Pittis Stavros *v* Public Prosecutor
[2015] SGHC 67

Case Number : Magistrate's Appeal No 82 of 2014

Decision Date : 13 March 2015

Tribunal/Court : High Court

Coram : See Kee Oon JC

Counsel Name(s) : Shashi Nathan, Tania Chin and Jeremy Pereira (KhattarWong LLP) for the appellant; Sanjiv Vaswani (Attorney-General's Chambers) for the respondent.

Parties : Pittis Stavros — Public Prosecutor

13 March 2015 Judgment reserved.

See Kee Oon JC:

1 This appeal concerns what may, for convenience, be called a "buy-back" or "short-supply" arrangement in the context of the supply of marine fuel oil ("MFO") to sea-going vessels. The appellant was the chief engineer of a vessel called the MV Sakura Princess ("the Vessel"). On 10 January 2013, a bunker barge was deployed to supply the Vessel with 500 metric tonnes ("MT") of MFO. The appellant faced a single charge arising out of this "buy-back" or "short-supply" arrangement. This charge was for the offence of criminal breach of trust ("CBT") by clerk or servant under s 408 of the Penal Code (Cap 224, 2008 Rev Ed), and it reads as follows:

> You, [the appellant], are charged that you, on 10 January 2013, in Singapore, being a servant of V8 Pool Inc., to wit, the Chief Engineer of MV Sakura Princess, a marine vessel chartered by V8 Pool Inc., and in such capacity being entrusted with dominion over property belonging to V8 Pool Inc., namely Marine Fuel Oil, did dishonestly misappropriate about 200 metric tonnes of Marine Fuel Oil by engaging in a buy-back scheme, and in so doing you did commit criminal breach of trust in respect of such property, and as such you have thereby committed an offence punishable under Section 408 of the Penal Code, Chapter 224.

2 The appellant claimed trial to this charge. The prosecution's case was that the appellant initiated an arrangement in which the Vessel would be supplied with only 300 MT of MFO. The remaining 200 MT would be kept by the supplier of the MFO, and documents and records would be doctored to cover up the shortfall in MFO supplied. Thus the supplier would be paid for having supplied 500 MT despite having supplied something significantly less than that, and the appellant would receive a sum of money from the supplier for his role in this scheme.

3 Following the trial, the District Judge convicted him on the charge and sentenced him to 18 months' imprisonment. The District Judge's grounds of decision are published as *Public Prosecutor v Pittis Stavros* [2014] SGDC 371 ("the GD"). The appellant has appealed against both conviction and sentence.

Undisputed facts

4 I shall set out first the facts which do not appear to be in dispute. The Vessel is a large cargo ship owned by Universal Reserve SA. The operators of the Vessel – also known as the technical managers – were Tsakos Columbia Shipmanagement SA ("Tsakos"). As operators, Tsakos provided the

Vessel with its officers and crew, including the chief engineer: hence the appellant was an employee of Tsakos. At the material time, the Vessel was chartered by V8 Pool Inc ("V8 Pool") under a time charter.

5 On 8 January 2013, the Vessel entered Singapore waters after a journey of almost a month that commenced on 12 December 2012 from the port of Nikiski in Alaska. The long voyage had depleted the Vessel's fuel reserves and so the charterers, V8 Pool, made arrangements for the Vessel to be supplied with 1,800 MT of MFO. The supplier of MFO was to be a company called Costank Singapore Pte Ltd ("Costank").

6 On 10 January 2013, the Vessel entered the port for bunkering, *ie*, refuelling. The plan was to supply the Vessel with 500 MT of MFO that afternoon, with the remaining 1,300 MT to be supplied later. In order to deliver the MFO to the Vessel, Costank chartered a bunker barge called the "Coastal Saturn" – which I shall refer to as "the Barge" – from Heng Tong Fuels and Shipping Pte Ltd ("Heng Tong").

7 In the early afternoon of 10 January 2013, one Seah Seng Chuan ("Seah") went on board the Vessel. Seah was the bunker surveyor and his role was to check the amount of MFO on board the Vessel and the Barge before and after the bunkering process, so as to ascertain that the correct amount of MFO had been transferred between the two. He would check the amount of MFO in the various fuel tanks on board the two vessels by dropping a sounding tape into each tank to measure the height of the empty space, *ie*, the space not filled by MFO, in that tank. Each vessel would have its own unique calibration table that would tell him how to calculate the volume of MFO from this measurement. With the volume of MFO having been derived, Seah would be able to calculate the weight of the MFO in MT. The measurement taken before the commencement of the bunkering process is called the "opening sounding", and the one taken after its conclusion is the "closing sounding".

8 I should mention at this juncture that this method of using a sounding tape is not the only way in which the amount of fuel in the fuel tanks may be ascertained. The appellant explained that in his office on board the Vessel, there are computers that provide a reading of the amount of MFO in the Vessel's fuel tanks. He said that he would check the sounding measurements and the computer readings against each other.

