

ZAINAL ABIDIN BIN JUNAIDI

AND

PUBLIC PROSECUTOR

**Court of Appeal of Brunei Darussalam
(Criminal Appeal No. 4 of 2022)**

Before: Burrell P. Seagroatt and Lunn JJ A.

Date of Hearing: 9 November 2022.

Date of Judgment: 23 November 2022.

Headnote:- sentence-appeal dismissed. ICCT No. 72 of 2020: s.457, Penal Code, housebreaking at night, starting point of 7 year's imprisonment for a single offence too high; discount of 42% for a plea of guilty excessive.

ICCT No. 44 of 2020: s.435, Penal Code, causing mischief by fire to a motor car;, starting point of 4 years' imprisonment too high; discount of 43% for a plea of guilty, excessive. Discount of 25% only for allegedly late pleas of guilty from the starting point for sentence for an Alternative to Additional Charge 5 of housebreaking, contrary to s. 454, Penal Code, and an Alternative to Additional Charge 9 of committing mischief by wrongful damage to a motor car, contrary to s. 426, Penal Code, not justified; usual discount of one-third appropriate.

Appellant in person.

DPP Pg Norsuzanawanti binti Pg Abas and PO Nur Hidayatul Aeny Alisah binti Hj Zullizam for the Respondent

Cases cited in the judgment:-

Public Prosecutor v Pengiran Abdul Rahman bin Pengiran Shahbudim [2003] 1 JCBD 138.

Shamsuddin bin Mohammed v Public Prosecutor (Criminal Motion No. 4 of 2014; unreported, 20 May 2014.)

Abd Aziz bin Hj Mohammad Saad v Public Prosecutor (Criminal Appeal No. 4 of 1999.)

Asman @ Asrol bin Jaya v Public Prosecutor [2011] Volume II, page 120.

Lunn JA

1. By Notices of appeal, dated 3 February and 16 February 2022, filed respectively by his mother and the appellant, the appellant appeals against the sentences of imprisonment imposed on him in the Intermediate Court, following his pleas of guilty, on two occasions by HHJ Radin Safiee Mas Basiuni and on one occasion by HHJ Hazarena binti POKSJ DP Haji Hurairah in the Intermediate Court.

Sentences imposed on the appellant

- (i) 24 January 2022: Judge Radin- [ICCT No. 44 of 2021-Charges 1,2,4,6 and 8.]
2. On 24 January 2022, Judge Radin sentenced the appellant to 4 years imprisonment for the theft of four motor cars, contrary to section 379 of the Penal Act (Charge 1, 2, 4 and 6) and to 6 months imprisonment for an offence of mischief by causing wrongful damage to one of the stolen motor cars by spray-painting its bonnet and rear bumper (Charge 8). The judge ordered the sentences to be served consecutively, to a total of 4 ½ years', imprisonment and that the effective date of sentence was to be from 22 November 2021.
- (ii) 19 March 2022: Judge Hazarena - [ICCT No. 72 of 2020-Charge 1.]
3. On 19 March 2022, Judge Hazarena sentenced the appellant to 4 years' imprisonment and 2 strokes for a single offence of housebreaking at night on 26 October 2020, contrary to section 457 of the Penal Code (Charge 1). The judge ordered that the effective date of sentence was to be from 22 November 2021. The effect of that order was to make the sentence of 4 years imprisonment concurrent to the sentences imposed earlier on 24 January 2022 by Judge Radin.
- (iii) 29 June 2022: Judge Radin - [ICCT No. 44 of 2021.]
4. On 29 June 2022, Judge Radin sentenced the appellant to an effective additional total of 31 ½ months imprisonment, to an overall total sentence of 85 ½ months imprisonment, for three offences:
- for an offence of housebreaking on 30 August 2021, contrary to section 454, 27 months' imprisonment and 1 stroke, to be served concurrently to all the other sentences (Charge 5); and
 - for an offence of mischief, by setting fire to a motor car on 30 August 2021-27 months' imprisonment and 6 strokes, to be served consecutively to the sentence of 12 months' imprisonment imposed in respect of Charge 6 and all the other sentences (Charge 7);
 - for an offence of mischief, by setting causing damage to a motor car by spray painting on 8/9 November 2021- 4½ months imprisonment, to be served consecutively to the sentence of 12 months' imprisonment imposed in respect of Charge 4 and all the other sentences (Charge 9).

