RAMZIDAH BINTI PEHIN DATU KESUMA DIRAJA KOL(B) HJ ABDUL RAHMAN
(1ST APPELLANT)

AND

PUBLIC PROSECUTOR

Court of Appeal of Brunei Darussalam
Criminal Appeal No. 3 of 2020

HJ NABIL DARAINA BIN PEHIN UDANA KHATIB DATO PADUKA SERI SETIA
USTAZ HJ AWG BADARUDDIN (2ND APPELLANT)

AND

AND PUBLIC PROSECUTOR

Court of Appeal of Brunei Darussalam
Criminal Appeal No. 6 of 2020

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RAMZIDAH BINTI PEHIN DATU KESUMA DIRAJA KOL(B) HJ ABDUL RAHMAN
(1ST RESPONDENT)

HJ NABIL DARAINA BIN PEHIN UDANA KHATIB DATO PADUKA SERI SETIA
USTAZ HJ AWG BADARUDDIN (2ND RESPONDENT)

Court of Appeal of Brunei Darussalam
Criminal Appeal No. 4 of 2020

Before: Burrell P, Seagroatt and Lunn JJ A.
6 July 2021

Mr. Simon Farrell, QC and Mr. Sheikh Noordin Mohammad of m/s Sheikh Noordin for the Appellants.

Mr. Davindar Singh, SC., DPP Hjh Suriana Binti Hj Radin, DPP Dk Didi Nuraza Binti Pg Hj Latiff and DPP Muhammad Qamarul Affyian Bin Abdul Rahman for the Respondent.

Headnote: Crime – Multiple criminal breach of trust (s.405 Penal Code Cap.22) and money laundering (s.3(1)(a)(b)(c) Criminal Assets Recovery Order 2012) offences by two public servants (husband and wife) in Brunei Judiciary involving $15.75 million – Appeals against convictions on 25 charges (1st appellant) and 6 charges (2nd appellant) dismissed. Unsuccessful grounds included – test for recusal of trial judge – stay for abuse of process – good character direction - complaint that judge "entered the arena" – consideration of s.177(3) Evidence Act – s.34 Penal Code – ss 370, 371 Criminal Procedure Code, -

Sentence – Appeal by Public Prosecutor against sentences of 10 years imprisonment (1st appellant) and 5 years imprisonment (2nd appellant) allowed – trial judge's order that all sentences be served concurrently wrong in principle – partly consecutive sentences substituted – 10 years increased to 15 years (1st appellant) and 5 years increased to 7 years 6 months (2nd appellant) – relevant considerations – multiple offences, public interest, multiple victims, amount of money misappropriated, time span of overall criminality (over 10 years), principle of totality, prosecution appeal discount applied. Public Prosecutor's appeal against acquittals on two charges of money laundering by 2nd appellant dismissed.

Cases referred to in the judgment

ADF vs PP [2010] I SLR 88;
Attorney General's Reference No. 4 1989 90 C.A. R 366;
AWG Group Ltd and another v Morrison and another [2006] AER 139;
Haji Nordin bin Haji Ahmad vs Public Prosecutor (Criminal Appeal No 8/1998);
Haw Tau Paw v PP (1982) AC 136;
Marzuki Bin Mokhtar vs PP [1981] 2 MLJ 155;
Mohammed Ali bin Johari v Public Prosecutor [2008] 4 SLR (R) 1058;
Mohd Noor bin Litoh v Public Prosecutor (Criminal Appeal No 3/2005);
Public Prosecutor vs Pg Hussin bin Pg Sulaiman (Criminal Appeal No 8/2017);
R v Smith [1999] 2 Cr. App. R. 238;
Razimi bin Hj Tajjuddin vs Public Prosecutor (Criminal Appeal No 8/2017);
Yeo Tse Soon v PP (1994) JCB 481;
Zhong Xiao Hui and others vs Public Prosecutor (Criminal Motion No 25/2017).

1. On 18 January 2020 the 1st appellant was sentenced to 10 years imprisonment having been found guilty, after a trial lasting 25 days before the Hon. Gareth Lugar-Mawson J.C., of all 25 charges she had faced. Charges 10-14 were of criminal breach of trust contrary to sections 405 and 409 of the Penal Code Chapter 22 involving the dishonest misappropriation of $15,750,292 over a period of 14 years from 2004 to 2017 whilst employed as a Registrar and Deputy Official Receiver in the Brunei Judiciary. Charge 15 was also a section 405 offence involving a misappropriation of $35,000 entrusted to her by a judgment debtor on 19 April 2017. The remaining 10 charges, for which she was sentenced to 5 years imprisonment to be served concurrently with the 10 year on charges 1-15, were charges under s.3(1)(a) and (b) of the Criminal Assets Recovery Order (*''CARO''*) 2012. The CARO charges concerned her disposal of the monies stolen in the s.409 charges.

2. On the same day the 2nd appellant, who is the 1st appellant's husband, was sentenced to 5 years imprisonment having been found guilty of 6 charges under s.3(1)(a), (b) and (c) of CARO. The charges concerned similar disposals of the money stolen by his wife. He was acquitted of 2 charges under CARO. The 2nd appellant was also a judicial officer in the Brunei Judiciary. He had transferred from the Attorney General's Chambers in 2011 and at the time of his arrest on 21 July 2018 he was a Senior Magistrate and Intermediate Court Judge.

3. The 1st appellant appeals her convictions, the 2nd appellant appeals his convictions and his sentence.

4. At trial and on appeal both appellants have been represented by Mr Simon Farrell QC and Mr Sheikh Noordin. At trial the prosecution was conducted by Mr Jonathan Caplan QC with representatives of the Attorney General's Chambers. On appeal the prosecution has been represented by Mr Davindar Singh SC of the Singapore bar with representatives of the Attorney General's chambers.

5. Appeals have also been lodged by the prosecution in relation to two matters. First, there is an appeal against the sentences imposed on both appellants of 10 years and 5 years respectively on the grounds that they are manifestly inadequate. Secondly, there are appeals against the acquittals of the 2nd respondent on charges 21 and 22, two instances of money laundering.

6. The appellants' grounds of appeal list 9 grounds which are common to both appellants, a further 4 grounds in relation to the 1st appellant and a further 9 grounds in relation to the 2nd appellant. We do not consider it necessary to set out all those grounds, seriatim, in this decision. They are a matter of record.

7. Before proceeding to deal with all the grounds of appeal we recite paragraph 6 and 7 of the trial judge's judgment (delivered on 16 January 2020) setting out a summary of the Prosecution's allegations:-

> *''6. The prosecution alleges a large-scale criminal breach of trust on the part of D1 committed over the 14-year period between 2004 and 2017 whilst she was a*

DOR. It is the prosecution's case that, in total, the proceeds of her crimes amount to about $15,750,000 (all dollar values in this judgment are in Brunei dollars) being monies withdrawn by her in cash from approximately 255 judgment debtors' accounts, all held at Bank Islam Brunei Darussalam Bank (''BIBD''), which had been opened by the Official Receiver's Chambers on behalf of the debtors for the purpose of collecting funds from them for payment to their judgment creditors.

7. The prosecution says that once D1 had withdrawn these monies, her husband D2 and she laundered them for their personal benefit. Between 2011-2017, $7,165,000 was paid in cash into the Defendants' joint accounts in Brunei - $5,918,000 in to their joint SCB account at the Standard Chartered Bank (''SCB'') and $1,104,000 in to their joint HSBC account. $2,058,000 in cash was spent on new car purchases. $563,951 in cash was used to pay credit card bills. In total the cash used by D1 and D2 between 2011-2017 was $9,787,000. Some of the monies deposited into the SCB joint account were transferred to the Defendants' UK bank accounts, either with HSBC or Lloyds Bank. About $6,000,000 remains unaccounted for.''

8. This decision is divided into 5 sections as follows:-

1) Grounds of appeal upon which both appellants rely under the following headings:-
   a) Recusal
   b) Stay for abuse of process
   c) Banking evidence
   d) Good character
   e) Integrity of the bankruptcy files

2) The 1st appellant's further grounds of appeal against conviction.

3) The 2nd appellant's further grounds of appeal against conviction.

4) The Respondent's appeals against the 2nd appellant's acquittals on charges 21 and 22.

5) Sentence:-
   (a) The 2nd appellant's appeal against his sentence of 5 years' imprisonment.
   (b) The Respondent's appeals against both appellant's sentences.

1. Grounds of appeal upon which both appellants rely

(a) Recusal

9. Ground 1 of the Notice of Appeal states that the trial judge ought to have recused himself from the proceedings. The basis of the appeal to this court was the same as made to the trial judge namely that he had a *''close connection with the 1st appellant and a number of important prosecution witnesses''.*

10. There has been no disagreement that the appropriate test is whether or not *''an informed objective bystander would legitimately conclude that judicial bias whether subconscious or otherwise is a realistic possibility''*. Mr Farrell has referred the court to a number of UK authorities on the application of the legal test. For example he highlights the remarks of Lord Justice Mummery in **AWG Group Ltd and another v Morrison and another [2006] AER 139**:

> *''By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case…*
>
> *…Where the hearing has not yet begun, there is also scope for the sensible application of the precautionary principle. If, as here, the court has to predict what might happen if the hearing goes ahead before the judge to whom objection is taken and to assess the real possibility of apparent bias arising, prudence naturally leans on the side of being safe rather than sorry''.*

11. Mr Farrell correctly sums up the issue at paragraph 26 of his written submissions as follows:

> ''What needs to be considered where a trial judge has personal knowledge of witnesses in a case (particularly when the judge is both the arbiter of law and fact) is the relationship which the judge has with those individuals and what are the issues in the case.''

12. There are two aspects to be considered:-

(i) the relationship between the judge and the 1st appellant and
(ii) the relationship between the judge and 3 prosecution witnesses and in the context of the evidence they were due to give.

13. Those 3 witnesses were Madam Hazarena Hurairah, Madam Rostaina Duraman and Madam Norismayanti Ismail. It was submitted that the judge would be required to *''decide where the truth lies in respect of important evidence to be given by the witnesses''* because it was submitted, *''there were important factual disputes''*

14. Madam Hazarena and Madam Norismayanti had been Registrars in the Judiciary for approximately 14 years prior to the trial; Madam Rostaina had been the Official Receiver and Chief Registrar for 10 years. The judge had been appointed as a Judicial Commissioner in 2007. His appointment was known as a *'visiting judge'* who sat in Brunei once or twice a year for periods of up to 2 months each visit.

(i) <u>The judge's relationship with the 1st appellant</u>

15. The submissions on behalf of the 1st appellant may be summarised as follows:

16. Although it was a professional relationship it had extended over 10 years during which time she had had, in her capacity as a Senior Registrar, daily contact with the judge and had been responsible for case listings. The 1st appellant and the judge had occasionally conversed at social gatherings about, for example, their families. The 1st appellant recalled an occasion at such a gathering when the judge invited her to visit him in the UK if she was ever near where he lived. (The judge did not recall this conversation and no visit was ever arranged).

17. There has been no challenge to the judge's comments that the relationship was purely *'professional'*, the contacts were *'infrequent'* and there was *'no social relationship'*. It should be also noted that the 1st appellant's primary role within the judiciary was in the Bankruptcy Court as Deputy Official Receiver ("DOR") and it was from this position that her criminality stemmed. The judge's involvement in the Official Receiver's Office was nil.

18. Mr Farrell submits that even taken at its lowest the relationship was one where there was *"a realistic possibility''* of bias *"subconsciously or otherwise''*.

19. On the other hand Mr Singh submits that the words of the judicial oath, plus the fact that the judge had 25 years experience sitting at a high level as a judge in Hong Kong and Brunei plus his own observations on the nature of the relationship precludes any possibility of actual bias and, more importantly, can safely lead this court to conclude the absence of any possibility of perceived bias either.

