Wuu David v Public Prosecutor
[2008] SGHC 89

Case Number : MA 11/2008

Decision Date : 10 June 2008

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ

Counsel Name(s) : Kesavan Nair (David Lim & Partners) for the appellant; Shahla Iqbal (Attorney-General's Chambers) for the respondent

Parties : Wuu David — Public Prosecutor

Criminal Procedure and Sentencing – Sentencing – Appeals – Credit card cheating offence under s 417 Penal Code (Cap 224, 1985 Rev Ed) – Custodial benchmark sentences set out in Payagala's case – When non-custodial sentence for credit card cheating offence warranted – Appellant stealing handbag but only taking credit cards – Appellant using credit only once and throwing it away

Criminal Procedure and Sentencing – Sentencing – Benchmark sentences – Benchmark sentences for credit card cheating offences – Whether custodial benchmark sentences set out in Payagala's case applicable to all credit card cheating offences – When non-custodial sentence for credit card cheating offence warranted

10 June 2008

Chan Sek Keong CJ:

Introduction

1 This was an appeal against the sentence of nine weeks' imprisonment imposed on the appellant, Wuu David ("the Appellant"), by the judge ("the District Judge") in District Arrest Case No 44067 of 2007 (see *Neo Jun Wei v PP* [2008] SGDC 9 ("the Judgment")). The Appellant had pleaded guilty to one charge of cheating, which is punishable under s 417 of the Penal Code (Cap 224, 1985 Rev Ed) as follows:

> **Punishment for cheating.**
>
> **417.** Whoever cheats shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

A second charge of theft ("the TIC charge"), which is punishable under s 379 of the Penal Code, was taken into consideration for the purposes of sentencing.

2 After hearing counsel for the Appellant and counsel for the Prosecution, I set aside the sentence of imprisonment and substituted it with a fine of $3,000. I now give the reasons for my decision.

The facts of the case

3 The Appellant is a male, aged 24 years old. At the time of his arrest and prosecution, he was working as a waiter in a restaurant while pursuing a part-time diploma course in mass communications. He is the main breadwinner in his family, which consists of his mother (who is a divorcee) and two younger siblings. He had, until this conviction, no antecedents.

4 The prosecution of the Appellant arose from his use of a stolen credit card at about 2.03am on 27 May 2007 to purchase a bottle of liquor at Dragonfly Backstage Bar, St James Power Station ("the Bar"). The Appellant and his friend, one Neo Jun Wei ("Neo"), were drinking at the Bar when the former spotted the complainant's handbag lying unattended. The Appellant took the handbag (this act formed the subject matter of the TIC charge) and went into the restroom, where he removed two credit cards (a MasterCard and a Visa card) belonging to the complainant's boyfriend ("the Victim") and kept them. Having done that, he threw away the handbag and the other contents in it. The Appellant later passed one of the credit cards (*viz*, the MasterCard) to Neo.

5 The Appellant then purchased a bottle of Hennessy VSOP for $765 at the counter of the Bar and paid for it using the stolen Visa card (which he had retained). The waiter swiped the Visa card through the point-of-sales terminal and the transaction was approved. A charge slip was printed, which the Appellant signed. There was no evidence that the waiter checked whether the Appellant was indeed the owner of the credit card. At about 2.22am, Neo also went to the Bar's counter and purchased another bottle of Hennessy VSOP for $688.50. He paid for it using the stolen MasterCard and similarly signed on the charge slip after the transaction was approved. After making the purchases, the Appellant and Neo threw the stolen credit cards into a dustbin outside the premises.

6 Very shortly after, at about 2.38am on 27 May 2007, the complainant discovered the loss of her handbag and the credit cards therein, and called the police. The police arrived soon after, and, upon investigation, found that the stolen credit cards had been used by the Appellant and Neo to purchase liquor at the premises. Both men were arrested at about 4.25am. They admitted to the offences immediately.

7 The complainant's handbag and all its contents (without the credit cards) were recovered. Full restitution of the price of the bottle of liquor which the Appellant had purchased was made by Neo immediately after his arrest. The Appellant later reimbursed Neo half of the amount paid. The other bottle of Hennessy VSOP which Neo had purchased had not been opened and was taken back by the Bar. Neither the Victim nor the Bar, therefore, suffered any monetary loss.

