

MOHAMMAD SHARIFUDIN BIN HAJI ABDULLAH

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 63 of 2018)**

Before: Burrell P, Seagroatt and Lunn JJ A.

Dates of Hearing: 16 and 22 April 2019

Date of Judgment: 30 April 2019

Headnote: Sentence-total sentence of 4 years and 8 months' imprisonment with two strokes imposed after pleas of guilty to 5 charges, including two charges of housebreaking, contrary to section 454, entirely appropriate. Discount of 4 months' imprisonment for assistance to the authorities, post-sentencing and prior to appearing in the Court of Appeal, in being prepared to give evidence for the prosecution in the trial of a defendant in an unrelated matter in face of which the defendant pleaded guilty.

Applicant in person

DPP Nor'adliatul Hidayah binti Haji Mohd Zaidi for the Respondent

Cases referred to in the judgment:

Public Prosecutor v Erwandy Bin Emran (Intermediate Court, Criminal Trial No. 60 of 2018)

Mohammad Yusrin Bin Hj Mohammad v Public Prosecutor and Muhammad Alisufian Alirahman v Public Prosecutor (Criminal Appeal No. 8 and No.10 of 2013; unreported, 2 December 2013)

Ibrahim bin Hj Mohd Mutsuman v Public Prosecutor and Redzwan Bin Roslam (Criminal Appeal No. 11 of 2005 and Criminal Motion No. 1 of 2006)

Mohd Sharifudin Bin Hj Abdullah v Public Prosecutor [2012] BLR 92.

Mohammad Joll bin Tumih & Mohammad Sharifuddin bin Abdullah [2007] BLR 183.

Hj Assim bin Ali v Public Prosecutor (Criminal Appeal No. 9 of 1990)

R v Choi Fook Sang (Hong Kong-CACC 278/1995)

R v Yan In Kun (Hong Kong-CACC 680/1996)

Lunn, JA.: (giving the Judgment of the Court)

1. By a Motion filed out-of-time by the applicant's mother with the court on 31 December 2018, the applicant seeks leave to appeal the total sentence of four years and eight months' imprisonment with two strokes imposed on him by Judge

Mohammed Faisal on 3 November 2018, following his convictions on his pleas of guilty to five charges.

The charges

2. The applicant pleaded guilty to the following charges, contrary to the Penal Code, Cap. 22 namely that:
 - he attempted to enter premises in the possession of another on 12 January 2018 at KB5, BSP Housing, Jalan Maulana, Kuala Belait, with intent to annoy the other, contrary to section 442 (charge 1) and, on the same date, to committing mischief, namely by breaking open the door to those premises, contrary to section 426 (charge 2);
 - he dishonestly received stolen property; namely, seven wristwatches, including a Rolex wristwatch, three pocket watches, four rings and five mobile telephones on and between 21 July and 3 August 2018, contrary to section 411 (charge 3);
 - on and between 19 and 21 June 2018, together with two other persons, he entered premises at H17, No. 58 Simpang, 129 Lorong, Seria, a building used as a human dwelling, in order to commit theft, contrary to section 454 (charge 4); and
 - on and between 20 and 21 July 2018, together with the 2nd defendant and another person, he entered premises at No. 1, Lot 7857, Simpang 106-27RPM Kg. Pandan 7, Kuala Belait, a building used as a human dwelling, in order to commit theft, contrary to section 454 (charge 5).

The Facts

Charges 1 and 2

3. By the Statement of Facts, which the applicant accepted as the basis for the Court accepting his pleas of guilty, the applicant admitted that in the late afternoon of 12 January 2018 he had been interrupted as he was using a screwdriver to break open the rear door to premises at KB5, BSP Housing, Jalan Maulana, Kuala Belait. Earlier, the applicant had parked his motor car outside the front of the house and, having discovered the house was empty, had gone to the rear, where he attempted to break into the premises. Having been confronted by a passer-by, who had observed that a car was parked outside a house belonging to an owner whom he knew to be away, the applicant immediately returned to his car and drove off. However, the person who had confronted the applicant noted down the particulars of the applicant's car model and registration plate and reported those facts to the police.

