AIDAH BINTI TENGAH

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 18 of 2016)

Before: Mortimer P, Leonard and Burrell JJ A.
23rd November 2016

Headnote: *Sentencing in corruption cases. Delay of 6 years considered. Rehabilitation during the delay. Extent of appellant's knowledge of the full criminality. Concurrent sentences of 5 years imprisonment reduced to 3 years. Consecutive sentence of 6 months for non-payment of penalty and prosecution costs. Total to be served 3 years and 6 months imprisonment.*

Mr Rozaiman Bin Dato Haji Abdul Rahman (Messrs Rozaiman Abdul Rahman Advocates and Solicitor) for Appellant
DPP Aldila Binti Haji Mohd Salleh for Respondent

Cases:

Public Prosecutor v Ang Seng Thor [2011]4 SLR 217 at 232;
HK SAR v Wong Kwok Wang [2008] 3 HKLRD 245 at 265

Mortimer P:

This is an appeal against the sentence of 5 years imprisonment concurrent on each charge imposed upon the appellant by Steven Chong J on 4 August 2016. After 4 days of trial the appellant pleaded guilty to 15 offences under section 6 (b) of the Prevention of Corruption Act, Chapter 131 (the act) and asked for 5 similar offences to be taken into account. Each offence was for accepting a gratification (a bribe) from David Chong who owned and ran Musfada Enterprise. She received from him a total of $200,200 which over 20 months was about 5 times her salary.

As he was required under section 17 of the act the judge ordered the appellant to pay a penalty equal to the amount of the bribes received with 6 months imprisonment in default of payment. Additionally 'by consent' she was ordered to pay costs of $120,000 with 3 months imprisonment in default.

The 'consent' related to the amount of the costs agreed with the prosecution in negotiations and was unrealistic as in the course of the mitigation advanced at trial it became clear that the

appellant was unable to pay either the penalty or the costs. In the event of non-payment the total sentence imposed by the judge was 5 years and 9 months.

The appellant's employment

The appellant is 44 years of age and was employed by Brunei Shell Petroleum Company SB (BSP) a designated Public Body under section 7 of the act. She was a "supply chain support" in the supply chain management department (SCM). This was part of the process for obtaining goods and services for BSP which was dauntingly known as "Systems Application and Products Enterprise Resource Planning Financial System". If a product was required an authorised employee in the relevant department would create a work order for that product. If then approved by a senior authorised employee in the same department a Purchase Requisition would be generated for the work order. The Purchase Requisition was then sent to the SCM department and an authorised employee in that department, such as the appellant, would create a Purchase Order. The purchase order would be sent to an approved contractor to supply the product. It would appear that the person authorised to create the Purchase Order had some authority as to which authorised supplier to favour with the order.

Obviously this elaborate system was designed to prevent fraud and to ensure economically sound purchases of products necessary for BSP were made

David Chong and Musfada Enterprise

Musfada enterprise was managed by David Chong. It was an approved supplier to BSP of a range of products including lubricants, cleaning solvents and similar products required in the oil industry. David Chong decided to increase the sales of Musfada by bribing BSP employees who were in the supply chain. He did this on a grand scale by employing 2 agents whose task was to make the necessary contacts in BSP and tempt them with substantial offers.

It was a successful criminal enterprise in which a number of BSP employees were tempted to participate in various necessary roles leading to the generation of purchase orders. However, there was a more serious aspect to the bribery. The price of the products in the purchase orders to Musfada amounted to $6,421,700 but products to the value of $5,542,200 were never delivered. Work orders were generated when goods were not required and delivery receipts were signed when no goods had been delivered.

The offences

The offences all followed the same pattern. The first charge is an example. In January 2008 the appellant created 12 purchase orders for various amounts of a cleaning degreaser, a wire lubricant and a solvent cleaner to the total value of $270,550. In accordance with an agreement between Mr Liew, one of Chong's agents, and the appellant at the end of the month David Chong met the appellant at the door of her home and handed over a bribe of $8000.

The appellant accepted the bribe of $8000 corruptly as a reward for "having done an act in relation to her principal's affairs namely the creation of the purchase orders charged". As the creation of purchase orders was part of her proper duty the question arose why this act was

corrupt. In fact she received the money corruptly because she expedited purchase orders in favour of Musfada and failed to search for cheaper products from another approved supplier.