8 The Appellant pleaded guilty and admitted unreservedly to the statement of facts tendered by the Prosecution ("the Statement of Facts"). The mitigation plea put forth by the Appellant's counsel rested essentially on the submission that the Appellant had been charged with the offence under s 417 of the Penal Code (commonly referred to as "simple cheating") and that ordinarily called for a non-custodial sentence. The Prosecution did not make any submissions on sentence. The District Judge decided that the nature of the Appellant's cheating offence was such that it warranted a custodial sentence regardless of whether the Appellant was charged under s 417 or s 420 of the Penal Code (the latter provision sets out what is commonly referred to as "aggravated cheating"). Accordingly, she sentenced the Appellant to nine weeks' imprisonment.

9 The Appellant appealed against the sentence. The arguments made before this court by his counsel and by counsel for the Prosecution on the propriety of the District Court's sentence were basically the same as those presented to the District Judge. Before I explain why I allowed the appeal and varied the sentence, it is necessary to understand the factual and legal basis on which the District Judge imposed a custodial sentence on the Appellant.

The District Judge's reasons for imposing a custodial sentence

10 The District Judge approached the question of sentencing by asking herself whether considerations of public interest justified a custodial sentence. She stated (at [7] of the Judgment) that:

> [O]nly public interest should affect the type of sentence to be imposed … The principle of advancing public interest is closely related to and expressed by the concept of general deterrence, which serves to educate and deter other like-minded members of the general public by making an example of the particular offender.

She then referred to the judgment of V K Rajah J in *PP v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR 334 ("*Payagala*").

11 In *Payagala*, the accused (a 20-year-old Sri Lankan) misappropriated a credit card which he found near his seat during a flight from New Zealand to Singapore. When he landed in Singapore, he immediately used the card to purchase, at Singapore Changi International Airport ("Changi Airport"), a laptop valued at $1,522, a watch valued at $449.81 and a mobile telephone valued at $1,288. He was arrested at one of the departure gates of Changi Airport after he tried to buy a bracelet valued at $2,728.01 and was told that the credit card facility had been blocked. The accused pleaded guilty to a charge of criminal misappropriation of a credit card under s 403 of the Penal Code and another charge of aggravated cheating under s 420 of the Penal Code in connection with his use of the misappropriated credit card. Two further charges of aggravated cheating under s 420 and another charge of attempted cheating under the same section read with s 511 of the Penal Code were taken into account for the purposes of sentencing. The accused was sentenced at first instance to two months' imprisonment for the aggravated cheating charge and a consecutive term of two weeks' imprisonment for the criminal misappropriation charge. On appeal by the Prosecution, Rajah J increased the sentence to concurrent terms of six months' imprisonment for the aggravated cheating charge and two months' imprisonment for the criminal misappropriation charge respectively. In so doing, he held that there was a public interest in checking credit card fraud for a variety of reasons, one of which was that such fraud would erode public confidence and could have a deleterious effect on Singapore's standing as a preferred destination for tourism, trade and investment (see *Payagala* at [20]). To check the abuse of credit cards, persons who committed credit card offences could usually expect harsh custodial sentences as the principle of general deterrence would be a vital, if not the paramount, consideration in assessing how severe the sentence should be in any given case.

12 The District Judge was cognisant of the fact that *Payagala* was a case of aggravated cheating under s 420 of the Penal Code (which is punishable with a term of imprisonment of up to seven years and a fine). Nevertheless, she held that the sentencing considerations applicable in *Payagala* would also apply to a case of simple cheating under s 417 of the Penal Code as the same public interest in deterring credit card abuse featured in both scenarios. She reasoned (at [12]–[15] of the Judgment):

> 12 The next question which arose was whether a non-custodial sentence should be imposed by virtue of the fact that Neo and Wuu were prosecuted under the "watered-down" charge under s 417. I did not see how the fact of prosecution under a less serious charge alone merited a non-custodial sentence in the circumstances. Section 417 carries a penalty of up to one year's imprisonment or a fine or both. Section 420, on the other hand, carries a maximum imprisonment term of seven years. In my opinion, what was of more significant importance in determining the *type* of sentence to be imposed was the gravity or seriousness of the *nature* of the actual offence. The seriousness of the offence would affect the severity and duration of the sentence imposed. It could not be simply dependent on the actual penal provision under which the accused was charged.
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> 13 There appears to be no reported decision on offences under s 417 involving the abuse of or fraudulent use of credit cards, as the case precedents gleaned suggest that they are more ordinarily prosecuted under s 420. There are [at] least two previous cases involving the use of *stolen* credit cards which were prosecuted under s 417, as highlighted in *Sentencing Practice in*

the Subordinate Courts ([LexisNexis, 2nd Ed], 2003) and reproduced in the [Appellant's] written mitigation plea [(namely, *Soh Puay Luan v PP* Magistrate's Appeal No 383 of 1993 (unreported) ("*Soh Puay Luan*") and *Toh Aik Keong v PP* Magistrate's Appeal No 49 of 1998 (unreported) ("*Toh Aik Keong*")], and an imprisonment term was imposed in one of them [*viz*, *Toh Aik Keong*]. …

