Er Joo Nguang and Another v Public Prosecutor
[2000] SGHC 60

Case Number : MA 149/1999

Decision Date : 17 April 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Leong Kah Wah and Navinder Singh (Joseph Tan Jude Benny) for the first appellant; Billy Low Naifah (Billy & Han) for the second appellant; Amarjit Singh (Deputy Public Prosecutor) for the respondent

Parties : Er Joo Nguang; Another — Public Prosecutor

Commercial Transactions – Sale of goods – Buyer taking delivery and possession of goods without endorsed bills of lading – Whether buyer has right to do so – Whether delivery conditional upon payment of – s 28 Sale of Goods Act (Cap 393, 1999 Rev Ed)

Courts and Jurisdiction – Appeals – Trial judge's observation of witnesses – Trial judge's findings of fact – Whether appellate court should overturn findings of fact – Whether any basis to interfere with trial judge's decision to prefer evidence of Prosecution witness

Criminal Law – Abetment – Abetment by conspiracy – Nature of offence -Whether principal offender necessary – Whether two accessories can abet each other – s 107(b) Penal Code (Cap 224, 1985 Rev Ed)

Criminal Law – Abetment – Abetment by conspiracy – Proof of conspiracy – Factors relevant to drawing inference of conspiracy – When inference justifiable – s 107(b)Penal Code (Cap 224, 1985 Rev Ed)

Criminal Law – Abetment – Abetment by conspiracy – Requisite mens rea – Dishonest intent – Whether evidence supports inference of dishonest intent – Whether negligence or failure to account for entrusted property constitutes dishonesty – s 107(b) Penal Code (Cap 224, 1985 Rev Ed)

Criminal Law – Abetment – Abetment by conspiracy – "Lucas" test – Appellant's motive for lying – Whether lie evidence of or corroboration of guilt

Criminal Procedure and Sentencing – Charge – Amendment – Whether High Court in appellate jurisdiction should amend charge and substitute conviction – Relevant considerations – s 256(b)(ii) Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Criminal Procedure and Sentencing – Charge – Amendment – Substitution of conviction under amended charge – Power of High Court to substitute conviction in appellate capacity – s 173 Criminal Procedure Code (Cap 68, 1985 Rev Ed)

Evidence – Admissibility of evidence – Corroboration – Lies – Appellant's lies as corroboration – Circumstances in which appellant's lies may provide corroboration against him

: ***Introduction***

Both appellants were convicted in the district court of abetment by conspiracy to commit criminal breach of trust (`CBT`), contrary to ss 109 and 409 of the Penal Code Cap 224 (`PC`). The offence was committed in relation to certain goods, valued at about US$301,673. The first appellant (`B1`) was sentenced to four years and six months` imprisonment. The second appellant (`B2`) was sentenced to five years and six months` imprisonment. I allowed B1`s appeal against conviction, acquitted him and set his sentence aside. As for B2, I amended the charge against him, substituted the conviction and dismissed his appeal against conviction. I allowed his appeal against sentence, and

reduced that sentence to four years` imprisonment. I now give my reasons.

Background facts

B1 was the managing director of a Singapore company of freight forwarders called `World Freight Pte Ltd` (`WF`). B2 was the managing director of a company called `Uncle Sam Apparel Pte Ltd` (`US Apparel`). The complainant was a Filipino businessman called Nari Kishanchand Gidwani (`PW13`).

Sometime in 1997, B2 contracted to purchase from PW13 500,000 pieces of Walt Disney apparel (`the goods`) at US$3 per piece. The total price of the goods amounted to US$1.5m. Initially, it was agreed that the transaction would be financed by letters of credit. Accordingly, in October 1997, B2 opened letters of credit worth US$600,000 in part payment for the goods. Between 2 and 6 November 1997, he went to Manila and met up with PW13. During this trip, they agreed to change the mode of financing for the transaction from letters of credit to `documents against payment` terms (`D/P terms`). Pursuant to the new terms of payment, the bills of lading (`b/ls`) relating to the goods were consigned in favour of the Industrial and Commercial Bank Limited (`ICB`), who were B2`s bankers. It was understood between them that under the new terms of payment, B2 would pay ICB for the goods in order to get b/ls that were duly endorsed. These b/ls would then allow B2 to obtain the goods from the consignees.

B2 needed to ship the goods from the Philippines to Singapore, and he contacted B1 around the end of October 1997 for that purpose. B1 and B2 had business dealings with each other since 1996, and B1`s freight forwarding company, WF, had handled many previous shipments for B2. At B1`s recommendation, a company in the Philippines called `Worldwide Consolidated Freight Corp` (`Worldwide`) was subsequently appointed as the freight forwarding agent in the Philippines to handle the shipment. When Worldwide prepared the ocean b/ls for the shipment, it named WF as the consignees in Singapore.

Following this, PW13 shipped a total of six container loads of Walt Disney apparel to Singapore. This was done in three shipments - the first shipment consisted of two containers, the second consisted of one container and the last shipment consisted of three containers. All six containers were consigned to B1`s company, WF, which collected the three shipments from the Port of Singapore Authority (PSA) on 7, 10 and 13 November 1997 respectively.

B1 was meant to release the goods only upon presentation of b/ls that were duly endorsed by ICB. However, he released the goods to B2 without receiving those b/ls. According to him, around 7 November 1997, on the arrival of the first two containers, B2 contacted him and said that he needed the goods urgently for his impending public sale at Seaview Hotel. B2 said that it would take some time for ICB to process the necessary documents, and he asked B1 to release the goods to him first. He assured B1 that he would pay for the goods and obtain the b/ls from ICB later on. He also gave B1 a verbal assurance that he would take responsibility in the event that WF faced any problems for releasing the goods without the duly endorsed b/ls.

Subsequently, on 13 November 1997, B1 delivered the first two containers to B2`s sales outlet at Seaview Hotel. On 15 November 1997, he delivered the third container, and on 26 November 1997 he delivered the last three containers.

From 17 to 30 November 1997 and from 5 to 7 December 1997, B2 conducted public sales of Walt Disney and other brands of apparel at his sales outlet at Seaview Hotel. Around 4 December 1997, PW13 (who was in the Philippines) was alerted by his sources in Singapore as to the public sales

organised by B2. PW13 then contacted B1 to ascertain the whereabouts of his six containers of Walt Disney goods. By this time, B1 had already delivered all the goods to B2, but he did not inform PW13 of this. Instead, he assured PW13 that the goods were still in his custody.

PW13 was never paid for the goods, and B1 never received the duly endorsed b/ls from B2. Between 13 to 15 December 1997, B1, with B2`s consent, retook custody of some cartons of Walt Disney apparel from B2`s premises. These were stored by B1 at his own expense at two warehouses at Jalan Terusan and Kallang Place. On 24 January 1998, B1 ceased providing agency services to B2.

Evidently, between 4 December 1997 and 27 February 1998, PW13 contacted B1 several times by telephone and fax, instructing B1 repeatedly not to release the goods to B2 unless he received an authentic `bank endorsement` from B2. On each occasion, B1 lied to PW13 and repeatedly assured him that the goods in the six containers had not left WF`s custody and had never been handed over to B2. He also told PW13 that he had been informed by B2 that the bank endorsement was forthcoming.

Finally, in March 1998, B1 called PW13 and confessed that he had actually released the goods to B2 in November 1997 without first obtaining the duly endorsed b/ls. He apologised, and asked for PW13`s forgiveness and explained the circumstances in which he had released the goods. He told PW13 that the goods had been released to B2 long before he received PW13`s call in December 1997. He said that he had previously lied about the whereabouts of the goods because he had hoped that PW13 and B2 would be able to sort things out between them. He said that he had now engaged a law firm Joseph Tan Jude Benny, to commence a civil action against B2, and was in the process of obtaining a Mareva injunction against the latter.

