

MALAYSIA
IN THE HIGH COURT OF SABAH AND SARAWAK
AT KOTA KINABALU
CRIMINAL APPEAL NO. BKI-42LB-7/7 OF 2019

5

BETWEEN

PUBLIC PROSECUTOR

... APPELLANT

AND

ADELINE CASIMIR YAPP

... RESPONDENT

10

GROUND OF DECISION

INTRODUCTION

[1] At the Session Court, there are two charges against the Respondent under s. 408 of the Penal Code. At the end of the Prosecution's case, the trial Judge discharged and acquitted the Respondent from the two charges without calling for her defence.

[2] Dissatisfied with the order, the Appellant now appeals to this Court on the 2nd Charge only. For the convenient of reference, the parties will be referred as they were in the Court below. The **2nd Charge** is as follows:

"Bahawa kamu pada 14hb September 2017, bertempat di FM Autohaus Sdn. Bhd., di dalam daerah Kota Kinabalu, di dalam Negeri Sabah, sebagai seorang pengurus yang diamanahkan atas sifatnya dengan harta syarikat iaitu wang tunai bayaran pelanggan berjumlah RM9452.40 telah melakukan pecah amanah jenayah iaitu menjadikan harta itu bagi kegunaan sendiri dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 408 Kanun Keseksaan".

THE LAW

[3] **Section 408 of the Penal Code** provides that:

“Criminal breach of trust by clerk or servant”

Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not less than one year and more than fourteen years and with whipping, and shall also be liable to fine.

[4] The ingredients under section 408 of the Penal Code can be referred to **Ratantlal & Dhirajlal’s Law of Crime. A Commentary on the Indian Penal Code, 1860, 27th Edition Abridged & Updated:**

“The ingredients of section 408 are:

- i. **the accused must be a clerk or servant;**
- ii. **he must have been entrusted with property, or dominion over property; and**
- iii. **he must have committed criminal breach of trust in respect of such property.**

PETITION OF APPEAL

[5] In his Petition of Appeal, the Appellant put forth the following grounds (verbatim):

- a. that the Learned Session Court Judge erred in law and in fact in discharging and acquitting the Respondent for the 2nd charge as sufficient evidence has been adduced to prove that the Respondent had committed the offence;

- b. that the Learned Session Court Judge erred in law and in fact when satisfied that the Appellant had failed to prove prima facie case against the Respondent for the 2nd charge;
- 5 c. that the Learned Session Court Judge erred in law and in fact when failing to consider the evidence of PW8 that he did gave RM11,027.20 the Respondent;
- 10 d. that the Learned Session Court Judge erred in law and in fact when failing to consider exhibit P4 that shows that the amount of RM11.027.20 that PW8 had given to the Respondent; and
- 15 e. that the Learned Session Court Judge erred in law and in fact when failing to consider that the Respondent had received RM11.027.20 the Respondent failed to hand over the money to the company.

WHETHER PRIMA FACIE CASE HAD BEEN ADDUCED?

20 [6] In order to establish a prima facie case, the prosecution must adduce credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction (**s.180 of the Criminal Procedure Code**).

25 [7] The test of prima facie case as pronounced in the case of ***PP v. Mohd. Radzi bin Abu Bakar* [2006] 1 CLJ 457** is as follows:

“... ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me?”

If the answer to that question is "Yes", then a prima facie case has been made out and the defence should be called. If the answer is "No" then, a prima facie case has not been made out and the accused should be acquitted".

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[8] I shall accordingly subject the evidence of the prosecution to the above test.

[9] The crux of the matter is whether the Prosecution had proof that
10 the accused **have committed criminal breach of trust in respect of such property in the sum of RM9452.40.**

[10] The Prosecution (Appellant) submit that the accused has been entrusted with the customer's monies when the Accused received from
15 PW 8. Moreover, P4 (1) and (2) clearly shows that the amount payable RM11,027.20 that the customer need to pay and P4 (9) the invoice show that Total RM11,000. However, the Accused has failed to hand over the full amount that the customer's paid to the Accused. The Accused only hand over the money for vehicle SAA8886W in the sum of RM1,547.60
20 and the balance RM9452.40 had been breached by the Accused.

[11] The Prosecution called PW 8 with regards to vehicle SAA8886W and rely to the following testimonies of PW 8 to support that the payment of RM11,027.20 was paid to the Accused:

25 **(lines 16-19 at page 161 of Record of Appeal)**

Q15 Adakah kamu masih ingat berapakah jumlah pembayaran bagi tujuan pembaikan SAA8886W tersebut?

