

**ROSIZAN BIN JUMAAT**

**AND**

**PUBLIC PROSECUTOR**

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**Court of Appeal of Brunei Darussalam  
(Criminal Appeal No. 9 of 2021)**

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Before: Burrell P, Seagroatt and Lunn JJ A.

**Date of Hearing: 2 November 2022**

**Date of Judgment: 19 November 2022**

*Headnote: sentence-appeal allowed; gang robbery, contrary to s. 395 and s. 398, Penal Code and housebreaking at night, s. 457; appellant's evidence for the prosecution accepted at trial of a co-accused who was sentenced to 15 years' imprisonment; 50% discount from starting points; 8 years' imprisonment and 12 strokes, reduced to 6 years' imprisonment and 12 strokes.*

Appellant in person.

DPP Raihan Nabilah binti Haji Ahmad Ghazali for Respondent

**Cases cited in the Judgment:-**

*Yan Saputra v Public Prosecutor [2009] 2 JCBD 162.*

*Awg Jamudin Bin Hj Suhali v Public Prosecutor [2014] 1 JCBD 226.*

*Phan Duc Luc, Ta Duc Hai and others v Public Prosecutor (Criminal Motions No. 36 -No. 39 of 2017.)*

*Mohammad Sharifuddin bin Haji Abdullah v Public Prosecutor (Criminal Motion No. 6 of 2018)*

*Z v Hong Kong Special Administrative Region 10 HKCFAR (2007) 183, at paragraph 23.*

Lunn, JA:

1. By a Notice, dated 25 March 2021, the appellant appealed against the sentences of imprisonment imposed on him on 4 March 2021, following his conviction on 30 January 2021 on his pleas of guilty to:

- an offence of gang robbery, together with Mohammad Noh Bin Mohd Edham and Mohammad Amirul Alif Bin Ali, contrary to section 395 of the Penal Code, on 12 December 2020 (Charge 1); and
- a charge of housebreaking, contrary to section 454 of the Penal Code, on 11 December 2020 (Charge 2).

Mohammad Amirul, also pleaded guilty to the charges, whereas Mohammad Noh claimed trial. Norziana Binti Nordin pleaded guilty to having dishonestly received or retained two necklaces, the proceeds of the robbery (Charge 4).

2. The appellant accepted the Statement of Facts as the factual basis for his sentence.

### *The Charges*

#### *Charge 1-gang robbery*

3. The amended Particulars of the Charge 1 alleged that in committing theft of nine gold necklaces belonging to Seng Kee Goldsmith and Jewellery shop, Tanjung Bunut, the appellant and his two co-defendants had caused fear of instant hurt to one of the shop assistants and that:

*“...all of you thereby committed an offence of gang-robbery punishable under Section 395 of the Penal Code, Cap. 22 and Mohammad Noh Bin Mohd Edham and Mohammad Amirul Alif Bin Ali at the time of the commission of the said gang robbery were armed with deadly weapons, to wit, a hammer and a machete respectively, using the said deadly weapons, and Mohammad Noh Bin Mohd Edham (D2) and Mohammad Amirul Alif Bin Ali (D3) have thereby rendered themselves liable to punishment under Section 398 of the same.”<sup>1</sup>*

Both sections 395 and 398 provide for punishment of imprisonment of up to 30 years and whipping with not less than 12 strokes. However, section 398 also provides in addition, that the term of imprisonment be “not less than 7 years”.

4. Charge 1 as originally drafted alleged that all 3 defendants had committed gang-robbery at the time of the commission of which “all of you are were armed with deadly weapons, to wit, a machete and a hammer and all of you committed an offence punishable under section 395 of the Penal Code, Chapter 22 read with section 398 of the same.”
5. The amendments to the Particulars by the Prosecution, which asserted that, at the time of the commission of the gang robbery, Mohammad Noh and Mohammad Amirul were armed with a hammer and machete respectively were made by the Prosecution following some observations made by the Chief Justice at the first hearing before him on 13 January 2021. He said that in alleging that all 3 of the defendants were armed with deadly weapons and punishable pursuant to section 398, Charge 1 appeared to be defective, explaining that the prosecution must prove the defendant was actually in possession of a weapon at the time of the commission of the offence. He said, “Section 34 has no application to section 398.”

#### *Charge 2-housebreaking*

6. On 11 December 2020, domestic premises in Tutong were broken into and two samurai swords and a television set stolen.

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Section 398: "If, at the time of committing or attempting to commit robbery or gang-robbery, the offender is armed with any deadly weapon, the offender shall be punished with imprisonment for a term not less than 7 years and whipping with not less than 12 strokes."

