Public Prosecutor
v
Law Aik Meng

[2007] SGHC 33

High Court — Magistrate's Appeal No 164 of 2006
V K Rajah J
26 January; 7 March 2007

Criminal Procedure and Sentencing *— Sentencing — Principles — Accused pleading guilty to charges under Computer Misuse Act and Penal Code for working in syndicate involved in perpetrating ATM card fraud — Whether totality principle and one-transaction rule for sentencing applicable — Sections 4, 10 Computer Misuse Act (Cap 50A, 1998 Rev Ed)*

Criminal Procedure and Sentencing *— Sentencing — Principles — Policy underpinning deterrent sentencing — Offences normally attracting deterrent sentence*

Criminal Procedure and Sentencing *— Sentencing — Principles — Whether relevance of foreign case law limited to clarifying principles only — Whether quantum of sentencing in other jurisdictions relevant*

Facts

The respondent, a male Malaysian national, was a member of an organised syndicate based in West Malaysia. The objective of the syndicate was to skim data from genuine automated teller machine ("ATM") cards in order to manufacture cloned ATM cards with which fraudulent withdrawals could subsequently be made.

The syndicate successfully withdrew a total of $18,590 from various bank accounts with the cloned cards before this was detected and stopped. 849 bank accounts were affected. No restitution was made by the respondent or any member of the syndicate to the affected bank for any of its losses.

The respondent pleaded guilty and was convicted on six charges before the District Court: two charges under s 4 read with s 10 of the Computer Misuse Act (Cap 50A, 1998 Rev Ed) ("CMA") for engaging with accomplices to cause a computer to secure access to the data in the Central Computer Systems of the bank, with the intention of using that access to commit theft of cash in possession of the bank; and four charges under s 379 read with s 109 of the Penal Code (Cap 224, 1985 Rev Ed) for conspiring with accomplices to commit theft of cash from the possession of the bank through an ATM. 94 further charges (70 CMA charges and 24 Penal Code theft charges) were taken into consideration for the purposes of sentencing. The trial judge sentenced the respondent to 20 months' imprisonment on each of the CMA charges proceeded with, and to six months' imprisonment on each of the theft charges proceeded with. The sentences of the two CMA charges and two of the theft charges were ordered to run consecutively. In effect, the entire sentence to be served by the

respondent amounted to 52 months' imprisonment. The Prosecution appealed against the sentence.

Held, allowing the appeal:

(1) While foreign authorities were helpful in clarifying the relevant sentencing principles in connection with a particular offence, the precise quantum relating to sentences imposed by foreign courts could not afford an appropriate guide or benchmark for sentencing by our courts. Public interest was the court's foremost consideration when deciding on an appropriate sentence, but public interest was not a static concept fossilised by time or space, but rather a dynamic one, shaped and coloured by the circumstances and mores of a particular society. For that reason, sentencing courts had to be extremely circumspect when devising sentencing benchmarks based on another jurisdiction's public policy or interest: at [15] and [16].

(2) Both specific and general deterrence were usually appropriate in instances where the crime was premeditated. But premeditated offences aside, there were many other situations relating to the type and/or circumstances of a particular offence where general deterrence assumed significance and relevance. Some examples of the types of offences, which warranted general deterrence were: (a) offences against or relating to public institutions, such as the courts, the police and the civil service; (b) offences against vulnerable victims; (c) offences involving professional or corporate integrity or abuse of authority; (d) offences affecting public safety, public health, public services, public or widely-used facilities or public security; (e) offences affecting the delivery of financial services and/or the integrity of the economic infrastructure; and (f) offences involving community and/or race relations. Examples of particular circumstances of an offence which might attract general deterrence included: (a) prevalence of the offence; (b) group/syndicate offences, (c) public disquiet; (d) difficulty of detection and/or apprehension; and (e) offence affecting several victims. One always had to bear in mind that such broadly-defined areas of misfeasance attracting general deterrence as a sentencing consideration were by no means mutually exclusive or cumulatively exhaustive: at [22], [24] to [26].

(3) In addition to so starkly exemplifying numerous areas of misfeasance warranting general deterrence, the crime in question also assumed the guise of an electronic commerce offence that had to be categorically denounced and severely penalised so as to deter similar would be offenders. The fact that this was the first case of its kind to come before the courts, that such offenders were notoriously difficult to apprehend, compounded by the abhorrent prospect that foreigners might be tempted to target and enter Singapore for the sole purpose of carrying out such illegal enterprises, called for nothing less than a resoundingly severe deterrent sentence: at [28].

(4) Parliament intended that offences prosecuted under the CMA be treated seriously, and that deterrence functioned as a necessary sentencing consideration in all such offences. The deliberate prosecution of ATM fraud offences under the CMA in lieu of the Penal Code signalled to the court that it should consider whether to treat the offences even more seriously than if the Prosecution had opted to invoke the provisions of the Penal Code. Further, the maximum imprisonment term of s 4 read with s 10 of the CMA was higher than

that of the applicable offences under the Penal Code and invoking the CMA undoubtedly denoted that a more serious offence had been committed, implying in turn that an enhanced sentence might be in order: at [38] and [39].

(5) An appropriate starting point of the sentencing tariffs for CMA offences would be in the range of 24 to 48 months' imprisonment for each charge. Mitigating and aggravating factors would then be factored in to discount or increase the sentence accordingly. The present case had a number of aggravating features: the respondent played a vital part both in the manufacture of the counterfeit ATM cards and within the criminal syndicate; and the respondent faced a substantial number of charges. Other aggravating factors included the extent of the planning and premeditation involved; the sophistication of the offences as evidenced by the advanced skimming devices utilised; the damage caused – both tangible and intangible; as well as the inescapable international dimension of the offences. The sentence of 20 months' imprisonment for each CMA charge imposed by the trial judge was therefore manifestly inadequate; a term of 42 months' imprisonment for each CMA charge would better reflect and serve the twin goals of deterrence and retribution and was also an appropriately commensurate sentence both in relation to the severity of the offence as well as the culpability of the offender: at [45] to [48].

(6) The one-transaction rule could be interpreted in terms of proximity in time and proximity in type of offence. Applying these principles to the present case, even if the offences committed at different ATMs in Singapore could be regarded as having been perpetrated against the same victim (*ie*, the bank), the offences were nevertheless not committed within a relatively short space of time. The requisite "proximity in time" element was to that extent absent and the offences could not be construed as a "single transaction". Further, the one-transaction rule was not to be construed as a hard and fast rule rigidly applied across the board. Where consecutive sentences were in keeping with the gravity of the offence, courts could not impose concurrent sentences simply because they felt fettered by the presumed operation of the one-transaction rule. Thus, even if the offences in the present case might conceivably be perceived as part of a single transaction, consecutive sentences were in fact dictated by the gravity of the offences involved: at [52], [53], [55] and [56].

(7) The totality principle guided the court in sentencing an offender guilty of more than one offence, ensuring that the total sentence remained proportionate to the gravity of the context. It was axiomatic that the totality principle, not dissimilarly from its one-transaction counterpart, functioned not as an inflexible rule, but rather as a helpful guideline to remind the court that the correlation of the sentence to the gravity of the offender's conduct and offences was of critical importance. In short, sentences had to be restrained by the principle of proportionality. Having accorded due consideration to the totality principle, a cumulative imprisonment term of 12 years' imprisonment in the present case was appropriate: at [58] and [60].

Case(s) referred to

Angliss Singapore Pte Ltd v PP [2006] 4 SLR(R) 653; [2006] 4 SLR 653 (refd)

Chia Kim Heng Frederick v PP [1992] 1 SLR(R) 63; [1992] 1 SLR 361 (refd)

HKSAR v Cheng Hung Man [2003] HKLCU LEXIS 1366 (refd)

Kanagasuntharam v PP [1991] 2 SLR(R) 874; [1992] 1 SLR 81 (refd)

Maideen Pillai v PP [1995] 3 SLR(R) 706; [1996] 1 SLR 161 (refd)

McKechnie (Court of Criminal Appeal, NSW) (1 October 1987) (refd)

Meeran bin Mydin v PP [1998] 1 SLR(R) 522; [1998] 2 SLR 522 (refd)

Moganaruban s/o Subramaniam v PP [2005] 4 SLR(R) 121; [2005] 4 SLR 121 (refd)

Mohammed Zairi bin Mohamad Mohtar v PP [2002] 1 SLR(R) 211; [2002] 1 SLR 344 (refd)

Navaseelan Balasingam v PP [2007] 1 SLR(R) 767; [2007] 1 SLR 767 (folld)

Ong Tiong Poh v PP [1998] 2 SLR(R) 547; [1998] 2 SLR 853 (refd)

Ooi Joo Keong v PP [1996] 3 SLR(R) 866; [1997] 2 SLR 68 (refd)

