

Public Prosecutor

AND

Siti Rasimah Bte Awg Taha

(Intermediate Court of Brunei Darussalam)
(Criminal Trial No.32 of 2018)

Dk Hj Norismayanti binti Pg Hj Ismail, Judge
27th September 2021

Sentence – After trial - Criminal breach of trust by clerk or servant - misappropriation of company funds amounting to BND\$454,030 - section 408 of the Penal Code (PC), Cap 22 - use of company cheques and bank transfers – clear record – aggravating factors – discount for delay.

DPP Dk Didi-Nuraza Bte Pg Hj Abd Latif for Public Prosecutor.
Defendant In Person and Unrepresented.

Cases cited:

Mohd Noor bin Litoh v Public Prosecutor (Criminal Appeal No.3 of 2005)
Hjh Roziah binti Hj Talip v Public Prosecutor (Criminal Appeal NO.18 of 2019)
Public Prosecutor v Norhanisah Binti Hj Md Nor (Criminal Appeal No.6 of 2018)
Public Prosecutor v Purwanti Jong (Criminal Appeal No.22 of 2016)
PP v Hjh Kasmah binti Hj Hashim (ICCT No.1 of 2009)
R v Bocski (1970) 54 Cr App R 519

S E N T E N C E

Dk Hj Norismayanti, Judge.:

Background

1. The defendant was convicted after trial on the 11th September 2021 on 4 charges of misappropriation of company funds under section 408 of the Penal Code, Cap 22 and the sums involved in each charge are as follows:
 - (a) 1st charge: B\$158,543 between 1st October 2009 and 30th September 2010
 - (b) 2nd charge: B\$236,387 between 1st October 2010 and 30th September 2011
 - (c) 3rd charge: B\$2,000 between 1st October 2011 and 30th September 2012
 - (d) 4th charge: B\$57,100 between 1st October 2013 and 21st March 2013

Plea in mitigation

2. The defendant is 41 years of age, married and is the mother of 6 children. Other than her immediate family, the defendant also cares for her elderly mother. The defendant did not make any significant plea in mitigation prior to sentencing. She challenged the judgment of the court and pleaded to be released on bail. Upon consideration, the court refused her bail and she was placed in custody pending sentencing. The court notes that the defendant has no criminal history and she was informed of her right to appeal against the court's judgment.

Sentencing Considerations

3. The court bears in mind that the offences involved are quite serious particularly when the offences are committed by an employee who was given a high degree of trust by the employer. The seriousness of the offense is reflected in the penalty prescribed which is imprisonment for a term not exceeding 10 years and fine, which is similar for both section 408 and 409 of the PC, cap 22.
4. In determining the appropriate sentence for each charge, the court adopts the approach taken by the CoA in the case of ***Hjh Roziah binti Hj Talip v Public Prosecutor (Criminal Appeal NO.18 of 2019)*** where the following factors were taken into consideration: (i) sums involved; (ii) the degree of trust reposed in the offender; (iii) the rank of the offender; (iv) the length of time when the misappropriation was perpetrated and (v) what the money was used for. As for the type of sentence to be given, based on the facts and circumstances of the present case, it is inevitable that a custodial sentence will be imposed for all 4 charges faced by the defendant.

Serious breach of trust

5. The commission of the offences charged involved a serious breach of trust on the part of the defendant. She was an employee working Comms Harris & Company (the Company) from the year 2000 to early 2014 and throughout her years of service to the company, she had risen within the Company until her last appointment as Head of Business Development. Based on the high degree of trust given by the employer, the defendant was made a signatory to one of the Company accounts which is the subject matter of this case and was given charge of the of the Company's book business to which the Company account was set up for as well as the Company's financial affairs. The defendant chose to abuse the high degree of trust given to her by issuing numerous cheques and cashing them out either by herself or through third parties whom she got to unknowingly assist her in her criminal endeavor. Based on the overall facts and circumstances of the case, it is inferred that the funds misappropriated were used to benefit herself financially for the purposes of her own personal expenses. Her criminal breach of trust covered a period from October 2009 to March 2013. The defendant kept misappropriating monies from the company account until such time the company account was depleted. The court also takes into account that no restitution was ever made in this case.
6. For the 1st charge, the defendant cashed out 50 company cheques and misappropriated the total sum was B\$158,543 over a 12 months' period inclusive of 1 bank transfer in the sum of \$2,280. For the 2nd charge, the defendant cashed out and misappropriated a total sum of B\$236,387 via 55 company cheques over a period of 12 months. In the 3rd charge, the defendant cashed out only 2 cheques totaling B\$2000 within a period of 12 months and lastly,

under the 4th charge, the defendant cashed out 11 cheques amounting to B\$57,100 within the period of 12 months.

