NOTES OF CASES

CRIMINAL BREACH OF TRUST AND BANK EMPLOYEES

Public Prosecutor v. *Yeoh Teck Chye* and
Lim Hong Pung & Anor. v. *P.P.*[1]

A friendly and obliging bank manager is no doubt, an "asset" to many. But here is a story of a bank manager who got so "friendly" with one of his clients that the law called it "criminal breach of trust". After reading the case you may well ponder over the "friendly" advances totalling M$7,269,801.36 which was the subject of the prosecution under section 408 of the Penal Code.[2] The following, somewhat involved, account of the facts may be gathered from the judgment.

The bank manager (accused 2), taken to be the principal offender in the case, was head of the Kuala Lumpur branch of Bank Buruh (Malaysia) Bhd. He knew that a customer of the bank (accused 3) was the actual operator and beneficiary of *seventeen* accounts opened in the names of different people that accused 3 managed to persuade should lend their names to his enterprise. The full picture of how this was done with such apparent success is not clear. In any case, accused 3 must have learnt to sign 16 different names in as many ways. Towards the end of this note I will briefly refer to charges arising out of this aspect of the case. According to accused 3, it was accused 2 along with accused 1 (the deputy general manager of the bank) who suggested the "spreading out" of accounts as a means of obtaining large over-draft facilities. Once the accounts were opened, accused 2, with some help from accused 1, let accused 3 draw a total of $7,269,801.36 *over* and *above* the agreed over-draft limits.

Inspectors from Bank Negara had uncovered these dealings. Immediately the head office of Bank Buruh took the necessary steps to safeguard the Bank's interest by *inter alia* removing accused 2 from his post. This and other steps taken by the bank were interpreted by the court as indicating that in the Bank's view accused 2 had acted beyond his authority. It appears from the judgment that, perhaps, the Bank did not suffer any "wrongful loss",[3] at least as at the date of the judgment. But the Federal Court held that accused 3 was given opportunities to obtain easy loans for his share-buying and other ventures and there was "wrongful gain".[4] Possibly, the over-

[1] [1981] 2 M.L.J. 176.

[2] "408. Whoever, being a clerk or servant, or employed as clerk or servant, and being in any manner entrusted in such capacity with property, or with dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine."

[3] See s. 23, Penal Code.

[4] *Ibid.*

drafts had been made good by accused 3. But neither that fact nor the fact that the Board of Directors of the Bank had ratified [5] the transactions entered into between accused 2 and 3 saved accused 2 from being prosecuted. Accused 2 had originally been charged under section 408, (read with section 405) of the Penal Code with having 'wilfully suffered (accused 3) to dishonestly use' the funds of the Bank entrusted to accused 2. The trial judge amended the charge to read that accused 2 'did dishonestly dispose of the said fund by approving for payment certain cheques … exceeding the overdraft facility or facilities approved in respect of the respective accounts' and also, in a separate second charge, that accused 2 'did dishonestly dispose of the said fund by approving for payment certain cheques drawn… exceeding the credit balance in the respective accounts when there was no security having been taken in respect of the overdraft facilities approved'. The court further amended these charges as will be mentioned below.[6]

In his defence accused 2 pleaded that,

1) The advances in question, given for periods of between 3 weeks to 7 months, were 'short-term' loans that his bank had 'impliedly' authorised him to make.

2) On his appointment to the managership of Bank Buruh he had been told by the Executive Director of the Bank that he was 'as far as possible to run the branch as he had been doing when he was a manager in Malayan Banking until receipt of further instructions'. As he had authority in his previous bank to grant loans of unlimited amounts 'on call' he assumed the same extent of authority was available.

3) The evidence, on the least favourable construction, could only show that he had been negligent and not dishonest in regard to the transactions in question.

The court found against accused 2 on all these points.

Though the law regarding criminal breach of trust is well-settled, the variety of circumstances in which courts are called upon to apply the law may yet prove baffling. The ingredients of the offence under section 405 of the Penal Code as set out by the court are:

An accused should be,

"(i) entrusted with property or dominion over the property;

(ii) (a) [and] he should dishonestly misappropriate or convert it to his own use or

(b) dishonestly use or dispose of the property or wilfully suffer any other person so to do in violation of,

[5] "As regards the effect of ratification on criminal liability two authorities were brought to our notice *viz., Yeow Fook Yuen* v. *Regina* ([1965] 2 M.L.J. 80) and *Mongol Sen* v. *Emperor* (A.I.R. 1930 Lahore 57). From these authorities we are satisfied that ratification would not exonerate a criminal offence and no authority we are aware of or which has been brought to our notice says otherwise." [1981] 2 M.L.J. 176, at 180H.

[6] See footnote 8.

