

Public Prosecutor

AND

Budi Waluyo

(High Court of Brunei Darussalam)
(Criminal Appeal No. 26 of 2024)

Haji Abdullah Soefri bin POKSM DSP Haji Abidin. J.C.
18th January 2025

Sentence – breach of trust punishable under Section 406 of the Penal Code – appeal by Public Prosecutor on the ground that sentence is manifestly inadequate – appeal allowed – sentence enhanced

DPP Pg Hjh Nor'Azmeena Pg Hj Mohiddin for the Public Prosecutor/Appellant.

Respondent in person and unrepresented.

Interpreted by Mr. Arif in Indonesian Language from Embassy of the Republic of Indonesia.

Cases cited:

R V Barrick [1985] 81 Cr App R.78

Public Prosecutor v Melanie Sumalpong Oritz [High Court Criminal Appeal No. 8 of 2023]

Mohammad Azwan bin Zawawi V Public Prosecutor [High Court Criminal Appeal No. 28 of 2020]

Public Prosecutor v Pengiran Hj Ramli bin Pengiran Hj Mohd Samli [1991] JCBD 84

JUDGMENT

Haji Abdullah Soefri, JC:

INTRODUCTION

1. This is an appeal by the Public Prosecutor against the Magistrate's sentence imposed on the Defendant on the 27th November 2024.
2. The Defendant was charged as follows:

CHARGE

That you, sometime on the 27th day of September 2024, in Brunei Darussalam, being entrusted with property, to wit, one Mitsubishi Pajero bearing registration number BAM 7632, registered to one Chow Kwai Choong for your use to go to project sites in the course of your employment as a

labourer at Normila Sdn Bhd, did commit criminal breach of trust in respect of such property, and thereby committed an offence punishable under Section 406 of the Penal Code, Chapter 22.

On the 23rd November 2024, the Respondent pleaded guilty to the said charge and agreed to the Statement of Facts.

STATEMENT OF FACTS

1. The defendant is a 54 year old Indonesian National. During the material time, the defendant was employed as a labourer with Normila Sdn Bhd since 31st July 2012. As a labourer, he was given the responsibility of fixing broken machineries at the company's project sites. Since May 2024, in order for him to carry out his duties more efficiently, he was entrusted with a Mistubishi Pajero bearing registration number BAM 7632 for him to use the said vehicle to go to project sites. The said vehicle is under the name of his employer, Chow Kwai Choong.
2. On the 19/11/2024, the defendant lodged a police report claiming that the said vehicle was missing when he left the said vehicle on the side of the road in the vicinity of Simpang 525, Ladang Betumpu Kg Masin, in Brunei Darussalam on the 27th September 2024.
3. Police investigation was then conducted by the Royal Brunei Police Force.
4. During police investigation, it was revealed that the defendant had made a false report and that the defendant never left the said vehicle on the side of the road in the vicinity of Simpang 525, Ladang Betumpu Kg Masin, in Brunei Darussalam. He was duly arrested on 21st November 2024.
5. Police investigation revealed that sometime on the 27th September 2024, the defendant had care and custody of the said vehicle. He had met with one Mohammad Amirmokmin bin Mahali (hereafter known as Mohmmad Amirmokmin) to pawn off the said vehicle in exchange for B\$100 loan in order to make online loan payment on facebook. He delivered the said vehicle to Mohmmad Amirmokmin and received B\$100. The defendant had no authority to enter into such transaction. By doing so, the defendant had dishonestly misappropriated the said vehicle.
6. Police investigation revealed that the defendant was to repay Mohmmad Amirmokmin B\$200 within an hour. However, as the defendant failed to make the repayment, Mohmmad Amirmokmin took ownership of the said vehicle.
7. Mohmmad Amirmokmin eventually sold the said vehicle to another person named Mohammad Hapizul bin Jumat for B\$850 who subsequently sold it off to Haji Seruji bin Haji Chunding for about BS1600.

