**MOHAMMAD NOH BIN ZAINAL ABIDIN**

**AND**

**PUBLIC PROSECUTOR**

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**(Court of Appeal of Brunei Darussalam)**
**(Criminal Appeal No. 21 of 2015)**

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**SUKARDI BIN HAJI JAMAHAD**

**AND**

**PUBLIC PROSECUTOR**

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**(Court of Appeal of Brunei Darussalam)**
**(Criminal Appeal No. 22 of 2015)**

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Before: Mortimer P, Leonard and Burrell JJ A.
**24th November 2015**

*Criminal – sentence – housebreaking with intent to commit theft – Section 451, Penal Code – Mischievous damage – Section 427, Penal Code – Bank premises entered and ATM machines damaged – Appeals against sentence dismissed.*

Appellants in person
DPP Dk Didi-Nuraza Pg Hj Abd Latiff, DPP Hjh Samiyyah Emeralda POKLSDSLJ Awg Hj Abas and DPP Mohd Danial Dato Haji Kifrawi (Public Prosecutor) for Respondent

**Cases referred:**

*Mohammed Sediken bin Bujang v. Public Prosecutor Criminal Appeal Nos. 3, 4 and 5 of 2014*
*Shahrulnizam bin Haji Mohiddin v. Public Prosecutor (1994) JCBD 47*
*Mohd Zahiruddin bin Hj Junaidi v Public Prosecutor, Criminal Motion No. 38 of 2013.*
*Ahmadi bin Hj Nawi v. Public Prosecutor Criminal Motion No. 1 of 2015*

**Leonard, JA.:**

The appellants were convicted and sentenced by Judge Hanani in the Intermediate Court after a trial and they now appeal against their sentences.

Sukardi bin Jamahad ("D1") and Mohammad Noh bin Zainal Abidin ("D2") were jointly charged under section 451 of the Penal Code ("the Code") with two offences of house trespass with intent to commit an offence punishable with imprisonment (charges 1 and 3). The first house trespass and mischief occurred at a bank in Sengkurong at 03.50 hours on 25 July, 2012. The second house trespass and mischief occurred at a bank in Kiulap at 04.30 hours on the same date. As the intent in each case was to commit theft, the offences carried a maximum term of ten years imprisonment on each charge. On both occasions of house trespass they had damaged ATM machines in the bank premises they had entered in order to steal cash. The cost of the damage amounted in all to $5,629.00. They were therefore charged under section 427 of the Code with two offences of mischievous damage (charge 2 and 4). That section provides for up to five years imprisonment and whipping with not less than 2 strokes.

D1 had in addition been convicted of criminal trespass (Charge 5) in the office of PAD Motors at 01.00 hours on 1 July 2012, where he stole two cheques which he subsequently paid into his own bank account. He had previously worked for that firm and knew where to find the cheques. That offence was also punishable under section 451.

The sentences imposed were as follows.

D1.
Charge 1. 30 months imprisonment.
Charge 2. 12 months imprisonment and 2 strokes.
Charge 3. 30 months imprisonment
Charge 4. 12 months imprisonment and 2 strokes.
Charge 5. 24 months imprisonment.

The sentences on charges 1 and 3 and 12 months of the sentence on charge 5 were to be consecutive. The sentences on charges 2 and 4 were to be concurrent with the others, so that the total effective term of imprisonment was 6 years. The whipping sentences were to be cumulative, making an effective total of 4 strokes.

D2.
Charge 1. 30 months imprisonment.
Charge 2. 12 months imprisonment and 2 strokes.
Charge 3. 30 months imprisonment
Charge 4. 12 months imprisonment and 2 strokes.

The sentences on charges 1 and 3 were to be consecutive. The sentences on charges 2 and 4 were to be concurrent with the others, so that the total effective term of imprisonment was 5 years. The whipping sentences were to be cumulative, making an effective total of 4 strokes.

