

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL 6/16 (Petcu)

IND 8/16 10-11/16 C# C#06682/15

CICA 7/16 (Bud-Popa)

IND12/16 C#06692/2015

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Ionut-Catalin Petcu (IP)

Marius-Ioan Bud-Popa (IP)

Appellants

Before:

**The Hon Sir George Newman, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Hon (Cecil) Dennis Morrison, Justice of Appeal**

Appearances: Toyin Salako for DPP/ Petcu & Bud-Popa in person/Romanian INTERPRETER for Bud-Popa translating.

JUDGMENT

Revised from transcript of oral judgment given on August 2016 and Approved
Released 10 January, 2017

The Honourable George Newman, JA

1. These appellants appeal against sentences imposed upon them by acting judge Mr Justice Alastair Malcolm sitting in the Grand Court on 16th of March 2016.
2. They each pleaded guilty to offences, in particular, the offence of conspiracy to defraud and a number of offences which represented the various overt acts of dishonesty committed in the course of the conspiracy. Each of them were

sentenced to 30 months' imprisonment for the conspiracy to defraud, and to concurrent sentences of nine months in respect of the other counts.

3. There were five defendants before the court in connection with the conspiracy. All of them pleaded guilty to this principal charge for which the court was required to sentence them.
4. Each of the appellants has appeared in person. They have maintained that the sentence of 30 months is harsh and excessive and that it has been based on errors made by the judge as to the intended harm and the actual harm to which the implementation of the conspiracy actually gave rise.
5. As I indicated in the course of the argument this morning, the proper approach to sentencing in respect of offences such as these is that you have regard to the charge which embraces the criminality involved. The criminality which the court was concerned with, and with which this court is also concerned, is that these defendants joined together in a criminal enterprise which was, by its agreement, had as its objective to cause financial harm to banks and account holders in the Cayman Islands to whatever extent they were able to achieve.
6. The question of what harm was intended is, fact is answered by paying regard to what was done to implement the conspiracy, but the central point is what the court can be satisfied was the obvious intended harm to which their agreement gave rise.
7. This was a sophisticated conspiracy. This court has regard to the careful planning and preparation and the use of expertise in connection with card data, the extent of the card data which was available to them for the purposes of the conspiracy, namely the data which was on the computer files with accompanying PIN numbers in respect of account holders outside the Cayman Islands.

8. These appellants arrived together in the Cayman Islands on the 30th of October 2015. They came from Jamaica in company with a third conspirator. Their journey from Romania to Cayman was for the purposes of the conspiracy. The ATMs in Cayman were known at that time as more susceptible to credit card scams of this nature.
9. The circuitous nature of the travel is itself a demonstration of the planning. Bud-Popa travelled from Budapest to Paris on the 21st of October, travelled from Paris to Guadeloupe on the fourth of October, and from Guadeloupe to Dominican Republic on the fifth of October. The appellant Petcu made his way to the Dominican Republic via Madrid on the 22nd of September. They all arrived in Cayman via Kingston, Jamaica, on the 30th of October. They got to work on the ATMs quickly. The first report from one of the banks, the Cayman National Bank, was on the second of November.
10. In his careful written, prepared submissions, Mr. Petcu has made a number of points — very skillfully, one might say — in which he has, with considerable attention, paid regard to the schedules of evidence used below as to the number of Cayman Islands dollars which were actually withdrawn from ATMs. He has paid particular attention to the lengthy schedule which the prosecution relied upon to show the number of attempts to withdraw which were unsuccessful.
11. The process of dealing with the details of a prosecution's case when someone pleads guilty can take the form of a challenge to the details of the prosecution's case. That will be done where there is an identifiable, clear dispute about hearing evidence on the issue. Short of there being no evidence, then it is of course open to a defendant, and indeed to an appellant, to draw attention to inconsistencies and weaknesses in the evidence upon which the prosecution rely. That is what Mr. Petcu has done today.
12. That is what, to a certain extent, took place before the sentencing judge. In paragraph 9 of his sentencing remarks, he stated the figure for attempted withdrawals is said by the defense to be misleading. He drew attention to the argument that there had been duplication in the schedule. As a result, when he came to sentence, he was required to have regard to the harm which had been done, but he said: Even bearing in mind the criticism of the figures by the defense, I am satisfied that the conspirators intended to obtain well in excess of

20,000 pounds sterling. Upon the basis of that finding and assessment on the evidence, he placed the case in category 3 of the Sentencing Guidelines.

13. We are entirely satisfied that in settling upon that figure as the intended harm, the judge had taken account of such argument as he had heard and about the extent of the possible duplication. We see no reason to differ from the conclusion reached by the judge in this regard.

14. When considering the intended harm, this court has to point out that it is not impressed by arguments such as; the computer did not belong to Mr. Petcu and that he did not really know how much data there was upon it. That is unimpressive as an argument because in this context we are dealing with a conspiracy, and we are not concerned to go into that sort of detail, nor to take account of that sort of contention, in order to reach our conclusion on the appeal.

15. The judge gave detailed consideration to the appropriate sentence. The appellant Petcu is 27 years old, or was at the material time, but he had a significant record of similar offending in the United Kingdom, Italy and France, and had been sentenced to imprisonment for 12 months in the United Kingdom.

16. The appellant Bud-Popa, 42 years old. He also had previous convictions — robbery, aggravated larceny in Romania, theft and business-related offences in Austria. In 2011, 2012 and again in 2013 he was convicted of the fraudulent use of data processing.

17. This conspiracy involved people coming together with the settled intention of defrauding banks and customers by the use of their expertise. It was conduct for which they had been found guilty in other jurisdictions and for which they had been sentenced. And they came to the Cayman Islands as part of a scheme because it was known and believed the ATMs in the Cayman Islands were susceptible to the abuse their expertise enabled them to perform.

18. The judge took an impeccable approach. He considered the seriousness of the conspiracy. He considered the sentencing court guidelines and correctly

identified the sophisticated nature of the conspiracy and the significant level to which the conspiracy had been taken, which, as I pointed out, put it into the high category.

19. The starting point in a category 3 case is three years with a range of 18 months to four years custody. The judge, having taken the starting point, having considered the relevant factors, then took account of aggravating or mitigating circumstances.
20. So far as Petcu is concerned, he found that the previous convictions were an aggravating factor. That means he raised the starting point from three years six months to three years nine months, but he gave full discount of one third for the plea of guilty, and thus reduced the sentence to 30 months.
21. For Bud-Popa he paid regard to similar factors, but he concluded that Bud-Popa in particular had aggravated the circumstances of his case because he had lied to the police about his previous convictions when interviewed, but he gave Bud-Popa one third discount for the plea of guilty, and thus 30 months was again arrived at.
22. I regard the sentencing judge's exercise as impeccable. He paid regard to the arguments about the frailty of some of the evidence, the errors and so forth. He reached the conclusion on the loss which was open to him on the evidence. He had no reason to distinguish between the role performed by either of these appellants. We see no reason for concluding that this sentence can be characterised as so excessive that this court should intervene.
23. I only wish to add one point about an argument advanced by Mr. Petcu in relation to the time for release on parole. The time for a prisoner sentenced to imprisonment to be released on parole is a matter for authorities other than this court. If there are any points or issues which either of these appellants wish to raise with the relevant authorities in connection with the time for their release, then they are issues which can be taken up with the appropriate authority, in particular the Parole Board.
24. The appeals are dismissed and sentences affirmed.

Newman, JA

Field, JA

Morrison, JA