AJIZUL BIN DAGANG

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 8 of 2019)

Before: Burrell P, Seagroatt and Lunn JJ A.
Date of Hearing: 6th November 2019
Date of Judgment: 26th November 2019

Headnote: Appeal allowed; the court quashed the judge's orders that, on his pleas of guilty, the appellant receive three strokes for each of three offences contrary to s. 457 of the Penal Code, to a total of six strokes, and that the sentences of imprisonment commence on the date of sentencing and imposed two strokes for each offence, ordering that they be non-cumulative, and that the sentences of imprisonment commence on the date when the appellant was first remanded in custody, notwithstanding that after a month he had been detained under a Detention Order pursuant to the Criminal Law (Preventive Detention) Act, Cap. 150.

Appellant in person
DPP Siti Nurjauinah @ Karmila binti Haji Kula for Respondent

Cases referred to in the judgment

Mohammad Joll Bin Tumih & Another v Public Prosecutor (2007) Volume II JCBD 183

Mohammad Azwan Bin Ibrahim v Public Prosecutor (Criminal Motion No 37 of 2018; unreported, 7 November 2018)

Lunn, JA.:

1 This is an appeal against the total sentence of 60 months' imprisonment, together with 6 strokes, imposed on the appellant on 27 June 2019 by HHJ Faisal following his conviction on his pleas of guilty on 24 April 2019 to a total of 19 charges, namely:

- three charges of housebreaking by night of a dwelling house, contrary to section 457 of the Penal Code (Charges 11, 13 and 14);
- eleven charges of theft, contrary to section 379 of the Penal Code (Charges 4, and 27; and, specifically the theft of motor vehicles-Charges 29, 31, 32, 34, 36, 38, 40, 44 and 45);
- one charge of assisting in disposing of stolen property, contrary to section 414 of the Penal Code (Charge 24);

- one charge of house trespass with intent to commit theft, contrary to section 451 of the Penal Code (Charge 39);
- one charge of theft in a building used for the custody of property, contrary to section 380 of the Penal Code (Charge 42);
- one charge of displaying a false identification mark on a motor vehicle, calculated to deceive as to the real identification mark of the vehicle, contrary to section 89 of the Road Traffic Act, Cap. 68 (Charge 37); and
- one charge of falsely representing that he was the person to whom a stipulated Brunei passport had been issued, contrary to section 12 (1) (c) of the Passport Act, Cap. 146 (Charge 19).

The Facts

Charge 19: the false representation that the appellant was the person to whom a stipulated Brunei passport had been issued

2. In the afternoon of 7 September 2018, the appellant was arrested at the Immigration Control Post in Sungai Tujoh on entering Brunei from Malaysia having falsely represented himself to be the person named in the Brunei passport, Mohd Yudhy bin Haji Jumat, which he presented to an Immigration Officer.

Charges 11, 13 and 14: three offences of housebreaking by night of a dwelling house

3. The three offences of housebreaking by night were committed in the overall period 27 July to 21 August 2018.

Charge 11

4. In the the period 27 to 31 July 2018, in the absence of the occupants, the appellant together with five other persons forced entry to the premises, damaging a metal grille to a window in doing so, and ransacked three bedrooms, forcing entry to a cabinet from which they stole jewellery and cash. None of the property, valued at about $30,000, was recovered. The appellant admitted to the police having taking part in the offence with five other persons.

Charge 13

5. In the period 21 August to 24 September 2018, in the absence of the occupants, the appellant together with another person gained entry to the premises by prising open a locked kitchen window, following which they stole two flat-screen television sets. Neither item of property, valued at about a total of $2,500, was recovered. The appellant admitted to the police having taken part in the offence with another person.

Charge 14

6. As she was about to leave her home at 6 a.m. on 21 August 2018, Madam Loy discovered the main entrance to the premises was open and that her Mercedes-Benz and Mazda 3 motorcars were missing. Also, she discovered that watches,

gold rings and bracelets and a diamond ring were missing from inside her home. The appellant admitted to the police having taken part in the offence together with five other persons. None of the property, valued at about $20,000, was recovered The Mercedes-Benz motorcar was stolen when the appellant and his fellow thieves made good their escape. The appellant returned to the premises later that night and stole the Mazda 3 motorcar.

