Pendakwa Raya v Cho Sing Koo & Anor

[2019] MLJU 659

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

MOHD NAZLAN BIN MOHD GHAZALI, J

PERMOHONAN JENAYAH NO: WA-42LB-86-07/2017

4 February 2019

Hafizza binti Sauni (Deputy Public Prosecutor) for the plaintiff.
Mohd Irzan Iswat bin Mohd Noor (Hanif Khatri) for the 1st respondent.
Harcharanjit Singh (Harcharanjit Singh & Assoc) for the 2nd respondent.

Mohd Nazlan bin Mohd Ghazali J:

JUDGMENTIntroduction

[1]This is an appeal by the Public Prosecutor against the decision of the Sessions Court acquitting and discharging both the respondents from charges under Section 409 of the Penal Code after having found that the prosecution had failed to prove its case against them beyond reasonable doubt.

[2]At the conclusion of the hearing of the appeal I dismissed the appeal and highlighted the principal reasons for the same. This judgment contains the full reasons for my decision.
Key Background Facts

[3]There is a fairly long history to this criminal proceeding. The first respondent was at the material time the managing director of Ganad Corporation Berhad (GCB"), a stock-exchange listed entity and at the same time a director of GCB's subsidiary, Ganad Media Sdn Bhd ("GMSB"), a company involved in the business of billboard advertising. The second respondent was also a director on the board of GMSB. Both respondents were, together with four others, the authorised signatories of GMSB for cheques issued out of the company's bank accounts.

[4]In its business operations, GMSB would erect its billboards on sites rented from landowners. GMSB would then rent out the advertising space on its billboards.

[5]The case against the respondents may be said to have started when the financial controller of the company lodged police reports in respect of six company cheques said to have been issued pursuant to instructions by the two respondents. The complaint was that these payments, ostensibly made for purposes of rental payments, were actually paid to fictitious owners. It was also alleged that the proceeds of the cheques were instead credited into the accounts of third party companies which were related to the respondents.

[6]The first respondent and the second respondent initially had to face a total of 14 charges under Section 409 and Section 420 of the Penal Code. A number of these charges were filed as far back as 2006 in respect of events which took place in the years 1999 and 2000.

[7]On 29 April 2011 the Sessions Court, after having heard 23 prosecution witnesses at the end of the prosecution case found that the prosecution had failed to prove a prima facie case against both respondents on all 14 charges. They were therefore acquitted and discharged without their defence being called.

[8]The prosecution appealed against the decision but only in relation to three out of the 14 charges. One was against the first respondent and two against the second respondent. All three concerned Section 409 of the Penal Code. They read as follows:-

Case No: 62-294-06 (against the first respondent):

"Bahawa kamu antara 10.3.2000 sehingga 29.5.2000 di Ganad Media Sdn Bhd di Tingkat 3, No. 120, Jalan Bukit Bintang,

di dalam Wilayah Persekutuan Kuala Lumpur, sebagai agen iaitu Pengurus Ganad Media Sdn Bhd dan di dalam kapasiti tersebut diamanahkan dengan penguasaan ke atas harta tertentu, iaitu dana Syarikat tersebut telah melakukan pecah amanah jenayah berkaitan harta tersebut iaitu wang berjumlah RM85,000.00 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 409 Kanun Keseksaan".

Case No. 62-292-06 (against the second respondent):

"Bahawa kamu pada 7.4.1999, di Ganad Media SdnBhd di Tingkat 3, No. 120, Jalan Bukit Bintang, di dalam Wilayah Persekutuan Kuala Lumpur, sebagai agen iaitu Pengurus Ganad Media Sdn Bhd dan di dalam kapasiti tersebut diamanahkan dengan penguasaan ke atas harta tertentu, iaitu dana Syarikat tersebut telah melakukan pecah amanah jenayah berkaitan harta tersebut iaitu wang berjumlah RM6,500.00 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 409 Kanun Keseksaan".

Kes No: 62-293-06 (terhadap OKT 2):

"Bahawa kamu di antara 10.3.2000 sehingga 29.5.2000, di Ganad Media Sdn Bhd di Tingkat 3, No. 120, Jalan Bukit Bintang, di dalam Wilayah Persekutuan Kuala Lumpur, telah bersubahat dengan Cho Sing Kho (No. K/P: 510417-11-5023) untuk melakukan pecah amanah jenayah berkenaan sesuatu harta tertentu iaitu wang berjumlah RM85,000.00 dimana Cho Sing Kho telah diamanahkan dengan penguasaan ke atas harta tersebut sebagai agen iaitu Pengurus Ganad Media Sdn Bhd dimana kesalahan pecah amanah jenayah tersebut telah dilakukan atas sebab persubahatan kamu dan oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawahSeksyen 409 Kanun Keseksaan".

[9]The High Court on 25 February 2013 dismissed the appeal against the acquittal of the respondents from the three charges.

[10]The prosecution was however successful in its further appeal to the Court of Appeal which on 2 September 2014 allowed the appeal and ordered that the first and second respondents enter their defence against the respective charges at the Sessions Court.

[11]The respondents called a total of eight witnesses. At the conclusion of the defence case, the Sessions Court on 4 July 2017 ruled that the prosecution had failed to prove its case against the respondents beyond reasonable doubt, and therefore again acquitted and discharged the first and second respondents, this time of the three charges, and at the end of the entire case.

[12]This led the prosecution to appeal against the decision of the Sessions Court to the High Court. Hence the appeal before me.

Law on Appellate Intervention

[13]In hearing this criminal appeal, I am mindful of the true role of this Court as established by the governing statute and the applicable case law authorities and have therefore proceeded approaching the same accordingly.

[14]Section 316 provides for the duty of a Court hearing an appeal from a subordinate Court in the following terms:-

> **316. Decision on appeal**
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> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:
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> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;
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> (b) in an appeal from a conviction or in an appeal as to sentence:
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> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (c) in an appeal from any other order, alter or reverse such order.

