ALIUDDIN BIN HAJI ALI MUSTAPHA

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 13 of 2018)

Before: Burrell P, Seagroatt and Lunn JJ A.
Date of hearing: 8th April 2019
Date of Judgment: 22nd April 2019

Appeal against conviction for possession of a purported Brunei Immigration Departure stamp, with intent that it be used for committing forgery, dismissed.

Sentence-appeal allowed; discount for delay from arrest on 12 June 2014 until sentence on 23 October 2018. Sentence of three years quashed and a sentence of two years and eight months' imprisonment substituted.

Mr Hj Mohamad Daud bin Hj Ismail (Messrs. Daud Ismail and Co) for Appellant
DPP Hjh Atiyyah Azzahra binti POKLSDSLJ Awg Hj Abas for Respondent

Cases referred to in the judgment

Tang Tuck Wah v PP [1991] 2 MLJ 404
Maimun Bte Hj Omar v Public Prosecutor (Criminal Appeal No, 1 of 2013, JCBD)
Shahrul Rizam bin Haji Ramlee v Public Prosecutor (Criminal Appeal No. 25 of 2016)
DM Atula Indrajith v PP (Singapore-MA 111/99)
Aiyadurai Gobikrishna v PP (Singapore-MA 209/2000)
R v Wan Ho Hung & Another (Hong Kong-CACC 342/1988

Textbooks

Sentencing Practice in the Subordinate Courts of Singapore; Third Edition, Volume 2 (2013)

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

The appeal against conviction and sentence

1. By a notice of appeal filed with the court on 29 October 2018, the appellant appealed against his conviction on 15 October 2018 after trial by Judge Norismayanti of five charges and the total sentence of three years' imprisonment imposed on him by the judge on 23 October 2018.

Background

2. In the mid-afternoon of 12 June 2014, Immigration officers intercepted and detained the appellant, Aliuddin bin Haji Ali Mustapha, in a Suzuki Alto motor car which he drove in the vicinity of the Malaysian High Commission at Jalan Kebangsaan in Bandar Seri Begawan. A search of his vehicle at that place revealed the presence of nine passports in the names of other persons. As a result, the appellant was brought by the Immigration officers to the headquarters of the Immigration and National Registration Department, where a further search was conducted of the motor car. Various items were found in the boot of the motor car. Five stamps, including a stamp in the name of Sin Boon Enterprise (charge 5) and one in the name of Emelle Beauty Salon and Massage (charge 6), were found in a blue plastic bag. Three passports were found in a white envelope, a Philippine passport in the name of Noel Ganub Rama (charge 3) and two Indonesian passports in the name of Siti Aisyah (charge 2). A Brunei Immigration stamp, Kuala Laura "Departure" -No. 357, was found, together with a Sarawak, Malaysia Immigration stamp, in a blue plastic bag inside an envelope amongst the tools for the spare tyre. (Charge 1.)

The charges
Charge 1

3. By charge 1, it was alleged that on 12 June 2014 that the appellant "did possess a stamp reportedly bearing a) a Kuala Lurah Departure stamp of Immigration Brunei Darussalam No 357 intending that the same shall be used for the purpose of committing forgery", contrary to section 473 of the Penal Code.

Charge 2 and 3

4. By charges 2 and 3, it was alleged that on or before 12 June 2014 the appellant abetted Siti Aisyah (charge 2) and Noel Ganub Rama (charge 3) in the commission of their respective offences of remaining in Brunei unlawfully, after the expiry of their respective employment passes, namely on 26 February 2013 and 21 April 2013 respectively, by intentionally keeping their respective Indonesian and Philippine passports, which offences were committed by them respectively in consequence of the appellant's abetment, contrary to section 15 (1) of the Immigration Act, 17.

Charges 5 and 6

5. By charges 5 and 6, it was alleged that, on or before 12 June 2014, at the 2nd floor of the Immigration office in Bandar Seri Begawan, the appellant had dishonestly misappropriated the respective stamps of Sin Boon Enterprise (charge 5) and Emelle Beauty Salon and Massage (charge 6), contrary to section 403 of the Penal Code.

The Proceedings
Judge Hanani

6. Following his arrest on 12 June 2014, the appellant was charged with various charges, including the five charges of which he was subsequently convicted. The appellant's trial before Judge Hanani commenced on 20 September 2014. There were five other hearing dates that year and two hearing dates in 2015, 6 August and 19 September 2015. Then, there were two further hearing dates in October 2016, 16 and 18 October 2016. The proceedings were brought to an end on the transfer of the judge out of the judiciary.

