Lee Yuen Hong v Public Prosecutor
[2000] SGHC 50

Case Number : MA 245/1999

Decision Date : 31 March 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Ang Sin Teck (Raja Loo & Chandra) for the appellant; Sellakumaran Sellamuthoo (Deputy Public Prosecutor) for the respondent

Parties : Lee Yuen Hong — Public Prosecutor

Courts and Jurisdiction – Jurisdiction – Appellate court – Intervention with findings of fact of trial judge – When intervention justifiable

Criminal Law – Abetment – Criminal breach of trust as servant – Abetment by conspiracy – Whether receipt of funds belonging to employer constituted conspiracy

Criminal Procedure and Sentencing – Appeal – Adducing additional evidence – Whether evidence available at time of trial – Whether evidence should be admitted in interest of justice

Evidence – Admissibility of evidence – Previous inconsistent statement – Use as evidence of facts stated – Whether lack of contemporaneity affects weight to be attached to previous inconsistent statement – s 147(3) & (5) Evidence Act (Cap 97)

Evidence – Witnesses – Impeachment – Credit of witness – Whether finding of impeachment justified in light of insignificant nature of discrepancies

Words and Phrases – "Dishonest" – Meaning of dishonesty – Whether temporary misappropriation of employer's funds constitutes dishonesty on employee's part – ss 24, 107(b), 109, 403 & 408 Penal Code (Cap 224)

: This was an appeal against the decision of district judge A Rahim Jalil. The trial judge found the appellant guilty of engaging in a conspiracy with one Don Wee to commit the offence of criminal breach of trust by a clerk or servant in respect of a sum of $3,000. The appellant was convicted and sentenced to ten weeks` imprisonment. The appellant filed a petition of appeal on 26 November 1999 against the conviction and sentence. On 3 February 2000, the appellant filed a notice of motion for leave to adduce fresh evidence. The charge against the appellant is set out below:

> *You Lee Yuen Hong NRIC No S 7122905Z are charged that you sometime on or about 16 February 1996, in Singapore, abetted one Wee Hian Thong, employed by United B&B Italia (Singapore) Pte Ltd and in such capacity entrusted with $3,000 belonging to the said company, to commit criminal breach of trust as a servant, in that you engaged in a conspiracy with Wee Hian Thong to dishonestly misappropriate the said $3,000, and in order to the doing of that thing, on the same day, in Singapore, you received from Wee Hian Thong the said $3,000, and you have thereby committed an offence punishable under s 408 read with s 109 of the Penal Code (Cap 224).*

The background

The appellant, Lee Yuen Hong (also known as `Corrine`), and Don Wee Hian Thong (`Don Wee`) were employees of United B&B Italia (Singapore) Pte Ltd (`B&B`). The appellant was a sales executive and

Don Wee was her supervisor and the sales marketing manager.

The appellant had sold some furniture to a customer, one Albert Hong. On 16 February 1996, the appellant, Don Wee and another sales and marketing manager by the name of Jeffrey Chiang, went to 48A Chancery Lane to collect the balance of the sale price of the furniture sold to Albert Hong. At 48A Chancery Lane, the appellant was given $35,000 in cash by one Peter Lim who made the payment on behalf of Albert Hong. After receiving the money, the appellant handed the $35,000 to Don Wee. As the sales marketing manager and the appellant`s supervisor, Don Wee was responsible for returning the money to B&B.

After receiving the $35,000, the appellant, Don Wee and Jeffrey Chiang went to a mobile telephone shop where the appellant bought a mobile telephone for $1,287.50. The appellant paid for the mobile telephone with cash that she got from Don Wee. Don Wee subsequently admitted that the cash that he handed over to the appellant was from the $35,000 given to the appellant by Peter Lim earlier in the day. According to the appellant, the amount that she got from Don Wee was $2,000whereas Don Wee maintained that he handed over a sum of $3,000 to the appellant.

Don Wee did not bank in the $35,000 or any part thereof on 17 February 1996, which was the next working day. It was a half working day because of the upcoming Chinese New Year celebrations. As a result of the Chinese New Year celebrations, B&B was in fact closed for a week commencing 19 February 1996, and business only resumed on 26 February 1996. Don Wee had told the appellant on 16 February 1996 that he would bank in a full $35,000 when he returned to work on 26 February 1996. When the appellant checked on 26 February 1996 if her client, Albert Hong, had paid for the furniture, she was told that payment had not been made. This indicated to her that Don Wee had not yet returned the $35,000 to B&B. The balance of the $35,000 that was kept by Don Wee over the Chinese New Year period was in fact used by him for his own purposes. Consequently, the sum of $35,000 was never returned by him to B&B.

Don Wee was subsequently charged with and pleaded guilty to committing criminal breach of trust as a servant in respect of the sum of $35,000. He was sentenced to one year`s imprisonment.

As regards the cash that Don Wee had given the appellant, the appellant claimed that she had repaid the money to Don Wee. After purchasing the mobile phone, the appellant told her boyfriend, Clifford Tan, that she had borrowed over a thousand dollars from Don Wee to purchase the mobile phone. Clifford Tan was displeased at this because he felt that it was inauspicious to be indebted to another person before Chinese New Year. Clifford Tan then wrote a cash cheque for $2,000 and gave it to the appellant so that she could repay Don Wee. The cash cheque was dated 28 February 1996. However, Don Wee denied receiving any part of the $3,000 he allegedly gave the appellant either from the appellant herself or from any other person.

