

YUSMADI BIN BUSRAH

AND

PUBLIC PROSECUTOR

**Court of Appeal of Brunei Darussalam
(Criminal Motion No. 8 of 2022)**

Before: Burrell P, Seagroatt and Lunn JJ A.

Date of Hearing: 14th November 2022

Date of Judgment: 24th November 2022

Headnote: Sentence – s.326 causing serious hurt likely to cause death – 4 years imprisonment after trial. Strokes reduced from 4 to 3.

Applicant in person

PO Shamsuddin bin Haji Kamaluddin and PO Hjh 'Adzimah Mukarramah binti Hj Salleh for Respondent

Cases referred to:

Public Prosecutor v Mohammad Faiz bin Abdullah and Amali Syaham bin Mohamad (Criminal Trial No 10 of 2017);

Public Prosecutor v Sumet Ob-orm (2008)1 JCBD 55;

Public Prosecutor v Sahminan bin Mohd Ranin (ICCT No 33 of 2015)

Burrell, P.:

On 2nd September 2020 the applicant was sentenced to 4 years imprisonment and 4 strokes after being convicted in the Intermediate Court following a trial before Judge Norismayanti of single offence contrary to s.326 of the Penal Code, namely on 16th June 2019 causing grievous hurt by means of a metal pipe likely to cause death.

Late Notice of Appeal

The first written notice of appeal was lodged in March 2022 by the applicant's wife 18 months out of time. The reason given for the delay was that she did not know that an appeal could be lodged. The applicant's written submission followed in October 2022, over 2 years after the sentence had been imposed.

The delay in this case is exceptionally long. If remission is granted the applicant could have already served over 75% of his sentence at the time his letter was lodged with the court.

Nonetheless we shall first of all consider the merits of the proposed appeal.

Facts

The background to this charge concerns a debt allegedly owed by the applicant to the victim of the assault. The victim and a friend went to the applicant's house to confront him about the debt. The confrontation soon became violent by which time the applicant had gone back into his house and re-emerged armed with a metal pipe.

The violent fight which ensued involved 5 people. Two others, (D2 and D3) on the same side as the applicant, were also charged with offences of assault and have been sentenced. The victim, at the conclusion of the fight was left on the ground with serious injuries. D2 had also armed himself with a wooden stick which he used to inflict injury onto the victim.

The 5th participant in the altercation was a friend of the victim.

The judge found as a fact that the applicant, in the course of the fight, had used the metal pipe to strike the victim, who was unarmed, a number of times in the region of his left hip. The victim's most serious injury arising out of this encounter was a fracture of the left femur in the region of his left hip. The judge summarised the applicant's involvement as follows.

"The 1st defendant is charged with voluntarily causing grievous hurt to the victim using a metal pipe, a weapon which is likely to cause death. The essential facts of the assault is that the Defendant used the metal pipe and hit the victim on the left hip and repeatedly on the left thigh. The assault was unprovoked. As a result of the assault, the victim suffered injuries to his left hip constituting tenderness and bruises at the left hip as well as an undisplaced fracture of the left femur bone (in the region of the left hip). The court considers this assault as serious in nature considering the injuries were categorized as grievous hurt."

Sentence

The applicant faced a single charge contrary to s.326 of CAP 22. His co-accused faced lesser charges. D2 was convicted under section 324 (using a wooden stick) and sentenced to 3 years imprisonment and 2 strokes. D3 was unarmed and convicted under section 323 and sentenced to 12 months imprisonment.

The prosecution, in laying three separate charges, clearly sought to differentiate between the roles played by each of the three defendants.

When considering the applicant's sentence the judge took note of previous cases involving fights and violence, for comparative purposes. She said:

In considering the appropriate sentence, the court also takes into account that he is a first offender. He however will not receive any discount normally afforded to defendant in the case where a guilty plea was entered at the earliest opportunity. The offence itself carries a penalty of an imprisonment term not exceeding 15 years and whipping.

Further to the above considerations, the court also takes into account similar past cases involving a section 326 offence. In Public Prosecutor v Mohammad Faiz bin Abdullah and Amali Syaham bin Mohamad (Criminal Trial No 10 of 2017), the case involved a defendant who caused grievous hurt to the victim also using a metal pipe resulting in an undisplaced fracture to the victim's forearm. On record he is a first offender. The defendant was found guilty after trial and the Honourable Dato Steven Chong, J. sentenced him to 5 years imprisonment and 5 strokes. In Public Prosecutor v Sumet Ob-orm (2008)1 JCBD 55, the case involved an attack where the defendant used a knife and injured the victim's head causing a fractured skull, fractures to his right elbow and his left finger. The trial judge took a starting point of 5 years and 5 strokes but reduced the sentence to 3 years and 3 strokes after taking into consideration the Defendant's remorse, clear record and plea of guilty at the earliest opportunity. The court takes note that injuries caused in this latter case is much more severe in comparison to the Mohammad Faiz case as well as the present offence by the 1st defendant. In Public Prosecutor v Sahminan bin Mohd Ranin (ICCT No 33 of 2015), the defendant stabbed the victim twice, on his left hand and left arm using a knife. The court found the defendant guilty after trial and sentenced the defendant to 4 years imprisonment and 4 strokes and reduced it to 3 years and 3 strokes after taking into account all mitigating factors in the case."

In the above cases the use of a knife is undoubtedly more serious. However the need for a deterrent sentence is nonetheless clear in the present case where repeated blows with a metal pipe have resulted in a fractured femur.

Decision

The applicant had a clear record. That apart there was nothing to be taken into consideration in his favour when determining the appropriate sentence. The applicant played the leading role in inflicting injuries in the course of this violence. The more serious charge against him and the more serious role he played merits a higher sentence than that passed on D2 for his involvement.

We have concluded that in all the circumstances 4 years imprisonment was within the correct range and is not manifestly excessive.

However, for the reasons below it is necessary to consider the matter further. We now turn to the imposition of 4 strokes as part of the sentence.

We were informed in the course of the hearing that, in late November 2020, about 3 months after the sentence was passed by Judge Norismayanti, the 4 strokes were in fact carried out.

It seems the reasons for this were that no notice of appeal had been filed by that time and the applicant was then 48 years old. He became 50 in April 2022.

We are bound to say that we consider the decision to carry out the whipping 3 months after the sentence was imposed was premature. The applicant was not yet 49 and it is common knowledge, particularly during the COVID pandemic, that appeals are frequently lodged late, sometimes months out of time. We do not know what enquiries,

if any, were made at the time concerning the applicant's intention, if any, to lodge a late appeal.

These circumstances are of particular relevance in this case because we have concluded that the imposition of 4 strokes was excessive. We observe that D2 received a sentence of 3 years and 2 strokes. The number of strokes ordered against this applicant was therefore double the number ordered against his co-accused, D2.

In short, we would have reduced the number of strokes from 4 to 3. In fairness to the applicant we have come to the conclusion that this unusual state affairs should be reflected by a modest reduction in sentence.

Accordingly, we will reduce the sentence by 3 months. We accept the reason given for the delay in sentence and order as follows.

Order

The application to appeal out of time is granted. We treat the application as the appeal. We allow the appeal in part and order that the sentence of imprisonment be reduced from 4 years to 3 years and 9 months.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A