Hwa Lai Heng Ricky v Public Prosecutor
[2005] SGHC 195

Case Number : MA 97/2005

Decision Date : 14 October 2005

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : T U Naidu and K R Manickavasagam (T U Naidu and Co) for the appellant; Han Ming Kuang and Lee Jwee Nguan (Deputy Public Prosecutors) for the respondent

Parties : Hwa Lai Heng Ricky — Public Prosecutor

Criminal Law – Cheating – Elements of offence – Whether the elements have been made out – Whether victim deceived and induced by representation – Whether inducement needed to be the sole reason for delivery of property – Whether victim's negligence and breach precluded a conviction of cheating

Criminal Law – Abetment – Abetment by conspiracy – Essence of conspiracy – Whether separate and independent intentions which coincide sufficient to amount to conspiracy – Whether finding of abetment by conspiracy established on facts

Criminal Law – Abetment – Abetment by aiding – Intentionally aiding commission of offence – Whether the appellant facilitated the commission of the offence

Criminal Procedure and Sentencing – Appeal – Power of High Court in appellate capacity to amend charges – Relevant considerations in exercise of power – s 256(b)(ii) Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Criminal Procedure and Sentencing – Charge – Amendment of charge – Conviction on amended charge – No prejudice to appellant – s 256(b)(ii) Criminal Procedure Code (Cap 68, 1985 Rev Ed)

1 The appellant, Hwa Lai Heng Ricky, was charged under s 420 read with s 109 of the Penal Code (Cap 224, 1985 Rev Ed) ("the Penal Code") for allegedly conspiring with one Roger Cheong Sing Whee ("Cheong") and one Joyce Tia Hui Yee ("Joyce") to cheat the Development Bank of Singapore Ltd ("DBS") into disbursing $1,940,000 to Yamazaki Mazah Singapore Pte Ltd ("Yamazaki"). The district judge convicted the appellant and sentenced him to a term of 20 months' imprisonment. The appellant appealed against both conviction and sentence. After careful and detailed consideration, I amended the charge of conspiracy to one of abetment by intentional aiding and dismissed the appeal against conviction. I further reduced the sentence to a term of 18 months' imprisonment. I now give my reasons.

Background facts

2 The appellant was an assistant sales manager of Yamazaki, a company in the business of manufacturing and repairing machinery. He was responsible for collecting orders, co-ordinating production schedules, preparing delivery orders and invoices, and collecting payment from customers. Cheong was a majority shareholder and Managing Director of Sin Yuh Industries Pte Ltd ("Sin Yuh"), a company which manufactured precision machine components for sale to integrated circuit manufacturers and computer makers. Joyce was Sin Yuh's Finance Manager.

3 Sometime in late 2001 and early 2002, Sin Yuh purchased 47 machines amounting to a total of $4,874,750 from Yamazaki in anticipation of increased production from a new project. Sin Yuh issued 36 post-dated cheques in favour of Yamazaki to pay for all the machines. However, due to cash flow problems, Yamazaki was able to present only seven of these cheques (amounting to a total

of $902,460) for payment. Joyce managed to secure financing by way of hire purchase agreements with Arab-Malaysian Finance Bhd ("Arab-Malaysian") for nine machines and Tokyo Leasing (Singapore) Pte Ltd ("Tokyo Leasing") for six machines in May 2002. The appellant was aware of these hire purchase arrangements and had in fact earlier confirmed with the two hire purchase companies that Yamazaki had received $438,000 (from Sin Yuh's cleared cheques) towards the payment of the relevant 15 machines. As for the remaining 32 machines, Sin Yuh applied to DBS for a loan under the Regionalisation Finance Scheme ("RFS"). The appellant came to know of this loan application from Joyce sometime before May 2002. On 21 May 2002, DBS agreed to finance Sin Yuh $1.94m or 60% of the valuation or purchase price for 31 specified Yamazaki machines, whichever was lower.