The appellants, who had no previous convictions, were unrepresented at the trial and before this court. They made no specific criticism of the individual sentences or the effective total sentences but pleaded for a reduction, saying that they were remorseful, that they intended not to offend again and that their relatives needed their support. We have

seen letters from family members asking for a reduction in sentence and we have given them due consideration. Expressions of remorse may carry some weight where an accused pleads guilty at the first opportunity and the plea can in those circumstances attract a substantial discount in sentence. Sometimes though not always, what is described at a later stage as remorse may in reality be regret for having been apprehended convicted and imprisoned. The courts can rarely take into account the hardship regrettably and almost inevitably suffered by the family members of offenders whose conduct results in their being sent to prison. In the present case, the offences were serious. The appellants had planned the crimes and a reconnaissance had been carried out. They equipped themselves with a crowbar and a screwdriver in order to break into the ATM machines and they covered their faces when in the premises in order to avoid identification by CCTV. Ms. Emeralda observed, quite rightly, that the individual sentences of 30 months imposed for the section 451 offences were not manifestly excessive. In in fact they were lenient, the usual starting point after trial being 3 years imprisonment. With regard to the section 427 offences, where the appellants were sentenced on each charge to12 months after trial, Ms Emeralda referred to the cases of *Mohammed Sediken bin Bujang v. Public Prosecutor (Criminal Appeal Nos. 3, 4 and 5 of 2014)* and *Shahrulnizam bin Haji Mohiddin v. Public Prosecutor (1994) JCBD 47.* In the former case, for section 427 offences, sentences of 2 years imprisonment were imposed after pleas of guilty. That indicates a starting point of 3 years after trial. The seriousness of the offences in that case was aggravated by the fact that they took place in a mosque at night. In the latter case, decided I n 1994 by Roberts CJ, hearing an appeal from the Magistrate's Court, sentences of six months and 2 strokes for two offences of mischievous damage were reduced to two months and 2 strokes, representing a starting point after trial of 3 months. The Chief Justice remarked that "Unless the damage is considerable or there are other aggravating factors the usual sentence for that offence is two months and two strokes, which seems to me to be appropriate." There the amount of damage caused to the ignition switch of a motorcycle was valued at $109.60. The value of the damage caused in the other mischief offence, which was the breaking of the rear slide window of a van from which the culprit was stealing some loaves of bread, is not stated. In the present case, the damage was considerable and there were other aggravating factors. The offences were committed in the course of attempts to steal cash at night from ATM machines on the premises of two banks and the total value of the damage was $5,629.00. Inconvenience was caused to the banks and to customers. Ms Emeralda submitted that a higher sentence is appropriate and justified. We agree with her that in all the circumstances the individual sentences were not manifestly excessive.

On the question of applying the totality principle in arriving at the total effective sentence of imprisonment on each appellant Ms Emeralda, properly attempting to assist the court in circumstances where the appellants were unrepresented, explored the possibility that a reduction might be required. She cited 2 cases. The first was *Mohd Zahiruddin bin Hj Junaidi v Public Prosecutor, Criminal Motion No. 38 of 2013.* That was case where leave to appeal was refused in relation to two sentences of two years, reduced to a total effective sentence of 2 years and 4 months, imposed on two defendants with clear records who, unlike the appellants before us, had pleaded guilty. They had broken into two different schools with intent to steal, thus committing offences punishable under Section 451. The reason for refusal of leave was that the court found that the applicant's explanation for delaying by six months the filing of notice of appeal was not satisfactory. The court said,

*obiter* that had it been necessary to consider whether the appeal was likely to succeed, it would have concluded that it was not. That, however, was not the basis of the refusal and the remarks made *obiter* cannot be taken to indicate that a higher effective sentence might not have been justified in that case. Nor can it be taken to indicate that the sentence presently under consideration was manifestly excessive. Each case must be considered on its own facts.

The second case brought to our attention was *Ahmadi bin Hj Nawi v. Public Prosecutor Criminal Motion No. 1 of 2015.* The applicant had entered the same unoccupied dwelling house four times over the course of a few days in 2014 and items had been stolen. There were four men who had entered the same house to steal over that period, some more often than others. The sentences varied for different defendants. Being given credit for his pleas of guilty and previous good character the applicant had been sentenced quite properly to two years imprisonment for each offence. By making some sentences concurrent, the judge arrived at a total effective sentence for him of 4 years imprisonment. Being concerned with a disparity between the sentences imposed upon the various defendants, this court found it necessary to reduce the total effective period of imprisonment to 2 years and nine months. That indicates a starting point after trial of about 4 years and two month's imprisonment. The facts of that case differ greatly from those of the one now under consideration and we are not led by it to think that the effective sentences of imprisonment in the present case can be regarded as manifestly excessive when one looks at the overall criminality of the appellants' conduct. It is right that Sukardi bin Jamahad should serve a further year on the 5th charge, the overall criminality of his conduct being greater than that of Mohammed Noh bin Zainal Abidin. We cannot say that the total of four strokes on each appellant is manifestly excessive. The appeals will be dismissed.

***Order***

The appeals are dismissed.

**Mortimer, P.**

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