20. Mr Singh added, correctly, that "*regard must also be accorded to Brunei's local circumstances. The fair-minded and reasonable observer would know Brunei's judiciary is small and its members must inevitably know one another and will deal with each other professionally and in the best traditions of the judiciary".*

21. The facts and matters relied on by Mr Farrell to demonstrate that the legal test has been met, in so far as it relates to the 1st appellant's relationship with the judge, are paper thin. They do not advance the recusal argument in any significant way.

22. We turn to the second aspect of the submission.

(ii) The relationship between the judge and PW1, 2 and 3 and their evidence

23. Before turning to the evidence, Mr Farrell makes a number of points about the relationships. He notes that Madam Hazarena (PW1) was the Judicial Registrar assigned to the case. In particular, she signed a letter to the appellants' solicitors informing them of the judge's decision refusing their applications for an adjournment. Also that she had sat on two pre-trial conference hearings in January 2019. It was submitted that the three witnesses were *"well known"* to the judge and that there had been a *"close connection...over many years."*

24. In the pre-trial recusal application Mr Caplan Q.C. had submitted that it was *"professional conduct but no close social contact, no close friendship, nothing that would give rise to the reasonable man believing that there was a real possibility of bias."*

25. With regard to Madam Rostaina it was said that she assisted in arranging the judge's travel to and from Brunei.

26. We entirely agree that none of these matters would cause the judge to recuse himself on a correct application of the legal test. The judge had said the relationships had *"always been a professional one and also an infrequent one, limited to occasions on which I have sat in the High Court of Brunei since late 2007. I have no social contact with any of these 4 (including the 1st appellant) persons."*

Their evidence

27. Fundamental to the 1st appellant's defence were her assertions made in her pre-trial interviews that (i) the cash withdrawn was used to pay creditors or (ii) the cash was paid into Fixed Deposit Accounts ("F.D.A") which she had opened in order to get better rates of interest. It therefore raised issues as to whether a DOR was permitted to draw cash from the court accounts and use it to pay creditors and/or set up fixed deposit accounts. The relevance to the recusal submission comes from the 1st appellant's assertion that PW1, 2 and 3's evidence *"contradicts my account in my interview"* and therefore their evidence could be relied on to show that her assertions at interview were untrue.

28. In her statement to the police, dated 22 July 2018, the 1st appellant had given the following answers:-

- that there were no practice directions as how to handle bankruptcy proceedings. She had learnt from her predecessors;
- that some creditors preferred to be paid in cash. There should be a written receipt in such cases but sometimes they go astray;
- that she had paid creditors in cash and had opened fixed deposit accounts but that she could not remember which files had F.D.As as she dealt with so many;
- that the F.D.As were sometimes opened in the OR's bank account and sometimes in other banks;
- that the money she withdrew would go straight to an F.D.A or to pay creditors.

29. In the event, the basis for recusal that PW1, 2 and 3 would contradict the 1st appellant's account, later to be relied on as being consistent with innocence, came to nothing. Although Mr Farrell did not cross examine them about their *"close relationship"* with the judge, he did question them about the operation of the OR's office.

30. In cross examination Madam Hazarena acknowledged that *"there is no official set of rules"* governing the handling of bankruptcy files and that DORs had a discretion as to how to deal with them. Madam Rostaina agreed also that there were no written rules governing the way in which the files were handled. She also agreed that DORs had *"quite a measure of discretion"*. There was no rule against opening fixed deposit accounts. Madam Norismayanti agreed there were no written rules; creditors could be paid in cash (she had twice done so in 2007) and there was no rule against opening F.D.As.

31. Thus, in short, the background against which the 1st appellant sought to establish her innocence was not challenged. The case against her was not that her innocent account breached any rules but that she took advantage of the lax system to systematically *"milk"* the accounts for her own benefit. Proof of the latter did not depend in any way on the evidence of PW1, 2 or 3.

32. The existence of a lax system clearly facilitated her dishonesty. Further extracts from Madam Norismayanti's evidence illustrates this. She confirmed that the 1st appellant had not been secretive about her claims that she had opened F.D.As. PW3 did not think it was wrong adding *"I have known her a long time. I believe that she is honest."*

33. In PW1, 2 and 3's witness statements they stated what their own practices had been. They were not asked to comment on the 1st appellant's practices, as alleged in her pre-trial record of interview. That was the subject of cross-examination.

34. The written statements do not undermine the 1st appellant's case either. They all said the usual (but not the required) practice was to pay creditors by cheque. Madam Norismayanti, recalled that she had made two cash payments, for a particular reason, in 2007. They all said it had not been their practice to open F.D.As.

35. In support of recusal Mr Farrell summarises his submissions at paragraphs 11 and 35:

> *"11. The Prosecution witnesses PW1, PW2 and PW3 were relied upon by the Prosecution to show that the 1st appellant's account in her interviews must be untrue because FDAs were rarely if ever opened by DORs.*
>
> *35. LMJC accepted the evidence of PW1, PW2 and PW3 as accurate and truthful and rejected the 1st appellant's account in her interview."*

36. However, it is crystal clear that the judge *"rejected the 1st appellant's account"* because of the overwhelming and unanswered evidence that almost 200 $10,000 notes were withdrawn and not accounted for, that there are 608 withdrawal slips for monies

which have gone missing, that there is no evidence of cash payments to creditors and no evidence of any F.D.As being opened.

37. This ground for recusal is not made out at all. The so-called *"disputes"* between the witnesses, said to have a *'close connection'* (which they did not) with the judge and the 1st appellant did not exist.

38. We have no doubt that the legal test for establishing recusal was not met in the pre-trial applications and neither is it met before this court.

39. Mr Singh described the ground (and indeed the following ground) as *"absurd."* Whilst not endorsing the choice of that particular word, we observe that one definition of *"absurd"* is *"wholly unreasonable"*. With that we do agree.

(b) <u>The stay application</u>

40. The 1st appellant's second ground of appeal is that the trial judge should have stayed the proceedings as an abuse of the process upon the defence application at the outset of the trial. For the reasons which follow we have determined that there is no merit in this ground, which accordingly fails.

<u>The legal test</u>

41. It is common ground that the court has the power to order a stay as an abuse of process if (i) it concludes that an accused cannot have a fair trial or (ii) it decides that it would otherwise be unfair to try the accused.

42. Mr. Farrell relies on both of the above limbs. The realistic consequence of a successful application to stay proceedings is that an accused will never face trial. It is therefore, as Mr. Singh points out, a power that is only exercised *"most sparingly."* The onus is on the defence to demonstrate on the balance of probabilities, that there cannot be a fair trial and/or that the prosecutor has acted in bad faith or has been responsible for serious irregularities.

<u>The application to the trial judge</u>

43. Having heard submissions in relation to four specific complaints the trial judge gave his decision dismissing the application on 16 September 2019, the same day that the trial commenced. The judge gave written reasons for his decision on 20th January 2020.

44. Before we turn to those four specific complaints Mr. Farrell's first submission to this court concerns a matter not raised in the pre-trial application. It concerned a matter which was canvassed in evidence and, in Mr. Farrell's submission, is an example of bad faith and heavy handedness by the prosecution.

45. Complaint is made that during a search of the appellants' home on 8th January 2018 a threat was made by an Anti Corruption Bureau Officer to the appellants' lawyer, Mr. Rozaiman, that he could be arrested for obstruction of justice. The trial transcript shows that the ACB officer denied the allegation when put to him in cross examination, no arrest was ever made and Mr. Rozaiman gave no evidence in the trial. The matter was taken no further in evidence.

We can safely attach no weight to this complaint.

46. Three of the grounds dealt with by the judge in his written reasons are as follows. The fourth ground concerning the integrity of the bankruptcy files is dealt with at paragraphs 78-80.

(i). That amendments were made to the Penal Code Chapter 22 after the commencement of the investigation. The amendments introduced an evidential presumption of dishonesty which facilitated proof of an offence of criminal breach of trust and a doubling of the maximum sentence for such an offence from 10 to 20 years.

Mr. Farrell points out that, as evidence of the prosecution's original intention to rely on these amendments to the obvious prejudice of the 1st appellant, the charge sheet as originally drafted specified the new maximum penalty of 20 years imprisonment. This, he submits, demonstrates bad faith on the part of the public prosecutor.

Prior to the commencement of the trial Mr Caplan made it clear that not only did the prosecution not rely on the amendments but also that they could not do so as a matter of law. It was conceded readily that such amendments could have no retrospective application. In such circumstances we are satisfied that it took the application for a stay based on an abuse of process no further. The judge correctly said:

> *"The prosecution acknowledges, correctly, that the amendments to s.409 of the Code made by the Amendment Order do not apply retrospectively and that the court must apply the section as it was at the time of offences, all of which pre-date the amendment and the start. This ground fails."*

(ii). That ACB officers attended the appellants' home on 30 April 2019 and conducted what has been described as a *"raid"* in which notes about the case made by the 1st appellant were seized. It is submitted that this 'raid' demonstrated bad faith and oppressive conduct which *"hampered with appellants' ability to prepare for trial and had a major destabilizing effect on both of them and adversely impacted on their health."*

When counsel for the prosecution was made aware of this matter he was able to inform the court as follows: (a) the so-called 'raid' related to a different

investigation which formed no part of the trial of the appellants, (b) the prosecution was not aware that the raid had been contemplated or that it had been carried out, (c) the prosecution had not seen any of the items seized in the raid and (d) an undertaking was given that nothing from the raid would be adduced in the trial. Further, no evidence was adduced as to how the appellant's health had been adversely affected.

To contend that this provided a valid reason for the appellants not to stand trial is surprising. We confirm the judge's ruling that *"this ground fails."*

(iii). Failures concerning the investigation process and disclosure.

In his oral submission to this court Mr. Farrell enlarged upon paragraphs 76, 78 and 79 of the grounds of appeal which stated:

76. the prosecution List of Unused Materials was missing important items including statements from the creditors and debtors who were at the heart of the allegation made by the prosecution.

78. there can be no confidence that all documents seized during the investigation were properly logged, listed and available for inspection by the defence.

79. it is striking, given the allegations faced by the Appellants in this case, that the prosecution failed to take witness statements from the debtors and creditors themselves.

47. It was accepted that there was an extensive list of unused material contained in the letter of 1 May 2019 from the Attorney General's Chambers to the appellants' solicitors. None of the documents on the list was subsequently requested. There was further discovery on 3 June 2019 and 24 August 2019. However, the main complaint was that statements from all the debtors (238 in all) and creditors was missing.

48. In the course of the stay application to the judge, Mr. Caplan explained, on 19 September 2019, why such statements would form no part of the prosecution case. The judge dealt with it in his ruling as follows:

"Mr. Caplan submits that, in light of the documentation, and in the absence of any positive and contrary assertion by D1 that she paid specific creditors, the prosecution is not required to enquire of hundreds of creditors as to whether or not they have received payment when the records show that they have not. In short, the prosecution is not required to prove a negative.

49. Mr. Caplan having said in the course of his submission:

"But I repeat it is not our case that we are calling the debtors or the creditors or the creditors' lawyers, we are not relying on the evidence that I've explained and if at the end of the day my learned friend feels that that cause of action gives him some comfort to make a submission to the Court then so be it but that is our case as set-out in our notes and that is the case we will present."

50. Mr. Singh adds *"the appellants have not remotely suggested how these documents were relevant to establishing any facts or raising any issues in their defence. The appellants never requested these documents."*

51. In short we are satisfied that the disagreements between the prosecution and defence concerning the sufficiency and timing of the disclosure issues fall woefully short of establishing an abuse of process. The judge's ruling that *"I am satisfied that there has been full disclosure."* is reasonable and unobjectionable in the circumstances. Once again, this ground fails.

