

MOHAMMAD ERWAN BIN MANGGIS

AND

PUBLIC PROSECUTOR

**Court of Appeal of Brunei Darussalam
(Criminal Appeal No. 1 of 2022)**

Before: Burrell, P. Seagroatt and Lunn JJ A.

Date of Hearing: 8th November 2022

Date of Judgment: 22nd November 2022

Headnote: sentence-application for leave to appeal out of time allowed; sentence of 8 years' imprisonment, following a plea of guilty to an offence of mischief by fire, intending to cause damage or knowing it likely to be caused quashed; in its place, a sentence of 6 years and 8 months' imprisonment imposed; no other orders. Total resulting sentence-7 years and 8 months' imprisonment and 6 strokes.

Appellant in person.

DPP Pg Norazmeena binti Pg Mohiddin for Respondent

Cases cited in the Judgment

Mohammad Yusrin bin Hj Mohammad v Public Prosecutor (Criminal Appeal No. 8 of 2013);

Public Prosecutor v Roslan Bin Yusof [2000] JCBD 149;

Haji Ahmad bin Haji Tamin v Public Prosecutor (Criminal Appeal No. 15 of 2018);

Hj Mohd Faizal bin Hj Wasli v Public Prosecutor (Criminal Motion No. 18 of 2020)

Lunn JA

1. By a Notice of appeal, dated 4 January 2022, the applicant seeks leave to appeal out of time against the sentences of imprisonment imposed on him on 1 December 2021 by HHJ Hazarena, following his pleas of guilty to a charge of theft in a dwelling on 18 March 2021, contrary to section 380 of the Penal Code, (Charge 1) and a charge of mischief by fire intending to cause damage or knowing it likely to be caused on 5 April 2017, contrary to section 435(1)(c) of the Penal Code, (Charge 2).

The facts

2. The applicant accepted a Statement of Facts as the factual basis of the Court accepting his pleas of guilty. He was a 38 year-old, unemployed Bruneian male.
3. On a day in March 2021, the applicant entered his mother's bedroom at her home and stole some pieces of jewellery and 8 pieces of patterned fabric. Although he tried to sell some of the items of jewellery he failed, having been told that they were not

real gold. Then, the applicant threw some of them into a river. He was successful in selling 4 of the pieces of fabric. On 18 March 2021, he was confronted by his mother, which led to him leaving her house. Later, he gave the remaining pieces of jewellery and 4 pieces of fabric to the owner of the premises in which his mother lived as a tenant, asking that the items be returned to his mother.

Charge 2

4. Almost four years earlier, in the early hours of the morning of 4 April 2017 the applicant and another man entered the Mentiri Mosque intending to steal from the donation box. Their attempts to take money out of the donation box failed. Then, having noticed a CCTV surveillance camera, the applicant determined to try to destroy the camera by fire, lest he be identified from the CCTV footage for what he had been doing. As a result, the applicant set fire to the plastic grill of an air conditioner, which burst into flames. The applicant and his accomplice fled. The Mosque was burned down and destroyed at a loss of about B\$5 million.
5. Having been arrested by the police, the applicant admitted both offences in statements that he made to the police.

Reasons for sentence

The applicant's criminal convictions

6. In her reasons for sentence, the judge said that she took into account that the applicant had a long list of previous criminal convictions. She did so, having referred to a judgment of this court setting out the circumstances in which a defendant's criminal convictions may be relevant to the determination of the starting point to be taken for the current sentence.¹ In particular, the judge noted that the convictions dated back to 2000 and observed that the most recent convictions were in 2019.
7. In 2001, the applicant had been sentenced to 6 months and 3 months' imprisonment respectively for offences contrary to section 380, theft in a dwelling, and section 427, mischief causing loss or damage up to \$500, of the Penal Code. On 20 May 2013, for 13 offences contrary to section 379 of the Penal Code, theft, he had been sentenced to a total of 64 months' imprisonment. The judge noted that the convictions dated back to 2000 and observed that the most recent convictions were in 2019, That was a reference to his conviction on 26 March 2019 for an offence contrary to section 395 of the Penal Code, gang-robbery, for which he was sentenced to 30 months' imprisonment and 12 strokes. On 7 September 2017, he had been sentenced 18 months' imprisonment for an offence of theft, contrary to section 379 of the Penal Code, and to 4 months' imprisonment for an offence of mischief, contrary to section 427 of the Penal Code.

