

COPY

ABDUL FAIZ BIN ZAIDIN

AND

PUBLIC PROSECUTOR



(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 17 of 2015)

Before: Mortimer P, Leonard and Burrell JJ A.
25th November 2015

Headnote: multiple offences committed over 5 months of serious professional housebreaking and the like – 27-year-old appellant without previous convictions – Sentenced to a total of 8 years imprisonment and 4 strokes with starting point of 12 years. In the circumstances 12 years as starting point excessive. Starting point reduced to between 10 and 11 years. Sentence reduced to 7 years imprisonment with 3 strokes.

Appellant in person
DPP Kamaliah Fadhilah Hj Ibrahim for Public Prosecutor

Cases referred:

Mohammed Joll bin Tumih and another v Public Prosecutor [2007] 2 JCBD 183
Airol Helmi bin Sanudin (Criminal Motion No. 30 of 2014)2015)
Muhammad Zulazlamie bin Zoelaliffin v Public Prosecutor (Criminal Appeal No. 28 of 2014)
Haji Shahrul Alim bin Haji Sulaiman v Public Prosecutor (Criminal Appeal No. 11 of 2013)

Mortimer. P:

This is an appeal against the total sentence of 8 years imprisonment with 4 strokes imposed on the appellant on 14 September 2015 by HH Judge Hanani. The appellant had pleaded guilty to 10 offences. He asked for 2 further offences to be taken into account and there was one offence from the Magistrate's Court for which he was to be sentenced.

He was sentenced as follows:

1. 4 offences of housebreaking by night (section 457 of the Penal Code) for which he was sentenced on each to 24 months imprisonment with one stroke reduced from 36 months imprisonment and 2 strokes.
2. 2 offences of housebreaking and theft (section 454 of the Penal Code) for which the sentence was 20 months and one stroke reduced from 30 months and 2 strokes.
3. 1 offence of house trespass to commit an offence (section 451 of the Penal Code) for which the sentence was 10 months imprisonment reduced from 16 months.

4. 3 offences of simple theft (section 379 of the Penal Code) for which the sentence was 8 months imprisonment reduced from 12 months.
5. 3 offences of theft in a building (section 380 of the Penal Code) for which he was sentenced to 8 months imprisonment reduced from 12 months.

In dealing with totality of sentence the judge ordered that each sentence of 24 months and one stroke for the 4 housebreaking by night offences should be served consecutively with the strokes cumulative and each of the other sentences was ordered to be concurrent with each other and the strokes noncumulative, making a total sentence of 8 years imprisonment with 4 strokes.

Although the judge made no reference to it this involves a sentence with a starting point after trial of about 12 years and 6 strokes.

The Offences

The offences were committed over a period of 5 months between January and May 2015. Houses and shops were targeted and valuable easily disposable property was taken most of which has not been recovered. Additionally considerable damage and loss was caused to the victim; over \$7,000 in 2 housebreakings and over \$6,000 in another. The items taken included TVs, laptops, toolboxes, cash, musical instruments, electrical equipment, electrical ground cable, iPads and the like.

The Sentencing

When sentencing the judge took into account the serious and professional nature of the offences and that the appellant took a leading role in them. She saw no signs of remorse in the appellant and noted that his actions were similar to that of a hardened criminal. As serious instances she noted the taking of a compressor, ground cables and cash of about \$2000.

She added that although the appellant was on record as a first offender she was inclined to think that he was lucky not to have been caught sooner.

When determining the total sentence the appellant should serve having regard to the whole criminality involved and any mitigation advanced she passed a total sentence of 8 years imprisonment and 4 strokes. This involves a starting point after trial of about 12 years imprisonment and 6 strokes.

The Appeal

In a short letter to the court the appellant asked for his sentence to be reconsidered and reduced. Since being detained in prison he really regrets what he has done and he has a feeling of deep remorse. It appears that this has been brought home to him when his mother visited him in prison. He asked for weight to be given to the fact that this is his first offence at the age of 27 years.

In her helpful and balanced submissions the DPP contends first that the individual sentence for each offence is appropriate and within the range of sentences usually imposed for similar offences. We agree.

Turning to the total sentence imposed and whether it is manifestly excessive she concedes that a starting point of 12 years imprisonment after trial is 'on the high end' but submits that there are such aggravating features of the offences noted by the judge that such a sentence is justified and necessary.

In support she cites 3 decisions of this court.

The first is *Mohammed Joll bin Tumih and another v Public Prosecutor [2007] 2 JCBD 183*. The total sentence of 7 years and 4 months passed upon the first appellant is relevant. The sentence was reduced by 2 months on somewhat technical grounds and the court would certainly have approved the sentence of 7 years and 6 months. This involved a starting point of over 11 years but not 12 years as submitted by the DPP. However this decision is comparable as the appellant pleaded guilty to 9 offences, including 5 housebreakings by night, committed over a two-month period similar to those in the instant appeal. Similar valuable items were taken to those in this appeal. The distinguishing feature is that Mohammed Joll had 11 previous convictions for theft going back to 1994.

