

ABD AZIZ BIN HAJI ALI

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 27 of 2014)

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

Appellant in person
DPP Ratno Eddy Sophian Hj Zaidi for Respondent

Cases referred:

Mohammed Joll bin Tumih v Public Prosecutor [2007] BLR 183 at 190
Mohammed Ibrahim V Public Prosecutor [Cr. App. Number 8 of 2004]

Mortimer. P:

On the 23 October 2014 the appellant pleaded guilty before HH Judge Abdullah Soefri in the Intermediate Court to 5 offences. Two offences of housebreaking by night (section 457 of the Penal Code); one offence of theft of a motorcycle from a building used for the custody of property (section 380) and 2 offences of theft; one of a licence plate from a motor car, the second of another motorcycle. The two offences of theft of motorcycles were committed on 2 August 2014; one offence of housebreaking and the theft of a licence plate were committed on 14 October 2014 and the second offence of housebreaking on 18 October 2014.

The appellant has an appalling record of previous dishonesty involving similar offences going back to 1991 and ending with a sentence of 4 years imprisonment in 2001 and 5 years imprisonment in 2005.

The sentences

The judge imposed a total sentence of 9 years imprisonment with 6 strokes which he reduced from 10 years and 4 months imprisonment and 6 strokes for the appellant's guilty pleas.

The sentences for the individual offences were 4 years and 3 months and 3 strokes reduced to 2 years and 8 months for each count of housebreaking (1 and 3). For the theft in a building (charge 4), he imposed 3 years imprisonment reduced to 2 years and for each of the 2 thefts he imposed 2 years imprisonment reduced to 16 months.

He ordered the 16 months imprisonment for each of the 2 theft charges to run concurrently but consecutively to each of the 2 sentences of 34 months and 3 strokes for housebreaking and the 24 months for theft in a building. This made the total of 9 years imprisonment and 6 cumulative strokes.

The Judge's Reasons

The judge noted the well-recognised serious nature of housebreaking offences. He noted that the facts were disturbing in that the offences were committed at night in occupied houses causing fear and distress to the householders. He was satisfied that the appellant was a threat to society which needed protecting. Underlining the seriousness of the offences he cited cases from England and Wales, Malaysia and Singapore to show that such offences are regarded very seriously in other jurisdictions he also rightly noted without citing them that there were many decisions of this court on the appropriate length of sentence and the serious nature of the housebreaking offences. When considering previous authority he noted:

“There are many cases which have been laid out by the Court of Appeal on the appropriate length of sentences in our jurisdiction. This I have taken into account. I would like to highlight the sentences that are imposed by other jurisdictions based on the principles that I have highlighted above.”

We will return to consider this reference to non-binding decisions in other jurisdictions.

The appeal

Having regard to his previous convictions the appellant is not entitled to any discount for good character nevertheless he asks for the sentence to be reduced as he says that it is manifestly excessive and he contends that he is entitled to the usual reduction for his timely pleas of guilt. He expresses remorse and an intention not to re-offend.

Discussion

Apart from the sentence of 2 years imprisonment reduced to 16 months on count 2 for the theft of a licence plate, which is excessive for this relatively minor theft, the individual sentences for each offence are appropriate in the circumstances. The appropriate sentence for the theft on charge 2 is 9 months imprisonment reduced to 6 months for the plea.

However, the central issues in the appeal are whether the total sentence imposed is manifestly excessive and whether the appellant has received the proper discount of one third from the total to which he is entitled.

The judge had to consider the overall criminality of these 5 offences including 2 housebreakings by night taking care not to increase the sentence in respect of his past record. That would be punishing him twice. He was mindful that the appellant could not advance any mitigation for previous good character and expressions of intent not to re-offend and of remorse could be given little weight.

The seriousness of the housebreaking offences is well-recognised. They are premeditated often professional and organised and nearly always valuable easily disposable property is taken. The

gains from the offences are easy and householders are put in fear and distress. As this court has recognised on many previous occasions deterrent sentences are necessary.

The most difficult aspect of sentencing for several offences is assessing the totality. It is not surprising that foreign jurisdictions also regard housebreaking as very serious and the judge's purpose in citing foreign cases is unclear. Indeed local conditions, sentencing and tariff regimes in foreign jurisdictions are different and such cases can be very misleading. For example section 307 of the Singapore Criminal Procedure Code provides:

-(1...if at one trial a person is convicted and sentenced to imprisonment for at least 3 distinct offences, the court before which he is convicted must order the sentences for at least 2 of those offences to run consecutively.

We have no similar provision.

There can be benefit in considering principles developed in foreign jurisdictions but great care is required. As the judge noted in this jurisdiction there are many relevant decisions on the approach to totality in this court. See for example: *Mohammed Joll bin Tumih v Public Prosecutor* [2007] BLR 183 at 190 and *Mohammed Ibrahim V Public Prosecutor* [Cr. App. Number 8 of 2004]. Attention is drawn in these cases to the duty of the sentencer to avoid passing an excessive total sentences when dealing with multiple offences. It is also worth noting that this court is bound by its previous decisions as are the lower courts.

It is good practice and also helpful when considering totality to state the starting point of the total sentence. Often when this is done it becomes clear whether the total sentence is appropriate or not.

Conclusion

The total sentence passed by the judge of 9 years and 6 strokes involves a starting point of 13 ½ years imprisonment and 9 strokes. Once stated this becomes obviously manifestly excessive for 2 housebreakings and 3 rather less serious offences.

The appellant's one mitigation is that he immediately pleaded guilty. Following the policy of the court he is entitled to a one third reduction from the starting point. In proper cases this policy should be followed. It is of great benefit to the administration of justice as well as the defendant.

In all the circumstances the appropriate starting point for these offences and this offender is 9 years imprisonment and 6 strokes. Giving weight to the pleas these sentences must be reduced to a total of 6 years imprisonment and 4 strokes.

This sentence is achieved by ordering that the sentences on each of charges 1 and charge 3 of 34 months shall be consecutive and 4 months of the 24 months imprisonment on charge 4 shall also be consecutive. The balance of the sentence on charge 4 and the sentences on charges 2 and 5 will be served concurrently with the sentence on charge 1 making 6 years imprisonment in all.

Turning to the strokes. 1 stroke on charge 3 will be cumulative with the 3 strokes on charge 1 otherwise the strokes on charge 3 will be non-cumulative making 4 strokes in total.

Orders

1. The appeal against sentence is allowed.
2. The sentence of 34 months on charge 1 will be served consecutively with the 34 months imprisonment on charge 3 and consecutively with 4 months of the 24 months imprisonment on charge 4. The balance on charge 4 the sentences of 6 months imprisonment on charge 2 and 16 months imprisonment on charge 5 will be served concurrently and concurrent with the sentence on charge 1 making 6 years imprisonment in all.
3. On charge 3, 1 stroke of the 3 strokes imposed will be cumulative with the 3 strokes on charge 1 and otherwise will be non-cumulative making 4 strokes in all.
4. The total sentence to be served is 6 years imprisonment with 4 strokes.

Mortimer, P.

Leonard, J.A.

Burrell, J.A