

**SHAHRUL RIZAM BIN HAJI RAMLEE**

**AND**

**PUBLIC PROSECUTOR**

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**(Court of Appeal of Brunei Darussalam)  
(Criminal Appeal No. 25 of 2016)**

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Before: Mortimer P, Burrell and Seagroatt JJ A.  
**18<sup>th</sup> May 2017**

*Headnote: Appeal against conviction for breach of trust offence, s. 419 of the Penal code,  
and against sentence, dismissed*

**Criminal Appeal No 25 of 2016**

Mr. Ahmad Zakaria bin Haji Mohammad (Messrs Ahmad Zakaria & Associates) for  
Appellant  
DPP Yvonne Lim Swee Twan for Respondent/Public Prosecutor

**Criminal Appeal No 27 of 2016**

DPP Yvonne Lim Swee Twan for Appellant/Public Prosecutor  
Mr. Ahmad Zakaria bin Haji Mohammad (Messrs Ahmad Zakaria & Associates) for  
Respondent

**Seagroatt, JA.:**

The Appellant, a 38 years old public servant employed by the Department of Islamic Studies at the Ministry of Religious Affairs as a secondary school Registrar, was convicted after trial before Judge Muhammed Faisal bin Haji Kefli on the 3<sup>rd</sup> November

2016 of an offence of breach of trust in respect of total sum of B\$86,344.77 over a period of time between 25 July 2011 and 2 April 2012.

For this offence he was sentenced to a period of 3 years imprisonment on the 8<sup>th</sup> November 2016.

He appeals against this conviction by way of Notice of Appeal dated 17 November 2016.

The Public Prosecutor appeals against the sentence imposed on the ground that it is manifestly inadequate, by way of Notice of Appeal dated 30 November 2016.

### ***The prosecution case from the Statement of Agreed Facts***

The appellant's position at the Zakat Fitrah Collection and Distribution Unit of the Belait District to which he had been seconded involved responsibility for the collection of Zakat Fitrah money submitted by its collectors (known as "Amil") and banking it at the HSBC.

The money concerned was collected from the public from the sale of rice. Each collection is recorded in a receipt book and a copy is given to the payer.

Once collected the money is handed over to the officer of the Zakat Collection and Distribution Section. The Zakat collector concerned has about 3 weeks within which to hand over the money to the said officer of the section.

Upon receiving the money the officer double checks the amount of the money and records it in a book at the section.

It is then deposited into the HSBC account of the Department of the Islamic Religious Council at the said bank. The bank then issues a slip recording this, which is attached to the collector statement and sent to the Treasury Department at the district from which the money has been collected.

In February/March 2012 the Council Committee concerned visited the Belait Department office to inquire about the district's collection money for 2011. The appellant was present during the visit.

On 10<sup>th</sup> April 2012 the appellant met with the Secretary of the Department of Islamic Religious Council to lodge a report concerning the amount of the collection money for the Belait district, totaling B\$86,344.77 which went "missing" in November 2011. The defendant admitted that he was responsible for the "missing" money and undertook to repay it from the sale proceeds of his house. He said the money had "gone missing" from his house in November 2011. This was minuted at the time.

When investigated by the Anti-Corruption Bureau he also admitted that the total amount had disappeared whilst in his possession.

The use of the word "missing" in the Statement of Agreed Facts was relied upon by the Defence as having particular significance. The prosecution had originally drafted the word "misappropriated" to which the Defence took objection as a result of which the words "was missing" were substituted. If the Defence had accepted the word

“misappropriated” that would have been the end of any defence. “Missing” was a neutral term leaving open for consideration, evidence and argument the circumstances under which the money went missing. Defence Counsel tried to submit that the prosecution had thereby agreed that the Defendant had not misappropriated the money. That is nonsense.

A second submission was equally without substance. It concerned the effect of paragraph 11 of the Statement of Facts in which was stated the defendant – *“by trying to sell.....his sister’s land”* had made efforts to repay the money.

It was argued that the prosecution’s contention that the sister’s evidence could not be relied upon was inconsistent with the agreed facts. It is true that the prosecution challenged the sister’s evidence as to the genuineness of the efforts to sell the land, but that in itself does not go behind the agreed fact in its very limited context. The materiality of the agreed fact is that the prosecution accepted that he had made some efforts, however limited or ineffective, to realise funds with which to repay the “missing” money. They were hardly material to the circumstances under which the money became missing. Far more material was the defendant’s explanation as to how he came to take to his home such a large sum of money and keep it there, if indeed he did, instead of dealing with it in the normal, secure and stipulated fashion. Equally pertinent was the fact that when he discovered the money was missing from his home he failed to report the “loss” to the Police. Since he gave no evidence at trial there was no evidence from him to answer directly any of the obvious questions arising from the way he had dealt with the money from the time of collection to the time of the investigations.

Mr Ahmad Zakaria made a number of other submissions on behalf of the Appellant some of which we will deal with.

A written statement had been obtained by the Police from the Appellant’s wife in which she stated, amongst other things, that the appellant was an honest and trustworthy person and that she was convinced that he did not steal or take the Zakat money and convert it to his own use. The appellant’s counsel at his trial did not call his wife to give evidence but managed to persuade the prosecution to admit her statement as a defence exhibit. In effect she was no better than a character witness giving vent to an understandable highly biased view of her husband’s innocence.

