

# DISTRICT COURT OF QUEENSLAND

CITATION: *R v Mrkajic & Panic* [2020] QDC 132

PARTIES: **MRKAJIC, Filip**  
(Appellant)

**V**

**QUEENSLAND POLICE SERVICE**  
(Respondent)

**PANIC, Romana**  
(Appellant)

**V**

**QUEENSLAND POLICE SERVICE**  
(Respondent)

FILE NO/S: 1566/2020; 1567/2020

DIVISION: Appeal

PROCEEDING: Appeal pursuant to section 222 of the *Justices Act 1886* (Qld).

ORIGINATING COURT: Magistrates Court at Brisbane

DELIVERED ON: 24 June 2020

DELIVERED AT: Brisbane

HEARING DATE: 19 June 2020

JUDGES: Smith DCJA

ORDER: **1. I vary the sentence imposed on the appellant Mr Mrkajic to the extent that it is declared he has spent one day in presentence custody, namely 3 April 2020, and it is declared this is time already served under the sentence. Otherwise, the appeal is dismissed.**

**2. The appeal in the case of the appellant Ms Panic is dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – WHETHER ERRORS ESTABLISHED – where the appellants pleaded guilty to computer hacking, fraud, and receiving – whether the Magistrate erred in his approach to sentence – whether the

Magistrate misapplied *R v Stroia* [2011] QCA 317 – whether the Magistrate erred in imposing imprisonment on the counts of receiving – whether the parity principle breached – whether the sentences are manifestly excessive

*Criminal Code 1899* (Qld) ss 398, 408C, 408D, 408E, 432, 433, 488

*Justices Act 1886* (Qld) ss 222, 223

*Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172, cited  
*McGrath v Garrett* [2013] QDC 312, distinguished

*Green v R* [2011] HCA 49; (2011) 244 CLR 462, cited

*Griffiths v R* [1987] HCA 39; (1989) 167 CLR 372, applied

*Hili v R* [2010] HCA 45; (2010) 242 CLR 520, cited

*Markarian v R* [2005] HCA 25; (2005) 228 CLR 352, cited

*Mella v R* [2017] NSWDC 193, cited

*R v Bedington* [1970] Qd R 353, cited

*R v Rangel Ryrie* DCJ 29 January 2020, considered

*R v Lopera McGinness* DCJ 17 October 2014, considered

*R v Nagy* [2003] QCA 175; [2004] 1 Qd R 63, cited

*R v Sea* [2006] QCA 421, considered

*R v Seagrave Dick* SC DCJ 24 January 2013, considered

*R v Stroia* [2011] QCA 317, considered

*R v UE* [2016] QCA 58, cited

*R v Ungvari* [2010] QCA 134, cited

*Teelow v Commissioner of Police* [2009] QCA 84; [2009] 2 Qd R 489, cited

*Wong v R* [2001] HCA 64; (2001) 207 CLR 584, cited

COUNSEL: Solicitors for the appellant

Ms McGregor for the respondent

SOLICITORS: McMillan Criminal Lawyers for the appellant

Office of the Director of Public Prosecutions for the respondents

## Introduction

- [1] This is an appeal pursuant to s 222 of the *Justices Act 1886* (Qld) by each appellant against sentences imposed on them in the Magistrates Court at Brisbane on 2 June 2020.
- [2] The sole ground of appeal alleged in the notice of appeal in each case is that the sentences were manifestly excessive. It was also alleged in the outline of submissions by the appellants that the magistrate erred in his application of the case of *R v Stroia*<sup>1</sup> to the present case; that each appellant should have received the same penalty and that imprisonment should not have been imposed on each count.

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<sup>1</sup> [2011] QCA 317.

- [3] Where a person pleads guilty the sole ground of appeal is that the penalty was excessive.<sup>2</sup>
- [4] An appeal under s 222 of the *Justices Act 1886* (Qld) is by way of rehearing.<sup>3</sup>
- [5] To succeed, it is usually necessary for an appellant to show that the order the subject of the appeal is the result of some legal, factual or discretionary error.<sup>4</sup>

### Charges

- [6] Mr Mrkajic pleaded guilty to the following charges and the following head sentences were imposed:

Charge No	Charge	Date and location	Maximum Penalty (imp)	Penalty
1.	Using restricted computer without consent and causing or intending to cause detriment, damage, or gain contrary to s 408E(1) & (2) of the <i>Criminal Code</i> .	21 March 2020. CBA ATM Cannon Hill	5 years	12 months
2.	Obtaining or dealing with another entity's identification information for the purpose of committing or facilitating the commission of, an indictable offence contrary to s 408D(1) of the <i>Criminal Code</i> .	21 March 2020. CBA ATM Cannon Hill.	5 years	12 months
3.	Fraud contrary to s 408C (1)(B) of the <i>Criminal Code</i> .	21 March 2020. Relates to CBA ATM Cannon Hill.	5 years	12 months
4.	Observations or recordings in breach of privacy	21 March 2020.	3 years	8 months

<sup>2</sup> Section 222(2) (c) of the *Justices Act 1886* (Qld).