The appellant had stolen those motor cars. They were the subject of charges for which he had been sentenced earlier. The motor car the subject of Charge 7, a Nissan Sunny, had been stolen on 30 August 2021 (Charge 6). The motor car the subject of Charge 9, a Toyota Corolla, had been stolen on 8/9 November 2021 (Charge 4).

Reasons for sentence

- (i) 24 January 2022: Judge Radin

Starting point

6. In sentencing the appellant on 24 January 2022, Judge Radin said that he took a starting point for sentence of 18 months' imprisonment for each of the 4 charges of theft of a motor car (Charges 1, 2, 4 and 6). In doing so, noted that in his judgment in *Public Prosecutor v Pengiran Abdul Rahman bin Pengiran Shahbudim*¹ the then Chief Justice Saied said that, in sentencing for an offence of theft of a motor car, a starting point of 12 months' imprisonment was appropriate for a person with a clear record, but that a greater sentence was appropriate for a person with a previous conviction depending on the nature of the offence. The judge stipulated a starting point for sentence of 9 months' imprisonment for the offence of mischief, by causing damage to the Toyota Corolla (Charge 8).
7. In stipulating the starting point for sentence of 18 months' imprisonment, Judge Radin said that he had regard to the appellant's multiple previous convictions for offences contrary to the Penal Code:
 - in 2005, a conviction, contrary to section 379,
 - in 2008, convictions for theft, contrary to section 380; and
 - in 2014, no less than 5 convictions, contrary to section 380; 7 convictions contrary to section 379; 5 convictions for offences of housebreaking, contrary to section 457; and 2 convictions for offences contrary to section 414 of the Penal Code.

In consequence, the judge described the appellant as a "recalcitrant offender for thefts."

Sentence

8. Affording the appellant a discount of one-third for his pleas of guilty, the judge imposed sentences of 12 months' imprisonment for each of the charges of theft of a motor car and 9 months' imprisonment for the mischief, by causing wrongful damage to a motorcar.

Consecutive sentences

9. Noting that each of the thefts of a motor car had occurred on different days and was to be taken as a separate criminal enterprise and that the offence of mischief and causing damage to one of the motor cars was a distinct and different offence, the judge ordered that each of the terms of imprisonment be served consecutively. He was satisfied that the resulting total sentence of 54 months' imprisonment appropriately reflected the overall criminality of the appellant.

(ii) 19 March 2022: Judge Hazarena

10. In sentencing the appellant for the offence of housebreaking at night sometime between 24 October and 26 October 2020, contrary to section 457 of the Penal Code, Judge Hazarena noted that the appellant was a 34-year-old unemployed Bruneian man. Having broken into the house by breaking a plywood cover placed over a window, the appellant had stolen an array of property, including: 12 watches, 3 telephones, a camera, a laptop computer and gold and jade jewellery. All the property, except the jewellery had been recovered.

¹ *Public Prosecutor v Pengiran Abdul Rahman bin Pengiran Shahbudim* [2003] 1 JCBD 138.

11. The offence was of a serious nature and left those who suffered the intrusion of their private residences with a long-term apprehension as to their safety. Having referred to several decisions of this court, the judge noted this court's observation that a sentence of up to 5 years' imprisonment may be upheld.²

Starting point

12. Of the features of aggravation in the commission of the offence by the appellant, the judge noted that, although a significant amount of property had been stolen, most of the stolen property had been recovered. Also, the appellant had a lengthy criminal record. Furthermore, he had committed other offences whilst on bail. Bail had been granted to the appellant in November 2020, which he had raised by early December 2020. In consequence, she said that not only was a deterrent sentence required but also it was necessary to stipulate a higher starting point for sentence. In the result, she stipulated a starting point of 7 years' imprisonment and 2 strokes. She ordered that the sentence take effect from 22 November 2021.