[15]In the often quoted authority of the Court of Appeal in *Periasamy Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557, Gopal Sri Ram JCA (as he then was) instructively made the following observation:-

> "In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
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> In *Lim Kheak Teong v. PP* [1984] 1 CLJ Rep 207;; [1985] 1 MLJ 38, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefore an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ, Malaya) said (at pp 39-40):
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> ... we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v. King-Emperor AIR 1934 PC 227 and secondly purporting to follow Terrell Ag CJ in R v. Low Toh Cheng* [1941] MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.

With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred *'the High Court should and will always give proper weight and consideration to such matters' as:*

(1) *the views of the trial judge on the credibility of the witnesses;*

(2) *the presumption of innocence in favour of the accused;*

(3) *the right of the accused to the benefit of any doubt; and*

(4) *the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.*

Lord Reid reiterated this same principle in *Benmax v. Austin Motor Co Ltd* [1955] AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt(or Thomas) v. Thomas* [1947] 1 All ER 582 that:

Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, 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.

The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v. Thomas*). On the facts of this case we do not think so. (emphasis added)

In *Wilayat Khan v State of Uttar Pradesh* AIR 1953 SC 122 at pp 123 and 125, Chandrasekhara Aiyar J, when delivering the judgment of the Supreme Court said:

Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that *in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end*; the second is that great weight should be attached to the view taken by the sessions judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.

…

Interference with an order of acquittal made by a judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence or the facts.

[16]The principles governing appellate intervention have also been analysed and explained by the Court of Appeal in *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] 6 MLJ 523, where Mohd Zawawi Salleh JCA (as he then was) held:

> "[13] Application of the correct standard review has not been proved exceedingly difficult in cases involving purely factual or purely legal questions. It is trite that the appropriate standard of review for purely legal questions is de novo review where the appellate court is not required to give deference to the rulings of the trial judge. Rather, it is free to perform its own analysis of the legal issue presented. When the finding of the trial judge is factual, however, the fact finder's decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong (see *China Airlines Ltd v Maltran Air Corp SdnBhd(formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517;; [1996] 3 CLJ 163); *Zaharah A Kadir v Ramuna Bauxite Pte Ltd & Anor* [2011] 1 LNS 1015, *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650;; [2013] 1 LNS 1). The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:
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> (a) by reason of some non-direction or mix-direction or otherwise the judge erred in accepting the evidence which he or she did accept; or
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> (b) in assessing and evaluating the evidence the judge has taken into account some mater which he or she ought not to have taken into account, or failed to take into account some matter which he or she ought to have taken into account; or
>
> (c) it unmistakenly appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses' or
>
> (d) in so far aside judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.
>
> [14] What, then, is the appropriate standard of review for the appellate court to apply in mixed question of fact and law? In our view, the appropriate standard of review in this situation would be to give appropriate deference to the trial judge's factual finding but to reserve for the appellate court the ability to independently evaluate the legal effect of those factual finding".

[17]And the position concerning situations where appellate interference is warranted is further reiterated in *Mohd Yusri Mangsor & Anor v PP* [2014] 4 MLJ 875, where Mohd Zawawi Salleh JCA (as he then was) stated thus:-

> "[4] We have heard learned counsel for the appellants and learned deputy public prosecutor ('DPP') at some length. We have also scrutinised the records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,

then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) SdnBhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149, (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395;; [1996] 4 CLJ 545 (CA))".

[18]With the above principles in mind, I now deal with the points of appeal raised by the appellant. The appellant has raised a number of grounds but these can be more usefully grouped into a few which have been highlighted in the appellant's written and oral submissions. Evaluation & Findings of this CourtThe Sessions Court failed to follow the finding of prima facie by the Court of Appeal

[19]This is a key complaint of the appellant. Which is that the Sessions Court fell into grave error in revisiting the finding of prima facie already determined by the Court of Appeal.

[20]As mentioned earlier, the Sessions Court initially acquitted both respondents after ruling that the prosecution had failed to prove a prima facie case against both of them in respect of the multiples charges. Although affirmed by the High Court, on a further appeal by the prosecution, the Court of Appeal agreed with the prosecution and found that a prima facie case had indeed been established in respect of the three charges. This then resulted in the first and second respondents being called to enter their defence to the respective charges.

[21]When the matter reverted to the Sessions Court, the proceeding resumed with the defence case, because the lower court would be and indeed was bound by the decision of the Court of Appeal which had found a prima facie case against the first and the second respondents.

[22]This is a fundamental point in criminal procedural law. And I must say that I readily agree with this assertion of the appellant, for that is the settled position under the law as enunciated by the appellate Courts which are also plainly binding on the High Court and the subordinate Courts under the *stare decisis* principle.

[23]This very issue was addressed by the Court of Appeal in the case of *Nwitelkechukwu Ogbonnaya lwn PP* [2018] 1 LNS 674. I can do no better than reproducing the relevant passages from the judgment of Mohd Zawawi Salleh JCA (as he then was), who instructively held as follows:-

> "[14] Pada pandangan kami, pendekatan yang diambil oleh hakim bicara adalah betul di sisi undang-undang. Adalah menjadi undang-undang mantap bahawa apabila Mahkamah Rayuan telah mengakaskan keputusan hakim bicara dan memerintahkan agar Perayu dipanggil membela diri terhadap pertuduhan yang dikemukakan terhadapnya, tugas hakim bicara ialah untuk memutuskan sama ada pembelaan Perayu telah berjaya menimbulkan keraguan yang munasabah terhadap kes pendakwaan, dan jika apa-apa anggapan statutory telah digunapakai, sama ada anggapan tersebut telah dipatahkan atas imbangan kebarangkalian.
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> [15] Hakim bicara adalah tidak dikehendaki untuk mengulangkaji keputusan yang dibuat oleh Mahkamah Rayuan bagi menentukan sama ada satu kes *prima facie* telah berjaya dibuktikan oleh pihak pendakwaan. Pendekatan ini telah dinyatakan, antara lain, oleh kes *PP v Sani Othman* [2011] 1 CLJ 626, apabila Mahkamah ini menyatakan:-
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> > "When defence is directed to be called by an appeal court the trial judge must accept that a *prima facie* case has been proven. It is as if the defence was called by the learned judge himself (*Saad Abas & Anor v. PP* [1998] 4 CLJ 575). Only after he has gauged the total evidence adduced, inclusive of all the evidence adduced at the prosecution's stage, and tested as against the defence evidence may the fate of the accused person be decided by the court. In short there will be a maximum evaluation of the whole evidence at the close of the defence."

