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COMBATING CHEATING OFFENCES: DOES A MORE DETERRENT PUNISHMENT CONSTITUTE A SUSTAINABLE POLICY?

ROKIAH KADIR* AND SURIYANI MUHAMAD

Faculty of Management and Economics, Universiti Malaysia Terengganu, 21030 Kuala Terengganu, Terengganu, Malaysia.

**Corresponding author: rokiah@umt.edu.my*

Abstract: Creating a safe, sustainable and crime-free society is one of the challenges faced by the authorities in almost all nations. In Malaysia, the Ministry of Home Affairs has placed crime reduction as a major component in the Key Performance Indicator. Analysing the judgements awarded by the Malaysian courts in cheating cases within the last decade, the paper argues that consideration of aggravating factors is warranted in view of the escalating number of cheating cases. Cases that have been decided indicate that the deterrence factor has not been fully considered in the punishments granted, thus leading to heavy economic losses to the affected parties.

KEYWORDS: cheating offences, economic losses, punishment, enforcement

Introduction

In Malaysia, of all the commercial offences committed in the last 5 years, cheating has been the most prevalent crime. Cheating cases increased threefold from 4,400 in 2005 to 13,384 in 2009. While some other commercial offences registered an improvement in certain years, this did not happen to cheating offences. More alarmingly, the data from 2005 to 2009 indicates that cheating constituted more than half of all commercial crime cases each year. This has resulted in more than RM900 million losses in 2009, a massive increase from RM400 million in 2005. In 2009, the number of investigated cases for cheating was sixfold greater than cyber crime cases, and four times greater than criminal breach of trust. The losses suffered by the victims in cheating cases were one hundred times higher than those in cyber crime cases and three times greater than those in criminal breach of trust[1].

The severity of this crime certainly calls for attention by the authority to formulate some sustainable policies, including increasing the number of enforcement agencies. Nevertheless this may not serve its purpose fully if punishment meted out to convicted criminals is not commensurate with the gravity of the offences perpetrated. As explained later, criminals more often than not act rationally, evaluating the potential gains of the crime and considering the probable risks in the event they are arrested and convicted. The enormous amount of money lost annually and the prevalence of the crime should justify a revisit of the courts' judgement in such offences. Prosecution has a role too. Being aware of the escalating rates of the offense and the loss suffered as repercussions of this crime, the prosecutions should have argued for tougher sentences in cases brought to court.

Explanation on what drive a person to commit crimes may be derived from the utility theory. The theory assumes that potential criminals act rationally, justifying their decision to commit a crime on an analysis of the costs and benefit of the act. Factors that may affect a person's decision to commit crimes include police presence, convictions and the severity of punishment in terms of the inclusion of imprisonment sentencing and the amount of fine. Prospective criminals who are about to commit crimes are presumed to evaluate both the risk of being caught and the accompanying punishment. Efficiency of police

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[1] See also Rokiah Kadir, Cheating Offences and Punishment: A Malaysian Perspective *OIDA International Journal of Sustainable Development, Vol. 3, No. 1, pp. 11-20, 2012.*

and judicial system has a bearing on the crime rate where it is expected that a high apprehension rate would lead to lower criminal activity.

Cheating offences are handled by the Commercial Crime Investigations Department, Polis Diraja Malaysia. The Department is tasked to conduct investigation, arrest and prosecute white-collared criminals who commit cheating offences, criminal breach of trust, cyber-crime fraud and others.

Scope of the study, methods and literature review

This paper analyses cheating offences as part of commercial crimes as a whole. There are vast varieties of modus operandi in which cheating activities can be committed. Frequently, reported cases include fraudulent money lending, job-search deception, phishing, black money, cheap sales, modified cheques, foreign workers deception, investment deception, share-transfer deception, sale and purchase of lands that do not exist, and many others[2].

The study employs the qualitative analysis of decided cases. Materials consulted consist of primary sources in the form of legislation such as the Penal Code Act 574, judicial decisions, as well as secondary sources that include books and journals.

