Public Prosecutor

AND

Siti Hawa Binti Hj. Ampal

(High Court of Brunei Darussalam)
(Criminal Trial No 13 of 2008)

Hairol Arni Majid, J.
20th September, 2014.

Criminal law – Criminal breach of trust by public servant – Section 409 of the penal Code – Cash proceeds retained for a certain period – Whether the proceed were converted for personal use.

DPP Christopher Ng for the Public Prosecutor.
Ahmad Zakaria Bin Muhammad of Ahmad Zakaria & Associates for the Defendant.

Cases cited in the Judgment:

Chan Kam Hong Randy vs Public Prosecutor [2008] 2 SLR (R) 1019 [2008] SGHC 20
Maimun bte. Hj. Omar vs Public Prosecutor (Criminal Appeal No 1 of 2013)
*Public Prosecutor vs Amir Hamzah Muhammad (*MA 006/2012) [2012] SGDC 52
Public Prosecutor vs Aslia Farina bte Abdullah (Criminal Trial No 6 of 2006)
Public Prosecutor vs Awg Muhammad Arizam Abdullah Asang (Criminal Trial No 12 of 2002)
Public Prosecutor vs Jublee Hj Gapar (Criminal Trial No 40 of 2004)
Public Prosecutor vs Mat Salleh Hj. Haider @ Hj. Hidup (Criminal Trial No 25 of 1994)
*Public Prosecutor vs Md Yussof Hj Jalil (*Criminal Trial No 8 of 2005)
Public Prosecutor vs Robiah bte Hj Awg Bakar (Criminal Trial No 8 of 2008)
Public Prosecutor vs Supt. Jambol Hj Suhaili [1999] JCBD 19)
Sarjit Singh s/I Mehar Singh vs Public Prosecutor (MS 114/2002/01)
Yau Kong Kui v Public Prosecutor [1989] 2 MLJ 139 *at 141*

Hairol Arni Majid, J.:

The defendant claims trial to an amended charge under Section 409 of the Penal Code, which reads:

Amended Charge

> *"That you, between 1st April 2006 and 31st July 2006 at the Bunut Post Office, Jalan Tutong in Brunei Darussalam being a public servant entrusted with property, to wit, BND$4,470.50 being the proceeds of the sale of stamps, road tax and postal money, committed criminal breach of trust in respect of that property and have thereby committed an offence punishable under section 409 of the Penal Code, Chapter 22."*

Prosecution case

The Prosecution called six witnesses and below is the summary of their testimonies.

Hajah Maria Hj. Abidin (PW1) is the Head Unit of the Internal Audit, Post Officers Services Department at the Old Airport Berakas. She testified that she was instructed by her Superior to conduct a pre-emptive inspection and auditing on accounts handled by the defendant working as a postal clerk at Bunut Post Office branch after receiving a report that the defendant was involved in misappropriation of cash belonging to the department.

On the 4th July 2006, around 7.45 am, she along with Awg. Hj. Akub bin Haji Said (PW2), an Officer with the Internal Audit went to Bunut Post Office to conduct a pre-emptive audit inspection of the branch stamps stock, postal money and cash specifically handled by the defendant. She said upon inspection of the road tax booklet, they found 89 pieces of road tax had been issued with the receipts, which had not been handed over to the head of Bunut Post Offices. She also found that no dated were recorded on the receipts upon issuance of the road tax.

Upon inspection they also found on the defendant a shortage of $355.50 of postal money and $203.22 value of stock stamp unaccounted for when asked about the shortfalls the defendant informed PW1 and PW2 that she had used the money for her own use namely to pay for her child's summon and informed them, she could pay the money that afternoon because she did not have enough money that morning. Hjh Mariah said the matter was reported to the Post Master General who issued the defendant a final warning letter and report the matter to the Auditor General.

As regards the Road Tax book, she said the first copy of the receipt should be issued to the customers, the second copy to the Head of Post and the third copy to be retained in the book. The second copy should be handed to the head of Post with the money and given to the Treasury Department as evidence that money had been conducted. Unfortunately, she said in the defendant's case her road tax book still contain the second copy meaning that money collected on the road tax were not handed to the

head of Post. In this case as well no dates were recorded on the second and third copies of the receipts.