Discount

13. In imposing a sentence of 4 years' imprisonment and 2 strokes, the judge afforded the appellant a discount from the starting point to reflect his pleas of guilty. That discount is more than 42% from the starting point.

(iii) 29 June 2022: Judge Radin

Charges 5 and 7

14. On 30 August 2021, having gained entry to a house through an open window, the appellant stole a motor car key, (Charge 5) which he used to steal the house owner's Nissan Sunny motorcar, which was parked nearby, to which offence he had pleaded guilty earlier. Having driven the motor car some distance, the appellant abandoned it but, before doing so, set fire to some tissues inside the motor car and closed the door. When the vehicle was recovered, it was found to be damaged by burning and smoke, the windows being covered with smoke and the middle console and parts of the driver's seat burned. (Charge 7.)

Charge 9

15. Having stolen a Toyota Corolla in the night of 8 /9 November 2021 (Charge 4) the appellant caused \$600 worth of wrongful damage to the vehicle by spray-painting its bumpers and bonnet.

Starting point

Charges 5 and 7

² *Shamsuddin bin Mohammed v Public Prosecutor* (Criminal Motion No. 4 of 2014; unreported, 20 May 2014.)

16. For or the offence of housebreaking, contrary to section 454 (Charge 5), the judge stipulated a starting point for sentence of 3 years' imprisonment, having observed that there was an abundance of authorities to support taking that starting point.
17. Having referred to the judgment of this court in *Abd Aziz bin Hj Mohammad Saad v Public Prosecutor*³, Judge Radin stipulated a starting point of 4 years' imprisonment for the offence in Charge 7, causing mischief by fire contrary to section 435 of the Penal Code. In doing so, he said that in *Abd Aziz* this court had agreed with the sentence of 3 years' imprisonment, after a plea of guilty, imposed by the judge on the appellant. Judge Radin said that represented a starting point of 4 years and 6 months' imprisonment. He noted that the whole motor car had been burned. Although the damage caused by this appellant was much more confined, he said that was not attributable to any act of the appellant. Nevertheless, the owner had not lost the motor car.

Charge 9

18. The judge said that he took a starting point for sentence for Charge 9 of 6 months' imprisonment.

Discount-less than one-third: 25%

19. In determining to afford the appellant a discount of less than one-third, the judge said that the appellant had not pleaded guilty in the first instance to Charge 5. He accepted that the alternative version of Charge 5 had only been introduced recently at the behest of the appellant, about 5 months after the pleas had been taken for the first time. Nevertheless, the judge said that the appellant was entitled only to a lesser discount, 25%, to reflect the considerable period of time that had elapsed. Similarly, the judge afforded the appellant a discount from the starting point of 25% on Charge 7 and Charge 9.

Consecutive sentences

20. The judge noted that Charges 5, 6 and 7 were related offences, which occurred in sequence on 30 August 2021:
- Charge 5 was an offence of housebreaking;
 - Charge 6 was an offence of theft of the house owner's Nissan Sunny motor car;
 - Charge 7 was an offence of causing fire damage to that motor car.
21. As a result, the judge ordered that:
- the 27 months of imprisonment imposed for Charge 5 be served concurrently to all the other sentences of imprisonment;
 - the 27 months of imprisonment imposed in respect of Charge 7 was to be served consecutively to the sentence of imprisonment in respect of Charge 6 and to all the other sentences; and
 - the sentence of 4 ½ months imprisonment imposed in respect of Charge 9 be served consecutively to the sentence of imprisonment imposed for Charge 4.

³ *Abd Aziz bin Hj Mohammad Saad v Public Prosecutor* (Criminal Appeal No. 4 of 1999.)

Totality

22. The judge said that he was satisfied that the resulting additional sentence of imprisonment imposed on the appellant of 31 ½ months imprisonment on the sentence of 54 months' imprisonment, which resulted in a total sentence of imprisonment of 85 ½ months imprisonment, was appropriate.

