REZIUAN BIN HJ JAPAR

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 39 of 2019)

Before: Burrell P, Seagroatt and Lunn JJ A.
27th November 2019

Headnote: Sentence: Additional discount appropriate where defendant assists the prosecution in bringing other offenders to justice whether before or after his own sentence. The appropriate range of discounts considered. In the present appeal a further 6 months reduction in sentence granted.

Applicant in person
DPP Muhammad Qamarul Affyian bin Abdul Rahman for Respondent

Cases cited in the judgment

Public Prosecutor v Haji Mawsadi bin Pungut (CT 28/2005)
Sudiman bin Mat Yassin v Public Prosecutor (CA 17/2018)
Mohammad Sharifudin bin Haji Abdullah vs Public Prosecutor (Criminal Motion No 63/2018)

Burrell, P.:

On 6th October 2018 the applicant appeared with a co-accused, who was his brother, in the Intermediate Court charged with an offence of using two counterfeit Brunei currency notes knowing or believing them to be counterfeit contrary to s.489B of the Penal Code CAP 22. The applicant pleaded guilty and later agreed a statement of facts. His co-accused brother pleaded not guilty and was remanded for trial.

On 25th October 2018 he was sentenced by Judge Faisal to 3 years and 4 months imprisonment. He now seeks leave to appeal against that sentence. Leave is required because the first notice of appeal is a letter from his wife dated 30th October 2019, a year after sentence was passed. The applicant's notice is also by letter, his dated 7th November 2019. Both letters ask for a reduction in sentence because of the effect on his family. He and his wife have 8 children. He further expresses remorse.

His explanation for the delay is that he was unaware of the appeal procedure. In the unusual circumstances of this appeal it is unnecessary to consider the adequacy of his explanation for the following reason. 8 months after he was sentenced but before he

lodged a notice of appeal he agreed to give evidence as a prosecution witness in the trial of his co-accused and did so. This is plainly a matter which is relevant to his appeal and thus his late notice enables this court to consider his sentence afresh in the light of the additional mitigation.

The facts

On 17th May 2018 the applicant handed to his brother one $100 note and 4 $10 notes which he knew to be counterfeit. They drove to a petrol station and put some petrol in their car. An attempt to pay for the petrol was made with both the $100 note and one $10 note. However the petrol pump attendant was suspicious about the notes and called for his supervisor. Rather than wait for the supervisor the applicant and his brother drove away. They were arrested the next day after the applicant had burnt, at the rear of his house, all the counterfeit notes that he had in his possession. The applicant has no previous convictions.

Mitigation and sentence

The judge took account of the applicant's early plea of guilty and lack of previous convictions. He also noted his family circumstances, in particular that he has 8 children and had very little income at the time of the offence. He had spent 17 years in military service but had been discharged and had no pension.

The judge correctly remarked on the seriousness of this type of offence. He referred to the High Court decision in:

Public Prosecutor v Haji Maswadi bin Pungut (CT 28/2005) in which a starting point of 6 years, reduced to 4 years for a plea of guilty was the sentence passed in a case involving the passing of a single $500 counterfeit note. More recently this court in *Sudiman bin Mat Yassin vs Public Prosecutor (CA 17/2018)* stated that such offences were:-

"designed to defraud the state and the public, though not sophisticated examples of counterfeiting. They have always attracted severe sentences world-wide. They strike at the integrity of the financial system. A starting point of six years discounted to four years was by no means too severe for the principal offence."

The judge selected a starting point of 5 years imprisonment and reduced it to 3 years and 4 months because of the plea of guilty. This was a proper sentence in all the circumstances at the time of sentencing.

Subsequent co-operation

In July 2019 a representative of the respondent visited the applicant in prison in order to ask him if he would be willing to give evidence, as a prosecution witness, in the forthcoming trial of his brother, the co-accused, on the same charge. The applicant agreed to the proposal. He gave evidence at the trial. His evidence was consistent with the statement he had made at the time of his arrest. The judge accepted his evidence and rejected the brother's evidence. The brother was convicted. The applicant's

evidence was crucial to the prosecution case. There would have been no conviction without it.