It was against this factual background that the appellant was charged with abetting the commission of criminal breach of trust by a servant in respect of $3,000.

The prosecution`s case

The prosecution contended that the ***actus reus*** of the offence had been made out. Don Wee had admitted that the $3,000 that he had given to the appellant originated from the $35,000 that Peter Lim had paid to the appellant on 16 February 1996. As a servant of B&B, and being entrusted with this money in his capacity as such, Don Wee had misappropriated the $3,000 in question.

With regards to the ***mens rea*** of the offence, the prosecution had to establish that ***both*** the appellant and Don Wee had been dishonest. Whilst the appellant and Don Wee had agreed that the appellant would use part of the cash received from Peter Lim to purchase a mobile phone, this agreement would only have amounted to a conspiracy to commit criminal breach of trust as a servant if both Don Wee and the appellant had been dishonest at the time.

The prosecution argued in their closing submissions that Don Wee had been dishonest. Don Wee had testified that he did not have the intention to deprive B&B of $3,000. According to the prosecution, Don Wee`s statement could not be read in isolation. Read in its proper context, Don Wee meant that he intended to eventually return the entire sum of $35,000 to B&B at the time he gave $3,000 to the appellant. The relevant parts of the cross examination of Don Wee (PW3) by defence counsel is set out below:

> *Q: ... If you say you gave her $3,000, the understanding at that time was that you would give her $3,000 first and she would return the $3,000 to you after the Chinese New Year break?*
>
> *A: That was the assumed understanding because she knew that the money came from the $35,000, and she knew I would be banking in the $35,000 on the next working day which was after the Chinese New Year.*
>
> *Q: So if that was the case, it was the understanding that when $3,000 was given to the accused, there was no aim or intention to deprive B&B of $3,000 because ultimately the $3,000 would be returned to you and you would bank in the $35,000?*
>
> *A: Yes ... that was the understanding that she would return the money after Chinese New Year.*
>
> *Q: You agree there was no intention to deprive B&B of the $3,000 you gave the accused?*
>
> *A: I don`t understand `deprive`.*
>
> *Q: You gave $3,0000 to her. There was no intention on your part or on the part of the accused to return B&B $32,000, the intention was to return $35,000?*
>
> *A: Yes.*
>
> *Q: So when you gave $3,000 to Corrine Lee [the appellant] you honestly intended that she return you $3,000 so that you could return the entire sum of $35,000 to B&B?*
>
> *A: Yes.*

The prosecution submitted that despite his evidence, Don Wee had the intention to cause temporary wrongful loss to B&B ***at the time he handed over $3,000 to the appellant*** . This was dishonest by virtue of s 24 of the Penal Code which states:

> *Whoever does anything with the intention of causing wrongful gain to one*

person, or wrongful loss to another person, is said to do that thing dishonestly.

The prosecution submitted that the appellant had also been dishonest on the basis of the following facts. She had conceded in the course of cross examination that the $35,000 received from Peter Lim belonged to B&B even when it was in Don Wee`s possession. She also knew that the money she had received from Don Wee came from the $35,000 in question. She knew that the money she had received from Don Wee was not meant to be a personal loan to her. She also knew of B&B`s policy not to allow sales personnel to use money collected from clients for personal use. In spite of her knowledge, she accepted the money from Don Wee and used it to purchase a mobile phone for herself. She did not expressly state when she would return the money to Don Wee, and she also kept the balance of the money after purchasing the mobile phone. She also did not reveal the fact of the purchase of the mobile phone to B&B after she discovered that Don Wee had not banked in the $35,000 after the Chinese New Year break. She explained that she did not want to back stab Don Wee, but this only showed that she knew it was wrong to receive the $3,000. She was clearly afraid of telling the truth regarding the $35,000 since this would expose her receipt and use of the $3,000. The prosecution accordingly submitted that the appellant had been dishonest in her treatment of the $3,000 in question.

In any event, the $3,000 was never returned to Don Wee. The prosecution urged the court to draw an adverse inference from the fact that the defence did not call the relevant bank officer who could tell the court into whose account the cash cheque went and from the fact that the defence did not produce the original cash cheque so that Don Wee could be cross examined on whether the alleged handwriting behind the cheque was his, as stated by Clifford Tan.

The prosecution urged the court to prefer Don Wee`s testimony over the appellant`s account of the relevant events. Don Wee was an honest witness who had no reason to falsely incriminate the appellant. He had pleaded guilty to the charge of criminal breach of trust in respect of the $35,000 and was serving a term of imprisonment for that offence. On the other hand, the appellant was an unreliable witness. There were material inconsistencies between her long statement and her testimony in court. She said in her long statement that the money was handed by Don Wee to her before she entered the mobile phone shop. In court, she said that Don Wee gave her the cash just before payment. She also claimed in court that she only received $2,000 as opposed to an amount between $3,000 and $5,000, which she had stated in her long statement. The appellant attributed the inconsistencies to her confusion and trauma after spending a night in remand. However, ASP Chew, the recorder of her statement, indicated that the appellant looked normal and confident during the recording of the statement.