<sup>3</sup> Section 223(1) of the *Justices Act 1886* (Qld).

<sup>4</sup> *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172 at [23]; *Teelow v Commissioner for Police* [2009] QCA 84; [2009] 2 Qd R 489 at [4].

	contrary to s 227A(1) of the <i>Criminal Code</i> .	CBA ATM Cannon Hill.		
5.	Possessing equipment for the purpose of committing/facilitating the commission of an offence against s 408D(1) of the <i>Criminal Code</i> .	21 March 2020. Relates to CBA ATM Cannon Hill.	5 years	12 months
6.	Using restricted computer without consent and causing or intending to cause detriment, damage, or gain contrary to s 408E(1) & (2) of the <i>Criminal Code</i> .	22 March 2020. CBA ATM Cannon Hill.	5 years	12 months
7.	Obtaining or dealing with another entity's identification information for the purpose of committing or facilitating the commission of, an indictable offence contrary to s 408D(1) of the <i>Criminal Code</i> .	22 March 2020. CBA ATM Wynnum.	5 years	12 months
8.	Fraud contrary to s 408C(1)(B) of the <i>Criminal Code</i> .	22 March 2020. Relates to CBA ATM Wynnum.	5 years	12 months
9.	Observations or recordings in breach of privacy contrary to s 227A(1) of the <i>Criminal Code</i> .	22 March 2020. CBA ATM Wynnum.	3 years	8 months
10.	Possessing equipment for the purpose of committing/facilitating the commission of an offence against s 408D(1) of the	22 March 2020. CBA ATM Wynnum.	5 years	12 months

	<i>Criminal Code.</i>			
11.	Obtaining or dealing with another entity's identification information for the purpose of committing or facilitating the commission of, an indictable offence contrary to s 408D(1) of the <i>Criminal Code.</i>	23 March 2020. CBA ATM Kelvin Grove.	5 years	12 months
12.	Possessing equipment for the purpose of committing/facilitating the commission of an offence against s 408D(1) of the <i>Criminal Code.</i>	23 March 2020. CBA ATM Kelvin Grove.	5 years	12 months
13.	Stealing to contrary to s 398 of the <i>Criminal Code.</i>	23 March 2020. Relates to CBA.	3 years	12 months
14.	Receiving tainted property contrary to s 433(1) of the <i>Criminal Code.</i>	3 April 2020. Items located in search Spring Hill.	7 years	14 months
15.	Receiving tainted property contrary to s 433(1) of the <i>Criminal Code.</i>	3 April 2020. \$23,500 cash at Spring Hill.	7 years	14 months
16.	Obtaining or dealing with another entity's identification information for the purpose of committing or facilitating the commission of, an indictable offence contrary to s 408D(1) of the <i>Criminal Code.</i>	3 April 2020. Westpac Bank details located at Spring Hill.	5 years	12 months
17.	Obtaining or dealing with another entity's	3 April 2020. St	5 years	12 months

	identification information for the purpose of committing or facilitating the commission of, an indictable offence contrary to s 408D(1) of the <i>Criminal Code</i> .	George bank details located at Spring Hill.		
18.	Using restricted computer without consent and causing or intending to cause detriment, damage, or gain contrary to s 408E of the <i>Criminal Code</i> .	23 March 2020. CBA ATM Kelvin grove.	5 years	12 months

- [7] Mr Mrkajic was sentenced to an effective head sentence of 14 months imprisonment suspended after serving three months for an operational period of two years. A forfeiture order of \$23,500 was made together with the forfeiture of other items.
- [8] Ms Panic pleaded guilty to the following charges:

Charge No	Charge	Date	Maximum Penalty (imp)	Penalty
1.	Fraud contrary to s 408C(1)(F) of the <i>Criminal Code</i> .	23 March 2020 to 29 March 2020	5 years	10 months
2.	Forgery and uttering contrary to section 488(1) of the <i>Criminal Code</i> .	24 March 2020 to 4 April 2020	3 years	8 months
3.	Forgery and uttering contrary to section 488(1) of the <i>Criminal Code</i> .	24 March 2020 to 4 April 2020	3 years	8 months
4.	Forgery and uttering contrary to section 488(1) of the <i>Criminal Code</i> .	24 March 2020 to 4 April 2020	3 years	8 months
5.	Forgery and uttering contrary to section 488(1) of the <i>Criminal Code</i> .	24 March 2020 to 4 April	3 years	8 months