Thereafter, on or about 30 March 1998, PW13 lodged a complaint with Singapore`s Commercial Crime Division (`CCD`), and CCD commenced investigations against B1 and B2.

A survey of the goods stored by B1 at the two warehouses was carried out by Unispec Adjusters & Surveyors (S) Pte Ltd (Unispec) between 14 to 20 May 1998. This survey was jointly arranged by PW13 and B1. B1 paid for the survey. Based on the quantity that had been shipped (as recorded in the shipping documents and invoices), and taking into account two cartons which had been taken away by the police in the course of the investigations, the inspection revealed that 3,327 cartons containing 94,147 pieces of Walt Disney apparel were missing. The value of the missing goods was estimated to be US$301,673.

In September 1998, CCD brought charges against B1 and B2 for abetting each other in a conspiracy to commit CBT. In essence, the charges against B1 and B2 stated that between 11 and 26 November 1997, they had engaged with each other in a conspiracy to commit breach of trust of goods belonging to GG Sportswear Manufacturing Corporation of the Philippines, and that in pursuance of that conspiracy, and in order to the doing of that thing, they had made the necessary arrangements to take possession and to subsequently sell off 3,327 cartons containing 94,147 pieces of Walt Disney apparel valued at US$301,763. They were charged under s 409 of the Penal Code (`PC`), for an aggravated form of CBT, on the basis that the goods had been entrusted to B1 in his capacity as an agent.

The proceedings below

The prosecution`s case

Based on PW13`s evidence, the prosecution alleged that B2 had concluded a contract with PW13 in June 1997 for the purchase of 500,000 pieces of assorted Walt Disney apparel at US$3 per piece, and that he had conducted a full inspection of the goods in Manila between 2 and 6 November 1997. Those goods were then shipped by PW13 to Singapore, and were entrusted to B1 in his capacity as the shipping agent in Singapore. B2 was supposed to pay ICB for the value of the goods, in return for b/ls that were duly endorsed by ICB. He could then obtain possession of the goods in the custody of B1. However, the prosecution alleged that B2 and his company were in financial problems at that time, and B2 had no funds to pay for the goods. The prosecution called PW14, the Vice-President of ICB, who testified that B2 and US Apparel were facing a shortage of funds at the relevant time, and had exceeded their credit lines. The prosecution`s case was that B2, not having paid for the goods, conspired with B1 to commit CBT of the goods, and pursuant to that conspiracy, B1 delivered those goods to him. From 17 to 30 November 1997 and from 5 to 7 December 1997, B2 conducted public sales of clothing at his sales outlet at Seaview Hotel. He put up PW13`s goods for sale during those occasions, and sold some 3,327 cartons of the goods, containing 94,147 items of Walt Disney apparel, and pocketed the proceeds of sale. PW1, 2, 3 and 7, who had attended the sales, testified that at least half of the sales space, being about three quarters of the size of a football field, had been devoted to the sale of Walt Disney apparel.

With regard to B1, the prosecution relied on PW13`s evidence to show that B1 had released the goods to B2 with dishonest intent, for the purpose of abetting B2 to commit CBT of the goods. PW13 testified that between December 1997 and February 1998, he corresponded several times with B1 via fax and telephone, repeatedly instructing B1 not to release the goods to B2 unless he received a valid bank endorsement. B1 assured him throughout that time that the goods had never left his custody and would not be released to B2 without the appropriate bank endorsements. In January 1998, PW13 asked for a survey of his goods but B1 did not respond to this request. PW13 also testified that around March 1998, B1 called him and finally admitted hat he had released the goods to B2 in November 1997 without obtaining the duly endorsed b/ls. In the course of the conversation, B1 apologised, and explained the circumstances in which he had released the goods. B1 said that he had relied upon and trusted the word of B2 and had been let down by B2. B1 also tried to explain why he had lied about the whereabouts of the goods to PW13 between December 1997 and February 1998.

The prosecution also called PW4, the Chairman of the Singapore Freight Forwarders Association (`the Association`), to give evidence as to the commercial practice of freight forwarders. By his evidence, the prosecution sought to establish that B1`s release of the goods to B2 without production of the original b/ls was contrary to standard commercial practice, and that there was a conspiracy between B1 and B2 to commit CBT of PW13`s goods. PW4 testified that under the standard terms advocated by the Association, goods could only be released by a freight forwarder against duly endorsed b/ls. The only other alternative, which was not contained in the Association`s standard terms, was to release the goods against a letter of indemnity enjoined by a bank (and not other types of indemnity). PW4 conceded that deviation from the alleged standard practice could not be ruled out, nor could it be controlled by the Association. He also acknowledged that B1`s company, WF, was not a member of the Association and therefore did not operate under the Association`s standard trading conditions.

B1`s defence

Before the trial judge, B1`s defence counsel raised a preliminary objection that the charges were flawed, as both B1 and B2 were charged as `abettors` while no one was charged as the principal offender. He submitted that there could not be offences of abetment by conspiracy when no principal

offender had been identified as the one whom the defendants had abetted.

Apart from the problem with the charges, B1`s defence was essentially a denial of any conspiracy between himself and B2 to commit CBT of the goods. He conceded that he had knowingly breached the standard commercial practice by releasing the goods without duly endorsed b/ls, and without a letter of indemnity enjoined by a bank. However, he maintained that he had done so because he trusted B2, and had never expected the latter not to pay for the goods. He therefore denied that he had been dishonest when he released those goods. The defence counsel for B1 also pointed out that the other requirements for establishing the aggravated form of CBT under s 409 of the PC, namely, the elements of `entrustment` and `agency`, had not been made out.

B2`s defence

B2 also denied that he had engaged in a conspiracy with B1 to commit CBT of the goods. In addition, he went one step further and claimed that there were no missing goods at all, and that the alleged shortfall in quantity was actually due to PW13`s own act of short shipment. B2 said that in June 1997, he had contacted PW13 and asked for samples of goods. He received the samples and upon finding them suitable, he negotiated the price with PW13 over the telephone, and then placed an order for about US$1.5m worth of the goods. He said that this was not a concluded contract, since their oral agreement was subject to his viewing of the styles and samples in Manila. In September 1997, he went to Manila to view the full range of goods available. In October 1997, he opened three letters of credit in favour of PW13. B2 conceded that he was in Manila on 5 and 6 November 1997 and had met up with PW13, but he disputed PW13`s evidence that he had spent two full days conducting a full inspection of the goods that he had ordered. Instead, he said that he had merely spent about two and a half hours on 5 November 1997 looking at samples of the goods.

B2 said that he had planned a massive advertising campaign for his impending public sales, but there was no sign of the documents of title even as late as 12 November 1997. He wrote to ICB requesting the urgent presentation of the documents but to no avail. With the impending public sale drawing nearer and still no sign of the documents of title, he then contacted B1 and asked him to release the goods to him first. He assured B1 that he would give him the relevant b/ls later on. He requested urgent delivery of the goods and this was done. He did not eventually give B1 the relevant b/ls because he discovered that the goods were not in accordance with his orders and therefore he rejected the goods and the documents. Having rejected the goods and the documents, he then tried to cancel the advertisements for the public sales, but could not do so. He claimed that the situation was so desperate that he had been forced to obtain counterfeit and unlicensed Walt Disney goods from another source, one `Manaf`, and that he had sold these counterfeit Walt Disney goods at his public sales. He denied having sold any of PW13`s goods, and he denied responsibility for the missing goods. Furthermore, he claimed that the goods were not missing at all, and that the shortfall in the quantity was actually due to PW13`s own short-shipment.