[24]In other words, the trial Court must accept the decision of the Court of Appeal which finds a prima facie case. It is not open for the trial Court to revisit the issue of whether prima facie has been established, even though the trial Court has previously found it was not established on a maximum evaluation of the evidence adduced during the prosecution case.

[25]This is because the Court of Appeal has set aside and reversed the acquittal and instead determined that a prima facie case has been proved and the acquittal overturned. The duty of the trial Court in that situation is to ascertain whether the prosecution at the end of the entire

case has proven its case beyond reasonable doubt, which is dependent on whether the accused, who bears the evidential burden, has succeeded in raising a reasonable doubt in the case of the prosecution (for which prima facie has been proved).

[26]This was made crystal clear in a recent decision of the Court of Appeal which also had to deal with the same point. The position was reiterated by Abdul Rahman Sebli JCA in *Norol Rojik Jun v PP* [2018] 8 CLJ 186 in the following terms:-

> "[10] The appellant's first ground of appeal against conviction was as follows:
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> The learned High Court Judge should not have called the defence on the charge of murder as it was obvious that the most important ingredient of murder, ie, *mens rea* was absent. There was absolutely no evidence at all that the Appellant intended to murder anyone particularly the deceased.
>
> [11] We found no merit in this ground of appeal. First of all, the calling of the appellant's defence to the original murder charge was on the order of this court, which must be taken as if it was made by the trial judge himself. It was therefore not open to the succeeding judge to reopen the issue of whether a *prima facie* case had been established by the prosecution. Nor was it open to us, being a court of co-ordinate jurisdiction, to do so.
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> [12] The trial judge's duty after the order was made by this court was only to consider whether the appellant's explanation, if any, had cast a reasonable doubt in the prosecution case. But of course in doing so, the learned judge was bound by s. 182A(1) of the Criminal Procedure Code ("the CPC") to consider all the evidence adduced before the court, which necessarily includes evidence adduced by the prosecution at its stage of the case.

[27]In the instant case before me however the learned trial judge, from the grounds of judgment, appear to have undertaken a re-evaluation of whether a prima facie case had been proved against the two respondents even though the Court of Appeal had reversed the finding of the Sessions Court (as affirmed by the High Court) that both respondents be acquitted as a prima facie case had, again, not been established.

[28]The statements and observations made by the learned trial judge as found in her grounds of judgment which acquitted the first and the second respondents at the end of the defence case exhibit this approach. For instance, the learned trial judge said that her previous findings at the end of the prosecution case were still applicable and relevant and unaffected by the decision of the Court of Appeal (paragraph 24). The analysis in her judgment also in effect re-opened a number of the issues pertinent to prima facie already addressed and determined by the Court of

Appeal such as on entrustment which was specifically found by the Court of Appeal to have been established whilst the learned trial judge held otherwise, as was the need for the defence to rebut the presumption of dishonesty at the defence stage, whereas the learned trial judge instead ruled it unnecessary to apply the presumption to start with.

[29]It cannot therefore be denied that the learned trial judge had misdirected herself under the law by revisiting the finding of prima facie made by the Court of Appeal. This is a form of a fundamental misdirection. But does this, without more, justify appellate intervention?

[30]The answer is in the negative. This is because despite the principles of appellate intervention which permit, if not compel, the reversal of the verdict on account of an erroneous application of the law as enunciated in the authorities mentioned earlier, the nature of the error in this instant is one that can and should be rectified at the appellate stage, and where the evidence adduced at the trial can be assessed to arrive at the correct findings.

[31]It should be reiterated that the true function of the appellate Court in a criminal appeal is to ascertain whether the conviction is safe and less on whether the decision is wrong. Thus in the case of *Mohd Johi Said & Anor v PP* [2005] 1 CLJ 389 it was held as follows:-

> "Unlike civil appeals, where the appellant carried the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe. See, *Mohammad Husain v Emperor AIR* [1945] Nag 441; *Zahari bin Yeop Baai v PP* [1980] 1 MLJ 160……"

[32]Similarly, in my view, should the approach be in respect of an acquittal. It ought not to be a question as to whether the acquittal by the learned trial judge was wrong. But it should instead be a determination whether the acquittal is safe, in the sense of whether in the present case an order of discharge and acquittal of the first and second respondents at the end of the defence case can be justified on a proper evaluation of the evidence.

[33]This Court is permitted to conduct a careful scrutiny of the evidence on record in order to determine whether a different result would have ensued had the correct approach been applied by the learned trial judge. It is simply not the law that a finding of some kind of an erroneous application of the law would necessarily lead to the setting aside of the decision.

[34]An appeal is after all a continuation of proceedings by way of rehearing where an appeal court may subject the evidence to a critical examination and come to its own findings (see *Mohamed Mokhtar v PP* [1972] 1 MLJ 122).

[35]Similarly in *Ahmad Najib Aris v PP* [2009] 2 CLJ 800, the Federal Court, in considering a not dissimilar issue, held the following:-

> **"Whether There Should Be A Retrial Upon The Rejection Of The Appellant's Confession**
>
> [46] The appellant further contended that the learned judges of the Court of Appeal erred in their evaluation of the prosecution evidence after having rejected the appellant's confession (P122) and thereafter affirming the conviction. It was argued that the Court of Appeal should have set aside the conviction or alternatively made an order for a retrial after the end of the prosecution's case and allowing the appellant to make a fresh decision as to whether to exercise his option to give sworn evidence or to remain silent. On this issue it is my considered view that the appellant's contention is without basis as there is no legal principle that a conviction should be set aside when a confession by the accused is rejected by the Court of Appeal. The Court of Appeal has the discretion to re-evaluate the remaining evidence and to scrutinize in totality such other evidence, apart from the confession to determine whether the evidence is sufficient to satisfy all the elements of the charges against the appellant. After all such steps have been taken, the Court of Appeal is obliged to scrutinize whether the evidence is sufficient to affirm the conviction against the appellant. (See *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337). The question of whether an order for a retrial should be made at the end of the prosecution's case therefore does not arise in this case since the evidence available before the Court of Appeal is sufficient to support the finding of guilt made by the trial judge. On the same issue it is untenable for learned counsel for the appellant to contend that the appellant should be allowed to make a fresh decision as to whether to exercise his option to give sworn evidence or to remain silent if this court is to order a retrial at the end of the prosecution's case. The appellant has been accorded the advantage of a full trial process under the law before the trial judge. Whatever rights and option he has as to whether to give sworn evidence or to remain silent must be exercised in that trial unless an Appellate Court on appeal had made an order setting aside the conviction and ordering a retrial".

