IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 151

Magistrate's Appeal No 9134 of 2015/1

Between

Public Prosecutor

… *Appellant*

And

Luciana Lim Ying Ying

… *Respondent*

Magistrate's Appeal No 9134 of 2015/2

Between

Luciana Lim Ying Ying

… *Appellant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [Appeal]

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v
Public Prosecutor and another appeal

[2016] SGHC 151

High Court — Magistrate's Appeal Nos 9134 of 2015/1 and 9134 of 2015/2
See Kee Oon JC
5 February; 29 July 2016

29 July 2016

See Kee Oon JC:

Introduction

1 These were an appeal and a cross-appeal against sentences imposed following a conviction entered in a District Court. The accused pleaded guilty to four proceeded charges: (a) one charge of criminal breach of trust as a servant under s 408 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"); (b) one charge of cheating and dishonestly inducing a delivery of property under s 420 of the Penal Code; (c) one charge of assisting another in carrying out the business of moneylending without a licence under s 5(1) read with s 14(1) of the Moneylenders Act (Cap 188, 2010 Rev Ed); and (d) one charge of using the benefits of criminal conduct under s 47(1)(c) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA"). I will refer to these as the "CBT", "cheating", "UML", and "CDSA" charges respectively. The sums

involved were considerable – for example, the CBT charge alone involved a sum of $6,370,280.48. Seven other related charges under the Penal Code and the CDSA were also taken into consideration for the purposes of sentencing.

2 The District Judge sentenced the accused to six years' imprisonment for the CBT charge; one year's imprisonment for the cheating charge; one month's imprisonment and a fine of $30,000 (in default one month's imprisonment) for the UML charge; and 18 months' imprisonment on the CDSA charge. The imprisonment terms imposed for the CBT and cheating charges were ordered to run consecutively, resulting in a total of seven years' imprisonment. The District Judge's grounds of decision are reported as *Public Prosecutor v Luciana Lim Ying Ying* [2015] SGDC 257 ("the GD").

3 In their respective petitions of appeal, the Prosecution and the accused raised important points of principle in relation to the sentencing of offenders for the commission of property offences. For this reason, Mr Daniel Gaw was appointed to assist the court as *amicus curiae* and tasked with addressing the following two questions:[1]

(a) whether the value of the goods, which is the subject matter of a criminal offence, should be pegged to its *retail value* or its *replacement value*; and

(b) whether the fact that an offender did not derive any pecuniary benefit from a criminal offence is a significant mitigating factor, warranting a substantial sentencing discount.

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[1] Letter from Registry to *Amicus Curiae* dated 18 January 2016 at para 6.

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4 In my judgment, the appeal turned heavily on these two issues. At the outset, I would state that I derived considerable assistance from Mr Gaw's submissions as well as those of the parties. In particular, I would mention that even though Mr Gaw's submissions were prepared on short notice, they contained useful expositions of the relevant points of principle in contention and were commendably succinct, cogent, and lucidly organised. The appeals were heard together and dismissed on 5 February 2016.

Summary of relevant facts

5 The facts were concisely set out in the GD as well as the Statement of Facts ("SOF") which the accused admitted to without qualification. At the material time, the accused was working as a relationship manager at Hock Tong Bee Pte Ltd ("HTB"), a company dealing in wine and spirits, where she had been employed since July 2010. It was not disputed that during this time, the accused was being harassed by unlicensed moneylenders over debts owed by a former colleague which she had guaranteed.[2]

6 As a relationship manager, the scope of her work involved bringing in customers and contacting them to arrange for the purchase of alcohol.[3] Each time a customer wished to place an order, his/her relationship manager would open a sales order which would then be sent to HTB's finance department for processing. Following this, the relationship manager would arrange for the products to be delivered to the client. Customers were allowed to make payment through a variety of means: cash, cheque, telegraphic transfer, or by charging the amounts to their credit cards. Should they elect to pay via credit

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2 Prosecution's submissions at paras 59–60.

3 Statement of Facts ("SOF") at paras 1 and 3 (ROP, p 15).

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card, they would provide their credit card details to their relationship manager, who would then furnish these details to HTB's finance department and arrange for the payment to be made. As a matter of practice, the finance department never dealt with customers directly – even if the customers were in arrears – but would instead contact the customers' respective relationship managers to ask that they request that their clients make payment forthwith.[4] HTB would not accept fresh orders from customers who were in arrears.

7 In time, the accused began sourcing for the names and contact details of professionals with a view towards making fraudulent orders for expensive wines and spirits. She did so by relying on old name cards in her possession or by searching the Internet for the contact details of professionals. She submitted these names to HTB's finance department, which registered these individuals as new customers and processed the orders placed under their names. After this had been done, the accused then sourced for buyers from amongst her existing clientele. The buyers would be asked to make payment directly to her either in cash, by cheque, or by bank transfer to various bank accounts controlled by her. Once the transfers had been made, she would direct HTB's warehouse to deliver the fraudulently obtained stocks of alcohol to the buyers.[5]

8 In this way, she was able to gain access to a large quantity of expensive alcohol (14,698 bottles worth approximately $7m), which she sold to her clients. HTB did not receive any payments for the alcohol which were sold in this way. Of the wines and spirits that the accused dishonestly converted to her own use, only 1,102 bottles were recovered from the buyers. For the acts of defalcation committed during this period, the Prosecution

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4 SOF at paras 3, 5–6 (ROP, pp 15–16).

5 SOF at paras 7–9.

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preferred two charges of criminal breach of trust as a servant under s 408 of the Penal Code, of which they proceeded on the second. This was the CBT charge, which stated that between July 2012 and January 2013, the accused dishonestly misappropriated wines and spirits worth a total of $6.4m and retained the proceeds of sale for her own use.[6]

9 When HTB's finance department starting chasing the accused for the outstanding payments for the fraudulent purchases, she provided various excuses. She would say that the payment was delayed or that it would be made soon. Eventually, the accused was banned from conducting any further sales on credit when the total amount of outstanding payments under her customers' accounts became too large. Faced with this, she decided to use the credit card details of existing customers to purchase wines from HTB directly. On 5 February 2013, she placed an order for wines under a pseudonym and made partial payment of $4,196.68 using one of one of her customer's credit cards. In so doing, she induced HTB to deliver the wines valued at $9,093.60 to yet another customer to whom she had on-sold the wine. This gave rise to the cheating charge.[7]

10 As stated above, the accused was the subject of harassment from unlicensed moneylenders during this time. Between 25 March and 3 December 2012, the accused deposited part of the proceeds she had obtained through the commission of the CBT and cheating offences into a bank account opened in her mother's name. In the same period, the accused used a sum totalling $737,295 of the said proceeds to pay off loans which she owed unlicensed moneylenders. For this, the CDSA charge was brought against her.[8]

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6 SOF at paras 8–10, 14–15, 22 (ROP, pp 16 and 19); 2nd charge (ROP, p 9).

7 SOF at paras 16–18 (ROP, p18); 3rd charge (ROP, p 10)

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In May 2012, the accused handed the automatic teller machine ("ATM") card for her POSB account to a runner of an unlicensed moneylender known only as "Tom", who had been harassing her. When she handed over her ATM card, the accused was aware that 'Tom' was an unlicensed moneylender and that her ATM card and POSB account was to be used by 'Tom' to facilitate his carrying out of the business of unlicensed moneylending (see the GD at [14]). This forms the subject matter of the UML charge.[9]

11 In March 2013, HTB noticed that there were significant arrears in the accused's clients' accounts. Suspecting that the accused was being cheated by her clients, HTB's company manager brought the accused to a police station and a police report was lodged (see the GD at [32] and [33]). Three days later, the accused voluntarily surrendered to the police and informed them of what she had done. This was how the offences came to light. In the course of the ensuing investigations, she provided the police with details of the invoices which had been forged and the identities of the clients to whom she had on-sold the wines.[10] On 21 July 2015, she pleaded guilty to the aforementioned charges and she was sentenced on 20 August 2015.[11]

The District Judge's decision

12 Given that it was common ground that the District Judge was correct in ordering that the sentences for the CBT and cheating charges run consecutively, I need only focus on these two offences and the reasons she gave for imposing the sentences that she did for each.[12]

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8 SOF at para 21 (ROP, p 19); 10th charge (ROP, p 13).

