

SAIFUL IRWAN BIN HAJI SIMPOL

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 10 of 2019)**

MD FAIZAL BIN ROSLI

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 36 of 2019)**

Before: Burrell P, Seagroatt and Lunn JJ A.

18th November 2019

Headnote: Sentence: Multiple charges including extortion, personating police officers, criminal intimidation, possession of offensive weapon, cheating and housebreaking. Sentences of 13 years and 2 months and 11 years and 8 months reduced to 11 years and 10 years respectively. Number of strokes also reduced. Late pleas of guilty should normally earn less than 1/3 discount.

Criminal Appeal No 10 of 2019

Appellant in person

DPP Hajah Anifa Rafiza binti Haji Abdul Ghani for Respondent

Criminal Motion No 36 of 2019

Applicant in person

DPP Hajah Anifa Rafiza binti Haji Abdul Ghani for Respondent

Cases cited in the judgment

R v Ingham (1980) 2 Cr App R184

Public Prosecutor v Goh Wei Seng (CA 14/2000)

Soh Lian Joo v Public Prosecutor (CA 19/2002)

PP v Adimodaamin bin Hj Moktal (HCCT 5/2010)

Chong Kim Hwa v Public Prosecutor (CA 51/1993)

Public Prosecutor v Lakim bin Hj Md Noor (HCCA 21/2012)

Public Prosecutor vs Abdullah Md Sham Khairunnas (ICCT 85/2018)

Public Prosecutor vs Mohd Shahiful Rizal bin Bakri (HCCT 4/2019)

Ainul Asrin bin Hj Mohd vs Public Prosecutor (CA 51/2001)

Public Prosecutor v Tan Eng Hok (1970) 2 MLJ 15
Mohd Ezam bin Tuah vs Public Prosecutor (CA 20/2015)
R vs Basil Mortimer Bernard (1997) 1 Cr App R 135
Hj Abdullah bin Hj Md Salleh (Cr App 79/2002)
Abd Aziz bin Hj Mohd Saad vs Public Prosecutor (CA 4/1999)
Public Prosecutor vs Abdul Malik bin Judin (ICCT 92/2018)

Burrell, P.:

On 27th June 2019 the applicant Mohd Faizal bin Rosli (D1) and the appellant Saiful Irwan bin Haji Simpol (D2) were sentenced by Mdm Justice Rostaina having pleaded guilty to multiple offences. The matter had been listed for trial following pleas of not guilty having been entered but after five prosecution witnesses (out of 49 named on the indictment) had given evidence and on the 9th day of the trial, they both changed their pleas to guilty and agreed a statement of facts.

The applicant Faizal (D1) pleaded guilty to 14 charges and Saiful Irwan (D2) to 18 charges. Faizal was sentenced to 11 years 8 months imprisonment with 5 strokes. Saiful Irwan was sentenced to 13 years and 2 months with 5 strokes. Faizal's notice of appeal against sentence was filed 3 month out of time. No written explanation was provided for the lateness but in court he said that his family had insufficient money to pay the court fees within the appropriate time.

Before considering the adequacy of the verbal explanation we shall consider the merits of both appeals.

The facts

There are eight incidents of criminal activity involving both appellants (we shall refer to both as "appellants", rather than "the applicant and the appellant") which gave rise to 14 charges and one further incident involving Saiful Irwan which resulted in a further 4 charges against him.

We shall briefly outline the circumstances of each incident in chronological order.

1. Charges 1 and 2: On 26th September 2017 both appellants and a third man approached a Bangladeshi worker posing as police officers. They threatened to arrest him unless he gave them money. In fear, the worker gave them \$42 which was all he had. The appellants left the scene. This led to a charge of extortion contrary to s.385 of the Penal Code and a second charge of pretending to be a police officer contrary to s.170 of the Penal Code.
2. Charges 3, 4, 5 and 6: These are the four extra charges against Saiful Irwan only. In fact Faizal was present in a car outside the premises where the incident occurred but did not take part. On 3rd October 2017 the appellant approached a Bangladeshi worker and an altercation took place. Two other Bangladeshis became involved which angered the appellant who then armed himself with a machete which he got from his car. He tried to hit one of the men with the machete close to his face. He later hit one of the other men on the buttocks with

the machete and also hacked a plastic chair with it intimidating the men. This incident led to charges of causing damage to property (s.426 Penal Code), possession of an offensive weapon (s.29 Public Order Act CAP 148) causing hurt (s.323 Penal Code) and criminal intimidation (s.506 Penal Code).