In charge 1 none of the goods ordered were supplied although false documents were provided to evidence receipt from Musfada and they were paid for. The loss to BSP was the full value of the goods ordered – $270,550. In other charges some of the goods ordered were delivered.

In this way purchase orders amounting to $6,421,700 were created. The non-delivery to BSP of goods ordered from Musfada led to a loss of $5,542,200 to BSP.

The Judge's Reasons for Sentence

When considering agreed facts relevant to sentencing the appellant the judge said:

> "*Importantly, the Statement of Facts reveals that the price of the Musfada products in the purchase orders amounted to $6,421,700 and the non-delivery to BSP of the Musfada products in the purchase orders resulted in losses to BSP amounting to $5,542,200.*"

He then set out the principles to be followed in sentencing for this type of offence citing examples. We broadly agree with his approach which in summary was:

1. Generally the sentence imposed for this type of offence must be substantial and deterrent. However, we do not agree with the judge that *R v Wellburn and Nurdin [1979] 1 Cr.App.R (S) 64*, (which he cited) is authority for the statement that "the paramount consideration must be deterrence." No such principle appears in the judgment. Lawton LJ. said that corruption had become widespread so that the courts must do all they could to stop the spread of corruption in public and commercial life adding:

   > "*All they can do is to show by the sentences passed that the giving and accepting bribes will not be tolerated... This must mean in most cases severe sentences, perhaps larger than some which have been imposed recently. This is particularly so when bribery has involved large sums.*"

   In the above case £23,000 was given in bribes by the 2 defendants to an army officer with the aim of generating orders worth in the region of 4 to 5 million pounds. In today's value £23,000 would be worth over £200,000. The main culprit was sentenced to 18 months imprisonment and the lesser to 12 months imprisonment suspended. They were on bail pending appeal. On the grounds of ill-health the main culprit's sentence was reduced to allow his release.

   Deterrence remains an important consideration in sentencing bribery cases.

2. The judge rightly referred to the public interest in business being conducted in a fair and transparent manner citing comments made by Rajah JA in *Public Prosecutor v Ang Seng Thor [2011]4 SLR 217 at 232* as apposite. This is especially so in present circumstances when attracting outside investment is so important.

Similarly he referred to the observations of Stock JA in *HK SAR v Wong Kwok Wang [2008] 3 HKLRD 245 at 265* a Hong Kong Court of Appeal case,

> *"It would seem that once it becomes known that at the heart of a major company in whose gift it is to award massively lucrative contracts, there sits a corrupt officer willing to sell himself in order to exert influence, many contractors are only too ready to avail themselves of the opportunity. Such officers and such contractors must be made aware that they can expect no quarter from the courts if they are caught."*

3. The judge then listed the main factors he took into account in assessing sentence. These were:

   A) the duty of the court to make it clear to those in positions of trust in a public body that they should expect severe sentences if they allow personal greed to overshadow responsibility and accountability.

   B) a substantial starting point was necessary even taking into account the defendant's clear record and contribution towards the education of special needs children because of the aggravating features in the case which were:

      i) The gross abuse of trust and position:
      ii) That the corrupt acts concerned a breach of trust in the oil and gas industry which is of strategic importance to the economy of Brunei Darussalam;
      iii) That the corrupt acts were perpetrated over a long period of 20 months;
      iv) That the amount of bribes was substantial: $200,200; and
      v) Finally, the loss to BSP arising from non-delivery of Musfada products in the purchase orders was a massive $5,542,200

The judge then considered the overall criminality of the offences and from a starting point of 6 years imprisonment he reduced it to 5 years giving proper limited effect to the defendant's late guilty pleas in the course of the trial.

The Appeal

Mr Rozaiman contends that the overall sentence of 5 years imprisonment is manifestly excessive and he takes 3 main points.

The first is that the judge failed to give proper weight to the 6 years delay from the time when the investigation started in October 2009 when the appellant confessed to receiving 2 gratifications from David Chong. During the delay her employment was terminated on the 23 December 2009 and she lost her pension rights. She was then unemployed for 3 ½ years until becoming a relief teacher working with special needs children with serious disabilities.

During this delay the anxiety and stress led to the appellant being divorced and she is now the single mother of 3 children.