9 SOF at paras 19–20 (ROP, pp 18–19); 7th charge (ROP, p 11).

10 ROP, pp 144–180.

11 ROP, pp 46–51.

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13 When the parties appeared before the District Judge, the chief point of contention was the methodology to be employed in the valuation of the wines. The Prosecution contended that the value of the wines misappropriated should be pegged to their retail price of $7m. By contrast, the Defence pointed out that the proper valuation of the misappropriated goods should be their cost price of $4.42m instead (see the GD at [18] and [35]). The Defence arrived at this figure by subtracting 37%, which was the mark-up HTB generally applied on their products, from the retail price. This disagreement led to a marked disparity in the sentences submitted for: the Prosecution asked for a sentence of ten years' imprisonment to be imposed for the CBT charge;[13] the Defence submitted that a sentence of 4.5 years' imprisonment would suffice.[14]

14 The District Judge began by placing the issue of valuation in its proper context. She explained that the dispute over valuation was, at the end of the day, a dispute over the appropriate measure of the loss suffered by HTB. This was critical because it affected the court's evaluation of the harm caused by the offence, which is a "central feature of the law of sentencing" (at [34]). The District Judge accepted the Prosecution's submissions that the retail price of the wines was the "true measure" of HTB's loss (at [37]). She observed that as a retailer, HTB's key interest was not in the goods *per se*, but in the opportunity to sell the goods at a profit (*ie*, at the retail price), and it was deprived of this opportunity because of the accused's actions.

15 As for the general sentencing considerations raised by the Prosecution, she accepted that the value of the goods misappropriated ($7m) and the length

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12 Prosecution's submissions at para 66; Appellant's submissions at para 93.

13 Prosecution's submissions on sentence in District Court at para 25 (ROP, p 89).

14 Notes of Evidence, 21 July 2015 (ROP, p 49)

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of time over which the offences were perpetrated (1.5 years) were significant aggravating factors. In particular, she observed that the accused had displayed "systematic dishonesty" (at [43]–[44]). However, she found the offences were neither particularly sophisticated nor well planned (at [45]). She also did not consider that there was an egregious abuse of position and trust. She held that the accused did not occupy a position of high authority and was merely a salesperson. Insofar as it was submitted that she had been entrusted with a "great deal of responsibility" because she was given the credit card details of her clients, the District Judge held that this was not relevant because it was the *clients*, not HTB, who "[had] chose[n] to trust her with their credit card details for payment" (at [46]).

16 As for the mitigating factors, there were three which she highlighted. The first, which she described as the "most significant mitigating factor", was that the accused "derived no pecuniary benefit" from the commission of the offence (at [49]). She noted, in particular, that it was undisputed that the charges framed under the CDSA stated that the sums of money she received were used to pay debts owed to illegal moneylenders. Second, she placed significant weight on the fact that "motivation was not greed" and that it was undisputed that the accused had committed the present offences while labouring under "significant pressure from the activities of unlicensed moneylenders", as evinced by the fact that the accused and her sister had filed multiple police reports complaining of harassment (at [50]). She emphasised that the accused was *not* herself the borrower, but was instead a trusting friend who had agreed to stand as guarantor for a loan taken out by a former colleague. She would not have considered this to be a mitigating factor otherwise. Third, she gave credit to the accused for cooperating with the police. She accepted that the accused's plea of guilt was an expression of

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remorse, though she noted that it was "quite inevitable" that she would plead guilty, considering the "overwhelming evidence" of guilt (at [51]).

17 Against this background of competing considerations, and considering the sentencing precedents cited, the District Judge held that an appropriate starting point was a nine year imprisonment term (at [48]). However, she gave the accused a one-third discount on account of the mitigating factors cited and imposed a six-year imprisonment term for the CBT charge (at [52]). She ordered that this run consecutively with the one year imprisonment term for the cheating charge, which she considered to be a "separate and distinct" offence which violated a different legally-protected interest (at [64]). In aggregate, the accused received a sentence of seven years' imprisonment.

The parties' submissions

18 On appeal, the parties took issue with both the individual sentences imposed by the District Judge for each offence as well as the global sentence that she passed. They each submitted that the District Judge had erred in law and in principle in her assessment of the aggravating and mitigating factors which were raised. The Prosecution submitted that the sentence was manifestly inadequate; the accused argued that it was manifestly excessive.

The Prosecution's submissions

19 The Prosecution submitted that the District Judge had erred in holding that the sentence for the CBT charge ought to be a sentence of six years' imprisonment for three reasons:

(a) First, she had not given due weight to the extent of the respondent's abuse of trust. It was argued that the District Judge had

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conflated the level of trust with which the respondent had been reposed with her seniority. While the accused held the fairly modest title of "relationship manager", she was given significant responsibilities in relation to the matters concerning the clients under her charge and occupied a high position of trust within the organisation.[15]

(b) Second, she had incorrectly found that the offences only involved a low level of planning and were comparatively unsophisticated. The Prosecution accepted that the accused did not employ any specialised technology nor did she operate as part of a syndicate. However, her *modus operandi* was sophisticated in another way, as she was an "insider" who had carefully used her knowledge of HTB's internal processes to her advantage.[16]

(c) Third, it was argued that the District Judge had given undue weight to the absence of personal greed as a mitigating factor.[17] While it was accepted that the accused did not commit the offences out of greed, the accused still stood to benefit significantly in the sense that she was able to "extricate herself from an entirely personal obligation by pillaging from her employer" and that she displayed "no qualms about saving her own skin by intentionally causing tremendous loss to [HTB]."[18] It was therefore submitted that the absence of a motive of greed could not be regarded as a significant mitigating factor.[19]

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15 Prosecution's submissions at paras 24–31.

16 Prosecution's submissions at paras 34–37.

17 Prosecution's submissions at paras 44–45 and 59.

18 Prosecution's submissions at para 60.

19 Prosecution's submissions at para 65.

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20 The Prosecution submitted that the District Judge ought to have begun by considering a sentence of between ten to 12 years' imprisonment for the CBT charge, which could then be reduced to account for the cooperation she had rendered. It was submitted that a sentence between 8.5 and ten years' imprisonment was appropriate.[20] It was further submitted that the sentence imposed for the cheating charge could be impugned for the same reasons (*ie*, that the District Judge had downplayed the aggravating factors and accorded too much weight to the mitigating factors) and that the sentence imposed for the cheating charge ought therefore to have been an imprisonment term of between 1.5 to two years' instead.[21] In conclusion, it was argued that a total sentence of between ten to 13 years' imprisonment was warranted.[22]

21 As for the accused's appeal, the Prosecution noted that it was premised on the narrow question of whether the misappropriated goods were properly valued. The Prosecution defended the District Judge's use of the retail price of the goods by arguing that the retail price represented the sum HTB – as a retailer – expected to receive in consideration, taking into account *all* the costs associated with bringing the goods to market and was therefore a true measure of HTB's loss. To use the cost price of the items as the index, it was submitted, would undervalue the loss suffered as it would not account for, among other things, the costs incurred by HTB in the storage of the wines and spirits, administration, logistics, and the packaging and delivery of the goods.[23]

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20 Prosecution's submissions at paras 76, 80.

21 Prosecution's submissions at paras 82–83, 89, and 116.

22 Prosecution's submissions at para 93.

23 Prosecution's submissions at paras 102, 105, and 108.

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The Accused's submissions

22 The sole ground of the accused's appeal was that the District Judge had erred in her assessment of the loss suffered by HTB and had, in so doing, imposed a sentence which was manifestly excessive. She put forward two broad submissions. The first was that the District Judge had fallen into error when she used the retail price of the goods as the measure of HTB's loss. The accused argued that the retail price of an item was variable and it depended heavily on various business exigencies. Therefore, it was submitted that to rely on the retail value of the goods was to open the door to inconsistency in sentencing.[24] Instead, the replacement cost of $4.4m (which she equated with the putative cost price of the wines: see [13] above) was a more reliable index of value, since it was a "historical and commercially accepted value" at which the goods were last transacted.[25] As for HTB's other pecuniary and non-pecuniary losses (*eg*, the costs of storing the wines etc.), the accused argued that they had not been established and should not be taken into account.[26]

23 The second broad submission was that the District Judge had overvalued the loss when she failed to consider the value of the 1,102 bottles of wine recovered, which had a total retail value of approximately $526,400 or a replacement value of about $331,600. It was contended that the District Judge ought to have omitted the value of these wines from her consideration of HTB's loss. By her best case, therefore, the measure of the loss suffered by HTB was not $7m, but just $4.1m (*ie*, $4.4m, which is the value of the goods as denominated in terms of its replacement cost minus the $331,600 worth of

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24 Appellant's submissions at paras 42–44.

25 Appellant's submissions at paras 41 and 54.

26 Appellant's submissions at paras 59–61.

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wines recovered).[27] The accused submitted that when this revised figure was used as the measure of loss, a much lower sentence of about 4.5 years' imprisonment was justified.[28]

24 She relied on the same arguments in submitting that the sentence for the cheating charge ought to be lowered. She argued that the District Judge had incorrectly valued the loss suffered by HTB from the cheating charge as $18,300 (based on the retail value) when it ought to have been $11,500 (by reference to the replacement value). With that in mind, and considering the mitigating factors (chiefly, the fact that she had pleaded guilty and assisted the police), it was argued that a sentence of five months' imprisonment would have been suitable for the cheating charge, which should have been ordered to run consecutively with the CBT charge for a global sentence of four years and 11 months' imprisonment.[29]

25 As for the matters raised by the Prosecution as aggravating factors – her knowledge of the "inner workings" of HTB and her use of the same in order to carry out the offences – the accused's position was the same as that taken by the District Judge; that is to say, she contended that she was no more than a low-ranking employee who had misused her position to appropriate money which rightfully belonged to her employer. It was submitted that when compared to the precedent cases, the accused's *modus operandi* was "not at all complicated" and the level of trust reposed in her was not so "unusually high" that her offence could be considered an aggravated breach of trust.[30]

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27 Appellant's submissions at paras 63–65

28 Appellant's submissions at para 73

29 Appellant's submissions at paras 4, and 74–77.

30 Appellant's submissions at paras 18 and 27.

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Furthermore, she submitted that these factors were already accounted for in the fact that she had been charged for the offence of criminal breach of trust as a servant rather than criminal breach of trust *simpliciter*.[31]

26 On the issue of motive, she submitted that her case could be distinguished from precedent cases where accused persons were the authors of their own misfortunes (for example, where they had run into financial trouble due to a gambling addiction and therefore had to turn to crime). In the circumstances, she submitted that the District Judge had rightly taken the absence of a motive of personal enrichment into account as a mitigating factor.[32] Emphasis was also placed on the fact that she had only found herself in this situation because of her trusting nature and willingness to help others in need. It was stressed that these offences were committed because she had yielded to pressure and acted out of fear in the face of harassment.[33]

My decision

27 The main issue was whether the District Judge had erred in sentencing the accused to a term of six years' imprisonment for the CBT charge. Although the parties also addressed me on the sentences imposed for the other charges, it was not the focus of their submissions and hence I do not propose to comment on the submissions made in respect of the other charges. Having regard to the arguments presented, I approached this central issue by considering the following three key sub-issues:

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31 Appellant's submissions at 18, 24, 26–27.

32 Appellant's submissions at paras 29–31.

33 Appellant's submissions at para 34.

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(a) Whether the District Judge had erred in using the retail price, rather than the replacement cost, of the misappropriated goods as a measure of its value ("the valuation issue");

(b) Whether the District Judge had erred holding that the fact that the accused was not motivated by a desire for personal enrichment and the fact that she did not derive any pecuniary benefit from the commission of the offences were significant mitigating factors which warranted a substantial sentencing discount ("the pecuniary gain and motive issue").

(c) Whether the District Judge had erred in concluding that the CBT offence did not involve a high level of planning and that it did not involve a breach of a significantly high level of trust ("the level of trust and sophistication issue").

28 When I reflected on these three key issues, it seemed to me that the valuation issue pertained to an analysis of the *harm* caused by the offence; the latter two – the motive and the trust issues – were relevant to a consideration of the accused's *culpability*. As I explained in *Public Prosecutor v Tan Thian Earn* [2016] 3 SLR 269 at [19], "harm" is a measure of the injury which has been caused to society by the commission of the offence, whereas "culpability" is a measure of the degree of relative blameworthiness disclosed by an offender's actions and is measured chiefly in relation to the extent and manner of the offender's involvement in the criminal act. These are the two principal parameters which a sentencing court would generally have regard to in evaluating the seriousness of a crime. After considering the three sub-issues, I will examine the adequacy of the sentence for the CBT charge by comparing it with the relevant precedents.

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The valuation issue

29 At the outset, I will state that I agree with Mr Gaw's submission that in order to determine the approach which should be taken towards the valuation of the goods, one first has to appreciate the purpose and relevance of the exercise.[34] In this connection, it is vital to appreciate the distinction between the function the valuation exercise plays in the *charging* process and its role in the *sentencing* process.

The role of the valuation exercise at the charging stage

30 In order to provide some context, brief mention of the procedural history of the case is necessary. In the court below, the issue of valuation was raised even before the accused's plea was recorded. When the accused's matter was first mentioned on 25 May 2015, counsel for the accused objected to the fact that the amount reflected in the CBT charge was the retail price rather than the cost price of the goods. It was argued that the mark-up applied by HTB was ten and 20 per cent, and not between 20 and 30 per cent, as the Prosecution had contended. It was submitted that this was a matter which would have a crucial impact on sentencing and that if it could not be resolved, a Newton Hearing might have to be convened. The District Judge elected not to record the accused's plea of guilt on that occasion and adjourned the matter for three weeks to give the parties an opportunity to discuss the issue.[35]

31 Shortly before the matter was restored for hearing, the Prosecution filed a set of submissions to address the question whether, for the purposes of the CBT charge, the goods misappropriated ought to be valued at the retail

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34 *Amicus curiae's* submissions at para 20.

35 ROP, p 45.

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price or the purchase price of the goods.[36] It was submitted that it ought to be the former because the retail price of the goods was a "convenient and logical starting point" and represented the "closest and most practical solution to determining the benefit gained by the accused and the loss suffered by the victim as the result [of] the criminal conduct."[37] The accused did not file any submissions in reply and it appears that she was content to have the matter taken up at the sentencing stage, where she continued to maintain that the cost price of the goods, rather than its retail price, ought to have been used instead.[38]

32 I pause now to say that I agree with the Prosecution that the general rule should be that the retail price of the goods ought to be the value reflected in the charge.[39] When one is particularising a charge, the chief aim is to put the accused on notice of the details of the offence for which he/she has been charged. Section 124(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") specifies that a charge must contain such details of the offence as are "reasonably sufficient to give the accused notice of what he is charged with" and s 124(2) of the CPC states that where the offence of CBT is concerned, the gross sum in respect of which the offence has been alleged to have been committed, together with the dates between which the offence is alleged to have been committed, must be stated. The retail price of the goods is a reasonable indicator of their worth and is therefore sufficient to give the accused details of the offence for which he has been charged. It should generally be adopted as the indicative value of the goods unless to do so would be grossly misleading. In this connection, it is important to be mindful that

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36 Prosecution's submissions on preliminary issue of law at para 3 (ROP, p 74).

37 Prosecution's submissions on preliminary issue of law at para 15(B) (ROP, p 79).

38 ROP, p 48.

39 Prosecution's submissions on preliminary question of law at para 22.

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charges are often particularised by police officers at an early stage of investigations. Ascertaining the value of the goods should therefore not be an overly complex or difficult exercise.

The role of the valuation exercise at the sentencing stage

33 The role that valuation plays in the sentencing process is different. The value of the goods is a useful *proxy* for the harm caused by the offence. But it is, at best, only a rough measure for it suffers from two significant limitations. First, it reflects only the harm to the *victim*, and not to wider society. However, any assessment of the "harm" caused by the offence must take into account the wider interests of society. For example, the misuse of funds meant for a charitable purpose and the concomitant loss of public confidence in charitable institutions that arises therefrom has been taken into account in the sentencing of offenders for the commission of CBT (see *TT Durai v Public Prosecutor* [2007] SGDC 334 at [124]–[125] and *Goh Kah Heng (alias Shi Ming Yi) v Public Prosecutor and another matter* [2010] 4 SLR 258 at [93]). Second, it is only a measure of the *financial* losses suffered by the victim and does not take into account the non-pecuniary losses (*eg*, emotional distress) which have been sustained. For example, the New South Wales Criminal Court of Appeal held that in measuring the loss suffered by a victim, the court would have to consider the "value of the stolen property to the victim, whether that value is measured in terms of money *or in terms of sentimental value*" [emphasis added]: see *Re Attorney-General's Application (No 1) under s 26 of the Criminal Appeal Act; R v Ponfield; R v Scott; R v Ryan; R v Johnson* [1999] NSWCCA 435 at [48(viii)]). Thus the value of the goods stolen should not be viewed as the sole measure of the victim's loss, let alone the full extent of the harm occasioned by the commission of the offence.

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34 However, as long as these two caveats are borne in mind, it is generally useful to have regard to the value of the goods in the sentencing process, for it provides a convenient yardstick against which the seriousness of the offence may be benchmarked against the precedent cases. It must be stressed that the valuation exercise is carried out from the *victim's* perspective, because its object is to ascertain the level of harm caused to the victim.

35 The Prosecution had submitted, citing the decision of the English Court of Appeal in *R v Ascroft* [2003] EWCA Crim 2365 ("*Ascroft*") at [60], that the test ought to be what it would "have cost the accused to obtain legitimately the goods he obtained dishonestly". I do not agree. The issue in *Ascroft* was whether the sum the accused was ordered to pay under a confiscation order issued under Criminal Justice Act 1988 (c 33) (UK) was excessive. That turned on the wording of s 71(1A) of the said Act, which provided that the amount an offender is ordered to pay under a confiscation orders shall be equal to "the benefit in respect of which it is made". This adopts the perspective of the *offender* and is concerned with the *benefits* the offender might have obtained through criminal conduct. It is immediately clear that the differing contextual concerns affect both the reference point of the inquiry (the offender, rather than that of the victim) and its substance (the benefits obtained by the offender, rather than harm caused to the victim). Thus, I concluded that the *Ascroft* approach was not an appropriate guide here.

36 To the extent that the court is concerned with ascertaining the value of the *financial* losses suffered by the victim, different approaches to valuation must be taken depending on the context. This was a matter which both Mr Gaw and the Prosecution agreed on.[40] To illustrate this point, I found the case

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[40] *Amicus curiae's* submissions at paras 14, 15, 20; Prosecution's submissions at para

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of *United States v Wasz* 450 F.3d 720 (7th Cir. 2006) ("*Wasz*") to be particularly instructive. The accused persons (the Waszes) had conspired with their co-defendants to sell goods which had been stolen from various home improvement and building supply stores around the country on the online website, "eBay". For this, they were charged with wire fraud. On appeal, they argued that the loss to the retailers should not be quantified by reference to the retail prices of the stolen goods, but at the much lower prices at which they were transacted on eBay. The United States Court of Appeals for the Seventh Circuit rejected this argument, reasoning as follows (at 727):

> The district court was on firm ground in using the retail value of the stolen merchandise fenced by the Waszes as the benchmark in estimating the loss. Other courts have recognized that when the stolen merchandise at issue has been taken from retailers, the price at which the retailers would have sold that merchandise serves as a reasonable estimate of the loss. ... In this case, the merchandise stolen was ready for sale and, in fact, had been offered for sale by the retailers; the Waszes' co-defendants literally took the merchandise off the retailers' shelves and out of the stores, bypassing the cashiers on their way out. *The retailers would have already incurred virtually all of the costs associated with the sales of these items and were simply waiting to ring up the sales.* In that regard, there is no dispute between the parties as to the prices at which the retailers would have sold the merchandise to willing customers. Under these circumstances, it was entirely reasonable for the district court to use the total retail value of the stolen items as a *reasonable estimate of the loss*. … [emphasis added]

37 I will return to the point about the incidental costs incurred in the sales of the items later. For the present, it cannot be gainsaid that the court must attend to the facts of particular cases in deciding how the process of valuation should be carried out. In particular, regard must be had to the use to which the misappropriated goods had been put in order to consider what the appropriate

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index of loss should be. Mr Gaw gave several useful examples of situations in which the court's approach to valuation might differ depending on the context. I gratefully adopt two of them, albeit with some modifications and amplifications, and set them out below for the purpose of illustration:

> (a) Where the goods in question were possessed by the victim for his own use and enjoyment, rather than for sale, the replacement cost of the item (whether it be the cost of an identical item or its closest available substitute) is generally a good measure of the loss. An example of such an item is a mobile phone. The victim's interest lies in the use of the item itself so the cost of obtaining a suitable replacement is both the fairest and simplest way of ascertaining his loss.
>
> (b) Where the goods were intended to be sold in the ordinary course of business, the sale price of the item should generally be used as the measure of loss. I have deliberately used the expression "sale price" in order to emphasise that what is being referred to is the price that the goods would normally (if it had not been stolen) have been sold at. If the victim is a retailer, the sale price will be the retail price; if the victim is a wholesaler, the wholesale price ought to be used. This reflects the fact that the loss to the victim consists largely of the fact that he is no longer able to sell the item – the "opportunity cost", so to speak, of the misappropriation of the items.

38 The two scenarios outlined above are useful rules of thumb. Mr Gaw posited that where the goods in question were intended to be sold but are unlikely to have been, the court would have to make a judgment as to whether the cost price of the item(s) or its retail price was more appropriate.[41] I accept

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this point, and think that it serves to reinforce the general principle that loss must always be measured "within the factual circumstances presented" (see *United States v Machado* 333 F.3d 1225 (11th Cir. 2003) at 1228). The evaluation of harm, like many other things in the sentencing process, is a matter which is quintessentially suited for case-specific judgment, and not general legislation. I would not seek to place any finer a point on this save to say that for most cases, the retail price of the goods is generally a good gauge of the loss suffered by the victim.

Conclusion on the valuation issue

39 I turn now to the facts of this case. HTB is a retailer of wines and spirits and it was in the business of selling the alcohol. Its interest lay not in the alcohol *per se*, but in the sum it would have received from their sale. In misappropriating the goods, the accused had deprived HTB of the *opportunity* of selling the goods at their retail price. This was the proper measure of HTB's loss. I also considered that the District Judge was entirely justified in taking into account the costs of bringing the goods to market ("rental, marketing, manpower, packaging, transportation et cetera": see the GD at [37]) as a further reason for using the retail price. As the court in *Wasz* pointed out, the retail price is a "reasonable estimate" of the loss suffered by a retailer because it also reflects the margin that merchants would have to add in to reflect the overheads incurred in the handling of the goods (see [36] above).

40 I rejected the accused's argument that the replacement value of the goods ought to have been used as it was a more stable measure of value. As a general point, the replacement value of the goods – insofar as it is measured as

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[41] *Amicus curiae*'s submissions at paras 37–43.

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the cost of purchasing a suitable replacement in the market – is as vulnerable to market fluctuations as its current retail price.[42] Insofar as the accused suggested that the cost price (which I would stress is not necessarily the same as the replacement value of the goods) should be used, I would also reject this.[43] The "cost price" of the alcohol would be an extremely imprecise measure of the actual cost of replacement in this case. The alcohols misappropriated by the accused comprised several expensive wines and spirits. It was not clear when the goods were bought by HTB but it would be reasonable to infer that the cost of replacing them today (assuming replacements could in fact be found) would be far higher than their cost price and the profits from their sale would be concomitantly lower.

41 The accused's other argument was that the measure of the harm caused should be reduced to reflect the value of the bottles of alcohol recovered. I did not accept this. At the time the appeal was heard, it was unclear whether the buyers or HTB was entitled to possession of the bottles, and it was anticipated that a disposal inquiry would have to be conducted. Either way, as the Prosecution rightly pointed out, someone would suffer loss, whether it would be HTB (which lost out on the opportunity of selling the alcohol) or the buyers (who paid the accused for the alcohol and had not been reimbursed) is quite irrelevant. The recovery of these bottles did not affect the extent of harm that was caused by the commission of the offence.[44]

42 At the end of the day, when the court exercises its sentencing function, its task is to assess, as best it can, the losses which had been caused by the

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42 *Amicus curiae*'s submissions at para 40.

43 Appellant's submissions at para 54.

44 Prosecution's submissions at paras 110–112.

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criminal act in order that it might impose, by reference to that, a condign punishment. To that end, it need not strive for absolute accuracy and the loss "need not be determined with precision" (see *United States v Miller* 316 F.3d 495 (4th Cir. 2003) at 503). The District Judge's use of the retail price of the goods as a yardstick for the loss suffered by HTB was entirely reasonable and in accord with common sense. In my judgment, the District Judge was correct to consider that the measure of the victim's loss would be appropriately pegged at $6.4m and I was not persuaded by the accused's attempt to impugn the sentence on this ground.

The pecuniary gain and motive issue

43 The relevance in sentencing of the absence of personal pecuniary benefit was the second of the two issues posed to Mr Gaw. From the outset, I should note that the parties agreed on the following two propositions:

(a) First, while there was some dispute over whether all the proceeds of sale of the misappropriated alcohol went to the discharge of the debts the accused owed the unlicensed moneylender ("UML"), the accused had not committed these offences for the sake of personal enrichment.[45]

(b) Second, the *factual* absence of personal pecuniary benefit was not, without more, of particular relevance to the question of sentence (see *Narindar Singh so Malagar Singh v Public Prosecutor* [1996] 3 SLR(R) 318 ("*Narindar Singh*") at [60]).[46] Instead, the specific

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45 Prosecution's submissions at para 59.

46 *Amicus curiae*'s submissions at para 44; Prosecution's submissions at para 43; Appellant's submissions at para 32.

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> question before the court was whether the fact that the offences were not committed for personal financial gain was a mitigating factor.[47]

44 I am in broad agreement with how the parties had framed the matter. It was clear to me that the absence of factual benefit (to broaden the inquiry from pecuniary benefit to include all forms of benefits, whatever form they might take) was neither here nor there. For example, if an offender intended to cause and does cause wrongful loss but is apprehended before he could realise the profits of his illegal acts, it is clear that this cannot count in his favour (see, eg, *Ding Si Yang v Public Prosecutor and another appeal* [2015] 2 SLR 229 at [64]). What is controversial is whether it makes a difference that no personal benefit accrued *because* the offender was not motivated by a desire for personal benefit and did not set out to obtain one in the first place. I will first consider the cases on the subject before turning to consider the specific context of the offence of CBT as a servant. Finally, I will consider whether the District Judge had erred in her application of the principles to this case.

The role of motive in the sentencing process

45 It is a deeply intuitive feature of moral reasoning that it matters not just *what* offence was committed, but *why* it was done. Taking motives into account in the sentencing process allows the court to distinguish between the relative blameworthiness of individuals who might be liable for the same criminal offence. For example, the commission of an offence for personal gain has been held up as an aggravating factor (see *Vasentha d/o Joseph v Public Prosecutor* [2015] 5 SLR 122 at [51]), as has been the commission of an offence out of malice or spite (see *Lim Siong Khee v Public Prosecutor* [2001]

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47 Prosecution's submissions at para 43–44; *Amicus curiae's* submissions at para 47;Appellant's submissions at para 34

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1 SLR(R) 631 at [21])), or an offence which is motivated by hostility towards a particular racial or religious group (see s 74(1) read with 74(4)(*b*) of the Penal Code). On the flipside, it has been recognised that "those motivated by fear will usually be found to be less blameworthy" (see *Zhao Zhipeng v Public Prosecutor* [2008] 4 SLR(R) 879 at [37] ("*Zhao Zhipeng*")) and in "exceptional" cases, the fact that the offence was motivated by a desire to satisfy a pressing financial need might also be considered a mitigating factor (see *Lai Oei Mui Jenny v Public Prosecutor* [1993] 2 SLR(R) 406 at [10]).

46 However, it is less clear whether the *absence* of a particular motive – in this case, a desire for personal enrichment – can be a mitigating factor. Mr Gaw submitted that the cases appeared to go both ways. On the one hand, there are three cases where the absence of a motive of personal gain appears to have been taken into account as a mitigating factor: *Seaward III Frederick Oliver v Public Prosecutor* [1994] 3 SLR(R) 89 ("*Seaward III*"), *Foo Siang Wah Frederick v Public Prosecutor* [1999] 1 SLR(R) 996 ("*Foo Siang Wah*"), and *Ong Beng Leong v Public Prosecutor* [2005] 1 SLR(R) 766 ("*Ong Beng Leong*"). On the other hand, there are also two decisions of the District Court where the absence of a motive of personal enrichment seems to have been held as not being of any mitigating value: *Public Prosecutor v Lim May Cheng* [2004] SGDC 85 ("*Lim May Cheng*") and *Public Prosecutor v Ooi Lye Guan* [2005] SGDC 228 ("*Ooi Lye Guan*").

47 However, closer reading of these cases will reveal that the position is less than conclusive. In both *Seaward III* at [31] and *Foo Siang Wah* at [57], the courts made little more than passing reference to the fact that the offenders were not motivated by personal gain without much elaboration of how it might have been relevant as a mitigating factor. As for *Lim May Cheng* (at [323]) and *Ooi Lye Guan* (at [32]–[34]), the point which was made was *not* that the

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lack of a pecuniary motive was not a mitigating factor. Rather, the emphasis was on the fact that accused persons did not, at the end of the day, benefit from the commission of the offences. This was not a mitigating factor that warranted a sentencing discount. Indeed, it should be noted that both the district judges in question cited [58] of *Narindar Singh* where Yong Pung How CJ said that "there is no inflexible rule that an accused who derives no personal benefit from a corrupt transaction should automatically be entitled to some sort of discount on his sentence." It is implicit in this statement that the absence of personal benefit *might* be relevant to the sentencing process.

48 In summary, the cited cases do not provide a clear answer to the question of whether the *absence* of a motive of personal enrichment is a mitigating factor that invites a substantial sentencing discount. However, I do not think that should surprise. In many matters in sentencing, it is often impossible to lay down a universal rule to govern a diverse range of situations. In this regard, it is useful to recall the remarks of Choo Han Teck J in *Public Prosecutor v Huang Hong Si* [2003] 3 SLR(R) 57 at [8], where he said:

> What have frequently been labelled as "aggravating factors" are, therefore, more accurately factors that *indicate the level of gravity of the crime in specific relation to the offence upon which the accused was charged*. The degree of seriousness at each level differs according to the individual facts of the case. Such facts are not intended to be used to compare the crime of robbery with the crime of rape, for example. They are to be used to engage the court in the exercise of establishing how the offender is to be punished *within the range of punishment prescribed for him for that offence*. …

49 Although these remarks were made in relation to aggravating factors, I consider that they are equally apposite in a consideration of mitigating factors. A mitigating factor serves to indicate the relative seriousness of a crime in "specific relation to the offence upon which the accused was charged." The court can only assess the relevance of the offender's motive *in the context of*

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the specific offence for which he has been charged and in the light of all the facts and circumstances of the case as part of a holistic evaluation of the accused person's culpability. It is simply not possible to say, in the abstract, whether the fact that the accused did not commit the offence for personal gain makes it less serious. The answer to this must depend on a myriad of factors.

50 The case of *Ong Beng Leong* is instructive to illustrate the holistic approach taken by the courts towards questions of motive in the sentencing process. The offender was a commanding officer in the Singapore Armed Forces who had awarded several maintenance contracts to a company, "SH", without first sourcing for alternative tenders, as was required under prevailing tender guidelines. In order to cover up this fact, SH prepared forged quotations which were prepared in the name of other companies and backdated to give the appearance that these quotations had been received before SH started work. The offender signed and approved these documents. For this, he was charged and convicted for the offence of using false documents with intent to deceive his principal under the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("PCA") and sentenced to six months' imprisonment. Yong Pung How CJ dismissed his appeal against his conviction but allowed his appeal against his sentence. At [60], Yong CJ said:

> … The offences which the accused was *convicted of could in fact be described as partly technical. There was never any suggestion by the Prosecution that the accused had been motivated by pecuniary gain.* Indeed, the *evidence suggested that the accused had honestly believed, albeit misguidedly, that he was expediting the works for the benefit of TRMC and the SAF. There was also no indication that the accused had actively participated in the scheme to submit false quotations,* which distinguished his case from those of Ong and Khoo. In my view, although his acquiescence in the Maintenance Department's practice was deplorable, it did not warrant such a substantial custodial sentence. … [emphasis added]

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51 The fact that the offender was not motivated by personal profit was not analysed in isolation, but as part of the broader examination of the facts and circumstances of the offence. It was stressed that the present case was less serious in absolute terms from usual cases of corruption (which he said were always "serious": at [59]) because the infractions here were "partly technical". It was never suggested that the offender had deliberately sought to cheat his employer. Rather he had, perhaps unwisely, had sought to circumvent what he thought were needless bureaucratic requirements. There was no suggestion that he was ever in cahoots with SH to turn a profit and in this sense, his transgressions were far less serious than that of the other two other employees of SH who stood personally to benefit from the cover-up and were therefore more culpable (at [60]). For the same reason, his offence was also less serious than that of offences which are usually prosecuted under the PCA, which are usually actuated by greed and marked by dishonesty.

52 To summarise, I would view the absence of a motive of personal enrichment not as a general mitigating factor *per se*, operating across the entire spectrum of cases, but as a factor which could, *in the right circumstances*, mitigate the seriousness of an offence when *compared to* other possible offences of like nature. Where an offence that would ordinarily be committed because of an aggravating motive (such as personal gain or indulgence in a social vice) is committed because of a less culpable motive (*eg*, to help others or out of fear) then the *absence* of that aggravating motive could be taken into account by the court as a factor that warrants the imposition of a lower sentence. An example of this is the case of *Ng Yang Sek v Public Prosecutor* [1997] 2 SLR(R) 816. The offender there was a practitioner of traditional Chinese medicine who was convicted of trafficking in a staggering quantity of opium (nearly 17.5kg, or nearly 15 times the

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amount which would attract the mandatory death penalty) and sentenced to death. On appeal, his conviction for trafficking was set aside and replaced with a conviction for drug possession for which he was sentenced to only two years' imprisonment on account of the fact that he possessed the opium not to perpetuate the vice of drug abuse, but for a therapeutic purpose (at [51]).

53 This is consistent with the approach taken in the United States Sentencing Commission, *Guidelines Manual* (Nov. 2015) ("US Sentencing Guidelines") where a sentencing reduction is applied in certain cases if it can be shown that it was committed without any intention of personal gain (see Carissa Byrne Hessick, "Motive's Role in Criminal Punishment", (2006) Southern California Law Review 80 at p 110). Two examples include the offence of smuggling, transporting, or harbouring of an unlawful alien (at §§ 2L1.1–2L2.1 of the US Sentencing Guidelines) and the offence of criminal infringement of copyright or trademark (at § 2B5.3 of the US Sentencing Guidelines). A defendant can expect to receive a reduced sentence where he did not commit the offences for personal financial gain. In these cases, motive distinguishes between more serious instances of the offence in question (*eg*, human trafficking) from those which may be less serious.

54 I am mindful of the general principle that the absence of an aggravating factor is not itself a mitigating factor (see *Public Prosecutor v AOM* [2011] 2 SLR 1057 at [37]). My remarks should not be taken as a licence for offenders to cite the absence of an aggravating motive as a basis for a sentencing discount in *every* case. Instead, the court must have regard to the nature of the offence in question (and, in particular, to the targeted mischief) and to the general profile of the median offender in deciding whether this is a factor which warrants a sentencing discount. I also stress that even if it were considered a mitigating factor, the weight that is given to it will differ

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according to the facts. Ultimately, it must be stressed that sentencing is not a mechanistic process, but a "fact-sensitive exercise in judicial discretion which involves balancing a myriad of considerations" (see *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 at [92]). With these points in mind, I now turn to consider the specific context of the offence of CBT.

Absence of pecuniary gain and the offence of CBT as a servant

55 The offence of CBT is made out whenever there has been the dishonest misappropriation of property. Instances of CBT run a wide gamut but in all its various forms, it involves the transgression of two distinct legally-protected interests. The first, which it shares in common with other property offences, is the protection of the victim's property rights. The second is the protection of the standards of probity, integrity, and right-dealing which the law expects of persons placed in positions of trust. When an offender commits CBT he commits a double wrong: not only has he dealt with property which did not belong to him as if it were his own, he has done so when the property in question was given to him with the expectation that he would only use it within the scope of his authorisation.

56 An offender who breaches this obligation for the sake of personal enrichment is appreciably more culpable than one who does not. This is so in both absolute and relative terms. At its core, the offence of CBT is about the breach of loyalty and confidence and all other things being equal, it is a more deplorable breach for a person in a position of trust to apply the entrusted properties purely for personal gain than to have applied it for an alternative unauthorised purpose. Furthermore, the vast majority of CBT offences involve the flagrant abuse of one's position for personal enrichment at the expense of

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one's principal. Thus, an accused who *does not* commit CBT for personal gain is less culpable, relatively speaking, than the median CBT offender.

57 *Public Prosecutor v Lim Lee Eng Jansen* [2001] SGDC 188, though not a case involving the offence of CBT, is instructive. The offender was the senior manager of a bank who had used his position to extend additional credit to a company, K, a long-time customer of the bank. The offender did so by manipulating the bank's records to record that K had used less credit than it actually had. K eventually defaulted on its repayments and the bank lost $5m in unpaid loans. The offender was charged and he eventually pleaded guilty to four charges of falsifying accounts under s 477A of the Penal Code (Cap 185, 1985 Rev Ed) ("1985 Penal Code"). The unchallenged mitigation was that the offender had done so out of a "misguided sense of altruism" to help K out in its time of need and that he had not obtained any direct pecuniary benefit for this. Pointing to this, counsel for the appellant submitted that the case ought therefore to be distinguished from two precedent cases in which the offenders had resorted to various means to cover up the losses sustained and had also committed various acts of misappropriation for personal pecuniary benefit. I accepted this submission and held as follows (at [22]):

> An important distinguishing factor in the present case was that the fraud perpetrated by the accused was only indirectly connected with his own interests. There was no evidence that the accused stood to gain from his misdeeds in pecuniary terms. Like the first accused in *Sabastian s/o Anthony Samy*, it could be inferred that he may have acted to protect his own reputation. *But it would be incorrect in principle to equate the circumstances in the present case with instances of theft, criminal breach of trust or misappropriation where the offender is typically actuated by greed and/or personal gratification.* This was evidently not the case here. … [emphasis added]

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58 My point then, which I reiterate here, is that an appreciation of the context is crucial. The offence of falsifying accounts covers a multitude of transgressions, and the precise reasons for the falsification matter deeply. I did not consider that that case was even remotely comparable not just to the two cited precedents, but also to other offences involving CBT or related property offences in which avarice, self-interest, and greed feature prominently. I also considered that the offender had cooperated fully with the police after being arrested, had a clean record and, by all accounts, was not likely to reoffend after being released. Bearing these points in mind, as well as the fact that the offender had already spent two months in remand, I imposed a sentence of six weeks' imprisonment on each charge and ordered that both run consecutively for an aggregate sentence of three months' imprisonment. The appeal was subsequently dismissed.

The role of motive in this case

59 The District Judge characterised the present case as one in which the accused was placed in her predicament not by personal design, but because of her trusting nature. It was not disputed that she became the victim of harassment by UMLs because she decided to stand as guarantor for her colleague and it was only because of the harassment that she turned to crime. The observations she made at [1] of the GD are apposite in highlighting the significance of the absence of pecuniary gain as a mitigating factor:

> The unchallenged mitigation was that [the accused] had obliged an ex-colleague by standing as guarantor for his loans from loan sharks. When the ex-colleague defaulted on payment and disappeared, the loan sharks started to threaten her and commit acts of harassment at her residence. She succumbed to their pressure and committed the offences of criminal breach of trust and cheating against her employer to pay them. There was no pecuniary gain to her.

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60 In response, the prosecution submitted that the absence of any motive for personal gain could not be a "significant mitigating factor". First, it was contended that while the accused was not motivated by personal enrichment, she certainly *stood to benefit*, as she applied the proceeds in discharge of the debt she owed the UML, thereby reducing the sum of her indebtedness at the expense of her employer. Second, they pointed out that the accused had persisted in her offending by turning to credit card fraud after her account with HBT was suspended because of the large arrears accruing on her clients' accounts. Third, it was argued that the District Judge had "glossed over" the tremendous losses sustained by HBT, which eclipsed whatever mitigating weight may be accorded to the absence of a pecuniary motive.[48]

61 I accept the Prosecution's point that the accused stood to benefit from her offence. However, the most that could be said about this was that she had committed the offence *for her own sake*, and that this case should therefore be set apart from situations where offenders were said to have been driven by purely altruistic motives. The accused was not arguing that she should be given credit for being altruistic. Instead, her plea was to be treated less harshly than the usual run of the mill CBT offender, who is usually motivated by avarice. The fact that the accused had turned to credit card fraud was neither here nor there. In any event, the use of the credit cards formed the subject matter of a separate charge and I did not think it fair to also count this as an aggravating factor for the CBT charge. As for the scale of the losses, the District Judge had made specific mention of this (see [15] above) and I saw no basis for the conclusion that she had somehow "glossed" this over.

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[48] Prosecution's submissions at paras 59–65 (quotations from paras 61 and 65).

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62 The District Judge attempted to draw a parallel between this case and that of *Zhao Zhipeng*, whom she said had also committed the offences under "significant pressure". With respect, I was not persuaded that the cases are all that alike. In *Zhao Zhipeng*, the offender (a foreign national who played in a local football club) was convicted of match-fixing. The evidence showed that the club manager was a domineering person and the accused, who had recently moved to Singapore from China, was afraid of antagonising him, particularly since the manager had intimated that he had triad connections in China and would hurt the offender and his family if he did not follow his instructions to fix the matches. In the circumstances, the court held that the offender's capacity for independent action was diminished and so his culpability for the offence was at the "lower end of the scale" (at [39]). It is critical to note that the charges of match-fixing which the offender in *Zhao Zhipeng* faced related to offences committed within the span of a month. In those circumstances, it is conceivable that the offender could have been so much in fear that his will was overborne by the circumstances. By contrast, the present offences were committed over a span of 1.5 years. While the accused might always have feared harassment from the UMLs throughout, I did not think it could be said that her capacity for independent action had been curtailed to the extent that it could be held up as a particularly compelling mitigating factor. Nevertheless, I accepted that she was under continued pressure and her sense of helplessness had contributed to her offending.

63 In summary, I found that the District Judge was correct in saying that the facts of this case are unusual and the sentence could not readily be benchmarked against cases where the offenders committed the offences for personal gain. On the undisputed facts, the absence of any motive or desire for personal enrichment rendered her offence of CBT as a servant less serious and

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blameworthy than a case where the offender was so motivated. In these circumstances, the District Judge was entitled to find that her culpability was significantly reduced and to afford her an appropriate sentencing discount.

The level of trust and sophistication issue

64 Finally, I turn to the level of trust and sophistication issue. The Prosecution's essential point was that the accused's offences were more calculated, the level of perfidy much higher, and her acts of deception more practised than the District Judge recognised. While it was admitted that the accused used simple techniques (Internet searches and the use of old name cards) and worked alone, this did not necessarily mean that the scheme was not carefully planned. Among other things, it was argued that "the sophistication of the [accused's] scheme lay in the keeping up of multiple ruses on multiple fronts": to the finance department, the warehouse department, and the clients to whom she sold the wines.[49] It was also stressed that the accused had to rely on her intimate knowledge of HTB's internal processes in order to pull this off, which attested to the high level of trust reposed in her.[50]

65 I accepted the Prosecution's submission that in determining the level of trust reposed in a person, the court looks to substance and not to form; thus, a person with a humble title may occupy a high position of trust (see *Public Prosecutor v Teo Cheng Kiat* [2000] SGHC 129 at [26]). Likewise, I accept that a criminal scheme may be said to be "sophisticated" and "carefully orchestrated" even if it did not involve the use of complicated technology and

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49 Prosecution's submissions at para 37.

50 Prosecution's submissions at para 24.

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was carried out by a single operator working alone, rather than a syndicate.[51] In all cases, what is critical is not the intricacy of the criminal enterprise *per se*, but whether there were careful steps taken to *avoid detection*. Such conduct is aggravating because it is evidence of purposeful offending (which is more blameworthy) and because it often leads to greater harm (see *Public Prosecutor v Fernando Payagala Waduge Malitha Kumar* [2007] 2 SLR(R) 334 at [42]). However, even with these two points in mind, I could not accept the Prosecution's submission that the District Judge had erred in her appreciation of the accused's culpability, as disclosed in the manner and mode of her offending.

66 The District Judge's conclusion, upon a review of the evidence, was that the accused was essentially a sales executive dealing with incoming corporate sales queries (see the GD at [46]). I accepted that this was a fair characterisation of the facts. While the accused had knowledge of HTB's internal workings, there was nothing in the SOF that suggested that she knew anything more than sales employees in similar companies would have known or that she had been entrusted with any special level of responsibility. Further, there was also nothing in the recitation of the facts which suggested that the manner of her offending was carefully calculated to avoid detection. On the whole, the facts revealed no elaborate criminal design, but only the efforts of an opportunist whose methods were simple and uncomplicated. When the finance department inquired about the arrears, she was only able to, in the Prosecution's words, "stave them off with various excuses". There was no evidence that she took any particular steps to avoid detection.

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[51] Prosecution's submission at para 36.

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67 I accepted the Prosecution's argument that the accused had clearly used her position in the company to commit the offences. As was rightly pointed out, while the customers were the ones who provided their credit card details to the accused, they did so *because* she was an employee of HTB.[52] However, this fact alone did not mean that she was in any elevated position of trust. At the end of the day, the District Judge rightly recognised that the accused was a sales person whose scope of work included the collection of payments and that she sometimes did so by using credit card details which had been given to her by her clients (see the GD at [46]). The fact that she had abused her position as an employee to perpetrate the offences was already accounted for in the fact that she had been charged for CBT as a servant, which carries a higher maximum punishment, rather than the offence of CBT *simpliciter*. It should not be held up as an aggravating factor (see *Soong Hee Sin v Public Prosecutor* [2001] 1 SLR(R) 475 at [16]).

Sentencing precedents

68 As far as the precedents were concerned, the Prosecution cautioned against reliance on the older cases and submitted that there had been a "clear upward trend in the sentences for such offences in recent years". They drew my attention to the following three decisions of the District Court – *Public Prosecutor v Lee Han Boon Adrian* (DAC 911016/2014 and others), *Public Prosecutor v Koh Mui Hoong* (DAC 500714/2013 and others), *Public Prosecutor v Yeo Kay Keng Matthew* [2011] SGDC 425 ("*Matthew Yeo*") – all of which involved the misappropriation of between $1m and $2m and in respect of which sentences of between five and six years' imprisonment were imposed. Extrapolating from this, they submitted that the starting point of nine

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[52] Prosecution's submissions at paras 28 and 29.

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years' imprisonment arrived at by the District Judge was too low and that a starting point of between ten and 12 years' imprisonment ought to have been ordered instead.[53] With respect, I could not agree with this.

69 There is no question that the amount of money misappropriated is an important sentencing consideration. Generally, the larger the amount misappropriated, the more severe the punishment that should be meted out. However, it has been emphasised in past cases that while the punishments imposed for CBT offences ought to increase in severity with the amounts misappropriated, the sentences "do not bear a relationship of linear proportionality with the sums involved" (see *Public Prosecutor v Tan Cheng Yew and another appeal* [2013] 1 SLR 1095 ("*Tan Cheng Yew*") at [184]). The fact that proportionately higher punishments were imposed for offences involving smaller sums of money does not, without more, imply that the District Judge had selected an inappropriate starting point or that the eventual sentence she arrived at was manifestly inadequate. I also did not think it possible to derive a sentencing range from such a small sample size (particularly considering the circumspection with which unreported decisions are generally viewed: see *Luong Thi Trang Hoang Kathleen v Public Prosecutor* [2010] 1 SLR 707 at [21]).

70 When I turned to consider the precedents cited, there were four which I found particularly helpful. In terms of *modus operandi* and level of culpability, I considered *Matthew Yeo* to be comparable. The offender was an accounts manager for the local telecommunications company, M1. He falsified more than 3000 subscription contracts over the period of two years in order to induce the delivery of handsets (purchased at the subsidised prices available to

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[53] Prosecution's submissions at paras 74–75.

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new subscribers) which he on-sold at their retail price. The offender spent the money he made on luxury items like cars, watches, and bags. The total loss to M1 was assessed to be $2m. The offender pleaded guilty to nine charges, comprising two charges of CBT as a servant and several charges of converting property which represented the benefits of criminal conduct under the CDSA. He received a sentence of five years' imprisonment for the CBT as a servant charge, which was ordered to run consecutively with the sentence of one year's imprisonment for one of the CDSA charges, resulting in a global sentence of six years' imprisonment.

71 In terms of the quantum, the closest precedents which were cited were the cases of *Joachim Kang Hock Chai v Public Prosecutor* (DAC 156/2003, unreported) and *Public Prosecutor v Kwek Chee Tong* [2001] SGDC 194. The former involved the misappropriation of about $5.1m of church funds for personal gain. Some, though not all, of the money was returned to the church. The offender pleaded guilty to a charge of CBT *simpliciter* under s 406 of the 1985 Penal Code after 13 days of trial and was sentenced to seven years and six months' imprisonment. The latter involved the misappropriation of $5.49m of which $2.6m remained unaccounted for. The offender had committed the offence in order to pay off debts incurred while gambling and had taken elaborate steps to hide his misdeeds. For this, he was charged with multiple counts of CBT under s 409 of the 1985 Penal Code. He was convicted after a lengthy trial in which he had convicted his defence in an "extravagant and unnecessary" manner, which resulted in an adverse costs order being made against him. After observing that the offender displayed little remorse, the trial judge sentenced him to a total of nine years' imprisonment.

72 I also had regard to the case of *Tan Cheng Yew* which, though far more aggravated in many respects, also provided a useful point of reference. The

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offender, a lawyer, had misappropriated nearly $4.8m worth of his clients' money and was on the run for six years. After he was caught in Germany, he resisted extradition but was eventually repatriated to Singapore where he stood trial for six charges, four of which were for the offence of CBT under s 409 of the Penal Code (which carries a higher maximum punishment of 20 years' imprisonment, as compared to a maximum of 15 years' imprisonment for CBT as a servant under s 408 of the same) and two charges of cheating. On appeal, he was sentenced to six years' imprisonment for each of the charges under s 409 of the Penal Code and both were ordered to run consecutively for a total sentence of 12 years' imprisonment.

73 These precedents provided some guidance to a certain extent, but they are of course broad and imperfect reference points. On the one hand, I was mindful that the harm caused by the accused far exceeds that in any of the four cases I have referred to because of the sheer quantum of the loss sustained by HTB. On the other hand, however, the accused was far less culpable than any of the aforementioned offenders, all of whom were motivated by avarice and many of whom led lavish lifestyles with their ill-gotten gains before they were prosecuted. There were many unique features of this case which called out for special attention, such as the absence of a desire for personal gain, the pressure placed on the accused by the harassment, and the cooperation she rendered the authorities in the course of the investigations. When I considered the facts in their totality, it seemed to me that the sentence of six years' imprisonment imposed by the District Judge in respect of the CBT charge and the global sentence of seven years' imprisonment was neither manifestly excessive nor manifestly inadequate.

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Conclusion

74 For the reasons set out above, I was not persuaded that there was merit in either set of appeals against sentence. In my judgment, the District Judge had given due consideration to the relevant sentencing considerations and that she had acted within the bounds of the sentencing discretion that was conferred on her. I concluded that there was no basis for appellate intervention and therefore dismissed both appeals.

See Kee Oon
Judicial Commissioner

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