

Public Prosecutor

AND

Melanie Sumalpong Ortiz

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 8 of 2023)**

Haji Abdullah Soefri bin POKSM DSP Haji Abidin. J.C.
28th December 2023

Sentence – breach of trust punishable under Section 406 of the Penal Code – appeal by Public Prosecutor on ground that sentence is manifestly inadequate – respondent absent – section 282(2) Criminal Procedure Code

DPP Siti Khalilah Bte Hj Hussin for the Public Prosecutor.
Respondent absent.

Cases cited in the Judgment:

Purwanti Jong v Public Prosecutor (COACA No. 22 of 2016)
Public Prosecutor v Hjh Kasmah binti Hj Hashim (ICCT No. 1 of 2009)
Public Prosecutor v Rodeo Zambrano (HCCT 14 of 2003)
Pg Hidayatullah bin Pg Hj Kula (COACA No. 12 of 2017)

JUDGMENT

Haji Abdullah Soefri, J.C.:

Introduction

This is an appeal by the Public Prosecutor against the Senior Magistrate’s sentence imposed on the Defendant on 24th May 2023.

The Defendant was charged as follows:

Charge

“That you, on diverse occasions between 20th day of November 2022 to 23rd day of January 2023, in Brunei Darussalam, being entrusted with property, to wit, a sum of B\$19,127.65

which are the daily cash sales of Shabulicious Restaurant, Delima Serusop, 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 11th April 2023, the Respondent pleaded guilty to the said charge and agreed to the Statement of Facts.

Statement of Facts

1. The Defendant is a 40 years old woman who is a national of the Philippines. The Defendant has been working at Shabulicious Restaurant Delima Serusop since 23rd February 2015 as a waitress where her duties include opening and closing of the said restaurant.
2. Since 1st November 2021, the Defendant was given the task of a supervisor whereby her responsibilities include counting and keeping the daily cash sales of the said restaurant at the end of each day and depositing the daily cash sales into the said restaurant's Baiduri Account the next day using the drop-in deposit service. The Defendant would then hand over a copy of the deposit slip to Najihah Kamilah binti Haji Metussin (the 'Accountant').
3. On 14th December 2022, the accountant conducted an audit on the daily cash sales of Shabulicious Restaurant Delima Serusop. During her audit, the accountant found the daily cash sales for 20th November 2022 amounting to BND \$838.75 were not deposited into the said account yet. The accountant confronted the Defendant to which the Defendant said there was a system error. The Defendant was told to make the deposit immediately. The Defendant then made the deposit on the 16th December 2022.
4. On 21st January 2023, the accountant audited the daily cash sales for the month of December 2022 until 20th January 2023 at Shabulicious Restaurant Delima Serusop. During her audit of the said period, the accountant again found \$10,390.70 of the daily case sales were not deposited in the said Baiduri bank account. When confronted, the Defendant again said that it was a system error. The Defendant was given 3 days to deposit the remaining amount.
5. On 24th January 2023, the Defendant texted the accountant to ask for time to pay the remaining undeposited amount, however, the accountant was instructed to lodge a police report by the owner of Shabulicious Restaurant. A report was subsequently lodged on 5th February 2023 which led to her arrest.
6. During police investigation, it was revealed that the Defendant had committed criminal breach of trust by misappropriating B\$19,127.65 in daily cash sales on diverse occasions between 20th day of November 2022 to 23rd day of January 2023 as follows:

No	Date	Amount (B\$)
1.	20/11/2022	838.75
2.	6/12/2022	595.60
3.	7/12/2022	547.55
4.	8/12/2022	538.15
5.	9/12/2022	458.45
6.	10/12/2022	518.20
7.	11/12/2022	720.20
8.	12/12/2022	494.55
9.	13/12/2022	603.35
10.	14/12/2022	831.20
11.	15/12/2022	925.65
12.	16/12/2022	582.10
13.	17/12/2022	758.00
14.	18/12/2022	642.90
15.	19/12/2022	319.85
16.	20/12/2022	401.90
17.	21/12/2022	466.70
18.	22/12/2022	388.60
19.	30/12/2022	823.75
20.	31/12/2022	1050.00
21.	12/1/2023	809.40
22.	13/1/2023	356.90
23.	14/1/2023	977.70
24.	15/1/2023	663.65
25.	16/1/2023	444.15
26.	17/1/2023	332.50
27.	18/1/2023	355.90
28.	19/1/2023	437.60
29.	20/1/2023	452.10
30.	22/1/2023	720.10
31.	23/1/2023	1072.20
	TOTAL MISAPPROPRIATED	AMOUNT 19,127.65

7. In her statement, she admitted to misappropriating B\$19,127.65 on diverse occasions between 20th day of November 2022 to 23rd day of January 2023 and to have used the said money for her own personal use and expense.

8. Police investigation further revealed that the Defendant had paid back B\$8,736.95 of the misappropriated fund by paying it into the said bank account on various date before the audit in paragraph 4 was carried out.

9. The Defendant further admitted that she had used her own money and also daily cash sales from subsequent days to repay the previous daily cash sales she has misappropriated and paid it into the said bank account. The last repayment she made was on 10th January 2023 in the amount of \$582.10 being the daily cash sales made by the restaurant on 16th December 2022.

