

Mohammad Joll Bin Tumih (D1)
Mohammad Sharifuddin Bin Abdullah (D2)

AND

Public Prosecutor

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 5 of 2005)

Power, P; Mortimer and Davies, JJ.A.
15th November, 2007.

Housebreaking and theft – appropriate approach to sentencing for multiple offences and application of totality principle.

First Appellant In Person.

Mr Sheikh Noordin Sheikh Mohammad of Messrs. Sheikh Noordin Mohammad advocates & solicitor for the second Appellant.
DPP Anifa Rafiza for the Public Prosecutor.

Cases cited in the Judgment:

Mohammed Ibrahim v PP [Cr. App. No. 8 of 2004].

Mohd Noor Bin Litoh v Public Prosecutor Criminal Appeal No. 3 of 2005
and *R v Bocski* [1970]54 Cr. App. R. 519.

Power, P.:

1. Between them the appellants faced 10 charges which included theft in a dwelling, housebreaking and theft by night, housebreaking simpliciter. All of the offences occurred between December 2004 and February 2005. It was a calculated orgy of lawless conduct.
2. The appellants who will be referred to hereafter as D1 and D2 pleaded guilty to the charges and the facts reveal:

1st Charge and 2nd Charge: (against D1 and D2 respectively) theft in a dwelling and abetting theft in a dwelling

1. Sometime between the 29th of December 2004 and 31st December 2004, D1 has entered into his neighbour's house at No. 64, Lot 325, Jalan Semaun, Seria, Brunei Darussalam. The said house belongs to one Mohd

Fizal bin Abdullah and his family who were outstation on holiday at the said time.

2. *D1 went to the said house with D2 by climbing the fence of the said house. D1 then went inside the house through the front door which was not properly locked whilst D2 waited outside the house.*
3. *After a few minutes D1 came out of the house with the following items:-*
 - i) *one wrist watch branded 'Guess'*
 - ii) *one wrist watch branded 'Casio'*
 - iii) *one wrist watch branded 'Swiss'*
 - iv) *one PC laptop*
 - v) *one Sony play station*
 - vi) *one CD player*
 - vii) *one 14 inch television branded 'Panasonic'*
 - viii) *one Digital camera branded 'DC1500'*
 - ix) *one camera branded 'Fuji'*

D1 gave some of the items to D2 and D2 helped to carry those items from the said house to D1's house.

4. *Police investigations revealed that D1 had stolen the above items from the said house belonging to Mohd Fizal bin Abdullah for the purpose of selling the said items for cash. Police investigation also revealed that D2 had abetted D1 in the process of the commission of the theft of the abovementioned items.*
5. *Further police investigation reveals the discovery of only one item – the sony playstation which was sold to one male person who lives in Kampong Lumut, Seria.*

3rd Charge and 4th Charge: (against both D1 and D2) house breaking by night and mischief causing damage

1. *Sometimes before midnight of the 21st of January 2005, D2 went to meet D1 at D1's house at Jln Semaun Seria. Both of them then decided to go out sometime after midnight heading towards One Way Auto Workshop at Lot 2659, Jalan Bunga Melati, Seria, Brunei Darussalam for the purpose of committing theft.*
2. *Both D1 and D2 went to the said workshop using D2's father's car, with registration number BH 531. D2 parked his car some distance away from the said workshop and then both of them walked towards the workshop. When they arrived at the vicinity of the said workshop D1 and D2 cut the*

fence to the said workshop and entered the said workshop through the cut fence.

3. *Inside the workshop both D1 and D2 broke the door to the office of the said workshop and committed the theft of:-*

- i) *one internet phone,*
- ii) *one house alarm system,*
- iii) *one Nokia handphone*

Then both D1 and D2 went out of the said office and approached a car with registration number KF 8328 which was parked inside the workshop. D1 then broke the left rear side mirror of the said car. D2 then reached the rear left car lock and opened the rear left door of the said car. Both D1 and D2 then committed the theft of two car speakers from the said car. Before leaving the workshop D1 and D2 also committed the theft of:-

- i) *one grinder,*
- ii) *one drill set, and*
- iii) *one shouldering gun*

4. *D1 and D2 then took all the abovementioned items into D2's father's car and brought the items back to D1's house.*
5. *Police investigation revealed that both D1 and D2 committed the above mentioned theft in order to sell those stolen items for cash.*
6. *Investigations revealed that the damages caused to the rear side mirror of the said car, the office door of the said workshop and the fence of the said workshop amounted to \$86.00.*
7. *Further investigations show the recovery of the 2 car speakers and the shouldering gun at D1's house, whilst the house alarm system and the Nokia handphone were found at one male person's house in Kg Lumut Seria after it was sold by D1.*

