Wong Seng Kwan *v* Public Prosecutor
[2012] SGHC 81

Case Number	: Magistrate's Appeal No 462 of 2010
Decision Date	: 17 April 2012
Tribunal/Court	: High Court
Coram	: Steven Chong J
Counsel Name(s)	: Manoj Nandwani (Gabriel Law Corporation) for the appellant; Sanjna Rai (Attorney-General's Chambers) for the respondent.
Parties	: Wong Seng Kwan — Public Prosecutor

Criminal law – offences – property – criminal misappropriation of property

17 April 2012

Steven Chong J:

Introduction

1 Are finders keepers? One could be forgiven for thinking that the law on such a simple question is relatively settled. However, as demonstrated in this case, a finder can in certain circumstances attract criminal liability.

2 It is important to recognise that civil liability for property claims has a direct bearing on criminal liability in respect of offences under Chapter XVII of the Penal Code (Cap 224, 2008 Rev Ed), collectively known as "Offences Against Property". Therefore, an understanding of the scope and content of property rights in civil law is essential for a proper interpretation of criminal law provisions relating to property offences. As fittingly observed by Lord Macaulay in his book, *Speeches and Poems, with the Report and Notes on the Indian Penal Code* (Riverside Press, 1867) at p 432:

> There is such a mutual relation between the different parts of the law that those parts must all attain perfection together. That portion, be it what it may, which is selected to be first put into the form of a code, with whatever clearness and precision it may be expressed and arranged, must necessarily partake to a considerable extent of the uncertainty and obscurity in which other portions are still left.
>
> This observation applies with peculiar force to that important portion of the penal code which we now propose to consider. *The offences defined in this chapter are made punishable on the ground that they are violations of the right of property; but the right of property is itself the creature of the law. It is evident, therefore, that if the substantive civil law touching this right be imperfect or obscure, the penal law which is auxiliary to that substantive law, and of which the object is to add a sanction to that substantive law, must partake of the imperfection or obscurity. It is impossible for us to be certain that we have made proper penal provisions for violations of civil rights till we have a complete knowledge of all civil rights; and this we cannot have while the law respecting those rights is either obscure or unsettled.* As the present state of the civil law causes perplexity to the legislator in framing the penal code, so it will occasionally cause perplexity to the judges in administering that code. If it be matter of doubt what things are the subjects of a certain right, in whom that right resides, and to what that right extends, it

must also be matter of doubt whether that right has or has not been violated.

[emphasis added]

3 The appellant, Wong Seng Kwan, was convicted in the court below of dishonest misappropriation of the cash taken from a wallet which he found on the floor of the Marina Bay Sands Casino ("the Casino"). He was sentenced to a fine of $2,000 and in default two weeks' imprisonment. He appealed against the conviction and after hearing the parties, I was satisfied that the conviction was safe and dismissed the appeal. However, as the appeal had raised an interesting issue of public interest, I decided to issue my detailed grounds to provide some clarity on the rights and obligations of a finder against the backdrop of the offence of dishonest misappropriation of property under s 403 of the Penal Code ("s 403"). This judgment will explain what steps, if any, a finder of lost property in a public place should take in order to avoid or minimise the risk of criminal liability. On my direction, both the Prosecution and counsel for the Defence, Mr Manoj Nandwani ("Mr Nandwani") filed further submissions to assist the court in providing my detailed grounds. I would like to record my appreciation to both counsel for their clear and concise submissions.

Facts

4 This appeal arose from the decision of the trial judge ("the Judge") in *Public Prosecutor v Wong Seng Kwan* [2011] SGDC 197. The appellant, Wong Seng Kwan, was tried on the following amended charge:

DAC 25615/2010

You,

Wong Seng Kwan, Male, 40 years old

D.O.B: 19-06-1970

Passport No.: [XXX] (MALAYSIAN)

are charged that you, on the 10th day of June 2010, at or about 1.48am, at Marina Bay Sands Casino, Singapore did dishonestly misappropriate to your own use a wallet, which you knew to be the property of a person other than yourself, to wit by not returning the wallet to the security personnel of Marina Bay Sands Casino and instead taking out cash from the said wallet and you have thereby committed an offence punishable under Section 403 of the Penal Code, Chapter 224.

5 The facts of this case were relatively uncomplicated because the Prosecution and the Defence tendered an Agreed Statement of Facts [note: 1], which stated, *inter alia*, that:

Agreed Statement of Facts

...

4 On 10 June 2010 at about 1am, the complainant was gambling at Marina Bay Sands, Casino, at the 'Midi Baccarat' table and placed her wallet of unknown brand and value on the side of the chair she was seated.