10. On record, the Defendant has no previous conviction.

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 23rd May 2023, the Senior Magistrate imposed an imprisonment sentence of 6 months effective from the date of when she was first remanded on 7th February 2023.

Preliminary Issue

The Appellant had filed the notice of appeal against the said sentence on 25th May 2023. It was discovered that the Respondent had completed serving her sentence and was released from prison on 7th June 2023. The Appellant's counsel informed the Court that the Respondent had exited Brunei Darussalam on 7th June 2023 and is no longer in the country.

The Appellant applied to the Court for the appeal to be heard in the absence of the Respondent. The Appellant referred the Court to Section 282 of the Criminal Procedure Code which states as follows:

282. Non-appearance of respondent

(1) If at the hearing of the appeal, the respondent is not present and the Judge is not satisfied that the notice of appeal was duly served upon him, the Judge shall not make any order in the matter of the appeal adverse to or to the prejudice of the respondent, but shall adjourn the hearing of the appeal to a future day for his appearance, and shall issue the requisite notice to him for service.

(2) If the service of such last-mentioned notice cannot be effected on the respondent, the Judge shall proceed to hear the appeal in his absence.

The Court has issued the notice for the Respondent to appear on 15/8/2023 and it was attempted to be served on her on 16/8/2023. However, the notice was unable to be served on her as the Prison Department has informed the process server that the Respondent has been released from prison as she has completed serving her sentence and this is verified in the memorandum from the Prison Department to the Chief Registrar dated 18th July 2023.

It was confirmed by the Immigration and National Registration Department as in the extract of the Respondent report and travel history that the Respondent has exited the country on 7/6/2023 by using aeroplane BI683. With all this information, this Court has ruled that the service of the notice cannot be affected on the Respondent as she has been released from prison and has left the country. The Court invoked section 282(2) of the Criminal Procedure Code and proceeded to hear the appeal in Respondent's absence.

Grounds for Appeal

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

The Appellant referred to the case of ***Purwanti Jong v Public Prosecutor (COACA No. 22 of 2016)***. In that case, the Court of Appeal agreed with the views of the Intermediate Court Judge in ***Public Prosecutor v Hj Kasmah binti Hj Hashim (ICCT No. 1 of 2009)*** that:

“the current trend is to impose a term of 2 years where the Defendant pleaded guilty and where the amount misappropriated is small and there is no restitution.”

The Appellant also submitted the case of ***Public Prosecutor v Rodeo Zambrano (HCCT 14 of 2003)*** but the charge for that case is under Section 408 and not under Section 406 as in the present case.

Further, the Appellant submitted on the frequency of the commission of the offence of criminal breach of trust whereby the Respondent had committed the criminal breach of trust on 31 different occasions over a period of 2 months.

It was further submitted that the case of ***Pg Hidayatullah bin Pg Hj Kula (COACA No. 12 of 2017)*** where the Court of Appeal held that the sentence where the Intermediate Court took a starting point of 9 months and reduced it to 6 months after taking into account that the Defendant has made a partial restitution of \$2678.72 out of \$6058.21 that he had misappropriated as manifestly inadequate. The Court of Appeal held that the appropriate sentence after the guilty plea should have been 18 months and the Court of Appeal set aside the sentence and substituted it with a sentence of 12 months' imprisonment.

The Appellant submitted that the amount misappropriated in this present case is 4 times more than in Pg Hidayatullah's case and therefore should attract a higher sentence than that which was decided in Pg Hidayatullah bin Pg Hj Kula.

The Appellant submitted that the appropriate sentence in this case should have been between 1 ½ and 2 years, after taking into account the mitigating factors.

Reverting back to the sentence imposed by the Senior Magistrate below, the Senior Magistrate below has correctly taken into account all the mitigating factors and also the aggravating factors that she has highlighted in her sentence. The Senior Magistrate below would have considered differently if the cases and submissions that the Appellant has submitted before this Court were submitted before the learned Senior Magistrate in the Magistrate Court. Looking into the Notes of Proceedings of the court below, these cases and some of the submissions that were submitted before this Court were not submitted before the Senior Magistrate.

I agree with the Appellant that the Senior Magistrate's sentence of a starting point of 9 months and reduced to 6 months is manifestly inadequate.

I agree that the decisions by the Court of Appeal in the cases highlighted by the Appellant are the more appropriate sentence to be imposed. However, each case has different facts. The cases highlighted have different facts than in the present case. The amount misappropriated is higher, the frequency of the commission of the offence is more and the partial restitution is lower and the Senior Magistrate was correct that the money used to pay did not come totally from her own pocket but used the restaurant's further sales to pay back the money that she had misappropriated in the first place.

With these reasons, I allow the Appellant's appeal and substitute the sentence of 6 months with a sentence of 24 months with a starting point of 36 months. She is entitled to a 1/3 discount (12 months) only as she has pleaded guilty not at the 1st instance.

Appeal is allowed. Original sentence of 6 months is substituted with 24 months to take effect from the date the Senior Magistrate has ordered.

Haji Abdullah Soefri Bin Poksm DSP Haji Abidin
Judicial Commissioner