14 … Neo and Wuu's acts were not just unthinking or negligent. Their exploits were marked by a dishonest intention to cheat through the abuse of the payment mechanics of the credit card – they fraudulently used the [Victim's] credit card[s] to pay for their indulgences. As was the case in *Payagala*, Neo and Wuu's transgressions involved *stolen* credit cards, which are regarded gravely by the courts. The factual circumstances leading up to the commission of the offences by Neo and Wuu were largely similar to those in *Payagala*, although they should be treated as "a few shades off" in terms of culpability – in *Payagala*, the High Court found that in [the] light of the two charges proceeded [with] against the accused and [the] three other charges that were taken into account for the purposes of sentencing, the accused's infractions could not be deemed as "one-off" or isolated (*cf* the present case, where Neo and Wuu each faced one charge, with another charge under s 379 taken into account in sentencing Wuu). The accused's intention [in *Payagala*] was 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 not formed at the spur of the moment but while in flight after he misappropriated the victim's credit card. That he selected items of substantial value and made several quick successive purchases was seen by the court as [a] testament to [his] calculated and pre-meditated conduct. As is commonly known, the [P]rosecution does, for various reasons such as when the accused enters a guilty plea, reduce the charge to be proceeded with. However, as I reasoned earlier in paragraph 12 above, in deciding on the *type* of sentence to be imposed, the court should not merely make reference to the penal provision [which] the accused is charged under but should have regard to the gravity of the offence committed. Still, offences of a similar nature would, in the ordinary course of events, attract a shorter or less severe sentence under s 417 as opposed to s 420, given the fact that Parliament has deemed an offence under s 420 as more severe, as can be seen in the much higher statutorily prescribed maximum penalty for s 420.

15 Bearing the above in mind, I came to the view that the public interest considerations espoused by Rajah J in *Payagala,* albeit in the context of s 420 offences involving credit card fraud, applied with equal force in the case before me. The use of credit cards in modern society as a mode of payment is already widespread. Moving forward, credit cards will become even more commonplace as our society evolves into one in which the use of credit becomes an integral part of a typical household's financial framework. As such, fraudulent use of credit cards in any form is a serious matter and should be stemmed. I had no doubt that a custodial sentence was warranted for cheating offences involving stolen credit cards … which were prosecuted under s 417, even if they were of a non-syndicated nature, as the protection of the general community and public interest dictate that deterrence should be a critical or forceful feature in the sentencing equation. It is incumbent upon the court to emphasise not only the need to punish the offender and to deter others, but also the need to protect all credit card holders.

[emphasis in original]

13 The District Judge then considered the mitigating circumstances put forward by the Appellant. Counsel for the Defence had emphasised the following (in addition to the fact that the Appellant had been charged under s 417, rather than s 420, of the Penal Code (see [8] above)):

(a) the relatively low value of the liquor which the Appellant had purchased using the stolen Visa card;

(b) the prompt making of full restitution of the value of the liquor in question; and

(c) the fact that the Appellant had readily admitted to the s 417 offence with which he was charged and had co-operated fully with the police in the investigations.

It was further submitted that the Appellant had committed the above offence while he was inebriated and, as such, his conduct had been out of character. The District Judge, however, was of the view that there was no cogent evidence that the Appellant had been behaving out of character when he committed the crime, in that tipsy though he had been at the material time, he had nonetheless acted with a dishonest intention (see [16] of the Judgment). Other mitigating factors raised in the court below included hardship, but these were summarily rejected by the District Judge on the basis of well-established law (see [18] of the Judgment).

