

MUHAMMAD AFHAM WAFI BIN BUJANG

AND

PUBLIC PROSECUTOR

**Court of Appeal of Brunei Darussalam
(Criminal Motion No. 52 of 2020)**

Before: Burrell P, Seagroatt and Lunn JJ A.

9 June 2021

Headnote: Offences (2) under section 384 and 385 of the Penal Code; minimum sentences provided for; prosecution's inaccurate drafting of particulars of both counts; wrong application of sections to the particular offences; sentences not affected: 3 years and 2 strokes under section 385 and 2 years and 1 stroke under section 384. Medical recommendation to Prison doctor.

Applicant in person

DPP Raihan Nabilah binti Hj Ahmad Ghazali of Public Prosecutor for Respondent

Seagroatt, JA.:

This applicant appeared before Judge Hazarena on the 20th June 2020 when he pleaded guilty to two similar offences under section 384 and 385 of the Penal Code, being the putting of fear into two separate victims by threatening to distribute or circulate a private photograph in order to extort money from them.

He was sentenced on the 7th July 2020 by Judge Hazarena in the Intermediate Court to a total sentence of 3 years imprisonment and 2 strokes. His Notice of Appeal is dated 19th December 2020 so it is over 4 months out of time. His explanation for this delay is that he had to wait for his family to pay the fee. That is a common explanation and credible enough in the circumstances. We have proceeded to consider the merits of the appeal.

He appeals against his sentence.

The facts of the offences

The first charge concerned a video record he took of a man, who he realised was a relative, when the latter was sitting on a lavatory with his trousers around his ankles. He had managed to see over the cubicle wall in order discreetly to obtain the video-recording. Then he obtained the victim's telephone number from his mother's phone and sent a WhatsApp message with screenshots to the

man demanding B\$300 if the video image was not to be distributed amongst their work colleagues. This offence was committed on the 12th May 2020. The victim contacted the police via the appellant's phone number which the latter had used in order to send the threatening message. As a result the police arrested the appellant on the 18th May 2020. He duly admitted the offence. The victim had not been induced to part with the amount demanded.

Investigations revealed that sometime in January 2020 he had committed a similar offence in respect of another work colleague, again whilst the latter was using the toilet. Having found the victim's telephone number at their workplace he sent a similar WhatsApp message containing screenshots of the video he had discreetly taken of the victim, demanding B\$1,500 if the screenshots were not to be circulated.

Understandingly fearful, this victim put B\$500 on a shelf at their workplace as instructed by the appellant, on one day, and on the next day went to the same place to put the B\$1,000 balance of the sum demanded. The two men met at the same time. The appellant, showing another strange quirk of behaviour, told the victim to keep the B\$500 as he respected the victim's "honesty", whereupon the victim said he had forgiven the appellant. However, he kept the B\$1,000 saying later that he gave B\$500 of it to charity.

The charges before the court

Both counts or charges are incorrectly framed. That under section 385 of the Penal Code wrongly alleges that the appellant "*thereby dishonestly induced the said [victim] to deliver to you BND300*". In fact the victim was not induced to part with any money as the Statement of Facts makes clear.

Before the sentencing judge the Public Prosecutor should have amended the charge. He or she did not do so. It should have read "*thereby dishonestly attempted to induce the said [victim] to deliver to you BND300.*"

That under section 384 wrongly contains the following – "*intentionally put one [the victim] in fear of a certain injury to wit...*" This in effect replicates an offence under section 385. Yet the penalty for section 385 offence carries a heavier punishment.

The appellant had pleaded guilty to both counts without, understandably, realising the errors committed by the prosecution. The counts were both the result of careless drafting and were not corrected at the sentencing hearing, when they should have been, nor was the judge informed at any stage. Fortunately the judge applied her mind to the different penalties provided by the two sections.

It is apparent that the prosecution should have charged the first count under section 384 and the second under section 385.

The sentences

The judge clearly drew the distinction between the two offences and the minimum sentences provided for in the code. For the section 385 offence she imposed the minimum sentence of 3 years imprisonment and 2 strokes, and for the section 384 offence, the minimum sentence of 2 years imprisonment and 1 stroke. She ordered these to run concurrently.

She had taken into account his pleas of guilty and his clear record. He had however no economic pressure to commit these offences. He had held his job as a cleaner for Brunei Shell Petroleum for 8 years. He has thrown that away.

These were unpleasant, insidious crimes which can undermine seriously the self-esteem of a victim and cause much sustained stress as well as financial loss.

In view of the medical condition of this appellant the Prison Medical Officer will no doubt want to consider carefully whether, in view of his condition, he is fit to undergo any strokes.

These being minimum sentences by statute his appeal is dismissed.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A