ZHONG XIAO HUI

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Motion No. 25 of 2017)

XIE LI RONG

AND

PUBLIC PROSECUTOR

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

LAI HAI YANG

AND

PUBLIC PROSECUTOR

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

ZHONG XIU YING

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 10 of 2017)

ZHONG JIAN YUN

AND

PUBLIC PROSECUTOR

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 9 of 2017)

Before: Mortimer P, Leonard and Burrell JJA.
7th November 2017

Headnote: Sentence – Multiple offences of using forged Bankcards by 5 Chinese nationals at Brunei ATM machines. In two cases sentences of 13 years and 10 years after pleas of guilty manifestly excessive and reduced to 7 years and 6 years respectively. In a third case 6 years reduced to 5 years.

Appellants/Applicants in person
DPP Hjh Suriana bte Hj Radin for Public Prosecutor/Respondent

Case cited in the Judgment:

PP vs Pathmanathan Jegan (HCCT 7 of 2013 and COA 13/2013)
Yap Yap Teck Eng v Public Prosecutor (CA 3/2012)
Jason Toh Han Heng v Public Prosecutor (CA 14/2012)
Yap Kean Huat v Public Prosecutor (CA 47/2013)
Yap Teck Hui v Public Prosecutor (CA 21/2014)
Public Prosecutor v Pg Hussin bin Pg Sulaiman (HCCA 8/2017)
Prakash A/L Kandasamy v Public Prosecutor (CA 22/2014)

Burrell, JA.:

There are five separate appeals before us. They concern five Chinese males who between them have pleaded guilty to 39 offences and have asked for a further 68 offences to be taken into consideration involving the use of forged bank cards to obtain cash from ATM machines in Brunei.

The criminal acts committed by each appellant/applicant have involved three separate offences as follows. First, the act of inserting a forged card into an ATM at a bank constitutes an offence contrary to s.4 (1) of the Computer Misuse Act CAP 194. Secondly, the dishonest appropriation of the cash thereby received is theft contrary to section 379 of the Penal Code CAP 22 and thirdly, the conversion of the stolen local currency into US dollars constitutes money laundering contrary to section 3(1) b of the Criminal Asset Recovery Order.

On 27th August 2017 all 5 defendants appeared before Judge Radin for sentence. Their first appearance in court had been on 16th October 2016. They had originally, in January 2017, entered pleas of not guilty to a total of 125 charges but with the assistance of Ms Christine Lim, who has appeared for all 5 defendant, over the course of subsequent hearings during 2017 the matter was sensibly amended so that all 5 defendants entered various pleas of guilty and asked for other offences to be taken into consideration to which we now turn in more detail.

Time for appeals

We first of all deal with a preliminary matter. Two of the defendants, D4 and D5, filed their appeals in good time. D1, D2 and D3 however were late. In each case the notice was 3 days late. Leave to appeal out of time will only be granted when there are reasonable grounds for a successful appeal and a satisfactory explanation has been given for the late filing. In view of the very short period of delay we shall now deal with the merits of each appeal and refer to the question of leave for late filing at the conclusion.

The sentences imposed

D1 came to Brunei from China with forged cards. He committed the offences over a two day period and was arrested at the airport on his way back to China. He pleaded guilty to two s.4 (1) offences and two thefts of $1,800 in total. He asked for three further s.4 (1) offences and three further thefts to be taken into consideration. He is a 43 year old married man with a family and no known convictions. Taking into account his pleas of guilty he was sentenced to 2 years imprisonment for each s.4 (1) offence consecutive and 6 months concurrent for each theft making 4 years in total.

D2 was also in Brunei for 2 days. His criminal activity during that time resulted in his pleading guilty to seven s.4 (1) offences with a further seven to be taken into consideration, one money laundering offence contrary to s.3 (1) b of CARO and seven thefts with seven further thefts to be considered when sentencing. The court was told he was a 38 years old man with no previous convictions. He is married with two children in China. The judge imposed 2 years for each s.4 (1) offence and the s.3 (1) b offence which had involved the conversion of Brunei dollars into US$7,348 and 6 months for each theft of monies totaling $6,100. He ordered all eight of the 2 years sentences to be served consecutively making a total of 16 years with the theft sentences to be served concurrently. The judge then considered the principle of totality and reduced the sentence to 13 years. The individual sentences had already been discounted because of his pleas of guilty thus the sentence deemed proper had there been a trial would have been 24 years, discounted to 19 ½ years because of the principle of totality.

D3's conduct over the same period resulted in five pleas of guilty to s.4 (1) offences, with a further five taken into consideration; five thefts totaling $1,300 with a further five considered and one CARO offence in which US$15,229 was converted. The sentencing procedure was the same as with D1 and D2, namely 2 years for the s.4 (1) and CARO offence, making a total of 12 years after pleas of guilty and 6 months each for the thefts concurrently. After applying the totality principle the 12 years was reduced

to 10; a sentence equivalent to 15 years after trial. He also is a family man from China with no known convictions. There are health problems concerning his mother and daughter-in-law.