The decision of the judge below

The trial judge did not think that it was necessary to have a principal offender in order for B1 and B2 to be charged with abetment by conspiracy. He considered the evidence adduced by the prosecution, and substantially adopted the prosecution`s version of material facts. In the course of the trial, he found material inconsistencies and discrepancies in B2`s evidence, and impeached B2`s credit. At the conclusion of the trial, the trial judge found that the evidence supported both the inference that B1 had been engaged with B2 in a conspiracy to commit CBT, and also the inference that B1 had been

dishonest when he released the goods to B2. He further agreed with the prosecution that B1 and B2 had abetted to commit an aggravated form of CBT as there had been entrustment of property by PW13 to B1, and a relationship of agency between them. Accordingly, he convicted B1 and B2 as charged.

Preliminary point of law in the appeal: whether two defendants can be charged under s 107(b) of the Penal Code for abetting each other by conspiracy in the absence of a principal offender

The first issue raised by both appellants` counsel in the appeal before me was the interesting legal question of whether there can be offences of abetment by conspiracy if no one had been charged as the principal offender. This question arose because, in the present case, both B1 and B2 were charged as `abettors`. Neither one of them was charged as the principal offender, and no one else was alleged to have been involved. Put simply, the rationale behind the arguments submitted by the appellants` counsel was that if no principal offender existed, then there was no one for the appellants to `abet`.

The same question was raised before the trial judge, who adopted the whole of the prosecution`s submissions on the issue. Those submissions stated that two or more persons could be co-principals in an offence. That is a well-established legal principle, but it does not directly answer the question raised in this case, namely, whether there can be offences of abetment by conspiracy when no principal has been charged. To my knowledge, no previous local case law or academic authority has considered this specific issue. Hence, I reverted to first principles.

First of all, it is important to clarify the meaning of the terms `principal offender` and `secondary offender`. The principal offender is the person whose acts fall within the legal definition of the offence - that is, he actually commits the actus reus with the necessary mens rea. For example, he is the one who makes the knife wound which causes the death of the victim with the requisite intention in a crime of murder, or who snatches the bag with the requisite intention for the crime of theft or robbery. The acts of a secondary offender (sometimes called an `accomplice` or `accessory`) do not fall within the legal definition of the substantive offence, but he is someone whom the law punishes for his involvement in the commission of the substantive offence. It does not follow from this that where two or more persons are involved in an offence, one must be the principal and the others the accomplices. Two or more persons can be co-principals, so long as each of them satisfies the definition of the substantive offence, for example, by each inflicting the wounds upon the victim with the required fault.

It should be emphasised that the terms `principal offender` and `secondary offender` are descriptive terms. The issue of the ***appropriate description*** of the offenders must not be confused with the issue of the complicity of the offenders. The former issue relates to identifying and describing the precise role that each offender plays in relation to the legal definition of the crime. In contrast, the issue of complicity relates to the level of involvement and the degree to which each offender should be punished. Therefore, the fact that one defendant is labelled the `principal offender`, and the other defendant is labelled the `secondary offender`, does not mean that the latter is automatically guilty to a lesser degree than the former. Indeed, the Penal Code provides that the secondary offender can be punished to the same degree as the principal offender, depending on his level of involvement and culpability.

In English law, the general consensus is that the offence of `abetment` (or `aiding and abetting` as it is more commonly called in English law) is a `secondary offence` and the abettor is a `secondary offender`. The position in English law is that the very nature of the offence of abetment makes the

liability of the abettor derivative in nature, in that it is necessary for a principal offender to exist before another person can be found guilty of `abetment`. Put simply, there must be someone for the accused to abet. In some cases, the principal offender may not be charged for various reasons, for example, he may have absconded, or there may be lack of evidence to ascertain his exact identity. Nevertheless, a principal offender must first be ascertained to exist before another person can be accused of abetment. This is because the offence of aiding and abetting, under English law, is understood to constitute some ***encouragement*** or ***help*** to the principal offender. Between them, the English notions of `aiding, abetting, counselling or procuring` embrace conduct which encourages or influences the principal offender or helps him in the commission of the crime.

In Singapore law, the offence of abetment is contained in s 107 of the PC. This section was derived from the Indian Penal Code, and differs significantly from the wording of English legislation governing the offence of abetment. Section 107 of our Penal Code states:

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

In contrast, the relevant English provision, namely, s 8 of the Accessories and Abettors Act 1861, states:

> *Whosoever shall aid, abet, counsel or procure the commission of any indictable offence ... shall be liable to be tried, indicted and punished as a principal offender.*

A comparison of these two statutory provisions reveals that, insofar as the offence of `abetment` is concerned, Singapore law has deviated significantly from English law. The concepts of `abetment by instigation` and `abetment by intentional aiding` found in limbs (a) and (c) of s 107 of our Penal Code are well-known in English criminal law. However, the concept of `abetment by conspiracy` in limb (b) of s 107 is alien to English law, and was derived from the Indian Penal Code. Therefore, whereas abetment by instigation and abetment by intentional aiding can be said to involve concepts of encouraging and helping the principal offender, it is not immediately clear that the same can be said of abetment by conspiracy.

It is time that we clarify the distinction between limb (b) of s 107 of our Penal Code and limbs (a) and (c). Unlike abetment by `instigation` or `intentional aiding`, the offence of abetment by `conspiracy` is, in substance, more closely related to the concept of `criminal conspiracy` than the traditional English notion of `abetment` (ie encouraging or helping another). The offence of `abetment by conspiracy`, postulates proof of a criminal conspiracy coupled with proof of some further act which has been done in pursuance of that conspiracy. In the case of **Chai Chien Wei Kelvin v PP** [1999] 1 SLR 25 , where I delivered the judgment of the Court of Appeal, it was stated (at p 60) that:

> *The distinction between abetment by conspiracy under s 107(b) of the Penal Code and criminal conspiracy under s 120A of the Penal Code was pointed out by the Supreme Court of India in* ***NMMY Momin*** *[1971] Cr LJ at p 796:*

`Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by s 107 IPC.`

*Unlike criminal conspiracy under s 120A of the Penal Code, abetment by conspiracy requires some further act to be done pursuant to the conspiracy. (See also Explanation 5 to s 108 of the Penal Code.) According to **Koh Clarkson and Morgan`s Criminal Law in Singapore and Malaysia** [1989] at pp 311-312, the essential elements of abetment by conspiracy are: first, the person abetting must engage, with one or more other persons in a conspiracy; second, the conspiracy must be for the doing of the thing abetted; and third, an act or illegal omission must take place in pursuance of the conspiracy in order to the doing of that thing.*

Having considered the nature and definition of the offence, I found, as a matter of law, that it is not necessary for a principal offender to exist before someone can be charged under s 107 (b) for abetment by conspiracy - so long as two accused persons agree that they want to effect a substantive offence, and so long as one of them commits an act in pursuance of that conspiracy, there is no reason why they cannot both be charged for abetting each other by conspiracy to commit that substantive offence.

