[2016] JMCA Crim 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 18/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

MEISHA CLEMENT v R

Cecil J Mitchell for the applicant

Mrs Natalie Ebanks-Miller for the Crown

29 February and 22 July 2016

MORRISON P

Introduction

[1] This is a renewed application for leave to appeal against conviction and sentence for the offence of possession of access devices, contrary to section 8(2) of the Law Reform (Fraudulent Transactions) (Special Provisions) Act (the Act). The application was initially considered on paper, and refused, by a single judge of the court (the single judge) on 7 September 2015. The applicant, as she is entitled to do, has now renewed the application before the court itself.

[2] The Act came into force on 28 March 2013. It was passed as an explicit legislative response to a new species of criminality known as 'lottery scams'. In the Memorandum of Objects and Reasons to the Bill which preceded the passing of the Act[1], the growth of illegal lottery scams was said to have "developed quickly and in a complex manner which has the potential to infiltrate all sectors of the society". It was therefore thought necessary to initiate "effective legislative action to combat the growth of this criminal activity as the law in its present stage has proven to be ineffective in prosecuting offenders". The Act is therefore relatively new legislation, designed to address what was perceived to be an urgent social need.

[3] The amended particulars of the charge for which the applicant was convicted were that, on 24 August 2013, she fraudulently possessed "a number of credit/debit cards to use data from these access devices, whether authentic or not, to obtain service from them".

[4] An "access device" is defined in section 2 of the Act as -

> "... any card, plate, code, account-number, electronic serial number, mobile identification number, personal identification number and any other means of access that can be used alone or with another device, to obtain a benefit or other thing of value, or that can be used to initiate a transfer of money."

[5] Section 8(2) of the Act provides that:

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[1]Laid before the House of Representatives on 26 February 2013

> "(2) A person commits an offence where that person fraudulently possesses, uses, trafficks in or permits another person to use any data from an access device (whether or not the data is authentic), that would enable such other person to use the access device or to obtain the services that are provided by the issuer of the access device."

[6] And, under item 6 of the Schedule to the Act, the penalty prescribed for an offence under section 8 is a fine, or imprisonment not exceeding 15 years, or both such fine and imprisonment.

The proceedings in the court below

[7] The applicant and another (the co-defendant) were originally charged with two offences under the Act. Count one charged them with possession of identity information, contrary to section 10(1), while count two charged them with possession of access devices, contrary to section 8(2). But when the matter came on for trial before G Fraser J (the judge) in the Circuit Court for the parish of Trelawny on 6 March 2015, the co-defendant pleaded not guilty to both counts and was discharged after the prosecution offered no evidence against him. Upon the applicant's plea of not guilty on count one as well, the prosecution also offered no evidence against her on that count. However, the applicant pleaded guilty on count two and was in due course sentenced to eight years' imprisonment.

[8] When the matter was called on before the judge on 6 March 2015, the prosecution was represented by Mrs Melony Domville. Mrs Domville it was who informed the court that the applicant was represented by Mr Peter Champagnie, but

that Mr Martyn Thomas, who was present, was holding for him. After the applicant's plea was taken, Mrs Domville outlined the following facts to the court. At about 4:00 pm on 24 August 2013, police officers intercepted a motor cycle on which the applicant was a pillion rider. The applicant agreed to the police officers' request that they be allowed to search her house and, during this search, a bag containing several credit/debit cards, bearing the names of persons residing overseas, was found. When informed by the police officers of the offence of possession of access devices and cautioned, the applicant said, "officer, I used to pay taxes of persons, of overseas persons ... so that is how I have the credit cards". The court was told that a report received from the Communications Forensics and Cybercrime Unit (CFCU) of the Jamaica Constabulary Force indicated that the credit/debit cards were valid cards, bearing the names and card numbers of seven persons.

[9] Towards the end of Mrs Domville's presentation of the facts, a discussion arose between counsel and the court on the nature and actual number of cards with which the applicant had been found. When counsel for the prosecution sought an amendment to the indictment to clarify these points, the following exchange ensued:

> "MR. M. THOMAS: I crave your indulgence, m'Lady. Before it is amended, can I have a word with my client? Might it please you, m'Lady ...
>
> HER LADYSHIP: Yes.
>
> MR. M. THOMAS: M'Lady, and I apologize, though Miss Clement had indicated a certain course and I was here yesterday and I was asked to hold in the matter and I'm here holding in the matter and she has given me certain instructions. The prosecution had outlined that there were a

certain number of credit/debit cards found. Having had further discussions with my friend and having looked at a report from the CFCU, we - I believe we can agree that eight of those cards were such cards.

HER LADYSHIP: No, Mr. Thomas, I was just asking if it's MasterCard, credit card or a number of them, because count two says ...

MISS DOMVILLE: I was asking for it to be amended, ma'am, to reflect what the CFCU indicates, credit/debit cards, ma'am.

MR. M. THOMAS: But, m'Lady, outside of that, my instructions are becoming a little bit more unclearer [sic] as we go along. M'Lady, I ...

HER LADYSHIP: Mr. Thomas ...

MR. M. THOMAS: Yes, m'Lady.

HER LADYSHIP: ... instructions caan (sic) change. You get them, they are written and they are signed to, *finis.* That is instructions, yes? Miss Clement, I don't have the time for this. Miss Clement, don't yank my chain. Is either you have the things or you don't have the things.

ACCUSED: No, ma'am, I'm not yanking your chain. I was just going off of what he is telling me.

HER LADYSHIP: My enquiry was in relation to what is the device the Crown is speaking of. Is it that there was a particular device or it's the credit card document, because it's a document itself. Isn't that what the count is about?

MISS DOMVILLE: Yes, m'Lady.

MR. M. THOMAS: Yes, m'Lady

HER LADYSHIP: So, what is your position, Miss Clement?