9 Sometime between 1.00pm and 2.00pm, the Barge came up alongside the Vessel. In the Barge was one Tan Shin Yam Tommy ("Tommy") who was employed by Heng Tong as a bunker clerk. His job was to take care of the documentation involved in the bunkering process. Tommy went over from the Barge to the Vessel, where he met the appellant and Seah. They spoke, and Seah then left the appellant and Tommy to carry out his opening sounding measurements on the seven fuel tanks within the Vessel.

10 At some point before Seah went to do his opening sounding measurements on the Vessel, the appellant had given him a document, marked as exhibit P17 in the court below. This document was a bunker survey report signed by the appellant, and it contained a table showing the amounts of MFO in each of the seven fuel tanks on the Vessel. Such bunker survey reports were prepared by the appellant on a daily basis for transmission to the Vessel's charterers so that they would be able to keep track of the fuel levels on board. P17 was the bunker survey report for that day, 10 January 2013, and according to the time stated thereon it had been prepared at 1.00pm. The report stated that there was a total of just under 146 MT of MFO in all of the Vessel's fuel tanks. After Seah had taken his measurements and done his calculations, he wrote in his own report that there was a total of about 143 MT of MFO in the Vessel's fuel tanks. Thus his numbers roughly tallied with those in P17.

11 Subsequently, Seah went over with Tommy to the Barge to carry out the opening sounding measurements on the tanks on board the Barge. The appellant remained on board the Vessel. Tommy had written in his report that there was about 786 MT of MFO on board the Barge; having taken his measurements, Seah then wrote in his own report that there was about 777 MT of MFO on board the Barge. Thus these figures also roughly tallied.

12 The actual bunkering commenced around 3.00pm and ceased sometime before 5.00pm. At some point, one Wu Yi Peng ("Wu") came on board the Vessel from a small boat having taken that boat from shore. Wu was employed as a "checker" by Heng Tong; he testified that his job was to take measurements of MFO on board Heng Tong's vessels. Wu's involvement in these events will be elaborated on later.

13 On completion of the bunkering process, Seah did his rounds taking the closing sounding measurements on board the Vessel and the Barge. He wrote in his report that the Vessel had 495 MT more MFO than it did at the beginning. As for the amount of MFO on board the Barge, Seah wrote that the Barge had about 283 MT left; Tommy's figure in his own report was 285 MT. Comparing these numbers with the pre-bunkering figures, between 494 and 500 MT of MFO had been transferred out of the Barge. Hence all the documents showed that close to 500 MT of MFO had been transferred from the Barge to the Vessel – exactly as had been arranged.

14 In a sudden turn of events, officers from the Maritime Port Authority and the Corrupt Practices Investigation Bureau ("CPIB") came on board the Vessel and took a number of its occupants into custody, including the appellant, Seah, Tommy and Wu. As it turned out, the authorities were not satisfied that the Barge had in fact supplied the Vessel with approximately 500 MT of MFO.

The competing versions of events

Prosecution's case

15 At the trial below, Seah, Tommy and Wu all testified for the prosecution. The common story put forward by Seah and Tommy was that the Barge had supplied the Vessel with 300 MT of MFO rather than 500 MT. They said that they had "doctored" the documentation and adjusted the figures therein to create the impression that 500 MT had been supplied.

16 Seah and Tommy both implicated the appellant. They pointed to him as the one who had initiated the short supply of MFO by telling Seah "I want business", and asking Tommy "Do you make business [*sic*]", or something along those lines. Seah testified that the amount of MFO stated on P17, the bunker survey report which the appellant had given him before the opening sounding measurements were made, was significantly less than the true amount of MFO in the Vessel's fuel tanks. P17 recorded that there was about 146 MT of MFO on board, but Seah said that when he did his measurements, the actual figure he obtained exceeded that number by more than 170 MT. He added that he wrote down the actual measurements on a piece of rough paper but subsequently threw that piece of paper away.

17 Seah further said that upon completion of the bunkering process, the appellant gave him another document, which was marked as exhibit P11 in the court below. P11 was ostensibly also a bunker survey report, and it resembled P17 in many respects, *eg*, it contained a table setting out the amounts of fuel in each of the Vessel's seven fuel tanks. The total amount of fuel in all the tanks as recorded in P11 was 630 MT. But whereas P17 was dated 10 January 2013 and stated to have been prepared while the Vessel was in Singapore, P11 was dated 12 December 2012 and stated to have been prepared while the Vessel was in Nikiski. Also, P11 was not signed by the appellant. Seah

testified that P11 was given to him to facilitate his adjustment of the closing sounding measurements. That is, he was to ensure that those measurements produced a number that was close to the 630 MT stated in P11. Seah said that P11 was subsequently seized from him by the CPIB.

