IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 13

Criminal Appeal No 27 of 2019

Between

Ewe Pang Kooi

… *Appellant*

And

Public Prosecutor

… *Respondent*

EX-TEMPORE JUDGMENT

[Criminal Law] — [Offences] — [Property] — [Criminal breach of trust]
[Criminal Procedure and Sentencing] — [Sentencing] — [Appeals]

Ewe Pang Kooi
v
Public Prosecutor

[2020] SGCA 13

Court of Appeal — Criminal Appeal No 27 of 2019
Sundaresh Menon CJ, Steven Chong JA and Woo Bih Li J
3 March 2020

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Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

1 This is an appeal brought by the Appellant against his conviction on a total of 50 charges under s 409 of the Penal Code (Cap 224, 2008 Rev Ed) and the preceding version of s 409 in the Penal Code (Cap 224, 1985 Rev Ed) (collectively, "the Penal Code"), and also against the aggregate sentence of imprisonment of 25 years and 10 months.

2 We first deal briefly with the appeal against conviction. Section 409 is the aggravated form of the offence of criminal breach of trust ("CBT") and it applies, in material part, to one who is "entrusted with property … in the way of his business as a banker, a merchant, a factor, a broker, an attorney or an agent" and who commits CBT in respect of that property. The key words in question are "entrusted … in the way of his business as … an agent". The Appellant contends that on a true construction of s 409 of the Penal Code and in the light of the judgment of this court in *Public Prosecutor v Lam Leng Hung*

[2018] 1 SLR 659 ("*Lam Leng Hung*"), he was not an agent within the meaning of that provision and ought instead to be convicted under the general provision dealing with the offence of CBT. We are satisfied that the Appellant is mistaken and that the Judge was correct to have convicted him of the offences under s 409. In our judgement, the point is covered by what was held by the Court of Appeal in *Lam Leng Hung*. There, the court was concerned with the offence of CBT committed by accused persons in their capacity as directors. The question was whether they could be regarded as "agents" for the purposes of s 409.

3 After conducting an exhaustive analysis of the text and the context of the provision and its historical roots, the Court of Appeal concluded that the word "agent" in s 409 did not cover just any legal agent but was confined to those who were in the business of being an agent. This was how the court put it at [231]–[232]:

> 231 *Third*, the Indian Penal Code and the earlier UK Embezzlement Act provisions were enacted at a time when professional agents, which included factors, brokers and the like, were a ***recognised and distinct class of persons*** *who provided agency services to the public*. Therefore, as the English cases on the early Factors Acts as well as on the Embezzlement Act 1812 and the Larceny Act 1827 indicate (see [239]–[246] below), it was readily understood at the time that the ostensibly broad references to "agents" in these Acts had to be construed purposively as referring to professional or mercantile agents who provided commercial services to the community at large as part of the emerging market economy of that era.
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> 232 These points, both individually and taken together, support the textual analysis of s 409 set out in the earlier part of our judgment. In other words, the extraneous material ***confirms***, *pursuant to s 9A(2)(*a*) of the* [Interpretation Act (Cap 1, 1999 Rev Ed)], *that the meaning of s 409* ***is the ordinary meaning*** *conveyed by the text of the provision*, taking into account its context in the CBT provisions of the Penal Code and the purpose or object underlying the provision. The history also readily explains why the phrase "in the way of his business" is employed in s 409 (*viz*, as a reference to commercial activity), and reinforces the need for the term "agent" to be read *ejusdem generis*. Finally, on the crucial issue of legislative purpose, the

> historical material on s 409 and the related embezzlement provisions unequivocally indicate that the provision was intended to capture not any legal agent, but *only* professional agents, who played an important role in commercial life by providing services to the public at large, and who were entrusted with property in the way of their businesses.
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> [emphasis in original]

4 This then led the Court of Appeal to answer the first question it was posed as follows at [288(a)]:

> For the purposes of s 409 of the Penal Code, the expression "in the way of his business as … an agent" refers only to a person who is a *professional* agent, *ie*, one who professes to offer his agency services to the community at large and from which he makes his living.
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> [emphasis in original]

