IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 248

Magistrate's Appeal No 9052 of 2020

Between

Rachel Ann Fernandez

… *Appellant*

And

Public Prosecutor

… *Respondent*

ORAL JUDGMENT

[Criminal Law] — [Offences] — [Property]
[Criminal Procedure and Sentencing] — [Sentencing] — [Principles]

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13 November 2020 Judgment reserved.

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Introduction

1 These are my brief remarks in respect of the Appellant's appeal against a sentence of seven months' imprisonment imposed for a charge of cheating under s 417 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code"). A charge of forgery under s 471 read with s 465 of the Penal Code was taken into consideration in sentencing.

2 In her plea of guilt, the Appellant admitted to the facts as follows. The Appellant was first introduced to the victim by the victim's sister. In March 2016, the Appellant deceived the victim that DBS Bank had an investment scheme in gold bars giving a monthly return of 4%, over three months, with the gold bars to be returned at the end of the investment period. The victim, believing the representation, gave ten gold bars of 100g each to the appellant;

the value of the ten gold bars was agreed to be $56,000, with $2,240 to be paid monthly for three months. The Appellant pawned the gold bars for $52,000. She paid the victim the initial alleged "return" of $2,240 for the first month, but no further payments were made. Despite persistent requests by the victim, the Appellant did not return the gold bars. Thereafter, the Appellant prevaricated and, among other things, sent the victim a fake e-mail, purportedly from the CEO of DBS Bank, to justify a further delay in returning the gold bars. The victim eventually filed a police report in February 2017.

3 The Appellant was charged. She pleaded guilty and her plea of guilt was entered on 6 February 2020. Restitution in the amount of $56,000 was also made. In the court below, the District Judge ("DJ") imposed a sentence of seven months' imprisonment, finding that the custodial threshold had been crossed and that, following *Idya Nurhazlyn bte Ahmad Khir v PP and another appeal* [2014] 1 SLR 756, a substantial sentence should be imposed. The sentencing considerations canvassed by the DJ included the fact that a) the value involved was substantial, b) there had been abuse of the DBS brand and impact on legitimate gold investment schemes, c) there was clear planning, and d) the Appellant had pleaded guilty. A further sentencing consideration was the restitution of $56,000, which was said to be a substantial mitigating factor. While the DJ did not appear to have found that there was exploitation of the victim's age, he did describe the victim was elderly in his grounds of decision, finding that the plea of guilt had saved an elderly victim from having to give evidence in court. The victim was 63 years old at the time of the Appellant's conviction, and 60 at the time of the commission of the offence

Summary of the Appellant's Arguments

4 The Appellant argued for the imposition of a fine, or a combination of a fine and imprisonment, given that restitution had been made, and because the offending was alleged to be a one-off incident. Issue was taken with the DJ's determination that there would be impact on legitimate investment schemes, and that an elderly victim had been targeted. It was pointed out that the victim had worked as a relief teacher, and could not be said to have been a vulnerable victim who was specifically targeted on account of her vulnerability. Sentencing precedents such as *PP v Lee Hwai San Adrian Matthew* [2018] SGDC 271 ("*Lee Hwai San*") were also said to indicate that a lower sentence on the instant facts was appropriate. In sum, a sentence of two weeks' imprisonment and a fine of $30,000 was submitted as being appropriate.

Summary of the Prosecution's Arguments

5 The Prosecution argued that the sentence below should be maintained. The precedents were said to indicate that sentences of between four and eight months' imprisonment should be imposed for losses between $1,000 and $15,000, and that, generally, the custodial threshold is crossed when the offence is committed for financial gain: *Gan Chai Bee Anne v PP* [2019] 4 SLR 838 ("*Anne Gan*"). The DJ was said to have correctly applied the principles to conclude that a substantial custodial sentence was warranted. Aggravating factors featured in the misuse of the DBS Bank's name, the planning and premeditation which underpinned the offending behaviour, the exploitation of a vulnerable victim, and the post-offence conduct by the Appellant. In comparison, the mitigating factors were said to have limited weight. The plea of guilt was not timely in that the Appellant only pleaded guilty two days before the start of the trial. Further, while full restitution had been made, this did not

show genuine remorse given that it was made late in the day. I note for completeness that the DJ did accept that mitigating weight should still be given because the restitution had caused a reduction of the economic harm engendered. Nonetheless, the Prosecution argued that the making of full restitution does not negate the need for a custodial sentence.

