

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT NO: 0026 & 0027/2016

THE QUEEN

V

ADAM MOKDAD
HAKIM BENAMARA



Appearances:

Ms. Toyin Salako for the Crown

Mr. John Furniss for Mokdad

Mr. Crister Brady for Benamara

Before:

The Hon. Mr. Justice Timothy Owen Q.C.


Submissions heard:

29th July 2016


SENTENCE RULING

1. On 29th April 2016 you, Adam Mokdad, pleaded guilty to a single count of conspiracy to defraud. On 13th May 2016 you, Hakim Benamara, pleaded guilty to the same offence. The period of the conspiracy spanned some two days between 31st January and 1st February 2016.
2. The factual basis for sentence can be briefly stated.
3. On the 1st of February 2016, five gifts cards were retained in the Butterfield Bank ATM machine at Butterfield Place, George Town. The cards were swiped through the PIN terminal in the ordinary way and the information contained on the magnetic strips was the genuine card data for MasterCard issued by Australian Banks.

For each attempted transaction the declined code was recorded, meaning that the cards in question had been reported as lost by the genuine cardholders so that no money was ultimately disgorged. Four (4) attempts were made to withdraw cash on the 31st January 2016 between 20:14 and 20:17. A further attempt to withdraw cash was made on the following day at 08:22. All of the attempted transactions were for \$50.00.



4. CCTV evidence was eventually obtained from the bank which showed that the cards had been used by two males. Information was subsequently received that the two suspects were staying at Sunset House and police officers eventually attended - at room 105. You were both in that room and were duly arrested. Your response, Mr Mokdad was to say "*we have done nothing wrong.*" That was a lie. Both you and Mr Benamara were the fraudsters shown on the CCTV, caught red handed in this credit card scam as your pleas of guilty eventually accepted.



5. Police officers searched your room and seized a number of items including a laptop, a card reader, 14 gift cards, cash and various receipts. The 14 gift cards seized also contained genuine card data. Eleven of them were issued from the United States, two from Australia and one from Canada. Of the cards seized, one had been used to attempt the cash withdrawals from the relevant Butterfield ATM.

6. In relation to the exhibits seized from the room, you Mr Benamara said that the card reader, the receipts and gift cards all belonged to you. You also said that you had brought the laptop to Cayman, albeit that you had borrowed it from a friend.

7. Because the ATM successfully identified that the relevant data was linked to cards reported as stolen, Butterfield Bank did not suffer any loss as a result of your fraudulent scheme. That was pure bad luck from your point of view.

Your possession of other cards yet to be deployed shows that, had you not been arrested, there was an obvious risk of loss to other financial institutions resulting from the conspiracy which you have each admitted. It is plainly impossible for the Court to precisely calculate the scale of the potential loss you planned to cause to financial institutions here in Cayman. But in light of the number of cards found in your possession and the size of the attempted withdrawals, it seems to me that it is not unreasonable to proceed on the basis that your activities at least risked causing harm in excess of KY\$ 5,000. This is of course relevant to the application of the UK Sentencing Council Guidelines on Fraud, Bribery and Money Laundering to which I will refer in greater detail later in this ruling.

8. As Ms. Salako explained, this is another case involving foreign nationals travelling to the Cayman Islands specifically to defraud the banking system with the use of cloned credit cards. It seems tolerably clear from this and other recent cases (see *R v. Pop and Others*¹ and *R v. Cheaabi and Others*²) that this jurisdiction is viewed as especially vulnerable to this form of fraud because the anti-fraud security measures linked to the majority of the ATMs on the Islands are far from being state of the art. Unless and until the banks upgrade their security systems, this vulnerability will continue.

9. The Crown's case is that together you cloned the cards, embossing genuine card data onto the gift cards with the use of the laptop and the card reader. Having done that, you together attempted to withdraw cash. The prosecution contends that any suggestion that you came to these islands for a holiday and only incidentally embarked on a sophisticated card fraud scheme is ludicrous.

¹ Ind. 114/2014, 10/15 and 11/15

² Ind. 8-13/2016 and 15/2016



SUBMISSION ON BEHALF OF ADAM MOKDAD

10. On behalf of you Mr Mokdad, Mr Furniss sought to persuade me that whatever Mr Benamara's intentions were, you simply came to the Cayman Islands with your co-accused for what you genuinely believed would be a holiday. Only after you arrived here did you discover that Mr Benamara had come armed with a fraud tool kit. Having discovered what he was up to, you then went along with the plan. Mr Furniss points out that you are a man of previous good character and you had plans to go on to college - which now lie in ruin as a result of your dishonesty.
11. I can't accept your claim to have come here simply for a holiday without criminal intent. You made no such suggestion on arrest or later in interview and while it is clear that Mr Benamara accepts principal responsibility in terms of ownership of the equipment necessary to advance the conspiracy to defraud to which you have both pleaded guilty, the fact is that you have both pleaded guilty to the same conspiracy to defraud over the same period of time.
12. In light of all that I have been told, I intend to sentence you on the basis that you two are equally guilty as joint co-conspirators. There is no sensible basis on which I can conclude that you were somehow under Mr Benamara's control or were otherwise reluctantly persuaded or coerced into joining him in this fraudulent enterprise. In light of your early plea I will give a full one-third (1/3) discount on what would otherwise have been the sentence had you been convicted following a trial. But aside from your good character and the fact that you pleaded guilty, there are no other mitigating factors.



