

**MD DZULFADLI BIN ABDULLAH (D1)  
NORLILAWATI BINTI AWANG HASSAN (D2)  
ADIB SUFI BIN MOHD ASRI (D5)**

**AND**

**PUBLIC PROSECUTOR**

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**(Court of Appeal of Brunei Darussalam)  
(Criminal Motion No. 51 of 2018)**

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Before: Burrell P, Seagroatt and Lunn JJ A.  
**22<sup>nd</sup> November 2018**

Applicant in person  
DPP Dr. Mohammad Hussin Ali bin Idris for Respondent

**Burrell, P.:**

This was originally an application for leave to appeal against sentence by D5 alone. However for reasons which appear below it is now also an application by D1 and D2. D5 at first instance was sentenced, together with D1 and D2, on 19<sup>th</sup> July 2018. He was sentenced to a total of 32 months imprisonment following pleas of guilty to 2 charges. His Notice of Motion seeking leave to appeal is dated 31<sup>st</sup> October 2018, about 10 weeks out of time. In view of the unusual circumstances surrounding this case, to which we now turn, we shall consider to merits of the proposed appeal first.

The Sentencing Proceedings

The problem which has emerged in this matter is that D5 (and D1 and D2) were sentenced under “additional 4<sup>th</sup> charge” to a term of imprisonment appropriate for an offence contrary to s.454 of CAP 22 namely, housebreaking in order to commit theft whereas they had in fact been arraigned on and pleaded guilty to an offence contrary to s.380 of CAP 22, namely theft from a dwelling.

The term of imprisonment actually passed on 19<sup>th</sup> July by Judge Faisal in the Intermediate Court was 32 months imprisonment after a plea, which the judge said would have been 48 months had there been a conviction after trial.

We now set out the material documents contained in this court’s appeal bundle, which it must be said at the outset, was woefully lacking.

1. The judge’s 4 page “sentencing” decision is dated 19<sup>th</sup> July 2018, the date of sentencing in court. Its contents appear in note form only as part of the judge’s handwritten notes. The DPP did not receive it until 5<sup>th</sup> November 2018. It states that the additional 4<sup>th</sup> charge against D1, D2, D3 and D5 was housebreaking with intent to commit theft contrary to s.454. It sets out the facts of the case which are consistent with a s.454 offence and lists the property stolen. The sentence is

then stated to be “a starting point of 4 years which is reduced by 1/3 for guilty plea.”

2. A statement of facts undated which sets out, inter alia, the facts referred to above.
3. A charge sheet dated 26<sup>th</sup> June 2018, but unsigned, stating the 4<sup>th</sup> additional charge to be a s.454 offence.
4. Notes of proceeding. This was a typed up version, not the original handwritten version. It stated that in the morning of 19<sup>th</sup> July 2018 DPP Ali, DPP Sharon and DPP Sabrina were present. The material parts are “tender charge sheet.....charges read in Malay.....Additional 4<sup>th</sup> charge D1, D2, D5 pleas guilty, D3 pleas not guilty.” In the afternoon of 19<sup>th</sup> July only DPP Sabrina is present. The record states “D1, D2 and D5 convicted and sentenced. D1: 32 months and 3 strokes; D2: 32 months, D5: 32 months.”
5. The Respondent’s written submission. In this document, for the first time, and contrary to the impression created by all of the above documents, it is submitted that a serious error had occurred. This document informs the court that D1, D2 and D5 should have been sentenced for a s.380 offence “instead of” s.454. It states that the charge read and explained to the defendants was a s.380 offence. Annexed to the submission was another charge sheet also dated 26<sup>th</sup> June 2018, but this one signed by Dr Hussin Ali, recording the 4<sup>th</sup> additional charge as a s.380 offence.

The written submission seeks to explain the confusion as a “typo” by the judge. We do not regard it as a “typo.” It is a full recital of the wrong charge.

