PUBLIC PROSECUTOR

AND

PURWANTI JONG

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 22. of 2016)

Before: Mortimer P, Leonard and Burrell JJ A.
22nd November 2016

Headnote: *Sentence – breach of trust punishable under section 408 Penal Code - appeal by PP on ground that sentence manifestly inadequate - delay – inordinate delay, effect on sentence*

Held: Appeal allowed. Judge entitled to reduce sentence for inordinate delay but selected wrong starting point for sentence after trial.

DPP Mohd Abd Raafe' bin Hj Ibrahim for Appellant
Respondent in person

Cases referred to in the judgment

R v Barrick (1985) 81 Cr App R. 78
Mohd Noor bin Litoh v Public Prosecutor, Criminal Appeal No. 3 of 2005
Awg Ismail bin Sahari @ Abdul Hamid v Public Prosecutor, Criminal Appeal No. 12 of 2006,
PP v Hajah Kasmah Binti HJ Hashim, Intermediate Court Criminal Trial No. 1 of 2009,

Leonard, JA.:

On 15 September 2016 the respondent Purwanti Jong was convicted after trial in the Intermediate Court before Judge Abdullah Soefri on two charges alleging breach of trust, an offence punishable under section 408 of the Penal Code by imprisonment for up to 10 years and a fine. The total sum involved in charge 1 was B$30,727.44 and the period covered was May 2011 to April 2012. In charge 2 the breach of trust occurred in July 2012 and the sum involved was B$3,312.00

According to a statement of agreed facts, the respondent is an Indonesian National with no previous convictions. She is 37 years old. During the period when the offences were committed she was an employee of PDB Gamilang Sdn Bhd, working as an accounts clerk. Her duties were to attend to the necessary paperwork in order to obtain signed cheques drawn on the company's account and then deliver the cheques or, where she was required to cash the cheques, deliver the cash to those entitled to receive payment, against signed receipts. On some occasions Mr

Patrick Woo, the managing director, asked the respondent to cash a cheque for him. The first charge relates to the proceeds of 18 cheques and the second to one cheque.

It was discovered by Mr Woo that the respondent in breach of trust had failed to deliver to him the proceeds of the cheques to which the charges relate. When confronted, she gave to Mr Woo B$3,312 in cash representing the proceeds of the cheque to which charge 2 relates. She failed to pay back the rest of the money and Mr Woo made a report to the police alleging that she had "siphoned money".

With regard to charge 1, the judge selected 18 months imprisonment as a starting point. He then took into account the fact that the respondent had a clear record and had co-operated with the police. In addition he decided that a discount should be given in view of delay. Deducting one third in recognition of those matters he arrived at a sentence of 12 months imprisonment. On the second charge he took a starting point of 12 months but imposed a sentence of 6 months imprisonment consecutive to the sentence on charge 1, producing a total effective sentence of 18 months imprisonment.

With regard to the delay, a report was made by Mr Woo to the police on 1 October 2012 and the police investigation began. The respondent's first statement to the police was made on the 27th of October 2012. She was initially charged on 16 December 2014 with one offence of breach of trust. When she appeared before a magistrate the case was remitted to the Intermediate Court for trial. The respondent first appeared before the Intermediate Court on 13 January 2015 and before she was tried the charge sheet was replaced by the one containing the two charges. She was convicted of those charges and sentenced on 15 September 2016. Thus the delay from the start of the investigation to the eventual sentence was just short of 4 years.

The appellant agrees that the matters considered by the judge and described above were proper grounds for a reduction but argues that the starting point was too low and the size of the reduction was too great, no account having been taken of the complete absence of restitution of the B$30,727.44 the subject of charge 1.

So far as the starting point is concerned, the judge considered a number of cases. The DPP has pointed out that most of the cases cited in the court below were decided before the penalty was increased from seven years to ten years imprisonment and that in the light of more recent cases the starting point should have been between 3 and 4 years so that, allowing for delay, the resulting sentence should have been between 2 and 3 years on charge 1. It was further submitted that as both charges arose out of one course of conduct, the sentences on both should have been concurrent. Emphasis was placed upon the fact that the respondent had in committing the offences taken advantage of the trust placed in her by Mr Woo, who was on friendly terms with her.

