Vivi Yanti Binti Hj Mohd Ali

AND

Public Prosecutor

(High Court of Brunei Darussalam)
(Criminal Appeal No. 40 of 2020)

Steven Chong, CJ
19 December 2020

Criminal law – Cheating and forgery offences – Sentence – ss.420 and 465 of the Penal Code

Ahmad Zakaria Bin Hj Mohammad (M/S Ahmad Zakaria & Associates) for the Appellant.
PO Hajah 'Adzimah Mukarramah Binti Haji Saleh for the Public Prosecutor.

Cases cited:
Ruhaya binti Mohd Razali [Criminal Appeal No. 9 of 2018]
Mohd Shouffee Bin Adam v Public Prosecutor [2014] 2 SLR 998
HKSAR v Ngai Yiu Ching [2011] 5 HKLRD 690

Steven Chong, CJ:

<u>Introduction</u>

On 8 October 2020 in the Magistrate's Court the appellant was convicted after a trial of eleven charges under the Penal Code: ten charges of cheating contrary to section 420 and one charge of forgery contrary to section 465.

Magistrate Kamaliah Fadhilah Binti Haji Ibrahim sentenced the appellant to imprisonment of 2 years on each of the cheating charges and 3 years on the forgery charge. Ultimately, having regard to the principle of totality, an overall sentence of 4 years was imposed.

The appellant was also ordered to pay compensation of $9,530 to the victim and in default of payment to serve an additional 2 weeks' imprisonment.

<u>The facts</u>

In essence, on the cheating charges, the facts were that from July 2018 to March 2019 the appellant, using a false name and pretending to be a lawyer, persuaded the victim to part with sums of between $300 and $1,870 by falsely representing, among other things, that she would assist him in managing an investment called "*Saham Dinar*". Altogether, the victim was cheated of $10,900. Only $1,370 was recovered from the appellant after her arrest.

Turning to the forgery charge, the facts in brief were that the appellant forged a document titled "*Pembayaran Besi Cukai Saham*" dated 28 March 2019 purportedly issued by the Monetary Authority of Brunei Darussalam, which she then used to defraud the victim and his friend of $1,370 each, deceiving them into believing the money would be invested.

The appellant appeals against the sentence of 3 years' imprisonment on the forgery charge only. The grounds of appeal are twofold: firstly, that the sentence is excessive; and secondly, that the consecutive sentence order is wrong in principle.

<u>Whether sentence is excessive</u>

The appellant in arguing that the sentence is excessive relies heavily on the case of *Ruhaya binti Mohd Razali* [Criminal Appeal No. 9 of 2018] where the Court of Appeal reduced a sentence of imprisonment of 27 months to 21 months imposed by the Intermediate Court on the offender who was convicted on eight charges of using a forged document contrary to section 471 of the Penal Code.

It is well established that each case must be decided on its own facts. The first point to be noted is that *Ruhaya* pleaded guilty to the charges against her unlike the appellant who contested the charges against her and was convicted after a trial. In the circumstances the appellant is not entitled to the usual discount in the sentence accorded for a guilty plea.

The second point to be made is that in *Ruhaya's* case, the Court of Appeal was of the view that there should be a discount in the sentence because of the delay of about two years in the prosecution. There is no complaint about any delay in the appellant's case.

Finally, the facts are obviously different in *Ruhaya's* case. Whilst employed as a clerk in the Authority for Info-Communication and Technology, she used forged documents to dishonestly obtain cash payments for her benefit to the detriment of her employer.

In my judgment the sentence of 3 years' imprisonment is not excessive considering the gravity of the offence and the fact that the appellant was convicted after a trial.

<u>Whether sentence should be concurrent or consecutive</u>

The appellant's contention is that since the forgery charge is "*part of a series of transactions affecting the same defendant and victim*", the Magistrate should have ordered the sentence to run concurrently and not consecutively.

This proposition is what is known as the one-transaction rule which stems from the principle that concurrent sentences and not consecutive sentences ought to be imposed when all the offences taken together constitute a single invasion of the same legally protected interest: DA Thomas, Principles of Sentencing (Heinemann, 2nd Ed, 1979). But the one-transaction rule is not an inflexible rule and is to be applied sensibly. In *Mohd Shouffee Bin Adam v Public Prosecutor* [2014] 2 SLR 998, a decision of the Singapore High Court, Menon CJ said [at 41]:

"There may well be circumstances where a sentencing judge may order two sentences to run consecutively even though they are in relation to offences that do form part of a single transaction. One instance of this is where the straightforward application of the one-transaction rule results in the offender benefitting from the court's failure to have regard to the enhanced culpability that is reflected in the multiplicity of the offences that have been committed."

Along the same vein, the Hong Kong Court of Appeal in *HKSAR v Ngai Yiu Ching* [2011] 5 HKLRD 690 observed [at 23]:

"The emphasis therefore should be on a reflection in the sentence of the true culpability disclosed by the offences of which the accused has been convicted. This is an approach which this Court has consistently adopted in recent times, for example in HKSAR v Kwok Shiu To [2006] 2 HKLRD 272 and HKSAR v Lu Wai Shun [2008] 1 HKC 79. It is likely to be a more effective approach in reflecting an offender's overall culpability than one which becomes overly concerned with the one transaction rule, although in the case of more than one offence, the court must guard carefully against punishing twice for the same act. If the second offence which takes place in the course of the suggested single episode adds to the culpability of the first offence, it will normally follow that the sentence for the second offence will run wholly or partially consecutive to that for the first; to what extent, if at all, will depend on an assessment of the totality appropriate for the conduct as a whole. As with most sentencing exercises, the approach is an art, sensitive to the individual circumstances of the case and the offender."

Clearly, the overall culpability of the appellant in committing these series of offences over a period of some nine months warrants consecutive sentences to be imposed.

Principle of totality

In the final analysis the totality principle requires the sentencer who has passed a series of sentences to review the aggregate sentence and consider whether the aggregate is just and appropriate: DA Thomas, Principles of Sentencing (supra).

It is evident the appellant is a swindler. She committed the present offences not long after her release from a prison sentence of 2 years and 6 months upon conviction on thirteen charges of cheating and five charges of forgery. Thus, no credit whatsoever can be given to her for good character.

A serious aggravating feature is that the appellant took advantage of a vulnerable elderly victim of 86 years of age and cheated him of his hard earned savings. What the appellant did was cruel and heartless and this kind of behaviour must be strongly discouraged.

Conclusion

For the foregoing reasons, the sentence in totality eminently was deserved and the appeal is dismissed.

DATO SERI PADUKA STEVEN CHONG
Chief Justice