5 On 10 June 2010 at about 1.46am, while the complainant was gambling at the said 'Midi Baccarat' table, the complainant dropped her wallet on the floor near the said 'Midi Baccarat' table. On 10 June 2010 at about 1.48am, the accused came along and picked up the complainant's wallet from the floor. The accused then *walked towards the toilet with the complainant's wallet* at about 1.50am on 10 June 2010. The accused then came out of the toilet at about 1.53am on 10 June 2010 *without holding the complainant's wallet in his hands.*

6 The accused was spotted and detained by the security staff of [the Casino]. *A search of the wallet was made by the security staff of [the Casino] but the wallet could not be recovered.*

[emphasis added]

6 The Prosecution adduced the security tapes of the Casino ("CCTV recording") to establish the facts stated in the Agreed Statement of Facts. The main issue at the trial below was whether the confession was voluntarily made by the appellant to the police ("the Long Statement"). After conducting a *voir dire*, the Judge found that the Long Statement was made voluntarily without any threat, inducement, promise or any form of oppressive conduct and admitted it in evidence. The Long Statement [note: 2] contained the following confessions:

4 In the toilet, I discovered that the wallet belonged to a foreigner. I assume that the wallet belonged to a foreigner as I noticed that there were dollar notes of 10 RMB currency and S$150/- in three denominations. *At this juncture I took the cash of S$150/- out from the wallet as I believed that the owner might has (sic) left the casino. I then leave the wallet behind on the toilet roll tray.* I then left the toilet and proceed to play cards in the lounge area.

...

7 The following questions were posed to me:

Q1) Did you admit picking up a brown wallet while you were in the casino?

A1) Yes.

Q2) Why did you take the wallet with you to the toilet?

A2) I was urgently using the toilet.

Q3) While I *(sic)* was on the way to the toilet where do you placed the wallet?

A3) I placed it in my rear left pocket.

Q4) What is your intention bringing the wallet to the toilet?

A4) I urgently need to use the toilet so I brought it along.

Q5) What do you intent to do with the wallet after you use the toilet?

A5) I wanted to check who the wallet belongs to.

Q6) *What happened after you check?*

A6) *I just took the money and leave the wallet there for someone else to pick it up.*

Q7) Do you admit taking the money, cash amounting to S$150/-?

A7) *Yes.*

Q8) Where is the cash now?

A8) The cash is with me *in my wallet*.

Q9) Police is going to seize the cash as case exhibit, do you have anything to say?

A9) No.

Q10) Do you have anything else to add?

A10) *It was a spur of moment I was not sure why I commit the act.* I have a lot of money in my pocket at the time of incident. *I am remorseful of my action.* This is my first time arrested by the police. I hope to be given a chance. I admit that this is the biggest mistake in my life and I regretted it.

[emphasis added]

In addition, the Judge accepted the evidence of the police investigation officers that the appellant made an oral confession that he had removed the cash from the wallet, when he was shown the CCTV recording.

7 At the trial below, the complainant, Ms Sun Yan Li ("Ms Sun"), testified that when she went to the Casino on 10 June 2010, her wallet contained, *inter alia*, about S$200 in cash, a RMB10 banknote, her China identification card, a Singapore credit card and a China bank card. [note: 3]

8 Although the appellant admitted to picking up the wallet, at the trial, he vehemently denied taking the cash from the wallet. The appellant also denied that he saw any identification documents (*eg*, Ms Sun's China identification card) in the wallet. However, after hearing all the evidence, the Judge disbelieved his defence. The Judge held at [45] that:

> The numerous discrepancies in the Defence's case and the incredulous explanations put forth by the Accused led me to the irresistible conclusion that he was not a truthful witness. I disbelieved his defence that although he had picked up the wallet and checked its contents, he had not taken the cash from the wallet.

9 The Long Statement, which was admitted in evidence by the Judge, corroborated the above finding. Consequently, the Judge, after a seven-day trial, convicted the appellant of the offence of dishonest misappropriation of property under s 403 and sentenced him to a fine of $2,000 and in default two weeks' imprisonment.

Appellant's case

10 Mr Nandwani raised the following grounds on appeal:

(a) that there was no good Samaritan law mandating the appellant to return an item that he

stumbled upon;

(b) that the appellant had no intention to cause any wrongful gain or wrongful loss;

(c) that the Judge failed to consider that the appellant could not have taken the money from the wallet because none of the other items alleged to be in the wallet were found on the appellant;

(d) that the Judge gave undue weight to the Long Statement because based on contemporaneous evidence, there were factual inconsistencies in the Long Statement, and any doubt should have been resolved in the favour of the appellant; and

(e) that objective evidence adduced at trial was sufficient to raise a reasonable doubt to justify the appellant's acquittal.