The prosecution also urged the court to give little weight to Clifford Tan`s (DW2) evidence. Clifford Tan was keen to give favourable evidence in support of the appellant. He was protective of the appellant and reiterated that she was a religious person who would not commit such an offence. He was also evasive during cross examination. Initially, he insisted that he had been told by the bank that Don Wee had banked in the cash cheque of $2,000 himself. When it was pointed out to him that there was no such procedure for the bank to find out who had banked in the cheque, he admitted that the bank had not told him so.

The prosecution therefore submitted that the charge had been proved beyond a reasonable doubt.

The defence

The appellant offered a different account of the events in her defence. She said that, after collecting the cash of $35,000 from Peter Lim, she had suggested to Don Wee that they proceed to their company head office to deposit the cash. Don Wee disagreed as that was not the normal procedure to take. He added that he did not want the accounts manager to grumble about himself and the appellant upsetting the flow of paper work. Don Wee then said that he would keep the money until after Chinese New Year. The appellant did not disagree with Don Wee over this as he was the senior manager and she felt that she had no right to object to the way Don Wee handled the money. The appellant also felt that after she had handed the money over to Don Wee, her responsibilities were over.

The appellant also said that it was Don Wee who suggested going to the mobile phone shop. At that time, she did not mind looking at mobile phones although she had not yet made up her mind as to the exact model she was interested in. She also did not have money at that time because her money was with Clifford Tan, her boyfriend. At the mobile phone shop, the appellant asked the salesperson several questions. She felt embarrassed that she might walk out without buying a mobile phone. Don Wee told her to go ahead and buy a mobile phone and said that he would pay for it first. She asked him why he was going to pay for it first. Don Wee replied that, as they were there already, she might as well buy the mobile phone and return him the money later. She did not object, because Don Wee reassured her that it was alright for her to accept the money. Don Wee then gave the money to her at about the time of payment for the mobile phone. He gave her $2,000 which she in turn gave the salesperson. Thereafter, the salesperson returned her some change. As the price of the mobile phone was $1,287.50, the change came to $712.50. She wanted to give the change back to Don Wee but he told her to keep it and return it to him the next time she saw him.

The appellant treated the money from Don Wee as a personal loan from him. It was understood as between her and Don Wee that she would return the money to him. According to her, Don Wee had used the word `lent`. From her point of view, she would be returning the money to Don Wee and not to B&B.

The appellant then informed her boyfriend, Clifford Tan, that she had bought a new mobile phone and that Don Wee had lent her some money for the purchase. Clifford Tan was displeased because he felt that it was inauspicious to borrow money before Chinese New Year. He wrote a cheque (exh D1) and gave it to the appellant. The appellant then gave this cheque to Don Wee. After giving Don Wee the cheque, the appellant asked Don Wee many times if he had returned the money to B&B. Don Wee had replied that he would do so.

The appellant denied that the actus reus of the offence had been committed. The ***actus reus*** of the offence with which the appellant was charged was not the receipt of money. Rather, the actus reus was the conspiracy between her and Don Wee. According to her, the existence of such a conspiracy had not been proven. There was no agreement between her and Don Wee to receive the money. Although she did not reject the money, the failure to reject the money could not be interpreted as an agreement to receive it.

The appellant also submitted that the prosecution was wrong to contend that Don Wee had the intention to cause temporary wrongful loss to B&B. Don Wee`s evidence was that he did not have the intention to cause wrongful loss to B&B. Even if there was such an intention on Don Wee`s part to cause temporary wrongful loss, it had not been proven that the appellant had abetted Don Wee in this regard.

Clifford Tan had been described as a highly unreliable witness who gave evidence without regard to the truth. Apparently, he had flown all the way back from Vietnam to testify for the appellant. The

appellant submitted that it was incorrect to state that he came back to Singapore to give false evidence for her. Clifford Tan was recalled to Singapore on a subpoena issued by the prosecution. When the DPP decided not to call him as a witness, he was offered to the defence as a witness.

As for the non-production of the original cheque by the appellant and the failure to call the relevant bank officer as a witness, it was submitted that an adverse inference should not be drawn by the court as a photocopy of the cheque had been given by Clifford Tan to ASP Chew. The prosecution was aware of this fact and had not sought to deny it.

The decision of the trial judge

The trial judge held that the appellant had engaged in a conspiracy with Don Wee to accept the money and use it to buy the mobile phone. It did not matter whether the suggestion to use the money from the $35,000 came from Don Wee or from the appellant. Therefore, the evidence of the appellant that she could not possibly have made the suggestion as she was a subordinate of Don Wee was not helpful. Even if Don Wee had made the suggestion, the appellant would still be engaged in a conspiracy with Don Wee if she agreed to Don Wee`s suggestion. Defence counsel`s submission that the appellant`s failure to reject the money could not amount to an agreement to accept the money was without merit. It was open to the appellant to refuse the money as she was clearly not compelled by Don Wee or anyone else to take it. Thus, the trial judge found that there was an agreement on the appellant`s part to accept the money and use it to buy the mobile phone. Accordingly, the appellant had engaged in a conspiracy with Don Wee to commit criminal breach of trust.