Hjh. Mariah said she arrived at the amount $3,915 i.e. shortfall for the road tax collection was from the June 2006 collection of book no.21, $377, book no.22 $2,246.00 and book no.23, $1,292.00 totaling $3,915 which was only paid by the defendant in the late afternoon on the 4th July 2006. She said the total amount used by the defendant was $3,915 (Road tax), $355.50 (Postal Order), $200 (Stamps), totalling $4,470.50. She said the amount $3,915 should have been handed to the Head of Post the day before but was not done.

As regards the Postal money $355.50, she said she arrived at this figure based on the amount ought to have been received from sale and the value of the stamp supplied as stock which is $1,000. She said when she confronted the defendant on the amount $3,915 in the morning of the 4th July 2014 but the defendant was not able to produced the money. The amount was banked in only in the afternoon.

As regards $203.22 of the stamps, she found this amount being the shortfalls from the supposedly $1,000 total value found in the stock stamp. The stock stamps books were to be updated on the account of sale of the stamps but were not done by the defendant. The last time it was updated only on the 24th June 2006. And the same applies to the postal money order. From the records, she testified that the defendant last updated the book only in 2005. It is a requirement that these books to be updated daily.

She admits that the total shortfall amount was eventually deposited in a bank subsequently in the afternoon of the 4th July 2006 only after she and the committee made the internal audit in the morning of the same day. She said it was the defendant who deposited the money in the bank.

Awg. Hj. Akub Hj. Said (PW2), Superintendent of Central Post Internal Audit with the Mail Processing Plant, at Old Airport Berakas confirms that he and PW1 conducted an inspection and audit on the 4th of July 2006 starting around 7.45a.m at Bunut Post Office. The Audit was specifically on money collected road tax, stamps and postal order assigned to the defendant.

He said they inspected and audited cash collected and books assigned to the defendant. He noticed the defendant looked nervous during the auditing. Result of the auditing reveals one road tax book which was not returned to head of Post and another road tax book, half of the content of which had been used also not returned. A total of 89 pieces of road tax was discovered and not returned to Head of Bunut Post Office. They also found that stamp stocks and postal orders were also short of the value amount provided by the post office. When they confronted the defendant about the shortfalls, the defendant admitted to them that she had used the cash collection to pay for her child's summon as fines. She admitted to being able to repay some part of the cash but not all and sought to pay the remainder by the afternoon. He said the

defendant admitted to them that she regretted what she had done and promised not to do it again.

Hj. Akub recalled inspecting the road tax books in the morning and found road tax book No 23 was not used at all. He confirmed the amount of $203.22 being the stamp money short from the collection and $355.50 from the postal order.

In cross examination he clarified that the two road tax books were not handed back to head of post namely books no 21 and no 23. He said he counted the money from the stamps collections, postal order and road tax collection at the counter in the office witnessed by the defendant. The defendant handed the money to Hjh Mariah (PW1). He inspected on book no 21 and no 22 of the road tax book while Hjh Mariah inspected book no 23. Altogether he said the amount of shortfalls was $4,470.50.

Zariah Binti Hj Johan, (PW3), works at Bunut Post Office as Assistant Superintendent of Post whose task was to receive from counter clerks proceed from the sales of road tax, stamps and postal order. The defendant was under her supervision. She confirms that the defendant was assigned to the sell and receive proceeds from sale of the road tax, stamps and postal order.

She said she knew of the defendant's issue with the cash collection because she recalled the defendant had made telephone calls to Mail Processing Centre (MPC) requesting for supplies of road tax book for April 2006/2007 numbered 246 with serial no from 064751 to 064800 and May Road Tax book 2006/2007 numbered 221 with serial no from 081001 to 081050. She confirmed this was requested without her consent as head of Bunut Post Office. She clarified that had the defendant sought her permission to order the said books, she could not have allowed it, as the existing books on the defendant's possession were not yet fully used. As far as she is concerned, the April and May 2006 Road Tax books were not registered in the issued/receipt recording register of the Post Office.

She said by May 2006, she had suspected the defendant had used the sales proceeds from her road tax account. She did in fact warn the defendant of this and advised her not to do it again. She recalled the defendant saying to her that she will make good of it at the end of the month.

On 29th June 2006 she was informed by Hjh. Zarinawati Hj. Hamdani, a clerk with MPC that the defendant gone to the MPC requesting for 2006-2007 June Road Tax book. Hjh. Zarinawati called her to require whether the June Road Tax book stock had finished. She replied it was still available. She was informed that the defendant had requested for the June Road Tax book but MPC was also running out of stock. The same day she said the defendant requested from her the June Road Tax book no 23 after failing to get the same from MPC.