[36]What it all therefore means is that upon the finding of a prima facie case, the learned trial judge should have ascertained whether the accused was able to raise a reasonable doubt to the case of the prosecution.

[37]In the leading Federal Court decision in *Balachandran v PP* [2005] 1 CLJ 85 it was ruled clearly as follows:-

> "Since the court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain

silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s. 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The *prima facie* evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt".

[38]In evaluating the case of an accused at that stage of the trial, whilst the overarching primary burden on the prosecution to prove its case beyond reasonable doubt continues to hold true throughout the trial, whereby at the close of the whole case the Court has to consider all the evidence adduced by both the prosecution and the defence and has to be satisfied that the case has been proven beyond reasonable doubt (see the Supreme Court decision in *Nagappan Kuppusamy v PP* [1988] 1 CLJ (Rep) 229), any findings by the trial judge consequent upon the examination of the evidence adduced and the arguments posited by the defence which are intended to cast a reasonable doubt against the case of the prosecution or to rebut on a balance of probabilities any statutory presumption against the accused cannot in any event change the determination of prima facie case earlier pronounced against the accused.

[39]In the event that the trial judge comes to the conclusion that the accused has successfully raised a reasonable doubt or rebutted a presumption, the legal analysis would be that the prosecution has failed to prove its case because the accused has raised a reasonable doubt or rebutted the presumption. As such any subsequent acceptance by the trial judge of the existence of a reasonable doubt or of the rebuttal would not be capable in any fashion of affecting the earlier finding of prima facie at the end of prosecution case, unless it is reversed on appeal.

[40]It follows therefore that matters which constitute the essence of a finding of prima facie such as in particular whether the ingredients of the offence, in the instant case, of criminal breach of trust under Section 409 of the Penal Code as specified in the charge against the respondents as the two accused persons (such as on whether there is entrustment over the property) have been established, cannot therefore be revisited at the end of the entire case.

[41]They are to be tested against the evidence of the defence. For emphasis, if the conclusion is that the defence is probable and reasonable doubt has been successfully raised, the end result is not that the findings on prima facie have been displaced. Rather, at the risk of repetition, the position would instead be that the case against the accused is not proven beyond reasonable doubt.

[42]Section 409 of the Penal Code reads as follows:-

> **409. Criminal breach of trust by public servant or agent**
>
> Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping, and shall also be liable to fine.

[43]And Section 405 defines criminal breach of trust in the following terms:-

> **405. Criminal breach of trust**
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> Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person 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”.

[44]Further the operation of Section 409 is aided by a statutory presumption. The pertinent parts of Section 409B of the Penal Code state:-

> (1) Where in any proceeding it is proved-

……..

(b) for any offence prescribed in sections 405, 406, 407, 408 and 409, that any person entrusted with property or with dominion over property had-

(i) misappropriated that property;

(ii) used or disposed 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 had made touching the discharge of such trust; or

(iii) suffered any person to do any of the acts described in subparagraph (i) or (ii) above,

it shall be presumed that he had acted dishonestly until the contrary is proved.

……. [emphasis added].

[45]It is apposite at this juncture to refer to the specific pronouncements of the Court of Appeal in its judgment which found a prima facie case had been proved and ordered for the respondents to enter their defence. In *PP v Cho Sing Koo & Anor* [2015] 4 CLJ 491 on the issue pertaining to the ingredient of entrustment and dominion over property it was held:-

"[16] In her judgment the learned Sessions Court judge found that the respondents had no exclusive power or dominion over Ganad Media's funds as such power was in the hands of PW2, being the chief executive officer and the "brain and mind" of the company. She described PW2 as the most powerful person in Ganad Media.

[17] The learned Sessions Court Judge used such words as "ekslusiviti dan/atau dominasi", "ekslusif kuasa", "dominasi kuasa penuh", "kuasa ekslusif" in determining whether the respondents had dominion over Ganad Media's funds. We consider this to be a misdirection. In a prosecution under s. 409 of the Penal Code it is sufficient for the prosecution to prove dominion by establishing control or power of disposal over the property. There is no requirement to prove dominion to the exclusion of all other persons.

[18] Being the directors of Ganad Media and having power to sign the company's cheques, clearly the respondents had control and power of disposal over the company's funds. The fact that there were others in the company who had power to sign the company's cheques does not dilute the respondents' control and power of disposal over the funds. The court is not concerned with the power of others over the funds but whether the respondents were actuated by dishonest intention when they disposed of the company's property. Under the law it is not even a defence to show that the property was openly appropriated or that the appropriation was duly recorded and entered in the books and accounts of the company: see s. 409A of the Penal Code.

[19] We are also unable to agree with the learned High Court Judge who affirmed the order of acquittal that the manner in

which the activities of Ganad Media were carried out would preclude any other person from having control over the company's funds and affairs without the knowledge and approval of PW2. First of all there is no evidence that PW2 knew about the unauthorised payments and secondly there is no evidence that the respondents had obtained PW2's approval prior to making the payments. Therefore with all due respect to the learned judge, the question of PW2 having approved the payments does not arise".