PP v Chan Chuan [1991] 1 SLR(R) 14; [1991] SLR 335 (refd)

PP v Fernando Payagala Waduge Malitha Kumar [2007] 2 SLR(R) 334; [2007] 2 SLR 334 (refd)

PP v Lim Boon Hong Magistrate's Appeal No 26 of 2000 (distd)

PP v Mohammad Farhan bin Moh Mustafa District Arrest Case No 1808 of 2004 (refd)

PP v Muhamad Hasik bin Sahar [2002] 1 SLR(R) 1069; [2002] 3 SLR 149 (refd)

PP v Navaseelan Balasingam [2006] SGDC 156 (distd)

PP v Nazarudin bin Ahmad [1993] 2 MLJ 9 (refd)

PP v NF [2006] 4 SLR(R) 849; [2006] 4 SLR 849 (refd)

PP v Ng Tai Tee Janet [2000] 3 SLR(R) 735; [2001] 1 SLR 343 (refd)

PP v Rohaazman bin Ali [2001] SGDC 339 (refd)

PP v Sayidina Ali bin Ibie [1989] 2 MLJ 137 (refd)

PP v Tan Fook Sum [1999] 1 SLR(R) 1022; [1999] 2 SLR 523 (refd)

PP v Yap Sin Peng [1986] 2 MLJ 66 (refd)

R v Caird (1970) 54 Cr App R 499 (refd)

R v Cenan [2004] EWCA Crim 3388 (refd)

R v Dixon-Jenkins (1985) 14 A Crim R 372 (refd)

R v James Henry Sargeant (1974) 60 Cr App R 74 (refd)

R v John Barrick [1985] 7 Cr App R (S) 142 (refd)

R v Kane (1987) 29 A Crim R 326 (refd)

R v Mayer [2006] ABPC 30 (refd)

R v Peter John Kastercum (1972) 56 Cr App R 298 (refd)

R v Taj; R v Gardner and R v Samuel [2003] EWCA Crim 2633 (refd)

R v Taylor (1985) 18 A Crim R 14 (refd)

Rahj Kamal bin Abdullah v PP [1997] 3 SLR(R) 227; [1998] 1 SLR 447 (refd)

Reg v Glenister [1980] 2 NSWLR 597 (refd)

Sim Gek Yong v PP [1995] 1 SLR(R) 185; [1995] 1 SLR 537 (refd)

Tan Kay Beng v PP [2006] 4 SLR(R) 10; [2006] 4 SLR 10 (refd)

V Murugesan v PP [2006] 1 SLR(R) 388; [2006] 1 SLR 388 (refd)

Wong Kai Chuen Philip v PP [1990] 2 SLR(R) 361; [1990] SLR 1011 (refd)

Xia Qin Lai v PP [1999] 3 SLR(R) 257; [1999] 4 SLR 343 (refd)

Legislation referred to

Computer Misuse Act (Cap 50A, 1998 Rev Ed) ss 4, 10
Penal Code (Cap 224, 1985 Rev Ed) ss 109, 379, 511

April Phang (Deputy Public Prosecutor) for the appellant;
S Dhillon (Dhillon & Partners) for the respondent.

[Editorial note: This was an appeal from the decision of the District Court in [2006] SGDC 243.]

7 March 2007

V K Rajah J:

1 Automated Teller Machines ("ATMs") were first modestly devised as cash dispensers for fully integrated banking networks. They gradually evolved to facilitate various other transactions such as account checking, the acceptance of cash deposits, currency recognition, monetary transfers, printing of bank statements, updating passbooks, *inter alia*. Today, they function as a veritable boon to the public, affording what can only be described as the epitome of ease both in terms of accessing cash as well as executing other essential transactions outside banking hours. Their ubiquitous presence has spared many financial institutions the need to erect brick and mortar branches, which has in turn helped to significantly reduce the costs of banking transactions.

2 By facilitating round-the-clock access to their services, ATM networks not only symbolise unprecedented convenience, they have also come to represent an *indispensable* conduit for the execution of a plethora of banal financial transactions. Unfortunately, but not altogether surprisingly, the proliferation of ATM facilities has engendered a corresponding proliferation in card related fraud. This in turn has from time to time undermined public confidence in the ability of banks to securely and effectively conduct electronic transactions. The attendant compromise on the secrecy of a customer's banking account compounded by the difficulty in apprehending such offenders, tilts the balance heavily in favour of *substantially deterrent sentences* for such offences.

3 The instant case is the first of its kind in Singapore to involve the *entire* criminal enterprise of ATM fraud. Commencing with card skimming and progressing to the transfer of "stolen" data onto cloned ATM cards, it culminated in the use of these cloned cards to withdraw money from the violated accounts. Having pleaded guilty, the respondent was convicted on six charges before the District Court. The charges are as follows:

> (a) *Two charges* under s 4 read with s 10 of the Computer Misuse Act (Cap 50A, 1998 Rev Ed) ("CMA") for engaging with accomplices to cause a computer to secure access to the data in the Central

Computer Systems of the Development Bank of Singapore Limited ("DBS"), with the intention of using that access to commit theft of cash in the possession of DBS; and

(b) *Four charges* under s 379 read with s 109 of the Penal Code (Cap 224, 1985 Rev Ed) ("Penal Code") for conspiring with accomplices to commit theft of cash from the possession of DBS through an ATM.

4 94 further charges (70 charges under s 4 read with s 10 of the CMA; ten charges under s 379 read with s 109 of the Penal Code; and 14 charges under s 379 read with s 511 of the Penal Code) were taken into consideration for the purposes of sentencing.

5 The respondent was sentenced by the district judge ("the trial judge") to 20 months' imprisonment on each of the CMA charges proceeded with, and to six months' imprisonment on each of the theft charges proceeded with. The sentences of the two CMA charges and two of the theft charges were ordered to run consecutively. In effect, the entire sentence to be served by the respondent amounted to 52 months' imprisonment. When a dissatisfied prosecution appealed, I allowed the appeal and enhanced the sentences to the following terms: 42 months' imprisonment for each of the two CMA charges; 15 months' imprisonment for each of the four theft charges. The sentences in *all* six charges are to run *consecutively*, giving rise to a term of 144 months' (12 years') imprisonment.

The facts

6 The respondent who is a male Malaysian national was a member of an organised syndicate based in West Malaysia. The objective of the syndicate was to skim data from genuine ATM cards in order to manufacture cloned ATM cards with which fraudulent withdrawals could subsequently be made. This was implemented by planting skimming devices at ATMs. The skimmer, a data capturing card reader, would capture the card information of account holders who used the ATM. A pin-hole camera was concealed above the ATM monitor to capture the act of cardholders keying in their Personal Identification Numbers ("PINs") on the keypad. These video images were then transmitted wirelessly to an MP4 player, which was also concealed nearby. The data would later be transferred to West Malaysia, where the syndicate would decrypt the data and process multiple cloned ATM cards. Finally the cloned cards would be employed to make fraudulent withdrawals of cash from the same ATM network in Singapore.

7 The respondent's role was to plant the skimming devices at certain DBS ATMs in Singapore and then lie in wait in the vicinity. After data from a sufficient number of ATM cards was captured, the respondent and his accomplices would remove the skimming devices and transport them to the syndicate in West Malaysia for the manufacture of cloned cards. The

respondent and his accomplices were also responsible for returning to Singapore to withdraw cash from various ATMs in Singapore with the cloned cards.

8 The syndicate successfully withdrew a total of S$18,590 from Post Office Savings Bank ("POSB") accounts with the cloned cards before this was detected and stopped. 849 POSB accounts were violated during the relevant period and DBS had to both block and replace all these accounts. No restitution was made by the respondent or any member of the syndicate to DBS for any of its losses. The respondent's accomplices are still at large.

Decision of the trial judge

9 The respondent pleaded in mitigation that he had received little education, coming from an impoverished background; that he committed the offences to settle debts; that he was merely a "runner" and not the mastermind; that he regretted committing the offences: see *PP v Law Aik Meng* [2006] SGDC 243 ("GD") at [5]. The prosecution, on the other hand, submitted *inter alia* that the respondent faced a large number of charges and that the criminal acts in question were committed over a period of three months; that there was a high degree of planning and organisation involved in the crime; that the respondent was a member of a vertically integrated syndicated operation; that the manner in which the offences were committed posed serious difficulties both in terms of detection and apprehension: see GD at [6]–[9].

10 The trial judge agreed with the prosecution that such crimes would erode confidence in the commercial and electronic banking systems in Singapore. He was of the view that the ambient circumstances called for a deterrent sentence to hinder both the respondent and other like-minded persons from committing crimes via the electronic systems: see GD at [11]. In computing the sentence, the following cases in various jurisdictions were considered in detail by the trial judge:

(a) *R v Cenan* [2004] EWCA Crim 3388 (English case): the accused and his accomplice were charged with conspiracy to defraud by cloning credit cards and using those cloned cards to obtain cash from machines. The accused was sentenced to three years' imprisonment after pleading guilty. The Court of Appeal reduced the sentence of three years to two years' imprisonment.

