KASIM BIN OMAR

AND

PUBLIC PROSECUTOR

Court of Appeal of Brunei Darussalam
(Criminal Appeal No. 10 of 2021)

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(Criminal Appeal No. 11 of 2021)

Before: Burrell P, Seagroatt and Lunn JJ A.
Date of Hearing: 3 November 2022
Date of Judgment: 19 November 2022

Headnote: sentence, causing -death of 5-month-old daughter (s.304(1) Penal Code) 15 yeas; causing GBH (s. 325-10 years and 2 strokes); failing to report to police (s. 176)-2 months. Total sentence: 20 years and 2 strokes. Appeal dismissed. Imposition of maximum sentence- within band of the worst type of case. No discount for pleas of guilty for s. 304 (1) and s. 325 offences- need to protect society and reflect public abhorrence. PP's appeal against order of 2 strokes only dismissed- within judge's discretion.

Criminal Appeal No 10 of 2021
Appellant in person
DPP Hajah Suriana binti Haji Radin and PO Kamal Ariffin bin Ismail for Respondent

Criminal Appeal No 11 of 2021
DPP Hajah Suriana binti Haji Radin and PO Kamal Ariffin bin Ismail for Appellant
Respondent in person.

Cases cited in the Judgment:-
R v Ambler [1976] Crim LR 266;
R v Tait and Barley [1979] 24 ALR 473;

Benseggar v R [1979] WAR 65;
Benseggar v R [1979] WAR 65;
Sim Gek Yong v Public Prosecutor [1995] 1SLR 537;
Public Prosecutor v Mohammad Zeni bin Sulaiman [2012] 1 JCBD 31;
R v Stabler [1984] 6 Cr App R (s) 129;
Public Prosecutor v Muhammad Firdaus bin Hamid & Masnani binti Haji Masri-High Court Trial No. 32 of 2013;
Public Prosecutor v Muhammad Zini bin Sulaiman [2012] BLR 31;
Public Prosecutor v BDB [2018] 1 SLR 127;
R v Butt (Sohail) [2006] CAR (S) 364;
R v Bright [2008] EWCA Crim 462;
Mohammad Zulkifli bin Abdul Jalil v Public Prosecutor (Criminal Appeal No. 6 of 2019; unreported.)

Lunn, JA.:

1. By a Notice of appeal, dated 24 March 2021, Kasim Bin Omar appealed against the total sentence of 20 years' imprisonment and 2 strokes, imposed on him by the Chief Justice Dato Seri Paduka Steven Chong on 18 March 2021, following his pleas of guilty that day to 3 charges contrary to the Penal Code, namely: Charge 1, contrary to section 304(2); Charge 2, contrary to section 325; and Charge 3 contrary to section 176.

2. By a Notice of appeal, dated 13 April 2021, the Public Prosecutor appealed against the imposition by the judge of 2 strokes only in sentencing of Kasim for the offence the subject of Charge 2, which the Public Prosecutor submitted was manifestly inadequate.

The charges

3. By Charge 1, it was alleged that at the family home in Kampong Salambigar, on or about 29 May 2018 Kasim had caused the death of his five-month-old daughter knowing that his act was likely to cause death, but without any intention to cause death or such bodily injury as was likely to cause death. By Charge 2 it was alleged that more than two weeks earlier at the family home Kasim had caused grievous hurt to his daughter by pressing her abdomen with such force as to cause two of her ribs to fracture. By Charge 3 it was alleged that, although Kasim was legally required to furnish information to the officer in charge of the nearest police station about her death in suspicious circumstances, he had intentionally failed to do so.

4. Kasim's wife, Siti Nozalia, pleaded guilty to charges of permitting the deceased to be physically abused by Kasim in May 2018, contrary to section 28(1) of the Children and Young Persons Act, Cap. 219 (Charge 4) and with intentionally failing after 29 May 2018 to furnish the requisite information to the police of the deceased's death, contrary to section 176 of the Penal Code (Charge 5).

The Facts

5. In pleading guilty, Kasim accepted the Statement of Facts as the factual basis of his pleas. Having been married since 2009, Kasim and his wife, Siti Norzalia were the parents of four children with whom they lived at the ground floor of the family home, the upper floor being occupied by Kasim's relatives. The deceased was their youngest and fifth child, having been born significantly prematurely on 1 December 2017. She was primarily cared for by Kasim. Kasim and his wife were both unemployed.