8. Police investigation revealed that since the day he pawned off the vehicle, the defendant had falsely informed representative of the company that the said vehicle was stolen. He was then subsequently brought to the police station to lodge a report.
9. Police managed to recover the said vehicle.
10. On record, the defendant has no previous convictions.

PENALTY

The penalty for an offence under Section 406 of the Penal Code was increased from imprisonment for a term not exceeding 5 years and fine, to imprisonment for a term not exceeding 10 years and fine pursuant to the Penal Code (Amendment) Order 2018 and to take effect from 30th October 2018.

On the 27th November 2024, the Respondent was sentenced to 3 months imprisonment, effective from the date of which he was first remanded on the 23rd November 2023.

The appellant is not satisfied with the sentence imposed as it is manifestly inadequate and filed an appeal on the 7th December 2024.

GROUND FOR APPEAL

The Appellant submits that the imprisonment sentence imposed by the Magistrate was manifestly inadequate.

The Appellant referred to the case of ***R V Barrick [1985] 81 Cr App R.78*** where it was held as follows;

“in general, a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. Despite the great punishment that offenders of this sort bring upon themselves, the Court should nevertheless pass a sufficiently substantial term of imprisonment to mark the gravity of the offence.”

The Appellant further submits that the amendment to increase the penalty from a term not exceeding 5 years and fine, to imprisonment for a term not exceeding 10 years and fine, on 30th October 2018, *“demonstrates the legislative need to take a more stringent approach in sentencing offences in this nature.”*

It is further submitted that *“an imprisonment sentence with a starting point of 5 months, reduced to 3 months, could not be said to be reflective of the gravity of the offence committed by the Respondent, nor it took into account of the increased maximum penalty.”*

The Appellant submitted that there is no delay in bringing the case to the Court.

The Appellant submits that the case that the Magistrate referred to, ***Noradielah binti Adanani v Public Prosecutor [Criminal Appeal No. 5 of 2019]***, is a case under section 403 Penal Code.

The Appellant further submits that the learned Magistrate did not give sufficient weight to the aggravating factors in arriving at his sentence for the case.

a. Degree of trust

The Appellant submits that the Respondent clearly took the level of trust reposed on him for granted, and subsequently abused the said trust by then misappropriating the vehicle.

b. Loss suffered by innocent buyer

The Respondent's misappropriation had inevitably cause loss to final buyer of the vehicle.

c. Type and Value of the property

The type of property that was misappropriated which is a car.

d. Lodging a false report and lack of remorse

Respondent had been dishonest and went to great lengths to conceal the fact that he had misappropriated the vehicle. He lied to the company representative when questioned regarding the whereabouts of the said vehicle entrusted to him, by informing them that the vehicle had been stolen. He only told that he pawned the car in exchange of \$100 during the police investigation which was over one month later. The respondent had ample time to reflect on his action before he was brought to the police station and it was further submitted that the Respondent had many opportunities to be forthcoming but chose to continue concealing the truth, even as going to lodge a false police report. The Respondent's behavior clearly shows that he was not remorseful and would go to great lengths to conceal his misappropriation.

CASE AUTHORITIES

The Appellant refer to the following cases:

Public prosecutor V Melanie Sumalpong Ortiz [High Court Criminal Appeal No. 8 of 2023] a case that was decided post amendment where the sentence of 6 months for misappropriating a sum of \$19,127.65 and after pleading guilty was substituted with 24 months, with a starting point of 36 months.

In ***Mohammad Azwan bin Zawawi V Public Prosecutor [High Court Criminal Appeal No. 28 of 2020]***, a case decided after the amendment but the offence was committed before the amendment, a 10 months' imprisonment imposed on the Appellant for an offence of abetting the commission of criminal breach of trust of various pieces of police uniform contrary to section 406

read with section 109 of the Penal Code that was committed before the amendment, was upheld by the Court.

The Appellant submits that a starting point of 12 to 18 months imprisonment would be appropriate in view of the aggravating factors.