(b) *R v Taj; R v Gardner and R v Samuel* [2003] EWCA Crim 2633 (English case): the three accused persons were charged with conspiring with others to defraud banks and other credit card issuing companies through the production of counterfeit credit and debit cards, which were encoded with the details of genuine cards. Taj was sentenced to five years' imprisonment; Gardner was sentenced to four years' imprisonment; and Samuel was sentenced to seven years

detention in a young offender institution. On appeal, the Court of Appeal reduced Samuel's seven-year term to five and a half years. Taj's sentence was reduced to four years, and Gardner's sentence was reduced to three years.

(c) *R v Mayer* [2006] ABPC 30 (Canadian case): the accused pleaded guilty to 28 charges of using forged debit cards and debit card data. He was part of a criminal organisation of individuals. Commenting that investigating the type of criminal activity involved in the case was both difficult and time consuming, the court imposed a global sentence of 18 months' imprisonment.

(d) *HKSAR v Cheng Hung Man* [2003] HKLCU LEXIS 1366 (Hong Kong case): the accused faced three charges: one for the possession of a forged credit card, a second for using the forged credit card, and a third for the possession of equipment for the fabrication of a false instrument. He was sentenced to three years' imprisonment in respect of the first and second charges and four and a half years' imprisonment in respect of the third charge; all sentences were to run concurrently.

(e) *PP v Navaseelan Balasingam* [2006] SGDC 156 ("*Navaseelan*") (local case): the accused was convicted on five theft charges and five charges under s 4 of the CMA for using cloned ATM cards to steal money from United Overseas Bank Limited. Another 258 charges were taken into consideration. The accused pleaded guilty and he was sentenced to six months' imprisonment for each theft charge and 18 months' imprisonment for each charge under the CMA, with two of the theft charges and three of the CMA charges to run consecutively, making a total of 66 months' imprisonment.

11 Unaware that *Navaseelan* ([10(e)] *supra*) would be subsequently appealed against and that the High Court on appeal determined that *all* the CMA charges were to run consecutively and that the accused would have to serve a total of eight and a half years' (102 months') imprisonment (see [59] below), the trial judge relied on the District Court's decision as a benchmark in relation to the present matrix. He noted in particular the greater number of charges taken into consideration in *Navaseelan* (258 charges) as compared to the present case (94 charges), as well as the larger amount involved in *Navaseelan* ($54,000) in contradistinction to the present case ($18,590): see GD at [17]. *In addition, he observed that the sentences imposed in the foreign cases ranged between three to five years' imprisonment*: see GD at [18]. The trial judge then determined that a total sentence of 52 months' imprisonment was appropriate in the present case.

The authorities considered by the trial judge

PP v Navaseelan Balasingam

12 A close examination of *Navaseelan* ([10(e)] *supra*) reveals the factual scenario in that case to be quite different from the present in several aspects. The more obvious differences relate to the nature of the offences and the role of the offender.

Nature of the offences

13 The offences in *Navaseelan* related solely to the use of counterfeit ATM cards to illegally withdraw cash from various ATMs. A syndicate *supplied the counterfeit ATM cards* to the accused. In contrast, the offences in the present case involved an entire train of criminal infractions. The Malaysia-based syndicate, in which the respondent was a key player, systematically planned, organised and targeted an entire banking network in Singapore. The CMA charges in the present case involved the accessing of bank accounts through the use of counterfeit ATM cards and PINs, not unlike *Navaseelan*, but significantly *also* included the audacious planting of skimming devices to secure that access. The bold and brazen nature of the offences in the present case clearly warrants a harsher severe penalty.

Role of the offender

14 A further distinction between *Navaseelan* and the present case relates to the roles of the respective accused persons. In the former case, the accused was convicted for *using* counterfeit ATM cards to withdraw money illegally from ATMs. In the present case, the respondent was convicted not only for the use of counterfeit ATM cards, but also for *planting skimming devices in ATMs to facilitate the manufacture of such cards*. The respondent's role in the criminal scheme was far more immediate and pronounced than that of the accused in *Navaseelan*. In fact, the scheme would not have worked *if not for* steps specifically implemented by the respondent. It is trite law that the greater the extent of the offender's involvement or participation, the higher the sentence warranted (see *PP v Sayidina Ali bin Ibie* [1989] 2 MLJ 137; *PP v Chan Chuan* [1991] 1 SLR(R) 14; *PP v Nazarudin bin Ahmad* [1993] 2 MLJ 9).

Relevance of foreign sentencing precedents

15 The trial judge also appears to have attached considerable weight to a number of sentencing precedents from England, Canada and Hong Kong. I was surprised to note that he went as far as to rubber stamp the actual sentences meted out in these foreign cases as guidelines to fix the upper and lower limits of the sentencing tariff the court ultimately adopted in this case: GD at [18]. It bears emphasis that while foreign authorities are helpful in clarifying the relevant *sentencing principles* in connection with a

particular offence, the *precise quantum* relating to sentences imposed by foreign courts cannot afford an appropriate guide or benchmark for sentencing by our courts. In *Chia Kim Heng Frederick v PP* [1992] 1 SLR(R) 63 at [12] Yong Pung How CJ unequivocally declared:

> Because the approach towards sentencing is governed by the objective in inflicting punishment, which in turn reflects the social environment in a country, it would not be appropriate for a court in Singapore to follow completely the approach and practice followed by English courts in sentences for imprisonment …

16 It has been held that public interest is the court's foremost consideration when deciding on an appropriate sentence; *Sim Gek Yong v PP* [1995] 1 SLR(R) 185. In *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR(R) 653 ("*Angliss*"), I stated at [17] that public interest dictates that in balancing the equation, a sentencing judge should apply his mind to whether the sentence is necessary and justified by the public's concern in deterring and preventing a particular type of criminal conduct. In the present case, public interest definitely figures as a vital, if not dominant consideration. Be that as it may, it is also pertinent to reiterate that public interest is not a static concept fossilised by time or space, but rather a dynamic one, shaped and coloured by the circumstances and mores of a particular society. It has been famously observed in another context that public interest is an unruly horse to mount and once incorrectly mounted is difficult to dismount. For that reason, sentencing courts must be extremely circumspect when devising *sentencing benchmarks* based on another jurisdiction's public policy or interest. Indeed, given the differences in culture, community values, public policy and sentencing attitudes in different jurisdictions, undue and unthinking deference by local courts to the sentencing benchmarks pronounced by foreign courts could well result in sentences inconsistent with and ill-suited to the administration of criminal justice in Singapore.

Principles of sentencing applicable to the present case

17 The conventional considerations, or "classical principles" of sentencing, may be divided into four broad categories: deterrence, retribution, prevention and rehabilitation: *R v James Henry Sargeant* (1974) 60 Cr App R 74 at 77. In a case such as this, where the accused has played a pivotal role in a sophisticated foreign syndicate that has sought to systematically and unflinchingly perpetrate fraud on a massive scale in Singapore, the principles of deterrence and retribution must assume centre-stage. These two principles will therefore be my prime focus.

Deterrence

18 It has been a recurrent theme in our sentencing jurisprudence that "the dominant choice of sentence in advancing the public interest is the deterrent sentence" (see *Sentencing Practice in the Subordinate Courts*

(Butterworths, 2nd Ed, 2003) ("*Sentencing Practice*") at p 73). Yong CJ observed with his customary clarity and acuity in *PP v Tan Fook Sum* [1999] 1 SLR(R) 1022 ("*Tan Fook Sum*") at [18]:

> ... The foremost significance of the role of deterrence, both specific and general, in crime control in recent years, not least because of the established correlation between the sentences imposed by the courts and crime rates, need hardly be mentioned.

19 This approach has been the cornerstone of our sentencing jurisprudence though it has not always been universally acclaimed by academics as invariably effective (see, for example, Andrew von Hirsch, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Hart Publishing, 1999) ("Andrew von Hirsch, 1999")). Ultimately however, the judicial philosophy and approach to crime control in each jurisdiction is a policy decision based on the balancing of communitarian values and concerns against individual interests. It is pointless to attempt to distil from the various strands of foreign criminal legal jurisprudence a universal consensus that could or should be applied in Singapore. The present crime control model premised on a judicious and focussed application of deterrence coupled with the effective apprehension of offenders has worked well for Singapore. There is neither any need nor basis to tamper with the present judicial policy of broadly applying deterrence as a vital sentencing consideration to a variety of different crimes. To pointlessly eclipse this approach would be to ignore the melancholic wisdom in the refrain of an old song: "You don't know what you have got until it is gone".