52. (iv). For the sake of completeness we now refer briefly to matters which arose subsequent to the pre-trial application.

The appellant's complaint concerning the 1st appellant's handphone (contained in paragraph 72 of the Grounds of Appeal) appears to relate to the following extract in the transcript:-

"Mr. Caplan : can I just check with Mr. Farrell that the phone from which these texts are coming will be produced?

Mr. Farrell : I haven't considered that. I've put the messages to the witnesses, they've accepted that they received the messages, I'm not sure if there is any need for the phone to be produced. But can we consider that?"

53. In fact the handphone had been in the prosecution's possession since January 2018 but there was no prejudice to the appellant as she was able to retrieve messages on it from the iCloud: the significance of this matter has been considerably overstated.

54. The fact that PW50 (the officer in charge of the investigation) had not read the 1st appellant's record of interviews is of no consequence.

55. Such matters, in the context of an application for a permanent stay for abuse of process and bearing in mind that they have been raised as 'new' grounds, are at best peripheral and at worst irrelevant.

This ground of appeal is refused.

(**c) <u>The Banking evidence</u>**

56. Mr Farrell submitted that the judge erred in "entering the arena" during the cross-examination of a prosecution witness, Madam Rashidah Binti Haji Rashid (PW50), by observing that the evidence, adduced in respect of the issue of whether or not fixed deposit accounts in the name of the Official Receiver had been created in the respective banks, was hearsay and inadmissible, suggesting that the issue be addressed by evidence adduced by a banker's affirmation. Further, the judge erred in permitting the prosecution subsequently to adduce the evidence of various bank officers (PWs 54 and PWs 89-94) addressing that issue. That evidence was also inadmissible and did not satisfy the requirements of section 177 (3) of the Evidence Act, in particular that at the material time the bank's computers had been operating properly and had not been the subject of unauthorised interference. He erred in not having regard to the fact that there was no evidence in respect of HSBC and Citibank. The judge was wrong to find that that those witnesses were not producing banker's records, rather that they were referring to checks or enquiries made as to whether or not such fixed deposits existed. Some of them did produce bank records: three of them produced lists of accounts said to reflect the records of the bank.

57. Mr Singh submitted that the contention that the judge had "entered the arena" was baseless. The judge was entitled to indicate to the parties his concerns about the evidence, in order to ensure that it was appropriately adduced ***Mohammed Ali bin Johari v PP*** **[2008] 4 SLR (R) 1O58**, at paragraphs 181-185. In their evidence, PW 54 and PWs 89-94 did not produce bank records. They said they searched their respective bank records, but found nothing relevant. It was not necessary that their evidence comply with section 177 (3). Their evidence was that there were no such records. The absence of evidence from a bank officer of either HSBC or Citibank was irrelevant. Madam Rashidah testified that those banks had ceased operations in Brunei but, if there had been such fixed deposit accounts with them, they would have been transferred to other banks. There were no such fixed deposit accounts.

58. In examination-in-chief, Madam Rashidah, an officer of the Anti-Corruption Bureau, produced letters from various banks responding first, to enquiries made by the Court's Bankruptcy Unit and secondly, by the Anti-Corruption Bureau, as to whether or not fixed deposit accounts had been opened in the name of the Official Receiver, in particular those registered in the name of the 1st appellant. In cross-examination, the issue was raised with Madam Rashidah of whether or not witness statements had been taken from the various bank officers concerned and if such witnesses were to be called. Madam Rashidah said that witness statements had been taken from the witnesses.

59. At the conclusion of re-examination on 10 October 2019, the judge asked Mr Caplan, "Are you going to call or put an affidavit in from the banks confirming that or are you relying on this witness and the Court officials?" The judge indicated the matter had been concerning him, "because technically what she says here is hearsay". The judge added, "Hearsay is hearsay." For his part, Mr Caplan indicated that he would consider the matter.

60. On 16 October 2019, the prosecution informed the judge that statements from six of seven bank officers, whom the prosecution intended calling to give evidence, had been served on the parties. They were not in affidavit form. They confirmed the contents of the letters to the Anti-Corruption Bureau to which Madam Rashidah had referred in her evidence. For his part, Mr Farrell objected to the evidence being led. He submitted that in making the observations about the hearsay nature of the evidence, to which Madam Rashidah referred, the judge had entered the "arena". Cross-examination having exposed the weakness in their case, the judge had suggested that the prosecution obtain further evidence. That was wrong. The prosecution ought not to be permitted to call the bank officers as witnesses, "to plug a hole in their case". To do so would prejudice and embarrass the defence. The defence would have approached the case differently. The evidence was "(in?) admissible." Even in its current form it was inadmissible.

61. The judge ruled that the prosecution may lead the evidence. The defence had not been taken by surprise by the prospective evidence to be called by the prosecution that there were no fixed deposit accounts in the name of the 1st appellant. Reference had been made in the prosecution's Opening to the evidence referred to by Madam Rashidah of the correspondence between banks and the Bankruptcy Unit of the Court and the Anti-Corruption Bureau on the subject. Of the submission that he had "entered the arena", the judge said that all he had done was, "express my concern" that the way the prosecution was leading the evidence "possibly offended against the rule against hearsay." Of that he said, "For a judge, even when he is the trial (trier?) of fact, to do so is part of the proper trial management."

62. The prosecution adduced evidence from seven bank officers (PW 54, who was recalled; and PWs 89-94). They gave oral evidence and produced their witness statements, dated variously 14 and 16 October 2019, pursuant to section 117(b) of the Evidence Act. Five of the witnesses (PWs 89-93) identified their earlier letters in reply to the Anti-Corruption Bureau, to which reference has been made in Madam Rashidah's evidence. They were all Compliance Officers of their respective banks. They had been asked for, "any relevant entries relating to the Official Receiver's accounts including current, savings, deposit, original, withdrawal slip, fixed deposit, documents or safe deposit boxes registered under the name of Ramzidah with the identity card number 253868 in the period 2000 to 2018." Four of them described a search that was made by reference to the name Ramzidah and her Identity Card number. Bank officers at BIBD, UOB and RHB testified there was no record of those particulars with their respective bank, so that there was no account in her name. Maz Yusrin Bin Mohidin (PW 91), a Compliance Officer at TAIB, said in his statement, "I found there were 130 Official Receiver accounts registered under the name" Ramzidah. He attached a list he had compiled of those accounts. None of them were fixed deposit accounts. Bank officers at Maybank, Standard Chartered Bank and Baiduri bank addressed the question of whether or not there were bank accounts held in the name of the Official Receiver. They said that there were such bank accounts which held fixed deposits, but none of them were in the name of the 1st appellant. Madam Selmizah Binti Selamat (PW 94), Head of Retail Banking at Standard Chartered Bank, said that she was able to verify the accuracy of the information supplied in an earlier letter sent to the Official Receiver, attached to which was a list of the details of 14 accounts set up by the Official Receiver with

the Bank, in which Madam Lim Siew Yen and Dato Haji Kifrawi were named as account holders. Charles Lim Tiong Thai (PW 93), a Compliance Officer at Maybank, provided a list of three accounts opened and closed in the name of the Official Receiver in the period 1996-1998. Alya Selah (PW 54), a Compliance Officer at Baiduri Bank, provided a list of five fixed deposit accounts opened with the bank in the names of Deputy Official Receivers: three in the name of Madam Lim and one in the name of Madam Norismayanti, opened in 2003, and an account, opened in 2010, in the name of Madam Hazarena.

63. Mr Farrell posed no questions in cross-examination of any of those bank officers, save in confirming with Madam Selmizah that the fixed deposit accounts that she had identified continued to exist.

64. In his written final submissions at the close of the trial, Mr Farrell took issue again with the admissibility of the evidence of those bank officers. He submitted that it was not permissible for a bank officer to give evidence simply that a search had been made of his/her bank's records and that nothing had been found of a particular account. In any event, not all of their evidence was negative evidence because some of the witnesses had summarised in lists of accounts relevant information which they said had been found in their respective searches. It was necessary for those witnesses to comply with section 177 of the Evidence Act, in particular to confirm that the bank's computers had been working correctly at all material times.

65. In his judgment, the judge said that the evidence led from the bank officers was to the effect that there was no evidence "that a fixed deposit account on behalf of a judgment debtor had been opened in D1's name in any of the banks and Islamic Trust funds currently licensed to operate in Brunei". Of their evidence, he said they, "were not producing banker's records, they were referring to checks or enquiries made as to whether or not such fixed deposit accounts existed. The enquiries were against existing or past account holders. I am satisfied that this evidence is admissible. No objection was raised when it was introduced."

66. We are satisfied that there is no merit whatsoever in Mr Farrell's complaint that the judge's intervention in the course of evidence, to the effect that the evidence led by the prosecution was hearsay, was impermissible. In conducting a fair trial, the judge was entitled to advise the parties of his initial reaction to an evidential issue. His intervention had the added merit of being entirely justified. The evidence, as adduced through Madam Rashidah, was hearsay, if advanced as evidence of the truth of the assertions in the letters from the banks. That much was blindingly obvious from Mr Farrell's line of questioning of Madam Rashidah as to whether witness statements had been taken from the bank officers and whether or not they were to be called. It was clear that issue was now being taken with the admissibility of that evidence as produced through Madam Rashidah.

67. Section 177 (1) of the Evidence Act provides that, subject to the provisions of the section, "a copy of entry or matter recorded in a banker's records shall, on its production without further proof, be admitted in any proceedings as *prima facie* evidence of the

matters and transactions recorded there." A "banker's record" includes, "(a) any document or record received or used in the ordinary business of the bank".

68. The nub of the argument advanced by Mr Farrell to the judge and this court is that before such a witness can testify that no record was found, in a search of bank records compiled and maintained on a computer of records of any accounts, of the name of a particular person or of an account in that name, evidence must be led that satisfies the requirements of section 177 (3). That subsection provides, in relation to a document produced by a computer which is tendered in evidence, that, subject to the provisions of subsection 3 (a), (b) and (c) proof is not required that the copy was a correct one of the original entry.

69. With respect, we do not accept that submission. In testifying simply and only that a search of the bank's records revealed no record of particular information, a witness does not seek to produce an entry or copy of a matter in a banker's record. In those circumstances, the section is irrelevant. The evidence of the various bank officers that, following a search of their respective bank records, no record had been found of a fixed deposit in the name of the 1st appellant was admissible.

70. Mr Farrell was correct to say that three of seven of the bank officer witnesses called by the prosecution not only asserted that a search of the records produced no relevant records but also went on to refer to material in their records. They did not produce the records themselves. Rather, in each case they produced a list of the information which was responsive to the questions asked of them by the Bankruptcy Unit or the Anti-Corruption Bureau officers in correspondence. That part of their evidence was inadmissible. But, as Mr Singh suggested in his oral submissions, clearly the evidence was not controversial. As noted earlier, Standard Chartered Bank produced a list of 14 bank accounts opened in the name of the Official Receiver with the Bank. Originally, that material was provided by Standard Chartered Bank in a letter to Madam Rostaina. In her evidence, Madam Rostaina produced that letter without objection. In fact, Mr Farrell cross-examined her about the contents, as he did about the contents of the letter from Baiduri bank, dated 31 January 2018. Baiduri bank identified five fixed deposit accounts (as noted earlier in paragraph 62). Indeed, Mr Farrell suggested that information in the letter from Baiduri, as to the date of the opening of a fixed deposit account, contradicted evidence of Madam Rostaina.

71. We are satisfied that the evidence of the seven bank officers of the absence of any records in their respective banks of fixed deposit accounts in the name of the 1st appellant was admissible and the judge was entitled to have regard to it as he did in his judgment. The admission of the inadmissible evidence of the banking witnesses was not material, there is no merit in this ground of appeal.