Charges 44 and 45: the theft of the Mercedes-Benz and Mazda 3 motorcars

7. The theft of the Mercedes-Benz and the Mazda 3 motorcars were the subject of Charges 44 and 45. As noted earlier, the appellant admitted his part in their theft. Neither vehicle valued at about $68,000 and $12,000 respectively, was recovered, they having been taken out of Brunei to Miri, Sarawak in Malaysia where they were sold to third party.

Charges 29, 31, 32, 34, 36, 38 and 40: the theft of other motorcars, contrary to section 379

8. In the overall period 18 November 2017 to 22 July 2018, the appellant stole seven other motorcars from where they were parked at or near the homes of their owners. The appellant admitted to police having taken part in the theft of those vehicles. Two of the vehicles, a Honda CRV and a Toyota Cressida (Charges 29 and 34) were not recovered. Their owners had not provided the police with a valuation of their respective vehicles. The other vehicles were recovered by the police.

Charge 37: displaying a false identification mark on a motor car calculated to deceive

9. In the early morning of 16 December 2018, the appellant stole an Hyundai Getz motorcar from domestic premises. (Charge 36) In a statement to the police, the appellant admitted that he had displayed a vehicle registration mark on the vehicle, which mark he had taken from another vehicle.

Charges 4 and 27: the theft of other property, contrary to section 379

10. In July and August 2018, the appellant stole three gas cylinders and a mountain bike from separate domestic premises. The appellant admitted to the police his involvement in those offences. All the property was recovered.

Charge 24: assisting in the disposal of stolen property, contrary to section 414

11. On the night of 5/6 September 2018, a Toyota Vios motorcar was stolen from domestic premises. (Charge 3) On 6 September 2018, the appellant determined to assist in the disposal of the stolen motorcar in Miri, Sarawak in Malaysia. To do so, he and another person drove across the border from Brunei into Malaysia and waited for the stolen motorcar to be driven by a confederate from Brunei into Malaysia. However, late in the evening of that day the driver of that vehicle was detained by Immigration officers, to whom he falsely represented that he was the person to whom a Brunei passport had been duly issued. That person was arrested and the motor vehicle seized.

12. *Charge 39*; house trespass with intent to commit theft, contrary to section 451

    In the early morning of 12 April 2018, the occupant of domestic premises discovered that the main door and a window to the living room in the premises were open. Then, she realised that her Suzuki SX 4 motorcar was missing. (Charge 40) In a statement to the police, the appellant admitted that he had entered the premises and stolen a laptop computer and the key to the Suzuki motor car which he drove away.

Charge 42: the theft of property, contrary to section 380

13. In a statement to the police, the appellant admitted that on 13 August 2018 he had stolen four sets of wheel rims for a Pajero motorcar from an unlocked storeroom of domestic premises. The police recovered the stolen property.

The appellant's criminal record

14. Finally, the Statement of Facts recorded that the appellant had *"previous convictions for offences against property."* That was a reference to the appellant's conviction and sentencing on 4 June 2016 in respect of four charges, two contrary to section 380 and two contrary to section 379, for which he was sentenced to a total of 18 months' imprisonment by the Bandar Seri Begawan Magistrates Court.

Reasons for sentence

15. In his reasons for sentence, the judge said:

    "It is clear from the statement of facts that the defendant is a serial thief. A deterrent sentence must be imposed upon him to reflect the seriousness of his crime."

Starting point for sentence

16. The judge stipulated the following starting points for sentence:

    (i) for the offences of housebreaking by night of domestic premises, contrary to section 457, 4 years' imprisonment and 3 strokes;
    (ii) for the offence of house trespass with intent to commit theft, contrary to section 451, 3 years' imprisonment;
    (iii) for the offences of theft of motor cars, contrary to section 379, 24 months' imprisonment;
    (iv) for the offence of assisting in the disposal of a stolen Toyota Vios motorcar, contrary to section 414, one year's imprisonment.