Charge 3

4. Whilst the owner was away on holiday, from 21 July 2018, his home at Lot 7686, No. 17, Simpang 106-44, RPN, Pandan, Kuala Balait was broken into and many items of property stolen. The burglary was discovered by the owner's brother on 26 July 2018 and a report made to the police. With the assistance of the owner of the property, the police traced one of the stolen mobile telephones to a woman, which led to the applicant's nephew. In turn, that led to the applicant, who was

found to be in possession of the other items of property stolen in charge 3. In statements to the police, the applicant admitted that he had received all the property from a friend, knowing or having reasonable grounds to believe that it was stolen.

Charge 4

5. In the absence of the owner of domestic premises at H 17, No. 58 Simpang, 129 Lorong, Seria the premises were broken into and property stolen, including two envelopes containing \$850, a 4-inch LG television, a Microsoft Surface laptop tablet and a set of screwdrivers. In statements to the police, the applicant admitted that he had broken into the premises with another person and stolen the items of property. A third person was the driver of the car they used travel to and away from the premises. The only item of property recovered was the 42-inch LG television.

Charge 5

6. In the absence of the occupiers of the premises, during the night of 20/21 July 2018 domestic premises at No. 1, Lot 7857, Simpang 106-27RPM Kg. Pandan 7, Kuala Belait, were broken into and various items of property belonging to the three occupants stolen. The applicant accepted that he, together with the 2nd defendant, had broken into the premises. However, an alarm sounded and they and the driver of applicant's motor car immediately left the scene. However, subsequently they returned to the premises and the applicant and the 2nd defendant re-entered the premises and stole various items of property, including an Asus laptop computer, a Balmar watch, a karaoke microphone and two ukuleles. The police recovered the two ukeleles from the applicant's home. The other items of property were recovered elsewhere.
7. No value was ascribed by the prosecution to any of the stolen or recovered property.

Reasons for sentence

8. In sentencing the applicant, the judge noted that in mitigation the applicant had sought a lenient sentence, saying that his parents were elderly and his father needed to attend hospital every month. Also, the judge said that he took into account that the applicant had pleaded guilty.
9. The judge noted that the applicant was 34 years of age, unemployed and that he had previous criminal convictions. Of that, the judge said "both defendants have previous convictions for theft related offences, but D1 has also convictions for housebreaking offences." The judge observed that the 2nd defendant was currently serving a sentence of three years imprisonment for an offence under the Misuse of Drugs Act.
10. The Certificate of Previous Convictions of the applicant described his previous convictions on 4 April 2005 for a total of nine offences, including two offences,

contrary to section 457 and one contrary to section 454 of the Penal Code, for which he was sentenced to a total of four years and 10 months' imprisonment with 8 strokes. On 5 and 7 July 2012, the applicant had been sentenced for multiple offences, including two offences, contrary to section 457 of the Penal Code, to a total of six years and six months imprisonment with four strokes. On those occasions, the applicant had pleaded guilty.

11. Of the criminal records of the applicant and the 2nd defendant, the judge said

"It seems that they will continue to commit housebreaking and other theft -related offence if they are still left free to do so. In this case a strong deterrent sentence is needed both as a punishment as well as a deterrent from them committing further offences of this nature again."

Starting point for sentence

12. In the result, the judge stipulated the following sentences of imprisonment as starting points for sentence:

charges 1 and 3, one year;
charge 2, 9 months;
charges 4 and 5, 6 years.

Discount of sentence

13. Affording the applicant a discount in sentence for his pleas of guilty, the judge sentenced the applicant to the following terms of imprisonment:

charge 1, 8 months;
charge 2, 6 months;
charge 3, 8 months;
charges 4 and 5, 4 years and two strokes on each charge.