(iii) (a) any direction of law prescribing the manner in which such trust is to be discharged or

(b) any legal contract made touching the discharge of such trust."[7]

The question is, what constitutes breach of trust through dishonest misappropriation or conversion in cases involving bank employees or, for that matter, people in similar employments of trust, such as, stock brokers, bookies and perhaps, shipping agents? It was conceded by defence counsel that there was "entrustment" of the bank's monies to accused 2. In which case, did accused 2 violate any direction of law prescribing the manner in which the trust should be discharged or was he in breach of any legal contract (expressed or implied) touching the discharge of the trust?

The court found that there was no law *stricto sensu* prescribing the mode(s) in which the accused was obliged to discharge his duties as a bank manager.[8] There was nothing comparable to Financial General Orders and instructions issued under a variety of enactments that closely regulate the disposal of public monies by government officials. One could, perhaps, add that government servants are also subject to fairly detailed, internal rules of procedure that deny them the sort of discretion a bank manager enjoys.

The court then sought to determine whether there had been a violation of any contract, express or implied, touching the discharge of the trust accused 2 owed as the manager of the bank's branch. In this case, apparently, there were no express provisions of an employment contract or similar agreement between the bank, as the employer, and accused 2 which could be relied upon to demonstrate how the trust was to be discharged. But as collateral evidence, a Management Committee Resolution[9] (on the powers of accused 1) and minutes of the meeting of the Board of Directors[10] were referred to. These documents were used to show, by way of inference, that accused 2 had no authority to make the advances in question. After examining the evidence of three of the bank's employees on the extent of the Manager's powers the Federal Court agreed with the court below that accused 2 had no authority to make the advances. It was held that the advances were not 'short-term' either.

The court also concurred with the lower court in finding that accused 2 had acted dishonestly under the circumstances and not merely negligently, as was pleaded. In this case it was easier, in view of the enormity of the sums involved and the obvious collusion between the accused in 'spreading out' the accounts to obtain unfair advantage and to conceal the true nature of the transactions, to conclude that there was dishonest breach of trust. But the proof of the essential elements of criminal breach of trust depended upon a number of

[7] [1981] 2 M.L.J. 176, at 178 D & E.
[8] The F.C., exercising its powers under s. 60, Courts of Judicature Act, amended the charge by substituting the words 'of any legal contract made touching the discharge of such trust' for the words, 'the direction of law prescribing the mode in which such trust was to be discharged'.
[9] Quoted at [1981] 2 M.L.J. 179 E & F.
[10] *Ibid.,* 180 B & C.

circumstantial factors, including "banking practice" on which evidence was taken by the trial court. It seems that the court was trying to establish the practice of Bank Buruh in regard to the powers the Bank granted its branch managers. The Federal Court clearly attached much importance to the steps taken by the Bank's Head Office in coming to the conclusion that the branch manager had acted without authority.

The implication seems to be that to act without authority may amount to want of *bona fides.*[11] If so, we ought to clarify two questions of principle here. Firstly, the way the law determines "acting beyond authority". Secondly, under what conditions would "acting beyond authority" show a dishonest or wilful intention? Section 405 envisages three broad situations: dishonest misappropriation or conversion; or dishonest use or disposal of entrusted property; or the wilful sufferance of dishonest use or disposal by a third person. There are, thus, three limbs to the section. With regard to the first question above, in this case at least, the courts had sought evidence on the practice of Bank Buruh Bhd. in the extent of discretion they granted their branch managers. Two of the three witnesses thought the branch manager was authorised to make "short term loans" of unlimited amount. The third took the view that

> "a temporary overdraft facility is normally given for a small amount and (for) short duration, and it is the responsibility of the approving authority to recover the amount in the shortest possible time."[12]

With this view the court agreed. They held,

> "To give a Manager unlimited discretion as to the amount he may thus lend is too obviously imprudent to be banking practice and would place a bank at the mercy of any irresponsible or unscrupulous Manager, and in this particular case would make absolutely unnecessary the Power of Attorney which the Bank had issued to accused 1."[13]

From the last remarks of the court it is clear that in these cases both the individual bank's practice as well as what is generally acceptable as banking practice are relevant in the determination of what constitutes "acting beyond authority".

This is surely the right position. For, if general banking practice is disregarded any whimsical or expedient disapproval of the branch manager's actions in border-line situations may become the basis for criminal charges. One hopes that the tainted nature of the transactions entered into would be determined carefully with reference to general banking practice and that the disapproval of the head office of a particular bank will not become the sole or even crucial fact in support of a prosecution. This protection for the bank employees is necessary.