During the hearing of the appeal, B1`s counsel raised a separate but related point. He argued that the prosecution must in every case prove that the principal offence has actually been committed before the abettor is convicted of abetting the commission of that principal offence. It was argued that B1 could not be convicted of abetment by conspiracy to commit CBT in this case as the principal offence of CBT had not been made out. This point can be disposed of simply by referring to my recent dicta in the case of **Chua Kian Kok v PP** [1999] 2 SLR 542 . In that case, I considered the issue of whether an abettor could be convicted when the principal offence that he abetted did not take place, and the principal offender was convicted of a different offence from that which the abettor was charged with abetting. I held that since an accessory`s liability was not strictly dependent on the liability of the principal, the fact that the principal offender was convicted of a different offence from that which the appellant was charged with abetting, did not pose any difficulty. In my judgment, I touched on the `derivative nature` of the liability of an accessory. I said (at p 562):

*It may perhaps be argued that it is illogical to convict an accessory when an offence has not been committed. **This is because the liability of an accessory is derivative in nature**. If the principal is not guilty of the offence that is abetted (as he would only be guilty of another offence, or at most for the attempt of the offence) how can it be said that the accessory, who is even more `removed` from the offence, is guilty of abetting it ? ...*

*This objection can be dealt with in the following way. **The principle that an accessory`s liability is derivative is a common law principle**. Our criminal law is codified in the form of the Penal Code. Sections 107(b), 109, 115 and 116 of the Code clearly state that an accessory can be guilty even though the actual offence is not committed. **Applying Bank of England v Vagliano Bros***

> ***[1891] AC 107, one should look at the natural meaning of the statutory words and not at earlier case law. That being the case, the Penal Code should prevail over the common law notion of an accessory`s liability being derivative****. In fact, even in England, inroads are being made to this notion of derivative liability ... [Emphasis mine.]*

The same observations apply in the present case. One should look at the natural meaning of the statutory words and not at earlier case law. By definition, the offence of `abetment by conspiracy`, which was derived from the Indian Penal Code, refers to proof of the existence of a conspiracy and proof of an act done in furtherance of that conspiracy. This does not necessitate the existence of a principal offender, and two accessories can therefore be charged for abetting each other by conspiracy. The Penal Code should prevail over the common law notion of an accessory`s liability being derivative.

It follows, therefore, that the charges against B1 and B2 in this case were not defective for want of a principal offender. Having disposed of the preliminary point of law, I will now turn to the rest of the contentions raised by the appellants. At the outset, I note that for the charges against B1 and B2 to be made out, the prosecution must have proved beyond reasonable doubt:

(i) first, that B1 and B2 were knowingly engaged in a conspiracy to commit the crime of aggravated CBT as defined under s 409 of the PC;

(ii) secondly, that B1 had dishonestly released the goods to B2 in pursuance of that conspiracy; and

(iii) thirdly that the other elements of aggravated CBT under s 409 of the PC had been made out, namely that those goods had been entrusted to B1 in the way of his business as an agent.

I will deal with B1`s appeal before moving on to B2`s appeal.

The first appellant`s appeal

The issues

The issues arising in B1`s appeal were:

(i) whether the prosecution had proved beyond reasonable doubt the existence of a conspiracy to commit CBT of the goods;

(ii) whether the prosecution had proved beyond reasonable doubt that B1 had the requisite dishonest intent when he released the goods to B2;

(iii) whether the prosecution had proved that the goods were entrusted to B1 in the way of his business as an agent

Proof of conspiracy to commit CBT

The essence of conspiracy is the combination and agreement by persons to do some illegal act, or to effect a legal purpose by illegal means. While it is not necessary that all the alleged conspirators should be equally informed as to the details of the conspiracy, it is essential that there is a `meeting of minds` so that they are all aware of the general purpose of the plot. In this case, the general purpose of the alleged plot was to commit CBT of PW13`s goods. Section 405 sets out the requisite mens rea and actus reus elements for the substantive offence of `CBT`, and it states:

> *Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits `criminal breach of trust`.*

So far as proof goes, conspiracy is generally a matter of inference, deduced from certain acts of the accused parties, done in pursuance of an apparent criminal purpose in common between them. Both the surrounding circumstances and the conduct of the parties before and after the alleged commission of the crime will be useful in drawing an inference of conspiracy: see ***Chai Chien Wei Kelvin v PP*** (supra). An inference of conspiracy would be justified only if it is inexorable and irresistible, and accounts for all the facts of the case. In the case of **Vinit Sopon v PP** [1994] 2 SLR 226 , the Court of Appeal allowed the third appellant`s appeal against his conviction for abetment by conspiracy to traffic in drugs. In delivering the judgment of the Court of Appeal, I stated at p 241:

> *Evidence can secure a conviction only if it **would inevitably** and **inexorably** lead to the conclusion that the third appellant had engaged in a conspiracy to traffick drugs ... It was our opinion that no irresistible inference could be drawn at the close of the trial to establish beyond a reasonable doubt that the third appellant knew of and participated in the drug sale that was being transacted. ... **In other words, the third appellant could be convicted on the strength of circumstantial evidence only if an irresistible inference could be drawn to establish the fact in issue,** viz the third appellant had abetted by conspiracy the trafficking in of drugs. [Emphasis mine.]*

In that case, the evidence which the trial judge relied on to convict the third appellant were some comments made by him during a drug sale between the first appellant and an undercover CNB officer. The third appellant had said in Teochew that `the first meeting between strangers is always difficult ... after we get acquainted with each other, our transaction would be much easier and simpler ...`. He had also said that after they had got acquainted, they could even offer the undercover officer `credit terms`. The Court of Appeal was of the opinion that there were other possible and viable explanations for those comments, including the fact that the third appellant had not been aware that the goods being transacted were drugs. As a result, the evidence did not support an irresistible and inexorable inference that the third appellant knew that he was partaking in a drug transaction.

I will now consider whether the evidence relied on by the trial judge in the present case supported an irresistible and inexorable inference that B1 and B2 had engaged in a criminal conspiracy to commit CBT of the goods. The first set of evidence related to the parties` conduct leading up to the release of the goods. The evidence before the court was as follows: B2 had arranged with B1 to look for a Philippines freight forwarder to ship the goods that he had purchased from PW13. On B1`s nomination, Worldwide was appointed as the agent in the Philippines, and Worldwide prepared the ocean b/ls

naming B1`s company, WF, as the consignees. This allowed B1 to collect the six containers shipped by PW13 from PSA by merely producing the ocean b/ls. On the arrival or shortly before the arrival of the first two containers, B2 contacted B1 and told him that he needed the goods urgently and to release the same to him without the duly endorsed b/ls. B1 was aware that the house b/ls in respect of the goods had been consigned to ICB, and he knew that he should not release the goods without having received the original b/ls duly endorsed by ICB. When he told B2 that he needed the duly endorsed b/ls from ICB, B2 told him that the bank had not released the documents to him and that the documents would not be ready in time. B2 assured B1 that he would hand over the endorsed b/ls later. B2 also assured B1 that he would take responsibility for the release of the goods without the b/ls. On that basis, B1 released the goods to B2. At the time when he released the goods, B1 was aware of the public sales that B2 had planned in respect of the goods from PW13. He knew that B2 intended to dispose of the goods during the public sales. During cross-examination, B1 conceded that, as the custodian of the goods, he was supposed to protect PW13`s interest by releasing the goods only upon receipt of the endorsed b/ls.

On its own, the evidence set out above did not support the irresistible and inexorable inference that there was an agreement between B1 and B2 to commit CBT of the goods. The evidence only revealed that B1 had agreed to release goods to B2 without duly endorsed b/ls. The act of releasing goods without having first received duly endorsed b/ls is not, on its own, an offence punishable under the Penal Code. Even if we assume, at this point, that B1`s act of releasing the goods without receiving duly endorsed b/ls did constitute a breach of trust, so that the actus reus element for CBT was made out under s 405 of the PC, the prosecution must still go on to prove the mens rea element. Whereas every breach of trust gives rise to a civil suit for damages, it is only when there is evidence of the mental element of dishonesty (or wilfulness in the appropriate instance) that such breach becomes a penal offence punishable as criminal breach of trust. In every case of criminal breach of trust, a breach of contract is implicit. It is therefore the mental element of dishonesty that clearly demarcates a breach of trust that is a civil wrong or tort, from the offence of criminal breach of trust. Put another way, every offence of criminal breach of trust involves a civil wrong in respect of which the complainant may seek his redress for damages in the civil court, but a breach of trust in the absence of the requisite mens rea cannot legally justify a criminal prosecution. The determining factor in judging whether a case is one of criminal breach of trust or of criminal breach of contract is whether the accused had acted dishonestly. Therefore, B1`s act of releasing the goods would only become punishable as a criminal act if it was coupled with the requisite mens rea.