4 Under DBS's letter of offer dated 21 May 2002 ("the Letter of Offer"), there was an important precondition in cl 2(j)(i) before the loan could be disbursed. It states as follows:

> Prior to disbursement of the Machinery Loan I and II, you [Sin Yuh] shall furnish evidence satisfactory to DBS Bank that the difference between the cost of the said machinery and the loan has been paid.

5 Accordingly, Sin Yuh had to furnish satisfactory evidence to DBS that it had paid 40% of the purchase price of the 31 machines to Yamazaki, which amounted to $1.293m. Upon the fulfilment of this precondition and the completion of relevant legal documentation (which was done sometime in November/December 2002), DBS would disburse $1.94m to Sin Yuh. Cheong and Joyce were both aware that this precondition must be satisfied before DBS would disburse the loan. In fact, sometime before 13 December 2002, Joyce received a request from DBS for a letter requiring confirmation that this precondition had been completed. Cheong knew, and was concerned, that Sin Yuh did not satisfy this precondition. Nonetheless, he asked Joyce to seek such a letter from Yamazaki. On 13 December 2002, Joyce sent an e-mail to the appellant, requesting the latter to prepare such a letter to DBS. By that time, the appellant was aware that DBS was going to provide financing of only $1.94m, and not the entire sum, for the 31 outstanding machines. He complied with Joyce's instructions and on or before 16 December 2002, he prepared and signed a letter to DBS ("P64") stating that Yamazaki had received from Sin Yuh $1.293m as down payment for the 31 machines intended to be financed by DBS. Further, the letter requested DBS to transfer to Yamazaki's account the balance amount of $1.94m. This confirmation letter was later sent to DBS.

6 Following which, Cheong proceeded to send a request to DBS's solicitors on 16 January 2003 for the loan to be disbursed. Subsequently, DBS delivered by way of bank transfer $1.94m to Yamazaki's bank account on 10 March 2003. However, Sin Yuh defaulted on the DBS loan repayment and in fact did not make any of the instalment payments to DBS. DBS later repossessed and sold 26 of the 31 machines secured to the loan. As for the remaining five machines, they were repossessed by Yamazaki in Malaysia. DBS was not able to repossess these five machines because Yamazaki had not been fully paid for them.

The Prosecution's case

7 The Prosecution called upon several witnesses who were personnel in the Sale, Credit and Credit Documentation Departments of DBS at the material time. Collectively, their evidence sought to establish the procedures on loan applications and disbursements. It was also through their testimonies that the Prosecution contended that DBS had been deceived and induced by P64.

8 The Prosecution further relied on Joyce's and Cheong's testimonies. It was suggested that the appellant had frequently chased Joyce and Cheong for full payment of the machines, during which the appellant would ask Sin Yuh to request DBS to expedite the loan disbursement. The Prosecution

argued that it could be inferred from the appellant's actions from as early as October 2002, that the appellant knew that DBS was not going to finance the full amount of the 31 machines and knew that there were moneys outstanding for the machines even after DBS were to disburse the loan amounts. The Prosecution submitted that the appellant prepared and signed P64, despite knowing that Sin Yuh had not paid the amount stated in P64. As a result of the representation contained therein, DBS delivered S$1.94m on 10 March 2003 to Yamazaki's bank account.

The Defence's case

9 The crux of the Defence's case rested on the contention that the appellant had been instructed by Joyce, in a visit to the premises of Sin Yuh, to treat the moneys being disbursed by the other two finance companies, Arab-Malaysian and Tokyo Leasing, as constituting the 40% deposit for the DBS machines. Counsel for the appellant asserted that the appellant prepared the letter P64 on these instructions. P64 was then sent to Joyce, who in turn sent it to DBS. The appellant claimed that he was unaware that such a course of action was wrong and he believed that he was perfectly entitled to do so. It was further contended that not one prosecution witness gave evidence that he or she was induced or deceived by P64 or the appellant. Finally, since $1.93m was such a huge amount, DBS should have done its own due diligence before disbursing this sum.