		2020		
6.	Forgery and uttering contrary to section 488(1) of the <i>Criminal Code</i> .	24 March 2020 to 4 April 2020	3 years	8 months
7.	Forgery and uttering contrary to section 488(1) of the <i>Criminal Code</i> .	24 March 2020 to 4 April 2020	3 years	8 months
8.	Obtaining or dealing with another entity's identification information for the purpose of committing or facilitating an indictable offence contrary to s 408D(1) of the <i>Criminal Code</i> .	22 March 2020	5 years	10 months
9.	Obtaining or dealing with another entity's identification information for the purpose of committing or facilitating the commission of, an indictable offence contrary to s 408D(1) of the <i>Criminal Code</i> .	21 March 2020	5 years	10 months
10.	Using restricted computer without consent and causing detriment, damage, or gaining in excess of \$5,000 contrary to s 408E(1) & (3) of the <i>Criminal Code</i> .	22 March 2020	10 years	10 months
11.	Using restricted computer without consent and causing detriment, damage, or gaining in excess of \$5,000 contrary to s 408E(1) & (3) of the <i>Criminal Code</i> .	21 March 2020	10 years	10 months
12.	Observations or recordings in breach of privacy contrary to s 227A(1) of	22 March 2020	3 years	8 months

	the <i>Criminal Code</i> .			
13.	Observations or recordings in breach of privacy contrary to s 227A(1) of the <i>Criminal Code</i> .	21 March 2020	3 years	8 months
14.	Possessing equipment for the purpose of committing/facilitating the commission of an offence against s 408D(1) of the <i>Criminal Code</i> .	3 April 2020	5 years	10 months
15.	Receiving tainted property to s 433(1) of the <i>Criminal Code</i> .	3 April 2020	7 years	12 months
16.	Obtaining or dealing with another entity's identification information for the purpose of committing or facilitating an indictable offence contrary to s 408D(1) of the <i>Criminal Code</i> .	3 April 2020	5 years	10 months

- [9] Ms Panic received an effective head sentence of 12 months suspended after two months for an operational period of two years. A similar forfeiture order was made in her case.

#### **Proceedings below**

- [10] On 2 June 2020, each of the appellants pleaded guilty in the Magistrates Court at Brisbane.

#### **Prosecution submissions**

- [11] A schedule was tendered as Exhibit 1 concerning Mr Mrkajic. He was born on 11 September 1979 and therefore was 40 years of age at the time of sentence.
- [12] The victim was the Commonwealth Bank of Australia. On 6 April 2020, detectives from Brisbane executed a search warrant at a unit in the Quest Hotel at Spring Hill where Mr Mrkajic was located. He was detained and a search was conducted. Five SD memory cards each containing pinhole camera footage overlooking ATM keypads were located.
- [13] Detectives were able to determine that one of the locations was Cannon Hill Plaza. Detectives attended Cannon Hill Plaza and found the camera overlooking the

Commonwealth Bank ATM. At 10:22am on 19 March 2020, Mr Mrkajic was observed attending that location conducting a reconnaissance of the ATM, pulling at the ATM components and pretending to wipe down the keypad of the machine with a cloth. At 9:03am on 21 March 2020, he re-attended the offence location wearing a baseball cap and surgical mask and he was observed placing a card skimming device on the machine. The device is described as a pinhole camera which records video and audio to a memory device and is placed in the position that will capture and store PIN entries as a customer makes a legitimate ATM transaction. Mr Mrkajic inserted a card reader with a magnetic strip inside the card to facilitate the capturing of customer card numbers. Both devices were disguised as they appeared to be a genuine part of the ATM (charge 1 Mr Mrkajic).

- [14] At 7:40pm on the same day, Mr Mrkajic re-attended and removed both devices from the ATM. Detectives analysed the camera footage seized from Mr Mrkajic, and identified that approximately 20 victims used the ATM during the eight hours the card skimming device was attached to the machine. Computer evidence seized by detectives identified skimmed card data downloaded by Mr Mrkajic and matched with customer PIN data from the pinhole camera. In addition, the data was copied through the use of a card reader/writer to a magnetic strip on the rear of another card, typically a gift card with a magnetic strip and the PIN written on the card transferring the information from one card to the other (charge 2 Mr Mrkajic).
- [15] This new card was used in another ATM to access the customer account and withdraw cash until either the daily limit was reached or there was no money remaining in the account (charge 3 Mr Mrkajic).
- [16] Detectives located numerous gift cards with PIN numbers recorded on the front, other blank cards, and a card reading device and keypad in the possession of Mr Mrkajic, during the execution of the search warrant. Mr Mrkajic manufactured the skimming device and pinhole camera and items in that regard were located (charge 5 Mr Mrkajic).
- [17] As to the charges of observations or recordings in breach of privacy, audio recordings from the SD card captured personal conversations between unknown victims using the ATM during the eight hour period (charge 4 Mr Mrkajic).
- [18] During the search, police located a further SD card containing pinhole camera footage from a Commonwealth ATM located at Wynnum. An examination of this footage identified that a device was attached to the ATM sometime in the morning. Detectives believe that on 22 March 2020, Mr Mrkajic attended the Commonwealth ATM situated at Edith Street, Wynnum and attached a card skimming device to the machine before decamping. He returned later to recover the device. Pinhole camera footage with audio showed approximately 15 members of the public attending and using the ATM during the time the card skimming device was attached. There was also audio obtained (charges 6,<sup>5</sup> 7,<sup>6</sup> 8,<sup>7</sup> 9,<sup>8</sup> and 10<sup>9</sup> Mr Mrkajic).