Mr Ahmad Zakaria sought to argue that the prosecution’s concession to the admission of this document amounted to an acceptance that the contents were true. This is untenable. The criticism of the trial judge on this point is equally baseless.

During the trial evidence was given by the one of the officers in the Zakat section that the appellant told the committee that the money was missing. This witness then gave on the 20<sup>th</sup> April 2012 notice by letter extending the time for him to repay the money, until 30<sup>th</sup> April. Upon the appellant’s failure, even with that extension, the witness wrote to the ACB for it to investigate the matter. He was asked in cross-examination whether he would have written that letter to the ACB if the money had been repaid. After hesitation he said he would not. This was followed up by the defence counsel suggesting on that premise that the witness believed the explanation that the money was missing from the defendant’s house, with which the witness agreed.

This was of no consequence. Time passed by and the appellant still failed to repay the money. The suggestion – whatever it really amounted to – was pointless. At some stage it was obvious that the Belait officials were prepared to accept the appellant's explanation that the money had gone missing from his house, perhaps out of a sense of wishful thinking and a degree of hope that the money would be restored. When it was not, any provisional acceptance of his story evaporated.

At the time of the inquiry into the records at the Belait Division's premises he failed to make any mention of the "missing" B\$86,344.77. Since he chose not to give evidence there was no evidence from him as to why he chose not to use the safety deposit box at the Belait Division, or why he decided to take the money back to his residence for counting or organizing, or why he chose not to bank the money.

### ***The Judgment***

All the foregoing factors of significance were considered by the trial judge and are reflected in his written judgment.

The judge had been presented with the following scenario. A public servant had been entrusted with a significant sum of money which had been collected on behalf of his employers and in respect of which there was a simple protocol for its handling and safe transfer to the bank.

When attention was first drawn to the fact that there was no record of the money collected (and receipted) being deposited at the appropriate bank he failed to declare that he had taken the money home and that, on his version, it had gone missing.

The defendant's failure to give evidence is not of itself proof of the allegations against him. He is not obliged to give evidence and the onus remains throughout on the prosecution to prove the case against him. But having chosen to remain silent there is no evidence from him to set against the prosecution evidence and rebut the inferences which can properly be drawn from all the evidence which had been adduced and subjected to cross-examination.

An adverse inference can properly be drawn against him where the prosecution's evidence requires rebuttal and none has been forthcoming.

The prosecution's case is a strong even overwhelming prima facie case. Much of its strength is derived from the facts agreed by the defendant himself. Those facts having been agreed, the remaining issue for the defendant was to explain why and how he handled the money which he had, at the very least imprudently, taken to his home, for no good reason, instead of complying with the established protocol and depositing it in the bank thus safeguarding it; and thereafter taking no sensible steps to report its loss, in view of his initial explanation which came late in the day, and which he has failed to confirm on oath. The evidence pointed inevitably to this appropriation and therefore breach of trust.

The judge was entitled to draw this inference. On the facts of this case there was no other reasonable conclusion to be drawn. The defence contention verged on the preposterous.

The conviction is affirmed and this appeal is dismissed.

### ***The Appeal against sentence***

The trial judge imposed a sentence of 3 years imprisonment.

He clearly noted the appellant's previous good character, expression of remorse, and the fact that proceedings were not commenced until May 2015 a delay of just under 3 years. This last point is double-edged since time was clearly accorded to enable him to repay the money if he could.

The other points were of limited value. He had committed a substantial breach of trust which may well have reflected adversely on others involved in the collection process. He had failed notably to be forthcoming with information both before trial, and by declining to give evidence.

The sentence is entirely justified and the appeal is therefore dismissed.

There remains however the prosecutor's appeal in relation to the sentence on the basis that it is manifestly inadequate. The more specific grounds relied upon are what are described as aggravating factors:

1. This was a substantial breach of trust.
2. There has been no restitution.

Others were alleged as follows:

- a) Failing to lodge a police report;
- b) Failure to report to supervisors;
- c) Failure to place the money collected into safety boxes.
- d) Taking the money to his house.

These are not aggravating factors but circumstances which went to the offence charged and which obviously undermined his defence.

The prosecution complained that the judge failed to take into account that no restitution had been repaid. This is not strictly accurate. The judge made an oblique reference to this in his sentence.

*".....The defendant family has tried to repay the monies lost, but has failed to do so."*

A more appropriate point would be that by virtue of his inactivity and lack of cooperation, no sensible explanation was advanced as to where the money had gone. The reasonable inference is that he used the money or has managed to secrete it somehow.

One point which the judge properly took into account by way of mitigation was the delay between the matter being reported to the police in September 2012 and the appellant appearing in court for the first time on 30 May 2015, a lapse of 2 years 8 months. The prosecution conceded this point and that there was no reasonable excuse. There was a further delay between the first court appearance on the 30 May 2015 and

conviction after a short trial in which he did not give evidence, on the 3 November 2016. He was sentenced on the 8 November 2016.

The overall period of delay was just over 4 years. This is wholly without justification. The comparison with another case concerning the length of delay in the context of the punishment is quite pointless.

The same case is relied upon by the prosecution as support for submitting that the discount given by this judge was excessive. Again, reference to that case is unhelpful.

We have concluded that although the sentence of 3 years is arguably on the light side it is not manifestly inadequate and we should not interfere with it. Accordingly the Respondent's appeal is dismissed.

**Mortimer, P.**

**Burrell, J.A.**

**Seagroatt, J.A**