Proof of dishonest intent

Thus, the pivotal consideration in this case was whether B1 had acted `dishonestly` when he released the goods to B2. If dishonest intent could be established, it would also be the basis for the court to draw an inexorable and irresistible inference that B1 had been engaged with B2 to commit CBT of the goods.

The issue of dishonest intent has to be considered with reference to ss 23 and 24 of the Penal Code. Section 24 of the PC states that `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`. According to s 23, `wrongful gain` is gain, by unlawful means, of property to which the person gaining it is not legally entitled, and `wrongful loss` is loss, by unlawful means, of property to which the person losing it is legally entitled. An accused person`s dishonest intention cannot be directly proved, and has to be inferred from the conduct of the accused and also from the surrounding circumstances: see **Amritlal v Bajranglal** [1963] 2 Cri LJ 474 at p 475. In most cases of CBT, where the accused is found to have been dishonest, he would have failed to provide any adequate explanation of his

conduct. However there have been other cases involving a bona fide claim, or where there was some other explanation which led the court to conclude that he was not dishonest. In particular, it must be stressed that negligence is insufficient to make out an offence of CBT.

In the context of CBT, a series of cases have shown that negligence or a failure to account for entrusted property does not, without more, constitute dishonesty. In **PP v Mohamed bin Abdul Jabar** [1949] MLJ 70 , the accused was entrusted with funds as a government servant. He failed to account for certain expenditure and offered no clear explanation of what happened to the money. However, he was acquitted. The court found that he had little or no accounting experience, and that he had placed great reliance on his clerk. He was not liable for CBT even though he had been `grossly careless`. Another more extreme example is provided by **Navaratnam v PP** [1973] 1 MLJ 154 . In that case, the officer in charge of a prison was found to have taken money belonging to a prisoner whose belongings had been entrusted to him. He claimed that he intended to use the money to retain a lawyer for the prisoner. Since there was nothing in the prosecution`s case to dispute the truth of the appellant`s statement, the appeal was allowed. Ali FJ concluded:

> *the point as it seemed to us is, if there was any truth in the appellant`s statement of his intention to pay the lawyer, then his taking of the money did not become dishonest even if he did so without the prisoner`s permission.*

Similarly, in **Rangi Lall v King-Emperor** [1930] 6 ILR 68, the court commented on the importance of proving `dishonesty` beyond reasonable doubt to make out an offence of CBT under the relevant section of the Indian Penal Code (which is in pari materia with Singapore`s legislation). It was pointed out that:

> *T **he sections dealing with the offence of criminal breach of trust were intended to punish an offence of which dishonesty is the essence**. Any breach of trust is not an offence. It may be intentional without being dishonest or it may appear dishonest without being really so. In such cases, the Magistrate should be slow to move. This caution is all the more necessary since there is a natural desire to secure speedy justice by having recourse to criminal law.*
>
> *Although transactions which involve civil liabilities may amount to criminal offences, and often do, so that the dividing line between the two in a discussion of the case is almost indistinguishable, the use of the criminal law, not for the purpose of punishing an offender or in the public interest, but as a means of exerting pressure to extract money from an agent, is to be discouraged.*
>
> ***The onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution who must prove the charge substantially as laid. The guilt of the accused must be proved beyond reasonable doubt. The gravest suspicion against the accused will not suffice to convict him of a crime, unless evidence established it beyond doubt.****[Emphasis mine.]*

In the present case, the trial judge found that the evidence adduced by the prosecution supported an inference that B1 had dishonestly released the goods to B2 for the purposes of committing CBT on those goods. However, having perused the evidence, I was unable to agree with him.

On three separate occasions, B1 released PW13`s goods to B2. This deprived PW13 of his financial security of payment against documents. B1 did this in circumstances where he knew that B2 needed the goods urgently for impending public sales, knowing that B2 had not paid for the goods, and knowing that B2 was going to sell those goods. Essentially, B1`s explanation for his conduct of releasing the goods was that it had never crossed his mind that B2, being a `man of means`, would not pay for the goods. It is clear from the evidence that B1 had been influenced by the urgency of B2`s request for the release of the goods. B1 was told that the public sales had been organised and widely publicised. There was still a lot to be done before the Walt Disney goods could be sold at the public sales - among other things, they had to be unpacked, arranged and price-tagged. B1 was aware of this urgency. He knew that B2 had not obtained the duly endorsed b/ls from ICB and had not paid ICB for the goods. He believed B2, who told him that the documents would not be ready in time for public sales. B2 requested B1 to ensure a quick clearance so that the goods could be sold at the public sales. B1 felt that this was a reasonable request - if B2 failed to get the goods in time for the public sales, he would have lost out on potential sales, or worse, be forced to incur additional costs, effort and publicity by organising more sales.

I found B1`s explanation of his decision to release the goods to B2 to be credible. However, the prosecution sought to discredit this explanation by relying on the fact that B1 had not made any checks to ascertain B2`s financial standing, and therefore had no basis to believe that B2 was `a man of means` who was financially sound and could pay for the shipment, which was worth US$1.5m. The prosecution submitted that, as a result, B1 must have known that B2 did not forward endorsed b/ls because he had no means to pay. The trial judge agreed with the prosecution. However, I disagreed, for it was not a startling concept to me that a man might be `a man of means`, and yet delay in paying for goods. Moreover, B1 had believed B2 when the latter said that the b/ls would not be ready in time. The point that B1 was trying to make was that, in his mind, B2 was a man of means and it never crossed his mind that B2 would ultimately not pay for the goods. After all, B2 had always been such a good customer, and had paid all his past invoices promptly. If B1 had truly held those beliefs at the time he released the goods, then it could not be said that he was dishonest. He had not released the goods with the intention of causing wrongful gain to himself or to B2. Neither had he intended to cause wrongful loss to PW13. He might have been negligent, or even grossly careless to expose his company, and PW13, to such risks, but he was not dishonest.

The prosecution conceded that B1 did not stand to gain financially from B2`s activities. There was no allegation that B1 and B2 agreed to share in any profits made from selling off the goods. The prosecution`s only allegation was that B1 wanted to foster his business relationship with B2, and that he had released the goods to B2 because he wanted to gain B2`s `goodwill`. B1 did testify that he considered B2 to be an important and valuable customer of his company. However, he denied that this had led him to dishonestly release the goods. Instead, he stated that he had felt a duty and an obligation to clear the goods quickly for B2, as it was part of the `good service` which he provided to his customers in times of urgency, especially an important customer like B2. He also testified that he had always considered B2 and not PW13 to be his customer, as the former had retained the services of his freight forwarding company. Again, if there was any truth in B1`s testimony as to his state of mind, then he did not release the goods with the dishonest intention to commit CBT on those goods.

It is worth noting that, by releasing the goods without first receiving the duly endorsed b/ls, B1 had put himself at a very great risk of being sued in the civil court by the holder of the b/ls for the full value of the goods. This was not a situation where the accused was (and knew that he was) immune from civil repercussions and could only be punished by criminal sanctions. B1 admitted that he had no money to pay for the goods if he was sued by the holder of the b/ls, and that he would be bankrupted if a civil suit was brought against him. In my judgment, this factor supported the conclusion that it had never even crossed his mind that B2 would not pay for the goods. It was

inconceivable that he would put himself at such great risk just so as to gain B2`s business. In the same vein, it did not cross his mind that he was putting the shipper at risk, simply because he had not expected B2 not to pay.

