Public Prosecutor v Fernando Payagala Waduge Malitha Kumar
[2007] SGHC 23

Case Number : MA 256/2006

Decision Date : 15 February 2007

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Paul Quan (Deputy Public Prosecutor) for the appellant; Peter Keith Fernando (Leo Fernando) for the respondent

Parties : Public Prosecutor — Fernando Payagala Waduge Malitha Kumar

Criminal Procedure and Sentencing – Sentencing – Benchmark sentences – When and how to be relied on – Basis for departure

Criminal Procedure and Sentencing – Sentencing – Principles – Foreign precedents on sentencing – Whether relevance confined to broad principles and articulated sentencing considerations

Criminal Procedure and Sentencing – Sentencing – Forms of punishment – Probation – Suitability of probation for foreigners

Criminal Procedure and Sentencing – Sentencing – Principles – Public interest – Reliance on deterrence as a sentencing consideration – Importance of deterrence when offending conduct undermining public confidence in financial services

Criminal Procedure and Sentencing – Sentencing – Sentencing tariffs for credit card cheating offences – Factors for court to consider when deciding whether sentencing tariff should be discounted or enhanced

15 February 2007

V K Rajah J:

1 Credit cards are now widely accepted as a preferred mode of payment for daily transactions. Unfortunately, the plethora of credit card transactions has in turn engendered a multiplicity of credit card offences. The financial burden perpetrated by such credit card frauds falls on the shoulders of the issuers, the banking industry and credit card holders. Indeed, the very substantial interest that credit card issuers and banks charge for instalment payments and defaults can also be directly attributed to the substantial losses these institutions continue to chalk up from card frauds and scams. It would be no exaggeration to assert that the entire credit card holding community bears the palpable and painful brunt of such offences. In addition, the inconvenience, frustration, distress and perhaps even loss of reputation suffered by victims of fraud are often incalculable and irremediable.

2 It is therefore important to have a coherent and consistent sentencing regime to deter the commission of such offences in Singapore. The relevant sentencing considerations, principles and appropriate sentencing tariffs for offences concerning the fraudulent use of credit cards are assessed and expounded upon in these grounds of decision.

3 The respondent pleaded guilty to two charges: (a) criminal misappropriation of a credit card under s 403 of the Penal Code (Cap 224, 1985 Rev Ed) ("Penal Code"), read with s 3(1) of the Tokyo Convention Act (Cap 327, 1985 Rev Ed); and (b) cheating and dishonestly inducing a delivery of property by the fraudulent use of a credit card, contrary to s 420 of the Penal Code. In addition, two

other similar cheating charges under s 420 of the Penal Code, as well as one other attempted cheating charge under s 420 read with s 511 of the Penal Code, were taken into consideration for the purpose of sentencing. The learned district judge ("trial judge") sentenced the respondent to two months' imprisonment for the cheating charge, and a consecutive sentence of two weeks' imprisonment for the criminal misappropriation charge: see *PP v Payagala Waduge Malitha Kumar Fernando* [2006] SGDC 304 ("GD"). Dissatisfied with the sentences, the Prosecution appealed. On hearing the appeal, I enhanced the sentences for the cheating charge to six months' imprisonment, and for the criminal misappropriation charge to two months. Both sentences are to run concurrently.

The facts

4 The respondent is a 20-year-old male Sri Lankan national currently residing and working in New Zealand. On 17 November 2006, the respondent boarded an SIA flight from New Zealand to Singapore where he was to take a further connecting flight to Colombo. During the flight, the respondent found in the proximity of his seat a credit card belonging to Ms Sanderson Weijde Kirsten Anna Maria ("Ms Sanderson"), a fellow passenger sitting next to him. The respondent decided to retain the credit card for his own use. Ms Sanderson only discovered that her credit card was missing when she was in transit at Singapore Changi International Airport ("Changi Airport"). She immediately reported the loss to her bank.

5 Upon arrival at Changi Airport Terminal 2, the respondent promptly and in great haste used the credit card to purchase the following items:

(a) A lap-top valued at $1,522 (this was the subject matter of the s 420 of the Penal Code charge to which the respondent pleaded guilty);

(b) A watch valued at $469.81; and

(c) A hand phone valued at $1,288.

6 When the respondent attempted to purchase a fourth item – a bracelet valued at $2,728.01 – he was informed by the cashier that the credit card facility had been blocked. The respondent then immediately left the shop and quickly made his way to the departure gate. There, he was identified and arrested. The items that he had fraudulently purchased were seized.

Decision of the trial judge

Aggravating factors

7 The trial judge noted that the respondent's misappropriation of the credit card would have caused tremendous anxiety and inconvenience to Ms Sanderson, a foreign traveller. He further observed that the credit card was used to make several purchases and that the total value of these purchases was fairly significant (GD at [14]-[16]).

Mitigating factors

8 The respondent had cooperated with the investigations, and had promptly pleaded guilty, instead of chancing on the Prosecution's ability to secure Ms Sanderson's attendance in Singapore as a witness against him. The trial judge relied on this in concluding that the respondent was genuinely remorseful: see GD at [19].

9 Further, the trial judge took into account the fact that the respondent was both young and a first offender. He surmised that offences were out of character and possibly a consequence of the respondent's 'youthful folly' culminating in an error of judgment (GD at [20] and [21]).

10 The trial judge also considered it pertinent that all the fraudulent purchases were made by the respondent within less than an hour and that all the items were in any event recovered. In the learned judge's view the respondent did not derive any benefit from his offences and no loss was occasioned to anyone: see GD at [23].

Other considerations

11 The trial judge distinguished the present case from the following types of cases, in which heavy jail sentences are imposed as a matter of course (GD at [22]):

(a) where a foreigner has come to Singapore for the *sole* purpose of committing offence;

(b) where the offender has *planned* to *steal* credit cards for fraudulent use, or has made use of *forged* credit cards;

(c) where the offender is part of a *sophisticated* credit card *syndicate*; or

(d) where the offender has committed credit card fraud on a *large scale*.

12 Lastly, the trial judge emphasised that while the principle of general deterrence admittedly featured significantly in offences such as that committed by the respondent, the notion of deterrence should nonetheless be tempered by the notion of proportionality. In other words, sentences imposed should reflect the severity of the offence committed as well as the moral and legal culpability of the offender: see GD at [24] to [26].

The appeal against sentence

13 On appeal, the Deputy Public Prosecutor ("DPP") submitted that the trial judge erred both in law and in fact by *inter alia*:

(a) Failing to accord sufficient weight to the nature of the offences committed, which involved credit card fraud, and thereby failing to impose a sentence that would deter similar opportunistic conduct in like-minded offenders;

(b) Failing to accord sufficient weight to the manner in which the offences were committed, and to the fact that there were three other charges to be taken into consideration for the purpose of sentencing; and

(c) Attaching undue weight and significance to both the respondent's plea of guilt and his cooperation with the investigations, the respondent's age, the fact that the respondent was a first offender and evidence of the respondent's good character.

Preliminary observations

14 First, it should be noted that this appeal was heard on 12 January 2007, *after* the respondent had been released from prison on 8 January 2007, having completed the sentence imposed by the trial judge. The enhanced sentences on appeal have resulted in the respondent having to return to prison

after his release. This was by no account due to want of diligence on the part of the Prosecution in prosecuting the appeal. Having said that, it is highly desirable that the relevant Court Registries and counsel involved in criminal cases pertaining to foreigners sentenced to short terms of imprisonment use their best endeavours to ensure that the appeals are expedited: see also the observations of Yong Pung How CJ in *PP v Siew Boon Ling* [2005] SGHC 20 at [29]. Indeed the written appeal submissions and possibly the trial judge's detailed grounds of decision may be dispensed with or alternatively replaced by short skeletal submissions/grounds of decision. In cases such as this, time is of the essence in ensuring that legitimate expectations about the administration of justice are not unnecessarily undermined. Where the liberty of an individual is at stake, certainty should always replace uncertainty as a matter of urgency and priority. I single out foreigners because they may be hard put to raise adequate security for bail in this regard. Similar considerations should also apply to impecunious Singaporeans and permanent residents.

15 Given the circumstances, I directed that the sentences be backdated to the date of commencement of the sentence imposed by the trial judge, and that the period when the accused was released (ie., 8 January 2007 to 12 January 2007) not be added to the sentence.