SUBMISSIONS ON BEHALF OF HAKIM BENAMARA

13. As for you Mr Benamara, you also are a man of good character in the sense that you have no criminal convictions. Ms. Salako has made reference to the fact that you have had items seized from you in the past by the Canadian Border Service Agency, including a card reader and a quantity of cash, but as no further details of the precise history of those non-criminal proceedings are available, I intend to approach your case on the same basis as Mr Mokdad in terms of your character.
14. You also pleaded guilty and although your plea was entered some two weeks later than Mr Mokdad I am prepared to accept that you have health problems that may have affected your conduct on 29th April when Mr Mokdad's plea was entered. In the circumstances, you too will receive a full one-third discount for your guilty plea.
15. I have taken into account the points advanced on your behalf by Mr Brady concerning your fragile state of mental health and what your twin sister said about you in the letter read to the Court by Mr Brady but, in my view, these matters do not provide you with particularly strong additional mitigation. Your state of health did not prevent you hatching a plan to travel to these islands to commit fraud and I have no medical evidence before me to suggest that you suffer from any formal mental disorder such as might explain or excuse your criminal actions or otherwise diminish your culpability.



RELEVANT SENTENCING GUIDELINES AND CASE LAW

16. There is no dispute between the Crown and the defence that in determining the appropriate offence category and sentence range, I am to be guided by the *UK Sentencing Council's Definitive Guideline on Fraud, Bribery and Money Laundering Offences* as well as by the relevant Cayman case law in relation to this kind of offence (prevalent as it is in this jurisdiction). I will be so guided while ensuring that I do not place myself in a rigid straitjacket.

17. In paragraphs 21-23 of her helpful written Submissions on sentence, Ms. Salako has identified the factors which she submits should lead me to conclude that by reference solely to the UK Guidelines, this case falls into Category 'A' (High Culpability) but Category 5 on the basis that it revealed a risk of Category 4 harm (5-20,000). If I were rigidly to follow this approach, this would suggest a category sentence range between a high level community order and a prison sentence of 12 months.

18. Having cited the UK Guidelines, Ms. Salako sought to argue that although the Cayman Islands does not have the offence of possession, making or supplying articles for use on fraud, such guidance as applies to this offence in the UK Definitive Guidance can still assist when addressing the level of harm in relation to this type of conspiracy to defraud where no economic loss was ultimately caused. She submits that if such guidance is relevant, and on the basis of the conduct qualifying as a greater degree of culpability and harm, the proper range is 3-7 years' custody with a starting point of 4 years and 6 months.



I reject that argument as it amounts submitting that a sentencing Judge should fill a perceived lacuna in Cayman law by sentencing individuals by reference to an offence with which they are not and could not be charged.

19. In terms of the relevant case law, Ms. Salako's submissions acknowledge that there is no Cayman Court of Appeal guidance that is directly applicable to the facts of the instant case. That may change in the near future but she, Mr Furniss and Mr Brady have helpfully referred me to the facts of the recent Grand Court decisions to which I have referred earlier. There are plainly differences between these earlier cases in terms of the apparent ambition of the offending, the extent to which you were principal participants as opposed to minnows manipulated by others and the success of your criminal efforts. Your efforts to defraud Butterfield Bank ended in failure but the fact that you had other cards for potential use in your fraudulent plan shows, as I have said, that there was clearly a risk of harm from your agreement, had you not been arrested when you were.

20. The purpose of any sentencing exercise is to achieve harmony between consistency and fairness to all who appear before the courts on the one hand (so that like cases are treated in the same way) and individual fairness to a defendant so that the sentence passed properly reflects the aggravating and mitigating factors present in each case.

21. The evidence in this case discloses the actions of two individuals travelling to the Cayman Islands equipped to commit card fraud on a well-planned but relatively modest scale in comparison with other recent cases.



There are, as Ms Salako acknowledges in para 38 of her written submissions, notable differences between this case and the case of *Pop and others* in terms of the cash successfully obtained and the apparent ambition of the conspiracy. And I of course take into account as a mitigating factor that you are both of good character.

22. In my view, the facts of this case show that you fall to be treated as co-equal conspirators in a sophisticated, well planned card fraud which would have lasted as long as you were able successfully to defraud Cayman Banks of funds. The custody threshold is plainly crossed. A simple, rigid application of the UK Sentencing Council Guidelines on the basis that this is a Harm A, Category 5 case (involving a risk of category 4 harm rather than actual loss) would indeed result in a sentence range between a high level community order and 1 year's custody. I take the view, however, that the particular prevalence of this kind of offence and the need to send a message to fraudsters who travel to the Cayman Islands with a card reader and a bag of cards ready for cloning, rather than more conventional holiday items, justifies a move up the sentencing scale into Category 4 and a range of 26 weeks to 3 years custody with a starting point of 18 months' custody.

23. I note that in *Cheaaibi & others* Malcolm J. Actg. approached the sentencing exercise of the defendants before him on the basis of a higher sentencing range (Category 3 with a range 18 months to 4 years custody) and concluded that the appropriate sentence for the more sophisticated and ambitious conspiracy he was considering was 3 years and 6 months' custody before considering any aggravating or mitigating factors.



24. In my view, the prevalent nature of this kind of fraud, and the consequent need to deter others, justifies an increase in sentence in your case from a Category 4 starting point of 18 months to one of two years - before factoring in the discount to reflect your early pleas of guilty. Having applied a one third discount to reflect your pleas of guilty, the sentence I pass on each of you is one of 16 months' imprisonment.
25. Time spent in custody is to be deducted from the sentences imposed.
26. I order the forfeiture of the card reader, the cards and the laptop computer.
27. Finally I recommend that each of you be deported once you have served your sentences.

Dated this the 4th day of August 2016



**Honourable Mr. Justice Timothy Owen Q.C. (Actg.)
Acting Judge of the Grand Court**