Prosecution's case

11 In response, the Prosecution made the following submissions that the decision of the Judge should be upheld:

(a) the Judge found that the confession in the Long Statement was made voluntarily and the appellant was not a truthful witness;

(b) although the appellant could easily have ascertained the identity of the wallet's owner; or alternatively, handed over the wallet to the security personnel of the Casino, he did not do so;

(c) Ms Sun's testimony in court was reliable and the Judge was correct to hold that there were sufficient identification documents in the wallet to enable the appellant to locate its owner; and

(d) the facts of the present case fell squarely within Explanation 2 and Illustration (e) to Explanation 2 of s 403.

12 The above arguments essentially concerned two key issues which were dispositive of the appeal:

(a) whether the appellant had dishonestly misappropriated the cash from the wallet; and

(b) whether the appellant had reasonable means to ascertain the identity of the owner of the wallet.

13 Although both issues are largely factual in nature, their determination involved an examination of the rights of the appellant as finder of the wallet and the steps which he was required to take on finding the lost property. Before doing so, it is perhaps useful to provide some overview of the property offences under the Penal Code and to explain how they differ from each other.

An overview of property offences in the Penal Code

14 The distinction between criminal misappropriation and other property offences such as theft, cheating and criminal breach of trust may not be immediately apparent to a layperson. They all involve property and an element of dishonesty but the punishment provisions are somewhat different.

15 While the element of dishonesty is common to all property offences, the critical distinction between criminal misappropriation, theft, cheating and criminal breach of trust lies in the manner in which the accused person *initially* comes across the movable property. An accused person commits *theft* if the movable property was originally in the possession of some other person and the accused person moves the property with a dishonest intention to take it. For *criminal misappropriation*, the accused person *initially* comes across the movable property in a legally neutral manner (*eg*, by finding), and he *subsequently* forms a dishonest intention to deal with the movable property in a manner that is inconsistent with the rights of the true owner. As for *criminal breach of trust*, the accused person is entrusted with property or dominion over the property at the outset by another person, and he dishonestly uses or disposes of that property in abuse of trust while for *cheating*, the possession of the property is voluntarily handed over to the accused person as a result of his deceitful or fraudulent misrepresentation.

16 The fact that an accused person charged with the offence of criminal misappropriation would usually have come across the movable property in a legally neutral manner is significant, because while civil rights and liabilities would attach at the moment when the accused person asserts possession over the property, criminal liability would *only* attach *when* the accused person forms a dishonest intention. According to Dr Hari Singh Gour, *Penal Law of India* (Law Publishers (India) Pvt Ltd, 11th Ed, 2011) ("*Gour*") at p 3918:

> **6. What is criminal misappropriation?**
>
> …
>
> The illustrations to Sec. 403, which are rather statements of principle than mere illustrations, clearly show that the essence of criminal misappropriation of property is that the property comes into the possession of the accused in some neutral manner, whereas the illustrations in Sec. 405 show equally clearly that the property comes into the possession of the accused either by an express entrustment or by some process placing the accused in a position of trust. …
>
> The question whether the act is theft or misappropriation depends upon when the dishonestly began — was it before or after the thing came into possession. This is a point of division as much between the two offences — theft and criminal misappropriation in the Code … In theft the initial taking is wrongful, *in criminal misappropriation it is indifferent and may even be innocent, but it becomes wrongful by a subsequent change of intention*, or from knowledge of some new fact with which the party was not previously acquainted [*Bhagiram v Ahar Dome* ILR 15 Cal 388, at 400].
>
> [emphasis added]

17 Given that the distinction between theft and dishonest misappropriation of movable property depends on whether the *initial* taking is wrongful, and that criminal liability might still attach on a subsequent change in intention, it is important for a finder to know when the taking of the movable property, though *initially* neutral, may nonetheless *subsequently* become wrongful.

Ingredients of an offence under s 403

18 I believe it would be useful to set out s 403 in its entirety as the Explanations and Illustrations are of assistance in its interpretation.

> **Dishonest misappropriation of property**

403. Whoever ***dishonestly misappropriates*** or ***converts to his own use*** movable p*rope*rty, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

Illustrations

(a) A takes property belonging to Z out of Z's possession in good faith believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) A, being on friendly terms with Z, goes into Z's house in Z's absence and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c) A and B being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

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

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 this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means, or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

Illustrations

(a) A finds a dollar on the high road, not knowing to whom the dollar belongs. A picks up the dollar. Here A has not committed the offence defined in this section.

(b) A finds a letter on the high road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(c) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person who has drawn the cheque appears. A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(d) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(e) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(f) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

[emphasis added in bold italics]

19 In order to make out the offence under s 403, the Prosecution must prove the following elements beyond reasonable doubt:

(a) the movable property ("lost chattel") must belong to some person other than the accused person;

(b) there must be an act of misappropriation or conversion to his own use; and

(c) the accused person must possess a dishonest intention.

20 I shall examine each ingredient separately, discuss the issues arising thereunder and apply the law to the facts of this appeal. I shall also make some general observations to alert members of the public as to what they should do when they come across lost chattel. It should be made clear that finders are but one species of persons who could be criminally liable for misappropriation or conversion under s 403. This judgment, however, will focus principally on the position of a finder like the appellant in this case, with specific reference to Explanation 2 and Illustrations (a) to (f) thereunder.

