

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CO 12/2017

[2018] SCSC 358

THE REPUBLIC

versus

- 1. XIAO XIAOCHUN**
- 2. LIANKUN ZHANG**

Accused

Heard:

Counsel: Mr. Georges Thatchet, State Counsel for the Republic
 Mr. Nichol Gabriel for the accused

Delivered: 9 April 2018

SENTENCE

Vidot J

[1] The Accused are charged with the following offences;

Count 1

Statement of Offence

Intentionally and without lawful authority, possess instruments and devises which are capable of being used, adapted and intended for the use in the forging or falsifying of

identity information, contrary to and punishable under Section 363B (1)(b) of the Penal Code (Cap 158) read with Section 23 of the Penal Code.

Particulars of Offence

Xiao Xiaochun, 41 year old Chinese National, passport number E 65852866 together with Liankun Zhang, 21 year old Chinese National, passport number E 56045080, intentionally and without lawful authority and with common intention, were found to be in possession of 262 counterfeit magnetic striped ATM Bank Cards and one card reading device (MSR 605) between 31st of March 2017 and 1st of April 2017 at Mahe, Seychelles.

Count 2

Statement of Offence

Intentionally and without lawful authority, possess another person's identity information, with intention to use the information to commit an offence forging or falsifying of cards contrary to and punishable under Section 363E read with Section 363D of the Penal Code (Cap 158) read with Section 23 of the Penal Code.

Particulars of offence

Xiao Xiachun, 41 year old Chinese National, passport number E 65852866 together with Liankun Zhang, 21 year old Chinese National, passport number E 56045080, intentionally and without lawful authority and with common intention, were found to be in possession of another person's identity information in 255 counterfeit magnetic striped ATM Bank Cards between 31st of March 2017 and 1st of April 2017 at Mahe, Seychelles.

Count 3

Statement of Offence

Stealing, contrary to Section 253 of the Penal Code (Cap 158) and punishable under Section 260 read with Section 23 of the Penal Code.

Particulars of offence

Xiao Xiaochun, 41 year old Chinese National, passport number E 65852866 together with Liankun Zhang, 21 year old Chinese National, passport number E 56045080, fraudulently and without claim of right and with common intention, stole an amount of SCR 218,800 from the ATM's Seychelles Commercial Bank located at Kingsgate House and Orion Mall, at Mahe, Seychelles on 31st of March 2017.

They pleaded guilty to the charges and were accordingly convicted. I note that the guilty pleas were only offered after compelling CCTV footages showing the Accused engaged in the criminal activity at the Seychelles Commercial Bank, with absolute disregard and concern about the result of and effect such criminal act would cause, were projected in Court.

- [2] I have heard and considered the submission in mitigation by Counsel for the Accused. He urged Court to exercise leniency on his clients as they had pleaded guilty and thereby saving the Court's precious time and that by pleading guilty they have shown remorse. They are first time offenders. He further submitted that the Accused are victims of the transaction as they were send here on this operation by a larger syndicate and that they have not benefitted from the crimes. The Accused are foreigners and their families are in China. He also urged Court to consider the young age of the second Accused who is only 22 years old.
- [3] Mr. Gabriel further referred to several cases (which he argued are similar in nature) decided before the Courts in Seychelles. They include **R v Mullner and Ors [2016]** SCSC 66 and **Hakim Yusuf Mohamed and Ors CS 343013** (unreported). he also referred to **Hu Dejin and Ors v Republic SCA 24-27 of 2016** (unreported)
- [4] The Accused travelled to Seychelles in order to carry out their criminal act whereby bank accounts of holders residing outside Seychelles were being hacked into and funds

withdrawn. When apprehended they were in possession of 262 counterfeit magnetic striped ATM Bank cards. They also had in their possession an MSR 605 card reading device. As result of the criminal transaction a sum of SR218.800 was withdrawn from the bank.

[5] I have taken into consideration of the authorities cited by Counsel for the Accused. However, these cases can be distinguished from the present one. Apart from the charge of Stealing contrary to Section 253 of the penal Code, the Accused in the cases cited were charged with offences different from Counts 1 and 2 of the present case. This is because such crimes are new to the jurisdiction and the Penal Code did not provide for offences to meet such crimes. As such cases were on the increase, Penal Code (Amendment) (No.2) Act 2016 was enacted. This was for the exact purpose of meeting the advance in these types of crimes.

