

**AK MUHAMMAD HAFIZ DZULFADHLY BIN PG HASSANAL ARIFFIN**

**AND**

**PUBLIC PROSECUTOR**

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**(Court of Appeal of Brunei Darussalam)**  
**(Criminal Appeal No 5 of 2023)**

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Before: Steven Chong, C.J., Burrell and Seagroatt, JJA

**Date of Hearing: 13<sup>th</sup> November 2023**

**Date of Judgment: 15<sup>th</sup> November 2023**

*Headnote: Sentence – 3 years and 6 strokes on a guilty plea to s.435(1) Penal code upheld.  
Probation not appropriate.*

Mr. Robin Cheok Van Kee of Messrs. Cheok for Appellant  
DPP Syafina binti Abd Hadzid of Public Prosecutor for Respondent

**Cases referred to:**

*Mohamad Shahrin bin Awang Zaini v PP (C.A. 18/2014)*

*PP v roslan bin Yusof (23/2000)*

*PP v Haji Ahmad bin Haji Tamin (HCCT 4/2018)*

*PP v Mohammad Nuzaiha bin Kamal Luddin (2000) 1 SLR 34 and;*

*PP v R bin Amas (D1) (11/2022)*

**JUDGMENT**

**Burrell, JA.:**

On 22<sup>nd</sup> December 2022 the Appellant pleaded guilty to an offence of committing mischief by fire intending to cause or knowing it to be likely that he will thereby cause damage to any property, contrary to s. 435(1) of the Penal Code, Cap 22.

On 16<sup>th</sup> March 2023 in the Intermediate Court he was sentenced to 3 years imprisonment and a mandatory minimum of 6 strokes by Her Honour Judge Hjh Hazarena.

## Facts

Prior to sentencing the statement of facts had been read to and agreed by the appellant. The statement was dated 22<sup>nd</sup> December 2022 and maybe summarized as follows.

At the time of the offence the appellant was a 22 years old Bruneian citizen. He had been working as a chef at the Boss Café in Kiulap. The café premises were part of a commercial building.

On 13<sup>th</sup> January 2022, for reasons which shall be referred to later in this judgment, the appellant decided to set the café alight by fire. That evening he purchased a litre of kerosene and a spray can of red paint. At approximately 04.30 in the morning of 14<sup>th</sup> January he drove to the café to carry out his plan. Having entered the premises he, at first, had second thoughts about setting the premises on fire and started to leave. However, he soon returned and continued with his original plan.

First of all, with the red paint, he sprayed “*Hj Mazlan, Amirul, Kenny bayar hutang 100 K*” (which is a reference to the wages he felt he was owed) together with an obscene gesture. Inside the café he sprayed the CCTV with red paint. He then poured kerosene on a table and on shelves in the premises, set light to it and then left the building as the fires took hold.

He then returned to his vehicle and drove to a nearby river where he discarded the over clothes, hat and gloves he had been wearing and the cans of kerosene and paint.

The fire was reported at 05.32 by an employee of a nearby hotel. The alarm had activated, as too had the sprinklers and by the time Fire Services arrived the fire was no longer burning although there was still considerable smoke which is what had alerted the nearby employee to raise the alarm. The appellant was arrested later the same day and admitted being responsible for setting the café on fire. \$16,300 worth of damage was reported.

## Sentence

In a thorough judgment the judge dealt with all matters relevant to sentence. She noted at the outset that the appellant, through his counsel, was urging the court to impose a Probation Order and not a custodial sentence. The judge was not persuaded to do so and passed a sentence of 3 years imprisonment (discounted from a starting point of 5 years because of his guilty plea and other mitigation) and 6 strokes which were mandatory.

She referred to a number of authorities involving s.435(1) Cap 22 cases. In particular:

*Mohamad Shahrin bin Awang Zaini v PP (C.A. 18/2014)*

*PP v roslan bin Yusof (23/2000)*

*PP v Haji Ahmad bin Haji Tamin (HCCT 4/2018)*

*PP v Mohammad Nuzaiha bin Kamal Luddin (2000) 1 SLR 34 and;*

*PP v R bin Amas (D1) (11/2022)*

Such guidance as was gleaned from these authorities in so far as they were relevant to the facts of the case before her, together with all the mitigation advanced on the appellant's behalf led her to conclude, correctly in our view, that a custodial sentence was necessary and appropriate in this case.

The determining factors maybe briefly stated as follows:

The offence was premeditated, its commission was planned and prepared the day before. An offence contrary to s.435(1) is a very serious offence meriting a possible maximum of 15 years imprisonment.

Although there was no intent to endanger the lives or the safety of others, the fire was nonetheless started in a commercial building at night. No attempt to raise the alarm was made by the appellant; he fled the scene as soon as kerosene had been ignited.

### Mitigation

When considering all the mitigation about this defendant, who at the time was 22 years old with a clear record, the judge had additional assistance from a number of written reports from medical professionals. The focus of these reports was to support the appellant's counsel's submission, impassionately made to the court below and also to this court, that this was an exceptional case in which the appellant's state of mind at the material time was such that a custodial sentence could safely and properly be substituted by a probation order.

In short, at the material time, and this was accepted by the sentencing judge, the appellant was suffering from great stress arising out of his relationship with his employer. His feelings towards his employer were a mixture of hate, fear and anger. He had felt trapped in his employment, he alleged his employer had been violent and abusive to him and during covid he had received no wages for almost a year.