14. The judge ordered that the sentences of imprisonment imposed in respect of charges 1 and 2 be served concurrently and that the sentences of imprisonment imposed in respect of charges 3, 4 and 5 also be served concurrently. However, he ordered that the sentences of imprisonment imposed in respect of charges 1 and 2 be served consecutively to the sentences of imprisonment imposed in respect of charges 3, 4 and 5. Accordingly, the total sentence of imprisonment imposed on the applicant was 4 years and 8 months' imprisonment with two strokes.

Grounds of appeal against sentence

15. In her notice, the applicant's mother sought a reduction in the sentence imposed on the applicant on the basis that his father was unwell and in need of his son's assistance to support their daily lives.
16. In a letter to the court, dated 19 February 2019, the applicant asked this court to reduce the sentence of imprisonment to which he was he was subject, inviting the

court to have regard to the sentences of imprisonment imposed on others: first, by the judge on the 2nd defendant, Mohammad Fauzi bin Haji Mohammad Taib, for charge 5, namely 16 months' imprisonment and 1 stroke; secondly, in the Intermediate Court on another defendant, Erwandy Bin Emran, in 2013 and in 2018 for separate offences contrary to section 454 of the Penal Code; and thirdly, on Mohammad Zulzakair bin Mohammad Jafar for yet another offence contrary to section 454 of the Penal Code, namely two years and two months' imprisonment with two strokes

17. The applicant asserted that in 2013, Erwandy Bin Emran was sentenced to 3 years' imprisonment with two strokes. Whereas, in 2018, he was sentenced by Judge Muhammad Faisal to 3 years and 4 months' imprisonment with two strokes (*Public Prosecutor v Erwandy Bin Emran* Intermediate Court, Criminal Trial No. 60 of 2018, 18 December 2018). The applicant suggested that, given that he had been convicted on two occasions of an offence contrary to section 454, the sentences imposed on *Erwandy Bin Emran* were light compared with the sentence he had received.
18. In his oral submissions, the applicant explained the fact that his application was out of time simply on the basis of the cycle of date of the the monthly visit he received from his mother. In a second letter of mitigation, which was produced during oral submissions at the hearing and translated *extempore*, the applicant submitted that he had:
 - (i) cooperated with the police's leading them to the discovery of stolen items;
 - (ii) provided information to the police which had led to the arrest and charging of a person for an offence of theft, in which case he had become a witness for the prosecution.
 He invited this court to take those matters into account in considering his application for a reduction in sentence.

The respondent's submissions

18. In the respondent's written submissions, Nor Adliatul Hidayah Binti Haji Mohd Zaidi acknowledged that, having regard to the starting points taken for sentence in *Mohammad Yusrin Bin Hj Mohammad v Public Prosecutor and Muhammad Ali sufian Ali rahman v Public Prosecutor* (Criminal Appeal No. 8 and No.10 of 2013; unreported, 2 December 2013) and *Public Prosecutor v Erwandy Bin Emran* were "high", but not manifestly excessive. It was submitted that regard was to be had to the fact that the two offences contrary to section 454 had been committed separately, one month apart. The judge was correct to determine that a deterrent sentence was required.

Aggravating factors in the commission of the offence

Commission of offences whilst on bail

19. It was submitted by the respondent that an aggravating factor in the commission of the offence was that whilst on bail for the offences the subject of charges 1 and 2, the applicant had committed the offences the subject of charges 3, 4 and 5.

