

WAHID BIN MAZID
AND
PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 9 of 2014)

Before: Mortimer P, Davies and Burrell JJ A.

20th May 2014

Sentence-Housebreaking (s.457 and s.427) –consideration of the discount for a plea of guilty in the context of the application of the totality principle.

Appellant in person

DPP Pg Nina Jasmine PLKDR Pg Hj Bahrin for Respondent

Cases cited in the Judgment:

Muhd Joli bin Tumih vs Public Prosecutor (Criminal Appeal No 5 of 2005)

Azman@Asrol bin Jaya vs Public Prosecutor (Criminal Appeal No 6 of 2011)

Burrell, JA.:

This is an appeal against a sentence of 7 years imprisonment and 5 strokes imposed by Hairol Arni Majid J on 6th March 2014. The appellant was the 9th defendant on a charge sheet containing a total of 11 charges. The charges to which the appellant pleaded guilty were as follows:-

1. Charge 1 an offence against s.457 of the Penal Code, namely housebreaking by night in order to commit theft on 20th November 2013.
2. Charge 4 an offence against s.427 of the Penal Code, namely housebreaking in order to commit theft on 1st December 2013.
3. Charge 8, a second s.427 offence committed on 12th December 2013.

On the 1st and 8th charges he had committed the offence with the 3rd defendant and on the 4th charge he had committed the offence with the 3rd and 6th defendants. They had all pleaded guilty at the earliest opportunity.

The first charge concerned a private residence in Jalan Tungku. Entry was gained at approximately 9.00p.m by breaking a window. The appellant entered the house, which was unoccupied at the time, with D3. Watches, jewellery, a laptop, an iPad and cash were among the items stolen. Some items were sold, some were recovered by the police with the assistance of the 3rd defendant.

The 4th charge involved a private residence in Kampong Beribi. Entry was gained at midday by levering open a window. The appellant was one of three who went inside and stole items. This enterprise was interrupted by an alarm going off. All the intruders fled. The appellant obtained nothing from this offence. Such items that had been stolen were recovered, again with the assistance of D3.

The 8th charge was committed on 12th December 2013 at a house in Kampong Sengkurong. The appellant broke a window at the rear of house and entered together with another person and stole watches, assorted jewellery, a camera and car keys. All the stolen items were passed to D3 who later sold them for \$600 of which \$200 was given to the appellant. The appellant sold the camera separately.

Factors relevant to sentencing

The learned Judge noted the appellant's clear record and early pleas of guilty. These factors apart there was little that could be said in the appellant's favour. All but two of the other defendants were Indonesian Nationals but there was no suggestion that this appellant was a local gang leader.

The Judge stated that the proper starting point for the offence contrary to s.457 (housebreaking at night) was 6 years imprisonment which he reduced to 4 years to take into account the appellant's clear record and plea of guilty. In support the Judge referred to two cases namely:-

Muhd Joli bin Tumih vs Public Prosecutor (Criminal Appeal No 5 of 2005) ***Azman@Asrol bin Jaya vs Public Prosecutor (Criminal Appeal No 6 of 2011)***

Both these cases emphasise, as we do again in this case, the seriousness of housebreaking offences particularly when committed at night, due to the potential fear and distress that is caused to the occupants. However, both cases also involved a greater multiplicity of offences. The court in the Azman case was concerned with a total of 27 charges. In all the circumstances of the present case we think that 6 years as a starting point for a single offence of housebreaking at night was excessive. We think that 5 years would have been proper, reduced to 3 years 4 months because of the plea of guilty.

With regard to the offences contrary to s.454, the Judge took a starting point of 3 years imprisonment for each offence and reduced it to 2 years because of the plea and mitigation. We consider this to be correct.

However, the Judge then noted that the appellant had committed two such offences and accordingly increased the 2 years to 3 years in each case.

The practical consequence of this being that the appellant immediately lost the benefit of the 1/3 discount for his plea of guilty. In this regard and in the particular circumstances of this case, we think the Judge erred. The Judge in his reasons for sentence said he was "*obliged*" to increase the sentence for this reason. It is, of course, open to a Judge to enhance a sentence due to a multiplicity of offences but there is no obligation on him to do so. Each case must be considered in context. Here, we take the view that it was inappropriate to enhance the sentences for the s.454 offences because (a) it eliminated the benefit afforded to the appellant for his guilty pleas and (b) it resulted in an excessive overall sentence. The original sentence of 2 years for each offence was the proper sentence in this case.

The passing of a 7 year sentence suggests that the Judge considered that 10 ½ years would have been appropriate for the overall criminality after trial. This would have been excessive.

The principle of totality was considered. The Judge's method of giving effect to the principle was to direct that the two sentences for the s.454 offences be served concurrently with each other but consecutively to the s.457 offence namely 3 years plus 4 years respectively, making a total of 7 years imprisonment.

Applying the principle in the same way to the sentences as adjusted by this court, the concurrent sentences of 2 years for the s.454 offences shall be served consecutively to the 3 years 4 months for the s.457 offence which makes a total of 5 years 4 months. We consider this to be a proper reflection of the appellant's overall criminality which would have been 8 years after trial.

To this limited extent we allow the appeal. For the avoidance of doubt the imposition of 5 strokes on the s.457 offence and 3 strokes on each of the s.454 offences to be non-cumulative remain. The sentence is reduced from 7 years imprisonment and 5 strokes to 5 years and 4 months and 5 strokes.

Mortimer, P.

Davies, J.A.

Burrell, J.A.