

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Cain*, 2016 NSPC 54

**Date:** September 19, 2016

**Docket:** 2800745; 2800746; 2800747

**Registry:** Halifax

**Between:**

Her Majesty the Queen

V.

Mary Ann Cain

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**DECISION ON SENTENCE**

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**Judge:** The Honourable Judge Marc C. Chisholm

**Heard:** May 7, 2015; June 9, 2015; January 4, 2016; February 22, 2016;

**Decision:** February 22, 2016

**Charge** Sections 380(1)(b); 342(1)(c); 342(3)(a) *Criminal Code*

**Counsel:** Ronald Lacey, for the Crown  
Brad Sarson, for the Defendant

**By the Court: Orally**

**Introduction**

[1] This is the matter of the sentencing of Mary Ann Cain. Ms. Cain was found guilty after trial on the three charges on the Information. Those three charges involve the commission of a fraud on Duncan Logan in an amount not exceeding \$5,000 between the 18<sup>th</sup> of June 2013 and the 15<sup>th</sup> of September 2013; the unlawful use of a credit card, CIBC bank card, in the name of Duncan Logan, knowing the same to have been obtained by the commission in Canada of an offence contrary to Section 342(1)(c) of the *Criminal Code*; and, further, the commission of the offence that she fraudulently and without color of right did possess credit card data knowing that the credit card data would enable her to use a credit card, specifically a CIBC bank card, that data, specifically the PIN number for the credit card in question.

[2] The Crown elected to proceed by indictment in relation to these offences. There was an election to be tried in provincial court and a plea of not guilty; the matter proceeded to trial.

[3] For the first of the three offences, the maximum punishment is a period of two years imprisonment. For the second and third counts, the maximum punishment is 10 years imprisonment.

[4] The circumstances of the offences found by the Court, in a prior decision rendered by the Court (February 22, 2016) involved Ms. Cain being employed by a company who provided personal care services to clients. The company required an employee such as Ms. Cain not to handle money or finances of the clients. Ms. Cain, during the course of the trial, admitted to violating that rule of her employment by handling monies of the victim, Mr. Logan. On nineteen occasions over a period of approximately 3 months, the accused went to an ATM with the victim's bank card and PIN number. She withdrew money. There were a number of failed attempts, in addition to those nineteen successful attempts. On a number of occasions, she attempted to withdraw more than the maximum withdrawal permitted for one transaction or one day. The withdrawals ended when the bank account was virtually emptied. The total amount taken during that period of time was \$3617.00.

[5] Ms. Cain, during the trial, claimed to have done so at the request of Mr. Logan and that she returned all of the money to him. She alleged that he and

friends drank excessively, perhaps drinking proceeds of the monies she had obtained. She indicated during the trial and in her comments to the court today, there were other personal care workers in the home, intimating they, perhaps could have stolen monies she obtained, perhaps could have taken the card and pin on his behalf and obtained other monies. I noted in the Pre-Sentence Report, she made reference to a niece of the victim who had an addictions issue; perhaps suggesting some of the monies were taken or went for that purpose.

[6] After hearing the evidence at trial, the Court delivered a written decision in which the Court rejected the evidence of Ms. Cain and accepted the evidence of Mr. Logan, who stated that he did not give Ms. Cain his bank card nor his PIN for that bank card; that he kept the two together; did not realize they were gone until he received a communication from the CIBC bank notifying him that his bank account was empty. At which point he was upset, understandably, and after discussions with the bank, he lodged a complaint to the police. The question became who was responsible. There were a number of caregivers in his home during that period of time.

[7] The evidence was that most transactions at ATMS, at financial institutions, have cameras that record the person making the transaction, but those cameras

record over every thirty days, or so. However, the Credit Union, in this case, at which Ms. Cain had used the card on more than one occasion still had the video recording and it showed Ms. Cain as the person making the transaction. And that was the evidence that led the police to investigate Ms. Cain.

[8] Mr. Logan, when testifying was almost 80 years of age, in relatively poor health, with a number of significant health issues. He came to court, he testified; he impressed the Court as being mentally sharp and clear in his understanding of his finances and his recollection. He was clearly upset by the perceived breach of trust by Ms. Cain, a person whom he had in his home and trusted, and liked as an individual, and undoubtedly upset with the news of having lost his lifesavings. He had a pension which paid for his rent and provided him money for small amounts of other things. He rarely touched the monies in the account, in question.