20 There are two aspects to deterrence: specific and general deterrence. These two aspects correspond to the deterrence of *the offender* and the deterrence of *likely or potential offenders* respectively.

Specific deterrence

21 Specific deterrence operates through the discouraging effects felt when an offender experiences and endures the punishment of a particular offence. Drawing from the maxim "once bitten twice shy", it seeks to instil in a particular offender the fear of re-offending through the potential threat of re-experiencing the same sanction previously imposed.

22 Specific deterrence is usually appropriate in instances where the crime is premeditated: *Tan Fook Sum* ([18] *supra*) at [18]. This is because deterrence probably works best where there is a *conscious* choice to commit crimes. Nigel Walker and Nicola Padfield in *Sentencing: Theory, Law and Practice* (Butterworths, 2nd Ed, 1996) ("Padfield & Walker, 1996") at p 99 explain the theory of "undeterribility". Pathologically weak self-control, addictions, mental illnesses and compulsions are some of the elements that, if possessed by an offender, may constitute "undeterribility", thus rendering deterrence futile. Such elements seem to involve some form of impulse or

inability to make proper choices on the part of the offender, which, by definition, runs counter to the concept of premeditation. It should be pointed out here that this reasoning applies with equal cogency to *general* deterrence (discussed below from [24]–[28]).

23 In the present case, the offences were without a doubt, premeditated and carefully planned. There was a conscious choice and effort on the part of the respondent and his accomplices to devise and carry out the criminal scheme in blatant disregard of the consequences of their conduct on both financial institutions and ATM customers in Singapore. It is appropriate in a case such as this to unequivocally signal that such offenders will be visited with severe punishment.

General deterrence

24 General deterrence aims to educate and deter other like-minded members of the general public by making an example of a particular offender: *Meeran bin Mydin v PP* [1998] 1 SLR(R) 522 at [9] ("*Meeran bin Mydin*"). Premeditated offences aside, there are many other situations where general deterrence assumes significance and relevance. These may relate to the type and/or circumstances of a particular offence. Some examples of the types of offences, which warrant general deterrence are:

(a) *Offences against or relating to public institutions, such as the courts, the police and the civil service*: In *Meeran bin Mydin*, the appellant bribed an immigration officer at Woodlands Checkpoint by giving him money to procure social visit passes to enable various Indonesian nationals to enter Singapore via the checkpoint. A deterrent sentence was imposed by the court. Further, in *Mohammed Zairi bin Mohamad Mohtar v PP* [2002] 1 SLR(R) 211 ("*Mohammed Zairi*"), the appellants were prison guards who were found to have abused the prisoners under their watch; Yong CJ was of the view that a clear message had to be sent that prison brutality would not be condoned under any circumstances.

(b) *Offences against vulnerable victims*: Offences against vulnerable victims often create deep judicial disquiet and general deterrence must necessarily constitute an important consideration in the sentencing of perpetrators. In *PP v NF* [2006] 4 SLR(R) 849, at [42], I stated as follows:

> [O]ur courts would be grievously remiss if they did not send an *unequivocal and uncompromising message to all would-be sex offenders* that abusing a relationship or a position of authority in order to gratify sexual impulse will inevitably be met with the harshest penal consequences. *In such cases, the sentencing principle of general deterrence must figure prominently and be unmistakably reflected in the sentencing equation*. [emphasis added]

Australian courts have taken a similar stance toward offences against vulnerable groups of victims such as the old, the young, the weak and the disadvantaged: see *R v Kane* (1987) 29 A Crim R 326.

(c) *Offences involving professional or corporate integrity or abuse of authority*: In the leading local decision of *Wong Kai Chuen Philip v PP* [1990] 2 SLR(R) 361, Chan Sek Keong J (as he then was) emphatically asserted at [30] that the criminal breach of trust by a lawyer in the discharge of his professional duty must inevitably call for a custodial sentence of a deterrent nature, not so much to deter the offender concerned but rather to deter other members of his profession from committing similar offences. It is axiomatic from this statement that general deterrence is an important consideration in many commercial offences. A similar view was taken by the English Court of Appeal in *R v John Barrick* [1985] 7 Cr App R (S) 142, a guideline judgment declaring that breach of trust by professional workers was a significant aggravating factor that should precipitate more severe penalties: see the observations of Mirko Bagaric in *Punishment & Sentencing: a Rational Approach* (Cavendish Publishing Limited, 2001) at p 139, footnote 49. Offences involving listed companies could similarly come under this category.

(d) *Offences affecting public safety, public health, public services, public or widely used facilities or public security*: In *R v Dixon-Jenkins* (1985) 14 A Crim R 372, the applicant was convicted on counts of threatening to damage property and threatening to injure persons. The applicant was an anti-nuclear activist. He had committed the offences in the hope of furthering the anti-nuclear cause through publicity that would be generated by his operations. His threats naturally resulted in public fear and terror. The court concluded that such a case was one where general deterrence had an overriding impact on the resulting sentence. The court must show that such conduct, however well intended, cannot and will not be tolerated in the community. An example of an offence affecting public safety is that of drunk driving, which puts other road users at a grave risk of danger. *Conduct that hinders or impedes public or social policies must also be categorically denounced*. For example, offences that may subvert the security and convenience of electronic commerce need to be firmly dealt with: see [64]. In fact, all offences threatening to undermine or impair financial systems merit consideration under another category of offences altogether prescribing inexorably hard deterrent sentencing (see [25(e)] below). Such a broad head of public interest protection can also embrace any conduct that forebodes systemic risk or peril of any kind.

(e) *Offences affecting the delivery of financial services and/or the integrity of the economic infrastructure*: The present case affords a

classic and illuminating illustration of such an offence. The public interest vested in a secure and reliable financial system that facilitates convenient commercial transactions is extraordinary, especially in light of Singapore's reputation as an internationally respected financial, commercial and investment hub. Yet another instance of such an offence surfaced in the recent case of *PP v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 ("*Payagala*"), where the appellant made fraudulent purchases with a misappropriated credit card. In imposing a deterrent sentence, I made the following observations at [88]:

> ... 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. ...

The courts will take an uncompromising stance in meting out severe sentences to offences in this category.

(f) *Offences involving community and/or race relations*: Community and racial harmony form the bedrock upon which peace and progress in Singapore are founded. This is often taken for granted but the courts must remain constantly vigilant in ensuring that all offences that jeopardise such a foundation be firmly and resolutely dealt with.

25 Examples of particular *circumstances* of an offence which may attract general deterrence include:

(a) *Prevalence of the offence*: In the Australian case of *R v Taylor* (1985) 18 A Crim R 14, the prevalence of armed robbery in a dwelling place was a factor which precipitated to the court's finding that deterrence was necessary. Locally, in *Ooi Joo Keong v PP* [1996] 3 SLR(R) 866, a "road bully" case, Yong CJ was of the view that where an offence was becoming prevalent in Singapore, such prevalence constitutes a relevant consideration in sentencing; where there are grounds for judicial concern about the prevalence of particular offences, the court will mete out a stiff sentence to show its disapproval and to deter like-minded offenders (see *Sentencing Practice* ([18] *supra*) at p 73).

(b) *Group/syndicate offences*: The fact that an offence was committed by two or more persons may be regarded as an aggravating factor (see *Sentencing Practice* at p 84). Group offences generally result in greater harm. Another significant factor is that the victim is likely to be in greater fear in cases where physical intimidation is exerted. Further, group pressure to perpetuate such offences may add to their persistency, and group dynamics necessarily imply greater harm or damage: see Professor Andrew Ashworth in *Sentencing and Criminal Justice* (Cambridge University Press, 2005,

4th Ed) ("*Sentencing and Criminal Justice*") at p 157. This is amply illustrated by the English Court of Appeal's decision in *R v Caird* (1970) 54 Cr App R 499, which dealt with a group of people engaging in a public riot. Sachs LJ stated at 507–508 of the judgment:

> … The law of this country has always leant heavily against those who, to attain [an unlawful] purpose, use the threat that lies in the power of numbers.
>
> Over and over again it was submitted on behalf of the applicants that their individual acts should be regarded as if they had been committed in isolation. Attempts were made on this footing to make light of such matters as pushing a police officer on one side, breaking a window, or throwing a lighted mole fuse at one of the officers. In the view of this Court, it is a wholly wrong approach to take the acts of any individual participator in isolation. *They were not committed in isolation and, as already indicated, it is that very fact that constitutes the gravity of the offence.*
>
> …
>
> … The court has felt bound in each case to give proper weight to the *public interest* and not simply to regard the welfare of the defendant as the paramount consideration.
>
> [emphasis added]

The same considerations were applied in *PP v Muhamad Hasik bin Sahar* [2002] 1 SLR(R) 1069, a case involving culpable homicide committed in the midst of a gang fight. In relation to the gang fight, Tay Yong Kwang JC (as he then was) stated at [5]:

> ... *Our streets and public places must be kept safe by day and by night for law abiding people*. There must be no curfew at certain localities or during certain hours imposed by any gang. Gang fights and running street battles have absolutely no place in a civilised society. [emphasis added]

Group offences may also involve syndicate crimes and in all such cases deterrence is a key sentencing concern. In imposing a deterrent sentence, Yong CJ in *PP v Ng Tai Tee Janet* [2000] 3 SLR(R) 735 took into account overwhelming evidence leading the court to infer that the crimes were the machinations of an organised criminal syndicate. I note that in addition to the aggravation accruing from the group element in syndicate crimes, deterrence is also particularly relevant in such crimes because of the premeditation, sophistication and planning that is inevitably involved: see also the observations of Yong CJ in *Ong Tiong Poh v PP* [1998] 2 SLR(R) 547 ("*Ong Tiong Poh*") at [29]–[30] where the sentence was enhanced for that reason. In the same way, premeditation features in the related group offence of criminal conspiracy, which similarly attracts deterrent sentences.