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<sup>5</sup> Charge 6 relates to the installation of the card skimming device.

<sup>6</sup> Charge 7 relates to obtaining the details of 15 people.

<sup>7</sup> Charge 8 relates to copying user's details to a magnetic strip.

<sup>8</sup> Charge 9 relates to recording the 15 people using the ATM.

<sup>9</sup> Charge 10 relates to possessing the card skimming and camera devices.

- [19] Also, at about 14:25 hours on 23 March 2020, the Commonwealth Bank ATM at Musk Avenue, Kelvin Grove had a technical fault. A technician attended and located a concealed box covering a portal which contained the pinhole camera, SD card and battery. There was a red light attached to a box which was flashing and the device was recording. The technician also located a stainless steel reader deep in the machine which appeared homemade and contained a black strip and computer component. Detectives seized the devices and looked at CCTV footage which showed Mr Mrkajic attending the offence location at 9:13am on the offence date. He attached the skimming device before decamping the scene in a yellow taxi. He then attended Spring Hill after the offence. Investigators were able to conduct inquiries with taxi companies and use CCTV footage to trace him to the Quest Hotel at Spring Hill (charges 11,<sup>10</sup> 12,<sup>11</sup> 13,<sup>12</sup> and 18<sup>13</sup> Mr Mrkajic).
- [20] A number of relevant items were located during the search (charges 14, 16 and 17 Mr Mrkajic).
- [21] In a handbag, there was \$5,000 in cash in \$50 notes. In Mr Mrkajic's wallet there was \$200 in \$50 notes. On his person, there was \$2,500 in \$50 notes. The total amount found was \$23,500 (charge 15 Mr Mrkajic).
- [22] As to Ms Panic, similarly a schedule was tendered. The facts concerning Ms Panic were similar to those involving Mr Mrkajic. She was also located at the unit at Spring Hill where the items referred to above were located on 3 April 2020. Ms Panic provided a field interview in which she indicated that the money which was in her bag (the \$5,000) was given to her by the appellant, Mr Mrkajic. She claimed she did not know anything further (charges 14,<sup>14</sup> 15,<sup>15</sup> and 16<sup>16</sup> Ms Panic).
- [23] A white coloured Samsung mobile phone belonged to her. She was released without charge on that date.
- [24] On 4 April 2020, investigators conducted further investigations in respect of Ms Panic's mobile phone. They located messages and photographs on the phone which indicated she had been speaking with a female person who resided in Brisbane requesting her to order the card reader apparatus located at the search warrant. There was also screenshots of Translink timetable images to get to the female person's house to pick up the device.
- [25] Ms Panic was placed under arrest and was warned and denied having anything to do with the photographs or the conversation.
- [26] On 10 April 2020, police confirmed with the female to whom Ms Panic had spoken to that she had met with both Ms Panic and Mr Mrkajic and they had asked her to order the item for them. She thought it was a tap and go device. On 17 April 2020,

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<sup>10</sup> Charge 11 relates to obtaining unknown persons banking details at Kelvin Grove.

<sup>11</sup> Charge 12 relates to possessing the card skimming and camera devices.

<sup>12</sup> Charge 13 relates to stealing personal banking information.

<sup>13</sup> Charge 18 relates to using personal banking information.

<sup>14</sup> Charge 14 relates to possession of a card reader.

<sup>15</sup> Charge 15 relates to the \$23,500 cash.

<sup>16</sup> Charge 16 relates to bank card information.

police attended Ms Panic's address and she declined to provide further information (charge 1 Ms Panic<sup>17</sup>).

- [27] As to the forgery charges, these relate to 22 cards; five of which related to unknown persons' card details who hold Commonwealth Bank accounts and the remaining 17 had unconfirmed banking institutions. The woman who ordered the card reader for them did so because she thought/knew that Ms Panic was a famous singer in Serbia and perhaps they wanted for a concert for people to pay at the door (charges 2, 3, 4, 5, 6 and 7 Ms Panic).
- [28] With respect to one incident of computer hacking and obtaining or dealing with identification information police, when investigating the matter, established one of the computer files related to the Commonwealth Bank ATM at Cannon Hill. Footage from camera placed over the key area facilitated observing persons putting the PIN numbers into the machine whilst using the ATM (charges 9, 11 and 13 Ms Panic.)
- [29] Further, similar evidence was obtained concerned the Commonwealth Bank ATM at Wynnum on 22 March 2020 (charges 8, 10 and 12 Ms Panic.)
- [30] The prosecutor informed the Magistrate that Mr Mrkajic was 40 years of age and Ms Panic was 45 years of age. They were both Serbian nationals on tourist visas which were due to expire on 8 June 2020. They both arrived in Australia at the Melbourne International Airport on 8 February 2020. Neither had any criminal nor traffic history in Australia.
- [31] The prosecutor summarised the offences contained in the two schedules. It was pointed out that 22 cards were located with correct account and PIN numbers. Five were confirmed to be CBA customers and 17 were related to other banking organisations.<sup>18</sup> The prosecutor relied on a number of comparable decisions.<sup>19</sup>
- [32] The prosecutor submitted that principles of deterrence were important in this matter. The prosecutor's ultimate submission was that the court would impose a sentence which would see the defendants serve actual time in custody.<sup>20</sup>
- [33] It was submitted that it was a sophisticated and premeditated offending conducted six weeks after they arrived in Australia. It was so sophisticated that the device went undetected at Wynnum and Cannon Hill for lengthy periods of time. Whilst no financial detriment was suffered by any customer, the CBA was still required to cancel and reissue new cards to customers as a result.<sup>21</sup>
- [34] The appellants were also found in possession of \$23,500 which was not an insignificant amount.<sup>22</sup>

