

MOHAMMAD AMLI BIN HAJI MATAYIR

AND

PUBLIC PROSECUTOR

**(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 7 of 2016)**

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

Headnote: *Theft and attempted theft from place of worship contrary to s380A Penal Code – sentences of 12 months and 18 months to be served concurrently due to exceptional personal circumstances.*

Mr. Hj Mohamad Rozaiman bin Dato Haji Abdul Rahman (Messrs. Rozaiman Abdul Rahman Advocates and Solicitor) for Appellant
DPP Karen Tan and DPP Muhammad Aiman Adri Ahmad Zakaria for Respondent

Case cited in the judgment:

Md Afendi Ag Damit v Public Prosecutor (COA 27/2015).

Burrell, JA.:

This is an appeal against sentence. On 28th April 2016 the appellant pleaded guilty in the Intermediate Court to two offences contrary to s.380A of the Penal Code which provides that:

“Whoever commits theft...in any building used as a place for worship, shall be punished with imprisonment for a term which may extend to 10 years and with whipping”

whereas the maximum for theft under s.380 is 7 years imprisonment.

The two offences were committed on the 7th and 8th March 2016. At about 9.00a.m on 7 March the appellant entered a place of worship in Tutong intending to steal money from donation boxes using a piece of wire and selotape. He was unable to carry out the theft because his activities were interrupted by people entering the mosque.

The next day, again in the morning, he returned to the same location with the same intention and the same equipment. This time he succeeded in stealing BND\$20 from a donation box.

Judge Hanani sentenced him to 12 months and 1 stroke for the attempted theft and 18 months and 2 strokes for the theft on the following day. She had selected starting points of 18 months and 28 months respectively for each offence.

She ordered 8 months from charge one to be served consecutively to the 18 months on charge two, thus making a total sentence of 26 months with the strokes to be cumulative, that is 3 in total.

Individually these sentences are appropriate and reflect the seriousness of the offence of theft from a place of worship and the fact that the dishonest act was committed twice.

It is also consistent with observations made in this court in the recent case of *Md Afendi Ag Damit v Public Prosecutor (COA 27/2015)*.

The appeal

On the appellant's behalf Mr. Rozaiman has focused on the appellant's personal circumstances as grounds for reducing this sentence. Similar mitigation had been advanced before the sentencing judge but in less detail. Mr Rozaiman did not appear in the court below. The key issue in this appeal is whether or not the additional mitigation concerning the appellant's family circumstances merit a reduction on the sentence passed.

In short, the appellant is 35 years old, a married man with 2 children. The elder child, aged 13, suffers from Down Syndrome. A medical report on this child was provided to the court below which confirmed that the boy had "*...heart problem, squint and significant intellectual deficiency*"

Naturally, the boy is highly dependent on both his parents for his physical and emotional needs. As is often the case in such circumstances there is a strong bond between all members of the family. It is therefore particularly hard for both the wife and the boy to be without the appellant's support. A second child was born 3 months ago adding to the hardship now facing the wife. The appellant enjoyed full time employment with the Fire Rescue department until 2014 when he lost his job. His wife has a full time job with the Baiduri Bank.

Mr Rozaiman was able to provide this court with more detailed, and more up to date information about the family circumstances than had been given to Judge Hanani. This was important because this court is being invited to regard the Appellant as an exceptional case so as to reduce what otherwise would have been regarded as a sentence within an acceptable range.

With regard to the appellant's previous employment the judge was told by the defendant that his suspension from work in April 2014 was "drug related". Mr Rozaiman however submitted that this did not reflect the true picture. The main problem, he submitted, was absenteeism caused by a need to help in looking after his severely disabled son after his wife had secured employment with the Baiduri Bank. The suspension from work since April 2014 has added considerably to the hardship because his employers had stipulated, although we do not understand on what basis, that he was not permitted to seek alternative employment and neither was he paid any wages.

His wife still works on a full time basis for the Baiduri Bank. In February 2016 she gave birth to their second child and she had 3 months maternity leave thereafter. She is now back at work. The appellant has been in custody since 12 March 2016. Since that time

the wife has been helped by her mother, her father and an aunt in caring for her son. It is anticipated that this family support will continue. In addition the boy attends, on 3 afternoons per week, a special school.

Finally, we have been informed that before these offences were committed the family applied for government funded financial support for the child which was unfortunately rejected. The appellant's wife's circumstances have now changed for the worse and it can only be hoped that a renewed application reflecting the new situation might result in a more favourable outcome.

In any event, the judge expressed sympathy with the wife's plight, as does this court.

Discussion

We are firstly prepared to accept that the prime motivation behind the commission of these offences was financial pressure caused by his job suspension. We are also prepared to accept that the mitigation stemming from his family circumstances makes this an exceptional case enabling this court to exercise a degree of compassion which would not otherwise be appropriate. We emphasize that much of the information which has led us to this course was not available to the sentencing judge.

We have stated that the individual sentences cannot be criticised. However, we now turn to the question of whether or not the two sentences in this case should be served concurrently, partially consecutively or wholly consecutively.

Mr Rozaiman urges us to regard the two offences as a single transaction. Normally, two offences committed on consecutive days would not be a single transaction. In this case however it is arguable that the second offence was merely the successful completion of the unsuccessful attempt on the previous day. In the context of the exceptional circumstances demonstrated in this case we are prepared to accept this argument, but in this case only. We will therefore order the two sentences of 12 months and one stroke and 18 months and two strokes to be served concurrently and the strokes non cumulative making a final sentence of 18 months and 2 strokes.

Order

The appeal is allowed to the extent that the sentence on the second charge of 18 months and 2 strokes will be served concurrently with the 12 months and 1 stroke on the first charge. The strokes to be non cumulative, making the term to be served one of 18 months with 2 strokes.

Mortimer, P.

Burrell, J.A.

Seagroatt, J.A