(d) Good character

72. Mr Farrell complained that, in giving his reasons for convicting the appellants, the judge had failed to give sufficient credit to the appellants for the fact that they were both of

"excellent character". He said that the judge had made only fleeting reference to the issue. The direction was of importance not only to the 2nd appellant, who had given evidence, but also to the 1st appellant who had made out-of-court statements in her interviews and statutory declarations.

73. At the conclusion of his judgment, the judge said, "In reaching my decision I have considered, under both limbs (propensity and credibility) of the accepted direction, the fact that both D1 and D2 are of good character."

74. It is clear that what the judge described as the "accepted direction" was the direction in law contained in the Specimen Directions given to a jury in England and Wales. That much is clear from the written and oral closing submissions the judge received from the parties. Mr Farrell had submitted that, in considering whether the prosecution had proved its case against the 1st appellant, the court must take into account good character in the following ways:

> "(a) D1 is more likely than otherwise to be telling the truth in her interviews than if she was not of good character; and
>
> (b) it is less likely, because D1 is of excellent character, that she would act in the dishonest way alleged by the PP."

75. A similar submission was made in respect of the 2nd appellant. In the context of the first limb, that was relevant not only to his out-of-court statements but also his evidence.

76. Mr Caplan acknowledged that the good character of the appellants was "not in dispute" and that the direction formulated by Mr Farrell was the direction given in England and Wales. He invited the judge to note that section 53 of the Evidence Act stated, "In criminal cases the fact that the person is of good character is relevant." He said that it was a matter for the judge whether or not to follow the direction given in England and Wales. For his part, Mr Farrell submitted that as a matter of law the judge should adopt the direction he had identified in his written submissions. He reiterated that submission in respect of the 2nd appellant.

77. We are satisfied that the judge gave himself the appropriate direction of the relevance of good character of the two appellants. Mr Farrell has not pointed to anything that suggests that the judge erred in the application of that direction to the evidence. There is no merit whatsoever in this ground.

(e) <u>The integrity of the 255 bankruptcy files from BIBD</u>

78. Mr Farrell submitted that the judge had erred in finding that the questioned integrity of the 255 bankruptcy files was "fanciful" and had failed to give sufficient reasons for his findings. The nub of his complaint was the absence of evidence recording the receipt of the files by the Anti-Corruption Bureau, their examination by those officers and the fact that the contents of the files were not copied and uploaded electronically to a database.

79. In his judgment the judge rejected the submission made in the defence closing submissions that, given that there was no dispute that two judicial officers had made minor mistakes in checking the proof of debt in three of the bankruptcy files, the integrity of all 255 files was called into question. He described the submission as "fanciful". In doing so, he articulated his reasons for the determination:

> "The simple fact-which I accept-is that there is no evidence on the bankruptcy files or the JCMS of any fixed deposit account opened in D1's name, or of cash payments by her to judgement creditors. There are no receipts-no correspondence-no account statement-not a single piece of paper-showing that. I agree with the prosecution that it is inconceivable that all documents, for all the accounts could go missing had such accounts existed."

80. There is force in Mr Singh's submission that it is significant that it was not suggested in the defence case that there were any documents missing from those files that would have shown that the 1st appellant had opened fixed deposit accounts or paid creditors with cash that had been withdrawn from the bank accounts. The criticism that the judge failed to give reasons for his determination is wholly misplaced. The judge articulated his reasons for his determination in simple and powerful terms: there was not a single piece of paper on any of the files that supported the 1st appellant's case.

There is no merit in this ground of appeal.

2. Grounds of appeal advanced on behalf of the 1st appellant

(a) Charge 15

81. Mr Farrell submitted that the judge erred in rejecting his submission there was no case to answer on Charge 15 because there was insufficient evidence from which it could be properly inferred that, between about 19 April and 31 May 2017, the 1st appellant had misappropriated the $35,000 as alleged.

82. There was no challenge to the prosecution case that $35,000 in cash had been received by the Bankruptcy Unit of the court from a judgment debtor, Haji Muhammad Masjuna bin A Matsuin. Receipt of the monies had been acknowledged in an 'Official Receipt' dated 19 April 2017, signed by the debtor and Madam Rozliani Binti Hj A. Timbang, as an Assistant Financial Officer in that Unit. Also, Madam Rozliani had signed a 'File Copy' version of that receipt on the same date.

83. Similarly, there was no dispute that, Madam Rozliani having passed those monies and the receipts onto her colleague Sharun Bin Hj Ibrahim, the 1st appellant had acknowledged receipt of those monies by signing the 'File Copy' of that receipt, dated 9 May 2017. It was for the 1st appellant to arrange for the monies to be deposited into the Official Receiver's account opened for that bankruptcy case with BIBD.

84. The evidence of Madam Rashidah that no such deposit had been made to that account after 19 April 2017 was not challenged in cross-examination, nor was her evidence that although the File Copy had been uploaded to the JCMS there was no physical copy in the physical bankruptcy file.

85. The Official Receiver's version of the receipt was found in a locked drawer of the 1st appellant on 10 January 2018, after the premises had first been searched on 8 January 2018. The File copy of the receipt had been found by Ahmad Haziq Bin Hj Othman in a room in which bankruptcy files were stored in a search he conducted for such receipts in what he thought was the second half of 2018. It was loose and not in the bankruptcy file.

86. In support of his submission, Mr Farrell relied on the evidence adduced in the prosecution case that Muhammad Iman Danial Bin Hj Ismail, an employee of BIBD, whose duties in 2017 included collecting cash from the court and delivering it to the Bank, had been dismissed in August 2017, after it was discovered that some cash was missing from such a delivery to the Bank. Mr Farrell contended that, in light of that evidence, there was insufficient evidence to establish a case to answer that the 1st appellant had misappropriated the $35,000.

87. In rejecting the submission ruling that there was a case to answer, the judge referred to the judgment of this Court in ***Yeo Tse Soon v PP (1994) JCB 481***, which cited with approval the Advice of the Privy Council in ***Haw Tau Paw v PP (1982) AC 136***, in determining that the "impugned evidence is not so inherently incredible that no reasonable person could accept it as being true."

88. In convicting the 1st appellant on Charge 15, the judge said that Danial's evidence was that he had been dismissed from his employment by the Bank because of his 'negligent' handling of the delivery of cash from the court, some of which cash had gone 'missing' in the course of delivery. Danial's superior at the bank, Madam Siti Hawa binti Haji Abdul Rahman and not Madam Norfadilah Amani as the judge said mistakenly, testified that Danial had been dismissed because he was in breach of a bank procedure, which required that two employees of the bank be responsible for receipt and delivery of such cash transactions. There was no evidence as to when the event had occurred or how much money was involved. Madam Rozliani had handed the $35,000 to the 1st appellant on 9 May 2017, three months before Danial had been dismissed. The judge observed that not only had the 1st appellant signed for and received the $35,000 but also the receipt had been found in her locked desk drawer. Also, he noted that, in the context of the evidence of the 1st appellant's misappropriation of other monies on a regular basis, the prosecution invited him to draw the irresistible inference that she had misappropriated the monies the subject of Charge 15. In the result, in determining that he was sure that the 1st appellant was guilty of Charge 15, the judge said "the evidence relating to Danial's dismissal and the reasons for it, does not lead me to doubt that inference."

89. For his part, Mr Singh submitted that the evidence establishing the essential ingredients of the offence the subject of Charge 15 was overwhelming. There was no dispute that the Bankruptcy Unit had received $35,000 for payment to the benefit of the

creditor and that the 1st appellant had received the monies on 9 May 2017, but it had not been deposited in the bank account. In context, at that time the 1st appellant was regularly misappropriating money from judgment debtors. The reliance placed by the 1st appellant on the evidence concerning Danial's conduct and dismissal from the bank was misplaced. There was no evidence of when that happened or how much money had been involved. In any event, the decision to call on the defence was not appealable ***(Marzuki Bin Mokhtar v PP [1981] 2 MLJ 155.)***

90. Although Mr Farrell's complaint is that the judge erred in ruling that there was a case to answer on Charge 15, pursuant to section 414 of the Criminal Procedure Act, in fact the 1st appellant's appeal is against her conviction on that Charge. This Court is invited to set aside the conviction as being "unsafe or unsatisfactory." Of course, this Court may entertain that ground ***(R v Smith [1999] 2 Cr. App. R. 238).*** It is not an impermissible interlocutory appeal prior to conviction.

91. We have no hesitation in rejecting the submission that the judge erred in holding that the 1st appellant had a case to answer in respect of Charge 15. The prosecution evidence was cogent and largely unchallenged. The issue of the relevance of such evidence as there was in respect of Danial was a matter for the judge as a judge of fact. At best it was equivocal and of limited relevance.

92. In cross-examination, Danial accepted that his duties involved him as part of a group responsible for collecting cash from the court, representing payments by debtors, and delivering it to the Bank. In August 2017, he had been dismissed from the bank. He accepted that his dismissal was in relation to cash which had "gone missing" from the court. However, he denied that it had been suggested to him that he had taken some of the cash. Rather, he said that he been dismissed for negligence in respect of the cash that had gone missing. No evidence was adduced from him of when the event occurred, how much money had been involved or to which bank accounts the payments were to be made.

93. Madam Siti Hawa's evidence gave context to Danial's evidence that he had lost his employment with the bank because of negligence: cash he had collected from the court alone had gone missing. In collecting the money alone, he was in breach of a requirement of the bank that there be two persons performing that duty. As a result, he was reported to the Disciplinary Committee of the Bank. Again, no evidence was led of the amount of money involved or when the event occurred. As she recalled, the practice of the bank collecting money from the court stopped in July 2017.

94. The evidence in support of Charge 15 was to be viewed in relation to the other evidence relied on by the prosecution of the misappropriation of other monies from judgment debtors by the 1st appellant at that material time. The 1st appellant's conduct in mid-June 2017 was the subject of two other charges, namely the 18th and 23rd Charges. Those charges averred that the 1s appellant had deposited monies into the joint account she shared with the 2nd appellant at Standard Chartered Bank, and made a part-payment for a motorcar knowing that the monies were the proceeds of the 1st appellant's criminal

breach of trust, contrary to section 3 (1) (a) and section 3 (1) (b) respectively of the Criminal Asset Recovery Order 2012.

95. On 14 June 2017, the 1st appellant had withdrawn $577,000 in cash from various judgment debtors' accounts at BIBD, including nineteen $10,000 banknotes (part of the monies allegedly stolen by the 1st appellant the subject of the 14th Charge). The serial numbers of those notes were recorded. The judge convicted the 1st appellant of that Charge. On the same date, a deposit of $300,000 was made into the joint account of the 1st and 2nd appellants at Standard Chartered Bank, of which 10 $10,000 notes, bearing the serial numbers of notes issued to the 1st appellant earlier that day, formed part of the deposit. The bank records recorded the 1st appellant to be the depositor of the monies, noting that she explained the provenance of the monies as being "a gift from her late brother's estate". (18th Charge.) On 23 June 2017, the 1st appellant made a part-payment to Jati Transport of $93,000 for the purchase of a motor car. That payment included 9 $10,000 banknotes, the serial numbers of which matched those that had been withdrawn by the 1st appellant on 14 June 2017 (23rd Charge). In convicting the 1st appellant of those charges, the judge said that, having stolen the money, she had "no defence to the money-laundering offences she faces."

There is no merit in this ground of appeal.