ACCUSED: Guilty

HER LADYSHIP: Sorry?

ACCUSED: Guilty.

MR. M. THOMAS: Very well, m'Lady

HER LADYSHIP: Yes, madam Prosecutor. So, it should read what, a number of?

MISS DOMVILLE: Possessed a number of credit/debit cards, m'Lady.

HER LADYSHIP: So, the words 'a MasterCard credit' to be deleted?

MISS DOMVILLE: To be deleted ma'am, and inserted [sic] 'a number of credit/debit cards'.

HER LADYSHIP: Yes.

MISS DOMVILLE: I also ask for it to be form a part of the facts, m'Lady, the CFCU report.

HER LADYSHIP: Well, you have amended it.

You have any objections to the amendment, Mr ...

MR: M. THOMAS: No, m'Lady.

HER LADYSHIP: Let her be repleaded on the amended count.

REGISTRAR: Miss Meisha Clement, you are charged, ma'am for the offence of Possession of Access Device. The particulars of this offence, ma'am, are that you, Meisha Clement, on the 24th day of August, 2013, in the parish of Trelawny, did fraudulently possess a number of credit/debit cards to use data from these access devices, whether authentic or not, to obtain services from them. How say you, are you guilty or not guilty?

ACCUSED: Guilty."

[10] Upon an indication from the judge that she would prefer to have sight of a social enquiry report and some further information about the applicant's antecedents before proceeding to the issue of sentence, the matter was adjourned to 20 March 2015. On that date, the social enquiry report and the applicant's antecedents were made

available to the court. This material revealed that the applicant was born at the Falmouth Hospital on 1 April 1983 and migrated to the United States of America when she was six years of age. She was educated, allegedly up to the level of a bachelor's degree in business administration and worked in that country for a few years before returning home. Upon her return to Jamaica, she operated a clothing store in Montego Bay for about two years and, after giving it up, she continued to sell clothing, presumably on her own account. This is the business in which she was engaged at the time of her arrest. At the time of sentencing, she was a married person and the mother of two dependent children aged eight and nine years. The applicant had five previous convictions recorded against her name. But it appears that four of them, in respect of which she was given non-custodial sentences, arose out of the same incident, in which she was charged with separate counts of possession of and uttering forged documents as a result of a failed attempt to obtain a passport by false means. The fifth related to a breach of the Corrections Act, for which she was put on probation for 12 months.

[11] The applicant's social enquiry report was essentially negative. The probation aftercare officer's conclusion was as follows:

> "The thirty-two year old offender, Ms. Meisha Clement is before the court for the offence of Possession of Access Device (s). She seemingly has had several run-ins with the law from 2012 through to 2014 and has further court appearances.
>
> Subject reportedly spent the first part of her early childhood in Jamaica but resided in the United States for most of her life. There, she was seemingly provided for by her parents, schooled, and obtained employment as a home aid nurse. She has also been married twice and is the mother of two

children, produced from her first marriage. Reports about the offender are in such dissonance it begs the question of her true mental state, as on the one hand she is portrayed as a quiet, doting mother and on the other hand, someone capable of heinous and deceptive schemes.

The offender does not appear to be taking any responsibility for her actions. She contended that some of the items found at her previously occupied apartment in Greenside, Trelawny, belonged to her friend, [the co-defendant]. She also insists that there were items that she legally obtained by means of her online businesses which she maintained with customers living overseas. Subject, who suggests that she was advised to enter a guilty plea, has adopted this position in her interview with the probation officer, after pleading guilty in court. The several different accounts about her character and her conduct, including her own accounts suggest strongly however, that truth and honesty may not reside in the bosom of the offender who now seems to be resiling from her previously expressed position of guilt. Her seeming level of dishonesty could raise questions about her true intentions. It is noted that although the offender laments the fact that she has been in custody for a number of months and considers her treatment unfair, she has at no time made the association between her own actions and the reason she may have been remanded in custody."

[12] In his plea in mitigation on the applicant's behalf, Mr Vincent Henry (who appeared for the applicant on this occasion) pointed out that she had been in custody for 10 months pending trial; that she had pleaded guilty and thus avoided wasting the court's resources in a trial; and that "both physically and economically up to the time that she was arrested … separating [the applicant] from her children … could have a negative impact on them". The court was therefore urged to impose a non-custodial sentence. At the conclusion of her counsel's plea, the applicant told the court, perhaps

in response to what she had heard or seen of the social enquiry report, that "I am emphasizing that I am in no way saying that anyone forced me to make that plea".

[13] In her sentencing remarks, the judge said this:

> "... when persons plead guilty I usually reward them with a significant discount in the possible sentence that they might obtain. I would usually start at a fifty percent discount with a guilty plea, however, a fifty percent discount would be in circumstances where the convicted person has a previously clean record; that is how the fifty percent comes about. In the circumstances, I must look to determine whether there are any aggravating circumstances which would cause me to lean towards the upper end of the scale which is a maximum of 15 years for this offence, or if there are any mitigating circumstances which would cause me to lean toward the lower end of the scale in relation to the appropriate sentence.
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> Now, I look at the mitigating factors, it is true that this defendant has pleaded guilty for whatever personal reasons she has pleaded guilty. Now, she has also indicated that she has been in custody for ten months, I will take that into consideration. She has indicated that she has two young children who will suffer if she is to be incarcerated, I do not take that into consideration. In fact, the authorities urge that that is not a consideration for the Court. Miss Clement should have thought about her children's welfare before she embark [sic] on the path that she chose as a mature and reasonable individual.
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> Now, I look at other aggravating factors, the statutory ones would be whether or not there was any intimidation of the witnesses, and so on and so forth. In those circumstances, there was none alleged by the Prosecution, so that cannot be weighed against Miss Clement in the circumstances. Other aggravating circumstances, of course, the most obvious is that she has a record; five previous convictions. It is true that counsel, Mr. Henry, pointed out that four of them arose from the same circumstances, but it is not so much the number of counts which happened on that one occasion that concerned me but rather the kind of offences