A I cannot recall the exact amount tapi dalam amount RM11,000.00.

(lines 11-19 at page 162 of Record of Appeal)

Q18 Tadi kamu menyatakan kamu tidak ingat the exact amount yang kamu perlu dibuat pembayaran. Adakah kamu boleh sahkan jumlah tersebut adalah sepertimana dalam P4(2)?

5 A Jumlah P4(2) adalah benar.

Q19 Boleh kamu beritahu kepada Mahkamah berapakah jumlah yang tertera pada P4(2) itu?

A RM11,027.20.

10

Q20 Boleh kamu sahkan kepada Mahkamah kamu telah membuat pembayaran berjumlah RM11,027.20?

A Betul.

15 **(lines 1-7 at page 163 of Record of Appeal)**

Q21 Kepada siapakah kamu telah membuat pembayaran RM11,027.20?

A Kepada Adeline.

20 Q22 Bagaimanakah cara pembayaran yang telah kamu bayar kepada Adeline sebanyak RM11,027.20?

A Secara tunai.

[12] Referring to the above testimonies of PW 8, the learned Sessions
25 Court Judge in her grounds said that PW 8 was actually led to say that he had paid RM11,207.20 as stated in P4(2). PW 8 first said that he cannot actually remember the exact amount but he was shown P4(2) which is the service estimate and he was asked if he had paid the sum of RM11,027.20, he said yes.

[13] I am in agreement with the learned Sessions Court Judge that PW 8's testimony must be treated with caution. This is in view of the fact that he has sent vehicle SAA8886W for repairs to FM Autohaus Sdn. Bhd. many times.

5 **(lines 6-11 at page 165 of the Record of Appeal)**

Q1 Kamu boleh ingat berapa kali kamu pernah menghantar SAA8886W untuk repair di FM Auto Hous?

A Tidak.

10 Q2 Maknanya kamu pernah hantar banyak kali?

A Ya.

[14] PW 8 also cannot remember when he actually paid the sum RM11,027.20 to the Accused.

15 **(lines 18-20 at page 163 of the Record of Appeal)**

Q25 Adakah kamu masih ingat bilakah tarikh kamu membuat pembayaran kepada Adeline sebanyak RM11,027.20?

A Tidak ingat.

20 [15] Further, PW 8's testimony also contradicted the other witnesses' evidence on service estimate and Tax Invoice. As stated by PW 9 (another customer in relation to the 1st charge for vehicle no. JMW 4883), you would only pay after you receive the Tax Invoice. The tax invoice will state the actual work that has been done on the car as per

25 PW11's evidence.

[16] So if PW 8 make any payment to the Accused, he would have received a Tax Invoice first which would show the actual repair and work done on his car. And only after receiving the Tax Invoice would he pay the company. He will not pay the amount of RM11,000.00 first.

5

[17] Why would PW 8 pay the sum of RM11,027.20 when the Tax Invoice (which was supposed to be the final bill as confirmed by other witnesses) only stated the sum RM1,547.60 [Exhibit P4 (3)]?

10 [18] And PW 8 himself had admitted that he received this Tax Invoice. Why didn't he asked the Accused to why should he pay the sum of RM11,027.20 when the final bill is only RM1,547.60? No explanation at all was offered by the witness to clarify this contradiction. Surely he would not have paid the sum of RM11,027.20 when the final bill is only
15 RM1,547.60.

[19] There was no evidence to conclusively confirm that the amount of repair done on SAA8886W amounted to RM11,027.60 and the Job Card was not produced in Court.

20

[20] It is important to prove how much was actually payable to the Company in respect of SAA8886V. If it is the prosecution's case that the sum of RM11,027.20 was payable to the company, then the prosecution must prove that the amount of repair done on SAA8886W was indeed
25 RM11,027.20. It must be remembered that the charge stated the money purportedly taken by the Respondent as "harta syarikat". So the prosecution must prove that the money belonged to FM Autohaus Sdn. Bhd.. The prosecution must prove that the amount of repair done on SAA8886V was indeed RM11,027.20.

[21] Clearly, there is a material gap in the Prosecution's case. It has been confirmed by many of the prosecution's own witnesses that the Job Card and the technician report would conclusively confirm what kind or work was done on the said vehicle and what kind of parts were
5 installed in the car.

