

ZOELALIFFIN BIN HAJI MOHD ZAINI

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 4 of 2019)**

Before: Burrell P, Seagroatt and Lunn JJ A.

23rd April 2019

Headnotes: Housebreaking offences and thefts of motor vehicles: pleas of not guilty: relevance of previous convictions: need for deterrent sentences: substantial fines not appropriate as an addition to long terms of imprisonment

Appellant in person

DPP Raihan Nabilah binti Hj Ahmad Ghazali for Respondent

Seagroatt, JA.:

This is an application for leave to appeal against a total sentence of 8 years 2 months and 3 strokes imposed by Judge Masni on the 22nd December 2018 after trial, for offences of housebreaking by night contrary to section 457, housebreaking contrary to section 454 and three offences of theft of motor vehicles contrary to section 379 of the Penal Code, and some other offences allied to the use of motor vehicles. His notice of application is dated 5th January 2019 and therefore in time.

He committed these offences with other defendants. He had elected trial but was convicted of all offences except one which concerned the display of a false registration plate on a stolen vehicle. (Charge 9)

The housebreaking offence was committed at night on the 13th/14th December 2016. On the following day he committed another housebreaking offence.

A few days earlier he had stolen a Toyota Corolla motor car. He has a previous conviction for this offence.

On the following month, January 2017 he stole another motor car, a Toyota Kijang preceded by the theft of a Toyota Cressida. He put a false registration plate on this car, and later was involved in a vehicle collision as a result of his careless driving. He did not have a valid driving licence.

For the first offence, of housebreaking by night, the judge sentenced him to 5 years and 3 strokes on the basis of "being a second offender and pleaded not guilty." He had a conviction for a similar offence in 2007, now 12 years ago, when he was sentenced to 4 years and 3 strokes. She felt that he was not remorseful.

The fact of his not having a clear record is a matter which may be taken into account when deciding the appropriate starting point for sentencing.

For the second offence of housebreaking she also referred to his previous conviction as being a matter to be taken into account in imposing a sentence of 3 years and 3 strokes. For the length of sentences she appears to have followed the Court of Appeal decision in *Azimi bin Hj Mohammad vs Public Prosecutor (Criminal Motion 25 of 2016)* where an individual sentence of 36 months (the starting point) was reduced to 24 months and 3 strokes on a plea of guilty.

For the theft of the Toyota Corolla car (section 379) she imposed a sentence of 12 months imprisonment "taking into account [his] track record of offence against property." He had a previous conviction for a similar offence in 1992, some 27 years ago.

She then proceeded to sentence him for what was identified as the 9th charge, one of displaying a false licence plate on one of the stolen cars. But she had already acquitted him of this offence as she makes clear in the preamble to her sentencing judgment. Nonetheless she sentenced him to a further 1 months' imprisonment. This was clearly wrong and has to be set aside.

Although the Prosecuting Counsel pointed out to the judge her error in relation to this count (charge 9) after reading the judges printed sentencing judgment and before the judge read out her decision. The judge unfortunately did not make the correction or acknowledge the error in writing. As a consequence the error remained in her formal sentencing record at paragraphs 28, 30 and 40; albeit not in paragraph 38.

For the second offence of the theft of a motor car under section 379 (the Toyota Kijang) she sentenced him to 12 months imprisonment.

The last four offences were the theft of a third Motor Car (the Toyota Cressida) and three ancillary offences arising out of that viz. the use of a false number plate, causing an accident by careless driving, and not having a valid driving licence.

The sentences imposed were respectively 12 months, 1 month, a fine of \$1,000 with one month imprisonment in default, and finally another \$1,000 fine again with one month imprisonment in default.

She then decided, on the principle of totality, to make the groups of sentences concurrent within the groups but consecutive to each other, viz: 5 years and 3 strokes for the housebreaking offences, 12 months for the first vehicle theft (and the first false licence offence in the 9th charge in respect of which she erred), 12 months for the second vehicle theft, and a total of 14 months for the last group being the third vehicle theft and its ancillary offences arising out of its use. However she was clearly mistaken

in the total sentence in the last group which she said were to be concurrent with each other i.e. 12 months total. It seems that she arrived at the final figure of 14 months for this last group of offences by adding the two sentences of 1 month imprisonment in default of paying the \$1,000 fine on being told by the defendant that he would not be able to pay any fines.

A judge may properly take into account a defendant's record of previous convictions, in the public interest, and reflect that in deciding upon the starting point for the sentence in respect of the offences with which she is dealing. Having taking that into account she has properly approached the first stage. This appellant was unarguably a repeat offender. By reason of his decision to elect trial he is not entitled to any reduction in his sentence. Nor could he be treated as a person of good character.

The offences of housebreaking and theft of vehicles are prevalent and justify deterrent sentences. Despite that and the overall consideration the total effective sentence is excessive.

The appellant is 49 years of age. The sentences for the housebreaking offences, made consecutive, total 5 years and 3 strokes. The sentence for the first vehicle theft is correct at 12 months imprisonment as are the sentences for the ancillary offences she expressed to be concurrent with the sentences for the third vehicle theft i.e. 12 months in total, not, as she calculated, 14 months.

We consider that the total sentence for the housebreaking offences-5 years and 3 strokes is correct. For the vehicle theft and ancillary offences we make the first two of the sentences of one year concurrent with each other but consecutive to the 5 year term. The third sentence of 12 months we also make consecutive to the 5 years term, thus totaling 7 years.

As for the fines for the ancillary offences following the theft of the Toyota Cressida, we see no rational basis for these in view of the substantial sentence of imprisonment and we quash these, the periods of imprisonment expressed to be in default of payment will remain as concurrent sentences which will not add to the overall term.

The total sentence is therefore 7 years and 3 strokes. To that extent this appeal is allowed.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A