**UMJAH BIN MOHD SALLEH**

**AND**

**PUBLIC PROSECUTOR**

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**(Court of Appeal of Brunei Darussalam)**
**(Criminal Appeal No. 23 of 2018)**

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Before: Burrell P, Seagroatt and Lunn JJA
**Date of Hearing: 11 April 2019**
**Date of Judgment: 15 April 2019**

*Sentence: One charge of housebreaking by night for the purpose of theft, contrary to section 457 and three charges of theft in a dwelling, contrary to section 380 of the Penal Code. Breach of trust. Pleas of guilty and a clear criminal record. Totality. Appeal allowed.*

Appellant in person
DPP Raihan Nabilah Binti Hj Ahmad Ghazali and DPP Siti Nurjauinah@Karmila Binti Hj Kula for the Respondent

***Cases referred to in the judgment:***

*Daud bin Hj Zainal v Public Prosecutor [2004] 2 JCBD 162;*
*Md Ishan Bin Haji Sain v Public Prosecutor (Crim. App. No. 12 of 2013)*
*Haji Shahrul Alim bin Haji Sulaiman v Public Prosecutor (Crim. App. No. 11 of 2013)*
*Shamsuddin bin Mohammed v Public Prosecutor (Crim. Motion No. 4 of 2004)*
*Public Prosecutor v Muhammad Rayyan Adam bin Abdullah Mulok (Crim. App. No. 30 of 2016)*
*Public Prosecutor v Mohd Shalan Bin Samat (Crim. App. No. 6 of 2013)*

**Lunn, JA.:** (giving the Judgment of the Court)

1. The appellant appeals against the total sentence of 46 months' imprisonment and two strokes imposed on him by Judge Masni in the Intermediate Court on 4 December 2018, following his pleas of guilty to a charge of housebreaking with the intention of committing theft, contrary to section 457 of the Penal Code and three charges of theft of property on different dates in a dwelling, contrary to section 380 of the Penal Code.

*The charges*

2. By charge 1, it was alleged that between sunset and sunrise on a date unknown in November 2018 the appellant had entered a building used as a human dwelling,

namely unit 2, SPG 100-3, Jalan Serasa, Kg Serasa, for the purpose of committing theft, contrary to section 457 of the Penal Code. By charges 2 to 4, it was alleged that in the first half of November 2018 the appellant had stolen items of property from those premises. First, on a date unknown in November 2018, he stole an electric kettle, a pressure cooker and a clothes dryer (charge 2). Secondly, at about midnight on 13 November 2018 he stole four empty water dispenser bottles (charge 3). Thirdly, shortly after 5 a.m. on 14 November 2018 the appellant stole a Dell TV monitor and various items of bedding (charge 4).

*Statement of facts*

3. By the Statement of Facts, which the appellant accepted as the basis for the Court accepting his pleas of guilty to the four charges, the appellant acknowledged that he was aged 53 years and employed as a security guard, working between 23:00 and 07:00 hours, at the very premises at which the four offences were committed. He committed the offences whilst on duty. In respect of the offence the subject of charge 1, having established that the premises were empty, on a day unknown in November 2018 the appellant gained entry to the premises through a toilet window by the use of a ladder and stole a Sharp refrigerator, which he removed to his motor car. He left the front door to the premises unlocked.

4. The appellant committed the offences the subject of charges 2 to 4 during the night on three subsequent days in November 2018, entering the premises through the front door that he had left unlocked. The last offence was committed on 14 November 2018. That evening, the owner of the premises, who had been away from the premises since 3 August 2018, returned and having discovered that property was missing and damage had been done to his bedroom door, reported the matter to the police.

5. Having been arrested by the police, the appellant admitted having committed the offences. CCTV captured the appellant entering and leaving the premises with stolen property. All the stolen property was recovered from the appellant's home.

*Sentence*

6. In sentencing the appellant, the judge acknowledged that she took into account the appellant's pleas of guilty and the fact that the appellant had no criminal record.

*Discount of sentence*

7. The judge stated that, having regard to his pleas of guilty, the appellant was entitled to a discount of one-third from that taken as the starting point for sentence for each of the offences.

*Aggravating factors*

8. The judge said that it was an aggravating factor in the commission of the offences that the appellant was employed as a security guard engaged to safeguard the very house which he had entered first by breaking into the premises and from which he

had stolen property on that and subsequent occasions. That was a serious breach of trust.

