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MOHAMMAD EZAM BIN TUAH

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 20 of 2015)

MOHAMMAD SHAHLAN BIN HAJI CHUCHU

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 23 of 2015)

AK KHAIRUL HANIF BIN PG ROSLI

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 25 of 2015)

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

Appellants in person
DPP Norhayati DP Hj Omar (Public Prosecutor) for Respondent

Leonard, JA.:

The three appellants in this consolidated appeal against sentence appeared before the Intermediate Court on the 17th of December 2014. There were two charges.

Charge 1

Mohammad Shahlan bin Hj Chuchu ("D1") and Mohammad Ezam bin Tuah ("D2") were jointly charged with an offence of housebreaking by night on the night of the 22nd to 23rd of November, 2014 by entering into a house used as a human dwelling in order to commit theft, an offence punishable under section 457 read with section 34 of the Penal Code Cap 22.

Charge 2

D1 and D2 together with Ak Khairul Hanif bin Pg Rosli ("D3") were jointly charged with an offence of housebreaking by night on the night of the 24th to 25th of November2014 by entering into a house used as a human dwelling in order to commit theft, an offence punishable under section 457 read with section 34 of the Penal Code Cap22.

A trial date was fixed for the period 21st September to 5 October, 2015. The appellants appeared before the court on the 5th of January 2015 but did not give any indication of a change of plea.

On 21 September 2015 when the case came on for trial counsel for D1 who had represented him on 17 December 2014 and 5 January 2015 asked for time for his client to reconsider his plea. The other two defendants who had been unrepresented throughout also asked time to consider their pleas. The case was adjourned to 23 September 2015. By that date no decision had been made and the matter was further adjourned to 3 October 2015 when all three defendants pleaded guilty before Intermediate Court Judge Hj Abdullah and a statement of facts was agreed. On the same day the judge imposed the following sentences.

Charge 1

D1. 4 years imprisonment and 3 strokes.
D2. 4 years imprisonment and 3 strokes.

The maximum penalty was 15 years imprisonment with whipping.

Charge 2

D1. 4 years imprisonment and 3 strokes.
D2. 4 years imprisonment and 3 strokes.
D3. 2 years imprisonment and 3 strokes.

The maximum penalty was 15 years imprisonment with whipping.

The judge ordered that the terms of imprisonment should take effect from 3 October 2015, (up to which date the appellants had been on bail) that in relation to D1 and D2 the sentences of imprisonment imposed on charges 1 and 2 should be concurrent, and that the strokes also be concurrent, that is to say non-cumulative.

According the admitted facts, all three appellants were unemployed Brunei Nationals. D1 and D2 had criminal records as follows.

D1 and D2 had been convicted together on 4 March 2008 of an offence of theft under section 379 of the Penal Code and each of them had been sentenced to one month's imprisonment. Thus they had been partners in crime long before the offences now under consideration were committed. D1 had previously, on 16 January, 2008, been convicted of theft under the same section. He had been fined $500.00 and had paid that fine.

D3 had a clear record.

The facts of the case were briefly as follows.

Charge 1

At about 1 am on 23 November 2014 D1 and D2 were in a car possessed by D1. D2, who was driving, parked near the house in question and, carrying a samurai sword, went to look at the premises. D1, carrying a machete, joined him. D2 after instructing D1 to go into the house, himself opened a window and went in. He then opened the main door to admit D1. In the house they stole 3 playstations, an Xbox console, a television set, a disc player, a home theatre and 4 speakers, 2 playstation controllers, a laptop computer, a digital photo frame and a watch. They took the stolen goods to the home of D2 who kept them all except a PS4 playstation console which D1 took home with him.

Charge 2

On the night in question, D1, D2 and D3 were driving round in D1's car, which was driven by D2. D2 parked the car and walked towards the house in question, followed by D1 and D3. D2 took a gas cylinder that was in the outer part of the house and passed it to D1 who was keeping a lookout. D2, using a machete, opened a window and entered, opening the kitchen door to admit D3. D1 later joined them and they stole some antique items, a pair of 'Vans' red shoes, a pack of Nescafe 3-in-one, a television set and a toy helicopter and remote control. The three culprits divided up the stolen items at the home of D2's mother and took them home. All D3 had was the Nescafe pack.

D1 was arrested on 26 November while D2 and D3 were arrested on 27 November 2014. They all admitted the offences to the police. All the stolen items were recovered except a playstation console, the watch, the digital photo frame, the disc player and the home theatre.