[46]In respect of the elements of misappropriation or conversion to one's own use, the Court of Appeal ruled as follows:-

"[13] The learned High Court Judge in affirming the order of acquittal held the view that the above statutory presumption has no application as there was no "violation of law" involved. With due respect to the learned judge it appears that she was only focusing her attention on the first limb of sub-para. (1)(b)(ii) without addressing her mind to the second limb.

[14] It is our considered view that the respondents' act of disposing of the company's funds in violation of the rental contracts Ganad Media had with the landowners in their capacity as agents of the company falls squarely within the ambit of the second limb of sub-para. (1)(b)(ii). The RM85,000 and the RM6,500 were meant for the actual owners of the lands and not for strangers or non-parties to the contracts. By making the unauthorised payments, clearly the respondents were in violation of the legal contracts touching the discharge of the company's funds.

[15] Therefore by operation of s. 409B(1)(b)(ii) of the Penal Code the respondents were presumed to have acted dishonestly when they caused payments to be made to the unauthorised individuals. The presumption can of course be rebutted by the prosecution's own evidence but there is none in this case. It behoves the respondents therefore to adduce evidence to rebut the presumption on a preponderance of probability and this can only be done if they were to enter their defence".

[47]And further, the one other aspect which had been addressed by the Court of Appeal is in respect of the credibility of the evidence of a key witness, PW20, who testified to having instructed by the two respondents to prepare payment vouchers for the impugned payments. The Court of Appeal concluded on this issue in the following clear terms:-

"[32] Contrary to the concurrent findings of the Sessions Court and the High Court, PW20's evidence does not stand alone. It is supported by the documentary evidence and the surrounding circumstances. For the payments to be made, someone in authority in Ganad Media must have given the instructions. Having regard to the totality of the evidence and the probabilities of the case, PW20 could not have been lying when she said that it was the two respondents who gave the oral instructions.

[33] The learned Sessions Court Judge being the trial judge was no doubt in a better position than us to judge PW20's credibility as a witness but in our view her rejection of PW20's evidence on the premise that the respondents had no opportunity to give the oral instructions due to the company's stringent procedure in approving payment vouchers is perverse and does not stand up to reason".

[48]The above findings of the Court of Appeal cannot be revisited, let alone challenged by the trial Court when calling for the defence of the respondents and when making a maximum evaluation of the totality of the evidence at the end of the whole case.

[49]However, it is worthy of emphasis that in the instant case, the learned trial judge had misdirected herself because, to give one patent example, although she professed to have undertaken a maximum evaluation of the entire evidence at the end of the case, in, again acquitting the respondents, the learned trial judge stated that her findings included the absence of the element of entrustment (paragraph 31 (a) of the grounds of judgment). In particular the learned trial judge even ruled that it was unnecessary for her to apply the presumption under Section 409B to the first and second respondents since the elements of entrustment, control or dominion over property vis-à-vis the accused were not proven (paragraph 53).

[50]This is a clear misdirection, because in a charge under Section 409 of the Penal Code, the finding of a disposal of the property in question in violation of any legal contract, as specifically found by the Court of Appeal in the instant case, by the operation of law gives rise to the application of the presumption under Section 409B (as set out above) that the accused had acted dishonestly until the contrary is proved.

[51]Yet in the instant case, the Sessions Court ruled that Section 409B was inapplicable because there was no misappropriation or violation in the use of the relevant property (in turn because the Sessions Court found that entrustment of or dominion over the said property was not established), all of which are contrary to the plain findings of the Court of Appeal.

Evaluation of All Evidence of the Whole Case by the Appellate Court

[52]However, notwithstanding this flaw, as I have stated earlier in this judgment, this Court is not prevented from evaluating the entire evidence on record to determine whether the acquittal is nevertheless defensible and justified and otherwise a proper and safe verdict. In this respect I have reviewed the entire evidence of the defence for the two respondents to ascertain whether they have been able to raise a reasonable doubt or, on a balance of probabilities, rebutted the presumption of dishonesty under Section 409B.

[53]In order to succeed in this case the respondents must not only be able to cast a reasonable doubt on the case of the prosecution. As stated, they must be able to rebut the presumption of dishonesty imposed on them by Section 409B upon the finding of prima facie and the calling for their defence. And this higher onus on the respondents, as opposed to merely raising a reasonable doubt is to prove the absence of dishonesty on a balance of probabilities.

[54]In this regard, it is useful to refer the Court of Appeal decision in *Hamdan Abu Bakar lwn PP* [2018] 1 LNS 589 which stated thus:-

> "[17] Adalah menjadi undang-undang mantap beban bukti untuk mengakas andaian undang-undang tersebut adalah di atas imbangan kebarangkalian, iaitu satu beban yang lebih berat berbanding dengan beban untuk menimbulkan keraguan yang munasabah. Hakim bicara adalah betul apabila menyatakan pembelaan gagal untuk memanggil saksi lain bagi tujuan mengakas anggapan undang-undang tersebut".

[55]In this appeal, the prosecution as the appellant argued that the evidence of the witnesses for the respondents at the defence stage had all been raised at the prosecution stage in the cross examination of the prosecution witnesses. The appellant is therefore now suggesting that since these must have been taken into consideration in the finding of prima facie, and that there are no new issues introduced at the defence stage, the respondents could not be said to be in a position to even cast a reasonable doubt on the prosecution case.

[56]I do not think this contention is an accurate analysis of the application of the prima facie finding in criminal procedural law. I say so for two principal reasons. The first is that whilst it is true, as it is trite, as stated earlier, that if a prima facie case if unrebutted by the accused who chooses to remain silent, a conviction must be recorded, should however the accused decide to defend, the evidence of the defence must be tested against that of the prosecution.

[57]Whilst the issues may have been raised by the defence at the prosecution stage, those are at that stage sufficient merely for the purpose of ascertaining whether or not a prima facie case can be proved.

[58]But significantly, these issues are not yet evidence of the defence when introduced at the prosecution stage. They could generally only be adduced as evidence at the defence stage.