(b) <u>Explanation by the 1st appellant for her withdrawal and use of cash from the accounts</u>

96. Mr Farrell complained that the judge had wrongly stated that the 1st appellant had "…never offered an explanation" to the officers investigating the case why "over a period of 14 years she withdrew approximately $15.75 million in cash" from the judgment debtors' accounts or of what she had done with the monies and that she had not advanced a "positive" case. He said, that was incorrect. The 1st appellant explained in a statement to the police that she had made cash withdrawals from those accounts and used the monies to pay creditors and fixed deposit accounts.

97. Mr Singh submitted that the context of the judge's statement was the absence of any evidence that supported the 1st appellant's bare assertion of what it was that she had done with the monies that she had withdrawn from those bank accounts.

98. It is to be noted that, having stated that the 1st appellant never offered an "explanation" of those matters, almost immediately the judge went on note that she had said to the police in an interview that she had opened fixed deposit accounts and paid creditors with cash she had withdrawn from the accounts of judgment debtors. Then, the judge went on to observe, "Not a single piece of paper has been found in the searches of D1's office and home, or has been produced, to demonstrate that any fixed accounts exist and that any part of the cash withdrawn by her from BIBD has been deposited in them. And D1 has never provided anyone with details as to where such accounts were supposedly held. Neither has she provided details of which judgment creditors she made payments to when and where she made those payments."

99. It is clear that in making the observation that he did in respect of the 1st appellant, the judge placed the emphasis on the absence of any *explanation*, as opposed to a bare assertion, of what it is that she said that she had done with the monies which she admitted she had withdrawn from the judgment debtors' bank accounts. The judge was entitled to make that determination. The judge's reference to the absence of a positive case resonated with Mr Caplan's submission that the 1st appellant had not asserted that she paid specific creditors, as noted earlier.

There is no merit in this ground of appeal.

(c) <u>The fact that the 1st appellant did not give evidence</u>

100. Mr Farrell complained that the judge was incorrect in stating that, "The defence also assert that D1's failure to give evidence means that her account is not contradicted and that she should be believed." He said that in fact it had been submitted that the prosecution had failed to prove that her account was untrue. Also, he complained that the judge erred in determining of that issue, that section 103 of the Evidence Act placed the burden on her of proving the defence she advanced in her interviews. s103 states:

> *"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law the proof of the fact shall lie on any particular person."*

101. Having noted that the 1st appellant had not given evidence, the judge said that that the 1st appellant was entitled to require the prosecution to prove its case, in particular observing that it, "…proves nothing, one way or the other. It does nothing to establish her guilt. On the other hand, it means that there is no evidence from D1 to undermine, contradict or explain the evidence led against her by the prosecution and it is on the prosecution's evidence, that I have to be sure of her guilt on all the charges she faces."

102. In that context, the judge observed that, in circumstances where a defendant did not give evidence, section 221 (5) of the Criminal Procedure Code permitted the prosecution to make an adverse comment and for the court to draw such inference as it thought fit. The section states:

> *"The fact that the accused does not give evidence on oath or affirmation may be the subject of any adverse comment by the prosecution, and the court may draw such inference therefrom as it thinks fit."*

103. In fact, the prosecution had commented adversely in their written closing submissions. For his part, the judge said:

> *"On a matter as fundamental as to whether or not she had opened fixed deposit accounts and paid judgment creditors from them, it is surprising that she did not want to explain where those accounts are and when and which creditors were paid out of them. Those are matters that are peculiarly within her knowledge. If there*

were any fixed deposit accounts and records of who was paid and when, and where, and how, she is the one who kept them and she is the one who must know where they are. Yet she chose to be totally silent on these matters. Without her explanation she can hardly complain if I am the readier to draw the inference against (her?) that the prosecution has asked me to draw from the evidence."

104. The judge said that, irrespective of the provisions of section 221 (5,) he was satisfied that "Such a comment from (a) trial judge would be justified at common law." It was in that context, that the judge addressed the weight to be given to the 1st appellant's out-of-court statements. He said that he did so on the basis that it was asserted on behalf of the 1st appellant that, given that she had not given evidence, the account that she had given in her out-of-court statement was uncontradicted and should be believed. He rejected that assertion as, "incorrect." Then, the judge said:

"First, it was given in pre-trial interviews not in evidence, it has not been tested by cross-examination. Secondly, it is clearly disproved by the prosecution evidence. And thirdly, s.103 of the Evidence Act places the burden of proving a fact on the person making it. In the case of a defendant in a criminal trial the standard of proof required would be on the balance of probabilities."

105. Clearly, the judge approached the issue of proof of the 1st appellant's guilt appropriately on each of the separate charges on the basis that it was for the prosecution to prove her guilt, in particular as to the ingredients of the offence. As he stated correctly for example, the criminal breach of trust charges required proof that the 1st appellant had misappropriated the property or converted it to her own use. The nub of the prosecution case was the evidence of the withdrawal of cash by the 1st appellant from the OR's account with the banks. No issue was taken at trial of her withdrawal of those monies. In her out-of-court statements the 1st appellant asserted that she had used those monies to pay creditors or open fixed deposit accounts. Further, she asserted that she had received about $7.5 million in total from the Malaysian lady and her late brother. Clearly, those were factual assertions. It was to those issues that the judge directed his observations, in particular that the use of the monies that she had withdrawn from those bank account lay peculiarly within the knowledge of the 1st appellant but, as was her right, she had not exercised her right to give evidence. As a result, the bare assertions in her out-of-court statements were untested in cross-examination. Moreover, there was no other evidence whatsoever that supported her account. On the other hand, there was unchallenged evidence of the use of a large number of $10,000 banknotes given to the 1st appellant on the occasions of those withdrawals that were used by the 1st and 2nd appellants to make multiple deposits into their bank accounts or to purchase numerous motor cars. The judge was entitled to state that, in those circumstances, inferences adverse to the 1st appellant were more readily drawn.

There is no merit in this ground of appeal.

(d) <u>The rejection of the 1st appellant's out-of-court account of her dealings with the Malaysian lady</u>

106. Mr Farrell submitted that the judge was wrong to reject the 1st appellant's out-of-court account of her dealings with the 'Malaysian lady' given to an officer of the Anti-Corruption Bureau in a statement, dated 20 March 2018, and further explained in a statement to a police officer, dated 22 July 2018. In setting out her source of income, in her statement dated 20 March 2018, the 1st appellant said that she had received $5 million from representatives of the Malaysian lady in the period 2010/2011 up and until 2017. For her part, she witnessed documents five or six times a year, the contents of which she was told she could not disclose or discuss. In return, she received payments of $100,000 and sometimes $200,000 in an envelope from representatives of the Malaysian lady. The documents, which were contained in a blue folder, had already been signed by the Malaysian lady.

107. In her statement, dated 22 July 2018 she said that part of the sum of $207,800 in cash that she had given to her husband in May 2015 was a gift from the Malaysian lady. She reaffirmed that she had reached a confidential agreement with the Malaysian lady in around 2010, which prevented her from disclosing anything about the agreement. She received money after she had witnessed documents for the Malaysian lady, the last occasion of which was in October or November 2017.

108. The judge rejected the 1st appellant's out-of-court account of her association with the Malaysian lady as "incredible", noting that no explanation had been given as to why the arrangement had continued for seven years and why she had been paid $5 million. In determining that the account was "imprecise and contradictory" the judge asked rhetorically what services the 1st appellant was rendering: "was she advising the Malaysian lady on some matter? Or was she just witnessing signatures on documents?" In finding that he did not know what it was that the 1st appellant alleged she had done for the Malaysian lady, the judge said that the 1st appellant's account was "confused and garbled". In the result, he determined "…there is simply no support of any kind for D1's story-which I do not believe."

109. There is no dispute that there was "no support of any kind" for the 1st appellant's account of her association with the Malaysian lady. On any view, the limited account she gave begged numerous questions, the most obvious of which the judge identified in his judgment. He was entitled to categorise her account as "imprecise and contradictory." In truth, it was extraordinary and bizarre. For what services was the 1st appellant rewarded with the payment of $5 million? In those circumstances, the judge was entitled to conclude that, in the absence of any support whatsoever for the account, he did not believe the 1st appellant's account.

110. It is to be noted that the 1st appellant's explanation in her statement, dated 22 July 2018, of the provenance of the $207,800 that she had provided to the 2nd appellant to make payment for a motor car, was from the Malaysian lady and from her savings derived from her late brother, was contradicted by the evidence, which the judge accepted in respect of the 25th Charge, that $190,000 of the payment came from 19 of a total of 46 $10,000 banknotes given to the 1st appellant by BIBD as part of the total of $595,000 withdrawn by her in cash from 20 judgment debtors' accounts on 11 May 2015. The payment for the

motor car was made on 12 May 2015. In his judgment, the judge said that payment must have been made by either the 1st or 2nd appellant, but he was not sure by whom.

(e) The failure of the prosecution to call the Malaysian lady as a witness

111. Mr Farrell submitted that the judge had failed to deal with or give proper weight to the fact that the prosecution had not called the Malaysian lady to give evidence. Her absence ought to have been taken into account by the judge in favour of the 1st appellant. The prosecution had referred to her evidence in its Opening and the judge had been provided with a copy of her witness statement. He contended that, given that the Malaysian lady was listed as a prosecution witness from the outset, "the defence never had the opportunity to contact her".

112. For his part, Mr Singh dismissed as "absurd" the contention that the judge ought to have taken into account in favour of the 1st appellant that the prosecution had not called the Malaysian lady. The defence had never said that they wished her to be called, but had no such access. They opposed the prosecution request for a further adjournment of the trial in order to allow her to give evidence.

113. In his Opening, Mr Caplan had informed the judge that he intended to call the Malaysian lady to give evidence: "she denies that she knew or had ever met D1 and therefore that she had ever paid her any money." In the event, the witness was not called to give evidence. However, up and until the close of the prosecution case the judge was repeatedly informed that the prosecution hoped to call the witness. Given that she resided in Malaysia, it was proposed that she give evidence by video link. On 14 October 2019, the judge was informed that the Malaysian lady had given birth on 15 September 2019 and was available to give evidence after the end of the 40-day confinement period, namely 28 October 2019. Earlier, Mr Farrell had expressed his concerns to the judge about the trial being delayed, if the witness was to be accommodated as to the date on which she gave evidence. He said that he got the feeling that, "she may not be coming, may be reluctant to come." Then, on 28 October 2019, the judge was informed by the prosecution that the witness was not available to give evidence before 20 November 2019. Mr Farrell opposed an adjournment to accommodate that request. Then, the judge ruled, "I am not prepared to grant an adjournment to this trial to the 20th November for this lady to make herself available. There is no certainty she would make herself available that day." As a result, the prosecution closed its case without calling the Malaysian lady.

114. In his judgment, the judge observed simply, "It proved impossible for the prosecution to call the Malaysian lady to give evidence."

115. As noted earlier, the prosecution opened its case on the evidence that they anticipated they would call from the Malaysian lady, in particular that it contradicted the out-of-court statements of the 1st appellant that she had received large cash payments from the Malaysian lady. It is clear from the information provided to the judge, as the trial went on, that the prosecution tried to secure her testimony until required to close its case. The obvious difficulty that lay in securing her attendance was not only that she resided in

another jurisdiction but also she had given birth shortly before the trial began. In those circumstances, the judge's observation that it proved "impossible" for the prosecution to secure her evidence was entirely justified. There was no evidence to suggest otherwise.

116. In the result, there simply was no evidence from the Malaysian lady. There is no basis whatsoever for the submission made on behalf of the 1st appellant that somehow that should have enured to her benefit in the judge's analysis of all the evidence.

There is no merit in this ground of appeal. The 1st appellant's appeal against convictions is dismissed.

3. The 2nd appellant's appeal against conviction

117. The charges against this former judge are eight in number encompassing a period of approximately 21 months between June 2014 and March 2016. We propose to deal with them in chronological order in order to make the overall picture clear.

