

JOHARI BIN HAJI JAYA

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 14 of 2018)**

Before: Burrell P, Seagroatt and Lunn JJ A.

14th November 2018

Headnote: Consideration of previous convictions as aggravating factors where relevant to sentence for current offence(s).

Appellant in person

DPP Hjh Rozaimah binti Hj Abd Rahman and DPP Muhammad Qamarul Affyian bin Abdul Rahman for Respondent

Seagroatt, JA.:

This is an application for leave to appeal against a total sentence of 114 months and 4 strokes imposed by Judge Hanani following a series of court appearances dating from April 2014 and concluding on the 19 December 2015. The notice of application is dated 30th April 2018 being entered by his sister. The application is clearly well out of time by over 2 years and 3 months.

In these circumstances of considerable delay the court applies two well-established factors: the length of the delay and whether there is any satisfactory explanation for it and whether the application is likely to succeed. If the appeal is bound to fail, the court will not grant leave to extend the time for the application even if the delay were to be deemed minimal. It is clear that this applicant has an uphill task.

The history of his court appearances and the cumulative sentencing process is somewhat tortuous.

It starts with an appearance on the 28th May 2014 when he pleaded guilty to two offences of theft of motorcars (under s.379) and not guilty to a number of other alleged offences mainly of housebreaking by night and house trespass. A trial was fixed for those offences. All the offences, admitted and disputed, took place in March/April 2014, and sentencing in respect of the admitted offences was to take place on 3rd June 2014. He remained in custody.

On the 2nd June 2014 he pleaded guilty to a further five charges of theft of motor vehicles. Sentencing was then postponed until 9th June 2014. On that occasion he was sentenced to a total 5 years to run from 10th May of the same year. This was made up of six consecutive sentences of 10 months each (the starting point being 15 months on

each) and one concurrent term of 7 months (reduced from a starting point of 10 months).

In November 2015 he indicated that he wished to plead guilty to the offences to which he had pleaded not guilty on 28th May 2014 and in respect of which he was awaiting trial. On 14th November he duly appeared before Judge Hanani again and pleaded guilty to four offences of house trespass (s.451) one offence of housebreaking by night (s.457) and one of theft in a building (s.380). On that occasion Judge Hanani made reference to his criminal record and that he had previously been sentenced to 7 years. The record shows that that term was imposed for a series of offences of theft from dwellings and causing damage. She said *“you will be sentenced for a long time in prison seeing that you have committed multiple offences and with your bad previous record.”* That last phrase which I have underlined is an unfortunate expression. It tends to suggest that she regarded his bad record as being a reason for a long prison sentence.

A previous conviction is to be treated as an aggravating factor if that conviction can reasonably be so considered having regard in particular to the nature of the offence to which the conviction relates and its relevance to the current offence being considered, and the amount of time that has elapsed since that previous conviction. In those circumstances a previous conviction (or more than one if they are relevant) maybe taken into account in determining the starting point for the current offence.

In the event she adjourned the actual sentencing for one month and on the 19th December 2015 she proceeded to sentence him on the basis of all the offences committed in 2014 and made no reference to his earlier criminal record as a factor. We are satisfied that his previous record was not reflected in the sentences imposed.

On that occasion he admitted one further offence of housebreaking by night. All the offences were committed in the period February to May 2014. The breakdown of the sentences for the groups of offences was:

1. For the four offences of house trespass and one of theft from a dwelling she imposed terms of 24 months reduced from a starting point of 36 months each.
2. For the two offences of housebreaking by night the sentence was 32 months and 2 strokes reduced from 48 months and 4 strokes, on each.

The sentence on the first offence of house trespass (24 months) was to be consecutive to the sentences on the housebreakings by night, which were themselves to be consecutive to each other, thus making a total of 88 months i.e. 7 years and 4 months (not 3 months as the Judge stated in error) and 4 strokes.

She then went on to consider the sentence of 5 years (60 months) which she had imposed in June 2014. She ordered that 54 months and 4 strokes of the latest sentence were to be served on the expiry of the earlier sentence making a total sentence of 114 months (9 years and 6 months). Effectively she had made a further discount of 34 months.

To reach a sentence of 114 months (9 years and 6 months) after pleas of guilty, the judge would have had in mind an overall sentence of 171 months (14 years 3 months). This is manifestly too high, given all the circumstances set out earlier.

This applicant is about 30 years of age. He has a bad criminal record having already received as stated earlier a 7 year term when he was about 20 years of age and had not long been released from prison when he began committing the latest series of offences.

We consider that the correct starting point should have been 144 months (12 years). The discounted sentence should therefore have been 96 months (8 years). The correct way of reaching this term is to leave the sentence imposed on the 9th June 2014 at 60 months (5 years) for the first set of offences and make a term of 36 months (3 years) consecutive to that term for the second set of offences, each of which will carry a sentence of 36 months, all to be concurrent with each other.

In view of this, and despite the otherwise inordinate delay in making this application, justice would be served by granting leave and allowing the appeal by varying the sentence accordingly, which we so do.

A total sentence of 96 months and 2 strokes is substituted for the sentence of 114 months and 4 strokes which is to run from 10th May 2014.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A