18 Seah testified that it was eventually agreed that the appellant would receive US$130 per MT of short-supplied MFO – Tommy put the agreed sum at US$130 or US$140 per MT – meaning that the appellant would receive a total of US$26,000 for his part in the scheme. Seah also said that he himself was to receive US$60 per MT for a total of US$12,000.

19 Thereafter, while Seah and Tommy were on board the Barge, Tommy spoke on the phone to a man working for Costank known as Ryan Lim Tion Choon ("Ryan") and apprised him of the short-supply and buy-back arrangement that had just been agreed. The purpose of this call was to seek Ryan's approval to the arrangement because Ryan would ultimately be providing the money that was to be paid to the appellant and the other participants in the scheme. On the prosecution's case, Wu was the person tasked to deliver the money, and that was how he came to be present on board. In Wu's statement to the CPIB – which the prosecution relied on having impeached Wu's credit on the stand – he said that he was carrying US$40,000 in cash.

Defence's case

20 The appellant testified that, as far as he knew, the Vessel had indeed been supplied with 500 MT of MFO. He denied that he had given Seah false information in P17, insisting that, as stated in P17, there had been only 146 MT of MFO in the Vessel's fuel tanks prior to the commencement of the bunkering – contrary to Seah's account that the actual amount of MFO at this time was around 320 MT. The appellant explained that he could not have been mistaken because he had had to calculate the amount of MFO every day.

21 The appellant also denied having given P11 to Seah upon completion of the bunkering process so that Seah would adjust his closing figures according to the document. He maintained that P11 had not actually been seized from Seah and that it must have been seized from him instead. He initially testified that P11 was a record of the amount of MFO in the Vessel's fuel tanks as at 12 December 2012 while the Vessel was in Nikiski. But he was subsequently shown another bunker survey report, also dated 12 December 2012 and stated to have been prepared in Nikiski. Unlike P11, this report had been signed by him; he acknowledged that the figure of 1,386 MT in this report accurately recorded the amount of MFO actually in the Vessel's fuel tanks at that point. He then gave a different explanation for P11, saying that the numbers therein were his calculations as to how much MFO would remain in the fuel tanks after 15 days of travelling. He said that P11 had been prepared for the Vessel's captain and himself and for no one else, and that the purpose of preparing it was to confirm that the Vessel had enough MFO to last it for the entire voyage.

22 The appellant flatly rejected any notion that he had agreed to receive US$130 per MT or any sum in return for his alleged participation in the buy-back and short-supply scheme. He said that if Seah and Tommy had indeed colluded to supply 200 MT less of MFO to the Vessel than should have been supplied, he had not been a part of the scheme at all.

The law

23 The offence for which the appellant was charged is defined in s 408 of the Penal Code and it may be called CBT by clerk or servant. It is an aggravated form of CBT, which is defined in s 405, and accordingly carries harsher punishments – the maximum term of imprisonment for CBT is 7 years, as provided for in s 406, but for CBT by clerk or servant it is 15 years. CBT itself may be considered to

be an aggravated form of the offence of dishonest misappropriation of property defined in s 403. For convenience I shall set out the relevant parts of these provisions:

> ***Criminal misappropriation of property***
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> **Dishonest misappropriation of property**
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> **403**. Whoever dishonestly misappropriates or converts to his own use movable property, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.
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> …
>
> **Criminal breach of trust**
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> **405**. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, …, commits "criminal breach of trust".
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> ...
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> **Punishment of criminal breach of trust**
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> **406**. Whoever commits criminal breach of trust shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with both.
>
> …
>
> **Criminal breach of trust by clerk or servant**
>
> **408**. 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 may extend to 15 years, and shall also be liable to fine.

24 Among the contentions advanced by the appellant was that, even if the District Judge's findings of fact are upheld entirely, the legal requirements for the offence under s 408 of the Penal Code are not met. I turn now to summarise the arguments that the appellant made before me.

The appellant's contentions

25 First, the appellant continues to deny having been part of a buy-back or short-supply arrangement whereby the Vessel would receive 200 MT less MFO than it was supposed to. He argues that the District Judge did not give sufficient weight to various inconsistencies and contradictions in the evidence of the prosecution witnesses, in particular Seah and Tommy. He contends that the District Judge wrongly ascribed reliability to Seah's and Tommy's testimonies just because they were self-incriminating, and did not adequately consider the possibility that they might have motives to implicate him falsely. He also says that the District Judge erred in finding that his explanation of a key document, P11, was a lie.

26 In addition to this, the appellant has two fall-back arguments. First, he was at no point entrusted with dominion over the 200 MT of MFO that had allegedly been misappropriated. That 200 MT of MFO never actually came on board the Vessel and remained at all times on the Barge,

meaning that it was the crew of the Barge and not the Vessel who exercised physical control over it. Moreover, he could not possibly have had dominion over the MFO since it did not even belong to V8 Pool throughout the bunkering process – title to the MFO would pass only when V8 Pool made payment, and V8 Pool had not made payment at the time. Should I accept this argument but not the appellant's other arguments, his conviction under s 408 of the Penal Code must be set aside, but he may still be liable to a conviction under s 403 for dishonest misappropriation of property.