The trial judge considered Don Wee`s statement that he did not have the intention to deprive B&B of $3,000. According to the trial judge, this simply meant that, at that time, Don Wee intended to return the full $35,000 to B&B eventually. It did not detract from the reality that Don Wee had the intention to cause temporary wrongful loss to B&B. There would still be a dishonest intention even if the loss was temporary. Support for this proposition was derived from explanation 1 to s 403 of the Penal Code which states:

> *Explanation 1 - A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.*

Further, Abdoolcader J in **PP v Datuk Haji Harun bin Haji Idris** [1977] 1 MLJ 180 made the following comments on `dishonesty` in the context of criminal breach of trust under s 405 of the Malaysian Penal Code:

> *... the mens rea must be held to have been established even though the deprivation may have been only for a short period and there may not have been any intention on the part of the accused to have any permanent gain to himself or cause any permanent loss to the person entitled to the property. It is quite immaterial whether the wrongful deprivation of property to its rightful owner is permanent or temporary, and further, if it is established that the accused had acted with the intention of causing wrongful loss to the owner, it is equally immaterial whether his intention was or was not to make a wrongful personal gain to himself.*

Accordingly, the trial judge held that Don Wee`s dishonest intention had been established in this case.

The trial judge rejected the appellant`s submission that she had no control over what Don Wee did with the money after she handed the $35,000 to him. The appellant stated that Don Wee was her supervisor and she had no right to ask him how the money was to be used. Nevertheless, the appellant knew that the money that she had received from Don Wee was B&B`s money and she also knew that she should not have used the money to purchase the mobile phone. The appellant was not compelled to accept the money from Don Wee. In fact, there were alternatives open to her. Clifford Tan, her boyfriend, could have purchased the mobile phone for her at a later date. Alternatively, Jeffrey Chiang or Don Wee could have paid for the mobile phone with their credit cards at the mobile phone shop.

The trial judge did not accept the appellant`s submission that the money was given to her as a loan from Don Wee. This submission was premised on the assumption that the money that was given to her belonged to Don Wee. Yet, the appellant herself admitted that the money given to her to buy the mobile phone was B&B`s money. In any event, Don Wee did not say that the $3,000 which he gave to the appellant was meant as a loan to her. Don Wee had no motive to lie. He was forthcoming about his own wrongdoings and did not try to shift all the blame to the appellant.

The prosecution had applied to impeach the credit of the appellant as there were material discrepancies between her evidence in court and her long statement to the police. In her long statement, the appellant had stated that she had received between $3,000 and $5,000 whereas in court she claimed that she had received only $2,000. She did not allege that the recorder of her statement had threatened, promised or induced her in regard to the making of the statement. She claimed that she was confused and traumatised after spending a night in remand and further, that she had forgotten specific details of the events of 16 February 1996. The trial judge did not accept her explanations. She was well treated during her brief period of remand. Her claims to have been confused and traumatised were somewhat inconsistent with her assertion that she felt confident as she did not think she had committed an offence. In any event, she could have easily qualified her statement by stating that she was not certain of some events as she was a university graduate.

The trial judge took into account the fact that, after giving her statement, the appellant had verified with her family members and Clifford Tan that the amount she had received from Don Wee was $2,000 and not between $3,000 and $5,000. However, the trial judge did not see how she could have verified the amount in this manner when neither her family members nor Clifford Tan were present when Don Wee gave her the money. The appellant had concluded that she had received $2,000 simply because she had received a cash cheque for that amount from Clifford Tan. This was not a reliable method of recollection. The trial judge accepted Don Wee`s statement that the sum handed over to the appellant was $3,000. As stated earlier, Don Wee had no reason to lie. It was significant that, unlike her testimony in court, the appellant`s initial position that she was given between $3,000 and $5,000 was consistent with Don Wee`s testimony that he had given her $3,000. Accordingly, the trial judge held that the appellant`s credit had been impeached.

The appellant and Clifford Tan claimed that the full sum of $2,000 had been returned to Don Wee by way of a cash cheque. However, Don Wee maintained that no part of the $3,000 had been returned to him. The trial judge chose to believe Don Wee`s account for reasons already stated. The defence had not shown into whose account the cash cheque was deposited, neither did the defence produce the original cash cheque in order that Don Wee might be asked whether the alleged handwriting behind the cheque was his. Even if the appellant had returned $2,000, there was still a shortfall of $1,000 that was never returned.

At the end of the case for the defence, the trial judge concluded that no reasonable doubt had been cast on the appellant`s guilt. He accepted the prosecution`s case and was satisfied beyond a reasonable doubt that the requisite dishonest intention had been established. Accordingly, the appellant was convicted.

The offence under s 408 of the Penal Code is punishable with mandatory imprisonment which may extend to seven years and the offender is also liable to a fine. The appellant pleaded in mitigation that as a result of the incident, she had separated from her boyfriend, Clifford Tan. She also tendered some testimonials and character references that attested to her good conduct. The trial judge did not find those references significantly mitigating. As he did not accept the appellant`s testimony that she had returned the $2,000 to Don Wee, he also rejected her mitigation plea that full restitution of the loss had been made. Nevertheless, he sympathised with her over the stress and anguish she must have suffered during the period of about three years from the date of the commission of the offence, ie 16 February 1996, until the date she was charged in court, ie 8 April 1999. He also noted that Don Wee had pleaded guilty to a charge under s 408 of the Penal Code in respect of $35,000. As a result, a short custodial sentence of ten weeks` imprisonment was imposed on the appellant.