[59]Reference could also be made to the case of *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 where the Supreme Court held:-

> "By calling an accused to enter his defence, it should be assumed that the trial judge must on evaluation of the evidence, have been satisfied that the prosecution had, at that stage of the trial, established a prima facie case which, if unrebutted, would warrant a conviction of the accused. To arrive at such a conclusion, it is inherent that the judge must consider all the evidence adduced by the prosecution as tested in cross-examination, on a prima facie basis".

[60]Secondly, it is incumbent on the defence to introduce these issues which constitute their case at the prosecution stage in any event. This is a rule of essential justice. The case of the defence must be put to the material witnesses of the prosecution. The former Federal Court had ruled in *Wong Swee Chin v PP* [1981] 1 MLJ 212 that a failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of a witness's testimony.

[61]Such failure may also move the trial court to dismiss a particular line of defence as an afterthought, or a recent invention. It is clear that the defence of an accused can be ascertained not merely from his own evidence but also the line of cross-examination of the prosecution's witnesses (see *PP v Dato Seri Anwar bin Ibrahim (No. 3)* [1999] 2 CLJ 215).

[62]Back to the instant case. The terminology "dishonestly" is defined in the Section 24 of Penal Code as follows:-

> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing "dishonestly".
>
> *Explanation* - In relation to the offence of criminal misappropriation or criminal breach of trust it is immaterial whether there was an intention to defraud or to deceive any person.

[63]In determining whether the respondents have disproved dishonesty, all the surrounding circumstances will have to be examined. This was made clear in the High Court in *Sathiadas v Public Prosecutor* [1970] 2 MLJ 241 which was decided before the amendment in 1993 which reversed the onus on the mental element of dishonesty to the accused, but which observations by Raja Azlan Shah J (as HRH then was) are still pertinent:-

> "The gist of the offence of criminal breach of trust is entrustment and dishonest misappropriation or conversion to own use.

> Once the prosecution have succeeded in proving the receipt of the money for a particular purpose the case of entrustment is made out. Dishonest misappropriation or conversion to own use involves wrongful gain to the appellant or wrongful loss to his employers for the period of the retention of the money. That must depend on the facts and circumstances of each case. Criminal breach of trust is not an offence which counts as one of its factors, the loss that is the consequence of the act, it is the act itself, which in law, amounts to an offence. The offence is complete when there is dishonest misappropriation or conversion to one's own use, or when there is dishonest user in violation of a direction, express or implied, relating to the mode in which the trust is to be discharged.
>
> It may be observed that mere retention of money would notnecessarily raise a presumption of dishonest intention but it is a step in that direction. The fact that money entrusted to be used for a particular purpose, was not used for such purpose; that there was retention for a sufficiently long time would, together with other facts and circumstances justify the inference that the appellant had dishonestly misappropriated or converted the money to his own use. There was the intention in the appellant to deprive his employers of their monies, and the appellant misappropriated the monies for a time, intending to make it good eventually when any further retention became impossible". [emphasis added]

Totality of Evidence Supports an Acquittal

[64]Having examined the appeal record, I am of the view that given the surrounding circumstances of this case, the respondents have succeeded in rebutting the statutory presumption of dishonesty and raised a reasonable doubt on the prosecution case. These are my reasons.

[65]First, the internal company procedures for the issuance of cheques or in all cases of the making of payments out of the company, as indeed was applicable to the charges in this case do not permit any outflow of company funds for payments to be effected by the respondents without the knowledge of GMSB and its directors and relevant officers and staff. Evidence was led by the respondents and other defence witness such as DW3, the former accounts manager of GMSB on the process involved before any payment could be made.

[66]This required the involvement of various departments such as, in this instant, the marketing department, the acquisition department and the finance department as well as documentation such as payment vouchers to be prepared by the finance department upon verification of supporting documents justifying the need for payments to be made.

[67]For the purpose of payment for land rental, the payment voucher required no fewer than five signatures; one by the staff who prepared the voucher upon satisfaction of the request for

payment; another by the supervisor who verified the payment requests; another by the officer who approved payment be made and cheque be issued; yet another by the officer who signed the cheque and another by the staff who collected the cheque to arrange for payment to the payee. This procedure was also corroborated by the testimony of the prosecution witnesses such as PW7 (the accounts supervisor of GCB), PW15 (accounts clerk of GMSB) and PW16 (accountant for GMSB) given earlier.

[68]Secondly, the evidence of the respondents as DW1 and DW2 also echoed that of the prosecution witnesses in particular PW1 (financial controller of GCB), PW15 (accounts clerk of GMSB), PW16 (accountant for GMSB) and PW18 (accounts assistant) that the impugned payments were made only after the relevant staff who verified the details and ensure their accuracy and genuineness.

[69]Significantly, although the evidence of the key witness PW20 (acquisition manager GMSB) was that the instructions came verbally from the two respondents, there is no documents to show that any of the payment vouchers for the impugned payments were issued by either of the respondents (even though they signed off the cheques as authorised signatories). Perhaps as crucially, the payments of the cheques were not even made or arranged by the respondents. They were also collected by the acquisition department, and not by the respondents, for payment arrangement.

[70]It is difficult to appreciate how payments which had gone through such a stringent albeit standard internal process with very minimal involvement of the respondents (which was mainly the signing of the cheques) could be said to have been a dishonest disposal of property where dishonesty requires proof of intention. The purposes of payments had also been verified before approval was granted for their issuance.

[71]Thirdly, DW1 and DW2 both testified that the impugned payments (to Kembar Mercu Sdn Bhd and Jelas Bijak Sdn Bhd) were made in accordance with the details contained in a company document titled “Rental Listing” marked as P2. This P2 sets out the list of sites rented by GMSB for billboard advertising, as well as the rentals payable. Payments subject to the charges against the respondents were made in line with P2.

[72]Not only that, for, as testified by the second respondent (DW2), before the acquisition department actually initiated the request for the impugned payments, the requirement for the payments for some of the rental sites (specifically to Khwee Choun Foong and Jelas Bijak Sdn Bhd) had even been tabled and discussed as well as approved at internal meetings involving various departments of GMSB and the management.