27 The appellant's other fall-back argument is that, even if he had been entrusted dominion over the 200 MT of MFO by V8 Pool, he was at no point a "clerk or servant" of V8 Pool. Therefore an element of s 408 of the Penal Code is not met and he cannot be convicted of CBT by clerk or servant. If this argument is the only one that is accepted, he remains liable to be convicted of CBT *simpliciter* under s 405 which is an offence punishable under s 406.

Whether the appellant participated in a buy-back or short-supply scheme

28 It is not disputed that there is no documentary proof that there was a short supply of 200 MT of MFO to the Vessel on 10 January 2013. According to the documents in evidence, close to 500 MT was supplied. The only evidence that there is more – or less – than meets the eye is the testimony of Seah and Tommy to that effect. The allegation of a short supply hinges entirely on their oral evidence, and hence it is of the highest importance to assess their credibility and the reliability of their accounts.

29 The appellant argues that Seah and Tommy's evidence is unreliable because it is replete with inconsistencies and contradictions, and because it conflicts in material aspects with the oral evidence of their fellow prosecution witness, Wu. The problematic parts of their evidence are as follows:

(a) Seah testified that only he and Tommy were present on the Barge when they spoke to Ryan on the phone about the alleged buy-back arrangement and how much each participant should be paid, but Tommy testified that the appellant was also present at this discussion.

(b) Seah testified that he, the appellant and Tommy would all be paid for their part in the scheme, in the amounts of US$60, US$130 and US$30 per MT respectively, but Tommy testified that only Seah and the appellant would be paid, with the former receiving US$70 per MT and the latter something between US$130 and US$140 per MT.

(c) Seah testified that the agreement reached was that a total of US$44,000 would be paid to all the people involved in the scheme, but Tommy said that it was US$40,000, and this might be contrasted with Wu's evidence on the stand – he initially said that he brought only US$30,000 on board the Vessel but later testified that it was "not more than US$40,000".

(d) Tommy testified that the money to be paid to the scheme's participants came from Ryan, but Wu testified that it was partly his own money and partly money that had been obtained from embezzling the wages of crew from a company related to Heng Tong.

(e) Tommy testified that Wu passed him the money in two bundles of US currency notes, but Wu said in his statement to the CPIB that the money was bundled into four stacks.

(f) Tommy testified that prior to the events in this case he had never accepted any offers to participate in buy-back or short-supply schemes, but he later testified that he had doctored figures and received monetary gratification pursuant to other such schemes.

30 Most of these inconsistencies were brought to the attention of the District Judge and were expressly noted in his GD. Ultimately the District Judge thought that these discrepancies were minor and not particularly significant (see the GD at [47]–[50] and [89]–[95]). The "most significant fact", according to him, was that "both Tommy and Seah had given clearly incriminating evidence against themselves knowing full well that their admission would expose them to being prosecuted in court" (at [51]).

31 In my judgment, the approach of the District Judge cannot be faulted. He was entirely correct not to place too much emphasis on the minute details of the evidence and instead to consider the broad possibilities and the likelihood of each possibility being true. It appears that there are three broad and distinct possibilities: (i) there was in fact no short supply of fuel, (ii) there was a short supply but the appellant was not aware of it, and (iii) there was a short supply and the appellant was aware of it. Like the District Judge, I am of the view that the first possibility is not at all likely. It must be remembered that there was no documentary evidence of any short supply; if there had indeed been no short supply, I agree that it would have been "befuddling and wholly senseless" (see the GD at [46]) for Seah and Tommy to assert otherwise against their own interests.

32 The appellant then suggests that Seah and/or Tommy might have short-supplied other ships earlier in the day on 10 January 2013, or perhaps in the few days before that, and that they might have decided to implicate the appellant to direct attention away from their other misdeeds. But if indeed Seah and/or Tommy had feared that their past wrongdoing would soon come to light, it is difficult to understand how it would mitigate matters to drag the appellant in. The hypothesis must be that Seah and/or Tommy sought to escape sanction for their earlier misdeeds by giving the authorities a bigger fish to fry, so to speak, in the shape of the appellant. However, the general consistency between the accounts of Seah and Tommy makes this highly implausible – given that the authorities took them into custody on board the Vessel, it is hardly probable that they would have had time to agree on a common fictitious story.

33 As for the second possibility, which is that Seah and Tommy conspired without the appellant's knowledge to supply only 300 MT of MFO to the Vessel, the District Judge gave this short shrift (at [36]–[38] of the GD). In my view the District Judge's reasoning on this point is beyond reproach and I too would reject that possibility. Therefore the most likely possibility is that there was indeed a short supply and that the appellant was aware of it.