6 The Prosecution further argued that two of the precedents relied upon by the Appellant were unreported and did not have written grounds rendered, and were in any event decided before the 2008 amendments to the Penal Code which increased the relevant punishments.

7 The Prosecution instead submitted that the sentencing precedents indicated a range of sentences of approximately three months' imprisonment for cases involving around $10,000, and four to five months' imprisonment for amounts of about $20,000 to $25,000. In light of these precedents, a sentence of seven months' imprisonment for the amount involved of $56,000 was appropriate.

Decision

8 While some factors were not properly weighted, I conclude that the sentence should not be disturbed as it is, overall, appropriate.

Sentencing Approach

9 Of the various factors considered or argued for, I am primarily concerned in these remarks with the age of the victim, the impact on the financial industry, restitution, and premeditation or planning. I am also concerned that parties and the sentencing court should be mindful of the need

to consider applicable factors carefully and not treat the sentencing process as one of merely affixing labels without deeper consideration.

Vulnerability

10 While this was not a substantial plank on which the DJ rested his decision on sentence, the Prosecution did argue that the victim, who was 60 at the time of the offence, was a vulnerable victim because of her age.

11 A person being 60 cannot by itself show vulnerability. 60 is far too young for that. There are many lawyers and judges who are in their 60s and are very far from being vulnerable. The same holds true of most, if not all professions.

12 In the context of cheating charges, for age to indicate vulnerability, there would have to be an impact on mental faculties, or something to indicate an increased dependency on others, or a proclivity to misplacing trust. Someone being 60 is not automatically vulnerable in that regard; I am in fact doubtful that even many at 70 or 75 could be, without more, so described. If the assertion by the Prosecution is that there has been some exploitation of a particular vulnerability present in someone of the age of 60, it should point to that vulnerability specifically. Such vulnerability might take the form of some mental illness, an unusual lack of expertise of understanding of ordinary concepts, or a deterioration in mental abilities caused by the onset of some disease. But, the Prosecution cannot ask the court to take a 60 year old as being vulnerable to an offence of cheating without more. Where the Court may more readily accept vulnerability because of age is where the crime involves some physical threat or use of force. The Court would be willing to accept that in

general, in the absence of other evidence, a victim of 60 and above would be physically vulnerable.

Threat to the financial industry, a financial institution or a facility

13 I am doubtful that there has been anything of a nature that would engage this factor here. What the Appellant did was to use a letter purportedly in the name of the Chief Executive of the DBS Bank. She had also told the victim that the scheme in question was one that involved the DBS Bank.

14 The invocation of the names of personalities, corporate leaders, and political leaders is not unknown and importantly not uncommon in cheating cases. Neither is the use of the name of a recognised financial institution

15 It is clear that it is not every such invocation or use of the names of prominent individuals or of existing financial institutions that would bring a case within the ambit of the principle in *PP v Fernando Payagala Waduge Malitha Kuma* [2007] 2 SLR(R) 334 ("*Payagala*"). *Payagala* involved charges of misappropriation of a credit card, as well as cheating through the fraudulent use of that credit card. The Court in that case recognised at [19] that the fraudulent use of a credit card increased the gravity of a cheating offence. At [20], the Court further noted that:

> Singapore's standing as an international financial, commercial 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.

16 The consideration in *Payagala* was of a threat to the international standing of Singapore; prevalent credit card fraud would undermine Singapore's tourism, trade, and investment landscape by affecting genuine transactions. Credit card fraud is pernicious since it can be hard to detect, both in respect of a) forgeries, that is the use of counterfeit cards, as well as b) the use of genuine cards by persons other than the actual cardholder. Measures taken to combat either of these will likely affect the ease of use of credit cards and undermine confidence in their use and acceptance. It is with that in mind that general deterrence was merited for the credit card fraud committed in that case, despite the offender being young and only in Singapore on transit.

17 However, that need to protect the general standing of Singapore, and to safeguard financial transactions carried on in Singapore, is not triggered in the present case. The actions of the Appellant are not the sort as to undermine confidence in the financial system on a systemic level, and would seem to be readily detectable. Genuine investment in genuine products would likely not be discouraged by the criminal acts of the Appellant, reprehensible though the Appellant's acts may be. Nor would her acts conceivably affect the reputation of the DBS Bank or its CEO: all the Appellant had to sustain her assertion concerning DBS Bank were her words and a fake email, without even anything like a DBS Bank letterhead. It may be otherwise if one were to encounter a well-crafted fake website, or even fake brochures or other such investment-linked paraphernalia.

