

**MN BIN MA**

AND

**PUBLIC PROSECUTOR**

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**(High Court of Brunei Darussalam)**  
**(Criminal Motion No. 21 of 2023)**  
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Muhammed Faisal bin PDJLD Kol (B) DSP Hj Kefli, JC  
**27<sup>th</sup> June, 2024.**

***Headnote:** Criminal law – Section 377H(3) of the Penal Code – voyeurism – appeal against sentence – deterrence is the dominant sentencing consideration of offence of this nature – imprisonment inevitable, when video recording is involved*

Appellant is in person and represented by Mr. Pg Syahizul (M/S LZ Hussain & Co).  
DPP Hjh Rozaimah for Public Prosecutor/Respondent.

**Cases cited:**

*Mohammad Khairi bin Mohammad Kamsani and Public Prosecutor* (Court of Appeal Criminal Motion 38 of 2018)  
*Kang Byong Dug and Public Prosecutor* (Criminal Appeal No.21 of 2022)  
*Roch LJ in R v David Angus Johnson* [1994]  
*Hj Muhammad Nasiruddin bin DP Hj Abdul Latif v Public Prosecutor* (High Court Criminal Appeal No.3 of 2011)  
*Public Prosecutor v Mohammad Nurhafiz Bin Bogaibah* (MCCT/BSB/390/2023)  
*Public Prosecutor v Heri Suwando* (MCCT/BSB/321/2021)  
*Public Prosecutor v Nurjawani Bin Musli* (MCCT/BSB/966/2020)  
*Public v Mahmud Sulaiman Bin Hj Husin* (Criminal Appeal No.10 of 2020)

**Statutes:**

Under Section 377H(3) of the Penal Code CAP 22  
Under Section 354 Penal Code

**RULING**

**Muhammed Faisal, JC:**

**I. INTRODUCTION**

The Appellant, MN bin MA was convicted of committing six separate acts of voyeurism under section 377H(3) of the Penal Code. On the 14th December 2023, he had entered guilty pleas to all charges and was sentenced to a total of 20 months imprisonment. He now appeals against the sentence.

## **II. BACKGROUND**

The offences all occurred between March 13th, 2018, and May 13th, 2019, involving the appellant secretly recording his sister-in-law (*Miss X*) while she was showering on six separate occasions. The Appellant used his mobile phone to record *Miss X* by placing his mobile phone lens through a small gap between the bathroom door and wall. The appellant's actions were discovered on October 19, 2019, when his wife (sister to *Miss X*) found a pen drive containing the recordings at the appellants parents' house.

## **III. THE CHARGES**

There are 6 charges in all. All under Section 377H(3) Penal Code CAP 22. The first charge is reproduced, below: -

*"1st Charge:*

*That you, on the 13th of March 2018, at about 2319 hours, inside a house addressed at (address redacted), in Brunei Darussalam, did for the purpose of obtaining sexual gratification, recorded Miss X doing a private act, to wit, by using your mobile phone to record three (3) videos of Miss X showering in the bathroom, with the intention that you will look at an image of the said Miss X doing the act, and you knew that Miss X does not consent to you recording the act with that intention, and you have thereby committed an offence under Section 377H(3) of the Penal Code, Chapter 22"*

The remaining 5 charges are basically in the same fashion, save for the number of video recordings and that the offences were committed on the 23rd March 2018, 2nd September 2018, 19th January 2019, 16th April 2019 and 13th May 2019, respectively.

## **IV. MAGISTRATE SENTENCE**

For each of the Appellant's charges, the Magistrate impose a 5 months' imprisonment sentence (with a starting point of 9 months imprisonment, reduced to 6 months and a further reduction of 1 month for delay).

She then ordered the following: -

*"Taking into account of the totality principle, I order for the 1st and 2nd charge to run concurrently with each other and for the 3rd, 4th, 5th and 6th charge to run consecutively. Therefore, for the 1st and 2nd charge to run concurrently to the 3rd, 4th, 5th and 6th charge. In total, the defendant is to serve 25 months imprisonment with effect from today, 14th December 2023."*

If we follow the order as instructed by the Magistrate, we will get a total of 20 months imprisonment. I have been assured by both the counsels for the Appellant and Respondent that 20 months was pronounced by the Magistrate in open court. I am further reassured of this by having sight of the duly signed remand warrant which clearly stated 20 months imprisonment. I would conclude then, the '25 months' imprisonment is a typographical error.

## V. THE APPEAL

The Appellant takes issue upon Magistrate's decision on several grounds: -

- the severity of the sentence imposed,
- the alleged lack of citation of relevant case law, and
- the refusal to grant probation.

The Appellant contends that the Magistrate failed to provide adequate reasons for departing from sentencing guidelines and case law precedent. Furthermore, the Appellant argues that the offences should be considered a single transaction, thus challenging the imposition of consecutive sentences.

*Mohammad Khairi bin Mohammad Kamsani and Public Prosecutor (Court of Appeal Criminal Motion 38 of 2018)* provides guidance for sentencing in voyeurism cases. In *Mohammad Khairi*, the 2nd charge, an offence under section 377(H)3 Penal Code, the initial sentence of the Intermediate Court of 8 months imprisonment was reduced to 4 months imprisonment. The Appellant argues that the Magistrate failed to properly consider this precedent and departed from established guidelines without adequate justification. This was commented by the Honorable Chief Justice in *Kang Byong Dug and Public Prosecutor (Criminal Appeal No.21 of 2022)*, where he stated "A lower court should respect the guidance given by a higher court in similar cases." The Honorable Chief Justice goes on, in the same paragraph to cite Roch LJ in *R v David Angus Johnson [1994] IS Cr App R(S) 827* on this matter. In *R v David Angus Johnson*, Roch LJ explains that only in special cases should judges depart from guidelines given by a Superior Court, and such factor or factors should be indicated in the Judge's sentencing. As a note in *Kang Byong Dug*, the Defendant was charged for an offence of outraging modesty contrary to section 354 Penal Code.