Judge Norismayanti

7. On 16 January 2017, the parties appeared before Judge Norismayanti for the first time. On 17 April 2017, dates were fixed for a retrial, with 10 to 13 and 31 July 2017 reserved. On 10 July 2017, on being rearraigned, the appellant pleaded not guilty and his retrial commenced. The prosecution case concluded on 11 January 2018. On 10 March 2018 the judge rejected a submission of no case to answer on the five charges of which the appellant was subsequently convicted. Having been told by counsel that the appellant would give evidence, the hearing was adjourned to 28 May 2018. On that date, counsel indicated that the appellant would not give or call evidence. Having received written submissions from the parties, the judge delivered judgment and imposed sentence on the appellant on 15 and 24 October 2018 respectively.

The prosecution case

8. In support of the five charges, charges 1-3, 5 and 6, the prosecution called witnesses who had conducted the searches of the motor car, taken photographs and drawn sketches of where the various physical exhibits had been found. Also, the prosecution led evidence through Immigration officers that the Kuala Lurah Departure stamp, No. 357 had been surrendered to the Immigration Stores Department on 4 June 2013. Another Immigration officer produced that stamp to a third Immigration officer on 26 June 2014. The latter took photographs of it and the impression made by the stamp on a piece of paper, which were led in evidence.

9. Witnesses from Sin Boon Enterprise and Emelle Beauty Salon and Massage respectively identified the stamps of those two companies, that had been found in the boot of the appellant's motor car, as being stamps made for and used by those companies, but which were missing.

10. Rosli Bin Hj Abdul Karim testified that he employed Siti Aisyah and Noel Ganub Rama. In January or February 2013, he had given the appellant the former's passport, number AP 485839, and asked him to obtain an extension of the then valid employment pass. Afterwards, he made the same request of the appellant in respect of Noel Ganub Rama and provided the appellant with this passport containing the then valid employment pass of Noel Ganub Rama.

11. Mohamed Ramzan Hj Zainal, an Investigation officer of the Immigration Department, gave evidence of the circumstances in which the appellant had

provided four statements to him, in the form of questions and answers, including three statements made on 13,17 and 23 June 2014.

The defence case

12. The defendant did not give or call evidence in the defence case.

The Judgment
The appellants out-of-court statements

13. In his Judgment, the judge noted that in his written statement, dated 13 June 2014, the appellant had said that he was retired but that, through his company Allimus General Development, he worked "to renew passports for foreigners."

Charges 2 and 3

14. Of the appellant's statements relevant to charges 2 and 3, the judge noted that the appellant admitted:

> *"…having received Aisyah and Noel Ganub Rama's passports for him to deal with. He states that the employment passes for both passports had already expired upon receipt."* (See answers 30 and 31.)

15. Of the circumstances in which the appellant contended that he had received those passports, by reference to the appellant's written statement, dated 17 June 2018, the judge noted that the appellant said that:

> *"…he received the passports belonging to Aisyah and Noel Ganub Rama from Hj Rosli (PW 10) sometime in February 2014 to deal with. He was to renew the employment pass for Aisyah but had already expired whereas he was to renew the employment pass for Noel Ganub Rama (PW 11) but the passport had already expired when he received it."* (See answers 19 and 20.)

Charge1

16. Of the appellant's statements relevant to Charge 1, the judge noted that in the statement dated 13 June 2014, the appellant admitted "to keeping the Kuala Laura control post "Departure" stamp no. 357 in the tyre found in the boot of his car explaining that the stamp belonged Munjamil." (See answer 32.)

17. The judge went on to note that in the statement, dated 17 June 2014, the appellant had asserted that:

> *"…sometime in May 2014 Munjamil had left the said stamp together with other exhibits with the defendant for him to keep. He explained that he kept the stamp No. 357 in his car because he thought Munjamil may want to use the stamps in the future. The defendant also admitted that it was wrong to keep the stamp and that is the reason why he kept it in the spare tyre."* (See answers 22 to 27.)

18. Finally, the judge noted that, in the statement dated 23 June 2014, the appellant:

> *"…admitted to knowing the "Departure" stamp found in his possession was fake and it was dangerous for him to keep, so he kept them inside the spare tyre in the boot of his car. The defendant reasoned the stamps were given to him by Munjamil to keep."* (See answers 7 and 8.)

Charges 5 and 6

19. Of the appellant's statements relevant to charges 5 and 6, the judge noted that in the statement, dated 17 June 2014, the appellant:

> *"…admitted to having found the company stamps belonging to "Sin Boon Enterprise" and Emelle Beauty Salon" at the second floor of the Immigration Department at the employment pass section and had intended to change the rubber part of the stamps to his company stamp with the explanation that it was expensive to make new stamps."* (See answers 9 and 10.)

