Tan Kim Hock Anthony *v* Public Prosecutor and another appeal
[2014] SGHC 32

Case Number : Magistrate's Appeals Nos 122/2013/01 and 122/2013/02

Decision Date : 21 February 2014

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Peter Low and Choo Zheng Xi (Peter Low LLC) for the appellant in MA No 122/2013/01 and the respondent in MA No 122/2013/02; Kwek Chin Yong and Joshua Lai (Attorney-General's Chambers) for the respondent in MA No 122/2013/01 and the appellant in MA 122/2013/02.

Parties : Tan Kim Hock Anthony — Public Prosecutor

Criminal Law – Offences – Property – Criminal Breach of Trust

21 February 2014 Judgment reserved.

Chan Seng Onn J:

Introduction

1 The appellant, Brother Tan Kim Hock Anthony, was the former Principal of Maris Stella High School ("the School") for 25 years from 1984 to 2009. He was charged with the offence of criminal breach of trust by a servant under s 408 of the Penal Code (Cap 224, 2008 Rev Ed) for having dishonestly misappropriated, via six cashier's orders between 27 March 2009 and 10 September 2009, the sum of $67,679.05 from the School's Chapel Building Fund account ("the Chapel Fund account") with United Overseas Bank ("UOB"). He used this sum to pay for certain expenses incurred in renovating Champagnat House, which is the official residence of the Marist Brothers in Singapore. By way of background, the Marist Brothers is an international Catholic religious order which founded the School, and the appellant himself is a Marist Brother.

2 The appellant was convicted on 24 April 2013 by the District Court and sentenced to five months' imprisonment. He appealed against both conviction and sentence, while the Prosecution cross-appealed against sentence. After careful deliberation, I have decided to uphold the trial judge's decision. I therefore dismiss both the appeal and cross-appeal. I now give my reasons.

Decision on conviction

3 I will deal first with the appellant's conviction. Mr Peter Low ("Mr Low"), for the appellant, urged me to set it aside for the following reasons:

(a) First, the elements of the offence under s 408 of the Penal Code are not made out. In particular, Mr Low argued that the appellant did not have a *dishonest* state of mind at the time of his offence and, further, that he was not a "*servant*" for the purposes of s 408; and

(b) Second, even if the elements of the offence were established beyond a reasonable doubt, Mr Low argued that it was nevertheless unsafe to uphold the conviction because *excessive judicial interference* by the trial judge in the proceedings below had given rise to apparent, if not

actual, bias.

I will now address these two submissions in turn.

Have the elements of the offence been made out?

4 I agree with the trial judge that the elements of the s 408 offence have been proved beyond a reasonable doubt.

Dishonest misappropriation

5 When read in conjunction, ss 23 and 24 of the Penal Code clearly provide that a man has a dishonest state of mind in the criminal context if he intends, by unlawful means, to cause "wrongful gain" to one person or "wrongful loss" to another. For the appeal to succeed in the present case, Mr Low had to show that the trial judge was wrong to find that the appellant did intend to cause wrongful gain and wrongful loss when he withdrew monies from the Chapel Fund account to renovate Champagnat House.

(1) Wrongful loss

6 Mr Low emphasised in his oral submissions that it was crucial for this court to appreciate how the appellant had viewed the relationship between the School and Champagnat House. He submitted that while the School and Champagnat House may have been formally separate entities, *in the appellant's mind*, they were both united by a common purpose to serve the religious mission of the Marist Brothers in Singapore, which is to make Jesus Christ known and loved through the education of young people. To enable this court to draw the same connection, Mr Low emphasised the following factors. Firstly, that Champagnat House is the official residence of the Marist Brothers. Secondly, that the School was founded and continues to be run by the Marist Brothers. Thirdly, while the two plots of land on which Champagnat House and the School were built are registered in the names of different statutory corporations in Malaysia [note: 1] and Hong Kong [note: 2], these corporations share direct links with the Marist Brothers' headquarters in Rome. In fact, in the course of this appeal, it emerged from Mr Low's submissions that all the Marist Brothers' missions worldwide were answerable to the Rome headquarters, whose controlling influence was not insubstantial.

7 It would thus appear that Champagnat House and the School were no more than local touchpoints through which the Marist Brothers manifested its presence and advanced its mission here. Both were in essence owned by the Marist Brothers. Against this backdrop, Mr Low then sought to persuade me that it was reasonable for the appellant, as a longstanding Marist Brother himself, to have thought that there was nothing untoward in his application of the monies in the Chapel Fund account towards the renovation works for Champagnat House, as both served, in their different ways, one and the same religious mission. On this view, the appellant could not have *intended* to cause any wrongful loss to the School because, by improving Champagnat House, he believed that he was thereby benefitting the religious mission which the School was a part of.