It is submitted that the offence committed was that of a crime of opportunity and the Appellant takes issue with the respondent's characterization of the offences as premeditated. The Appellant contends that the act of recording through a small gap in the bathroom wall was spontaneous and did not involve the deliberate planning or planting of a recording device, as suggested by the Respondent. It is submitted that this matter is more akin to the case of *Hj Muhammad Nasiruddin bin DP Hj Abdul Latif v Public Prosecutor* (High Court Criminal Appeal No.3 of 2011) than that of *Mohammad Hairey*. In the former case, the High Court accepted, that the Defendant's action was crime of opportunity, and commented that a starting point of 4 months was appropriate, and

reduced the 7-month imprisonment sentence imposed in the first instance, to that of 1-month imprisonment.

The Appellant further disagrees with the magistrate's decision to order consecutive sentences. It is argued that the offences should be treated as a single transaction. It is also asserted that the Magistrate erred in not considering the circumstances of the case; namely that the Appellant is a first offender, that he is the father of an autistic 7-year-old boy thus having a level of responsibility and commitment towards his son. Furthermore, it is submitted that the appellant has expressed his remorse for his actions. For these reasons and the absence of aggravating factors warranting consecutive sentences, the magistrate ought to have considered probation order or treated the offence as a single transaction.

## **VI. RESPONDENTS REPLY**

The Respondent emphasize the severity of the offences and argues that the Magistrate had appropriately considered the aggravating factors, including the breach of trust and the degree of intrusion into the victim's privacy. The Respondent relies on case law, including *Mohammad Khairi*, to support the imposition of a custodial sentence. I would refer back to the case of *Hj Muhammad Nasiruddin* where it is held, *where a video is taken, a custodial sentence is inevitable*.

It is contended that the magistrate followed established sentencing guidelines and principles in determining the appropriate sentence. Of note, are the Magistrate's cases of *Public Prosecutor v Mohammad Nurhafiz Bin Bogaibah* (MCCT/BSB/390/2023), *Public Prosecutor v Heri Suwando* (MCCT/BSB/321/2021) and *Public Prosecutor v Nurjawani Bin Musli* (MCCT/BSB/966/2020). In these cases, the Defendants faced multiple charges under section 377(H)3 Penal Code, and had pleaded guilty. The Magistrates took a starting point of 9 months and reduced the sentence to 6 months' imprisonment for each of the charges. In total, the Defendants were sentenced to 24 months, 24 months and 18 months' imprisonment, respectively.

The Respondent highlights the need for deterrence and punishment in cases of voyeurism and argues that probation would not be appropriate given the serious nature of the offences. As stated, again, by the Honorable Chief Justice in *Public v Mahmud Sulaiman Bin Hj Husin* (Criminal Appeal No.10 of 2020), "*In my judgement the dominant sentencing consideration for this kind of offence which involves a serious violation of a women's privacy for the purpose of satisfying a sexual perversion must be deterrence.*" In this case, in the first instance, faced a single charge under section 377(H)3 Penal Code. He pleaded guilty was sentenced to 2 months' imprisonment, the Magistrate having considered mitigating factors. On appeal the sentence was increased to that of 6 months imprisonment.

## **VII. FINDINGS**

After careful consideration of the arguments presented by both parties and a thorough review of the case law and guidelines, I find that the Magistrate's decision was appropriate and in accordance with established legal principles. The Magistrate properly considered relevant case law, including that of *Mohammad Khairi*, in determining the sentence. The appellant's contention that the magistrate failed to apply this precedent is unfounded.

In *Mohammad Khairi*, the sentence, on appeal was reduced from 8 months to 4 months for the section 377(H)3 offence. In the subsequent case of *Mahmud Sulaiman*, the sentence was increased, on appeal to 6 months imprisonment. This would mean a starting point of 9 months imprisonment, after a guilty plea. The Magistrates' cases of *Mohammad Nurhafiz Bin Bogaibah*, *Heri Suwando* and *Nurjawani Bin Musli*, are in line with *Mahmud Sulaiman*. More relevantly, so is the Magistrate sentence, in the case at hand.

With respect to whether the Appellant action were spontaneous or premeditated, I find that the Appellant's actions, though spontaneous in nature, constitute premeditated voyeurism. The repeated acts of secretly recording the victim over a period of time demonstrate a deliberate intention to invade her privacy for the Appellant's gratification. I cannot accept, that the repetitive actions done over a period of 15 months, are anything else than that.

Contrary to the Appellant's argument, I conclude that the offences cannot be considered a single transaction. Due to the length of time between each offence and the total length of time the offences were committed as a whole, I cannot, by any stretch of imagination, accept that they are a single transaction. Each instance of recording constitutes a separate offence, warranting consecutive sentences to reflect the gravity of the appellant's actions.

## **VIII. CONCLUSION**

To reiterate, deterrence is the dominate sentencing consideration for cases of this nature. Where video recordings are involved, imprisonment sentence is inevitable. Thus, probation is not appropriate in cases of voyeurism. The Appellant's conduct represents a serious breach of trust and a significant invasion of privacy, justifying the need for deterrence and punishment.

The Magistrate sentence is correct and cannot be faulted. Therefore, the application is dismissed, and the Appellant's convictions and sentences are upheld.

**MUHAMMED FAISAL BIN PDJLD KOL (B) DSP HJ KEFLI**  
Judicial Commissioner