Sriram s/o Seevalingam *v* Public Prosecutor
[2022] SGHC 168

Case Number : Magistrate's Appeal No 9215 of 2021

Decision Date : 17 August 2022

Tribunal/Court : General Division of the High Court

Coram : Vincent Hoong J

Counsel Name(s) : Lulla Ammar Khan and Derek Kang (Cairnhill Law LLC) for the Appellant; Dhiraj G Chainani (Attorney-General's Chambers) for the Respondent.

Parties : Sriram s/o Seevalingam — Public Prosecutor

Criminal Law – Offences – Cheating

Criminal Procedure and Sentencing – Sentencing

17 August 2022

Vincent Hoong J (delivering the judgment of the court *ex tempore*):

Introduction

1 Sriram s/o Seevalingam ("the Appellant") pleaded guilty to and was convicted of five charges, which included four charges of cheating by personation under s 419 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") and one charge of theft in dwelling under s 380 of the Penal Code. He further consented to have the remaining ten charges taken into consideration for sentencing. The Appellant was sentenced to a total of 12 months' and one week's imprisonment.

2 In this appeal, the Appellant only seeks to challenge the individual sentences imposed for the proceeded charges under s 419 of the Penal Code and the global sentence. He contends that these sentences are manifestly excessive.

3 Having heard and considered both parties' submissions, I allow the Appellant's appeal against sentence in part by reducing the Appellant's sentence in respect of DAC 931281/2019 from nine months' imprisonment to six months' imprisonment. These are the brief reasons for my decision.

My decision

4 To begin, I note that the Prosecution has a broad ambit to decide which charge to prefer based on the same set of facts. For instance, where an accused is found to have stolen items from a convenience store, the Prosecution may prefer a charge of theft in dwelling under s 380 of the Penal Code or a charge of theft *simpliciter* under s 379 of the Penal Code. This is consistent with the Prosecution's discretion conferred under Art 35(8) of the Constitution of the Republic of Singapore (2020 Rev Ed). Hence, as observed by Yong Pung How CJ in *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR(R) 185 at [15]:

> ... The onus lies on the Prosecution in the first place to assess the seriousness of an accused's conduct and to frame an appropriate charge in the light of the evidence available. Once an accused has pleaded guilty to (or been convicted of) a particular charge, *it cannot be open to the court, in sentencing him, to consider the possibility that an alternative – and graver – charge might have been brought and to treat him as though he had been found guilty of the graver charge*. [emphasis added]

5 This statement was endorsed by a three-Judge coram of the High Court in *Public Prosecutor v Ng Sae Kiat and other appeals* [2015] SGHC 191 at [70].

6 That being said, where a less severe charge (*eg*, s 419 instead of s 420 of the Penal Code) is preferred, the sentencing court may consider that a more severe charge could have been preferred in considering the *gravity of the offence* as charged. For example, in *Public Prosecutor v Muhammad Shafie bin Ahmad Abdullah and others* [2011] 1 SLR 325, the offenders were originally charged with rape and sexual assault by penetration of the victim who was 17 years old at the time of the offences. They were subsequently convicted on a reduced charge of aggravated outrage of modesty under s 354A(1) of the Penal Code, with some other charges being taken into consideration by the court. In passing sentence, Chan Seng Onn J (as he then was) took cognisance of the fact that there had been factual rape and sexual assault by penetration, but he stressed that (at [16]):

> Let me be clear that … my taking of cognizance that there was factual rape and sexual assault by penetration was not an exercise … [of] treat[ing] them as though they had been legally found guilty of the charge of rape or sexual assault by penetration (for which the maximum sentence of imprisonment of 20 years is twice that for the reduced charge of aggravated outrage of modesty proceeded with by the Prosecution against each of the Offenders). *Instead, what this exercise really entailed was to recognise that the precise nature of the criminal acts carried out by the Offenders … effectively brought the Offenders' conduct within the more if not most serious category of cases under s 354A(1) of the Penal Code* … [emphasis added]

