

Rosdinata bin Ismail

and

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 26 of 2017)**

Roslan bin Hj Tarip

and

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 27 of 2017)**

**Pg DP Hjh Rostaina Pg Hj Duraman, J.C.
17th October, 2017**

Criminal Law and procedure --- Appeal against convictions --- under section 380, 379 and 411 of the Penal Code --- invoking powers under section 168 of CPC--- whether Magistrate erred in findings of facts --- Appeal against sentences --- appropriate sentences --- whether sentences are manifestly excessive

Cases referred to:

Pie bin Chin vs PP (1985) 1 MLJ

Pg Jaafar bin Pg Hj Othman vs PP [1995] JCBD 84

PP vs Pg Abdul Rahman bin Pg Shahbudin (HCCA No.145 of 2002)

Public Prosecutor vs Isa Mohammad and 4 Others [2003] JCBD 104

PP vs Mohd Zulani bin Hj Sani (HCCA No.4 of 2005)

PP vs Raddyman bin Awg Hj Radin (HCCA No.6 of 2005)

Appellant 1 unrepresented and in person.

Appellant 2 unrepresented and in person.

DPP Muhammad Aiman Adri bin Ahmad Zakaria for the Public Prosecutor/Respondent.

Pg DP Hjh Rostaina, JC

1. In these two cases the appellants appeal against the convictions and sentences imposed by Magistrate Hjh Ervy Sufitriana bte Hj Abdul Rahman. Both appeals are related to matters in Criminal Appeal No 22 of 2017.
2. They were charged as follows:-
Public Prosecutor vs Roslan bin Hj Tarip (D1)

Rosdinata bin Ismail (D2)
Mohammad Ibrahim bin Hj Simat (D3)
Masdeni bin Mahmud (D4)

1st Charge (against D1 and D2 only)

That both of you, on the 29th day of November 2015, at about 10.00 a.m, at a building used as a human dwelling, to wit, No.10, Spg 110, Jalan Ban 5, Kg. Mulaut, Sengkurong, in Brunei Darussalam, in furtherance of your common intention, did commit theft, to wit:

- a) One wallet containing:
 - a. One identification card;
 - b. One driving license;
 - c. One Union Pay debit card;
 - d. One Visa Credit Card;
 - e. One Visa Paywave debit card;
 - f. \$10 Brunei Dollars;
- b) One make-up bag containing make-up utilities
- c) One Volkswagen car key belonging to a Volkswagen Polo car bearing registration number BAB 6646 from the possession of one Hajah Siti Fairuz Fadzillah binti Haji Badar and both of you thereby committed an offence punishable under section 380 of the Penal Code, Chapter 22 read with section 34 of the same.

Penalty under section 380 of the Penal Code, Chapter 22 Imprisonment for a term which may extend to 7 years and with fine.
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2nd Charge (against D2, D3 and D4 only)

That all of you, on the 3rd December 2015 at about 12.45 a.m at No.10, Spg 110, Jalan Ban 5, Kg Mulaut, Sengkurong, in Brunei Darussalam, in furtherance of your common intention, did commit theft, to wit, one Volkswagen Polo car bearing registration number BAB 6646, from the possession of Hajah Siti Fairuz Fadzillah binti Haji Badar, and all of you have thereby committed an offence punishable under section 379 of the Penal Code, Chapter 22 read with section 34 of the same.

Penalty under section 379 of the Penal Code, Chapter 22 Imprisonment for a term which may extend to 3 years or with fine, or with both.

3. The Magistrate invoked her powers under section 168 of the Criminal Procedure Code and convicted D2 under section 411 of the Penal Code instead of under section 380 of the Penal Code.

In the end result after trial on 3rd August 2017, against both appellants D1 and D2, the Magistrate convicted and passed the following sentences:-

Under section 380 for Roslan (D1): 24 months' imprisonment.

Under section 411 for Rosdinata (D2): 12 months' imprisonment.

Under section 379 for Rosdinata (D2): 18 months' imprisonment. His sentences are to be served concurrently resulting in a total of 18 months.

4. Further the Magistrate granted a stay of execution and released both appellants on bail pending today's appeal hearing.
5. Roslan bin Hj Tarip (D1) in his Notice of Appeal dated 16th August 2017 and referred to as Criminal Appeal No.27 of 2017 gave the following grounds:-
 - He is the sole breadwinner of his family. He works as a food delivery, home improvement and driver. He occasionally helps his friend who is a vendor at Gadong market. His wife and five young children are dependent on him. He is responsible

for two of his children school runs. His other three children need asthma treatment at the Suri Seri Hospital in Kuala Belait. That they are all currently staying at his mother in law's place.