[22] The CEO of FM Autohaus Sdn. Bhd., PW 11 had confirmed that a service estimate is not a final bill.

(lines 1-8 at page 231 of Record of Appeal)

10 Q13 Setuju kalau saya katakan tax invoice/final invoice ini hendaklah berdasarkan work done yang telah dibuat ke atas kereta tersebut?

A Setuju.

15 Q14 Maknanya jumlah di dalam tax invoice tidak semestinya sama dengan jumlah di dalam service estimate, setuju?

A Setuju.

[23] PW11 had also confirmed that P4(1) and (2) are the service
20 estimate for SAA886W.

(lines 1-4 at page 204 of Record of Appeal)

Q41 Saya tunjukkan kamu kepada P4(1) dan (2). Dokumen service estimate ini adalah dokumen apa?

A Ini adalah dokumen service estimate yang telah dikeluarkan
25 untuk kereta BMW E60 SAA8886W.

[24] To this the learned Sessions Court Judge had rightly stated in her grounds that Job card and technician report would conclusively confirmed what kind or work was done on the said vehicle and what parts were install in the car to determine the final bill invoice that was paid by PW 8. To this she referred to the testimonies of PW 11:

(lines 6-9 at page 229 of Record of Appeal)

Q5 Bila sesuatu kereta dihantar ke FM Auto Haus untuk dibaikpulihan, satu job card akan dikeluarkan untuk kereta tersebut, setuju?

10 A Ya, betul.

(lines 18-22 at page 229 of Record of Appeal)

Q8 Setelah pembaikanpulihan/repair telah dibuat ke atas sesuatu kereta maka technician yang membuat repair tersebut hendaklah mengisi job card tentang kerja pembaikanpulihan yang telah dibuat ataupun work done, setuju?

15

A Setuju.

(lines 8-12 at page 230 of Record of Appeal)

Q10 Dan jikalau technician tersebut memasukkan parts ke dalam kereta yang dibaiki maka technician tersebut hendaklah memcatatkan sedemikian sebagai work done didalam job card?

20

A Ya

(lines 20-22 at page 230 of Record of Appeal)

Q12 Tetapi apa yang technician repair atau masukkan parts ke dalam kereta contohnya hendaklah dicatit di dalam job card?

25

A Setuju.

(lines 18-22 at page 231 of Record of Appeal)

5 Q17 Untuk megesahkan apakah repair yang telah dibuat dan
apakah parts yang telah dimasukkan ke dalam kereta,
dokumen yang terbaik untuk mendapatkan maklumat ini
adalah job card, setuju?

A Setuju.

[25] Therefore, the Job Card and the technician report is crucial as it
would have confirmed what kind of work was done and therefore how
10 much is truly payable to the Company FM Autohaus Sdn. Bhd.
The amount of RM11,027.20 in P4(2) as the document shows is only
service estimate for SAA8886W.

[26] As the Prosecution failed to adduce the Job Card and the
15 Technician Report for vehicle SAA8886W, the learned Sessions Court
Judge was right in invoking adverse inference under Section 114(g) of
the Evidence Act against the prosecution for failing to produce these two
documents.

20 [27] The burden is always on the prosecution to prove its case beyond
reasonable doubt. As stated above, there are doubts in this case as to
the sum of money stated in the 2nd charge is given to the Accused and
also whether the money belonged to the Company. There is no
evidence which can conclusively confirmed both facts.

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[28] At the end of the prosecution case, if a prima facie had been made out and the Accused wishes to remain silent, then the evidence must be enough for the court to convict the Accused. That means after the prosecution case, there shouldn't be any doubts in the prosecution case.

5 If there are doubts, then the Accused must be acquitted.

CONCLUSION

[29] For the above reasons, the order of discharged and acquitted by the learned Sessions Court Judge for the 2nd charge is affirmed. The
10 appeal is therefore dismissed.

-sgd-

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AMELATI PARNELL

Judicial Commissioner

High Court Kota Kinabalu

Sabah

20 Date of Delivering of Ruling: 26th April 2021

25	For the Appellant:	Mr. Rustam Bin Sanip Deputy Public Prosecutor Jabatan Peguam Negara, Negeri Sabah Kota Kinabalu, Sabah
30	For the Respondent:	Mr. Rizwandeane Bukhary Bin M Borhan Messrs. Yusri & Rizwan Sabah