The judge's findings

20. The judge found that the appellant's out-of-court statements were "mixed statements", namely that they contained inculpatory and exculpatory statements. Of that, the judge said that, following the authority of *Tang Tuck Wah v PP* [1991] 2 MLJ 404, and having regard to all the evidence:

> *"I accept the defendant's admissions as containing matters of truth and reject the defendant's explanations as matters which are favourable to the defendant himself."*

21. Then, having noted that section 221 (5) of the Criminal Procedure Code, Cap. 7 provides that "the fact that the accused does not give evidence on oath or affirmation may be made the subject of any adverse comment by the prosecution and the Court may draw such inferences therefrom as it thinks just", the judge said:

> *"…in the absence of any defence, the court draws adverse inferences based on the prosecution submissions. I find that in opting to remain silent, the defendant had failed to adduce any evidence in his defence and in corroboration of his previous written statement and I find that this failure is material to the charges made against him."*

Charge 1

22. Having resolved discrepancies in the evidence led by the prosecution as to the number of the Kuala Lurah Departure stamp, number 357 or number 457, found in the possession of the appellant, the judge found that the appellant was in possession of the stamp with the number 357, as particularised in Charge 1.

23. Then, turning to the other elements of the offence, he said:

> *"The prosecution submits that the defendant was in possession of the stamp for the purposes of committing forgery. No evidence was adduced by the defence to prove otherwise or in corroboration of the explanation provided in his previous written statement referred. Adverse inference is made against the defendant that he was in possession of the "Departure" stamp no. 357 for the purposes of committing forgery."*

Charges 2 and 3

24. In finding the appellant guilty of charges 2 and 3, the judge said that, there being no evidence to rebut the evidence, he accepted the evidence of HJ Rosali (PW 10) that he had handed over the passports of Siti Aisyah and Noel Ganub Roma sometime in January or February 2013, not in February 2014 as the appellant asserted in his written statement dated 17 June 2014, and when he did so both passports (sic) were still valid.

Charges 5 and 6

25. The judge said that, having regard to the evidence of the prosecution witnesses and the appellant's out-of-court written statements, he was satisfied that not only had the appellant found the stamps of the two companies, namely Sin Boon Enterprise and Emelle Beauty Salon and Massage but also, having regard to his admission in his out-of-court statement that he intended to reuse part of the stamps for his own purposes, and noting that there was no evidence of any attempt to return the stamps to the owners, the judge drew the adverse inference against the appellant that he had dishonestly misappropriated the stamps.

Mitigation
Personal circumstances

26. The judge said that in mitigation, having regard to the fact that the appellant was a 64 year old man, married with 7 children, with a good background and without any criminal convictions, the court had been invited to regard the commission of the offences by the appellant as out of character and to impose a lenient sentence.

Delay

27. Further, she said that the court had been invited to take into account the delay in bringing the proceedings to a conclusion in October 2018, the appellant having been arrested on 12 June 2014 in sentencing the appellant. The judge said that, having been referred to the judgment of this court in *Maimun Bte Hj Omar v Public Prosecutor* (Criminal Appeal No, 1 of 2013, JCBD) she had been invited to impose a non-custodial sentence.

Sentence

28. In sentencing the appellant, the judge stated that she took into account, as mitigating factors, the fact that the appellant was 64 years of age and had no previous criminal convictions, together with the fact that he had cooperated fully with the law enforcement officers from beginning to end.

29. Of the fact of the delay in bringing the proceedings against the appellant to a conclusion, the judge said:

> *"…a four-year delay to conclude this trial is to no fault of either the prosecution or defense. The delay is a result of a retrial due to circumstances that cannot be avoided and thereafter depended on the availability of all parties for trial dates to be fixed before a new presiding judge. Nevertheless, the court finds a four-year delay does not amount to inordinate delay. Given due consideration, I am satisfied that there is no exceptional circumstances in the present case to depart from a custodial sentence."*

Aggravating factors

30. The judge said that he found it to be factors in aggravation of the commission of the offences that the appellant was a former police officer, who had served in the Special Branch as well as the Security Intelligence Department, and the impact and the use for forgery of a purported government Immigration stamp.

Charge 1

31. Having regard to what he determined to be the "impact and repercussions" of the use of the purported Immigration stamp for purposes of forgery, namely its significance to "a country's national security if it were to remain undetected" the judge determined to impose a deterrent sentence of imprisonment. Then, the judge said:

> *"Taking into account the case as a whole and the guidelines on the appropriate sentence to impose, I begin with a starting point four years imprisonment. Considering the defendant's clear record, I reduce the sentence by one quarter discount which is a discount of 12 months giving a final sentence of three years imprisonment."*

In the result, the judge imposed a sentence of three year's imprisonment on charge 1.