The decision below

10 The trial judge was satisfied that the Prosecution had proved beyond reasonable doubt that DBS was deceived by the appellant's confirmation letter, P64, and thereby induced into disbursing $1.94m to Yamazaki. In addition, the trial judge found that the representation contained in P64 was false as Sin Yuh had not paid Yamazaki 40% of the purchase price for the 31 machines and the appellant had acted with dishonest intention in preparing P64.

11 It was held that the fact that there are other matters which DBS had to consider in finally allowing the loan disbursement was inconsequential. The trial judge also found that Cheong conspired with Joyce to cheat DBS and that although Joyce did not explicitly convey to the appellant her intention to cheat DBS at all material times, the appellant was clearly party to the cheating scam and had acted with dishonest intention. As regards the appellant's contention that he was instructed to "reallocate funds", the trial judge was unconvinced that Joyce had verbally instructed the appellant to "reallocate funds". Even if Joyce did give these instructions, the trial judge decided that this did not absolve the appellant from the offence of conspiracy to cheat as the appellant could not make out a defence of mistake since he had failed to act with due care and attention.

The appeal

The issues on appeal

12 This appeal was premised on the following few grounds. Firstly, the district judge erred in law and in fact in holding that DBS was induced by P64. Counsel for the appellant argued that the elements of s 420 of the Penal Code were not made out as none of the prosecution witnesses testified that they were induced by P64. It was further contended that there was a critical error contained therein, so serious that if spotted and acted upon, DBS would have asked for the correction of P64 and would not have disbursed the sum. Since DBS failed to do so, it could only mean that DBS did not rely on P64 at all. Further, the appellant asserted that the trial judge erred by not finding that the appellant could succeed on the defence of mistake. Secondly, the appellant contended that the district judge erred in law and fact by accepting the evidence of Cheong and Joyce while rejecting the evidence of the appellant. The third ground of appeal related to the actions

of DBS. Essentially, the appellant contended that too much emphasis had been placed on P64 and the trial judge did not place enough emphasis on the fact that DBS had flouted and breached Economic Development Board guidelines, and that the loan application was made in breach of regulations. It was further submitted that the trial judge had not given due weight to the fact that DBS did not carry out its own due diligence to ascertain the veracity of the content contained in P64.

Whether the offence of cheating had been made out

13 I shall first address the issue on whether the elements of the offence of cheating had been satisfied. I had expressed in *Gunasegeran s/o Pavadaisamy v PP* [1997] 3 SLR 969, that to make out an offence of cheating under s 420 read with s 415 of the Penal Code, three elements had to be fulfilled: (a) the victim had to be deceived; (b) there had to have been an inducement such that the victim delivered any property to any person; and (c) there had to have been a dishonest or fraudulent intention on the part of the deceiving person to induce the victim to deliver the property (see also *Chua Kian Kok v PP* [1999] 2 SLR 542 and *Rukiah bte Ismail v PP* [2004] SGHC 98).

14 Under the first two limbs of the test, the relevant "victim" must refer to the relevant person or persons who were deceived and the relevant person or persons who was induced into delivering the property. Thus, the Prosecution need only prove that DBS, through its relevant officer(s), had been deceived and induced by P64 into disbursing the loan. There is no necessity to show that every DBS officer called by the Prosecution to testify was deceived and induced by P64.

15 DBS's Credit Department deals with evaluating credit risk, approving loans and issuing letters of offer while loan disbursements were dealt with by the Credit Documentation Department. Here, the disbursement by the Credit Documentation Department was based on the Credit Department's confirmation of P64. Tan Li Eng ("Tan"),[1] an officer from the Credit Documentation Department, testified that she was responsible for approving the loan disbursement to Yamazaki. According to Tan, she approved the disbursement after being satisfied that Sin Yuh had fulfilled all the preconditions in the Letter of Offer. After consultation with DBS's Credit Department, she accepted P64 as fulfilling the 40% deposit payment requirement under cl 2(j)(i) in the Letter of Offer. During examination-in-chief of Tan, the following transpired:

> Q: Without any of these 3 terms [includes Clause 2(j)(j)] being met, would you have approved this disbursement?
>
> A: No
>
> …
>
> Q: Condition in Clause 2(j). What kind of evidence is DBS looking for?
>
> A: Either a receipt or a letter of confirmation from the supplier that the deposit had been paid.
>
> …
>
> Q: Is this letter [P64] satisfactory to DBS to satisfy Clause 2(j)?
>
> A: Our department is in no position to confirm. Our role is to highlight the letter to our credit department and ask whether this is sufficient evidence to show that the 40% requirement has been met.