8 I am not convinced by Mr Low's submissions. First, as the learned Deputy Public Prosecutor had quite rightly pointed out, the alleged direct links which both Champagnat House and the School had with the Rome headquarters were not canvassed at all before the trial judge. I am not inclined to accept this part of Mr Low's submissions based on his mere say-so. In any case, while it may well be that, *theoretically*, the network of Marist Brothers around the world is answerable to the Rome headquarters, it scarcely accords with *practical reality* to say that this alone can engender the belief that funds from one entity can be used for the purposes of another without any prior authorisation. I

am further fortified in my conclusion by the following facts that were found by the trial judge. Firstly, two of the Prosecution's witnesses who were, significantly, the Local Superior of the Marist Brothers (PW4) and the Vice-Chairman of the School's Board of Management ("BOM") (PW6), testified that there was no "connection" between Champagnat House and the School [note: 3]. Secondly, the appellant had himself admitted in cross-examination that he knew that the Chapel Fund account was only to be used for the School's purposes and that the payments for the renovation works on Champagnat House had nothing to do with the School specifically [note: 4]. It is hardly surprising to me that the appellant, having been the Principal of the School for so many years, was fully aware that the monies in the Chapel Fund account should not be used for the renovation works on Champagnat House. This must be the case because the trial judge had found that the monies in the Chapel Fund account came from public donations and the Ministry of Education [note: 5] and, further, that the Chapel Fund account had a clear designated purpose as stated in the account opening letter, which was "for building a Memorial Chapel in Maris Stella High School" [note: 6]. Thirdly, the appellant's assertion at trial that he had a wide authority to manage the School's finances was also found to be inconsistent with the extrinsic evidence, which showed that he knew that the approval of the Board of Management ("BOM") was required before he could draw on the Chapel Fund account [note: 7].

9 The evidence adduced therefore undoubtedly establishes that, at the time of the offence, the appellant *knew* that the Chapel Fund account was intended for a specific school-related purpose that was unconnected with Champagnat House, and that approval from the BOM was required before he could use the monies in that account. In light of this, it is disingenuous for the appellant to now claim that he had thought, at the material time, that it was permissible for there to be a loose intermingling of funds for the use of the School and Champagnat House merely because they advanced the same cause and had a common root in Rome.

10 In the interest of completeness, I should briefly mention that Mr Low also submitted that the appellant had at all times intended to and did in fact reimburse the Chapel Fund account, and that this is therefore inconsistent with an intention to cause wrongful loss to the School. However, the learned trial judge had found that the *timing* and *manner* of the appellant's reimbursement provided grounds for inferring that the *reason* for him doing so was to "cover up" his misappropriations to begin with [note: 8]. I see no reason to disturb this finding.

11 Mr Low also highlighted the appellant's track record during his lengthy tenure as Principal of the School. He referred to several testimonials that had spoken favourably of the appellant's character. I was therefore invited to infer that such an outstanding individual could not conceivably have acted with the intention to harm the School for which he had sacrificed so much. While I do acknowledge the admirable contributions made by the appellant to the School and the wider education sector as a whole, I do not think that this alone can support the inference which Mr Low was inviting me to draw, especially in light of the various indicia that spoke of his guilty mind at the material time.

12 I am therefore in agreement with the trial judge's finding that the appellant had intended to cause wrongful loss to the School at the time he used the monies in the Chapel Fund account to pay for the renovations to Champagnat House. The appellant was accordingly "*dishonest*" in his misappropriation of the monies.

(2) Wrongful gain

13 Having already found that the appellant intended to cause *wrongful loss* to the School, there is strictly no need for me to consider whether he had also intended to cause any *wrongful gain*. This is

clear from the plain wording of s 24 of the Penal Code, which provides that proof of intent to cause wrongful gain "*or*" wrongful loss would suffice for a finding of dishonesty. However, let me state briefly why I agree with the trial judge's finding that the appellant was *himself* the intended beneficiary of a wrongful gain as a result of his unauthorised transactions, since Mr Low had taken issue with this point on appeal.

14 In the court below, the trial judge found that the appellant had agreed to pay for the three items that were part of the renovation works for Champagnat House out of his own personal funds. By using the misappropriated monies instead, the appellant had benefitted wrongfully because, according to the trial judge, he then "did not have to use his personal funds for the payments" [note: 9].