Mr Rozaiman cites *Maimun Binti Haji Omar v Public Prosecutor [2013] 1 JCBD 154* and below submitted that the appropriate sentence in all the circumstances was probation.

Mr Rozaiman's second point is that the judge failed to take into account the prosecution's submission that a sentence of not less than 4 years imprisonment ought to be passed. He wrongly overlooked this submission.

Finally, Mr Rozaiman relies upon:

a) a comparison with the sentence which David Chong received of 8 years imprisonment reduced to 6 years for pleas of guilt when his criminality was vastly greater than the appellant's.
b) the sentences passed in 2 Singaporean cases: *Public Prosecutor v Andrew Ong Tiong Chiew [2012] SGDC 454; and Public Prosecutor v v Teo Chu Ha and Henry Teo [2013] SGDC 61*.

As to David Chong's criminality Mr Rozaiman invites us to a comparison with Chong who tempted as many as 30 BSP employees to accept bribes to defraud BSP leading to the massive loss to which we have referred.

In the first Singaporean case a total of $631,000 was involved. The defendant was sentenced to 10 months imprisonment in total and 36 months consecutive in default of paying the $631,000 penalty. It would appear that the defendant must have had the means to pay the penalty but even when the total sentence including the default is taken into account the starting point was less than 6 years.

In the last case there were 11 payments totalling $576,225 between 2004 and 2010. The sentence was 6 months imprisonment with 6 months consecutive for non-payment of the penalty.

The Public Prosecutor

DPP Aldila contends that the judge's reasoning and his exercise of discretion was correct save on the question whether the appellant was shown to be aware of the extent of the criminality in which she played a part. In particular whether she was aware that products ordered were not delivered but were paid for as a result of the bribery of others in the chain. She readily agreed that there was 'no evidence that she (the appellant) knew the orders were part of a criminal scheme. In David Chong's statement it was not revealed to the appellant. Her only involvement is that she helped Chong to quickly approve and process the orders. It was always our case that at the time of signing the purchase order she would not know if the order was genuine.' She added that it was not the prosecution case that that the appellant was knowingly taking part in a fraudulent scheme and someone who knew he was raising false orders could be higher in the scale of criminality.

In particular the DPP notes the need to stamp out all forms of corruption repeatedly underscored by his Majesty the Sultan in various 'titahs' going back to 1981.

Discussion

The most serious aspect of the whole criminal scheme established by David Chong was the loss to BSP of over $5 million. As we have already pointed out the judge referred to this as an important factor in the appellant's overall criminality. On this the DPP readily concedes that it

was never shown in the evidence that she was aware of the full extent of the criminal scheme and in particular that the products ordered were paid for but never delivered. The prosecution case has never been otherwise.

She received the bribes to expedite the purchase orders which would have been produced following a purchase requisition by her or others fulfilling the same task in due course. She would select a purchase requisition for goods for which David Chong was an authorised supplier and expedite the order in his favour. Further, she would not search for another authorised supplier of the same goods to obtain them at a lower price.

Turning to the delay. Delay of 6 years from the beginning of the investigation to trial is obviously excessive in normal circumstances. The judge held it "not to be inordinate" in the circumstances of this case on the basis that the appellant could not be prosecuted for her full criminality until David Chong was available to give evidence after his conviction and sentence in November 2013. Obviously any delay which is the defendant's fault cannot be relied upon in mitigation. The DPP contends that at least in part the delay was the appellant's fault. Having admitted in October 2009 the receipt of 2 payments she then denied the authenticity of records kept by the Musfada staff in the "Purchase Order Book" and failed 'to come clean' about her criminality.

However, an accused person is always entitled to require the prosecution to prove its case without his assistance. The appellant admitted two corrupt payments but then did not admit the authenticity of the records. As the whole corrupt scheme was complex, sophisticated and involved a large number of BSP employees over a long period the investigation into her part was lengthy and we accept that she could not be prosecuted for her full criminality until David Chong had been convicted and sentenced. There was no fault on the prosecution's part in not pursuing the case against the appellant earlier but in the absence of causing the delay herself she is entitled to raise it in mitigation.

There can be little doubt that she suffered anxiety and stress over the 6 years and that it may well have led to the breakdown of her marriage as she claims. These are matters for which she must be given credit.