#### The hearing of the application

At the first hearing of this application on 12<sup>th</sup> November 2018 in answer to questions from this court, DPP Dr Hussin Ali and DPP Sabrina made oral submissions as to the events of 19<sup>th</sup> July 2018 when sentence was passed. The DPPs confirmed that all three defendants were arraigned for a s.380 offence as the 4<sup>th</sup> additional charge. They were not able to assist us as to why a charge sheet unsigned, containing a s.454 offence was included in the Court of Appeal bundle.

DPP Sabrina who appeared alone for the sentencing in the afternoon of 19<sup>th</sup> July further informed this court, for the first time, of an oral exchange which took place between the judge and herself. She remembered that when the judge sentenced D1 and D5 to 32 months on the 4<sup>th</sup> charge he also imposed 3 strokes (this did not apply to D2 who is female). Whipping is mandatory with a s.454 offence but there is no provision for whipping as a punishment for theft in a dwelling contrary to s.380. DPP Sabrina pointed out this error to the judge. It then transpired that the judge amended his sentence on D5 by deleting the 3 strokes. In his handwritten note the reference to “3 strokes” is crossed out. However, the 3 strokes passed on D1 is not crossed out even though he also had only been arraigned on a s.380 offence.

Moreover, even though DPP Sabrina had correctly alerted the judge to his error concerning the 3 strokes, she did not comment on the length of the sentence which whilst appropriate for a s.454 offence (which was clearly the offence in the judge’s mind

because he had added whipping), was plainly excessive for a plea of guilty to a s.380 offence.

On the application before this court the DPP is correctly asking this court to reduce the sentence of 32 months imprisonment, passed in error, for a s.380 offence. This court was minded readily to do so but in view of the confusion, the paucity of accurate documents in our appeal bundle and the deficiencies of the judge's notes, we directed affidavits to be filed by DPP Hussin and DPP Sabrina so that whatever our ultimate order was to be, it would be supported by evidence rather than mere oral submissions from the bar.

It was plainly necessary also to make arrangements for D1 and D2 to be brought to court as the sentences imposed on them for the additional 4<sup>th</sup> charge are also wrong not only as to length but also as to the inconsistency that D1, according to the judge's notes, has still been sentenced to 3 strokes on that charge but D5 has not. The final sentence to be imposed on D1 and D2 is not affected because they had also pleaded guilty to charge 1 which was a different s.454 offence.

#### The hearing on 19<sup>th</sup> November 2018

The court has now read the two affidavits filed in accordance with our directions. It is apparent that the crossing out of "3 strokes" in the judge's handwritten notes was as a result of DPP's Sabrina's intervention at the time of sentencing when she informed the judge that there was no provision for such a sentence for an offence contrary to s.380. It is regrettable that the exchange between DPP Sabrina and the judge is not recorded in the judge's notes.

We are satisfied that all 3 defendants were arraigned on a s.380 offence but erroneously sentenced for a s.454 offence. Accordingly, at the court's invitation, D1 and D2 have now applied for leave to appeal out of time. The agreed facts of the offence are that all three applicants entered a private dwelling in Tutong on 16<sup>th</sup> June 2018 and stole 7 items including a television, a karaoke set and tools. They had travelled there by car, driven by D1.

The sentence of 32 months for theft in a dwelling is manifestly excessive. In all the circumstances of this particular case, by which we mean the agreed facts, the personal circumstances of D1, D2 and D5, the pleas of guilty and the unusual and unfortunate history of these proceedings, we substitute a sentence of 16 months imprisonment from a starting point after trial of 2 years imprisonment. The sentence of 4 months imprisonment imposed on D1, D2 and D5 following their pleas of guilty to the 3<sup>rd</sup> additional charge of theft contrary to s.379 is entirely appropriate.

We grant leave to all three to appeal out of time. We regard it as unnecessary, in the circumstances to consider any explanation for the delay.

#### Order

In respect of D1 the sentence of 32 months and 3 strokes and in respect of D2 and D5 the sentences of 32 months imposed on the 4<sup>th</sup> additional charge are quashed and a sentence of 16 months imprisonment against each of them is substituted.

In all other respects the judge's sentences and orders remain.

**Burrell, P.**

**Seagroatt, J.A.**

**Lunn, J.A**