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<sup>17</sup> Dishonestly inducing Ms Varagic to obtain a card scanner device.

<sup>18</sup> Transcript day 1 page 19.25.

<sup>19</sup> Transcript day 1 pages 19-22.

<sup>20</sup> Transcript day 1 page 22.40.

<sup>21</sup> Transcript day 1 pages 22.45-23.10.

<sup>22</sup> Transcript day 1 page 23.7.

- [35] The prosecution submitted for a head sentence of 18 months to two years imprisonment.<sup>23</sup> In particular, Mr Mrkajic should receive a head sentence of two years and Ms Panic, a head sentence of 18 months.<sup>24</sup>

### **Defence submissions**

- [36] The defence submitted that the comparable cases relied on by the prosecution should be distinguished. As to the tainted property charge which involved \$23,500, the plea was on the basis that Mr Mrkajic knew or must have known that the money was tainted not that he had acquired the property through criminal conduct.<sup>25</sup> It was submitted it could not be concluded that the \$23,500 came from the card skimming exercise.<sup>26</sup>
- [37] The defence pointed out that the maximum penalty was three years imprisonment with seven years being the maximum for the tainted property charge.<sup>27</sup> It was submitted the pleas were important and were at an early stage. The pleas were important because a trial would have been expensive and lengthy. It was submitted that a sentence of imprisonment was one of last resort.<sup>28</sup> It was submitted that the amount of money, whilst relevant, was not determinative of the penalty. The offending occurred only over seven days. Mr Mrkajic had one day in pre-sentence custody. It was submitted that deportation was relevant to the sentencing decision.<sup>29</sup> Mr Mrkajic also had very restrictive bail conditions including having an ankle bracelet, being confined to a hotel and having his passport removed. Onerous bail conditions are something a court may take into account.<sup>30</sup> It was pointed out that neither offender had any criminal history. Mr Mrkajic had two eight year old children. Ms Panic had no children. Mr Mrkajic was a real estate agent and Ms Panic was a singer.<sup>31</sup> They came to Australia on holiday visas and their plan was to travel around Australia. They ran into money problems and associated with people from Eastern Europe and a plan was hatched between them to engage in the criminal conduct to “fill their wallets”.<sup>32</sup>
- [38] The appellants’ lawyer also relied on the single Judge decision of *R v Seagrave*.<sup>33</sup> The defence ultimately submitted that the court should impose a fully suspended sentence on each offender.<sup>34</sup> The defence also relied on sentencing statistics to support its submission.

### **Decision**

- [39] The Magistrate in his reasons noted that the appellants had entered early pleas of guilty which indicated remorse and saved the cost of a trial. The Magistrate took into account the comparable decisions relied on by the parties. He noted that the

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<sup>23</sup> Transcript day 1 page 23.15.

<sup>24</sup> Transcript day 1 page 23.30.

<sup>25</sup> Transcript day 1 page 25.5.

<sup>26</sup> Transcript day 1 page 25.22.

<sup>27</sup> Transcript day 1 page 26.55.

<sup>28</sup> Transcript day 1 page 26.30.

<sup>29</sup> Transcript day 1 page 27.42. The appellants relied on *R v UE* [2016] QCA 58.

<sup>30</sup> Transcript day 1 page 28.20.

<sup>31</sup> Transcript day 1 page 29.45.

<sup>32</sup> Transcript day 1 page 29.6.

<sup>33</sup> Dick SC DCJ 24 January 2013.

<sup>34</sup> Transcript day 1 page 32.45.

offending with which they were charged involved a sophisticated system of placing audio visual recording devices on automatic teller machines at three locations around Brisbane. The installation of these devices allowed the appellants to unlawfully record unknowing persons using the ATM's. He referred to the charges against each of the appellants. The Magistrate noted the offending was only discovered as a result of the person complaining to the bank at Kelvin Grove. The Magistrate relied on comments made by McMurdo P in *R v Stroia*.<sup>35</sup>

- [40] Taking into account the relevant matters in the *Penalties and Sentences Act* and the absence of criminal history and the early pleas of guilty, the Magistrate imposed the penalties which I referred to previously.

