[BKI-42LB -7/7 of 2019 ]   
(Public Prosecutor v. Adeline Casimir Yapp )   
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 MALAYSIA   
IN THE HIGH COURT OF SABAH AND SARAWAK   
AT KOTA KINABALU   
CRIMINAL APPEAL NO. BKI -42LB -7/7 OF 2019   
BETWEEN 5   
PUBLIC PROSECUTOR … APPELLANT   
AND   
 ADELINE CASIMIR YAPP … RESPOND ENT   
   
GROUNDS OF DECISION 10   
   
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 15   
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 w ere in the Court below. The 2nd Charge is as 20   
follows:   
“Bahawa kamu pada 14hb September 2017, bertempat di   
FM Autohaus Sdn. Bhd ., di d alam daerah Kota Kinabalu, di dalam   
Negeri Sabah, sebagai seorang pengurus yang diamanahkan atas   
sifatnya dengan harta syarikat iaitu wang tunai bayaran pelanggan 25   
berjumlah RM9452.40 telah melakukan pecah amanah jenayah   
iaitu menjadikan harta itu bagi kegunaan sendiri dengan itu k amu   
telah melakukan satu kesalahan yang boleh dihukum d i bawah   
Seksyen 408 Kanun Kese ksaan” .

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 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 5   
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. 10   
   
[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: 15   
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 tr ust in   
respect of such property . 20   
   
PETITION OF APPEAL   
[5] In his Petition of Appea l, the Appellant put forth the following   
grounds (verbatim) :   
a. that the Learned Session Court Judge erred in law and in 25   
fact in discharging and acquitting the Respondent for the   
2nd charge as sufficient evidence has been adduced to prove   
that the Respo ndent had committed the offence;

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 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 Respon dent for the 2nd charge;   
   
c. that the Learned Session Court Judge erred in law and in 5   
fact when failing to consider the evidence of PW8 that he did   
gave RM11,027.20 the Respondent;   
   
d. that the Learned Session Court Judge erred in law and in   
fact when failing to consider exhibit P4 that shows that the 10   
amount of RM11.027.20 that PW8 had given to the   
Respondent; and   
   
e. that the Learned Session Court Judge erred in law and in   
fact when failing to consider that the Respondent had 15   
received RM11.027.20 the Respondent failed to hand over   
the money to the company .   
   
WHETHER PRIMA FACIE CASE HAD BEEN ADDUCED?   
[6] In order to establish a prima facie case, the prosecution 20   
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 ).   
   
[7] The test of prima facie case as pronounced in the case of 25   
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?

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 If the answer to that question is "Yes", then a pr ima 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” .   
 5   
[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   
the accused have committed criminal breach of trust in respect of 10   
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 receiv ed from   
PW 8. Moreover, P4 (1) and (2) clearly shows that the amount payable 15   
RM11,027.20 that the cu stomer 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   
and the balance RM9452.40 had been breached by the Accu sed. 20   
   
[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 A ccused :   
(lines 16-19 at page 161 of Record of Appeal) 25   
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.

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 (lines 11-19 at page 162 of Record of Appeal)   
Q18 Tadi kamu menyatakan kamu tidak ingat the exect amount   
yang kamu perlu dibuat pembayaran. Adakah kamu boleh   
sahkan jumlah tersebut adalah sepertimana dal am P4(2)?   
A Jumlah P4(2) adalah benar. 5   
   
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.   
   
(lines 1-7 at page 163 of Record of Appeal) 15   
Q21 Kepada siapakah kamu telah membuat pembayaran   
RM11,027.20?   
A Kepada Adeline .   
   
Q22 Bagaimanakah cara pembayaran yang telah kamu b ayar 20   
kepada Adeline sebany ak RM11,027.20?   
A Secara tunai.   
   
[12] Referring to the above testimonies of PW 8, the learned Sessions   
Court Judge in her grounds said that PW 8 was actually led to say that 25   
he had paid RM 11,207.20 as stated in P 4(2). PW 8 first said that he   
cannot actually remember the exact amount but he was shown P 4(2)   
which is the service estimate and he was asked if he had paid the sum   
of RM11,027.20, he said yes.

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 [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 rep airs to FM Autohaus Sdn. Bhd.   
many times .   
(lines 6-11 at page 165 of the Record of Appeal) 5   
Q1 Kamu boleh ingat berapa kali kamu pernah menghantar   
SAA8886W untuk repair di FM Auto Hous?   
A Tidak.   
   
Q2 Maknanya kamu pernah hantar banyak kali? 10   
A Ya.   
   