The appeal

It is settled law that an appellate court will not lightly disturb a trial judge`s findings of fact, even though it may have some doubt as to those findings. To justify appellate intervention on questions of fact, the doubt must be sufficiently strong to render the conviction against the weight of the evidence (**Tan Hung Yeoh v PP** [1999] 3 SLR 93 ; **PP v Azman bin Abdullah** [1998] 2 SLR 704). On the other hand, appellate intervention on a question of law requires that an error of law has occurred in the court below (**PP v Low Tiong Choon** [1998] 1 SLR 300).

In her petition of appeal dated 26 November 1999, the appellant submitted that the trial judge had erred in law and in fact for the following reasons:

(a) the trial judge had found that the appellant had engaged in a conspiracy with Don Wee to misappropriate $3,000 when the evidence of Don Wee showed that there was no conspiracy and that the appellant did not abet Don Wee;

(b) the trial judge had found that the appellant and Don Wee had dishonest intentions when this was contrary to the evidence adduced by the prosecution;

(c) the trial judge had failed to consider the appellant`s evidence that she was given a loan of $2,000 and not $3,000 by Don Wee;

(d) the trial judge had failed to consider the evidence that the appellant had returned $2,000 to Don Wee by way of a cash cheque issued by Clifford Tan;

(e) the trial judge had erred in impeaching the credit of the appellant on the basis of inconsistencies that were minor and immaterial;

(f) the trial judge had erred in holding that the appellant did not produce the original cheque when a photocopy of the cheque had already been handed over to the police. He had also failed to recognise the fact that the prosecution did not deny that the photocopy of the cheque had been given to the police and consequently, did not consider that the police had failed to investigate whether or not the

money had been returned when they were duty bound to do so. As a result of this failure, the trial judge did not take into account the fact that the prosecution had failed to produce a vital piece of evidence that would have pointed to the innocence of the appellant;

(g) the sentence imposed was manifestly excessive.

Did the appellant engage in a conspiracy with Don Wee to commit criminal breach of trust in his capacity as a servant of B&B?

The appellant was charged with abetting Don Wee to commit criminal breach of trust in his capacity as a servant of his company, B&B. The manner of abetment was abetment by conspiracy as defined in s 107(b) of the Penal Code:

> *107 A person abets the doing of a thing who ...*
>
> *(a) ...*
>
> *(b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing;*
>
> *(c) ...*

On a charge of abetment by conspiracy, the prosecution has to establish the following elements:

(1) the person abetting must engage, with one or more other persons in a conspiracy;

(2) the conspiracy must be for the doing of the thing abetted; and

(3) an act or illegal omission must take place in pursuance of the conspiracy in order to the doing of that thing.

In my opinion, the trial judge fell into error when he concluded that the prosecution had proven beyond a reasonable doubt the fact that the appellant had engaged in a conspiracy with Don Wee to commit the offence of criminal breach of trust by a servant by dishonestly misappropriating the sum of $2,000 or $3,000 (`the disputed sum`) which belonged to their employer, B&B. I will now set out the reasons for my opinion.

On the issue of abetment by conspiracy, it was stated in **PP v Yeo Choon Poh** [1994] 2 SLR 867 , 873:

> *... The essence of 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 ... One method of proving a conspiracy would be to show that the words and actions of the parties indicate their concert in pursuit of a common object or design, giving rise to the inference that their actions must have been co-ordinated by arrangement beforehand.*

In this case, it has not been proven beyond a reasonable doubt that the appellant and Don Wee had engaged in a conspiracy to commit the offence of criminal breach of trust in respect of the disputed sum. The evidence in court did not reveal an agreement between the two parties to commit the offence in question. Don Wee himself testified that there was no such conspiracy between himself and the appellant to deprive B&B of the disputed sum. The trial judge appeared to think that the appellant`s failure to reject the disputed sum from Don Wee was sufficient to constitute an agreement to use part of the $35,000 belonging to B&B to buy the mobile phone. This conclusion was, with due respect, dubious for the following reasons.

First, it was unclear who made the suggestion to use the disputed sum. Although the trial judge believed Don Wee`s testimony, Don Wee himself could not recall whether it was he or the appellant who made the suggestion. Secondly, the appellant`s failure to reject the disputed sum must be interpreted in the proper context. Whilst the appellant knew that the disputed sum belonged to B&B and that it was not the practice of B&B to lend their employees money, she was a subordinate of Don Wee and truly believed that her responsibility as a sales personnel ceased when she handed the $35,000 to him. She knew, as he did, that he was responsible for the $35,000 that she had handed over to him and that it was his duty to pay the money back to B&B after the Chinese New Year break. In fact, the former General Manager of B&B, Joseph Goy (PW2), stated that the appellant had `no say` in the way the $35,000 was to be treated after the money was given to Don Wee. When the appellant received the disputed sum from Don Wee, she treated it as a personal loan from him. She had intended to repay him after the Chinese New Year break and told him so. Don Wee`s testimony was consistent with the appellant`s in this regard. Although he did not expressly state that the disputed sum was meant to be a loan, he stated that he had presumed that she would return the disputed sum after the Chinese New Year break. In my opinion, Don Wee at least impliedly treated the disputed sum as a loan that he had extended to the appellant. Thirdly, the appellant`s failure to reject the disputed sum must be examined in the light of the circumstances existing at that time. She was in a mobile phone shop and had made many enquiries of the salesperson there. As she was embarrassed about walking out without making a purchase, she felt compelled to buy the mobile phone and did not refuse the disputed sum as a result.

