

Public Prosecutor

and

Mohd Hairol Husne bin Hj Zakariah

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 8 of 2019)**

Pg DP Rostaina bte Pg Hj Duraman, J

15th May 2019

*Criminal Law --- Appeal against sentence --- theft by employee --- section 381 of the Penal Code
--- guilty plea --- money not recovered --- Appropriate sentence*

Cases cited:

R v De Cruz (1953) MLJ 1

Abdul Karim vs R; Sundra Singh vs R; Loh Kai Hoi vs R [1954] MLJ 86

PP vs Selvakumar Pillai s/o Suppiah Pillai [2004] 4 SLR (R) 2008

PP vs Mohammad Fakillah Ali bin Hj Narawi (HCCA No.24 of 2017)

PP vs Kevin Salinghay Tobias (MCCT No.690 of 2018)

PP vs Khalifuddin bin Mohammad Yusof & 3 others (MCCT No.1895 of 2018)

DPP Muhammad Qamarul Affyian bin Abdul Rahman for Appellant/Public Prosecutor.

Mr Hj Ahmad Zakaria bin Hj Mohammad of M/s Ahmad Zakaria & Associates for
Respondent/Defendant.

JUDGMENT

Pg DP Hjh Rostaina, J

1. On the 18th of March 2019, the respondent pleaded guilty to the theft of one Baiduri Bank cheque in the sum of B\$4,500 in the possession of Kian Bee Company contrary to section 381 of the Penal Code. On 20th March 2019, he was sentenced to 3 months' imprisonment with effect from 18th March 2019

2. The charge was as follows:-

That you on the 4th of March 2019 at about 0730 hours, at the vicinity of Kian Bee Company, Chin Kian Building, Spg 5, Jalan Gadong in Brunei Darussalam, being employed in the capacity of a clerk of Kian Bee Company, did commit theft, to wit, one Baiduri Bank cheque in the sum of B\$4,500, in the possession of the said Kian Bee Company, and you have thereby committed an offence punishable under section 381 of the Penal Code, Chapter 22.

Penalty under section 381 of the Penal Code, Chapter 22 Imprisonment for a term not exceeding 7 years and fine.

3. This is an appeal by the Public Prosecutor against that sentence on the ground that it is inadequate considering the aggravating factors in this case. The Petition of Appeal was filed on 30th March 2019.
4. The maximum sentence that can be awarded for an offence under section 381 of the Penal Code, Chapter 22 is 7 years imprisonment and fine.
5. The Magistrate when passing sentence took into account the aggravating features of the case and further stated the following:- *“Nevertheless in sentencing the defendant, I take into account that he had pleaded guilty at the earliest opportunity given which saved the court’s and the prosecution’s time and expenses and that he is a first offender. These factors goes to the merit. I had considered his mitigations. Therefore in light of the whole circumstances, I take a s/p of 12 months but due to mitigating factors, I reduce it to 3 months. His sentence is backdated from his first date of remand -18th March 2019.”*
6. The facts revealed that the respondent was employed by Kian Bee Company under Logistic and Marketing. He admitted on 4th March 2019, he had arrived early at the Company’s office at about 7.30 am and stole one Baiduri Bank cheque in the sum of \$4,500 from Ms Ariene Guingab Mercado’s desk. She is the Company’s assistant accountant. He chose her desk to steal from as he assumed she would have kept the Company’s money there. She recalled having last seen the cheque on 2nd March 2019 and that she had kept it in the bottom drawer of her desk. Upon discovering the cheque was missing, she called the bank and was told someone had cashed it at 11 am at the Bank’s Supa Save, Beribi branch. As the said cheque was not crossed, it could be cashed out by anyone. The respondent admitted that he cashed out the cheque with the help of his friend as he had forgotten to bring his Identification card on that day. The transaction was captured and recorded on CCTV. It showed the respondent and his friend at the bank’s counter cashing out the said cheque. He was arrested on 16th March 2019. None of the cash was recovered. Before me, he gave the explanation that the money had slipped (fallen out) from his handbag. On record, he has no previous conviction.
7. Counsel for the appellant, DPP Muhammad Qamarul Affyian bin Abdul Rahman urged the court to quash the sentence of 3 months’ imprisonment, notwithstanding the aggravating factors of this case. That the respondent was an employee of the company and he had betrayed his employer’s trust. The offence committed was premeditated. He had arrived early in the morning at the office before anyone else and chose the desk his colleague from the finance department. The sum stolen was a large sum of \$ 4,500. The cash was lost to the Company and to date it was not recovered.
8. He submitted the Magistrate erred in imposing the final sentence of 3 months’ imprisonment. That the respondent should have at least received 8 months’ imprisonment, being 1/3 off from a starting point of 12 months’ imprisonment.
9. He submitted the court has always taken a serious view of an offence committed under section 381 of the Penal Code as it involved a breach of trust by an employee and public interest dictates that the court should impose a serious deterrence sentence.
10. He drew my attention to several authorities involving offences committed under section 381 of the Penal Code and where the court had taken a higher starting point and due to mitigating factors reduced it by 1/3.