17. The judge did not stipulate a starting point for sentence in respect of Charges 4, 19, 37 and 42.

Discount from the starting point

18. The judge said that he afforded the appellant a discount of one-third from that taken as a starting point *"for each charge"*, to reflect his pleas of guilty.

Sentence

Charges 11, 13 and 14, contrary to section 457

19. For each of Charges 11, 13 and 14, the judge imposed sentences of 3 years' imprisonment, together with 3 strokes.

Charge 39, contrary to section 451

20. For charge 39, the judge imposed a sentence of 24 months' imprisonment.

Charges 29, 31, 32, 34, 36, 38, 40, 44 and 45: theft of motorcars contrary to section 379

21. For each of Charges 29, 31, 32, 34, 36, 38, 40, 44 and 45, the judge imposed sentences of 16 months' imprisonment.

Charge 24, contrary to section 414

22. For Charge 24, the judge imposed a sentence of 8 months' imprisonment.

Other sentences

23. The judge imposed the following sentences in respect of charges for which he had not stipulated a starting point for sentence:

Charge 4-2 months' imprisonment;
Charge 19-6 months' imprisonment;
Charge 37-2 months' imprisonment; and
Charge 42-12 months' imprisonment.

Totality

24. The judge said that, having regard to the appropriate totality of sentence, he ordered that sentences of imprisonment imposed in respect of Charges 11, 13 and 14 were to be served concurrently, as were the sentences of imprisonment imposed in respect of all the other charges, but that the latter sentences were to be served consecutively to the sentences of imprisonment imposed in respect of Charges 11, 13 and 14.

25. Further, he ordered that the strokes imposed in respect of Charges 11 and 14 be non-cumulative.

Commencement of sentence

26. In the result, the judge said that the total sentence imposed on the appellant was 60 months' imprisonment and 6 strokes, which sentence he ordered "to take effect

from today." In making that order, the judge refused the prosecution's application that the sentences be ordered to commence at the conclusion of the appellant's detention, under the Criminal Law (Preventive Detention) Act, Cap. 150, at an unspecified date in October 2019. He noted that the prosecution had "declined to explain" the reason for the appellant's detention, but had "indicated that it bears no relation to this case."

The appellant's submissions

27. In the Notice of Appeal, in inviting this court to reduce the sentences imposed on the appellant, the appellant's mother submitted that whilst in custody the appellant had come to realise the error of his ways, so that he would not commit further offences in future.

28. For his part, in his written submissions the appellant expressed his remorse for his conduct and asserted that he had cooperated and provided information to both the investigation officers and the Public Prosecutor, surrendering almost all the stolen property. Further, he contended that he had done so without delaying the court proceedings. In addition, he said that as the eldest of his siblings he was responsible for looking after the welfare of his mother, who was old and suffered from diabetes and high blood pressure.

29. In addition, in support of his submission that this court ought to reduce both the sentence of imprisonment and the number of strokes to which he was subject, the appellant drew the court's attention to its judgment in *Johari Bin Haji Jaya v Public Prosecutor* (Criminal Motion No, 14 of 2018; unreported, 14 November 2018) and judgment in *Muhamamad Zulazlaine Bin Zoel Arrifin* (2014) Volume II JCBD 2014.

30. In his oral submissions, the appellant asked that the sentences be ordered to run from the day that he had been first arrested, namely 6 September 2018.