3. Charges 7 and 8: On 26th April 2018 both appellants were in a car tailgating a lorry which they caused to stop. They approached the lorry driver. Faizal was armed with a machete. They pretended that they were police officers and took \$500 from the driver's wallet. This incident led to an alternative charge of extortion by putting the Indian lorry driver in fear of grievous hurt (s.386 Penal Code) and pretending to be police officers (s.170 Penal Code).
4. Charge 9, 10 and 11: On 4th May 2018 both appellant's approached three foreign workers who were employed as grass cutters. Saiful Irwan was armed with a metal rod. They threatened the workers and took property from them including three cell phones, an ID card and \$282 cash. This led to 3 charges of extortion contrary to s.385 Penal Code.
5. Charge 12: On 9th May 2018 the appellants tailgated and stopped a car being driven by a Bangladeshi national. Saiful Irwan, whilst holding a stick approached the driver and threatened him. They demanded money from him but he had none. They then hit the car with the stick and took away the driver's car keys so that he was abandoned at the spot. Again, the appellants were charged with a s.385 Extortion charge arising out of this incident.
6. Charges 13 and 14: On 12th June 2018 the appellants went to a house in Kiulap occupied by a Malaysian man. They told him they were "Government officers" and that they had a search warrant to search for illegal cigarettes. Once inside the Malaysian man and another occupant were ordered to put many of their personal items on a table in the kitchen. The items included mobile phones, wallets, passports, ID cards, bank cards, a driving licence and some cash. The occupants were told to wait outside. The appellants then took the items and left the property. They were charged with two offences of cheating by pretending to be a person in authority (s.420 Penal Code), one in relation to each occupant.
7. Charge 15: On 24th June 2018 they committed an offence of house trespass contrary to s.448 of the Penal Code by entering a man's house on the pretext of looking for cigarettes.
8. Charge 16: On 28th June 2018 they stopped a car, pretended to be police officers and took \$400 from the driver. They were charged with cheating by pretending to be police officers contrary to s.419 Penal Code.
9. Charges 17 and 18: On 30th June 2018 at 11.30p.m. both appellants entered saloon premises in which the two owners were present. Faizal was armed with a wooden stick. They stole property from the two men including a mobile phone, cash and bank cards. They were charged with two offences of s.385 Extortion.

Mitigation and Sentencing

The sentencing judge noted and took account of each appellant's backgrounds. They were aged 34 and 43 respectively. D1 had minor offences for dishonesty for which he was fined about 10 years earlier. D2 also had very minor previous offences which were even older. None of the previous offences were of any significance in the sentencing process for the current offences. Both appellants pleaded financial and family circumstances as reasons for their offending. They ask for leniency and express remorse.

The judge was then faced with a difficult task in sentencing two family men for a 10 month spree of very serious criminality activity. In each case where there was a statutory minimum sentence she imposed that minimum term. In all other cases she stated her starting point for each offence and then discounted it by 1/3 to reflect the pleas of guilty. This was surprising given that the guilty pleas were only tendered after five witnesses had given evidence at trial. We shall deal with this matter later in this judgment. The appellants were unrepresented. The judge passed the following sentences: -

- (A). 26th September 2017 both appellants
Charge 1 s.385, 3 years and 2 strokes (statutory minimum)
Charge 2 s.170, 12 months (starting point 18 months)
- (B). 3rd October 2017 D2 only
Charge 3 s.506, 8 months (starting point 12 months)
Charge 4 s.426, 6 months (starting point 9 months)
Charge 5 s.29 Public Order Act 12 months and 3 strokes (statutory minimum)
Charge 6 s.323, 4 months (starting point 6 months).
- (C). 26th April 2018 both appellants
charge 7 s.386 5 years and 3 strokes (statutory minimum)
charge 8 s.170 12 months (starting point 18 months)
- (D). 4th May 2018 both appellants
Charge 9 s.385 3 years and 2 strokes (statutory minimum)
Charge 9 s.385 3 years and 2 strokes (statutory minimum)
Charge 9 s.385 3 years and 2 strokes (statutory minimum)
- (E). 9th May 2018 both appellants
Charge 12 s.385 3 years and 2 strokes (statutory minimum)
- (F). 12th June 2018 both appellants
Charge 13 s.420 12 months (starting point 18 months)
Charge 14 s.420 12 months (starting point 18 months).
- (G). 24th June 2018 both appellants
Charge 15 s.448 8 months (starting point 12 months)
- (H). 28th June 2018 both appellants
Charge 16 s.419 12 months (starting point 18 months)
- (I). 30th June 2018 both appellants

Charge 17 s.385 3 years and 2 strokes (statutory minimum)
 Charge 18 s.385 3 years and 2 strokes (statutory minimum)

The next task the judge undertook was to decide which of the above sentences should be served consecutively and which concurrently. Given that the total of the sentences actually passed came to 31 years and 8 months for D1 and 34 years and 2 months for D2 this was inevitable.

The first step in such an exercise is to decide what the correct starting point should be after trial to reflect the overall criminality. Then decide on the appropriate discounts, if any, for the pleas of guilty. Then direct which sentences are to be served consecutively and which concurrently. Wherever possible the decisions in relation to concurrent and/or consecutive sentences should be reasoned and logical. It is recognized however that given the number of offences and the length of sentences this cannot always be achieved.

Although the judge was plainly aware of the principle of totality the judgment does not state the overall starting point which resulted in the total sentences actually passed.

As she gave a 1/3 discount in all cases (which, we assume, was applied also in the cases where the statutory minimum sentence was passed) it is a matter of arithmetic.

D1's sentence of 11 years 8 months reflects a starting point of 17 years 6 months. D2's sentence of 13 years 2 months reflects a starting point of 19 years 9 months.