The second case is *Airol Helmi bin Sanudin (Criminal Motion No. 30 of 2014)*. Here this court approved a starting point of 12 years for similar offences. There were 8 offences of housebreaking by night and housebreaking or theft in a dwelling house between April and July 2013. These were followed by 5 housebreakings by night and one theft between February and March 2014 each of which was committed when on bail for the 2013 series. The property taken was similar to that in the present appeal and the offences were described as premeditated, persistent professional offences in which considerable quantities of valuable easily disposable property were taken.

The appellant in the case cited was 30 years of age with 2 previous convictions for which he had been fined.

The distinguishing feature of this decision from the instant appeal is that there were 2 series of offences and that the second series was committed when on bail for the first.

Muhammad Zulazlamie bin Zoelaliffin v Public Prosecutor (Criminal Appeal No. 28 of 2014) is the third case to which our attention is invited. In this case the appellant had pleaded guilty to 11 offences between January and June 2014 involving 7 housebreakings 5 of which were by night. The appellant was a family man whose age is not known but he had no previous conviction. The judge's starting point of 12 years imprisonment was determined to be manifestly excessive and a total sentence of 6 years imprisonment reduced from a starting point of 9 years was imposed.

Discussion

The application of authorities on the level of sentencing is not easy. Rarely are 2 cases completely comparable. However the previous decisions of this court indicate that in

appeals such as the one we are now considering a starting point in the region of 12 years is exceptional. In the cases cited 12 years or near were approved when serious offences had been committed when on bail or the appellant had serious previous convictions of the same type.

Of course, when there is a long series of offences by the end the offender cannot be treated as a first offender but he does not lose mitigation for his good behaviour before the first offence.

As we have said on many previous occasions deterrent sentences are passed for housebreaking offences recognising the prevalence of this type of offence, the fear and anxiety caused to householders and the loss of valuable property. Nevertheless courts must try to achieve a balance. Here the cases which have been helpfully cited to us demonstrate that 12 years imprisonment as a starting point was too high and the judge failed to give sufficient weight to his years of good behaviour before the first offence.

In all the circumstances we think the appropriate starting point is between 10 and 11 years reduced to 7 years for the pleas of guilty. We therefore order that the sentence of 2 years imprisonment on charge 16 shall be consecutive as to one year and concurrent as to one year to the consecutive sentences of 2 years on each of charges 1, 4 and 8. The remaining charges are concurrent with the total making 7 years in all. As to the strokes imposed on charge 16 we order that the 1 stroke be noncumulative with the 3 cumulative strokes on charges 1, 4 and 8 making 3 strokes in all. The remaining concurrent and noncumulative sentences stand.

On a point of practice. We have often said that it is helpful both to the sentencer and to any court reviewing a sentence if the judge states his starting point for the total when sentencing on pleas of guilty. This enables a judge more easily to give reasons, to avoid depriving an accused of the benefit of early pleas when dealing with totality and finally to identify the appropriateness of the total sentence. See *Haji Shahrul Alim bin Haji Sulaiman v Public Prosecutor (Criminal Appeal No. 11 of 2013)*.

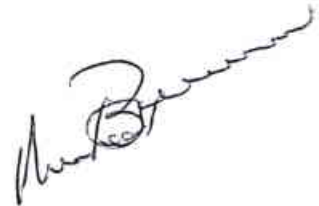
A Final Point

The DPP helpfully raises a question about the appellant's plea to charge 2. He pleaded guilty to the charge but later denied stealing the air compressor which amounted to a denial of the charge. The judge pointed out that he had already pleaded guilty to the charge which had been read and explained to him in Malay and refused to set aside the plea. The DPP suggests that the plea was equivocal and ought to have been withdrawn.

We have not investigated this as there is no appeal against conviction of the charge. It appears from the record that initially there was an unequivocal plea but we leave the matter there as the sentence passed was concurrent and the total sentences unaffected.

Orders

1. Appeal against sentence allowed.
2. The consecutive sentence of 2 years imprisonment on charge 16 be varied so that one year shall be consecutive to and one year concurrent with the sentences of 2 years on each of charges 1, 4 and 8.
3. The one stroke imposed on charge 16 cumulatively with the one stroke on each of charges 1, 4 and 8 shall be noncumulative.
4. The concurrent sentences of imprisonment on all other charges and the noncumulative strokes shall stand.
5. The total sentence now imposed is 7 years imprisonment and 3 strokes.

**Leonard, J.A.****Mortimer, P.****Burrell, J.A.**