

MUHAMMAD ZAAKIRIN BIN RAHIM

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 3 of 2016)**

Before: Mortimer P, Burrell and Seagroatt JJ A.
12th May 2016

Headnote: Appeal against total sentence of 5 years imprisonment with 2 strokes after pleas to 7 offences of dishonesty to support a drug habit. A persistent, opportunist, small-time offender. Offences not professional. Offences began shortly after his release from prison for similar offences but has realistic support from family to assist him when released. Appeal allowed against total sentence. Reduced to 3 years and 4 months with 2 strokes. Exceptional case.

Applicant in person
DPP Dk Hazirah Pg Mohd Yusof for Respondent

Cases cited:

Wahid bin Mazid v Public Prosecutor (Crim. App. No 9 of 2014)
Ahmadi bin Hj Nawawi v Public Prosecutor (Crim. Motion No 1 of 2015)
Mohammad Zul Asnawi bin Hj Asmad v Public Prosecutor (Crim. App. No 5 of 2015)
Mohammed Joll bin Tumih v Public Prosecutor (Crim. App. No.5 of 2005)
Doni Hardi bin Hj Maidin v Public Prosecutor (Crim. App. No 16 of 2012)
Haji Shahrul Alim bin Haji Sulaiman v Public Prosecutor (Crim. App. No 11 of 2013)

Mortimer P.

The appellant appeared before HHJ Pg Hanani on 4 April 2016. He pleaded guilty to 7 offences of dishonesty and was sentenced to a total of 5 years imprisonment with 2 strokes. He appeals against this sentence contending that in all circumstances it is manifestly excessive.

The appellant has previous convictions for dishonesty and was last released from prison in November 2015.

The seven offences to which he pleaded guilty were as follows:

1. Housebreaking and theft on 16 December 2015 contrary to section 451 of the Penal Code. He saw a bicycle in a house. He prised open a sliding window gained entry, and stole the bicycle which he sold for \$20.
2. On 21 January 2016 simple theft contrary to section 379 of the Penal Code. He was riding a blue bicycle when he saw a grey one parked at a house. He stole the grey bicycle and left the blue one in its place. The grey bicycle was later recovered.
3. On 30 January 2016 simple theft contrary to section 379 of the Penal Code. He went to a business address and walked through an unlocked gate where he found a black mountain bicycle left outside the building. He stole the bicycle and sold it for \$20. He used the proceeds to buy drugs.
4. On 8 February 2016 theft in a dwelling house contrary to section 380 of the Penal Code. The appellant entered the house through an unlocked back door and inside he stole \$224, two small amounts of foreign money and a mobile phone. He then returned home where his mother became suspicious and reported him to the police. The police came to the house and recovered the stolen goods.
5. On 16 February 2016 theft in a dwelling house contrary to section 380 of the Penal Code. Once more the appellant went into a house through an unlocked door and took \$30 from the maid's wallet and a set of 4 keys. He used the money to pay a debt.
6. On 9 March 2016 theft in a dwelling house contrary to section 380 the Penal Code. He walked into a staff house through an unlocked door into one of the upstairs rooms and stole \$12 and \$20 in cash.
7. On 10 March 2016 house trespass contrary to section 451 of the Penal Code. The appellant walked into the same staff house and open the door into an upstairs room which was occupied. He said that it was looking for someone, closed the door and ran away. He was chased by other occupants caught and detained.

Sentence

The judge passed the following individual sentences:

1. Offence 1 under section 454 of the Penal Code: 36 months and 3 strokes reduced to 24 months and 2 strokes for the plea.
2. Offence 7 under section 451 of the Penal Code: 30 months reduced to 20 months.
3. Offences 4, 5 and 6 under section 380 of the Penal Code: 24 months reduced to 16 months on each.
4. Offences 2 and 3 under section 379 of the Penal Code: 18 months reduced to 12 months on each.

She then ordered the 24 months on the first offence, the 16 months on the 5th of offence and the 20 months on the 7th offence to be served consecutively with the balance concurrent making 60 months and 2 strokes in all.

In determining her sentence the judge noted in particular the appellant was 32 years old and unemployed. He had previous convictions of theft for which he was released only in November 2014. He resumed offending in December. His motivation was to feed a drugs habit. Prison had not reformed him and he continued committing offences even after his mother called the police on 8 February 2016. The judge took into account that the stolen items were of relatively small value but noted that trespassing into houses was involved.

