Public Prosecutor

AND

Lim Ai Hui

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 5 of 2004)

Cons, P., Power and Chong, JJ.A.
6th December, 2004.

Criminal Breach of Trust – appeal against inadequacy of sentence – dismissed principally by reason of failure to notify defendant.

Pg Nina Jasmine (Deputy Public Prosecutor) for Public Prosecutor.
Mr Francis Chiew (M/S Francis Chiew & Co.) for the Respondent.

Cons, P.:

The background to this appeal cannot be more usefully put than it was by the Judge in the Court below:-

> "The Defendant (now the Respondent) joined the Royal Brunei Police Force in 1972 as an administration clerk with a monthly salary of $280.00. She worked her way up to become a Grade 3 clerk with a salary of $1,625.00. She is now 50 years old and has 3 grown up children. She was described as a diligent and honest worker by her superior, Pg Datin Hjh Noralam (since retired), who was shocked to learn that the defendant had committed Criminal Breach of Trust as she had known her for more than 20 years and she believes that the defendant must have been forced by circumstances. Another superior equally paid tribute to the defendant's integrity and diligence.
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> Indeed, the defendant received Pingat Jasa Kebaktian (PJK) in 1981 and Pingat Kerja Lama (PKL) in 1996. She was also awarded an award by the Commissioner of Police for her integrity, diligence and patience in January 2002.
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> She had, by January 2002 served about 30 years and her record was excellent. In her capacity as a Grade 3 clerk in the finance department, she often received a

> large amount of cash for the use of the special services to the CID which she would hand over to her superior immediately to be kept in a safe in the director's office. Sometime in February 2002, tragedy struck in her household. Her husband suffered a stroke. He sought treatment in RIPAS Hospital but his condition did not improve. A friend advised her to bring her husband for acupuncture treatment overseas which would cost them about B$15,000 a session, but they did not have sufficient money to do so. She was sad and desperate to do something for her husband. She arranged to borrow some money from a friend but the loan did not materialize."

The opportunity to do something for her husband came her way in May. In the course of her duties she was handed $250,603 in cash. Having properly disbursed $603.00, she should have paid the balance of $250,000 to her superior. She simply did not do so. Instead, she locked the monies in her desk drawer and took from time to time, as it was later discovered, a total amount of $80,000.00. She told the Judge below that all of it went on medical treatment for her husband. This was not queried at the time and the Judge so accepted. We see no reason now for any doubt. When asked about the money by a colleague in October, the Respondent said the relevant cheque had not been received from Treasury. In December, she denied to the Accounts Officer that the money had ever been given to her but confronted two days later with the gentleman who had actually done so, she, as it were, came clean and confessed to what she had done.

Just over a year later, she was brought before Madam Justice Hayati charged with Criminal Breach of Trust, laid, as one would have expected, under section 408 of the Penal Code, being breach by a clerk or servant. It was then reduced to a charge of simple breach under section 406, a less serious offence carrying a maximum sentence of 5 years as compared with the 10 for the more serious offence. Counsel for the Public Prosecutor tells us that this was done following "without prejudice" discussion with respondent's counsel. Whether in the circumstances as they appear from the Agreed Statement of Facts, the decision of the Public Prosecutor was, in fact, justifiable in the public interest is a matter that is perhaps open to doubt. In any event, the respondent pleaded guilty to the new charge. Counsel stressed the obvious factors in mitigation and the Judge also noted:-

> "More unfortunately for her, her husband suffered a second stroke on learning, sometime in August 2002, that the defendant had committed this offence. Her husband now confined to a wheelchair told the court that he would not have agreed to receive the treatment had he known that his wife had resorted to the crime for his sake"

and the Judge said finally,

> "I have given careful consideration to the defendant's counsel's plea for a non custodial sentence but, not without hesitation, I have to say that a custodial sentence is inevitable. I take 6 months imprisonment as an appropriate starting point. However, I will give about a third discount for the defendant's plea of guilty, and another third for her full cooperation with the police, her excellent

> record and long service, the fact that she did not use the money for her own personal gain and that the offence was not a ploy concocted to be executed for over a long period of time."

That left the sentence as one of 2 months. The Public Prosecutor now appeals. The initial Notice of Appeal complained that the sentence was manifestly inadequate. The subsequent Grounds of Appeal added that it was also wrong in principle.

We have to say that we have not been persuaded that the Judge erred in anyway in principle. But we have no hesitation in saying that as matters stood at the time of the trial, the sentence was markedly inadequate. Cases to which our attention has been drawn indicate 2 years as an acceptable starting point upon a plea to an offence under sections 408 or 409 where the amount taken is modest. Little assistance is to be found in the reports with regard to section 406, but bearing in mind, on the one hand, that the charge was reduced to one under the lesser section, and on the other, that $80,000 is by no means a modest sum, not to mention the $250,000.00 that was actually taken, 2 years as a starting point might well have been appropriate. The mitigation was considerable but even so, a sentence could properly have been expected within the range of 9 to 12 months.

But matters no longer stand as they did then. To start with, the Respondent has already served her sentence and was released from prison completely unaware that the Public Prosecutor had instigated these proceedings. No notice had been served on her, even though it could so easily have been done as she was then, of course, still in prison. Counsel for the Public Prosecutor accepts that the fault was hers alone, but that cannot alter the position. An application of this kind is deliberately intended to affect the liberty of the person concerned. It goes without saying that it must be brought immediately to his or her attention. Failure to do so is unacceptable. In the present instance, Mr Chiew who appears for the respondent has been content, however, not to apply for the appeal to be struck out, but merely to urge the circumstance as an important factor for our consideration.

The second factor is that we know now with more certainty the financial consequences of the Respondent's conduct. They are not so favourable to the State as we had at first been led to believe. We note that none of the money taken has been directly repaid and we have no reason to think that there is any likelihood that it will be. But speaking in very broad terms, it is apparent that the State will, in fact, recover approximately half of what was stolen as the respondent has now been dismissed from Government Service and will no longer be entitled to the gratuities that would otherwise have eventually been paid to her.

Having regard to these two matters, and in particular to the first, we have come to the conclusion that although the Public Prosecutor was justified in bringing the appeal, it would not be appropriate for this Court to interfere now and the appeal is therefore dismissed.

Appeal dismissed