The respondent's submissions

23. DPP Pg Norsuzanawanti submitted that the overall sentence of imprisonment imposed by the two judges on the three occasions on which the appellant had been sentenced appropriately reflected the appellant's criminality and was not manifestly excessive. On the other hand, she submitted that in sentencing the judges had fallen into error in various respects, albeit that those errors did not undermine the overall appropriateness of the sentences.

Charge 5: 25% discount

24. She submitted that the Judge Radin was an error in affording the appellant only 25% from the starting point of 3 years' imprisonment for the offence of housebreaking (Charge 5). Given that the Alternative Charge 5 had only been added to the charges on 14 June 2022, the appellant had no opportunity to plead guilty at an earlier stage. That error had no material effect, given that the sentence on Charge 5 was ordered to be served concurrently with the sentences imposed on Charges 1, 2, 4, 6 and 8.

Charge 7

25. She suggested that the starting point identified by Judge Radin for Charge 7, mischief by causing fire to the Nissan Sunny, was a low starting point. In addition, the judge had afforded the appellant an unduly large discount of sentence of over 40%, reducing the sentence to 27 months imprisonment. Compared with the sentence of 3 years imprisonment, with which the Court of Appeal did not disapprove, imposed by the judge in *Abd Aziz*, the sentence imposed on the appellant was unduly lenient.

Charge 1

26. DPP Pg Norsuzanawanti submitted that the starting point for sentence of 7 years' imprisonment taken by Judge Hazarena for the offence of housebreaking at night, contrary to section 457 (Charge 1), albeit higher than that taken in the cases to which she referred, was justified by the judge taking into account the appellant's previous criminal convictions. Any concern that the starting point was too high was allayed by the unduly generous discount of sentence the judge afforded the appellant of more than 40%. In the event, the resulting sentence was entirely appropriate.

Discussion

27. We are satisfied that there were errors in the sentencing of the appellant. Nevertheless, we accept DPP Pg Norsuzanawanti's submission that the ultimate overall sentence imposed on the appellant was not manifestly excessive.

Charge 1: housebreaking, section 457 [ICCT No. 72 of 2020]

28. In our judgement, the starting point for sentence of 7 years' imprisonment taken by Judge Hazarena for the offence of housebreaking, contrary to section 457 (Charge 1), was too high, notwithstanding the factors of aggravation which the judge identified correctly. In answer to a question from the court DPP Pg Norsuzanawanti said that she was unaware of any case in which a judge had identified a starting point of 7 years' imprisonment for a single offence contrary to section 457. A starting point of 6 years' imprisonment was appropriate. However, any adverse effect on the appellant was wholly mitigated by the unduly lenient discount of 42% the judge afforded the appellant in sentencing him to 4 years imprisonment. Serendipitously, that was the sentence that the judge imposed on the appellant.
29. In passing, we observe that if, in imposing a sentence following a plea of guilty, the judge decides in the exercise of his or her discretion to afford the defendant a discount other than the usual discount, the judge ought to provide the reasons for so doing. That enables the parties and this court to better understand the basis of the course taken.

Charge 7: causing mischief by fire to a motor car, section 435

30. Similarly, in our judgement the starting point taken for sentence of 4 years' imprisonment for the offence of causing mischief by fire to the Nissan Sunny, contrary to section 435, was too high. With respect, the reliance placed by Judge Radin on the judgment of this court in *Abd Aziz*, in which this court did not disapprove of the judge's sentence of 3 years' imprisonment after plea, was misplaced.
31. The context in which the offence in *Abd Aziz* was committed was wholly different. The offence of causing mischief by fire occurred in and what might be described as 'road rage', in which the defendant was also convicted of offences of voluntarily causing hurt by a dangerous weapon, contrary to section 324, and committing criminal intimidation, contrary to section 560 of the Penal Code. Having forced the victim to stop his motor car, the appellant, who was armed with a baton and a knife, kicked in the windscreen and used the baton to strike the windscreen on the driver's side. When the victim emerged from his car, the appellant struck him a blow with the baton and threatened him with a parang. After the victim had run away, the appellant set fire to the victim's motor car and succeeded in causing damage to the whole car. Obviously, those circumstances bear no resemblance whatsoever to the appellant's commission of the offence the subject of Charge 7. Further, in *Abd Aziz* this court made no reference to the starting point or to any level of discount of sentence afforded to the appellant.
32. We are satisfied that a starting point of 3 years' imprisonment was appropriate for Charge 7. That was the starting point for sentence identified by the judge in the sentencing of the defendant, whose appeal is reported as *Asman @ Asrol bin Jaya v Public Prosecutor*⁴, to which the judge's attention had been drawn by counsel for the prosecution. In that case, this court did not disapprove of the resulting sentence of 2 years' imprisonment imposed by the judge on a charge of causing wrongful damage to a motor car by fire. The appellant had been sentenced to 12 months and 16 months' imprisonment in respect of the theft of two motor cars.