On the 1st July 2006 she said the defendant repeated her request for a new Road Tax book from here. But she reminded the defendant via SMS text that she was still on possession of two Road Tax books no 21 and 22 with serial no 088501 to 088600, which

were not yet finished. Once at the office the defendant assured her that she would make the effort to repay the money she had used.

She then decided to inform the Assistant Post Master General who head the Financial Unit of the Department of the defendant's predicament and requested for a pre-emptive auditing on the account handled by the defendant. The auditing was carried out on the 4th July 2006 starting at 7.45 a.m. with the assistance of PW1, PW2 and herself to determine whether the alleged breach of trust actually happened.

Result of the audit on the 4th July 2006 revealed that $203.22 of stamp money was still in the defendant's possession and not yet handed over to her. It is the regulation known to the counter clerks that they were not to hold more than $50.00.

As regards postal order, it is the case that at the start of the day postal order would total $570.95. She recalled on the 3rd July 2006 the defendant ordered from her $106.30 worth of postal order. But on the day of the auditing (i.e. 4th July 2006) was conducted, $355.50 was still in the defendant's possession despite her counter was closed for the day. She confirmed that the defendant repaid a total of $4,470.50 from sale of Road Tax, stamps and postal order to her after 3.00p.m. on the 4th July 2006. At first she said she only received $3,410 in the morning and the remainder was not paid that morning but was paid only after 3.00p.m the same day, including postal order $355.50 and stamps worth $210.

Hjh. Zarinawati Hj. Hamdani (PW4) works as a Postal Clerk at the Mail Processing Centre (MPC) Berakas. In 2006 she was then appointed as Daily Paid Clerical Assistant with the Stock Stamps Unit of the MPC. Her main duties were to supply stock stamps, Road Tax books, Licenses book, Postal Order, International Reply Coupon (IRC) and General Receipts books to all Post Office branches.

She confirmed that on the 6th May 2006, the defendant did request to her Road Tax book via a telephone call. At that time Dyg. Zarina was on leave and the defendant was acting the post, she complied with her request. On the 29th June 2006, she recalled the defendant came to MPC to see her requesting for additional Road Tax book. She refused her as the stock had run out. As soon as the defendant left MPC, she called Hjh Zariah inquiring if they had ran out of stock for Road Tax June 2006-2007 book. Hjh Zariah informed her, the book was still in used and not yet fully used and that the Defendant had still with her another book numbered 23. I informed her of the Defendant request and that the latter had come personally to MPC for that purpose.

Hj. Abdul Kadir Tengah, (PW5) was the Post Master General since 5th November 2005 and is now retired. On 4th July 2006 he confirmed that Dyg Hjh Mariah Abidin, the head of the Internal Audit at the Postal Service Department, had reported an alleged case of criminal breach of trust involving the defendant. It was informed that she and Hj. Akub had conducted an impromptus inspection on the Bunut Post Office on the same day.

He received a report from the Internal Audit Unit specifying proceeds that 89 pieces of Road Tax collections valued as $3,915, $200 from sales of stamps and $355.50 from Postal Order totally $4,470.50 had not been deposited to the post office branch's bank account. This prompted the department disciplinary committee to issue to the Defendant as final warning letter and as well to entrust her to move her to another unit. The committee also recommended for this matter to be reported to the Public Service Department, Public Service Commission the Police Department and the Treasure Department of Ministry of Finance. These were done.

On the 6th July 2006, he issued a letter for the Defendant to be transferred to Mail and Parcel Processing Center at the Old Airport Berakas. On 20th July 2006 the Defendant met him at the office and handed to him two pieces of letter addressed to Head of Disciplinary Committee of Public Service Department and the other to himself, admitting to the offences and seeking forgiveness for her mistakes.

Sgt. 1220 Erek bin Ikas, (PW6) was the Investigating Officer of the case. He and PC 4356 Hazri went to the MPC on the 4th July 2006 to collect from Hjh Mariah copies of Road Tax book for June – July 2006, cash statement from Head of Post and Postal Orders.

On the 21st October 2006, the Defendant came to CID Office for questioning regarding the alleged breach of trust. On the 2nd November 2006, Dyg Zariah Hj Johan handed to him all the relevant cash receipt book, road tax book, receipt register book, stamp stock book and cash stock book.