Probation order unsuitable

16 Secondly, the respondent is 20 years old. In *PP v Mok Ping Wuen Maurice* [1999] 1 SLR 138, Yong Pung How CJ stated that rehabilitation is the dominant consideration where the offender is 21 years and below (at [21] and [25]). However, the authorities suggest that probation is unsuitable for an offender who is a foreign national not resident in Singapore: *Sentencing Practice in the Subordinate Courts* (2nd Ed, 2003) ("*Sentencing*") at page 39. This proposition was explained in *Tan Choon Huat v PP* [1991] SLR 805 by Rubin JC at 811 in the following terms:

> … having regard to the nature of the offence, the circumstances of the case and the fact that the appellant is a *foreign national not resident in Singapore, a probation order appears to be wholly inappropriate*."
>
> [emphasis added]

17 The logistical and administrative difficulties involved in the monitoring and supervision of a non-resident render a probation order both inappropriate and impracticable in the case of an offender. A key feature of probation is rigorous supervision against the backdrop of a nurturing environment. I am however loathe to *completely* rule out the possibility of probation as a sentencing option in the case of *all* foreigners. For instance, a foreign offender with some local roots in the form of relatives who are locally resident may in appropriate circumstances constitute a suitable candidate for a probation order. In this case, quite correctly, there was no attempt by counsel for the respondent to suggest that a probation order would be suitable. The respondent has no roots to anchor him here.

General sentencing principles for credit card offences under s 420 of the Penal Code

18 Section 420 of the Penal Code ("s 420") is a provision that embraces a wide spectrum of cheating offences. It states:

> Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of a term which may extend to 7 years, and shall also be liable to fine.

19 Simple cheating is punishable under s 417 of the Penal Code for a term that may extend to one year or with a fine or with both. An offence contrary to s 420, which prescribes a maximum term of imprisonment of seven years and liability to a fine, is sometimes described as aggravated cheating, an offence of far greater culpability. The fraudulent use of credit cards has accounted for some of the harsher sentencing precedents in the context of s 420 offences. In fact, credit card fraud is often regarded as a factor enhancing the gravity of a cheating offence: see *Sentencing* at pages 451-452. In *PP v Mihaly Magashazie* [2005] SGDC 35 ("*Mihaly Magashazie*") at [19], the District Court observed that such offences have always been viewed with severity because they involve deception of financial institutions and business establishments, and while they are easy to commit, they are difficult to detect. In a similar vein, Tay Yong Kwang J in *Lim Pei Ni Charissa v PP* [2006] SGHC 128 ("*Lim Pei Ni Charissa*") recognised that the courts must certainly treat cases of credit card fraud with disapprobation and censure; that it is very much in the public interest for the courts to take a harsh stand against credit card fraud in order to deter both the accused person and like-minded potential offenders from committing such crimes in the future: at [20] and [30].

20 Singapore's standing as an international financial, commerce and transit hub is premised upon its ability to ensure that financial transactions are easily carried out and yet adequately safeguarded. The prevalence of credit card offences will erode public confidence and could have a deleterious effect on Singapore's standing as a preferred destination for tourism, trade and investment. To check the abuse of credit cards, a severe stance has to be consistently adopted and applied against all credit card offenders, regardless of whether they are citizens, residents or transient visitors. In the present case, the respondent was a transit passenger in a Singapore airport. I stress that deterrence should be of equal, if not greater, concern in such cases, as short term visitors to Singapore should not be permitted to take advantage of and abuse the hospitality accorded and commercial opportunities available to them.

21 Credit card offences under s 420 can commonly be divided into two main categories of cases: counterfeit cards (which also concurrently attracts the attention of s 474 of the Penal Code) and/or syndicate cases; and use of stolen/misappropriated credit card cases. Heavier sentences are appropriate for the former cases as they involve deception that invariably assumes a degree of sophistication and planning. This is illustrated in the decision of *Ong Tiong Poh v PP* [1998] 2 SLR 853 ("*Ong Tiong Poh*") at 862, where Yong CJ enhanced the sentence to take into account the fact that the appellant appeared to be part of a sophisticated syndicate, capable of committing counterfeit credit card fraud on a large scale and was skilled at avoiding detection. That the same sentencing factors do not invariably apply to stolen/misappropriated credit card cases was highlighted in *PP v Poh Leong Boon David Danille* [2006] SGDC 104 ("*Poh Leong Boon*"). Thus, due to the aggravating factors present in the counterfeit cards and/or syndicate cases, offenders in those cases would generally be treated more severely than offenders in the stolen/misappropriated credit card cases. It should also be pointed out that the penal policy embodied in s 474 of the Penal Code appears to prescribe more severe sentencing for infractions involving counterfeiting. While such a broad principle seems to be relatively well established, an overview of the relevant case law pertaining to credit card offences indicates that the latter does not consistently embody clear sentencing norms. Nor does it coherently reflect the relevant sentencing principles.

The relevant case law for credit card offences

Counterfeit cards and/or syndicate cases

22 In *Ong Tiong Poh* ([21 *supra*]), the prosecution proceeded on ten charges against the appellant – two charges of cheating and eight of abetment of cheating by the use of counterfeit credit cards. The prosecution's evidence was that the appellant helped to run a counterfeit credit card syndicate.

The District Court convicted the appellant on all the charges, and sentenced him to *eight months'* imprisonment for each of his cheating charges, and *14 months'* imprisonment for each of his abetment charges. Three of the sentences for the abetment charges were ordered to run consecutively with each other and concurrently with the other seven sentences, making a total of 42 months' imprisonment. The district judge detected no remorse in the appellant but noted that he was only 21 years old. He also took into consideration the sentences ranging between two to three years imposed on the appellant's accomplices. On appeal, Yong CJ was of the view that the sentences imposed on the accomplices did not constitute *per se* a valid reason for the relatively light sentence imposed on the appellant by the district judge. Yong CJ emphasised that the accomplices had pleaded guilty, and that the appellant had played a more important role in the credit card operation than his accomplices. Thus the sentences imposed by the district judge did not properly reflect the seriousness of the appellant's offences and were to that extent manifestly inadequate. The appellant's sentences for the two cheating charges were therefore *enhanced* to *12 months' imprisonment* for each charge, and the sentences for the eight abetment charges were enhanced to *20 months' imprisonment* for each charge. The total cumulative sentence was 60 months' imprisonment.

23 The appellant in *Than Stenly Granida Purwanto v PP* [2003] 3 SLR 576 ("*Purwanto*") pleaded guilty to a charge of conspiracy to possess forged credit cards with intent to use them as genuine, and five charges of conspiring to cheat using counterfeit credit cards, with another 16 similar charges taken into consideration. He was sentenced to a *total of six and a half years'* imprisonment by the trial judge, and this sentence was *upheld* by the High Court on appeal. In view of the potential injury that such offences may cause to Singapore's credibility as a reputable financial centre, Yong CJ opined that the district judge had properly exercised his discretion in imposing a deterrent sentence. The aggravating factors in this case included the involvement of an international criminal syndicate; the appellant's active role in the commission of the offence, even if he was not actually the mastermind; and the substantial loss that the offences entailed ($14,630.46 including the charges taken into consideration). Further, the appellant's plea of guilt had little weight because the appellant was literally caught red-handed with the forged credit cards upon his arrest in the very midst of attempting another fraudulent card transaction. The fact that the appellant had not obtained any benefit from the commission of yet another offence as a result of his arrest did not warrant a reduction in sentence.

24 In another syndicate case, *Navaseelan Balasingam v PP* [2006] SGHC 228 ("*Navaseelan Balasingam*"), counterfeit ATM cards were used to withdraw cash from ATMs. On appeal, Tay Yong Kwang J *revised the total sentence of five and a half years' imprisonment to seven and a half years*. The policy considerations for such cases are by and large quite similar to offences involving the fraudulent use of credit cards, and the district judge in this case had considered sentencing precedents for the closely related offence of credit card frauds in arriving at the appropriate sentence. He noted that where a *first offender* is involved in a large scale credit card fraud involving a *genuine* credit card, the High Court had imposed or affirmed substantial custodial sentences of between 14 to 18 months. He relied on the decisions in *Fadilah bte Omar v PP* (Magistrate's Appeal No 168 of 1996, unreported) ("*Fadilah bte Omar*") and *PP v Rohaazman bin Ali & 2 ors* (Magistrate's Appeal Nos 286-288 of 2001) ("*Rohaazman bin Ali*") to support his view. In the case of *counterfeit* credit card fraud, the district judge in *Navaseelan Balasingam* had relied on *Ong Tiong Poh* ([19] and [20] *supra*), *PP v Edward Lekwachi Cox* (Magistrate's Appeal No 464 of 1993, unreported) ("*Edward Lekwachi Cox*") and *Vasudevan A/L Thandavan v PP* ("Magistrate's Appeal No 77 of 1996, unreported) ("*Vasudevan A/L Thandavan*") in concluding that the High Court has imposed or affirmed sentences ranging from 20 to 30 months for *first offenders*.