20. The notes of proceedings in the Magistrate's Court in Bandar Seri Begawan described the applicant's appearance on 15 January 2018 on two charges, namely charges 1 and 2 before the judge. In face of his pleas of not guilty, the applicant was granted bail on various conditions, including that he not re-offend whilst on bail. On 17 October 2018, the judge was informed by the prosecution that the applicant had been remanded in custody, bail having been revoked, since 16 August 2018.
21. Further, the respondent submitted that the applicant's previous criminal convictions, including offences contrary to section 457 of the Penal Code were relevant to the necessity to impose a deterrent sentence. The applicant's appeal against the sentences imposed on those earlier cases was rejected by this court. (See *Mohd Sharifudin Bin Hj Abdullah v Public Prosecutor* [2012] BLR 92.)
22. In a second written submission, provided to the court at its request on 18 April 2019, explained at the hearing of 22 April 2019, Ms Nor'adliatul addressed the issues raised by the applicant at the hearing.
 - (i) *Recovery of stolen property*
23. The respondent rejected the applicant's assertion that he had assisted in the recovery of stolen property. Such property as was recovered by the police was recovered as a result of their investigations, in particular as a result of the tracing of a mobile phone, which had been stolen and which led to charge 3, from a woman. In turn, that led to the identification and arrest of the applicant and the recovery in his possession of stolen property.
 - (ii) *Information from the applicant leading to the arrest and prosecution of another*
24. Ms Nor'adliatul accepted that the applicant had apprehended a man, Mohamad Nasrinshah bin Mohd Jamil, in the commission of an offence of attempting to commit theft at 00:45 hours on 19 January 2018 in a garage in the vicinity of a house at number 12, Simpang 72 Jalan Mumong, Kuala Belait. The house belonged to a friend, whom he was visiting. The police having been called, the thief was arrested and charged with an offence contrary to section 379 of the Penal Code. Mohamad Nasrinshah having pleaded not guilty, at a case management hearing in February 2018, at which Ms Nor'adliatul appeared for the prosecution, trial dates were fixed to commence 11 March 2019. In a visit to the applicant in prison in January 2019, Ms Nor'adliatul had secured his agreement to give evidence for the prosecution. In consequence, at her request, on 9 March 2019 the Chief Magistrate issued a warrant to the Director of the Maraburong prison to produce the applicant at court on 11 March 2019 to give evidence at the trial of Mohamad Nasrinshah. However, on that date, Mohamad Nasrinshah pleaded guilty to the charge of attempted theft, contrary to section 379 of the Penal Code, and was sentenced by Senior Magistrate Hj Azrimah binti Haji Abdul Rahman to 6 months' imprisonment.

25. As relevant to those circumstances, Ms Nor'adliatul, drew the court's attention to the judgment in the High Court in *Hj Assim bin Ali v Public Prosecutor* (Criminal Appeal No. 9 of 1990) in which Mr Commissioner Mayo allowed the appeal against sentence, reducing the term of imprisonment from two years to 18 months, and the number of strokes from four to one. In doing so, he said:

"I accept the validity of Mr Sandhu's submission that a substantial discount should be given where a defendant provides the police with information which enables them to investigate other defendants in respect (of) further offences..."

This was not a matter which figured with any prominence before the magistrate and I do not think that the appellant has been given sufficient credit for his cooperation."

26. Nevertheless, Ms Nor'adliatul submitted that, notwithstanding the applicant's successful cooperation with the authorities, this court ought not to afford the applicant "substantial or any credit at all because the aggravating factors in this case outweighs the mitigating factors." In her oral submissions, Ms Nor'adliatul contended that the conduct of the applicant in relation to Mohamad Nasrinshah was not related to the offence for which he was sentenced and was irrelevant.
27. In the result, Ms Nor'adliatul invited the court to dismiss the application.

Discussion

28. In *Ibrahim bin Hj Mohd Mutsuman v Public Prosecutor and Redzwan Bin Roslam* (Criminal Appeal No. 11 of 2005 and Criminal Motion No. 1 of 2006; unreported, 30 November 2006) this court observed of the offence contrary to section 454 of the Penal Code (page 6):

"We have been reminded of sentences passed in other cases. These show that offences of housebreaking are prevalent. They are often committed during the day when the householders are out of work so that their houses are an easy target. Such offences cause immense distress. Heavy deterrent sentences are called for."