The extent to which the threat of punishment and enforcement can deter potential criminals from engaging in crimes has been the subject of much study. Buikhuisen (1974) in his analysis of many legal systems recognised the significance of punishment in deterring future criminals. Writings in the 18th century have articulated the theory that punishment can have an impact on future perpetrations of crime (Dolling *et al.*, 2009). The theory is further confirmed by other researches. For example, literatures on crime and punishment (Becker, 1968) states that the rational willingness to commit a crime is related to some institutional and judicial variables, such as the probability of detection, the probability of conviction, and the punishment inflicted by the court. Property crime is driven by the rational cost-benefit analysis which is carried out by offenders before deciding to do the crime. Monetary calculation is often used for cost-benefit analysis (Farrel & Roman 2002). In the case of crimes against property, benefits would be in the form of the monetary gain from the commission of the crime and this in return is compared against the cost of a fine or of time spent in jail[3].

The probability that the crimes be detected as well as the severity of ensuing punishment should the case end in convictions impact negatively on the decision or inclination to commit the crime. Under the utility theory an individual is assumed to participate in crime by calculating the expected utility maximisation. The decision whether a person would engage in a crime is determined by the prospective returns of the activities as well as the probable risk of detection and conviction (Reilly & Witt, 1996). Reilly's theory was further confirmed by other researches on this issue. The relative prices of legitimate and illegitimate activities form the underlying motivation to commit the crime or vice versa. This is what is termed as the utility theory or economic model of criminal behaviour and law enforcement. According to this model, the formulation of various policy tools, including punishment and enforcement efforts, is made on this basis (Nussim & Tabbach, 2009). An illustration of this model would be that an increase in the arrest rate of cases and a harsher punishment should decrease criminal activities, given that a higher probability of arrest and a harsher punishment increase the fear to commit the crime, thereby lessening crime levels[4].

Results and Discussion

Punishments for cheating offences are spelt out in sections 417 to 420 of the Penal Code[5]. It may

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[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*
[5] *Section 417: Whoever cheats shall be punished with imprisonment for a term which may extend to five years or with fine or with both.*

be noted that sections 417, 418 and 419 provide only for the maximum period for imprisonment and section 420 states both the minimum and maximum range of imprisonment period within which courts can select[6]. Section 420 was amended in 1993 to impose the mandatory minimum 1 year imprisonment and mandatory whipping, in addition to discretionary fine. All provisions provide for fine as alternative or concurrent punishment in addition to the imprisonment. These four provisions generally give discretion to courts in deciding the appropriate length of the imprisonment period. The basic presumption is a longer period would be chosen if the nature of the cases being dealt with is of a graver nature.

The accused who cheats under sections 418 and 419 is punishable by a longer term of imprisonment. Section 417 which provides for a five-year imprisonment applies to simple cheating cases whereas section 418 which lays down a seven-year imprisonment period is aimed at the accused who, under some legal relationships, is bound to protect the victim concerned. Because of the breach of the legal obligation to render the necessary protection, section 418 imposes heavier sentences than the offenders who commit simple cases of cheating without the breach of such obligation. As with section 418 which imposes a seven-year imprisonment, section 419 also employs similar mode of punishment for the accused who cheated the victims by pretending himself to be some other person, or cheated by substituting one person for another. The difference in terms of the length of the imprisonment here is applauded given the grave nature of the cheating offences in sections 418 and 419. The breach of legal or contractual obligation and the impersonation warrant a heavier sentencing and with a heavier sentencing the law expects the criminals to be apprehended and hence deterred from committing the crimes in question.

Section 420 which provides for the mandatory one year imprisonment covers cases of cheating involving delivery of property. These include cases where the victims were induced to make payments by a deception moving from the accused. The essential ingredient of the provision is the delivery of the property, where the victim parted with valuable property on the basis of the false representation made by the accused. The 1993 amendment was a creditable move and the heavier sentence is praised for its deterrence purpose.

A surf of CLJ database indicates that, from year 2000 to 2010, there were 22 cases on section 420, 2 cases on 417 and 1 case on 419. However not all of these 25 cases deal with the issue of punishment. The following will briefly examine samples of these cases.

Abd Manap Maamin v. PP[7] provides a good illustration of the punishment awarded under section 419. In this case the accused has been previously convicted of nine offences from 1978 to 1994. Low Hop Bing Judge opined that it is appropriate for the learned magistrate to order a term of five years' imprisonment. In this appeal, the accused did attempt to persuade the court to give a lighter punishment considering his old age (59 years) and poor medical condition (heart disease, diabetes and hypertension), but the learned judge declined to accept them. Having recognized that the accused was given the chance to raise his mitigation plea and he

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Section 418: Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by a legal contract, to protect, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.
Section 419: Whoever cheats by personation shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.
Section 420: Whoever cheats and thereby dishonestly induces the person deceived, whether or not the deception practised was the sole or main inducement, to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment for a term which shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine.