Mitigation

¹ *Johari bin Haji Jaya v Public Prosecutor* (Criminal Motion No. 14 of 2018; unreported, Court of Appeal 14 November 2018.)

8. Judge Hazarena said that the only mitigating factor was the applicant's pleas of guilty at the first opportunity. In consequence, she determined to afford him a discount of one-third from that taken as the starting point for sentence.
9. Of the other factors of aggravation in the commission of the offences, the judge said that the applicant's theft of property from his mother breached their bond of trust. She noted that the applicant had used the proceeds of the theft to buy dangerous drugs. Of the offence of mischief by fire, she said that it had resulted not only in damage and loss of \$5 million but also in inconvenience to the public, because the Mosque had been closed and worshippers had to worship elsewhere.

Starting point

10. Having referred to several authorities², the judge stipulated a starting point of 18 months' imprisonment for the offence the subject of Charge 1 and 12 year's imprisonment and the mandatory minimum 6 strokes, for the offence subject to Charge 2.

Sentence

11. In the result, affording the applicant a discount of one-third from the starting point for sentence, the judge sentenced the applicant to 12 months' imprisonment on Charge 1 and 8 year's imprisonment and 6 strokes on Charge 2. Having said that the two offences were distinct and separate, occurring at different times and places, the judge ordered that the sentences be served consecutively. Accordingly, the total sentence imposed on the applicant was 9 years' imprisonment and 6 strokes.

The applicant's submissions

12. In a letter to the court, dated 15 August 2022, the applicant invited this court to order that the sentences of imprisonment be served concurrently. He said that the sentence was too heavy and expressed his remorse. In answer to a question from the court, the applicant explained that he was about a week out of time in filing his Notice of appeal because of restricted family visits at that time in consequence of Covid-19 restrictions.

The respondent's submissions

13. DPP Nor Azmeena Pg Mohiddin submitted that the judge was entitled to take a starting point of 18 months' imprisonment for the offence the subject of section 380, having regard to what this court had said in its judgment in *Mohammad Yusrin bin Hj Mohammad v Public Prosecutor*³, namely that for less serious offences the sentencing range was between 12 months and 2 years' imprisonment.

² *Section 380-Mohammad Yusrin bin Hj Mohammad v Public Prosecutor* (Criminal Appeal No. 8 of 2013; unreported Court of Appeal, 2 December 2013.) *Muhammad Rayyan Adam Bin Abdullah Mulok @ Royston Anak Mulok v Public Prosecutor* (Criminal Appeal No. 30 of 2016; unreported High Court, 2 November 2016.) Section 435(1)(c)-

14. In respect of the offence contrary to section 435(1)(c), she referred to two judgments of this court in which the sentences of imprisonment imposed after a plea of guilty to a single offence had been upheld.⁴ In *Hj Ahmad bin Haji Tamin v Public Prosecutor*, a sentence of 6 years' imprisonment imposed on a mature man with no previous convictions for committing mischief by fire inside a commercial building as an act of revenge, in which over \$134,000 of damage was caused, was upheld. In *Hj Mohd Faizal bin Hj Wasli v Public Prosecutor* a sentence of 6 years' imprisonment and 6 strokes, after his plea of guilty, was imposed on a 37-year-old man, who suffered from chronic drug abuse, but was described as having no previous convictions. He had set fire to clothing in the house owned by his mother. The sentence was upheld.
15. In *Public Prosecutor v Roslan Bin Yusof*, Hayati J, in sentencing the defendant in the High Court after his pleas of guilty to 4 charges of committing mischief by fire on the same occasion, contrary to section 435(1)(c) of the Penal Code, stipulated a starting point of 10 years' imprisonment and imposed sentences of 7 years' imprisonment on each charge, which were ordered to be served concurrently.⁵
16. DPP Azmeena acknowledged that she was unable to draw to the court's attention any case in which the sentence of imprisonment imposed on a defendant, for an offence contrary to section 435(1)(c), was greater than 7 years' imprisonment.
17. Nevertheless, in her oral submissions, DPP Azmeena asserted that, whilst the sentence imposed on the applicant by the judge was at the higher end of the scale nevertheless, having regard to the aggravating factors, it was not manifestly excessive. The aggravating factors included, in addition to those enumerated by the judge, that the applicant's conduct was motivated to destroy evidence of his criminal conduct and that the applicant had failed to take any meaningful steps to raise the alarm about the fire at the Mosque, rather he fled.
18. DPP Azmeena invited the court to reject the applicant's request that the sentences of imprisonment be ordered to be served concurrently. The offences were different, having been committed on different days and places and involved different victims. Similarly, she said that the judge was justified in having regard to the applicant's criminal record as an aggravating factor in the commission of these offences. Relevant to that consideration were offences committed before the offences for which he was sentenced. There were numerous such offences of dishonesty. On the other hand, the offences for which he was sentenced on 2017 and 2019 were committed after the offence of mischief by fire on 4 April 2017 (Charge 2) for which he was sentenced by the judge. In those circumstances, it was not appropriate for her to have regard to the convictions in 2017 and 2019 in respect of Charge 2. It was not clear if she had done so.