Having been unemployed for a lengthy period the appellant found work as a relief teacher with seriously disabled children. That work is spoken of in glowing terms by the Deputy Principal. This involves substantial effort in rehabilitation on her part. The Deputy Principal praised the appellant's patience, dedication, efficiency and honesty and reported that the appellant had provided constructive and proactive ideas in the planning of the children's lessons to improve their life skills and self development. The judge said of this:

> *"Certainly, I think the defendant deserves full credit for her valuable contribution towards the welfare and education of these children and I hope this will continue in the future."*

In sentencing the judge rightly intended to take this into account together with the appellant's clear record.

The judge declined to take into account a number of other matters put forward in mitigation. These were not only the anxiety and stress caused by the delay in the lengthy investigations and the breakdown of her marriage in consequence but also the loss of employment and retirement

benefits. Also her present position as a single mother with 3 children under her care. The judge dealt with these matters on page 11 of his judgement saying:

> *"I have sympathy for the defendant's children. But the anxiety and stress the defendant says she was subjected to and which led to the failure of her marriage, the difficult family circumstances she found herself in, and her financial hardship, are the consequences of her own corrupt conduct and cannot mitigate the offences: Lai Oei Mui Jenny v Public Prosecutor [1993] 2 SLR (R) 406."*

We do not agree that such matters "cannot mitigate the offences" as suggested in the above judgment. Such matters must always be considered and taken into account in sentencing as often they are part of the punishment suffered as a consequence of the offences. Nevertheless because an accused may bring some of these matters onto himself the weight given to them is a matter for the judge to consider.

For our part we would give little but some weight to the loss of employment and pension rights but more to the effect of the delay.

The sentences in default

The sentences passed in default of payment of the penalty and the prosecution costs amounting to 9 months imprisonment to be served consecutively to the total of 5 years require consideration.

Although the amount of the prosecution costs was a matter of negotiation and agreement leading to the pleas of guilt it was a meaningless exercise because it was abundantly obvious in mitigation that the appellant was without means and had no chance of paying either the costs or the penalty and has not done so. The sentences are to be served consecutively. The total sentence to be served and considered is therefore 5 years and 9 months.

Conclusion

We agree with the principles to be applied to sentencing offences of corruption set out by the judge save in the detail we have mentioned.

We also agree with the serious aspects of the appellant's criminality described by the judge save in one major respect. We agree that the offences disclose a gross breach of trust, that the bribes received were substantial, and that they were received over a lengthy period.

However the appellant was sentenced on the basis that she was knowingly involved in the fraudulent scheme of ordering goods which were not delivered but were nevertheless paid for causing substantial loss to BSP. Her involvement was limited to expediting purchase orders and not searching for the products at a lower cost.

The 6 years delay was the consequence of the extent of the criminal activities of David Chong. The appellant could not be prosecuted for her full criminality until he was available to give evidence. We accept that the appellant suffered anxiety and stress and a broken marriage as a possible consequence. We take this into account.

We give some but very limited weight to the misfortunes of the appellant brought about by her criminality. These are her loss of employment and her loss of pension rights. We take into account the effect of a sentence of imprisonment upon a single mother responsible for children.

Equally we agree with the judge that credit must be given to the appellant for her attempts to rehabilitate herself in her significant work as a relief teacher with seriously disabled children and her clear record.

In the circumstances 5 years imprisonment is manifestly too high even leaving aside the 9 months imprisonment consecutive for default of payment of the penalty and costs which she was destined to serve at the outset.

Bearing in mind the many aspects of this case to which we have referred we allow the appeal. A starting point after full trial of 4 years and 6 months imprisonment is appropriate. Giving limited weight to the late pleas of guilt and taking into account the other matters of mitigation to which we have referred we reduce the starting point by 18 months making 3 years imprisonment in all. We achieve an appropriate total sentence by ordering the 2 sentences of 6 and 3 months to be concurrent with each other but consecutive with the 3 years making a total sentence of 3 years and 6 months.

Orders

1. The appeal against sentence is allowed.

2. The total sentence of 5 years imprisonment on the charges is reduced to 3 years imprisonment concurrent on each charge.

3. The sentences of 6 months and 3 months imprisonment imposed in default of payment of the penalty and prosecution costs will be served concurrently with each other but consecutively with the 3 years making 3 years and 6 months imprisonment in all.

Mortimer, P.

Leonard, J.A. **Burrell, J.A**