[6] *See also Rokiah Kadir, Cheating Offenses and Punishment: A Malaysian Perspective OIDA International Journal of Sustainable Development, Vol. 3, No. 1, pp. 11-20, 2012*

[7] [2003] 8 CLJ 1.

did use the opportunity by asking the sentence to run concurrently with the term he has already served, and having considered that the accused had admitted all his nine previous convictions, the learned judge endorsed the sentence passed by the learned magistrate. The court further confirmed the one year's police supervision imposed by the magistrate. This sentence of police supervision is provided for in section 295 of the Penal Code and the power of a magistrate's court to impose this sentence is contained in the following relevant words of section 295(i)(b)[8]. A question which could be raised is whether, considering the previous offences committed by the accused, the punishment meted out at the magistrate court could have been heavier. This sadly could never be ascertained as the report mentions nothing on the value of property or the loss suffered by the complainant, or whether the prosecution has also attempted to argue for the imposition of the fine in addition to imprisonment at the magistrate court.

In *PP v. Samiyah & Anor*[9] , the accused were charged under section 420 of the Penal Code for swapping price tag on certain items in a supermarket, resulting in a loss of RM935.65 to the supermarket. At first, the Magistrate mistakenly bound them for good behaviour under section 294 of the Criminal Procedure Code. However after learning that they are of Indonesian nationals, and had come to this country illegally, the Magistrate had imposed the punishment provided under section 420 of the Penal Code. The prosecuting team argued that the offense of cheating is a serious one hence warranting a heavy sentence. On the other hand the counsel for the accused pressed for a lighter punishment considering that the accused are first offenders. The counsel also argued that, in the event the accused are found guilty, the plea of guilt by the accused should justify a discount of a one fourth or a one third of the sentence to be awarded. The judge conceded to this request of discounted punishment, saying:

> "I considered the plea of guilt which has saved the Court's time and costs of prosecution, and sparing the witnesses the inconvenience of coming to Court. For that, the 2 Accused should be given an appropriate discount in their sentence (see *Mohd. Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ 209 (Rep); [1988] 1 MLJ 167 and *Gek Sing a/l Kaliappan v. Pendakwa Raya* [1999] 4 CLJ 292; [2000] 1 AMR 1198). I also take judicial notice of the fact that it costs the Government about RM31.00 to accommodate and maintain a convict in prison (see *PP v. Mustafa Abu Bakar*. High Court Shah Alam (Petaling Jaya) Criminal trial No. 45-10-2004)"

Taking into consideration that the money involved was relatively not a substantial amount, the judge finally came to a conclusion that the sentence appropriate in the case was a one year imprisonment. The High Court also set aside the order for the bond of good behaviour.

The judicial notice highlighted by the court raises an interesting point. The high cost to be incurred by the government to maintain prison services has been considered as a mitigating factor justifying a shorter period of imprisonment. Whilst this may be logical at least in terms of planning strategy to curb financial expenses, it certainly defeats the purpose of punishment. The government may be able to save money when courts grant a shorter imprisonment but the cost-cutting strategy is certainly not a sustainable policy to be carried out in all cases. The policy will render the whole idea of sentencing ineffective. On the contrary, the state will have to bear more cost in the long run given the probability of the future attempt or commission of the crime by the criminals. The loss to the society and the cost of the enforcement might override the savings in the first sentencing.

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[8] (i) when a person having previously been convicted of an offense punishable with imprisonment for a term of two years or upwards is convicted of any other offense also punishable with imprisonment for a term of two years or upwards:
(a) [this concerns the corresponding power of the High Court or a Sessions Court];
(b) a Court of a Magistrate may direct that he be subject to the supervision of the police for a period of not more than one year commencing immediately after the expiration of the sentence passed on him for the last of such offences.

[9] [2009] 1 LNS 1260.