### **Appellants' submissions**

- [41] The appellants submit that the sentences imposed were manifestly excessive. In this case, there were only three distinct incidents upon which skimming occurred, both appellants lacked criminal history, there were early pleas of guilty and the tainted property offence was "un-aggravated". Mr Mrkajic also had very onerous bail conditions which was a matter which should be taken into account.<sup>36</sup>
- [42] The appellants did not derive the \$23,500 from any skimming activity. There was no evidence they derived any financial benefit from it and no person suffered any financial loss. There was no connection between the appellants and any organised criminal enterprise.
- [43] It is further submitted that the learned Magistrate unlawfully fettered his sentencing discretion by misapplying the comments made in *Stroia*.<sup>37</sup> It is submitted that *Stroia* is not comparable at all to the present case. It is further submitted the magistrate erroneously drew a causal connection between the \$23,500 and skimming activities.
- [44] It is further submitted that terms of imprisonment should not have been imposed on the receiving counts and the decisions of *McGrath v Garrett*<sup>38</sup> and *Seagrave* support the contention that fully suspended sentences are appropriate.
- [45] Finally, it is submitted that there was no reason for the Magistrate to have distinguished between the two appellants.

### **Respondent's submissions**

- [46] The respondent submits that there was no error as to the \$23,500. Both parties accepted before the Magistrate that the money could not be proved to be from the card skimming activity and the Magistrate noted it was a receiving charge simpliciter.
- [47] The respondent also submits there was no error in attaching imprisonment on the charges of receiving. This is in accordance with traditional sentencing practice.

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<sup>35</sup> [2011] QCA 317.

<sup>36</sup> *Mella v R* [2017] NSWDC 193 at [47].

<sup>37</sup> [2011] QCA 317 at [19].

<sup>38</sup> [2013] QDC 312.

- [48] The respondent submits that there was no error in the Magistrate relying on *Stroia*. The Magistrate accepted it was a more serious case and the sentence imposed on the appellants was markedly less than imposed in *Stroia*.
- [49] In all of the circumstances, the sentences are not manifestly excessive.
- [50] The respondent submits that the Magistrate moderated the sentences to reflect the pleas of guilty and the lack of criminal history.
- [51] On the other hand, the appellants were 40 and 45 years of age, there were three instances of card skimming and they obtained more than 35 persons' banking details. They recorded eight hours of footage at a single ATM. Unlike in *Stroia*, they did not cooperate with police.
- [52] It is submitted, the offending was not trivial due to the there being a degree of sophistication and the skimming occurred at three different locations. The appellants were located with \$23,500 of tainted money, card skimming devices, storage cards depicting footage of customers at ATM's, personal banking details for customers at those banks, tools to install further devices and related material.
- [53] It is also submitted that while no financial detriment was alleged, the banks had to reissue cards to customers. The overwhelming inference is that the data was obtained with an intention to fraudulently obtain money from the accounts.
- [54] Deterrence loomed large in this matter.
- [55] The Magistrate took into account all relevant matters. The sentence is not manifestly excessive.
- [56] The respondent though does accept that the Magistrate ought to have declared the one day in pre-sentence custody.

### **Discussion**

- [57] I firstly turn to whether the magistrate erred in his application of *Stroia*.
- [58] In *R v Stroia*,<sup>39</sup> the applicant pleaded guilty to six counts of possessing a thing with intent to dishonestly obtain or deal in personal financial information, two counts of wilful damage and one count of dealing in the proceeds of crime where the value of the money was \$50,000 or more. He was effectively sentenced to three years imprisonment with a non-parole period of 18 months. The charges arose out of an investigation into the spate of ATM skimmings in south east Queensland. A summary of the applicant's offending was that he attached electronic card skimming devices to four ATM's and damaged a further two bank ATM's. In all, he transferred \$88,370 from Australia to European countries mainly Romania and the United Kingdom. The applicant was 25 and 26 years of age at the time of his offending and 27 at the time of sentence. He had no criminal history. A report from a psychologist was tendered which showed that he had a reasonably turbulent upbringing. His motivation for committing the offences was to raise money for his

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<sup>39</sup> [2011] QCA 317.

mother's neurosurgery. It was noted that the maximum penalty was only seven years imprisonment for Count 9. McMurdo P noted:

“[19] But deterrence was a particularly important consideration in this case. Stroia was part of an organised international professional criminal organisation. Whilst he may have been a lowly foot soldier in that sinister cartel, if the criminal masterminds were unable to recruit people like him their unlawful schemes would flounder. He received about \$30,000 for his part in the crimes, none of which has been repaid. Stroia's offending struck at the integrity of and public confidence in the use of ATMs, the Australian banking system's mode of providing convenient services to customers. The misuse of credit card information had the potential to undermine public confidence in credit and savings card use, practical and much-used tools of modern commerce and banking. The sending of over \$80,000 of stolen Australian money overseas was also a significant crime against the Australian public. Stroia's illegal conduct continued over 18 months during three separate visits to Australia when, according to one of his own referees, he could have obtained gainful, honest employment for which he was well qualified. His offending was carefully and professionally planned. A substantial penalty involving a significant period of actual custody had to be imposed to deter him and others. People like Stroia and Flutur who are tempted to make easy money through sophisticated criminal enterprises like this one, even if only to help family members in straightened circumstances, must appreciate that they are likely to be caught and sentenced to a significant prison term. The promise of quick money for joining in an international criminal enterprise is not worth the risk.”