15 Mr Low questioned the trial judge's reasoning on appeal. Mr Low argued that it was incorrect to say that any "gain" had accrued to the appellant in the form of personal savings when the appellant himself had always considered that his salary belonged to the Marist Brothers, and not to him. In this regard, Mr Low pointed out that the appellant had taken a "vow of poverty" when he became a Marist Brother and, consequent upon such a vow, had dutifully contributed his salary to the Marist Brothers over the years. Mr Low's argument, therefore, was that the appellant could not possibly have intended to improve his own position by using the monies in the Chapel Fund account because whatever accrual there was in terms of his personal savings then would not ultimately be enjoyed by him, as he had all along treated his savings as belonging to the Marist Brothers. In short, there was *in fact* no personal gain to the appellant, which makes it absurd to suggest that he could have *intended* the same.

16 Mr Low's submission on this point, however, is not supported by the evidence before me. To my mind, what was crucial in shedding light on how the appellant had treated his personal funds at the material time of the offence was the undisputed fact that he had stopped contributing his salaries to the Marist Brothers for a four year period between 2006 and 2009. As the appellant had explained at trial, his decision to discontinue his monetary contributions was prompted after witnessing how other Marist Brothers were not properly taken care of when they became old and sick [note: 10]. Therefore, he kept his own salary to ensure that his own welfare in his old age was secure. He also spoke of a concern that his monetary contributions might be used for other Marist Brothers outside of Singapore [note: 11]. To me, these explanations given by the appellant are telling. They collectively point to the fact that, by 2009, which was the period during which the offence was committed, the appellant had begun to consider his personal funds as standing separate and apart from the Marist Brothers. While this might not have been the case before, it certainly seems to have been the case *at the time of the offence*.

17 Essentially, I am unconvinced that the appellant had *always* treated his salary as belonging to the Marist Brothers when, in the same breath, he claims that he had made a deliberate decision to withhold it for use in his old age. I therefore reject Mr Low's argument and uphold the trial judge's finding that the appellant had in fact applied the misappropriated sum towards Champagnat House so as to avoid having to make the payments out of his own pocket.

Servant

18 Mr Low also argued that as the School was an unincorporated entity at the time of the offence, it did not have a legal personality and hence could not have entered into an employment contract with the appellant. This, it was submitted, negated the element in s 408 of the Penal Code that requires the appellant to have been entrusted with the misappropriated monies in his capacity as a "servant".

19 I do not accept this argument as I am unaware of there being any legal bar to an unincorporated association employing its own staff. In fact, common experience tells us that it will frequently be necessary for such associations to engage staff to further their activities: see Jean Warburton, *Unincorporated Associations: Law and Practice* (Sweet & Maxwell, 2ndEd, 1992) at pp 90–92. In any event, the Court of Appeal in *Khoo Jeffrey and others v Life Bible-Presbyterian Church and others* [2011] 3 SLR 500 at [27] clearly did contemplate the possibility of an unincorporated association employing staff, as appears from the following passage:

> ... The faculty members were simply staff hired by the College to carry out its objects, *just as any unincorporated association can hire non-members, or even members, as its employees*. ...
>
> [emphasis added]

Therefore, even though the School was an unincorporated entity at the material time of the offence, this did not mean that it could not have employed the appellant as its Principal who was, in the somewhat antiquated language of the Penal Code, accordingly its "servant".

Is it safe to uphold the conviction?

20 While I am satisfied that all the elements in s 408 of the Penal Code have been made out, that is not the end of the matter as regards the appellant's conviction. Mr Low further contended that the conviction should not be allowed to stand because excessive judicial interference by the trial judge had prejudiced the partiality of the proceedings below, or at the very least, there was apparent prejudice. In this regard, Mr Low referred to the following portions of the Notes of Evidence ("NE"):

(a) Peter Low's examination-in-chief ("EIC") of the appellant at pp 142–167 of the NE dated 4 December 2012 [note: 12];

(b) Peter Low's cross-examination of Cheng Liang Gek (PW3) at pp 56–59 of the NE dated 30 October 2012 [note: 13]; and

(c) Peter Low's cross-examination of Chin Hon Mann (PW4) at pp 206–221 of the NE dated 30 October 2012 [note: 14].

21 Before providing my analysis of these material portions of the NE, let me first say that the allegation being made here is, by all accounts, a serious one for it raises doubts over the judicial temperament, if not integrity, of the trial judge below. I am therefore minded to approach this issue with great care and, to that end, have undertaken a close perusal of the NE. In the course of doing so, I am also guided by the authoritative decision in *Mohammed Ali bin Johari v Public Prosecutor* [2008] 4 SLR(R) 1058 ("*Johari*") which both parties have relied on. In particular, I have in mind the Court of Appeal's statement that, when faced with an allegation of excessive judicial interference, the "ultimate question" for the court reviewing the propriety of proceedings below is "whether or not there has been the possibility of a denial of justice to a particular party (and, correspondingly, the possibility that the other party has been unfairly favoured)" (at [175]).

