

MOHAHAMAD ZUL EQRAM BIN HAJI ASMAD

AND

PUBLIC PROSECUTOR

**Court of Appeal of Brunei Darussalam
(Criminal Motion of 29 of 2019)**

MOHAMMAD ZUL WALIYUDDIN BIN HAJI ASMAD

AND

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**Court of Appeal of Brunei Darussalam
(Criminal Appeal No. 17 of 2019)**

Before: Burrell P., Seagroatt and Lunn JJ A.
23 June 2021

Headnote: Sentence-reduced discount of sentence for post-sentencing assistance to the authorities; giving evidence for the prosecution at the trial of two co-accused; evidence accepted in convicting one co-accused; hostile witness-s. 154 and 145, Evidence Act-oral evidence rejected in respect of the other co-accused.

Appellants in person
DPP Raihan Nabilah Binti Haji Ahamd Ghazali for the Respondent

Lunn, JA.:

1. Mohammad Zul Eqram Bin Haji Asmad (2nd defendant) applied for leave to appeal out-of-time against the total sentence of 3 years and 4 months' imprisonment and 3 strokes imprisonment imposed on him by HHJ Norismayanti on 15 June 2019 following his pleas of guilty to 2 charges of housebreaking, contrary to section 454 (Charges 1 and 3) and two charges, contrary to section 451 of the Penal Code (Charges 6 and 8). Mohammad Zul-Waliyuddin Bin Haji (4th defendant) appeals against the sentence of 3 years imprisonment imposed on him on 17 October 2019 by HHJ Norismayanti, following his conviction of an offence of housebreaking (6th Charge), contrary to section 451 of the Penal Code. They were referred to as the 2nd and 4th defendants respectively in the lower court, by which designation they are referred to in this judgment.

2. In all, four defendants appeared before the judge on 30 May 2019. The 2nd and 3rd defendants pleaded guilty to the charges they faced. The 1st and 4th defendants pleaded not guilty and stood trial subsequently. On 6 November 2019, having been informed by the prosecution that it intended calling the 2nd defendant as a witness in the trial of his co-accused, the court adjourned the hearing of his application for leave to appeal out-of-time against sentence. On 10 October 2020, HHJ Norismayanti found the 1st defendant guilty of Charges 2, 5 and 7 and the 4th defendant guilty of Charge 6. The 2nd and 3rd defendants were called as witnesses for the prosecution in the trial of their co-accused.

The Facts

3. All the charges concerned the same premises, namely a house in Kampong Katok. Charges 1 and 3 were offences of housebreaking, contrary to section 454 committed by the 2nd defendant on 2 and 3 May 2019. Charges 6 and 8 were offences, contrary to section 451, committed on 5 May 2019.

Sentence: the 2nd defendant

4. In sentencing the 2nd defendant, the judge noted that he had gained entry to the premises either through an unlocked window or door. In a statement to the police, the 2nd defendant had admitted his role in the offences. All the property stolen by the 2nd defendant had been recovered. The judge noted that the 2nd defendant had been sentenced in October 2015 for no less than 12 charges, including housebreaking by night, theft in a dwelling and housebreaking to a total of 80 months' imprisonment. Having regard to the 2nd defendant's two previous convictions for offences contrary to section 454, the judge stipulated a starting point for sentence for the two offences contrary to section 454 of 5 years' imprisonment. For the two offences contrary to section 451 of the Penal Code, she took a starting point of 4 years and 6 months' imprisonment. Affording the 2nd defendant a discount of one-third for his pleas of guilty, she sentenced the 2nd defendant to 3 years and 4 months' imprisonment, with 3 strokes on each of Charges 1 and 3 and to 3 years' imprisonment, with 3 strokes on each of Charges 6 and 8. Having regard to the fact that the offences were all committed within a short period of time and all involved the same premises, the judge ordered the sentences of imprisonment to be served concurrently and that the strokes to be non-cumulative.

The 2nd defendant's submissions

5. The 2nd defendant's Notice of Appeal was filed by his mother on 16 July 2019, 3 days out-of-time. In his submissions, dated 19 August 2019, the 2nd defendant invited the Court to reduce the sentences imposed on him having regard to his pleas of guilty, his co-operation with the police and the fact that he was remorseful for his conduct. At the hearing, he invited Court to have regard to the fact that he had given evidence for the prosecution in the trial of his co-accused.

Sentence: the 4th defendant

6. In sentencing the 4th defendant for the 6th Charge, the judge said that he had admitted that he and the 2nd defendant had arrived together and entered the premises through the back door. He admitted that he had stolen whitening creams, which he had identified in photographs attached to his statement to the police. The property had been recovered from him.

The 4th defendant's submissions

7. In his submissions, dated 27 February 2021, the 4th defendant invited the Court, having regard to his cooperation with the police, his return of the stolen property and the fact that he had no previous convictions, to reduce the sentence imposed on him.