[9] Turning to the circumstances of the offender, Ms. Cain. Ms. Cain is a woman in her early 50s with no prior criminal record. She has a long history of employment in the personal care field. An unblemished record as indicated by her counsel. As a result of this matter, she lost her employment, which on the information before the Court garnered her an annual income of approximately \$80,000 a year. She has been unable to continue in her field of choice. In

September 2016, just a short time ago, she began a course at Nova Scotia Community College; a retraining program. Within the last couple of months she has paid through her counsel's trust fund \$800 towards the restitution.

[10] In her statement to the Court today, Ms. Cain maintained that she is not guilty, which is her right. I infer from her comments that she paid \$800 towards restitution, not out of a sense of repaying a debt in any way, since she does not believe she owes any money; but paid for the purpose of presenting herself in the best light for the purpose of sentencing.

[11] The Pre-Sentence Report in relation to Ms. Cain details a difficult upbringing; a home where there was alcohol abuse; a youth where she was the victim of sexual abuse; experienced poverty and racism. Ms. Cain overcame those difficulties, to her credit, and has been steadily employed for many years. Her mother is elderly and Ms. Cain indicated in her comments to the Court that she is the caregiver for her mother. She did not express to the author of the report any concern with respect to her consumption of alcohol, or gambling or any other issue that might explain where the monies taken by Ms. Cain went. Ms. Cain's son spoke to the author of the report. For the record, his comments with respect to his belief with respect to Ms. Cain's commission of the offence are not relevant from

the Court's perspective, in terms of sentence. He did express a concern with respect to the amount of alcohol that she consumes and questioned whether or not gambling was an issue. The information before the court, with respect to alcohol and gambling is not sufficient for the Court to conclude that there is, in fact, an alcohol or substance abuse problem, or a gambling problem.

[12] Turning to the position of counsel, it is the position of the Crown that given the nature of the offence and the circumstances of the offender, the appropriate sanction is a period of straight time imprisonment of between 3 to 4 months, followed by a period of probation with appropriate conditions.

[13] It is the position of the Defence that the Court ought to consider the granting of an absolute or conditional discharge. It being in the best interest of Ms. Cain not to have a criminal record and it would not be contrary to the public interest to grant her a discharge in the circumstances before the Court. If the Court does not accept the submission on behalf of Ms. Cain for a discharge, whether conditional or absolute, and if the Court takes the view that a period of imprisonment, as recommended by the Crown, is appropriate, the Court ought to consider and grant a Conditional Sentence Order, allowing Ms. Cain to stay in the community to continue her re-training program and to continue her care for her mother. And

finally, if the Court is not satisfied that a Conditional Sentence Order is appropriate, that the Court ought to consider a period of not more than 90 days and allow Ms. Cain to serve it on weekends, on an intermittent sentence order.

[14] I have reviewed, as counsel have reviewed for the Court, the purpose and principles of sentencing in Section 718 and the subsequent sections of the *Criminal Code*. I accept the position of counsel that aggravating factors in this case include the time period over which the offence was committed, the amount of money taken, the breach of trust in the commission of the offence and the vulnerability of the victim of the offence. In terms of mitigating factors, that Ms. Cain has no prior criminal record; a mature adult with a difficult past, which she has overcome; the impact of the charge and conviction; the loss of her employment; the likely loss of her ability to continue in her field of choice; the need for re-educating, which she has begun; the help of her mother, she as a caregiver, details of which are not before the Court; the making of partial restitution. With respect to the restitution, again, it is the Court's view that has not been done out of a sense of repayment of debt, but rather out of a sense of putting herself in the best possible light, which causes the Court some question with respect to likely further restitution payments.



[15] I have had the benefit of numerous cases submitted by counsel, all of which I have read and reviewed in detail. As counsel acknowledged, while they assist the Court in terms of principles and range of sentences, they are all distinguishable on their facts. Counsel spent a fair bit of time during closing arguments today speaking to the **Taylor** decision (2014 NSPC 75), a decision of myself, in relation to an individual who was a personal care giver, a manager of a personal care facility and a housekeeper of sorts for another couple, and in each case, took advantage of the position of trust to steal property under \$5000 in each case. There are circumstances in that case which are similar to those before the Court in this case in terms of the offender being a personal care worker for one of the victims and having no prior record. There are clearly differences. That individual was in her twenties and intending to run her own personal care business. That individual pled guilty and Ms. Taylor's sentence was by way of a joint recommendation of counsel for a conditional sentence order.