Element 1: Property belonging to someone else

Abandoned property

21 The significance of this ingredient is that the offence does not arise if the lost chattel has been *abandoned* since in such a case there is really no owner to speak of. In this case, there can be no suggestion that Ms Sun had abandoned her wallet. Whether a lost chattel has been abandoned is essentially a question of fact to be inferred from the surrounding circumstances. Factors such as (a) the place where the chattel was found; (b) the nature of the chattel; and (c) the value of the chattel are relevant considerations to determine whether the owner had intended to abandon the chattel. It is ultimately an exercise of common sense. The higher the value of the lost chattel, the less likely it has been abandoned by the owner.

22 The topic of abandonment of property was recently comprehensively surveyed by Associate Professor Saw Cheng Lim in *The Law of Abandonment and the Passing of Property in Trash* (2011) 23 SAcLJ 145, where the learned author explained at p 167 that the circumstances surrounding the discarding of chattels should raise the irresistible inference that the original owners had clearly abandoned them – both possession and ownership. Associate Professor Saw concluded at p 173 that given that it is difficult to predict with any certainty how much proof is required to establish a specific and unequivocal intention on the part of the original owner to abandon the property in question, the courts should be slow to make any finding of abandonment except in the clearest of cases. I agree with the view expressed by Associate Professor Saw.

Rights of a finder

23 In understanding the relevance of this issue, it is necessary to note that finders do acquire certain rights to lost chattel found by them. However, where the finder is able to locate the owner but fails to do so, he may be convicted of the offence under s 403. As such, it is particularly pertinent to discuss the rights of the finder and the reasonable steps that the finder is obliged to take to avoid criminal liability.

24 This issue is part of the critical path in determining whether the offence under s 403 is made out. As pointed out at [19] above, the first ingredient of the offence under s 403 is that the lost chattel must belong to someone other than the accused person. That being the case, the inquiry must be examined in the context of the rights, if any, of a finder such as the appellant and the means by which the true owner of a lost chattel can be ascertained and/or identified.

25 The common law distinguishes between the concept of ownership and possession. In the normal state of affairs, possession of a chattel is the outward expression of ownership. Ownership is the highest possible right in a thing that exists, and the person with the best possible right to a thing is the owner: see Duncan Sheehan, *The Principles of Personal Property Law* (Hart Publishing, 2011) at pp 4–18.

26 However, a finder is in an anomalous situation because the true owner of a lost chattel is presumed to have lost possession, but not ownership, of the lost chattel. The rights of a finder arise by virtue of finding a lost chattel *and* asserting possession over it. The act of asserting possession allows the finder to acquire certain rights over the lost chattel. So long as a finder of the lost chattel acts within his legal entitlement, he would not have caused any "wrongful gain" and/or "wrongful loss" and consequently cannot be said to have acted dishonestly to attract criminal liability. I will be returning to the issue of "wrongfulness" at [52] below.

27 It is clear that a finder has the *right to possess* the lost chattel from the moment of finding it. Therefore, for the purposes of s 403, the fact of finding and asserting possession cannot *per se* constitute an offence. Indeed, the Penal Code expressly provides for the above situation in Illustration (a) to Explanation 2 of s 403:

> A finds a dollar on the high road, not knowing to whom the dollar belongs. A picks up the dollar. Here A has not committed the offence defined in this section.

28 However, since the true owner has never intended to divest his right to ownership (this assumes that he did not abandon the chattel), it would not be possible for the finder to acquire an ownership right over the lost chattel. In such a case, what right(s), if any, does a finder acquire after he asserts possession over the lost chattel? A finder merely obtains a right to possess and not a right to ownership by virtue of his find and being the first to assert possession over the lost chattel. Yet,

paradoxically, as noted at [25] above, there is a presumption that the person in possession is the owner. How does the law resolve this seemingly irreconcilable conundrum?

29 The Gordian knot described above can be resolved by applying the concept of relativity of title. The finder has good title as against the whole world except the true owner: see *Armory v Delamirie* (1722) 1 Str 505 ("*Armory*"). Professors F H Lawson and Bernard Rudden explained in *The Law of Property* (Oxford University Press, 3rd Ed, 2002) at p 65 that:

> If you make a ring from your own hair, there is no doubt whatever that it is yours and that you have a better right to it than anyone else. If you lose it, you can claim it from the finder. But in the absence of any claim by you, the finder is treated as having a title good against everyone. You have a better right to possess the thing than does the finder, but the finder has a better right to possess it than does anyone else.