Apart from the bare fact that the applicant had *"given oral testimony for the prosecution"* none of the above facts were provided to this court by the respondent in their written submission. Neither were any submissions advanced as to its effect. In advance of the hearing the court therefore asked for further written submissions concerning the significance of the applicant's evidence in the trial and the relevance of it to his appeal against sentence. The further written submission provided the date of the trial and its result. It also referred to the recent decision of this court in *Mohammad Sharifudin bin Haji Abdullah vs Public Prosecutor (Criminal Motion No 63/2018)* in which this issue was addressed. Regrettably the submissions were silent as to the application of that decision in the present appeal.

At the hearing of the appeal the respondent submitted that, in spite of the above, there should be no reduction in sentence. When asked why the applicant should get no credit for giving crucial evidence against his co-accused Mr Qamarul said *"because the sentence passed by the judge was within the proper range for the offence charged."*

With respect, the position adopted by the respondent was misconceived and is self-contradictory. On the one hand it was conceded that giving credible evidence for the prosecution was *"relevant",* as an additional mitigating factor, to the question of sentence but on the other hand, it was submitted that the applicant should be given no credit for it because the original sentence was *"within the proper range…"*

Unfortunately, this discloses a misunderstanding about the principles involved. This judgment is intended to remedy that misunderstanding.

The respondent's handling of this case has fallen short in the following respects.

- There was no documentation recording the visit to the prison when the applicant was asked to give evidence. There should have been an accurate record of the questions and answers in the course of that meeting. Such record should be disclosed to the defendant and, if represented, to his lawyer in any ensuing trial of the co-accused. The judge should also be made aware of such a record, particularly if the defendant is unrepresented.
- A transcript of the applicant's evidence should have been provided to this court, at the outset. We were provided with a copy only after asking for it.
- The respondent's written submissions should have provided further particulars which might be relevant to sentence. In this case such particulars were that the applicant gave evidence on oath, was cross-examined and was relied on by the court. Also, that his evidence was consistent with his original statement and that but for his evidence there would have been no conviction of the co-accused.
- The respondent should have conceded that this was not only relevant to an appeal against sentence but also that it merited a further discount. Submissions should have been made as to the range of such a discount. Where there are matters known to the respondent which may assist an appellant in his appeal it is their duty to bring them to the attention of the appellate court.

Discount

At the time of sentence the discount given of 1/3 was entirely correct. In the light of the applicant's subsequent co-operation outlined above this court must now consider what further discount is appropriate.

To submit that no further discount is appropriate is plainly wrong. This court must now consider sentence afresh. The proper approach is to revert to the original starting point and calculate a new percentage based on all the new mitigation. Plainly a discount in excess of 1/3 is appropriate.

We shall not, in this appeal, set a scale of increasing discounts dependant on increasing levels of assistance. It is ultimately a matter for the sentencing judge to evaluate the level of assistance and the resulting benefit to the administration of justice.

Where there has been positive assistance it would be proper to increase the discount already granted of one-third to 40% at least. Where, as in this case, the assistance resulted in the conviction of a co-accused a figure slightly higher than 40% may be justified. Where, not as in this case, assistance has been given in more than a single case or in relation to several other offenders and the assistance leads to their arrest and conviction, the percentage would increase further. It would be unusual, but nonetheless possible, for a discount to exceed 50%.

In all the circumstances of this case which have been fully canvassed above, we have decided that justice will be achieved by reducing the sentence by a further 6 months.

We grant leave to appeal out of time. We treat the application as the appeal and quash the sentence of 3 years and 4 months and substitute a sentence of 2 years and 10 months imprisonment.

Burrell, P.

Seagroatt, J.A. **Lunn, J.A**