34 The conclusion is buttressed by the appellant's own performance on the stand, which did not show him to be a credible witness. The District Judge thought that the appellant's explanations for the document P11 were wholly unconvincing (at [61]–[69] of the GD). I agree with his reasoning. As the District Judge rightly noted, the appellant furnished one explanation for it in evidence-in-chief before changing his tune completely when shown another document in cross-examination, and the explanation that he eventually settled on does not make much sense for the reasons given by the District Judge.

35 Finally, there was the fact that when surveyors commissioned by the port authorities measured the amount of MFO in the various fuel tanks of the Vessel in the evening of 10 January 2013, their measurements were strikingly similar to the numbers in P11, as shown in the GD at [57]. It is thus a strong inference that, upon the completion of the bunkering process, the MFO in the Vessel was distributed among the Vessel's seven fuel tanks so that the final amounts in each tank would roughly follow the figures in P11. This yields some insight into the nature of P11 and what sort of document it is. It is likely that Seah was truthful in testifying that the numbers in P11 represented the amounts of MFO in each fuel tank that were to be achieved in order to avert any suspicion of short supply; in contrast, it is unlikely that P11 contained the appellant's calculations as to how much MFO would be

left in the tanks after 15 days of travelling, as he claimed.

36 Before me, the defence mounted an attack on the measurements of the surveyors, saying that the surveyors' report containing those measurements had been put into evidence without the maker of the report having been called. But I do not see where the defence could be going with this because it was the defence which had sought admission of the surveyors' report in the first place – it was marked as defence exhibit D3. Absent any cogent evidence that the surveyors' measurements were somehow erroneous, I can see no basis to impugn them at this stage.

37 For these reasons, I am satisfied that there is no warrant for me to disturb the District Judge's finding that there had been a short-supply scheme and that the appellant had participated in it. Accordingly I affirm his holding that the appellant had dishonestly misappropriated 200 MT of MFO.

Whether the appellant was entrusted with dominion over the MFO

38 The appellant's next argument is that he had not been entrusted with dominion over the misappropriated 200 MT of MFO at any time. It is not controverted that this 200 MT of MFO remained at all times on the Barge. The appellant's point is that as chief engineer of the Vessel, his dominion was, at best, over the Vessel and its contents and not the Barge. Hence, anything on the Barge, including the misappropriated 200 MT of MFO, would not have been within his dominion. After all, he says, the crew of the Barge could have unilaterally ceased transferring MFO to the Vessel at any time, and he would not have been able to do anything about it.

39 It is established law that the question of whether a person has dominion over property is a matter of the degree of control exercised by the person over the property: see the decision of Yong Pung How CJ in *Hon Chi Wan Colman v Public Prosecutor* [2002] 2 SLR(R) 821 at [48]. Yong CJ also said that a "general degree of control" can amount to the requisite dominion (at [50]). Thus the question is whether the appellant in the present case had control over the MFO on the Barge. In my view, the clear answer is yes. Although Tommy undoubtedly had control over the MFO in that he could have physically stopped the transfer of MFO to the Vessel, this does not mean that the appellant did not also have control over the MFO. The appellant's control stemmed not from any physical mastery over the MFO, but from his having been empowered to receive the MFO on behalf of a party legally entitled to receive it, *viz*, V8 Pool.

40 It would appear that there are two assumptions in the appellant's arguments. The first is that dominion is constituted exclusively by *physical* control. The second is that only one person may have control and dominion over any given property. Neither of these limitations exist in the language of the relevant Penal Code provisions, and in the absence of any supporting authority, I do not see any basis for departing from the common-sense view that (i) dominion may be constituted by non-physical control, and (ii) more than one person may have dominion over the same property at the same time. Indeed, I would say that the facts of this case illustrate how insensible it would be to confine the concept of dominion in the manner urged by the appellant.

41 The appellant's next contention in this regard is that V8 Pool could not possibly have entrusted him with dominion over the MFO because V8 Pool did not have any dominion over the MFO to begin with. At the time the MFO was being transferred to the Vessel, V8 Pool had yet to pay for it and hence did not own it, meaning that the MFO was not V8 Pool's "property".

42 I do not accept this contention. A person does not have to be the owner of property in order to have a right to take possession of it. There is no requirement in the provisions of the Penal Code that the property in question must be owned by the person from whom it is misappropriated. So long

as that person has some sort of right to the property, which right he then delegates to or confers upon someone else, there has in my opinion been an entrustment of dominion over the property by the first person to the second. This is precisely what happened in the present case.

43 As the deputy public prosecutor Mr Sanjiv Vaswani pointed out in oral submissions, questions of title and ownership may often be the subject of private arrangements that are outside the knowledge of the accused. He put forward the following illustration: suppose an employee is given a work laptop by his employer and he misappropriates it or converts it to his own use. It may well be that, unknown to the employee, the employer is not in fact the owner of the laptop because it was purchased on credit terms and title would pass only upon full payment. I find that Mr Vaswani's illustration is a helpful and compelling one; it is not easy to see why the mere fact that the employer does not own the laptop should make any difference to the employee's criminal liability.

