IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2015-404-000097
[2015] NZHC 1251

ERICKA CHARMAYNE KORA

v

NEW ZEALAND POLICE

Hearing:	2 June 2015
Appearances:	Peter Kaye for the Appellant Sarah Jacobs for the Respondent
Judgment:	5 June 2015

JUDGMENT OF MOORE J
[Appeal against sentence]

This judgment was delivered by me on 5 June 2015 at 4:00pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Introduction

[1] Ms Kora was sentenced to three years' imprisonment after pleading guilty to 21 charges of dishonestly using a document with intent to obtain a pecuniary advantage.

[2] She appeals against this sentence on the grounds it is manifestly excessive. More particularly, Ms Kora claims that insufficient credit was given for her personal mitigating circumstances.

Factual background

[3] Between 2007 and June 2011, a period of a little under four years, Ms Kora used multiple names, multiple aliases and false documents and details to apply for credit cards. She did this 13 times. All but one of those applications was successful.

[4] Once in possession of the fraudulently obtained credit cards Ms Kora used them to steal $107,077.79.

[5] Then, in April 2011, just a few months before the end of the first phase of her offending, Ms Kora filed eight fraudulent GST returns claiming payment of some $64,000. The fraud was discovered before the final refunds were paid. The total sum which Ms Kora defrauded the Inland Revenue Department was $52,250.

[6] Thus, the total amount defrauded over the whole period was in the vicinity of $160,000.

[7] In explanation to the Police Ms Kora said she had no intention of repaying the money and believed that the debt would be passed to Baycorp. She said that if she was caught she believed that she would have paid a small amount back each week.

Procedural background

[8] On 8 November 2013, a sentence indication was given by Judge Harvey. The Judge indicated a sentence in the order of three years and four months imprisonment.

This was accepted by Ms Kora who was then granted bail and remanded for sentence. She failed to appear and a warrant for her arrest was issued. When she finally appeared for sentence on 29 July 2014 Judge Harvey was unavailable and Judge Collins sentenced her.

Approach on appeal

[9] This proceeding was commenced prior to 1 July 2013, so the pre-Criminal Procedure Act 2011 regime applies.[1]

[10] Ms Kora has a general right of appeal against conviction or sentence pursuant to s 115 of the Summary Proceedings Act 1957 (the SPA). Section 119 of the SPA provides that the appeal is by way of rehearing. The High Court's powers on appeal are set out in s 121, which relevantly provides:

> **121 High Court to hear and determine appeal**
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> …
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> (3) In the case of an appeal against sentence, the High Court may—
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> (a) Confirm the sentence, or
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> (b) If the sentence (either in whole or in part) is one which the Court imposing it had no jurisdiction to impose, or is one which is clearly excessive or inadequate or inappropriate, or if the High Court is satisfied that substantial facts relating to the offence or to the offender's character or personal history were not before the Court imposing sentence, or that those facts were not substantially as placed before or found by that Court, either—
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> (i) Quash the sentence and either pass such other sentence warranted in law (whether more or less severe) in substitution therefor as the High Court thinks ought to have been passed or deal with the offender in any other way that the Court imposing sentence could have dealt with him on the conviction; or
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> (ii) Quash any invalid part of the sentence that is severable from the residue; or
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> (iii) Vary, within the limits warranted in law, the sentence or any part of it or any condition imposed in it.

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[1] By virtue of ss 397(1) and (2) of the Criminal Procedure Act, and the Criminal Procedure Commencement Order 2013.

[11] As the Court of Appeal observed in *R v Shipton*, there must be an error vitiating the exercise of the original sentencing discretion:[2]

> … The discretion to vary the sentence is not unfettered; this Court does not embark upon the sentencing afresh nor substitute its own opinion for that of the original sentence. There must be an error vitiating the exercise of the original sentencing discretion. In short, this Court must proceed on an "error principle" …

[12] On an appeal against sentence the focus is on the correctness of the net result, not the process by which the sentence was reached:[3]

> … this Court has consistently observed that sentence appeals will almost always turn on a consideration of whether the final outcome is manifestly excessive. The route by which the judge reached that outcome will be relevant to the analysis, but seldom in itself pivotal.

