IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 88

Criminal Motion No 14 of 2021

Between

Raj Kumar s/o Brisa Besnath

… *Applicant*

And

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing] — [Criminal references] — [Requirements]

Raj Kumar s/o Brisa Besnath
v
Public Prosecutor

[2021] SGCA 88

Court of Appeal — Criminal Motion No 14 of 2021
Andrew Phang Boon Leong JCA, Judith Prakash JCA and Chao Hick Tin SJ
14 September 2021

14 September 2021

Andrew Phang Boon Leong JCA (delivering the judgment of the court *ex tempore*):

Introduction

1 The Applicant was convicted in the District Court after trial on one charge of criminal breach of trust under s 406 of the Penal Code (Cap 224, 2008 Rev Ed) ("Penal Code").

2 Following his conviction, the Applicant was sentenced to 13 months' imprisonment. The Applicant's appeal was dismissed by the High Court Judge ("the Judge") in *Raj Kumar s/o Brisa Besnath v Public Prosecutor* [2021] SGHC 57 ("the Judgment"). Having exhausted his appeal, the Applicant filed the instant criminal motion ("CM 14"), seeking to place seven questions of law before the Court of Appeal. The seven questions are as follows:

> Question 1: Where the Prosecution has taken the position that to make out the element of "entrusted with property" for an

> offence under Section 405 of the Penal Code, that the person entrusting the property has to have some "right" over the property, what is the nature of the "right" that the Prosecution has to prove?
>
> Question 2: Where the Prosecution has taken the position that to make out the element of "entrusted with property" for an offence under Section 405 of the Penal Code, the person entrusting the property must have "possession" over the property, does the nature of the "possession" mean actual possession or constructive possession or a possessory right?
>
> Question 3: If the answer to Question 2 is that "possession" includes a "possessory right", what are the elements of a "possessory right"?
>
> Question 4: If the answer to Question 2 is that "possession" includes "constructive possession", what are the elements of "constructive possession"?
>
> Question 5: Is there entrustment for the purposes of an offence under Section 405 of the Penal Code where the person entrusting the property deceives the person to whom the property is entrusted into believing that the property is not stolen property or property obtained whole or in part through an offence involving fraud or dishonesty?
>
> Question 6: Is there entrustment for the purposes of an offence under Section 405 of the Penal Code where the person entrusting the property, for the purposes of the entrustment, deceives the person to whom the property is entrusted into believing that there is a relationship of trust between the parties?
>
> Question 7: If the description of the property given by the person entrusting the property is different from the property that is received by the person to whom the property is entrusted, is there entrustment of the property received for the purposes of an offence under Section 405 of the Penal Code?

The Facts

3 Large parts of the factual background were uncontested, at least by time of the Applicant's appeal before the Judge. In particular, it was uncontested that:

(a) Sometime in 2012, the Applicant became acquainted with an online persona known as "Maria Lloyd" ("Maria").

(b) During the course of their communications, the Applicant agreed to receive the sum of S$89,000 in Singapore on Maria's behalf. The money was to be subsequently taken by the Applicant to Maria in Malaysia. The Applicant was informed by Maria that someone would call him and pass him the money. About two days later, the Applicant received a phone call from one Melody Choong ("Melody") who told him that she would be passing the sum of S$81,000 to him.

(c) On 9 March 2013, the Applicant and Melody met at NEX Shopping Mall. There, the Applicant received an envelope from Melody, which she indicated contained cash. The Applicant claims to not have opened the envelope to check its contents before he left.

(d) Following the handover at NEX Shopping Mall, the Applicant did not send or carry any money to Malaysia on Maria's behalf. When Melody contacted him on 10 March 2013 to check on the progress of his travel to Malaysia to hand over the money, the Applicant informed her that he had a "problem in check point [*sic*]" and that he was "coming on bail soon" after he was bailed out by a friend. These claims were false.

At first instance, the Applicant had insisted that he did not receive any money from Melody, and that Melody had passed him only blank pieces of paper in the envelope. This claim was rejected by the District Court at trial, and was in any event abandoned by the Applicant on appeal to the Judge. For the purposes of CM 14, the Applicant appears to have at effectively admitted that his account at trial had been a lie, and that the envelope Melody passed him did in fact contain S$81,000.