25 In *Edward Lekwachi Cox*, the accused had pleaded guilty to three charges of engaging with another to conspire to cheat by dishonestly presenting counterfeit credit cards. The accused had no

antecedents. He was sentenced on each charge to *12 months'* imprisonment, which was *enhanced to two years'* imprisonment on each charge on appeal. In *Vasudevan A/L Thandavan*, the appellant had pleaded guilty to four charges of conspiracy to cheat using a counterfeit credit card (s 420 read with s 109 of the Penal Code), with eighteen similar charges taken into consideration. The total value of the purchases amounted to $13,231.10 and the High Court imposed a sentence of *two years and six months* on each of the charges on appeal. The cumulative sentence was a term of imprisonment of 60 months.

Use of stolen or misappropriated credit card cases

2 6 *Rohaazman bin Ali* ([24] *supra*) involved postal officers who had stolen 42 credit cards which they intercepted in the course of carrying out their mail sorting duties with Singapore Post. Purchases amounting to $81,142.39 were made with the credit cards. The prosecution proceeded with seven counts of cheating and four counts of theft against two of the accused persons, Rohaazman and Jamaludin, with another 219 charges taken into consideration. The trial judge found that Rohaazman was clearly the mastermind in the operation and considered the massive number of charges (230), the number of credit cards involved (42), and the length of the time the scam went undetected (20 months), critical factors. The total value of the fraudulent transactions was also taken into account. However, the trial judge was mindful of the fact that the scam was unsophisticated and their modus operandi both simple and apparently consistent. He was therefore persuaded that it was inappropriate to equate Rohaazman's and Jamaludin's culpability with that demonstrated by offenders typically involved in syndicated counterfeit credit card operations. Rohaazman and Jamaludin were sentenced by the District Court to *nine months'* and *six months'* imprisonment respectively for each of the charges. In the aggregate, Rohaazman was sentenced to a total of 24 months' imprisonment, while Jamaludin was to serve a total of 18 months. The prosecution's appeal was allowed, and the terms of imprisonment for each charge for Rohaazman and Jamaludin were *enhanced* to *two years'* imprisonment and *18 months'* imprisonment respectively, with Rohaazman receiving a total of five and a half years' imprisonment and Jamaludin receiving five years' imprisonment.

27 In *Fadilah bte Omar* ([24] *supra*), the 16-year-old accused pleaded guilty to, *inter alia*, three counts of cheating under s 420. 11 other charges were taken into consideration for the purposes of sentencing. The accused had committed a relatively unsophisticated offence by misappropriating and using a credit card she found in a public toilet. She subsequently surrendered herself to the authorities and pleaded guilty to the charges. The total value of all the charges (including those taken into consideration) was $1,325.62. The District Court sentenced her to *12 months' imprisonment* for each of the cheating charges, ordering that the sentences run concurrently. This sentence was *upheld* on appeal.

28 *One year's imprisonment* was imposed in respect of each of the three s 420 charges preferred against *Mihaly Magashazie* ([19] *supra*), with two of the sentences of imprisonment running consecutively. The appeal against sentence by the accused was dismissed. In that case, there was a plea of guilt, but the district judge had attached little weight to it as he considered that the accused had no choice but to plead guilty and cooperate in the circumstances of arrest; the accused had been arrested outside a jewellery shop after making a fraudulent purchase with one of the stolen credit cards. The fact that the respondent did not derive any benefit and no loss was occasioned to anyone was dismissed as 'purely fortuitous', as the accused was arrested with the fruits of his crime which were duly seized (*Mihaly Magashazie* at [13]). The fact that the accused had broken into secured lockers three times to steal the credit cards, and had adopted stealthy tactics to delay detection of his misdeeds weighed heavily on the district judge's mind in this case. The district judge contrasted the facts with a case in which the accused was a 'mere opportunist who – after chancing upon unattended wallets left in public places – was momentarily tempted by greed to steal the credit

cards and use [sic] them' (*Mihaly Magashazie* at [16]). He then went on to state that any act committed after deliberation and with premeditation, as opposed to an act committed on the spur of the moment and 'in hot blood' is an aggravating circumstance. Finally, the accused had used the stolen credit cards to make numerous fraudulent purchases, altogether committing nine counts of cheating and five counts of attempted cheating with the stolen credit cards; the total fraudulent purchases amounted to a total of $23,105. The district judge felt that the large number of offences committed had justified the imposition of longer custodial sentences.

29 In *Poh Leong Boon* ([21] *supra*), the 27-year-old accused pleaded guilty to, *inter alia*, seven counts of cheating under s 420. 27 other similar charges were taken into consideration. The District Court sentenced the accused to *six months'* imprisonment for one of the cheating charges and *three months'* imprisonment for each of the remaining six cheating charges. The sentences for the first cheating charge and two of the remaining six cheating charges were ordered to run consecutively, making up a total of 12 months' imprisonment for the s 420 charges. The first cheating charge involved the most valuable item fraudulently purchased – a gold chain valued at $7,103.62 – which was $2,000 more than any of the other items fraudulently procured. The total value of the items (including those in the charges taken into consideration) was $36,504.57. The district judge distinguished *Mihaly Magashazie*. The accused in *Mihaly Magashazie* was said to have committed a string of offences targeting hotels and foreign nationals which 'struck at the heart of Singapore's tourism industry' (*Poh Leong Boon* at [21]). The district judge concluded that the offences in this case, where the accused had stolen credit cards from his neighbours' letterboxes, were in contrast relatively unsophisticated; his grounds of decision suggested that this warranted a lower sentence. No appeal against sentence from the prosecution ensued. In my view the sentences meted out by the district judge were clearly inadequate and did not appropriately reflect the culpability of that accused.

30 The 22-year-old accused in *Glynis Wong Dwe May v PP* (Magistrate's Appeal No 7/99/01) had pleaded guilty to three counts of cheating under s 420 for using a stolen credit card in her purchase of goods, with three other counts taken into consideration. The offence was not premeditated and involved the accused removing, in a moment of indiscretion, her colleague's credit card which had been left lying in a wallet in an open drawer. The total value of the fraudulent purchases (including those taken into consideration) amounted to $4,735.45. The District Court noted that the accused was a first offender and had expressed real remorse. *Seven months' imprisonment* was imposed on each of the three cheating charges, with two of the sentences to run consecutively. This sentence was *upheld* on appeal.

31 Lastly, in *Lim Pei Ni Charissa* ([19] *supra*), the 20-year-old accused had claimed trial and was convicted on seven charges under s 420 read with s 109 of the Penal Code, for the abetment of cheating offences relating to the use of stolen credit cards. On appeal, Tay Yong Kwang J ordered *probation* for her. He considered *Fadilah bte Omar* ([24] and [27] *supra*), and distinguished that case. Tay J was of the view that although the amount involved in *Fadilah bte Omar* was much smaller than in this case, the misappropriation and the fraudulent use in the former had both been carried out by the offender; Fadilah's culpability was therefore correspondingly greater (*Lim Pei Ni Charissa* at [20]).

Sentencing patterns discernible from case law

The decision in Lim Pei Ni Charissa to be confined to its exceptional facts

32 The last case discussed above appears at first blush to be anomalous in its departure from the deterrent custodial sentences imposed on credit card offences in the other relevant cases. The District Court in *Lim Pei Ni Charissa* had imposed a total sentence of 33 months' imprisonment on the

accused, as the district judge felt that the accused person's punishment should reflect sufficient disapprobation of her acts and deter similarly-minded persons in future. He also wanted to convey the message that the courts did not condone the theft of credit cards and their subsequent use.

33 However, Tay Yong Kwang J had allowed the appellant's appeal on sentence. With respect to the probation order, he stated that the guiding principle is the likely responsiveness of the young offender to rehabilitation, and that the court must apply its mind to the facts of each case and, in particular, the probation report (*Lim Pei Ni Charissa* at [17]). The comprehensive and detailed probation report in that case *strongly recommended* a probation order for the appellant.

34 According to the probation report, the appellant had established a stable relationship with her current boyfriend and she had just given birth to a three-month-old daughter. Since the birth of her daughter, the appellant had been accepted by the University of Western Australia to pursue a degree course and was also enrolled in a one-year diploma course in law at the Singapore Institute of Commerce. The probation report also indicated that since the birth of her child, the appellant had unequivocally left behind her previous wayward life and had now turned over a new leaf. The probation officer was convinced that the appellant would respond positively to supervision.