EIC of the appellant

22 I now turn to the first material portion of the NE which Mr Low had flagged for my attention. This essentially concerns a somewhat extended exchange between the trial judge and the appellant during the latter's EIC. It arose after the appellant had given evidence relating to his disclosure of the

accounts which the School had with Standard Chartered Bank, Hongkong and Shanghai Banking Corporation and Oversea-Chinese Banking Corporation at a meeting with the BOM in 2002. At this point, the trial judge wanted to understand why the appellant had not taken the same opportunity to inform the BOM of the Chapel Fund account with UOB, especially when he had earlier stated that he was accountable to the BOM. This exchange appears in the following excerpt [note: 15] :

Court:	Why didn't you inform the board about of all the existence of all these accounts?
Witness:	Uh, because---
Court:	And the 1st meeting 17th July 2002, Annex A. You got that?
Witness:	Yes, Your Honour, uh, because if you want to go into the land, uh, option the board had to show evidence that they themselves raise the money. This money have to be raised 2.---2.3 million---
Court:	No---no---no. Why---you recall the Annex A and the minutes at the board meeting, right? 17th July 2002, is it? You---you---you set out the bank accounts, the purpose, the
Court:	signatories.
Witness:	Yes.
Court:	My question to you is this, you were saying item 1, 2, 3 and 4 were pre-2000.
Witness:	Yes.
Court:	So why didn't you give a full and frank disclosure of all the accounts set up by the school and how they want to---because after all these are SMC money, right? After the constitution came in to force in 2000---2001---
Witness:	Your---Your Honour---
Court:	the---the board will have---
Witness:	Yah.
Court:	jurisdiction over them, right?
Witness:	Yah. Your Honour, these 4 account is---is reflected in the---in the audited account, the investment.
Court:	No, but you see the op---the operation of this account, the signatories---
Witness:	Yes.
Court:	and the numbers, how much money there is, why wasn't it reported to the board in---in---when you're discussing all the bank accounts? And there were many several minutes where they ask you to give a---for the update of all the bank accounts held by the school.

Witness:	Your Honour, the---this account is annually is reflected, is reported by the auditor. And then they would have---they would have a copy, that's why in certain meetings---
Court:	It---it is not good enough to fo---for the auditor to know, right? You---you---you earlier told us---
Witness:	Yes.
Court:	the board is also your boss, right?
Witness:	Yes.

23 Mr Low objected on two grounds to the trial judge's intervention, which he said showed that the trial judge had closed his mind and predetermined the appellant's guilt. The first pertained to the stage of the proceedings at which the intervention took place. Mr Low argued that it was "premature" for the trial judge to begin questioning the appellant when he had only begun giving his EIC. The second objection related to the sustained nature of the trial judge's questioning, as that took up the better part of some 24 pages of the NE.

24 I do not agree with both objections raised by Mr Low. The trial judge's power to ask questions of the witnesses before him is set out in s 167 of the Evidence Act (Cap 97, 1997 Rev Ed) and, as has been observed, this is a "wide power": see *Ng Chee Tiong Tony v Public Prosecutor* [2008] 1 SLR(R) 900 at [12]. Section 167 of the Evidence Act clearly provides that a trial judge may ask any question he pleases "at any time" to discover or obtain proper proof of relevant facts. Hence I do not understand Mr Low's first objection which seems to suggest that the trial judge should have exercised greater restraint by posing those questions only after the appellant's EIC had reached a more advanced stage or had been concluded. In any case, the trial judge had also explained why he had begun questioning the appellant at this relatively early juncture in the following manner [note: 16] :

Court:	If---if there's something that I---I---I---as it comes to my mind I want to ask him.
Low:	Yah---yah, understand.
Court:	Because if---if you pass it after he forget.

I find the trial judge's approach to the matter to be both practical and reasonable. Accordingly, I see no reason to fault the timing of his intervention.