Analysis

4 CM 14 is brought by the Applicant under s 397 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC").

5 The prerequisites for granting leave to bring a criminal reference under s 397 of the CPC are not in dispute. The four cumulative conditions (the "*GCK* requirements") are as follows (see the decision of this court in *Public Prosecutor v GCK and another matter* [2020] 1 SLR 486 ("*GCK*") at [64]):

(a) first, the reference can only be made in relation to a criminal matter decided by the High Court in the exercise of its appellate or revisionary jurisdiction;

(b) second, the reference must relate to a *question of law*, and that question of law must be a question of law of *public interest*;

(c) third, the question of law must have arisen from the case which was before the High Court; and

(d) fourth, the determination of the question of law by the High Court must have *affected* the outcome of the case.

6 Having briefly set out factual background and applicable law, we now turn to the substance of CM 14. There is, in essence, one central issue before this Court: Which, if any, of the seven questions the Applicant seeks to refer to the Court of Appeal in fact satisfies all the four requirements as set out in *GCK*?

7 In considering this issue, we will take each of the seven questions as framed by the Applicant in turn. We will group Questions 2, 3, and 4 together as Questions 3 and 4 arise – as the Applicant himself recognises – only as "follow-up questions" to Question 2.

Question 1

8 Question 1 is well-settled by existing authority. The Judge's answer to Question 1 was that all that the entrustor required was "some right to the property, including a bare possessory right". This answer arose from [41] to [42] of *Pittis Stavros v Public Prosecutor* [2015] 3 SLR 181 ("*Pittis Stavros*") and the observations of the High Court in that case that the party entrusting the property did not need to have legal ownership of the property. All that was required was for the entrusting party to have *some* right, including a bare possessory right, to the property. This position is buttressed by the longstanding decision of *R v Tan Ah Seng* [1935] MLJ 273 ("*Tan Ah Seng*") that:

> *A prosecution will lie for criminal misappropriation of money entrusted to a person even if it has been entrusted to him for a criminal purpose.*
>
> […]
>
> We are … content to rely on the plain wording of section 405 of the Penal Code:-
>
> > "Whoever being in any manner entrusted with property.."
>
> which is *clearly wide enough to cover the present case*; and we see *no reason by refining the plain meaning of these words to allow a man to escape punishment for one crime because he has conspired with the complainant to commit another.*
>
> [emphasis added]

9 By contrast, the Applicant has been unable to point to any authority to the contrary in *any* of his submissions. The question of law set out in Question 1 thus appears well-settled. In this regard, the observations of Yong Pung How CJ in the High Court decision of *Wong Sin Yee v Public Prosecutor* [2001] 2 SLR(R) 63 ("*Wong Sin Yee*") at [27] are instructive:

> Mr Yim submitted that the question should be decided by the Court of Appeal because there are two conflicting views of the High Court on this issue. However, the question raised had

> already been settled conclusively by the High Court in *Kee Leong Bee*. The statement in *PP v Norzian bin Bintat* [1995] 3 SLR(R) 105 at [48] relied on by Mr Yim as evidence of a conflicting view of the High Court was clearly *obiter* …

Unlike *Wong Sin Yee*, there is not even a divergence of views at the High Court level in the present context. Rather, the authorities speak with one voice to indicate that there is no need for the entrustor to "own" the entrusted property. All that is required is that he has some right to the property, even a bare possessory right. On the facts of this case, the Applicant has in fact repeatedly admitted – notably in his sworn statements and written submissions – that Maria *did* possess a bare possessory right to the S$81,000 in question.

10 For the Applicant to suggest that Question 1 gives rise to a question of law *of public interest* or a novel or contested point of law is simply untenable, and the second *GCK* requirement is therefore not fulfilled.

Questions 2, 3, and 4

11 Turning next to Questions 2, 3, and 4, Question 2 falls foul of the second, third, and fourth *GCK* requirements. Question 2 does not disclose a question of law *of public interest* because, as has been outlined above, the question of what *degree* of possession is required by the entrustor has already been determined by existing authority. Thus, there is again no controversy on this point.