11. In ***PP vs Selvakumar Pillai s/o Suppiah Pillai [2004] 4 SLR (R) 2008*** where the offender was a servant of an organisation. It involved a breach of trust by an employee and public interest dictates that the court should impose a serious deterrence sentence. He was sentenced to 2 years.
12. In ***PP vs Kevin Salinghay Tobias (MCCT No.690 of 2018)***, the defendant being an employee stole one Diamond Gold Rolex worth B\$50,000 from his employer which was never recovered. He pleaded guilty and was a first-offender. The Court took a starting point of 18 months' imprisonment and reduced it to 12 months' imprisonment.
13. In ***PP vs Khalifuddin bin Mohammad Yusof & 3 others (MCCT No.1895 of 2018)***, the defendants were employed as security guards at Aman Hills Residence. They were first-offenders and had pleaded guilty at first instance to the four charges against them. Where the items were recovered the Court took a starting point of 12 months' imprisonment and reduced it to 8 months' imprisonment. In the 3rd charge, given the stolen items were unrecovered, the Court took a starting point of 12 months' imprisonment but reduced it to 10 months' imprisonment.
14. In ***PP vs Mohammad Fakillah Ali bin Hj Narawi (HCCA No.24 of 2017)***, the defendant pleaded guilty to two counts of theft under sections 381 and 379 of the Penal Code. He was sentenced to 2 months and 1 month respectively, to be served consecutively resulting in a total of 3 months. The Public Prosecutor appealed against the 2 months sentence meted out under section 381 of the Penal Code. On appeal, the High Court quashed the sentence of 2 months' imprisonment and held that a 12 months starting point was appropriate, taking into account the amount of the property stolen (a video camera valued around B\$1,000). It was reduced to 8 months' imprisonment for a guilty plea and his clear record.
15. Counsel for the respondent Mr Ahmad Zakaria bin Hj Mohammad objected. He submitted that the sentence of 3 months' imprisonment was proper and adequate. That there was no manifest error on the part of the Magistrate. That in passing sentence she had made observations, took into account all the relevant factors and was able to determine if the respondent was remorseful for the offence he had committed.
16. That the DPP did not state that the sentence passed was wrong in principle. (see ***R v De Cruz [1953] MLJ 1***). That the most important mitigating factor is that the respondent had pleaded guilty at the earliest opportunity when he was produced in court on 18th March 2019. Hence, he had safe time for the police and prosecution.
17. He submitted that ***PP vs Mohammad Fakillah Ali bin Hj Narawi*** case involved 2 charges, breach of trust by a public servant and he had enjoyed the stolen items which were in his possession for 2 years before they were recovered, unlike the present case the respondent was caught very soon after the offence. Further, that case was seeking a guideline on the appropriate sentence to be imposed under section 381 of the Penal Code and he did not serve the remainder of that sentence after the 3 months' custodial sentence was quashed and replaced with 8 months' custodial sentence.
18. He further submitted that any tendency to standardise punishment for any type of offence is to be deplored because it meant that the individual offender is being punished

not upon the facts of the case but because he committed an offence of that type. (See **Abdul Karim vs R; Sundra Singh v R; Loh Kai Hoi v R [1954] MLJ 86**)

19. The respondent is aged 29, single and is currently serving his sentence. He is scheduled to be released on 18th May 2019. He was employed as a clerk with the Company since June 2018 and earned more or less about \$500. He told the Magistrate in his mitigation plea that he committed the theft because he was desperate and has a lot of debts.
20. His counsel submitted the respondent had suffered. His employment is terminated. He urged the court not to interfere with the sentence imposed by the lower court as the respondent is determined to settle the company's claim for the sum of \$4500 soonest upon his early release. He demonstrated this by informing the court that his sister had assisted him to pay the loan of \$2,860 that he had earlier taken with the Company.
21. The DPP stressed being determined and planning to pay the stolen cash is not a mitigating factor. Planning to settle the stolen cash is not the same as actually paying for. Further, in **PP vs Mohammad Fakillah Ali bin Hj Narawi** case, the reason he did not serve the substituted sentence was that by the time the appeal was heard he had already served his 3 months' custodial sentence.
22. Having financial hardship, cannot provide a licence to steal nor can it mitigate the offence. There was a degree of deliberation in the commission of the offence. He stole from his employer. He had motive, knowledge and opportunity to commit the theft. He was familiar with the office layout having worked there as a clerk since June 2018. Deterrence must be the foremost consideration when it comes to sentence for an offence of this nature to deter like-minded and potential offenders.
23. Having chosen a starting point of 12 months and by reducing it to 3 months' imprisonment sentence, I find the Magistrate had erred and was clearly unduly lenient. There are only 2 points in the respondent's favour; his guilty plea and clear record but even after taking into account these mitigating factors, the 3 months' imprisonment imposed by the Magistrate is clearly inadequate. To give 9 months discount is too lenient and not proportionate to the mitigating factors. The normal discount for a guilty plea and a first offender is 1/3 of the starting point which in this case would make a sentence of 8 months' imprisonment.
24. For these reasons, I agree with the submission of the DPP that the sentence of the court below is unduly lenient. Accordingly, I allow the appeal, quash the sentence of 3 months and substitute it with 8 months' imprisonment.

PG DP HJH ROSTAINA BINTI PG HJ DURAMAN
High Court Judge
15th May 2019