5 In our judgment, the effect of the Court of Appeal's decision in *Lam Leng Hung* was not to ossify the classes of persons who could be captured by s 409 of the Penal Code to those who were in the business of mercantile agents in the mid-1800s. Were that the case, it might well be said that the section could not apply to liquidators or receivers and managers as the present Appellant was at the material time. But the Court of Appeal's decision was directed at identifying the proper limits of the section and it did so by emphasising that it would only apply to: (a) professional agents; (b) who provide services to the public at large; and (c) who are entrusted with property in the course of their businesses.

6 In our judgment, the position of the Appellant in his various capacities comfortably brings him within that definition of a professional agent. He was at the material time a certified public accountant and an approved liquidator. He was managing partner of a firm of certified public accountants and a director of a related company of management consultants. In these capacities he practised

as, among other things, a corporate insolvency practitioner and a receiver and manager of assets and offered his services to the public at large. Indeed, he made a living from this. The offences relate to acts he did when he was appointed as a liquidator of a number of companies or as a receiver of assets or as the manager of the bank accounts of a company. In each of these capacities he was engaged as part of his business and was entrusted with property and it was that very property that he misappropriated. The Judge analysed these points at [44]–[62] of his judgment and we see nothing objectionable in his analysis.

7 We therefore dismiss the appeal against conviction.

8 We turn to the appeal against sentence. The Appellant made a few key points before us.

9 First, it was said that the Judge should not have ordered more than two sentences to run consecutively because, it was said, this was not an exceptional case. We disagree. Having regard to: (a) the amounts involved (this came to more than $40 million over a period of ten years, and although we recognise that some part of this was money the Appellant misappropriated from one or more victims to conceal what he was misappropriating from others, the nett amount was nonetheless in the region of $24 million which was extremely substantial); (b) the number of charges and victims; and (c) the prolonged period of offending, we think it was well within the sentencing discretion of the Judge to order that three sentences run consecutively.

10 It was next suggested that the aggregate sentence should be adjusted downwards because, in effect, it could amount to a life sentence given the Appellant's advanced age and this would be crushing. We do not accept this. First, the Judge took into account the advanced age of the Appellant and

moderated the sentence as a result. In our judgment, while it is right that a sentencing court should be mindful of the real effect of a sentence on an offender of advanced age, as noted in *Public Prosecutor v UI* [2008] 4 SLR(R) 500 at [78], there are limits to this principle. Here, this was simply a consequence of the period of time during which the Appellant was able to keep his fraudulent activities concealed. As we pointed out in the course of the arguments, it would be perverse to suggest that if he had successfully continued with the fraud for another decade and been apprehended at the age of 70, the sentence should be further moderated on account of his remaining life expectancy at that point.

11 Finally, it was suggested that the Judge should have drawn at least one of the sentences from the version of the offence as it was prior to 2008. It was noted that 22 of the 50 offences were committed when the 1985 version of the offence-creating provision was in force, while the remaining offences were committed under the 2008 version of the offence-creating provision. We decline to make any adjustment on this ground because, as we pointed out to Mr Tan, there were sentences for offences covered by the 1985 version that were more severe than at least one of the three sentences the judge chose to run consecutively.

12 In all the circumstances, the question for us was whether the aggregate sentence was appropriate having regard to the overall criminality in this case and in our judgement it was. The Judge applied his mind to the relevant factors and arrived at a conclusion that was within his sentencing discretion and we see no basis for appellate intervention in the circumstances.

13 We therefore dismiss the appeal against sentence as well.

Sundaresh Menon Chief Justice	Steven Chong Judge of Appeal	Woo Bih Li Judge

Harpreet Singh Nehal SC, Tan Zhengxian Jordan (Audent Chambers LLC) (instructed) and Elan Krishna (Cavenagh Law LLP) for the appellant;
G Kannan, Hon Yi, Nicholas Khoo and Gerald Tan (Attorney-General's Chambers) for the respondent.