The appellant`s conduct on 16 February 1996 was foolish but it was not criminal. I did not think that the evidence supported a finding that she had engaged in a premeditated scheme with Don Wee to dishonestly misappropriate the disputed sum at that point in time. Accordingly, appellate intervention in this regard was justified as the trial judge`s finding that there was a conspiracy was reached against the weight of evidence (see **Lim Ah Poh v PP** [1992] 1 SLR 713) even after considering the advantage the trial judge may have enjoyed by reason of having seen and heard the witnesses (see **Yau Heng Fang v PP** [1985] 2 MLJ 335).

Was there a dishonest intention on the part of Don Wee?

On this basis I concluded that the appellant`s dishonesty and the existence of a conspiracy had not been proven beyond a reasonable doubt. It was then appropriate to examine whether the trial judge was correct in his finding that there was a dishonest intention on the part of Don Wee to misappropriate the disputed sum at the time it was handed over to the appellant.

The trial judge found that Don Wee had the intention to cause temporary wrongful loss to B&B. According to him, the fact that Don Wee had the intention to return the money after the Chinese New Year break was irrelevant. He relied upon explanation 1 to s 403 of the Penal Code which states:

> *Explanation 1 - A dishonest misappropriation for a time only is a*

misappropriation within the meaning of this section.

It is also useful to set out the illustration to explanation 1:

> *Illustration - A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under [s 403].*

The trial judge also relied upon Abdoolcader J`s observations in **PP v Datuk Haji Harun bin Haji Idris** [1977] 1 MLJ 180 that `dishonesty` in the context of criminal breach of trust under s 405 of the Malaysian Penal Code ` ***must be held to have been established even though the deprivation may have been only for a short period and there may not have been any intention on the part of the accused to have any permanent gain to himself or cause any permanent loss to the person entitled to the property*** `.

The facts of **PP v Datuk Haji Harun bin Haji Idris** [1977] 1 MLJ 180 were similar to the scenario in the illustration to s 403 of the Penal Code. The accused in that case was in possession of shares and stocks that were entrusted to him in his capacity as a company director. However, he pledged them to a third party prematurely without the sanction of the board of directors and without lawful authority. Although he did not have the intention to permanently deprive the rightful owner of the shares, the court held that the element of dishonesty had been satisfied.

I agreed with the trial judge`s finding in this regard. As stated in ***Ratanlal & Dhirajlal`s Law of Crimes*** (24th Ed) at 1949:

> *A servant, who misappropriates his master`s property with the intention of restoring it after a time ought to be punished. He has no more right to steal his master`s property for a time than for ever.*

Employees or servants should not treat the funds or properties belonging to their employers casually. Temporary misappropriations which are seemingly innocuous and do not cause any loss to the employer should not be permitted by the law in any event. Even though Don Wee may have intended to return the disputed sum to B&B ***at the time the disputed sum was handed over to the appellant*** , he was nevertheless dishonest at law. Accordingly, the finding that Don Wee had been dishonest in his treatment of the disputed sum should not be disturbed.

Despite the fact that a dishonest intention on the part of Don Wee had been established, I was of the view that the appeal against the appellant`s conviction should still be allowed as the crucial ingredients of the charge against her, being the existence of a conspiracy and the appellant`s dishonesty, had not been proven beyond a reasonable doubt.

Did the learned judge err in finding that the credit of the appellant had been impeached?

The appellant further submitted in her petition of appeal that the trial judge had erred in finding that her credit had been impeached on the basis of inconsistencies that were minor and immaterial. In view

of the conclusions given above, it was unnecessary for the purposes of this appeal to express an opinion on the trial judge`s finding as to the appellant`s credit. For the sake of completeness, I nevertheless addressed some issues raised by his decision in this specific regard.

The trial judge had concluded that the discrepancy between the appellant`s long statement and her testimony in court as regards the amount of cash she received from Don Wee was material. The appellant`s explanation that she was confused and traumatised after one night in remand was rejected by the trial judge. He also felt that the appellant`s claims to be confused and confident on the other hand were inconsistent. He also felt that the appellant, a university graduate, could have qualified her statement by adding that she was not certain of past events. Furthermore, the manner in which she verified the amount given to her by Don Wee was unsatisfactory. Accordingly, he held that the appellant`s credit had been impeached.

In my opinion, the trial judge placed an undue emphasis on the appellant`s apparent inconsistent state of mind. Her claim to be confused and traumatised was reasonable as this reaction was not unexpected of the average person who had just endured one night in remand. Similarly, it was not unreasonable for her to state that she felt confident as she did not think that she had committed an offence. Whilst not exactly compatible, these two states of mind were not completely irreconcilable either. This was a minor inconsistency which to my mind did not necessarily support the conclusion that the appellant`s testimony was unreliable. It was also unfair to hold the fact that the appellant did not qualify her statement, despite being a university graduate, against her. The environment in which statements are given to the police is unfriendly and intimidating. One should not expect persons to behave in the way they do on ordinary occasions.

I did not think it was necessary for the purposes of this appeal to express an opinion on whether the discrepancy as regards the amount of cash received by the appellant was material. In the case of **Ng Kwee Leong v PP** [1998] 3 SLR 942 it was stated that a discrepancy which had ` ***no direct bearing on the facts in issue*** ` was immaterial. Whilst the amount of cash received by the appellant was an important fact, it must be borne in mind that she did not deny that she had received ***some*** cash from Don Wee. She only disagreed with the prosecution as regards the amount received from Don Wee. Due regard must also be had to the fact that she gave her statement to the police about one year and seven months after the incident. Thus, it was possible to attribute the discrepancies to the long lapse of time between 16 February 1996 and the time the long statement was made. Further, the fact that the method of recollection employed by her was unsatisfactory went only to the weight of her testimony in court and did not necessarily mean that she was lying.