12 Question 2 also does not satisfy the third *GCK* requirement in that it misrepresents the position *actually* adopted by the Judge. The Judge did not rely on *any* reasoning which called for distinctions between "actual possession" and "constructive possession". If anything, the Applicant *himself* had to concede, at [19] of his written submissions in this application, that "Hoong J did not

expressly accept the concept of 'constructive possession'". Instead, the Judge accepted the position in *Pittis Stavros* that the entrusting party had to have some sort of right to the property in question, and that such a right included a bare possessory right. No question of the "nature" of possession arose, and certainly no issue of "actual possession" or "constructive possession" was ever part of the Judge's reasoning. For the Applicant to now suggest that Question 2 had "arisen from" the case before the Judge is simply erroneous. It formed no part of the Judge's reasoning. While it may be argued by the Applicant that the Judge had made reference to Maria's possession of a bare possessory right, consideration of the *content* or *nature* of that bare possessory right did not find its way into the Judge's reasoning. The third *GCK* requirement is thus not met.

13 In any event, Question 2 does not satisfy the fourth *GCK* requirement. It cannot be said that determination of Question 2 by the High Court would have affected the Judge's decision because the Judge's decision did not turn on the nature of possession. There was no need for the Judge to consider questions of whether there was actual or constructive possession. All that the Judge's decision in this regard turned on was whether Maria had at least a bare possessory right. As it happened, the Applicant himself ***repeatedly*** and ***sustainedly*** acknowledged in his *own* written submissions dated 21 May 2019 that Maria *did* in fact have such a right:

> 39 Assuming it was stolen property, the only right that Maria Lloyd had over the property was a bare naked possessory right …
>
> 41 That is not untrue, for Maria Lloyd does have a possessory right over the monies …
>
> 43 … Since Maria Lloyd only had a bare naked possessory right over the property …

The Judge's decision turned on Maria having a bare possessory right. Thus, even if the Judge had opined on the nature of the possession required, that would have made no difference to the outcome of the case. The fourth *GCK* requirement is therefore not fulfilled.

14 Having addressed Question 2, we now consider Questions 3 and 4. The Applicant himself described Questions 3 and 4 as "follow-up questions to Question 2", and it accordingly follows that if Question 2 is impermissible, the same may be said for Questions 3 and 4. Nonetheless, we briefly consider Questions 3 and 4 and illustrate how they are in themselves flawed:

(a) Question 3 asks what the "elements" of a possessory right are. With respect, the Applicant posing Question 3 as though it is a novel question that requires the Court of Appeal to opine on is surprising. After all, the Applicant dedicated no fewer than *sixteen* paragraphs from [12] to [27] of his written submissions dated 21 May 2019 to elucidating what a bare possessory right entails, citing no fewer than *nine* authorities on this. The Respondent appears to have accepted the Applicant's exposition. The question of what a possessory right entails thus appears to be relatively uncontroversial. For the Applicant to now suggest otherwise when his exposition had proved largely uncontroversial is, quite simply, disingenuous. In any event, even if one sets aside the fact that Question 3 raises no question of law of public interest, the question of what the "elements" of a possessory right are is purely hypothetical in so far as the Applicant has repeatedly and unequivocally stated that Maria *did* in fact have a bare possessory right to the money in question. A purely hypothetical question cannot fall within the ambit of s 397 of the CPC (see the decision of this court in *Public Prosecutor v Sollihin bin Anhar* [2015] 3 SLR 447 at [12]).

(b) As for Question 4, the Applicant is on even more tenuous ground. All that the Applicant could assert was that the Judge had *somehow* "impli[edly] accept[ed]" that constructive possession was part of the broader concept of "possession" which had been part of the Judge's reasoning. This was patently false. The Judge did not delve into any broad or overarching concept of "possession", nor did his reasoning go into granular consideration of constructive possession. He did not even mention constructive possession *once* in his reasoning. All that the Judge relied on was the fact that Maria had, as the Applicant himself repeatedly admitted, a bare possessory right. The Applicant's self-serving mischaracterisation of the Judge's reasoning is regrettable.