5th Charge: (against D1 and D2) theft

1. *Sometime between 10th February 2005 and 11th February 2005, both D1 and D2 decided to go to the vicinity of Barrack No. 307D, Simpang 19, Jalan Lorong Bolkiah Seria, Brunei Darussalam using D2's father's car, with registration number BH 531.*
2. *When they both reached the said vicinity, both D1 and D2 then committed the theft of one mountain bike (bicycle) branded Peerless with Serial No. PL02434204 belonging to one Mohamad Jefferie Lee bin Abdullah which*

was placed outside the abovementioned barrack. Both D1 and D2 broke the bicycle lock and then took the bicycle and put it into D2's father's car. Both D1 and D2 then brought the bicycle to D1's house.

3. *Police investigations later revealed the discovery of the said bicycle at D2's house.*

6th Charge: (against D1 and D2) theft in a dwelling

1. *Sometime between 12th February 2005 and 19th February 2005, both D1 and D2 went to house No. 23, Simpang 43-17, STKRJ Lorong 3 Selatan, Seria, Brunei Darussalam belonging to one Mohammad bin Hj Ladis.*
2. *At that time D1 and D2 decided to commit theft inside the said house which had no occupants at the time. D1 and D2 then went into the store room of the said and committed the theft of the following items:-*
 - i) *one welding set*
 - ii) *eight sport rims*
 - iii) *eight tyres sized 15' and 17'*
 - iv) *one Power M Player*
3. *one water pump*
4. *D1 and D2 then brought the above items which belonged to the said Mohammad bin Hj Ladis to D1's house.*
5. *Police investigations revealed that D1 and D2 committed the above theft for the purpose of selling the stolen items for cash.*
6. *Police investigations also revealed the discovery of the eight sport rims and eight tyres sized 15' and 17' at one workshop in Kuala Belait after being sold by D2 for cash of \$300.*

7th Charge and 8th Charge: (against D1 and D2) house breaking by night and mischief causing damage

1. *Sometime between 12 midnight on 13th of February 2005 and 6.30 AM on 14th of February 2005, both D1 and D2 decided to go to Yek Tyres Workshop, at Lot 212, Jln Satu Barat, Seria, Brunei Darussalam in order to commit theft.*
2. *Both D1 and D2 went to the said workshop sometime after midnight using D2's father car with registration number BH 531. When they both arrived at the said workshop, both D1 and D2 cut the chain wired fence around the said workshop and then entered the said workshop through the said cut fence.*

3. *Inside the workshop both D1 and D2 then committed the theft of the following items:-*
 - i) *one set of battery charge*
 - ii) *one set of battery tester*
 - iii) *four sets of silencer*
 - iv) *one key copier machine*
 - v) *five sets of car mats*
 - vi) *six car batteries branded Puma, Expanded and Delcor*
 - vii) *four sets of 2 in 1 tyre opener*
 - viii) *two sets of sport rim labeled 'Alen Key'*
 - ix) *three car jacks*
 - x) *two sets of car rim cover sized 13' and 14'*
 - xi) *two sets of wheel spacer*
 - xii) *30 pieces of sport plug*
 - xiii) *five sets of locks for sport rims*
4. *which belonged to the owner of the said workshop named Yek Tiew Chang.*
5. *D1 and D2 then brought the above stolen items to D1's house. It was revealed from police investigations, both D1 and D2 had stolen the said items for the purpose of sale for cash.*
6. *Police investigations revealed the discovery of the stolen items in D1 and D2's house respectively. Police investigation also revealed the damage cost to the cut fence amounted to \$30.00.*

9th Charge: (against D1 and D2) house breaking by night

1. *Sometime between midnight of 13th December 2004 and the early hours of 14th December 2004, both D1 and D2 decided to go to No. 378, B2, Simpang 37 – 35, Jalan Setia Negara, Kuala Belait, Brunei, which is the office of the Department of Planning and Estate Administration of the Ministry of Education in order to commit theft.*
2. *D1 and D2 went to the said office sometime after midnight on 14th December 2004 using D2's father's car with registration number KE 2846. When they both arrived at the said office, D1 entered the said office through a sliding window which happened to opened when they arrived at the said office, whilst D2 waited outside the said window.*
3. *D1 then took a set of desktop computer with the brand 'Acer' which comprises of a computer monitor, CPU and keyboard which belonged to the said office. D1 handed over the said computer to D2 who was waiting outside the open window.*

