

MOHD ZAINAL ABIDIN BIN HJ JUNAIDI

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 16 of 2015)**

MOHAMMAD ZUL – EQRAM BIN HJ ASMAD

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 24 of 2015)**

Before: Mortimer P, Leonard and Burrell JJ A.

25th November 2015

Headnote – Consideration in two separate appeals of the appropriate starting points and the application of the totality principle in multiple offences of dishonesty.

Criminal Motion No 16 of 2015

Appellant in person

DPP Dk Hazirah Pg Mohd Yusof (Public Prosecutor) for the Respondent

Criminal Appeal No 24 of 2015

DPP Didi-Nuraza Pg Hj Abd Latiff and DPP Muhammad Aiman Adri Ahmad Zakaria for
Appellant

Respondent in person

Burrell, JA.:

These two appeals have been heard together although, in fact, there is little to link them. We shall deal with them separately.

Each appeal is factually complex involving a total of 31 pleas of guilty to a variety of offences of dishonesty, spread over a lengthy passage of time, some committed individually, some with others, all requiring separate consideration. In both appeals we have been greatly assisted by the “skeleton arguments” written by Public Prosecutor’s representatives. In both appeals all the relevant matters have been succinctly and helpfully set out.

Criminal Motion 16/2015

On 13th August 2014 the applicant was sentenced in the Magistrates’ Court for 7 offences of theft (4 being theft of motor vehicles) contrary to s.379 and s.380 of the Penal Code CAP 22. A term of 4 years and 10 months was passed. On 2nd October 2014, he was sentenced by Judge Hanani in the Intermediate Court for a further 12 offences contrary to s.379, 380, 411 and 457 of the Penal Code CAP 22. For these offences he was sentenced to 9 years and 10 months imprisonment and 6 strokes. This sentence was ordered to run concurrently with the Magistrates’ Court sentence save for 8 months which was made consecutive, making a final total for the applicant’s pleas of guilty to 19 offences of 10 ½ years and 6 strokes.

Leave to appeal out of time

The applicant’s Notice of Appeal was 6 months late being filed on 30th April 2015. In order for leave to be granted we must be satisfied that there has been a satisfactory explanation for the delay and that the appeal has a reasonable prospect of success. The applicant informed the court that the late filing was due to his inability to pay the necessary fee. It was eventually paid by his father. We accept this explanation. We are also satisfied that there is a reasonable prospect of some success in this appeal. Accordingly, we grant leave to appeal out of time and will treat the application as the appeal.

Merits of the Appeal

In a careful and detailed reasons for sentence the judge set out all the facts relevant to each of the numerous offences which the appellant faced. Rather than repeat it we consider it sufficient, for the purposes of this appeal, simply to highlight the important aspects of the appellant’s wide ranging criminal conduct.

The 7 offences to which he pleaded guilty in the Magistrate’s Court in August 2015 were all committed over a relatively short period of time in June and July 2014. They were all theft charges (to both s.379 and s.380 of the Penal Code) 4 involved thefts of motor vehicles. After plea, 12 months imprisonment was passed for each of the car thefts and 3 or 4 months for the more minor thefts. All sentences were ordered to be served consecutively. Had this court been dealing with this series of offences in isolation we would have observed that a proper application of the totality principle would have resulted in sentences which were not all consecutive. However, in view of our decision on the whole matter, as set out below, this issue need not be addressed in further detail.

Turning to the 12 offences to which he pleaded guilty in September 2014 in the Intermediate Court, he received a total of 9 years and 10 months imprisonment and 6 strokes. These offences were committed between December 2013 and May 2014. In 9 of them he was part of a gang carrying out serious offences including 5 housebreakings at night, 3 thefts of motor vehicles and 4 thefts and disposals of stolen electrical equipment from electricity sub-stations. The judge had a complex and difficult sentencing task to perform. There can be no criticism of her individual sentences for each offence. In each case she selected a starting point and gave a one third reduction for the plea of guilty, having given due weight to all mitigating factors. For the housebreakings at night, sentences of 28 months and 2 strokes were passed; for the car thefts 8 months and for the offences relating to the thefts from electricity sub-stations sentences between 4 and 10 months.

She then applied the totality principle. She made 3 of the housebreakings consecutive (28 months each) and 3 thefts of cars consecutive (8 months each) and one theft from a building consecutive (10 months). Thus a final sentence of 9 years and 10 months and 6 strokes was achieved.

The appellant had already commenced his sentence of 4 years and 10 months imposed a month earlier in the Magistrates' Court. Again with the principle of totality in mind she ordered the sentence of 9 years and 10 months to commence after the first 8 months of the Magistrate's sentence had been served making an effective total for the entire criminality of 10 ½ years and 6 strokes.