### *The Facts*

7. The appellant accepted the Statement of Facts as the basis on which the court accepted his pleas of guilty. As part of their plan of robbery, in the early evening of 12 December 2020 the appellant drove Mohammad Amirul and another man in his motor car to a car park in the vicinity of the Baiduri Bank, an area nearby to the Seng Kee Goldsmith shop. There is no dispute that the ‘other man’ was Mohammad Nor. They were armed with a hammer and a machete. Having driven around in the immediate vicinity, as instructed by the other man, the appellant waited in his car at the car park whilst the other two men carried out the robbery. He was to pick them up after the robbery at a designated place near- by. Mohammad Amirul and the other man left the motor car, armed with a machete and a hammer, wearing face masks.
8. Having entered the Seng Kee Goldsmith shop, in which there were both customers and members of staff, the other man smashed a glass display cabinet with the hammer, whilst Mohammad Amirul threatened a member of staff with the machete before grabbing nine gold necklaces and fleeing to the pickup spot arranged with the appellant. The estimated value of the necklaces was B\$16,000.
9. For his part, sometime later the appellant met the other two men in his motor car as agreed and drove away. Whilst doing so, they divided up the spoils of the robbery, the appellant taking two gold necklaces. With the assistance of Norziana, the appellant sold the two gold necklaces the following day, for which he received \$784.
10. Having been arrested by the police on 16 December 2020, the appellant admitted participation in the robbery at the Seng Kee Goldsmith shop and in the housebreaking.
11. Of his role in the housebreaking, he said that whilst driving around in his car with Mohammad Amirul and the other man, the latter instructed Mohammad Amirul to alight from the motor car to confirm that a nearby house appeared to be unoccupied. After he had confirmed that to be the case, Mohammad Amirul and the other man broke into the premises by kicking the back door open and stole a samurai sword. The appellant waited for them nearby in his car. Having returned and met up with them, nevertheless the other two men returned to the house to seek further property to steal. They stole a second samurai sword and a television set and then re-joined the appellant in his car and drove away.

### *Sentence*

12. In determining the appropriate sentence to be imposed for the offence of gang robbery, the Chief Justice said that he had regard to the judgments of the Court of Appeal in *Yan Saputra v Public Prosecutor*<sup>2</sup> and in *Awg Jamudin Bin Hj Suhali v Public Prosecutor*<sup>3</sup>. Of the appropriate sentence for housebreaking, he noted that for an offender with a “bad record” the Court of Appeal had said that the appropriate sentence was 3 years’ imprisonment and 2 strokes.

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<sup>2</sup> *Yan Saputra v Public Prosecutor* [2009] 2 JCBD 162.

<sup>3</sup> *Awg Jamudin Bin Hj Suhali v Public Prosecutor* [2014] 1 JCBD 226.

13. Having noted that the subject of the gang robbery was a jewellery store, the Chief Justice said that the robbery was planned and carried out by three men. Deterrence was the dominant consideration in order to protect the public.
14. Of the appellant's personal particulars, the Chief Justice's noted that he was 38 years of age with a previous conviction for theft. That was a reference to the appellant's conviction on 15 December 2012 for an offence of theft in a dwelling house, contrary to section 380 of the Penal Code, for which he was sentenced to 4 months' imprisonment.
15. Mohammad Amirul had three previous convictions for theft, contrary to section 379 of the Penal Code. On 22 April 2020, he had been sentenced to 6 months' imprisonment on each of two offences of theft, which sentences were made concurrent.
16. In determining the appropriate sentence to impose on each of them, the Chief Justice said that "a sharp distinction" was to be drawn between them as to their culpability. Of the appellant's role, he said that he was the getaway driver and did not carry any weapon with him. On the other hand, he said that they were equally culpable of the housebreaking offence.

#### *Starting point*

17. The Chief Justice stipulated a starting point for sentence of the appellant for Charge 1 of 9 years' imprisonment and 12 strokes. By contrast, he stipulated a starting point of 15 years' imprisonment and 12 strokes for Mohammad Amirul. For the housebreaking offence, he stipulated a starting point of 4 ½ years' imprisonment and 3 strokes.

#### *Sentence*

18. Affording the appellant and Mohammad Amirul a discount of one-third from the starting points for their pleas of guilty, for Charge 1 the Chief Justice sentenced the appellant to 6 years' imprisonment and 12 strokes and Mohammad Amirul to 10 years' imprisonment and 12 strokes. For Charge 2, he sentenced each of them to 3 years' imprisonment and two strokes.