The respondent's submissions

31. In her helpful submissions Ms Nurjauinah reminded the court of its judgments in which guidance was given as to the approach to stipulating the starting point for sentence for some of the offences for which the appellant was sentenced:

(i) Sentence for offences contrary to section 457
Mohammad Joll Bin Tumih & Another v Public Prosecutor (2007) Volume II JCBD 183;
Wahid Bin Mazid v Public Prosecutor (CA No.9 of 2014; unreported, 20 May 2014);
Mohammad Azwan Bin Ibrahim v Public Prosecutor (Criminal Motion No 37 of 2018; unreported, 7 November 2018)

(ii) Sentence for offences contrary to section 451
Mohammad bin Yusof v Public Prosecutor (CA No. 14 of 2018; unreported, 8 November 2018);
Ahmadi bin Haji Nawi v Public Prosecutor (Criminal Motion No.1 of 2015; unreported, 23 May 2015)

(iii) Sentence for an offence contrary to section 379

Public Prosecutor v Pengiran Abdul Rahman Bin Pengiran Shahabudin [2003] BLR 13

Mohammad Saiful Bin Haji Simpol v Public Prosecutor (Criminal Motion No. 29 of 2018; unreported, 15 November 2018)

32. Ms Nurjauinah submitted that it was appropriate for the judge to take into account the fact that the appellant had previous convictions for similar offences, namely for offences contrary to sections 379 and 380, in determining the appropriate starting point to be taken for sentence. She said that the sentence of 3 years' imprisonment with 3 strokes imposed on the appellant following his pleas of guilty to the three offences contrary to section 457 and the sentences of 16 months' imprisonment imposed in respect of the multiple charges for theft of a motor car, contrary to section 379 were clearly not manifestly excessive. They lay within the range of sentence identified by this court. Similarly, she submitted that the sentences of imprisonment imposed in respect of all the other charges were appropriate individually and that the totality of sentence imposed on the appellant appropriately reflected his overall criminality.

33. Of the judge's order that the sentences commence on the day of sentencing, namely 27 June 2019, Ms Nurjauinah explained that at that date the appellant was subject to a Detention Order, made under the Criminal Law (Preventive Detention) Act. The appellant had been remanded in custody following his arrest on 6 September 2018. On 6 October 2018, the appellant became subject to a Detention Order made under the Act. On that date, the prosecution had withdrawn the charges against the appellant. So, thereafter the appellant was not remanded in custody in respect of the charges for which he was sentenced on 27 June 2019.

34. Ms Nurjauinah said that, although she had sought information from the police, she had been unable to discover the basis on which the appellant had been made the subject of the Detention Order, of which result she informed the judge. She submitted that, notwithstanding that he ruled against her application, the judge was correct to order the sentences to commence on the date of sentencing.

Discussion

35. Although the judge stated expressly that he was affording the appellant a discount of one-third from the starting points that he had identified for various offences, including the offences contrary to section 457, it is clear that, having stipulated a starting point for sentence of 4 years' imprisonment, in sentencing the appellant to 3 years' imprisonment for each of Charges 11, 13 and 14 the judge did not afford the appellant a discount of one-third. Rather, the discount was 25%. If the judge had done what he said he was doing, he would have imposed sentences of 32 months' imprisonment on each of the three charges. Furthermore, he afforded the appellant no discount at all in respect of the strokes. He ought to have ordered 2 strokes, not 3 strokes in respect of each of (Charges 11, 13 and 14). On that limited basis, the appellant is entitled to feel aggrieved. Clearly, the judge fell into error.

36. Ms Nurjauinah explained that she had not drawn the judge's attention to that simple arithmetic error because, in his oral delivery of sentence, the judge did not stipulate the proportion or percentage of the discount. On the other hand, this court observes that the judge's handwritten note of the sentencing is accurately reflected in the typed version of the Notes of Proceedings, and makes specific reference to "a further reduction of 1/3" for the appellant's guilty pleas. Perhaps, Ms Nurjauinah did not hear the judge's oral articulation of the specific discount.

37. In stipulating a starting point for sentence of 4 years' imprisonment and 3 strokes for the offences contrary to section 457, the judge made no reference at all to the guidance that this court has given to identify the appropriate starting point for sentence. In all the circumstances, that starting point was unduly lenient.

38. The two judgments to which the appellant has referred the court are not relevant, being merely examples of appeals against sentence which were allowed having regard to the appropriate totality of sentence imposed on the particular appellants.