Charges 2 and 3

32. Having noted that section 15 (b) of the Immigration Act provides that the offence of remaining unlawfully in Brunei for a period exceeding 90 days requires the imposition of a term of imprisonment of not less than three months but not more than two years and not less than three strokes, the judge noted that the effect of section 109 of the Penal Code was that the same penalties were available to a court in sentencing for the offence of abetting the commission of that offence.

33. In the result, the judge imposed a sentence of five months' imprisonment on the appellant in respect of each of charges 2 and 3.

Charges 5 and 6

34. Having noted that the maximum penalty for the offence of dishonestly misappropriating property, contrary to section 403 of the Penal Code, was two years imprisonment and a fine or both, the judge imposed a sentence of four months' imprisonment on the appellant for each of the charges.

Totality

35. The judge said that, having regard to the principle of totality, he ordered that the sentences of imprisonment imposed on all five charges be served concurrently. In the result, the total sentence imposed on the appellant was three years' imprisonment.

Grounds of appeal
Conviction

Charge 1

36. Mr Daud submitted that the judge erred in law in convicting the defendant on charge 1 in the absence of evidence that the appellant knew the Departure stamp to be counterfeit and that he intended to use it to commit forgery. It was conceded that there was evidence that the stamp was in his possession.

Charges 2 and 3

37. Next, Mr Daud contended that the judge had erred in law in convicting the appellant of abetment of the offences alleged in charges 2 and 3: first, given that no principal offender had been charged with the primary offence; secondly, in the absence of evidence from the alleged principal offender Siti Aisyah; and thirdly, in the absence of evidence as to the date of expiry of the employment pass in the passports of Siti Aisyah and Noel Ganub Roma.

Charges 5 and 6

38. Finally, Mr Daud submitted that, having regard to the evidence of the respective owners of the two stamps concerned that they regarded the stamps as being "Lost and found" items, the judge had erred in law in fact in convicting the appellant on charges 5 and 6.

Sentence

39. Mr Daud submitted that in imposing sentence the judge had failed to consider adequately all the mitigating factors and that the judge had erred in failing to have regard to the delay between the time that the appellant was charged with various offences, including those on which he stood trial, retrial and was convicted, and was first brought before the court on 24 July 2014, and delivery of judgment and the imposition of sentence on 15 and 24 October 2018 respectively.

The respondent's submissions
Conviction
Charge 1

40. Of proof of the elements of charge 1, the prosecution pointed to the evidence of multiple witnesses that the appellant had been found in possession of the Kuala Laura Departure stamp. Secondly, the court was invited to note that the appellant had admitted that he knew that the stamp was "fake." (The appellant's statement of 23 June 2014, answer 8.) Thirdly, it was submitted that in all the circumstances the only reasonable inference to be drawn was that the appellant was in possession of the stamp in order to commit forgery.

Charges 2 and 3

41. The prosecution submitted that the judge was entitled to resolve in their favour the conflict in the evidence between Hj Rosli and the exculpatory assertions made by the appellant in his out-of-court statements of the validity/ invalidity of the respective employment pass in the passports of Siti Aisyah and Noel Ganub Rama at the time that they were handed by Hj Rosli to the appellant. Hj Rosli said that they were both valid at the time that he handed them separately to the appellant in January or February 2013 in the case of the former, and shortly thereafter in respect of the latter. For his part, in his out-of-court statements the appellant said that he received those documents in February 2014, at which time the employment pass in the respective passports had expired. (The appellant's statements, dated 13 June 2014, answer 31; and 17 June 2014, answers 19 and 20.) The prosecution submitted that it was to be inferred from the judge's acceptance of the evidence of Hj Rosli that there was no purpose in the appellant accepting the passports in those circumstances, other than to abet those two persons to remain in Brunei unlawfully.

42. In support of that submission, the prosecution adverted to the judgment of this Court in *Shahrul Rizam bin Haji Ramlee v Public Prosecutor* [CA 25 of 2016; unreported, 18 May 2017] in which it was observed that, although the onus remains on the prosecution throughout to prove its case against the defendant, but nevertheless, "having chosen to remain silent there is no evidence from him to set against the prosecution evidence about the influences which can properly be drawn from all the evidence which has been adduced and subjected to cross examination."