committed, that is what concerns me. She has been convicted of uttering forged documents, two counts; attempting to obtain passport by false pretence, and possession of false documents, three counts of possession of false documents. Now, that is so closely akin to this offence for which she is before me presently for sentencing and what her records indicates [sic] is a particular behaviour pattern on Miss Clement's part and that she is prone to dishonesty. That is what it signifies to me so that is an aggravating factor that weighs heavily against Miss Clement. I have also looked at the contents of the report and I must tell you, Mr. Henry, that Miss Clement has not been truthful even in relation to the information supplied to the Probation Officer. Information supplied by her has been liaising [sic] by her own parent, for example she indicates her educational achievements and how she had gone to particular schools and obtained particular qualifications, a Bachelors [sic] degree in Business Administration from Broward College in the United States. Her mother ... confirm [sic] that she attended a particular high school reported that she started at Broward Community College but never continued it and that the offender is a Certified Home Nurse instead of the qualification she indicates she possess. So, even in terms of her education and academic achievement, Miss Clement has not been honest with this Court.

She also indicated that she was employed in particular occupations and at various places and again her mother has contradicted this information. Even in respect of her very name, as far as I understand it, Miss Clement or Mrs. Clement is no longer Mrs. Clement because she is divorced from Mr. Clement and married to a Mr. Isaacs since then, so I don't know that Mrs, [sic] Clement can be her proper name. And when I look at her record I note that she has been using a number of different names, the name Whittaker, Sobrina Whittaker, Aneisha Whittaker so I am not even sure at this point in time what her real name is, I don't know what her name is in those circumstances.

... in the words of the Probation Officer which I adopt, she is a stranger to the truth. On top of that she has not expressed one iota of remorse even at this time. The only credit card other persons [sic] name that she said in her possession they gave it to her for tax purposes. Who gives people a

> card for tax purposes, nobody, you put a credit card in the wrong hands it can ruin a person financially in the United States. If it is one thing I know, people in that country guard with their life, it is their credit rating and unauthorized use of their credit cards can result in bad credit ratings. You can't even get a place to live if you have bad credit rating so I don't believe that persons would have given her their credit card so that she could come to Jamaica with those credit cards. For what purposes?
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> ... in the circumstances, I award Miss Clement, a one third discount on the maximum penalties of 15 years and I also take into account that she has spent ten months in custody and for that would make her another two years credit, that's 2 and 5; 7. So, in all the circumstances I believe an appropriate sentence for Miss Clement is eight years imprisonment."

The application for leave to appeal

[14] In her amended application for leave to appeal dated 14 April 2015[2], the applicant gave notice of her desire to appeal against both her conviction and sentence, on the following grounds:

> "(a) I wanted a fair trial and the judge refuse [sic] to allow me to withdraw my guilty plea, which was taken in the absence of my lawyer and the Probation Officer told me that he would recommend a change of Plea to the court but was never fulfilled.
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> (b) The sentence is excessive."

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[2] Amended Criminal Appeal Form B1, filed 14 April 2015

[15] Attached to the applicant's application for a reconsideration of the single judge's refusal to grant leave[3] was an unsigned document dated 28 September 2015, in which the applicant raised a number of issues concerning the circumstances of her guilty plea. Among other things, she complained that her "paid attorney" was not present at court on any of the three court dates leading up to the date on which she pleaded guilty; that the attorney who offered to assist her in court after she had indicated to the judge that she wished to plead guilty had only conferred with her while she was "on the witness stand"; that the judge was left with a misconception as to the true nature of the cards with which she had been found; and that the probation officer had failed to fulfil his promise to tell the court that she wished to change her plea to one of not guilty. However, the applicant also said that, "I never once indicated to the lawyer or anyone else that I was forced to plead guilty ... I made it clear to the judge I never said that I was forced because the lawyer never even stopped her to clarify that I said nothing of the sort".

[16] On 23 February 2016, Mr Cecil J Mitchell filed a single ground of appeal on the applicant's behalf. In it, the applicant complained that the sentence of eight years' imprisonment imposed on her by the judge was manifestly excessive. But when the application came on for hearing on 29 February 2016, Mr Mitchell told the court that his instructions obliged him to bring to the court's attention the applicant's concerns as to whether the plea of guilty had been properly taken from her. In so doing, Mr Mitchell

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[3]Criminal Appeal Form B6, dated 28 September 2015 and filed 1 October 2015

also very properly reminded us of, first, the circumstances in which the applicant was re-pleaded on the amended indictment[4]; and, second, the applicant's final statement to the court before the judge commenced her sentencing remarks[5].

[17] In our view, both these passages amply negate any suggestion that the applicant's plea of guilty was anything other than voluntary. Indeed, in the document dated 28 September 2015 to which we have already referred[6], the applicant herself clearly reiterated that "I never once indicated to the lawyer or anyone else that I was forced to plead guilty". In these circumstances we cannot possibly improve, and therefore gratefully adopt, the single judge's conclusion on this point:

> "The applicant was convicted following a clear and unequivocal guilty plea. She was duly represented by counsel at the material time and remained so up to the date of sentencing. At no time was it indicated to the learned judge that the applicant wished to withdraw her plea. The applicant personally indicated to the learned judge that no one had forced her to plea guilty. The guilty plea was also sufficiently supported on the facts outlined to the learned judge which were unchallenged. There is no basis on which it can properly be said that the learned judge fell into error in accepting the plea and in sentencing the applicant based on it."

