

MOHD SOFFIAN BIN HAJI KIPLI

AND

PUBLIC PROSECUTOR

**Court of Appeal of Brunei Darussalam
(Criminal Appeal No. 7 of 2021)**

Before: Burrell P, Seagroatt and Lunn JJ A.

Date of Hearing: 31 October 2022

Date of Judgment: 12th November 2022

Headnote:

Conviction: appeal dismissed; 3 charges s. 409 Penal Code-criminal breach of trust dishonest misappropriation, \$17,400 of cash bail bond monies over 2 ½ years by Inspector of RBPF; repeatedly failed to hand over monies; handed over only \$3,900 at the end; balance of \$13,500 unaccounted for. Judge entitled to draw adverse inferences.

Sentence: total of 4 years' imprisonment entirely appropriate; aggravating factors-abuse of position and authority over 2 ½ years-undermined public confidence in the integrity of RBPF; significant loss. Compensation order of \$13,900 in favour of RBPF-entirely proper. Appeal dismissed.

Applicant in person

PO Shamsuddin bin Kamaluddin for Respondent

Cases cited in the Judgment:-

Public Prosecutor v Hj Ali bin Haji Ajis (Criminal Appeal No. 7 of 2004)

Public Prosecutor v Norwidayawati binti Haji Mokti (Criminal Appeal No. 13 of 2019)

Lunn, JA.:

1. The applicant seeks leave to appeal against his conviction and sentence out of time. On 23 January 2021 the applicant was convicted after trial in the Intermediate Court by HHJ Faisal of three charges of criminal breach of trust by a public servant, contrary to section 409 of the Penal Code, Cap 22. The charges averred that, having been entrusted as a police officer with cash bail bond monies the applicant had dishonestly appropriated those monies. That was to the overall total of B\$17,400 in the overall period of 1 September 2015 to 28 February 2018:

- B\$8,400 in the period 1 September 2015 to 31 August 2016 (Charge 1);
- B\$5,400 in the period 1 September 2016 to 31 August 2017 (Charge 2); and
- B\$3,600 in the remaining period (Charge 3).

On 10 February 2021, the applicant was sentenced to a total of 4 years' imprisonment.

Notices of appeal

2. By a Notice, dated 3 March 2021, the applicant's wife filed an appeal against sentence on his behalf. That was outside the 28-day period, following the sentencing of the applicant, in which such an application was required to be filed. She stated simply that she sought a lighter prison sentence for the applicant. By a Notice, dated 23 June 2021, the applicant filed an application for leave to appeal against his conviction,
3. At the hearing in this court, on 10 June 2021, fixed for the application for leave to appeal against sentence, the applicant relied on a letter he had written to the Court some days in advance of the hearing, but not copied to the respondent, indicating that he wished to contest his convictions and to rely on the grounds set out therein. In those circumstances, that hearing was adjourned.

The trial

4. At the trial, pursuant to section 117 C of the Criminal Procedure Code, Cap. 7, a Statement of Agreed Facts, was put before the judge by the parties. The prosecution adduced evidence from four former colleagues of the applicant. The applicant gave evidence and relied on a statement, adduced pursuant to section 117B of the Criminal Procedure Code.