Defence Case

The Defendant elected to give a sworn testimony and did not call other witness. In her Section 117B statement she states that she worked under the supervision for Dyg Jariah bte Johan, Assistant Head of Post. She states she performed most of Dyg Jariah's task for her, the likes of opening the front sale of the post office, opening and closing the office and looking after the "strong room" and others.

She states that sometimes it was difficult for her to hand over daily proceed of her sales as Dyg Jariah was rarely at the office after 3.00p.m. , the main reason she said that the daily proceeds usually end up with the staffs.

She admits to receiving a final warning letter on the 11th July 2006 from the Post Master General for the alleged criminal breach of trust. On the 20th July 2006, she received a letter informing her of being suspended from her work pending conclusion of the investigation.

On the 4th July 2006, she states PW4 and PW2 conducted an audit inspection on accounts handled by her. But the auditing was conducted by PW3. PW2 requested for her petty cash containing all her cash collection. She said she had volunteered to hand over the same to PW3 but she refused citing that the auditing was yet to be done.

After inspection and auditing of the petty cash, then the Defendant was called inside the head of Post's room. She recalled being asked about short falls of $200 on the stamp money, $3,915. On the road tax collection around $355.50, on the postal order, she states she handed the money immediately to PW1 and PW2. On the afternoon of the 4th July 2006 she had all the day collection banked in into the bank. She admitted to appealing to her head of post for her mistake for not handing the collections which was in her possession to her earlier.

On the 6th July 2006 after having been transferred to MPC at Berakas Old Airport, she admits to making a stupid mistake in admitting to the charges, which she felt, was not merited given the evidence or for that lack of it.

She tried to make appointment to see the Post Master General but the latter refused to see him. It was only on the 16th October 2006 she was allowed to see him. Following this meeting he wrote the memorandum to the Director of Public Service Department informing the latter of the alleged offence. She admitted to writing two letters dated 20th July 2006 but claimed she made up the contents of the letter.

The Law

The burden is on the prosecution through out to prove its case beyond reason doubt. Section 409 of the Penal Code reads:

> *409. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.*

Conviction under section 409 of the Penal Code, the prosecution has to prove that the followings:

1. *The defendant was a public servant.*
2. *He/She in such capacity was entrusted with property or with any dominion over it.*
3. *He/She commits criminal breach of trust in respect of that property.*

By virtue of section 21 of the Penal Code "*Public Servant*" for the purpose of the charge denotes..

i. *Every officer whose duty it is as such officer, to take, receive, keep or expend any property on behalf of the Government to execute any revenue process and every officer in the service or pay of Government or remunerated by fees or commission for the performance for any public duty.*

The prosecution has to prove that the defendant was entrusted with the money or property in that it has been transferred to the defendant in circumstances, which shows that it continues to reside with him. However there is no requirement for the prosecution to prove how the defendant had disposed of the property misappropriated by him. But it should be proved that money entrusted to him or received by him for a particular purpose was not used for that purpose not returned by him in accordance with his duty to do so. (***see Public Prosecutor vs Supt. Jambol Hj Suhaili*** **[1999] JCBD 19).***"*

Section 405 defines criminal breach of trust as follows:

> *Criminal breach of trust*
>
> *405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contact, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust."*

Section 24 of the Penal Code defines "Dishonestly" as

> "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another is said to do that thing dishonestly."

The Court in *Public Prosecutor vs Supt. Jambol Hj. Suhaili* (Supra) clarify:

> *"This means that to establish dishonestly, there must be evidence justifies a finding that the defendant had the intention of wrongfully keeps money entrusted to him as a public servant. This is after (but not necessarily) proved an overt act, not by mere retention of money which should have been used for a specific purpose".*

Findings

It is not disputed that the defendant was a public servant within the meaning or definition of the CPC. She had served some 20 years as a postal clerk. As well, given her admission in her Section 117B statement, I believe it is not an issue that her post as a counter clerk was entrusted with the proceeds of the daily collections of the road tax, postal order and stamps.

The mainstay of the defendant's submission is that the prosecution had failed to prove the defendant had misappropriated the exact amount as alleged in the charge. It was contended that the amount missing as alleged was ringed with uncertainty.