7 Turning to the present case, what is immediately striking is the factual similarity of this case to that of *Public Prosecutor v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 ("*Fernando Payagala*"). In *Fernando Payagala*, the accused was charged under s 420 of the Penal Code for dishonestly misappropriating the credit card of a fellow passenger on a flight and using his credit card to make purchases valued at $6,007.82. V K Rajah J (as he then was) observed that for non-syndicated credit card offences *under s 420 of the Penal Code*, the starting point should be 12 to 18 months' imprisonment (at [75]). However, after considering the accused's contrition, the lack of proper planning and sophistication in his offending conduct, his personal circumstances, such as his relative youthfulness and lack of antecedents and the fact that he had been released from prison custody before the sentence was enhanced, Rajah J considered that six months' imprisonment was appropriate.

8 Notwithstanding the factual similarity in the cases, the Prosecution, in exercising its discretion, elected to prosecute the accused under s 419 of the Penal Code. This charge carries a maximum penalty of five years' imprisonment, which is *half* the maximum penalty of ten years' imprisonment that may be meted out under the current s 420. However, I also note that the offender in *Fernando Payagala* was convicted under a previous iteration of s 420, which prescribed a maximum punishment of seven years' imprisonment.

9 In my view, given the principle I enumerated earlier, it would be unfair to apply sentencing benchmarks pertaining to s 420 of the Penal Code to determine the appropriate sentence for the Appellant. As Kow Keng Siong observed in *Sentencing Principles in Singapore* (Academy Publishing, 2nd Ed, 2019) ("*Sentencing Principles in Singapore*") at [08.042]: "a court cannot take into account the *sentencing benchmarks* for a graver charge that might have been brought against the accused in deciding the appropriate sentence to be imposed". Concomitantly, "[a] court should be cautious when comparing an offender's case with a different offence in passing sentence, as it may run the risk of being alleged to have been 'influenced by the consideration that the [offender] might have been charged with a more serious offence or … one carrying a greater maximum sentence'": *Sentencing Principles in Singapore* at [08.043].

10 What then should the appropriate sentence be? It would be *useful to consider the sentencing principles enumerated in similar cases*. For example, in *Idya Nurhazlyn bte Ahmad Khir v Public Prosecutor and another appeal* [2014] 1 SLR 756 ("*Idya*"), which was a case involving a s 417 Penal Code offence, Menon CJ referred to *Fernando Payagala* (at [48] of *Idya*) and observed that relevant factors to be taken into account include the value of the property involved, the number and vulnerability of victims and the level of premeditation and deception.

11 Given the lack of reported decisions for offences under s 419 of the Penal Code, it may be useful to ***scale the sentencing range*** *for s 419 of the Penal Code cases with reference to the sentencing ranges for similar offences under ss 417 and 420 of the Penal Code*. This would be commensurate with the principle that "[w]hen Parliament sets a statutory maximum, it *signals the gravity* with which the public, through Parliament, views this particular offence" [emphasis added]: *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [84].

12 However, I caution against relying on cases involving ss 417 and 420 of the Penal Code to directly compute the appropriate individual sentences. The reason for this is simple – each case turns on its own facts. Sentencing is not purely an arithmetic exercise. Neither should it be a mechanistic process. While it is commendable that the parties have assiduously sought to compare the relevant offence-specific and offender-specific sentencing factors in each of the cases cited in order to calibrate their proposed sentences, I find that there is little utility in such an exercise. To this end, the observations of the Court of Appeal in *Public Prosecutor v Leong Soon Kheong* [2009] 4 SLR(R) 63 at [32], are instructive:

> … Due to the extraordinary range of possible factual circumstances, *rigid* adherence to sentencing precedents and/or attempts to *narrowly distinguish* them are ordinarily not very helpful, and, indeed, may sometimes lead to missing the wood for the trees …

13 Bearing this in mind, I am of the view that a sentence of six months' imprisonment would be more appropriate for DAC 931281/2019, for these reasons:

(a) First, I note that custodial sentences of between four to eight months' imprisonment have ordinarily been imposed for cheating offences under s 417 of the Penal Code resulting in losses of between $1,000 and $15,000: *Idya* at [47]. I also have regard to the starting point set out in *Fernando Payagala* of between 12 to 18 months' imprisonment for credit card cheating offences prosecuted under s 420 of the Penal Code. Nonetheless, I treat these sentencing ranges with care bearing in mind that the Appellant in this case was charged under s 419 of the Penal Code, which carries a lighter maximum penalty than s 420 of the Penal Code and a heavier maximum penalty than s 417 of the Penal Code.