Planning and premeditation

18 The DJ found that there had been some planning in the present case, and that such planning was a factor which went towards sentencing. Certainly, there had been some planning involved, but it was not something of the nature as to attract a substantial increase in sentence. The level of sophistication and preparation here did not indicate a markedly increased level of criminal culpability, nor did it indicate any substantive degree of subterfuge or premeditation.

Restitution

19 Even if full restitution is given, such restitution may be of limited effect in showing remorse, and really only goes to reducing the economic harm caused. Here the DJ found, citing *Anne Gan*, that where economic harm is reduced, late restitution would still be mitigatory. I would note however that the Chief Justice's consideration of the issue in *Anne Gan* was made in the context of a situation where there was no intention on the part of the accused to personally benefit, and it may be that the overall effect of late restitution as regards offenders who have benefited personally would have to be considered more fully on another occasion.

Labelling

20 At this juncture, I would like to highlight that parties and Judges all have to be careful in how they approach sentencing submissions. Sentencing is not an exercise in labelling or slotting features into categories of aggravating and/or mitigating factors. Taxonomy should not take centre-stage in sentencing for its own sake. Where particular facts are relied upon to evidence either aggravating or mitigating considerations, regard must be had to the actual ambit of the facts

and their relevance, purpose, and function in the sentencing process. Labelling a particular fact as showing 'old age', 'vulnerability' or 'misuse of a financial instrument' without going deeper would rarely be useful, and often, as is the case here, might actually be unhelpful. In determining the appropriate sentence, Judges should carefully weigh and consider how these factors are actually in play in the cases before them.

Sentencing Precedents.

21 No sentencing framework has yet been laid down for offences of this nature. This is not to my mind, however, an appropriate case for such a framework to be laid down. It is sufficient in this case to consider how the current circumstances sit alongside the precedents relied upon by both sides. The primary considerations in this regard are:

(a) The quantum involved;

(b) The effect of the restitution; and

(c) The weight that can be attributed to the plea of guilt.

I note in addition that the DJ had accepted that the victim was vulnerable because of her age, and that there had been an impact on the financial system which was aggravating. As has been noted above, I was not convinced that, based on the evidence, these factors were actually engaged on the instant facts.

22 I will consider in these remarks only some of the precedents cited, and in particular those which I find most useful to comment on. I note in *PP v Chen Young Ja* [2014] SGDC 454, a total of 5 months' imprisonment was imposed following the accused's plea of guilt in facts concerning a sum of about $21,000 that was cheated, with full restitution having been made. That sentence would

appear to be appropriate. In comparison, in *Lee Hwai San*, 4 months' imprisonment was imposed for a total of $65,000 cheated, with full restitution also having been made. It is of note that the accused in *Lee Hwai San* had made a substantial amount of partial restitution to the victim even before having been charged. Given that factor, the ultimate sentence in *Lee Hwai San* may have been correct, though perhaps at the lower end of the appropriate range.

23 The quantum involved in the present case called for the imposition of a substantial term of imprisonment. Deterrence was an important sentencing consideration on the facts. Taking the other factors into account, I am of the view that the DJ only really erred in ascribing some aggravating weight to an alleged impact on the financial industry on the facts. It would not seem that substantial store was placed by the DJ on the supposed vulnerability of the victim simply because of her age. The primary sentencing factor, as the DJ correctly identified, was the quantum cheated, though the DJ may have given somewhat more weight to the erasing of harm by restitution that I would have done myself. In any event, that operated to the benefit of the Appellant, and is not being appealed against.

24 On an overall assessment, weighing the quantum, the plea of guilt, and restitution made, and taking into account that there was neither impact on the financial sector nor exploitation of vulnerability through age, the sentence I would have arrived at would be lower than that imposed by the DJ by only a relatively small length, and thus as the sentence below was not manifestly excessive, I do not disturb that sentence of seven months' imprisonment. The appeal is thus dismissed.

Aedit Abdullah
Judge

Dhanwant Singh (S K Kumar Law Practice LLP) for the appellant;
Asoka Markandu and Tan Hsiao Tien (Attorney-General's Chambers) for the respondent.