

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	DPP v Khan
Citation:	[2024] ACTSC 19
Hearing Date:	7 February 2024
Decision Date:	7 February 2024
Before:	Mossop J
Decision:	See [56]
Catchwords:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – Judgment and punishment – sentence – guilty plea to offence of obtaining property by deception – joint commission – where offenders purported to purchase e-cigarettes with envelopes of paper intended to resemble banknotes – suspended sentence of imprisonment imposed CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – Judgment and punishment – sentence – where character reference appears to be generated by or rewritten using large language model – use of such reference not appropriate – duty of counsel to make enquiries as to how references are written – question of how much weight to place on good character reference that appears to be AI generated – whether appropriate to use automated translation software in preparing references – whether commitment to cleanliness a factor on sentencing
Legislation Cited:	<i>Crimes (Sentence Administration) Act 2005 (ACT)</i> <i>Criminal Code 2002 (ACT)</i> , ss 45A, 326
Cases Cited:	<i>DPP v Osmani (No 2)</i> [2023] ACTSC 128 <i>R v Rhodes</i> [2022] ACTSC 182
Parties:	Director of Public Prosecutions Majad Khan (Offender)
Representation:	Counsel S Bargwanna (DPP) G Le Couteur (Offender) Solicitors Director of Public Prosecutions ACT Legal Aid (Offender)
File Numbers:	SCC 90 of 2022

MOSSOP J:

Introduction

1. Majad Khan has pleaded guilty and is to be sentenced on one charge of dishonestly obtaining property by deception, contrary to s 326 of the *Criminal Code 2002* (ACT). The maximum penalty is 10 years' imprisonment or 1000 penalty units or both. The offending occurred on 15 May 2021. The offence is one of joint commission pursuant to s 45A of the *Criminal Code 2002* (ACT). His co-offenders were Amro Aseeri, Joshua Rhodes, and Albion Osmani.

Facts

2. The facts upon which the offender is to be sentenced are agreed and are set out in a Statement of Facts which was admitted into evidence. In summary, the offending involved ripping off a supplier of illegal e-cigarettes by pretending to pay for them with cash which was in fact simply paper and then absconding with the goods. The scheme involved Mr Aseeri, Mr Khan, Mr Rhodes, and Mr Osmani.
3. In 2021, both Mr Aseeri and Mr Khan were 22 years old. Mr Aseeri was slightly older than Mr Khan. Mr Aseeri knew Mr Rhodes because they met at Canberra High School. Mr Osmani and Mr Rhodes were friends.
4. Mr Aseeri and Mr Khan were both listed as contacts in Mr Rhodes' mobile telephone.
5. The complainant had listed a large volume of IGET branded e-cigarettes for sale on Facebook Marketplace. In about April 2021, Mr Osmani and Mr Rhodes began searching Facebook Marketplace in an attempt to secure an agreement to purchase e-cigarettes in bulk. The complainant received a number of enquiries on his Facebook account from an account in the name of "Josh Rhodes". The correspondence included providing Mr Aseeri's mobile telephone number as a contact telephone number.
6. On 10 May 2021, Mr Osmani's mobile telephone sent Mr Aseeri an SMS message stating: "Josh found a big time supplier".
7. Between 13 and 15 May 2021, the complainant sent and received a number of text messages and telephone calls to and from Mr Aseeri's mobile telephone, with arrangements being made for "Josh Rhodes" to purchase 12,000 IGET branded e-cigarettes for an agreed sale price of \$63,600.
8. The complainant requested the user of Mr Aseeri's mobile telephone to provide him with proof of their identity and to make a deposit of \$600 into his bank account. In response, the user of Mr Aseeri's mobile telephone sent an image of a New South Wales driver licence in the name of "Haosheng Zheng", and a screenshot for the deposit of \$600,

scheduled to transfer on 16 May 2021, originating from an account that was in Mr Aseeri's name. No such transfer occurred on 16 May 2021.