If the trial judge was correct in admitting the appellant`s long statement for the truth of the facts stated therein in preference to her testimony in court in accordance with s 147(3) of the Evidence Act and **PP v Sng Siew Ngoh** [1996] 1 SLR 143 , it was my view that very little weight should have been attached to the substance of the appellant`s long statement. As stated in ***PP v Sng Siew Ngoh*** , s 147(5) of the Evidence Act provides that the court, in assessing the weight to be accorded to an inconsistent statement, shall have regard to:

> *... all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular, to the question of whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts.*

The clear absence of contemporaneity in this case was sufficient reason to accord little weight to the appellant`s long statement.

The courts must always exercise caution when admitting a previous inconsistent statement for the truth of its contents. Although the previous statement may have been made voluntarily, the weight to be accorded to such a statement should still be carefully considered. In this regard, the observation of Abdul Hamid J in **Chean Siong Guat v PP** [1969] 2 MLJ 63 is particularly instructive:

> *Absolute truth is, I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common occurrence. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognised by the court.*

The motion to adduce fresh evidence

The appellant applied for leave to adduce her affidavit together with the exhibits referred to therein and the affidavit of Clifford Tan in support of her application to adduce fresh evidence.

The principles to be followed in deciding if additional evidence should be taken were first applied in **Ladd v Marshall** [1954] 3 All ER 745. They were applied by the Court of Appeal in **Juma`at bin Samad v PP** [1993] 3 SLR 338 . The principles are as follows:

(1) firstly, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(2) secondly, the evidence must be such that, if given at trial, it would probably have an important influence on the result of the case; and

(3) thirdly, the evidence must be apparently credible although it need not be incontrovertible.

It was also stated in ***Juma`at bin Samad v PP*** that exceptionally the court might allow fresh evidence to be adduced even if it could not strictly be said that the evidence was not available at the time of the trial, if it could be shown that a miscarriage of justice had occurred. This is consistent with the core principle in s 257 of the Criminal Procedure Code that fresh evidence may be taken if it is necessary in the interests of justice.

Nevertheless, it must be borne in mind that the circumstances in which an application to adduce fresh evidence will be allowed are extremely limited. As stated in **Chung Tuck Kwai v PP** [1998] 2 SLR 693 , a liberal approach to such applications is contrary to the adversarial system as it is tantamount to ` ***allowing lacunae in the case of any party to be filled in by afterthoughts or reconstruction of any case after it has failed at trial*** `.

The fresh evidence that the appellant sought to adduce was that the cash cheque written by Clifford Tan had been deposited into the DBS account number 033-14571-3, and that the holder of that account was Don Wee. Alternatively, the appellant asked to be granted leave for the defence to call one Ms Jessie Yip, assistant branch manager of DBS Bank, Clementi branch, to give evidence that the cash cheque written by Clifford Tan had been deposited into the DBS account number 003-14571-3 and that the holder of that account was Wee Hian Thong, ie Don Wee.

Could the evidence that the appellant sought to adduce have been obtained with reasonable diligence for use at the trial?

The appellant`s position was that the evidence could not have been obtained with reasonable diligence for the trial below. Clifford Tan had given a photocopy of the cash cheque to ASP Chew. He subsequently went to Vietnam to work and could not be reached as a result. He returned only to give evidence at the trial. The appellant and Clifford Tan had also separated. Thus, the appellant was not able to obtain the original copy of the cheque. Due to banking secrecy, she could not check the matter with the bank as the account from which the cheque was issued belonged to Clifford Tan and not to her. The appellant simply assumed that, when the photocopy of the cheque was handed to the police, they would investigate the cheque and the account into which it was deposited, since this issue was important in the trial.

On the other hand, the prosecution submitted that the evidence could have been made available for the trial below. A photocopy of the cash cheque was shown to Don Wee in the course of his cross-examination by the defence. Don Wee was asked if he remembered being given the cheque. He was also asked if the figure `033-14571-3` written on the reverse side of the cheque was his DBS account number. Don Wee answered both questions in the negative. The prosecution suggested that Don Wee should have been asked by the defence if the handwriting on the reverse side of the cheque was his handwriting. Further, it was not sufficient for the defence to state that Clifford Tan had information that the cheque was deposited into Don Wee`s account. Clifford Tan had stated that he had made enquiries with the bank vis-Ã -vis the cheque and into whose account it had been deposited. However, everything that he allegedly heard from officers of the bank was hearsay. The prosecution contended that the defence should have stood down the matter to make the necessary confirmation with the prosecution or requested for further investigations. By seeking to adduce fresh evidence at the appellate stage, the appellant was effectively depriving Don Wee of any opportunity to explain any inconsistencies that might arise in his own evidence as a result of the new evidence.

In my opinion, the evidence that the appellant sought to adduce in the criminal motion could have been obtained with reasonable diligence for purposes of the trial. I agreed with the prosecution that the defence should have asked Don Wee if he had written the figures on the reverse side of the cheque. A handwriting expert could also have been called. If it was found that Don Wee had indeed written the figures, this would have supported the inference that the cheque was received and subsequently banked in by Don Wee.