#### *Totality*

19. Although he noted that the two offences warranted consecutive sentences, being wholly "unrelated and separate", the Chief Justice said that having regard to totality, he ordered that only 2 years of the sentence of imprisonment imposed for Charge 2 was to be served consecutively to the sentences imposed in respect of Charge 1 and ordered that the strokes were to be non-cumulative. Accordingly, the appellant was sentenced to a total of 8 years' imprisonment and 12 strokes, whereas Mohammad Amirul was sentenced to a total of 12 years' imprisonment and 12 strokes.

#### *The appellant's submissions*

20. In the Notice of appeal, filed by the appellant's wife court was invited to reduce the appellant's sentence, having regard to the fact that his role in the robbery was that of a driver only and of the hardship caused to the family by his incarceration. In a letter to the Court, dated 12 August 2022, in addition to those submissions, the appellant asked the

court to take into account that he had cooperated with the police and the court, in particular that he had given evidence as a witness.

21. In their submissions, the respondent's acknowledged that the appellant had given evidence for the prosecution in the Intermediate Court in the trial of his co-accused Noh, in respect of the gang robbery and housebreaking offences.

*The respondent's submissions*

22. DPP Raihan submitted that the sentences imposed on the appellant were not manifestly excessive in light of the aggravating factors in the present case, including the appellant's criminal record.
23. The sentence of 6 year's imprisonment for gang robbery fell within the appropriate range of sentence. In *Yan Suptra* the sentence of 9 years' imprisonment imposed after a plea of guilty to a charge of gang robbery was reduced by this court to 7 years' imprisonment. In *Awang Jamuddin* this court did not disturb the sentence of 7 years' imprisonment imposed in respect of a second of two charges of gang robbery committed on consecutive nights to which the appellant had pleaded guilty. That of course is the minimum sentence that may be imposed for the offence. However, the court did reduce to 9 years' imprisonment the total of sentence imposed for the two charges of gang robbery from 11 years and 8 months' imprisonment and 12 strokes to 9 year's imprisonment and 12 strokes.
24. Of the distinction drawn by the Chief Justice between the appellant and Mohammad Amirul in respect of their culpability in the gang robbery, namely that the appellant was the getaway driver and did not carry any weapon himself whereas Mohammed Amirul had brandished a machete in the course of the robbery, the court was invited to note its judgment in *Ta Duc Hai v Public Prosecutor*<sup>4</sup>. In the commission of two offences of housebreaking at night by multiple defendants, the role of one of the defendant's was to be the driver of a vehicle in which they travelled to the premises where they committed the offences. He did not enter the premises. Nevertheless, Burrell JA said in his judgment in this court that, "In normal circumstances the driver in a serious criminal enterprise such as this should bear equal responsibility with those who entered the premises."
25. The court's attention was drawn to the fact that the appellant had given evidence in the trial of his former co-defendant Noh and that his evidence had been accepted by the judge in convicting Noh. DPP Raihan acknowledged that in those circumstances the appellant was entitled to be afforded some measure of additional discount to sentence.

*Discussion*

26. There is no doubt that the circumstances of the commission of the gang robbery were extremely serious. Violence was used and threatened. The glass display cabinet was smashed by the use of the hammer and a member of staff confronted with and threatened by the brandishing of the machete. The machete was recovered by the police and was produced before this court. Although described as a machete, it was perhaps better

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<sup>4</sup> *Ta Duc Hai v Public Prosecutor* (Criminal Motion No. 36 of 2017; unreported, 8 May 2018.)

described as a curved-bladed sword, the blade of which was 45 cm in length with a two-handed hilt 24 cm in length.

27. Clearly, the judge was correct to describe the gang robbery as planned and carried out by three robbers. They were equipped to break into the display cabinets and were armed with the machete with which to threaten, as they did, those that they confronted within the Goldsmith shop. They took opportunistic advantage of the anti-Covid requirement to wear face masks. The fact that the premises housed a Goldsmith and Jewellery shop, at which it was known valuables would be kept, made the premises vulnerable to such predators. There is a public interest in protecting such businesses.
28. We are satisfied that a starting point of 12 years' imprisonment and 12 strokes for the gang robbery was within the appropriate sentencing range.