6. On 29 May 2018, the deceased was distressed and crying. In the course of changing her diaper Kasim threw the deceased to the floor of the toilet, where she struck her head. She became stiff for a while. Then, she resumed crying. Having picked her up from the floor, Kasim took the deceased to the bedroom where he threw her on the bed, where she hit her head on the bed frame. He left her there to cry. Some hours later he noticed that she was weak and her breathing irregular. In the presence of his wife, he administered CPR. Foam came out of her mouth and she no longer breathed. Kasim rejected his wife's suggestion that they take the deceased to the hospital for fear that they would be accused of child abuse. Kasim's wife having agreed with his suggestion that he should bury the deceased, together they wrapped up her body and placed it amongst other items in the store room. They agreed not to tell anyone about the death of their daughter. When members of the family asked about her whereabouts, they said that she had been adopted.

   Kasim admitted that, knowing that the deceased had died in those circumstances, he had not given that information to the police.

7. The matter came to light when Kasim's mother-in-law made a report to the police on 12 September 2019, having received an admission from Kasim's wife of the fact of the death of her daughter.

8. Kasim admitted to the police his conduct towards the deceased on 29 May 2018. His concerns about his financial situation and the burden of his domestic chores had caused him to become stressed and angry. It was in that state of mind that he had acted towards the deceased as he did. He admitted that at an earlier date, more than two weeks prior to 29 May 2018, whilst he was changing the deceased, he had pressed her upper abdomen with such force that he had caused the fracture of two of her ribs.

Autopsy

9. Having conducted an autopsy on the deceased on 14 September 2019, Dr PU Telesinghe said that the deceased had a 5 cm linear fracture of the left parietal bone and callus formation on the fifth and sixth ribs on the left and right side. In his opinion, the cause of death was blunt trauma to the head. The injuries to the deceased's ribs had been caused at least two weeks prior to the head injury.

Reasons for sentence

11. Having noted the facts that Kasim had accepted in pleading guilty, the Chief Justice said that they revealed a "horrific case of child abuse" committed by a father on his infant daughter. The protection of children from such ill-treatment required a strong element of deterrence in the sentence. A severe sentence was necessary to mark public abhorrence of this conduct.

12. Of the culpability of the appellant and his wife in not informing the police of the circumstances of the deceased's death, the Chief Justice noted that they had also lied to family members to explain her disappearance.

Imposition of the maximum sentence of imprisonment: worst type of offence

13. Having noted that the maximum sentence of imprisonment for the offence in Charge 1 was imprisonment for a term not exceeding 15 years, a fine or both and, for Charge 2 imprisonment for a term not exceeding 10 years and whipping, the Chief Justice addressed the circumstances in which it was appropriate to impose the maximum sentence. He referred to the judgment of the Court of Appeal of England and Wales in *R v Ambler*[1] and that of the Federal Court of Australia in *R v Tait and Bartley*[2], in which reference was made to the judgment in *Bensegger v R*.[3] In determining whether or not to impose a maximum sentence for an offence, it was appropriate to consider whether the facts fell within the broad band of the worst type of offence, not whether it was possible to conjure up worse circumstances. In the judgment of the High Court of Singapore in *Sim Gek Yong v Public Prosecutor*[4], that approach was cited with approval by Yong Pung How CJ. Finally, the Chief Justice noted that those principles had been applied by the High Court in Brunei in *Public Prosecutor v Mohammad Zeni bin Sulaiman*.[5]

14. In applying those principles to the circumstances of the appellant, the Chief Justice said that the imposition of the maximum sentence was warranted having regard to the multiple aggravating factors:

    (i) there was a serious breach of trust, given that the appellant was the father of the deceased;
    (ii) the deceased was vulnerable and defenceless;
    (iii) the assaults were cruel and inhumane;
    (iv) the assaults were repeated; and
    (v) no effort was made to seek medical help for the deceased after the assaults, the subject of Charge 2.

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[1] *R v Ambler [*1976] Crim LR 266.
[2] *R v Tait and Barley* [1979] 24 ALR 473.
[3] *Benseggar v R* [1979] WAR 65.
[4] *Sim Gek Yong v Public Prosecutor* [1995] 1SLR 537.
[5] *Public Prosecutor v Mohammad Zeni bin Sulaiman* [2012] 1 JCBD 31.