[18] Mr Mitchell then went on to submit that, while he did not feel able to urge a non-custodial sentence in the circumstances, the sentence imposed by the judge is manifestly excessive. In this regard, Mr Mitchell's main contention was that in

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[4] See para. [9] above
[5] See para. [12] above
[6] At para. [15] above

determining what sentence to impose on the applicant the judge had started from the statutory maximum and worked downwards, instead of, as she ought to have done, choosing an appropriate starting point within the statutory range and adjusting it as required.

[19] For reasons which may yet require to be revisited at some future date, it is not usual for the prosecution to be invited to participate in a discussion on a matter of sentencing in this court. In this case, however, we considered that it might be helpful to canvass the views of Mrs Natalie Ebanks-Miller, who appeared for the prosecution, given the relative newness of prosecutions under the Act and the absence of any established body of precedent in these matters. Directing our attention to the applicant's antecedents, as well to what she described as the "draconian" statutory maximum penalty, Mrs Ebanks-Miller submitted that the judge had taken into account all the relevant factors and that this court ought not to interfere with the exercise of her sentencing discretion.

Discussion on sentencing

[20] It is a commonplace of modern sentencing doctrine that, in choosing the appropriate sentencing option in each case, the sentencing judge must always have in mind what Lawton LJ characterised, in his oft-quoted judgment in **R v Sergeant**[7], as the four "classical principles of sentencing". These are retribution, deterrence,

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[7] (1975) 60 Cr App 74, 77

prevention and rehabilitation. In **R v Everald Dunkley**[8], P Harrison JA (as he then was) explained that it will be necessary for the sentencing judge in each case to apply these principles, "or any one or a combination of ... [them], depending on the circumstances of the particular case". And ultimately, taking these well established and generally accepted principles into consideration, the objective of the sentencing judge must be, as Rowe JA (as he then was) explained in **R v Sydney Beckford and David Lewis**[9], "[to] impose a sentence to fit the offender and at the same time to fit the crime".

[21] But in arriving at the appropriate sentence in each case, the sentencing judge is not at large. The view that "[u]ltimately every sentence imposed represents a sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process"[10], has now given way to a recognition of the need for greater objectivity, transparency, predictability and consistency in sentencing. As one Australian commentator has observed[11] –

> "In order to to have a coherent, transparent and justifiable sentencing system, the relevant principles must not only be articulated, but prioritized and weighted."

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[8] RMCA No 55/2001, judgment delivered on 5 July 2002, page 3
[9] (1980) 17 JLR 202, 203
[10] **Williscroft v R** [1975] VR 292, 299-300 (Supreme Court of Victoria)
[11] Mirko Bagaric, Sentencing: From Vagueness to Arbitrariness: The need to abolish the stain that is the Instinctive Synthesis, (2015) UNSW Law Journal, Volume 38(1) 76, at page 113

[22] In the brief discussion which follows, we will, insofar as they are relevant to this application, identify some of the means through which modern sentencing practice now seeks to realise and promote these aims.

[23] As has been seen, the Act empowers the sentencing judge to sentence a person convicted of a breach of section 8 to a fine, or imprisonment not exceeding 15 years, or both such fine and imprisonment. The range of options given to the sentencing judge is therefore wide, no doubt reflecting the view of Parliament that, as with any other offence, offences committed in breach of section 8 may vary widely in seriousness, as will the particular circumstances of each offender who is brought before the court. In other words, as Hilbery J put it in a similar context in the well-known older case **R v Ball**[12] –

> "Our law does not ... fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of the case."

[24] Where, as in this case, the law provides for an alternative to imprisonment as punishment for the offender, section 3(1) of the Criminal Justice (Reform) Act (the CJRA) requires the sentencing judge to deal with him or her otherwise than by way of imprisonment, save in the cases mentioned in section 3(2). Section 3(2) provides that the rule shall not apply where (a) the court is of the opinion that no method of dealing

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[12] (1951) 35 Cr App R 164, 166

with the offender other than imprisonment is appropriate; (b) the offence is murder; or (c) the offender at the time of commission of the offence was in possession of a weapon referred to in the First Schedule[13], a firearm or an imitation firearm. Section 3(3) provides that, where the court is of opinion that no other method of dealing with the offender is appropriate and passes a sentence of imprisonment on him or her, "the court shall state the reason for so doing, and for the purpose of determining whether any other method of dealing with such person is appropriate the court shall take into account the nature of the offence and shall obtain and consider information relating to the character, home surroundings and physical and mental condition of the offender".

[25] The effect of section 3(1) and (2) of the CJRA is therefore that the sentencing court must, in those cases in which it is at liberty to impose a non-custodial sentence, consider all the circumstances in order to determine whether the seriousness of the offence nevertheless warrants the imposition of a custodial sentence.[14] Thus, imprisonment is a last, rather than a first, resort.[15] As McDonald-Bishop JA recently pointed out in the judgment of this court in **Dwayne Strachan v R**[16], the CJRA "was geared, largely, at reducing the burden on the overcrowded prison system, while at the

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[13]"1. Daggers. 2. Any knives commonly known as switchblades, flick blades, ratchet knives or rambo knives. 3. Articles made or adapted for use to cause injury to the person."

[14]Cf section 152(2) of the English Criminal Justice Act 2003, which provides that "[t]he court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence".

[15] Other sections of the CJRA make provision in certain circumstances for suspended sentences (sections 6-9), community service orders (sections 10-11), forfeiture orders (section 12), attendance orders (section 13) and curfew orders (section 14).

[16][2016] JMCA Crim 16, para. [28]

same time promoting the rehabilitation of offenders within the context of community-based justice". Accordingly, as McDonald-Bishop JA went on to observe[17], it is "an indispensable tool in the hands of the judiciary to be employed in the sentencing process and so sentencing judges at all levels and at all times should pay due regard to its provisions and give effect to them".