The Prosecution case

5. No issue was taken by the applicant with the prosecution case that, whilst serving as the officer in charge of Sungai Liang Police Station, he had received the bail bond monies as described in the Statement of Agreed Facts and set out in the charges nor that, save for B\$3,900, which sum of money he had handed over to ASP Haji Muhammad Helmi Haji Abdullah one of the prosecution witnesses, on 9 April 2018 the balance had gone missing.
6. Cpl 4707, Haji Zulfarrizal bin Haji Abdul Rahmin, testified that it was part of his duties while stationed at Sungai Liang Police Station, to deliver bail bond monies to the Chief Clerk at Panaga. It had never been his practice to acknowledge receipt of such monies by signing the forms in the Bail Bond Book. Those forms were signed by the officer in charge of the police station and the Chief Clerk at Panaga. When the applicant became the officer-in-charge of the police station in 2015, he refused his request that he too should sign the forms.
7. ASP Mohammad Zulhelmi Azmi said that having replaced the defendant as the officer in charge of the police station in March 2017, and having become aware that the applicant had not handed over to the Chief Clerk at the Panaga all the bail bond monies that he had received, he had reprimanded him for that failure on separate occasions in March, May and August 2017. In March 2017, the defendant acknowledged that to be the case and said that he would hand over the money as soon as possible. In May 2017, given that the situation was unresolved, the defendant repeated that undertaking.
8. ASP Mohammad Helmi said that, having become officer-in-charge of the police station in place of ASP Zulhelmi Azmi in November 2018 he was made aware that the applicant

had not resolved the issue of the bail bond monies. However, it was not until 3 April 2018 that he had confronted the applicant and demanded that he hand over those outstanding monies. On 9 April 2018, the applicant handed over B\$3,900.

9. In cross-examination, both ASP Mohammad Zulhelmi Azmi and ASP Mohammad Helmi testified that notwithstanding Cpl. 4707, Zulfarrizal's refusal to sign the Bail Bond Book forms to acknowledge receipt of those monies at their requests, they had nevertheless given him the bail bond monies to deliver, or they had made that delivery personally. Each of them acknowledged that section 9 of General Order No. 370 of the Police General Orders provided that "A receipt shall be obtained on the back of the duplicate entry in the Bail Bond Book from each person who takes over the money" and that cash bail was required to be kept in a safe by the officer in charge of a police station and, if in excess of B\$100, to be kept in the officer in charge of the Police Division's safe.

The Defence case

10. It was the applicant's case that he had come to retain the money, rather than handing it on to others in the police force, because of various difficulties he was concerned about in the appropriate procedures of doing so. Although the appellant had signed forms in the relevant Bail Bond Book, his subordinate at Sungai Liang Police Station, Cpl. 4707 Zulfarrizal, had refused to sign those forms to acknowledge receipt of those monies as the next step in the process of sending them on to the Chief Clerk in Panaga. Further, he understood that there was an instruction from the officer in charge of the Police Division that only the person assigned to handle those monies could send them to the Chief Clerk. Also, he was concerned that if anything happened to the monies, in the absence of such a receipt, he would be held liable. As a result, he had decided to retain the monies, securing them in the safe in the room which he occupied when he was the officer in charge of the station.
11. In March 2017, after ASP Mohammad Zulhelmi Azmi had replaced him as officer in charge of the police station and he became the Assistant officer in charge, he was asked by him to remove his possessions from the room and the safe. He did so, including the bail bond monies, which he kept in separate envelopes marked according to their case numbers. He placed them in a shopping bag which he kept in the room to which he had relocated. His office was accessible to anyone. In the last week of July and all of the month of August 2017 he was on a training course and not in the office.
12. On 9 April 2018, at the request of ASP Mohammad Helmi, he had handed over to him B\$3,900 of the bail money, which he had found in envelopes in the shopping bag in his room at the police station. However, he was unable to locate the remaining envelopes and their contents of bail money.

Judgment

13. In his judgment, Judge Faisal acknowledged that the applicant's complaints of irregularities in the handling of cash bail bonds had merits. Nevertheless, he found that the applicant had failed to give any reasonable explanation as to why he had retained possession of those monies and not forwarded them to the Chief Clerk. Having been instructed to hand over possession by ASP Zulhelmi Azmi, he had ample time to do so.

On the contrary, he noted that the applicant had continued to retain possession of fresh bail bond monies issued after those reprimands.