[16] This offence, in the Court's view, was planned; it required the theft of the victim's bank card and the victim's PIN for that bank account. The accused on numerous occasions went to an ATM and, using that bank card and PIN, made withdrawals from the victim's account without his knowledge, without his permission and kept the monies for herself. She was able to obtain his bank card

and PIN because he gave her access to his home as a personal care worker. He got to know her, she gained his trust. The commission of these offences was an egregious breach of Mr. Logan's trust. The victim was elderly, with failing vision, with diabetes, with mobility and other health issues. He had a small pension by which he paid his rent and other expenses. His life savings of less than \$4000 were in his CIBC savings account. The accused continued to make withdrawals, quickly towards the end of the time period, until she had virtually emptied his account of his life savings.

[17] In the Court's view, the offence was a gross breach of trust. It was callous. It was motivated by greed. There is no evidence of remorse from the Court's perspective. The accused victimized a vulnerable member of the community, an elderly man. As persons in our community age, they, like the victim in this case, often become more reliant on others. They depend on others for assistance. They, of necessity, place their trust in persons, allow persons into their home. Sentences for this type of offence must reflect not only deterrence but denunciation of such conduct.

[18] I have considered the Defence request for an absolute or conditional discharge. In the Court's view, such a sentence would be entirely inappropriate. It

would not address the strong need for deterrence, both specific and general. It would not in any way address the need for denunciation of this type of offence. It would not provide a sentence that would protect vulnerable members of the community from an egregious breach of trust by persons trusted to care for them.

[19] It is the view of the Court that in these circumstances a period of imprisonment is the appropriate sanction. The Defence have applied for a Conditional Sentence Order. Any sentence of imprisonment of less than two years may be served in the community subject to conditions. The Defence take the position that the period of time recommended by the Crown of 3 to 4 months may be appropriate if the Court is of the view that a period of imprisonment would be appropriate. The Defence have urged the Court to consider that if a Conditional Sentence Order is considered, that it would include house arrest with strict conditions but ought to allow for exceptions to allow Ms. Cain to attend community college, to attend medical appointments for herself and her mother, to attend for personal needs, and other such exceptions that might be viewed as reasonable and appropriate by the Court.

[20] I've given this issue considerable thought and considered the decision in **Taylor**. In the Court's view, a conditional sentence would be inadequate to

address the purpose and principle of sentencing. It would provide little impact on the current life circumstances of Ms. Cain. It would provide little deterrence to her or others in circumstances such as she found herself, working in the home of an elderly individual providing personal care. If convicted of stealing from such persons, the sanction of staying at home under house arrest for a few months, in the Court's view is, generally, inadequate to communicate the strong need for deterrence and denunciation. Therefore, I find that in these circumstances, in this case, such a sentence would be contrary to the purpose and principle of sentencing.

[21] I turn to the Defence request for an intermittent sentence. Defence asked that any sentence imposed by the Court be no more than 90 days and be permitted to be served on weekends. Such a sentence the Defence submits would allow Ms. Cain to continue her retraining program. A retraining program she started some 3 years after the commission of the offence. Some 6 or 7 months after being found guilty for the offence. Just a period of weeks before the sentencing for the offence. Her indication that her mother is elderly and that she is the caregiver for her mother is not doubted by the Court. The needs of her mother are not before the Court. Given Ms. Cain's comments with respect to restitution, the Court is uncertain with respect to her motivation with respect to such things as restitution and retraining.

[22] While the Court has, as in all cases, considered factors of rehabilitation and the importance of imposing the least restrictive sanction, I am not satisfied that in these circumstances anything other than a period of straight time imprisonment would properly address the purpose and principles of sentencing.

[23] And it is, for that reason, the sentence of the Court that Ms. Cain serve a period of three months' imprisonment on a straight time basis, to be followed by a period of probation for a term of 24 months. The terms of probation to be that: she keep the peace and be of good behaviour; appear back before the court whenever required by the court to do so; notify the court or her probation officer in advance of any change of name, address or employment; that she report as directed to a probation officer, first reporting within the first 5 days and thereafter as directed by her probation officer; that she not have any direct or indirect contact or communication with Duncan Logan; that she not be on or within 25 metres of the premises of the place of residence of Duncan Logan, including 2630 Gottingen Street, Halifax, Nova Scotia, or the premises of any personal care home, unless in the course of her employment so long as her criminal record has been disclosed to her employer or to the person or persons whom she is caring for and their immediate family; she is not to be employed in a personal care facility or on a personal care basis unless her criminal record for this offence is disclosed to her

employer or to any client for whom she is providing services and members of their immediate family, and if self-employed, the same is required; that she make restitution in the amount of \$800 before the end of September of 2016 and for the balance of the \$3,617.00, for the benefit of CIBC, 6429 Quinpool Road, Halifax, NS, before the end of the probation term.

[24] Given the Order of restitution, the Court is exempting Ms. Cain from the payment of any fine surcharge.