District Court decision

[13] Judge Collins, in a careful and comprehensive decision, recorded that he had taken into account the relevant factors identified in the numerous Court of Appeal and High Court cases. He referred to the quantum, the length of time over which the offending took place, the number of individual and identifiable fraudulent acts, the degree of premeditation, the efforts undertaken to deceive, and the sophistication of the offending. He referred to the reasons given by Ms Kora for the offending as well as the impact on those defrauded.

[14] Taking these matters into account his Honour concluded that a starting point in relation to the credit card offending was two and a half years' imprisonment.[4] The Crown submission had been that the starting point for this offending deserved a three and a half year starting point.

[15] After acknowledging this was probably lower than that adopted by Judge Harvey, Judge Collins uplifted the starting point on a totality basis by nine months for the Inland Revenue Department offending, bringing the provisional starting point

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2 *R v Shipton* [2007] 2 NZLR 218 (CA) at [138]. See also *George v Police* HC Auckland CRI-2009-404-218, 19 August 2009 at [8].

3 *Ripia v R* [2011] NZCA 101 at [15].

4 *New Zealand Police, Commissioner of Inland Revenue v Kora* DC Auckland CRI-2013-004-4891, 29 July 2014 at [16].

to three years and three months. He then uplifted this by a further three months in recognition of the offending taking place while Ms Kora was on bail and also subject to a community-based sentence.

[16] His Honour then reviewed Ms Kora's extensive list of previous convictions and the proliferation of convictions for fraud and dishonesty. This resulted in a modest uplift of three months giving a total finite starting point of three years and nine months from which the Judge deducted a nine month discount, equivalent to 20 per cent, for the guilty pleas. This brought the final sentence to three years' imprisonment.

[17] The Judge then observed he had given lengthy consideration to the issues around Ms Kora's mental health and the reasons for her offending, in particular her claim that she had deep-seated and chronic psychological and psychiatric issues arising from her withdrawal from methamphetamine use and feeling rejected by her family.

[18] In concluding that no further discount was deserved because there was no nexus between her mental health issues and the offending, the Judge stated that the offending was driven by her drug use rather than anything else.

Appellant's submissions

[19] Mr Kaye, for Ms Kora, submits that Judge Collins erred in two material respects. First, the starting point of three years and nine months was manifestly excessive and wrong in principle. Secondly, Mr Kaye submits that insufficient credit was given for Ms Kora's personal circumstances and, in particular, the issues around her mental health and wellbeing, her family circumstances and her expressions of remorse.

[20] In relation to the starting point, Mr Kaye submits that while more serious offending of this sort tends to attract sentences in the range of four to four and a half years' imprisonment,[5] offending at the level of the instant case generally calls for

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[5] *R v Rose* [1990] 2 NZLR 552 (CA); *R v Lynn* CA90/01, 20 June 2001; *R v McKelvey* [1990] 2 NZLR 558 (CA); *R v Hancox* HC Wellington S56/92, 14 August 1992.

terms of imprisonment in the vicinity of two and a half years. Thus, Mr Kaye submits, with a starting point of two and a half years together with the other uplifts which Mr Kaye does not take issue with, a final end point of three years is reached. From that, Mr Kaye submits that with a discount of 20 per cent, the end sentence is reduced to something less than two and a half years.

[21] Mr Kaye also submits the Judge erred in not allowing discounts for Ms Kora's mental history. In particular, he submits that the Judge was wrong in finding that there was no nexus between Ms Kora's psychiatric and psychological background and the index offending. Instead, the Judge determined there was an "absolute nexus" between her drug use and the offending. This, Mr Kaye submits, was a conclusion which failed to take into account Ms Kora's reported past and present stressors and her claim that she began to use methamphetamine in an effort to elevate her moods. She explained that she committed the offences to obtain money to feed her addiction.