25 As regards Mr Low's second objection, I acknowledge that the trial judge's questioning of the appellant does carry on for several pages of the NE. However, as the Court of Appeal sensibly observed in *Johari* (at [175]), it is not merely the quantity but also the "qualitative impact" of the trial judge's questions which has to be assessed. It is therefore necessary to look beyond simply the volume of questions asked by the trial judge. Upon closer inspection, I have found that the particular exchange here had progressed in the way that it did largely due to the fact that the appellant's explanations had shifted during the course of the questioning [note: 17] and because he had struggled to give a plausible explanation to satisfy the trial judge's queries [note: 18] . This is certainly not a case in which the trial judge had, or looked as if he had, embarked on his own line of questioning upon which an adverse case was then constructed against the appellant.

26 Far from appearing to have closed his mind to the case before him, the trial judge was in fact, through his questions, being open with both Mr Low and the appellant about the matters which concerned him at the material time.

Cross-examination of PW3

27 Mr Low also submitted that the trial judge's interruption during his cross-examination of PW3 was improper. Mr Low argued that his cross-examination was directed at eliciting facts to show that the appellant had not been dishonest. By interrupting to insist that the defence be disclosed at this stage, the trial judge had shown himself once again to have closed his mind to all further circumstantial evidence that might be probative of the appellant's innocence.

28 I see no merit in this submission. While Mr Low is of course right to argue that proof of dishonesty will depend on all the circumstances, that is surely not a licence for counsel to pose all manner of questions to witnesses which may have little or no discernible relevance to the issue at hand on the basis that they might have some speculative or tangential connection to the factual matrix. A distinct advantage of the cut and thrust nature of oral advocacy within our adversarial context is that the issues which require the court's determination should, ideally, become progressively sharpened as the trial proceeds. It will therefore be entirely counter-productive if counsel's conduct of the case is to confound rather than assist the judge hearing it. The trial judge in this case certainly had difficulties following how Mr Low's cross-examination of PW3 was relevant to the defence. Hence I find it sensible that the trial judge proceeded to ask Mr Low to explain the thrust of his questioning to avoid prolonging the trial unnecessarily. This may be gleaned from the following extract from the NE [note: 19] :

Court:	but how---what---what---how do you hope to use all this as part of a submission on this element of dishonesty? I still---
Low:	Yah.
Court:	have---have not been able to see that the---what you are trying to drive at.
Low:	Ah---
Court:	I mean you need to---to---to---to put your defence case---
Low:	Yes.
Court:	to the Prosecution witness---
Low:	Yes.
Court:	isn't it?
Low:	Yes, correct.
Court:	That is the---that is what the Law says---
Low:	Yes.
Court:	in cross-examination.
Low:	Yes.

Court: But so far I've not seen you putting your case. What is the---the case for the Defence?

Low: Yah. So I---I will have to draw your---draw out the elements that go into the factual matrix, because you will have to look at the---with the fact I---I will submit, you will have to look at all the circumstances, because nobody knows what goes on in a person's mind, whether he's honest or not dishonest. You will have to look at all the circumstances and you have to decide on the matrix which I'm trying to put this trial a bit. On the---

Court: So far the evidence that we have based on the first 3 witnesses, I do not know what the others are going to say. It seems to---the case seems to be something along these lines, that the---this payment for all this extra work, he has no money---lack of money or whatever and he decided to pay. He said he will pay, the bill was sent by the architects to him for that---for those---certain portions, not all that.

Low: Yah.

Court: So far as those portions which are covered by the contract sums is quite clear from the evidence, is Brother Thomas. From you---for this 21st charge, we're only talking about the amount of 67-over thousand, right?

Low: Yah.

Court: And your client's statements were positive. He did admit it came from the school fund, correct?

Low: Yes.

Court: So you need to---for your defence you need to---and---and you're aware under the CPC, for you to rely on any defence, right, you need to reveal it at the time of investigation, otherwise adverse inference will be drawn, isn't it, under 22, 23---under Section 25, is it, of the CPC?

Low: Yes, but we---

Court: So---

Low: already---

Court: but so far your client has not stated any Defence, in fact he made an admission that he took the money but he reimbursed it. You need to---to---how do you---what is the defence to this?

…

Low: I just ask for your indulgence to give me some latitude to extract---

Court: I have---

Low: the information---

Court: given you a lot of latitude---

Low: Yah---

Court: by---

Low: thank you, Your Honour.

Court: going through all this document which I still---mind---the mind---the question in my mind is, what's the relevance?

Low: Yes, okay.

Court: Because I have not---you haven't show me---

Low: Yah.

Court: what's the relevance.

Low: Okay, yah---okay.

Court: You see, you know, in your cross-examination---

Low: Okay, yah.

Court: as a Judge I have to decide to allow the questions, know. I have to decide what is the relevance to your defence.

Low: Correct, yah. I---I'm---

Court: Right?

