

**KHAIRUL BASHAR**  
**AND**  
**PUBLIC PROSECUTOR**

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**Court of Appeal of Brunei Darussalam**  
**(Criminal Appeal No. 3 of 2022)**

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Before: Burrell P, Seagroatt and Lunn JJ A.

**Date of Hearing: 9<sup>th</sup> November 2022**

**Date of Judgment: 22<sup>nd</sup> November 2022**

*Headnote: Sentence: Taking obscene photographs (3 charges under s.293B of the Penal Code) and one charge contrary to s.354 of CAP 22. Pled guilty and clear record. Sentence of 6 years and 6 months plus 3 strokes excessive. Appeal allowed sentence reduced.*

Appellant in person

DPP Nurul Fitri binti Kiprawi for Respondent

**Cases cited in the judgment:**

*Public Prosecutor v Mohd Salleh Bin Abdullah@Ambrose Aban Anak Igah (HCCT No.6 of 2014)*

*Public Prosecutor v Mohammad Shahdon bin Mohammad Ramlee (ICCT No 17 of 2015)*

*Public Prosecutor v Normajili bin Napir, (CA No 16 of 2009)*

*Jumaat bin Hassan v Public Prosecutor [1994] JCBD 345*

*Awg Hj Abd Aziz bin Hj Salleh v Public Prosecutor (CA 28 of 2012),*

**Burrell, P.:**

On 27<sup>th</sup> November 2021 the appellant, a 43 year old Bangladeshi national, pleaded guilty in the Intermediate court before Judge Harnita Zelda Skinner to three charges contrary to s.293B of the Penal code, namely taking obscene photographs of a child and one charge contrary to s.354 of the same code, an offence of using criminal force to outrage the modesty of a child. The child in all four charges was the same young girl, aged 12 at the time of the offences in November 2020.

Facts

On each occasion the appellant took the young girl inside public toilets at Pasar Tani Selayun in the early afternoon. The meetings were over a few days all in November 2020. The girl was in her school uniform. On the first and second occasion he took

photographs on his mobile phone of himself kissing the girl and cupping her breast with his right hand. The next day, again inside the public toilet, he instructed the girl to sit on the toilet and lift up her shirt thus exposing her breasts which he, again, photographed.

A few days later, the appellant followed the girl into the female toilet at the same location. He asked her to pull down her trousers and lift her shirt so that he was able to photograph both her vagina and breasts, which he did.

The matter only came to light a year later when the photographs, 6 of them in total, appeared on social media. The appellant was arrested and admitted the offences. He also confessed that he realized the girl was of low I.Q; to use his own words he realized she “was not normal”. How the matter came to light on social media we do not know. However, the fact that it came to light at all clearly demonstrates the risks involved when mobile phones are used to take photographs. Although taken privately it is all too easy for them to become very public.

### Sentence

The only mitigation in this case is the fact that the appellant, who had lived and worked in Brunei for 10 years, had a clear record and pleaded guilty at the earliest opportunity.

The judge balanced against these mitigating factors the aggravating features of the case which were as follows.

The victim was a young girl of low intelligence. It was not one isolated incident, the appellant returned to the scene twice to find the girl. The photographs were not kept privately but found their way into the public domain via social media.

The judge then considered a number of Brunei authorities on the same charges. This is a difficult case and we consider it helpful to recite the judge’s remarks in relation to the previous cases she considered for guidance. She said:-

*“For section 293B of the Penal Code, Chapter 22, the prosecution referred to 2 cases. In the case of Public Prosecutor v Mohd Salleh Bin Abdullah@Ambrose Aban Anak Igah (HCCT No.6 of 2014), the defendant touched the victim’s vagina, told her to lie on the couch and took photographs using his mobile phone of her vagina. The High Court sentenced him to 3 years imprisonment, reduced to 2 years for his guilty plea and mitigation.*

*Also in the case of Public Prosecutor v Mohammad Shahdon bin Mohammad Ramlee (ICCT No 17 of 2015), the judge took a starting point of 6 years and reduced to 4 years for each charges under section 293B for recording and distributing videos of victims.*

*As for section 354 of the Penal Code, in the case of Public Prosecutor v Normajili bin Napir, (CA No 16 of 2009), the defendant was sentenced to 6 months imprisonment and 1 stroke of whipping for touching the buttock of a 14 year old girl at a bookstore. This sentence was upheld upon appeal.*

*Further in Nomajilis bin Napir, Hon CJ Dato Steven Chong referred to then CJ Roberts in Jumaat bin Hassan v Public Prosecutor [1994] JCBD 345 “any act of outraging modesty must necessarily be taken as a serious one” ...further “I agree. It is in the public interest that women are protected from those who are minded to misbehave like the appellant. Generally, a custodial sentence of 6 months would be appropriate in cases of outraging of modesty involving any intrusion on the private parts of the victim even when the defendant pleads guilty and has clear record.....”*

*In another case, Awg Hj Abd Aziz bin Hj Salleh v Public Prosecutor (CA 28 of 2012), the defendant touched the victim’s genitalia and was sentenced to 2 years and 6 months imprisonment. The Chief Justice varied the sentence to 2 years and 3 months but maintained 4 strokes of whipping.”*

She then passed the following sentences

On the 3 charges contrary to s.293B (charges 1, 3 and 4) a starting point of 3 years was reduced to 2 years in each case.

On the 2<sup>nd</sup> charge (s.354) her starting point was 3 years and 3 strokes. She then said “a deduction of one third is given resulting in a sentence of 2 years and 6 months and 3 strokes.” We refer to this arithmetic error below.

She went on to consider totality. She said “the sentence for the 1<sup>st</sup> and 3<sup>rd</sup> charges to run concurrently and consecutively with the sentence to the 2<sup>nd</sup> and 4<sup>th</sup> charge (which presumably were also to be consecutive with each other) adding up to a total of 6 years and 6 months and 3 strokes.

### Decision

Bearing in mind all the circumstances we consider the final result to be manifestly excessive. It reflects a sentence after trial of 9 years and 9 months and 3 or more strokes.

We direct the following amendments to the judge’s calculations. Firstly on charge 2, taking her starting point of 3 years as correct, she did not give a proper one third discount. She only gave 6 months. It should have been 1 year. It is regrettable that this arithmetic error was not noted at the time. It is clear from the sentencing decision that what was read out was that a discount of one third from a sentence of 3 years resulted in a sentence of 2 years and 6 months. We remind counsel for the prosecution that it is also their duty, when listening to a sentence being read out, to alert the judge to errors such as this one before the court rises.

The judge did not discount the strokes following his guilty plea. On charge 2 we therefore substitute a sentence of 2 years and 2 strokes. The individual sentences of 2 year after plea for the s.293B charges, are not excessive.

On the question of totality she made 3 of the 4 sentence consecutive. Bearing in mind that his course of conduct all occurred within about one week and that the physical contact was limited to a single occasion when he cupped her breast we have decided

that the judge was in error when making 3 out of the 4 sentences to be served consecutively.

We have decided that the correct approach in all the circumstances of the case would have been to make charges 1, 3 and 4 concurrent but consecutive to charge 2 making a final total of 4 years imprisonment and 2 strokes.

We so order.

**Burrell, P.**

**Seagroatt, J.A.**

**Lunn, J.A**