D4 pleaded to four offences. Two s.4 (1) offences with three more considered and two thefts with three more considered. He was sentenced to 2 years each for the s.4 (1) offences consecutive and 6 month concurrent for the thefts. 4 years in all. He is a family man from China, aged 35 with 2 children.

D5 pleaded guilty to five offences; two s.4 (1) offences, one CARO offence and two thefts. He asked for a further eight offences to be considered. He received 6 years in total being 2 years consecutive for the s.4 (1) and CARO offences. The theft sentences were, again, concurrent. Again also, there is a familiar background profile. A 47 year old man from China, married with children and some health problems in the family.

Thus, if we look solely at the s.4 (1) and CARO offences the result was as follows:

D1 = 2 offences (and 3 "t.i.cs") – 4 years imprisonment
D2 = 8 offences (and 7 "t.i.cs") – 13 years imprisonment
D3 = 6 offences (and 5 "t.i.cs") – 10 years imprisonment
D4 = 2 offences (and 3 "t.i.cs") – 4 years imprisonment
D5 = 3 offences (and 4 "t.i.cs") – 6 years imprisonment

These figures ignore the theft charges and theft "t.i.cs" all of which were dealt with by concurrent sentences and, in reality, add nothing to the overall criminality.

Discussion

In his reasons for sentence the judge referred to the case of *PP vs Pathmanathan Jegan (HCCT 7 of 2013 and COA 13/2013)*. That case is of importance for two reasons. First, it emphasizes the seriousness of these types of offences which are all too prevalent. In particular the Court of Appeal said:

> *"As we have said before these commercial offences are very serious and regrettably common in many jurisdictions. They are carried out by organized crime and are international in character. Those who come over the border are the foot soldiers for these international crime syndicates who produce counterfeit cards for use in ATM machines and the purchase of goods."*

Secondly the court said that a realistic starting point for a single s.4 (1) offence, after trial, would be 4-5 years imprisonment. In recent years the courts in Brunei have dealt with a number of similar cases. The Respondent's written submissions for the current appeals remind us of the following which we have read and considered

Yap Yap Teck Eng v Public Prosecutor (CA 3/2012)
Jason Toh Han Heng v Public Prosecutor (CA 14/2012)
Yap Kean Huat v Public Prosecutor (CA 47/2013)
Yap Teck Hui v Public Prosecutor (CA 21/2014)
Public Prosecutor v Pg Hussin bin Pg Sulaiman (HCCA 8/2017)

Prakash A/L Kandasamy v Public Prosecutor (CA 22/2014)

A common theme running through all these cases is that the appellants were not acting alone and had come to Brunei from overseas in order to use counterfeit banking cards. The appellants have all prayed in aid that they were mere foot soldiers for a "mastermind" in China, which we accept.

In the present cases, although the individual sentences of 2 years after a plea for each s.4 (1) offence is on the low side, we focus our attention on the final sentences passed and the application of the principle of totality.

It is apparent at the outset that the range of sentence from the lowest of 4 years (D1) to the highest of 13 years (D2) is too great and unjust.

There are no grounds for interfering with the sentences of D1 and D4, both 4 years. They are proper and appropriate sentences. However 13 years for D2 and 10 years for D3 are clearly excessive and manifestly so. The judge correctly considered the totality principle but should have made greater reductions so as to achieve a more just overall outcome with regard to these five appellants and also to be consistent with the recent Brunei cases cited above.

In order to achieve such a result we will reduce the sentence of D2 by 6 years, D3 by 4 years and D5 by 1 year; all to run from 25th June 2016.

Late filing of Notices of Appeal

D1, D2 and D3 were 3 days late. There is no merit in D1's appeal we therefore refuse leave. There is merit in D2 and D3's appeals we therefore overlook the very short delay and grant leave. We treat the applications as the appeals and make the following orders.

Orders

D1 – leave refused.

D2 – leave granted and appeal allowed. The 2 year sentences passed on charges 11, 12, 13 and 1 year on charge 14 to be consecutive making a total of 7 years. All remaining sentences to be concurrent with each other and concurrent with the 7 years.

D3 – leave granted and appeal allowed. The 2 year sentences passed on charges 32, 35 and 38 to be consecutive making 6 years in total. All remaining sentences to be concurrent with each other and concurrent with the 6 years.

D4 – Appeal dismissed.

D5 – Appeal allowed. The 2 year sentences on charges 2 and 55 to be consecutive together with one year from charge 64 making 5 years in total. All remaining sentences to be concurrent with each other and concurrent with the 5 years.

For the sake of completeness we also order that pursuant to s.13 (A)2 of the Criminal Procedure Code CAP 7 a conviction is recorded in respect of all of the offences taken into consideration.

Mortimer, P.

Leonard, J.A. **Burrell, J.A**