This represents a starting point after a contested trial of 15 years 9 months. 19 offences of dishonesty, including many thefts from buildings, some occupied, some at night, as a member of a criminal gang is a very serious matter. A heavy starting point was plainly merited. Moreover, the appellant had been sentenced to 5 years imprisonment in 2008 for 9 offences of theft. He was released in March 2012. These also are matters to be considered when selecting an appropriate starting point. The judge also noted that most of the 19 offences were committed after the appellant had been granted bail.

In short, his overall conduct demonstrates wholesale disregard for the law and for the safety and security of home owners and their property.

We note however that even multiple acts of dishonesty of the type in this case rarely attract starting points in excess of 12 years. Taking an overall view we accept that this is a particularly bad case which does merit a starting point in excess of 12 years. We have come to the conclusion, however, that 15 years and 9 months is too high. In order to reduce it to what we consider to be the proper level for this particularly serious case we amend the judge's order in two respects.

Decision

First, she made the 10 month sentence on the 8th charge, which was theft of a drill and a table from a dwelling contrary to s.380, consecutive. We now order that sentence to be

served concurrently. This reduces the Intermediate Court sentence by 10 months to one of 9 years and 6 strokes.

Secondly, a further consideration of the totality principle persuades us that the sentences for the offences heard in the Magistrates' Court should run concurrently with those imposed in the Intermediate Court. Thus the final sentence will be 9 years. We make no alteration to the strokes as ordered. A 9 year sentence after plea represents a starting point for all these offences of 13 ½ years. The sentence will run from the date specified by the judge below, namely 9th August 2014.

Criminal Appeal 24/2015

On 9th September 2015 this appellant pleaded guilty to 12 offences of housebreakings and thefts. This was as a result of three separate cases (in which the appellant appeared with different co-accused, one being the appellant in CM 16/2015 with whom we have just dealt) being consolidated. In all three cases he faced a total of 32 charges. One of the three cases was in the course of being tried and had reached a point near the end of the prosecution case when his change of plea to 12 charges was accepted by the Prosecution and the remaining 20 charges were withdrawn pursuant to s.172 of the Criminal Procedure Code.

Those 12 offences can be summarised as follows. In June and July 2012 he committed 2 thefts from dwellings. He stole \$20,000 worth of jewellery and \$10,000 cash from one and electrical equipment such as a TV and a video player from the other. He also committed two housebreakings, one of them at night, and stole similar electrical goods. Between September and December 2013 he committed 4 more offences. In a housebreaking and a theft in September 2013 he stole electric cables and in December 2013 he stole more cabling from an electricity sub-station and damaged more cables in the process.

Thefts from electricity sub-stations continued in January 2014 when he committed 4 more offences, stealing busbars, cabling and copper plate and leaving a trail of damage behind him valued in excess of B\$60,000. All 8 offences committed between September 2013 and January 2014 were committed whilst on bail for earlier offences.

In a careful and considered sentencing exercise the judge selected a starting point for each offence having outlined all the material facts relevant to each offence. In particular she noted the high value of the property stolen in July 2012, the seriousness of housebreaking, especially at night, and the dangers involved, inconvenience caused and recent prevalence of thefts from electricity sub-stations.

The appellant was 33 years old at the time of sentencing and although he had not been convicted before, it was clear that he had embarked on a spate of criminal activity since 2012. In such circumstances a defendant cannot pray in aid good character thereafter.

Although his pleas of guilty came during a trial the judge, rightly in our view, still gave a full one-third discount from each starting point because the pleas were entered as soon as the

prosecution decided to consolidate all three cases and withdraw 20 of the 32 outstanding charges.

The sentences actually passed were 24 months for the three housebreakings, between 8 and 14 months for the five thefts and between 4 and 8 months for the causing damage offences.

She then considered the question of totality and her approach cannot be criticised. She made the three housebreakings in June 2012, July 2012 and September 2013 all consecutive (24 months each) and further added 8 months for one of the offences of damage in a sub-station in January 2014. All other sentences were ordered to be concurrent.

The total, in months, was 80 months and 5 strokes. This amounts to a sentence of 10 years after trial (or more likely more than one trial) and 6 years and 8 months on a plea. For the avoidance of doubt we confirm that the start date for this sentence is 26th January 2014.

The sentence may appear to be on the high side. However, bearing in mind all the circumstances we which have outlined above and which the judge considered in detail we have concluded that it was not manifestly excessive nor was it wrong in principle.

The appeal is dismissed.

Order

In Criminal Motion 16 of 2015 we reduce the total sentence from 10 ½ years and 6 strokes to 9 years and 6 strokes by:

1. The 10 month sentence on charge 8 shall be served concurrently and not consecutively as ordered by the sentencing judge
2. The 4 years and 10 months passed in the Magistrate's Court shall be served concurrently
3. The final sentence of 9 years and 6 strokes shall be served with effect from 9 August 2014.

In Criminal Appeal 24 of 2015 the appeal is dismissed.

Mortimer, P.

Leonard, J.A.

Burrell, J.A.