Low: and---

Court: That is the---

Low: yes---

Court: role of the Judge---

Low: Yes.

Court: in the trial, right?

Low: Yes.

Court: Otherwise, the trial will go on and---

Low: Yah.

Court: ad infinitum---

Low: Yes---

Court: with---

Low: yes.

Court: everybody says, I'm entitled to ask many questions so as to be on my case, but---

Low: Yah.

Court: you must first start out with a---a---the---what is the position of your Defence? What is the case of the Defence and then your questions are to---to build up your case.

Low:	Correct, Your Honour.
Court:	But so far I'm not been able to---
Low:	Correct.
Court:	to get from you what is---other than saying that you need all
Court:	these facts and surroundings to build up your case. See, that's the problem---
Low:	Yah.

29 Not only do I find that the trial judge's intervention was practical in order to save the court's time, I also think that it was prudent for the trial judge to be proactive in ensuring that he had a proper understanding of the defence's legal and factual position. The trial judge was also giving Mr Low an opportunity to clarify the relevance of the line of questioning to the issues at hand. I therefore dismiss Mr Low's objection to this part of the trial proceedings as well.

Cross-examination of PW4

30 Finally, Mr Low took issue with the trial judge's interruption during his cross-examination of PW4. Mr Low attempted to show that the appellant had a wide authority in managing the School's finances and that this even extended to using the School's funds for *non*-School purposes. The trial judge found this position difficult to comprehend upon first hearing it and so persisted in clarifying with Mr Low whether this was indeed the defence he was making. According to Mr Low, the trial judge had, in so doing, revealed that he had prejudged the matter. The relevant extract which records this exchange between Mr Low and the trial judge is reproduced below [note: 20] :

Low:	But he was given authority to use the funds in the way---as long as he doesn't---he doesn't abscond with the funds.

Court: How can it be used anyhow---thing you like? The problem here is this, the 3 items based on his evidence, he said your client agreed that he will take care of it, he will pay for it. He says your client did not contribute to the Marist Brother common fund, he---your client has the money, so let him pay. The understanding based on his evidence so far, we've heard him from the morning until now, is that he---your client has the money, because for---from 2006 to 2010 he did not contribute to the Marist Brothers common fund, from his salary as a principal, which is I think quite substantial in a---any remu---remuneration, being a principal for so many years, easily a super-scale officer in the government and I know how much a super-scale officer earns, from the lowest to the highest. So that's---that's the thing. So how---how---I---I just don't get why---why you are saying that because there are no rules, there are no discre---you're given wide discretion all these years, you can do what you like with the fund, for purposes other than for the school purposes? I don't---do---I'm not with you on this point. As a matter of law and logic it does not make sense. When---and especially when these are from donations, as you're telling me. And people are asked to donate to the school management fund and it's clear from the---the---he is a senior member of the Marist Brother. He is telling us that the 2 are separate entities and he keep it as that and the agreement between him and your client is that for those items he will pay out from his own pocket, not to touch---it's quite---quite clear from his evidence, from the morning till now.

Low: But, Your Honour, you have not heard my client's evidence. You have not heard---

Court: No---no---no, I---

Low: the other evidence.

Court: *I'm just saying up to now, lah.* But---

Low: Yah.

Court: this is what we have heard.

Low: Yah.

Court: But i---*I'm just saying is---is it reasonable* for you to take the stand that just because there are no rules, no guidelines issued by the---his board of management appointed by him on the use of the school funds and because all these years since 1984 he's been doing what he likes, he can use the

Court: school fund to pay for these 3 items? Are you---are you saying that? Is that---

Low: Yes, Your Honour.

Court: your case?

Low: Yes, Your Honour. I---

Court: That is your case?

Low:	Yah, that is my case.
Court:	You think---
Low:	A---and---and I want---
Court:	that can withstand legal scrutiny?
Low:	Sorry?
Court:	Can that withstand legal scrutiny?
Low:	Legal scrutiny I think so, Your Honour.

[emphasis added]

31 It is clear that the trial judge was merely making the point that the defence at trial, pitched at the level that it was, appeared to be somewhat unrealistic. The trial judge's preliminary observations of the defence's weakness from the manner Mr Low was cross-examining the prosecution's witnesses at this stage of the trial should not be confused with him having made a conclusive predetermination on its merits. As the trial judge himself had stated in the above extract, he was cognisant that there was further evidence to be led by Mr Low on this point. What is of importance ultimately is that the trial judge certainly did not prevent Mr Low from continuing with his chosen line of cross-examination. I therefore fail to see where the denial of justice lay.