Charge 32

118. The first charge in time following that sequence is the 32nd. It is a money laundering allegation committed on 16 June 2014 when the prosecution say that the 2nd appellant transferred the sum of $45,000, from the joint account in his and the 1st appellant's names at the Standard Chartered Bank to their joint account at the HSBC bank in the United Kingdom.

119. This transfer was effected by the 2nd appellant, the clear evidence being the on-line instruction given by him and the confirmation by him, his voice being recorded. He accepted in his evidence that he made this transfer but asserted that he neither knew nor suspected that the funds were proceeds of crimes committed by the 1st appellant.

Charge 33

120. The 33rd charge is identical in form. On 1 September 2014 he effected a transfer in the same sum of money, $45,000, from the same SCB joint account in Brunei to the same joint account at the HSBC in the UK.

121. These transfers, made within 2½ months of each other, were themselves substantial sums totaling $90,000. By way of comparison the sum was approximately equivalent to eleven months salary for either of them. He accepts that he made both transfers in a similar fashion which were similarly recorded.

122. That particular SCB joint account had received substantial deposits in 2014 and had continued to do so before and after that year. For example the account had received a deposit of $240,000 in November 2012.

123. From this account there were also other substantial transfers to the HSBC joint account in the UK in 2014. In February 2014 transfers totaling $260,000 were made from the SCB account to the HSBC joint account and before those transfers, substantial deposits have been made into that SCB for it to be able to make such transfers. Even before the transfers made in 2014 there had been on 15 November 2013, a transfer from the SCB joint account of $150,000 to the HSBC joint accounts.

124. What is patently obvious is that the operators of the joint SCB account must have been aware of the credit state of that account on each and every occasion on which he or she made a transfer to the joint HSBC account in the UK in substantial amounts. The frequency of the deposits in the joint SCB account, the credit balance that they created, and the use of such funds to transfer large amounts to their bank account in the UK, quite apart from other drawings from the SCB to fund their life style, must have alerted him to the fact that there were vast amounts of money flowing in. What then were the sources of such sums?

The trial judge found that the 2nd appellant was aware of bank and credit card balances.

125. In 2014, the year of a number of transfers of substantial funds from the SCB account to the UK bank, including those itemised in charges 32 and 33, cash deposits into their Brunei bank accounts totalled $1,335,525 and cash payments to clear their credit card debts were $128,000. The latter figure well-exceeded the annual judicial salary of either of them. Add to that figure the amount of money spent on cars in that year, $608,000, then the cash transactions total $2,071,525. The following year, 2015, the total is $1,781,422.70.

126. The figures for earlier years are equally illuminating. In 2011, the sum of $748,737.90 in cash went into their bank accounts in Brunei. The following year the figure was $880,851 and in 2013 it had risen to $952,318, making an overall total for those three years of $2,581,906.90.

127. Throughout this period, before and after, the 2nd appellant had access to all the records of the joint accounts. Even if he sought no explanations for the credit payments he could have obtained such. He was content therefore to be aware of this vast accumulated wealth and was content simply to see the figures coming in and, through his own activity, going out.

128. If he had no idea of the sources of these monies he could easily have checked with the banks if there were any records of the providers of such accumulating wealth. Either he remained deliberately blind to such information or he well knew where it was all coming from.

129. As a lawyer and judge of some experience his natural forensic nose would have led him to uncover this supply of treasure if he did not already know. In cross-examination he agreed that he would have checked his bank account. This included his account at HSBC in Brunei (until it closed in 2016 or 2017) at which he accepted a *"significant amount of money paid in there was converted to sterling,"* and that was *"generally the pattern"* over the years.

Charge 26

130. On 5 November 2014, nearly two weeks after the 1st appellant had withdrawn $383,000 from 39 judgment debtors' accounts at the BIBD including 5 $10,000 notes, 4 of those notes were used to pay to Indera Motors the sum of $140,000, in cash, being the balance of the purchase price of a Jaguar F-type car, the 2nd appellant having paid the deposit of $10,000 on 1 October 2014 just over one month earlier. He had also paid $8,000 for some wheels, no doubt specialist extra items on 28 October 2014, about one week before the completed purchase of the Jaguar.

131. The official receipt from Indera is made out in the 2nd appellant's name stating that the money had been received from him.

132. There is conflicting evidence on this from witnesses. An accounts clerk recorded that both the 1st appellant and the 2nd appellant were present when payment was made on 5 November 2014. Text messages from the 1st appellant to Indera employees state that the 2nd appellant would not be making the payment on 5 November as he was in court and one of those stated that the 2nd appellant was not present. The 2nd appellant himself said that he was not present as he was in court.

133. However he knew that the car was being bought as a present to him; he knew the cost of the car having paid the deposit and he had paid for the special wheels and rims. The inference to be drawn from the text messages is that it was anticipated that he would be attending to pay the balance - $140,000 – and it matters not whether he was absent or not on the day of sale. It was registered in his name, as were several others bought in 2014. He knew too that the joint accounts were awash with money and there was a high level of spending by both of them.

Charge 20

134. On 28 November 2014, the same month which had seen the purchase of the Jaguar costing $158,000, $13,000 in cash was deposited in the joint SCB account which included one of the $10,000 notes which the 1st appellant had withdrawn from the debtors' accounts and $383,000, on 23 October 2014. That sum had included 5 $10,000 notes. The other 4 notes of that denomination had been included in the $140,000 cash paid for the Jaguar car on 5 November.

135. The deposit slip records the 2nd appellant as having paid the $13,000 cash into the joint account and the serial number of the $10,000 note was recorded for the purpose of the Monetary Authorities of Brunei Darussalam ("AMBD") report. The report itself also records the 2nd appellant as the depositor.

136. The 2nd appellant in his evidence admitted that he made that deposit and that some of his handwriting was on the deposit slip – the words *"home savings"*. The 1st appellant he conceded, had given him the $10,000 note on his birthday on 17 November 2014.

Charge 25

137. On 12 May 2015 a Porsche 911 car was purchased from QAF Eurocars. The cost of that purchase was $207,800 in cash and the payment was made in part by way of 19 $10,000 notes which the 1st appellant had withdrawn as part of the considerable cash handed over to her on 11 May 2015 – the day before the purchase. A total cash sum of $595,000 had been handed over to her from the debtors' accounts.

138. Eurocars records show that the 2nd appellant handed over the cash payment of $207,800 – the receipt is made out in his name showing that it came *"from"* him. He signed the invoice for the car on 14 May 2015. Eurocars AMBD records him as being the person handing over the 19 notes, each of $10,000. The car was registered in his name. The salesman said both the 1st appellant and the 2nd appellant were present at the time of payment and that *"for most of the deal it was always be handled [by him]."* The 2nd appellant in evidence said both of them (he & wife) were present and that the 1st appellant handed over the money. The weight of evidence indicates that he was the prime mover and payer. The AMBD required accuracy in its completion. The number of $10,000 notes was significant. It accounted for the bulk of the cash payment. He was well aware of the amount of the cash sum. The trial judge had little difficulty in coming to the conclusion that the 2nd appellant well knew all the material aspects of this transaction.

Charge 21

139. On the next day, 13 May 2015, the sum of $220,000 was deposited into the SCB joint account of the 1st appellant and the 2nd appellant. The total amount was composed of $10,000 notes which had been part of the $595,000 cash withdrawn by the 1st appellant on 11 May, two days earlier. The AMBD report made by the SCB teller in respect of those notes recorded the 2nd appellant as the depositor.

140. The deposit slip says *'came personally"* and had the 2nd appellant's IC and number and date of birth recorded on it and the words *"sale of property in UK."* The time recorded is 14:19 hours.

141. The bank teller, giving evidence five years later, said he did not recall which of the two account holders came and that he could have written down the lead account holder's name [2nd appellant]. The telling aspect of the contemporary record is *"came personally."* Would the teller on an important financial account have then written the details of the 2nd appellant unless he was the account holder who *"came personally."*? The words indicating the stated sources of the funds could only have came from the account holder who *"came personally."* However, for the reasons as appear in the judgment the trial judge acquitted the 2nd appellant of this charge. The 2nd appellant had maintained that he was at work on that day at 14:19 hours. The suggestion by the prosecution that he could have driven to the bank by car in ten minutes was not disputed by the defence.

Charge 27

142. Later in the year 2015 on 2 October 2015 a Mercedes Benz AMG GTS motor car was purchased in cash from Jati Transport for $235,000 of which $140,000 was made up of 14 $10,000 notes.

143. These large denomination notes, all 14 of them, had been withdrawn by the 1st appellant from the debtors' accounts at BIBD on 29 September 2015, three days earlier. The 2nd appellant does not deny that he had paid Jati Transport $69,000 by an SCB cheque on the 15 October 2015, and a further sum in cash, $31,000, on 27 October 2015. Although the cash payment on 2 October 2015 was $235,000, the additional subsequent payments, added on, put the full cost at $335,000.

144. The receipt for the cash payment on 2 October 2015 states that it was received from the 2nd appellant. His signature is on the sales invoice. The car was registered in his name.

145. The 2nd appellant said in evidence that the 1st appellant paid over the cash although he was present at the time, the 1st appellant went into a room to make the payment. But the 2nd appellant well knew the cost of this luxury status-symbol of a prestigious marque – he had made two further payments and signed the invoice. This was another instance of his seeking to distance himself from being involved in and knowledgeable about a remarkable cash purchase or transaction.

Charge 22

146. In March 2016 the 1st appellant withdrew another large sum of cash, $514,000, from the debtors' accounts at the BIBD. This included a total of 40 $10,000 notes, duly recorded on the AMBD report.

147. On the following day, 17 March 2016, the sum of $300,000 which included 20 of those $10,000 notes, was paid into their joint SCB account. The teller concerned accepted that he put the details of the depositor at the end of the day and made a mistake in putting the name of the lead account holder (2nd appellant) in the AMBD report. There seemed to be some confusion in his mind or memory as he concluded by saying that the depositor's ID card was given to him at the time and that decided which name he should record – But, he recorded the 2nd appellant's name, so had been given the 2nd appellant's ID card. However faced with this apparent conflict of evidence, the trial judge acquitted the 2nd appellant on this charge 22. The 2nd appellant's own evidence was that he did not make the deposit, that the words on the deposit slip – *"share of sale of property"* – was written by the 1st appellant. He said he was at work that day.

The trial judge's assessment of the 2nd Appellant

148. In the evidence from him at trial he said that his wife told him that she received large sums of cash from the *"Malaysian lady"* and also from the brother Ramzey who died in 2015. Precisely when he became privy to that information is not entirely clear but he must have

been aware that, many years before 2015, his wife was in possession of significant sums of money which needed explanation as to their source, particularly those from the *"Malaysian lady."* The two of them had joint bank accounts so he would have been aware of the substantial sums that were going in and out of them.

149. He did not question her as to why she should receive money on such a lavish scale. Nor did he ask her about the so-called investment that her brother allegedly made on her behalf. It appears that there was no discussion between the two of them about the consistent appearance of large sums of cash from the *"Malaysian lady"* who between them was referred to as *"the one who must not be named."* Thus they could not bring themselves, as extraordinarily fortunate beneficiaries, to trust each other with even the barest of details. Nor did he follow up on the obligation, which he well recognized, to declare these incredible sources to an authority to obtain approval of their receipt of such sums. The obligation clearly covered his own position concerning the numbers of expensive cars, bought and registered in his name, and the sums of money going into their joint accounts. He says he relied upon his wife's story that she had declared the position to the Chief Justice on the day and been "given the nod" to retain the gifts. The judge simply did not believe him.

