MOHAMMAD EDDY FAISAL BIN ABDUL RAZAK

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 16 of 2019)

Before: Burrell P, Seagroatt and Lunn JJ A.
Date of Hearing: 11 November 2019
Date of Judgment: 21 November 2019

Headnote: An appeal against a sentence of 1½ years imprisonment and one stroke, imposed following the appellant's conviction after trial of an offence of housebreaking of domestic premises at night, contrary to s.457 of the Penal Code, was dismissed. The judge was unduly lenient in imposing a sentence of 1½ years imprisonment, together with one stroke, having regard to the "inordinate delay" of more than 6 years since the commission of the offence

Appellant in person
DPP Hajah Atiyyah Azzahra binti Pehin Orang Kaya Lela Sura Dato Seri Laila Jasa Awang Haji Abas for Respondent

Cases referred to in the judgment

Mohammad Azwan bin Ibrahim v Public Prosecutor (Criminal Motion No 37 of 2018; unreported, 7 November 2018)
Daud bin Hj Jair v Public Prosecutor (CA No. 5 of 2008; unreported, 6 November 2008)
Joll bin Tumih v Public Prosecutor (2007) Volume II JCBD 183

Lunn, JA.:

1. This is an appeal against the sentence of 1 ½ years' imprisonment and one stroke imposed on the appellant on 2 October 2019 by HHJ Faisal, following the appellant's conviction after trial of a single charge of housebreaking by night on 21/22 May 2013 of domestic premises for the purpose of committing theft, contrary to section 457 of the Penal Code.

The charge

2. The charge alleged that, in furtherance of a joint enterprise, together with his two co-accused, the appellant had committed the offence, stealing a wallet, a laptop, an hard disk, a camera, two watches, two cartons of cigarettes and two schoolbags, contrary to section 457 of the Penal Code.

The trial

3. The trial before Judge Faisal was a re-trial, which commenced with the receipt of evidence on 3 August 2019. The re-trial was necessitated because, although HHJ Hanani had received the evidence and submissions in the first trial, reserving judgment until 17 December 2016, she had been transferred from the Judiciary before she delivered judgment. In those circumstances, a mistrial had occurred.

The facts

4. In his evidence, the owner of the premises testified that in the morning of 22 May 2013 the fact of the break-in and theft was discovered, in particular that the ground floor had been ransacked and the main door to the premises left open. He, his wife and children had been asleep in the premises during the night. An exhaust fan situated in a window had been pushed in. None of the stolen property, which he estimated to be worth about $3,000, had been recovered.

5. For his part, Airol Helmy Bin Sanudin, named as one of the parties to the joint enterprise, testified for the prosecution that the appellant had planned the housebreaking, which he and a person called Pandai had carried out. The appellant had driven the two of them to the vicinity of the premises, after which Airol had gained entry to the premises through a window. Then, Airol had opened the door and Pandai entered. Together they stole the items stipulated in the charge, leaving the premises through the front door, after which they called the appellant. He met them and drove them away, together with the stolen property. The judge said that he accepted the evidence of Airol.

Sentencing

6. Having convicted the appellant of housebreaking of the premises, the judge said that, were it not for the circumstances of delay, he would have stipulated a starting point for sentence for the offence of between 3 to 4 years imprisonment, together with whipping. Noting that the appellant had first appeared in the Intermediate Court in 2013, the judge said that the delay in the proceedings was not only unfortunate but also an *"inordinate delay".* In consequence, he determined that *"the starting point should be halved to a range of between 1½ -2 years' imprisonment with whipping."*

7. In the result, the judge stipulated the *"starting point"* for sentence to be 1 ½ years' imprisonment and one stroke, which sentence he imposed on the appellant.

The appellant's submissions

8. In the Notice of Appeal, filed on behalf of the appellant by his sister, the court was informed that, given that the appellant was no longer able to provide for his dependent children, she provided support for four of his children who were receiving schooling. The youngest was in preschool, whilst the other children were in Years 6, 7 and 11 respectively at school. In those circumstances she asked the court to reduce the sentence imposed on the appellant.

The respondent's submissions

9. For the respondent, Ms Atiyyah opposed the appeal, submitting that the sentence of 1 ½ years' imprisonment imposed on the appellant was not only not manifestly excessive but also that a higher sentence of imprisonment ought to have been imposed on the appellant. She submitted that the appropriate starting point for sentence for an offence of housebreaking at night with intent to commit theft, contrary to section 457 of the Penal Code, was 5 years' imprisonment. She suggested that it was a factor in aggravation of the commission of the offence that the owner and his family were asleep upstairs in the premises at the time that the thieves broke into the premises.

10. Of the delay, of more than six years from the time of his arrest to the conclusion of the proceedings against the appellant, Ms Atiyyah invited the court to note that in *Daud bin Hj Jair v Public Prosecutor* (CA No. 5 of 2008; unreported, 6 November 2008) this court had reduced a sentence of 4 years' imprisonment imposed on the appellant, following his conviction after trial of a charge of housebreaking by night of domestic premises with intent to commit theft, contrary to section 457 of the Penal Code, to 2½ years' imprisonment, in part because of the delay of four years from the commission of the offence in June 2004 to the conclusion of the proceedings on 19 April 2008. The court observed that it *"heard no adequate explanation of much of this delay."*

11. In her oral submissions to the court, Ms Atiyyah was not able to assist the court as to why there had been a delay of:
    - two years from the time of the appellant's arrest in July 2013 to the commencement of the appellant's first trial in August 2015;
    - over 11 months in the course of the receipt of evidence from 18 August 2015 to 25 July 2016;
    - more than 30 months from the mistrial of the first trial to the commencement of the receipt of evidence in the second trial, other than to repeat the explanation, which she gave to HHJ Faisal on 22 October 2018 that she was not available to prosecute the case until July 2019, asserting to this court that no other prosecutor was able to take her place.