The prosecution also put a great deal of emphasis on the fact that B1 had knowingly breached standard commercial practice of freight forwarders. It was contended that, by doing so, B1 had not only put himself, but also the shipper of the goods, at great risk. This contention clearly influenced the trial judge`s decision to find that B1 was dishonest. I was however not convinced by this argument - just because B1 took risks with the goods, and such risks were not in the best interests of the shipper, did not show that he was dishonest. The case **Cheam Tat Pang & Anor v PP** [1996] 1 SLR 541 is relevant. The facts, briefly, were as follows: the appellants were former directors of IPH. They were convicted in the district court of having conspired with each other to commit criminal breach of trust, contrary to s 409 and s 109 of the Penal Code. They were found to have dishonestly used IPH`s funds for the purchase of shares in a Hong Kong listed company, LMP. The appellants had devised a scheme for IPL to disburse about $8.45m to another company APL, and then for APL to facilitate the purchase of the LMP shares on IPH`s behalf. They then arranged for two other private companies, Lambang Maju and Wartakaya, to purchase the shares from APL at a higher price so that APL made a profit from the sale. The district judge found that the appellants had undisclosed beneficial interests in APL and had acted in conflict of interests. She also found that they had failed to act in IPH`s best interests, having taken dishonest risks with IPH`s funds to make a wrongful gain for themselves in the form of APL`s profit from the sale of the LMP shares. On appeal, the appellants argued, inter alia, that there were genuine commercial reasons for them to minimise disclosure of the LMP acquisition. The appeals against conviction and sentence were allowed. In relation to the question of dishonesty, the appellate court pointed out that:

> *... the pivotal consideration was whether the appellants had acted `dishonestly`. This had to be considered with reference to s 24 of the Penal Code. It was not enough for the respondent to suggest that the appellants were dishonest in having taken risks with the entrusted funds, such risks not being in the best interests of IPH.*

Despite the fact that the appellants in ***Cheam Tat Pang*** had clearly taken risks with the entrusted funds, it was held on appeal that there was no cogent evidence that they had acted in the pursuit of a common object or design involving the commission of criminal breach of trust. The appellate court also found little support for the district judge`s finding that the appellants had some undisclosed interest in APL and that they had intended to use IPH`s funds to gain profit in their capacity as APL`s shareholders. There were no `unlawful means` employed in the process of acquiring the LMP shares. Thus, it was held that the nature and degree of dishonesty required under s 405 of the PC had not been proven beyond reasonable doubt.

Like in the case of ***Cheam Tat Pang*** , I found that there were genuine commercial reasons in the present case for B1`s decision to breach standard practice and release the goods to B2. The urgency of the situation, the fact that B2 was a trusted customer, the knowledge that B2 had incurred substantial costs arranging and publicising the impending sales were all genuine commercial reasons. In the light of these reasons, I found that, although B1 had clearly taken risks with the entrusted goods, the nature and degree of dishonesty required under s 409 of the PC had not been proven beyond reasonable doubt.

The next piece of evidence related to B1`s acts between 13 to 15 December 1997, when he took back cartons of goods from B2`s premises at Seaview Hotel and stored them at warehouses at Jalan

Terusan and Kallang Place. The deputy public prosecutor submitted that, having delivered the goods, there was no reason for B1 to become involved in retaking custody of the goods. He argued before me that B1`s act of taking custody of the remaining goods was an indication of his guilt and his involvement in the conspiracy to commit CBT of the goods. I was unable to agree with him. B1 had already explained in cross-examination that he had retrieved the goods from B2 because he was becoming increasingly worried about the situation. He had repeatedly requested B2 to forward to him the duly endorsed b/ls, but to no avail. By December 1997, B2 had also indicated to B1 that he no longer wanted the goods as they were not up to specifications. B1 was afraid that the shipper would take legal action against him for releasing the goods, and he felt that by taking back the remaining goods, it would reduce his own risk in the event that the shipper sued him. I found this explanation to be acceptable and credible.

The respondent also pointed out to me at the appeal that, although B1 claimed that he had retaken custody of 5,505 cartons of goods in December 1997, only 5,348 cartons were found in his warehouse in May 1998 when the joint survey was carried out by B1 and PW13. He submitted that the fact that B2 had testified that he continued to sell Walt Disney goods at least until April 1998, coupled with the fact that 157 cartons of PW13`s goods went missing between December 1997 and May 1998 while in B1`s custody formed evidence of B1`s dishonesty and his involvement in a conspiracy with B2 to commit CBT of the goods. However, I found that B1 had merely said during cross-examination that his contractors had done a rough count when he retook the goods from B2 in December 1997, and that ***approximately*** 4,800 to 5,505 cartons of goods were stored in the warehouses. There was no conclusive evidence that 157 cartons of goods had really gone missing whilst in B1`s custody.

The lies told by the first appellant

The onus was on the prosecution to prove beyond reasonable doubt that B1 was engaged in a conspiracy with B2 to commit CBT of the goods, and that B1 had dishonestly released the goods to B2 in pursuance of that conspiracy. On the evidence thus far, I felt that they had not discharged their onus. Indeed, taking the evidence as a whole, I found the most cogent piece of evidence against B1 was the fact that he had lied to PW13 about the whereabouts of the goods. The undisputed evidence was that, between December 1997 and February 1998, he lied to PW13 repeatedly, assuring the latter that the goods were intact in his possession although he had already released the goods to B2. This is what I will consider next.

The relevant authority on the effect of lies told by an accused is the English case of **R v Lucas (Ruth)** [1981] QB 720[1981] 2 All ER 1008. There, the English Court of Appeal held that the mere fact that an accused told lies should not be taken as evidence of his guilt, although these lies could, in appropriate circumstances, amount to corroboration because it indicated a consciousness of guilt. Lord Lane CJ held at p 724 that there were four criteria to be satisfied before an accused`s lie could amount to corroboration:

> *The lie ... must first of all be deliberate. Secondly, it must relate to a* ***material issue****. Thirdly,* ***the motive for the lie must be a realisation of guilt and a fear of the truth****. ... Fourthly, the statement must be clearly shown to be a lie by [independent] evidence ... [Emphasis mine.]*

I found, without much difficulty, that the first and fourth criteria of the `Lucas` test were satisfied in the present case, for B1 conceded at the trial that he had deliberately lied to PW13 as to the whereabouts of the goods. I also found the second criterion of the test to be satisfied, and that B1`s

lies related to a material issue. B1 lied to PW13 that he had not released the goods to B2. These lies were told pursuant to enquiries made by PW13, at a time when the goods had already been released. The lies clearly related to a material issue in the appeal, since they went towards determining whether he was covering up the conspiracy to commit CBT.

Thus, in my judgment, the effect of B1`s lies depended on whether the third criterion in the `Lucas` test was satisfied. The task for the court was to determine the motive behind the lies. During cross-examination, B1 explained that he had lied to PW13 because he was hoping that B2 would work out his differences with PW13, so that he would avoid being dragged into the conflict. I found B1`s subsequent conduct to be consistent with his explanations. In March 1998, B1 had called PW13 and apologised for lying to PW13. In the course of that conversation, he had given the same explanation to PW13 that he later repeated at the trial. This was before any complaint was made by PW13 to CCD. Hence, although I found that B1 was `dishonest` in general (because he had told lies), his lies were not sufficient to indicate any consciousness of guilt for releasing the goods dishonestly. He did not lie due to a realisation of `guilt`, but because of an `innocent motive`, namely, to buy time for himself, in hope that PW13 and B2 would work out their differences: see **R v Goodway** [1993] 4 All ER 894.