In sum, Questions 2, 3, and 4 do not satisfy the *GCK* requirements, and may not be referred to the Court of Appeal.

Question 5

15 Moving next to Question 5, this question also does not satisfy the second *GCK* requirement. It cannot be said that Question 5 discloses a question of law *of public interest* in so far as any question of the effect of an entrustor's deception has been addressed by the clear and unequivocal position in *Tan Ah Seng* that money transferred by an entrustor pursuant to an unlawful purpose can *still* give rise to an offence under s 405 of the Penal Code. Again, the Applicant has raised no authority to the contrary, nor does the Applicant suggest that any other Commonwealth jurisdictions have reached a differing position. The Applicant has no answer to the determination of the issue in *Tan Ah Seng*; nor can the Applicant explain away the similar position adopted by the Supreme Court of India in *Som Narth Puri v State of Rejasthan* 1972 AIR 1490 at [7] that:

> … *As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property* to be applied in accordance with the terms of entrustment and for the benefit of the owner. The expression "entrusted" in Section 409 is used in a wide sense and includes ***all cases*** *in which property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to the terms on which possession has been handed over* … [emphasis added in italics and bold italics]

Quite simply, the issue which Question 5 appears to be trying to get at cannot be said to be a question of law *of public interest* in so far as it is a settled question. The second *GCK* requirement is not satisfied.

16 Perhaps the most fundamental objection in relation to Question 5 is that even if one were to ignore the analysis above, Question 5 is irreparably flawed because it is not even a true question of law. This court in *Public Prosecutor v Teo Chu Ha* [2014] 4 SLR 600 observed at [31] that:

> … As a matter of principle, the courts must determine whether there is sufficient generality embedded within a proposition posed by the question which is more than just descriptive but also contains normative force for it to qualify as a question of law; a question which has, at its heart, a *proposition which is descriptive and specific to the case at hand is merely a question of fact*. [emphasis added]

Question 5 simply seeks to shoehorn what the Applicant believes to be the key facts into a statement and frame that statement as a question for the Court of Appeal to address. The question calls on the Court of Appeal to consider whether entrustment for the purposes of s 405 of the Penal Code has occurred within a narrow set of facts. However, this inexplicably ignores the decision of the High Court in *Gopalakrishnan Vanitha v Public Prosecutor* [1999] 3 SLR(R) 310 ("*Gopalakrishnan*") at [20], that "entrust[ment]" in s 405 of the Penal Code is *not* necessarily a term of law, and can take on multiple different meanings in different contexts. To the extent that entrustment is a context and

fact-specific term, the Applicant's attempt to contort it to fit only *one* particular factual situation in Question 5, devoid of any surrounding context, reveals that Question 5 is a clandestine attempt to place a question of fact before the Court of Appeal. This will not be countenanced.

Question 6

17 Question 6 does not satisfy the second and fourth *GCK* requirements. Turning first to the second *GCK* requirement, Question 6 is not a question of law of public interest. Even if the entrustor deceived an individual "into believing that there is a relationship of trust between the parties", the individual's *subjective* belief as to whether or not there is a relationship of trust is immaterial. The question in making out an offence under s 405 of the Penal Code is, first and foremost, whether there *has been* entrustment or not. An individual can erroneously believe that there does not exist a relationship of trust, or he can simply not apply his mind to whether or not there is a relationship of trust, but that is irrelevant if he has in fact been entrusted by another person to carry out a particular task in relation to some specific property. It is thus difficult to see how Question 6 may be said to be a question of law of public interest.

18 Question 6 also falls foul of the fourth *GCK* requirement in so far as its determination would not affect the High Court's decision. Quite simply, even if the entrustor had deceived the accused person into believing that there existed a relationship of trust, what matters is whether the accused person knew that the property had been entrusted to him for a purpose. On the facts, the Applicant's subjective beliefs as to whether or not a relationship of trust existed were quite simply irrelevant, and would have had no bearing on the Judge's decision. We note for completeness that we also do not see how questions concerning a

party's subjective beliefs as to the existence or otherwise of a "relationship of trust" arose out of the case before the Judge as well.

