

Mohd Shah Nurul Ridzuan Bin Haji Maidin

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 18 of 2022)**

Steven Chong, C.J.
21 March 2023

Criminal law – Public servant obtaining a valuable thing without consideration from a person concerned in business transacted in connection with official functions – Sentence

Sheikh Noordin Bin Sheikh Mohammad (M/S Sheikh Noordin Mohammad & Associates) for the Appellant.

DPP Hjh Rozaimah Haji Abd Rahman for the Respondent/Public Prosecutor.

Cases cited:

Maimun Binti Hj Omar v Public Prosecutor [2013] 1 JCBD 154

Tan Kian Kwang v Public Prosecutor [1995] 3 SLR (R) 746

Steven Chong, C.J.:

Introduction

On 20 October 2021 in the Magistrate’s Court the appellant was charged with two offences: corruptly accepting a gratification contrary to section 6(a) of the Prevention of Corruption Act (1st Charge); and being a public servant did obtain a valuable thing without consideration from a person concerned in business in connection with your official functions contrary to section 165 of the Penal Code (Alternative Charge).

The appellant contested both charges and the case was fixed for trial to commence on 16 May 2022.

At the commencement of the trial on 12 July 2022 the appellant through counsel indicated his intention to plead guilty to the Alternative Charge.

On 14 July 2022 the appellant pleaded guilty to the Alternative Charge and admitted to the Statement of Facts.

The Magistrate sentenced the appellant to one year's imprisonment.

This is an appeal by the appellant against sentence.

The facts

Shortly stated the facts were as follows. In June 2015 the Ministry of Religious Affairs ("MORA") awarded a contract to Ari Candor Contractor ("*the company*") to carry out works for "*Additional Power Points at Unit Perumahan Tingkat 2, Bangunan Lama, Kementerian Hal Ehwal Ugama*" ("*the project*"). Houg Yu Kai ("*Houg*") was the supervisor in *the company* involved in carrying out the project and he was assisted by a colleague named Roberto Anueco Baler ("*Roberto*"). The appellant, who was a Staff Officer (Grade II) in MORA, was assigned by the Head of the Building and Maintenance Section of MORA to be the "*Supervising Officer*" responsible for overseeing the performance of the project.

Upon completion of the project *the company* submitted an invoice dated 22 June 2016 to the Finance Unit of MORA. On 28 June 2016 the appellant sent a Whatsapp message to *Houg* asking him to deliver the Invoice and Quotation pertaining to the project to him for onward submission to the Finance Unit of MORA for payment to be made. *Houg* replied to the appellant telling him that he was preparing "*something*" for him which *Roberto* would hand over.

On the same day the appellant met *Roberto* in the car park of the Building and Maintenance Section Office of MORA and received an envelope containing \$1,000 in cash from him.

The appellant, as he did on previous occasions in relation to other works undertaken by the company for MORA, "*rendered assistance to expedite the payment*" for the project completed by the company.

Investigations by the Anti-Corruption Bureau following a tip-off from a member of the public revealed that after receiving the money from *Roberto* the appellant used \$500 to pay for his vehicle insurance premium and gave the rest of it to his parents and colleagues at work.

Magistrate's sentencing remarks

In passing a sentence of one year's imprisonment the Magistrate observed that the seriousness of the offence was reflected in the penalty of a maximum of 7 years' imprisonment on conviction.

The Magistrate did not consider a probation order or a fine as appropriate punishment having regard to the gravity of the offence and the “*aggravating factors*” present.

She concluded that the appellant’s position as a public servant was an “*aggravating factor*”.

Grounds of appeal

On the authorities relevant to offences of this nature counsel for the appellant acknowledges that the usual sentence is one of imprisonment.

However, it is contended that the “*exceptional circumstances*” of the case justify a probation order or a fine: (1) guilty plea; (2) clear record; (3) amount of \$1,000 is “*relatively small*”; (4) appellant has agreed to give evidence against his co-accused; and (5) delay of about 5 years in the prosecution of the charge.

Counsel for the appellant finds support for the prosecution delay factor as justification for a non-custodial sentence in the case of *Maimun Binti Hj Omar v Public Prosecutor* [2013] 1 JCBD 154, in which the Court of Appeal substituted a sentence of 4 years’ imprisonment and a fine of \$6,000, imposed by the Intermediate Court on the appellant upon her plea of guilty to multiple forgery offences, with a probation order considering the “*stress*” caused with “*the offences held over the appellant’s head*” for 10 years.