[11] See the Singapore case of *Yeow Fook Yuen & Anor.* v. *Regina,* [1965] 2 M.L.J. 80 where the facts show that the two accused had, perhaps, adopted a casual attitude towards the handling of their Union's Funds. Wee Chong Jin C.J. said, "It was urged before me that so long as both appellants regarded these moneys as advances or loans and *bona fide* believed them to be advances or loans there was no dishonest intention on the part of either of them. This argument is in my view fallacious. The real question to be decided on the issue of dishonest intention is not the question whether either appellant *bona fide* believed these takings to be loans but whether either appellant *bona fide* believed that the first appellant had lawful authority to make these loans to the second appellant." *Ibid.,* 83 B & C.

[12] [1981] 2 M.L.J. 176, at 179 I.

[13] *Ibid.*

With regard to the second question, it seems, acting beyond authority could amount to a *prima facie* breach of trust. Taking the second and third limbs of section 405 together, such acting must have been done either dishonestly *or* as part of wilful sufferance of dishonesty by a third person. This presumably means that mere inadvertence or negligence would not do but something more positive is required. If a bank employee, knowing well that before granting a loan he has to refer the matter to another officer in the hierarchy, fails to do so, then surely, an explanation is called for. Did he grant the loan dishonestly or, at any rate, did he wilfully suffer dishonesty? Where he unreasonably assumes powers that, as *per* general banking practice, he cannot have, then too, the question may be raised as to whether his actions were either dishonest or wilful. In all these situations it is important that we are able to rule out negligence or mistaken belief on the part of the bank employee. Collusion, as in the case, or any other deliberate scheme involving bank employees and outsiders would amount to dishonest or wilful dealing.

The differences, if any, in the nature of proving dishonesty and wilfullness await clarification. It is of interest that, as noted above, accused 2 had been charged under the last limb of Section 405 but the trial judge had amended the charge to bring him under the second limb of Section 405 (he could not have been brought under the first limb in the absence of proof of misappropriation or conversion for his use of the monies in question). In view of this a few comments may be justified upon the words 'wilfully suffers any other person so to do', constituting the third limb of Section 405.

The element of *mens rea* in relation to the accused is, presumably, satisfied if the prosecution could prove that he "wilfully" suffered a breach of the trust by another person. To his knowledge, this third party was acting in a manner prejudicial to the trust and it was within his power to put a stop to the third party's action. Under those circumstances if the accused had failed to guard the trust there would be "wilful" sufferance. The proof is stronger where connivance or collusion can be shown as between the accused and the third party. A question may be raised here *whether the Prosecution needs to prove the third party's dishonest intention as well?* In order to substantiate the charge against the accused under this limb of section 405, is proof necessary of dishonest intention of the third party or, at least, a knowledge that his acts were in breach of the trust held by the accused. The answer to this depends on the construction of the words "wilfully suffers any other person so to do" in section 405. *Prima facie* "so to do" has reference to the dishonest use, misappropriation or conversion in violation of the trust. So dishonesty has to be proved as an element in the third party's use, misappropriation or conversion. If that cannot be proved then is the accused not liable though he knew that the third party's acts were in breach of the trust? In the case at hand, if accused 3, the bank's customer had no idea that running 17 accounts and obtaining generous advances were in breach of trust, would accused 2 have "wilfully" suffered the other person "so to do"? If the answer is "yes" then the concern is only with the state of the accused's knowledge and not that of the third party. It is submitted that this is the more sensible view to take. *Accused's liability should follow the state of his knowledge* and not be made to depend on a third party's. This matter awaits to be clarified further.

In this case there was no clear allegation of personal gain by the accused bank manager though there were some allegations against accused 1, the deputy general manager.

Now turning to accused 3, the bank customer and recipient of the seven million dollar loans, the Federal Court confirmed the trial court's finding that on the evidence it was clear that he knew accused 2 had no authority to grant the loans and therefore, the charge of abetting criminal breach of trust was substantiated. He had also been charged with forgery under sections 465 and 471 of the Penal Code for signing the names of his friends and thus opening accounts in their names. The two individuals named in the charge gave evidence that they had consented to accused 3 using their names to open the accounts. The court held that in view of this consent accused 3 had not made "false documents" within the meaning of section 464, Penal Code. Thus the forgery charges were dismissed. However, the court agreed that there may have been scope for the charge of cheating but nevertheless declined to use its powers (under section 60, Courts of Judicature Act) to amend the charges substituting cheating for the offence of forgery.

As for accused 1, the court was unwilling to disturb the trial court's finding that there was insufficient evidence on which to convict him of the charges of abetting criminal breach of trust.

The serious public interest aspect in the case was aptly brought out by the court when it said,

> "It would perhaps not be inappropriate for us to add that but for a kindly providence and vigilance of a paternal Bank Negara, yet another fledgeling Bank would have come to grief, the victim of *'pagar makan padi'*".[14]

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[14] *Ibid.,* 182 B (*'Pagan Makan Padi',* 'the fence eating the rice crop').