RESPONDENT SUBMISSION

The Respondent informed to the Court that the sentence imposed by the Magistrate is appropriate and disagree with the Appellant that it should be increased. The Respondent submitted that he is remorseful for what he had done. He is concerned about his family in Indonesia and concern who will support them.

CONCLUSION

The question is whether the sentence imposed by the Magistrate is manifestly inadequate? The Magistrate has correctly identified and considered all the mitigating and aggravating factors.

“A deterrent sentence is necessary to prevent others, particularly those in similar positions to the defendant, from committing such offences and exploiting their employers. Therefore, I believe a custodial sentence is appropriate in this case.

In determining the appropriate sentence, I have taken into account the defendant’s previous record of good character. The facts of the case show that this was a one-off offence. I also take note that the car was recovered.

The defendant has also pleaded guilty at the earliest opportunity and for that he is ought to be given a one third discount from his total sentence. A guilty plea is usually a strong mitigating factor as it saves the court and prosecution’s precious time and resources from having to conduct a full trial.”

The Magistrates had taken 5 months as a starting point. The Magistrate in his sentence states

“Having regard the overall criminality of this case, I hereby take the starting point of 5 months’ imprisonment and reduced it to 3 months imprisonment.”

The learned Magistrate relied on ***Public Prosecutor v Jeffrey Munos San Miguel*** [MCCT/2018] and ***Public Prosecutor v Hj Muhammad Ali bin Hj Besar*** [CT 14/2005]. The Magistrate also refer to the case of ***Noradielah binti Adanani V Public Prosecutor*** [Criminal Appeal No. 5 of 2019]. However, in this case the Defendant was charged with an offence under section 403 which carries a maximum penalty of 2 years imprisonment and not a section 406 offence as in the present case.

In *Public Prosecutor v Melanie Sumalpong Ortiz* [High Court Criminal Appeal No. 8 of 2023], on appeal the 6 months sentence imposed by the Magistrate was substituted with 24 months imprisonment with a starting point of 36 months.

In *Mohammad Azwan bin Zawawi v Public Prosecutor* [High Court Criminal Appeal No. 28 of 2020], the 10 months' imprisonment sentence imposed on the Appellant for an offence abetting the commission of criminal breach of trust of various pieces of police uniforms contrary to section 406 read with section 109 Penal Code was upheld by the High Court sitting in its appellate capacity.

In the case of *Public Prosecutor v Pengiran Hj Ramli bin Pengiran Hj Mohd Samli* [1991] JCBDB 84, after a trial, the 31 year old defendant was convicted of section 406 of the Penal Code. He had misappropriated \$1,758.50 and the then Chief Justice, Dato Sir Denys Roberts said that after a trial he would probably impose a sentence of not less than 2 years but since no satisfactory explanation for the long delay of 4 years was given, the defendant was sentenced to 12 months imprisonment.

The Magistrate even though he had correctly identified the mitigating and aggravating factors, he had failed to give the appropriate weight to the aggravating factors in view of the new amended penalty to section 406 and the cases that I have cited above. The sentence that was imposed by the Magistrate is lenient and might be appropriate before the amendment. I agree with the Appellant submission that the starting point of 12-18 months imprisonment is more appropriate in view of the facts of the case and its aggravating factors. If the facts of the case are serious than the facts of the present case, the amount misappropriated is high in value and amount and even though he had pleaded guilty, a starting point of 24-36 months or even higher will be appropriate. Further, it has been established that financial or family hardship is not a factor to be considered.

Having had said all of the above I am satisfied that the sentence of 3 months, with a starting point of 5 months is manifestly inadequate and substituted it with a starting point of 18 months and maintain the deduction of 1/3. The original sentence imposed by the Magistrate of 3 months is substituted with 12 months imprisonment with the same effective date as imposed the Magistrate below.

Appeal is allowed.

(HAJI ABDULLAH SOEFRI BIN POKSM DSP HAJI ABIDIN)

Judicial Commissioner