There is no doubt that the appellants are guilty of a serious and lengthy spree of criminality involving numerous incidents of extortion, personating police officers and government officials, putting foreign workers in fear, dishonesty and violence.

This factually complex case requires this court's observations and partial intervention in three respects. Before turning to those three matters we note our agreement to all the individual sentences passed in this case. It is unnecessary to consider each individual sentence. We note that the judge carefully considered a number of previous cases for guidance. They were:

R v Ingham (1980) 2 Cr App R184
Public Prosecutor v Goh Wei Seng (CA 14/2000)
Soh Lian Joo v Public Prosecutor (CA 19/2002)
PP v Adimodaamin bin Hj Moktal (HCCT 5/2010)
Chong Kim Hwa v Public Prosecutor (CA 51/1993)
Public Prosecutor v Lakim bin Hj Md Noor (HCCA 21/2012)
Public Prosecutor vs Abdullah Md Sham Khairunnas (ICCT 85/2018)
Public Prosecutor vs Mohd Shahiful Rizal bin Bakri (HCCT 4/2019)
Ainul Asrin bin Hj Mohd vs Public Prosecutor (CA 51/2001)
Public Prosecutor v Tan Eng Hok (1970) 2 MLJ 15

In addition the Deputy Public Prosecutor has referred the court to further previous cases concerning the various provisions of the Penal Code relevant to this appeal including:

Mohd Ezam bin Tuah vs Public Prosecutor (CA 20/2015)
R vs Basil Mortimer Bernard (1997) 1 Cr App R 135
Hj Abdullah bin Hj Md Salleh (Cr App 79/2002)
Abd Aziz bin Hj Mohd Saad vs Public Prosecutor (CA 4/1999)
Public Prosecutor vs Abdul Malik bin Judin (ICCT 92/2018)

In short, there can be no criticism that any of the individual sentences were excessive.

Discussion

We return to the three matters referred to above.

I. The appropriate discount

The appellants were given the benefit of a full one third discount having entered pleas of guilty nine days after their trial had commenced. This is wrong in principle. Whilst, in Brunei, the amount of a discount for pleading guilty is rightly, in our view, left to the discretion of the judge some recognition must be given, when exercising that discretion, to distinguish between a defendant who pleads guilty at the earliest opportunity, who deserves a full one third discount, on the one hand, and a defendant who pleads during his or her trial who deserves very little credit at all, on the other hand. Between these two extremes adjustment should be made.

The pleas in the present appeal were very late. In such circumstances any discount over 15% would have been overgenerous. We shall apply about a 15% discount in due course.

II. The appropriate starting point

Firstly, D2's starting point should be higher than D1's to reflect the fact that he was involved, on his own (charges 3-6), in an additional incident of violence and threatening behavior armed with a dangerous weapon. This incident led to 4 additional charges against D2. As they all arose out of the same incident it would have been appropriate in all the circumstances of this case to order them to run concurrently. The judge made charges 3, 4 and 6 consecutive (namely the criminal intimidation, the criminal damage and the causing hurt all in the same incident) and the possession of an offensive weapon concurrent (charge 5). This resulted in an additional sentence of 18 months for D2, after discount. Had she made them all concurrent the additional term would have been 12 months.

Secondly, whilst not belittling in any way the seriousness of the appellants' conduct we are satisfied that the starting points to reflect the overall criminality of 17 years and 6 months and 19 years and 9 months respectively are excessive and manifestly so.

We have concluded that starting points in region of 12 years and 13 years each would be appropriate. We think that an extra year for D2 is appropriate. As already referred to a discount in the region of 15% is all that these appellants should be entitled to given the timing of their guilty pleas.

We will adjust the sentences so that D1 shall be sentenced to a 10 year term and D2 to an 11 year term. In other words a reduction of 2 years in both cases from the revised starting points for the late pleas of guilty.

III. Consecutive or concurrent?

Wherever possible in a case such as this, the consecutive sentences should come from separate incidents. Adopting all the judge's individual sentences which we have considered to be perfectly proper we sentence D1 to consecutive terms on charge 1 (3 years for s.385), 7 (5 years for s.386), 13 (1 year for s.420) and 16 (1 year for s.419). 10 years in all. All the remaining sentences against D1 shall be served concurrently.

For D2 we pass identical consecutive sentences with an additional 12 months on charge 5 (possession of offensive weapon). 11 years in all. The remainder to be served concurrently.

We turn finally to the question of strokes. We make a commensurate reduction in the number of strokes as follows. For D1 all strokes shall be non-cumulative making a total of 3. For D2, one stroke on charge 5 shall be cumulative to the 3 strokes on charge 7 making 4 strokes in all. The rest shall be non cumulative.

Order

In all the circumstances we grant leave to the applicant to appeal out of time. We treat the application as the appeal. We quash the orders made by the judge of her consecutive sentences and substitute those referred to above. D1 at trial (Faizal) is now sentenced to 10 years imprisonment and 3 strokes and D2 at trial (Saiful Irwan) is now sentenced to 11 years imprisonment and 4 strokes.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A