

Mohd Rafee Bin Jublee

AND

Public Prosecutor

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 18 of 2007)**

Before: Power, P; Mortimer and Davies, JJ.A.
2nd November, 2009.

Isolated offence of robbery under sections 390 and 392 of the Penal Code. Sentence of 6 years and 12 strokes imposed after plea held to be manifestly excessive. Starting point of 6 years reduced to 3 years and 6 months imprisonment for the plea and other mitigating factors substituted. Proper approach on sentence to previous convictions discussed.

Mr Sheikh Nordin of Messrs. Sheikh Nordin Advocates & Solicitors for the Appellant.
DPP Anifa Rafiza of Public Prosecutor for the Respondent.

Cases cited in the Judgment:

Ilham Syarif v PP (Cr. App. No. 3 of 2009)

Basir bin Badonggo and others v PP (Cr. App. No. 4 of 1988)

Mohd Azarian bin Bungsu v PP (Cr. App. No. 3 of 2000)

Alihan bin Durahim v PP (Cr. App. No. 9 of 1999)

Md Juliani bin Hj Hidup v PP (Cr. App. No. 8 of 1997)

Abdul Muhin bin Haji Maksin v PP (Cr. App. No. 2 of 1989)

Mortimer, J.A.:

On 15 November 2007, in front of Hairol Arni JC, the appellant pleaded guilty to an offence of robbery contrary to sections 390 and 392 of the Penal Code which was committed on 14 June 2005. It carries a maximum of 30 years imprisonment and not less than 12 strokes.

On 19 November 2007, the judge sentenced the appellant to 6 years imprisonment as well as the minimum 12 strokes. He now appeals against the sentence of 6 years imprisonment on the grounds that it is manifestly excessive.

When sentenced the appellant was 30 years of age. He is married with two young children and has previous convictions as a youth.

The facts

At about 11:00 on 14 June 2005, the appellant drove his car to a place near a convenience store in Kampong Sengkurong owned by MTK enterprise. Intending to rob, he put on black gloves and a maroon mask over his face. He went into the shop which was empty save for Ms Justado behind the counter at the cash register. He approached and told her to take the money out of the till. He threatened to hurt her if she did not obey. When she said there was no money in the till he went behind and took \$400 from it. Taking her by the hands he then dragged her to the room behind where he bound her wrists with telephone wire and made her sit on a chair before returning to the shop to search for more money. Finding none, he took twelve Easi recharge cards and Ms Justinado's mobile phone. He then returned to Ms Justado, covered her head with a white shirt, and escaped to Serasa beach in his car. There he changed his clothes and threw those which he had been wearing into the sea.

Ms Justado managed to free herself and report the matter to the police. Her report led to the appellant's arrest the following day. By then he had spent the money but the remaining stolen property was recovered.

The sentence below

The appellant has previous convictions. Between 1992 and 1996 he was convicted of two counts of theft, ten counts of theft in a dwelling house, one count of housebreaking by night and one count of receiving stolen property. At the time he was between the ages of 17 and 21 years.

When sentencing the appellant the judge took into account his plea of guilty but added *"I cannot wholly ignore his poor record of previous convictions which dates back as far as 1992 and his last being in 1996."*

He had regard to cases which were cited to him and summarized the sentences imposed for this type of offence as varying between two years and seven years imprisonment. He then noted,

"The fact of the matter is that the accused has put his victim who is a woman through such a terrifying ordeal, tied her hands and threatened to hurt her if she disobeyed him."

Having regard to his poor record and the circumstances of the case, I hereby sentence the defendant to six years and twelve strokes ..."

The appellant's and respondent's cases

Sheik Noordin, who appears for the appellant, submits that the sentence passed is manifestly too high. The judge failed to give a starting point and thereby misled himself as the notional starting point must be about 9 years. He cites for our assistance *Abdul Muhin bin Haji Moxsin v PP* (Cr. App. No. 2 of 1989). A decision of this court concerning an isolated offence of robbery with some violence in which a

sentence of 4 years after plea was imposed on a young man without previous convictions.

On the other hand we are urged to dismiss the appeal by DPP Anifa Rafiza who appears for the public prosecutor. In support she invites our attention to the previous convictions of the appellant and to previously decided cases. These cases include:

Ilham Syarif v PP (Cr. App. No. 3 of 2009) and *Basir bin Badonggo and others v PP* (Cr. App. No. 4 of 1988) which involved gang-robberies committed by those who had crossed the border for the purpose. Usually in such cases heavy deterrent sentences are passed and they are of little assistance in the present case.

In *Mohd Azarian bin Bungsu v PP* (Cr. App. No. 3 of 2000) this court did not interfere with a sentence of 7 years was after trial for one offence of robbery and one of possession of a knife. Similarly, in *Alihan bin Durahim v PP* (Cr. App. No. 9 of 1999) an appeal was dismissed against a sentence of 7 years after trial for one offence of gang robbery. In *Md Juliani bin Hj Hidup v PP* (Cr. App. No. 8 of 1997) an appeal against a sentence of 9 years after trial for a robbery with the use of a deadly weapon was also dismissed.

A further 2 cases cited concerned appeals against sentence for simple robbery where sentences of 5 years and 3 years were not disturbed. It is worth noting that the dismissal of an appeal against sentence by this court is not necessarily an approval of the level of the sentence.

Previous convictions

The proper approach to previous convictions when sentencing deserves comment. Good character is a powerful mitigation. A person of good character will have the starting point of his sentence reduced by giving effect to this mitigation. Clearly a person who has previous convictions may not receive the same discount. The amount of discount (if any) depends upon the detail. A man who has a minor conviction many years before he is sentenced may properly be regarded as of good character and full weight to the mitigation may be given whereas a man with a bad record for the same type of offence may well not be entitled to any reduction for this factor.

Conclusion

The judge was entitled to have regard in passing sentence to all the matters to which he referred. It was a serious offence in which the appellant used both force and threats towards the victim. As we have noted the offence carries a maximum of 30 years imprisonment and a minimum of 12 strokes. On the other hand it can be said in the appellant's favour that it was an isolated offence in which the property taken was of relatively small value.

It is not clear how the judge approached the appellant's previous convictions nor what weight he gave to them. He properly took into account the plea of guilt so his notional starting point was in the region of 9 years. Here the previous convictions were between 9 and 13 years before the present offence and at the time the appellant was

between 15 and 19 years old. Even though he is not of good character he must be entitled to credit for keeping out of trouble for many years before this offence after having had such a bad start as a youngster.

He is a married man with children with a severe personality disorder described in a report before us. However, there is no indication that this disability is relevant either to the commission of the offence or to the punishment being served.

Having considered the previous cases of this court cited to us and the facts concerning both the offence and the offender in the present appeal we are of the opinion that the judge's starting point was manifestly too high even for this serious offence. The proper starting point after trial in this case is 6 years reduced to 4 for the plea of guilty. It is then appropriate to give effect to any other mitigating factors. These are that the appellant's previous convictions were committed when he was between the ages of 15 and 19 years; that he has been out of trouble for nine years before this offence; that he is now married with a family.

Giving weight to these matters we consider the proper sentence to be 3 years and 6 months imprisonment. The minimum of 12 strokes must remain.

Order

We therefore allow the appeal, quash the sentence of 6 years imprisonment and substitute a sentence of 3 years and 6 months imprisonment together with the statutory minimum of 12 strokes.

Power, P.

Mortimer, J.A.

Davies, J.A.