7. As reflected in the charges and the judgment handed down by the court, the offences were committed over a period of more than 3 years and involved the total of 118 separate transactions carried out by the defendant and the overall sum misappropriated totaled a substantial amount of B\$454,030. These are aggravating factors to be taken into account in determining the appropriate sentence.
8. As for the mitigation, it is not disputed that a custodial sentence would undoubtedly result in hardship for the defendant's family in her absence. Especially in the present circumstances where the defendant still has young children and an elderly mother to care for. Due consideration has been given to the defendant's mitigation, but it carries little weight in comparison to the gravity of the offences committed by the defendant and the fact that familial hardship is the usual outcome for defendants who receive custodial sentences.

Issue of inordinate delay

9. The court acknowledges that there has been a considerable delay in the start and conclusion of this case. Below is a short chronology of the discovery of the defendant's breach up to the date of judgment:
 - i. The defendant's breach of trust (which occurred between 2009 to 2013) was only discovered in early 2014 and a police report was lodged in April 2014.
 - ii. The police wrote to HSBC bank for bank documents on the 12th July 2014.
 - iii. HSBC Bank replied to the police in September 2014.
 - iv. The defendant was only charged in May 2018.
 - v. The trial of this case was first assigned to ICJ Lailatul Zubaidah in 2018 but had to be reassigned to another judge due to administrative reasons.
 - vi. The trial only started in July 2020.
 - vii. On the first day of trial, the defendant requested for several bank documents which led to 2 adjournments to secure the documents, bearing in mind that the bank concerned was no longer operational in Brunei.
 - viii. The adjourned trial recommenced in December 2020 and concluded in April 2021.
 - ix. Judgment handed down on 11th September 2021 (some delay due to Covid19 restrictions affecting court proceedings).
10. Overall, the case took about 7 years to conclude, and the court will take this considerable delay into account as a mitigating factor for sentencing purposes.

Case authorities

11. The DPP submitted on a couple of case authorities as guidelines for sentencing purposes. Both cases involved a substantial sum of money, and one case also addresses the issue of delay.
12. In the first case of ***Mohd Noor bin Litoh v Public Prosecutor (Criminal Appeal No.3 of 2005)***, the appellant, who was working as acting Accounts Clerk Grade II at the Examinations Department of the Ministry of Education, pled guilty to 3 charges under section 409 of the PC which carries the same prescribed penalty as section 408 offense. The charges encompassed

the period between December 1999 and April 2002 and involved the total sum of \$327,094.18. The Court of Appeal (CoA) reduced an overall sentence of 6 years' imprisonment to 4 years' imprisonment and stated that *"The 6 years imprisonment passed is approximately the level of sentence, which may have been passed after trial."*