Q: Credit department's response after you forwarded this letter [P64]?

A: OK to proceed with this letter [this statement was subsequently confirmed by the credit department]

Thus, it was clear that DBS extended the loan to Sin Yuh for the purchase of 31 machines on the appellant's representation in P64 that Sin Yuh had made the necessary 40% deposit payment for these machines. In reliance on P64, DBS permitted the drawdown of the loan and disbursed the funds to Yamazaki.

16 The fact that there were other matters which DBS had to consider in its final decision to permit the loan disbursement, such as the financial risk involved in lending, and completion of the relevant legal documentation, was inconsequential. In *Seaward v PP* [1994] 3 SLR 369, I have held that to prove a cheating charge, the inducement need not be the sole or even main reason for the delivery of the property by the deceived party. So long as the deceiving party's deception played some part in inducing the victim to deliver some property, this element in the offence would be satisfied.

17 In *Chow Dih v PP* [1990] SLR 203, it was held that if the victim, at the time when he transferred the goods, was influenced by the false pretence, and would not have transferred the goods but for his reliance upon it, it was immaterial that he may have had additional reasons for making the transfer. This has been endorsed by myself in *Syed Jafaralsadeg bin Abdul Kadir v PP* [1998] 3 SLR 788 where I stated at [43]:

> This principle [in *Chow Dih v PP*] is given further credence by the case of *R v Lince* (1873) 12 Cox CC 451 where it was decided that the fact that the false pretence was not the only reason why the victim parted with his property was quite immaterial. This case was cited in *Gour's Penal Code of India* as good law and thus it was clear that it was sufficient that the complainant was partly and materially, though not entirely, influenced by the false pretences of the accused.

18 I was not persuaded by the attempts of counsel for the appellant to downplay the significance of P64 in the whole scheme of things. P64 was prepared by the appellant to constitute the satisfactory evidence that was required under cl 2(j)(i). It contained a representation that the amount was paid and a request to disburse the loan. The 40% deposit payment for the 31 machines was indeed a material prerequisite to the loan disbursement and had been described as a "precondition" for disbursement in cl 2(j)(i). Gui Kong Hwa,[2] Vice-President of DBS's Credit Department, had explained that the rationale for this precondition was to ensure that charges created by DBS over the relevant machineries would not be threatened by third-party claims. The appellant's deception through P64 played not just some part, but a material part, in inducing the disbursement of the loan. Without such a representation, DBS would not have disbursed the loan. Consequently, DBS was materially influenced by the false pretence effected through P64 and it was immaterial DBS might have had additional reasons or relied on other documents before deciding to disburse the loan.

19 Further, counsel for the appellant contended that DBS (a) had been negligent in relying on P64; (b) had failed to carry out its own due diligence test; and (c) had breached the guidelines of the RFS. I found these arguments completely unmeritorious. These were completely irrelevant considerations in determining whether an offence of cheating had taken place. They detracted from the whole purpose of s 420 which lies in the protection of innocent parties against being cheated by unscrupulous persons: *Gunasegeran s/o Pavadaisamy v PP* ([13] *supra*) at 980. It simply does not lie in one's mouth, especially one who has committed cheating, to raise a defence stating that the victim should have taken active and better steps to prevent being cheated. After all, as the trial judge aptly

pointed out, cheating offences frequently occur because the victim is naïve, less cautious, or more trusting of others: see *PP v Teo Cheng Kiat* [2000] SGHC 129 and *PP v Chia Teck Leng* [2004] SGHC 68.