4. *Both D1 and D2 then brought the set of computer to D2's father's car and they both drove back to D2's house and carried the computer into D2's house.*
5. *Police investigation reveals that D2 later sold the computer for cash of \$100 which he shared together with D1 and the computer was later recovered at a house in Kuala Belait where D2 sold the computer.*

10th Charge: (against D1 and D2) house breaking to commit an offence

1. *Sometime between 8th February 2005 and 15th February, D1 went to a house at No, 15, G10, Simpang 66, Panaga, Seria, Brunei which belonged to Haji Harun bin Haji Ibrahim and Hajah Julia binti Haji Ali Hassan. D1 went to the said house with D2 using D2's father's car with registration number KE 2846 with the intention of committing theft.*
2. *Earlier on D1 together with D2 had surveyed the said house to make sure that there was nobody in the said house and when they saw that the house was not occupied, both D1 and D2 decided to commit theft inside the said house.*
3. *When D1 and D2 arrived at the said house, D1 and D2 broke open the door of the said house using a screw driver. After the door was broken D1 and D2 went inside the house and committed theft of several items from the living room, bedroom and store room of the said house.*
4. *The items which both D1 and D2 has stolen from the said house are:-*
 - i) *one refrigerator branded Toshiba*
 - ii) *one washing machine branded Akira*
 - iii) *four sets of framed verses from the Quran*
 - iv) *one set of aircond brand branded National*
 - v) *one set of water dispenser branded Bottle*
 - vi) *one wall clock branded Nova*
 - vii) *two vacuum cleaners branded National and Wet and Dry*
 - viii) *one standing fan branded Mitsukawa*
 - ix) *three pairs of shoes*
5. *All these items belonged to Haji Harun bin Haji Ibrahim and Hajah Julia binti Haji Ali Hassan.*
6. *D1 then carried half of the above items to D2's father's car which was parked not far from the said house, whilst D2 carried the other half of the stolen items. D1 and D2 then drove to D2's house and dropped off a few of the stolen items at D2's house, to wit, one vacuum cleaner wet and dry,*

one refrigerator branded Toshiba and one pair of shoes, whilst the other stolen items were later brought by D1 to his house.

7. *Police investigation reveals that D1 and D2 have not sold any of the stolen items in this case and all of the stolen items were later recovered from D1 and D2's house respectively.*

D1 and D2 were subsequently arrested by the police and brought to court on the 19th of February 2005. D1 has a record of previous convictions for theft and housebreaking and D2 has no previous conviction."

When sentencing Commissioner Hairol said "In mitigation both defendants pleaded for a concurrent sentences and promise the court that they would not repeat these offences again.

The 1st defendant Mohammad Joll Bin Tumih has 11 previous convictions for theft convictions as far back as 1994. On record, he also has conviction under S. 427 of the Penal Code (Mischief) and other offences under the Misuse of Drugs Act Cap 27 and the Poison Act Cap 114. The fact that he pleaded guilty obviously deserves a discount in sentencing. But the fact of the matter is that he has such a poor record and appears to be a habitual offender as such that I feel that whatever sentence, this court may imposed on him it looks likely that it won't have any affect and I doubt he would ever learn anything from it.

As far as the 2nd defendant is concerned, he has no person convictions, and prior to this has a clean record. Taking into account of the fact that he had pleaded guilty and previous clean record, the 2nd defendant deserves a discount in sentences. Having said that these are serious offences committed in series and the court has always view offences such as housebreaking as a serious offence as exhibited by their sentences.

I hereby sentence the defendants to following terms.

1st defendant:

1st Charge: 3 months

3rd Charge: 2 years and 2 strokes

4th Charge: 2 months and 2 strokes

5th Charge: 2 months

6th Charge: 3 months

7th Charge: 2 years and 2 strokes

8th Charge: 2 months and 2 strokes

9th Charge: 2 years and 2 strokes

10th Charge: 6 months and 2 strokes

All the sentences to run consecutively. Total of 7 years 6 months and 12 strokes.