39. In *Mohammad Joll Bin Tumih & Another v Public Prosecutor,* this court said that the appropriate approach to sentencing an appellant for charges of housebreaking by night with intent to commit theft "…when they are not isolated offences but the convicted person is of previous good character would have been 5 years reduced to 3 years for the plea with two strokes on each charge." (Paragraph 10.) In that case there were three such charges.

40. In *Mohammad Azwan Bin Ibrahim v Public Prosecutor*, this court dismissed an appeal against a total sentence of 4 years' imprisonment and 2 strokes imposed on the appellant following his pleas of guilty to three offences of housebreaking at night with intent to commit theft, contrary to section 457. The offences had been committed in a period of about two months. The applicant had no previous criminal convictions. The judge had taken a starting point of 6 years' imprisonment and 2 strokes, which he discounted for pleas of guilty to sentences on each charge of 4 years' imprisonment and 2 strokes ordered to be served concurrently. Having referred to a number of the decisions of this court relevant to sentencing for the offence, Burrell P said:

"Whilst there is, inevitably, some variation in the sentences passed in these cases due to the differing circumstances and facts of each case it can be seen that for a single offence contrary to s.457, absent any particularly unusual circumstances pertaining to either the offence or the offender, a sentence of up to 5 years after trial would be correct."

41. It is clear that there were no such *"particularly unusual circumstances pertaining to either the offence or the offender"* which might have justified the judge taking a lower starting point for sentence than 5 years' imprisonment. On the contrary, the three offences had been committed in a short period of time in criminal enterprises involving multiple culprits, in which the appellant had played a very active role. In the housebreaking the subject of Charge 14, Ms Loy and her parents were asleep in the bedrooms upstairs at the time of the commission of the offence. Obviously, that gave rise to the risk that the occupants might have been disturbed

by the multiple thieves roaming around their house to find themselves confronted by those thieves. That was a factor of significant aggravation in the commission of the offence.

42. Of the *"offender"*, as noted earlier, the judge had been informed in the Statement of Facts (paragraph 95), the appellant had "previous convictions for offences against property", for which he had been sentenced to a total of 18 months' imprisonment. It is apparent from the Statement of Facts relating to those charges, provided to this court at our request by the respondent, that the two offences contrary to section 380 were committed in May 2016 in domestic premises which the appellant had entered in daylight and from which he had stolen property. From one home, he stole a laptop computer, which was not recovered (Charge 1). From the other premises, he stole two mobile phones and $300 (Charge 2), which property, save for the money, was recovered. The two charges contrary to section 379 involved the theft of motor cars in May and June 2016, which their owners had parked in the street. In the first case, having stolen the motor car, the appellant affixed to it a vehicle licence plate which he had removed from an abandoned car. Both stolen motorcars were recovered by the police.

43. In all the circumstances, the judge would have been fully entitled to take a starting point of 6 years' imprisonment and 3 strokes for the offences contrary to section 457 and, having afforded the appellant a discount of one-third for his pleas of guilty, to have imposed sentences of 4 years' imprisonment and 2 strokes for each of the three charges. In consequence, overall the appellant was the beneficiary of an unduly lenient approach to sentence taken by the judge in respect of those three offences.

The theft of motor cars, contrary to section 379

44. In stipulating a starting point for sentence of 24 months' imprisonment for charges concerning the theft of motor cars, contrary to section 379, the judge was entitled to have regard to the fact that there were no fewer than nine such charges and that four of the motor cars were never recovered. Two of the motor cars, a Mercedes-Benz and a Mazda (Charges 44 and 45) were removed from Brunei and sold in Miri. The appellant was also convicted of the offence of assisting in the disposal of a stolen Toyota Vios (Charge 24). Furthermore, the appellant had been released from serving a sentence of imprisonment, including for two offences of stealing motorcars, only a few months before he embarked upon stealing motorcars again in November 2017 (Charge 38). In all circumstances, the judge was fully entitled to sentence the appellant to 16 months' imprisonment for each of these offences.