The 2nd defendant's assistance to the authorities

8. In February 2020, the 2nd defendant was called as a witness by the prosecution in the trial of his co-accused. Having given evidence-in-chief which implicated the 1st defendant in the commission of the 2nd and 7th Charges, namely of abetting housebreaking on 2 and 5 May 2019, the prosecution was given leave to cross-examine the 2nd defendant on his previous statements in respect of the conduct of the 4th defendant, his brother, on the 6th Charge, namely an offence on 5 May 2019, contrary to section 451 of the Penal Code. Although the 2nd defendant's out-of-court statements described a role in the commission of the offence performed by his brother, the 4th defendant, in his evidence the 2nd defendant denied that the 4th defendant "came with him to commit housebreaking." Having acknowledged that in his statement, dated 10 May 2019, (P27) it was recorded that he and his brother Adik, namely the 4th defendant, had taken a "bag full of watches" the 2nd defendant said that was an account related by the police who had threatened him. He denied that the 4th defendant had accompanied him to commit housebreaking.

Judgment

9. In her judgment, the judge said that she accepted the evidence of the 2nd defendant of his description of the role played by the 1st defendant in leading the 2nd and 3rd defendants to the premises in order to commit housebreaking and his evidence that the 1st defendant had stolen items from the house. She found the 2nd defendant to be a credible witness.

10. In convicting the 4th defendant, the judge said that she accepted as believable and credible the account he gave to the police in his statement, in which he said that he had committed the offence the subject of the 6th Charge together with the 2nd defendant.

The respondent's submissions

11. DPP Raihan Nabilah Binti Haji Ahamd Ghazali submitted that the sentence of 3 years' imprisonment imposed on the 4th defendant following his conviction after trial

for an offence, contrary to section 451 was entirely consistent with the decisions of this Court.

12. Having reminded the court that the 2nd defendant's Notice of Appeal was filed 3 days out-of-time, DPP Raihan acknowledged that the delay in filing the Notice was short and, in light of the 2nd defendant's mother's explanation that she did not know of the time limit for filing the Notice, invited the Court to disregard the delay. She submitted that, whilst the 2nd defendant had given evidence for the prosecution, his promise to assist the prosecution had been fulfilled only partially. Having given evidence in respect of the 1st defendant, the prosecution had been permitted to cross-examine him on his out-of-court statements, in particular in respect of the 4th defendant. Pursuant to section 145 (3) of the Evidence Act, she had ruled that the statement was admissible as evidence of the facts. The Court was invited to take that into account in considering whether or not to afford the 2nd defendant any further discount in sentence.

Discussion

13. We are satisfied that the sentence of 3 years' imprisonment imposed on the 4th defendant was entirely appropriate and his appeal is dismissed.

14. In sentencing the 2nd defendant, the judge was correct to observe that the offences were serious and prevalent. She was entitled to have regard to his criminal record for offences of dishonesty, including housebreaking. The total sentence of 3 years and 4 months' imprisonment and 3 strokes was entirely merited.

The 2nd defendant's assistance to the authorities

15. We turn now to the issue of the discount to be afforded to the 2nd defendant for the assistance that he has afforded the authorities subsequent to his sentencing. He is entitled to a further discount in sentence in addition to the discount of one-third taken from the starting point taken for sentence by the judge. It is clear that, whilst the 2nd defendant was prepared to give evidence that inculpated the 1st defendant, he was not prepared to do so in respect of his brother, the 4th defendant. Having noted that the inconsistent part of the 2nd defendant's statement concerned the involvement of his brother, the 4th defendant, on the third occasion that he went to the premises, the judge ruled that she admitted that statement "in place of his inconsistent oral testimony in respect of his brother's participation in the third occasion he went to the place of incident." Of the 2nd defendant's denial in oral testimony that the 4th defendant was present, the judge said that the 2nd defendant clearly had a motive to "lie in his court testimony about his brother's involvement in order not to implicate his brother in the crime." Nevertheless, in convicting the 1st defendant on the 2nd and 7th Charges the judge accepted the 2nd defendant's evidence as credible. They were serious offences.

16. The discount in sentence to be afforded to a defendant who assists the authorities by giving evidence for the prosecution at the trial of other defendants, including against his co-accused for the very offences of which he has been convicted, is to be determined on the facts of each case. However, for a defendant who has pleaded guilty at the outset, a total discount of up to 50% from that taken as a starting point for

sentence may be appropriate to reflect such assistance to the authorities. In this case, the 2nd defendant did not give evidence that was consistent with his out-of-court statement to the police in respect of the 4th defendant. Rather, he denied that the 4th defendant was present, which evidence the judge rejected. Accordingly, he is entitled to only a lesser discount in sentence.

17. We are satisfied that it is appropriate to reduce the sentences imposed in respect of Charges 1 and 3 to 3 years' imprisonment and 2 strokes and that imposed in respect of Charges 6 and 8 to 2 years and 10 months' imprisonment.

Conclusion

18. Accordingly, at the hearing on 23 June 2021 we allowed the application to appeal out-of-time and, treating the hearing of the application as the hearing of the appeal, we quashed the sentences of 3 years and 4 months' imprisonment imposed and 3 strokes imposed in respect of the 1st and 3rd Charges and 3 years' imprisonment and 3 strokes imposed in respect of the 6th and 8th Charges. In their place, we imposed sentences of imprisonment of 3 years' imprisonment in respect of the 1st and 3rd Charges and 2 strokes and sentences of imprisonment of 2 years and 10 months' imprisonment and 2 strokes in respect of the 6th and 8th Charges. We made no other orders. In the result, the total sentence imposed on the 2nd defendant is 3 years' imprisonment and 2 strokes. We said that we would give our reasons in due course. That we do now.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A.