

**Mohamad Zainal Abidin Bin Hj Junaidi**

AND

**Public Prosecutor**

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**(Court of Appeal of Brunei Darussalam)  
(Criminal Appeal No. 6 of 2008)**

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

Criminal appeal. Sentence. Disparity between sentences imposed on co-offenders by different courts on different occasions. A substantial and unacceptable disparity between such sentences may be rectified only if that can be achieved without substituting a wholly inappropriate sentence for one which is appropriate.

Appellant in person.

DPP Dk Hjh Hana Molina Bte Pg Hj Mohamad for the Respondent.

**Case(s) cited in the Judgment:**

*Fawcett* [1983] 5 Cr. App. R. (S) 158.

*Goodacre* [1996] 1 Cr. App. R. (S.) 424.

*Pitson* [1972] 56 Cr. App. R. 391

*Raddyman bin Hj Radin*, Criminal Appeals Nos 4 and 6 of 2005.

*Stroud* [1977] 65 Cr App R 150

*Wood* [1983] 5 Cr. App. R. (S) 381

**Davies, J.A.:**

On 24 May 2008 the appellant pleaded guilty in the Intermediate Court to nine charges of theft in a dwelling house contrary to the section 380 of the Penal Code. He was sentenced to 14 months imprisonment on each charge, the first five to be served consecutively, the last four to be served concurrently with the first five, making a total term of imprisonment of five years and 10 months. He appeals against that total sentence on the ground that it is manifestly excessive.

The appellant was charged jointly with two other defendants on the second to ninth charges. One of these defendants was Mohamed Zulfady bin Hj. Sinin who pleaded guilty to a total of 12 charges, including those jointly committed with the appellant. He was sentenced in the Magistrate's Court to a total of three years imprisonment. The third co-defendant is still awaiting trial. The disparity between the appellant's sentence and that of this co-defendant is one of the appellant's grounds of complaint.

At the time he committed these offences the appellant was only 21 years of age. He had one previous conviction for theft for which had been imposed a bond for good behaviour for eight months.

The offences were committed over a period of nearly a year from May 2007 to April 2008. A large amount of personal property was stolen. Only a small amount of it was recovered. The offences were undoubtedly serious and, it seems from comments made by Judges in the High Court, were of a kind which are prevalent, a matter which is relevant to the perceived need to impose increasingly deterrent sentences. See, for example, *Raddyman bin Hj Radin*, Criminal Appeals Nos 4 and 6 of 2005.

The learned sentencing Judge, in imposing the sentences which she did, did not indicate the starting point for her overall sentence, the sentence which she would have imposed if the matter had gone to trial. She should have done this. However the sentence imposed indicates that that would have been one of a little under nine years. Leaving aside for the moment the question of disparity with a sentence imposed on the appellant's co-defendant, the question is whether, having regard to the overall criminality of these offences and to the appellant's relative youth, a sentence of a little under nine years was manifestly excessive.

Having regard to the comparative sentences cited to us we do not think that individual sentences of 14 months imprisonment on each of these offences would ordinarily be manifestly excessive or that an overall sentence of five years and 10 months would be manifestly excessive for the totality of these offences. However, in this case, we think that some further discount should have been made for the youth of this offender notwithstanding the fact that he had been given a bond for a previous offence of theft.

Having regard to that additional factor, but leaving aside the question of disparity to which we are about to turn, we think that a sentence of 12 months imprisonment on each offence would have been appropriate with a totality of five years imprisonment.

It is not immediately clear to us why the appellant's co-offender was sentenced in the Magistrate's Court on a different occasion. It is of the utmost importance that co-offenders be sentenced by the same Judge, if possible on the same occasion. Otherwise there is a serious risk of inexplicable and unacceptable disparity between the sentences imposed on co-offenders such as occurred in this case.

There is no doubt that there is a substantial and inexplicable disparity between sentence imposed on the appellant and that imposed in the Magistrate's Court on his co-offender Mohamed Zulfady bin Hj. Sinin. The latter was sentenced to a substantially shorter term notwithstanding that he had committed a greater number of similar offences and there was nothing in his personal circumstances which justified a shorter term. It is plain to us that the total sentence passed on the co-offender was manifestly inadequate. What then should we do, if anything, about this disparity now?

In *Blackstone's Criminal Practice* referred to us by counsel for the respondent, reference is made to a statement by Scarman LJ in *Stroud* [1977] 65 Cr App R 150 in which Lordship expressed the view that disparity can never in itself be a sufficient grounds of appeal - the question for the Court of Appeal is simply whether the

sentence received by the appellant was wrong in principle or manifestly excessive. If it was not, the appeal should be dismissed, even though a co-offender was, in the Court of Appeal's view, treated with undue leniency. To reduce the heavier sentence, his Lordship thought, would simply result in two, rather than one, over lenient penalties. His Lordship went on:

*"The appellant's proposition is that where you have one wrong sentence and one right sentence, this Court should produce two wrong sentences. That is a submission which this Court cannot accept."*

His Lordship's remarks were made during the course of argument. In delivering the judgment of the Court in that Appeal, Roskill LJ drew a distinction between different sentences imposed by the same court at the same time and different sentences imposed by different courts at different times, in each case in respect of co-offenders. Adopting some unreported remarks of the Lord Chief Justice in an earlier appeal, Lord Roskill expressed the view that a disparity occurring in the former kind of case could be corrected but that one occurring in the latter kind of case could not be.