6. He feared what would happen to his family without his care and urged for his sentence of imprisonment to be quashed and substituted with a fine and to be paid by monthly instalments in proportionate to the offence. Before me he denied committing the above offence and carrying the bag @ makeup bag (*exhibit P8*).
7. Rosdinata bin Ismail (D2) filed his Notice of Appeal on 16th August 2017 and referred to as Criminal Appeal No.26 of 2017.
 - He denied being involved in the commission of the offences and before me urged to reduce his sentences and quash the convictions and sentences imposed on him.
8. He informed me, being the eldest in his family, he is also responsible for the care of his old aged parents.

Appellant Roslan (D1); under section 380 Penal Code

9. The Magistrate did not accept the appellant Roslan D1 as a credible witness. During the trial he had told the court he found the bag (*P8*). She was not convinced of this. She was entitled to come to this conclusion. She did consider the evidence by him, evaluated it and came to the finding that she did not believe him.
10. In her findings she stated, "if he had found the bag why would he asked Rosdinata D2 to destroy it immediately soon after".
11. It was clear from her findings she was satisfied the stolen items in the 1st charge were the properties of PW1 (Hjh Siti Fairuz Fadzillah binti Hj Badar) and PW2 (Hjh Samiah binti Awang Salleh). She accepted their testimonies that they both last saw these items inside their house at Spg 110, Ban 5, Kg Mulaut, on 29th November, 2015 before the items went missing.
12. She accepted the testimonies of PW6 (Sahdu bin Hj Samad) and PW7 (Erny Marni Marsitawati binti Wahid) who both saw a man whom they identified as Roslan D1 coming out of the said address carrying a small *pink* ladies bag (*P8*) and he was being picked up by a maroon Honda Civic car with registration no BL 7147.
13. During the trial, he did not dispute he was in the vicinity of the said address nor the fact that PW6 saw him there. However, he objected he was carrying *P8* and that its colour was *pink*.
14. As to the consistencies of the witnesses the Magistrate was in a position to have heard and seen the witnesses giving their evidence. I found she did assess their credibility.
15. From the trial notes of proceedings the following testimonies of PW6 and PW7 was recorded:-

- *DPP: You mentioned the colour of the bag looked like it was pink as in para 2, having sight of P8, is P8 the same bag?*
- *PW6: From my statement at that time the bag was similar to pink colour.*
- *DPP: Is this the same bag?*
- *PW6: Yes.*
- *DPP: You say you saw D1 was holding a woman's bag. Do you see it in court today?*
- *PW7: Yes and pointed to P8.*
- *DPP: Are you sure this the bag D1 was holding?*
- *PW7: Yes*
- *DPP: How was your vision at that time?*
- *PW7: Clear.*

16. In her findings she had explained the P8 was not pink in colour. She found this as a minor discrepancy and it did not affect both PW6's and PW7's credibility. In ***Pie bin Chin vs PP (1985) 1 MLJ***, "....failure to recall exactly certain events do not necessarily shake his credibility or render other parts of his story unworthy of belief".
17. Further, Rosdinata D2 in his Statement P33 confirmed that after an hour of waiting inside the car, Roslan D1 came bringing a wallet and makeup bag (P8). He saw Roslan D1 took out BND\$8.00 from the wallet. There was also a yellow identification card and a credit card inside the wallet. Roslan D1 had also instructed him to destroy the wallet and makeup bag (P8).
18. She had also accepted that this bag P8 was found at Rosdinata D2's residence.

Appellant Rosdinata D2; under section 411 Penal Code

19. In the appellant Rosdinata D2's case, in light of her findings the Magistrate invoked her powers under section 168 of the Criminal Procedure Code and convicted Rosdinata D2 of a lesser offence of retaining stolen properties *under section 411 of the Penal Code instead of a section 380 of the Penal Code offence.*

Section 168 of the CPC states:-

"if in the case mentioned in the last preceding section the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it".

20. She was satisfied that Rosdinata D2 ought or reasonably believed that the items carried by Roslan D1 were stolen. She accepted that Rosdinata D2 admitted he had received the stolen items from Roslan D1 and had retained it.
 - She accepted the stolen bag (P8) was found at Rosdinata D2's residence.
 - In D2's statement P33, he stated that Roslan D1 had told him after entering the car carrying the bag (P8), that he had stolen it from a terrace house at the industry Ban 5.
 - In P33, Rosdinata D2 admitted he did not know where (to whom) the items carried by Roslan D1 belonged to and he was asked to destroy the wallet and the makeup bag (P8).