In *Moganaruban s/o Subramaniam v PP* [2005] 4 SLR(R) 121 at [57], Yong CJ opined that the original sentence was manifestly inadequate given that the appellant was involved right from the conception of a complex and premeditated conspiracy. Reiterating that deterrence may well be of considerable value when the crime is premeditated, he rationalised that a harsh sentence was necessary to deter other like-minded members of the general public, *inter alia*, because the appellant was clearly involved in a meticulously planned and well-orchestrated scheme.

(c) *Public disquiet*: Certain crimes, in addition to harming their immediate victims, also have the wider-felt impact of triggering unease and offending the sensibilities of the general public. A deterrent sentence is therefore necessary and appropriate to quell public disquiet and the unease engendered by such crimes. In *Meeran bin Mydin* ([24] *supra*), the court observed in relation to the bribery of immigration officers at [12] that:

> [T]he consequence of the corrupt scheme not only concerned gaining some ill advantage, it also *threatened the very happy belief shared by Singaporeans that adequate controls are in place to ensure security*. [emphasis added]

In *Mohammed Zairi* ([24(a)] *supra*), Yong CJ opined at [47]:

> ... Inmates incarcerated within prisons for long periods of time have a right to know that they will not be abused. Similarly, *their relatives and the public at large also need to be assured that prison officers will not abuse their positions of trust* vis-à-vis *the prisoners and the public.* ... [emphasis added]

It is pertinent to reiterate that the offence in that case also warranted deterrent sentencing as it involved a public institution, *ie*, the prisons, in addition to constituting an abuse of authority: see [24(a)] above. Maid abuse cases could similarly be considered either under this head, or alternatively under "abuse of authority" as delineated above under types of offences warranting general deterrent sentences: see [24(c)] above. Such cases will almost inevitably merit deterrent sentencing. It is critical that a crystal clear signal be conveyed through deterrent sentences that all such offences causing public disquiet will be unstintingly deplored and denounced by the courts. Instances of gratuitous violence will also fall under this broad category.

(d) *Difficulty of detection and/or apprehension*: In *Reg v Glenister* [1980] 2 NSWLR 597, commercial crimes were committed by a financial expert who "[used] much cunning to have money taken and concealed, in the expectation that it would never be discovered"; and the difficulty of detection of such commercial crimes was regarded as a powerful factor precipitating a heavy sentence if and when such

crimes are eventually uncovered through painstaking investigation: at 616. In that case, the court opined that general deterrence must play a significant part in such offences. In the unreported case of *McKechnie* (Court of Criminal Appeal, NSW) (1 October 1987), the Court further stressed the importance of deterrence in commercial cases, and this was, in part at least, based upon the difficulties and costs connected with detection. In Singapore, the obstruction of detection has been a factor relevant in enhancing sentences (see *Ong Tiong Poh* ([25(b)] *supra*)). The fact that the criminal scam went undetected for 20 months in *PP v Rohaazman Bin Ali* Magistrate's Appeals Nos 286–288 of 2001 [[2001] SGDC 339] was a consideration that influenced the trial judge in sentencing. In my view, these cases compellingly illustrate the need for deterrence in such crimes, rendering it a crucial sentencing consideration.

(e) *Offences affecting several victims*: The court in *PP v Yap Sin Peng* [1986] 2 MLJ 66 construed illicit bookmaking as an organised crime where the motive is cold calculated greed. The bookmakers had infiltrated a legitimate sport, harassing, intimidating and blackmailing jockeys and trainers who refused to cooperate with them. The court felt that anyone indulging in such a large scale organised crime should be severely penalised. In *Rahj Kamal bin Abdullah v PP* [1997] 3 SLR(R) 227, the appellant had practised deception on a large scale: he had projected himself as the economic saviour of the Malay community, persuading his victims to hand over their hard-earned money and exploiting the ignorance and trust of his victims. He ruthlessly formed one business entity after another to confuse the authorities. Numerous victims were deceived, and such widespread deception mushroomed into a serious threat to society. Deterrence once again assumed cardinal importance in the court's sentencing discretion.

26 *One must always bear in mind that such broadly defined areas of misfeasance attracting general deterrence as a sentencing consideration are by no means mutually exclusive or cumulatively exhaustive*. For example, the present case could come under the category of offences affecting the delivery of financial services or economic infrastructure ([24(e)] above); it would also attract a generally deterrent sentence due to the circumstances surrounding the offences involved, such as *inter alia* their prevalence ([25(a)] above), the presence of a criminal syndicate ([25(b)] above) and the difficulty both in detecting such offences and in apprehending the offenders ([25(d)] above). This signals in no uncertain terms that general deterrence assumes a very real significance here. I observed in *Tan Kay Beng v PP* [2006] 4 SLR(R) 10 ("*Tan Kay Beng*") at [31]:

> [General deterrence] is premised upon the upholding of certain statutory or public policy concerns or alternatively, upon judicial

> concern or disquiet about the prevalence of particular offences and the attendant need to prevent such offences from becoming contagious. Deterrence, as a general sentencing principle, is also intended to create an awareness in the public and more particularly among potential offenders that punishment will be certain and unrelenting for certain offences and offenders.

To that extent, the various categories as delineated and discussed, where general deterrence figures prominently in the sentencing equation, offer but a few illustrated examples of the principles I had earlier articulated in *Tan Kay Beng*.

27 General deterrence is derived from the overarching concept of "public interest". In *Angliss* ([16] *supra*), I had specified that public interest in sentencing is tantamount to the court's view of how public security can be enhanced by imposing an appropriate sentence. A sentencing judge should apply his mind to whether the sentence is necessary and justified by the public's interest in deterring and preventing particular criminal conduct: *Angliss* ([16] *supra*) at [17]. This context should form the backdrop for the interpretation of my decision in *Tan Kay Beng*. The types of offences and offenders for which punishment will be "certain and unrelenting" would therefore depend upon the corresponding interest of the public in preventing that kind of conduct and in restraining particular offenders. For example, given the current climate where international and domestic terrorist security threats are more prevalent than before, bomb hoaxers must inexorably be visited with draconian sentences. (See *PP v Mohammad Farhan bin Moh Mustafa* District Arrest Case No 1808 of 2004 where the accused was sentenced to three and a half years' imprisonment for a bomb hoax; the senior district judge correctly declared at [14] that "it [was] clear that the sentencing of [such] offences … must be treated seriously and that a strong deterrent be sent to those whose idle minds might otherwise turn to creating false alarms".) Such offences are easy to commit and difficult to detect and could become rampant if not firmly dealt with. A clear signal must be unequivocally sent by the sentencing court, through an appropriate sentence, that such behaviour will be perennially viewed with grave and unrelenting disapprobation.

28 The present case can only be described as an audacious enterprise targeting and manipulating an ATM network through the installation of several cleverly disguised devices at a bank's ATM locations throughout the island. A failure to apprehend and severely penalise such offenders will irreparably undermine public confidence in the security of our ATM networks. The fruition of such schemes, will not only precipitate potentially massive losses for banks and their customers, they will also trigger soaring costs in banking transactions as a result of the extra effort and money that has to be expended to research, investigate and implement enhanced security measures. Therefore, the present case in addition to so starkly

exemplifying numerous areas of misfeasance warranting general deterrence (see [26] above), also assumes the guise of an electronic commerce offence that should be categorically denounced and severely penalised so as to deter similar would be offenders. The slightest risk of compromising the integrity of financial institutions must be viewed in the context of Singapore's reputation as a stalwart and reliable international financial centre. As such, public interest would surely prescribe an out and out clampdown on such conduct and the unequivocal censure of such offences. The fact that this is the first case of its kind to come before the courts, that such offenders are notoriously difficult to apprehend, compounded by the abhorrent prospect that *foreigners* might be tempted to target and enter Singapore for the *sole purpose* of carrying out such illegal enterprises, calls for nothing less than a resoundingly severe deterrent sentence.