14. He noted that, although both ASP Mohammad Zulhelmi Azmi and ASP Helmi had also been confronted by Cpl. Zulfarrizal's refusal to acknowledge receipt of those monies in the Bail Bond Book forms, nevertheless they had been prepared to hand over monies to him to deliver to the Chief Clerk. A search of the appellant's home had not revealed any cash bail bond monies. Further, he said that the appellant's conduct in leaving the monies in a shopping bag in his room at the police station to which anyone had access whilst he was absent for more than a month "belies logic."
15. In the result, in convicting the defendant of all three charges, the judge said that he could come to only one reasonable conclusion, namely that the applicant had misappropriated the monies.

Sentence

16. In sentencing the applicant, the judge noted that he had misappropriated a total of B\$17,400 from 31 sets of bail bonds over a period from 2015 to 2018, of which only B\$3,900 had been returned.
17. In mitigation, the applicant had sought the imposition of a non-custodial sentence. The judge noted that the applicant was 47 years of age, married with a child of school age with a clean record of service.
18. The judge said that the fact that the applicant held the rank of an Inspector in the Royal Brunei Police Force holding the position of officer in charge or assistant officer in charge of Sungai Liang Police Station at the time of the commission of the offence was a factor in aggravation.
19. The judge noted that this court had said that, save for very exceptional circumstances, in cases of criminal breach of trust the court should impose a sufficiently substantial term of imprisonment to mark the gravity of the offence.¹ There were no such very exceptional circumstances in the applicant's case. On the other hand, the judge observed that this court had said that in sentencing the judge had a discretion and was to have regard to all the circumstances.² Finally, he said we had regard to the observations made in the course of sentencing by the judge, in a case of criminal breach of trust in the Intermediate Court in *Public Prosecutor v Mohammad Razeeq bin Abdullah Ajai*.³

Starting point

20. In identifying the appropriate starting point for sentence, the judge said that, given that the amount misappropriated in Charge 1 was much greater than the amounts misappropriated on the other charges, it would attract a high sentence. The judge stipulated a starting point of 3 years imprisonment for Charge 1 and 2 years' imprisonment for Charges 2 and 3. The sentences of imprisonment imposed in respect of

¹ *Public Prosecutor v Hj Ali bin Haji Ajis* (Criminal Appeal No. 7 of 2004)

² *Public Prosecutor v Norwidayawati binti Haji Mokti* (Criminal Appeal No. 13 of 2019)

³ *Prosecutor v Mohammad Razeeq bin Abdullah Ajai*. (Criminal Trial no. 52 of 2020)

Charges 2 and 3 were to be served consecutively with each other, but that the sentence imposed in respect of Charge 1 was to be served concurrently to the sentences imposed in respect of Charges 2 and 3. In the result, the applicant was sentenced to a total of 4 years' imprisonment.

Compensation

21. The judge ordered the applicant to pay compensation of B\$13,500 to the Royal Brunei Police Force or to the Government within three months, in default of payment of which the applicant was to serve a sentence of 6 months' imprisonment, consecutively to the other sentences of imprisonment.

Notice of Appeal against conviction

22. The applicant advanced multiple grounds of appeal against conviction.
 1. The judge erred in accepting the evidence of ASP Mohammad Zulhelmi Azmi and ASP Mohammad Helmi that the applicant had been given repeated reprimands for retaining possession of the bail bond monies, rather than handing them over to the Chief Clerk. Further, the judge did not state that he disbelieved the applicant's evidence to the contrary.
 2. The judge was in material error in stating that not only were bail bond monies not found in the search of the applicant's home but also, "nor were they in his office in the police station". There had been no search of his office in the police station. Acting DSP Omarali testified that he did not search that office. The applicant asserted that he had asked the officer that his office be searched.
 3. The judge had erred in making an order that he pay compensation of \$13,500 to the Royal Brunei Police Force or the Government. The monies were not owned by the government.
 4. There had been attempts to obstruct the course of justice. First, by emptying the applicant's room at the police station, without conducting a search and without the knowledge of the investigating officer. Secondly, by threats of disciplinary action being taken against his fellow officers if they agreed to be interviewed as potential witnesses by his lawyers during the course of the proceedings.
 5. The judge erred in finding, in effect, that it was unreasonable of the applicant, having removed the bail bond monies from the safe, to have left the monies unattended in their envelopes in a shopping bag in the office that he then occupied. He erred in finding that the room could be entered by anyone. It was for the applicant's use only. In addition, the judge erred in not giving weight to the fact that the practice of the police as to the secure processing of bail bond monies was wrong, in particular in not considering the specific requirements of General Order 370 (9) of the Police General Orders.
 6. In convicting the applicant of the charges the judge erred in failing to make a specific finding that the applicant had acted dishonestly in misappropriating the bail bond