Reports that were before the court included:

- a health report prepared by Dr. Bushra Sabahal dated 15<sup>th</sup> February 2023;
- a psychiatric report from Dr. Damit Muhammad Zul Azmi Timbang dated 16<sup>th</sup> February 2023;
- a psychiatric report by Dr. Hilda Ho dated 29<sup>th</sup> November 2022;
- a report from Pusat Pembangunan Belia dated 28<sup>th</sup> January 2023;
- a psychologist report by Dr. Julian Lim dated 5<sup>th</sup> November 2022;
- a pre-sentence report by Nur Iliya Hanania binti Haji Mahri dated 15<sup>th</sup> February 2023.

The above list is not a complete list. From all these reports this court considers the "opinion and recommendation" by Dr. Hilda Ho on 29<sup>th</sup> November 2022 best crystallizes the situation and merits inclusion in this judgment.

*"1. Awangku Muhammad Hafiz Dzulfadhly bin Pg Hassanal Ariffin does not currently have a mental illness. He does not currently need psychiatric treatment. However, he has*

*occasional feelings of anxiety and I have advised him that he could seek help from his psychiatrist in RIPAS Hospital should these feelings become more persistent or problematic.*

2. *He is a young man who was unable to manage the adverse conditions of his workplace. It appears that he was bullied and made to work for no pay. He did not have the wherewithal to ensure that he had a written agreement with his employer prior to entering the agreement to work for him. His working environment appears to have been abusive. He also appears to have been unable to manage a resignation process with his employer because he was frightened for his safety and he felt intimidated.*
3. *Due to the adverse conditions of his workplace, he had also developed physical and mental health problems prior to the alleged offence. He had sought help from his parents, who were also unable to help him. He therefore appears to have felt very distressed and desperate at the time of the alleged offence, with no one else available to help him.*
4. *He did not appear to have thought about the full consequences of his actions at the time of the alleged offence. He currently appears to regret his actions.*
5. *He has informed me that his lawyer plans to ask for a probationary or community service sentence. He appeared to be willing to comply with this, should he find himself in this situation.*
6. *Much of the information gained for the preparation of this report was obtained directly from the Awangku Muhammad Hafiz himself. The contents of this report are therefore dependent on the information provided to me. I am not able to confirm the veracity of all the information provided.*
7. *I confirm that I have no personal or financial interests in this case."*

Later reports confirming his "suitability" as a candidate for a probation order are relevant to his willingness to participate positively. There is support for this offender being a suitable candidate for probation but whether or not probation is an appropriate sentence for this particular offence is solely a matter for the court.

Whilst, it is acknowledged that the appellant regretted his actions and felt under extreme pressure at the time, the question for the court was-did all the mitigation cause the court to conclude that this particular defendant could be spared what would otherwise be the certainty of a custodial sentence for such a serious offence?

### The Appeal

The sole submission on appeal is that the correct sentence for this offender and this offence should be a probation order. This, unusually has given rise to three discrete applications to this court as follows:

- (1) That the judge should have directed that a “Newton hearing” be held prior to sentencing at first instance.
- (2) That the court should have granted a “stay of execution” pending the outcome of the Newton Hearing and/or pending appeal. In either case, it amount to the same thing, namely the granting of bail pending appeal.
- (3) That the sentence passed be quashed and a probation order, with conditions be substituted.

When asked at this hearing whether or not items (1) and (2) were still being pursued, Mr. Cheok informed the court that they were not. We regard his decision to abandon these submissions, albeit at a very late stage, to be entirely correct. We therefore turn to the only ground of appeal, namely item (3).

### The sentence

Having disposed of (1) and (2) above the question that remains is-was the sentence passed manifestly excessive or wrong in principle?

On any view a probation order for this offence would be exceptional. Mr. Cheok seeks to persuade this court that this is indeed an exceptional case because of matters pertaining to the offender at the time of the offence.

The judge was fully aware of all such surrounding circumstances and considered them carefully. At the conclusion of her reasons for sentence she said:

*“Before I take leave, I wish to highlight a recurring matter that was raised. This is the employment conditions faced by the defendant during his employment at Boss Café. Employees should not be subject to the conditions that the defendant was exposed to. I do not condone how the defendant was treated by his employer. However, this matter does not excuse the defendant’s actions and in my view are issues that maybe better addressed before a different venue.”*

It is clear that the judge had some sympathy for the appellant and the effect of his situation at work was having on him at the time. The appellant regarded his employer as “a narcissist”, “a bully”, “a gangster.” The appellant had no money, he felt trapped and vulnerable. Such matters were accepted by the judge in the appellant’s favour. It should here be noted that a response from the employer has not been made.

However, the judge decided, correctly in our view, that these matters in mitigation, taken as a whole could not diminish the seriousness of the offence, its planning and reckless disregard to property in a commercial building containing a variety of shops and offices, so as to pass a non-custodial sentence.

She identified 5 years as a starting point which was in line with similar cases in Brunei. She gave a generous 40% discount for his plea of guilty even though the plea was not entered at the earliest opportunity. From the first hearing after arrest in January 2022 until December

2022 his plea on record was not guilty. During this period there were six appearances in court. She also took full account of his personal circumstances and of the numerous reports before the court. The sentence passed was not manifestly excessive. It was carefully considered and was appropriate for this offence and this offender.

The imposition of 6 strokes is mandatory by law and we cannot intervene.

Decision

Appeal dismissed.

**Steven Chong, C.J**

**Burrell, J.A.**

**Seagroatt, J.A.**