150. As a holder of the joint accounts he had complete access to the state of those accounts. Even if he did not see any entry indicating the source of the deposits the sheer amounts and their frequency in their account would have revealed the situation and if sufficiently interested in the sources he could easily have made inquiries. He was content to play the part of the *"not knowing," "not seeing"* dishonest receiver of monies, dishonestly obtained. He was simply unbelievable.

The Trial Judge's Findings

151. We have already dealt with the judge's findings in relation to charges 21 and 22 and his decision to acquit the 2nd appellant of these.

152. Charges 25, 26 and 27 all relate to the purchase of 3 top-of-the range motor cars for a total sum of money in the region of $700,000, between November 2014 and October 2015, a period of 12 months. All were registered in his name. All three purchases were made within a matter of days following the 1st appellant's withdrawals of substantial sums from the debtors' accounts at the BIBD. All were paid for in cash using at least 37 notes of $10,000 denominations.

153. The 2nd appellant had paid significant sums before the purchase of the Jaguar (charge 26), and the Mercedes Benz (charge 27), and in respect of the purchase of the Porsche (charge 25) he had signed the invoice, the car had been registered in his name, and he admitted he was present when the 1st appellant handed over the money. There was other evidence involving him in the transactions relating to all three of the cars. The judge rightly drew the overwhelming inference that substantial sums of cash were being used by the 1st appellant and himself to buy these cars, all to his knowledge with in all three cases, clear knowledge on his part and admitted participation by him. Both of them were jointly concerned in these purchases. From where, then, did all this cash come?

154. These vast sums of cash, as has been proved, unarguably so, came from the 1st appellant's defrauding, on a considerable number of occasions over many years, of the debtors' accounts, which she and he used to fund their respective and collective life-styles.

155 But what was the 2nd appellant's knowledge of the source of such wealth? His use of the joint SCB account and his viewing the balance in the account from time, made him aware that it was receiving and being used to dispense very large sums of money for both their benefits, on top of which were the large sums of cash used to pay for three extremely expensive cars. He knew of course that their respective salaries and allowances, and occasional gifts from their parents, would never be enough to account for the sums of cash which came flooding in and out.

156. He maintained throughout that he had no idea or inkling, that his wife was using her position as a member of the judiciary for more than a decade to milk the debtors' accounts at the BIBD. These are considerable amounts of cash. The two sources he or she conjured up as providing the degree of generosity and largesse to account for their great good fortune, were the 1st appellant's late brother and "Malaysian lady."

The late brother of the 1st appellant – Ramzey

157. The 1st appellant's brother died on 31 October 2015. When his estate was administered by his parents, the sworn value was $235,176 and a few cents. Any gift or benefit of any substance must have been made by him in his lifetime. The 2nd appellant said in evidence that he accepted the 1st appellant's estimate of the benefit received from her brother, set out in her Statutory Declaration, as $2.5 million.

158. There has not been produced one document in support of a reasonable assertion or belief that either of them received such monetary gift from Ramzey. No bank statement itemizing a single gift from him, or, if the sums were from investments, by way of dividends or capital gain, no records have been produced, nor is there any evidence of any declaration of such income or gift to the authorities.

159. At this stage it is pertinent to consider his emoluments. He had an income from his occupation averaging about $8,000 monthly, or about $96,000 per annum. For a number of years he has had a bank loan for which he had to pay a little over $3,000 monthly or $36,000 annually. Two hire purchase payments for cars cost him $1,839 monthly or over $22,000 annually. Repayments of loans were costing him over $58,000 yearly, nearly two thirds of his salary. Monthly gifts from his father would enable him to meet the bulk of this liability. What is clear is that his income including allowances and parental gifts could not possibly enable him to sustain his apparent life style. There had to be another source of money to account for his expenditure.

The Malaysian Lady

160. This mysterious personage emerges from the Statutory Declaration by the 1st appellant as her benefactor to the tune of $5 million. There is, as in the case of Ramzey's

alleged gifts totaling $2.5 million, not a single document, written entry, bank statement, notification to the authorities or to the head of the Judiciary, or even a letter in any form from this shadowy lady to evidence any gift from her.

161. The 2nd appellant said that after the alleged first cash gift from her, whenever that was, and whatever the amount and however it was conveyed, received or recorded, he advised the 1st appellant to declare the gift to the then Chief Justice. The discussion he said he had with her, has no basis save the flimsy assertion by him, lacking any support since she did not give evidence. According to him, he advised her to make this revelation to the Chief Justice on subsequent occasions but made no contact with the Chief Justice himself to check this. Given his admitted knowledge of the flow in and out of these remarkable sums of cash from which he also benefited substantially, it is astonishing that he did not take the reporting/declaring initiative himself. The trial judge had little difficulty in concluding that his explanations were not credible.

162. The obvious question passing through his mind, must have been this. When the 2nd appellant said that they rarely discussed the money coming from this extraordinarily generous lady, beyond the frontier, they referred to her as *"the one who must not be named."* How, as between husband and wife whose life style over more than a decade had been funded as they contended, could they have avoided, between themselves, every time a transfer of cash flowed in from her, a discussion if only to decide how they should recognize their gratitude and appreciations of her incredible level of financial support? They seem to have had little difficulty in deciding how the money was to be spent.

163. The judge had little difficulty in concluding that his story was a fairytale and that he well knew that the source of these monies was a criminal enterprise on the part of his wife from which they were both to benefit.

164. In our view the judge cannot be faulted. The grounds of appeal can be dealt with shortly as they have been fully considered in relation to the 1st appellant.

1) Failure to give credit for good character

165. The judge did so to the extent that it was relevant. The evidence against both defendants was overwhelming. The 1st appellant gave no evidence to rebut or explain or provide any credible alternative context for the considerable consistent withdrawals of cash from the debtors' accounts.

2) Inadequate reasons for finding the 1st appellant's accounts that the Malaysian lady was or may have been the provider of funds

166. She did not give any evidence so there was no account from her for the court to consider, apart from the contents of her police interviews and her Statutory Declaration, none of which could be tested.

3) Failed to give any or proper weight to the fact that the Malaysian Lady had not given evidence when giving reasons for convicting appellants

167. The defence did not call her. She was part of their defence. This is bizarre reasoning.

4) Failed to give adequate reasons for finding that the 2nd appellant's account about the Malaysian Lady's existence as the source of funds was untrue

168. He gave no evidence about her existence or the alleged gifts. He merely repeated what he alleged the 1st appellant had told him. The explanation such as it was, was bizarre and not credible.

5) Wrong to reject defence submission of no case to answer

169. There was unarguably clear evidence to support all the charges.

6) Wrong to find that the 2nd appellant had knowledge of Breach of Trust in absence of sufficient evidence to criminal standard

170. He rejected the 2nd appellant's evidence about Malaysian lady's gifts. The story was incredible.

171. The 2nd appellant well knew the funds, in cash, were paying for a luxury lifestyle. There were no legitimate funds used for this purpose. Legitimate income could not support that lifestyle and expenditure. Therefore, they were *"ill-gotten gains,"* made by the 1st appellant. He was well aware of deposits/expenditure to and from SCB account etc, over many years. The inference was overwhelming that he knew they came from the 1st appellant by virtue of her access to such funds. He knew she was the Official Receiver in bankruptcy and was so for many years. It is untenable that as a judge himself for many years, that he did not know aspects of her work, such as the handling of payments made by debtors into court. To use the trial judge's term his contention *"beggars belief."*

Common intention and section 34 of the Penal Code

172. There is clear evidence against both appellants of common intention particularly in relation to counts 25, 26 and 27 in respect of the purchase of the Porsche, Jaguar and Mercedes motor cars. The trial judge found the 2nd appellant guilty of those three counts.

173. The fact that the counts did not allege common intention is immaterial. The prosecution's case had been conducted on that basis.

S.370(1) of the Criminal Procedure Code provides that:

> *"…no finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed unless, in the opinion of the Court of Appeal…a failure of justice has been occasioned thereby."*

S.371

"...no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:-

a) any error, omission or irregularity in the…charge, judgment or other proceedings under this Code…

unless such error, omission…want…has occasioned a failure of justice."

174. The appellant has not been misled, prejudiced or embarrassed. The convictions are proper ones. The appellant's case did not include any reasonable argument that a secondary case based on common intention was improper, nor was it suggested that the appellant was taken by surprise.

The 2nd appellant's appeal against convictions is dismissed.

4. The Respondent's appeal against the 2nd appellant's acquittals on charges 21 and 22

(a) Charge 21

175. The deposit of $220,000 in the SCB joint account in the form of 22 $10,000 notes, on 13 May 2015, came from the total amount of $595,000 withdrawn by the 1st appellant only two days earlier on 11 May 2015. They were recorded on the BIBD report to AMBD and then on SCB's report to the AMBD.

176. The report made by the SCB teller on 13 May 2015 named the 2nd appellant as the depositor. The deposit slip says *"came personally"* and has the 2nd appellant's ID card number and date of birth recorded on it. The words *"sale of property in UK"* are also on it. The recorded time is 14:19 hours.

177. At trial 5 years later the bank teller giving evidence said that he could not remember who made the deposit, whether man or woman or both. He said he would normally ask for the identity card of the customer who paid in the money but could not remember whether he entered the details of the customer at the end of the day. In a somewhat unclear section of his cross-examination he was asked – Q. *"Is it possible you got the details of the lead customer from the Bank's system."* A. *"Yes."*.

178. The lead customer was of course the 2nd appellant. The contemporaneous entries on the documents are significant and reliable despite the degree of uncertainty indicated by the material witness five years later, who had for the last four years worked not for SCB but for BIBD. That same witness added that he would ask to see the identity card of the depositor in a big transaction. The sum of $220,000 cash, paid over in 22 $10,000 dollars notes was such a transaction.

179. The 2nd appellant said he was not at the bank on that day and at that time and so did not make the deposit. He said he was at work and the writing on the deposit slip was the 1st appellant's. The prosecution contended that it would have taken him only ten minutes to drive to the bank. The overall conclusion of the trial judge was that he did not believe the 2nd appellant to be a credible witness. That is our clear conclusion as well. In these circumstances and on this evidence, we, or another judge might have reached a different conclusion but the trial judge was a very experienced one over many years, and had the advantage of seeing and hearing the evidence in the context of the trial, and we cannot say that he was wrong.

(b) Charge 22

180. On 16 March 2016 the 1st appellant withdrew $514,000 in cash from the debtors' accounts including 40 x $10,000 notes. The following day 29 of those $10,000 notes, as part of a total of $300,000, were deposited in the joint SCB account.

181. The teller concerned at SCB, well over 3 years after the deposit was made, accepted that he put the details of the depositor on the records at the end of the day and said that he made a mistake in putting the name of the lead account holder (the 2nd appellant) in the AMBD report. There seemed to be some confusion in his mind or memory as he concluded by saying that the depositor's ID card was given to him at the time and that decided which name he should record. He recorded the 2nd appellant's name, so he must have been given his ID card. However faced with this apparent conflict of evidence the trial judge acquitted him on this count. He had said that he did not make this deposit and that the words on the deposit slip – *"share of sale of property"* – were written by his wife. He said he was at work that day. He thought the money came from the Malaysian lady and/or Ramzey.

182. Having considered the overall picture of transactions involving the 2nd appellant, and his clear lack of credibility, we consider that the contemporaneous records give the true picture of his involvement. Nonetheless we remind ourselves that the trial judge had the full opportunity of seeing the witnesses and documentary evidence, which we have not as far as the live evidence is concerned, and although any one of us may well have come to a different conclusion in relation to this count, we cannot say that the trial judge was clearly wrong.

The appeal of the prosecution against these two acquittals is dismissed.