[22] Mr Kaye also refers to a report from the Phobic Trust which diagnosed Ms Kora as having a major depressive disorder.

[23] In Mr Kaye's submission these elements provide a proper basis on which the Judge should have given a further discount which would have brought the sentence below two years and thus made Ms Kora eligible for consideration of home detention.

[24] Mr Kaye also submits that the letters written to the Court by Ms Kora and her supporters demonstrate genuine remorse and the Judge was wrong to dismiss these as more consistent with a "plea for mercy rather than any genuine remorse". However, in the course of argument before me Mr Kaye properly accepted that in the circumstances of this case a separate and distinct discount for remorse beyond that necessarily included in the guilty plea discount is probably not realistic.

[25] In conclusion Mr Kaye submits that the sentence imposed was manifestly excessive and given that Ms Kora has been in custody since 22 July 2014 he

exhorted the Court to quash the sentence of imprisonment and substitute it with home detention and intensive supervision.

Respondent's submissions

[26] Ms Jacobs, for the Crown, notes that while the offending in question was not at the same level as *Rose* it was nevertheless lengthy and sophisticated involving multiple and separate episodes of fraudulent conduct committed over a period of four years and totalling over $107,000.

[27] Ms Jacobs refers to Judge Harvey's three years and four months sentence indication which was accepted by Ms Kora. She pointed out that the starting point adopted by Judge Collins appears to have been lower.

[28] She also refers me to the substantial body of material relating to Ms Kora's personal circumstances. All this material was before the sentencing Judge who explicitly noted that over the several hours he took in preparing for the sentencing he had read everything on the file. This documentation included a PAC report (dated 2 July 2013), a letter from Ms Kora's general practitioner, a letter from the Phobic Trust, a crisis assessment report from Counties-Manukau Mental Health Services, a PAC report (dated 25 January 2014), a Court-ordered psychological report, a PAC report (dated 22 July 2014), and letters from Ms Kora and her family.

[29] Ms Jacobs points out that the Judge did not reject the defence submission there were some underlying mental health issues in Ms Kora's life, but found there was no nexus between these features and the index offending.

[30] Ms Jacobs accepts that a mental disorder is capable of mitigating a sentence if it is causative of the offending, but there must be a nexus between the offending and the disorder.[6] This is because the disorder may render a sentence of imprisonment less appropriate or more subjectively punitive.[7]

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6 *R v M* [2008] NZCA 148 at [33].
7 See too, s 8(h) of the Sentencing Act 2002.

[31] Ms Jacobs submits that the Judge was correct to give no credit for Ms Kora's self-induced addiction.[8] Furthermore, Ms Jacobs submits that any mental health issues combined with Ms Kora's drug dependency carry a heightened risk of re-offending and she relies on the Court of Appeal's decision in *R v Abraham*[9] that a defendant's inability to appreciate the consequences of their actions and exercise independent self-control, especially when that is combined with evidence of a continuing disorder and of drug dependency which is likely to exacerbate or increase the risk of offending, may require the sentencer, in the interests of the public at large, to put aside thoughts of discounting the penalty which the offence would otherwise warrant.

[32] Accordingly, Ms Jacobs submits that the sentence was not manifestly excessive or otherwise wrong in principle.

Decision

Starting point

[33] It is accepted there is no tariff case for offending of this sort. Sentences vary widely depending on their facts. The Court of Appeal has acknowledged this variance and indicated that sentencing Judges must perform a culpability analysis in determining the appropriate sentence. In *R v Varjan*[10] the Court of Appeal described the analysis in the following way:

> "Culpability is to be assessed by reference to the circumstances and such factors as the nature of the offending, its magnitude and sophistication; the type, circumstances and number of victims; the motivation for the offending; the amounts involved; the losses; the period over which the offending occurred; the seriousness of the breaches of trust involved; and the impact on victims."