At the early stage of the prosecution case, there were some arguments as to the exact amount alleged misappropriated as appeared in the earlier original charged. The prosecution subsequently amended the charge. This was so to reflect the exact amount namely, $4,470.50 from the initial rounded figure of $4,471.00. This exercise was done after the prosecution had already called several prosecution witnesses and recalling one of them to the stand. The defence did not object to this, in fact it was the defence who had highlighted this matter in the cross examination of the prosecution witnesses. The explanation was provided by PW5 in that he said the amount of $203.33 in regard to the proceeds of sales of the stamp money was rounded off to $200. This being the final figure reflected in the total amount as stated in the charge.

Did the defendant commit criminal breach of trust in respect of the money ($4,470.50)?

It is put in evidence and not disputed by the defendant that when PW1 and PW2 confronted the defendant on the shortfalls, the defendant admitted to have used the money to pay for her son's summons. Prior to the afternoon of 4th July 2006, the money was not in the possession of the head of post. It was only on the afternoon the same day that the defendant deposited the amount to the bank despite request by the auditing officer to hand the money to them personally. Through the period before the 4th July 2006, the relevant books (road tax, postal order and stamps) were never handed to the head of post (PW3) as requested by the head of post and as per the defendant's job descriptions.

It is not disputed that the defendant had requested to MPC for supplies of road tax book for April and May 2006/2007 without PW3 authorities. Similarly on the 29th June 2006 the defendant also requested for June road tax book. She repeated this request on the 1st July 2006 given that the road tax book no 21 and 22 were not yet finished and yet to be handed to PW3.

The result of the audit in the morning of the 4th July 2006 prior to the counter being opened was that 89 pieces of road tax amounting to $3,915, $203.22 value of stamp stocks and $385.50 of postal order were never handed to head of post. This part of the evidence of the prosecution were never disputed nor rebutted.

The defendant testimony in Court is purely one of denial. I believe she lied in most of the relevant and contention issues in the case. I believe she lied when she said she had always been in possession of the cash proceeds with her at all time. I believe she paid the money in the afternoon to cover her track and purposely refuse to hand over the cash to the auditor as was requested by them. I believe she was never in possession of the proceeds in the morning of the 4th July 2006. I believe she concocted a story to say that PW3 was rarely around and specifically on 3rd July 2006, PW3 was not in the office when she wanted to handover the money. I believe she only had the money in the afternoon of 4th July 2006 after the auditors asked for it in the early morning that day.

Much reliance was made by the defence counsel on the issue of dishonesty in his submission. Mr. Ahmad Zakaria had drawn my attention to various cases on this. The relevant one is *Public Prosecutor vs Mat Salleh Hj. Haider @ Hj. Hidup* (Criminal Trial No 25 of 1994). I believe the above case could be clearly distinguished to the present case. In *Mat Salleh's* case, the prosecution reliance on the evidence of the defendant delay in deposits money into the bank as evidence of dishonest misappropriation failed, because there was no evidence that the money was pocket by the defendant to spend the money for herself. Whilst in the present, she admitted in her letters and verbally to her co-workers that she had converted the money for other purpose.

Conclusion

In this case, I do not think there can be any dispute that the defendant had converted the amount $4,470.50 for her personal used. The uncontroverted evidence is that the cash proceeds were in her possession all along prior to the auditor coming in for the pre-emptive inspection and auditing.

Her failure to hand over the road tax books, postal order and stamp books as required before the closing of the account day shows her attempts at hiding from her superiors of the shortfalls in the accounts under her charged. The dishonest intention is strengthened by her attempts at getting more road tax books from MPC on two occasions without prior proper authorization by her superior.

Having examined all the evidence before me, I have no doubt that prosecution had proven the charge against the defendant beyond reasonable doubt and I convict her accordingly.

Sentence

In mitigation Mr. Ahmad Zakaria submits that the defendant worked as a counter clerk at the Post Office since 1999 and she received the Excellent Customers Service Calak Brunei award in 2000 from the Public Service Institute. Prior to this she has no previous conviction and has a clean record. He also touched upon the delay in bringing this case to court. He highlighted the fact that the offence was committed in 2006 but the defendant was only charged in 2008. Citing the case of *Maimun bte. Hj. Omar vs Public Prosecutor* (Criminal Appeal No 1 of 2013) he invites the court to consider a non-custodial sentence namely imposing a sentence under section 19 (0) of the Offender (Probation and Community Service) Order 2006 an order for probation and community service.