2nd defendant:

2nd Charge: Fine \$1,000 in default 1 month

3rd Charge: 1 year 3 months and 1 stroke

4th Charge: 2 months and 2 strokes

5th Charge: \$500 in default 1 month

6th Charge: \$1,000 in default 1 month

7th Charge: 1 year 3 months and 1 stroke

8th Charge: 2 months and 2 strokes

9th Charge: 1 year 3 months and 1 stroke

10th Charge: 6 months and 1 stroke

*The sentences to run consecutively with effect from 22 February 2005.
Total 4 years 10 months and 8 strokes."*

3. The appellants now seek leave to appeal against those sentences on the ground that they are manifestly excessive and inappropriate.

D2's case

4. Sheikh Noordin Mohammad who appears for the appellant submits;

that the total sentence imposed was manifestly excessive. He says, that the Judge failed to give sufficient weight to his pleas of guilty, to his previous good record, to the relatively short period over which all the offences were committed, to his young age, to the fact that a considerable amount of the property was recovered and finally to the fact that he was under the influence of his co-accused.

Although the Judge did not refer to these matters save for the guilty plea there is no reason to think that he did not have them in mind in assessing the sentences.

D1's case is that the sentences were overall manifestly excessive.

5. As can be seen, the Judge approached sentencing by attempting to pass such sentences in respect of each offence that when ordered to be served consecutively and cumulatively the totality was appropriate in all the circumstances. Whereas this approach does not necessarily lead to any injustice either to the defendant or the public, it is wrong in principle as the individual sentences may not reflect the gravity of the individual offences and, it is being wrong in principle, this court is called upon to make a fresh assessment of the appropriate sentences.

This court considered sentencing in cases of multiple housebreaking and theft in *Criminal Appeals No. 11 of 2005 and No. 1 of 2006* which were heard together. We said:

“When sentencing for a series of offences a judge must first determine the proper sentence for each offence. In all these cases the judge did so. There can be no criticism of the individual sentences she passed on each.

However, after a judge has determined the appropriate sentence for each offence it is imperative that he or she then considers the appropriate total sentence for the overall criminality of all the offences. His or her duty is to ensure that the total is adjusted as to be appropriate but not excessive.

See *Mohd Noor Bin Litoh v Public Prosecutor* Criminal Appeal No. 3 of 2005 and *R v Bocski* [1970]54 Cr. App. R. 519, in which the point was succinctly made:

“The final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive.”

Finally, as this Court said in *Mohammed Ibrahim v PP* [Cr. App. No. 8 of 2004]:

“It is useful, both to the sentencer and to any court which may later review the sentence, if the Judge determines first the appropriate starting point for sentence after trial before making any deductions for plea or other mitigation. On other occasions, we have pointed out that this leads to a more coherent and uniform sentencing policy and assists a Judge to determine the proper sentence.”

6. The proper approach is to pass appropriate sentences for each offence bearing in mind the Court’s powers, the gravity or otherwise of the offence and all the other proper mitigating factors. When such sentences have been determined the sentencer should then consider the totality bearing in mind the overall criminality of the offences, the pleas and other mitigating factors. In this way what is commonly referred to as “the totality principle” is brought into play.
7. In the above appeals we also considered the appropriate level of sentence in cases such as the present:

“We have been reminded of sentences passed in other cases. These show that offences of housebreaking are prevalent. They are often committed during the day when the householders are out at work so that their houses are an easy target. Such offences cause immense distress. Heavy deterrent sentences are called for.”
8. In the above appeals the 2nd appellant Redzwan was 19 years of age with a similar previous conviction. He pleaded late to a series of 5 offences (2 office breaking,

2 housebreaking and 1 associated damage) over a period of 6 months. All the offences were committed under the influence of an older co-accused and concerned property similar to that in the present appeal. In Redzwan's case we reduced the total sentence to 4 years from a starting point of 6 years.