⁴ *Asman @ Asrol bin Jaya v Public Prosecutor* [2011] Volume II, page 120.

33. In this appellant's case, having stipulated a starting point for sentence of 4 years' imprisonment, the judge imposed a sentence of 27 months' imprisonment. That represented a discount of more than 43%. The judge did not give his reasons for doing so, other than saying that he was affording him leniency. The discount was unduly lenient. Nonetheless, having identified a starting point that was too high and having afforded the appellant a discount which was unduly lenient, serendipitously the resulting sentence of 27 months' imprisonment was within the range of sentence that lay in the judge's discretion.

The reduced discount of 25%

34. In determining to afford the appellant a reduced discount of only 25% for his pleas of guilty to Charges 5, 7 and 9, the judge said of Charge 5 that the appellant did not plead guilty "at the first instance", although he acknowledged that the Alternative Charge had only recently been introduced by the prosecution. He said that was at the behest of the appellant, but noted that was about 5 months after the pleas had been taken originally. He said that the reduced discount reflected the considerable time that had elapsed since the matter was first brought to court.

Charges 5 and 9

35. As DPP Pg Norsuzanawanti pointed out, Alternative Additional Charge 5, to which the appellant had pleaded guilty on 29 June 2022, had been averred for the first time on 14 June 2014 in the charge sheet of that date. For the first time, an offence contrary to section 454 of the Penal Code was now alleged, whereas Additional Charge, 5 set out in the charge sheet dated 21 December 2021 alleged an offence contrary to section 457. The maximum penalty for the latter was higher than that for the offence to which the appellant pleaded guilty. In fact, as the Notes of Proceedings evidence, when the appellant was arraigned on 23 December 2021 on Additional Charge 5, which alleged an offence contrary to section 457, the appellant had asked for the charge to be reduced to an offence contrary to section 451. In response, the prosecutor said, "The prosecution will not be lowering the charge".

36. Similarly, Additional Charge 9 on the charge sheet dated 21 December 2021 alleged an offence contrary to section 427 of the Penal Code. Alternative Additional Charge 9, to which the appellant pleaded guilty on 29 June 2022, alleged an offence contrary to section 426 of the Penal Code. It first appeared in the charge sheet on 14 June 2022. Once again, the maximum sentence for the former offence was higher.

37. DPP Pg Norsuzanawanti was correct in submitting that until 14 June 2002 the appellant did not have the opportunity to plead guilty to these charges. In those circumstances, the judge erred in affording the appellant a discount of 25% only. The judge ought to have afforded the appellant a discount of one-third from that taken from the starting point for those offences.

Charge 7

38. On the other hand, it is to be noted that there was no change in the offence averred by Charge 7 in either of the charge sheets, namely an offence of causing mischief by fire to

the Nissan Sunny motor car, contrary to section 435(1)(c). In those circumstances, it was within the judge's discretion to afford the appellant the lower discount of 25% for that charge. Applying that discount, to what we have identified as being the appropriate starting point of 3 years' imprisonment, a sentence of 27 months' imprisonment is appropriate. Again, serendipitously, by an erroneous route, the judge arrived at that sentence.

Conclusion

39. In the result, for the reasons given, we are satisfied that there is no merit in the appeal, which we dismiss.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A.