The logic of that distinction is not immediately apparent to us. No doubt in practice it is generally easier to recognize a disparity between sentences passed by the same Judge on the same day than it may be to do so in respect of sentences passed by different Judges on different days. And it may be that the facts put before the courts on different days may be different. But these are mere factual difficulties. They do not justify a logical distinction.

It is true that many of the cases in which a disparity between sentences has been recognized and corrected have been ones in which disparate sentences have been passed by the same Judge on the same day. See, for example *Goodacre* [1996] 1 Cr. App. R. (S.) 424. But not all are cases of this kind: see for example, *Fawcett* [1983] 5 Cr. App. R. (S) 158 and *Wood* [1983] 5 Cr. App. R. (S) 381. It is of some significance that in none of these cases or in subsequent cases to which we will refer is *Stroud* referred to.

*Fawcett* and two other co-offenders, all of whom had pleaded guilty, received sentences which were, in the view of the Court of Appeal, correct in principle. Nevertheless they each had their sentences reduced on appeal because another co-offender, *Hardwick*, who was subsequently convicted after a trial, received a lesser sentence from another Judge. The Court of Appeal had no hesitation in saying that the sentence passed on *Hardwick* was inadequate. After asking, rhetorically, what the approach of the Court should be, *Lawton LJ* answered to this by saying:

*"In our judgment, the approach is that which is set out in the decision of this Court in Pitson [1972] 56 Cr. App. R. 391, namely, would right thinking members of the public, with full knowledge of all the relevant facts and circumstances, learning of this sentence, consider that something had gone wrong with the administration of justice. When the question is posed in that form, we are of the opinion that the public would say that something had gone wrong here because Hardwick and Chatterton should clearly have received the same sentences."*

The court then proceeded to reduce the sentences imposed on Fawcett and his co-offenders before the Court notwithstanding that the principal reason for the disparate sentences was the inadequate sentence passed on Hardwick.

A similar approach was taken in *Wood*. In reducing Woods' sentence O'Connor LJ, in giving the judgment of the Court of Appeal, said:

*“No criticism can be made of the learned trial judge at the Knutsford Crown Court. Indeed, it is accepted by Mr Cowan that no complaint could be made of the sentence which he passed and we certainly make no complaint about it. It was a just and fair sentence. I think that the appellant himself would recognize that, but in the face of what has happened to the scoundrel, who was a major ringleader in this burglary, it is plain that that is a state of affairs which this Court must correct.*

*On that ground alone and for no other we shall allow this appeal by reducing his sentence to such a term as will allow for his immediate release.”*

*Bartlett*, Court of Appeal, 25 March 1997, unreported, is a relatively recent example of how the English Court of Appeal would apply the test stated by Lawton LJ in *Fawcett*. In that case the Court held that there was no disparity. However, after stating the question posed by Lawton LJ, Jowett J, in giving the judgment of the Court, said:

*“There are some cases in which, even where the answer to the question is “yes”, a reduction in sentence may not be called for because the public's response may be that the offender who received the sentence which is said to be harsh in comparison to his co-accused's sentence was dealt with properly, and that it would be to add insult to injury to reduce his sentence when the real cause of the trouble has been that the other defendant in has been sentenced too leniently.”*

This passage does, to some extent, appear to reflect the views of Scarman LJ, quoted earlier, though *Stroud* was not referred to. However, the way in which the Court, in that case, would apply the test stated by Lawton LJ seems to be inconsistent with the way in which it was applied in *Wood*. We prefer the way in which the Court would have applied it in *Bartlett*.

We think that that test should be applied in the following way: where there is a substantial and unacceptable disparity between the sentence under consideration by the court and one imposed on a co-offender, the sentence under consideration should be altered so as to eliminate or reduce that substantial and unacceptable disparity only if that can be achieved without substituting a wholly inappropriate sentence for one which is appropriate.

In the present case, we think that, to reduce the sentence imposed on the appellant to one of a total of less than five years would be to substitute a sentence which was inappropriate.

**Orders**

1. Allow the appeal
2. Set aside the sentences imposed
3. Substitute for each offence a sentence of 12 months imprisonment
4. Order that the sentences imposed in respect of alternative charge 1, and charges 2, 3, 4 and 5 be served consecutively upon each other and that the sentences on charges 6, 7, 8 and 9 be served concurrently with the sentences imposed in respect of alternative charge 1 and charges 2, 3, 4 and 5 making five years in all, with effect from 23 April 2008.

**Power, P.**

**Mortimer, J.A.**

**Davies, J.A.**