9. At around this time, Mr Rhodes had entered several search terms into the internet browser on his mobile telephone, including searching "asian australian id" and "australian id". Contained on Mr Rhodes' mobile telephone were several images consistent with being cropped from the driver licence image of "Haosheng Zheng".
10. At about 7:47am on 15 May 2021, CCTV cameras positioned near the entry of an apartment building in Belconnen (the apartment building) captured a blue Hyundai being driven by Mr Osmani. Mr Aseeri got into the Hyundai, putting a bag on the rear seat.
11. At 10:30am on 15 May 2021, the complainant and the user of Mr Aseeri's mobile telephone came to an agreement that they would both attend a residence in Bruce (the residence) in order to complete the agreed transaction. The complainant arranged assistance from a friend to transport the e-cigarettes to the location and replied that he would arrive "around 3pm".
12. At approximately 1:50pm, Mr Aseeri and Mr Khan are captured on CCTV walking through the lobby area of the apartment building, exiting onto the street, and walking into a Woolworths supermarket. They emerge about two minutes later with Mr Aseeri carrying a brown coloured bag.
13. At about 2:00pm, Mr Rhodes, Mr Aseeri, and Mr Khan are seen in or around a Fiat SUV. Mr Aseeri removed a brown coloured bag from the passenger seat and he and Mr Khan examined the contents before returning it to the front passenger seat.
14. At about 2:22pm, the complainant phoned Mr Aseeri's mobile telephone number and the user of that telephone indicated to the complainant that they would "need 30 minutes to be home". At approximately 2:46pm, Mr Aseeri's mobile telephone sent the complainant a photograph of the car park outside the residence, presumably depicting the agreed meeting place.
15. At about 2:55pm on 15 May 2021, the complainant and his friend arrived at the carpark located outside the residence. Already at that location was the Fiat SUV, Mr Rhodes, who was carrying the brown coloured bag, and Mr Khan. Both Mr Rhodes and Mr Khan used false names. Mr Aseeri and Mr Osmani were not there.
16. The complainant and Mr Khan got into the back of the complainant's truck with Mr Khan opening several boxes to check the contents, which were then loaded into the Fiat SUV.

17. Once the unloading and loading was completed, Mr Rhodes stated words to the effect: "My dad is waiting for you ... You need to deliver to him. I'll give the money." Mr Khan then drove the Fiat SUV away from the location.
18. Once the vehicle had departed, Mr Rhodes said words to the effect: "Where do you want to count the money?" The complainant replied that he was happy to count the money inside the truck; Mr Rhodes passed the brown bag to the complainant's friend.
19. The complainant's friend opened the bag and identified that the contents were several paper envelopes roughly the size of Australian currency with rubber bands wrapped around them and with numbers written on the front, purportedly to indicate the amount of money each envelope contained. He opened one of these envelopes and saw that the contents were not money but were instead paper.
20. The complainant's friend said words to effect: "There's no money. Catch him!" Mr Rhodes turned and started running in the opposite direction away from the truck. The complainant, who prior to this, was standing close to Mr Rhodes, started to give chase. Mr Rhodes escaped and ran to a small blue car which was being driven by Mr Osmani and in which Mr Aseeri was also present in the passenger seat.
21. The complainant contacted police.
22. The Fiat SUV was subsequently recorded on CCTV as entering the underground car park of the apartment building where Mr Aseeri lived.
23. On 17 May 2021, police executed a search warrant at Mr Aseeri's residence. During the search, police found in the kitchen cupboard two envelopes with rubber bands around them in similar size and shape to Australian currency notes, consistent with those provided to the complainant purporting to contain money.
24. Police offered Mr Aseeri an opportunity to participate in an interview, but he declined.
25. Sixteen fingerprint samples were developed from the brown paper Woolworths bag and its contents. Two fingerprint matches from the external surfaces of the envelopes contained within the bag were identified as being deposited by Mr Rhodes, and one fingerprint match to Mr Khan.
26. Six fingerprint samples were developed from the seizure comprised of the two envelopes with rubber bands that came from Mr Aseeri's residence. A fingerprint match from the external surface of one envelope was made to Mr Rhodes.

27. The fingerprints of Mr Aseeri, Mr Khan, and Mr Rhodes were found on the envelopes located in the bag at the scene of the incident as seized from the residence, and Mr Aseeri's fingerprints were found on the writing pads inside the envelopes.
28. Mr Rhodes and Mr Osmani pleaded guilty and were sentenced on the charge of obtaining property by deception.

Objective seriousness

29. The offending itself, for which Mr Khan is liable by joint commission, is in the mid-range of objective seriousness. It involved property of significant value and a premeditated and thoroughly dishonest scheme. The motivation was financial gain. None of the stolen items have been returned to, or recovered for the benefit of, the victim of the offending. There is no evidence as to the financial gain actually realised or what happened to that gain.
30. In the absence of any evidence explaining the respective roles of the offenders in any more detail than appears in the Statement of Facts, it is very difficult to produce a hierarchy of culpability within the offenders. Mr Khan was present when the e-cigarettes were stolen and drove off with them. He therefore played a significant role in that aspect of the scheme. It is not possible to determine the extent of his involvement in the planning and organisation of the scheme or the subsequent disposal of the e-cigarettes. The situation is that it is not possible to prove beyond reasonable doubt that he had a greater role than the other offenders and not possible to conclude on the balance of probabilities that he had a lesser role than the other offenders.