monies and keeping them in his possession, albeit that the judge had identified dishonesty as an ingredient of the offences.

The Respondent's submissions

23. In her helpful written submissions DPP Emily Goh assisted the court by first identifying and then addressing the multiple grounds of appeal advanced by the applicant in his home-made grounds of appeal against conviction. In the result, she submitted that there was no merit in those grounds. Of the application in respect of sentence, she said that having regard to the authorities and to the circumstances of the case the total sentence of 4 years' imprisonment imposed on the applicant was entirely proper. Regard was to be had to the multiple factors of aggravation in the commission of the offence, namely that the applicant had: abused his position and authority as an Inspector betraying the public's trust and undermining confidence in the integrity of the Royal Brunei Police Force; having been told to hand over the monies not only had he not done so but also he had continued to misappropriate fresh bail bonds; his misconduct occurred over a period of 2 ½ years; and, although he had repaid B\$3,900, there was an outstanding balance of B\$13,500 of misappropriated monies.

Discussion

Conviction

Ground 1

24. As Ms Goh pointed out in her written submissions, in cross-examination the applicant agreed with the suggestion that, on 3 April 2018, he had been reprimanded by ASP Helmi for retaining possession of the bail bond monies and not handing them over to the Chief Clerk. Furthermore, the issue taken by the applicant in cross-examination with the evidence of ASP Zulhelmi Azmi of the various occasions in which he reprimanded the applicant was not as to the broad fact of reprimand, rather it was to the detail of what was said. The applicant testified that, rather than being told to make the payments as soon as possible, he was enjoined to "settle" or "sort it out". In contrast, it is to be noted that ASP Zulhelmi Azmi had been cross-examined on the basis that no reprimands were delivered by the witness.

25. Clearly, the judge was entitled to accept the evidence of those two witnesses and, in doing so, equally clearly, he was rejecting the evidence of the applicant in so far as it was in conflict. The judge was entitled to determine that the significance of the evidence was that, although the applicant acknowledged he had possession of the bail monies, he did absolutely nothing to make payment of them to the authorities.

Ground 2

26. Again, as Ms Goh pointed out in her written submissions, in re-examination, the applicant explained that he had found the B\$3,900 that he had handed over to ASP Mohammad Helmi contained in envelopes in the shopping bag in his office at the police station, but he had been unable to find the rest of the envelopes. The applicant had testified that, when he had removed the bail bond monies from the safe, he had placed all of the envelopes containing the money in the shopping bag which he then kept in the office to which he was relocated. All the monies were there when he checked the contents of the shopping

bag later in 2017 after the issue of bail bond monies had been raised by ASP Zulhelmi Azmi. Clearly, the applicant's own testimony was the basis for the judge's observation that the monies were not in the applicant's office.

Ground 3

27. The judge's order in sentencing that the applicant make payment of compensation is irrelevant to his application in respect of his convictions.