In referring to the question of delay, the appellant was apparently led by a guideline in *R v Barrick (1985) 81 Cr App R. 78* to think that the only period to consider was that between the time when an offender was confronted with his dishonesty and the start of his trial. Such an approach might be appropriate in the context of the administration of justice in the courts of England and Wales but in this jurisdiction the inordinate delay in bringing proceedings to a conclusion after the offender's first appearance in court sometimes through no fault of the

defendant exceeds any pre-trial delay and that will be taken into account in this court in an appropriate case. It matters not to a defendant whether a delay which is not due to some fault on his or her part is caused, for example, by human error, lack of resources or maladministration: the effect upon him or her is the same.

The DPP has helpfully adverted in her submissions to a number of cases decided in the Intermediate Court since 1997 which do lend general support to its proposition that an appropriate starting point here would be 2 to 3 years. After reviewing several cases in *PP v Hajah Kasmah Binti HJ Hashim, Intermediate Court Criminal Trial No. 1 of 2009*, Judge Lim Siu Yen deduced from them, we think correctly, that

> "*The current trend is to impose a term of 2 years where the defendant pleaded guilty and where the amount misappropriated is small and there is no restitution*"

There can be no hard and fast rule. Each case must be considered in the light of its facts. This is evident if one considers such cases as *Mohd Noor bin Litoh v Public Prosecutor, Criminal Appeal No. 3 of 2005* where over a lengthy period a public servant faced 3 charges, having misappropriated sums amounting to $327,094.18. He pleaded guilty. A total effective sentence of 6 years, which implied a starting point of 9 years was reduced on appeal to 4 years, indicating a starting point after trial of 6 years. *In Awg Ismail bin Sahari @ Abdul Hamid v Public Prosecutor, Criminal Appeal No. 12 of 2006*, which was cited by defence counsel in the court below, another public servant faced 3 charges alleging that he had misappropriated sums of public money amounting to a total of $326,890.00. There had been a delay of 6 years and three and a half months between complaint and first appearance in court and there had been no satisfactory explanation. An overall sentence amounting to a total of 3 years and 6 months imprisonment had been imposed by the trial judge. On appeal, the overall sentence was reduced to 2 years and 6 months.

The court here and below was apprised of the fact that the respondent was Indonesian. She and her Malaysian husband have young children aged 9 and 11 years. The husband is presently employed in the building trade but the respondent says that the job is not secure. There may well be hardship if the respondent is in prison and her husband is left to manage on his own. It is a sad but not unusual fact that when offenders are imprisoned for their offences hardship is caused to the family but that is not something that the court can normally take into account in sentencing. The respondent appeared in person at the hearing of this appeal and provided a written statement in mitigation of sentence. We have read and considered a translation of that statement. She maintains that she is innocent and submits that a sentence of one year would suffice.

We have concluded that in the light of the facts of the case before us the sentence of 12 months on charge 1 was manifestly inadequate. An appropriate starting point for sentence after trial would have been 3 years imprisonment. From that one third, i.e. one year should be deducted in respect of the inordinate delay. We thus arrive at a period of two years. It has been the practice of this court that on allowing an appeal by the prosecution some allowance should be made for the additional stress and uncertainty it imposes on the respondent. For that reason in allowing the appeal we will substitute on Charge 1 a sentence of 18 months imprisonment.

The considerably smaller sum of money the subject of charge 2 has been refunded. Nevertheless the sentence of 6 months imprisonment was manifestly inadequate. We allow the appeal and substitute a sentence of 12 months imprisonment.

Since Charges 1 and 2 arise out of one course of conduct, it was wrong in principle to order that the sentences be consecutive. The order made below will be set aside and replaced by an order that the sentences be served concurrently. Though the overall effective sentence remains unaltered it was necessary to allow the appeal lest it be thought that the original individual sentences were considered appropriate.

Mortimer, P.

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