20 As for the third ingredient of dishonesty under s 420, s 24 of the Penal Code provides that anyone who does anything with the intention of causing wrongful gain to one person or wrongful loss to another, is said to do that thing dishonestly. The appellant's intention was dishonest within the meaning of s 24 read with s 23 Penal Code, as there was an intention on his part to cause wrongful gain to his company, Yamazaki, or alternatively to cause wrongful loss to DBS. On the facts of the case, I found that the representation in P64 was obviously false. At the material time, Yamazaki had only received $902,460 from Sin Yuh towards the payment for all the machines. Out of this, the appellant confirmed that $147,000 was supposed to have been considered as down payment for six machines under hire purchase arrangements with Tokyo Leasing; $291,000 was supposed to have been considered as the down payment for nine machines under hire purchase arrangements with Arab-Malaysian. This means that Yamazaki would have received from Sin Yuh only about $464,460 (and not $1.293m as represented in P64) for the 31 machines.

21 As the trial judge helpfully observed, the appellant had been hounding Cheong and Joyce for the payment of the machines for some time. He knew Sin Yuh must show that it had made a 40% deposit payment for the 31 DBS machines before the loan could be disbursed. The appellant must have known that DBS would not disburse the loan had it known that Sin Yuh only paid less than 40% of the purchase price. Thus, the appellant prepared P64 to induce DBS to disburse the loan. At this juncture, I would also dismiss the appellant's contention that he did not send P64. It did not matter whether Joyce or the appellant sent P64. What was important was that the letter was prepared by the appellant who harboured a dishonest intention, and the letter did in fact result in the deception and inducement of DBS into disbursing the moneys. Consequently, I agreed with the judge's conclusion that the elements of s 420 Penal Code had been satisfied.

Typographical error in P64

22 Counsel for the appellant attempted to dispute the status and importance of P64 by pointing out that it contained a typographical error as to the sum to be disbursed. The sum was stated as "$1,9400 000" instead of $1,940,000 and it appeared that neither defence counsel nor the Prosecution was aware of this error during the trial below, and this error was not brought up to the trial judge's attention. I found this contention completely untenable. Counsel for the appellant acknowledged that the appellant admitted this was a typographical error. Nothing turned on this mistake as all other documents and evidence tendered in court showed that the amount to be financed by DBS was $1.94m. The operative aspect of the document was the representation that Yamazaki had received $1.293m. This was what led to the disbursement of the moneys, the sum of which was also stipulated in the Letter of Offer. In any event, the subsequent amount disbursed by DBS was indeed $1.94m and not $19.4m. I therefore dismiss the error as nothing more than a simple and trivial typographical error.

Whether Joyce gave the appellant instructions to reallocate funds

23 The next issue I had to consider was the appellant's contention that Joyce had given him instructions to reallocate the funds. The appellant claimed that when he prepared P64, Joyce had verbally instructed him to reallocate the hire purchase funds Yamazaki had received to the 31 DBS machines as 40% of the purchase price. He said that he did not query these instructions and complied because (a) Sin Yuh was a "VIP" customer; (b) he honestly believed that Sin Yuh was entitled to do so as these funds were Sin Yuh's moneys; and (c) he considered payment for all the 47 machines

purchased by Sin Yuh as a package and was only concerned with the total payment collected. On the other hand, Joyce testified that no such instructions had been given and the appellant had in fact chased her and Cheong for payment. In fact, Joyce admitted that she decided to cheat DBS as the appellant was pressing her for the outstanding payments.