13. In ***Hjh Roziah binti Hj Talip v Public Prosecutor (Criminal Appeal NO.18 of 2019)***, the appellant faced one charge under section 408 of the Penal Code along with 14 other charges for money laundering. The section 408 offence was for the misappropriation of funds totaling \$163,800.11. The CoA agreed with the lower court's starting point of 4 years and 6 months' imprisonment for the criminal breach of trust. The CoA also agreed with the lower court's decision to allow a 6 months' discount for a period of 4 years delay in the prosecution. It was also highlighted for the discount to be applied to the overall sentence, after and not before the one third discount in light of the appellant's guilty plea.
14. The court also refers to the case of ***Public Prosecutor v Norhanisah Binti Hj Md Nor (Criminal Appeal No.6 of 2018)***, where the respondent pleaded guilty and was sentenced to 2 years' imprisonment for a one offense of criminal breach of trust under section 408 of the PC. The facts in this case are that the appellant had misappropriate a total of \$154,700 over a period 12 months whilst working as Acting Chief Cashier at TAIB Bank in May 2011. The breach of trust was (i) only discovered in March 2016, (ii) reported to the police in April 2016 and (iii) the respondent was charged 2 years later in March 2018. The CoA observed that the lower court judge did not consider the 2 year investigation stage as a delay and the CoA concluded that the reasons provided for the delay during the investigation stage *"..does not amount to a satisfactory explanation and more significantly, whatever the explanation, it provides no comfort to the respondent who, in respect of the delay was blameless."* For the delay, the CoA held that a sentencing judge would have been entitled *"to extend some leniency towards a defendant."* Upon consideration of the appeal, the CoA concluded the sentence imposed was a lenient sentence but was not manifestly inadequate. The PP's appeal on sentence was dismissed.
15. The court also relies on the case of ***Public Prosecutor v Purwanti Jong (Criminal Appeal No.22 of 2016)*** where the respondent faced two charges for criminal breach of trust under section 408 of the Penal Code. The first charge involved the misappropriation of \$30,727.44 which covered a period from May 2011 to April 2012. The second breach of trust involved the sum of B\$3,312.00 which occurred in July 2012. It was noted that there was short of a 4 years delay involved from the start of the investigation to the eventual sentencing in the said case. The CoA particularly expressed that in this jurisdiction where the inordinately delay in concluding a case after the defendant's first appearance exceeds any pre-trial delay, the delay will be taken into account by the court in appropriate cases. This court also takes note that the CoA agreed with the observation made by Judge Lim Siew Yen in ***PP v Hjh Kasmah binti Hj Hashim (ICCT No.1 of 2009)*** that *"The current trend is to impose a term of 2 years where the defendant pleaded guilty and where the amount misappropriated is small and there is no restitution"* but the CoA however held that there was no hard or fast rule and each case must be considered in light of its facts. In this present case, on appeal, the sentence for the 1st charge was held to be manifestly inadequate and was substituted with 18 months imprisonment (starting point of 3 years imprisonment, applied 12 months discount for the plea of guilty and additional 6 months discount for delay). For the 2nd charge, the sentence of

6 months was also found to be manifestly inadequate. The sentence was substituted with a 12 months' imprisonment sentence.

Appropriate sentence

16. Having regard to the aggravating factors involved, the facts and circumstances of the case as well as the cases referred to above, the court decides on the following starting points:

1st charge: 4 years and 6 months' imprisonment
2nd charge: 5 years' imprisonment
3rd charge: 3 years' imprisonment
4th charge: 3 years and 6 months' imprisonment

17. The court finds that a discount should be applied for the delay involved having considered the period of about 7 years (2 years for pre-trial, about 5 years for trial) that it took to conclude this case. The court finds it would be appropriate to apply a one third discount to the sentence in respect of this delay. The final sentence after discount are as follows:

1st charge: 3 years' imprisonment
2nd charge: 3 years and 4 months' imprisonment
3rd charge: 2 years' imprisonment
4th charge: 2 years and 4 months' imprisonment

Totality principle

18. The court now addresses the totality principle. It is for the court to decide that the total sentence reflects the overall criminality committed by the defendant and to ensure that the total of the consecutive sentence is not excessive (*R v Bocski* (1970) 54 Cr App R 519 referred). The total sentence of 10 years and 8 months would be excessive in this case. The court is of the view that in the present case, after trial, a total sentence within the range of 5 to 6 years imprisonment would be appropriate and would reflect the seriousness of the offences involved and to act as a deterrent for potential offenders.

19. Based on the aforesaid, the court orders that the sentences for the 1st and 3rd charge are to run consecutively and the sentences for the 2nd and 4th charge are to run concurrently with the consecutive sentences. The defendant is to serve the total sentence of 5 years imprisonment and the sentence is to take effect from the date of judgment, 11th September 2021.

DK HJH NORISMAYANTI BINTI PG HJ ISMAIL
Judge, Intermediate Court