Subjective circumstances

31. The evidence as to the offender's subjective circumstances comes from two sources. First, from the Intensive Correction Order (ICO) assessment report and, second, from the bundle of character references and other documents tendered by the offender.
32. He is 24 years old. He was born in Pakistan. His family moved from Pakistan to Australia when he was nine years old. They moved to Canberra when he was 15 years old. He had a positive upbringing and remains close with his parents and his brother.
33. He has not had any long-term relationships and has no dependents.
34. After completing Year 12, he commenced a mechanics course but then changed to a plumbing apprenticeship. He only did that for a year. He then enrolled in a nursing course at the Canberra Institute of Technology in 2021. He did not continue with that course in 2022. From the time when he started the nursing course, he worked as a rideshare driver until April 2023. He then worked as a mechanic from July until November 2023, and then

moved back to Sydney. In January 2024, he got work as a plumbing apprentice and that is what he is doing at the moment.

35. He reported that he was active in the Islamic community in Canberra while he was here. He is still trying to establish his community contacts in Sydney. He does not use alcohol or illicit drugs. He has no health concerns other than symptoms of depression and anxiety relating to the present charge.
36. He lives with his parents and younger brother in Sydney. He assists with caring for his mother who has a variety of health conditions.
37. The only information that he disclosed to the author of the ICO assessment report about the offending conduct was that he said “he was dragged into it by someone he considered a friend, and he was unaware of some of the details regarding the situation”. However, he expressed remorse relating to his involvement in the offence.
38. He was assessed by the author of the ICO assessment report as being at a low risk of reoffending. He is assessed as not suitable for a community service work condition or for an ICO because he resides in Sydney. If given a sentence that involved supervision in the community, ACT Corrective Services would seek to have his supervision transferred to New South Wales Community Corrections.
39. The offender tendered a number of personal references. They include a character reference from the offender’s brother and from his mother. The terms of the reference from his brother strongly suggest that it was written with the assistance of a large language model program, such as ChatGPT. As no evidence was given by the author of the reference, I enquired of counsel for the offender as to whether or not it had been prepared with such assistance and she said that her instructions were that it may have been prepared with the assistance of computer translation but not with a large language model. In the absence of evidence, I must make of the document what I can having regard to its terms. Read as a whole, the use of language within the document is consistent with an artificial intelligence generated document. Two particular aspects of the document stood out. The first is the manner in which the author’s relationship with the offender is introduced:

I have known Majad both personally and professionally for an extended period, and I am well-acquainted with his unwavering commitment to his faith and community.

40. One would expect in a reference written by his brother that the reference would say that the author was his brother and would explain his association with the offender by reference to that fact, rather than by having known him “personally and professionally for an extended period”.

41. The second is a paragraph towards the end of the reference which appears after paragraphs describing his “exceptional qualities”, “academic excellence”, his “positive contributions and willingness to assist others” and that he is a “family man”. It provides:

Majad's commitment to cleanliness and order is another facet of his character that stands out. He maintains a meticulous approach to his surroundings, expressing a strong aversion to disorder. His proactive attitude towards cleaning, both inside the house and in the community, reflects a sense of responsibility and respect for the environment. His efforts extend to keeping the streets and driveways clean, a testament to his commitment to a well-maintained and orderly community.

42. It is certainly possible that something has been lost in translation. He may well be committed to cleanliness. However, the non-specific repetitive praise within the paragraph which places such an emphasis on his proactive attitude towards cleaning and strong aversion to disorder is strongly suggestive of the involvement of a large language model.
43. The absence of evidence as to how the reference was generated and the extent to which it was assisted by either computer-generated translation or a large language model means that it is difficult to assess the weight that can be given to it. In my view, it is clearly inappropriate that personal references used in sentencing proceedings are generated by, or with the assistance of, large language models as, if they are not objected to on that basis, it becomes difficult for the court to work out what, if any, weight can be placed upon the facts and opinions set out in them. It is also undesirable that they be written in another language and then translated using a computer-based translation, as the subtleties of the use of language, which will be significant in assessing the content of the reference, will not necessarily be accurately reflected in the automated translation. In my view, counsel appearing on a sentence should make appropriate enquiries and be in a position to inform the court as to whether or not any reference that is being tendered has been written or rewritten with the assistance of a large language model or any automated translation program.
44. In the present case, because there were a number of other references which did not have similar features and which were tendered without objection, it is possible to reach favourable conclusions about the offender's character without placing reliance upon the reference given by his brother, upon which I place little weight.
45. The reference from his mother indicates that she suffers from a variety of medical conditions and that he provides assistance for her now that he has moved back to Sydney. There are references from two friends who studied with him which both attest to his good character. There is a reference from an Islamic Imam who attests to the fact that he has been involved with the Islamic community at a Canberra mosque and he has

demonstrated “a strong commitment to living a righteous and principled life”. There is no explanation as to how a righteous and principled life is consistent with the offending to which he has admitted.