24 In *Teo Ai Choo v Leong Sze Hian* [1986] SLR 75 at 79, [9], the Court of Appeal said:

> [W]here there were two directly contradictory versions the acceptance or rejection of which significantly depended on the oral testimony of the protagonists, the role of the appellate court is clear. We have to accord to the findings of facts of the learned trial judge the greatest respect and ought not to disturb them unless we are satisfied that the learned trial judge had reached a wrong decision …

Here, the trial judge found Cheong and Joyce to be candid and truthful witnesses, and their testimonies were not in any way slanted or embellished against the appellant. He also found that the omission by the Defence to dispute Joyce and Cheong's evidence that the appellant had frequently chased Sin Yuh for the outstanding payments seriously undermined the credibility of his claim that he had prepared P64 to comply with Joyce's instructions because he was afraid of offending Sin Yuh, a "VIP" customer. Having subjected the notes of evidence to great scrutiny, I found nothing which would justify interfering with the trial judge's evaluation of the various witnesses' credibility.

25 There was also a further difficulty in accepting the appellant's story. The appellant admitted that he was responsible for full payment for all the machines and that his superior had been keen to ensure Sin Yuh made prompt payments. The appellant knew of the DBS loan application as early as May 2002 and had admitted that Sin Yuh had become a huge liability to Yamazaki. Thus, it would not be inconceivable that he did in fact chase Sin Yuh for payment. In addition, the appellant did not confirm Joyce's verbal instructions to reallocate funds in writing, or reflect these instructions in some internal record, or communicate these instructions to the boss who took an active interest in ensuring Sin Yuh made its payments. In fact, these purported instructions were contradicted by Yamazaki's records. Six months after DBS had disbursed the loan, the appellant wrote to Joyce stating that, based on Yamazaki's own records, a substantial amount was still outstanding for a number of DBS machines, and requested full payment for these machines. Consequently, I was in agreement with the trial judge's conclusion that Joyce did not instruct the appellant to reallocate the funds.

Defence of mistake

26 Having disposed of the issue of whether Joyce had in fact given the appellant any instructions, I would nonetheless still address the merits of the appellant's contentions on mistake. Even if Joyce did instruct the appellant to treat the moneys disbursed by Arab-Malaysian and Tokyo Leasing as being payment towards 40% of the purchase price of the 31 DBS machines, I was of the view that the appellant could not succeed on the defence of mistake.

27 Section 79 of the Penal Code states:

> Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

The appellant certainly could not assert that he was justified by law in doing what he did under s 79 of the Penal Code, and counsel for the appellant rightly did not pursue this line of argumentation. What remained open was for the appellant to argue that he had made a mistake of fact. However,

the appellant would have to show that he acted in good faith as defined in s 52 of the Penal Code.

28 Section 52 of the Penal Code states:

> Nothing is said to be done or believed in good faith which is done or believed without due care and attention.

As correctly pointed out by the trial judge, the appellant did not display the level of due care and attention expected of him. Being an assistant sales manager who had more than ten years' working experience, who knew about the nature of hire purchase transactions, and who knew that Tokyo Leasing and Arab-Malaysian had intended their funds to be applied towards the payment of 15 specific machines only, he should have suspected something amiss when Joyce told him to wrongfully treat the hire purchase funds as payment for a different set of 31 machines. He must have known that such instructions were contrary to the general scheme of hire purchase arrangements and grossly improper. He must also have known the consequences and that the rights of DBS would be prejudiced through such an act. His failure to check with his superiors and his casual attitude towards the whole matter did not avail him of the defence of mistake. In these circumstances, the trial judge was perfectly entitled to arrive at the conclusion that the defence of mistake had not been made out.

Whether there was a conspiracy between Cheong, Joyce and the appellant

29 I now turn to the issue of whether there was a conspiracy between Cheong, Joyce and the appellant. The trial judge was correct to find that Cheong had conspired with Joyce to cheat DBS. Cheong had testified that at the time of the DBS loan application, he was aware as well as concerned that Sin Yuh did not satisfy one of the preconditions for the loan disbursement. Nonetheless, he asked Joyce to request P64 from Yamazaki and he further went on to request for the loan disbursement by sending a letter to DBS's solicitors. Further, Joyce admitted to cheating DBS, the intention having arisen when the appellant was calling her frequently to chase for the payment of the outstanding amount.