Ground 4

28. The applicant's assertions that there were attempts to obstruct justice in the investigation and subsequently in the trial proceedings are without foundation. The fact that there was no search of the applicant's office at the police station is to be viewed in the context that, after handing over B\$3,900 on 9 April 2018, the applicant had suggested that the missing balance might be at his home. That, resulted in a search of his home by DSP Omarali. No suggestion was put to him in cross-examination, as the applicant contends in his grounds, that the applicant had asked him that there be a search of his office.
29. The issue of the alleged reluctance of potential defence witnesses, who were police officers or government servants, to give evidence for the applicant at trial was a matter canvassed with the trial judge immediately before the applicant testified. The complaint was made that some of those potential witnesses had informed the applicant's lawyers that they had been prohibited by their superiors from cooperating with threats of consequent disciplinary action. Those representing the applicant acknowledged that the prosecution had informed the defence by letter that they had no objection to the defence interviewing such potential defence witnesses and that they had informed the police of that position. It is to be noted that the judge had indicated that, if necessary, the court would issue subpoenas to such witnesses. No such application was made and no evidence was adduced before the judge of the alleged misconduct. Similarly, no such material has been put before this court. The complaint was and is a meritless bare assertion, unsupported by any evidence.

Ground 5

30. The applicant's complaint that the judge erred in stating that the office room to which the applicant relocated when he was replaced as officer-in-charge of this police station and in which he testified he kept the shopping bag and its contents of envelopes containing bail bond monies, was a room which could be accessed by anyone in the police station is contradicted by the applicant's own evidence. The applicant stated as much in terms at paragraph 23 of his witness statement, confirming that to be correct in cross-examination in his testimony.
31. In those circumstances, and having regard to the fact that hitherto the applicant had thought it appropriate to keep the bail bond monies secure in a safe, the judge was perfectly entitled to determine of his evidence that he had then left the monies unsecured in a shopping bag in his office room as belying logic.
32. Although the judge did not refer specifically to the Police General Orders, in particular General Order 370, he did find that the applicant's complaints about irregularities in the

practice in respect of the issuing of bail bonds and the proper handling of monies “may have their merits”. Given that ASP Zulhelmi Azmi and ASP Helmi had conceded in cross-examination that General Order 370⁴ stipulated that such monies were to be kept in a safe, either that of the officer in charge of the police station or of the Police Division and made no mention of the requirement that they be sent to the Chief Clerk at Panaga, it is clear those were some of the irregularities to which he adverted. Clearly, he weighed that concern, namely “irregularities in practice or the failure to follow proper procedures”, against the conduct of the applicant. He was entitled to find that those concerns did not “negate nor mitigate” the applicant’s conduct in keeping possession of the monies and not forwarding them to the Chief Clerk.

Ground 6

33. Although the judge did not state specifically that he found that the applicant had acted dishonestly in the way in which he had conducted himself, it is clear that is the conclusion that he had reached. He said that an offence contrary to section 409 of the Penal Code required proof that the applicant was a public servant who had been entrusted with property, namely the cash bail bonds, in respect of which he had committed a breach of trust. A criminal breach of trust required proof that the applicant “...either dishonestly misappropriated or convert (ed) to his own use the cash bail bond monies, or dishonestly used or disposed of it.”
34. The judge said that there was no dispute that the applicant was a public servant and that he had been entrusted with the monies as described in the charges. The issue was whether the applicant had committed a breach of trust in respect of those monies.
35. Having been instructed to hand over the monies and having had ample time to do so the judge said that the applicant failed to give any reasonable explanation for that failure. Moreover, he continued to hold onto freshly issued cash bail bonds. He failed to give any satisfactory explanation as to what had happened to the cash bail bonds. The only reasonable conclusion was that the applicant had misappropriated the monies and kept it in his possession. Clearly, that was a finding of the requisite element of dishonesty. Having made those findings, the judge said that he was satisfied that the prosecution had proved its case against the applicant beyond a reasonable doubt. Accordingly, he convicted the applicant of the three charges.

Conclusion

35. For the reasons that we have set out, we are satisfied that there is no merit in the applicant’s proposed grounds of appeal against conviction. Accordingly, we dismiss his application for leave to appeal against conviction out of time.