[26] Having decided that a sentence of imprisonment is appropriate in a particular case, the sentencing judge's first task is, as Harrison JA explained in **R v Everald Dunkley**[18], to "make a determination, as an initial step, of the length of the sentence, as a starting point, and then go on to consider any other factors that will serve to influence the sentence, whether in mitigation or otherwise". More recently, making the same point in **R v Saw and others**[19], Lord Judge CJ observed that "the expression 'starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features".

[27] In seeking to arrive at the appropriate starting point, it is relevant to bear in mind the well-known and generally accepted principle of sentencing that the maximum sentence of imprisonment provided by statute for a particular offence should be

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[17] At para. [29]
[18] At page 4
[19] [2009] EWCA Crim 1, para. 4

reserved for the worst examples of that offence likely to be encountered in practice[20]. By the same token, therefore, it will, in our view, generally be wrong in principle to use the statutory maximum as the starting point in the search for the appropriate sentence.

[28] This view of the matter was recently confirmed by this court in **Kurt Taylor v R**[21], which was also a case involving the commission of offences charged under the Act. Speaking for the court, F Williams JA said this:[22]

> "Although with new and relatively-new legislation there might be challenges in ascertaining the average or norm or range of sentences to use as a starting point and, in those cases, the sentencing judge will have to do the best that he or she can do, that starting point ought never to be the maximum sentence."

[29] But, in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence. Although not a part of our law, the considerations mentioned in section 143(1) of the United Kingdom Criminal Justice Act 2003 are, in our view, an apt summary of the factors which will ordinarily inform the assessment of the seriousness of an offence. These are the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused.

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[20] See, for example, the old leading case of **R v Harrison** (1909) 2 Cr App R 94, 96, per Channell J; and **R v Byrne and others** (1975) 62 Cr App R 159, 163 per Lawton LJ. See also **R v Everald Dunkley**, per P Harrison JA, at page 6.
[21] [2016] JMCA Crim 23
[22] At para. [41]

[30] Before leaving this aspect of the matter, we should refer in parenthesis, with admiration and respect, to the recent judgment of the Court of Appeal of Trinidad and Tobago in **Aguillera and others v The State**[23]. In that case, after a full review of relevant authorities from across the Commonwealth, the court adopted what is arguably a more nuanced approach to the fixing of the starting point. Explicitly influenced by the decision of the Court of Appeal of New Zealand in **R v Tauer and others**[24], the court defined the starting point[25] as "… the sentence which is appropriate when aggravating and mitigating factors relative to the offending are taken into account, but which excludes any aggravating and mitigating factors relative to the offender". So factors such as the level of premeditation and the use of gratuitous violence, for instance, to take but a couple, would rank as aggravating factors relating to the offence and therefore impact the starting point; while subjective factors relating to the offender, such as youth and previous good character, would go to his or her degree of culpability for commission of the offence.

[31] We have mentioned **Aguillera and others v The State** for the purposes of information only. But it seems to us that, naturally subject to full argument in an appropriate case, the decision might well signal a possible line of refinement of our own approach to the task of arriving at an appropriate starting point in this jurisdiction.

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[23]Crim. Apps. Nos. 5, 6, 7 and 8 of 2015, judgment delivered on 16 June 2016
[24] [2005] NZLR 372
[25]At para. (22)

[32] While we do not yet have collected in any one place a list of potentially aggravating factors, as now exists in England and Wales by virtue of Definitive Guidelines issued by the Sentencing Guidelines Council (SGC)[26], the experience of the courts over the years has produced a fairly well-known summary of what those factors might be. Though obviously varying in significance from case to case, among them will generally be at least the following (in no special order of priority): (i) previous convictions for the same or similar offences, particularly where a pattern of repeat offending is disclosed; (ii) premeditation; (iii) use of a firearm (imitation or otherwise), or other weapon; (iv) abuse of a position of trust, particularly in relation to sexual offences involving minor victims; (v) offence committed whilst on probation or serving a suspended sentence; (vi) prevalence of the offence in the community; and (vii) an intention to commit more serious harm than actually resulted from the offence. Needless to say, this is a purely indicative list, which does not in any way purport to be exhaustive of all the possibilities.

[33] As regards mitigating factors, P Harrison JA (as he then was), writing extra-judicially in 2002[27], cited with approval Professor David Thomas' comment[28] that "[m]itigating factors exist in great variety, but some are more common and more effective than others". Thus, they will include, again in no special order of priority, factors such as (i) the age of the offender; (ii) the previous good character of the

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[26]Established pursuant to section 170(9) of the Criminal Justice Act 2003 – see, in particular the 'Definitive Guideline, Overarching Principles: Seriousness'.
[27]See footnote 4 above
[28]David A Thomas, Principles of Sentencing, 2nd edn, page 46

offender; (iii) where appropriate, whether reparation has been made; (iv) the pressures under which the offence was committed (such as provocation or emotional stress); (v) any incidental losses which the offender may have suffered as a result of the conviction (such as loss of employment); (vi) the offender's capacity for reform; (vii) time on remand/delay up to the time of sentence; (viii) the offender's role in the commission of the offence, where more than one offender was involved; (ix) cooperation with the police by the offender; (x) the personal characteristics of the offender, such as physical disability or the like; and (xi) a plea of guilty. Again, as with the aggravating factors, this is not intended to be an exhaustive list.

[34] This list is now largely uncontroversial. However, in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial. As the Privy Council stated in **Callachand & Anor v The State**[29], an appeal from the Court of Appeal of Mauritius –

> "... any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing."

[29][2008] UKPC 49, per Sir Paul Kennedy, at para. 9

[35] This decision was applied by the Caribbean Court of Justice in **Romeo DaCosta Hall v The Queen**[30], an appeal from the Court of Appeal of Barbados, in which Wit JCCJ, in a separate concurring judgment, remarked the emergence of "[a] worldwide view ... that time spent in pre-trial detention should, at least in principle fully count as part of the served time pursuant to the sentence of the court".

