

SALEHIN BIN HJ MARSAL

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 3 of 2017)**

Before: Mortimer P, Burrell and Seagroatt JJA.
3rd May 2017

Headnote: Corruption: Sentence – 6 years imprisonment upheld – appellant employed by Brunei Shell Petroleum. Consecutive terms of imprisonment for default of payment of restitution and prosecution costs approved.

Mr. Pg Muhammad Khairul Nizam Bin Pg Hj Mohd Yassin (Messrs Yusof Halim & Partners) for Appellant
Dato Davinder S.C for Respondent / Public Prosecutor
Mr Gary Leonard Low
Mr Navin Thevar

Case cited in the Judgment:

Public Prosecutor v Aidah Binti Tengah, (Criminal Appeal 16/2016)
Public Prosecutor v Sabeli Bin Ismail (Criminal Case 909/2015)
Public Prosecutor v Mohammas Azam Zaki Bin Haji Md Zain (6/2015)
Public Prosecutor v Mohd Faisall Bin Haji Ismail (MCCT/911/2015)
Public Prosecutor v Awang Rosli Bin Simon (CC/910/2015)

Burrell, JA.:

After a three day trial the appellant was convicted, on 31st January 2017, by Findlay J. on 49 charges of corruptly accepting gratifications contrary to s.6(a) of the Prevention of Corruption Act (CAP 131). On 15 February 2017 he was sentenced to 6 years imprisonment on each charge to run concurrently. In addition he was ordered to pay a penalty, pursuant to S.17 of CAP 131, of \$200,872.13 being the total sum of the bribes in the 49 charges or 6 months imprisonment consecutive in default of payment. He was also ordered to pay \$120,000 towards the cost of the prosecution or 3 months consecutive in default of payment.

The appellant's original Notice of Appeal was against both his conviction and the sentence. However, on 18 April 2017 he formally withdrew his Notice of Appeal against conviction and now appeals his sentence only.

This case was one of a number of cases concerning a fraudulent scheme which operated between approximately 2004 and 2009 in which employees of a company called

Musfada Enterprises paid gratifications to employees of Brunei Shell Petroleum Company (BSP) in relation to purchase orders for goods ostensibly to be supplied by Musfada to BSP. The benefit to Musfada was that in some cases the purchase orders were approved and released to Musfada without any competition from alternative suppliers and in other cases the subject matter of the purchase orders were paid for but not delivered because the goods were not required and they were not genuine orders.

In the present case the appellant was a Senior Operations Supervisor in the Product Operations Department of BSP. In each of the 49 charges the person from whom he accepted gratifications was a Steve Liew, a salesman employed by Musfada.

In the cases that have already been heard and in those still waiting to be heard one name is common to all, that is Mr David Chong. David Chong was the manager of Musfada at the material time and it was he who initiated the fraudulent scheme. He has been tried. After his trial started he changed his plea from not guilty to guilty and was sentenced to 6 years and 4 months imprisonment. The court stated that the appropriate starting point, in his case, after a full trial would have been 8 years. There can be no doubt that of all the individuals involved in this criminal enterprise David Chong was the most culpable. He stands alone as the central figure. He recruited his own employees to bribe employees of BSP. In each case careful consideration must be given to the role played by the offender and to the extent of his or her knowledge of the scheme to which he or she was a party.

The appellant's role, knowledge and position.

The appellant was convicted after trial and has abandoned his appeal against conviction. We look therefore to the Judge's findings to determine the appellant's role.

The judge concluded, for example, that the appellant's explanation for ordering such a large quantity of drums of degreaser was dishonest. He found that he had lied to his employer. He lied also about his explanation for not disclosing Steve Liew's name. More significantly he found that the orders and requisitions approved by the appellant were false and dishonest. He concluded also, that the appellant must have known that large quantities of products that he had ordered had never been delivered. The judge said his evidence could be "safely rejected as false".

In both his written and oral submission to this court, Mr Khairulnizam, on the appellant's behalf, has heavily relied on a decision of this court in November 2016 in the appeal of Aidah Tengah V PP (CA 18/2016). We now turn to that decision.

That appellant was another BSP employee. At first instance she had pleaded guilty to 15 charges a few days after her trial had commenced. The trial Judge had selected a starting point of 6 years imprisonment for the 15 offences contrary to s.6(a) CAP 131 to which she had ultimately pleaded guilty. In reducing that starting point to 4½ years this court made to following observation.

"The DPP readily concedes that it was never shown in the evidence that she was aware of the full extent of the Criminal scheme and in particular that the products ordered were paid for but never delivered. The prosecution case has never been otherwise.

She received the bribes to expedite the purchase orders.....”

The decision also notes the concession made by the Public Prosecutor as follows:-

“Her only involvement is that she helped Chong to quickly approve and process the orders. It was always our case that at the time of signing the purchase order she would not know if the order was genuine. She (DPP Aldila) added that it was not the prosecution case that the appellant was knowingly taking part in a fraudulent scheme and someone who knew he was raising false orders could be higher in the scale of criminality.”