The appeal

The appellant asks that his total sentence be reduced on the grounds that it is manifestly too severe. He has always readily accepted his guilt and is remorseful. His offending was to support a drug habit which he is now determined to overcome. He accepts that this will not be easy. He invites our attention to a letter from a member of his family. In this we are invited to consider reducing the sentence on the basis that he will receive treatment and advice in prison for his drug problem. We are invited also to note that the cash stolen was not substantial and that the drugs bought were not for daily use. We take this to indicate that he was not severely reliant upon them. A reduction in sentence would allow the appellant to return to his family which can give him *"therapy and continuous rehabilitation and awareness"*.

The DPP, Mme Hazirah, submits that the overall sentence is appropriate having regard particularly to the appellant's persistent offending which began so shortly after he was released from prison for similar offences. She has invited our attention to a number of relevant previous decisions of this court in which we have considered similar individual offences to which an appellant pleaded guilty as well as the proper approach to the total sentence to be imposed.

Relying upon these decisions she submits that the sentences for the individual offences are appropriate in the circumstances. She concedes that in some instances individual sentences may be high within the proper scale but in each case the judge determined a proper starting point and gave the appropriate discount for the plea. Further, she points out that when considering the overall sentence for the criminality involved the judge has totality in mind and having considered both the nature of the offences and the offender the judge passed a substantial sentence but certainly not one which is manifestly excessive.

Discussion

As the judge noted the property taken by the appellant was modest in value. The serious aspects are the persistence of the offences after the police had become involved, the trespassing into private property and committing the offences so soon after leaving prison for similar offences. On further examination however, it is clear that none of the appellant's offences is professional in nature. This is in stark contrast to the offences considered by this court in each of the decisions cited. Any offence concerning trespass in a home is serious but in the scale of culpability for this type of offence the instant offences are low. What is more, the offences show that this appellant is far from being a professional thief nor is he in any way dangerous. He is a persistent, opportunist, small-time offender who takes or makes small sums of money to support a drug habit. Even the drug habit must be relatively minor if supported by the amounts taken.

Bearing these matters in mind the DPP was realistic in her concession that the sentences for the individual offences were high within the proper scale. They were. However, our main concern is the total sentence imposed.

Having considered the nature of the offences we now consider the appellant, the offender. So far imprisonment has failed either to deter him, persuade or help him to abandon drugs or to succeed in living a productive honest life. He now expresses remorse and good intentions for the future. We are inclined to accept these protestations as genuine but, in the circumstances, can give them limited weight.

We give some weight however to his family circumstances. From the letter he has put before us it is clear that he has a family which is not only supportive but realistic. While asking for a reduction of the sentence this member of the family recognises "*the prison department has methodology in place to instil awareness and rehabilitation as well as self-confidence*". And in relation to the drug habit, "*the prison department can mould a positive personality even though the imprisonment term is reduced.*" We note also that the appellant's mother was quite prepared to report him to the police when she became suspicious of some stolen items.

Having specified the starting point after trial for each sentence passed for the individual offences the judge overlooked specifying the starting point when considering totality. This court has emphasised the advantage to the sentencer of specifying the starting point when dealing with multiple offences on many occasions over the past 10 years. See for example *Mohammed Joll bin Tumih v Public Prosecutor (Crim. App. No.5 of 2005)*. The danger to be averted is that when dealing with multiple offences a defendant can easily be deprived of the advantage of his pleas if the starting point for the overall criminality of the offences is not first specified. We note in passing that the policy of a one third reduction in sentence for early pleas of guilty is successful and of considerable advantage to the administration of law

Conclusion

The total sentence of 5 years imprisonment after pleas involves a starting point for the overall criminality of these offences of 7 years and 6 months after trial. Taking into account all the factors to which we have referred (some of which were unknown to the judge) we are of the opinion that the starting point is excessive and ought to have been in the region of 5 years imprisonment. As is clear from the particular facts relating to both the offences and the offender this is an exceptional case

For these reasons we allow the appeal against sentence, take into account the one third reduction for the early pleas, quash the total sentence of 5 years and impose a total sentence of 3 years and 4 months. We achieve this by ordering the 24 months sentence on the first offence and the 16 months sentence on the 5th offence to be served consecutively making 3 years and 4 months in all. The remaining sentences to be concurrent and the sentence of 2 strokes on the first offence to remain.

Orders

1. Appeal against the total sentence of 5 years imprisonment allowed.

2. The sentence of 24 months imprisonment on the first offence and 16 months imprisonment on the 5th offence to be served consecutively. The remaining sentences to be served concurrently.
3. Consequently a total sentence of 3 years and 4 months imprisonment is imposed.
4. The sentence of 2 strokes on the first offence to remain.

Mortimer, P.

Burrell, J.A

Seagroatt, J.A