Discussion

12. The overall delay of more than 6 years, from the time of the arrest of the appellant in July 2013 to the conclusion of the proceedings against him on 2 October 2019, was extraordinary. The chronology of those events is best approached in two parts: first, the delay leading up to the mistrial before HHJ Hanani, namely on 17 December 2016; and secondly, the delay thereafter until 2 October 2019.

    (i) the delay up to the mistrial on 17 December 2016

13. As noted earlier, the offence for which the appellant was tried and convicted occurred on 22 May 2013. Having been arrested on 10 July 2013, the appellant was jointly charged with his two co-accused on seven charges, namely offences alleged to have been committed in the overall period 20 April to 5 July 2013. The appellant pleaded not guilty. Three of the charges, including the only one of which

he was tried and convicted by HHJ Faisal, were of housebreaking of domestic premises at night with the intent to commit theft, contrary to section 457 of the Penal Code.

14. His co-defendants having pleaded guilty to various charges, the trial of the appellant began before HHJ Hanani on 17 August 2015 and continued the following day. That was more than two years since the appellant's arrest. Then, the trial was adjourned until 25 July 2016. The evidence of a total of 21 prosecution witnesses concluded on 2 August 2016. Having heard the evidence of the appellant and having received closing submissions, the judge reserved judgment to 17 December 2016. However, prior to the delivery of judgment, HHJ Hanani was transferred from the Judiciary. So, a mistrial resulted.

(ii) the delay from 17 December 2016 to 2 October 2019

15. In 2017, the case was brought up on a number of occasions for mention before HHJ Radin. Then, on 30 January 2018, HHJ Faisal was assigned to preside at the trial. Having been informed by the prosecution that it intended to call 21 witnesses, on 7 April 2018 the judge fixed trial dates for 24 to 29 September 2018. However, having informed the parties that he was unable to conduct the trial on those dates, on 22 October 2018, HHJ Faisal re-fixed hearing dates for the trial on 1 to 6 July 2019. He did so having been informed by Ms Atiyyah, appearing for the Public Prosecutor, that she was only available in July 2019. On 12 December 2018, for reasons of his unavailability, the judge re-fixed hearing dates for the trial on 29 July 2 to 3 August 2019.

16. Finally, the re-trial began on 3 August 2019. That was more than six years after the appellant's arrest and more than 30 months since the mistrial. On that date the prosecution withdrew all the other charges and proceeded against the appellant on one charge only, contrary to section 457 of the Penal Code. Evidence was received that day and on 6 August 2019. On 2 October 2019, the judge delivered judgment and passed sentence.

Starting point for sentence

17. In stating that the appropriate starting point to be taken for sentence in other circumstances was in the *"range of between 3 to 4 years' imprisonment and with whipping"* the judge made no reference to any authority. In *Mohammad Azwan bin Ibrahim v Public Prosecutor* (Criminal Motion No 37 of 2018; unreported, 7 November 2018), having referred to a number of judgments of this court in respect of sentencing for offences contrary to section 457 and having acknowledged that there was some variation in sentences that reflected the differing circumstances of the commission of offences of this nature, Burrell P. said *"…for a single offence contrary to s. 457, absent any particularly unusual circumstances pertaining to the offence or the offender, a sentence of up to 5 years after trial would be correct."* The appellant in that case had no previous criminal convictions.

18. In this case, the owner and his family were present in their home when the housebreaking took place. Having broken into and ransacked the premises, the

thieves stole property valued at $3,000 that was never recovered. As this court observed in *Joll bin Tumih v Public Prosecutor* (2007) Volume II JCBD 183 *"Such offences cause immense distress."* The judge was unduly lenient in determining that, absent the delay in concluding proceedings against the appellant, the appropriate starting point for sentence lay in the range of *"between 3 to 4 years imprisonment with whipping".*

19. Having regard to the extraordinary delay in bringing the proceedings to a conclusion against the appellant, the judge was entitled to afford the appellant a significant discount in sentence. This court has received no satisfactory explanation for why:

- it was fully two years after his arrest before the appellant's trial before HHJ Hanani began on 17 August 2015;
- there was a delay of more than 30 months from the mistrial before HHJ Hanani in December 2016 and the commencement of the retrial in August 2019, in particular why 9 months of that delay was accounted for by the asserted unavailability of any counsel to prosecute what was a simple case.

Surprisingly, Ms Attiyah said that no priority was given by her Department to assisting in expediting the second trial of the appellant. In all circumstances, that was unacceptable.

20. The discount in sentence afforded to the appellant by the judge for that overall delay in concluding the prosecution of more than six years from the time of his arrest was 50% at the lower end and over 60% at the higher end of the range of sentence of 3 to 4 years' imprisonment that the judge said that he would have taken as a starting point for sentence. It is to be noted that the reduction in sentence this court afforded the appellant in *Daud bin Hj Jair v Public Prosecutor* of 18 months from a sentence of 4 years' imprisonment to reflect, in part, a delay of 4 years in bringing proceedings against him to conclusion, was a reduction of 37.5%. In our judgment, notwithstanding the egregious delay in concluding proceedings against this appellant, the discount in sentence that the judge said that he afforded him was unduly generous.

21. In the result, we are satisfied that the sentence of 1½ years' imprisonment imposed on the appellant was unduly lenient. Clearly, it was not manifestly excessive. Accordingly, the appeal against sentence is dismissed.

Burrell, P.

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