[36] Next, as regards the plea of guilty, such a plea must, as P Harrison JA stated in **R v Collin Gordon**[31], "attract a specific consideration by a court". The rationale for this has been variously explained. In **Keith Smith v R**[32], for instance, a decision of the Court of Appeal of Barbados, Sir Denys Williams CJ observed that "[i]t is accepted that a plea of 'Guilty' may properly be treated as a mitigating factor in sentencing as an indication that the offender feels remorse for what he has done". And in **R v Collin Gordon**, P Harrison JA said this[33]:

> "The rationale in affording to an offender the consideration of discounting the sentence because of a guilty plea on the first opportunity is based on the conduct of the offender. He has thereby frankly admitted his wrong, has not wasted the court's time, thereby saving valuable judicial time and expense, has thrown himself on the mercy of the court and may be seen as expressing some degree of remorse."

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[30] [2011] CCJ 6 (AJ), para. [32]

[31] SCCA No 211/1999, judgment delivered on 3 November 2005, page 4.

[32] (1992) 42 WIR 33, pages 35-36. This statement was recently referred to with approval by Brooks JA in the judgment of this court in **Jermaine Barnes v R** [2015] JMCA Crim 3, para. [11]

[33] At page 5

[37] The view that a plea of guilty may be treated as an expression of remorse on the part of the offender has been adopted by this court on more than one occasion. In **R v Everald Dunkley**, for instance, P Harrison JA characterised[34] the plea of guilty as "an indication of repentance and a resignation to the treatment of the court". And, most recently, in **Kurt Taylor v R**, F Williams JA reiterated[35] that "the authorities have observed that a plea of guilty in and of itself may very well be regarded as an indication of remorse".

[38] The extent of the allowable discount for a guilty plea has never been fixed. But the authorities make it clear that all will depend on the circumstances of the particular case. So in **Joel Deer v R**[36], Phillips JA stated that "[t]he amount of credit to be given for a guilty plea is at the discretion of the judge". Phillips JA went on to refer to **R v Buffrey**[37], in which Lord Taylor CJ stated that, as a general rule "something of the order of one-third would very often be an appropriate discount from the sentence which would otherwise be imposed on a contested trial". The editors of Archbold[38] stated that English Court of Appeal cases suggest that "it is normally between one-fifth and one-third of the sentence which would be imposed on a conviction by a jury". Among the relevant considerations for the sentencing judge will be the strength of the case against the offender ("an offender who pleads guilty in the face of overwhelming evidence may

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[34]At page 4
[35] At para. [32]
[36][2014] JMCA Crim 33, para. [8]
[37] (1993) 14 Cr App R (S) 511, 514
[38]Archbold: Criminal Pleading, Evidence and Practice, 1992, para. 5-153

not receive the same discount as one who has a plausible defence"), as well as the timing of the plea. As regards the latter, a plea offered on the first opportunity which presented itself to do so before the court may qualify the offender for the maximum allowable discount, while a plea offered at some later stage during the prosecution might attract some lesser discount.[39]

[39] Examples of levels of discount for guilty pleas applied or approved by this court include **R v Everald Dunkley**, in which a sentence of 12 months' imprisonment was reduced by 50%; **Basil Bruce v R**[40], in which the court observed that the sentencing judge had "quite properly indicated that as a result of Mr Bruce's plea of guilty she was inclined to reduce that figure by one third"; and **Oneil Murray v R**[41], in which the sentences imposed by the sentencing judge, which the court considered to be "quite unexceptionable ... had the applicant been found guilty after a full trial of the matter", were reduced by just under 25%.

[40] We should add for completeness that the whole matter of allowing a discount for a guilty plea has now been put on statutory footing by the recent enactment of the Criminal Justice (Administration) (Amendment) Act, 2015. By virtue of section 2 of that Act, which came into force on 27 November 2015, the Criminal Justice (Administration) Act (CJAA) has been amended to include a new Part 1A, under the rubric 'Reduction of Sentence upon Guilty Plea'. However, these amendments have no relevance to the

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[39] See **R v Everald Dunkley** and see also **R v Hall** [2007] 2 Cr App R (S) 42
[40] [2014] JMCA Crim 10, per Brooks JA at para. [7]
[41] [2014] JMCA Crim 25, per Morrison JA at para. [28]

instant case, in which the judge's sentencing exercise was completed well before they came into effect. So, for present purposes, it is not necessary to indicate more than that sections 42D and 42E of the CJAA, as amended, now provide for reductions in sentence on account of guilty pleas in specified cases. The level of reduction ranges from as high as 50% to 15%, depending on the stage of the proceedings at which the plea is offered and the nature of the offence with which the defendant is charged. Section 42H goes on to list a number of factors which must be considered by the court in determining the percentage by which the sentence is to be reduced in particular cases.

[41] As far as we are aware, there is no decision of this court explicitly prescribing the order in which the various considerations identified in the foregoing paragraphs of this judgment should be addressed by sentencing judges. However, it seems to us that the following sequence of decisions to be taken in each case, which we have adapted from the SGC's definitive guidelines[42], derives clear support from the authorities to which we have referred:

(i) identify the appropriate starting point;
(ii) consider any relevant aggravating features;
(iii) consider any relevant mitigating features (including personal mitigation);
(iv) consider, where appropriate, any reduction for a guilty plea; and
(v) decide on the appropriate sentence (giving reasons)

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[42]See Andrew Ashworth, Sentencing and Criminal Justice, 5thedn, page 32

[42] Finally, in considering whether the sentence imposed by the judge in this case is manifestly excessive, as Mr Mitchell contended that it is, we remind ourselves, as we must, of the general approach which this court usually adopts on appeals against sentence. In this regard, Mrs Ebanks-Miller very helpfully referred us to **Alpha Green v R**[43], in which the court adopted the following statement of principle by Hilbery J in **R v Ball**[44]:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene."

