

KHAIRUL BIN HAJI KULA

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 24 of 2014)**

ABDUL HADZI BIN HAJI KULA

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 25 of 2014)**

PUBLIC PROSECUTOR

AND

**KHAIRUL BIN HAJI KULA
ABDUL HADZI BIN HAJI KULA**

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 26 of 2014)**

Before: Mortimer P, Leonard and Burrell JJ A.
25th of November, 2014

DPP Dk Siti Nurul Fairuz Pg Rosli (Public Prosecutor) for Appellant/Respondent
Appellant/Respondent (Khairul bin Haji Kula and Abdul Hadzi bin Haji Kula) in person

Mortimer. P:

Criminal Appeals 24 and 25 of 2014

The appellants in these two appeals were joint offenders in the same two charges, they were tried together and given identical sentences by the judge. We heard these two appeals together. The appellant in Criminal Appeal number 24 is the first appellant, the appellant in Criminal Appeal number 25 is the second appellant.

On 15 October 2014 the appellants, who are brothers, appeared before HHJ Hanani in the intermediate court, and pleaded guilty to 2 offences.

The first was theft, on 15 September 2014, of 4 alloy wheels from a workshop. For this offence they were each fined \$2000 with one week to pay and 8 weeks imprisonment in default. They sold the wheels for \$36 which they divided between themselves. Three of the wheels were later recovered.

The second offence was house trespass with intent, on 3 October 2014. They entered an unoccupied house taking with them the second appellant's three children aged seven, five and two. They were in search of food and drink for the children. For this offence they were each sentenced to a \$1000 fine with one week to pay and four weeks imprisonment in default.

The person looking after the unoccupied house noticed the appellant's car outside. He armed himself with a machete and confronted the appellants who apologised for going into the house. They were told to stay there pending the matter being reported to the police but when the person confronting them left to make the report they made their escape in the car. They were soon arrested when they admitted the offences at once saying that they had gone into the house in search of food and drink, presumably for the children, who were in the second appellant's care because of marriage difficulties.

Sentencing

The judge determined that in all the particular circumstances of the case she would extend leniency to the appellants by not passing a custodial sentence. She therefore imposed the total fines of \$3000 on each with one week to pay and a total of twelve weeks imprisonment in default. At the expiry of the week she gave them a return date on 23 October for them to return to the court.

She noted that in the second charge the final description of the offence was erroneous. The words are "*both of you have committed an offence of criminal trespass under section 442 punishable under section 448 of the Penal Code*" whereas the offence was house trespass under those sections.

She said that as the words were ambiguous she would read the ambiguity in favour of the appellants and read the charge as that of criminal trespass under section 441 punishable under section 447 of the Act. House trespass carries a maximum sentence of three years imprisonment whereas criminal trespass only carries a maximum of one year. However, as she makes clear in her further reasons, she had determined in any event to pass a lenient non-custodial sentence.

When mitigating the first appellant explained his financial position. With allowances he earned about \$1500 per month. Out of this however there were substantial deductions including over \$400 per month for his car. He was left with about \$500 to support his wife and three children.

He expressed considerable remorse and explained that he was the only person looking after his children at the time.

The second appellant's financial position was not clear. He appears to have been unemployed assisting his father in his business selling rice for which he received \$300 a month. He also expressed remorse and regret saying that he appreciated that whatever happened it would affect the future of both the brothers and their children.

Neither appellant has previous convictions.

On the question of time to pay the Public Prosecutor submitted that a longer grace period than a week ought not to be given 'for deterrence'. The judge exceeded saying:

"One week grace period to pay up. Next mention date on the 23 October 2014 at 2 PM. If they had paid beforehand, you should inform court to vacate the date."

The 23 October 2014

On this day the two appellants arrived at court to appear at the time fixed by the judge. They had been unable to pay the fines or any part of them. According to their submissions before this court they wanted to ask the judge for further time to pay but having told the interpreter that they had been unable to pay there was no hearing. This account is supported because the same day they came to the registry and filed letters accepted as notices of appeal asking this court to vary the sentences by granting further time to pay. They had in mind asking the judge for a stay of execution pending appeal. In the event none of this happened because they had no hearing and on return to the intermediate court they were arrested for non-payment of the fines.

They have since been in prison and have now served one month of the default sentences.

Fines as Punishment

Before we go further it is necessary to say something about fines as a punishment. We leave aside small fines for minor offences for which there is a standard tariff. For more serious offences, such as in this case, the court has regard to the size of the fine imposed compared with the ability of the accused person to pay as well as the nature of the offence. The reasons are trite. The severity of such a sentence depends upon the ability of the accused to pay. A small fine on a poor man may be severe punishment whereas a substantial fine to a wealthy man may be insignificant.

Further, it is contrary to principle to impose a fine of such amount and with a period of time to pay with imprisonment in default if it is certain, or highly likely, that the fine cannot be paid and imprisonment will result. This would be passing a sentence of imprisonment dressed up as a fine whereas the court's intention when imposing a fine for a serious offence is to avoid passing a custodial sentence.

In the instant appeal when all the information before us is considered it appears that it was near certain that the appellants would not be able to pay within the time given – or possibly within any reasonable time. It was equally certain that in the absence of further time to pay the sentences in default would be served. This is what has happened.

Conclusion

The consequence is that we are presented with a difficult sentencing problem. Both the appellants must now be out of work and in a far worse position than they were at trial. There would be no purpose in giving them time to pay even with reduced fines because they have no income save perhaps for the doubtful prospect of about \$300 a month for helping their father in his business.

Both appellants are of good character, the shock and punishment of going to prison must have been great. In the particular circumstances the best we can do is to reduce the total period of imprisonment in default imposed by the judge to one of such length as will involve their immediate release. Serving this sentence is in lieu of payment of fines which in the particular circumstances of these offenders and these offences were wrong in principle.

Order

The appeal is allowed in part. The total periods of imprisonment in default of payment of the fines of 12 weeks is reduced to such length of sentence as will involve both appellants' immediate release.

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The Public Prosecutor wrongly assumed that the appellants had been acquitted of the second charge and she seeks to appeal against the acquittal. The record before this court is clear. There was no such acquittal. Both appellants pleaded guilty to house trespass under section 442 punishable under section 448 of the Penal Code. These pleas were never withdrawn and the conviction stands. At most the judge indicated that she would sentence 'as if' the appellants were guilty of a lesser offence. The Public Prosecutor's appeal therefore falls to the ground and is dismissed.

Order

The Public Prosecutor's above appeal against an acquittal is dismissed.

Mortimer, P.

Leonard, J.A.

Burrell, J.A.