29 It is necessary to emphasise that one precondition to ensure successful general deterrence resides in the public acknowledgement of the severity of punishment. A potential offender must *realise* that the sanction for a particular offence is severe before deterrence can set in: *cf*, Andrew von Hirsch, 1999 ([19] *supra*) at p 7. Therefore, it is also in the interests of the public that the media seize upon and highlight deterrent sentences, adequately publicising these cases so as to facilitate the court's aim of general deterrence. Padfield & Walker, 1996 ([22] *supra*) at p 100, quite rightly note that the sentencer should seriously consider whether he is sentencing an offender with criminal acquaintances who will take note of any leniency (or severity) of the sentence. Some offenders belong to social networks where news of their sentences travels with clockwork precision through the grapevine. In the present case, the criminal syndicate to which the respondent belonged would have a vested interest in the sentence meted out to the respondent. As both the syndicate, as well as the respondent's immediate accomplices who are still at large, are likely to get wind of the consequences that befall their "fallen" member, the sentence will in all likelihood exert some deterrent effect.

Deterrence tempered with proportionality/retributive justice

30 It is pertinent to highlight at this juncture that whilst local case law adopts a strongly deterrent sentencing philosophy, such an approach is nevertheless circumscribed by the idea of proportionality. In *Tan Kay Beng* ([26] *supra*), I stated at [31]:

> Deterrence must always be *tempered by proportionality* in relation to the severity of the offence committed as well as by the moral and legal culpability of the offender. ... [emphasis added]

In a similar vein, Yong CJ in *Xia Qin Lai v PP* [1999] 3 SLR(R) 257 at [29] stated:

> [T]he principle of deterrence (especially general deterrence) dictated that the length of the custodial sentence awarded had to be a not

> insubstantial one, in order to drive home the message to other like-minded persons that such offences will not be tolerated, *but not so much as to be unjust in the circumstances of the case*. [emphasis added]

31 Therefore, a punitive sanction imposed in the name of deterrence should not contravene the principles of proportionality or retributive justice as discussed below.

Retribution

32 The essence of the retributive principle is that the offender must pay for what he has done. The idea is that punishment restores the just order of society which has been disrupted by his crime. It follows that the punishment must reflect and befit the seriousness of the crime: *Tan Fook Sum* ([18] *supra*) at [16].

33 According to Professor Andrew von Hirsch in his article "*Deservedness and Dangerousness in Sentencing Policy*" (1986) Crim L R 79–91 at 85, the seriousness of crime is a double-pronged fork: the first prong relates to the degree of harmfulness of the conduct, while the second focuses on the extent of the actor's culpability when committing the conduct. This concept of seriousness of crime is particularly significant in the present case. The damage caused here is decidedly widespread and multi-faceted: the prevalence of such offences will irreparably undermine public confidence in the security of ATM networks and compromise the integrity of the affected financial institution, tainting its reputation for security and secrecy. It will also translate to increased costs and efforts necessary to implement improved security measures. One only appreciates the full extent and impact of the harm in this case when it is viewed and measured in the context of Singapore's milieu as a secure and efficient financial and commercial hub. With regards to the second "prong" of seriousness, the respondent's culpability was by all accounts substantial. His participation in the scheme was hardly peripheral. His involvement with a criminal syndicate, his central role in the criminal scheme, the premeditation and planning that preceded the operation all constitute relevant factors exacerbating his culpability. The crime in the present case is very grave indeed and applying the theory of retributive justice, the punishment must reflect and befit this gravity.

34 To summarise, while a highly punitive sanction is necessary in this case for the purposes of specific and general deterrence, it should also within reasonable limits be commensurate with the severity of the offence, both in terms of the harm caused and the culpability of the offender.

The CMA

35 I now pause to assess the policy considerations underpinning the prevention of certain CMA offences. The CMA was first enacted in order to

deal specifically with computer crimes and to adequately deter computer criminals. In the Second Reading of the Computer Misuse Bill on 28 May 1993, the then Minister for Home Affairs, Professor S Jayakumar noted (see, *Singapore Parliamentary Debates, Official Report* (28 May 1993) vol 61 at col 300):

> Presently, computer or computer-assisted crimes reported to the Police are dealt with under our general existing laws, eg, as cases of mischief, theft, cheating, criminal breach of trust under the Penal Code. But it is difficult to proceed under these general laws because of the special nature of computer technology. Furthermore, *the existing penalties under the general laws do not always sufficiently deter computer criminals* … [emphasis added]

36 The subsequent proliferation of computer-related crimes led to a review of and further amendments to the CMA in 1998. The ministerial concerns articulated during Parliamentary debates relating to these amendments are especially pertinent. In particular, during the Second Reading of the Computer Misuse (Amendment) Bill on 30 June 1998 ("*Computer Misuse (Amendment) Bill*"), the Minister for Home Affairs, Mr Wong Kan Seng explained (see, *Singapore Parliamentary Debates, Official Report* (30 June 1998) vol 69 at col 392):

> The increasing use of computers for various purposes in Singapore would mean that this rising trend in computer crimes would continue. It is therefore necessary and timely to update the Computer Misuse Act (CMA) to deal with an increasingly complex environment.
>
> In addition, crimes committed through the electronic medium and through use of computers are difficult to detect but they are just as serious as traditional crimes and we must equally protect our population against such crimes. *To ensure that Singapore remains an attractive place for investors and businesses to operate effectively and securely, computer crimes must be treated as seriously as other criminal offences*.
>
> [emphasis added]

The amendments therefore advocate, *inter alia*, stronger deterrence for offences under the CMA, and aim to enhance the deterrent effect of the penalties for computer crimes. Further, the penalties prescribed by the amendments were also intended to be proportionate to the damage caused: see col 392 of the *Computer Misuse (Amendment) Bill*.

37 Mr Wong Kan Seng then concluded, at col 400 of the *Computer Misuse (Amendment) Bill*:

> [T]his Bill is *intended to send a strong signal that computer crimes will be treated and dealt with seriously in Singapore*. As Singapore positions itself to be an intelligent island and a global centre for E-commerce, the legislative framework must keep pace with the developments to ensure the integrity of our computer systems against would-be cyber criminals

> and hackers. *With the Bill, banks, commercial institutions, foreign investors and businesses can rest assured that Singapore would be a good and safe place where E-commerce can flourish*. Singaporeans can also rest assured that the law provides adequate coverage for the safe operation of essential computer systems in Singapore. [emphasis added]

38 It is amply evident that Parliament intended that offences prosecuted under the CMA be treated seriously, and that deterrence functions as a necessary sentencing consideration in all such offences in order to protect the integrity of our computer systems and the security of financial and commercial institutions, foreign investors and locals alike.

39 ATM frauds could certainly be encompassed under the Penal Code, either as aggravated cheating pursuant to s 420 or as constituting possession of forged instruments with intent to use them as genuine articles pursuant to s 474. However, the deliberate prosecution of such offences under the CMA in lieu of the Penal Code signals to the court that it should consider whether to treat the offences even more seriously than if the prosecution had opted to invoke the provisions of the Penal Code. This is borne out by the policy considerations behind the CMA. Further, both ss 420 and 474 of the Penal Code involve maximum imprisonment terms of seven years; in contrast, s 4 read with s 10 of the CMA prescribes a maximum imprisonment term of ten years. Invoking the latter undoubtedly denotes that a more serious offence has been committed, implying in turn that an enhanced sentence might be in order.

Relevant sentencing considerations for ATM fraud cases

40 I addressed and articulated the relevant sentencing considerations for *credit card* fraud offences in my decision in *Payagala* ([24(e)] *supra*). The same considerations should be applied by the sentencing judge in cases concerning ATM card frauds. Both credit card and ATM card frauds undermine the reliability and security of an established and vital medium of financial transaction. Combating both necessitates the expenditure of huge amounts of time, money and effort by financial institutions and the authorities. Both types of offences, if left unchecked, could irretrievably damage Singapore's standing as a secure financial and commercial centre; to that extent, nothing short of uncompromisingly harsh deterrent sentencing is warranted.

41 The relevant sentencing considerations to be assessed in the sentencing of credit card cheating offences *and* ATM card frauds should be similar. They include (see *Payagala* ([24(e)] *supra*) at [73]):

(a) extent of planning and premeditation;

(b) degree of sophistication of offence and measures taken to avoid detection;

(c) role of the accused;

(d) number of offences and quantum involved;

(e) extent of actual loss and damage (both tangible and intangible) to victims and connected parties;

(f) international dimension; and

(g) remorse shown.