30 In *Armory*, the plaintiff, a chimney sweeper's boy, found a jewel and took it to a goldsmith's shop to find out what it was. An apprentice from the shop took out the stones from the jewel and refused to return the stones to the boy. Pratt CJ held at [1]:

> 1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

31 The position in Singapore as regards the rights of finders of lost chattel is similar to the position in England. According to Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at p 422:

> As the adage "finders keepers" aptly sums up, a person who finds a lost or abandoned item acquires good title against everyone except the true owner [*Armory v Delamirie* (1722) 1 Str 505]. A finder, in general, is the person who first exerts control over lost or abandoned property.

32 Since the finder has good title to the lost chattel as against the whole world except the *true owner*, criminal liability, if any, of the finder would depend on, *inter alia*, whether the true owner can be ascertained and/or identified by the finder.

Reasonable steps to locate the owner

33 As the finder's title is good against the whole world except the true owner, retention of the lost chattel might be construed as dishonest if the finder is able to locate the true owner using reasonable means but fails to do so and decides to retain possession for himself.

34 It is important to note that the question as to what reasonable steps should be taken to locate the owner only arises for consideration if the person who finds the chattel decides to take possession of it. When the person stumbles upon a lost chattel, he has three options: he could choose to ignore it and walk away; or having picked it up decides to leave it behind; or he could assert possession over it. It is only if the person chooses to retain the lost chattel in his possession that he becomes a finder with the attendant rights and obligations.

35 Where a person finds and decides to take possession of a lost chattel of which from its nature, there must be an owner, the law requires the finder to take reasonable steps to discover and give notice to the owner, and keep the lost chattel for a reasonable time to allow the owner to claim it: see Explanation 2 to s 403. Explanation 2 also clearly states that what are reasonable means, or what

is a reasonable time in such a case, is a question of fact. The finder is not obliged to undertake extraordinary steps or incur disproportionate expenses in order to locate the true owner of the lost chattel.

36 There is a wide spectrum of circumstances that may give rise to different consequences. In one extreme, a person who finds a dollar note on the street would ordinarily not be expected to take any step to locate the owner because identification of the true owner would be practically impossible. At the other extreme, the finder might have actual knowledge of the identity of the owner. For example, the finder might have witnessed the owner dropping his wallet; or he might know the owner personally and had previously seen the owner use the particular item that he just found. In such cases, the finder is required to restore the lost chattel to its owner without unreasonable delay.

37 However, in between these two extreme examples is a wide spectrum of circumstances where the position may not be entirely clear. For example, a person may find an expensive watch that carries a serial number or a diamond ring with a laser identification number or mark that is not easily visible to the naked eye. While an expert or a collector may know where to look and who to contact to trace the identity of the owner, the layperson who finds such items may not even notice the serial number, let alone appreciate its significance. What should such a finder do in cases like these to avoid the risk of criminal liability?

38 The crucial question to ask in every situation is whether the finder can reasonably be expected to discover and give notice to the owner. In my opinion, what amounts to reasonable steps would always depend on all the circumstances of the case, including the following factors:

(a) *The place where the lost chattel was found*. If, for example, the lost chattel is found in a vacated hotel room, it is likely that the owner can be located as opposed to an item found in a public area of a shopping mall. If, instead, the lost chattel was found in a shop in a shopping mall, it would be reasonable to expect the owner to retrace his footsteps back to the shop after realising that he had lost the chattel. In such a situation, in order to avoid criminal liability, it would be prudent for the finder to leave his contact details with the shop owner to discharge his duty of taking reasonable means to give notice to the owner. The finder may only deal with the lost chattel as his own after the owner has failed to claim it in spite of the lapse of a reasonable time. Alternatively, he could leave it behind with the shop owner.

(b) *The nature and value of the lost chattel*. Finding cash in a public area may pose a greater problem for the finder to locate the owner as opposed to finding a wallet in a hotel lobby. Given the fungible nature of cash, it would usually be practically impossible to locate the owner of lost cash unless the cash was found together with other identifying items (see (c) below) or if there are special facts that could potentially lead to the identification of the owner. In this regard, there must be some proportionality between the value of the lost chattel and the steps that a finder is required to take in order to locate the owner.

(c) *The nature of identifying features on the lost chattel*. Where there are clear identification marks, such as the address of the owner or a telephone number, the owner of the lost chattel can be easily discovered and contacted. For other identification marks such as names, NRIC numbers, bank account numbers, membership numbers or serial numbers, the finder would usually require the assistance of the police or the issuing body in locating the owner.

39 Each of the above factors would assist the finder to identify the true owner and will therefore be relevant to ascertain whether the finder has in fact taken reasonable steps. Of the six Illustrations to Explanation 2, five of them would attract criminal liability under s 403 because in each of them, the

finder did not take reasonable steps to locate the owner.