5. Sentence

183. The 1st appellant was convicted of all 25 charges laid against her. On charges 1-15, all offences of criminal breach of trust contrary to s.409 of the Penal Code, she was sentenced to 10 years' imprisonment on each charge, all to be served concurrently. Each of the first 14 charges represented one year of dishonesty from 2004 to 2017 inclusive. The 15th charge related to a single breach of trust in April 2017 involving the misappropriation of $35,000. The remaining 10 charges were of money laundering contrary to ss3(1)(a) (b) and (c) of the Criminal Asset Recovery Order 2012 ("CARO"). 4 concerned substantial deposits

of stolen money into her (joint) Standard Chartered Bank account; one concerned the purchase of a Mercedes motor car, one concerned the changing of 5 $10,000 notes into smaller denominations and the last 4 related to the transferring of substantial sums from her Brunei SCB account to their joint account with the Hongkong Shanghai Bank in the U.K.

184. On each money laundering charge she was sentenced to 5 years' imprisonment to be served concurrently and concurrently with the 10 years sentences making a total of 10 years.

The 1st appellant does not appeal against these sentences.

185. The 2nd appellant faced 8 charges of money laundering contrary to ss3(1)(a) and (b) of CARO. He was convicted of 6. He was acquitted of charges 21 and 22 which had concerned the depositing of large sums of cash into the appellants' joint account with SCB. He was convicted of a third similar charge. He was further convicted of 3 charges involving the purchase of 3 motor cars, a Mercedes, a Porsche and a Jaguar and, finally, of 2 charges concerning the transfer of money from Brunei to their joint HSBC account in the U.K. He was sentenced to 5 years imprisonment on each charge to be served concurrently. He appeals against these sentences.

186. When sentencing the 2nd appellant the judge said that he was in no doubt that he was *"fully aware"* of his wife's *"systematic milking"* of judgment debtors' accounts and was happy to share the lavish lifestyle funded by the proceeds of her crimes. He noted his previous good character but, that apart said *"you have no mitigation whatsoever".*

(a) <u>2nd appellant's appeal</u>

187. It has been submitted on his behalf that the sentence was manifestly excessive and should be reduced. In support it was pointed out that the total sum involved in the 6 charges on which he was convicted was $470,000, a much smaller sum than the total against the 1st appellant. He was *"hitherto a man of excellent character."*

<u>Prosecution's submission</u>

188. We have been referred to 2 previous cases in Brunei. In ***Public Prosecutor vs Pg Hussin bin Pg Sulaiman (Criminal Appeal No 8/2017)*** a sentence of 2 years was passed after a guilty plea involving a sum of $98,029. In ***Zhong Xiao Hui and others vs Public Prosecutor (Criminal Motion No 25/2017)*** sentences of 2 years imprisonment were passed, again after pleas of guilty, on two defendants. The sums involved were $7,348 and US$15,229. The 2nd Appellant's crimes were significantly worse. The sum of money involved was much greater and continued over a two year period.

189. The appellant contested the allegations and was convicted. He was a serving judge in the Brunei Judiciary. He made no attempt to curtail his wife's activities. He lost his good character when he chose to enjoy the lavish lifestyle his wife provided by her criminal conduct of which *"he was fully aware."*

190. Bearing in mind these matters and bearing in mind the statutory maximum is 10 years and bearing in mind he is guilty of 6 separate offences the submission that the sentence was manifestly excessive is untenable.

The 2nd appellant's appeal against sentence is dismissed.

(b) The Prosecution's appeals against both appellants' sentences

191. Pursuant to ss.438J and 438K of the Criminal Procedure Code Chapter 7 the Public Prosecutor seeks an increase in the sentence of both appellants on the ground that they are manifestly inadequate.

192. The Public Prosecutor invites this court to consider the combined effect of the following factors.

(i) The 1st appellant's dishonesty spanned 14 years. Throughout that period the determined efforts of 255 bankrupts to get themselves discharged from bankruptcy were frustrated by her withdrawals of an enormous sum of money from their accounts. Even today there are many bankrupts who remain undischarged because of her crimes.

(ii) The total sum involved is over $15 million, an average of over $1 million a year for 14 years.

(iii) $6 million remains unaccounted for.

(iv) The appellants' position within the judiciary renders this case the worst type of abuse of position and abuse of trust.

(v) As a result the judiciary's reputation has been severely damaged. They are grave offences which have undermined public confidence in the courts. Such damage is long standing, it is impossible to repair quickly.

(vi) There was no mitigation. We agree with the submission that once convicted the 1st appellant lost her good character in 2004 and the 2nd appellant in 2014.

(vii) The 1st appellant laundered $1,498,435, the 2nd appellant laundered $470,000. These are the highest amounts ever dealt with in these courts.

(viii) Both appellants had well paid jobs; thus their offences were motivated by greed. The 1st appellant became greedier as the years went by. In the first year her theft was under $100,000. In the latter years it was over $1.5 million per year.

(ix) Neither appellant has shown any remorse nor has any information been forthcoming in relation to the unaccounted for sum of approximately $6 million.

193. The Public Prosecutor has drawn to our attention three Brunei cases of criminal breach of trust. In ***Razimi bin Hj Tajjuddin vs Public Prosecutor (Criminal Appeal No 8/2017)*** a starting point of 6 years was reduced to 4 years on a guilty plea to a single charge of misappropriation by a hospital employee who was entrusted with patients' money. The total sum involved was $458,106.

194. The same sentence was passed in ***Mohd Noor bin Litoh vs Public Prosecutor (Criminal Appeal No 3/2005)***, a case involving 3 charges and $327,094. A similar sum was involved in ***Haji Nordin bin Haji Ahmad vs Public Prosecutor (Criminal Appeal No 8/1998)*** where 3 years 6 months was imposed, again after a guilty plea.

Clearly, these cases pale into insignificance when compared with the present case for all the reasons outlined above.

Appellant's submissions

195. We have regard to Lord Lane's remarks in Attorney General's Reference **No 4 1989 90 Criminal Appeal R 366** concerning the meaning of "unduly lenient" which is the test in the U.K.

> *"…it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection, regard must of course be had to reported cases and in particular to the guidance given by this Court from time to time in the so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency itself is not a vice. That mercy should season justice is a proposition as soundly based in law as in literature."*

196. It is submitted that the test in Brunei of *"manifestly inadequate"* should be regarded as setting the bar higher than *"unduly lenient"*.

197. In our judgment the words *"manifestly inadequate"* may be expressed in different ways but still convey the same meaning. *"Clearly not long enough"* or *"obviously too short"* are examples.

198. We accept the submission made that the court should only intervene where an error of principle has been made which has resulted in a sentence which is manifestly inadequate.

199. We finally note the devasting effect these sentences have had on the appellants and their family. We have been informed and accept that both the physical and mental health of both appellants has been adversely affected.

We now consider each appellant's sentence.

1st appellant

200. For a single offence of criminal breach of trust the maximum sentence of 10 years was passed and, rightly, has not been appealed. There were 15 such offences.

201. It is not disputed, again rightly, that when sentencing for multiple offences where the maximum has been imposed for each offence, it is open to the court to consider ordering that subsequent terms be served consecutively or partly consecutively, subject to the principle of totality, so that the final sentence is a proper reflection of the appellant's overall criminality.

202. In this case a 10-year sentence for each individual charge was proper. The 14th charge, for example, standing alone, would merit a 10-year sentence after trial.

203. This court is in no doubt that the fact of multiple offences, 15 in all over 14 years involving a huge total sum from 255 vulnerable victims, must merit consideration of the sentences being ordered to be served partly consecutively.

204. We have concluded in this case that the failure to do so is an error in principle which requires correction. Whilst it was plainly right to decide that, say, charge 14 merited 10 years in prison but it was plainly wrong to decide that the 13 earlier charges covering 13 years of dishonesty should not result in a longer final sentence.

205. For the money laundering charges (10 charges) 5 years was passed concurrently. As previously noted, in ***Public Prosecutor vs Pg Hussin bin Pg Sulaiman (Criminal Appeal No 8/2017)*** 2 years imprisonment was passed for 20 charges involving $98,029 after guilty pleas. In the present case a sentence of up to 7 years for a single charge, as suggested by Mr. Singh, would not have been excessive, albeit at the upper end of an acceptable range. In the present case we regard 5 years as lenient but not unduly so.

206. However, these were multiple offences over a long period of time and three different types of money laundering were involved; paying stolen money into their joint account in Brunei, transferring stolen money to their U.K. bank account and buying expensive motor cars.

207. These factors were not recognized by the passing of concurrent sentences and in so doing we have decided that the judge fell into error. Moreover, making them concurrent not only with each other but also with the 10-year sentence for criminal breach of trust failed to recognize that the money laundering charges were separate and distinct acts of criminality enabling her to use her ill-gotten gains to lead an offensively lavish life style.

All the above is, as already stated, subject to the overriding principle of totality.

208. A final principle which we have in mind concerns the fact that this is an appeal by the prosecution to increase already lengthy terms of incarceration. We recognize that in such

circumstances it is open to the court to make a final short reduction in sentence to mark the effect on an appellant when a sentencing error is being corrected by a significant increase.

209. As will be seen below we are ordering that a partly consecutive element is required in Charges 1-15 and further that an additional consecutive element is required in relation to the money laundering charges. We note and agree with the following remarks taken from the judgment of Rajah J.A. in the judgment of the majority of the Singapore Court of Appeal in ***ADF v PP [2010] I SLR*** at page 926:-

> *"In my view, an order for more than two sentences to run consecutively ought to be given serious consideration in dealing with distinct offences when one or more of the following circumstances are present, viz:*
>
> *(a) dealing with persistent or habitual offenders;*
> *(b) there is a pressing public interest concern in discouraging the type of criminal conduct being punished;*
> *(c) there are multiple victims; and*
> *(d) other peculiar cumulative aggravating features are present.*

210. Whilst we accept the Respondent's submission that the sentences passed were manifestly inadequate and require significant increases we regard the huge increases sought by the Respondent of 24 years for the 1st appellant and 18 years for the 2nd appellant as advanced in the submissions made to the court, to be unrealistic and unhelpful.

Decisions

(i) 1st appellant

211. The judge should have ordered that 4 years of the 10 years sentence on charges 12-14 be served consecutively to the remaining s.409 offences.

212. Then, he should have ordered that 2 years of the 5 years sentence on the money-laundering charges be served consecutively to the 14 years on the s.409 charges.

213. Thus, the resulting total should have been 16 years imprisonment. Applying the principle of totality, we are satisfied that this is the proper sentence, but we shall reduce it to 15 years as it is a prosecution appeal.

214. We quash the judge's order that the sentences of imprisonment imposed on the 1st appellant all be served concurrently. In place of those orders, we order that:

(a) 4 years of the sentences of imprisonment imposed in respect of charges 12-14 be served consecutively to charges 1-11 and 15;

(b) 1 year of the 5 years sentences imposed in respect of charges 16-19, 23 and 24, and 28-31 be served consecutively to the resulting total of 14 year's imprisonment imposed in respect of charges 1-15.

The total sentence of imprisonment imposed on the 1st appellant is 15 years.

(ii) 2nd appellant

215. The judge should have ordered that 3 years of the sentences on charges 25, 26 and 27 be served consecutively to the 5 years on the remaining charges making a total of 8 years imprisonment. This would have been the proper sentence for his overall criminality. We shall reduce it to 7 years and 6 months as it is a prosecution appeal.

216. We quash the judge's order that the sentences of imprisonment on the 2nd appellant all be served concurrently. In place of that order we order that 2 years and 6 months of the 5 year sentences on charges 25, 26 and 27 be served consecutively to the remaining sentences.

The total sentence of imprisonment imposed on the 2nd appellant is 7 years and 6 months.

Burrell, P.

Seagroatt, JA. **Lunn, JA.**