30 However, the trial judge found that at all material times, Joyce *did not explicitly convey* to the appellant her intention to cheat DBS. Nonetheless, he found that the appellant was clearly party to the cheating scam and had acted with dishonest intention. In fact, the Prosecution advanced its case on the basis that there was a *tacit (unspoken) agreement* between the appellant and Joyce, and the trial judge deemed that this constituted a sufficient basis for a conspiracy to cheat to exist between the three parties. With respect, I do not agree with the trial judge's finding that this was a case where a conspiracy to cheat between the three parties, Cheong, Joyce and the appellant existed.

31 Abetment by conspiracy is defined in s 107(*b*) of the Penal Code. It has three essential elements. First, the person abetting must engage, with one or more persons, in a conspiracy. In *PP v Yeo Choon Poh* [1994] 2 SLR 867 at 873, [19], "conspiracy" was defined as follows:

> The essence of a conspiracy is *agreement* and in most cases the actual agreement will take place in private in such circumstances that direct evidence of it will rarely be available. [emphasis added]

Second, the conspiracy must be for the doing of the thing abetted; and third, an act or illegal omission must take place in pursuance of the conspiracy, and in order to the doing of that thing: *Chai Chien Wei Kelvin v PP* [1999] 1 SLR 25 and *Chua Kian Kok v PP* [1999] 2 SLR 542.

32 Agreement is the basic element in conspiracy. In my view, the problem here lies at the very first hurdle of establishing an agreement to cheat. The idea of an agreement entails a meeting of minds, and there is no need for a physical meeting of the persons involved so long as they reach a mutual understanding of what is to be done. There must be an agreement between the alleged conspirators to do the act. Thus the Prosecution must show that Joyce and the appellant had reached an agreement to cheat DBS, and that such an agreement extended beyond a simple agreement to prepare P64.

33 It was also held in *PP v Yeo Choon Poh* at 873, [20] that:

> One method of proving a conspiracy would be to show that the words and actions of the parties indicate their concert in the pursuit of a common object or design, *giving rise to the inference that their actions must have been co-ordinated by arrangement* beforehand. These actions and words do not of themselves constitute the conspiracy but rather constitute evidence of the conspiracy. [emphasis added]

I have also previously stated in *Er Joo Nguang v PP* [2000] 2 SLR 645 that so far as proof goes, conspiracy is generally a matter of inference, deduced from certain acts of the accused parties, done in pursuance of an apparent criminal purpose in common between them. Both the surrounding circumstances and the conduct of the parties before and after the alleged commission of the crime would be useful in drawing an inference of conspiracy. An inference of conspiracy would be justified only if it was inexorable and irresistible, and accounted for all the facts of the case.

34 Any co-ordination by arrangement was clearly not evident here. Neither was any agreement, tacit (unspoken) or otherwise, evident. This was clear from Joyce's testimony as she was constantly trying to dissociate herself from the appellant. Further, the Prosecution proceeded with its questioning and submissions on the basis of a tacit (unspoken) agreement. And when Joyce was asked by defence counsel how the appellant was involved, the following transpired:

> Q: Ricky played no part in your intention to cheat DBS?
>
> A: Disagree
>
> Q: Why?
>
> A: Because when he called me and chased for the DBS loan application status, he asked me how was Sin Yuh going to settle the balance of 40% deposit. He was aware that the full 40% deposit had not been fully paid up.

The evidence in the lower court did not reveal an agreement between the two parties to commit the offence in question, except for the appellant's knowledge that the full 40% deposit had not been fully paid up by Sin Yuh and that Joyce's request to prepare P64 was accepted by the appellant. This however did not inexorably lead to an inference that there was an agreement between the appellant and Joyce and Cheong to cheat DBS.

35 In *Johnson v Youden* [1950] 1 KB 544, which was endorsed in *Nomura Taiji v PP* [1998] 2 SLR 173, it was held that *mens rea* was only an essential ingredient in conspiracy in so far as there had to be an *intention to be a party to an agreement* to do an unlawful act. No such intention on the part of the appellant could be found here and there was no explicit intention conveyed by Joyce to the appellant. I was of the view that both parties had independently intended to cheat DBS, the appellant wishing to do so because he wanted the machines to be paid for, while

Joyce was simply seeking ways to pay up the money Sin Yuh had owed. However, to find that such separate intentions which coincide can constitute conspiracy is perhaps overextending the law and should be rejected. One can most certainly establish a conspiracy if there was an inference of an agreement, but a tacit (unspoken) agreement on its own is insufficient to constitute a conspiracy.