Charges 5 and 6

43. The prosecution invited the court to reject the submission made on behalf of the appellant that the two stamps were to be regarded as "Lost and found" property and pointed to the appellant's admissions, "I just found the stamps and the company stamps rubber can be used by changing the rubber to my company, in view that the price to make such stamp is expensive." (Appellant's statement, dated 17 June 2014, answer 10.) That evidence established that the appellant had taken possession of what he knew to be relatively valuable property, without making any attempt to contact the owner. In those circumstances, the judge was entitled to conclude that the appellant had dishonestly appropriated the property.

Discussion
Charge 1

44. Clearly, the judge was entitled to be satisfied on the evidence that the appellant was in possession of the Kuala Laura Departure stamp No. 357, that it was an instrument for making an impression and the appellant knew it to be counterfeit. We reject Mr Daud's submission that there was no evidence of the appellant's knowledge that the stamp was counterfeit. As the judge noted, the appellant admitted knowing that the stamp was "fake" and that, in consequence, it was dangerous for him to keep, so that he kept it inside the spare tyre in the boot of his car. The appellant admitted that he knew it was an offence to keep such a stamp. (See the appellant's statement dated 17 June 2014, answer 27.)

45. The other issue taken by Mr Daud is that of proof of the requisite intent in the appellant that the stamp be used for purposes of committing any forgery. There is no dispute that in the appellant's out-of-court statements he repeatedly asserted that he had no intention of using the stamp. (See the appellant's statement, dated 17 June 2014, answer 26; and the statement, dated 23 June 2014, answers 5 and 5.)

46. However, we are satisfied that the judge was entitled to determine of the appellant's out-of-court statement that he accepted "the defendant's admissions as containing matters of truth and reject (ed) the defendant's explanations of those matters which are favourable to the defendant himself." In that context, it is to be remembered that the appellant's out-of-court statements were not made on oath or affirmation and were not subjected to cross examination. The matter of what weight, if any, to be given to those assertions was a matter for the judge.

47. In that context, it is to be noted that, whilst denying that he had any intention of using the stamp himself, the appellant admitted that he had kept the stamp "because I think Munjamil was going to use the stamps again."

48. Obviously, the undisputed evidence that the appellant had kept the stamp knowing it to be fake and that it was an offence to do so and, therefore dangerous for him, begs the question of why the appellant had conducted himself in that way. In that context, it is to be noted that it was the evidence of Senior Immigration Officer Iswan that after nine passports had been found during the first search of the appellant's motor car in the vicinity of the Malaysians Embassy prior to the commencement of the second search, at the Immigration Headquarters, when asked if there was anything else in his car, the appellant replied that there was nothing. (Section 117B statement, page 212, paragraphs 3.) In the ensuing search, two passports in the name of Siti Aisyah, one passport in the name of Noel Ganub Rama and the Kuala Laura Departure stamp No. 357 were found.

48. The appellant asserted that he had received the stamp from Munjamil on 25 May 2014. So, knowing it to be an offence to do so, he had been in possession of the stamp in those circumstances for 18 days at the time of his arrest on 12 June 2014.

49. As noted earlier, this court observed in *Shahrul Rizam bin Haji Ramlee v Public Prosecutor* of the drawing of inferences in circumstances where no evidence was led in the defence case "An adverse inference can properly be drawn against him where the prosecution's evidence requires rebuttal and none has been forthcoming." That statement is entirely apposite to the circumstances obtaining in respect of charge 1.

50. In those circumstances, having regard to all the evidence, the judge was entitled to infer that the appellant "was in possession of the "Departure" stamp and no. 357 for the purposes of committing forgery."

Charges 2 and 3

51. Section 15 (1) (c) of the Immigration Act, Cap. 17 provides that it shall be unlawful for any person to remain in Brunei after the expiration of any pass relating to or issued to him, unless he was otherwise entitled or authorised to remain in Brunei. Section 107 of the Penal Code provides that a person abets the doing of a thing who, *inter alia*, (c) intentionally aids, by any act or illegal omissions, the doing of that thing. Section 108 provides that a person abets an offence:

> *"who abets either the commission of an offence, or the commission of an act which would be an offence if committed by a person capable by law of committing an offence, with the same intention or knowledge as that of the abettor."*

52. As noted earlier, the judge accepted the evidence of Rosli that when he handed the two passports to the appellant, in January/February 2013 in the case of Siti Aisyah or shortly thereafter in the case of Noel, the employment passes were valid. The judge was entitled to do so. Although, the appellant asserted in his out-of-court statement, dated 17 June 2004, that he had received those passports from Rosli in February 2014 (answer 20), it is to be noted that in his earlier statement, dated 13 June 2013, he said that he had received them on " a day and month in 2013", which he did not remember (answer 31.) Nevertheless, he asserted that the employment passes had expired.