19 Question 6 is therefore not only a question of fact; it is a *hypothetical* question of fact. Worse, it is a hypothetical question of fact which addresses a point which was fundamentally *irrelevant* to the Judge's reasoning.

Question 7

20 Finally, we come to Question 7. With respect, it cannot be said that Question 7 discloses a question of law. Rather, what the Applicant seeks to conceal behind Question 7 is a question of fact. Question 7 does not arise unless it is accepted beforehand that the S$81,000 the Applicant received was entirely and wholly distinct from the S$89,000 Maria informed him that he was to receive, and was not a sub-set of the larger sum. Once this premise of Question 7 is exposed, it is immediately apparent that Question 7 is only tenable if this question *of fact* is assumed in the Applicant's favour. In that regard, it bears note that the Applicant never, at any point in the proceedings prior to CM 14, even *suggested* that there was no entrustment because the S$81,000 he was alleged to have received was different from the S$89,000 he claimed that Maria told him he would receive. This was an altogether novel argument which arose for the very first time in CM 14. Whatever the case, it cannot be said that Question 7 discloses a question of law, much less one of public interest. It is little more than a carelessly concealed question of fact.

21 In any event, Question 7 does not even arise out of the case before the Judge. As alluded to above, no question arose in the proceedings leading up to CM 14 suggesting that the difference between the sums of S$81,000 and S$89,000 precluded the money from having been entrusted by Maria to the

Applicant. If anything, the necessary implication in Question 7 – that the Applicant had in fact received the sum of S$81,000 – runs squarely contrary to the Applicant's sworn testimony and written statements. Question 7 thus represents a dramatic morphing of the Applicant's position from that which was adopted before the Judge.

Summary

22 In CM 14, the Applicant has raised altogether novel arguments in his submissions, notably, (a) speculating on the relationship between Maria and Jacques as a basis for suggesting that the difference between the S$81,000 he received and S$89,000 he was allegedly told he would receive was significant, (b) asserting that Maria was not the owner of the S$81,000 but merely an "agent" of the true owner, and (c) claiming that the Prosecution was relying on an (unstated and unexplained) "legal fiction" to prove entrustment for the purposes of s 405 of the Penal Code. The breezy ease with which the Applicant raises these new arguments, coupled with the casualness with which he disregards his lie about only having received blank paper from Melody, speaks volumes as to his credibility and true intentions in CM 14.

23 Even assuming that all seven questions were placed before the Court of Appeal, the Applicant faces the insuperable difficulty of explaining why the "relationship of trust" between the entrustor and himself must take the form he suggests. The Applicant indicated in his written submissions on appeal that:

> 32 … it is not our submission that the principles governing the law of contract or trust should apply wholesale in the context of criminal liability. Some principles, however, which are so fundamental to property rights in civil law, should also apply in criminal cases.

In this extract, the Applicant purports to adopt concepts from the law of contract and/or trusts, but never specifies precisely *which* principles should be imported. He also fails to explain why only *those* particular principles which are helpful to his case should be adopted. More fundamentally, given the clear and unequivocal finding in *Gopalakrishnan* that the notion of "entrust[ment]" within the meaning of s 405 of the Penal Code is context-specific, the Applicant's insistence on a blanket approach imbuing the statute in *all* cases with specific yet unspecified elements of private law is untenable. Ultimately, the only explanation appears to be that the Applicant is engaging in a cynical attempt to subvert s 397 of the CPC for a backdoor appeal.

Conclusion

24 For the reasons set out above, CM 14 is dismissed in its entirety. All seven questions make clear that CM 14 is merely an attempt to circumvent the clear legislative intention to provide only *one* tier of appeal in criminal matters. CM 14 is a backdoor appeal, and not even a very well-camouflaged one at that.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Chao Hick Tin
Senior Judge

Ponnampalam Sivakumar and Phang Shi Ting (BR Law Corporation) for the applicant;
Alan Loh, Stacey Anne Fernandez and Ong Xin Jie (Attorney-General's Chambers) for the respondent.