46. Finally, there is another reference from somebody who has known him since 2011 through the Canberra Muslim community. While this reference says that in that period he has “demonstrated unwavering moral character and a deep sense of responsibility”, it does not make any reference to the offending or knowledge of the offending. The high praise of the offender is hard to reconcile with his involvement in the offending and the reference makes no attempt to do so.

Criminal history

47. The offender has no criminal history.

Plea of guilty

48. The offender pleaded guilty in the Supreme Court after a criminal case conference. The trial was due to start in the week of 9 October 2023 and he pleaded guilty on 4 October 2023. The plea has utilitarian value and will result in a 10 percent reduction on the sentence that would otherwise have been imposed.

Time in custody

49. The offender has spent no time in custody in relation to the offence.

Co-offenders’ sentences

50. Both Mr Rhodes and Mr Osmani have been previously sentenced. For Mr Rhodes the starting point was a sentence of 30 months which was reduced to 21 months and two weeks. That sentence was to be served by intensive correction in the community: *R v Rhodes* [2022] ACTSC 182. For Mr Osmani, who was found to have a lesser role, the starting point was 17 months’ imprisonment which was reduced to 12 months. That was to be served by a suspended sentence with a good behaviour order for two years and a requirement to perform 150 hours of community service: *DPP v Osmani (No 2)* [2023] ACTSC 128.

Consideration

51. As with Mr Aseeri (who was sentenced at the same time), the unusual feature of this case is the absence of any attempt to explain how the offender became involved in this serious offending. The court is therefore left with evidence that he is otherwise a person of good character and the evidence as to the offending contained in the agreed Statement of Facts but nothing to make the connection between the two in a way that

allows the court to understand the factors that led to the offending and hence of the prospects of reoffending in light of those factors.

52. Further, the late plea of guilty and the absence of any explanation for the conduct informs the extent to which the court can assess remorse for the conduct as extending beyond remorse for the consequences of the conduct for the offender. It may be to the forensic advantage of the offender to provide no explanation of his involvement, but that, and the late plea that occurred only after two of his co-offenders had pleaded guilty, reduces the capacity of the court to infer genuine remorse.
53. Notwithstanding that, there is sound evidence that the offender is regarded as a person of good character and has a number of protective factors which result in his prospects of reoffending as being low.
54. The sentencing options available are reduced by the fact that the offender is resident outside the Australian Capital Territory. It is for that reason that he is unsuitable for an ICO and unable to perform community service. The absence of those sentencing options means that, in a case which might otherwise have been suitable for such dispositions, the court is pushed towards a penalty which is harsher or more lenient than it would otherwise impose.
55. Having regard to the manner in which I have assessed the objective seriousness of his offending, I consider the appropriate starting point is a sentence of two years' imprisonment reduced to 21 months and 15 days on account of the plea of guilty. I do not consider that this is a case in which the purposes of sentencing require that the offender serve, in the first instance, time in full-time detention and in the circumstances, the matter can be dealt with by way of a fully suspended sentence. However, in order that it adequately reflect the need for denunciation and general deterrence, some additional punishment is needed. That would have been, as in the case of Mr Aseeri, a period of community service. Given the unavailability of that option, a fine will be imposed. I have imposed a fine conscious of the offender's limited financial resources as an apprentice, but consider that with a significant period in which it is to be paid it is appropriate to impose such a penalty.

Orders

56. The orders of the Court are:
 1. On the charge of dishonestly obtaining property by deception (CAN 928/2022) the offender is convicted and sentenced to imprisonment for 21 months and 15 days which sentence is wholly suspended upon the offender entering into an undertaking to comply with his good behaviour obligations under the *Crimes*

(*Sentence Administration*) Act 2005 (ACT) for a period of two years with the additional condition that he pay the fine imposed on 7 February 2024 within that period.

2. The offender is fined \$6000 and allowed two years to pay.

I certify that the preceding fifty-six [56] numbered paragraphs are a true copy of the Reasons for Sentence of his Honour Justice Mossop

Associate:

Date: