IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 02

Criminal Reference No 2 of 2018

Between

Ho Man Yuk

… *Applicant*

And

Public Prosecutor

… *Respondent*

GROUNDS OF DECISION

[Criminal law] —[Offences] — [Property] — [Dishonest misappropriation of property]
[Statutory interpretation] — [Construction of statute] — [Rectifying construction]
[Statutory interpretation] — [Construction of statute] — [Strict construction rule]

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Ho Man Yuk
v
Public Prosecutor

[2019] SGCA 02

Court of Appeal — Criminal Reference No 2 of 2018
Sundaresh Menon CJ, Judith Prakash JA and Tay Yong Kwang JA
14 August 2018

7 January 2019

Judith Prakash JA (delivering the grounds of decision of the court):

Introduction

1 The striking feature about this criminal reference was that it was initiated by a convicted person who candidly admitted that she was dishonest when she first came into possession of certain monies which she was subsequently charged with dishonestly misappropriating. Indeed, it was her contention that she ought to have been acquitted of the charge precisely because she was dishonest at such time of initial possession.

2 The person in question, Ho Man Yuk ("the Applicant"), was convicted in the State Courts on one count of abetment by conspiracy to dishonestly misappropriate monies under s 403 read with s 109 of the Penal Code (Cap 224, 2008 Rev Ed) ("the Code"). On the premise of this conviction, she was also convicted on several counts under the Corruption, Drug Trafficking and other

Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("CDSA") for money laundering in respect of the monies which had been misappropriated. On her appeal to the High Court, the convictions were upheld. She thereafter applied for leave to refer certain questions of law to this Court. At the conclusion of the leave hearing, she was given leave to refer the following question for determination:

> Whether a conviction for dishonest misappropriation under s 403 of the [Code] can be made out only if the accused person had an innocent or neutral state of mind when he first came into possession of the property in question.

We will refer to this question as the "innocent possession question" or the "question referred" as the context may require and to the offence itself as "dishonest misappropriation".

3 At the leave hearing, we also directed the parties to address five ancillary questions concerning the consequences that might ensue if the question referred was answered in the affirmative. These consequences included the possibility of alternative charges based on the same facts and an exploration of the Court's powers and conduct in that regard.

4 In this reference, the Applicant argued that the question referred should be answered in the affirmative. According to her, an essential element of the offence of dishonest misappropriation was that the misappropriating person had to have come into possession of the relevant property in an innocent or neutral manner. In her case, however, she had known from the outset that she was not entitled to receive the monies. She was therefore dishonest, rather than innocent or neutral, at the time of initial possession. Accordingly, the convictions under the Code and the CDSA should be set aside. The Prosecution took the opposing

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position and argued that the question referred should be answered in the negative.

5 At the end of the hearing of this reference on 14 August 2018, we answered the question referred in the negative. In our judgment, it is *not* necessary, in order to make out a conviction under s 403 of the Code, to establish that the accused person had an innocent or neutral state of mind when he or she first came into possession of the property in question. Accordingly, we affirmed the convictions. We now provide our full grounds of decision.

Facts

6 The Applicant is a Chinese national. She committed the offences with two co-offenders:

> (a) Shaikh Farid, a male Indian national, who was convicted of one similar charge under s 403 of the Code and 26 counts of money laundering under the CDSA; and
>
> (b) Shaikh Shabana Bi, a female Indian national, who was convicted of one similar charge under s 403 of the Code and three counts of money laundering under s 47(1)(*b*) of the CDSA.

7 We will refer to the two co-offenders as the "Co-Offenders", and the three offenders collectively as "the Offenders".

8 The Offenders were members of a rewards programme at the Marina Bay Sands ("MBS") casino. As members, they were eligible to participate in MBS' marketing promotions. One such promotion was the "Sands Bonus Dollars Rewards" promotion, under which eligible members were entitled to a

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limited number of Sands Bonus Dollars ("SBDs") that could be redeemed for an equivalent number of Free Play Credits ("FPCs") at electronic kiosks situated in the casino. The FPCs had no monetary value in themselves, but could be used for gambling at the gaming machines located in the premises. For this purpose, each EPC was credited with a value of $1.

9 On 13 April 2014, the Applicant swiped her membership card at a kiosk in the casino and selected the "Sands Bonus Dollars Rewards" icon. The kiosk screen showed "You are eligible for $100 of Free Play Offer! Redeem offer now?" The Applicant selected "Yes, Redeem Now" and entered her personal identification number. An error message appeared which showed: "Sorry, service seems to be unavailable. Please try after sometime". She exited the screen showing the error message, and tried to swipe her card several more times, but the same error message continued to appear. Thereafter, she left the casino.

10 The next day, 14 April 2014, the Applicant returned to the casino. She swiped her card at a kiosk and discovered that $800 worth of FPCs had been credited into her account. Apparently, on the previous day, even though an error message had showed each time the Applicant tried to redeem her FPCs, 100 FPCs were in fact credited to her account on every such occasion. Using these FPCs, the Applicant gambled at electronic roulette machines in the MBS casino. At the end of each game, she was given a paper slip stating her winnings which she then encashed at "Ticket In, Ticket Out" ("TITO") machines.

11 Later that same day, the Applicant called the Co-Offenders and asked them to join her at the casino. On their arrival, the Applicant told them about what she had done that afternoon. The Offenders then repeated numerous cycles

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of swiping, gambling, and encashing their winnings using the Applicant's membership card.

12 In total, the Applicant's membership card was swiped 10,293 times during the seven-day period from 14 to 20 April 2014 leading to 1,029,300 FPCs being credited to the card. These FPCs were utilised for games at various electronic roulette machines at the casino, netting the Offenders winnings which they were able to encash at the TITO machines. In total, the Offenders obtained $875,133.56 ("the Monies") from the TITO machines.

13 On 20 April 2014, the Applicant was detained by the police. She managed to message the Co-Offenders that the "police [were] coming". The Co-Offenders then, on their own accord, took $500,000 of the Monies to the casino at Resorts World Sentosa ("RWS") where they converted the sum into casino gambling chips and expended them on table games. The winnings from these plays were then transferred to a third party. The Co-Offenders were subsequently arrested at RWS.

14 Based on evidence given in the trial, the precise number of FPCs that a member was eligible to redeem depended on various factors such as the frequency of his casino visits and his value to the MBS casino, and it was to be solely determined by MBS. The Applicant was supposed to be given only 100 FPCs. The Applicant obtained more FPCs than were due because of a system error at the kiosks which went undetected by MBS until 20 April 2014.

15 Arising from the facts above, one charge for abetment by conspiracy to commit dishonest misappropriation, under s 403 read with s 109 of the Code,

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was brought against each of the Offenders. The charges were worded similarly as follows:

> … you, sometime in April 2014, at [MBS] Casino located at No. 10 Bayfront Avenue, Singapore, did abet by engaging in a conspiracy with [the Co-Offenders] to commit dishonest misappropriation of property, and in pursuance of the conspiracy and in order to the doing of that thing, an act took place, to wit, between 14 April 2014 and 20 April 2014, you, together with [the Co-Offenders] did dishonestly misappropriate cash from [MBS] Casino amounting to S$875,133.56 using [FPCs] which [the Applicant] was not entitled to obtain, and you have thereby committed an offence under Section 403 read with Section 109 of the [Code].

16 Furthermore, as the Offenders had remitted part of the Monies overseas, transferred some to third parties, and converted some into gambling chips and credits at MBS and RWS, several charges of conversion of property representing the benefits of criminal conduct under s 47(1)(*b*) of the CDSA, punishable under s 47(6)(*a*) of the same Act, were also brought against each of them. These charges broadly read as follows:

> … you, on or about 14 April 2014, in Singapore, did convert property, namely cash sum of S$3,500, which property in whole directly represented your benefits from criminal conduct, namely, Dishonest Misappropriation of Property under Section 403 read with Section 109 of the [Code] committed between 14 and 20 April 2014, in Singapore, to wit, by converting the aforesaid property into gambling chips at the [MBS] Casino, Singapore, and you have thereby committed an offence under Section 47(1)(*b*) of the [CDSA], and punishable under s 47(6)(*a*) of the [CDSA].

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17 In summary, the Applicant was convicted on a total of 21 charges and sentenced to a 21-month aggregate imprisonment term, the details of which may be tabulated as follows:

<table>
<tr><th>Charges</th><th>Counts</th><th>Abbreviation</th><th>Sentence</th></tr>
<tr><td>Abetment by conspiracy to dishonestly misappropriate the Monies under s 403 read with s 109 of the Code</td><td>1</td><td>“the DM Charge”</td><td>13 months</td></tr>
<tr><td>Money laundering under s 47(1)(b) of the CDSA</td><td>16</td><td rowspan="3">“the CDSA Charges”</td><td rowspan="3">Ranging from two weeks to eight months depending on the amount stated in the relevant charge.</td></tr>
<tr><td>Money laundering with common intention under s 47(1)(b) of the CDSA read with s 34 of the Code</td><td>3</td></tr>
<tr><td>Attempted money laundering with common intention under s 47(1)(b) of the CDSA read with ss 511 and 34 of the Code</td><td>1</td></tr>
<tr><td>Global sentence for 21 charges</td><td colspan="3">21 months’ imprisonment,
(the sentences for the DM Charge and one of the CDSA Charges to run consecutively)</td></tr>
</table>

The proceedings

The trial

18 The Offenders were jointly tried, convicted, and sentenced in the State Courts by the learned District Judge, whose decision was reported in *Public Prosecutor v Ho Mun Yuk and others* [2017] SGDC 23 (“SC GD”). In regard to the DM Charges, the District Judge relied on *Wong Seng Kwan v Public*

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Prosecutor [2012] 3 SLR 12 ("*Wong Seng Kwan*") at [19] for the proposition that the three elements of a dishonest misappropriation charge under s 403 of the Code are:

(a) the movable property must belong to some person other than the accused person;

(b) there must be an act of misappropriation or conversion to the accused's own use; and

(c) the accused person must possess a dishonest intention.

19 On the facts, the elements of dishonest misappropriation were found to have been made out. The subject matter of the charges was the Monies and not the disputed FPCs (SC GD at [45]). Since the Applicant was not entitled to more than 100 FPCs, the Offenders had no entitlement to the Monies which belonged to MBS at all times (SC GD at [49]). Through "a whole series of detailed and calculated steps, an astronomical number of FPCs were downloaded into [the Applicant's] membership card" which the Offenders then encashed (SC GD at [52]). Each of the Offenders possessed the requisite dishonest intention as each had knowingly exploited a system error and used the electronic roulette machines to convert FPCs to which they were not entitled into "winnings" which they could encash (SC GD at [54]). Further, the evidence also showed that the Offenders had committed dishonest misappropriation pursuant to a plan or agreement between them (SC GD at [68]). Thus, the District Judge found "abundant evidence … which established the guilt of the [Offenders] in a conspiracy to commit [dishonest] misappropriation" (SC GD at [71]).

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20 The CDSA Charges were also found to have been made out, with the DM Charge forming the predicate charge since one requirement under s 47(1)(*b*) of the CDSA is that the property in question must "directly or indirectly, represent[] his benefits from criminal conduct" (SC GD at [74]).

The Magistrate's Appeal

21 Each of the Offenders appealed against both conviction and sentence in respect of all the charges. The matter was heard by the learned High Court judge ("the Judge"). On 29 September 2017, the Judge dismissed the appeals in their entirety. His judgment is published as *Shaikh Farid v Public Prosecutor and other appeals* [2017] 5 SLR 1081 ("HC GD").

22 In relation to the DM Charge, the Defence raised several arguments, one of which was that innocent possession is a requirement for a conviction under s 403 of the Code. The Defence argued that even if the District Judge's findings of fact were accepted, the DM Charge could not be made out because the Monies did not come into the Offenders' possession innocently or in a neutral manner – the Applicant had swiped her membership card at the redemption kiosks at MBS *with the knowledge* that there was a system error.

23 The Judge considered the argument on the merits even though it was being raised for the first time on appeal, and held that there was *no* rule, in order to fall within the scope of s 403 of the Code, that a dishonest intention must come into existence only *after* (but not before or at the time) the accused came into possession of the property in question. For this and other reasons, the Judge affirmed the convictions on the DM and the CDSA Charges, as well as the sentences imposed by the District Judge (see HC GD at [47]–[53]).

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The criminal motions

24 The Offenders applied to this Court by three separate criminal motions for leave to refer a total of 16 purported questions of law of public interest for determination. At the initial hearing on 6 March 2018, the Co-Offenders sought and obtained leave to withdraw their applications. After some consideration the Applicant decided to proceed with her criminal motion. Subsequently, we dismissed the Applicant's application except in so far as it related to the issue of innocent possession under s 403 of the Code. We also directed the parties to address the Court on five ancillary questions which related to consequential matters that would follow if the Court returned an affirmative answer to the question referred.

25 On 24 May 2018, the Applicant filed this application, seeking our determination of the question referred and the five ancillary questions. At the hearing on 14 August 2018, we were much assisted by the submissions of counsel for the Applicant and the Public Prosecutor. At the end of the hearing, we gave a brief oral judgment in the following terms:

> This is our decision. Insofar as the main question before us is concerned, we answer that in the negative. In other words, to make out a conviction under s 403 of the [Code], it is *not* necessary to establish that the accused person had an innocent or neutral state of mind when he or she first came into possession of the property in question. It is clear to us from the drafting history that the drafters set out to cover a particular category of property offences. But even if that category was not specifically the felonious taking of the property in the possession of another, which would typically be covered by the offence of theft, the drafters chose to frame the offence in general terms. Those general terms simply did not require proof that the offender did not have a guilty mind at the time the property was taken into possession. As we put it to [counsel for the Applicant] in the course of the arguments, in our judgment, the real point of s 403 of the [Code] is to make it an offence *even if* the offender took the property innocently and only

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> subsequently formed a guilty intention. But this simply does not mean that the offence is made out *only if* the property was taken innocently. This view is also reflected in the Sri Lankan case of *Walgamage v The Attorney General* [2000] 3 Sri LR 1 which we find persuasive, and it is more in keeping with the plain language of s 403 of the [Code].
>
> [emphasis in original]

The analysis

The proper interpretive approach

26 We were faced with the question of the proper interpretation of s 403 of the Code. Before we go into the discussion it might be helpful if we set out how we approached this issue. We followed the principles laid down in the minority judgment in *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 at [59] and affirmed by a 5-judge coram of this Court in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [37] which guide the court in its task of giving a purposive interpretation to legislation as required by s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("IA"). These principles direct the court to:

> (a) First, ascertain the possible interpretations of the provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole.
>
> (b) Secondly, ascertain the legislative purpose or object of the statute in which the provision is contained.
>
> (c) Thirdly, compare the possible interpretations of the text against the purposes or objects of the statute.

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27 When applying these principles, we considered the legislative history and intent of s 403 as well as the cases which interpreted the section. We also had regard to both academic and case authority from India and Sri Lanka since their penal codes contain similar provisions on dishonest misappropriation.

28 As a reference point for the discussion, we set out here the full text of s 403 and its illustrations:

> **Dishonest misappropriation of property**
>
> **403.** Whoever dishonestly misappropriates or converts to his own use movable property, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.
>
> *Illustrations*
>
> (*a*) *A* takes property belonging to *Z* out of *Z*'s possession in good faith believing, at the time when he takes it, that the property belongs to himself. *A* is not guilty of theft; but if *A*, after discovering his mistake, dishonesty appropriates the property to his own use, he is guilty of an offence under this section.
>
> (*b*) *A*, being on friendly terms with *Z*, goes into Z's house in *Z*'s absence and takes away a book without *Z*'s express consent. Here, if *A* was under the impression that he had *Z*'s implied consent to take the book for the purpose of reading it, *A* has not committed theft. But if *A* afterwards sells the book for his own benefit, he is guilty of an offence under this section.
>
> (*c*) *A* and *B* being joint owners of a horse, *A* takes the horse out of *B*'s possession, intending to use it. Here, as *A* has a right to use the horse, he does not dishonestly misappropriate it. But if *A* sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.
>
> *Explanation 1.* — A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.
>
> *Illustration*
>
> *A* finds a Government promissory note belonging to *Z*, bearing a blank endorsement. *A*, knowing that the note belongs to *Z*, pledges it with a banker as a security for a loan, intending at a

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future time to restore it to *Z. A* has committed an offence under this section.

Explanation 2. — A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means, or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

Illustrations

(*a*) *A* finds a dollar on the high road, not knowing to whom the dollar belongs. A picks up the dollar. Here *A* has not committed the offence defined in this section.

(*b*) *A* finds a letter on the high road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(*c*) *A* finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person who has drawn the cheque appears. *A* knows that this person can direct him to the person in whose favour the cheque was drawn. *A* appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(*d*) *A* sees *Z* drop his purse with money in it. *A* picks up the purse with the intention of restoring it to *Z*, but afterwards appropriates it to his own use. *A* has committed an offence under this section.

(*e*) *A* finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to *Z*, and appropriates it to his own use. A is guilty of an offence under this section.

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(*f*) *A* finds a valuable ring, not knowing to whom it belongs. *A* sells it immediately without attempting to discover the owner. *A* is guilty of an offence under this section.

Summary of the parties' submissions

29 The Applicant, in contending that the court must read a requirement of innocent possession into s 403 such that dishonest misappropriation could not be established unless the initial receipt of the subject property was with an innocent or neutral state of mind, relied on the following arguments and authorities:

(a) illustrations to s 403 which show the clear intention of the drafters of the Code to require initial innocent possession;

(b) certain observations of Steven Chong J (as he then was) in the High Court in *Wong Seng Kwan*;

(c) that each offence under Chapter XVII of the Code is "distinct and it is readily clear when the dishonest intention must be formed";

(d) two Indian cases that support the existence of the innocent possession requirement; and

(e) the principles that any lacuna in the law should be filled by Parliament and that any ambiguity in the interpretation of s 403 as a penal provision should be resolved in favour of the Applicant.

30 The Prosecution based its submission that the question referred should be answered in the negative on the argument that dishonest misappropriation was the "most general of the property offences" and was not "concerned with

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the circumstances under which the offender came into possession of the property". It relied on the following authorities and arguments:

(a) a textual reading of s 403;

(b) that the explanations and illustrations of s 403 are *not* exhaustive of the scope of the provision; indeed, Explanation 2 to s 403 "implicitly suggests that initial innocent possession is not a necessary ingredient [of dishonest misappropriation]";

(c) that reading s 403 in the context of s 404 of the Code makes clear that there is no requirement for innocent possession;

(d) that there is *no* difficulty with some degree of overlap between property offences in the Code;

(e) the legislative history of s 403 of the Code; and

(f) case law from India and Sri Lanka that has considered the innocent possession question.

Explanation of our decision

The text of the provision

31 We started by examining the plain text of s 403. The material part of this section is the phrase "[w]hoever dishonestly misappropriates or converts to his own use movable property …".

32 The Prosecution made two main submissions in this regard. First, it emphasised that there is no express mention in s 403 of any requirement as to the accused person's state of mind at the time he first obtains possession of the

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subject property. Therefore, imposing a requirement that the initial possession be innocent would be tantamount to adding a further ingredient to the offence which is not permissible. Second, it would also give rise to an absurdity in so far as it would make a criminal of one who is only subsequently dishonest, but would let off one who had been dishonest from the outset.

33 The Prosecution's arguments needed further exploration. On the first point, it is correct that a plain reading of s 403 suggests that there is *no* requirement that the accused person must have had an innocent or neutral state of mind at the time the subject property first came into his possession. Indeed, there is also *no* requirement that the accused person must have been dishonest at that specific time. Although dishonesty is a requirement for conviction under the section, by the concurrence principle between *actus reus* and *mens rea*, the focus is only on whether the accused is dishonest *at the time he misappropriates or converts* the subject property to his own use, and not at the time that he first comes into possession of it. On a plain reading of s 403, therefore, the accused person's state of mind at the time of initial possession – whether innocent, neutral, or dishonest – is irrelevant to a conviction under that provision.

34 There is, however, one possible argument that a plain reading of s 403 is not sufficiently probative of its ingredients because the text of the provision is not indicative of the comprehensive scope of the provision. This argument is derived from the analysis in *Wong Seng Kwan*.

35 In that case, the accused had picked up a wallet from the ground and kept the cash in it for himself before disposing of the wallet and the rest of its contents. The question was whether the accused was guilty of dishonest misappropriation under s 403 of the Code. Chong J held that in order to establish

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the offence under s 403, the Prosecution had to prove three elements beyond a reasonable doubt (at [19]):

> (a) the movable property must belong to some person other than the accused person;
>
> (b) there must be an act of misappropriation or conversion to the accused's own use; and
>
> (c) the accused person must possess a dishonest intention.

36 Applying the elements to the facts, Chong J found the offender liable for dishonest misappropriation under s 403. If Chong J's formulation is correct, then it is clear that s 403 cannot be construed strictly by its plain text because the first requirement identified by Chong J – that the movable property must belong to some person other than the accused person – is itself also not a requirement that appears on the face of s 403.

37 It is, however, possible to question whether this "not owned by the accused person" requirement is indeed a separate requirement for a conviction under s 403. In our view, this requirement may instead be conceived of as being encompassed within the third requirement, *ie*, that the accused person possessed the requisite dishonest intention. This is because in certain, admittedly limited, circumstances an owner of property may dishonestly misappropriate it. For instance, if person A owns a bicycle and rents it to person B for a specified period of time, and before the expiry of this period, A sees the bicycle parked by the side of the road and takes it away and sells it without the consent of B, thus depriving B of its use for the entire period of hire, it would appear that A could well be liable under s 403 even though he may be the owner of the bicycle.

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There is also Illustration (*c*) to the main text of s 403 which makes it clear that in certain circumstances a joint owner of property may be guilty of dishonest misappropriation of property which he co-owns. In both the situations described, the misappropriating party, albeit the owner, was not entitled to the immediate and exclusive possession of the property. Indeed, in misappropriating the property, he may have caused wrongful loss to the person so entitled to it. Thus, the first requirement may be rephrased as "the accused person was not entitled to immediate and exclusive possession of the movable property in question", and once it is so rephrased it is apparent that this is but one aspect of the inquiry into dishonesty, rather than a distinct emphasis on or a separate requirement of ownership.

38 In our judgment, the essential elements of an offence under s 403 of the Code, therefore, are:

> (a) that the thing in question constitutes movable property;
>
> (b) that the accused person has misappropriated or converted such property to his own use; and
>
> (c) that the accused person, not being a person entitled to immediate and exclusive possession of such property, possessed a dishonest intent at the time of such misappropriation or conversion.

All three elements appear on the face of the section. Once they are met, there will be an offence of dishonest misappropriation notwithstanding the ownership of the movable property concerned, as illustrated by the examples we gave earlier.

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39 As far as the Prosecution's second argument was concerned – that of absurdity if an innocent possession requirement was in fact read into s 403 – we found this more difficult to accept in the form that it was presented to us. The Prosecution's point was that it cannot rationally be held that a person who is initially innocent but subsequently becomes dishonest is a criminal, but one who had all along been dishonest escapes criminal liability. The strength of this submission, however, was premised on the false assumption that dishonest misappropriation under s 403 is the only relevant property offence and that the other property offences do not even enter the picture. The interplay of property offences is something that we deal with below. We also elaborate below on a slightly different form of absurdity that may arise should the innocent possession requirement be adopted in s 403.

40 In our view, a plain reading of s 403 assisted the Prosecution. As we mentioned above at [26], however, the proper interpretation of a provision involves a consideration of more than just its plain text, and it is to these other considerations that we now turn.

Context of the provision

41 As s 9A(2) of the IA makes clear, the context of the provision under consideration in the written law as a whole must also be taken into account. In this regard, three factors are relevant:

(a) the explanations and illustrations to s 403;

(b) section 404 of the Code; and

(c) the interplay of and overlap between various property offences set out in the Code.

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(1) Explanations and illustrations

42 The explanations and illustrations to s 403 are extensive, and they have been reproduced above in full (at [28]).

43 The Applicant argued that the illustrations to s 403 clearly show that the draftsmen "envisaged a situation where an accused person comes into possession of the property innocently but subsequently formed a dishonest intention to misappropriate the property". Her counsel submitted that these illustrations are useful notwithstanding s 7A of the IA. In fact, in *Basudeb Putra v Kanai Lul Haldar* (1949) Cri LJ 382 ("*Basudeb*"), the Calcutta High Court opined (at [4]) that the illustrations to s 403 are "rather statements of principle than mere illustrations".

44 The Prosecution conceded that the illustrations to s 403 are compatible with an innocent possession requirement, but argued that pursuant to s 7A of the IA, they "should not be seen as exhaustive in respect of the scope of s 403". In fact, as the Judge had reasoned in the HC GD at [26]–[28], Explanation 2 to s 403 and Illustration (d) thereto "implicitly suggest[]" that innocent possession is *not* an element of dishonest misappropriation.

45 We agreed with the Prosecution that the illustrations to s 403 of the Code may not show the full scope of the provision, but we disagreed that Explanation 2 (or Illustration (d) to Explanation 2) has any value in disproving or supporting the innocent possession requirement.

46 Section 7A of the IA states, without providing for any exception, that illustrations are not exhaustive and cannot trump the provision itself:

Examples and illustrations

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> 7A. Where an Act includes an example or illustration of the operation of a provision —
>
> (*a*) the example or illustration shall not be taken to be exhaustive; and
>
> (*b*) if the example or illustration is inconsistent with the provision, the provision prevails.

47 Section 7A of the IA clearly applies to the illustrations to s 403. In particular, reliance solely on the illustrations to read an innocent possession requirement into s 403 would contravene s 7A(*a*) of the IA which *mandates* that illustrations *not* be taken as exhaustive of the scope of a provision. Therefore, little if any weight can be given to the argument that the illustrations to s 403 are uniformly consistent with the existence of a requirement for innocent possession, even if the argument is taken to be correct.

48 *Basudeb* did not assist the Applicant in arguing the contrary. First, as foreign judicial authority, it cannot displace the operation of s 7A of the IA. Second, the observation in *Basudeb* that the illustrations to s 403 are "statements of principle" rather than mere illustrations was *obiter*. In *Basudeb*, the accused borrowed gold ornaments from the complainant for his wedding but thereafter refused to return them. The accused argued that he should be convicted and sentenced under s 403 of the Indian Penal Code for dishonest misappropriation, rather than for criminal breach of trust under s 405. The Calcutta High Court disagreed and opined as follows (at [4]):

> On the broad question raised, namely, the difference between Section 403 and 405, [of the Indian] Penal Code the answer is clear. *The illustrations to Section 403, which are rather statements of principle than mere illustrations, clearly show that the essence of criminal misappropriation of property is that the property comes into the possession of the accused in some neutral manner*, whereas the illustrations to section 405 show equally clearly that the property comes into the possession of the accused either by an express entrus[t]ment or by some

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> process placing the accused in a position of trust … On the facts of the p[re]sent case, which as I have said are not, open to question at this stage, it is quite clear that the ornaments were handed over to the petitioner by the beneficial owner in the confidence that they would be returned to the beneficial owner in due time after having been used for the purpose for which they were handed over. If this is not an entrustment, it is impossible to conceive what can be an entrustment.
>
> [emphasis added]

49 Therefore, the issue before the court was whether criminal breach of trust was made out on the facts, and the court decided in the affirmative. This conclusion was not affected by the characterisation of the illustrations to s 403 of the Code, which the court did not need to opine on, and which was in any event an observation without apparent substantiation. We would point out, additionally, that the observation does not appear to have been necessary as the fact that the accused might have committed dishonest misappropriation under s 403 would not mean that he had not *also* committed criminal breach of trust under s 405 if he misappropriated property that had been entrusted to him. We deal with overlapping of property offences below.

50 However, contrary to the Prosecution's submission, we see no probative value in Explanation 2 to s 403 of the Code, the relevant part of which reads as follows:

> **Explanation 2**.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it.
>
> …

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51 The Prosecution asserted that the second part of Explanation 2 means that "*when a person finds property not in possession of any other person*, if that person knew the owner or had means of discovering the owner, but decided to appropriate the property to his own use nonetheless, he would be guilty of the offence under s 403 of the [Code]" [emphasis added; original emphasis omitted]. This proposition does not bear scrutiny. The innocent possession question is, in essence, a question about the time at which a dishonest intent must be formed by the accused. The second part of Explanation 2 states "… but he is guilty of the offence above defined, *if he appropriates it to his own use*, *when* he knows or has the means of discovering the owner …" [emphasis added]. This wording was present in Explanation 2 from its enactment. The dishonesty that the second part of Explanation 2 actually envisages is thus one that is present *at the time of appropriation*, and not at the time of initial taking, which the Prosecution's inaccurate rephrasing of Explanation 2 might at first glance suggest.

52 On balance, therefore, the illustrations and explanations to s 403 neither support nor deny the existence of the requirement for initial innocent possession under s 403. In our view, the fact that many of them deal with situations where the movable property has been found (presumably, with the finder having an innocent or neutral state of mind at the time of taking the property into possession) was rather, as we discuss below, a response to the state of English law at the time s 403 was first formulated.

(2) Section 404 of the Code

53 As another contextual point, the Prosecution submitted that s 404 of the Code makes clear that there is no requirement for initial innocent possession

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under s 403 of the Code. The Applicant did not address this issue in her written submissions.

54 Section 404 of the Code provides as follows:

> **Dishonest misappropriation of property possessed by a deceased person at the time of his death**
>
> **404.** Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment for a term which may extend to 3 years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to 7 years.
>
> *Illustration*
>
> *Z* dies in possession of furniture and money. His servant *A*, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. *A* has committed the offence defined in this section.

55 The Prosecution argued that both the text and illustration of s 404 of the Code suggest that there is *no* requirement of initial innocent possession, because:

> (a) it is "possible" for property to be misappropriated under s 404 of the Code where the accused has a dishonest state of mind from the outset; and
>
> (b) it is "entirely plausible" under the Illustration to s 404 that the servant could have had a dishonest intention *before* the misappropriation or conversion.

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56 In our view, s 404 is neutral on the requirement of initial innocent possession. The mental element of s 404, that is, "… knowing that …", could be construed as having reference to the preceding phrase, "Whoever dishonestly misappropriates or converts to his own use property …", such that the requisite dishonesty, again, is to be assessed at the time of misappropriation or conversion rather than the time of taking possession of the property in question since such taking could be with an innocent intention, for example, to safe-keep the property until the person entitled to possession comes to claim it. In that sense, s 404 does not positively support the existence of an innocent possession requirement. Nor does it, as the Prosecution appeared to argue, make clear that there is no requirement of initial innocent possession under s 403 of the Code.

(3) Interplay and overlap between property offences

57 The third contextual point related to the interplay and overlap between the various property offences legislated under the Code. A brief tabulation of the most salient property offences is provided as follows:

Name of offence	Defining provision in the Penal Code	Maximum imprisonment term
Theft	**378**. Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.	3 years (s 379)
Dishonest misappropriation of property	**403**. Whoever dishonestly misappropriates or converts to his own use movable property, shall be punished with imprisonment for a term which may extend to 2 years,	2 years (s 403)

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	or with fine, or with both.	
Criminal breach of trust (*simpliciter*)	**405**. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person to do so, commits "criminal breach of trust".	7 years (s 406)
Cheating (*simpliciter*)	**415**. Whoever, by deceiving any person, whether or not such deception was the sole or main inducement, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property, is said to "cheat".	3 years (s 417)

58 The Applicant asserted that "[e]ach offence under Chapter XVII of the [Code] is distinct …". Thus, an innocent possession requirement must be read into s 403 of the Code for dishonest misappropriation, in order to distinguish it

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from theft under s 378 of the Code under which the dishonest intent must exist at the time of initial possession.

59 The Prosecution countered that there is no issue with overlapping property offences under the Code. Further, there is no canon of interpretation that penal provisions should be construed such that no overlap will exist.

60 We agreed with the Prosecution in this regard. The Applicant provided no authority, whether by way of legislation or case law, for her assertion to the contrary. Nor did she give any good reason why an overlap was not permitted. Thus, a requirement of innocent possession could not be justified merely on the basis that it distinguishes between theft and dishonest misappropriation.

61 Indeed, we went further than the Prosecution's *defensive* argument and were of the view that the interplay between the property offences *positively* suggests that it cannot be the proper construction of the provision. Indeed, it could not have been the legislative intent underlying the provision, that innocent possession be an implicit requirement of s 403 of the Code. We say so for three reasons.

62 First, making innocent possession a requirement would be unusual in that it would require the offender to *not* possess a particular mental state at a particular point in time. As far as we could ascertain, there is no other property offence, or indeed any offence at all, which imposes a similar "negative" or exonerative *mens rea* requirement. In that light, not only is an innocent possession requirement unusual, it invites the question – why would a presumptively exonerative fact be made an element of a criminal (or property) offence? Furthermore, the golden thread across all property offences in the Code

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is the need for dishonesty, in the sense that the element of dishonesty is common to all property offences (*Wong Seng Kwan* at [15]). Consequently, the statutory provisions uniformly focus on defining the circumstances and time at which dishonesty must exist. No other provision provides for the putative offender's mental state at any other point in time or examines any other mental state apart from dishonesty.

63 Therefore, the innocent possession requirement is one that does not sit well with the context of s 403 as one species of the genus of property offences in the Code. While it is not impossible that innocent possession is uniquely required for s 403 but not for other property offences such as criminal breach of trust, it is more natural to construe the property offences consistently and to "begin by presuming that the statute is a coherent whole" (*Tan Cheng Bock* at [40], original emphasis omitted).

64 Secondly, it was not clear what the precise contours of the definition of "innocent possession" were. The Applicant perhaps assumed that the term is self-evident and means an innocent or neutral state of mind at the time of the accused came into possession of the property in question. But what is "neutral" and how is that different from "innocent"? More importantly, what is "innocence", and does it mean a "freedom from guile or cunning" or a "lack in knowledge" in the conventional sense of the term, or does it simply mean "not dishonest" which is in turn defined in s 24 of the Code? In that context, how do "innocence" and "dishonesty" interact on the spectrum of mental states that an accused can possess?

65 This question of the interaction between "innocence" and "dishonesty" is important because, depending on the answer, there might be a lacuna in the

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law on property offences arising from the imposition of the requirement for innocent possession under s 403. The Applicant's assumption is that an innocent possession requirement would neatly distinguish theft and dishonest misappropriation – if dishonesty is present at the time of initial possession, theft is made out; if the offender was initially "innocent" but subsequently dishonest, dishonest misappropriation is made out. But, unless "innocence" is defined as simply "not dishonest", there would be a lacuna in the sense that an offender who is initially *neither "innocent" nor "dishonest"* will escape criminal liability for *both* theft and dishonest misappropriation even if he becomes dishonest subsequently and does in fact misappropriate the property.

66 To illustrate, consider an offender who picks up a wallet, not intending then to keep it for his own use, but knowing it to be likely that he would eventually keep it for his own use. He subsequently crystallises his dishonest intention and converts the wallet to his own use. In this hypothetical, the offender would not have committed theft as he did not have an initial intention to keep the wallet and thus was not "dishonest" (within the meaning of s 24 of the Code) at the time of initial possession. But nor was he initially "innocent" in the conventional sense of the term, since he knew it to be likely that he would subsequently convert the wallet to his own use. Thus, he would also not be liable for dishonest misappropriation (assuming innocent possession is required).

67 This demonstrates that if "innocent possession" is made a requirement of s 403, then so long as there is a situation where one may be said to be neither "innocent" nor "dishonest", there would be a possibility that neither theft nor dishonest misappropriation is made out, even though the putative offender clearly misappropriated the property and was dishonest at the time of misappropriation (although not at the time of initial possession).

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68 This brings us to our third point – that even if "innocence" is defined as "not dishonest" which assists the alignment of theft and dishonest misappropriation, the rest of the definition of the two provisions does not appear to be complementary and might nevertheless give rise to a lacuna in the law if initial innocent possession is made a requirement of s 403.

69 Theft is defined under s 378 of the Code as follows:

> **378.** Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

70 Dishonest misappropriation is defined as follows under s 403:

> **403.** Whoever dishonestly misappropriates or converts to his own use movable property, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

71 Apart from the possible requirement of an initial innocence, the other difference between the two provisions appears to be that theft requires the subject property to be *taken out of the possession* of a person. Therefore, if a person picks up a wallet that has been lying on the ground for some time, it would probably not qualify as "theft" even if that person had a dishonest intention from the outset. Nor would that be dishonest misappropriation since the person was not "initially innocent".

72 The foregoing illustrates a clear lacuna and absurdity in the law if the requirement of innocent possession is upheld in relation to s 403:

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(a) An "innocent finder" who subsequently dishonestly misappropriates the property can be held liable for dishonest misappropriation, as was found to be the case in *Wong Seng Kwan*.

(b) But a "dishonest finder", that is, one who finds property that is not in the possession of any person and dishonestly intends to keep it from the outset, *cannot* be held liable for theft or dishonest misappropriation.

(c) And further, a "seeker", in the sense of one who actively seeks opportunities to appropriate items which others misplace or lose with the intent to thereafter keep them for his own use, is also *not* liable for theft or dishonest misappropriation.

73 We add three points on the issue of lacunae and absurdity:

(a) First, none of the other property offences in the Code (including cheating, criminal breach of trust, and extortion) appear to be applicable in the situations (b) and (c) identified above. Therefore, in considering whether the requirement of innocent possession would give rise to lacunae and absurdity in the law, it is correct to focus on the interaction between the offences of theft and dishonest misappropriation.

(b) Second, it might be possible to "cure" some of the absurdity by broadly construing the term "possession" in s 378. If so, the broader scope of theft might ameliorate some issues arising from a narrowed scope of dishonest misappropriation (given the need for initial innocence). But this is speculative and it is not likely, however broadly

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"possession" is construed, that theft and dishonest misappropriation will be defined in a perfectly coincident manner.

(c) Third, the Applicant argued that "any lacunae in the law should be filled by Parliamentary intervention". That statement is one of broad principle but has no application in this case. This is *not* a situation where the court is asked to read words into a statute in order to cure a perceived lacuna or policy deficiency; this is also *not* a situation where the court is asked to stretch the meaning of statutory terms to fit the facts at hand. Instead, this is a situation where the court is asked to read words into the statute which would *precisely* give rise to an absurd state of the law. Deference to Parliament operates here against the Applicant.

74 To summarise, the context of s 403 of the Code suggested that initial innocent possession is *not* a requirement for dishonest misappropriation. First, such a requirement is highly unusual as a negative or exonerative mental element. Second, as we elaborated above, the imposition of such a requirement would likely give rise to lacunae and absurdity in the law of property offences, given the structure and construction of these other offences under the Code.

Legislative purpose

75 A proper construction of a statutory provision also requires the court to take into account "the purpose or object underlying the written law". In relation to s 403 of the Code, this can only be gleaned from the history of the enactment of the provision, which in turn requires reliance on extraneous materials.

76 The Applicant did not raise any argument based on the legislative history of s 403 of the Code.

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77 The Prosecution's position was that the extraneous materials relating to the legislative history of s 403 of the Code confirm that initial innocent possession is not a requirement. This is because the drafters of the Indian Penal Code, from which s 403 of the Code was derived, clearly disagreed with the old English common law position under which initial innocent possession *absolutely* absolved one of criminal liability even if he subsequently dishonestly misappropriated or converted the property.

78 What follows is a brief legislative history of s 403 of the Code:

(a) At the beginning of the nineteenth century, the English common law required that to constitute larceny or theft at common law there should be a felonious "taking," which was understood to mean a "taking out of the possession of some person entitled to [the property]". Thus, misappropriation of property was not a crime so long as the taker had not taken the property out of its owner's possession dishonestly but had originally acquired it honestly (Sir James Fitzjames Stephen, *A History of the Criminal Law of England* vol III (Macmillan and Co, 1883) at pp 150–151 and 158). This remained the law in England until the mid-twentieth century, and appears to have been unaffected by the passage of the Embezzlement Act in 1812 and the Larceny Act 1827 which statutorily enshrined exceptions relating to embezzlements by agents (see *Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 at [178]–[181]).

(b) In India, the first draft of the Indian Penal Code was submitted by the Law Commission of India under the chairmanship of Lord Thomas Macaulay ("the ILC") to the Governor-General of India in 1837. This first draft contained provisions criminalising dishonest

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misappropriation, and aggravated dishonest misappropriation (of property taken from deceased persons, as per s 404 of the Code) ("the Draft IPC"). The relevant provisions read as follows:

> OF CRIMINAL MISAPPROPRIATION OF PROPERTY NOT IN POSSESSION
>
> 383. Whoever fraudulently takes into his possession any property *which is in no person's possession*, is said to, except in the case hereinafter excepted, "criminally to misappropriate property not in possession."
>
> *Exception*. If the person taking the property into his possession neither knows, nor has reason to believe, that any particular party has a better right than himself to the property, or that any particular person can direct him to any such party, he is not guilty of the offence above defined.
>
> *Illustrations.*
>
> (*a*) A finds a rupee on the high road, not knowing, nor having reason to believe, that the rupee belongs to any particular party, or that any particular person can direct him to the party to whom the rupee belongs. A takes the rupee. Here, A has not committed the offence defined in this Clause.
>
> (*b*) A finds a letter on the road containing a bank note. From the direction and the contents of the letter he learns to whom the note belongs. He appropriates the note. Here, he criminally misappropriates property not in possession.
>
> (*c*) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person who has drawn the cheque appears. A knows that this person can direct him to the party in whose favour the cheque was drawn. A appropriates the cheque. Here, he criminally misappropriates property not in possession.
>
> …
>
> 385. Whoever criminally misappropriates property not in possession, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such

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> possession, shall be punished with imprisonment either description for a term which may extend to three years and must not be less than six months, and shall also be liable to fine.
>
> *Illustration.*
>
> Z dies in possession of furniture and money. His servant, A, before the money comes into the possession of any person entitled to such possession, fraudulently takes possession of it. A has committed the offence defined in this Clause.
>
> [emphasis added]

It would appear from the plain language of the proposed ss 383 and 385 and their illustrations that the offence of dishonest misappropriation was directed primarily at a finder of movable property lost by its owner who dishonestly converted the same to his own use. Legal possession of the property was the distinction between criminal misappropriation and theft, both in English law and in the Draft IPC. The ILC explained that it wanted to maintain a "reasonable and expedient" line between theft and criminal misappropriation because in theft the intention of the offender was always to take property in another's possession out of that person's possession.

(c) At the same time, in England, a similar codification effort of the criminal law was underway. The Commissioners on the Criminal Law of England ("the ELC") released reports in 1839 and 1843 containing a draft digest of the proposed criminal laws ("the Digest"). The Digest was never enacted into law. In regard to theft, it was different from the Draft IPC in that it defined the offence of theft as being "a wrongful taking and removal" of the property of another without the necessity of it being in the possession of that other. It also stated in Art 14 that "[w]here the taking is upon a finding or other casualty, the quality of the

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act depends *on the intention of the party at the time*; and it is not theft unless he took with the intention to despoil the owner and fraudulently to appropriate the thing taken, although the owner be unknown" [emphasis added]. Thus, Art 14 made it the crime of theft if a finder, at the time he found the property, had the dishonest intention of taking it for himself. Article 14 did not cover situations in which the original taking was innocent and the dishonest intention arose later. No proposed article appeared to cover those situations.

(d) In 1846, the ILC was tasked to review the Draft IPC against the Digest to detect any omission or imperfection that might have existed in the Draft IPC. In a Special Report issued in 1847, the Indian Law Commissioners noted at para 461 that because the offence of theft under the Draft IPC was the taking of property which was in another's possession out of that person's possession, it was "necessary" to introduce separate provisions under the head of "Criminal misappropriation of property not in possession".

(e) Between 1854 and 1856, several changes were made to the Draft IPC, the reasons for which were documented in a final report put together in 1856 by the ILC led by Sir Barnes Peacock ("the Peacock Report"). Unfortunately, there appears to be no surviving copy of the Peacock Report. As far as s 383 was concerned, by the time of the Second Reading of the Indian Penal Code Bill in 1857, its language had been altered considerably to read:

> Fraudulent misappropriation of property
>
> Whoever fraudulently misappropriates or converts to his own use any moveable property, shall be punished with

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> imprisonment of either description for a term which may extend to two years, or with fine, or with both.

As can be seen, the ILC had amended the dishonest misappropriation offence to almost its current wording except for the use of the word "fraudulently" in place of "dishonestly" and had removed the explicit requirement that the property misappropriated was "not in possession".

(f) The Indian Penal Code containing s 403 in its present form was subsequently passed by the Legislative Council of India. On 31 March 1869, the Indian Penal Code was received into Singapore with no changes to s 403. It was then brought into force in Singapore by the Legislative Council of the Straits Settlement in 1872 as Ordinance 4 of 1871. Section 403 of the Code has remained materially unchanged since then.

79 The Peacock Report was not available to explain the reasons for the material changes in structure of the provision on dishonest misappropriation between that in the Draft IPC, and that eventually found in the Indian Penal Code Bill. In the absence of such explanation, any attempt to discern the actual intent of the draftsmen would be speculative and contrary to the previous guidance of this Court that extraneous materials relied upon must be "clear" (see *Tan Cheng Bock* at [54(c)(iv)]). Greater weight must thus be placed on the text and context of the provision.

80 The Prosecution's main point was that the ILC had expressly disagreed with the view of the ELC that taking property which had been found did not amount to theft unless it was accompanied by a dishonest (or fraudulent) intention at the outset. Therefore, the Draft IPC must be taken to have *expanded* on what was already covered under the English law on theft. As it would not

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have been logical for the ILC to design a lacuna while filling another lacuna, s 385 of the Draft IPC must be taken to apply to both situations: initial innocent possession, and initial dishonest possession.

81 We were not persuaded by this argument. The ILC's Special Report accompanying the Draft IPC indicates that in proposing to create a distinct offence of dishonest misappropriation (in addition to theft), the ILC's primary intent was to avoid the problems with the intricate concepts of ownership and possession that underlay the then-existing English common law on theft. Thus, in the Draft IPC, the ILC defined the offence of theft clearly and singularly against the concept of possession; the ILC's position was that "possession by the *proprietor* of the article stolen is not essential to the offence [of theft]". However, because theft was then defined as the taking of property *out of the possession of someone*, a distinct offence of dishonest misappropriation had to be created in order to deal with the misappropriation of property "which is in no person's possession" (see the text of s 383 at [78(b)] above).

82 The Prosecution also cited one part of Lord Macaulay's comments in the notes to the Draft IPC:

> One offence which it may be thought that we ought to have placed amongst thefts is the pillaging of property during the interval which elapses between the time when the possessor of the property dies, and the time when it comes into the possession of some other person authorized to take charge of it. This crime, in our classification, falls under the head, not of theft, but of misappropriation of property not in possession.

83 The Prosecution submitted that this passage shows that the ILC had "intended for the offence to apply to situations where dishonesty had been formed from the outset". We agreed that this was a reasonable inference and provided some indication of the thinking of the ILC. The Peacock Report was

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not available to confirm that that remained the thinking when s 383 was recast. However, as the history of the legislation did show plainly that the intention of the drafters was that initial innocent possession would not prevent a subsequent dishonest misappropriation or conversion from constituting an offence, it would seem incongruous to infer an intention to also make initial innocent possession an ingredient of the offence.

Consideration of the authorities

84 We turned next to examine case and academic authorities on the interpretation of the section.

(1) Local authorities

85 This issue of innocent possession and s 403 of the Code did not appear to have posed a problem in the local courts until fairly recently. Thus, there were only two judgments which dealt with the issue.

86 The first was the HC GD, in which the Judge held that innocent possession was *not* a requirement under s 403 of the Code (HC GD at [30]):

> … [I]t is … not incorrect as a matter of general principle to say that s 403 … would ordinarily apply where an accused person had originally been legitimately or innocently in possession of property, or where he had initially acquired it lawfully or in a legally neutral manner, and the dishonest intention is only formed subsequently. … [Section] 403 is intended to apply where the accused person does not commit theft or some other criminal offence in order to obtain possession of the property; in other words, he does not obtain possession of the property wrongfully by removing it from the possession of another. … [T]here is no requirement that the dishonest intent to misappropriate the property must have been formed only subsequently; instead, a person who harbours dishonest intent before or at the time he "finds property not in the possession of

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any other person and takes such property" … is no less guilty of a s 403 offence.

[emphasis omitted]

87 The Judge's reasons were as follows:

(a) A plain reading of s 403 of the Code did not support the proposition that innocent possession was a requisite element of the offence (HC GD at [23]).

(b) The illustrations and explanations to s 403 "can arguably be read" as supporting the innocent possession requirement, but their role is only illustrative and they cannot alter the scope of a substantive provision (HC GD at [25]).

(c) The innocent possession argument "appear[ed] at first blush" to be consistent with Chong J's decision in *Wong Seng Kwan* (HC GD at [20]), but Chong J was merely referring to the archetypal s 403 scenario rather than imposing a requirement for all s 403 cases (HC GD at [22]).

(d) The local text – Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd Ed, 2012) ("*YMC Criminal Law*") – also stated that dishonest misappropriation would "mainly" and "often" (but not always) cover cases of initial innocent possession (HC GD at [22]).

(e) The 2007 edition of *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code, 1860 vol 2* (C K Thakker & M C Thakker eds) (Bharat Law House, 26th Ed, 2007) ("*Ratanlal*") further noted at p 2268, citing a 19th century Indian authority, that the retention of money paid by mistake where the recipient determines to appropriate

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the property at the time of receipt, knowing it was a mistaken payment, can amount to criminal appropriation, which supported the absence of an innocent possession requirement (HC GD at [28]).

88 The Judge's reasons for rejecting the innocent possession requirement were sound and generally accorded with our views.

89 The second local decision was *Wong Seng Kwan*. This case involved a "traditional" factual situation involving a finder-turn-keeper. In his grounds, Chong J opined that "it is perhaps useful to provide some overview of the property offences under the [Code] and to explain how they differ from each other" (at [13]). Thereafter, Chong J explained as follows:

> 14 The distinction between criminal misappropriation and other property offences such as theft, cheating and criminal breach of trust may not be immediately apparent to a layperson. They all involve property and an element of dishonesty but the punishment provisions are somewhat different.
>
> 15 While the element of dishonesty is common to all property offences, the critical distinction between criminal misappropriation, theft, cheating and criminal breach of trust lies in the manner in which the accused person initially comes across the movable property. An accused person commits theft if the movable property was originally in the possession of some other person and the accused person moves the property with a dishonest intention to take it. *For criminal misappropriation, the accused person initially comes across the movable property in a legally neutral manner (eg, by finding), and he subsequently forms a dishonest intention to deal with the movable property in a manner that is inconsistent with the rights of the true owner.* As for criminal breach of trust, the accused person is entrusted with property or dominion over the property at the outset by another person, and he dishonestly uses or disposes of that property in abuse of trust while for cheating, the possession of the property is voluntarily handed over to the accused person as a result of his deceitful or fraudulent misrepresentation.
>
> 16 The fact that *an accused person charged with the offence of criminal misappropriation would* ***usually*** *have come across the movable property in a legally neutral manner* is significant,

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> because while civil rights and liabilities would attach at the moment when the accused person asserts possession over the property, criminal liability would only attach when the accused person forms a dishonest intention. According to Dr Hari Singh Gour, *Penal Law of India* vol 4 (Law Publishers (India) Pvt Ltd, 11th Ed, 2011) at pp 3918–3919:
>
> > 6. What is criminal misappropriation? …
> >
> > The illustrations to Sec. 403, which are rather statements of principle than mere illustrations, clearly show that the essence of criminal misappropriation of property is that the property comes into the possession of the accused in some neutral manner, whereas the illustrations in Sec. 405 show equally clearly that the property comes into the possession of the accused either by an express entrustment or by some process placing the accused in a position of trust …
> >
> > The question whether the act is theft or misappropriation depends upon when the dishonesty began — was it before or after the thing came into possession. This is a point of division as much between the two offences — theft and criminal misappropriation in the Code … In theft the initial taking is wrongful, in criminal misappropriation it is indifferent and may even be innocent, but it becomes wrongful by a subsequent change of intention, or from knowledge of some new fact with which the party was not previously acquainted [*Bhagiram v Ahar Dome* ILR 15 Cal 388 at 400]. …
>
> 17 Given that *the distinction between theft and dishonest misappropriation of movable property depends on whether the initial taking is wrongful, and that criminal liability might still attach on a subsequent change in intention*, it is important for a finder to know *when the taking of the movable property, though initially neutral, may nonetheless subsequently become wrongful.*
>
> [original emphasis omitted; emphasis in italics and italics bold added]

90 The Judge sought to reconcile his decision with *Wong Seng Kwan* by characterising the reference in *Wong Seng Kwan* to innocent possession as merely referring to the *archetypal* s 403 scenario, rather than imposing a

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requirement for all s 403 cases (HC GD at [22]). In particular, the Judge pointed out Chong J's use of the word "usually" in [16] of *Wong Seng Kwan*.

91 With respect, we find it difficult to reconcile the two local decisions. *Wong Seng Kwan* took the view that dishonest misappropriation, unlike theft, required innocent possession. Tellingly, after citing the 2011 edition of an Indian text at [16], Chong J went on to conclude at [17] that "the distinction between theft and dishonest misappropriation of movable property depends on *whether the initial taking is wrongful*" and questioned when "the taking of the movable property, *though initially neutral*, may nonetheless subsequently become wrongful" [emphases added]. Subsequently, as part of the factual analysis, Chong J observed that "[i]n the present appeal there can be no dispute that in picking up the wallet, the [accused] had committed an act of appropriation. At that stage, *his act of appropriation was still neutral*. However, his intention will become dishonest if he removed the cash …" [emphasis added] (at [55]). If Chong J had been of the view that innocent possession was *not* a strict requirement of s 403, there would have been little reason for him to make these comments about neutral or innocent possession.

92 The discussion on innocent possession in *Wong Seng Kwan* was, however, *obiter* and made without the benefit of full argument. Chong J did not need to make a finding on innocent possession in that case and therefore counsel did not present him with the materials that were put before us nor with a full analysis of this aspect of the offence. The Judge, however, was faced squarely with the issue and as a result dealt with it in depth in the HC GD. Accordingly, with respect, we find *Wong Seng Kwan* to be less persuasive on this aspect of s 403.

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(2) Foreign jurisprudence

93 The foreign jurisprudence cited to us consisted of case law from Sri Lanka and India, unsurprisingly, as their provisions on dishonest misappropriation could also be traced to the Draft IPC.

94 The Prosecution relied on the decision of the Sri Lankan Supreme Court (which is the apex court of the land) in *Walgamage v The Attorney-General* [2000] 3 Sri LR 1 ("*Walgamage*"). The Applicant did not raise or discuss this case in her written submissions. In our view, *Walgamage* is persuasive authority *against* the requirement of initial innocent possession.

95 There, the accused was a bank manager who was supposed to hand a certain sum of money entrusted to him in his capacity as manager to another person, but in fact kept the sum for himself. He was convicted of criminal breach of trust. Special leave to appeal to the apex court was granted to determine the question of "whether to constitute the offence of criminal misappropriation or criminal breach of trust it is essential that the initial taking be innocent". The lower courts' decisions on this issue had not been consistent. The statutory provision on dishonest misappropriation in Sri Lanka (that is, s 386 of the Sri Lankan Penal Code ("SLPC")) was in material part the same as s 403 of the Code: "whoever dishonestly misappropriates or converts to his own use such movable property …".

96 Counsel for the accused argued, in *Walgamage*, that even though s 386 of the SLPC did not on its face impose a requirement for initial innocent possession, such a requirement nevertheless existed because:

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(a) In respect of property offences, there were "clear lines of demarcation in the [SLPC] between those where the victim is in possession at the time the offence is committed (such as theft and cheating) and those where the victim is out of possession the offender being already in possession (such as [dishonest] misappropriation and breach of trust)" (at 6). These offences were intended to be "self-contained without any overlapping, so the same act could not constitute both cheating and [dishonest] appropriation" (at 6).

(b) The Indian courts had consistently taken the view that innocent possession was a requirement for dishonest misappropriation (at 6–7).

(c) The *cursus curiae* (*ie*, the practice of the court) in Sri Lanka had been to regard innocent initial taking as an indispensable ingredient of dishonest misappropriation, except for a brief period of ten years between two conflicting decisions (at 8).

97 The Sri Lankan Supreme Court unanimously held that innocent possession was *not* a requirement under s 386 of the SLPC. The court's main reasons were as follows:

(a) There is no principle under the SLPC or any other statute that there can be no overlap in offences under the SLPC (at 8).

(b) The principle that penal statutes are to be strictly construed does not apply where a statute is clear and unambiguous (at 8).

(c) Although the Indian Penal Code was enacted at a time when larceny in English law did not include cases where property was taken without a dishonest intention, "probably the offence of [dishonest]

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misappropriation was intended to cover such cases" and "the definition actually adopted to give effect to that intention covers not only such cases, but extends also to cases where a dishonest intention existed at the outset" [original emphasis omitted] (at 9).

(d) Illustrations (b), (c) and (f) to Explanation 2 to s 386 of the SLPC run contrary to the requirement for innocent possession, "for they show that a person who finds property not in possession of any one, and immediately misappropriates it is guilty of that offence" (at 9).

(e) Upon surveying the academic texts and case law, the court concluded that the Indian position was by no means consistent (at 9–13).

(f) The *cursus curiae* in India and Sri Lanka did not reveal "an emphatic and uniform insistence on such a requirement" of innocent possession (at 14).

(g) In relation to criminal breach of trust, the absence of a requirement for innocent possession was "even plainer" since this offence requires an ingredient of entrustment "which is anterior to and distinct from the dishonest misappropriation … which is another ingredient" (at 14).

98 In our judgment, *Walgamage* is salient and persuasive authority, save that the court's reliance on the illustrations to Explanation 2 to s 386 of the SLPC appeared to be misplaced in so far each of these illustrations still appeared to show situations of initial innocent possession with only subsequent dishonesty, even though the time gap between the two states of mind might have been very short.

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99 As for the Indian authorities, they span the spectrum of possibilities and there appeared to have been no authoritative decision by the Indian Supreme Court to date.

100 The Applicant relied on the following Indian decisions:

(a) *Mohammad Ali v State of Madhya Pradesh* [2006] Cri LJ 1368 ("*Mohammad Ali*"), where it was stated at [8] that:

> Criminal misappropriation takes place where the possession has been innocently come by, but where, by a subsequent change of intention, on or from the knowledge of some new fact with which the accused was not previously acquainted, the retaining becomes wrong and fraudulent. The essence of the offence of criminal misappropriation is that the property of another person comes into the possession of the accused in some neutral manner and is misappropriated or converted to his own use by the accused.

(b) *Parshottam Mahadev Patharphod v State of ILR* (1962) Bom 755 ("*Parshottam*"), in which the Bombay High Court purportedly stated at [5(a)]:

> In theft the property is taken without the consent of the owner and the dishonest intention to take property exists at the time of such taking. In criminal misappropriation the property is innocently acquired, often casually and by chance, but by a subsequent change of intention the retention becomes unlawful and fraudulent. …

101 With respect, these authorities did not bear much weight.

(a) In *Mohammad Ali*, the court's statement on innocent possession was clearly *obiter*. This is because that case involved an accused who denied an allegation of dishonest misappropriation of electric wires by arguing that he had actually purchased those wires from a shop. The

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Madhya Pradesh High Court quashed the charge on the basis that there was no evidence to show that the electric wires were *not* the property of the accused. It was in that context that the court opined that dishonest misappropriation "takes place when the possession has been innocently come by …" (at [8]), before stating the three elements of the charge one of which was that "[t]he property must belong to a person other than the accused" (at [8]). Applying the three elements to the facts, the court concluded that "… there is nothing on record in order to show that the impugned electric wire belong[ed] to any other person other than the accused" (at [8]). Read in context, the part of the judgment on innocent possession relied on by the Applicant was unnecessary for the disposal of the case, and was written without analysis or authority.

(b) For *Parshottam*, the quotation cited by the Applicant was in fact a direct quotation from Dr Hari Singh Gour, *Penal Law of India* (Law Publishers (India) Pvt Ltd, 1962 Ed) ("*Gour*") which was reproduced in the section of the judgment summarising the parties' arguments. Indeed, one paragraph down in the judgment, the Bombay High Court had expressly declined to decide on the legal question of innocent possession (at [6]):

> On these arguments the two material questions that arise for consideration are--(i) Whether there can be criminal misappropriation in respect of the property obtained by cheating, and (2) Whether in all cases of criminal misappropriation the initial possession must be innocent, i.e. the person concerned cannot be convicted for such possession. -- These points, that are urged, seem to be arguable. We, however, think that it is unnecessary to decide these questions in this appeal, as, in our opinion, in this case for reasons recorded below there can be no doubt that the property in question can be held to be stolen property.

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The Bombay High Court went on to dispose of the matter on the evidence. Thus, this case was not authority for or against the innocent possession requirement.

102 The Prosecution relied on two other Indian authorities:

(a) The Indian Supreme Court decision in *Ramaswamy Nadar v The State of Madras* AIR 1958 SC 56, where the court laid down elements of dishonest misappropriation under s 403 which did *not* refer to any need for initial innocent possession:

> In order to prove an offence under s. 403, Indian Penal Code, the prosecution has to prove that the property, in this case, the net amount of ninety six thousand odd rupees, was the property of the prosecution witnesses 1 to 3 and others, and … that the accused misappropriated that sum or converted it to his own use, and … that he did so dishonestly.

Unfortunately, the court here did not specifically consider the innocent possession question, and so little weight can be placed on its *dictum*.

(b) The High Court of Allahabad decision of *Rajendra Singh and another v State of Uttar Pradesh* AIR 1960 All 398 ("*Rajendra*"), where the accused persons induced a goldsmith to hand them a necklace on a false representation that they would return it that evening, but they subsequently refused to do so. It was argued that the facts could not establish criminal breach of trust under s 406 of the Indian Penal Code, but instead amounted to cheating under s 420 of the same Code. The court held that a charge under s 420 could not be substituted, but that the original charge under s 406 should be substituted with one under s 403 of the Indian Penal Code for dishonest misappropriation, opining as follows (at [19] and [21]):

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> 19. …
>
> The offence of Section 403 is a minor offence in comparison to that of Section 406 inasmuch as it is constituted by some of the facts mentioned in the charge. No entrustment is proved and, therefore, no offence under Section 406 is made out against the applicants, but it is proved that they obtained delivery of the necklace and that they dishonestly misappropriated it. They, are, therefore, guilty under Section 403, I. P. C., and can be convicted of it under Section 238(1). It has also been proved that they are guilty of Section 420 by dishonestly inducing [the goldsmith] by misrepresentations to deliver the necklace to them, but neither were the necessary facts set out in the charge nor were they charged with Section 420.
>
> …
>
> 21. I do not accept the contention of the applicants that they are not guilty even under section 403, I. P. C., because they had a dishonest intention at the time when they took possession of the necklace from [the goldsmith]. As far as [the goldsmith] is concerned the possession of the applicants was valid and they afterwards misappropriated it. *If they had no dishonest intention at the time of taking possession, they would undoubtedly be guilty under Section 403; they did not cease to be so guilty merely because they had a dishonest intention at that moment.* Even if they had a dishonest intention at the moment of taking possession, they could return the necklace; they were not bound to misappropriate it.
>
> When they misappropriated it they certainly committed some additional offence and it could not be any other than that punishable under Section 403, I. P. C. I do not accept the argument that criminal misappropriation cannot be committed if the accused had a dishonest intention at the time of taking possession of the article. The complaint has the choice; if he thinks that he can make out a case of dishonest intention while taking delivery of the article he can charge the accused with cheating; otherwise he is entitled to charge him with criminal misappropriation.
>
> The offence of criminal misappropriation made out by the prosecution can be reduced to a minor offence on account of some fact proved by the accused in defence but I doubt if it can change its nature altogether. If the

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> prosecution proves a case of Section 403, I. P. C., the accused by proving that he had a dishonest intention at the time of taking delivery of the article cannot change the nature of the offence to that of cheating. … He could not plead that he was prejudiced by his own act of proving that he committed the offence, and not that charged with I, therefore, hold that the applicants are guilty under Section 403, I. P. C., and that I can alter their conviction.
>
> [emphasis added]

The discussion of innocent possession in *Rajendra* could not be considered *obiter*. The court reasoned that if the accused peresons had honestly meant to return the necklace at the time of receipt and then changed their mind, they would have been guilty of criminal misappropriation. In the court's view, the fact that the accused persons' intention from the outset was to keep the necklace could not negate the act of misappropriation which was the act of keeping something to which they were not entitled. We agreed. While the court did not give many reasons for its decision to reject the requirement of innocent possession, in our view the decision accords with common sense and the language of the Indian Penal Code permits it.

103 The Prosecution also dealt with the contrary authority of *Bhagiram Dome v Abar Dome and another* (1888) ILR 15 Cal 388 which had been cited in *Wong Seng Kwan*. There, the High Court of Calcutta held at [10] that "[c]riminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent". The Prosecution submitted that little weight could be placed on this case as it was largely unreasoned and the authority which it cited, being John Mayne, *Commentaries*

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on the Indian Penal Code (Act XLV of 1860) (1878, 10th Ed), did not itself appear to stand on solid authority or reasoning. We agreed with this submission.

104 From the authorities cited by both sides it appeared that the Indian cases were, with respect, not persuasive precedents as (a) they were not consistent; and (b) none of the cases appeared to have seriously or thoroughly considered the innocent possession question.

(3) Academic authorities

105 We were unable to derive much assistance from the academic authorities. The leading local text, *YMC Criminal Law*, did not specifically consider the innocent possession question while the Indian texts expressed differing views.

106 The position taken in the 2013 edition of *Ratanlal* ("*Ratanlal 2013*") appeared to be that innocent possession *is required* for dishonest misappropriation, and it is this requirement which distinguishes theft from dishonest misappropriation (see p 2546 under the heading "Scope"). The requirement for innocent possession is buttressed by the section titled "English law and Indian law" (*Ratanlal 2013* at pp 2546-2547):

> … According to the English law only the intention of the accused at the time of obtaining the possession of property is taken into account. In India, on the other hand if a change of intention occurs, viz. from honest to dishonest, the offence of criminal misappropriation is committed.

In a subsequent section titled "Theft and criminal misappropriation", the authors of *Ratanlal 2013* explained the distinction between the two property offences as follows (at p 2547):

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> In theft the object of the offender always is to take property which is in the possession of a person out of that person's possession; and the offence is complete as soon as the offender has moved the property in order to a dishonest taking of it. In criminal misappropriation, there is not necessarily an invasion of the possession of another person by an attempt to take from him that which he possesses. The offender is already in possession of the property; and is either lawfully in possession of it, because either he has found it or is a just owner of it, or his possession, if not strictly lawful, is not punishable as an offence because he has acquired it under some mistaken notion of right in himself or of consent given by another.

107 On the other hand, the 1996 edition of *Gour* ("*Gour 1996*") suggested that innocent possession is *not* a requirement for dishonest misappropriation. In the 2011 edition of Gour ("*Gour 2011*") (which was the edition relied on in *Wong Seng Kwan*), however, the authors took a contrary position *in clear support of* a requirement of innocent possession. This position was not maintained for very long as by the 2015 edition of Gour ("*Gour 2015*"), the requirement of innocent possession was rejected. At p 3923 of this 2015 text, the authors stated:

> **8. Accused having dishonest intention at the moment of taking possession.**
>
> The argument that criminal misappropriation cannot be committed if the accused had dishonest intention at the time of taking possession of the article, cannot be accepted. The complainant has the choice; if he thinks that he can make out a case of dishonest intention while taking delivery of the article he can charge the accused with cheating; otherwise he is entitled to charge him with criminal misappropriation. If the prosecution proves a case of Sec. 403, I.P.C., the accused by proving that he had a dishonest intention at the time of taking delivery of the article cannot change the nature of the offence to that of cheating. …

108 This reading of *Gour 2015* was buttressed by the discussion in the same text titled "Theft distinguished", under which instead of concluding definitively as to the requirement of innocent possession, the authors opined that dishonest

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misappropriation is "indifferent" to the wrongfulness of the initial taking (at p 3919):

> The question whether the act is theft or misappropriation depends upon when the dishonesty began – was it before or after the thing came into possession. This is a point of division as much between the two offences – theft and criminal misappropriation in the Code – as between criminal misappropriation and a civil wrong under English law. … In theft the initial taking is wrongful, in criminal misappropriation it is indifferent and may even be innocent, but it becomes wrongful by a subsequent change of intention, or from knowledge of some new fact with which the party was not previously acquainted. …

109 That said, there are parts of *Gour 2015* which did not sit well with its stated proposition that innocent possession is *not* required for dishonest misappropriation. For instance, *Gour 2015* also asserted that the "illustrations to Sec. 403, which are rather statements of principle than mere illustrations, clearly show that the essence of criminal misappropriation of property is that the property comes into the possession of the accused in some neutral manner …" (at p 3918). Perhaps the phrase "the essence was" was intended to suggest that innocent possession is merely the archetypal example of dishonest misappropriation (as the Judge had reasoned), but the proposition that the illustrations to s 403 are statements of principle is a clear reference to *Basudeb* which is contrary to s 7A of the IA (see [48] above).

110 In any event, the present conclusion in *Gour 2015* ran contrary to the other leading Indian text of *Ratanlal 2013*.

111 As the academic texts had not come to a consistent or conclusive landing on the innocent possession question, we considered it safer not to place reliance on them.

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Other interpretive canons

112 Finally, there were other canons of interpretation which are permissible as tools to aid the court's effort in determining the proper interpretation of a provision (*Tan Cheng Bock* at [38]). For present purposes only two of these have any relevance.

(1) Rectifying construction

113 Rectifying construction "involves the addition or substitution of words to give effect to Parliament's manifest intentions" (*Nam Hong Construction & Engineering Pte Ltd v Kori Construction (S) Pte Ltd* [2016] 4 SLR 604 ("*Nam Hong*") at [54]). It is possible to invoke this method in the Applicant's favour so as to circumvent the absence of an express reference to innocent possession on the face of s 403 of the Code. If so invoked, the words which may be added to s 403 of the Code are as set out in **bold** in the following re-wording of the section:

> 403. Whoever, **having obtained possession of any movable property without a dishonest intention**, **thereafter** dishonestly misappropriates or converts to his own use movable property, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

114 In principle, a rectifying construction is not excluded for penal legislation (see Oliver Jones, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) at section 15.3):

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> 15.3 Although a court may, as a matter of principle be cautious about applying a rectifying construction to penal legislation or other onerous enactments, this caution will not prevent it from applying such a construction in suitable cases.

115 In our judgment, a rectifying construction could not be applied to assist the Applicant in the present case. This was because our primary conclusion was that innocent possession is *not* a requirement under s 403 of the Code, and so there was nothing to rectify.

(2) Strict construction rule

116 The other potentially relevant canon of construction is the "strict construction rule", also known as the "principle against doubtful penalisation". According to VK Rajah JA in *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 at [30]–[38], this is a "tool of last resort" to which recourse may be had only if there is genuine ambiguity in the meaning of the provision even after the courts have attempted to interpret the statute purposively. If the meaning of the provision is sufficiently clear after the ordinary rules of construction have been applied, then there is no room for the application of this rule (see also *Nam Hong* at [28]).

117 In our judgment, even though the plain text, history, and purpose of the provision are not entirely helpful, the context of s 403 of the Code sufficiently demonstrates that innocent possession could not have been an intended element of dishonest misappropriation. In those circumstances, there is no room for the strict construction rule to apply.

118 In this regard, we add that in *Walgamage*, the Sri Lankan Supreme Court also rejected the argument that an innocent possession requirement should be

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read into s 386 of the SLPC on the basis that a criminal statute should be strictly construed in favour of the offender (at 8–9):

> The principle that penal statutes are to be strictly construed does not apply where a statute is clear and unambiguous. I am therefore of the view that the suggested principles of interpretation cannot be applied so as to introduce an additional ingredient into the definition of an offence. It is unnecessary to consider when and how those principles could be utilised to resolve an ambiguity, because we are here concerned not with an ambiguity but with the imposition of an additional ingredient through interpretation. …

We agreed with these observations.

Summary on the question referred

119 In summary, initial innocent possession is *not* a requirement for conviction under s 403 of the Code. First, the context of s 403 sufficiently demonstrated that innocent possession could not have been an intended element of dishonest misappropriation. Such a requirement as to "negative" mental state would be highly unusual and would likely give rise to lacunae and absurdity in the law of property offences. Second, while no part of the extraneous evidence as to the legislative history of s 403 was in itself conclusive, they *collectively* pointed sufficiently towards an *absence* of Parliamentary intention to distinguish between the offender's states of mind at the time of initial possession. Third, the absence of such a requirement was also supported by persuasive authority from the Sri Lankan Supreme Court.

Conclusion

120 As we have answered the main question in the negative, we need not deal with the ancillary questions. While the parties' submissions on the

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questions were helpful, we would prefer to address the important and difficult issues they pose if and when the appropriate facts are before us.

121 Finally, we note that while the Co-Offenders initially filed separate criminal motions for leave to refer purported questions of law of public interest to this Court, they subsequently withdrew their applications while the Applicant chose to proceed with hers (see [24] above). Strictly speaking therefore, this criminal reference related only to the Applicant. In any event, as the question referred was answered in the negative, there were no grounds and no reasons apparent to us why the convictions and sentences of the Co-Offenders should be disturbed.

Sundaresh Menon	Judith Prakash	Tay Yong Kwang
Chief Justice	Judge of Appeal	Judge of Appeal

Ragbir Singh Bajwa (instructed) (Bajwa & Co),
Kertar Singh s/o Guljar Singh and Lee Wei Liang
(Kertar & Sandhu LLC) for the applicant; and
Leong Wing Tuck, Jiang Ke-Yue, Kelvin Chong, Ang Siok Chen and
Jocelyn Teo (Attorney-General's Chambers) for the respondent.

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