The Grounds of Appeal

Mohammed Shahlan bin Haji Chuchu (D1)

This appellant's grounds of appeal are stated to be that the sentence was wrong in principle, manifestly excessive and inappropriate in all the circumstances of the case. In a letter to this court he expressed remorse and repentance. He seeks a reduction in sentence. Before us he said that he needed to take care of his child while his wife was working

Mohammed Ezam bin Tuah (D2)

In a letter dated 12 October 2015 the appellant's wife pleads for a reduction in sentence because of the effect upon her of his incarceration. She is in poor health and has a child. She says that the appellant was employed and providing for the family from June 2015 until he was sentenced on the 3rd of October 2015. Before us also was a letter from D2 himself. In it he alleged that the DPP, saying that it was only a theft case and not a housebreaking case, asked him to plead guilty. His suggestion seems to be that he thought that only a housebreaking offence carried whipping and he had not damaged or broken anything so he pleaded guilty to theft. The DPP Ms Norhayati, who had appeared for the prosecution below, agrees that she did speak to the appellant in the presence of the investigating officer in order to explain his options as he was unrepresented but she denied asking him to plead guilty. Before us, the appellant agreed that the charge had been read and explained to him in open court by the judge before his plea was taken and we have no doubt that he was well aware of the charges he faced and of the contents of the agreed statement of facts. In answer to a question from the bench, Ms Norhayatie said that she was not aware of any guidelines from her department as to discussions with accused persons. If an unrepresented accused seeks advice a prosecutor would be well advised to leave it to the judge to explain matters to the accused in open court. Well-meaning advice might otherwise be misunderstood or even subsequently misreported.

Ak Khairul Hanif bin Pg Rosli (D3)

In a letter dated 19 October, 2015 the appellant's mother makes the following points.

1. He only stole 1 pack of Nescafe 3 in 1.
2. This was his first offence.
3. He is a quiet man who follows his friends because he is afraid of them.
4. She is lonely without the appellant.

In a written submission to this court this appellant says that he is stressed and remorseful. He lived with his widowed mother who had a heart ailment and depended on him.

Sadly, people with family responsibilities who commit crimes leading to their imprisonment do cause hardship to their innocent dependants but that hardship is brought about by their own conduct and it is a matter which the court will not normally take into account when considering sentence.

In approaching his task, the judge explicitly took account of the following mitigating factors.

1. That all three pleaded guilty.
2. That D3 was a first offender and
3. That some of the stolen items were recovered.

He also referred to what he described as aggravating factors, namely

1. The offences were committed at night.
2. The defendants blatantly committed the offence.
3. The offences were planned and premeditated.
4. They carry (*sic*) weapons while committing the offences.

We would observe that committing the offences by night was an essential element of the offence so it could not be described as an aggravating factor. We do not know what the judge meant by saying that blatant commission of the offences was an aggravating factor. That the offences were planned and premeditated was relevant to the assessment of the starting point after trial in a normal case. We do agree, however, that the carrying of weapons did take the case out of the normal run of housebreaking offences and could therefore be regarded as aggravating the offence and justifying an enhanced sentence.

D1 and D2 could not claim the benefit of having no previous convictions. They were clearly the prime movers in the criminal activity. The Public Prosecutor fairly observes that a sentence of four years on each charge is on the high side but submits that in all the circumstances it is justified. Weapons were carried on each occasion and though the judge noted the fact that there were guilty pleas he may well have considered that because they had only been tendered at a late stage a full discount could not be justified. When he went on to consider the totality principle the judge ordered the sentences to be concurrent and the strokes to be non-cumulative. The effective sentence was therefore four years imprisonment and 3 strokes. That was neither wrong in principle nor manifestly excessive. A serious view is taken by the courts of housebreaking and theft in dwelling houses at night. The carrying of weapons is an aggravating factor to be taken into account. The case against the appellants was strong.

So far as D3 is concerned, it is clear that he played a minor part in the offence to which he pleaded guilty. This is indicated in the share of the loot that he acquired. Nevertheless he must take the consequences of embarking on the joint enterprise of housebreaking with intent to commit theft. A man of previous good character, he co-operated with the police and pleaded guilty. The sentence he received was in the circumstances a normal one, neither wrong in principle nor manifestly excessive.

The appeals are dismissed.

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