42 I should highlight that a particularly important and relevant consideration in the present case is the "international dimension" involved. The respondent had been part of a *foreign syndicate* which had systematically targeted financial institutions *in Singapore* to carry out its criminal activities. The audacity and daring of such a cross-border criminal scheme must be unequivocally deplored and denounced. There is a resounding and pressing need to take a firm stand against each and every cross-border crime, not least because the prospect of apprehending such foreign criminals presents an uphill and, in some cases, near impossible task.

The present appeal

43 I now turn to the appeal proper with the relevant sentencing principles in mind.

Charges under the CMA

44 The prosecution averted to the case of *PP v Lim Boon Hong* Magistrate's Appeal No 26 of 2000 ("*Lim Boon Hong*") as a relevant sentencing precedent in its submissions. The accused in that case pleaded guilty to five charges under s 4 read with s 7 (now s 10) of the CMA, of abetting two others to use a laptop computer and magnetic stripe card reader at a petrol station to secure access without authority to data stored on the magnetic stripes of credit cards, with the intention that the data so accessed would then be used to cheat the credit card centre. The offender's role was to furnish the information so obtained by his accomplices to a counterfeit credit card syndicate for a fee. Counterfeit cards were then produced and were used by the syndicate to make purchases amounting to $141,525.57; 33 similar charges were taken into consideration. On the prosecution's appeal, the High Court doubled the sentences from 15 months' imprisonment to 30 months' imprisonment per charge. Two of the sentences were ordered to run consecutively.

45 *Lim Boon Hong* ([44] *supra*) is by and large similar to the present case. ATM card frauds and credit card frauds are both equally insidious, and similar sentencing considerations should apply with equal cogency to both: see [40] above. I am therefore of the view that an appropriate starting point of the sentencing tariffs for the CMA offences should be in the range of 24

to 48 months' imprisonment for each charge. Mitigating and aggravating factors should then be factored in to discount or increase the sentence accordingly.

46 The present case has a number of aggravating features, especially when compared with *Lim Boon Hong*. First, the role assumed by the respondent is a particularly relevant consideration: see [41(c)] above. The respondent played a vital part both in the manufacture of the counterfeit ATM cards and within the criminal syndicate. The accused in *Lim Boon Hong*, in contrast, much like the accused in *Navaseelan* ([10(e)] *supra*), had played a more peripheral part in the entire operation. While the accused in *Lim Boon Hong* was merely the conveyor of data captured by the devices, the respondent in the present case was instrumental in capturing the data itself, conveying the data back to the syndicate in West Malaysia, as well as stealing the money from ATMs using the manufactured counterfeit ATM cards. Secondly, the respondent here faced 70 other CMA charges and 24 other Penal Code theft charges, all of which were to be taken into consideration in sentencing. Such a substantial number of charges should be factored into the sentence imposed, since the number of offences constitutes a salient sentencing consideration: see [40(d)] above.

47 Other aggravating factors include: the extent of the planning and premeditation involved in the present case; the sophistication of the offences as evidenced by the advanced skimming devices utilised; the damage caused – both tangible (no restitution was made to DBS on account of its losses) and intangible (the undermining of public confidence in the integrity of the financial institutions, *inter alia*) as well as the inescapably international dimension of the offences: see [41(a)], [41(b)], [41(e)] and [41(f)] above.

48 The sentence of 20 months' imprisonment for each CMA charge imposed by the trial judge is therefore manifestly inadequate, particularly when calibrated against the 30 months' imprisonment term imposed in *Lim Boon Hong* and the benchmark sentencing range of 24 to 48 months' imprisonment. Bearing in mind the numerous aggravating factors in the present case as well as the public interest concerns engendered by such offences, a term of 42 months' imprisonment for each CMA charge would better reflect and serve the twin goals of deterrence and retribution; it is also an appropriately commensurate sentence both in relation to the severity of the offence as well as the culpability of the offender.

Charges for theft under the Penal Code

49 Section 379 of the Penal Code covers a wide range of situations, ranging from the theft of small items committed on the spur of the moment, to highly organised, large scale thefts. Significant sentencing considerations under s 379 would include the value of the stolen items, *the nature and circumstances of the theft*, the age of the offender, the prevalence

of the offence and the offender's criminal record: see *Sentencing Practice* ([18] *supra*) at p 340. It is pertinent to note that the theft offences in the present case are part and parcel of the syndicate operation of counterfeit ATM cards and as such, these very vital circumstances forming the backdrop and surrounding the commission of the theft should constitute a relevant factor in sentencing. Further, where the theft is in fact part of an organised team activity and is meticulously planned as it was in the instant scenario, the offence assumes an enhanced gravity and should attract a higher custodial sentence.

50 The sentence imposed for the theft charges in *Navaseelan* ([10(e)] *supra*) affords a relevant *guideline* or *starting point* when contemplating the rather similar charges in the present case, as both cases concern the illegal withdrawal of money from ATMs using counterfeit ATM cards. In *Navaseelan*, although the total value of all the thefts was $54,380 (admittedly far more than the $18,590 involved in the present case), the amount stolen in the *proceeded charges* only came to $3,700. In the present case, the amount stolen in the proceeded charges came up to $8,000, twice as much as that in *Navaseelan*. This was overlooked by the trial judge. Further the *nature* of the offences viewed in their entirety is more serious in the present case than in *Navaseelan*. Taking these factors into account, the six-month imprisonment term imposed for each theft charge in *Navaseelan* should be enhanced accordingly in the present case. I have determined that a term of 15 months' imprisonment for each theft charge is more appropriate and hardly disproportionate in light of the factual matrix surrounding the thefts.

The one-transaction rule and the totality principle analysed

51 It must be stated at the outset that the applicability of both the one-transaction rule and the totality principle in Singapore is qualified by the operation of s 18 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC"), in cases where an accused is convicted and sentenced to imprisonment for more than two distinct offences. The section provides:

> 18 Where at one trial a person is convicted and sentenced to imprisonment for at least 3 distinct offences, the court before which he is convicted shall order that the sentences for at least two of those offences shall run consecutively.

In the present case, the respondent has been convicted and sentenced to imprisonment for six distinct offences and s 18 of the CPC requires that at least two of these sentences are ordered to run consecutively. Having established that, we may proceed with an analysis of the two principles.

The one-transaction rule

52 The one-transaction rule requires that where two or more offences are committed in the course of a single transaction, all sentences in respect of those offences should be concurrent rather than consecutive: *Maideen Pillai v PP* [1995] 3 SLR(R) 706; *Kanagasuntharam v PP* [1991] 2 SLR(R) 874 ("*Kanagasuntharam*"). Prof Andrew Ashworth in *Sentencing and Criminal Justice* ([24(f)] *supra*) at p 245 interpreted the *raison d'être* for the "single transaction" principle in terms of proximity in time *and* proximity in type of offence. Such an interpretation was also adopted by Dr D A Thomas in *Principles of Sentencing* (Heinemann, 2nd Ed, 1979) ("*Principles of Sentencing*"), who opined at p 54:

> The concept of 'single transaction' may be held to cover a sequence of offences involving a repetition of *the same behaviour* towards the *same victim* … provided the offences are committed *within a relatively short space of time*. [emphasis added]

53 Applying these principles to the present case, even if the offences committed at different ATMs in Singapore may be regarded as having been perpetrated against the *same victim*, *ie*, the DBS-POSB group, the offences were nevertheless not committed *within a relatively short space of time*. From the statement of facts, it can be ascertained that the card skimming executed by the respondent and his accomplices took place between 22 May 2006 and 29 June 2006 at three different ATM machines and at different points in time. Further, at different junctures between 24 May 2006 and 1 July 2006, cloned ATM cards were used at various ATMs in Singapore to illegally withdraw cash. The requisite "proximity in time" element is to that extent absent and the offences cannot be construed as a "single transaction".

54 In the High Court decision of *Navaseelan Balasingam v PP* [2007] 1 SLR(R) 767 (the appeal from *Navaseelan* ([10(e)] *supra*)), Tay Yong Kwang J discussed the one-transaction rule in relation to ATM card frauds. He stated that while consecutive withdrawals made at the *same* ATM *on one occasion* may be regarded as one transaction for the purpose of sentencing, it was quite impossible to view the multiple offences in that case as one transaction as they were committed at *different ATMs* in various parts of the island. Tay J was therefore of the view that the consecutive sentences imposed in that case were justified and that the one-transaction rule did not apply. By the same token, the one-transaction rule cannot be invoked in the present case.