This court concluded

“Her involvement was limited to expediting purchase orders and not searching for the products at the lower cost.”

Discussion

Mr Khairulnizam submits that the starting point in the present case should have been closer to that in Aidah Tengah’s case. In the course of the hearing of the appeal he acknowledged that there were significant differences between this case and that of Aidah Tengah. However, he nonetheless submitted that the starting point should have been 5 years on the basis that this appellant was not involved in *“the whole criminal scheme”*, a phrase taken from the court’s judgment in the Aidah Tengah appeal.

We have no hesitation in saying that this submission is without merit. There is only one person about whom it could be said was involved in *“the whole criminal scheme”* and that was David Chong. His involvement merited a sentence of 8 years after trial. The sentences for those he recruited from his own company and those who were then recruited from BSP to carry out his corrupt scheme will naturally be lower. How much lower depends on the actual involvement of each participant. In the cases that have come before these courts thus far an example of the lowest level of involvement, as conceded by the prosecution, is that of Aidah Tengah. The same plainly cannot be said of the appellant in the current case.

The Judge’s finding when convicting the appellant makes it clear that he was aware of the full extent of the criminal scheme to which he was a party. He may not have known the identity and activities of other employees involved in the scheme but was rightly sentenced on the basis that he knew the method, the purpose and the consequences of his own corrupt activities.

There have been four other cases involving David Chong’s scheme in which the accused knew that the Musfada Products were ordered and paid for but not delivered, thereby contributing to the substantial overall losses suffered by BSP. They are:-

***Public Prosecutor V Sabeli Bin Ismail
(Criminal Case 909/2015)***

***Public Prosecutor V Mohammad Azzam Zaki bin Haji Md Zain
(6/2015)***

***Public Prosecutor V Mohd Faisal Bin Haji Ismail
(MCCT/911/2015)***

***Public Prosecutor V Awang Rosli bin Simon
(CC/910/2015)***

In all these cases the court selected 6 years imprisonment as the appropriate starting point. The amounts received by the defendants in the above cases varied from \$30,250 to \$110,000. The sum involved in the present appeal was \$200,872 and the position held by the appellant ranked higher in BSP than any of the others so far tried and sentenced. In the appeal against sentence by Mohd Azam Zaki bin Hj Zain (CA 8/2017) this court said *“for those Shell employees who took a full part in the plan and accepted considerable gratifications a starting point after trial in the region of 6 years imprisonment is now recognized by the Brunei courts as appropriate.”*

In conclusion it only needs to be noted that the aggravating features referred to in Aidah Tengah’s case are also present in this case. They are that:

- a) there was a gross abuse of trust,
- b) the industry concerned is of great importance to Brunei,
- c) the corrupt acts were committed over a long period (the present case concerned 49 charges between 2007 and 2009),
- d) the sum corruptly received was substantial and
- e) the criminal scheme, in which the appellant played a crucial part, led to massive losses by BSP.

In all the circumstances there is no substance in the submission that the starting point for sentence should have been 5 years. In all the circumstances it could not have been less than 6 years.

The sentences of imprisonment in default of repayment of \$200,872 (6months) and in default of payment of \$120,000, prosecution costs (3months)

These sentences were ordered to run consecutively. We have been informed that no payments have been made. Thus, 9 months will be added to the sentence in default. The appellant was ordered to pay the costs within 3 months and the repayment penalty within 6 months. The time for payment will commence upon the delivery of this decision.

We are satisfied that both the restitution of \$200,872 imposed as a mandatory order pursuant to S.17 of CAP 131 and the costs order of \$120,000 imposed pursuant to a discretionary power in s.382 of the Criminal Procedure Code were appropriate. Consideration of the defendant’s ability to pay such orders only arises if the issue is raised by the defendant at the material time. Moreover, there is no reference to it in the Notice of Appeal. In any event, Mr Davinder Singh S.C for the Respondent informed the court that when the appellant left the employment of BSP in 2009 his criminal activities had not yet come to light and he had received a pension of approximately \$650,000. He also owns land and property. Any plea based on lack of means would have been hopeless.

The more important issue is the fact that the appellant was ordered to serve the 6 months and 3 months consecutively in default of payment of these two sums. On the

facts of this particular case we are satisfied that it was appropriate to make the terms both consecutive to the 6 year sentence and consecutive to each other, making an extra 9 months in total, in default of payment. We can see no good reason why an appellant in the circumstances of this case should be permitted to serve time for two entirely separate sanctions at the same time. There may be circumstances, as in other cases, where it would be merciful to do so, but none arise in this case where the appellant had run a wholly dishonest defence and had put the Prosecution to considerable time and expense in bringing him to justice.

Decision

We find the 6 year sentence and the default terms of imprisonment to be entirely correct. The appeal is refused.

Mortimer, P.

Burrell, J.A.

Seagroatt, J.A