⁴ General Police Order 370:

(8) If cash bail is deposited, the money shall be placed on a Valuable Property envelope (Form 102) and receipt acknowledged on the back of the duplicate entry in the bail book by the OC Station. An endorsement shall be placed on the Valuable Property envelope “Cash Bail” in the name of the Bailey should be recorded under “Owner's Name”.

(9) Cash Bail shall be kept in a safe by the OC Station. Cash bail amounts exceeding \$100 shall be kept in OCPD’s safe. The receipt shall be obtained on the back of the duplicate entry in the Bail Book from each person who takes over the money.

Sentence

36. In sentencing the applicant, the judge referred to sentences imposed at first instance or approved of by this court ⁵, but stated that in determining the starting point he had regard to the nature and circumstances of the instant case. With respect, the judge was correct in taking that approach. Having regard to the sentences imposed for offences of criminal breach of trust in other cases assists in identifying the broad parameters of the appropriate sentence, but then focus was to be given to the peculiar circumstances of the case at hand.
37. The judge was correct to take into account that the applicant was a middle-aged man, who was a first offender with a clean record of service and then to have regard to the factors of aggravation in commission of the offences. We are satisfied that DPP Goh was correct in identifying the range of those aggravating factors in her written submissions, namely that: the applicant had abused his position and authority as an Inspector, thereby betraying the public's trust and undermining confidence in the integrity of the Royal Brunei Police Force; having been told to hand over the monies not only had he not done so but also he had continued to dishonestly misappropriate fresh bail bonds; his misconduct had occurred over a period of 2 ½ years; and, although he had repaid B\$3,900, there was an outstanding balance of B\$13,500 of misappropriated monies.
38. Given that \$8,400, from no fewer than 16 cash bail bonds, was misappropriated in the year-long period the subject of Charge 1, the judge was entitled to determine to impose a higher sentence for that charge than for the other two charges, which concerned considerably lesser amounts of monies misappropriated on fewer occasions. The sentence of 3 years' imprisonment in respect of Charge 1 and 2 year's imprisonment in respect of each of Charges 2 and 3, together with his orders that resulted in a total sentence of 4 years' imprisonment, appropriately reflected the applicant's culpability and was entirely appropriate.

Compensation

39. In ordering the applicant to pay compensation of B\$13,500 to "the Royal Brunei Police Force or to the government", the judge did not stipulate pursuant to which power he made the order. However, section 382 of the Criminal Procedure Code, Cap. 7 makes provision for a judge to make such an order on the conviction of a person of a crime or offence by way of compensation to any person "...injured in respect of... his person, character or property" by the crime.
40. It is to be noted that Police General Order 370 provides that when a cash bail is cancelled or the terms of the bail had been completed the Prosecuting Officer "...shall return the amount of the bail to the bailee and obtain a receipt from him on the back of the relevant entry in the Bail Book."

⁵ Court of Appeal: *Public Prosecutor v Hj bin Ajis* (Criminal Appeal No. 7 of 2004). *Pg Hidayatullah Bin Pg Kula v Public Prosecutor* (Criminal Appeal No. 12 of 2017). *Public Prosecutor v Nowidayawati binti Haji Motki* (Criminal Appeal No. 13 of 2019).

41. PO Shamsuddin, who appeared at the hearing, was unable to inform the court of whether or not the bail monies, which were the subject of the offences of which the applicant had been convicted, had been returned at the conclusion of proceedings to the persons who had made a deposit of those monies. Be that as it may, it is clear that the Royal Brunei Police Force were acting as a bailee of those monies and, at the conclusion of proceedings, was liable to make repayment, if the conditions of bail had been met. In those circumstances, clearly the Royal Brunei Police Force falls to be regarded as a person injured by the crime. We are satisfied that the judge's order, together with the order of imprisonment in default of payment, was properly made.

Conclusion

42. There is no merit in this application for leave to appeal against sentence out of time, which is dismissed.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A