[73]These were even documented by minutes of the said meetings held on 14 April 2000 in D16 and 28 April 2000 in D17 as tendered by the respondents. DW2 and DW3 (accounts director GMSB) confirmed that only after confirmation of approval in these meetings did the acquisition department made the requests for payment from the finance department.

[74]Fourthly, there is no evidence that any part of the cheques issued for the impugned payments of the collective sum of RM 85,000 was cashed by or transferred to either of the two respondents. Evidence show that the cheques were either cashed by PW19 (director of GCB, also wife of PW2) or transferred into the accounts of Kembar Mercu Sdn Bhd and Jelas Bijak Sdn Bhd. No connection has been established between these two companies and the two respondents despite the allegation by the prosecution. And the prosecution did not even call the directors of these entities to testify.

[75]The respondents however at the defence stage did call the directors of these companies. Thus it is clear that DW5 (director of Kembar Mercu Sdn Bhd) even confirmed to jointly own Kembar Mercu Sdn Bhd with PW20 (key witness for prosecution - manager, acquisition department GMSB) and that that company had various dealings with GMSB through PW20. DW5 crucially testified that Kembar Mercu Sdn Bhd had absolutely no connection or dealings with either of the respondents.

[76]Neither is there evidence to show that the respondents had any dealings with the land owners. DW5 gave evidence that he dealt directly with the landowners and in his meetings with them were often accompanied by PW20 (manager, acquisition department GMSB). Never the respondents.

[77]Similarly, DW8 (owner and director of Jelas Bijak Sdn Bhd) testified that the company dealt

with PW2 directly. There was no evidence that this company ever dealt with either of the respondents.

[78]In other words, it has not been established how it could be inferred from the facts of the surrounding circumstances that the respondents could have intended to wrongfully gain or benefit from the impugned payments, for themselves or others. Or how they could have intended to cause losses to GMSB by authorising the payments.

[79]At the same time, even though PW20 was found by the Court of Appeal to be a credible witness, the evidence of the defence witnesses - not only DW1 and DW2, but also DW5 and DW3 (on the testimony that PW20 did not report to the respondents, see below) has, on the basis of a maximum evaluation of all evidence at the end of the case, somewhat cast doubt on the truthfulness of PW20's testimony.

[80]Fifthly, the testimony of DW1 made it clear that the said sum was utilised for the purposes of the company's "slush fund", a reserve of money intended to be used for illicit or illegal purposes such as bribing local authorities. DW1 gave the example involving Kembar Mercu Sdn Bhd, whereby GMSB, after having agreed to rent a site to build a billboard from a private landowner, would procure another company such as Kembar Mercu Sdn Bhd to enter into the formal lease agreement with the landowner instead. Kembar Mercu Sdn Bhd would thereafter sub lease the land to GMSB at a rental higher than the amount paid by Kembar Mercu Sdn Bhd to the landowner. This generally supported the evidence given by the prosecution witnesses such as PW1 (financial controller of GCB), PW15 (accounts clerk of GMSB), PW8 (assistant accountant GMSB) and PW2 (CEO of GCB).

[81]The difference in the amount for the higher rental payable by GMSB (to Kembar Mercu Sdn Bhd, for example) would then be channelled into this slush fund maintained at GMSB. There was little challenge to this testimony.

[82]The defence even produced DW7 (supervisor at Ganad Builders Sdn Bhd) with the supporting evidence that he had cashed the cheques issued by GMSB and Ganad Builders Sdn Bhd to these third party or friendly companies, whereby in one instance he had cashed a

cheque for RM 49,087.50 to a company called Jelas Bijak Sdn Bhd which then returned the sum to the accounts department of GMSB as part of the arrangement involving the transfer of the differential between the rental paid by Jelas Bijak Sdn Bhd to the landowner and that paid to the friendly company by GMSB. It is therefore clearly an arrangement that was known to, if not sanctioned by GMSB itself.

[83]Sixthly, although the Court of Appeal in ruling that the respondents at the defence stage must rebut the presumption of dishonesty adding that the Court of Appeal found at the end of the prosecution stage no evidence to show that PW2 (CEO of GCB & MD of GMSB) knew about the impugned payments or that the respondents had obtained PW2's prior approval before the payments were made, a maximum evaluation of the entire evidence at the end of the whole case would now, with the additional benefit of the evidence of the respondents, lead one to conclude that it is improbable that PW2 did not have knowledge of the impugned payments.

[84]Other than the strict control procedures for the making of payments, that they were made based on the fixed asset listing P1 and site rental listing P2, and that the approvals for the payments were all documented, it is also established that the minutes of the meetings in D16 and D17 were even furnished to PW2, and most significantly there was overwhelming and almost unchallenged evidence that PW2 was the one having overall and dominant control of GMSB at the material time.

[85]I am mindful that under Section 409A of the Penal Code it is no defence to a charge under Section 409 that the property in question is openly appropriated or that the appropriation is duly recorded in the account of the books of the company. In the first place this Section 409A refers only to "appropriation" but not "conversion", or "use" and "disposal" in violation of law or contractual agreements as well. In this case the charges concerned the dishonest disposal of company funds.

[86]Secondly, assuming Section 409A is applicable to disposals as well, even if reliance cannot be made by the respondents on the evidence that the impugned payments were also recorded in the books of the company and were also subjected to annual audit exercises, there are other

evidence which are not within the scope of Section 409A that can still form the basis of the defence of the respondents.

[87]This included, among others, the knowledge on the part of PW2 of the making of the payments and the reasons for the same, the related fact of the existence of the slush fund established by PW2 in GMSB as well as the dominant control exercised by PW2 in all matters concerning the running of the company, and specifically on rental payments for sites identified for billboard advertising which is the core business of GMSB to start with.

[88]Further, thirdly, notwithstanding the applicability of Section 409A or otherwise, the fact that no evidence has been established, among others, to show the presence of the element of an intention on the part of the respondents to cause wrongful gain or wrongful loss means that the presumption of dishonesty under Section 409B has in any event been rebutted.