Discount for a guilty plea: none

15. Having said that a guilty plea is a mitigating factor which usually merits a reduction in sentence of up to one-third from that which would have been imposed after trial, the Chief Justice said that there were circumstances in which it was appropriate to afford no discount. He noted the statement in the judgment of the Court of Appeal of England and Wales in *R v Stabler*[6] that in some cases the overwhelming consideration was the protection of society, so that no discount was to be afforded. That approach had been followed in Singapore. In *Sim Gek Yong v Public Prosecutor,* Yong Pung How CJ said that in some cases the mitigating factor of a plea of guilty may be, "…completely outweighed by the need for a deterrent sentence."

16. Having regard to those considerations, the Chief Justice said that the public interest in the protection of children was the paramount consideration, so that the need for a deterrent sentence completely outweighed the mitigation of the appellant's plea of guilty. In the result, he determined to give the appellant no discount in sentence for his pleas of guilty on Charges 1 and 2,

17. In respect of Charge 3, the Chief Justice stipulated a starting point for sentence of 3 months' imprisonment, and afforded him a discount of one-third for his plea of guilty.

18. Having noted that Charge 1 and Charge 2 involved separate offences committed about two weeks apart, the Chief Justice said that the imposition of consecutive sentences of imprisonment was warranted.

Sentence

19. In the result, the Chief Justice imposed the following sentences on the appellant:

    (i) Charge 1:15 years' imprisonment;
    (ii) Charge 2: 10 years' imprisonment and 2 strokes; and
    (iii) Charge 3: 2 months' imprisonment.

Totality

20. Having regard to the appropriate totality of sentence of imprisonment to be imposed on the appellant, the Chief Justice ordered that 5 years, of the sentence of 10 years' imprisonment imposed in respect of Charge 2, was to be served consecutively to the sentence of 15 years' imprisonment imposed in respect of Charge 1. The sentence of 2 months' imprisonment imposed in respect of Charge 3 was ordered to be served concurrently with the other sentences. In result, the total sentence of imprisonment imposed on the appellant was 20 years and 2 strokes.

[6] *R v Stabler* [1984] 6 Cr App R (s) 129.

The appellant's submissions

21. In the Notice of appeal, dated 8 April 2021, the appellant's sister sought a reduction in the sentence imposed on the appellant, contending that it was "too long". He invited the court to note, that the appellant had no previous criminal convictions. In a letter to the Court, dated 27 August 2022, the appellant asked the court to order that the sentences of imprisonment imposed in respect of Charge 1 and Charge 2 be served concurrently, rather than consecutively, from the date on which he was remanded at the police station.

The respondent Public Prosecutor's submissions

(i) CA 10 of 2021

22. In her written submission, DPP Suriana invited the court to note that in child abuse cases lengthy sentences of imprisonment had been imposed in Brunei. In *Public Prosecutor v Muhammad Firdaus bin Hamid & Masnani binti Haji Masri*[7], having pleaded guilty to 11 charges, including a charge contrary to section 324 (2) the defendant had been sentenced by the Chief Justice to a total of 16 years' imprisonment and 10 strokes. In *Public Prosecutor v Muhammad Zini bin Sulaiman* [8], having pleaded guilty, the defendant was sentenced by the Chief Justice to a total of 15 year's imprisonment, including a sentence of 15 years' imprisonment for the offence contrary to section 304(2), and 10 strokes.

23. DPP Suriana submitted that the Chief Justice was correct to determine that the circumstances of the case of the appellant came within the test of the "worst type" broad band of cases and required a deterrent sentence. He was justified in imposing the maximum sentences of imprisonment on Charge 1 and Charge 2.

24. Further, given that the commission of the offences in Charge 1 and Charge 2 were committed weeks apart and were separate assaults on the deceased, the judge was correct to determine that consecutive sentences were warranted. The Chief Justice could have imposed a sentence of 25 years' imprisonment, had he ordered that the sentences of imprisonment in respect of Charge 1 and Charge 2 be served entirely consecutively. Having regard to the totality of sentence, the Chief Justice had correctly determined that only 5 years of the sentence of imprisonment imposed in respect of Charge 2 be served consecutively to the sentence imposed in respect of Charge 1. The resulting sentence of 20 years' imprisonment was entirely appropriate.