29. The applicant's reference to sentences imposed on other defendants in other cases is of no particular assistance to this court. The simple issue before this court is whether or not the sentences imposed on this applicant were appropriate and within the range of sentences available to the judge.
30. The applicant's previous criminal record is set out in detail in the judgment of this court in *Mohd Sharifudin Bin Hj Abdullah v Public Prosecutor*, delivered on 14 November 2012. In the judgment of the court, Mortimer P said:

"On 2nd July, 2012 the applicant pleaded guilty before H. H. Judge Lim in the intermediate Court to 3 offences; two of housebreaking by night (section 457 of the Penal Code) and one of theft (section 379 of the Penal Code) committed in June 2012. It then came to light that these offences were committed when the applicant was on bail for three offences committed in November, 2011; two of

theft (section 379) and one of house trespass (section 451). On 7th June, he pleaded guilty to the three earlier offences and asked for two further offences of theft in August and October, 2011 to be taken into account.

The judge sentenced him to 4 years and 2 strokes for each of the housebreaking by night offences; to 2 years and 6 months for the house trespass; and to 4 months for each of the four thefts. The sentences of 4 years were ordered to be concurrent with each other, the sentences of 4 months were ordered to be consecutive with each other but concurrent with the 4 year sentence and the 2 years and 6 months was ordered to be consecutive to the 4 years sentence making a total of 6 years and 6 months imprisonment. The strokes were ordered to be non-cumulative, 4 in all."

31. Mortimer P noted that the two offences of housebreaking by night had occurred in the overall period 8 to 16 June 2012, and involved houses in Lumut. The property stolen included two television sets, a PlayStation and Astra receiver, a laptop, memory sticks, bank cards, jewellery and foreign currency. One of the bank cards was used to steal \$8,000 in cash from an ATM machine in Kuala Belait.
32. Of the applicant's then criminal record, Mortimer P said *"He has nine previous similar convictions committed 6 years ago for which he was sentenced to (a) total of 4 years and 10 months with 6 strokes."*
33. In dismissing the applicant's appeal on that occasion, Mortimer P said *"They were serious offences some of which were committed on bail. The total sentence was justified in all circumstances and followed the guidelines of this court."*
34. The earlier convictions to which Mortimer P referred in his judgment were themselves reported in *Mohammad Joll bin Tumih & Mohammad Sharifuddin bin Abdullah* [2007] BLR 183. This applicant's appeal against the total sentence of four years and 10 months imprisonment imposed on him on his pleas of guilty for nine charges, December 2004 and February 2005 including three charges of housebreaking was dismissed, this court saying that it would have been appropriate to order a total sentence against this applicant of five years imprisonment. However, the court reduced the order of the judge that the applicant received 8 strokes to 6 strokes.
35. It is clear that the offences the subject of charges 4 and 5 were premeditated offences committed by the applicant, together with others, in which the targets were houses the applicant clearly identified as likely to contain high value property. He was correct. Those offences were committed whilst the applicant was on bail for the offences the subject of charges 1 and 2. That was a substantial factor in aggravation of the commission of those offences. Notwithstanding the fact that he had been caught in the very act of breaking into the premises the subject of those charges and subsequently arrested, it is clear that the applicant was not in any way daunted in prosecuting his campaign of crime. Similarly, although the burglar alarm sounded during the commission of his offence the subject of charge 5, and although in consequence the applicant fled the scene, he displayed remarkable persistence in his pursuit of theft in returning to the premises later to

steal the property stolen in that offence. The judge was correct to determine that the overall, sustained criminal conduct required a deterrent sentence. Quite obviously, the public required protection.

36. We are satisfied that, on the information made known to the judge, the total sentence of imprisonment imposed on the applicant by the judge and the order that he receive two strokes were entirely appropriate.