[14] PW 8 also cannot remember when he actually paid the sum   
RM11,027.20 to the Accused.   
(lines 18 -20 at page 163 of the Record of Appeal) 15   
Q25 Adakah kamu masih ingat bilakah tarikh kamu membuat   
pembayaran kepada Adeline sebanyak RM11,027.20?   
A Tidak ingat.   
   
[15] Further, PW 8’s testimony also contradicted the other witnesses’ 20   
evidence on service estimate and Tax Invoice. As stated by PW 9   
(anot her 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   
PW11’s evidence. 25

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 [16] So if PW 8 make any payme nt 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 P 4 (3)] ?   
   
[18] And PW 8 himself had admitted that he received this Tax Invoice. 10   
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   
RM1,547.60. 15   
   
[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   
RM11,027.20. It must be remembered that the charge stated the money 25   
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.

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 [21] Clearly , there is a material gap in the Prosecution’s case. I t 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 vehic le and what kind of parts were   
installed in the car. 5   
   
[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)   
Q13 Setuju kalau saya katakan tax invoice/final invoi ce ini 10   
hend aklah berdasarkan work done yang telah dibuat ke atas   
kereta tersebut?   
A Setuju.   
   
Q14 Maknanya jumlah di dalam tax invoice tidak semestinya 15   
sama dengan jumlah di dalam service estimate, setuju?   
A Setuju.   
   
[23] PW11 had also confirmed that P 4(1) and (2) are the service   
estimate for SAA886W. 20   
(lines 1-4 at page 204 of Record of Appeal)   
Q41 Saya tunjukan kamu kepada P4(1) dan (2). Dokumen   
service estimate ini adalah dokumen apa?   
A Ini adalah dokumen service estimate yang telah dikeluarkan   
untuk kereta BMW E60 SAA8886W . 25

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 [24] To this t he learned Sessions Court Judge had rightly stated in he r   
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: 5   
(lines 6-9 at page 229 of Record of Appeal)   
Q5 Bila se suatu kereta dihantar ke FM Auto Haus untuk   
dibaikpulih, satu job card akan dikeluarkan untuk kereta   
tersebut, setuju?   
A Ya, betul. 10   
   
(lines 18 -22 at page 229 of Record of Appeal)   
Q8 Setelah pembaikanpulih/repair telah dibuat ke atas sesuatu   
kereta maka technician yang membuat repair tersebut   
hendaklah mengisi job card tentang kerja pembaikanp ulih 15   
yang telah dibuat ataupun work done, setuju?   
A Setuju.   
   
(lines 8 -12 at page 230 of Record of Appeal)   
Q10 Dan jikalau technician tersebut memasukkan parts ke dalam 20   
kereta ya ng dibaiki maka technician tersebut hend aklah   
memcatatkan sedemikian seb agai work done didalam job   
card?   
A Ya   
(lines 20 -22 at page 230 of Record of Appeal) 25   
Q12 Tetapi apa yang technician repair atau masukkan parts ke   
dalam kereta contohnya hendaklah dicatit di dalam job card?   
A Setuju.

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 (lines 18 -22 at page 231 of Record of Appeal)   
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? 5   
A Setuju.   
   
[25] Therefore, t he Job Card and the t echnician repo rt is crucial as it   
would have confirmed what kind of work was done and therefore how   
much is truly payable to the Company FM Autohaus Sdn. Bhd. 10   
The amount of RM11,027.20 in P4(2) as the document shows is only   
service estimate for SAA8886W .   
   
[26] As the P rosecut ion failed to adduce the Job Card and the   
Technician Report for vehicle SAA8886W, the learned Sessions Court 15   
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.   
   
[27] The burden is always on the prosecution to prove its case beyond 20   
reasonable doubt. As stated above, t here 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.   
 25

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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.   
If there are doubts, then the Accused must be acquitted. 5   
   
CONCLUSION   
[29] For the above reasons, t he order of discharged and acquitted by   
the learned Sessions Court Judge for the 2nd charge is affirmed. The   
appeal is therefore dismissed. 10   
   
   
   
-sgd-   
AMELATI PARNELL 15   
Judicial Commissioner   
High Court Kota Kinabalu   
Sabah   
   
Date of Delivering of Ruling: 26rd April 2021 20   
   
   
   
For the Appellant: Mr. Rustam Bin Sanip   
 Deputy Public Prosecutor 25   
 Jabatan Peguam Negara, Negeri Sabah   
 Kota Kinabalu, Sabah   
For the Respondent: Mr. Rizwandean Bukhary Bin M Borhan   
Messrs. Yusri & Rizwan   
 Sabah 30