32 Accordingly, the appeal against conviction is dismissed.

Decision on sentence

33 I come now to the appeal and cross-appeal against sentence. The trial judge imposed an imprisonment term of five months. I am of the view that this is neither "manifestly inadequate" nor "manifestly excessive" in the circumstances.

Is the sentence manifestly inadequate?

34 In both the trial below and in this appeal, the Prosecution relied heavily on the case of *Goh Kah Heng (alias Shi Ming Yi) v Public Prosecutor and another matter* [2010] 4 SLR 258 ("*Shi Ming Yi*"). The Prosecution highlighted no less than 10 features which *Shi Ming Yi* had in common with the present case and therefore submitted that the starting point must be the sentence imposed in *Shi Ming Yi*, which was a term of six months' imprisonment.

35 The trial judge agreed with the Prosecution that *Shi Ming Yi* had many similarities with the present case [note: 21], but not with the proposed starting point of six months' imprisonment [note: 22]. The trial judge was careful to note that only four out of the six months' imprisonment term imposed in *Shi Ming Yi* was for the offence of criminal breach of trust ("CBT") under s 406 of the Penal Code, whereas the remaining two months were for the separate offence of providing false information to the Commissioner of Charities under the Charities Act (Cap 37, 2007 Rev Ed). As the trial judge was of the view that the "policy and punishment" underlying the Charities Act offence had no resonance with the s 408 CBT offence faced by the appellant, he reasoned that it would be more sound to adopt an imprisonment term of only four months as the "starting point" here, given that this was the sentence meted out for the analogous s 406 CBT offence in *Shi Ming Yi*.

36 In my judgment, the trial judge is correct to stress the importance of the "policy and

punishment" underlying a particular penal provision when assessing the value of sentencing precedents. However, I find it curious that he should then go on to adopt the sentence imposed for a s 406 offence (in *Shi Ming Yi*) as the appropriate benchmark for a s 408 offence (in the present case). This is because while both offences are essentially of the same nature, in that they involve the dishonest misappropriation of property by a person who occupies a position of trust, the maximum sentence of 15 years' imprisonment for a s 408 offence compared to the maximum sentence of 7 years' imprisonment for a s 406 offence clearly illustrates that the former is an aggravated form of the latter. In this connection, I note that Lee Seiu Kin J has described ss 406 to 409 of the Penal Code, which comprise the CBT group of offences, as revealing a "sliding scale of severity": see *Public Prosecutor v Tan Cheng Yew and another appeal* [2013] 1 SLR 1095 at [102]. Therefore, the trial judge should not have adopted the sentence imposed for an offence of CBT *simpliciter* in s 406 as the starting point for the more severe s 408 offence.

37 While I would have adopted a higher starting point than four months' imprisonment, I do not think that the final sentence of five months' imprisonment which the trial judge imposed is "manifestly inadequate" in the circumstances. In arriving at this view, I am inclined to give a fair amount of weight to the following factors.

38 First, I note that the appellant has dedicated much of his adult life to the School, having been its Principal for some 25 years. It is undisputed that, during his tenure, the School achieved much success as evidenced by the various awards conferred on it. While these must of course have been the product of a collective effort from its students and educators, it is certainly not the case that the appellant had played an insignificant role in raising the status of the School. So much is clear from the testimonials that speak glowingly of his contributions to the School and his attributes as a Principal, and from the many awards he has personally received in recognition of his dedicated service towards education. The Prosecution, however, relied on Tay Yong Kwang J's judgment in *Shi Ming Yi* and submitted that it would be wrong to place *any* weight at all on the appellant's contributions as they did not involve a risk of "life and limb" and were therefore not sufficiently "stellar".

39 I am not impressed by this argument. Nowhere in the judgment of *Shi Ming Yi* did Tay J espouse the extremely narrow proposition which the Prosecution had articulated in their submissions. While it was indeed the case that Reverend Shi Ming Yi had undertaken physical risks in his efforts to raise money and thereby received a discount in his sentence, there is nothing in Tay J's judgment which suggests that he was laying down an authoritative sentencing principle to govern all future CBT cases. In any event, I am of the opinion that it is unfair to characterise the appellant's contributions to society as being not sufficiently "stellar". That trivialises not only his contributions to the School and society in general, but also those of other educators at large. I have therefore taken the appellant's contributions into account for, as was eloquently said by Tay J in *Shi Ming Yi* (at [94]), "one wrongdoing does not have to be so overwhelming that the many good deeds are completely forgotten and interred with the bones".