35 The probation report proposed the maximum term of probation coupled with an intensive individualised case management plan, which included a prison visit, psychological counselling and a parenting programme. Tay J was persuaded that the probation programme envisaged for the appellant was carefully-crafted, taking into account the appellant's circumstances and needs; it was correctly premised and contingent upon the reliable network of family support that the appellant could avail herself to. He was also clearly moved by the fact that although prison regulations permit the appellant to be with her infant while she served a custodial sentence, it was eminently more desirable that the appellant's baby be brought up in a positive familial environment, rather than in prison (at [29]).

36 Quite apart from the probation report, Tay J noted that the appellant was neither the principal offender nor the instigator of the theft of the credit cards (at [19]). Nor was the nature of the operations symptomatic of a syndicate engaged in large-scale credit card fraud. In light of these factors, Tay J was of the view that a happy medium between public interest and the interest of the offender would not be compromised by the imposition of a probation order.

37 In the result, Tay J was prompted by the *exceptional* circumstances of this case to grant probation to the appellant. His decision was precipitated by a *unique* confluence of factors, including the appellant's age at the time of the offences, her role in the offences, her subsequent acknowledgment of her misdemeanours, her family support, her newborn baby and her receptiveness to the terms of her intensive individualised probation plan (at [30]). Tay J concluded at [30]:

> In the final analysis, I was persuaded by the *exceptional circumstances* of this case to grant probation to a young woman who had exhibited maturity since the commission of her offences and deserved a chance to right the wrongs she had committed against society.
>
> [emphasis added]

As a sentencing precedent that case should be confined to its very exceptional circumstances and unique factual matrix; it should not by any account be viewed as portending or signalling a departure from the severe sentencing precedents for credit card offences.

Fraudulent use of credit cards - relevant sentencing considerations

38 I set out below various relevant factors to be taken into account in the sentencing of credit card offences. However, these factors are by no means exhaustive, and needless to say every case must ultimately be considered on the basis of its own factual matrix.

Planning and premeditation

39 As discussed in [21], syndicated credit card offences would almost invariably attract more severe sentencing than non-syndicated offences. This stems from the trite law that a deterrent sentence should be *de rigueur* where an offence is committed with premeditation and planning: *Ooi Joo Keong v PP* [1997] 2 SLR 68; this is particularly so when an offender has colluded with the activities of an organised criminal syndicate: *Ong Tiong Poh* ([21] *supra*); *Purwanto* ([23] *supra*).

40 The rationale for this approach is summarised with admirable clarity and succinctness by Professor Andrew Ashworth in *Sentencing and Criminal Justice* (Butterworths, 3rd Ed) at page 136:

> A person who plans or organises a crime is generally more culpable, because the offence is premeditated and the offender is therefore more fully confirmed in his anti-social motivation than someone who acts on impulse… . Planned lawbreaking constitutes a great threat to society, since it betokens a considered attack on social values, with greater commitment and perhaps continuity than a spontaneous crime.

41 I should add that the principle that planned and premeditated offences are more alarming, insidious and malignant, thus warranting more serious treatment applies with equal force to non-syndicated offences. Indeed, in *Mihaly Magashazie* (at [26]), the accused person quite correctly was found to have planned his offence, instead of having committed it on the spur of the moment and in "hot blood". This was deemed to be an aggravating factor for the purposes of sentencing. The accused in that case was clearly preying on victims and appeared to be a recalcitrant offender.

Sophistication of offences and measures taken to defy detection

42 Inextricably linked to the idea of premeditation and organised crime is the level of sophistication that characterises an offence. A sophisticated offence replete with carefully orchestrated efforts and steps to avoid detection is an aggravating factor in sentencing. This is illustrated in *Ong Tiong Poh* ([21] *supra*), where Yong CJ adverted to the sophistication of the offence and the syndicate's adeptness at avoiding detection as relevant factors when enhancing the sentence. Conversely, where an offence was relatively unsophisticated, and minimal precautions are taken to avoid detection, a comparatively lower sentence would generally be imposed: *Poh Leong Boon* ([21] *supra*). In *Lim Pei Ni Charissa* ([19] *supra*), the fact that the offences were committed by extracting credit cards from mailboxes with a pair of chopsticks (as opposed to a more sophisticated modus operandi) constituted yet another dimension in the exceptional circumstances within which Tay Yong Kwang J felt he should impose a probation order. I would add this further observation: often, the more sophisticated crimes cause greater consternation and raise the ante for better protective measures to prevent a recurrence of similar offences. This results not only in substantial costs being incurred by potential institutional victims but also much inconvenience and perhaps even loss of reputation. Financial institutions, particularly in counterfeit cases, have also to face the wrath of card holders who are inconvenienced and embarrassed.

43 The length of time a particular scam or offence has gone undetected would be yet another relevant consideration in sentencing. In *Rohaazman bin Ali* ([24] *supra*), the fact that the scam went undetected for 20 months was a consideration the trial judge felt he could not overlook. This was the case even though he found that the scam was unsophisticated and the modus operandi simple. The

relevance of this is as a sentencing consideration may also be tied to the recalcitrance of the offender. In the case of a hardened offender, he would have repeatedly committed a pattern of offences without any sign or acknowledgment of contrition or remorse. The longer the period of time over which the offences have been committed, the more irrefutable it is that the offender manifests the qualities of a habitual offender. Specific deterrence is incontrovertibly an important sentencing consideration in such cases.

Role of the accused

44 The severity of the sentence imposed should reflect the role played by the accused in the credit card offence. This principle features prominently in cases involving syndicates. In *Purwanto* ([23] *supra*), the appellant's active role in the commission of the offences was construed as an aggravating factor. Although the appellant in that case was not the mastermind, the appellate court was of the view that his participation was hardly minor, nor accidental, and that his culpability surpassed that of his accomplices. The court found it significant that the appellant had a sizeable stake in the outcome of the scam.

45 Even in non-syndicate cases, the role of the accused person is a relevant sentencing consideration. In *Rohaazman bin Ali* ([24] *supra*), it was noted that Rohaazman was clearly the mastermind and that his co-accused, Jamaludin, had a lesser role. This consideration resulted in the imposition of a higher sentence on Rohaazman. In *Lim Pei Ni Charissa* ([19] s*upra*), the fact that the appellant was neither the principal offender nor the instigator of the offences was also deemed to be a relevant consideration.

Number of offences and quantum involved

46 As both a matter of commonsense and general principle, it can be said that the larger the number of offences committed the longer the custodial sentence. The application of this principle in credit card offences is amply illustrated by *Mihaly Magashazie* ([19] *supra*) where the court concluded that the numerous fraudulent purchases made by the accused justified the imposition of longer custodial sentences. The massive number of charges in *Rohaazman bin Ali* ([24] *supra*) also proved to be a relevant consideration for the court in sentencing.

47 With respect to quantum, it can also be generally surmised that the higher the quantum, the heftier the sentence (see Lee Teck Leng in "Sentencing in Cheating Offences", *Law Gazette*, August 2000(4) ("*Law Gazette Article*")). That the sentencing tariffs for cheating offences under s 420 are based on the quantum in each charge is well illustrated in the *Law Gazette Article*. In my view, this applies across the board to all s 420 cheating offences, *including* credit card offences.

48 The nexus between the number of offences and quantum involved was also discussed in the *Law Gazette Article*. Lee Teck Leng observes:

> … the total sentence imposed on an offender convicted of multiple charges would still bear some semblance to the sentence that may be passed in a case where an offender is convicted of a single cheating offence involving the same sum of money. This is due to the fact that from the victim's view point, the sentences to be imposed should not, logically speaking, depend greatly on whether the victim was cheated a hundred times amounting to a total of $250,000 or cheated once to the tune of $250,000. Having said that, it is also quite clear that an offender who has cheated a victim of small amounts a hundred times over is a serial offender and he would rightly be regarded as being more culpable than an offender who cheated only once, albeit of a large sum. *Amalgamating both perspectives, it would appear that the total sentence imposed on the*

serial cheat would probably be ***slightly higher*** *than the sentence imposed on an offender convicted of a single cheating offence, if the total quantum is identical in both instances.*

[emphasis added]

To this I would add that sentences meted out in serial cheating cases should not be only 'slightly higher' as compared to that assigned to a single offender for the same quantum. The sentence could in the appropriate circumstances be *significantly* higher. *A serial offender would be hard put to credibly submit that his conduct was the result of a momentary indiscretion*.