44 I might add that, if there were a requirement of ownership as the appellant suggests, it would not be possible to commit CBT in respect of bank accounts, as where, for instance, an employee wrongfully withdraws money from his employer's bank account and uses that money as his own. This is because the monies in the account are owned by the bank and not the employer. In my view, it cannot be that for this reason alone the employee would not have committed CBT.

45 Therefore, I am satisfied that the District Judge was right to hold that the appellant had been entrusted by V8 Pool with dominion over the misappropriated 200 MT of MFO, even though V8 Pool might not have been the owner of the MFO at the relevant time. I note that the charge formulated against the appellant states that the MFO was property "belonging to V8 Pool Inc". For the reasons given by the appellant I am not sure that statement is accurate. However, I do not think that this is fatal to the prosecution's case; it can be rectified simply by deleting the words "belonging to V8 Pool Inc".

Whether the appellant was a servant of V8 Pool

46 The result of the foregoing analysis is that the appellant is guilty of at least CBT *simpliciter* as defined by s 405 of the Penal Code. The final issue is whether the appellant was a servant of V8 Pool and entrusted with dominion over the MFO in that capacity – if so, he would be guilty of CBT by clerk or servant under s 408.

47 The appellant's contention is a simple one. The factual premise is that the charter which V8 Pool had over the Vessel was a time charter, as opposed to a "demise" or "bareboat" charter. In time charters, the officers and crew on board the Vessel are provided by the owners and not the charterers; by way of comparison, in demise or bareboat charters it is the charterers who provide their own manpower. In the instant case, it was the operators or technical managers, Tsakos, which provided the officers and crew, and at all times the appellant was employee of Tsakos and not V8 Pool. In these circumstances, it is urged that the appellant cannot have been a servant of V8 Pool.

48 The respondent's argument – on the authority of an English case of some vintage, *viz*, *The Queen v Negus* (1873) LR 2 CCR 34 ("*Negus*") – was that the test was simply whether the appellant was "under the control and bound to obey the orders of his master", V8 Pool. In the instant case, said the respondent, the appellant was certainly under the control of V8 Pool and bound to obey its orders. There was uncontested evidence that V8 Pool would give instructions to the officers and crew of the Vessel which they were bound to comply with. The appellant was one such officer and accordingly he was a servant of V8 Pool.

49 Before I address the substantive merits of the arguments, I should note as a preliminary point

that this contention that the appellant was not a "servant" was not made in the court below. It was not accurate for counsel for the appellant to state at [53] of the appellant's skeletal submissions that this point "was not fully ventilated during submissions in the Court below"; in fact, the point was not taken at all. There was no indication at all that it was a point of dispute between the parties at any time during the trial. I do not understand Mr Vaswani to have suggested that the appellant was precluded or estopped from making this new argument on appeal, and that is to his credit. The prosecution ultimately and invariably bears the burden of proving the elements of the offence beyond a reasonable doubt, and a conviction must be set aside so long as there is reasonable doubt as to the existence any one of those elements, even if there was no contest on it at first instance.

50 In my judgment, there is merit in the appellant's arguments. Absent from the relationship between V8 Pool and the Vessel's officers and crew are what might be thought to be the usual incidents of a master-servant relationship. These include: (i) legal obligations owed by the servant to the master, (ii) legal rights or recourse that the master has against the servant, and (iii) the master's provision of the servant's salaries and other job-related benefits or necessities.

51 As to the first aspect, a reading of the terms and conditions of the time charter reveals that there is no contemplation of legal obligations being owed directly to V8 Pool by the Vessel's officers and crew. Any obedience due from the Vessel's working personnel to V8 Pool was a result of legal obligations owed by the *owners* to V8 Pool. For instance, under the time charter between the owners and V8 Pool, the owners guaranteed that the officers and crew of the Vessel would "load and discharge cargo as rapidly as possible when required by [V8 Pool] or their agents to do so".

52 As to the second aspect, there was a lack of direct legal recourse available to V8 Pool against the Vessel's working personnel. One of the clauses in the time charter provided that, should V8 Pool "complain of the conduct of the master or any of the officers or crew", it was the owners' obligation immediately to "investigate the complaint", and should the complaint prove to be well-founded, it was the owners who would "make a change in the appointments".

53 As to the third aspect, the Vessel's working personnel did not receive their salaries and job-related benefits from V8 Pool. Rather, it was the owners who were obliged to "provide and to pay for all provisions, wages and shipping and discharging fees and all other expenses of the master, officers and crew".

54 The picture that emerges is that the officers and crew on the Vessel would answer not to V8 Pool but to their employers Tsakos and, through Tsakos, to the owners. There was some reciprocity to this in that the owners and Tsakos and not V8 Pool were the ones responsible for the Vessel's working personnel. Given these circumstances, unless compelled to a different conclusion by authority, I find that the appellant was not a servant of V8 Pool.