[89]Reverting to the evidence of overall dominant control exercised by PW2, despite the testimony of PW2 in examination in chief that he had relinquished the management of the company to DW1 in 1994, the latter produced a letter from the Insolvency Department in D44 confirming that because of his previous bankrupt status, DW1 could only resume managing companies in 1996. Further, a review of the minutes of management meetings in D40 and D41 would readily and clearly reveal that all day to day company business matters must secure the endorsement by PW2 to whom all heads of departments in GMSB reported.

[90]This arrangement was confirmed by DW3 (accounts director, GMSB) who used to attend the meetings, and by DW6 (confidential secretary, GCB). The latter was responsible for preparing the minutes and testified that the draft minutes, including D40 and D41 would first be sent to PW2 for approval before finalisation.

[91]In addition, the company organisational chart in D42 (which was dated prior to DW1 leaving GMSB) depicted plainly that the heads of departments all reported to PW2, and DW3 even testified that this chart was approved by PW2 himself, and also confirmed that PW20 (despite her testimony that she reported to the respondents whom she alleged gave her the instructions

to prepare for payments as charged) reported to other individuals and not to either of the two respondents.

[92]DW3 and DW6 further gave evidence that PW2 had issued a company memorandum dated 28 June 1997 establishing a weekly management meeting every Monday. DW1 himself was not listed as one who was required to attend the meeting. This thus weakens further the prosecution and PW2's assertion that DW1 was the one in control of the company at the material time. This is not to mention the important meetings of the company such as on budget planning sessions which would definitely have to be chaired by PW2 as evidenced in the minutes of budget meetings (on 19 August 1999 and 7 November 2000 in D73 and D72 respectively).

[93]DW6 who was the confidential secretary to three individuals, namely PW2, PW19 (director of GCB and spouse of PW2) and the first respondent (DW1) testified that every single document, including cheques, agreements and payment vouchers would have to be passed to PW2 for instructions before she on send them to either of the other two. To the question whether any document could go to the first respondent for signing or approval before first seen by PW2, DW6 gave a categorical reply *"No way".* DW6 also gave evidence that neither the first nor the second respondent was in charge of finance which was instead under the control of PW19, the spouse of PW2. Consistent with the evidence of DW3, DW5 also said that PW20 did not report to either of the respondents.

[94]Seventhly, the contention that the act of PW1 making police reports against the respondents that led to the institution of criminal charges against them was at the behest of PW2 (CEO of GCB & MD of GMSB) who had an axe to grind against them is not at all improbable. PW20 herself earlier testified that she witnessed a quarrel between PW2 and DW1 at the office. At the defence stage this was further fortified by the unchallenged evidence of DW2 and DW3 (accounts director GMSB) who confirmed to have witnessed the same which was in respect of a report on falsification of documents against PW2 to the Securities Commission (for which PW2 had pleaded guilty) which complaint PW2 believed had been made by DW1 (the first respondent).

[95]Having considered the evidence of the defence as contained in the appeal record with the

requisite assessment on the credibility of the witnesses, and after examining them against the evidence of the prosecution, it is my finding, particularly in view of the reasons that I have set out, that the respondents have successfully rebutted the presumption of dishonesty and raised a reasonable doubt in the case of the prosecution. The testimony of the witnesses for the defence was in any event mainly based on company documents as largely supplied by the prosecution under Section 51 of the Criminal Procedure Code and cannot be said to be a mere assertion, recent invention or an afterthought.

[96]The version of the defence that the sums of the impugned payments of RM 85,000 and RM6,500 were in truth made in accordance with recognised company documents P1 and P2, as officially authorised by the minutes of company meetings in D16 and D17 (and as testified by DW1, taken into account in the annual audit of GMSB's financial statements), and thereafter transferred out of GMSB for purposes related to the use of the slush fund with the full knowledge of the relevant directors and officers of the company is not a mere unsubstantiated assertion. Neither is it improbable or should be disbelieved. Especially since the evidence of the witnesses of the defence including DW1 and DW2 on these and other issues were not seriously nor successfully challenged by the appellant in cross examination. At the same time, the credibility of the witnesses for the prosecution, especially PW2 and PW20 in view of the evidence given at the defence stage may have to be treated with some degree of caution.

[97]Thus, even though the payments were said to have been made to parties who were not the owners, these recipients were recognised in official GMSB documents P1 and P2, and where the details of the sites were not disputed. The explanation for the payments being made to the non-landowners is that the recipients were instead the third parties who entered into the lease or rental agreements with the landowners and which third parties later contracted with GMSB in a sub-lease of the same site at a higher rental. This higher rental would directly concern the impugned payments stated in the charges against the respondents, where the difference between the two rental charges would be channelled to GMSB's slush fund in the full knowledge of, if not directly overseen by PW2, and all documented in the books of the company. The proceeds of the difference in rental payments after made to the true landowners would be channelled back into the slush fund in GMSB under the control of PW2. There is in evidence

neither any wrongful gain by nor wrongful loss to any party. Nor could any intention on the part of the respondents to cause such loss or gain be shown.

[98]All these cannot in all probability be said to point towards the presence of the element of dishonesty on the part of the respondents. In fact quite overwhelmingly the evidence, as set out above, can admit of no conclusion other than the inescapable result that strongly militates against any finding of dishonesty. There was none.

[99]On the totality of the evidence it cannot in my assessment be said that the respondents, in authorising the payments as charged did so dishonestly within the meaning ascribed to it in Section 24 of the Penal Code or had the intention of causing wrongful gain to any person, including themselves or wrongful loss to another person, including GMSB. Although unnecessary to be established, no such wrongful loss or gain has been shown in any event. As such, the respondents have successfully rebutted the presumption under Section 409B of the Penal Code that the disposal of the funds had been effected dishonestly, and this at the same time has raised a reasonable doubt on the charges against the respondents. Consequently I find that the appellant, as the prosecution, has failed to prove its case as per the charges against the first and the second respondents beyond reasonable doubt.

Conclusion

[100]In view of the foregoing analysis, it is my judgment that the appellant has failed to prove its case as specified in the charges against the first and the second respondents beyond reasonable doubt. Accordingly, I affirm the decision of the Sessions Court which acquitted and discharged the respondents from the three charges, and thereby dismiss the appeal.

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