Actual loss and damage

49 Quite apart from the quantum involved in cheating offences (as discussed above) is the notion of the extent of loss or damage *actually* suffered as a result of the offences. In *Khoo Ban Hock v PP* [1988] 3 MLJ 22, it was held that as there was no evidence of loss to the public, leniency should be accorded to the appellant. Similarly, in *Hoo Chee Keong v PP (No.2)* [2000] 5 MLJ 448, the court in assessing the appropriate sentence, briefly alluded to the fact that the evidence adduced failed to reveal that the accused had caused heavy financial loss to anyone by the use or intended use of forged credit cards. The English Court of Appeal in *R v Lennon (Jeffrey)* [1996] CLY 2087 noted that the fact that the fraudulent scheme was frustrated and that no loss occurred should be a mitigating consideration. In *R v Harjit Singh Samra* (1992) 13 Cr App R (S) 168 the Court of Appeal construed the lack of evidence that loss had been suffered as a result of the frauds committed by the accused, as having constituted at least limited mitigation. In my view, the fact that no or minimal loss has occurred because the offender has been apprehended or because the items or proceeds of crime are subsequently recovered is a *relevant but not decisive factor* in assessing the appropriate sentence. The cogency of such a consideration will have to be evaluated in its proper matrix. Almost invariably in every case of commercial fraud, it cannot be gainsaid that a serious offence has indeed been committed. That the loss has been minimised because of external intervention is purely fortuitous. Apart from the actual amount involved in a credit card fraud, it should also be emphasised that a chain of parties is inevitably involved in every transaction. Damage or loss may sometimes be intangible when it assumes the form of inconvenience, embarrassment, loss of reputation, time and costs expended in investigations as well as time, research, effort and costs involved in enhancing security measures. Every credit card fraud, regardless of whether the money or items are eventually recovered would cause inconvenience and some form of intangible damage to either the card holder or an involved financial institution. General and specific deterrence must therefore feature as the vital if not dominant sentencing considerations for such offences. Indeed, in *PP v Ng Tai Tee Janet* [2001] 1 SLR 343, Yong CJ was also of the view at [28] that when considerations of public interests were implicated, the fact that no actual harm or loss was suffered by any party was of less relevance.

50 However, if an accused of his own volition and out of contriteness returns the items or benefits procured before his personal involvement is noted or detected, this should have a material bearing on the sentence imposed. It could be persuasively argued that this constitutes proper acknowledgment of guilt since it is manifested by genuine remorse. That said, restitution of any kind is also usually a relevant sentencing consideration. This may be illustrated by another English Court of Appeal's decision, *R v Harivadan Patel* (1986) 8 Cr App R (S) 67. Webster J in that case rejected the appellant's argument that the victim from whom the appellant had stolen money had taken proceedings to recover that money and therefore would probably be able to recover his loss. He added, if on the other hand, the thief before being sentenced has realised his assets and has attempted to repay, or has repaid, the loss or a substantial part of it that constitutes potential mitigation. Similarly, in the Australian case of *The Queen & ors v Debra Jane Mitchell & Anor*

[1998] WASCA 299, the Supreme Court of Western Australia concluded that a loss to the victim, would be a factor rendering the offence more serious; the fact that the loss has been made good is, however, a mitigating factor. Local authorities have also proposed that making restitution may provide some evidence of remorse, genuine good character or reformation, thereby carrying some mitigating value: see for example, *Krishnan Chand v PP* [1995] 2 SLR 291; *Tan Sai Tiang v PP* [2000] 1 SLR 439. At this juncture, it must be reiterated that attaching mitigating value to efforts at restitution is largely premised on the assumption that voluntary restitution reflects true remorse. In instances where in spite of monetary restitution, the accused has shown no remorse, such restitution would be of little mitigating value: see *Ng Kwee Seng v PP* [1997] 3 SLR 205 at 209, [15], where the court wryly observed that the appellant in attempting to castigate the credibility of the prosecution witnesses had showed no remorse whatsoever despite having made monetary restitution.

Plea of guilt

51 Generally, a timeous plea of guilt is a mitigating factor: *Xia Qin Lai v PP* [1999] 4 SLR 343; *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR 653. This principle has been applied to credit card offences, as amply illustrated in the decision in *Rohaazman bin Ali* ([24] and [26] *supra*); the district judge noted that the accused persons pleaded guilty unreservedly at virtually the earliest possible opportunity, thereby demonstrating at least some basic decency and remorse. However, the weight to be attached to a plea of guilt must depend on the facts of each case.

52 In *Wong Kai Chuen Phillip v PP* [1990] SLR 1011 ("*Wong Kai Chuen*"), one of the leading local authorities on this issue, Chan Sek Keong J (as he then was) had commented at page 1014, [14]:

> … I do not dissent from the principle applied by the senior district judge that the voluntary surrender by an offender and a plea of guilty by him in court are factors that can be taken into account in mitigation as they may be evidence of remorse and a willingness to accept punishment for his wrongdoing. *However, I think that their relevance and the weight to be placed on them must depend on the circumstances of each case.* I do not see any mitigation value in a robber surrendering to the police after he is surrounded and has no means of escape, or much mitigation value in a professional man turning himself in in the face of absolute knowledge that the game is up.
>
> [emphasis added]

53 In a similar vein, Kow Keng Siong DJ in *Mihaly Magashazie* ([19] *supra*) correctly attached little weight to the accused person's guilty plea. He was of the view that the accused, having been arrested outside a jewellery shop and having just made a fraudulent purchase with a stolen credit card, had no choice but to plead guilty and cooperate with the authorities. Similarly, in *Purwanto* ([23] *supra*), the discount for the plea of guilt was minimal as the appellant was caught red-handed with the forged credit cards upon his arrest, whilst attempting another fraudulent card transaction.

54 *Wong Kai Chuen* ([52] *supra*) should not however be construed as signalling that a plea of guilt can *never* be of mitigating value, when conviction is inevitable. In *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR 653, I endorsed a remorse-based approach to a plea of guilt. I was of the view that the exceptions to the practice of reducing sentences for guilty pleas, for instance where the evidence against the offender was truly overwhelming, or where the offender was caught red-handed, simply represent and reflect judicial and common experience. They are no more than helpful analytical and evidential presumptions to assist a court in assessing whether the offender's guilty plea is activated by sincere remorse: at [69]. I have adopted a similar view in the present case and note that this remorse-based approach was actually adopted in *Lim Pei Ni Charissa* ([19] *supra*). In that case, Tay J

recognised that the appellant had chosen to claim trial rather than plead guilty. Nonetheless, the appellant's subsequent acknowledgment of her wrongs was indicative of her remorse and could be taken into account. Tay J based that finding on the probation report which stated that the appellant had since taken responsibility for her actions.

The larger picture: A broad overview of the entire spectrum of credit card frauds

55 Thus far, credit card offences have been discussed according to their classifications into two broad categories: counterfeit cards and/or syndicate offences and stolen/misappropriated cards offences. Such a dichotomy is virtually inevitable as these two genres of credit card fraud not only seem to feature most prominently in local case law, the culpability that each category of offenders attracts might also be compared and contrasted accordingly. However, it would be appropriate to point out that in point of fact, an entire gamut of potential credit card frauds exists with varying levels of seriousness. That said, the sentencing considerations just discussed above continue to be relevant across the board. In fact, it is the commonsense application of consistent sentencing considerations to the different types of credit card frauds that yields differing degrees of sentencing severity in each case. In ascending levels of seriousness (and attracting correspondingly ascending levels of sentencing severity), the principal types of credit card frauds may be categorised in more depth and detail as follows. This list is by no means comprehensive or exhaustive in scope and cannot be presumed to cover every conceivable credit card fraud/scheme that may be concocted by inventive criminal minds:

(a) *Lost and stolen cards*: This corresponds to the stolen/misappropriated cards category as adverted to in our previous, more simplistic dichotomy. Misappropriated use of such cards would come to the owner's attention fairly quickly and these offences generally require minimal criminal expertise; they are therefore the most commonly committed type of credit card frauds.

(b) *Intercept fraud*: This is a related category to that of lost and stolen cards. Postal intercept fraud occurs when a card is stolen from the postal service before it reaches its owner. The theft of such cards depends on individuals who work for the postal service, and involves a breach of trust by these individuals.

