The Court's Decision

The Judge when sentencing cited all of the pertinent circumstances. He clearly had in mind the proper approach to sentencing in cases involving a criminal breach of trust as set out in the landmark decision of *R.V. Barrick* [1985] 81 cr.app.R.78.

He observed:

> "In these types of cases where the criminal breach of trust were committed by public servant, custodial sentences are inevitable save in very exceptional circumstances. I believe that the court should pass custodial sentence of substantial term to mark and remind the public the gravity and seriousness of the offence."

The Judge referred to offences by a "public servant"; he was nevertheless, we are satisfied not sentencing him on the basis of the S.409, charge which had been withdrawn, but on the lesser S.406 charge to which he had pleaded. This is clear not only from his reference to Tahir's case but also from the leniency of the sentence imposed.

He was mindful of the deceit practiced by the appellant and of his failure to justify the faith placed in him by those who had elected him to the office of Ketua Kampong.

He bore in mind his clear record and his plea of guilty and that the appellant's conviction would lead to his dismissal from office. Finally he was concerned with the delay in bringing the matter to court observing that the police filed a report on 15 th March 2001, that the investigation papers were only received by the Attorney-General's Chambers on 16th June 2005 and that the appellant was only brought to court on 22nd April 2006.

There is no merit in the suggestion that the Judge failed to give weight to all of the factors properly to be considered when sentencing this appellant.

This was a serious offence committed over a period of 2 years. It is true that it came to light because of an admission by the appellant, that he has repaid about ⅓ of the money he took, and that there was considerable delay in bringing the matter to trial. We note, however, that despite his promise "to make the effort" to pay the balance by February 2001 and the fact that he has been on bail since his conviction he has, in fact, made no further payments. We bear in mind the indication given by the Chief Justice that the proper sentence after plea in Tahir's case would have been 6 to 9 months imprisonment had there not been powerful mitigating circumstances. We are satisfied that the sentence imposed was by no means excessive. This was a serious offence which called for a custodial sentence. The bail of the appellant is revoked. He is to be taken into custody to serve the sentence of 2 months.