[43] On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion.

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[43](1969) 11 JLR 283, 284
[44]At page 165

Applying the principles

[44] As has been seen from her sentencing remarks[45], the judge approached the question of what was the appropriate sentence to impose on the applicant by (i) taking as her starting point the maximum sentence prescribed by the Act; (ii) discounting it by one-third as a "reward" for the guilty plea; and (iii) reducing it by a further two years to take into account the time spent in custody pending trial, thus resulting in a sentence of eight years' imprisonment.

[45] The first thing to note is that, despite the fact that the applicant, through her counsel, had urged the court to consider a non-custodial sentence, there is no indication whatsoever from the judge's sentencing remarks that this was done. Indeed, the sentencing remarks commence with a discussion by the judge as to what level of discount for the guilty plea would be appropriate in this case. Given the clear mandate of the CJRA, we take the view that, as a matter of invariable practice, a sentencing judge must demonstrate for the record, in explicit terms, that he or she has given principled consideration to whether the particular offender can be dealt with otherwise than by imprisonment. As F Williams JA observed in **Kurt Taylor v R**[46],"the imposition of a custodial sentence should never be regarded as automatic for an offence of this nature, the deleterious and far-reaching effects of lottery scamming notwithstanding".

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[45]Para. [13] above
[46]At para. [31]

[46] But, that having been said, the applicant does not now seriously contend, as she did in the court below, that she should have been given a non-custodial sentence. In the light of her history of previous convictions for not entirely dissimilar offences, in respect of which she had been sentenced to non-custodial sentences less than a year before, we think that the applicant's current stance is a realistic one. The question whether it would be appropriate to deal with the applicant by a method other than imprisonment was entirely a matter for the judge and, in all the circumstances of the case, we are unable to say that she erred in principle in deciding that it was not.

[47] So, having determined that the applicant could only be dealt with by a term of imprisonment, the next step for the judge was to choose an appropriate starting point. As we have already indicated, we consider that the judge erred in choosing the statutory maximum term of 15 years as the starting point. For, given the one to 15 year range of custodial sentences provided for by the Act, it must be assumed that the maximum term was intended by the legislature to be available to punish the most egregious examples of the kind of criminality proscribed by the Act.

[48] In **Kurt Taylor v R**, the appellant, who pleaded guilty to the offence of knowingly possessing identity information of persons, contrary to section 10(1) of the Act, was sentenced to five years' imprisonment. On appeal, as has already been seen[47], F Williams JA pointed out that relatively new legislation, such as the Act, may pose special challenges "in ascertaining the average or norm or range of sentences to use as

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[47]See para. [25] above.

a starting point". But notwithstanding this, the court considered a starting point of "say, between seven and nine years" to be appropriate in that case. Then, after making the necessary deductions to account for the appellant's good record and his guilty plea, the court settled on three years' imprisonment as an appropriate sentence.

[49] In **Kurt Taylor v R**, this court therefore took a point roughly midway the sentencing range provided for by the Act as its starting point. It is true that the offence to which the applicant pleaded guilty in this case consisted of 'simple' possession of access devices (by which we mean as distinct from using, trafficking or permitting another person to use the access devices). But it is clear that it is a serious offence, carrying potentially serious consequences and, in this regard, the following observation by the judge bears repetition:

> "... you put a credit card in the wrong hands it can ruin a person financially in the United States. If it is one thing I know, people in that country guard with their life, it is their credit rating and unauthorized use of their credit cards can result in bad credit ratings. You can't even get a place to live if you have bad credit rating so I don't believe that persons would have given her their credit card so that she could come to Jamaica with those credit cards. For what purposes?"

[50] In these circumstances, it seems to us that a starting point at or around the midpoint of the range, as in **Kurt Taylor v R**, in which the appellant was charged with the equally serious offence of possession of identity information of persons, would also have been appropriate in the instant case. Accordingly, affecting as it does the very basis on which the sentence imposed on the applicant was arrived at by the judge, we

have no doubt that the judge's choice of the maximum sentence of 15 years was an error in principle sufficient to justify this court's intervention. We will therefore approach the matter on the basis that a starting point of seven years would be appropriate in this case.

[51] As for aggravating factors, the judge considered the applicant's criminal record of five previous convictions to be the "most obvious" of these. While taking counsel's point that four of them arose out of the same circumstances, the judge indicated that she was more concerned by the type of offence, that is, one which demonstrated that the applicant was "prone to dishonesty". So this was, the judge said, "an aggravating factor that weighs heavily against [the applicant]".

[52] In our view, this was clearly a fair point. Although the dates on which the offences which led to the previous convictions were committed do not appear from the record, the applicant was sentenced in respect of them in May 2014. This would have been just eight months after the offences in the instant case were committed and two months short of a year before she appeared before the judge for sentencing in the instant case. At the core of the previous offences would have been the uttering of forged documents, with a view to obtaining a passport by false means. So while it is true that, as the judge accepted, four of the applicant's five previous convictions arose out of the same set of facts, taken together they demonstrated a pattern of dishonest behaviour. And, in our view, this pattern of behaviour plainly bore a sufficient relationship to the possession of access devices, in this case a number of credit/debit

cards obviously the property of others, to justify the judge's treatment of the applicant's previous convictions as an aggravating factor.

[53] But the judge went further. Based on the probation officer's view of the truthfulness of the applicant's statements about the schools she had attended, her educational achievements, her employment history and her reported use of various names in the past, the judge concluded that the applicant was "a stranger to the truth". Then, "[o]n top of that", the judge added, "she has not expressed one iota of remorse even at this time".