In my judgment, having considered the conduct of the parties and the surrounding circumstances, and taking the evidence as a whole, there was insufficient evidence to support the inference that B1 was dishonest when he released the goods to B2. The prosecution failed to show that B1`s explanations for his conduct were not acceptable. The evidence, at best, showed that B1 was negligent. Bearing in mind that the prosecution must prove its case beyond reasonable doubt, the evidence adduced by the prosecution also did not justify an irresistible inference that B1 had abetted B2 to commit CBT by conspiracy. There was insufficient evidence to support an inference that there was a `meeting of minds`, or agreement as to any general purpose to dishonestly misappropriate and dispose of the goods. The evidence showed only that B1 had agreed to release the goods to B2 in the absence of duly endorsed b/ls. By releasing the goods without having first received duly endorsed b/ls, B1 may very well be found to have been negligent, and be made liable in a civil suit for the full value of the goods. However, the act of releasing the goods without first receiving duly endorsed b/ls was not, in itself, an offence under the Penal Code. Hence, an `agreement` between B1 and B2 to effect such a release bore no significance in criminal law, unless it could be shown that this was done with dishonest intent. These findings were sufficient for me to allow B1`s appeal against his conviction, and there is no need to go on and consider the issues of `entrustment` and agency`.

The second appellant`s appeal against conviction

Amendment of the charge against the second appellant

In order to establish the offence of abetment by conspiracy, it must be shown that there was agreement to commit the offence in question. An agreement necessarily involves at least two parties. This means that where only two persons are charged for abetment by conspiracy, and if one is acquitted on the basis that there was lack of evidence of any `agreement` or `conspiracy`, then the remaining person cannot be convicted of abetment by conspiracy. Having found, in relation to B1, that there was insufficient evidence to prove the existence of any conspiracy between B1 and B2, it followed that B2 should not have been convicted on the charge of `abetment by conspiracy` to commit CBT, for the element of `conspiracy` would also not have been made out in relation to B2. The nature of the offence dictated that the original charge against B2 was revealed to be improper

once B1`s appeal was allowed.

However, the fact that I acquitted B1 did not mean that I had no choice but to also acquit B2. Although the general principle is that an accused should be acquitted if the charge against him has not been made out, this principle must be balanced with the interests of the public, which require that those persons who are evidently guilty of serious crimes be brought to justice. Thus, a combination of case law and statute provides the High Court, sitting in its appellate capacity, with the power to amend a charge: see **Garmaz s/o Pakhar & Anor v PP** [1995] 3 SLR 701 , and **Carl Elias Moses v PP** [1995] 3 SLR 748 . In appropriate cases, the High Court in its appellate capacity could also alter the finding of a subordinate court by convicting on an amended charge: s256(b)(ii) Criminal Procedure Code (Cap 68) (`CPC`). The power to amend the charge will be exercised where the record of facts and the record of evidence support the amended charge, and where such amendment does not affect the substance of the evidence given in the lower court. Such power must be exercised judiciously and the court will ensure that the accused is not prejudiced in any way.

In my judgment, this was a proper case for amending the original charge against B2 of `abetment by conspiracy to commit CBT` to one of `cheating` under s 420 of the PC. Section 420 states:

> *Whoever cheats, and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.*

Amendment of the charge to one of cheating did not affect the substance of the evidence given in the lower court. The facts of the case, and the record of evidence revealed a classic case of cheating, which is defined in s 415 of the PC as follows:

> *Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to `cheat`.*

The substance of the amended charge against B2 was that he, by deceiving PW13, had dishonestly induced PW13 to deliver goods to him, and had thereafter misappropriated US$301,673 worth of those goods. Without paying for the goods, B2 induced PW13 to deliver those goods to him. Prosecution witnesses who had attended the public sales at B2`s premises at Seaview Hotel testified that over half of the space had been dedicated to sale of Walt Disney apparel. Yet, B2 claimed that he did not sell any of PW13`s goods at the public sales. He would have the court believe that he rejected PW13`s goods because those goods did not meet specifications, yet, he could not point to any specific term of his contract with PW13 that was breached in respect of the goods. Before the trial judge, he merely gave a bare assertion that the goods were not sorted out by size, and that there were very few colours and too much quantity of particular styles. He claimed that the Walt Disney goods that he sold at the public sales were actually counterfeit goods which he had obtained from one `Manaf` out of desperation. He also argued that none of PW13`s goods actually went missing, and that the alleged shortfall in quantity was in fact due to PW13`s short shipment.

Issues in B2`s appeal

At the appeal, B2`s counsel raised the following issues:

(i) the trial judge had erred in making various findings of fact;

(ii) the trial judge had erred when he preferred PW13`s evidence over B2`s evidence, and he had erred in impeaching B2`s credit without giving adequate consideration to B2`s explanations for the inconsistencies in his evidence at the trial and his previous statement to the police;

(iii) the trial judge had erred when he ruled that the terms of the inspection certificates did not give B2 the right to take delivery of the goods in the absence of the duly endorsed b/ls.

The trial judge`s findings of fact

Counsel for B2 sought to appeal various findings of fact made by the trial judge. First, it was argued that the trial judge was wrong to believe PW13 and to make the finding that B2 had spent 5 and 6 November 1997 in Manila conducting a full inspection of the goods. B2 had testified at the trial that he had only spent two and a half hours on 5 November 1997 looking at samples, and that he had not inspected either the quantity or quality of the goods before they were shipped to him. However, the trial judge disbelieved him as the evidence he gave at the trial was inconsistent with his previous statement to CID. In that previous statement, he had told CID officers that he was in Manila between 5 and 6 November 1997 for the purpose of inspecting the goods, and that he had found the goods to be in order. Moreover, B2 himself conceded that he had signed inspection certificates dated 6 November 1997. These certificates certified that B2 had made a `random check and inspection` of the goods, and had found the goods to be fully compliant in terms of quality, size, general appearance, colour, measurements, workmanship and instructions on the labels and tags.

The second finding of fact which B2`s counsel appealed against was the finding made by the trial judge that B2 and his company, US Apparel, were not in a financially secure position at the relevant times and could not pay for the goods that had been purchased from PW13. At the trial, B2 called DW10 to testify that a company called Vastraco Pte Ltd had paid him the sum of $445,000 for goods purchased from a Hong Kong company affiliated with US Apparel. However, it transpired at the trial that DW10 was not even an officer or employee of Vastraco Pte Ltd. He could not even produce a letter of authority verifying his claim that he managed the affairs of Vastraco Pte Ltd. Moreover, the sum of $445,000 was for goods purchased from a Hong Kong affiliated company and not US Apparel, and B2 did not testify as to how he could utilise these funds to pay off the debts of US Apparel. Added to this, the trial judge found it curious that neither DW10 nor B2 could explain why the sum of $445,000 had been paid in the form of two cheques instead of one cheque. Thus, the trial judge preferred the evidence of PW14, the Vice-President of ICB, who testified that, at the material time, US Apparel had generally exceeded its credit lines and did not have sufficient funds to even pay the two collection bills sent by Citibank, Manila, much less to pay US$1.5m for all the goods purchased from PW13.

Thirdly, B2`s counsel argued that the trial judge had erred in holding that PW13 had not made a short shipment of goods to Singapore. The trial judge had rejected B2`s allegations as `incredible`, since he had not mentioned the fact of PW13`s short shipment in any of his statements to the police. The defence of short shipment had only been entered at the last minute. Moreover, B1 testified that B2

had not complained to him of short shipment.

Fourthly, B2`s counsel argued that the trial judge had erred in holding that the goods that were sold at the public sales originated from PW13 and were not counterfeit goods. The trial judge disbelieved B2`s claim that he had sold counterfeit goods which he had obtained from one `Manaf`. He pointed out that B2 had in his possession six container loads of genuine Walt Disney apparel. It simply defied logic for B2 to claim that he did not sell any of PW13`s genuine goods, out of fear that he would not be able to reject them in a civil suit, and yet say at the same time that he was so desperate that he had to obtain counterfeit Walt Disney apparel for the sales, thereby taking the risk of being indicted for the criminal offence of selling unlicensed goods. The learned judge rejected the evidence of DW7, whom B2 had called as an `expert witness` to testify that the Walt Disney goods sold at the public sales were counterfeit. He found DW7 to be an unreliable, biased and untruthful witness. He also took into account the fact that B2 had not made any attempt to trace `Manaf` and to call him as a witness.