Reference was also made to *Public Prosecutor v Chan Key Hong* where a Magistrate imposed a fine of \$10,000 on an executive of a car dealer upon conviction on a guilty plea to a charge of abetting a section 165 offence by two planning inspectors of the Town and Country Planning Department involving a sum of \$90.

Prosecution submission

The DPP submits that (1) notwithstanding the prosecution delay a custodial sentence is warranted; (2) *Maimun’s* situation was distinguishable as she was subjected to a “*piecemeal trial*” and had the case “*hanging over her head for an unduly long and indefinite period*”; and (3) the appellant was a public servant and the “*gratification was received in the course of his duties*” which was an aggravating factor.

My decision

At the outset it is necessary to point out that both the Magistrate and the prosecution have misunderstood the meaning of an aggravating factor in considering the fact that the appellant was a public servant was an aggravating factor in the case.

To put it simply an aggravating factor is a fact related to the offence which makes the crime more serious. The fact that the appellant was a public servant, in itself, cannot be considered

as an aggravating factor since this is an essential ingredient of the offence. It is important not to conflate the two issues.

Hypothetically, if the appellant were the Head of the Building and Maintenance Section of MORA when he committed the offence this could be considered by the court as an aggravating factor given the breach of a greater degree of trust reposed in him.

The Magistrate in giving her reasons for sentence referred to the presence of “*aggravating factors*” but, with the exception of (wrongly) considering the appellant being a public servant as an aggravating factor, failed to identify them.

Magistrates in citing the presence of aggravating factors when passing sentence should identify them so that the convicted person knows precisely the basis for his sentence.

I am not persuaded that the “*exceptional circumstances*” relied upon by the appellant are so exceptional as to justify the imposition of a probation order or a fine.

There was a clear nexus between the receipt of the money by the appellant and what he was expected to do in return for the giver which was to assist in expediting payment due to the company. The amount of \$1000 was considered by the appellant to be “*relatively small*” but it is not insubstantial.

This kind of conduct erodes public confidence in the integrity of public servants and must be strongly discouraged. Lenient sentences will not serve the objective of deterrence. A substantial prison sentence must be imposed.

Neither *Maimun* nor *Chan* can assist the appellant as the circumstances in these two cases are distinguishable. *Maimun* was said have suffered the “*stress*” of having the offences “*held over*” her head for 10 years. In the appellant’s case there was a delay of about 5 years in the prosecution. Once the appellant was charged in the Magistrate’s Court trial dates within a 7 month timeframe were set.

As was pointed out by Yong Pung How CJ in *Tan Kian Kwang v Public Prosecutor* [1995] 3 SLR (R) 746, cited with approval by the Court of Appeal in *Maimun*, the delay argument may carry more force if the delay sets in after the accused has been charged, since it is only then that the charge can be said to “*hang over his head*”.

Nevertheless, I think an appropriate reduction in sentence ought to be given to the appellant for the prosecution delay.

Turning to *Chan’s* case counsel for the appellant was unable to provide the court with either the full facts or the case number. I therefore do not consider it proper to say more than that the critical difference is *Chan*, unlike the appellant, was not a public servant.

The Magistrate was right to decide on a starting point sentence of one year and 6 months. She gave a discount of one third for the guilty plea resulting in a sentence of one year. This discount in my view was overly generous.

The long established practice in sentencing recognizes a guilty plea justifies a reduction in the starting point sentence of a conviction after a trial. A reduction in sentence is appropriate because a guilty plea avoids the need for a trial enabling other cases to be disposed of more expeditiously, shortens the gap between charge and sentence, saves considerable costs and in the case of an early plea saves victims and witnesses the concern about having to give evidence.

I think the reduction in sentence should be on a sliding scale depending on when the guilty plea was indicated. Ordinarily, the largest reduction of one third is to be accorded to accused persons who indicate their plea of guilty at the first reasonable opportunity. Thereafter, the proportionate reduction in sentence diminishes so that a plea of guilty at the door of the trial court, as in the present case, will attract a reduction of about one tenth.

All in all, giving appropriate reductions for the guilty plea entered on the eve of the trial and the prosecution delay, a sentence of one year is neither excessive nor wrong in principle.

Conclusion

For these reasons the appeal is dismissed.

DATO SERI PADUKA STEVEN CHONG
Chief Justice