Further, no good explanation was furnished by the defence as to why Jessie Yap was not called as a defence witness for the trial below. If she was allowed to give evidence at this stage, the prosecution would be allowed to cross-examine her. It would therefore be necessary for the appellate court to take such evidence or to order that such evidence be taken again by the trial court. This might be unjust as the trial judge`s recollection of the case would have been affected by the lapse of time. In addition, ordering a re-trial for the purposes of taking fresh evidence in this case would be tantamount to allowing the defence to take advantage of its own default (see **Fazal Din v PP** [1949] MLJ 123).

Finally, I did not think that the appellant`s assumption that ASP Chew would carry out investigations on whether or not the money had been returned to Don Wee was a legitimate assumption. The prosecution was under no obligation to negative any defence or explanation until it was raised by the appellant. The appellant had to raise sufficient evidence of her defence before it fell on the prosecution to disprove it beyond a reasonable doubt (see **R v Lobell** [1957] 1 QB 547). It was an essential part of the appellant`s defence that ***she had repaid Don Wee by way of a cash cheque*** .

On the other hand, the prosecution merely had to prove the that the appellant conspired with Don Wee to dishonestly misappropriate the sum in question. It was not essential for the prosecution to prove that the appellant did not return the money since the prosecution`s case was that the appellant`s acceptance of the money and her knowledge of B&B`s policy against lending money to employees were sufficient to establish the conspiracy and the appellant`s dishonesty. It was clearly open to the appellant`s lawyers to seek an adjournment during the trial for the purpose of obtaining more evidence to support a critical part of the appellant`s defence.

In view of my conclusions above, it was not necessary to examine whether the other two requirements of **Juma`at bin Samad v PP** [1993] 3 SLR 338 were satisfied. Accordingly, the appellant`s motion to adduce fresh evidence was not granted. For the sake of completeness, I will briefly analyse whether the exception in **Juma`at bin Samad v PP** [1993] 3 SLR 338 could have been invoked by the appellant in any event.

Will the rejection of fresh evidence in this case result in a miscarriage of justice?

The exception in ***Juma`at bin Samad v PP*** is invoked where a rejection of the fresh evidence would result in a miscarriage of justice. The exception applies even if the fresh evidence could have been made available at the trial. Nonetheless, it is a narrow exception and should only be invoked when the circumstances are extenuating. Such circumstances ` ***may include the fact that the offence is a serious one attracting grave consequences and the fact that the additional evidence sought to be adduced is highly cogent and pertinent and the strength of which renders the conviction unsafe*** ` (see **Chan Chun Yee v PP** [1998] 3 SLR 638 , 641).

If there was sufficient evidence that $2,000 had been deposited into Don Wee`s bank account, the outcome of the case might have been affected in several ways. First, such evidence would have supported the appellant`s statement that she had given a cheque for $2,000 to Don Wee. Secondly, there would have been stronger support for the appellant`s submission that she had treated the $2,000 as a loan and that she had intended to repay Don Wee. Thirdly, the trial judge might have formed a more positive view on the reliability of the testimony of the appellant and Clifford Tan, since the fresh evidence would have corroborated their testimony that the $2,000 had been returned to Don Wee. Accordingly, the evidence that the appellant sought to adduce would probably have strengthened her defence at the trial.

However, it remained my view that the interests of justice did not require such evidence to be adduced at this late stage. It was unclear whether the specific evidence that the appellant intended to adduce in this motion would sufficiently establish the fact that the cash cheque had been deposited into Don Wee`s account. In her submissions, the appellant stated that she intended to adduce the evidence contained in her affidavit and the affidavit of Clifford Tan, together with two letters from the bank that were referred to in Clifford Tan`s affidavit, in order to establish the fact that the cash cheque had been deposited into Don Wee`s account. Alternatively, the appellant stated that she intended to call Jessie Yap to give evidence to that effect.

I did not think that Clifford Tan`s affidavit evidence was reliable in view of its hearsay character. Paragraphs 10, 11 and 12 of his affidavit simply set out his version of what the bank officer, Jessie Yap, had told him as regards the cash cheque and into whose account it was deposited. As regards Jessie Yap, no good reason was furnished by the defence as to why she was not called as a witness. It would not be fair to give the defence another bite of the cherry at this late stage. The injustice and inconvenience of a retrial also militate against allowing Ms Yap to give evidence. Although it is unfortunate that the appellant should be disadvantaged by the poor judgment of her counsel, it would

be unwise to condone a practice whereby counsel`s mistakes in the lower courts can be remedied at the appellate stage of the proceedings.

Therefore, the exception in **Juma`at bin Samad v PP** [1993] 3 SLR 338 could not be invoked by the appellant. Accordingly, the criminal motion should be denied.

Conclusion

The trial judge erred in fact and law when he found that the elements of the charge against the appellant had been made out by the prosecution. In my opinion, the prosecution had failed to establish beyond a reasonable doubt a conspiracy between the appellant and Don Wee and a dishonest intention on the part of the appellant. Accordingly, I allowed the appeal against the conviction, and quashed the sentence of ten weeks` imprisonment.

Outcome:

Appeal against conviction allowed; sentence of ten weeks` imprisonment set aside.