The appeal of D2

9. If the sentences passed are reconsidered in the light of this approach it is immediately clear that the individual sentences bearing in mind the seriousness of some of the offences are manifestly lenient.
10. The most serious offences were charges 3, 7 and 9 (house breaking by night to commit theft). On each the appellant was sentenced to one year and 3 months and one stroke. Under Section 457 they carry a maximum sentence of 15 years' imprisonment and whipping. An appropriate starting point for each of these for D2 when they are not isolated offences but the convicted person is of previous good character would have been 5 years reduced to 3 years for the plea with 2 strokes on each charge.
11. Similarly charges 2 and 6 contrary to Section 380 were thefts in dwelling houses on each of which the appellant was fined \$1,000. Such offences are punishable with up to 7 years and a fine. A fine does not mark, however, in the present circumstances, their gravity nor is it proper to impose a fine on the expectation that it will not be paid so that it is in effect the imposition of a sentence of imprisonment in default. 3 years' imprisonment on each as a starting point reduced to 2 years would be minimum appropriate sentences in these circumstances.
12. The tenth charge (house breaking) was a planned breaking into an unoccupied house in which among other things a refrigerator, a washing machine, an air-conditioner and 2 vacuum cleaners were taken. Section 454 carries a maximum of 10 years with whipping. Even after plea the sentence of 6 months and one stroke passed by the Judge is manifestly inadequate for this offence considered alone. 4 years would have been the appropriate sentence reduced to 2 years and 8 months after plea with 2 strokes.
13. Charge 5 (theft) was the simple theft of a mountain bike. Under Section 379 this offence carries a penalty of 3 years and/or a fine. As part of a series of offences without the expectation that any fine would be paid for the reasons we have outlined a fine is not appropriate but in all the circumstances the imposition of 3 months' imprisonment reduced to 2 months after plea would be proper.
14. Charges 4 and 8 (causing damage) were associated with the commission of other offences and attracted sentences of 2 months' imprisonment on each and the statutory minimum under Section 427 of 2 strokes.

The sentences that should properly have been imposed on D2 are:

- 3rd Charge - 3 years and 2 strokes.
- 7th Charge - 3 years and 2 strokes.
- 9th Charge - 3 years and 2 strokes.
- 2nd Charge - 2 years.
- 6th Charge - 2 years.
- 10th Charge - 2 years and 8 months and 2 strokes.
- 5th Charge - 2 months.
- 4th Charge - 2 months and 2 strokes.
- 8th Charge - 2 months and 2 strokes.

Totality

15. We are required now to consider, in the light of the totality principle, the overall sentence appropriate to reflect the criminality involved in the offences. We are satisfied that a proper overall sentence would be one of 4 years. When doing so we bear in mind that no restitution of any sort had been made.
16. We are satisfied that it would have been appropriate to order concurrent sentences of 3 years' imprisonment on counts 3, 7 and 9 (house breaking by night). Sentences of 2 years' imprisonment on charges 2 (abetting theft) and 6 (theft in a dwelling), concurrent between themselves but consecutive to the sentences on counts 3, 7 and 9, a concurrent sentence of 2 years' and 8 months' imprisonment for charge 10 (house breaking to commit an offence), a concurrent sentence of 2 months' imprisonment on charge 5 and concurrent sentences of 2 months' imprisonment on counts 4 and 8. The total period of imprisonment would be 5 years. The appeal against the terms of imprisonment fails.
17. We turn to the strokes. We are satisfied that the cumulative imposition of 8 strokes was excessive in all the circumstances. The 2 strokes imposed on charges 3, 7, 9 and 10, we would order to be non-cumulative, making 2 strokes in all. Each of charges 4 and 8 carry a statutory minimum of 2 strokes. We order that the strokes on these latter charges are cumulative and also cumulative with the 2 strokes on the other charges making 6 strokes in all.
18. The sentence of 4 years and 10 months was not excessive. However the appeal of D2 will succeed in so far as we order the imposition of 6 and not 8 strokes. The sentence of 4 years and 10 months will stand.

The Appeal of D1

19. D1 has a bad record and was the older man. As we have already indicated it falls upon us to make a fresh assessment as to the appropriate sentences and totality. We are satisfied that it would have been appropriate to order concurrent sentences of 4 years and 2 strokes non-cumulative on counts 1, 3, 7 and 9; a sentence of 3

years and one stroke on count 6 to be cumulative to the sentence and strokes on counts 1, 3, 7 and 9; a concurrent sentence of 3 years and 2 strokes to be non-cumulative on count 10; a concurrent sentence of 2 months on count 5; concurrent sentences of imprisonment of 2 months and 2 strokes to be cumulative on count 4 and 8. The proper total punishment that should have been imposed on D1 is 7 years and 4 months and 7 strokes.

Normally this court would not vary a sentence of 7 years and 6 months by 2 months. However in the present case we must do so as the trial Judge was wrong in principle in his assessment of sentence, requiring us to set aside his sentence and make our own assessment. D1 must be sentenced in accordance with that assessment.

D1's appeal succeeds. His overall sentence is reduced to one of 7 years and 4 months and 7 strokes.

Power, P

Mortimer, J.A.

Davies, J.A.