The fifth finding of fact that was appealed against was the trial judge`s finding that B2 had not rejected the goods purchased from PW13. The trial judge found no evidence to substantiate B2`s allegations that the goods had failed to comply with specifications in the contract. He noted that up to April 1998, B2 had never intimated to PW13 that he was rejecting the shipment for non-compliance with his specifications. Moreover, B2 could not, in court, point to any specific term of his contract with PW13 that was breached in respect of the goods. He made a bare assertion that the goods were not sorted out by size, were of very few colours and that too much quantity of particular styles had been shipped. Yet, when asked to verify his assertion, B2 had to concede that there were no written documents showing that he had stipulated the requisite sizes, colours and styles of the goods which he had ordered from PW13. It was therefore not surprising that the trial judge accepted PW13`s evidence that B2 had contracted to purchase half a million pieces of PW13`s inventory of assorted apparel at US$3 per piece, and not on the basis of size, colour or style.

As can be seen, each of the findings of fact that was appealed against was dealt with in great detail by the trial judge in his written judgment. At the appeal, B2`s counsel presented lengthy arguments as to why each of the above findings was wrong. I will not delve into those arguments in detail. It suffices to say that, after carefully scrutinising the reasons given by the trial judge for those findings of fact, I found that they were all findings of primary fact, based on the evidence given by the witnesses in the trial. In relation to each finding of fact which B2 appealed against, the trial judge chose to believe the evidence given by the prosecution`s witnesses, over the evidence given by the witnesses called by B2. It is well-established that an appellate court should not set aside a finding of fact unless the appellant satisfies the court that the trial judge was plainly wrong and that his decision ought to have been the other way. In particular, appellate courts are exceedingly slow to overturn findings of primary fact based on evidence given by witnesses, which the trial judge had the advantage of hearing first hand. Therefore, B2`s appeal in respect the trial judge`s findings of fact failed, for he did not show that the trial judge was plainly wrong, or that these findings were made against the weight of evidence.

The trial judge`s decision to impeach the second appellant`s credit

Counsel for B2 also argued before me that the trial judge erred when he impeached B2`s credit at the trial, and preferred PW13`s evidence over that given by B2. However, an appellate court, not having seen or heard the witnesses, is in a less advantageous position than the trial judge to judge the veracity of witnesses. Even when the appellate court is disposed to come to a different conclusion, it should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of

having seen and heard the witnesses could not be sufficient to explain or justify the trial judge`s conclusion. In **Chow Yee Wah & Anor v Choo Ah Pat** [1978] 2 MLJ 41 , the Privy Council approved of the following statement of principle as to appellate intervention expressed by Lord Shaw in ***Clarke v Edinburgh & District Tramways Co*** 1919 SC (HL) 35 at p 36:

> *When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in the case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What, in such circumstances, thus psychologically put, is the duty of an appellate court ? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself ... the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privileges of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong ? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.*

There was no indication that the trial judge in the present case had failed to take proper advantage of his having seen and heard the witnesses. Thus, there was no basis for me to intervene with his decision to impeach B2`s evidence, or to prefer PW13`s evidence over B2`s. In any event, so much of B2`s evidence was unsubstantiated and inconsistent that it was not at all surprising that the trial judge chose to believe PW13`s evidence.

The inspection certificates

The last submission which B2`s counsel made before me was that the inspection certificates gave B2 the right to take delivery of the goods prior to payment without duly endorsed b/ls, and that the trial judge had therefore erred when he held otherwise. His argument ran as follows: the inspection certificates provided that the shipper was responsible for the correctness of the goods right up to destination. B2`s evidence was that he had not inspected the goods in Manila before their shipment and hence he wanted to check the goods before making payment. The assurance or indemnity given to WF in the inspection certificates, be it oral or otherwise, gave him the entitlement to clear the cargo in advance, prior to the arrival of the documents.

Even if one disregarded the finding of fact made by the trial judge that B2 had conducted a full inspection of the goods in Manila on 5 and 6 November 1997, the above argument would still have failed. There is no rule in commercial law that gives the buyer the specific right to take possession and delivery of goods via inspection certificates and for the purpose of inspection. The buyer`s right to possession of goods is governed by s 28 of the Sale of Goods Act (Cap 393) (`SGA`), which makes delivery conditional upon payment of the price, unless the parties have expressly agreed otherwise. The right to possession is therefore independent of the passing of property and ownership in the

goods, and the general rule is that a buyer obtains the right to possession of the goods only upon paying the price. Of course, the parties may specifically contract otherwise, for example, if the seller sees fit to grant him credit. There was no evidence of any contract term in the present case granting B2 the right to take possession and delivery of the goods via the inspection certificates. The only statutory provision providing for the buyer`s right to inspect goods is s 35(2) of the SGA. This section provides that a buyer who has not previously examined the goods, upon obtaining possession of those goods, is accorded a reasonable opportunity to examine them. Even though the buyer has obtained possession of the goods, he is not deemed to have accepted them, and he may reject non-conforming goods within a reasonable time. However, s 35(2) does not circumvent s 28 of the SGA to provide the buyer with the right to possession in order to inspect the goods.

Substitution of conviction

Taking the evidence as a whole, and having considered and rejected all of the arguments forwarded by B2`s counsel, I found that B2 had no defences against the amended charge of cheating. Following the Court of Appeal`s decision in ***Garmaz s/o Pakhar v PP*** (supra), it was open to this court to substitute under s 256(b)(ii) of the CPC a conviction under the original charge to one under the amended charge. In **Sivalingam v PP** [1982] 2 MLJ 172 , it was held that the High Court`s power to substitute a conviction in its appellate capacity must be exercised with great caution bearing in mind the restrictions in ss 172 and 173. The appellate court must be satisfied that there is clear evidence that a case for the substituted offence has been made out against the accused in the court below, and that no prejudice or injustice has been caused to the accused.

The circumstances of this case made it suitable to substitute B2`s conviction under the original charge, to a conviction under the amended charge of `cheating`. For B2 to be guilty of `cheating`, it had to be proved beyond reasonable doubt that he had induced PW13 to deliver the goods to him, and that he had done so with dishonest intent. The facts of this case were such that both the act of inducement and B2`s dishonest intent had been made out on the evidence. Not only did the record of facts and the record of evidence support the amended charge, all the evidence necessary to satisfy the elements to constitute the amended charge of cheating was also available. In particular, I found that B2`s evidence and defence would have been substantially unchanged had the charge of `cheating` been brought against him from the start. Therefore, I amended the charge against B2 to one of `cheating` under s 420 of the Penal Code, and I exercised my powers under s 256(b)(ii) of the CPC and substituted the conviction.

The second appellant`s appeal against sentence

In relation to B2`s appeal against sentence, I noted that the maximum term of imprisonment for the amended charge was seven years. This was lower than the maximum term of imprisonment for the original charge under s 409 of the PC, which was ten years. The original term of imprisonment passed by the trial judge of five years and six months was very close to the maximum term of imprisonment provided under s 420 of the PC. In the circumstances, to reflect the fact that the charge against B2 had been amended to one with a lower maximum term of imprisonment, I found it appropriate on the particular facts of this case to reduce his term of imprisonment to four years.

Conclusion

In conclusion, the charge against B1 was not made out, and his appeal against conviction was

accordingly allowed, and his sentence set aside. As for B2, the charge against him was amended to one of `cheating` under s 420 of the PC. His conviction was substituted under the amended charge, and his sentence reduced to four years` imprisonment.

Outcome:

First appellant`s appeal against conviction allowed;second appellant`s appeal against conviction dismissed; appeal against sentence allowed.

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