36 In my opinion, this was a case where a charge for abetment by intentionally aiding the commission of the offence of cheating under s 107(c)of the Penal Code would have been more appropriate. Explanation 2 to s 107 states that a person abets by aiding, when either prior to or at the time of the commission of an act, he does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof. In such a charge, "the intention should be to aid an offence or to *facilitate* the commission of an offence": *Jimina Jacee d/o C D Athananasius v PP* [2000] 1 SLR 205. It was found by the trial judge ([2005] SGDC 157 at [79]) that the appellant had "played an active role by supplying Joyce with the necessary supporting document to *facilitate* the cheating scam" [emphasis added]. The false documentation as prepared by the appellant was a vital link. Without a letter emanating from Yamazaki, DBS would never have disbursed the sum and the offence could not have been committed. Despite knowing that this was not appropriate, the appellant acceded to Joyce's request, thereby intentionally aiding Joyce in committing the offence of cheating DBS. Thus, I would amend the charge of conspiracy to one of abetment by intentional aiding.

Whether an amendment of the charge would be appropriate

37 The High Court, in exercising its appellate capacity, has the power to amend charges under s 256(*b*)(ii) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed): *Garmaz s/o Pakhar v PP* [1996] 1 SLR 401. The power to amend the charge will only be exercised if the court is certain that the amendment would not affect the substance of the evidence given in the proceedings below. Further, the court should be mindful that the amendment does not cause any prejudice to the appellant's defence or to the Prosecution. I was of the view that to amend the charge would not cause any prejudice to both the Prosecution and the appellant. The particulars relied on to make out the offences set out in the charges remained unchanged. Thus, there had been sufficient notice of the case the appellant had to answer in court and no prejudice had been caused. Further, both offences stem from that of abetment which carries the same punishment. For the reasons above, I had no doubt that the appellant was guilty of an offence under s 420 of the Penal Code. I was also of the view that the charge of abetment by intentional aiding was more appropriate. Accordingly, I amended the charge and also dismissed the appeal against conviction.

Sentence

38 I was left with one final issue to decide, that of the sentence handed out by the trial judge. At the outset, I was minded that an appellate court might interfere with the sentence if it was satisfied that (a) the sentencing judge made the wrong decision as to the proper factual basis for sentence; (b) there was an error on the part of the trial judge in appreciating the material placed before him; (c) the sentence was wrong in principle; or (d) the sentence imposed was manifestly excessive or inadequate: *Tan Koon Swan v PP* [1986] SLR 126, *Lim Poh Tee v PP* [2001] 1 SLR 674 and *Ong Ah Tiong v PP* [2004] 1 SLR 587. It must be noted that the co-accused, Cheong, had earlier pleaded guilty to an offence under s 420 read with s 109 of the Penal Code and was sentenced for that offence. He had also admitted to another charge relating to the same subject matter as the present charge against the appellant, and consented to it being taken into consideration for the purpose of sentencing: see *PP v Cheong Sing Whee* [2005] SGDC 124. Cheong was originally sentenced to three years' imprisonment. Upon an appeal on sentence, I have reduced it to a term of two years' imprisonment.

39 I was undoubtedly aware of the peculiar circumstances of Cheong which constituted the reasons for my decision in reducing the sentence. I was also aware of the significance of the appellant's role in the commission of this offence. However, the appellant had not profited from this offence and I also took into account the appellant's previous clean record and the fact that DBS was able to recover a portion of the sum. Consequently, I found the sentence of 20 months' imprisonment to be excessive and therefore reduced the sentence to 18 months' imprisonment.

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[1] PW4.

[2] PW3.