In *Loh Lian Gun & Anor v. PP*[10] the appellant was a marketing officer of Hong Leong Finance and his job was to verify particulars of proposed hire-purchase loan, and this includes interviewing the applicants to ensure that their particulars in the proposal forms were correct, inspecting the vehicles and cross-checking them with the Road Transport Department, visiting the applicants at their respective addresses, rejecting proposal forms from unqualified applicants, and finally submitting the verified proposal forms with his recommendations to the branch manager. Through his recommendation, the appellant had falsely represented to Hong Leong Finance that all the particulars provided had been checked and verified by him to be true and correct. In fact it was not. The appellant dishonestly caused the finance company to deliver ten payments totalling RM440,000 to one used-car company. The money actually went to second appellant's account. He was charged under section 420 of the Penal Code and sentenced to four years imprisonment on each of the first five counts; and five years imprisonment each on the rest, all the 10 sentences to run concurrently.

The counsel for the appellant argued that the sentence was excessive given the fact that he was a first offender. Dismissing this contention the court said:

> "I am unable to find any merit in the first appellant's appeal against the aforesaid sentences. The process of sentencing involves an exercise of judicial discretion by the trial judge, having regard to the facts and circumstances prevailing in each particular case. In the absence of any unauthorised, extraneous or irrelevant exercise of discretion by both the courts below, this court should be slow and indeed should refrain from disturbing the aforesaid sentences: (see eg, *Bhandulanand Jayatilake* [1981] 1 LNS 139; [1982] MLJ 83, 84 FC and *D atuk Sahar bin Arpan v. Public Prosecutor* [2007] 1 CLJ 326.)"

A question which may deserve attention is whether the sentence imposed by the trial judge was already an adequate one. There was no cross-appeal by the prosecution on ground of inadequacy of sentences; on the contrary, the prosecution urged the court to affirm these sentences. Given the value of money lost out of the deceit by the appellant, it may probably be contended that a harder sentence could have been awarded by the court. This represents a missed opportunity as it would have provided a much more compelling case for the prosecution to argue for a longer period of imprisonment.

The statistical report on the financial loss incurred as a result of the commission of this particular crime should justify the granting of a severe punishment. It must be admitted that not all reports lodged with the police will proceed with prosecution, and those cases which are pursued may not necessarily be won by the prosecutors. Data from the PDRM shows that only a small fraction of the complaints will be investigated, and a small fraction of the investigated cases will end up with the arrest. The scarcity of successful prosecution may be a factor encouraging more criminals to engage in the crime in the future. It would not be very hard for the criminals to digest this information in their cost-benefit analysis of crime perpetration given that cheating offenders are commercial or white-collared criminals, who more often than not are affluent members of the society and better able to calculate the risk and the illicit gain by studying the punishment and enforcement.

Prosecutors should take into account economic loss suffered by the nation in their submission against the accused, and court should not be precluded from giving pervasiveness of crime due consideration in cheating offences. Court once considered prevalence of crime as a factor that justifies the aggravating of a punishment. In the case of *Lee Chow Meng v. Public Prosecutor*[11], the learned President took judicial notice of the prevalence of the crime involving firearms in Kuala Lumpur.

[10] [2007] 4 CLJ 467.
[11] [1976] MLJ 287.

Difficulty of detection has also been endorsed as one of the aggravating factors. In *PP v. Roslan Imun*[12] Ishak J recognised this element as necessitating a tougher sentence to the accused, saying:

> "there are certain factors such as prevalence, difficulty of detection and injury to the public revenue which operate in the direction of severity and others such as leniency to first offenders which operate in the other direction and where, as frequently happens, a number of these factors apply in one case the Court must balance them as best it can".

A surf in the CLJ for cases from 2000 to 2010 indicates that no consideration of the prevalence of offense was given in ascertaining the punishment for the offense of cheating. The closest case on this aggravating factor is in the case of *PP v. Obeng Frederick Kwabena*[13], a case involving African scam and black money. In this case, the accused was sentenced to 6 months imprisonment. The prosecutor appealed against the magistrate's decision on the ground that there has been a mistake given that section 420 prescribes for a minimum punishment of one year imprisonment with whipping. In his judgement, the magistrate argued that the accused is a young offender aged 21 years and a foreign citizen, and the plea of guilty made by the accused has saved everybody's time of a lengthy trial in the court, and that considering these factors it would be cruel to impose the one year mandatory imprisonment provided under section 420 to the offender. The High Court granted the appeal and sentenced the offender to 18 months imprisonment with 3 whippings, on the basis of the facts and nature of the case, the applicable principles including the public interest[14]. The court also made some reference to *Mohamed Jusoh Abdullah & Anor v. PP*[15] in which Willan CJ said:

> "In our view, no sentence can be assessed by a simple mathematical formula. Many factors must be taken into account according to the circumstances of each individual case. In that respect we would draw attention to the matters which should be taken into account in fixing punishments as set out in *Halsbury*'s *Laws of England* (Hailsham Edition) volume 9, para. 365:"
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> The Court, in fixing the punishment for any particular crime, will take into consideration the nature of the offense, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he has received, if the crime is one of violence, the antecedents of the prisoner up to the time of sentence, his age and character". It is submitted that, under the consideration of the nature of the offense, statistical figures of the crime in the society may be used in prosecutions' argument to indicate the seriousness of the harms caused and the extent to which the offences, if go undeterred, could inflict economic injury to the nation.