The applicant's assistance to the authorities

37. Although the judge sentenced the applicant on 3 November 2018, he was not informed by the prosecution of the role of the applicant in apprehending the thief on 19 January 2018, in circumstances which led to thief's arrest and subsequent charging by the police on 22 January 2018. Ms Nor'adliatul explained that, although she was counsel assigned to represent the prosecution in both cases and had been assigned to prosecute the case of Mohamad Nasrinshah in February 2018, it was only after the applicant's sentence that she had read the papers relevant to the prospective trial of Mohamad Nasrinshah. Nevertheless, she agreed that the judge ought to have been informed of the applicant's conduct in preventing the commission of a crime, leading to the arrest and charging of Mohamad Nasrinshah, as being potentially relevant to sentence.
38. However, since then the extent of the applicant's assistance to the authorities has become greater. As Ms Nor'adliatul readily acknowledged, knowing of the imposition of the sentence on the applicant by Judge Mohammed Faisal on 3 November 2018, nevertheless, in January 2019 she had visited him in prison and secured his agreement to be a witness for the prosecution in the prospective trial of Mohamad Nasrinshah. Further, she had secured his attendance for that purpose at court on 11 March 2019. The applicant was not called as a witness for the prosecution only because Mohamad Nasrinshah pleaded guilty that day.
39. Ms Nor'adliatul acknowledged that she had provided none of that information to this court in her written submissions dated 23 March 2019. She said that she had not done so because that information was not relevant to the sentence passed on the applicant and because the respondent only replied to the grounds of appeal articulated by the applicant. Once the applicant had raised those issues, she had responded. Nevertheless, she submitted that the undisputed conduct of the applicant in that regard was not relevant to the sentence imposed on him by the judge.

Assistance to the authorities prior to sentencing

40. As is evidenced by the judgment of Mr Commissioner Mayo, it is the sentencing policy in this jurisdiction, as it is in other jurisdictions, to reflect assistance given by a defendant to the authorities in bringing others to justice, be it for offences in which the defendant has been found to be guilty or pleaded guilty or in other separate offences.

Assistance to the authorities post-sentencing but prior to the hearing in the Court of Appeal

41. Assistance rendered to the authorities post-sentencing but prior to the hearing before the Court of Appeal is a matter to which the Court of Appeal of Hong Kong has been prepared to have regard. In *R v Choi Fook Sang* (CACC 278/1995; unreported, 1 December 1995) Mortimer JA, said:

“Since conviction the applicant has given considerable assistance to the ICAC about other matters...When a person gives assistance of this nature, the court will recognise that assistance.”

In that case, the court reduced the sentence of three years to two years’ imprisonment.

42. Moreover, those who are prepared to testify against another should not lose the benefit in mitigation of sentence that they would have gained because the other person accepts the truth of the case against him and pleads guilty. [See the judgment of the Court of Appeal of Hong Kong, of which Mortimer JA was a member, in *R v Yan In Kun* (CACC 680/1996; unreported, 28 May 1997).]
43. We are satisfied that is the appropriate approach to be taken for sentencing in this jurisdiction.
44. The relevant overall context of the applicant’s conduct on 19 January 2018 preventing the attempted theft, which led to the prosecution of that defendant, is that subsequently, whilst on bail for attempted housebreaking himself, he went on to commit two serious offences in June and July 2018, contrary to section 457 of the Penal Code. Such credit as he was due for his meritorious conduct in preventing the attempted theft was subsumed in his own subsequent criminality. The applicant was not entitled to any discount of the sentence imposed on him by the judge for those reasons.
45. On the other hand, notwithstanding that the applicant had been sentenced on 3 November 2018 to a substantial term of imprisonment the prosecution was prepared to call him as a witness at the trial of Mohamad Nasrinshah on 11 March 2019. Ms Nor’adliatul said that she had taken that decision in the knowledge that Mohamad Nasrinshah had made out-of-court-admissions. She had done so because the applicant was an “eyewitness”. It is reasonable to infer, that fact played some part in Mohamad Nasrinshah’s decision to plead guilty. It was for that reason only that the applicant did not testify at the trial.

Conclusion

46. In those circumstances, the applicant is entitled to be afforded some measure of discount additional to the discount afforded to him from the entirely appropriate sentence of four years’ imprisonment imposed by the judge for charges 4 and 5. In our judgment a further discount of four months’ imprisonment is appropriate. In the result, we allow the application for leave to appeal out of time, quash the sentences of four years’ imprisonment on each of charges 4 and 5 and, in

substitution, impose a sentence of three years and eight months' imprisonment on each of those charges. We make no other orders.

47. Accordingly, the total sentence imposed on the applicant is four years and four months' imprisonment with two strokes.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A