55 It is also appropriate to reiterate that the one-transaction rule should not be construed as a hard and fast rule rigidly applied across the board. In this context, in *Kanagasuntharam* ([52] *supra*), Yong CJ observed at [6]:

> *The general rule, however, is not an absolute rule*. The English courts have recognised that there are situations where consecutive sentences

> are necessary to discourage the type of criminal conduct being punished: see *R v Faulkner* (1972) 56 Cr App R 594, *R v Wheatley* (1983) 5 Cr App R (S) 417 and *R v Skinner* (1968) 8 Cr App R (S) 166. *The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence*. It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms *in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard*. [emphasis added]

Further, in recognising that the one-transaction rule is not carved in stone and should be applied sensibly, the Court of Appeal in *V Murugesan v PP* [2006] 1 SLR(R) 388 ("*V Murugesan*") also referred to the case of *R v Peter John Kastercum* (1972) 56 Cr App R 298, where the English Court of Appeal had considered the principles for determining whether sentences for convictions of a substantive offence and of assault on a police officer should run concurrently or consecutively. The English Court of Appeal had rationalised the one-transaction rule, at 299–300, in the following terms (see *V Murugesan* at [34]):

> [W]here several offences are tried together and arise out of the same transaction, it is a good working rule that the sentences imposed for those offences should be made concurrent. The reason for that is because if a man is charged with several serious offences arising out of the same situation and consecutive sentences are imposed, the total very often proves to be much too great for the incident in question. *That is only an ordinary working rule; …* [emphasis added]

56 Indeed, in *Sentencing and Criminal Justice* ([25(b)] *supra*), Prof Ashworth has also perceptively remarked that one stumbling block in constructing a workable definition of a "single transaction" for the one-transaction rule is that "it seems to be little more than a pragmatic device for limiting overall sentences rather than a reflection of a sharp category distinction": see p 244. Therefore, where consecutive sentences are in keeping with the gravity of the offences, courts should not impose concurrent sentences simply because they feel fettered by the presumed operation of the one-transaction rule. I am persuaded in any event that even if the offences in the present case might conceivably be perceived as part of a single transaction, consecutive sentences are nonetheless not only more appropriate here, they are in fact dictated by the gravity of the offences involved.

The totality principle

57 Dr D A Thomas explains the totality principle in *Principles of Sentencing* ([52] *supra*) as follows:

> [T]he principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual

> offences involved, or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his records and prospects.

This definition was adopted by the Court of Criminal Appeal in *Kanagasuntharam* ([52] *supra*).

58 Admittedly, the cumulative sentence of 12 years' imprisonment I have prescribed exceeds the maximum sentence tier for the most serious of the individual offences involved (s 4 read with s 10 of the CMA) in the present case. Be that as it may, a sentence merely two years in excess of the ten-year upper limit for a s 10 CMA charge cannot be considered excessive. More importantly, it must be borne in mind that such a definition of the totality principle should not be rigidly and blindly applied to *all* cases. Rather, it must be invoked sensibly. The totality principle guides the court in sentencing an offender guilty of more than one offence, ensuring that the total sentence remains proportionate to the gravity of the context. There is a suggestion in *V Murugesan* ([55] *supra*) that the aggregate sentence can be measured against the maximum sentence for the most serious of the offences the accused has been convicted of, *unless* the offender is a persistent offender or alternatively, if the maximum sentence seems *too short to reflect the gravity of the appellant's total conduct*. Professor Tan Yock Lin in *Criminal Procedure* (Butterworths, 2006) at XVIII [4101.1] has correctly observed:

> In the present view, while the totality principle is a salutary reminder to ensure proportionality in a global sense, especially with respect to overlapping offences, there will be cases where the commission of multiple last offences, viewed in the light of the offender's antecedents, *suggests strongly a persistent offender who should in the public interest be specifically deterred from a life of crime by a heavier sentence*. [emphasis added]

59 Indeed, when *Navaseelan*'s appeal ([54] *supra*) was heard, Tay J was of the view that the district judge erred when he appeared unduly constrained by the totality principle and unduly attentive to the maximum sentence provided for the "most serious offence" (which would be ten years' imprisonment but for which the district judge could only sentence up to seven years because of s 11(3) of the CPC): [54] *supra* at [28]. As a consequence the district judge settled on an aggregate sentence of five and a half years' imprisonment in assessing the permutation of consecutive sentences. Tay J opined that this aggregate sentence imposed by the district judge did not reflect the severity of the offences in question and was indeed manifestly inadequate in the circumstances. He therefore enhanced the sentence by altering the permutation of the consecutive sentences, ordering that *all* the sentences for the CMA charges were to run consecutively. This resulted in a total sentence of eight and a half years' imprisonment (including the sentence for the theft charges).

60 It is axiomatic that the totality principle, not dissimilarly from its one-transaction counterpart, functions not as an inflexible rule, but rather as a helpful guideline to remind the court that the correlation of the sentence to the gravity of the offender's conduct and offences is of critical importance. In short, sentences must be restrained by the principle of proportionality. In the present case, the serious damage inflicted on the integrity and reputation of a financial institution, the scale of the syndicated operation, the premeditation and sophistication of the offences and, not least, the audacious bravado that inspired the commission of the offences coalesce to radically exacerbate the gravity of the offences. Having accorded due consideration to the totality principle, I am of the view that a cumulative imprisonment term of 12 years' imprisonment adequately betokens and befits the gravity of the offences.

Conclusion

61 I reiterate that this is the *first* case in Singapore encompassing the *entire* gamut of ATM crime, starting with ATM card skimming and the transfer of "stolen" data onto cloned ATM cards and culminating in the use of cloned cards to withdraw money from accounts. The respondent played a critical role in a sophisticated criminal plot *that was conceived and master-minded in another jurisdiction to specifically target and harm a financial institution in Singapore*. Had he not been promptly apprehended, one can only imagine the colossal loss that could potentially have been incurred by a significant number of other POSB account holders and/or the DBS-POSB group. The prevalence of such offences will only spell doom for the future of ATM operations, portending soaring costs and substantial inconvenience for all involved in daily financial transactions that so many of us take for granted; financial institutions will inevitably succumb to the vulnerability of electronic fraud and be forced to employ considerable resources in order to remain vigilant and safeguard themselves against the threat of imminent innovative and fraudulent schemes. In short, such crimes if left unchecked, will strip ATMs of the safety, security and convenience that they have heretofore promised. Only the spectre of a severe penalty can serve as a proper panacea to counter any attempt by any individual or member of a syndicate seeking to systematically compromise our ATM network and the integrity of our financial institutions. Such an offender must appreciate that any sentence meted out, while it is commensurate with the gravity of the offence and the actual culpability involved, will nevertheless be significantly enhanced by the paramount sentencing consideration of general deterrence.

62 This is decidedly not a case involving an isolated indiscretion or a momentary lapse of judgment. The offences in question could not have been perpetrated without substantial and meticulous planning and organisation. Indeed, the offences *systematically* targeted and ventured to

compromise the integrity of a bank's platform for payments and cash withdrawals. The 94 charges taken into account in this matter are a compelling, and indeed irrefutable testament to the respondent's pivotal role in a sophisticated syndicate that schemed to conscientiously and unrelentingly perpetrate fraud on a massive scale in Singapore. I am persuaded that the sentences meted out by the trial judge were manifestly inadequate and do not waver in acceding to the prosecution's appeal.

63 In the result, I have ordered:

(a) 42 months' imprisonment for each of the two CMA charges (District Arrest Cases Nos 32568 of 2006 and 32570 of 2006);

(b) 15 months' imprisonment for each of the four theft charges (District Arrest Cases Nos 32575 of 2006, 32577 of 2006, 32579 of 2006 and 32585 of 2006); and

(c) that all sentences run consecutively.

64 It would be appropriate to underscore that the courts will dispense similarly harsh sentences to all individuals or syndicates who presume to engage in criminal conduct that may undermine public confidence in the use of the internet or any other technology employed to settle or process financial transactions. This being the age of electronic commerce, the courts have a duty to police and protect all such mediums of settlement by signalling in no uncertain terms that any attempt to compromise the security and convenience of such transactions will be ruthlessly countered. A recent issue of *The Economist* (17–23 February 2007), at p 14, has aptly focussed attention on the rapidly increasing importance of electronic payments as a substitute for cash payments:

> [C]ash, after millennia as one of mankind's most versatile and enduring technologies, looks set over the next 15 years or so finally to melt away into an electronic stream of ones and zeros. If an era is represented by its money, the information age is at hand.
>
> …
>
> Information-money can be handled by any information processing device. That includes the mobile phone, which can add to money's utility thanks to its display and its power at any time to link to your bank as a mobile ATM. Visa thinks a contactless digital transaction takes less than half the time of a cash one and that people liberated from what happens to be in their wallets spend a fifth more.
>
> Which is why digital cash is now solving its chicken-and-egg problem. In the past shopkeepers would not install systems unless shoppers had electronic cash. And shoppers would not use electronic cash unless they had something to buy. But smart cards and readers have become cheap and consumers now possess mobile phones in droves. The trillions of payments that are too small to bear the fees of paying by credit card have come within reach and almost everyone stands to gain.

It is incumbent on our courts to facilitate this ground breaking transition so as to herald a new paradigm which promises to be not merely the epitome of ease and convenience but also of security.

Reported by Una Khng.