Discussion

⁴ Section 435(1)(c)-*Haji Ahmad bin Haji Tamin v Public Prosecutor* (Criminal Appeal No. 15 of 2018; unreported, 14 November 2018.) *Hj Mohd Faizal bin Hj Wasli v Public Prosecutor* (Criminal Motionl No. 18 of 2020; unreported 3 June 2021.)

⁵ *Public Prosecutor v Roslan Bin Yusof* [2000] JCB 149. (High Court, 25 September 2000.)

19. The judge set out with admirable clarity the steps that she had taken in the route leading to the determination of the appropriate sentence to be imposed on the applicant. She said that, “in assessing the sentencing”, she had regard to the applicant’s plea of guilty. That was the only mitigating factor. Then, she referred to the applicant’s “long list of previous convictions”, including his convictions “more recently in 2019”. Next, she stipulated a starting points for each charge, which she said were arrived at for the “above- mentioned reasons”. Clearly, those reasons included his convictions for criminal offences in September 2017 and March 2019. Those were convictions that occurred after the events the subject of Charge 2 on 4 April 2017. Accordingly, they were simply irrelevant to a consideration of the applicant’s culpability for the offence the subject of Charge 2. The usually relevant consideration of the amount of time that has elapsed since earlier convictions before the commission of the instant offence simply did not arise. With respect, the judge was not entitled to have regard to those particular convictions at all in determining the starting point for the offence the subject of Charge 2.
20. Of the factors relevant to the determination of the appropriate starting point to be taken for Charge 2, the judge had referred to the observations made in sentencing for offences of reckless arson, in the High Court by Hayati J in *Public Prosecutor v Roslan Bin Yusof*⁶. The defendant in that case had pleaded guilty to 4 charges of committing mischief by fire knowing it to be likely that it would thereby cause the destruction of property, namely houses in Kampong Ayer. The judge took a starting point of 10 years’ imprisonment, from which he afforded the defendant a discount for his pleas of guilty.
21. This applicant’s commission of the offence was clearly impromptu and the steps he took to cause the fire were improvised. No accelerant was used. He was motivated to seek to destroy the CCTV camera to avoid detection for his failed attempts to steal from the donation box. DPP Azmeena informed the court that the seat of the fire was close by to the camera. As she readily acknowledged, at that time of night the premises would be unoccupied. On the other hand, the applicant fled without alerting anyone to the gathering force of the fire. The damage caused was very extensive, to a total of \$5 million. The applicant’s greatest culpability clearly lies in the very extensive loss and damage caused to the Mosque. In these circumstances, fire can be uncontrollable and the extent of damage cannot be anticipated and calculated.
22. Notwithstanding, all the aggravating circumstances of the commission of the offence the subject of Charge 2, in our judgement the starting point taken for sentence by the judge was manifestly excessive. We are satisfied that a starting point of 10 years’ imprisonment was appropriate. Affording the applicant a discount of one-third, the appropriate sentence to be imposed on the applicant is 6 years and 8 months’ imprisonment and 6 strokes.

⁶*Public Prosecutor v Roslan Bin Yusof* , at page 152 G-153 A. They included: the nature of the premises and whether they were likely to be occupied; the degree of planning; the motive; steps taken to raise the alarm; and the damage to be expected and that which resulted.

22. We are satisfied that the sentence of one year's imprisonment imposed in respect of Charge 1 was entirely appropriate, as was the judge's order that the sentences of imprisonment of imposed for the two offences be served consecutively.

Conclusion

24. In those circumstances, we allow the application for leave to appeal out of time and quash the sentence of 8 years' imprisonment imposed by the judge in respect of Charge 2 and, in its place, impose a sentence of 6 years and 8 month's imprisonment. We make no other orders. Accordingly, the total sentence of imprisonment imposed on the appellant is 7 years and 8 months' imprisonment and 6 strokes.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A