IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO. 589 OF 2002

(ON APPEAL FROM HCCC355 OF 2001)

BETWEEN

HKSAR	Respondent
and	
WONG HIU SHUI, TERESA LINERA (黃曉穗) (D1)	Applicants
WONG FAI TUNG (黃輝棟) (D2)	

Before: Hon Stuart-Moore VP, Stock JA and Lunn J

Date of Hearing: 26 October 2004

Date of Handing Down Judgment: 3 December 2004

J U D G M E N T

Stuart-Moore, VP (giving the judgment of the Court):

Introduction

1. On 6 November 2002, the applicants (D1 and D2 respectively) were convicted by a jury on the four counts jointly alleged against them, following a trial in the Court of First Instance before Deputy Judge To. On 20 November 2002, D1 was sentenced to a total of 11 years' imprisonment and D2 received an overall sentence of seven and a half years. They were each, in addition, disqualified to act as a director of a company for 15 years under section 168E of the Companies Ordinance, Cap. 32.

2. D1 and D2 both sought leave to appeal against conviction. D1, additionally, sought leave to appeal against her sentence of imprisonment.

3. We can say at the outset that although this application was concerned with five grounds of appeal with which counsel had, in advance, very sensibly worked out a division of labour so that the same arguments were not repeated, there is, we consider, only one ground of any real substance. This related to the directions given by the judge on the standard of proof. Nonetheless, one of the other grounds requires an insight into the background of the case and it is necessary, therefore, to deal with this aspect before turning to the main ground of appeal.

The indictment

4. The first count on the indictment alleged forgery, contrary to section 71 of the Crimes Ordinance, Cap. 200. The particulars were that D1 and D2, between 1 February 1999 and 20 February 1999:

> "…. made false instruments, namely documents of International Wisdom & Mercy VDA S.A. consisting of four minutes of meetings of the board of directors, two written resolutions of the shareholders and two declarations of the directors and shareholders, all dated the 9th day of February 1999 in relation to a first and second mortgage on the property known as 22 Kent Road, Kowloon Tong, Kowloon, Hong Kong, with the intention that they should use them to induce somebody to accept them as genuine, and by reason of so accepting them, to do some act, or not to do some act, to his or her own or another person's prejudice." (Appeal bundle pp. 1-2)

5. In the second count, contrary to section 73 of the same ordinance, charging D1 and D2 with using the false instruments set out in count 1, it was alleged that on or about 20 February 1999 they did so knowing or believing them to be false and with the same dual intention as expressed in the first count.

6. Counts 3 and 4 both alleged that D1 and D2 had procured the execution of a valuable security, contrary to section 22(2) of the Theft Ordinance, Cap. 210. Count 3's particulars were that between 1 February 1999 and 31 March 1999, they dishonestly and with a view to gain for themselves or another or with intent to cause loss to another:

> "…. procured from the Sin Hua Bank Limited (the Bank) the execution of a valuable security, namely a mortgage dated the 1st day of March 1999 between the Bank as mortgagee and International Wisdom & Mercy VDA S.A. (the company) as mortgagor with Tacglory Limited as borrower by deception, namely by falsely representing that the company and its directors and shareholders had approved the use of the property known as 22 Kent Road, Kowloon Tong, Kowloon, Hong Kong, as security to the Bank for credit facilities granted or to be granted to Tacglory Limited." (Appeal bundle p. 3)

7. The particulars of count 4 were the same as set out in count 3 except that the borrower was described as P&T Motors (China) Limited ("PTM").

Prosecution's case

8. Adopting in large measure the helpful summary of the case for the prosecution which has been prepared on behalf of the respondent by Mr Simon Tam, the events which formed the background to this case began in October 1995. At that time, Mr Lau Pak-hun made $62.8 million available to a religious organisation known as International Wisdom Mercy VDA S.A. ("IWM"). Its purpose was for the purchase of a property at 22 Kent Road, Kowloon Tong ("the Property"), in order that it could be used as a museum to promote the teaching of his Mizong master, Yi Yunggao ("Master Yi"), and as a meeting place for Master Yi's disciples in Hong Kong. IWM had three shareholders, namely, Mr Lau, Tse Kit-ha (PW2) and D1, and the Property was held in trust for Mr Lau. There were ten directors who included the three shareholders.

9. D1 became a highly trusted disciple of Master Yi and acted as his representative in Hong Kong. However, in April 1997, about 18 months after the acquisition of the Property, D1's younger brother, D2, who was neither a follower of Master Yi nor affiliated with IWM, attempted to offer the Property to the Sin Hua Bank ("the Bank") as a security for obtaining banking facilities for his companies, Tacglory Limited ("Tacglory") and PTM. In the event, this came to nothing.

10. Neither Tacglory nor PTM had any connection with the religious organisation to which D1 belonged. D1 and D2 were directors and shareholders of Tacglory. D2 and Tacglory were also directors and shareholders of PTM, and hence D1, through her interest in Tacglory, also had an interest in PTM.

11. Towards the end of 1998, the Bank reviewed the banking facilities to these companies and demanded additional security. Again this came to nothing, but, in early 1999, D2 again offered the Property as security to the Bank to obtain a credit facility for Tacglory. In short, this was achieved by using the eight documents purportedly signed by Mr Lau, PW2, D1 and some of the other directors. The documents formed the subject matter of the 1st and 2nd counts. The Bank then executed the two mortgages, the subject of the 3rd and 4th counts.

12. In July 1999, relations between Master Yi and his Hong Kong disciples turned sour. In essence, it was believed that he had acted fraudulently and also inappropriately in a number of other ways. Accordingly, it was resolved that the museum would be closed and that IWM would be disbanded.

13. On 18 September 1999, IWM passed a resolution to transfer the Property to Mr Lau. The meeting also authorised D1 to effect the transfer. It was after D1 had failed to carry out this task that the other directors and shareholders discovered for the first time that the Property had been mortgaged to the Bank as security for the banking facilities given to Tacglory and PTM. For his part, Mr Lau, who had been led by D1 to believe that D2 had a listed company and was a person of means, told D2 that he had never consented to the mortgage of the Property. In response, D2 remained motionless. Mr Lau suggested a solution to the problem by offering to pay $20 million leaving D2 to pay the balance of the sum to redeem the Property. The amount Mr Lau had offered to pay was fixed on the basis that the Property had been mortgaged for a total of $40 million and this went halfway. His concern was the damage that might otherwise be done to the religious organisation by the disgrace this incident could bring to its name. D2 replied that that could not be done as there were binding contracts between IWM and the two companies, Tacglory and PTM.

14. The matter was eventually reported to the Independent Commission Against Corruption ("ICAC") after civil proceedings had been commenced.

15. Amongst the documents seized by ICAC from the Bank were the minutes of what purported to be meetings of IWM's directors recording the resolutions of the shareholders and the declarations of the directors and shareholders of IWM approving the mortgage of the Property. These were all dated 9 February 1999. The prosecution's case was that these documents (Exhibits P4 and P5) were either signed by the relevant directors and shareholders in blank form or were signed with no more than the standard preamble used for recording the minutes of meetings thereon and that, thereafter, resolutions had been added purporting to execute Deeds of Mortgage. It was alleged that D1 and D2 caused Exhibits P4 and P5 to be created so that these resolutions and other details could later be added to them. Needless to say, when the documents were signed in more or less blank form, they were intended by all the signatories except D1, IWM's chairman, to be used for the legitimate affairs of IWM. The evidence clearly established that whatever else the documents might have been used for, they were not intended for the purpose of mortgaging the company's property and that the relevant directors and shareholders, apart from D1, would not have signed the documents if they had known they were going to be used in this way.

Defence case

16. Neither of the applicants gave evidence. However, both of them replied to questions they were asked in interview by ICAC officers.

17. D1's defence at trial was presented on the basis of the answers she had provided in interview. D1 claimed that prior to July 1999, Mr Lau, PW2 and the other directors who signed the documents were devoted disciples of Master Yi and that they would have done anything for him. More specifically, they would sign any document Master Yi told them to. Accordingly, they signed the documents on the instructions of Master Yi, which D1 had transmitted to them, knowing that the documents were mortgage documents and in the full knowledge of what it was that they were being asked to sign. In relation to the 1st and 2nd counts, it was said that the documents were not forgeries and, in regard to counts 3 and 4, D1 asserted that there had been no deception.

18. D2's case was also presented on the answers he gave at his interview. He said that he had acted at the request of his sister (D1), to raise $5 million for IWM at the bidding of Master Yi. He relied on what he was told by D1 as well as on the documents she supplied to him. D2 claimed to have had no knowledge of any forgery or deception, saying that if the documents were forgeries, he had not acted dishonestly.

19. The defence did not dispute that the applicants had jointly procured the Bank's execution of the mortgage deeds by the use of Exhibits P4 and P5. It was claimed that after the Hong Kong disciples discovered that Master Yi was effectively a fraud, they levelled the blame at D1 because she had been closest to him and had acted as his Hong Kong representative. The disciples felt cheated out of large sums of money by Master Yi which they could not recover but, as the Property had been purchased with Mr Lau's donation, this at least was still available. Mr Lau, it was alleged, had insisted that the Property should be returned to him and he had agreed to sell the Property so that the losses suffered by the Hong Kong disciples could be partly restored to them. For this reason, it was suggested, the Hong Kong disciples turned against D1 because of the benefit they hoped to gain from the sale of the Property. When D1 was unable to transfer the Property to Mr Lau, it was alleged that Mr Lau reported the matter to the ICAC in order to pressurise D1 into satisfying the civil claim against her.

The evidence

20. The first main category of evidence at trial came from the two shareholders apart from D1 and five other directors of IWM, all of whom testified that they had not signed the minutes of meetings of directors containing the resolutions of shareholders and the declarations of shareholders and directors, in the form which appears in Exhibits P4 and P5. Although it was accepted that their signatures appeared on those documents, they said that they had known nothing about the contents and had not given their consent for the Property to be used for the benefit of Tacglory and PTM. Evidence was also given by Sek Wai-tong (PW10), the accountant used by IWM, who said that he had not prepared the minutes resolving to mortgage the Property.

21. The second main category of evidence came from bankers and lawyers who handled the mortgage of the Property. The lawyers acting on behalf of the Bank made it a condition of the mortgage that at least four directors should sign the minutes and that all three shareholders should sign the resolutions approving the use of the company's property as security for the credit facilities of Tacglory and PTM.

22. Other evidence of considerable importance at trial came from an expert document examiner whose evidence was not seriously challenged. His findings went to prove that the documents (Exhibits P4 and P5) were false in the sense that later additions had been made to them.

23. As we have said already, there was a further category of evidence which related to the interviews of the applicants which provided the basis on which their cases were presented.

Grounds of appeal (conviction)

(1) Standard of Proof

24. In what we consider to have been the principal ground of appeal, it was submitted that the judge's directions on the standard of proof were materially erroneous in that they:

(i) incorporated an attempt to define a 'reasonable doubt'; and

(ii) may have left the jury with the impression that a doubt about the guilt of a defendant was to be disregarded if it was "fanciful, stupid or ridiculous" and that guilt did not need to be proved to a "mathematical certainty".

25. In the early part of the summing up, the judge gave the following directions which contain the passages about which the complaint in this ground of appeal is directed. He said:

> "Secondly, the standard of proof. The prosecution must prove beyond all reasonable doubt that the accused person is guilty of the offence with which they are charged, before you can convict them. A reasonable doubt is precisely what it says, a reasonable doubt as opposed to a fanciful, stupid or ridiculous doubt. Prosecution does not have to prove the guilt of an accused to a mathematical certainty. Human affairs do not lend themselves to that degree of certainty, but the prosecution has to prove to your satisfaction, so that you feel sure that the accused is guilty….." (Appeal bundle p. 19)

Immediately following this, the judge went on to say:

"It is only then, would it be your duty to convict. This is a very high standard; unless you are sure of his guilt beyond all reasonable doubt, it would be your duty to acquit. It is not enough for the prosecution to establish that there are very strong suspicious circumstances involving the accused person, or that he or she is probably guilty. If, having considered all the evidence, you are left in a reasonable doubt, then you must acquit the accused, because prosecution has failed to discharge its burden.

In the course of my summing-up, you may hear me saying 'proved', 'conclude', 'find', 'believe' or 'satisfy' etc. These words are all to be read as if they are followed by the words 'beyond a reasonable doubt'. I may sometimes leave them out because it is too repetitive or sometimes by a slip of the tongue, but remember the concept beyond all reasonable doubt is there and always there when I use those words." (Appeal bundle p. 19)

26. It was contended that although this later direction and others in similar terms, to which we shall turn in due course, were unobjectionable in themselves, they were qualified by what had been said in the passages which are criticised. In particular, it was submitted that the judge had directed the jury in a way which, in the courts of Australia, has been found not merely to be undesirable but to have amounted to a fatal misdirection. Applying this jurisprudence to the present case, it was argued that these convictions must be quashed.

27. In *Green v R* [1971] 126 CLR 28, which Mr Grounds described as the seminal Australian case dealing with the point at issue, the High Court held that it was a misdirection to state that a reasonable doubt is confined to a "rational doubt" or a "doubt founded upon reason". In that case, the trial judge had answered the rhetorical question he had posed, as to how the jury would know when they had reached the stage of being satisfied about something beyond a reasonable doubt, by directing them (in a passage which appears at pp. 30-31) that:

"…. it is when you have reached the stage that you either have no doubt at all, because if you have got no doubt at all you must have got rid of all reasonable doubts; or if there is some thing nagging in the back of your mind which makes you hesitate as to whether you are satisfied beyond reasonable doubt, you have got to try and take it out and identify this thing which is causing the hesitation, causing the doubt if you like, and you have a look at it and you try to assess it and you say to yourself is this doubt that is bothering me, does it proceed from reason; is it a rational doubt; is it something which raises a really sensible doubt; or is it a fantastic sort of doubt; is it something which arises from some prejudice that I may have; some quite unreasonable fear that I might go wrong; some perhaps reluctance to make an unpleasant finding. Well, if it is one of those doubts – merely one of those doubts, then of course it cannot be described as reasonable because it does not come from reason; it comes from something which is emotional or irrational or – at any rate it is not based upon reason, and if you have had a look at what is bothering you and you decide that it does proceed from something which is not reason but something fantastic or rising out of prejudice or one of these other things, then you should say to yourself, 'The only doubt I've got is one which is not based on reason, I have therefore got rid of all doubts which are not based in reason, and the result of that is that I am satisfied beyond reasonable doubt, because the only things that are worrying me are things which I now assess after looking at them as not based in reason.'"

However, the directions did not end there and, when later the court (at p. 32) went on to say that it was "unable to feel any confidence as to what (the jury) would understand by the totality of what the judge told them", it was the further direction which was described as being the "dominant impression" with which the jury would have been left. This direction (at p. 31) was in these terms:

> "And of course it is a commonsense point of view before you find anybody guilty of a crime like this, you do need to feel comfortable about it; you do need to feel, 'Very well, I've considered everything and I'm really satisfied. I am satisfied beyond reasonable doubt; I have given it the best consideration I can.' There it is. And then you go away from the court and you are comfortable, and that is the way you ought to be. You might not enjoy it, but you will nevertheless be comfortable, and unless you can make a decision of guilt and feel comfortable that it is the right decision, well then you do not make it."

The court made the point that although later in the summing up the trial judge had made references to the need to be satisfied beyond reasonable doubt, these were "controlled" by the way the judge had expressed the definition in the passages we have just cited. The judgment also set out a number of earlier admonitions which had been issued to judges in other criminal trials "to adhere to and not to attempt needless explanations of the classical statement of the nature of the onus of proof resting on the Crown" and went on (at p. 32) to say that it was "remarkable that in this instance the learned judge, undeterred by the failures of illustrious predecessors, has made a new endeavour to explain that which requires no explanation and to improve upon the traditional formula". The court went on to say, when allowing the appeal, that "so far from succeeding where they did not, he has, in our opinion, not only confused the jury but misdirected them". The judgment (at pp. 32-34) continued as follows:

> "…. the direction was in our opinion fundamentally erroneous. A reasonable doubt is a doubt which the particular jury entertain in the circumstances. Jurymen themselves set the standard of what is reasonable in the circumstances. It is that ability which is attributed to them which is one of the virtues of our mode of trial: to their task of deciding facts they bring to bear their experience and judgment. They are both unaccustomed and not required to submit their processes of mind to objective analysis of the kind proposed in the language of the judge in this case. 'It is not their task to analyse their own mental processes': Windeyer J., *Thomas v. The Queen* ([1960] 102 CLR, at p. 606). A reasonable doubt which a jury may entertain is not to be confined to a 'rational doubt', or a 'doubt founded on reason' in the analytical sense or by such detailed processes as those proposed by the passage we have quoted from the summing up. Yet that is what they were directed to do in this case.

But the error, in our opinion, does not end there. If the jury could get any clear picture from the trial judge's directions, we think the predominant impression they would take to the jury room would be that a comfortable satisfaction of the accused's guilt would be enough to warrant conviction. It seems to us that the language used in this portion of the summing up equated satisfaction beyond reasonable doubt with that comfortable satisfaction felt by persons who have done their best and depart self-satisfied with their efforts. Such a standard of conduct on the part of a jury in a criminal trial would in our opinion be a denial of that traditional solicitude for certainty expressed in the traditional formula as to the onus of proof.

If during the course of a trial, particularly in his address to the jury, counsel for the accused has laboured the emphasis on the onus of proof to such a degree as to suggest to the minds of the jury that possibilities which are in truth fantastic or completely unreal ought by them to be regarded as affording a reason for doubt, it would be proper and indeed necessary for the presiding judge to restore, but to do no more than restore, the balance. In such a case the judge can properly instruct the jury that fantastic and unreal possibilities ought not to be regarded by them as the source of reasonable doubt. In the passage which we have quoted from the summing up in this case the trial judge did alert the jury to the impropriety of acting upon such possibilities. We do not know whether counsel for the accused had actually sought to influence the jury in an inadmissible way calling for the judge's intervention. But in any case as we have indicated the judge did not confine his remarks to restoring a proper balance in the mind of the jury. Cf. *Thomas v. The Queen, per* Windeyer J. ([1960] 102 CLR at p. 605).

Lastly on this aspect of the summing up, the language of the trial judge was calculated to lessen the sense of responsibility of the jury in the sense in which that expression was used by Isaacs and Rich JJ. in *Hicks v. The King* ([1920] 28 CLR 36 at p. 46). It seems to us that its clear tendency apart from its obfuscation and inaccuracy was to blunt the jury's proper sense of reluctance to act whilst what they might consider a reasonable doubt had not been removed. In our opinion, the jury were not properly instructed as to the onus of proof. For that reason alone there must be a new trial. See *Thomas v. The Queen* ([1960] 102 CLR 584)."

28. It is to be noted that whilst the court in *Green v R* stated this to be an appeal related to the 'onus of proof', it is clear that the issue which was addressed was the criminal standard of proof. However, our attention was additionally drawn to other leading Australian cases on the standard of proof. We were, amongst others, referred to *R v Flesch & McKenzie* [1986] 24 A.Crim.R. 290 where the Court of Criminal Appeal in New South Wales, when allowing the appeal, held that ordinarily it is desirable for trial judges to use the commonly recognised form of direction on proof beyond reasonable doubt, without development or analysis and that a lengthy development, which occurred in that case, will almost always lead to a situation where there is a risk that the jury will be left confused.

29. In a much later case to which we were taken, *R v Krasniqi* [1993] 69 A.Crim.R. 383, the South Australian Court of Criminal Appeal reviewed a number of earlier decisions on the point at issue, including *R v Green*, when concluding (at p. 391) that the summing up included an "undesirable elaboration on the burden of proof" but the court stated (at pp. 391-392):

> "…. the jury has not been directed to analyse doubt. They were not carried past the point of reaching doubt. The learned trial judge told the jury that fanciful or fantastic suppositions or possibilities are not doubts. He did not postulate, or give the appearance of postulating, the existence of some doubt and tell the jury to decide whether the doubt was fanciful or fantastic. He did not leave room for analysis in that sense."

30. The analysis of a doubt had occurred in *R v Wilson & Ors* [1986] 22 A.Crim.R. 130 where the trial judge had directed the jury (at p. 132): "If you think there is a doubt but that is merely a fanciful doubt, you will still convict because that is not a reasonable doubt: it is a doubt beyond reason". The Court of Criminal Appeal, South Australia, having considered *R v Green* (above) held by a majority that:

> "… the direction in the present case was radically defective. It went further than merely to warn the jury against being influenced by fanciful or unreasonable possibilities or notions. The judge said: 'If you think there is a doubt but that it is merely a fanciful doubt, you will still convict because that is not a reasonable doubt.' This direction postulates a doubt about guilt which the jury thinks exists. It then invites them to subject their mental state to examination in order to determine whether the doubt about guilt which they think to exist, is to be characterised as fanciful or reasonable. That direction is a negation of the proposition of which *Green's* case is authority that the test of whether a doubt is reasonable is whether the jury entertains it in the circumstances.

> I think that a direction in the terms given in the present case has a dangerous tendency to produce in the minds of the jurors an impression that a view held by them that there is a doubt about guilt is to be disregarded unless it passes some further test; that there must be some particular degree of doubt or even that a slight doubt is to be disregarded. When jurors are invited to consider whether a doubt which they actually think to exist is fanciful, they may well interpret the invitation as one, not merely to exclude aberrant mental processes, but to put aside real doubts unless those doubts possess in their minds a certain degree of strength. Proof beyond reasonable doubt requires that doubts, irrespective of degree of strength which they attain, be given effect to if the jurors, as reasonable persons, are prepared to entertain them."

31. Seen in isolation, it might be said that the judge in the present case had offended in the way which gave rise to criticism in *R v Wilson and Ors*. Nevertheless, this is an aspect which, in our opinion, should be viewed in its full context. We shall return to this in due course.

32. In *R v Goncalves* [1997] A.Crim.R. 193, the Court of Criminal Appeal, Western Australia, dealt with an appeal which has relevance in the present context to the other words which are criticised in the summing up. There, a trial judge had directed the jury that reasonable doubt was: "not proof to the point of absolute certainty. It's simply what the words say, 'beyond reasonable doubt'". The court held, when dismissing the appeal, that whilst this was an undesirable direction, the remark in its proper context could not be said to have misled the jury. Malcolm CJ (at p. 196) said:

> "In my opinion, the direction in this case did not suffer from either of the vices in *Green*, although the elaboration of the point by the learned trial judge was clearly undesirable. In my opinion, by saying that proof beyond reasonable doubt was not proof 'to the point of absolute certainty', the learned judge was telling the jury that proof beyond reasonable doubt did not mean proof beyond any doubt whatsoever. From the way in which it was put, I am of the opinion that it remained for the jury to determine whether any doubt they had was a reasonable doubt. In that sense, the direction excluded an approach which would have been wrong and emphasised to the jury that if they had any doubt they would have to determine whether it was reasonable."

33. Returning to the case presently before us, Mr Tam has at all times realistically accepted that the judge had commented on the standard of proof in ways which were, with respect, unwise. This is borne out by the Specimen Directions issued to judges in this jurisdiction which sets out the model direction on the standard of proof in these terms:

> "How does the prosecution succeed in proving the defendant's guilt? The answer is – by making you sure of it. Nothing less than that will do. If after considering all the evidence you are sure that the defendant is guilty, you must return a verdict of 'Guilty'. If you are not sure, your verdict must be 'Not Guilty'."

Attached to this direction is a helpful footnote which indicates that it is normally unnecessary to use the phrase 'beyond reasonable doubt', but that where counsel have adopted the phrase during the trial it is desirable to give the direction:

> "The prosecution must make you sure of guilt, which is the same as proving the case beyond reasonable doubt."

The point is also made in the same footnote that the Court of Appeal in England has cautioned against any attempt at a more elaborate definition of being 'sure' or of 'beyond reasonable doubt'.

34. The modern position in England and Wales dates back to *Walters v R* [1969] 2 AC 26. The developments on this topic since that time are well summarised in *Archbold* [2004] at paras. 4-384/5.

35. In Hong Kong, Kempster JA, in *R v Lee Yuk-wah & Ors*, CACC 467/1984 (unreported), described a "plethora of applications" following the decision in *R v Yeung Kuen-chi & Anor*, CACC 266/1984 where this court held that the following direction was misleading and wrong:

> "There is a burden on the Crown to prove every element of these charges and the Crown must do so beyond (a) reasonable doubt. It cannot do so to a hundred percent certainty. This is not possible, but you must, in other words, be sure."

36. The judgment in *Lee Yuk-wah & Ors*, to which we were not unfortunately referred by counsel in argument, made reference to *R v Ngan Chun-yee & Ors*, CACC 137/1984, *R v Wong Leung*, CACC 517/1984 and *R v Peter Li Kwok-sui & Anor*, CACC 292/1984. In all of those cases, it was, as Kempster JA said:

> "…. held that unfortunate elaborations by reference, for example, to 'mathematical certainty' not markedly different from that impugned in *Yeung*, had not, having regard to subsequent references to reasonable doubt, misled the relevant juries."

37. In *Lee Yuk-wah & Ors*, complaint was made about the direction given to the jury that they did not "have to be certain of a defendant's guilt before you can convict him. Few things are certain in this uncertain world and you can't be certain in a mathematical sense in any case". The court accepted that, but for two decisions in the Privy Council, it was bound by the decision in *Yeung Kuen-chi & Anor*. Those decisions arose from *Walters v R* (above) and *Ferguson v R* [1979] 1 All ER 877 and Kempster JA's judgment deals with each of them in these terms:

"7. In *Walters* a direction referring to 'absolute certainty'(which is) substantially similar to that complained of in the instant applications was upheld. The word 'absolute' is no more than surplusage and no distinction is to be made between certainty and mathematical certainty. In *Ferguson* Lord Scarman said at p. 882:

> 'The time-honoured formula is that the jury must be satisfied beyond reasonable doubt. As Dickson C.J. said in *Dawson v. The Queen* ([1961] 106 CLR 1) at p. 18, attempts to substitute other expressions have never prospered. It is generally sufficient and safe to direct a jury that they must be satisfied beyond reasonable doubt so that they feel sure of the defendant's guilt. Nevertheless other words will suffice so long as the message is clear. In the present case the jury could have been under no illusion. The importance of being sure was repeatedly emphasized.'

Although Deputy Judge Hopkinson did not emphasize the importance of being sure he repeatedly stressed the importance of being satisfied beyond reasonable doubt which, to quote my lord Barker, J.A. in *Yeung*:

> 'are simple English words and experience shows that juries are capable of understanding them without explanation.'

8. I am satisfied that the jury here was made well aware of the required standard of proof. Nonetheless I would express the hope that all judges in this jurisdiction will heed the helpful guidance in relation to directions on the standard of proof to be found in *Ferguson*and in *Yeung*."

38. It was made clear in the concluding words of Lord Diplock's judgment (at p. 31) in *Walters v R* (above), with which we respectfully agree, that it is "the effect of the summing up as a whole that matters". With these words in mind, Mr Tam reminded us that in numerous places during the summing up, the judge had correctly and succinctly dealt with the standard of proof. We shall take some of these in turn.

39. There were two passages shortly before the directions which are criticised. When dealing with the burden of proof, the judge said:

> "I shall now remind you about a cardinal principle in criminal law, which I am sure you are now very familiar with because that has been repeated to you time and again by counsel, but it is my duty to repeat it to you again. I have already mentioned that an accused is presumed innocent until the prosecution has satisfied you of his guilt beyond all reasonable doubt. This means firstly, the burden of proving the guilt of an accused rests upon the prosecution throughout the entire trial from beginning to end. This burden never shifts. There is no burden on the accused to prove anything, let alone his innocence. Remember, it is for the prosecution to prove the guilt of the accused; the accused is not required to prove his innocence." (Appeal bundle p. 18)

Then, immediately afterwards, when the judge was explaining that the applicants had no obligation to give evidence, he said:

> "…. they are presumed innocent unless the prosecution has satisfied you of their guilt beyond a reasonable doubt." (Appeal bundle p. 19)

A little later, after the passage (cited above at paragraph 25) which was criticised, and, importantly, the passage which contains a model direction on the standard of proof and its impact on the approach the jury should take in the event that a reasonable doubt was raised, the judge said:

> "Does what defence counsel suggests in the totality of the evidence raise any reasonable doubt in your minds about the prosecution's case. In coming to that conclusion, I would remind you once again that you should apply your common-sense derived from your experience as men and women of this society." (Appeal bundle p. 20)

Shortly afterwards, in the context of a 'lies' direction to which we shall have to return later under another ground of appeal, the judge said :

> "Convict him or her only if you are satisfied so that you are sure on the whole of the evidence, including what they said in their recorded interview, that he or she is guilty of the charge." (Appeal bundle p. 22)

Later, when defining the elements of forgery the judge said :

> "… if you are not satisfied beyond a reasonable doubt that the instruments are false, then you shall acquit the accused, not only of this count but also of all the other counts." (Appeal bundle p. 28)

40. It is not without significance that experienced counsel who separately appeared at trial on behalf of D1 and D2 indicated no issues of any concern after the judge had enquired, at the end of the first day of his summing up, whether there were any matters they wished to raise.

41. Perhaps in fairness to the judge, whilst in no sense is this to be taken as offering encouragement for the formula he chose to adopt in the passages which are criticised, it may be that he considered that the phraseology of D1's trial counsel in his final speech called for something to be said over and above the usual direction given for the standard of proof beyond the words usually adopted to. Counsel had said as follows:

> "You can't say, 'Well, she sounds guilty to me' or 'I think she's guilty.' It's not enough. You've got to be sure. You've got to be able to walk out of this courtroom, having found her guilty, knowing that at no time in the future, in your life, will you ever ask yourself the question, 'I wonder if she really was guilty.' Because if you found her guilty and walked out of the court and at some later stage asked yourself that question, then you would not have been satisfied beyond reasonable doubt when you found her guilty." (Appeal bundle p. 155)

Similar phraseology was repeated by the same counsel later (at p. 169). If these words triggered the judge's decision to add to the specimen direction on the standard of proof, we do not, with respect, consider that they justified a departure from the usual direction.

42. The impugned words used by the judge when he was giving the standard of proof directions have to be looked at in their full context. We do not consider, in the present circumstances, that the judge's direction that "a fanciful, stupid or ridiculous doubt" or his reference to proof not having to reach the standard of "mathematical certainty", unwise though those words undoubtedly were, could have led to any confusion on the jury's part. It was made abundantly plain that the jury had to feel sure of guilt if they were to convict. The offending words, which form no part of the normal directions given to juries on the standard of proof, were immediately followed by the exhortation that the jury should feel sure of guilt. The jury were told that this was a very high standard and that unless they were sure of guilt beyond all reasonable doubt, it was their duty to acquit. The judge followed this by telling the jury in terms that suspicious circumstances or probable guilt were not enough.

43. In the light of our conclusion, we do not need to dwell at any length with the further contentions made by Mr Grounds that a misdirection on the 'standard of proof' might also have affected the jury's approach to the 'inferences' which might be drawn from the evidence or to the issue of dishonesty alleged against D2 in counts 3 and 4.

44. All we need to say in regard to the ancillary submissions, which were effectively dependent on the principal ground succeeding, is that they added nothing of substance to the matters with which we have already dealt. The judge went to considerable lengths to sum up the defence which had been presented to the jury without, of course, the benefit of evidence from either of the applicants. Despite this, Mr Grounds submitted that D2 "may have stupidly believed or trusted his sister (D1) or there may have been an element of stupidity or ridiculousness or mathematical uncertainty involved which was capable of raising a doubt" in the jury's approach to his defence and the issue of dishonesty. There was, however, no hint or suggestion in the papers before us that D2 suffered from stupidity or anything approaching it and such considerations would have been entirely speculative.

(2) Lies

45. Counsel for D1 and D2, as well as Mr Tam for the respondent, were agreed that a direction on 'lies' was not strictly required in present circumstances. Counsel accepted that this was a case which fitted the position described in *HKSAR v Mo Shiu-sing* [1999] 1 HKC 43 at p. 57 where the judgment reads:

> "… where an allegation has simply been made against the defendant that he has been lying, this subject can be dealt with by the judge directing the jury in terms that this is an issue which relates solely to credibility, that is, that it is for the jury to decide whose evidence they believe. In such circumstances, no more needs to be said."

For our part, we can well understand why the judge chose out of an abundance of caution to give a 'lies' direction in view of the gulf which lay between the prosecution and the defence. Again, adopting the judgment in *Mo Shiu-sing* (at p. 57):

"(2) Where there is a danger that the jury may believe that lying goes to *proof of guilt*, usually because the prosecutor has alleged that the defendant has lied and has addressed the jury upon the basis that the lie is supportive of the prosecution case, a twofold warning should be given to the effect that:

(a) lies can never prove guilt in themselves; and

(b) that persons may lie for reasons other than guilt.

This last direction will need to be accompanied by the possible 'innocent' reasons that are usually given as examples in a standard direction as to why a person facing an allegation of crime might lie."

46. Nevertheless, it was submitted, as a further ground of appeal, that the judge, having decided to give a direction on lies, had misdirected the jury on that issue by leaving open the danger that the jury would misuse lies as evidence probative of guilt.

47. The directions given by the judge about lies were in these terms:

"You have seen the video interview of the two accused; they gave you an account of how the events happened. If, having listened to the accused's account in the video-recording, you come to the conclusion that he or she had at some stage told you lies, you must not convict him or her simply for that reason; because people tell lies for reasons other than that they are guilty. Perhaps because they think the truth is unconvincing or out of confusion or out of panic or to protect someone else, or because they are ashamed of their behaviour that might fall short of committing a criminal offence.

That is not an exhaustive list of reasons why people tell lies, but it may help you to understand more clearly that people do tell lies sometimes for reasons other than that they are guilty. So, do not convict the accused simply because you think he was telling lies in the interview. Convict him or her only if you are satisfied so that you are sure on the whole of the evidence including what they said in their recorded interview, that he or she is guilty of the charge." (Appeal bundle p. 22)

48. The specific complaint made in this ground was that these directions did not go far enough. The judge had not stated that lies in themselves could not prove guilt and he did not go on to say, in the suggested formula set out in *Mo Shiu-shing* (at p. 58):

"If you think that there is, or may be, an innocent explanation for his lies then you should take no notice of them. It is only if you are sure that he did not lie for an 'innocent' reason that his lies can be regarded by you *as evidence which supports the prosecution's case*."

49. However, whilst the compliant as it stands may have some force, it cannot be viewed in isolation. The jury were not pouring over the written words of the summing up to scrutinise under a spotlight every nuance of each stage as it proceeded. They were able to hear the whole of the summing up before beginning their deliberations and, in the latter part of the summing up, the judge returned to this issue in a context where it was specifically relevant to the subject-matter with which he was dealing. When referring to some of the answers D1 had given in her interview which prosecuting counsel had submitted were lies, the judge was at pains to remind the jury that even though they might find her to have been lying, this was not a sufficient reason to convict her. He reminded the jury that lies might be told for reasons other than guilt and he said, for the first time, that lies could not in themselves prove guilt. It was, in addition to the passages cited earlier in relation to the principal ground of appeal, emphasised again that the jury had to be satisfied of guilt beyond all reasonable doubt before they could convict.

50. Mr Tam submitted that the 'lies' directions, taken overall, provided a clear message in circumstances where, at trial, counsel for D1 had alleged that Mr Lau and PW2 to PW5 had been lying while prosecuting counsel had said that the applicants had been lying in their interviews. D2's case was that he had relied on what he was told by D1. The judge's directions, it was submitted, removed the potential danger of the jury thinking that a defendant who had lied must be guilty.

51. In the first of these later directions, as all counsel accepted, it was not entirely clear what the judge was meaning to say in relation to D1 albeit there appears, in our view, to have been nothing contained in the passage which was prejudicial to her. The judge said:

> "I remind you what I said earlier. Even though you find (D1) lying, that is not a sufficient reason to convict her, because a person may lie for reasons other than that she is guilty. You have to be satisfied of her guilt beyond reasonable doubt before you could convict her. Now, do the lies you find in the interview help you to remove any doubt, if what she said at the interview could be true? This is a matter for you.
>
> (Counsel for D2) has taken you through the video interview of the 2nd accused. The crux of his submission is that what the 2nd accused said is consistent with what the 1st accused said in the interview. Now, for that purpose, it does not matter if what the accused said in an interview was found to be untrue, because the defence of the 2nd accused was that he was acting on what he was told by the 1st accused. So, that would not damage the 2nd accused's case." (Appeal bundle p. 75)

Later, again, when the judge was itemising areas of dispute, he said:

> "… Now, I remind you what I said earlier about lies; lies can never prove guilt in themselves, and that persons may lie for reasons other than (that) they are guilty. …" (Appeal bundle p. 79)

As we have already said, the judge had in fact omitted to say earlier that lies could not in themselves prove guilt. In this sense it was not a 'reminder', but the judge went on later to say:

"… As against the 1st accused, you have the evidence of the lies she told about the documents and how they came to be created. Again, I remind you that lies can never prove guilt and a person may lie for reasons other than she is guilty. So, ask yourselves whether in the light of all the circumstances, she knew the documents were forgeries.

Again, the 2nd accused, he has not been shown to have told you lies about how the documents came to be created. He stated that he did not know, he has no knowledge. So, ask yourselves whether in the light of the circumstances, he knew the documents were forger(ies). …" (Appeal bundle p. 81)

52. We consider that the directions given by the judge were adequate in all the circumstances. Nothing more needed to be said and, to answer the point raised in this ground, nothing, in our opinion, was said by the judge which could have led the jury to infer guilt merely from lies.

(3) Dishonesty

53. The next ground of appeal with which we shall deal impugned the judge's directions on dishonesty by, amongst other things, "muddling" the defences of D1 and D2 and, in D2's case, by directing the jury that they did not have to consider the second question in *Ghosh* when determining whether D2 had acted dishonestly.

54. The judge, on the issue of dishonesty, had directed the jury as follows:

"Thirdly, dishonesty. On this issue you have to decide two questions. Firstly, was what the accused did or agreed to do, dishonest by the standard of reasonable and honest people? In this regard you, the jury, must form your own judgment of what those standards are. That is why you are called from your various inconveniences to come here to apply your everyday experience as reasonable members of the public and to exercise common-sense.

The second question is, must the accused themselves have realised that what they were doing or agreed to do would be regarded as dishonest by reasonable and honest people? In deciding this question, you must consider the accused own state of mind as at the time of the event. And counsel has reminded you the background that is, in February 1999. Counsel says (D1) acted under the spell of the master, and counsel says (D2) acted on the trust of the sister. This is something that you may consider.

This question has both a subjective and an objective element in it. It is not simply whether the accused themselves realised what they were doing was dishonest, it is not simply that. It is not simply whether under the spell of the master they did not realise what they were doing was dishonest. It is this; it is whether they must have realised that what they were doing or agreed to do, would be regarded as dishonest by reasonable and honest people.

So, I repeat, it is whether they must have realised what they were doing or agreed to do, would be regarded as dishonest by reasonable and honest people. I shall come back to this and give you more specific directions on the facts when I sum up the evidence to you in due course." (Appeal bundle pp. 32-33)

55. In this passage, it is plain that the judge's reference to "they", meaning both applicants, had been under Master Yi's spell was a slip of the tongue. It was no doubt caused by the difficulty which had arisen, that D1, by virtue of her defence that she was acting under the spell of Master Yi, was entitled to a *Ghosh* direction whereas D2, who merely said that he honestly relied on his sister's word, was not so entitled.