25. In the course of her oral submissions, DPP Suriana informed the court that on the occasion of the appellant's first appearance before the Chief Justice on 1 March 2021, the prosecution had withdrawn a charge of murder against the appellant. Then, the appellant pleaded guilty on arraignment to the three charges. It being the policy of the prosecution not to give a public explanation for the exercise its discretion, the

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[7] *Public Prosecutor v Muhammad Firdaus bin Hamid & Masnani binti Haji Masri*-High Court Trial No. 32 of 2013; 11 January 2014.

[8] *Public Prosecutor v Muhammad Zini bin Sulaiman* [2012] BLR 31.

Chief Justice had not been informed of the reasons for the withdrawal of the murder charge.

(ii) CA 11 of 2021

26. By a Notice of appeal, dated 13 April 2021, the Public Prosecutor took issue with the sentence imposed by the judge on the appellant of only two strokes in respect of Charge 2. It was asserted that was manifestly inadequate. It was submitted that the Chief Justice had erred in law and/or fact in failing to give adequate weight to the aggravating factors of the commission of the offence the subject of Charge 2, in particular having regard to the nature and extent of the injuries to the deceased's ribs.

27. In her written submissions DPP Suriana invited the court to note that section 325 of the Penal Code did not specify the maximum number of strokes that might be imposed by the court for an offence. Section 257 (1) of the Criminal Procedure Code provided that the maximum number of strokes that a court might order was limited to 24 strokes.

28. DPP Suriana submitted that, in cases in which the injuries were minor, the range of strokes imposed on defendants had been one to two strokes; where the injuries constituted grievous hurt or death resulted, between 6 and 10 strokes had been imposed[9]. Cases involving a fatality flowing from an assault were to be distinguished from those resulting in non-fatal injuries. That consideration was all the stronger in the case of child abuse cases. In its judgment in *Public Prosecutor v BDB,* the Court of Appeal of Singapore had suggested that where death results in an offence contrary to section 325, a sentence of 12 or more strokes might be warranted.[10]

29. In her oral submissions, in response to a question from the court, DPP Suriana suggested for, the first time, that it was appropriate to impose a sentence of 6 strokes on the appellant for the offence contrary to Charge 2.

The respondent's submissions

30. In his submissions, Kasim invited the court to reject the Public Prosecutor's appeal, given the "high" sentence of imprisonment imposed on him.

Discussion
The imposition of the maximum sentence

33. The principles identified in the judgment of the Court of Appeal in England and Wales in *R v Ambler and Hargreaves*[11] are of some longevity, having been articulated in 1975 in the judgment of Lawton LJ, namely:

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[9] *Public Prosecutor v Muhammad Zini- 10* strokes for each of the two offences, contrary to section 304(2) and in 325 of the Penal Code.
Public Prosecutor v Muhammad Firdaus-10 strokes for an offence contrary to section 326 of the Penal Code.
[10] *Public Prosecutor v BDB* [2018] 1 SLR 12 7, paragraph 76.
[11] *R v Ambler and Hargreaves*[1976] Crim LR 266.

"It is of course a principle of sentencing that maximum sentences should only be passed for the worst kind of offence. But it is to be borne in mind that when judges are asking themselves whether they should pass the maximum sentence, they should not use their imagination to conjure up unlikely worst possible kinds of cases. What they should consider is the worst type of offence which comes before the court and ask themselves whether that particular case they are dealing with comes within the broad band of that type."

34. Those principles were endorsed in the judgment of Leveson J in the Court of Appeal of England and Wales in *R v Butt (Sohail)*.[12] , "Having regard to the passage of time, this enunciation of principles bears repetition." Further endorsement was given to those observations by the Court of Appeal in *R v Bright.*[13] In our judgment in *Mohammad Zulkifli bin Abdul Jalil v Public Prosecutor* those observations were cited with approval.[14] More recently, the Court of Appeal in *R v Bridger*[15] reiterated the court's endorsement of the observations made by Sir Igor Judge P in *R v Bright*, stating that "It is important to dispel the notion that the maximum sentence for an offence cannot be passed if it is possible to envisage any more serious example of the offence." In that case, the court upheld the sentence of 10 years' imprisonment imposed on the appellant, a prison officer, after conviction after trial. The sentence was the maximum for the offence of conspiracy to convey prohibited items into the prison in which he worked.