*Charge 1-the culpability of the appellant*

29. As noted earlier, in accepting the Statement of Facts, the appellant accepted that he was a party to the planned gang robbery and that he knew and intended that a hammer and a machete was to be carried and used by his co-defendants in the robbery in the Seng Kee Goldsmith shop. His acceptance of his culpability in the commission of the offence of gang robbery, contrary to section 395 of the Penal Code, was fully in accordance with the well-established principle that when an act is done by several persons in furtherance of their common intention generally all of them are culpable for that act as if each of them had done the act himself<sup>5</sup> That is the case, irrespective of the specific role they played themselves.
30. On the other hand, given the allegation that the appellant was punishable pursuant to section 398 was made not in the amended charge, the judge was not required to impose a minimum sentence of 7 years' imprisonment on the appellant, as required by that section.
31. With the greatest of respect to the Chief Justice, the appellant's culpability was not reduced in comparison with that of Muhammad Amirul by the fact that, with that knowledge and agreement to the plan, he played his role in the joint enterprise by remaining in the car as the getaway driver, whereas Mohammad Amirul wielded and brandished the machete within the Goldsmith shop. The Chief Justice fell into error in determining otherwise. The appellant was the fortunate, but undeserving beneficiary of that determination.
32. We are satisfied that the judge was correct in determining that the appropriate starting point for sentence for the offence of housebreaking was 4 ½ years' imprisonment.

*Assistance to the authorities*

33. DPP Raihan has provided the Court with material relevant to the appellant's evidence for the prosecution in the trial of his co-accused Noh in the Intermediate Court. The appellant testified before HHJ Masni on 24 and 25 May 2021, less than three months after he had been sentenced himself. He gave evidence of the circumstances of the commission of both the gang robbery and the housebreaking offence, in particular as to the role of Noh.

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<sup>5</sup> Section 34, Penal Code.

As noted earlier, Noh was the man described in the Statement of Facts as the ‘other man’. He was cross-examined by Noh. Having denied committing the offences in his evidence, in his final speech Noh suggested that the appellant was a liar and had fabricated his evidence against him.

34. In her judgment<sup>6</sup>, dated 4 June 2022, HHJ Masni convicted Noh of the two charges. In doing so, she found that the appellant was a credible witness, whose evidence she accepted as establishing beyond reasonable doubt the role of Noh in the gang robbery (Charge 1). Similarly, she accepted that the appellant’s evidence that he had driven Noh in his motor car to the vicinity of the premises the subject of the housebreaking and that Noh and Mohammad Amirul had returned to the car with a samurai sword and a television set. (Charge 2)
35. In our judgment in *Mohammad Sharifuddin bin Haji Abdullah v Public Prosecutor*<sup>7</sup>, this court decided that it was appropriate to afford a discount in the sentence imposed on an appellant who had assisted the authorities post-sentencing, but prior to the hearing in this court. In his judgment in the Court of Final Appeal of Hong Kong in *Z v Hong Kong Special Administrative Region*<sup>8</sup> Li CJ said that the Court of Appeal used various percentages of discounts of sentence for different degrees of assistance. He noted that, “Where an appellant has not only given information but had proceeded to give truthful and material evidence, the Court of Appeal has given a usual discount of 50% (including the one-third reduction for pleading guilty).”
35. We are satisfied that is the appropriate approach to be taken for sentence in in this jurisdiction.
36. In the result, we are satisfied that the appellant is entitled to a 50% discount from the starting points taken for sentence. The appellant gave evidence which was relied upon by the judge to convict Noh and did so in the face of being described as a liar and a fabricator of evidence by the man against whom he testified. Given the violence used by Noh in the course of the gang robbery, that was at some risk to the safety of the appellant.

### *Conclusion*

37. Accordingly, we allow the appeal and quash the sentences of imprisonment imposed on the appellant by the judge. In their place, we sentence the appellant to 4 ½ years’ imprisonment and 12 strokes on Charge 1 and to 2 years and 3 months’ imprisonment and two strokes on Charge 2. The strokes are to be non-cumulative. We order that 18 months’ imprisonment of the latter sentence be served consecutively to the sentence imposed on Charge 1. In the result, the total sentence imposed on the appellant is 6 years’ imprisonment and 12 strokes.

**Burrell, P.**

**Seagroatt, J.A.**

**Lunn, J.A**

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<sup>6</sup> *Public Prosecutor v Mohammad Noh Bin Edham* (ICCT No. 7 of 2021.)

<sup>7</sup> *Mohammad Sharifuddin bin Haji Abdullah v Public Prosecutor* (Criminal Motion No. 6 of 2018)

<sup>8</sup> *Z v Hong Kong Special Administrative Region* 10 HKCFAR (2007) 183, at paragraph 23.