

Md Abd Aziz bin Hj Bungsu

and

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 13 of 2017)**

Pg DP Hjh Rostaina Pg Hj Duraman, J.C.
27th September 2017

Criminal Law and procedure --- Appeal against convictions --- under section 380 and 379 of the Penal Code --- whether Magistrate erred in findings of facts --- Appeal against sentence --- appropriate sentence --- whether concurrent sentence manifestly excessive

Cases referred to:

Ng Soo Hin vs PP [1994] 1 SLR 105

Hj Sahak bin Hj Salleh vs PP (HCCA No. 104 of 2002)

Hj Mazlan bin Hj Shahbuddin vs PP (HCCA No. 50 of 2015)

Appellant unrepresented and in person.

DPP Mohammad Danial bin DSP Hj Kifrawi for the Public Prosecutor/Respondent.

Pg DP Hjh Rostaina, JC

1. This is an appeal against convictions and sentence. The appellant was brought before Magistrate Hjh Ery Sufitriana bte Hj Abdul Rahman, and charged as follows:-

1st Charge

That you, on 21st April 2015, in a staff house at Lot 15151, Simpang 528, Jalan Tutong, Kampung Telanai in Brunei Darussalam, inside a building used for the custody of property, did commit theft of, to wit:

- Monies amounting to BND\$10,256.00; and
- Monies amounting to Indian Rupee (INR) \$7,1750.00

in possession of the complainant, an Indian national, Aladimurugan, and you have thereby committed an offence punishable under section 380 of the Penal Code, Chapter 22.

2nd Charge

That you on the 3rd May 2015 at the Tumasek parking lot, Bandar Seri Begawan in Brunei Darussalam, did commit theft of one motor vehicle, to wit, a white Mitsubishi Pajero bearing registration number BF 4200 with chassis number CL047VLK400183, in possession of Ahad bin Haji Dahlan, and you have thereby committed an offence punishable under section 379 of the Penal Code, Chapter 22.

3rd Charge

That you, on 23rd May 2015 at about 5.30 pm, in a parking lot at Jalan Residency, Bandar Seri Begawan in Brunei Darussalam, did commit theft of property, to wit:

- 1) One (1) Royal Brunei Police Force hat;
- 2) One (1) Royal Brunei Police Force pistol holster;

- 3) One (1) Royal Brunei Police Force belt;
- 4) One (1) Royal Brunei Police Force ankle lid;
- 5) One (1) Royal Brunei Police Force Panji-Panji patch;
- 6) One (1) DUB MAG audio speaker;
- 7) One (1) Soundstream amplified; and
- 8) One (1) Dreamcaszts DVD player

belonging to the complainant, Police constable 4948 Muhammad Darwis bin Abdullah Jemut, and you have thereby committed an offence punishable under section 379 of the Penal Code, Cap 22.

2. In the end result after trial he was acquitted of the 2nd charge but was convicted and sentenced for the 1st and 3rd charge to 12 months' and 8 months' respectively. It was also ordered for the sentences to run concurrently with each other bringing the totality of sentence to 12 months' imprisonment.
3. Further, the Magistrate allowed the appellant to be released on bail pending today's appeal hearing.
4. In his Notice of Appeal on 17th June 2017, the appellant stated he was not satisfied with the conduct of the trial. He claimed that there was no evidence regarding the monies and there were no witnesses. He did not do the offences that he was charged for. That the Magistrate was not concerned that he was (allegedly) forced to admit to the offences.
5. The appellant submitted with regard to the 1st charge there was no evidence regarding the monies and that there were no witnesses that he committed the offence.
6. During the trial it was not disputed the stolen monies were not recovered. In her findings the Magistrate found the Prosecution's case for the first charge solely relied on the complainant PW2's evidence (Aladimurugan). DPP Mohammad Danial bin DSP Hj Kifrawi further submitted she had found him not only to be a credible and reliable witness but was also consistent throughout his crossed examination.
7. That she had accepted PW2's evidence that he saw the appellant for 2 to 3 minutes in front of his house carrying a box and entered into a Nissan Sunny bearing registration number BQ9356, which was revealed to be the appellant's car and was later seized at the appellant's house. She was satisfied that it was in this same box that PW2 had kept his monies amounting to \$10,256.00 and Indian Rupee \$7,150.00. She was also satisfied that it was not a fleeting glance and that PW2 could positively identified the appellant even amongst the 8 other present at the identification parade.
8. It is also clear from her findings that she was not impressed with the appellant and his witnesses. She believed the appellant was there at the said location in the 1st charge at the said date and time as witnessed by the complainant. She rejected the evidence of DW2 (Sofri bin Mat Salleh/former owner of the said Nissan Sunny) and DW3 (Hj Sheikh Audib bin Hj Nikman). DW2 could not recall when he gave the car to DW3. DW3 also could not recall when the appellant took the car from him as he had alleged. Neither did she accept that there was a person named Bungsu who had allegedly used the car before the appellant.
9. As to the 3rd charge, the appellant claimed there was no evidence that he had committed the offence. The DPP submitted that the Magistrate found the complainant PW1