53. With respect, the appellant's criticism of the judge that she did not identify the elements of the offence or the evidence upon which she determined the offences to be proved is valid. For her part, the judge found that having been given the two passports when the employment pass in each of the passports was valid, the appellant retained possession of the passports up and until his arrest on 12 June 2014. The judge did not condescend at all to stipulating how her evidential findings led her to determine that the appellant was guilty of charges 2 and 3.

54. Evidence that the two employment passes had expired was before the court in the form of the physical employment passes, attached to the two passports which were made exhibits in the trial. That evidence substantiated the averments made in the charges that the employment pass of Siti Aisyah had expired on 26 February 2013 (charge 2) and that of Noel Ganub Roma on 21 April 2013 (charge 3).

55. In his evidence, Rosli said that in answer to his question the appellant had told him that he had renewed the employment pass of Noel Ganub Roma. Later, he found he

had not done so. He said that he had accompanied the appellant to the Immigration offices to renew the employment pass of Siti Aisyah. He understood that it had been renewed. Later, he found out that it had not been renewed. For his part, he said that he trusted the appellant.

56. Noel Ganub Roma confirmed that he had provided Rosli with his passport containing his employment pass before the latter had expired. He did not know that the employment pass had expired during his continued employment by Rosli.

57. Siti Aisyah was not called as a witness at the trial, although she had been called as a prosecution witness in the trial before Judge Hanani. In the interim, she had returned to Indonesia. Neither she nor Noel Ganub Roma have been prosecuted for let alone found guilty of remaining unlawfully in Brunei, their employment pass having expired. In the circumstances, it was perfectly understandable why they had not been charged.

58. Clearly, in those circumstances the appellant abetted the commission of an act by Siti Aisyah and Noel Ganub Roma respectively, which would be an offence if done by either of them with the same intention or knowledge as that of the appellant as abettor, namely remaining in Brunei knowing that their respective employment pass had expired.

Charges 5 and 6

59. There is no dispute that the appellant had found the two stamps the subject of charges 5 and 6 nor that he intended to use them, stating as he did in his out-of-court statements that the "company stamp's rubber can be use (d) by changing the rubber to my company". (The appellant's statement dated 17 June 2014, answer 10.) He said that he "…intended to change the rubber with my company". (The appellant's statement dated 13 June 2014, answer 29.) Similarly, it is clear that the appellant recognised that the stamps were valuable property, stating as he did in his out-of-court statements, "it cost a lot for me to make stamps." and "the price to make such stamp is expensive", (the appellant's statement dated 13 June 2014, answer 29; and the appellant's statement dated 17 June 2014, answer 10.)

60. In those circumstances, having regard to the issue of dishonesty, the judge was entitled to have regard to the fact, as he did, that there was no evidence of any attempt to return the stamps to the owners. The fact that the stamps detailed the names of each of the companies and afforded a ready means of contacting the owners was highly relevant to that issue.

Conclusion

61. In the result, we are satisfied that there is no merit in any of the grounds of appeal against conviction, which we dismiss.

Sentence
Charge 1

62. Clearly, the judge was entitled to have regard to the fact that the stamp, the subject of charge 1, was a government Immigration stamp, the intended use of which clearly threatened the integrity of immigration controls of Brunei and to determine that, it being a serious offence, a deterrent sentence of imprisonment was required. In those circumstances, the fact of the appellant's clear record carried very little, if any weight.

63. Similarly, the judge was entitled to regard as an aggravating factor in the commission of that offence to the fact that earlier in his life as a police officer in the Special Branch and Intelligence Branch of the police force, the appellant had been trusted with assisting in securing and maintaining the security and integrity of Brunei.

64. Although the judge said that she had regard to the "guidelines on the appropriate sentence to impose", that was a reference to general principles of sentencing and not to any specific guidelines in respect of the particular circumstances of the commission of this offence. The maximum sentence, for an offence contrary to section 473 of the Penal Code, is ten years' imprisonment.

65. The Editors of the *'Sentencing Practice in the Subordinate Courts of Singapore'*; Third Edition, Volume 2 (2013) note that for offences committed before 1 February 2008 section 473 of the Penal Code of Singapore, which provides for an identical offence to that provision in Brunei, the maximum sentence was seven years' imprisonment. Thereafter, the maximum sentence was increased to 10 year's imprisonment.

66. The Editors note that in *DM Atula Indrajith v PP* (MA 111/99) the court dismissed an appeal against a total sentence of six years' imprisonment imposed on the appellant after his plea of guilty to one charge of having in his possession six Singaporean Immigration rubber stamps for the purpose of committing forgeries and four charges of forging immigration special passes. The appellant abetted another person in making forged special passes by assisting him to stamp the forged Singapore Immigration rubber stamp on the forged special passes. The judge imposed a sentence of 24 months' imprisonment for the possession charge and 12 months' imprisonment on each of the forgery charges.