(b) Second, I consider the relevant sentencing factors in this case, including:

(i) That general and specific deterrence is the dominant sentencing consideration for credit card cheating cases as recognised in *Fernando Payagala*.

(ii) The total sum involved in the cheating by personation offences (including the charges that were taken into consideration) of $6,252.30 is not insubstantial. There was also actual loss caused to the various establishments visited by the Appellant, one of the credit cardholders and also to the banks that provided chargebacks to another two victims.

(iii) The number of the charges that were taken into consideration, which included six similar charges under s 419 of the Penal Code, demonstrating the Appellant's repeated offending.

(iv) The lack of planning and sophistication.

(v) The Appellant's early plea of guilt.

(vi) The Appellant making partial restitution.

(c) Third, a sentence of six months' imprisonment is broadly consistent with the cases of *Public Prosecutor v Song Hauming Oskar and another appeal* [2021] 5 SLR 965 ("*Oskar Song*") and *Keeping Mark John v Public Prosecutor* [2017] 5 SLR 627 ("*Keeping Mark John*"):

(i) In *Oskar Song*, the offender used a credit card which he had found on the floor on *103 occasions* over a period of less than three months to purchase items with a total value of $20,642.28. He was charged with an amalgamated cheating charge under s 417 of the Penal Code read with s 124(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). In that case, I considered that a starting point of 12 months' imprisonment was appropriate. Nonetheless, having regard to his mental disorders, I ultimately imposed a sentence of eight months' imprisonment. Having regard to the fact that the charge under s 417 of the Penal Code in *Oskar Song* was amalgamated and the amount involved was more than three times of that in the instant case, I am of the view that a sentence of six months' imprisonment is appropriate notwithstanding the higher number of victims disclosed in the present case.

(ii) I have also considered the case of *Keeping Mark John*, which is the only recent reported High Court decision involving an offence under s 419 of the Penal Code. There, the offender pleaded guilty to a single charge of abetment of cheating by personation under s 419 read with s 109 of the Penal Code. The offender had been recruited by a people smuggling syndicate to facilitate the illegal entry of one Kajanan into New Zealand. His role was to check in for a flight to New Zealand in his own name, and after having done so, to hand the boarding pass to Kajanan, who would use it and a forged passport to board the flight to New Zealand. He received US$600 for his role in the scheme. The District Judge sentenced him to 12 months' imprisonment. On appeal, Chao JA observed that "the benchmark sentence for s 419 [of the Penal Code] offences committed in the context of people smuggling should be a term of imprisonment of four to six months" (at [38]). However, as the offence was "perpetrated by a transnational syndicate, and one in which the [offender] was very much involved at that, a sentence at the higher end of the benchmark range was warranted". Given the need to differentiate between local and transnational syndicates, a sentence of nine months' imprisonment was warranted. The circumstances in *Keeping Mark John* are very different from the present case, but it demonstrates that for a case of a local nature involving small value items (such as the present), a sentence of about six months' imprisonment would be more appropriate.

14 Lastly, I find that there is no reason to disturb the District Judge's decision to order the sentences in DAC 931281/2019, DAC 933435/2019 and DAC 933445/2019 to run consecutively, as this reflects the overall criminality of the Appellant and the persistent pattern of his offending.

15 For these reasons, I allow the Appellant's appeal against sentence to the extent of reducing the sentence in DAC 931281/2019 from nine months to six months' imprisonment. This sentence is to run consecutively with the sentences in DAC 933435/2019 and DAC 933445/2019. The appeal against the remaining individual sentences is dismissed. The global sentence is thus nine months and one week's imprisonment.

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