(Muhammad Darwis bin Abdullah Jemut) to be a credible and reliable witness and his evidence was corroborated by the recordings in the CCTV in P17 and P18. She highlighted that it was not disputed that the defendant was present at the time and location as stated in the 3rd charge, since these recordings showed that the appellant had parked near PW1's car on 23rd May 2015. She had placed full weight on these recordings.

10. She was satisfied that PW1 had possession of the items, *P12A (police hat), P12B (ankle lid), P12C (crescent), P12D (belt), P12E (muffler), P14A (speaker), P14B (amplifier) and P14C (DVD player)*. She accepted these items were found in the vicinity of the appellant's house a few days after they were reported missing. She found that the only acceptable conclusion was that the appellant had stolen these items from PW1's car on 23rd May 2015 when he was parked next to PW1's car.
11. She had also rejected DW4's (Mohd Najib bin Bungsu) evidence as it contradicted with the appellant's evidence.
12. I cannot interfere with the findings of fact by the Magistrate unless it is apparent that she made some error. It is trite law and as a matter of fact that the trial Magistrate had the benefit of observing the demeanour of both the prosecution and defence witnesses. Given this advantage, the trial Magistrate had opportunities first hand to see and evaluate all the 16 witnesses in this case giving their evidence. The appellant court will not disturb the finding of facts of the trial court unless they are clearly reached against the weight of the evidence – see *Ng Soo Hin vs PP [1994] 1 SLR 105; Hj Sahak bin Hj Salleh vs PP (HCCA No.104 of 2002); Hj Mazlan bin Hj Shahbuddin vs PP (HCCA No.50 of 2015)*.
13. From the finding and reasoning expressed by the trial Magistrate here, I find there is nothing wrong with her finding of facts. This, she is entitled to do.
14. I now come to the appeal against the sentence. These were for two different offences, occurring at different dates, places and for different items. The appellant was sentenced 12 months' imprisonment for the 1st charge and 8 months' imprisonment for the 3rd charge. She ordered the sentences to run concurrently with each other, bringing the totality of sentence to 12 months' imprisonment.
15. The DPP submitted the Magistrate had taken into account the totality principle and the sentences passed by her in both charges were not manifestly excessive given the appellant had claimed trial, has a previous conviction of theft in 2011 and some of the stolen items (monies) were not recovered.
16. An offence of theft in a building under section 380 of the Penal Code, Cap 22, carries a term of imprisonment of 7 years and with fine. An offence of theft under section 379 of the Penal Code, Cap 22, carries a term of imprisonment which may extend to 3 years, or with fine or with both.
17. He further submitted for offences under section 380 of the Penal Code a sentence of 12 months is proper taking into account a plea of guilty and clear record. See *PP vs Md Zulaini bin Hj Sani (HCCA No.4 of 2005); PP vs Raddyman bin Awg Hj Radin (HCCA No.6 of 2005); PP vs Mohd Shalan*

bin Samat and Mohd Azhim bin Hj Mohd Rais (HCCA No.6 of 2013); PP vs Jumat bin Batang (HCCA No.15 of 2014).

18. He further submitted for an offence under section 379 of the Penal Code for a first offender and had not claimed trial, a starting point of 9 months was appropriate **see *PP vs Ak Md Fadzly Shah bin Pg Zainal Abidin (HCCA No. 158 of 2002)***.
19. In his mitigation, the appellant informed the court that he is aged 37. He is not married, has fathered two children and is self-employed doing car repairs.
20. I agree the sentences imposed by the Magistrate were not manifestly excessive.
21. In conclusion, I find there is no merit in any of the grounds of appeal. The appeal against convictions and sentence is dismissed.

I order for the appellant to serve his custodial sentence of 12 months' with effect from today.

**PG DP HJH ROSTAINA BTE PG HJ DURAMAN
Judicial Commissioner
27th September 2017**