67. The editors went on to note that in *Aiyadurai Gobikrishna v PP* (MA 209/2000) the defendant pleaded guilty to a charge, contrary to section 473 of the Penal Code, to having two forged Singapore Immigration and Registration rubber stamps for making an impression with intent to commit forgery. The defendant was sentenced to 30 month's imprisonment on that charge. The appellant's appeal lapsed.

68. In *R v Wan Ho Hung & Another* (CACC 342/1988; unreported, 30 December 1988), the Court of Appeal of Hong Kong dismissed appeals, *inter alia*, from the 1st applicant against a total sentence of three years imprisonment imposed on him following his pleas of guilty to charges of having used a forged Malaysia passport

at Kai Tak International Airport, to making a false declaration that he was the person described in the passport, and to two charges of possession of forged dies, namely Hong Kong Immigration stamps for Arrival and Departure respectively, contrary to section 76 (2) of the Crimes Ordinance, Cap. 200 for which the maximum sentence was seven years' imprisonment, and to one charge of possession of a forged stamp for Malaysia Immigration Departure, contrary to section 76 A for which the maximum sentence was 14 year's imprisonment. The 1st applicant was sentenced to 18 months' imprisonment, to be served concurrently, on each of those three charges, although those sentences were to be served consecutively to the terms of 18 months imprisonment imposed in respect of the use of the forged passport and the false declaration.

69. Of course, care must be exercised in having regard to judgments in foreign jurisdictions, particularly in respect of sentence. Nevertheless, reference to these cases serves to confirm the common approach taken to the serious nature of the offence committed by possession of a forged immigration stamp with intent to use it.

70. In all the circumstances, in particular having regard to the fact that the appellant was sentenced after trial for an offence for which the maximum sentence was 10 years' imprisonment, subject to a consideration of any discount for delay, we are satisfied that the sentence of three years' imprisonment imposed on the appellant for charge 1 was not manifestly excessive.

Delay
The first trial

71. Having been arrested on 12 June 2014, the trial of the appellant commenced before Judge Hanani on 20 September 2014. There were six other hearing dates that year: 25 September, 1 and 23 October, 18 and 20 November and 23 December 2014.There were no hearing dates in 2015. In 2016, there were hearing dates on 6 August, 19 September, 17 and 18 October 2016. On the last date, the hearing was adjourned to 9 November 2016, but subsequently the proceedings were brought to an end on the transfer of the judge out of the judiciary.

72. Of the fact that there was no hearing date in 2015, it is to be noted that at the hearing of 23 December 2014 the judge indicated to the parties that her court diary was full until June 2015, so that the trial could only proceed in the second part of that year. Mr Daud acknowledged that it was at his request that the dates subsequently fixed for hearings on 23 and 25 July 2015 were vacated. That was so that he could attend a China-Asean Legal Training Base Alumni Gathering in Cambodia over those dates, at which he had been invited to present a paper "Rule of Law and Brunei Darussalam".

73. For her part, Hajah Atiyyah, counsel for the prosecution at trial and for the respondent in the appeal, acknowledged that at her request hearing dates fixed for 30 and 31 March 2016 were vacated, so that she could participate in a sporting event organised by the Royal Brunei Police Force. Similarly, hearing dates fixed for 2 and 3 August 2016 were vacated at her request so that she could attend enrolment procedures for a "Diploma Program in UNISSA".

The second trial

74. On 16 January 2017, the appellant appeared before Judge Norismayanti, for the first time. Then, after it had been determined that it was necessary to proceed by way of retrial, trial dates were fixed on 17 April 2017, with 10 to 13 and 31 July 2017 reserved for the hearing. Those hearing dates having been exhausted, after two mention hearings in October 2017, the substantive hearing was resumed on 8, 10 and 11 January 2018. On the latter date, the prosecution closed its case.

75. Mr Daud acknowledged that, following his request for an adjournment of a month to prepare a submission of no case, the judge adjourned the hearing to 26 February 2018. The parties provided the court with written submissions prior to that hearing, at which additional oral submissions were made by Mr Daud. On 10 March 2018, the court ruled that the appellant had a case to answer on all charges. On that date, Mr Daud informed the court that the appellant would give evidence and, at his request, the hearing was adjourned to May 2018 for the defence case to be presented. On 28 May 2018, Mr Daud informed the court that the appellant would neither give nor call evidence in the defence case. At Mr Daud's request the judge ordered an adjournment of the proceedings so that written submissions could be provided by the parties to the court. Although the court ordered that the submissions be provided within 14 days, nevertheless, the court adjourned judgment to 14 July 2018.