40 It should not be overlooked that apart from taking reasonable steps to locate the owner, the finder should also keep the lost chattel for a reasonable time to enable the owner to claim it, before dealing with it as explained in Illustration (f). In other words, on finding a valuable item with no apparent identification, if the finder sells it immediately thereby preventing the true owner from ever claiming it back, he would also have committed the offence. What amounts to keeping the lost chattel for a reasonable time would, again, depend on the circumstances of each case. To illustrate the above principles, the consequences of a finder's failure to take reasonable steps can be seen in the decision of Chan Sek Keong CJ in *Public Prosecutor* v *Neo Boon Seng* [2008] 4 SLR(R) 216 where the sentence of the finder was enhanced from a fine of $6,000 to a term of imprisonment of three weeks. In that case, the accused person was a taxi driver. His passenger boarded the taxi at Changi Airport but left behind some items valued at $11,661.05 in the front passenger seat of the taxi when he alighted at his residence. The accused person did not take any step to return the items to the passenger even though he knew where that passenger lived. Chan CJ held at [10] that:

> [A] taxi driver is in a special position *vis-à-vis his passenger. The taxi d*river provides a transport service to the passenger for a fee and a passenger, in purchasing the service, not only entrusts the safety of his person but also custody of his property to the taxi driver during the journey. *If the taxi driver finds lost property in the taxi, he should return it to the passenger if he knows who he is and where he lives. If he does not have such knowledge, he should place the goods within a reasonable time with the taxi company.* At the very least, a taxi driver has a legal obligation not to take his passenger's property and, in my opinion, this duty should be enforced strictly and vigorously.
>
> [emphasis added]

41 It is difficult to exhaustively state what a finder should do in any given circumstance owing to the diverse situations. However, what is clear is that when a person finds a lost chattel which he knows has not been abandoned, which is of some value and where the true owner can possibly be identified and located, the prudent course of action would simply be to report the lost chattel to the police, not because the finder is legally obliged to do so, but because it is the best and most pragmatic way for the finder to discharge his duty in taking reasonable steps to locate the owner, and to avoid a finding of dishonesty that attracts criminal liability under s 403.

Element 2: Act of misappropriation or conversion to his own use

42 There are two distinct limbs under s 403, *viz* the misappropriation limb and the conversion limb. As a matter of statutory interpretation, both limbs are not intended to have an identical meaning since it is presumed that Parliament does nothing in vain, and the court must endeavour to give significance to every word of an enactment: see *Bennion on Statutory Interpretation: A Code* (5th Ed, LexisNexis, 2008) at p 1157.

43 The meaning of "to appropriate" (from which misappropriate derives its meaning) was discussed in the Indian case of *Sohan Lal v Emperor* 1915 AIR All 380, where Piggot J held at 381 that:

> The verb "to appropriate" in this connexion means "setting apart for, or assigning to, a particular person or use;" and "to misappropriate," no doubt means "*to set apart for or assign to the wrong person or a wrong use*", and this act must be done dishonestly.
>
> [emphasis added]

44 Conversion, on the other hand, refers to an act in dealing with the chattel in a manner inconsistent with the rights of the true owner. A helpful definition can be found in the decision of Supreme Court of Queensland in *R v Angus* [2000] QCA 29, where Pincus JA held at [15] to [16] that:

> 15 … A definition originating in a judgment of Atkin J in *Lancashire & Yorkshire Railway Co v MacNicoll* (1919) 88 LJKB 601 at 605 has been applied in this country to allegations of conversion under the criminal law: *Hansford* (1974) 8 SASR 164 at 169, 170, 183 and 193; *Fitzgerald* (1980) 4 ACrimR 233 at 235:
>
> > "… *dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right*".
>
> …
>
> 16 … The answer is that the Code requires not just passive possession, but an act of conversion; that must be or include a physical dealing with the goods and the dealing must in my opinion be such as to be inconsistent with the true owner's rights. Leaving a borrowed book on a shelf is not an act of conversion, no matter how long the book stays there.
>
> [emphasis added]

45 The meaning of "conversion" under s 403 is consistent with civil liability for conversion. As can be seen from the Court of Appeal's decision in *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101, "inconsistency is the gist of the action" for conversion. VK Rajah JA at [45] held that:

> Complex rules continue to govern its application even today. … The following propositions are nevertheless now regarded as established. *Generally, an act of conversion occurs when there is unauthorised dealing with the claimant's chattel so as to question or deny his title to it* (*Clerk & Lindsell* at para 17-06). Sometimes, this is expressed in the terms of a person taking a chattel out of the possession of someone else *with* the "intention of exercising a permanent or temporary dominion over it" (R F V Heuston and R A Buckley, *Salmond & Heuston on the Law of Torts* (Sweet & Maxwell, 21st Ed, 1996) ("*Salmond & Heuston on Torts*") at p 99). … *Inconsistency is the gist of the action, and thus there is no need for the defendant to know that the goods belonged to someone else or for the defendant to have a positive intention to challenge the true owner's rights* (*Halsbury's Laws of England* Vol 45(2) (Butterworths, 4th Ed Reissue, 1999) at para 548).
>
> [emphasis added]

46 The effect of the above distinction is that conversion is a subset of misappropriation with the result that a person who has committed conversion would have also committed criminal misappropriation but not necessarily the other way round. The act of either misappropriation or conversion constitutes the *actus reus* of the offence under s 403. Unlike misappropriation, conversion requires the *additional* element of acting in a manner inconsistent with the rights of the true owner, and usage is one way of acting inconsistently. Mere possession is not sufficient to make out the element of conversion.