- That Rosdinata D2 had in his possession the stolen car's key and subsequently gave it to PW17 which was used for the commission of another offence on 2nd December 2015 at 12.45 am.

Under section 379 read with section 34 of the Penal Code

21. She did not believe the appellant Rosdinata D2. From his actions of handing over the car's key to PW17 and showing the location of the car, the Magistrate found Rosdinata D2 was aware of the intention to commit the theft of the Volkswagen Polo car.
22. She accepted the testimony of PW17 (Mohd Ibrahim). She found him to be consistent and that his statement P36 corroborated his evidence. He had received the key from Rosdinata D2 at Rosdinata D2's house and then gave it to D4. They went to the said location that was pointed by Rosdinata D2 to steal the car. PW17 drove the car away and later switched with D4.
23. The Magistrate found there was common intention. She found there was a meeting of the mind when Rosdinata D2, PW17 and D4 decided to go to the said location together and steal the car from its rightful owner PW1 (Hjh Siti Fairuz Fadzillah binti Hj Badar). *In his statement P33, D2 admitted, "I showed the location of the house with the intention to send Mohammad Ibrahim (PW17) to take the car only".*
24. After trial the Magistrate made her observation, gave her reasons for convicting both the appellants and for imposing the sentences as she did. I made the general observation that I cannot interfere with the finding of facts by the Magistrate, who had the opportunity at first hand to observe the demeanour, hear the witnesses and having a complete overview of the evidence, unless it is apparent that she had made some error.
25. 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.
26. Accordingly the appeals against the convictions are dismissed.
27. I now come to the appeals against sentences. I am only able to interfere with the sentences passed by the trial court if the Magistrate acted on a wrong principle or the sentences passed were manifestly excessive.
28. For offences contrary to section 380 of the Penal Code, Cap 22, carries a term of imprisonment of 7 years and with fine; under section 379 of the Penal Code, Cap 22, carries a term of imprisonment of 3 years, or with fine, or with both; and under section 411 of the Penal Code, Cap 22, carries a term imprisonment of 3 years, or with fine or with both.
29. The DPP submitted that the sentences passed were adequate, not manifestly excessive and the trial Magistrate had correctly addressed the principle of totality. 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 Mohd Zulani bin Hj Sani (HCCA No.4 of 2005) and PP vs Raddyman bin Awg Hj Radin (HCCA No.6 of 2005);*** in the lower court a sentence of 1 month imprisonment was imposed. However,

the appellant court found a sentence of 12 months would have been proper after taking into account the plea of guilty and clear record.

30. In Roslan D1's case not being of clear record, had claimed trial and some of the items were not recovered, the DPP submitted a higher sentence of more than 12 months is appropriate. That the trial Magistrate had rightly taken the view to impose a sentence of 24 months' imprisonment for the section 380 Penal Code offence.
31. In Rosdinata D2's case for an offence under section 411 of Penal Code. **See *Pg Jaafar bin Pg Hj Othman vs Public Prosecutor [1995] JCBD 84 and Public Prosecutor vs Isa Mohammad and 4 Others [2003] JCBD 104***. The appellant in the former case was sentenced to 2 years and 1 month. In the latter case, the 5th defendant was sentenced to 18 months by the High Court for a similar offence.
32. In Rosdinata D2's case for an offence of theft of a motor vehicle, the court has always viewed theft of motor vehicle as a serious offence. Being deprived of their motor vehicle would cause much anxiety and inconvenience to the owners. Dato Mohammaed Saied CJ, in ***PP vs Pg Abdul Rahman bin Pg Shahbudin HCCA No 145 of 2002***, held, *"there can be no dispute theft of a vehicle is a serious offence in that it is usually deliberate and pre-meditated with the intention of using it inter alia in the commission of other just as serious or grave offences."* He further added, *"a starting point of 12 months is appropriate for a person with a clear record and more than 12 months for a person with a previous record, depending on the nature of his previous convictions."*
33. Before me both appellants had cited hardship or being inconvenienced by the sentences imposed. They pleaded for their sentences to be quashed or reduced. It is well established in previous cases these are merely personal circumstances and are not directly connected with the commission of the offence itself. It is unfortunate the appellants' families have to suffer and endure the consequences of their actions. But the fact of the matter is, these offences were deliberate and premeditated.
34. I agree the sentences above imposed by the trial Magistrate were not manifestly excessive to warrant my interference in the matter.
35. In conclusion, I find there are no merits in both appellants' appeals. Their appeals against convictions and sentence are dismissed.

I order for both appellants to serve their custodial sentences with effect from today.

PG DP HJH ROSTAINA BTE PG HJ DURAMAN
Judicial Commissioner
17th October, 2017