[6] I have given particular consideration to the Accused pleas and bear in mind that they were only tendered after the trial had commenced. However, a guilty plea saves the court's precious time and the Accused should earn credit for that and obtain discount from the sentence that would have otherwise been imposed if the case had proceeded though full trial. In **R v Buffery 14 Cr. App. R. (S) 511CA**, Lord Taylor CJ stated that there was no absolute rule as to what the discount should be, but as general guidance, the Court believed that something of the order of one third would be an appropriate discount. **Blackstone's Criminal Practice (2012), paragraph E.12 p2148** provided that a guilty plea would in effect earn an accused a reduction in sentence as it saves time of the court and reduces considerable cost and in case of an early plea, saves inconvenience of witnesses to give evidence before Court, and therefore that "*reduction should be a proportion to the total sentence imposed calculated by references in which the guilty plea was indicated, especially at what stage in the proceedings.*"

[7] In **Hong Kong Special Administrative Region v Oancea and Ors DCC 782/2011**, cited in **Hu Dejin and Ors v Republic** (supra), the Court of Appeal provided a list of factors to be considered in such cases. They include;

- i. The size of the operation, for example the amount of money involved;

- ii. The number of persons involved;
- iii. The number of fake or forged credit cards involved;
- iv. The level of sophistication planning;
- v. The international dimension; and
- vi. The role of the Accused and whether they were cogs in the wheel of or planners of the operation.

[8] **Hu Dejin and Ors v Republic** cited sentences meted out in several cases of similar nature. These include **Ont Toing Poh v PP [1998] 2 SLR 583**; **Navaseelan Balasingham v PP [2007] 1 SLR 767** and **R v Taj, R v Gardner and R v Samuel [2003] EWCA Crim 2633**. In these cases sentences ranged from 3 years to 7½ years.

[9] In sentencing the Accused I have taken into account the principles of totality and proportionality of sentence; see **John Vinda v Republic (1995)** (unreported). I have also taken into consideration the mitigating factors addressed by Counsel for the Accused. I have taken into account factors to be taken into account as listed in paragraph 7 above. I take into account that the classic principle of sentencing is deterrence, prevention, rehabilitation, reformation and retribution; see **Lawrence and Anor v Republic [1990] SLR 47**. I note that the offences were committed as part of one transaction. I also consider that the Penal Code (Amendment) (No.2) Act 2016, was enacted to meet these new types of offences that were on the increase, which in my view sends a message to those daring to use this jurisdiction to launch their criminal activity, that they will be strictly dealt with. It is a message that we will not tolerate foreigners to use the Seychelles as a base from which to defraud others in other jurisdictions or locally. In meting out the sentences I have already credited the Accused a third reduction from the sentences that I initially intended to impose had the case continued on not guilty pleas

[10] Therefore; I impose on both Accused the following sentences;

(a) Count No.1: 7 years imprisonment;

(b) Count No. 2: 7 years imprisonment

(c) Count No 3: 4 years imprisonment

[11] I further take note that the 3rd Count of Stealing falls under Chapter XXVI of the Penal Code. Section 36 of the Penal Code provides;

“where a person after conviction for an offence is convicted of another offence, either sentence is passed upon him upon the first conviction or before the expiration of that sentence, any sentence which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court direct that it shall be executed with former sentences or of any part thereof.

Section 36 carries a proviso that it shall not be lawful for a court to direct that any sentence under Chapter XXVI, Chapter XXVIII or Chapter XXIX be executed or made to run concurrently with one another..

The offence of stealing fall under Chapter XXVI.

[12] However, relying on **Neddy Onezime v Republic SCA [2013]** and **Frederick Ponoo v Attorney General SCA 38 / 2010**, I shall not accord a strict interpretation and application to Section 36 as I believe that in the circumstances, consecutive sentences will not be in the best interest of justice and only concurrent sentences will be just and fair. Therefore the sentences shall run concurrently.

[13] Time spent on remand shall be discounted from the sentence. The Accused may appeal against the sentence within 30 working days from today.

Signed, dated and delivered at Ile du Port on 9 April 2018

M Vidot
Judge of the Supreme Court