47 The distinction was helpfully illustrated by the Prosecution's reference to *Tuan Puteh v Dragon*

(1876) 3 Ky 86. There, the accused person found a cheque payable to one Captain Strong. He attempted to encash the cheque but could not do so owing to the absence of Captain Strong's endorsement. The court found that although there was no conversion since he did not manage to encash the cheque, he clearly misappropriated the cheque when he dishonestly attempted to encash it.

"To his own use"

48 The appellant was charged with and convicted of dishonestly misappropriating *to his own use* a wallet, which he knew to be the property of a person other than himself. During the appeal before me, I invited the Prosecution to clarify whether the words "*to his own use*" in s 403 qualified both the misappropriation limb and the conversion limb or just the latter. In response, the Prosecution submitted that it should only govern the conversion limb and applied to amend the Charge to delete the words "*to his own use*" pursuant to s 256(b)(ii) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC"). The Prosecution cited *Garmaz s/o Pakhar and another v Public Prosecutor* [1996] 1 SLR(R) 95, where the Court of Appeal held at [28] and [29] that:

> 28 The question still remains whether it is implicit in s 256(*b*) of the CPC that the High Court in exercise of its appellate jurisdiction has the power to amend the charge. If a literal and strict construction is adopted, it is clear that the High Court has no such power. However, such a construction would lead to incongruous results: on the one hand the court by that section is given extensive powers in respect of conviction, sentence and findings, and yet on the other it has no power to amend the charge, and the consequence of this is that it has no power even to correct any errors appearing in the charge. Such a position is untenable. … *A more purposive construction should in our view be adopted. We think that such power is by necessary implication implied in s 256(b). In the result, our answer to the first question is in the affirmative, subject to what we have to say below.*
>
> 29 *The power that an appellate court has in amending a charge under s 256(b) of the CPC is not unlimited and obviously such power has to be exercised with great caution and not to the prejudice of the accused.* The same tests laid down by Taylor J in *Lew Cheok Hin* and Cussen J in *Ng Ee* in substituting a conviction for the one under appeal are, subject to necessary modifications, appropriate and applicable to the exercise of the power of amendment of a charge. The purpose of these tests is to prevent any prejudice to the accused.
>
> [emphasis added]

49 I am persuaded that under s 256(b)(ii) of the CPC, I have an implied power to amend the Charge in the manner proposed by the Prosecution. Keeping in mind the potential prejudice of the amendment to the appellant, the proposed amended Charge was read and explained to the appellant, who thereafter informed the court through Mr Nandwani that his defence remained unchanged notwithstanding the amendment to the Charge. As I was satisfied that the amendment did not affect the substance of the Charge, I allowed the amendment. The amendment was made and allowed without the benefit of substantive submissions from both parties. Since then, the further submissions by both parties have indeed confirmed that the words "*to his own use*" only qualify the conversion limb. Let me elaborate.

50 The learned authors of Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2012) explained at p 431 that:

> [14.5]Section 403 is open to two interpretations. The first is that the phrase 'to his own use'

governs the word misappropriates as well as the word conversion. Read in this way, the physical element of criminal misappropriation is either (i) conversion to one's own use or (ii) misappropriation to one's own use. The second interpretation is that the phrase 'to his own use' only governs the word conversion. In this case, the physical element is either (i) misappropriation or (ii) conversion to one's own use.

51 I agree with the learned authors that to read the requirement of "*to his own use*" into the misappropriation limb would render the conversion limb otiose, with the result that there would be no instance involving conversion that does not also fall within the meaning of misappropriation. The learned authors of *Criminal Law in Malaysia and Singapore* explain insightfully at p 432 that:

> [14.8] Under general principles of statutory interpretation, ***the word misappropriation must be given a meaning that distinguishes it from conversion*** . Since conversion means 'appropriating' another person's property and then making use of that property, misappropriation would have little or no scope if it was read as 'misappropriation *to one's own use*'. Consequently, the alternative physical element should simply be 'misappropriation'. It is perhaps unfortunate that the Code refers to *mis*appropriation rather than appropriation because the word *mis*appropriation might seem to indicate that there is some element of dishonesty in the behaviour itself. ***However the illustrations to s 403 use the verb 'appropriates' rather than 'misappropriates' and the cases have taken a broad approach to the word.*** …
>
> [14.9] Misappropriation is therefore broader than conversion and it is difficult to think of cases of conversion that would not also constitute misappropriation. …
>
> [emphasis in original in italics; emphasis added in bold italics]