[34] As the Judge properly identified, the key aggravating factors in the present case are multiple and include the amount of the money involved, the large number of separate deceptions which form part of the course of conduct and, in my view most seriously, the length of time over which the dishonest offending took place.

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8 *R v Brooking* CA419/04, 7 March 2005 at [11].
9 *R v Abraham* (1993) 10 CRNZ 446 (CA) at 449.
10 *R v Varjan* CA97/03, 26 June 2003 at [22].

[35] As Mr Kaye rightly accepted, the large number of cases reflect the breadth and the range of sentences and generally provide little practical guidance in the present case.

[36] There are, however, a number of cases which in the present context support Judge Collins' analysis. In *R v Lynn*[11] a starting point of four years' imprisonment was upheld for extensive fraud by an employee. The offending occurred over a period of three and a half years. The Court of Appeal referred to its earlier decision in *Clayton v R*[12] where a sentencing range of between two and a half years to four years' imprisonment was regarded as appropriate for offending involving amounts between $100,000 and $800,000.

[37] While *Clayton* is a relatively old authority the range it indicates is supported by the cases cited by Mr Kaye. It thus provides some guidance. In the present case the starting point of three years sits at the lower end of the range. Given the aggravating features discussed earlier the starting point of three years' imprisonment is well within the available range, particularly given the number of separate individual deceptions, the period over which the offending occurred and the amount stolen.

[38] I am not satisfied that the starting point was manifestly excessive. The starting point of three years' imprisonment was well within the Judge's sentencing discretion.

Mitigating circumstances

[39] There are three broad circumstances where particular personal factors will justify a reduction in sentence. These are:

(a) where it is causative of the offending such that it reduces the offender's culpability (short of a substantive psychiatric defence); or

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11 *R v Lynn* CA90/01, 20 June 2001.
12 *Clayton v R* CA324/98, 10 December 1998 at [4].

(b) where the circumstance is such that the sentence will have a disproportionately severe effect on the offender; or

(c) where, as a result of the offending, the offender has experienced severe consequences which, in themselves, have operated as a partial punishment thereby reducing the need to punish the offender's conduct.

[40] In the present case, Mr Kaye forcibly submits that Ms Kora's history of adoption and intra-familial abuse, her mental health issues and the deaths of several close family members are factors which would justify a reduced sentence in accordance with one or more of the principles referred to above.

[41] It is apparent from the large volume of material which was before Judge Collins that Ms Kora has suffered a difficult and abusive life. However, the only formal diagnosis of any psychological or psychiatric condition appears to have been of depression. That condition does not appear to have been causative of the offending.

[42] Furthermore, no cogent explanation has been offered as to how the deaths in Ms Kora's family, while obviously tragic and deeply upsetting for her, contributed to her offending. Certainly, the timing of these events does not tend to support the suggestion that the offending was linked to these tragedies.

[43] Furthermore, even if Ms Kora's account that she developed her addiction in order to cope with her psychological difficulties is accepted and that the offending was to generate sufficient funds to purchase drugs such an indirect link cannot be said to be causative of her offending such as it reduces her culpability.

[44] Finally, I agree with Ms Jacobs that in the present case and on the authority of *Brooking* the Judge was correct to conclude that a self-induced addiction is not a mitigating factor. The reasoning in *Brooking* has previously been applied in the context of fraud and dishonest offending.[13]

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[13] *Wilton v Police* [2015] NZHC 427 at [22]; *Campbell v Police* [2013] NZHC 838 at [39].

[45] For these reasons I am not satisfied the sentence imposed by the Judge was manifestly excessive nor am I satisfied insufficient credit was given for Ms Kora's personal circumstances.

Result

[46] The appeal is dismissed.

Moore J

Solicitors:
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