

**Daud Bin Hj Jair**

AND

**Public Prosecutor**

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**(Court of Appeal of Brunei Darussalam)**  
**(Criminal Appeal No. 5 of 2008)**

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Power, P.; Mortimer and Davies, JJ.A.  
**6<sup>th</sup> November, 2008.**

Appellant in person.

DPP Norhayati Binti DP Hj Omar for the Public Prosecutor/Respondent.

**Cases cited in the Judgment:**

*Ibrahim Bin Hj Mutsuman v PP* (Crim. App. 11 of 2005)

*Redzwan Bin Roslan v PP* (Crim. App. 1 of 2006)

*Mohammadin Joll Bin Tumih and Anor v PP* (Crim. App. 5 of 2005).

**Mortimer, J.A.:**

After a long trial the appellant was found guilty by Hairol Arni J of a joint offence of housebreaking by night contrary to sections 457 and 34 of the penal code and a second joint offence of housebreaking and theft contrary sections 454 and 34 of the code. On 19 April 2008 he was sentenced to four years imprisonment on the first charge and three years concurrent on the second charge making four years in all. He now appeals on the basis that the total sentence is manifestly excessive.

**The Facts**

The two offences took place in Temburong within a few days of each other in June, 2004. The first at night and the second during the day. In count one the appellant drove his two co-accused in his car to an empty house in Kampong Lepong Lama. He stayed with the car, but the others broke in and stole a television set, a radio cassette player and a gas cylinder. Having taken the goods they drove to Limbang, sold them and spent the money on drink and drugs.

The second offence was somewhat similar, the appellant drove the others to some empty labourer's barracks intending to steal there. They found an Astro satellite disc system which they took and again sold in Limbang. The proceeds went on drink and drugs.

**The Sentence**

In sentencing the appellant to four years on the first charge and three years on the second concurrent the judge made reference to his age and family but only gave effect

to the appellant's previous good record which he regarded as the only mitigating factor.

### **The Appellant**

The appellant contends that the sentence of four years imprisonment in total is manifestly excessive. He submits that even if the sentence would be justified in many circumstances the judge failed to give weight to a number of important matters. He submits (in effect) that these are:

- His age of 53 years coupled with his avoidance of any further offence of dishonesty since committing these offences. This he contends shows that the offences were isolated and that there is little risk of repetition.
- His family circumstances as a married man with children.
- The fact that he was serving a sentence in a drug rehabilitation centre when these sentences were passed. He had served seven months at the centre so he would be in custody for the equivalent of a total sentence of four years and seven months.
- The inordinate length of time that this case has been hanging over him. The offences took place over four years ago and the trial, which started on the 25<sup>th</sup> August 2004, did not end until he was sentenced on the 19 April 2008, a period of three years and eight months. We have heard no adequate explanation of much of this delay.

The appellant also said he felt aggrieved that his co-accused Nordin (who gave evidence against him) had only received a two year sentence for his part. However, from the record we have seen this seems to be a mistake. Nordin pleaded guilty on 11 August 2005 to three offences which included the two jointly committed with him but the total sentence passed on Nordin was three years and six months. We are satisfied that there is no basis for the appellant's concern in this respect.

### **The Respondent**

DPP Norhayati, who appears for the respondent in reply, submits that this sentence is perfectly appropriate and cites a number of previous cases which show that a three to four year sentence in total for this type of offence is within the normal range of sentences passed in the lower courts.

There are two cases decided in this court however which she did not cite. They are of some relevance to the proper approach. The first is *Ibrahim bin Hj Mutsuman v PP* and *Redzwan bin Roslan v PP* (Crim. App. 11 of 2005 and 1 of 2006) and the second *Mohammadin Joll Bin Tumih and Anor v PP* (Crim. App. 5 of 2005). Both were to the same effect. We said in Ibrahim's case and repeated in the second:

*"We have been reminded of sentences passed in other cases. These show that offences of housebreaking are prevalent. They are often committed during the day when householders are at work so that their houses are an easy a target. Such offences cause immense distress. Heavy deterrent sentences are called for."*

**Conclusion**

In individual cases the circumstances vary significantly concerning the weight of mitigating circumstances. In the instant appeal in particular the length of time during which this case has been hanging over the appellant before the trial was completed and the fact that he has demonstrated that the offences are unlikely to be repeated are matters to which weight ought to be given. He was not involved in any dishonesty before these two offences were committed and he has not been involved in any dishonesty since. We do not overlook that he had been in custody for seven months before the present sentence was passed. At the least it can be said that in his case a deterrent sentence is not called for.

The judge did not give any effect to the mitigating circumstances to which we have referred with the consequence that the total sentence is wrong in principle and manifestly too severe. For the reasons we have given it is necessary to give weight to two matters in particular in determining the appropriate sentence. The first is the length of time this was hanging over him caused by delays in the completion of the trial. The second is the fact that he was about 50 years of age when he first became involved in these two dishonest offences and he has not committed any further offence of dishonesty in the three years afterwards when he was on bail. It is exceptional in the court's experience for a man of this age to first become involved in such offences.

We therefore reduce the total sentences passed from four years imprisonment to two and a half years. We achieve this by reducing the sentence on the first charge from four years to two and a half years which will run concurrently with the sentence of two years on the second charge making two and a half years in all.

**Order**

We allow the appeal against sentence. We reduce the sentence on Count 1 from four years to two and a half years. This will be concurrent with the sentence of two years on count 2 making two and a half years imprisonment in all.

**Power P.**

**Mortimer, J.A.**

**Davies, J.A.**