35. For the numerous reasons enumerated by the Chief Justice, as being the aggravating factors in the commission of the offences the subject of Charge 1 and Charge 2, we have no hesitation in determining that the Chief Justice was correct to find that the circumstances were such that they fell within the broadband of the worst type of offence, for which it was appropriate to impose the maximum sentences of imprisonment of 15 years and 10 years. The failure of the appellant to seek medical assistance for the deceased following his assault on her several weeks prior to 29 May 2018 evidenced a very significant, sustained callousness and complete indifference to the welfare of a wholly vulnerable baby. That indifference was evidenced again by a similar failure to seek medical help following the assault on the deceased on 29 May 2018.

Discount for plea of guilty: none

36. There is no doubt that there is a very considerable public interest in the protection of the young and vulnerable from physical abuse. The public interest demands a deterrent sentence is imposed to reflect the deep abhorrence in society of violence visited upon such victims. In those circumstances therefore, we are satisfied that the Chief Justice was entitled to determine that the mitigation of sentence, that would otherwise have been afforded to the appellant for his pleas of guilty, was

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[12] *R v Butt (Sohail)* [2006] CAR (S) 364.
[13] *R v Bright* [2008] EWCA Crim 462.
[14] *Mohammad Zulkifli bin Abdul Jalil v Public Prosecutor* (Criminal Appeal No. 6 of 2019; unreported at page 4, 18 November 2019.)
[15] *R v Bridger* [2018] 2 Cr. App. R. (S.) 44; at pages 374-5, paragraph 26.

"completely outweighed" by the need for a deterrent sentence and to have determined to give no discount in sentence to the appellant.

Consecutive sentences

37. We reject the appellant's submissions that the sentences of imprisonment imposed on him should be ordered to be concurrent. We are satisfied that the Chief Justice was fully justified in determining that the imposition of consecutive sentences was warranted for the offences committed by the appellant on Charge 1 and Charge 2, for the reasons that he gave, namely that the assault on the deceased which gave rise to the offence the subject of Charge 2 was committed some weeks prior to the offence subject of Charge 2 and was a separate and different assault from that the subject of Charge 1.

Totality

38. Finally, we are satisfied that the Chief Justice was correct to determine that the overall culpability of the appellant was properly addressed in sentencing by ordering that only 5 years of the sentence of imprisonment imposed in respect of Charge 2 was to be served consecutively to the sentence imposed in respect of Charge 1, so that the total sentence imposed on the appellant was 20 years' imprisonment.

The effective date of sentence

39. In the warrant of committal, the Chief Justice stipulated that the sentences imposed on the appellant were effective from 14 September 2019. The first report of the alleged death of the deceased to the police was on 12 September 2019. The appellant was interviewed by the police on 13 and 14 September 2019. So, it appears that he was remanded in police custody on the latter date.

CA 11 of 2021: order of two strokes for Charge 2

40. Of the Public Prosecutor's appeal that in sentencing the appellant for the offence the subject of Charge 2, the Chief Justice's order that he be subject to two strokes was manifestly inadequate, it is to be noted that DPP Suriana had provided the Chief Justice with lengthy written submissions in advance of sentencing. In concluding those submissions, she felt it appropriate to inform the Chief Justice that the prosecution sought the imposition of the maximum sentence on each charge, which sentences she asked to be made consecutive to the extent that the total sentence to be imposed on the appellant would be in the range of "18 to 20 years" imprisonment. However, she did not indicate that the prosecution sought the imposition of a sentence of strokes on the appellant, let alone the 6 strokes that she now stipulates as being the appropriate order.

41. The context in which the Chief Justice ordered that the appellant to be subject to 2 strokes, as part of the sentence imposed for Charge 2, was that an overall sentence of 20 years imprisonment was being imposed on the appellant. It is to state the obvious, to observe that was a very lengthy sentence of imprisonment. Having

regard to that context, and the fact that the imposition of strokes lay within the discretionary power of the judge, we are satisfied that the order of 2 strokes, albeit that it was at the lower end of the range, nevertheless lay within the acceptable range of the exercise of those powers.

Conclusion

42. For the reasons that we have given, we dismiss Kasim's appeal against sentence and the Public Prosecutor's appeal in respect of the order of two strokes.

Burrell, P.

Seagroatt, J.A. **Lunn, J.A**