Mr. Ng for the prosecution submits that numerous authorities on criminal breach of trust by Government Servants, mostly points to custodial sentence. [*see Public Prosecutor vs Md Yussof Hj Jalil (*Criminal Trial No 8 of 2005)], *Public Prosecutor vs Jublee Hj Gapar* (Criminal Trial No 40 of 2004), *Public Prosecutor vs Aslia Farina bte Abdullah* (Criminal Trial No 6 of 2006), *Public Prosecutor vs Ang Muhammad Arizam Abdullah Asang* (Criminal Trial No 12 of 2002), *Sarjit Singh s/I Mehar Singh vs Public*

Prosecutor (MS 114/2002/01), *Public Prosecutor vs Amir Hamzah Muhammad (*MA 006/2012) [2012] SGDC 52.

However, in *Public Prosecutor vs Robiah bte Hj Awg Bakar* (Criminal Trial No 8 of 2008) the defendant was sentenced to a fine of $2,000 in default 2 months imprisonment after having pleads guilty of criminal breach of trust under section 409 of the Penal Code. In this case this defendant who worked as a clerk at a Post Office took $400.50 from the Postal Service sale and used the money. She repaid the money a week later after the shortfall had been discovered. Chong J. took into account of the delay in bringing the defendant to court to be prosecuted as the main mitigating factor. As well, the defendant has previous clean record prior to the conviction and has shown genuine remorse.

In this case, I agree that there had been an element of delay in bringing the defendant to court. The offence was committed in April 2006 and the prosecution conceded that investigation by the police only commenced in March 2007. The defendant was first charged in court in September 2008.

As well, here had been delay in the disposal of this case in court. The trial commence in April 2009 and continued to September 2010 after various adjournments; due for the unavaibility of the defendant's counsel. After October 2010, the court was informed that the defendant's counsel Mr. Hj Zul Sukarla Zul Kifle could no longer represents the defendant, as a Receiving Order had been made against him. The defendant was insistence that she be to be legally presented by counsel for the remainder of the trial until eventually Mr. Ahmad Zakaria represented the defendant in June 2012. But the case only resume in August 2003.

In *Chan Kam Hong Randy vs Public Prosecutor* [2008] 2 SLR (R) 1019 [2008] SGHC 20, V.K. Rajah JA deals in great detail as regards to the consideration in sentencing in cases where there had been inordinate delay in commencement of investigation and eventual prosecution. In the judgments he states:

> 29 In cases involving an inordinate delay between the commission of an offence and the ultimate disposition of that offence via the criminal justice process, the element of rehabilitation underway during the interim cannot be lightly dismissed or cursorily overlooked. If the rehabilitation of the offender has progressed positively since his commission of the offence and there appears to be a real prospect that he may, with time, be fully rehabilitated, this is a vital factor that must be given due weight and properly reflected in the sentence which is ultimately imposed on him. Indeed, in appropriate cases, this might warrant a sentence that might otherwise be viewed as "a quite undue degree of leniency" (*per* Street CJ in *R v Todd* ([23] *supra*) at 520).
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> 30 Substantial guidance can also be obtained from the recent case of *R v Merrett, Piggott and Ferrari* (2007) 14 VR 392, where Maxwell P adroitly

summarized the Australian judicial approach towards an offender's prospects of rehabilitation in the following words (at [49]):

> As I said in *R v Tiburcy* [[2006] VSCA 244], the sentencing court looks to the future as well as to the past. There is very great benefit to the community at large, as well as to the individuals themselves and their immediate families, if future criminal activity can be avoided. It is important that this court, by its own sentencing decisions, recognize and reward efforts at rehabilitation, just as we should support trial judges who do so. *It is important to reinforce in the public mind the very considerable public interest in the rehabilitation of offenders. The preoccupation with retribution which characterizes much of the public comment on sentencing is understandable, but it focuses on only one part of what the sentencing court does.* [emphasis added]

31 In the final analysis, however, it should always be remembered that the preceding discussion must be interpreted in the proper context and must not be construed to support the general proposition that *any* or all delays in prosecution merit a discount in sentencing.

Determining the appropriate sentence where there has been inordinate prosecutorial delay

32 In cases of inordinately-delayed prosecution the first and foremost inquiry should always be whether the accused was in any way responsible for the delay. The courts must be careful to draw a distinction between, on the one hand, cases where the delay is occasioned by the offender's attempts to avoid the consequences of his criminality and, on the other hand, cases where the delay is due to circumstances entirely beyond the offender's control.