*Starting point for sentence*

9. The judge said that, in determining the appropriate starting point for sentence, he had regard to the judgments of this court in *Daud bin Hj Zainal v Public Prosecutor* [2004] 2 JCBD 162; *Md Ishan Bin Haji Sain v Public Prosecutor* (Criminal Appeal No. 12 of 2013; unreported, 2 December 2013); *and Haji Shahrul Alim bin Haji Sulaiman v Public Prosecutor* (Criminal Appeal No. 11 of 2013; unreported 2 December 2013). Further, he said that he had regard to the fact that the appellant was a first offender and to his mitigation.

*Charge 1*

10. Having observed that the maximum punishment for the offence the subject of charge 1 was 15 years' imprisonment and whipping, the judge stipulated a starting point for sentence of four years' imprisonment, with two strokes.

*Charges 2 to 4*

11. Having noted that all the property that had been stolen had been recovered, the judge stipulated a starting point for sentence in respect of charges 2 to 4 of 12 months imprisonment.

*Sentence*

12. Stating that he discounted the starting point taken for sentence to reflect the appellant's pleas of guilty the judge imposed a sentence of two years and six months imprisonment, together with two strokes, in respect of charge 1 and eight months' imprisonment in respect of each of charges 2 to 4.

*Totality*

13. The judge said that, having regard to the principle of totality of sentence, he ordered that the sentences of imprisonment imposed in respect of charges 3 and 4 be served concurrently with each other, but that they be served consecutively to the sentences of imprisonment imposed in respect of charges 1 and 2. He said that, in the result, the total sentence imposed on the appellant was 46 months' imprisonment with two strokes.

*Notice of appeal against sentence*

14. In a Notice of Appeal filed with the court on 24 December 2018, the appellant's wife invited this court, having regard to the hardship resulting to the family from the imprisonment of the appellant, to reduce the sentence of imprisonment imposed on the appellant. She said that the burden of supporting the family now fell on her shoulders. Although she worked as a clerk, given that she was unable to drive because of her health, she encountered difficulties in being able to deliver all that was now required of her by her family.

15. In an undated letter to the court, the appellant expressed remorse at having committed the offences for which he was now imprisoned. He reiterated his wife's assertion that the burden of supporting the family, including three children who attended school, now fell on his wife's shoulders. In those circumstances, he invited the court to exercise compassion and reduce the sentences of imprisonment.

16. In his oral submissions to the court, the appellant informed the court that his wife had not been well in consequence of which his children had not attended school for seven weeks. However, acknowledging that his children were aged 18, 15 and 12 years, the appellant agreed that, given the children all attended the same school and his eldest child was 18 years of age, the eldest child was more than capable of escorting the other children to school, if necessary. Finally, the appellant repeated his request for the substitution of a more lenient sentence.

*The respondent's submissions*

*Housebreaking at night: section 457 of the Penal Code*

17. In his written submissions on behalf of the respondent, Muhammad Qamarul drew our attention to statements of this court in various judgments in which the seriousness of the offence of housebreaking at night, contrary to section 457 of the Penal Code was emphasised. In particular, our attention was directed to the statement of Burrell JA, as Burrell P was then, in *Shamsuddin bin Mohammed v Public Prosecutor* (Criminal Motion No. 4 of 2014; unreported, 20 May 2014) that: (page 5)

> *"Housebreakings at night are serious crimes. In a typical case a sentence of up to 5 years' imprisonment may be upheld by the court because of the distress and potential fear caused to home owners."*

18. However, it is to be noted that the court went on to state that, in the particular circumstances of that case, the starting point of 3 ½ years' imprisonment reduced to 28 months' imprisonment, for each of two offences of housebreaking at night of unoccupied premises, was "perfectly proper". Entry was achieved by breaking into the premises, causing damage to doors and windows. Jewellery was stolen and sold to goldsmiths for $1,000 in the first offence and property in excess of $16,000 stolen in the second offence, most of which was not recovered.