- [59] *Stroia* was a more serious case than the present one. The Magistrate specifically said that.<sup>40</sup> As he said the case sets out the requirement for personal and general deterrence for this kind of offending. I agree. The sentences imposed were far less than in *Stroia*. The appellants have not established this ground.
- [60] The next point is whether the sentence on the counts of receiving were excessive.
- [61] The appellants have relied on *McGrath v Garrett*.<sup>41</sup> I do not consider this case to be comparable. In that matter, the respondent pleaded guilty to less serious charges (three minor drug charges together with the receiving charge). Also, it was a police appeal against sentence. Regardless, Everson DCJ noted that the receiving charge was serious and warranted a sentence reflecting deterrence.
- [62] In this case, it was entirely appropriate for the magistrate to impose the highest head sentence on the receiving charges and lesser concurrent terms on the other charges.
- [63] In *R v Griffiths*,<sup>42</sup> Gaudron and McHugh JJ said:

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<sup>40</sup> Reasons page 3.11.

<sup>41</sup> [2013] QDC 312.

<sup>42</sup> [1987] HCA 39; (1989) 167 CLR 372 at 393.

“It is well established that in sentencing a person in respect of multiple offences regard must be had to the total effect of the sentence on the offender: *Reg. v. Smith* (1983) 32 SASR 219, at pp 220, 221, 222; Boyle and Allen, *Sentencing Law and Practice*, (1985), p 282; Hall, *Sentencing in New Zealand*, (1987), p 195. This may be done through the imposition of consecutive sentences of reduced length with or without other sentences to be served concurrently or through the imposition of a head sentence appropriate to the total criminality with all other sentences to be served concurrently.”

- [64] This practice has been applied in Queensland.<sup>43</sup>
- [65] In this case the imposition of the head sentences on the receiving counts reflected the entire criminality. It cannot be said that the sentence on those counts was beyond the bounds. The receiving for Mr Mrkajic related not only to the \$23,500 but to charge 14.<sup>44</sup> Also the receiving of \$23,500 is serious. This is property which has been obtained from an act constituting an indictable offence<sup>45</sup> which the appellants knew or had reason to believe was tainted. It has been said previously the crime of receiving is a very serious offence<sup>46</sup> and carries a greater penalty than that for stealing because a receiver makes theft on a wholesale scale, possible.
- [66] The appellants fail on this ground.
- [67] The next point relates to parity.
- [68] The fact is in sentencing offenders one must have regard to the level of involvement of the offender. This means that different sentences may be imposed to reflect different degrees of culpability.<sup>47</sup> Usually it is often that case that the party receives a lesser term than the principal.
- [69] On the hearing of the appeal, the appellant conceded that Mr Mrkajic was the principal and Ms Panic the party. That was a reasonable concession when one considers the facts of the matter - it was Mr Mrkajic who installed the skimming devices. He also had the second receiving charge.
- [70] I am satisfied there is no justifiable sense of grievance of the part of Mr Mrkajic.<sup>48</sup> This ground of appeal is rejected.
- [71] I now turn to the ground of manifest excess.
- [72] A number of decisions were put before the Magistrate to consider.
- [73] In *R v Sea*,<sup>49</sup> the applicant pleaded not guilty originally to 12 counts of attempted fraud, 36 counts of fraud and 11 counts of fraud with circumstance of aggravation. He pleaded guilty on the eighth day of trial to a new indictment of two counts of

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<sup>43</sup> *R v Nagy* [2003] QCA 175; [2004] 1 Qd R 63 at [39] and [66].

<sup>44</sup> Clothing, computers, electronics, mobile phones, debit cards, tools, storage devices and personal accessories.

<sup>45</sup> Section 432 (1) (a) of the *Criminal Code 1899* (Qld).

<sup>46</sup> *R v Bedington* [1970] Qd R 353 at p 363.

<sup>47</sup> *Green v R* [2011] HCA 49; (2011) 244 CLR 462 at [28].

<sup>48</sup> *Green v R* [2011] HCA 49; (2011) 244 CLR 462 at [31].

<sup>49</sup> [2006] QCA 421.

fraud with a circumstance of aggravation that the amount involved and each case was more than \$5,000. He was sentenced to three years imprisonment. He was 43 years of age and had no previous convictions. The offences occurred over a six week period and concerned the use of between 23 and 25 counterfeit credit cards. The genuine credit card holders' bank details were transferred onto magnetic strips on blank cards and the credit cards were stamped with genuine credit card numbers and a signature was forged on each card. The offending occurred on about 22 occasions and a total of \$122,659 transferred from the accounts of genuine ANZ bank customers to the applicant's bank account. It was noted that deterrence both general and personal is an important factor in sentencing. Ultimately, his appeal was refused.