33 In cases where the delay is attributable to the offender's own misconduct (*eg,* where the offender has evaded detection, destroyed evidence, actively misled the police or been less than forthcoming to the investigating authorities), the offender cannot complain of the delay in prosecution, much less seek to opportunistically extract some mitigating credit from it. To allow the offender in such a scenario any discount in sentencing would be contrary to all notions of justice. This axiomatic proposition was endorsed in *R v Whyte* (2004) 7 VR 397, where Winneke P observed (at [25]) as follows:

> I do not think [the trial judge] erred in according to the fact of "delay" little significance. Delay will very frequently be a matter of mitigation, particularly where the accused has used the time involved to rehabilitate himself or herself. For the respondent [*ie,* the prosecuting authorities], Mr. Ross contended that the concept of delay as a mitigating factor cannot figure largely in the sentencing

> process where the delay is "self-inflicted"; rather it will become a major mitigating factor if the delay was not due to the fault of the accused but rather the fault of the prosecuting authority or the system of the administration of justice. *Where, however, the delay cannot be sheeted home to the prosecution or the system, but can be fairly attributed to the accused, such as absconding from bail, fleeing the jurisdiction or otherwise avoiding being brought to justice, delay must necessarily become of less significance, even to the point of giving less credit for rehabilitation established during that period. [emphasis added]*

34 It is therefore clear both as a matter of principle and common sense that the courts should not afford any leniency to offenders who are responsible for delaying justice o preventing justice from taking its course either by concealing the truth or by obstructing investigations. This would be tantamount to allowing the offender to profit from his own wrongdoing.

35 Second, the rehabilitative progress of the offender must be considered in the light of the nature and the gravity of the offence, as well as the wider public interest in each individual case. Considerations of fairness to an accused may in certain circumstances be substantially irrelevant – or, indeed, even outweighed by the public interest – if the offence in question is particularly heinous or where the offender is recalcitrant and/or has numerous antecedents. Convictions for certain offences, I emphasise, cannot be treated lightly, notwithstanding inordinately delayed prosecution.

36 In a similar vein, the length of delay involved must always be assessed in the context of the nature of the investigations – *viz*, whether the case involves complex questions of fact which necessarily engender meticulous and laborious inquiry over an extended period, or whether the case may be disposed of in a relatively uncomplicated manner (for instance, where the offender has fully admitted to his complicity). In the former scenario, an extended period of investigations might not only be expected, but also necessary and vital to uncover sufficient evidence to bring the accused to trial. This is likely to be the case for offences, which often, by their nature, resist straightforward inquiry (for instance, sexual offences against young or vulnerable victims and financial fraud involving complex accounting and multi-jurisdictional issues).

37 By way of illustration, *Yau Kong Kui v Public Prosecutor* [1989] 2 MLJ 139 *at 141,* Roberts CJ considered a lapse of 16 months between the offender's appearance in court and the date of his eventual sentence to be "difficult to excuse for an offence of this nature" (*ie,* the offence of dangerous driving causing death). Similarly, in *Tan Kiang Kwang* ([21 *supra*]), the accused, who was investigated and arrested in 1988 for offences which "did not involve what might be termed complex or sophisticated fraud" (at [25]),

was not charged until some six years later in 1994. Such an aberration was attributed entirely to the Prosecution and was castigated by Yong CJ as "unacceptable" by any standards.

38 At the end of the day, it must be appreciated that every factual matrix is infused with myriad imponderables and subject to its own singular permutation of variable factors, and is, to that extent, unique. Not every instance of a long and protracted investigate process warrants a reduction in sentence. The weight to be attached to fairness and/or rehabilitation as attenuating sentencing considerations in the event of inordinate prosecutorial delay must necessarily vary from case to case.

No doubt there had been delay in the investigation of this case and bringing the defendant to court. As well, there had been considerable delay in the disposal of this case in court. This was by no means due to any fault or attributed to the defendant's. As such I believe that substantial reduction in sentence is appropriate.

What she had done was undoubtly wrong and deserves punishment. But having considered the amount involved, the delays, the fact that the defendant has shown a genuine remorse, and there being no financial loss to the government as she has eventually repaid the money, I believe the conviction does not warrant a custodial sentence. I believe a fine of $5,000 in default 2 months imprisonment is appropriate in the circumstances of the case. I so ordered. I allow the defendant to pay the fine by the 20th December 2014.

Dato Paduka Hairol Arni Majid
Judge, High Court