[54] Save to the extent that the probation officer's assessment of the applicant's truthfulness may possibly have been relevant to the question of her capacity for reform, which is not a point which the judge made, it is not entirely clear to us what bearing it could have had on the sentencing exercise being carried out by the judge. However, it seems to us that, notwithstanding the applicant's plea of guilty, the actual circumstances of this case give rise to different considerations with respect to the question of remorse. It is clear from the probation report that, up to the time of sentencing, the applicant was still maintaining that she was not guilty. Indeed, her stance with regard to the judge's acceptance of her plea of guilty, even up to the time when her application for leave to appeal was before this court, only served to confirm the probation officer's view that "[the applicant] does not appear to be taking any responsibility for her actions ... [and] ... now seems to be resiling from her previously expressed position of guilt".

[55] So, despite the fact that, as this court has from time to time confirmed, a guilty plea "may very well be regarded as an indication of remorse", it is clear that this is a case in which that indication was fully displaced by the conduct and utterances of the applicant herself. In our view therefore, the judge cannot be faulted for having treated the applicant's absence of remorse as an aggravating feature of the case.

[56] Turning now to mitigating factors, the judge considered, correctly, that the applicant should receive credit for time spent in custody pending trial. However, having been told by counsel that the applicant had been in custody for 10 months pending trial, the judge then proceeded, without explanation, to make an allowance of two years under this head. As it turns out, however, since the offence for which the applicant was charged was committed on 24 August 2013 and she was sentenced on 20 March 2015, it was simply impossible for her to have spent two years in custody pending trial. So this was again a clear error by the judge. As is now clear from the authorities, the allowance to be given by the sentencing judge under this head should reflect the actual time spent in custody pending trial. On the face of it, therefore, the applicant would have been entitled to a deduction of 10 months in this regard.

[57] On the basis of these considerations, the starting point of seven years is therefore subject to, on the one hand, the aggravating factors of the applicant's previous convictions and lack of remorse and, on the other hand, her entitlement to credit for the time spent in custody. The appropriate value to be ascribed to the aggravating factors will usually be a matter for the determination of the sentencing

judge, doing the best he or she can in all the circumstances of the particular case. In this case, taking into account all the matters to which we have already referred, we consider it appropriate to add two years to the starting point to reflect the fact of the applicant's previous convictions and absence of remorse. So, using round numbers, the exercise of adding and subtracting the aggravating and mitigating factors respectively results in a net accretion of one year to the starting point.

[58] We come finally to the impact of the applicant's guilty plea. As has been seen, the judge accepted that, upon a plea of guilty, "a significant discount" in the sentence which the offender might otherwise obtain is indicated. However, as regards the level of discount to be given, the judge went on to observe as follows:

> "I would usually start at a fifty percent discount with a guilty plea, however, a fifty percent discount would be in circumstances where the convicted person has a previously clean record ..."

[59] We are bound to say, with respect, that we are not aware of any such qualification to the principle that an offender who pleads guilty will usually be entitled to receive a discount in the sentence which would ordinarily be imposed after a contested trial. As we have attempted to demonstrate, the level of discount to be applied will be a matter entirely for the discretion of the sentencing judge, taking into account all the circumstances. So the only remaining question in this case is whether, putting on one side the judge's self-imposed limitation, the applicant would have been entitled to a level of discount greater than the one-third discount which she received.

[60] It is not clear from the record at what stage of the proceedings the applicant's guilty plea was offered. But, even if it is assumed in the applicant's favour that it was offered at the earliest possible stage of the proceedings, and thus qualified her for the maximum allowable discount, there is the contrary indicator of the apparent strength of the case against her. The incriminating evidence having been found in the applicant's presence during a search of her house, this was plainly a case in which the plea of guilty was offered in the face of quite irresistible evidence. To this extent, the competing considerations might be said to be evenly balanced. In these circumstances, we cannot say that the judge's choice of a one-third discount was so wholly outside of the range of possibilities available to her to justify this court's interference with it.

[61] Accordingly, applying the principles which we have identified and taking all factors into account, we have come to the conclusion that a sentence of five years' imprisonment would have been appropriate in this matter. It naturally follows from this conclusion that we consider that the sentence of eight years' imprisonment imposed by the judge was manifestly excessive and that the application for leave to appeal against sentence must therefore be granted.

Conclusion

[62] As we indicated at the outset of this judgment, the Act represents Parliament's response to what was considered to be a pressing social problem. The maximum custodial sentence provided for by the Act is a clear indication of the seriousness with which the behaviour which it criminalises is viewed by the legislature. In applying the

legislation, it is, of course, the duty of the court to give effect to the intention of Parliament. But, once provision is made for a range of sentencing options, it is equally the duty of the court in each case to determine the appropriate sentence to be applied to the particular offender in accordance with accepted sentencing doctrine, as laid down by Parliament itself in other legislation, such as the CJRA, or in previous decisions of the court.

[63] As this court noted in **Kurt Taylor v R**, new legislation, such as the Act, may pose special challenges for sentencing judges seeking to locate and impose the appropriate sentence in an unfamiliar legal and factual context. It is in acknowledgment of this reality that we have chosen in this judgment to review in detail some of the generally accepted principles of sentencing, with a view to providing guidance to judges confronted with sentencing problems under the Act. But, to the extent that most, if not all, of the principles which we have reviewed in this judgment are equally applicable to the difficult business of sentencing in other areas of the criminal law, we hope that the discussion may also be of more general value.

Disposal of the application

[64] The application for leave to appeal against conviction is dismissed. However, the application for leave to appeal against sentence is granted. The hearing of the application is treated as the hearing of the appeal, which is allowed. The sentence of eight years' imprisonment imposed by the judge is set aside and a sentence of five years' imprisonment is imposed in its stead. The sentence is to be reckoned as having

commenced on 20 March 2015, which is the date on which it was imposed by the judge.