

**NOOR EFFA NIRZA AZMILZAH BINTI JAMIL**

**AND**

**PUBLIC PROSECUTOR**

---

**(Court of Appeal of Brunei Darussalam)  
(Criminal Motion No. 6 of 2019)**

---

Before: Burrell P, Seagroatt and Lunn JJ A.  
**24<sup>th</sup> April 2019**

*Headnote – Sentence – Breach of trust – Non custodial sentence not appropriate in the circumstances – 25% discount for total delay from arrest to sentence of 5 years. An appropriate discount for delay always depends on the particular facts of each case.*

Mr. Mohd Shazale bin Haji Mat Salleh (Messrs. Mohd. Shazale Salleh, Advocates and Solicitors) for Applicant  
DPP Emily Goh Miem Yien for Respondent

**Cases cited in the judgment**

*Maimun bte Omar vs Public Prosecutor (CA 1/2013)*  
*Public Prosecutor v Hj Mohd Ali (ICCT 14/2005)*  
*PP v Jeffrey Munos San Miguel (MCCT/2018)*  
*PP vs Hj Muhammad Ali bin Hj Besar (CT 14/2005)*

**Burrell, P.:**

This is an application to appeal out of time by Noor Effa Nirza Azmilzah binti Jamil (the applicant) who on 17<sup>th</sup> November 2018 was sentenced to a total of 3 months imprisonment by Intermediate Court Judge Safiee. She had pleaded guilty to two offences, one pursuant to s.406 of the Penal Code involving a breach of trust whereby she stole \$4,200 of her employer's money and a second charge of using forged documents contrary to s.471 of the Penal Code.

Delay in filing Notice of Appeal

The applicant was legally represented before the judge. After sentencing an application was made to stay the sentence, due to its relatively short duration, pending appeal. It was thus understood by all that there was an intention to appeal at the outset and the application to stay was granted.

Unfortunately however, the Notice of Appeal was not filed until approximately 6 weeks after the 28 day period for appeal had expired. We accept that the failure to comply with the time limit was not her fault. We accept that she was unaware that the deadline had been passed until it was too late. She then engaged a new lawyer and a Notice was duly filed. We are satisfied with this explanation and therefore will now consider the merits of the applications to determine the prospects of success.

### The facts

In 2011 the applicant, then aged 25, commenced employment as a clerk for the "Gai Employment Agency". Her job included receiving deposits (normally \$600) from potential employers wishing to employ foreign domestic helpers, then submitting the necessary paperwork to the Labour Department.

Between April and August 2013, in the course of her employment, she received \$4,200 in relation to seven employment applications. For record purposes she had created and kept, forged application forms but had not processed the genuine paper work and had not sent any documents to the Labour Department. The matter came to light when her employer made investigation with the Labour Department concerning the seven applicants about which, so it transpired, the Labour Department had no information. The applicant had kept the \$4,200 in order to repay debts arising out of another business of her own.

The matter was reported to the police on 4<sup>th</sup> December 2013, the applicant having been dismissed from her employment in November 2013.

### Delay

The first court appearance was in November 2016, 3 years after the matter was first reported to the police. It then took a further 2 years to finally dispose of the matter. The case was listed for trial from November 2016 onwards and adjourned a number of times for a number of different reasons including three changes of defence solicitor, errors in notifying people of court dates, some changes of pleas from guilty to not guilty and back to guilty and unavailability of courts. It was only in November 2018 that pleas of guilty were accepted by the prosecutor to 2 out of 3 of the charges which the applicant faced. We agree that a significant part of the delay after November 2016 was caused by the applicant herself.

However the delay from December 2013 to November 2016 was not. For reasons unknown, although the matter was reported to the police in December 2013 the file was not handed over to the DPP until June 2015. No satisfactory explanation has been advanced for this 18 month delay. There was then a further delay of another 17 months to November 2016 when the matter was first brought to court. Again, this court, prior to the hearing, had been furnished with no information about this delay. When asked, Ms Emily Goh, on the DPPs behalf informed the court that the taking of statements from witnesses and the validation of documentary exhibits had taken longer than usual. More accurately, it had taken longer than it should have done. This was not a complex case.

### Sentence

After considering the cases of *Maimun bte Omar vs Public Prosecutor (CA 1/2013)* and *Public Prosecutor v Hj Mohd Ali (ICCT 14/2005)* and the mitigation advanced on the applicant's behalf, particularly her pleas of guilty albeit not at the earliest opportunity, her previous good character, her family circumstances and the issue of delay, the judge determined that the proper starting point for the s.406 breach of trust offence was 6 months imprisonment.

He then gave a full 1/3 discount for her plea of guilty and a further reduction of 1 month for the delay between 2013 and 2016. Adopting a similar approach he passed a 2 month sentence for the s.471 forgery offence and ordered the two sentences to be served concurrently making a final sentence of 3 months imprisonment. He correctly noted that these were serious offences involving theft of monies from an employer thereby breaching the trust placed in her and that there had been no restitution of the money. He was invited by her counsel to consider a Probation Order which he did, but determined that it would not be appropriate in this case.

### Discussion

The Public Prosecutor has brought a number of similar cases to our attention for comparative purposes. In *PP v Jeffrey Munos San Miguel (MCCT/2018)*, a s.406 case a 4 months sentence was passed after a guilty plea, where the sum involved was \$4,181 and there had been full restitution. In *PP vs Hj Muhammad Ali bin Hj Besar (CT 14/2005)* after a guilty plea but no restitution of \$3,282, 3 months imprisonment was the sentence.

We agree that cases of breach of trust where significant sums of money are stolen from an employer in the course of a continuing scam to deceive merit an immediate custodial sentence. The starting point in this case of 6 months is appropriate, arguably lenient. The applicant was fortunate to be given a full 1/3 discount for her pleas of guilty, given that she had changed her pleas from guilty to not guilty and back to guilty over a 2 year period. The judge's further discount of 1 month for the delay in bringing the case to court between 2013 and 2016 is also reasonable. It represents a 25% discount from the sentence of 4 months. We agree also that the two sentences of 3 months and 2 months be served concurrently. Her final total discount from a lenient starting point was 50%.

The judge was also alive to the applicant's personal and family circumstances. She is the wife of a husband in poor health and a mother of three young children. The court sympathizes with her situation. However, whilst such matters are never irrelevant they are rarely matters which, when taken on their own, should persuade a court to pass a non custodial sentence in place of an otherwise appropriate custodial sentence.

For all these reasons, whilst we recognize that this has been a difficult case, we have concluded that an appeal should not succeed and therefore leave to appeal out of time is refused notwithstanding that we fully accept the explanation for the Notice of Appeal being filed 6 weeks late.

Application refused.

**Burrell, P.**

**Seagroatt, J.A.**

**Lunn, J.A**