(c) *Application fraud (financial fraud)*: This occurs when an individual applies for a credit card, but gives false details about himself or herself. The most common scenario is where an individual exaggerates his or her income. This may prove relatively difficult to detect. Financial institutions try to safeguard themselves from this sort of fraud both by requiring documentary support of a card applicant's financial claims, and by carrying out credit checks on an applicant's financial status and current address. By and large, this sort of fraud neither requires nor involves any real sophistication.

(d) *Application fraud (assumed identity)*: This is a long-standing mode of credit card fraud. A criminal assumes another person's identity, solely for the purpose of receiving another individual's credit card. The carrying out of such offences requires more planning and pre-meditation than the other type of application fraud (financial fraud) discussed in (c) above; to that extent it ought to be viewed as a more serious offence.

(e) *Fake cards*: Fake cards are cards created completely from scratch and they require substantial effort and skill to produce. Banks have found ways to safeguard themselves against this method of credit card fraud by instilling features in the credit card, such as holograms. The modern credit card is therefore even more difficult to create completely from scratch. Indeed, hologrammed cards account for the increased costs that banks and financial institutions, and

consequently credit card holders suffer as a result of credit card frauds. But just as credit cards have evolved in sophistication, credit card fraudsters have correspondingly become more ingenious. Modern technology has been deployed to improve and refine methods of credit card frauds, resulting in a plethora of more complex schemes for the fraudulent use of credit cards (discussed below from (f) to (i)).

(f) *Skimming*: This occurs where the data contained in the magnetic stripe on a credit card is copied on to the stripe of another card. Skimming is very difficult, if not entirely impossible to trace. Even the modern and apparently more secure smart chip credit cards can now have their data copied with the appropriate technology. Special devices are required for skimming and elaborate planning and premeditation are invariably involved. As is evident, skimming is a sophisticated mode of procuring counterfeit card information, and is extremely difficult to detect.

(g) *Site cloning and false merchant sites*: In this type of fraud, the Internet provides the details required by fraudsters to commit credit card frauds. Site cloning occurs when fraudsters clone websites or webpages from which online transactions are made. These cloned sites are identical to the real ones and the unsuspecting customers would fill in their details, including their names, addresses and full credit card details, which would then be collected by the credit card fraudsters. False merchant sites often offer the customer an extremely cheap service, with the requirement that customers must enter their full credit card details, names and addresses in order to access the content of the site. These sites are set up to accumulate as many credit card numbers as possible, so that the numbers may be used, or sold to smaller fraudsters. Such offences are very sophisticated, premeditated, and usually operate on a large scale. Detection is once again very difficult.

(h) *Triangulation*: This is similar to site cloning and false merchant sites. The fraudster operates from a website, where goods are offered at heavily discounted rates and shipped before payment. The customer must furnish his or her name, address and valid credit card details to purchase the goods. The fraudsters then order the goods from a legitimate site using another set of stolen credit card details and with the customer's name and address. The customer's own credit card details are in turn used to purchase other goods. This process is designed to avoid early detection by creating a great deal of preliminary confusion for the authorities. The authorities track down the customers of the site whose names were used to purchase goods with stolen credit card details, but substantially more time is required to track down the fraudsters operating the website. The sites are usually closed down within a few weeks, and new fraudulent sites subsequently opened. Authorities therefore often have little or no chance to apprehend the operators of the networks. The inherently high level of sophistication involved in such a method of credit card fraud, and the very deliberate avoidance of detection contribute to the gravity of such offences.

(i) *Credit card generating*: This method of credit card fraud manifests by far the highest degree of sophistication among all the credit card frauds identified so far. Computer programs are used to generate valid credit card numbers and expiry dates by generating lists of credit card account numbers from a single account number. These generators could entail grave repercussions and send the levels of credit card fraud soaring on a global sale.

(*Per* http://www.ex.ac.uk/~watupman/undergrad/owsylves/index.html (accessed on 1 February 2007))

56 This brief outline and overview provides a flavour of the many guises of credit card fraud that have now surfaced to plague both financial institutions and their customers. By and large, with the

exception of simple theft, most forms of credit card fraud require considerable planning, actual knowledge of how electronic credit cards operate and a comprehensive understanding of how to circumvent existing safeguards. However, for the purposes of the present grounds of decision, the clearer, albeit more simplistic dichotomy of credit card offences will suffice to illustrate the appropriate treatment of such offences. For the purposes of assessment of sentence, however, the court should bear in mind the context of the whole multifaceted sphere of credit card fraud, as outlined and discussed, should always be adjusted with reference to the level of planning and sophistication involved and the consequences flowing from each crime.

Approach and range of sentences for credit card cheating offences in some foreign jurisdictions

57 Purely for the purposes of a comparative study of sentencing considerations, I now turn to look briefly at the sentencing precedents for similar offences in Hong Kong and United Kingdom.

Hong Kong

58 Credit card cheating offences are treated severely in Hong Kong, given its apparent prevalence in that jurisdiction. This is evident from the observations of Macdougall JA in *R v Wong Fu-keung* Criminal Appeal No 5 of 1991 (unreported) at page 5:

> It is a notorious fact that the illegal use of credit cards has become widespread. Those who are engaged in this type of activity can expect to be dealt with severely by the courts.

59 The *raison d'etre* for such a tough stance was furnished by Liton JA in *R v Kwai Ying-ho* Criminal Appeal No 527 of 1992 (unreported) at page 5:

> Credit card frauds have in recent years been an insidious poison in the community. It affects a large number of citizens. It erodes the credit card system and damages Hong Kong's standing in the international community.

Whilst those words specifically applied to charges of conspiracy in that case, they were adopted by the court in *Attorney-General v Chan Piu-sang and Another* [1994] 1 HKCLR 211 ("*Chan Piu-sang*") in relation to credit card frauds in general.

60 It would appear that Hong Kong courts view offences concerning *forged* credit cards as more serious than those concerning *stolen* credit cards. Stolen card offences are likely to come more quickly to the attention of the credit card company so that retailers can in turn be expeditiously alerted. The period of time within which stolen cards can be successfully employed is therefore usually limited. On the other hand, the employment of a forged card is in the normal course of events not likely to surface until the true card holder receives a statement of account which he then observes to be incorrect (see *The Queen v Chan Sik Kwan* Magistracy Criminal Appeal No 1284 of 1989).

61 In so far as *forged* credit cards are in issue, it suffices to note that the Court of Appeal in *R v Chan Siu To and Another* [1996] HKCA 385 ("*Chan Siu To*") imposed two years' imprisonment on each charge of obtaining property by deception, taking into account that the scheme was 'not a very sophisticated one'. For similar charges, the Court of Appeal in *The Queen v Leung Kwok Chung* [1995] HKCA 178 similarly took a starting point of two years' imprisonment for each charge. In *Chan Piu-sang* ([59] *supra*), the trial judge's sentence of six months' imprisonment was enhanced to two years by the Court of Appeal with respect to the charge of attempting to obtain property by

deception using a forged credit card.

Use of stolen credit cards

6 2 *The Queen v Ajibola Swaju Oyalowo and Another* [1985] HKCA 50 involved the use of stolen credit cards to obtain property/services. The applicants were convicted of 11 charges. The Court of Appeal opined that the sentence of 18 months' imprisonment imposed by the trial judge on each charge was a proper sentence. The trial judge had emphasised that the applicants' one and only object in proceeding to Hong Kong was to defraud shopkeepers. It was deemed to be a systematic fraud, well-planned and orchestrated with the use of stolen credit cards and tantamount to a threat both to Hong Kong's business activities as well as their credit structure. Further, as the applicants were caught red-handed, very little discount was given to their pleas of guilt. The Court of Appeal concluded by suggesting that in future, the appropriate sentence in similar cases should be a minimum of 18 months.

63 Different facts arose in *HKSAR v Lam Pui Tak* Magistracy Appeal No 655 of 2001. In that case, the sentence of eight months' imprisonment imposed by the Magistrate for each of the four charges of obtaining by deception was upheld. The Magistrate had taken a starting point of 12 months for each offence, but he had given the appellant full credit for her plea of guilt, the appellant having confessed to having stolen the credit card and having voluntarily surrendered to the police. Further, there was no suggestion that the appellant was heavily involved in credit card fraud, or that she had in her possession additional credit cards, or that she was working as a member of any syndicate. It should, however, be noted that the Magistrate, in considering sentence, took the view that offences relating to the use of credit cards were very common, and that even a first-time offender had to be sentenced to an immediate sentence of imprisonment for the purpose of deterrence.