14 In discussing the appropriate punishment, the District Judge said (at [20]–[22] of the Judgment):

> 20 In determining the appropriate length of imprisonment to be meted out, I bore in mind the sentencing considerations and relevant benchmarks set out in *Payagala*. In particular, it should be remembered that the offences committed by both the accused [*ie*, the Appellant and Neo] were non-syndicated in nature and involved stolen, as opposed to counterfeit, credit cards, and as such were less egregious than those involving counterfeit credit cards or a syndicate. I made particular reference to *Toh Aik Keong* [([12] *supra*)], which revolved around similar circumstances. In that case, the accused, a 21-year-old final-year engineering student at a polytechnic and a first offender, pleaded guilty to two charges under s 417. The accused used a stolen credit card on *two* occasions to buy, first, jewellery valued at $1,280 and second, a watch which too was valued at $1,280. The victim discovered that his credit card was missing from his locker at a health centre one day. On that day in question, the accused was at the same health centre with a friend, one Jason. Jason showed the accused the victim's credit card and suggested that they make purchases with the card. The accused agreed to the suggestion, which then led to the purchases detailed above. The losses suffered by the credit card company as a result were all settled by the accused's father. In *Toh Aik Keong*, the accused was sentenced to four months' imprisonment for each charge, with both sentences running concurrently, making it an aggregate sentence of four months' imprisonment.
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> 21 Although the *modus operandi* of the offences in *Toh Aik Keong* was akin to that in the present case, a couple of distinguishing features between the two cases led me to the conclusion that a sentence of four months' imprisonment or thereabouts was not warranted here. First, and this was a key consideration to my mind, each accused before me faced *one* charge of cheating, whereas the accused in *Toh Aik Keong* faced *two* cheating charges for *two* occasions of using a stolen credit card. Second, the amount involved in *Toh Aik Keong* was $2,560, which was considerably more than that in the instant case. As was observed by the court in *Payagala*, generally, where the quantum involved is higher, the sentence is heftier. The facts also showed that the offences were not committed as a result of premeditation or planning but were perpetrated in a sudden moment of greed – the accused were, to put it simply, opportunists. Although I was strongly of the opinion that a deterrent sentence in the form of imprisonment was necessary and apt, the length imposed should be tempered with proportionality. A period of incarceration [such] as that in *Toh Aik Keong* would have been of inordinate length when viewed against the conduct of both accused and the nature and extent of the credit card abuse involved.
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> 22 For the foregoing reasons, I sentenced Neo to **six** weeks' imprisonment for the s 417

charge in DAC 44065 of 2007. I found Wuu's conduct relatively more culpable than Neo's as he was, after all, the one who instigated and brought into motion the series of events that early morning at St James Power Station. I also took into consideration the charge under s 379 against him [*ie*, the TIC charge] and sentenced him to **nine** weeks' imprisonment for the s 417 charge in DAC 44067 of 2007. I should add for the sake of completeness that I would have been minded to impose a stiffer sentence but for the fact that both accused were first offenders, gave full restitution and confessed to their wrongdoing promptly.

[emphasis in italics and in bold in original]

The appeal

15 Counsel for the Appellant argued that the District Judge had misapplied the relevant considerations and benchmarks in *Payagala* ([10] *supra*) as the Appellant had been convicted under s 417 of the Penal Code for simple cheating and his act of cheating had been on a relatively smaller scale than that involved in *Payagala*. Counsel also referred to *Soh Puay Luan* ([12] *supra*), where the accused ("Soh") used a stolen credit card on two occasions to purchase two items of jewellery valued at $5,635 and $4,500 respectively. The credit card had actually been stolen by Soh's boyfriend and Soh had used it to help him as he was in financial difficulties. She made full restitution of the sums involved and previously had a clean record. She pleaded guilty to two charges under s 417 of the Penal Code, with three other similar charges taken into consideration for sentencing purposes. At first instance, Soh was sentenced to three months' imprisonment on each charge, with both terms to run concurrently. On appeal, the High Court set aside the sentence of imprisonment and substituted it with a fine of $2,500 (with two months' imprisonment in default of payment) on each charge.

16 Counsel for the Appellant had referred *Soh Puay Luan* to the District Judge, who, at [13] of the Judgment, distinguished it on the basis that Soh had not accepted any of the wrongful gains from the transactions and had committed the offences to help her boyfriend. I accept that *Soh Puay Luan* may be distinguished on the basis that the boyfriend's influence on Soh was a valid mitigating factor, but, in my view, the public interest in deterring credit card abuse is exactly the same, whether such abuse is committed in the factual matrices of *Soh Puay Luan*, *Payagala* or the present case. What the decision in *Soh Puay Luan* shows is that a cheating offence under s 417 of the Penal Code which is constituted by the use of a stolen credit card *does not* necessarily entail a custodial sentence as the norm. There is always room to determine what the proper sentence should be on the facts of the particular case.