Other charges

45. We are satisfied that the sentences of imprisonment imposed by the judge for the charges in respect of other offences were entirely appropriate as was the judges determination that the appropriate totality of sentence of imprisonment was to be achieved by ordering that the sentences of imprisonment imposed in respect of the charges, other than the three charges contrary to section 457, be served concurrently, but consecutively to the sentences imposed in respect of Charges 11,

13 and 14. However, the judge erred in ordering that only two of the order for strokes be non-cumulative. All the orders for strokes ought to be non-cumulative. As noted earlier, those sentences of 3 years' imprisonment were unduly lenient. To that extent, albeit that the judge incorrectly calculated the effect of a one-third discount in imposing those sentences to the detriment of the appellant, nevertheless overall the appellant was a beneficiary of the judge's unduly lenient sentences.

46. *The date of the commencement of sentence*

In ordering that the sentences imposed on the appellant commence on the date of sentencing, the judge acknowledged specifically the terms of section 251 of the Criminal Procedure Code, which provides that sentence *"…takes effect from the date on which it was passed, unless the Court passing the sentence otherwise directs."* It is clear that the court took no account of the fact that the appellant had been remanded in custody, together with other defendants, on the order of the court, for the period from 6 September to 6 October 2018, in respect of charges which were amongst those to which he pleaded guilty in due course. That order had been made at the request of the prosecution, who said that they wished to make "further investigations". The appellant had been charged with offences arising from his false representations in respect of a passport he presented on his return to Brunei (Charge 19) and in assisting in the disposal of the stolen Vios motorcar (Charge 24). Those charges were withdrawn on 6 October 2018, by which date he was the subject of a Detention Order.

47. On 28 January 2019, those charges were re-instated in the Magistrates Court in Bandar Seri Begawan, together with three other charges, including two charges of housebreaking of domestic premises by night (Charges 11 and 13). Then, on 2 February 2019, the appellant was brought before HHJ Faisal on a Charge Sheet which included all 19 charges to which the appellant pleaded guilty on 24 April 2019. On the latter date, the prosecution informed the judge that the appellant was the subject of the Detention Order, whilst the appellant said that he had been detained in a police station for four weeks prior to 6 October 2018. On the occasions that the appellant appeared before the courts, on and between 28 January 2019 and 27 June 2019, no order for the remand of the appellant had been sought by the prosecution nor made by the courts. Of course, there was no need to do so because the appellant was detained under the Detention Order.

48. A copy of the Detention Order was not provided to the judge or this court. Further, no information about the Detention Order was provided to the judge, other than the date it was made and an indication to the judge that it expired after one year in October 2019. On the other hand, it is clear from the chronology of events described above that the prosecution took advantage of the existence of the Detention Order against the appellant to withdraw the charges against the appellant in October 2018, thereby no longer being required to persist with its successful application that the appellant be remanded in custody. They were entitled to do so, but those circumstances were relevant to the issue of the date of the commencement of the sentences. Subsequently, even after those charges had been re-instated and additional charges laid against the appellant, in particular even after he had pleaded guilty to all 19 charges, no order was sought by the

prosecution that the appellant be remanded in custody. Again, it is readily apparent that the prosecution took advantage of the existence of the Detention Order.

49. In all the circumstances, in our judgment the judge ought to have had regard to the period of the appellant's detention in custody from 6 September 2018 to 27 June 2019 and, having done so, ought to have ordered that the sentences imposed on the appellant commence on 6 September 2018.

Conclusion

50. In the result, we allow the appeal against sentence. We quash the order that the appellant receive 3 strokes for each of Charges 11, 13 and 14 and that the sentences commence on 27 June 2019. In place of those orders, we order that the appellant receive 2 strokes for each of those charges, all of which are to be non-cumulative, and that the sentences commence on 6 September 2018. We make no other order. Accordingly, the total sentence imposed on the appellant is 60 months' imprisonment and 2 strokes.

Burrell, P.

Seagroatt, J.A. **Lunn, J.A**