Element 3: Dishonest intention

52 I now come to the *mens rea* requirement of the offence under s 403. The *mens rea* of the offence is dishonesty. "Dishonestly" is defined under s 24 of the Penal Code as follows:

> **"Dishonestly"**
>
> **24**. 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.
>
> [emphasis added]

53 The definition of "dishonestly" in turn makes reference to "wrongful gain" and "wrongful loss" which are defined under s 23 of the Penal Code as follows:

> **"Wrongful gain" and "wrongful loss"**
>
> **23**. "Wrongful gain" is *gain by unlawful means of property to which the person gaining it is not legally entitled*; "wrongful loss" is loss by unlawful means of property to which the person losing it is legally entitled.
>
> *Explanation.*—A person is said to gain wrongfully when such person *retains wrongfully*, as well as when such person *acquires wrongfully*. A person is said to lose wrongfully when such person is *wrongfully kept out of any property*, as well as when such person is *wrongfully deprived*

of property.

[emphasis added]

54 As the verb "misappropriates" itself conveys an element of wrongfulness, as opposed to the neutral verb "appropriates", it seems to be tautologous to qualify it with the word "dishonestly". As Yong Pung How CJ observed in *Tan Tze Chye v Public Prosecutor* [1997] 1 SLR(R) 876 at [37]:

> *To "misappropriate" means to set apart or assign to the wrong person or wrong use, and this must be done dishonestly.* Setting aside property by one person for the use of another other than himself and the true owner can also constitute misappropriation; see *Tan Sri Tan Hian Tsin v PP* [1979] 1 MLJ 73 where criminal breach of trust was committed by the MD of the company which paid money into the bank account of another company of which he and his wife were the sole shareholders. Therefore, in this case, setting aside property for the appellant as well as his brother's firm could both constitute misappropriation.
>
> [emphasis added]

55 In the present appeal, there can be no dispute that in picking up the wallet, the appellant had committed an act of appropriation. At that stage, his act of appropriation was still neutral. However, his intention would become dishonest if he removed the cash from the wallet and kept it as his own. No usage is necessary. The essence of the appellant's defence was directed at the alleged subsequent change of intention. He claimed that although he admitted to picking up the wallet, he left it behind in the toilet and did not remove the cash of $150 from the wallet. The appellant urged the court to acquit him on the basis that all the cash that was found in his possession when he was arrested had been properly accounted for and therefore the critical ingredient of dishonest misappropriation of the cash from the wallet was not made out.

56 The appellant claimed that he withdrew $3,500 in cash from his account with the Casino and had a balance sum of $3,200 (inclusive of casino chips) at the time of his arrest. He alleged that the difference of $300 was lost on the poker table and since all the monies were accounted for, it must follow that he did not take the cash from the wallet. The force of the argument was misconceived because there was no evidence that he lost $300 on the poker table. In fact, the evidence was to the contrary as the appellant conceded in cross-examination that he played other games as well and had won some monies in those games. In any event, this defence was completely contradicted by the appellant's Long Statement and his oral confession where he admitted to taking the cash from the wallet.

57 The Judge accepted the evidence of Ms Sun that her wallet contained her identification card. I saw no reason to disturb her finding. In the circumstances, by taking the cash from the wallet, and disposing of the wallet with the identifying documents, the appellant had clearly intended to cause wrongful gain to himself and/or wrongful loss to the true owner, Ms Sun.

58 The present appeal is therefore a clear case of criminal misappropriation on its facts. It may not be so clear where, for example, the finder picks up a wallet containing cash and the owner's identification but chooses to leave it in his home without using it because he could not be bothered to return it to the owner or to report his find to the police. In such a case, is the offence made out? Perhaps so, since such an act would have caused a wrongful loss to the true owner. In such situations, it is always prudent to report the find to the police. This is not an exhortation to act in a morally upright manner. Instead, it is a cautionary step to take to avoid criminal liability. As explained at [34] above, the finder can choose to either ignore the lost chattel or leave it behind after picking

it up to avoid criminal liability. In such a situation, the finder does not attract any criminal liability because there is no act of appropriation to begin with. However once he decides to assert possession, the rights and obligations attach at that point in time.

Conclusion

59 In the result, the decision of the Judge is affirmed and the appeal is consequently dismissed.

60 It is hoped that this decision has provided some useful guidelines for persons who through no initial fault of theirs come across lost chattel. Finders are not always keepers, and a finder who dishonestly keeps his find may instead "*find*" himself in violation of the law.

[note: 1] RA at p 156.

[note: 2] RA at pp 157 and 158.

[note: 3] GD at [7].