64 In *HKSAR v See Chun Fat Billy* Magistracy Appeal No HCMA367 of 2005, the appellant stole credit cards from letterboxes. The Magistrate had taken 18 months' imprisonment as the starting point, but the term was reduced by a third upon a plea of guilt. On appeal, it was held that the sentence was not too severe. Credit card fraud is a serious matter which is prevalent and causes significant loss. The appellant's involvement demonstrated premeditation and was not perpetrated in a sudden moment of greed. The orders were thus confirmed.

65 Higher sentences were imposed in *R v Blancaflor* Criminal Appeal No 294 of 1986 ("*Blancaflor*"), *HKSAR v Wong Wan Shan* Criminal Appeal Nos 9 & 10 of 2002 ("*Wong Wan Shan*") and *HKSAR v Chan Kwai-Fui* [1998] HKCA 377 ("*Chan Kwai-Fui*"). In all three cases, elements of syndication or group conspiracy to commit the offences can be found. In *Blancaflor*, a *group* of persons used stolen credit cards to obtain goods. It was a *planned* fraud and a sentence of 21 months was confirmed. In *Wong Wan Shan*, a starting point of three to four years' imprisonment was taken and sentences of between two years and four months' imprisonment and two years and eight months' imprisonment each were imposed for charges of obtaining property by deception. That the offences had been committed over a lengthy period of time and the fact that the applicant was a persistent offender, *acting in concert with others as part of an accomplished thieving syndicate* constituted aggravating factors in that case. Lastly, in *Chan Kwai-Fui*, a four-year starting point was taken for each of the five charges of obtaining property by deception through the fraudulent use of stolen credit cards. The sentencing was subsequently discounted and reduced to two years and eight months' imprisonment. The judge took into account, *inter alia*, the prevalence of such offences and the indication that *the applicant was involved with others in the offences*. The sentence was upheld on appeal.

Factors considered by the Hong Kong judiciary

66 In *Chan Siu To* ([61] *supra*), a non-exhaustive list of factors to be considered by a sentencing judge in credit card fraud cases was set out by the Hong Kong Court of Appeal. These factors included:

(a) The size of the operation (whether it involves large sums of money, large numbers of persons or large numbers of fraudulent credit cards);

(b) The planning that has gone into perpetrating the fraud (whether it is elaborate or simple, whether technical skills were used);

(c) Whether there is an international dimension;

(d) Whether the accused played a major role (whether the accused ran the syndicate, organised the use of the fraudulent cards, or was a mere 'cog in the wheel'); and

(e) Whether there is a plea of guilty.

67 The factors listed by the Hong Kong court are essentially largely similar to the relevant sentencing considerations I have set out in [38] to [54] above. With the possible exception of factor (c) (international dimension), it should be noted that our local courts have generally also paid attention to all the other factors when sentencing perpetrators of credit card offences. I agree with and endorse the Hong Kong Court of Appeal's incorporation of the international dimension as a relevant sentencing consideration. *Foreigners and/or criminal syndicates who single out Singapore as a platform for their crimes must be uncompromisingly visited with very severe sentences*.

United Kingdom

68 The English courts also consider the fraudulent use of credit cards as a relatively serious offence. The threat that such crimes might become prevalent also appears to be a critical sentencing consideration.

69 In *R v Jackson and Jackson* (1992) 13 Cr App R (S) 22 ("*Jackson*"), the appellants had pleaded guilty to three counts of obtaining by deception using stolen credit cards, with 31 and 47 similar offences to be taken into consideration respectively. The court regarded these offences as meriting a sentence of immediate imprisonment as they had been committed over a substantial period of time. The general preponderence of such offences given that they required little effort or exertion was yet another critical factor prompting the court to conclude that such conduct should be severely dealt with for the purposes of general deterrence. Ultimately, in that case, however, the positive character references of the appellants and their dire financial predicament dissuaded the court from imposing custodial sentences. Community service orders were prescribed instead.

70 In the more recent decision of *R v Shellie Wallace* [2001] EWCA Crim 1405, where the appellant had pleaded guilty to *inter alia* four charges of obtaining property by deceptively employing a credit card, a different conclusion was reached. 133 offences were taken into consideration, and she was sentenced to eight months' imprisonment on each charge. The court considered the sentence in *Jackson* ([69] *supra*) as peculiar to its facts, emphasising that *Jackson* raised and affirmed deterrence as a critical consideration. The Court of Appeal emphasised that each case must be assessed on its own merits. The sentence of eight months in that case was upheld.

71 The older English case of *R v Peacock* [1967] Crim LR 548 appears to have imposed more severe sentences for credit card offences. There, the accused had come into possession of a credit card

belonging to someone else and with others, had used it to obtain goods worth £53 from shopkeepers. He pleaded guilty to two charges of obtaining goods by false pretences, with three similar offences to be taken into account. The accused was sentenced to 18 months' imprisonment and in upholding his sentence, the Court of Appeal stated that the fraudulent use of credit cards is a serious matter.

72 In light of the relatively inconsistent sentencing practices for credit card offences in the United Kingdom, and particularly because of the differing cultural, social and policy contexts prevailing in the UK and Singapore, I am not inclined to adopt the sentencing precedents in the UK. The relevance of English and Hong Kong authorities in Singapore on credit card frauds should be strictly confined to the broad and essential principles distilled from both – that credit card offences ought to be viewed seriously, and the deterrence *must* feature significantly in the sentencing equation.

Summary of relevant sentencing considerations for credit card offences

73 In summary, any assessment of sentencing factors in a credit card cheating offence should take into account the following:

(a) degree of planning and premeditation, see [39] to [41];

(b) sophistication of offence and measures taken to avoid detection, see [42] to [43];

(c) role of the accused, see [44] to [45];

(d) number of offences and quantum involved, see [46] to [48];

(e) extent of actual loss, damage and adverse consequences (both tangible and intangible) to victims and connected parties, see [49] to [50];

(f) international dimension, see [66] to [67]; and

(g) remorse shown, see [49] to [54]

The sentencing benchmarks for credit card cheating offences

74 One common thread quite perceptibly runs through cases on credit card offences in all three jurisdictions of Singapore, Hong Kong and the United Kingdom: such offences have been deemed almost invariably to warrant deterrent sentences. There are indeed sound public interest considerations underpinning and warranting benchmark sentences for this genre of offences so that a deterrent message is unequivocally conveyed. Potential offenders should be alerted to the consequences of committing credit card frauds. Further, benchmark sentences would engender a greater degree of consistency and certainty in the sentencing of such offences. However, I pause here to caution that despite such obvious advantages of benchmark sentences, they should never be applied mechanically, without a proper consideration and assessment of the individual facts of the case. Ultimately, each case must be determined on its own factual matrix. The process of sentencing is a matter of law that involves manifold factors so that no two cases could ever be totally identical for the purposes of sentencing: *Wan Kim Hock v PP* [2003] 1 SLR 410. Thus while past cases (and benchmark sentences) are clearly helpful in providing guidelines for the court, they must be acknowledged as just that and no more. In the final analysis, while consistency in sentencing is a desirable objective, it should never become an overriding or inflexible principle: *Mohd Shahrin bin Shwi v PP* [1996] 3 SLR 553. I am inclined at this juncture to reiterate my observations in *Dinesh Singh Bhatia s/o Amarjeet Singh v PP* [2005] 3 SLR 1 at [24]:

> The circumstances of each case are of paramount importance in determining the appropriate sentence. Benchmarks and/or tariffs (these terms are used interchangeably in this judgment) have significance, standing and value as judicial tools so as to help achieve a certain degree of consistency and rationality in our sentencing practices. They provide the vital frame of reference upon which rational and consistent sentencing decisions can be based. They ought not, however, to be applied rigidly or religiously. No two cases can or will ever be completely identical or symmetrical. The lower courts, while obliged to pay careful and thoughtful attention to tariffs and/or sentencing precedents, must not place them on an altar and obsessively worship them. The judicial prerogative to depart in a reasoned and measured manner from sentencing and precedent guidelines in appropriate cases should not be lightly shrugged off. Sentencing is neither a science nor an administrative exercise. Sentences cannot be determined with mathematical certainty. Nor should they be arbitrary. The sentence must fit the crime. Every sentence reflects a complex amalgam of numerous and various factors and imponderables and requires the very careful evaluation of matters such as public interest, the nature and circumstances of the offence and the identity of the offender. Most crucially, it calls for the embodiment of individualised justice. This in turn warrants the application of sound discretion. General benchmarks, while highly significant, should not by their very definition be viewed as binding or fossilised judicial rules, inducing a mechanical application.