40 Secondly, I also note that the appellant is 67 years of age now. While I am aware that there is no general rule *mandating* a discount in prison time for offenders of mature years (*Krishnan Chand v Public Prosecutor* [1995] 1 SLR(R) 737 ("*Krishnan Chand*") at [8]), I am also unaware of any principle which *disallows* me from taking it into account for the purpose of sentencing. I am therefore inclined to accord at least some degree of compassion to the appellant on account of his advanced age because, as has been said, "the rigour of imprisonment is, generally speaking, a harsh experience for elderly offenders": *Edward Alfred Braham v R* [1994] NTSC 60 at [21], *per* Angel J.

41 Thirdly, I also considered that the appellant has led a crime-free life up to now. His status as a first-time offender is certainly a factor that is generally accepted as having mitigating value: *Krishnan*

Chand at [14].

42 Ultimately, while I have explained why I find the five months' imprisonment term imposed by the trial judge to be somewhat lenient given the aggravated nature of this s 408 offence, all things considered, I do not find it to be "*manifestly* inadequate" such that appellate interference is warranted. I therefore dismiss the Prosecution's cross-appeal against sentence.

Is the sentence manifestly excessive?

43 Mr Low argued that a nominal custodial sentence would suffice in this case. In my judgment, that would be wholly inappropriate as it marginalises what should be at the centre of a sentencing judge's mind where CBT offences are concerned and in particular, those by servants – *deterrence* in both its specific and general aspects. To the particular offender, a short custodial sentence is no more than a slap on the wrist. Imposing a nominal custodial sentence in this case will also send out the wrong message that the courts do not take CBT offences by servants seriously. That is hardly desirable.

44 The trial judge found that (a) the appellant had misappropriated public funds from a public institution and applied it towards a private purpose; (b) the manner of his misappropriation was premeditated; and (c) the misappropriated sum of $67,679.05 was by no means a small amount. Having regard to these circumstances and the aggravated nature of the offence, I fail to see how a term of five months' imprisonment is "*manifestly* excessive". I therefore dismiss the appeal by the appellant against his sentence.

Conclusion

45 In light of the foregoing, I uphold the decision of the trial judge on both the appellant's conviction and his sentence.

[note: 1] See the Record of Proceedings ("ROP") vol 5, pp 261–266: SLA Certificate of Title reflecting that Champagnat House is built on land owned by "The Titular Superior of the Institute of the Marist Brothers of the Schools, Federation of Malaya".

[note: 2] See ROP vol 5, pp 255–257: SLA Certificate of Title reflecting that the School is built on land owned by "The Visitor in Hong Kong of the Institute of the Marist Brothers of the Schools".

[note: 3] See the Grounds of Decision ("GD") at [16], [17] and [22](x) (at ROP vol 2, pp 668–9 and 673).

[note: 4] See GD at [30] and [50](v) (at ROP vol 2, pp 680–681 and 701).

[note: 5] See GD at [17] (at ROP vol 2, p668–9).

[note: 6] See GD at [39] (at ROP vol 2, p 687).

[note: 7] See GD at [31]–[34] (at ROP vol 2, pp 681–685).

[note: 8] See GD at [67] under the sub-heading "Reimbursements" (at ROP vol 2, pp 732–735).

[note: 9] See GD at [65] (at ROP vol 2, p 713).

[note: 10] See GD at [24] (at ROP vol 2, p 678).

[note: 11] See GD at [24] (at ROP vol 2, p 678).

[note: 12] See ROP vol 2, pp 271–296.

[note: 13] See ROP vol 1, pp 223–226.

[note: 14] See ROP vol 1, pp 373–388.

[note: 15] See NE dated 4 December 2012 at line 22 of p 142 to line 31 of p 143 (at ROP vol 2, pp 271–272).

[note: 16] See NE dated 4 December 2012 at line 31 of p 144 to line 2 of p 145 (at ROP vol 2, pp 273–274).

[note: 17] See NE dated 4 December 2012 at lines 22–31 of p 157 (at ROP vol 2, p 286).

[note: 18] See NE dated 4 December 2012 at lines 1–5 of p 160 (at ROP vol 2, p 289).

[note: 19] See NE dated 30 October 2012 at line 18 of p 55 to line 7 of p 58 (at ROP vol 1, pp 222–224) and at line 21 of p 69 to line 3 of p 71 (at ROP vol 1, pp 236–8).

[note: 20] See NE dated 30 October 2012 at line 21 of p 211 to line 13 of p 213 (at ROP vol 1, pp 378–380).

[note: 21] See GD at [83](i)(e) (at ROP vol 2, p 775).

[note: 22] See GD at [85] (at ROP vol 2, p 785).