55 I do not think that the respondent can derive much assistance from *Negus*, the case which it cited. The facts of that case are very briefly stated in the report, but they are sufficient to ascertain that the accused there "was engaged by the prosecutors to solicit orders for them, and he was to be paid by a commission on the sums received through his means". Thus it seems that the accused there was undoubtedly employed or "engaged" directly by the person of whom he was said to be a "servant". It was in this context that Blackburn J (at 37) held that the test of whether the accused was a servant was whether he is "under the control and bound to obey the orders of his master".

56 In my view, given the factual context in *Negus*, the enquiry posed by Blackburn J *presupposes* the existence of a relationship characterised by reciprocal legal obligations to and rights against each other. It is only when this has been established that Blackburn J's test kicks in and the focus shifts to

the extent of the control that the one has over the other. Where, however, that relationship has not even been established, I do not think that the test laid down by Blackburn J has any application.

57 In the present case, even though the appellant and the other officers and crew of the Vessel might have been bound to obey the orders of V8 Pool, in my opinion it makes all the difference that this obligation to obey was not an obligation owed directly to V8 Pool, but one owed to the owners of the Vessel. More broadly, I do not see a reciprocity of legal obligations and rights between the appellant and V8 Pool. In these circumstances, I am satisfied that the appellant was not a "servant" of V8 Pool.

Conclusion on the appeal against conviction

58 I therefore allow in part the appeal against conviction. I shall set aside the conviction under s 408 of the Penal Code, but on the evidence I am satisfied beyond a reasonable doubt that the legal conditions for the offence of CBT *simpliciter* under s 405 of the Penal Code have all been established. Accordingly I shall substitute a conviction under s 406 of the Penal Code, and I turn now to consider the appropriate sentence in this case.

The appeal against sentence

59 The prosecution's arguments in the appeal against sentence were, for the most part, premised on my affirming the appellant's conviction for CBT by clerk or servant under s 408 of the Penal Code. Almost all of the precedents cited were s 408 cases. It goes without saying that these precedents are not very helpful given my decision to set aside the appellant's s 408 conviction and to substitute a conviction for CBT *simpliciter*.

60 The appellant did highlight for my consideration two precedents involving CBT *simpliciter*. These cases pre-date the 2008 amendments to the Penal Code and should be viewed in the light of the lower maximum imprisonment term of 3 years for such offences under the Penal Code which was then in force. In the prevailing version of the Penal Code which the appellant is to be sentenced under, the maximum imprisonment term for CBT *simpliciter* under s 406 is 7 years.

61 In the High Court decision of *Ong Chee Eng v PP* [2012] 3 SLR 776 at [24], Chao Hick Tin JA had observed that "where Parliament has enacted a range of possible sentences, it is the duty of the court to ensure that the full spectrum is carefully explored in determining the appropriate sentence". This was cited with approval by Sundaresh Menon CJ in *Poh Boon Kiat v PP* [2014] 4 SLR 892 at [60]. Menon CJ further noted, citing *Angliss Singapore Pte Ltd v PP* [2006] 4 SLR(R) 653 at [86], that the statutory maximum sentence signals the gravity with which Parliament views any individual offence and that the sentencing judge "ought to note the maximum penalty imposed and then apply his mind to determine precisely where the offender's conduct falls within the entire range of punishment devised by Parliament".

62 Since the full range of sentencing options ought to be considered, it would follow that the same criminal conduct could attract a higher sentence where the maximum was 7 years' as compared to 3 years' imprisonment. But ultimately whether a higher sentence is warranted must still depend on a careful consideration of the gravity of the offending conduct in each case. In this regard, the following observations of the Senior Minister of State for Law and Home Affairs, Associate Professor Ho Peng Kee, during the Second Reading of the Penal Code (Amendment) Bill are apposite. He explained that "it does not mean that automatically when the maximum punishment is raised, the punishment will go up": see the *Singapore Parliamentary Debates, Official Report* (23 October 2007) vol 83 at col 2439. At the Opening of the Legal Year 2008, the Public Prosecutor similarly noted that

the prosecution "will not automatically press for higher sentences merely because the maximum penalties have been increased".

63 The prosecution did bring to my attention two s 406 precedents. The first was the case of *Soh Wei Siang* (DAC047766/2013 and others, unreported) in which the offender rented four vehicles which he then drove into Malaysia and did not return to the rental companies. He was eventually arrested in Malaysia. The vehicles were not recovered and no restitution was made. The offender pleaded guilty to two charges – each charge was for CBT in respect of one of the cars. The two cars which were the subject-matter of these charges were worth $228,000 and $155,000. Two other charges, for CBT in respect of the remaining two cars which were worth $150,000 and $98,000, were taken into consideration. The offender was sentenced to 20 months' imprisonment on each of the two charges to which he pleaded guilty, and these terms of imprisonment were ordered to run consecutively for a total sentence of 40 months' imprisonment.