75 In my view, the starting point of the sentencing tariffs for the various s 420 credit card cheating offences should figure in the following range:

> (a) *Syndicated and/or counterfeit/forged credit card and/or sophisticated offences*: 24 to 36 months' imprisonment for each charge
>
> (b) *Non-syndicated stolen/misappropriated credit card offences*: 12 to 18 months' imprisonment for each charge

Mitigating and aggravating factors should then be assessed in deciding whether they should be allowed to tip the balance so that the sentence is discounted or enhanced accordingly. The adoption of a spectrum of sentencing options for first time offenders will permit consideration to be duly accorded to the many and varied imponderables that inevitably figure in the sentencing equation.

The present appeal in relation to the s 420 cheating charge

76 Non-syndicated misappropriated credit card offences constitute the subject matter of the present case. A starting point of 12 months' imprisonment is the appropriate benchmark.

77 In this respect, I noted that the value of the fraudulent purchases made by the respondent amounted to $6,007.82 (including the charges taken into consideration). This is not an insubstantial amount. The respondent had also made no less than four attempts at the fraudulent use of the misappropriated credit card and had only stopped on the fourth attempt because the credit card was rejected.

78 The district judge was clearly impressed and persuaded by the respondent's plaintive plea that the offences were the result of a "momentary indiscretion"; no benefit was derived by him; and no loss was occasioned to anyone. With all due respect, if this is indeed to be construed as a folly from a "momentary indiscretion", it was a rather long "moment". The respondent appears to have embarked on an extended shopping binge and stopped, not because he was plagued by pangs of guilt, but because the last transaction was literally blocked by the issuing bank. I agree with the prosecution's submission that in light of the two charges proceeded against the accused and three other charges

that had to be taken into account for sentencing purposes, the respondent's infractions cannot be deemed a 'one-off' or isolated transgression. This was nothing less than a disturbing spate of calculated conduct redolent of avarice and callousness. What prevented him from returning the card to Ms Sanderson when he knew she was the rightful owner? Why did he embark on a series of extravagant purchases in a state of frenzy? It was clearly his intention to take full advantage of his short transit stop to maximise his returns and then quietly slip out of the jurisdiction. The intention to commit the offences was assuredly not formed on the spur of the moment. It must have been percolating while he was in flight, after he misappropriated the card. That he selected items of substantial value and made several quick successive purchases is testament to a calculated and pre-meditated conduct.

79 I find his conduct in seeking to take advantage of his short transit stay in Singapore and thereafter attempting to literally take 'flight' troubling. A clear, unequivocal signal must be sent to all would be offenders enjoying a transit stop in Changi Airport that any attempt whatsoever to commit credit card fraud during their transit stay will entail a severe penalty. Millions of passengers use Singapore's international airport as a transit hub and this facility and hospitality must not be abused to provide a platform for criminal activities. The emergence of credit card fraud at shops located at Changi Airport's terminals can only result in financial losses, warranting additional security measures and inconvenience all round. It may in time also damage the reputation of the airport as a transit hub. This is unthinkable.

80 I should also add for the sake of completeness that the respondent's age in this case affords limited mitigating value. Youth provides neither a criminal crutch to lean on nor a license to deliberately commit offences.

81 The trial judge accorded considerable mitigating value to the respondent's early plea of guilt, coupled with his full and complete co-operation with the police investigations. However, the circumstances of the respondent's arrest – given that the respondent was apprehended with the fraudulent purchases and misappropriated credit card on his person – raised, initially, dubious questions about his remorse; the case against him was overwhelming to say the least; a foregone conclusion, one might say. The reliance on the early plea of guilt and co-operation with the police *per se* was therefore insufficient by itself to reflect true remorse. In a remorse-based approach, only a genuine finding of remorse can warrant a discount in sentence: see above at [50] to [53]. I did, however, after careful consideration accept Mr Peter Fernando's persuasive plea on behalf of the respondent that he is now contrite and fully acknowledges his mistake.

82 Having assessed a two-month term of imprisonment for these credit card frauds as wholly inadequate, I have nevertheless determined that the benchmark sentence of 12 months admittedly be discounted to take into account certain mitigating factors. While the offences were pre-meditated in nature, they were committed without any proper planning and clearly lacked any measure of sophistication.

83 Further, the respondent's personal circumstances in this particular case should also be taken into account in assessing the appropriate sentence. The respondent's relative youthfulness (albeit of limited mitigating value *per se*), his lack of antecedents as well as a good family background and upbringing point to a higher amenability to rehabilitation and a correspondingly lower necessity for specific deterrence. A discount from the benchmark sentence was therefore justified. The fact that no loss was occasioned was also a relevant though not decisive consideration: see [49] and [50] above. I also made an allowance for the fact that he had been released from prison custody before the sentence was enhanced.

84 For the above reasons, I enhanced the sentence of two months' imprisonment to six months' imprisonment for the s 420 charge of cheating with a misappropriated credit card.

The criminal misappropriation charge under s 403 of the Penal Code

85 The case law for criminal misappropriation charges seems relatively consistent in contradistinction to the s 420 authorities. The prosecution highlighted two relevant cases in its submissions on sentence. These cases, because they are by and large factually similar to the present case, afford useful guidelines for the imposition of a sentence for the respondent's charge pursuant to s 403 of the Penal Code.

86 In the case of *Fadilah bte Omar* ([24] *supra*), the 16-year-old accused had misappropriated a credit card that she had found in a toilet. She pleaded guilty to one count of criminal misappropriation and two months' imprisonment was imposed. The second case cited is the unreported case of *Siti Nor Anin Binti Tugiman* (District Arrest Case No 10126 of 2006 & ors). There, the 20-year-old accused had misappropriated a credit card whilst working as a cashier. She had similarly pleaded guilty to one count of criminal misappropriation and was sentenced to three months' imprisonment. I regard sentences of imprisonment in the range of two to six months as an appropriate benchmark for first offenders.

87 Given the facts of the present case, I was of the view that a two months' imprisonment term for the s 403 of the Penal Code criminal misappropriation offence was proportionate to his culpability and provide sufficient deterrence and value. I therefore enhanced the sentence of two weeks' imprisonment imposed by the trial judge to two months' imprisonment, to run concurrently with the sentence imposed for the s 420 charge.

Conclusion

88 The sentences imposed by the district judge were manifestly inadequate. Offences involving credit cards inevitably warrant severe treatment, save in exceptional cases. Given the pre-eminence and pervasiveness of credit cards as a preferred mode of payment in day to day commerce, such recurrent offences threaten to grievously undermine both its reliability as a mode of payment as well as the entire security of our credit infrastructure. An enormous amount of time, money and effort is unnecessarily expended by financial institutions and authorities in combating such fraud. Such offences, if left unchecked, would be akin to a slow drip of a subtle but potent poison that will inexorably and irremediably damage Singapore's standing both as a financial hub as well as a preferred centre of commerce. Further, as a key global financial player, Singapore bears international responsibility in ensuring that it does not afford a platform either for the launch or perpetration of this genre of fraud. Financial institutions face a constant and relentless struggle each and every time a security risk posed by a credit card fraudster surfaces. Indeed, the entire credit card holding community bears the brunt, both financial and the incalculable inconvenience, whenever such an offence rears its ugly hydra head. The price of security is unstinting vigilance and the unflinching imposition of appropriately stiff sentences in dealing with transgressions. Offenders must expect to face harsh custodial sentences; general deterrence is a vital if not paramount consideration in assessing how severe the sentence should be in any given case.

89 In the result, I made the following orders:

(a) Offence of criminal misappropriation (District Arrest Case No 52684 of 2006): sentence of two weeks' imprisonment to be enhanced to two months' imprisonment;

(b) Offence of cheating (District Arrest Case No 52683 of 2006): sentence of two months' imprisonment to be enhanced to six months' imprisonment;

(c) Both sentences are to run concurrently and commence from 18 November 2006. The period that the accused has been released (i.e. 8 to 12 January 2006) is not to be added on to this sentence.

90 Finally, I would like to thank counsel for their assistance in this matter. While some of their arguments did not resonate with me, I nevertheless found them helpful. Considerable effort and diligence had clearly gone into the preparation of the cases on both sides. In particular, I would like to commend Mr Peter Fernando, counsel for the respondent, for the clarity and cogency of his advocacy as well as the even-handed manner in which he vigorously pressed his client's cause. While he may have not have succeeded in convincing me of the merits of his client's cause, I commend him for more than successfully discharging his obligations to the court and to his client.