- [74] Clearly enough, that case is more serious than the present one but the sentences here are far less.
- [75] In *R v Lopera*,<sup>50</sup> the defendant pleaded guilty to dealing in the proceeds of a crime worth more than \$10,000 namely \$46,087.56. On five separate occasions he attended Western Union agencies and transferred the total in 17 separate transactions to recipients in Columbia. It was noted he was 29 years of age with no previous convictions. Mr Lopera was sentenced under the Commonwealth Sentencing regime. Ultimately, he was sentenced to three years imprisonment with release on a good behaviour bond after serving 328 days imprisonment.
- [76] *Lopera* involved more money and a different charge.
- [77] In *R v Seagrave*,<sup>51</sup> the defendant pleaded guilty to stealing as a servant by selling stock from his employer on eBay. The total value of stock lost was \$37,337.37. He was 28 years of age at the time of the sentence and had no previous convictions. The Judge was persuaded taking into account his age, good history, a lengthy period of the offending and the amount involved, to frame an order which did not see him go into custody. Ultimately, he was imprisoned to a fully suspended sentence of two and half years with restitution ordered in the sum of \$32,000.
- [78] I consider *Seagrave* to be a different case from the present. Ultimately, it displays the exercise of the discretion of the judge to not impose actual custody.
- [79] In *R v Rangel*,<sup>52</sup> the offender pleaded guilty to two counts of obtaining identification information, one count of fraud to the value of more than \$30,000, one count of attempted fraud, one count of possession of relevant equipment, one count of possessing tainted property, two breaches of bail conditions, one count of stealing and one count of attempted stealing. The offender used card skimming devices to obtain cash from ATMs. There were 520 transactions which resulted in the offender receiving \$77,256. The defence alleged the money was to be sent to family members overseas but some was used to buy a BMW. The attempted fraud involved \$44,520. He received 3 ½ years' imprisonment to serve five months.
- [80] Again, I consider that case to be more serious but it does show how the courts seriously regard this offending.

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<sup>50</sup> McGinness DCJ 17 October 2014.

<sup>51</sup> Dick SC DCJ 24 January 2013.

<sup>52</sup> Ryrie DCJ 29 January 2020.

## Disposition

[81] The question of manifest excess in sentence has been considered on a number of occasions by the High Court of Australia. McHugh J in *Markarian v R*<sup>53</sup> said:

“Unfortunately, discretionary sentencing is not capable of mathematical precision or, for that matter, approximation. At best, experienced judges will agree on a range of sentences that reasonably fit all the circumstances of the case. There is no magic number for any particular crime when a discretionary sentence has to be imposed.”

[82] Further, in *Hili v R*<sup>54</sup> it was said:

“Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons.... And, in the present matters, the Court of Criminal Appeal, having described the circumstances of the offending and the personal circumstances of the offenders, said that "the sentence imposed in these matters is so far outside the range of sentences available that there must have been error".

[83] In *Wong v R*<sup>55</sup> it was said :

“Reference is made in *House* to two kinds of error. First, there are cases of specific error of principle. Secondly, there is the residuary category of error which, in the field of sentencing appeals, is usually described as manifest excess or manifest inadequacy. In this second kind of case appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons.”

[84] Bearing in mind the serious nature of the offences, I do not consider that the Magistrate in this case was wrong to impose jail sentences which involved actual custody.

[85] It is my view the offences were serious and involved three different ATM locations. I agree with the characterisation that the offending was sophisticated and had the potential for significant gain.

[86] In addition, there was the receiving charge which involved \$23,500 and which was serious in itself. It may be accepted of course that the prosecution could not prove that the money came from the ATM skimming. Nonetheless, it was a serious possession of tainted money.

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<sup>53</sup> [2005] HCA 25; (2005) 228 CLR 352 at [65].

<sup>54</sup> [2010] HCA 45; (2010) 242 CLR 520 at [59].

<sup>55</sup> [2001] HCA 64; (2001) 207 CLR 584 at [58].

- [87] Deterrent sentences are necessary in this area as McMurdo P noted in *Stroia*.
- [88] The Magistrate took into account the mitigating factors of the pleas of guilty and the absence of previous convictions by releasing each of the appellants far earlier than the usual one third.<sup>56</sup>
- [89] In all of the circumstances, I cannot conclude that the sentences are manifestly excessive notwithstanding the absence of previous convictions and the early pleas of guilty.
- [90] I agree that I should declare the pre-sentence custody in respect of Mr Mrkajic.

### **Orders**

- [91] In the circumstances, my orders are:
1. I vary the sentence imposed on the appellant, Mr Mrkajic, to the extent that it is declared he has spent one day in presentence custody, namely 3 April 2020 and it is declared this is time already served under the sentence. Otherwise, the appeal is dismissed.
  2. The appeal in the case of the appellant, Ms Panic, is dismissed.

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<sup>56</sup> *R v Ungvari* [2010] QCA 134 at [30].