64 The prosecution candidly acknowledged that, since the appellant in this case had been sentenced to 18 months' imprisonment on a charge under s 408 of the Penal Code, should the charge be reduced to one punishable under s 406, the sentence should logically be less than 18 months' imprisonment. Hence, the prosecution accepted that the imprisonment term of 20 months imposed in *Soh Wei Siang* would be inapt in the instant case. In my view this point was correctly conceded by the prosecution.

65 The other s 406 precedent mentioned by the prosecution was the case of *Karen Teo* (DAC902611/2014 and others, unreported). The offender there was an executive assistant who had been entrusted with dominion over her boss's pre-signed cheques. She misappropriated a cheque worth $138,491.75. She pleaded guilty to one charge of CBT in respect of that cheque; taken into consideration were a few other CBT charges. She was sentenced to 9 months' imprisonment.

66 For CBT offences, the value of the property misappropriated is a very significant factor in sentencing, as the District Judge rightly noted at [99]–[100] of the GD. The two precedents highlighted by the prosecution were undoubtedly chosen with that in mind because the amount misappropriated in this case, $153,358.51 – which was how much V8 Pool paid for the short-supplied 200 MT of MFO – was not far from the amounts misappropriated in those precedents. Having said that, as the District Judge observed at [112] of the GD, in this case the loss caused to V8 Pool was not equivalent to the gain which the appellant stood to enjoy, which was US$26,000. In fact, it is possible that the appellant did not in fact enjoy any gain: the evidence is that the money, which the authorities did not manage to recover, was last seen in the hands of an unidentified colleague of the appellant. In those circumstances the District Judge thought that a downward adjustment in sentence was warranted (at [113] of the GD) and I am inclined to agree.

67 Another important consideration in sentencing is whether the offender made restitution. That tends to demonstrate genuine remorse – although I might add that restitution does not *necessarily* imply remorse – and genuine remorse does call for a lower sentence. In the case of *Karen Teo*, the offender made restitution even before she was charged and she also pleaded guilty, and in my opinion the relatively lenient sentence of 9 months' imprisonment has to be seen in that light. In contrast, there was in the present case no attempt at restitution, and hence the appellant cannot claim the benefit of that particular mitigating factor. Moreover, as the District Judge noted at [110] of the GD, the fact that the appellant claimed trial shows an absence of remorse on his part.

68 The District Judge seemed to think it an aggravating factor that the appellant had "abused his senior position as the Chief Engineer and betrayed the trust reposed in him" (at [110] of the GD). In the same vein, based on the prosecution's summary of the case of *Karen Teo*, the judge there

thought that the offender's "abuse of trust" was an aggravating factor. With respect, I would caution against placing too much emphasis on this notion of "abuse of trust". Abuse of trust *per se* is inherent in the offence of CBT; to put it another way, it is a constitutive element of the offence. To say that abuse of trust is, over and above that, an aggravating factor is, in my view, an error of double-counting.

69 That said, I think that the District Judge in this case was not wrong in so far as he implied that the seniority of an offender's position is a factor to be taken into account in sentencing. It is a sensible proposition that the greater the trust reposed in an offender that is subsequently betrayed, the higher the sentence ought to be. Thus a chief executive officer entrusted with the affairs of an entire company who commits CBT is more culpable than an administrative assistant entrusted with less extensive matters. Similarly, a ship's chief engineer who commits CBT is more culpable than a junior officer or crew member. It is difficult, however, to draw comparisons between a chief engineer and an administrative assistant (as in *Karen Teo*) or a customer of a car rental company (as in *Soh Wei Siang*) and so I shall not make use of the seniority of the appellant's office as a basis to add to or subtract from the sentences imposed in the two precedents.

70 Finally, I agree with the District Judge's view (at [109] of the GD) that such bunkering offences as the appellant's are difficult to detect because there would be doctoring of documents so as not to leave any paper trail that might reveal the criminality, and that these offences threaten Singapore's economic interests. Hence I also agree that these considerations call for an appropriate sentence on the ground of general deterrence.

71 Taking all these factors in the round, I am of the view that the sentence ought to fall somewhere between the 9 months' imprisonment in *Karen Teo* and the 20 months' imprisonment in *Soh Wei Siang*. I would impose a sentence of 14 months' imprisonment.

Order

72 For the above reasons, I set aside the appellant's conviction under s 408 of the Penal Code. I order that the words "belonging to V8 Pool Inc." be deleted from the charge and that the reference therein to "Section 408 of the Penal Code, Chapter 224" be replaced by a reference to "Section 406" of the same. I convict him on that amended charge. It follows that the sentence imposed by the District Judge should be reduced and so I sentence the appellant to 14 months' imprisonment.