76. On 14 July 2018, the judge adjourned the delivery of judgment to 25 August 2018, stating that she did so because, notwithstanding the court's directions, the prosecution had not provided the court with written submissions until several days earlier. Hajah Atiyyah acknowledged that she had failed to comply with the directions to provide written submissions within the time stipulated by the court. On 25 August 2018, without any explanation, the judge indicated that it was necessary to defer delivery of judgment until a later date. On 15 October 2018 the judge delivered judgment and imposed sentence on the appellant on 23 October 2018.

77. It is clear that at the outset the first trial began and proceeded expeditiously. No doubt, in part that was because the prosecution was calling as witnesses foreigner, non-residents who had been detained in Brunei since June 2014 only to give evidence. Judge Hanani was anxious that the evidence of Bangladeshi witnesses, who had been detained in Brunei since June 2014 in order to give evidence should be heard expeditiously, so that they might be permitted to return to Bangladesh. Evidencing that concern, at the hearing of 20 November 2014 Judge Hanani was critical of delay in achieving that objective arising from the unavailability of prosecuting counsel. As a result, she fixed a hearing for the afternoon of 23 December 2014, on which occasion she concluded their evidence.

78. On 23 December 2014, the judge foreshadowed difficulties arising from her court diary commitments in fixing hearing dates in the first half of 2015. In the result, the next hearing date was on 6 August 2016! As noted earlier, the two hearing dates fixed for July 2015 were vacated at the request of Mr Daud. That was a delay of fully 19 months since the last hearing date. Delay of that length, without there

being extraordinary circumstances, is wholly unacceptable. It is very obviously inamical to a fair trial.

79. In the judgment of this court in *Maimun Bte Hj Omar v Public Prosecutor*, Mortimer P observed that although the court had no control over the length of time taken to investigate a case and bring a charge, nevertheless "it has considerable control over the speed with which cases are then brought to trial and brought to a conclusion." Having observed that those controls included "firm case management and proper listing", he went on to say: (page 6)

> *"As we have said previously <u>when cases are begun they should be heard continuously until concluded with only absolutely necessary adjournments being granted and then for the minimum period necessary.</u> This is a necessary attribute of fairness and doing justice in a trial. After inordinate delay judges have obvious difficulty in recalling the evidence, remembering witnesses, assessing credibility and making sound judgments. Too much reliance is placed on notes. Further, witnesses have problems with fading memories so that often they reconstruct facts rather than remember them. Counsel have no recollection other than their notes leading to unnecessarily lengthy submissions and lack of focus. Apart from obvious problems with recollection of the facts defendants are put under lengthy unnecessary stress. Inordinate delay may well render it impossible to hold an acceptably fair and just trial."* [Underlining added.)

80. Of the stress to the defendant in that case, citing with approval the observation of Yong Pung How CJ in the Court of Appeal of Singapore in *Tan Kiang Kwang v Public Prosecutor* [1995] 3 SLR (R) 746, Mortimer P said "This piecemeal trial with frequent lengthy adjournments must have caused the appellant to suffer 'the stress and uncertainty of having a matter hanging over her head for an unduly long and indefinite period'."

81. It is clear from the recitation of the chronology of the progress of the appellant's trial that the injunction of Mortimer P that "when cases are begun they should be heard continuously until concluded with only absolutely necessary adjournments being granted and then for the minimum period necessary" was not observed at all. Adjournments ought not be sought by counsel for personal convenience and certainly ought not to be granted by the judge when the consequence is the otherwise avoidable delay of a trial of a defendant on a serious charge. Regrettably, that is what happened repeatedly in this case. Nevertheless, the court must be alert to ensure that delay caused by an adjournment granted inappropriately by the judge in consequence of an application by the defence does not inure to the appellant's benefit in sentencing.

Conclusion

82. For the reasons we have given, we are satisfied that the judge erred in refusing to afford any discount to the appellant in respect of the delay of over four years from the time that he was charged before judgment was delivered on 15 October 2018. In our judgment, it is appropriate to afford the appellant a discount of four months' imprisonment in respect of the sentence of three years imprisonment imposed for charge 1.

83. In the result, we allow the appeal against sentence and quash the sentence of three years imprisonment imposed on the appellant in respect of charge 1 and, in its place, we substitute a sentence of two years and eight months imprisonment. Accordingly, the total sentence imposed on the appellant's two years and eight months imprisonment.

Burrell, P.

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