17 Counsel for the Appellant also argued that the Appellant had been intoxicated at the time he committed the s 417 offence. He had gone to the Bar at about 9.30pm to drink with his friends and had shared two bottles of brandy with them. It was submitted that his actions in stealing the credit cards and subsequently using one of them had been out of character because of his mental state as affected by prolonged drinking. The District Judge dismissed this argument on the ground that the Appellant had nevertheless acted with a dishonest intention. In my view, there was no doubt that the Appellant had acted with a dishonest intention in using the stolen Visa card in the sense that he must have known that it was wrong to use that credit card to purchase the bottle of Hennessy VSOP, but that does not therefore mean that he had not acted out of character. The Appellant might not have stolen the credit cards and might not have used one of those cards if he had been more sober at the material time. I also found it significant that the Appellant did not leave the Bar with the bottle of liquor that he bought using the stolen Visa card. Instead, he stayed behind for almost two and a half hours, sharing the bottle with his friends, until he was arrested. It was almost as if he was waiting to be arrested for using the stolen credit card. Of course, the state of mind of the Appellant after the

few hours' worth of drinking that he had engaged in prior to the offences cannot be known for certain, and the fact that he had been drinking would not exonerate him from criminal culpability. However, the pertinent question for the purposes of this appeal is whether the Appellant deserved to be imprisoned for nine weeks for the offence under s 417 of the Penal Code in the circumstances of the case.

18 In my view, the present case did not involve a type of credit card abuse where the public interest required that the Appellant be punished by imprisonment. As mentioned earlier (at [7] above), the Victim and the Bar suffered no financial loss as there was full restitution by Neo and the Appellant jointly of the cost of the bottle of liquor which was consumed (*ie*, $765). The Appellant had a clean record with the law prior to this incident and also had a good national service record.

19 However, the decisive factor that influenced my decision that a custodial sentence was inappropriate and excessive in this case consisted of two facts which were not stated in the Statement of Facts. These two facts, which were mentioned earlier (at [4]–[5] above), were that the Appellant had, after stealing the complainant's handbag and removing the Victim's credit cards therefrom, thrown away the handbag with the rest of its contents, and, furthermore, had, after using the Victim's Visa card, also thrown it away. These facts were not brought to the attention of the District Judge. They were also not known to counsel for the Appellant in the proceedings both in the court below and before this court, although they were known to the Prosecution. In the course of making submissions before me, counsel for the Prosecution mentioned these facts, probably without realising their significance.

20 In my view, the above-mentioned facts cast a very different light on the state of mind of the Appellant at the material time. Firstly, although the Appellant was also charged (under the TIC charge) with stealing the complainant's handbag and its contents (which included, *inter alia*, an "EZ-link" card, a "NTUC Link" card and an "EasiCard" issued by OCBC Bank, but no cash), he only took the Victim's Visa card and MasterCard with the intention of using them to buy drinks. This was confirmed by his subsequent conduct. Secondly, the Appellant intended to use the stolen Visa card to make only *one* purchase and no more (a point which was likewise inferable from his conduct). In my view, the intention of the Appellant, as manifested by his conduct, made his act of cheating very different, in terms of the nature of the cheating and the degree of culpability involved, from the kinds of cheating (whether simple or aggravated) involving the use of misappropriated or stolen credit cards that Rajah J highlighted in *Payagala* ([10] *supra*). The Appellant's act of cheating in the present case was akin to his having found $765 *in cash* in the complainant's handbag and having used the money – as opposed to the Victim's Visa card – to buy the same bottle of liquor. In my view, the District Judge erred in applying the sentencing benchmarks set out in *Payagala* to the Appellant's cheating offence as the latter, although likewise involving the use of a stolen credit card, did not have the characteristics of the type of credit card abuse addressed in *Payagala*, which was held by Rajah J to warrant a custodial sentence, given the manner in and the intent with which it was committed.

21 For these reasons, I held that the District Judge erred in respect of the factual and legal basis for imposing the custodial sentence in the present case, and that, in the circumstances, that sentence was manifestly excessive. In my view, a fine of $3,000 was a sufficient punishment for the specific offence under s 417 of the Penal Code which the Appellant committed, taking into account the other mitigating factors in his favour.

22 As regards the principle of general deterrence, I should add that, where one-off offenders such as the Appellant are concerned, *prosecution* for the offence(s) committed will *in itself* provide some form of deterrence in most cases. As stated in Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4th Ed, 2005) at p 79:

Sentences are not the only form of general deterrent flowing from the criminal justice system. *In some cases it is the process that is the punishment* – being prosecuted, appearing in court, receiving publicity in the local newspaper – *rather than the sentence itself.* In some cases the shame and embarrassment in relation to family and friends are said to have a more powerful effect than the sentence itself. [emphasis added]