

AHMAD RAMADHAN BIN HJ MUHTADIN

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 1 of 2017)**

Before: Mortimer P, Burrell and Seagroatt JJA.
18th May 2017

Headnote: Sentence: whipping - court's "discretion" provided by S.260 CAP 7 applies to the provisions of S.259 only. It does not apply to the provisions of S.258.

Applicant in person
DPP Hjh Rozaimah binti Hj Abd Rahman for Respondent

Burrell, JA.:

On 19 December 2016 the appellant entered a plea of guilty to an offence contrary to S.354B of the Penal code, CAP 22, namely outraging modesty of a person under 18 years of age by a person in a position of trust or authority. He had at an earlier appearance entered a plea of not guilty but changed his plea to guilty before the commencement of the trial on 19 December. The proceedings were before H.H Judge Masni and the appellant was represented by Mr. Rozaiman.

S.354B concludes with the following words: ".....shall be punished with imprisonment for a term not less than 3 years and not more than 10 years and with whipping." The appellant agreed a statement of facts, to which we shall refer shortly, and after Mr Rozaiman had mitigated on the appellant's behalf, the judge passed a sentence of 3 years imprisonment for the offence plus an additional 2 months imprisonment in lieu of whipping due to the appellant's age being over 50. He is 52.

The Facts

According to the agreed Statement of Facts the appellant was a teacher at the Bright Jigsaw International School. In the morning of 2 June 2016 when he and an 11 year old female pupil of the school were alone together in the school library he hugged the girl tightly, touched her chest and kissed her several times on her lips. The incident lasted only a very short time and the girl soon left the library in a distressed state. Later in the morning she told another teacher what had happened. When confronted with the allegation the appellant immediately admitted that it was true and he begged for forgiveness. A police report was made in the course of which the appellant again admitted the offence.

The Appeal

Before this court the matter has been listed as an appeal against conviction and sentence, in spite of the fact that the appellant pleaded guilty before Judge Masni and was represented by Mr Rozaiman at the time. It was however, correct for the matter to have been so listed for the following reasons.

On 18 January 2017, 27 days after the sentence had been passed, the appellant wrote a lengthy letter to the court which contained a number of comments which rightly gave rise to a concern that his plea of guilty before Judge Masni may not have been an unequivocal plea.

Examples of such comments are:- *"hear my real story", "I wish to inform the actual matter but not challenge or open the case", "the charge against me never existed" and "I was not given the opportunity to tell the real event"*. Clearly, such remarks are capable of being construed as an application to reverse his plea and thus the Public Prosecutor has, very properly, treated it as such and made written submissions accordingly.

To place the appellant's letter in context it is necessary to refer briefly to two other matters. First, the notes of proceedings in court when the appellant pleaded guilty state that the court interpreter *"reads and explains charge and penalty to defendant, defendant understood nature and consequence of plea."* Also, when sentencing the appellant the judge said *"s354B carries a minimum sentence of 3 years imprisonment"*.

Secondly, on 27 March 2017, the appellant wrote a second letter to the court in which he says *"I admit that I had committed the offence and am very remorseful". "I have apologised to the victim's family."*

Thus, whether or not the appellant wished to apply to this court to change his plea was unclear. He was unrepresented on appeal but Mr Rozaiman had very properly agreed to attend the hearing to assist if necessary.

In the event his assistance was not required because on being questioned by the court the appellant made it clear that he had pleaded guilty and that he was only appealing his sentence. He confirmed that the charge against him had been translated and that he had understood it. He also confirmed that the statutory penalty had been read to him and that he understood what the penalty was and that it was a minimum penalty. He said he accepted the sentence passed but wanted to ask if there was any chance of it being reduced for family reasons.

We were therefore satisfied that the plea had been correctly entered and recorded and that it was unequivocal.

Our decision

The appellant was informed that this court had no power to reduce the sentence of 3 years imprisonment for the offence, regardless of a number of mitigating factors such as his plea of guilty, his clear record, his hitherto good reputation as a teacher and his family circumstances, and thus his appeal against that part of his sentence had, as a matter of law, to be dismissed.

There remained however, separate consideration in relation the 2 months imprisonment which was added in lieu of the 2 strokes which the judge had initially imposed pursuant to s.354B. She said:

“As to the corporal punishment, defendant is over the age of 50 years old. He is 52 years old. Section 258 of the Penal Code provides for no whipping to be imposed on a male above the age of 50.

By virtue of the said section, the defendant is exempted from the corporal punishment. I, therefore, substitute the 2 strokes to 2 months imprisonment.

I order for the substitute sentence to run consecutively with the minimum sentence of 3 years imprisonment.”

Pursuant to s.258 of the Criminal Procedure Code, CAP 7 no person over the age of 50 shall be punished with whipping. Pursuant to s.259 no person who is not in a fit state of health shall be whipped. Under s.260, a court may, in its discretion, impose a sentence of imprisonment in lieu of whipping when s.259 applies. s.260 does not give such discretion to a court when s.258 applies. In other words, imprisonment in lieu of strokes pursuant to s.260 does not apply where age is the reason for not imposing whipping.

For this reason we quashed the consecutive sentence of 2 months imprisonment which the judge had “substituted” instead of 2 strokes.

Order

Appeal allowed in part. Sentence of 3 years and 2 months imprisonment reduced to 3 years imprisonment.

Mortimer, P.

Burrell, J.A.

Seagroatt, J.A