

PG AZIZUL AKBAR BIN PG HJ BADARUDDIN

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 14 of 2019)**

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(Criminal Appeal No. 15 of 2019)**

Before: Burrell P, Seagroatt and Lunn JJ A.

20th November 2019

Headnote: Sentence: Plea of guilty to s.323 assault – vicious attack leaving victim in “vegetative” state – Prosecutor’s appeal allowed against manifestly inadequate sentence of 3 months imprisonment. Sentence of 18 months substituted.

Criminal Appeal No 14 of 2019

Mr Hj Mohamad Rozaiman bin Dato Hj Abd Rahman (Messrs. Zico RAR) for Appellant
DPP Siti Nurjauinah binti Hj Kula for Respondent

Criminal Appeal No 15 of 2019

DPP Siti Nurjauinah binti Hj Kula for Appellant
Mr Hj Mohamad Rozaiman bin Dato Hj Abd Rahman (Messrs. Zico RAR) for Respondent

Cases cited in the judgment

In R v Ambler [1976] Crim Cr 266

R v Tait and Bartley [1979] 24 ALR 473

Sim Gek Yong v Public Prosecutor [1995] 1 SLR 37

Burrell, P.:

On 27th August 2019 the appellant was sentenced, having pleaded guilty, to 3 months imprisonment for an offence of voluntarily causing hurt contrary to s.323 of the Penal

Code CAP 22. The judge, Judge Faisal, had taken a starting point of 6 months imprisonment which he had discounted by 1/3 to reflect the appellant's plea of guilty and by a further month because of the inordinate delay in bring this matter to a conclusion.

The offence had been committed on 11th August 2015 and there had been a trial before another judge commencing in 2016 on the more serious charge of causing grievous bodily hurt contrary to s.325 of the Penal Code. After the evidence had been heard but before the judge had made a decision the trial, through no fault of the appellant, had to be aborted in 2018 and a retrial was arranged before Judge Faisal in 2019. At the retrial the lesser charge contrary to s.323 was offered to the appellant who then pleaded guilty. Given the relatively short sentence the appellant has been granted bail pending appeal.

Appeals

There are two appeals before this court. The first by the appellant contends that the sentence of 3 months imprisonment was manifestly excessive. Both before the sentencing judge and before this court a non-custodial sentence of probation has been urged. In addition, pursuant to s.438J of the Criminal Procedure Code CAP 7, the Public Prosecutor invites this court to conclude that the sentence passed was, in all the circumstances of the case, manifestly inadequate. The Public Prosecutor's written submission is that "the present case undoubtedly falls into the category of the worst cases under the offence charged and the maximum sentence is warranted due to the aggravating features."

The facts

A lady named Alinawati is the appellant's second wife. At the time of the offence both she and the victim of the assault worked for the Royal Brunei Police Force. In August 2015 she complained to the appellant that the victim had, for about a year, been texting her and harassing her.

In order to entice him to their home the appellant sent texts to the victim, pretending to be Alinawati, and invited him to come to their apartment so as to confront him. The victim accordingly went to the apartment expecting to meet her. However, only the appellant was there waiting for him. The victim entered the flat and went into the bedroom. The appellant was hiding behind the door. A fight ensued, in which the appellant punched the victim's head and face. At one point he was able to overpower him and tie him up with nylon string. However the victim managed to free himself which caused the appellant to continue his assault. Eventually the victim managed to escape and because of the injuries he had sustained went to the RIPAS Hospital A&E Department. On arrival he was vomiting and soon lost consciousness. Initial examination revealed bruising to the left side of the face, swelling to both cheeks, subconjunctival haemorrhage on both eyes and bruising on both wrists where he had been tied up with nylon string. A later CT scan showed that the victim's brain had suffered an acute subdural haematoma. He underwent an emergency craniotomy and later required further surgery. He was in intensive care for over one month. His current condition is described as being in a vegetative state on tracheotomy, a feeding

tube and a Foley catheter. He continues to be under constant care at home in this condition, 4 years after the assault.

There is no evidence of injuries being sustained by the appellant.

The appeals

1. The Appellant

In his written submission Mr. Rozaiman, on the appellant's behalf submits that the conduct as outlined in the agreed statement of facts is neither disproportionate nor unwarranted. He submits that any prison term is excessive. He further argues that the appellant felt betrayed because of possible infidelity by his wife which led him to a state of passionate indignation. In the circumstances he describes the appellant's conduct as "not unexpected."

We disagree. We regard this offence as a vicious, planned, sustained and one sided assault. In such circumstances consideration of a Probation Order on a former prison warder guilty of such violence is plainly inappropriate. A prison sentence is inevitable and the only question for this court is how long that sentence should be.

2. The Respondent

The respondent points out that the appellant's conduct has resulted in the victim losing his job, his family and his bodily functions. There is no evidence or suggestion that he was in any way injured or suffering from any disability before the incident. It is plain that his condition on arrival at hospital on 11th August 2015 was as a result of the assault on him at the appellant's hands.

The respondent invites the court to consider imposing as a starting point the maximum sentence of 3 years imprisonment. We have been referred to three authorities which provide guidance as to how the courts should approach such a possibility.

In R v Ambler [1976] Crim Cr 266

"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 the particular case they are dealing with comes within the broad band of that type."

In R v Tait and Bartley [1979] 24 ALR 473

"The true rule as I understand it is that the maximum sentence should be reserved for the worst type of cases falling within the prohibition or...'for the worst cases of the sort'. That expression should be understood to be marking out a range and an offence may be within it notwithstanding the fact that it could have been worse than it was."

And in *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 37

“To restrict the maximum sentence to the ‘worse case imaginable’ would only invite an endless permutation of hypotheses....the possibilities are limitless and the uncertainty intolerable. All that a court can realistically do and all that it should do when deciding whether or not to impose a maximum sentence is to identify a range of conduct which characterizes the most serious of the instances of the offence in question.”

Decision

To suggest that injuries which resulted in the victim being reduced to a vegetative state may have occurred accidentally after the assault is fanciful. In short, we are satisfied that for an offence of “voluntarily causing hurt” contrary to s.323 this is an example of the worst type. We therefore allow the Public Prosecutor’s appeal and consider the question of sentence afresh.

Taking 3 years as a proper starting point we firstly, discount it by one third to 24 months. This is appropriate in this case to take account of his plea of guilty, his hitherto good character, his age, employment and background.

We accept also that a further discount is necessary for the delay in this case which was no fault of the defendant. We consider a further 3 months discount to be appropriate.

Finally, we recognize that this is an appeal from the Public Prosecutor. It has been the practice of this court to allow a further discount in such circumstances. We shall reduce the sentence by 3 more months, resulting in a final sentence of 18 months imprisonment.

The defendant’s appeal (No 14 of 2019) is dismissed. The Public Prosecutor’s (No 15 of 2019) appeal is allowed. The sentence of 3 months imprisonment is quashed and a sentence of 18 months imprisonment substituted.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A