*Theft in a dwelling: section 380 of the Penal Code*

19. Having referred to the judgments of the High Court in *Public Prosecutor v Muhammad Rayyan Adam bin Abdullah Mulok* (Criminal Appeal No. 30 of 2016; unreported, 2 November 2016) and *Public Prosecutor v Mohd Shalan Bin Samat* (Criminal Appeal No. 6 of 2013; unreported 5 March 2013) counsel for the prosecution invited the court note that in the former case Steven Chong J, as Chong CJ was then, and Dato Seri Paduka Hj Kifrawi, CJ in the latter case, had said that the usual sentence imposed for an offence of theft in a dwelling house, contrary to section 380 of the Penal Code, on a plea of guilty for a first offender, was "12 months imprisonment". Nevertheless, counsel submitted that the sentences imposed by the

judge on the appellant for charges 2 to 4 were "well in line with the normal sentencing tariff".

*Whipping*

20. In an interchange with the President in oral submissions, Ms Raihan readily acknowledged that, given that the appellant was 53 years of age at the time sentence was imposed on 4 December 2018, the judge had erred in imposing a sentence of two strokes in respect of charge 1. To do so, was contrary to the provisions of section 258 of the Criminal Procedure Code, Cap. 7, which provides that males that the court considers to be more than 50 years of age shall not be punishable with whipping. It is most surprising that Mr Qamarul, who appeared for the prosecution at sentencing, did not draw the judge's attention to her mistake at the time of sentencing or acknowledge the mistake in his written submissions to this court.

*Discussion*

21. It is to be noted that no estimate of the value of the stolen property was provided to the judge. Ms Raihan explained that the prosecution had not provided the court with a valuation of the stolen property because the complainant had not provided such a valuation. On the other hand, she readily acknowledged that not only had all the stolen property been recovered but also it was in good condition.

22. Clearly, the judge was entitled to have regard to the fact that the offences were committed by the appellant in *"serious breach of trust"*, given that he was employed as a security guard to protect the very property that he stole.

*Charge 1*

23. Having regard to the aggravating factor of a serious breach of trust by the appellant, the starting point for sentence stipulated by the judge for charge 1, namely four year's imprisonment was entirely appropriate. It is to be noted that in the commission of that offence not only had the appellant gained entry by climbing through a window to the premises but also the appellant had left the doors to the premises unlocked, which enabled him to commit the offences the subject of charges 2 to 4 subsequently. However, having stated that the appellant was entitled to a discount of one-third for his plea of guilty, the judge fell into error in sentencing him to 2 years and six months imprisonment for charge 1. That sentence ought to have been two years and eight months imprisonment. Equally, given that the 53 years of age at the time of sentence, the judge fell into error in ordering that he receive 2 strokes.

*Charges 2 to 4*

24. In our judgment, counsel for the prosecution was correct to acknowledge that the sentences of eight months imprisonment imposed on the appellant for charges 2 to 4 were appropriate having regard to the particular circumstances of the commission of those offences, in particular that it was in the commission of the offence the subject of charge 1 that the appellant had left the doors to the premises

unlocked and that when he committed the offences of theft he did so knowing the premises to be unoccupied. Also, all the stolen property was recovered.

25. Clearly, the thefts the subject of charges 2 to 4 fall to be be regarded as one criminal enterprise. It appears that, if he had wished to do so, the appellant could have stolen the property the subject of those three charges on one occasion rather than three occasions. The fact that he did so on three separate occasions added nothing to the criminality. In those circumstances, it was appropriate to order the sentences of eight months imprisonment imposed on charges 2, 3 and 4 be served concurrently with one another.

26. On the other hand, in having regard to the principle of totality, the judge was entitled to order that those sentences be served consecutively to the sentence of imprisonment imposed in respect of charge 1.

27. Given the errors that the judge fell into in imposing sentence, we approach sentencing afresh. We quash the sentence of two years and six months imprisonment with two strokes imposed in respect of charge 1 and the order that the judge made that sentences imposed on charges 3 and 4 be served "consecutively with the 1st and the 2nd charge." In fact, the judge made no express order that the sentence of imprisonment imposed in respect of charge 2 be served consecutively to the sentence of imprisonment imposed in respect of charge 1. Certainly, none was endorsed on the Warrant of Commitment signed by the judge, addressed to the Director of the Prison at Maraburong, dated 4 December 2018.

*Conclusion*

28. In respect of charge 1, we substitute a sentence of two years and eight months imprisonment. We order that the sentences of eight months' imprisonment imposed in respect of charges 2, 3 and 4 be served concurrently but that those sentences be served consecutively to the sentence of imprisonment imposed in respect of charge 1. Accordingly, the total sentence imposed on the appellant is three years and four months' imprisonment.

**Burrell, P.**

**Seagroatt, J.A.** **Lunn, J.A**