In response to the young age argument, counsels for the prosecution contended that at the time of the commission, the facts surrounding the case does not indicate any lack of maturity. The counsel referred to the judgement by Brown, Ag CJ in *Abdul Karim v. Regina*[16];

> "In the matter of punishment, the "type of offense" is the concern of the Legislature, which has provided the maximum punishment which can be inflicted for a serious offense of that type. The particular offences, and the particular offender, are the concern of the Court, whose business it is to decide what punishment is merited upon the facts of the individual case within the limits which the Legislature has provided. Any tendency to standardise

[12] [1999] 3 CLJ 494.
[13] [2001] 8 CLJ 578.
[14] See also Rokiah Kadir, Cheating Offences and Punishment: A Malaysian Perspective *OIDA International Journal of Sustainable Development, Vol. 3, No. 1, pp. 11-20, 2012*.
[15] [1947] 1 LNS 66.
[16] [1954] 1 LNS 3.

> punishment for any type of offense is to be deplored because it means that the individual offender is being punished not upon the facts of his particular case but because he has committed an offense of that type".

The imposition of whipping was justified and was indeed welcome on the need to deter the public from committing the crime. The judgement of NH Chan H in *Public Prosecutor v. Leo Say & Ors [1985] 2 CLJ 155* was adopted in which he was reported to have said:

> "I would be failing in my duty if I do not pass sentences which make it absolutely plain that those who indulge in such conduct do receive sentences of the utmost severity. The sentences should act as a warning to others not to take part in similar offences. Such conduct should not only be held in utter abhorrence by all ordinary men and women, but should receive when brought to justice, the most severe possible punishment".

On the whole the High Court's decision in *PP v. Obeng Frederick Kwabena*[17] is much welcomed. It may be commented that even without a minimum punishment, the novelty factor of black money as a modus operandi should have warranted a heavier sentencing than that granted by the lower court. In future cases it may be thought that courts should take a harsher approach in exercising their discretion under section 420 given the underlying rationale of sentencing to deter future crime. The prevalence of crime in the society can be considered as an aggravating factor and prosecutions should not feel inhibited to press for a severe punishment if statistics show the frequent occurence of the crime in the society.

Concluding remarks

The perpetration of crimes by cheating offenders may to a large degree be contributed by the criminals' apprehension of arrest, conviction and punishment. Inefficient police force and prosecution as well as inadequate sentencing in the existing laws may constitute the underlying incentives for the commission of crimes amongst these individuals. Though cheating offences are not a new phenomenon, an enormous increase in the number of the offences seen in the last five years, as well as the loss the offense has given rise to, necessitates a revisit into the sentencing issue. The importance of the issue is undeniable, given that sentencing constitutes the final process the criminals are subjected to as a result of the commission of the crime. Unemployment and the availability of sophisticated technologies may have contributed towards the increase of these offences, and measures taken by the authorities such as through the increase of police officers can be seen as quite a feasible policy for crime reduction. Courts' roles would only come into play if investigated cases end up with prosecution; 25 cases brought to the court within ten years time may be regarded as few, and criminals might not be adequately deterred if they see that the harsh laws are not applied. At the same time, the police's job in receiving complaints, carrying out investigation, arrest and prosecution would not mean much if, at the end of the day, the judgement awarded does not duly serve a lesson to future criminals. Scholars have long admitted that courts' role is not insignificant towards reducing the crime rate; a harsher punishment would certainly help deter future criminals. This is supported by the utility theory that postulates that individuals commit crime if the expected benefits or rewards from that crime are greater than the expected costs, and abstain from it as the severity of punishment overrides its benefits. It is hoped that courts will take cognisance of the crime rise in the society in awarding the punishment to the offenders and the punishments granted will have the effects of raising the apprehension level of future criminals and hence deter them from committing the crime.

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