56. As Mr Tam submitted, a fair reading of the passage shows that the judge was directing the jury that they had to decide two questions on the issue of dishonesty. These arose from the two limbs of the well-known test in *R v Ghosh* [1982] 1 QB 1053 at 1064. When the judge returned to this issue, he said:

"I have told you that (the) prosecution must prove that what the accused have agreed to do was dishonest and you must decide two questions; firstly, was that the accused did by the standard of reasonable and honest people, dishonest? Now, you the jury must form your own judgment of what those standards are. As reasonable men and women of society, you must know what those standards are, apply those standards to the facts of this case as you found them, ask yourselves whether what the accused did was dishonest by the standard of reasonable and honest people; not by their own standard, by the standard of reasonable and honest people. Was it dishonest to present Exhibit P4 and P5 to the bank as IWM's board meeting minutes and shareholders' resolution when no such meeting had been held and no such resolution has been passed? This is a question for you.

If the answer is 'Yes', then the next question to consider is, must the accused themselves have realised that what they were doing or agreed to do – we are just concerned with what they were doing – would be regarded as dishonest by reasonable and honest people. Now, this question has both a subjective and an objective element in it. It is not simply whether the accused themselves thought that they were honest in so doing. It is whether they realised reasonable and honest people would regard it as dishonest to present those documents when there was no such board meeting held and when there was no such resolution passed.

Counsel rightly asked you to take into account the accused's state of mind as at February 1999. For (D1), counsel said that she was acting under the spell of the master. Do you find that to be true or could possibly be true? If 'Yes', would she, while under that spell, consider it not dishonest to do what you found she did; that is, to present those documents as if there were board meetings and resolutions passed when in fact there was no.

Of course, if you do not find that she was acting under the spell of the master, then there is no need to ask yourselves this second question. You only ask this question if you think that she might be acting under the spell of the master.

For (D2), his position is different. He was not acting under the influence of the master. He was not a believer. He acted on the trust of his sister. Perhaps there is really no need for you to consider this second question." (Appeal bundle pp. 82-83)

57. In our judgment, the judge had dealt with this matter in a sensible fashion, having tailored his directions to the somewhat awkward situation which had arisen. It is apparent that he had not confused the separate nature of the cases presented by D1 and D2. All that we need to say on this issue is that in D1's case, the *Ghosh* direction was a model of its kind and would not have been required in all probability if her defence had been presented on a different footing. So far as D2 was concerned, whilst it may be said that the judge was somewhat generous in giving D2 the benefit of a partial *Ghosh* direction, the fact is that as the jury had to be given such a direction in D1's case, it was impractical to tell the jury wholly to ignore it in D2's case.

(4) Admitted facts

58. Amongst the 'Admitted Facts' which trial counsel for both applicants and counsel for the prosecution had signed under section 65C of the Criminal Procedure Ordinance, Cap. 221, was the following:

> "17. On 26th July 2001 an agreement between IWM, Tacglory and P&T dated 12th January 1999 was found at Flat D, 6/F., 24-28 Yik Yam Street, Happy Valley, the home of D1, by the ICAC following a search of the premises. The agreement is produced as exhibit P54." (Appeal bundle p. 13)

59. Mr Grounds, in a further ground of appeal, raised a matter which was never raised at trial and should never have been raised as a serious point in these proceedings. He alleged that as Exhibit P. 54 was a "mere sham" the exhibit should have been referred to as a document. To have referred to this as an "agreement" meant, he suggested, that the prosecution was bound by their admission that this *was* an agreement (as opposed to a sham).

60. We do not propose to say more on this point than that a careful draftsman would no doubt have described Exhibit P. 54 as a "document described as an agreement". However, no one at trial was under any misapprehension about it nor could they reasonably have been.

(5) Alternative basis of defence

61. In the final ground to which we need to make reference, it was submitted that the judge had failed to put to the jury a possible alternative basis on which the defence might be viewed. It was accepted in these proceedings that neither of the highly experienced counsel at trial had put forward any alternative basis for the defence but Mr Poon, for D1, argued at some length that the evidence had left an alternative defence open which the judge ought, in the proper exercise of his duty, to have explained to the jury.

62. The 'alternative defence' which Mr Poon had in mind was that D1 may have believed that the other Hong Kong disciples would not have objected to the application for a mortgage on the Property, even though their consent was not sought or obtained, "as she had been instructed to act in this way by Master Yi …… D1 may also have believed that they would not have questioned her evenif she had just typed in the mortgages unilaterally".

63. The respondent's submission that there was no evidence in the court below to raise these issues is well-founded. There was no evidence of any kind to suggest that D1 might have believed that she was entitled to make use of false documents in order to deceive a bank into granting credit facilities to her or her brother's companies. Mr Poon, despite repeated requests to indicate any material from which such a defence might spring, was unable to do so.

Conclusion (convictions)

64. Having regard to the matters raised under the principal ground of appeal in relation to the standard of proof, we shall grant leave. However, treating the hearing in each case as the appeal of D1 and D2, we dismiss their appeals against conviction.

Sentence

65. There remains for our consideration an application for leave to appeal against the sentence of eleven years' imprisonment imposed on D1. No complaint was raised in relation to the additional order that she should be disqualified for fifteen years from acting as a director of a company under section 168E of the Companies Ordinance, Cap. 32, and this order will stand.

66. The judge, when sentencing, correctly described D1 and D2 as having carried out a carefully planned fraud which had taken nearly two years to materialise. In early 1997, D1 and D2 arranged banking officers to view the Property on the pretext of raising a loan for IWM and later at the end of 1998 the Property was provided as security for credit facilities to Tacglory and PTM. The judge found that this was an elaborate fraud in which false corporate and banking documents were created and used to mortgage the Property of the religious body to which D1 belonged. The value of the Property was large and the Bank stood to lose a sizeable sum of money as the result of the fraud. $35 million was owed by Tacglory and another $58 million was owed by PTM to the Bank. D1 had shown no remorse for her wrongdoing, notwithstanding the overwhelming evidence against her.

67. These offences, as the judge commented, amounted not only to a fraud on the Bank but on IWM also. By their conduct, D1 and D2 had fraudulently mortgaged the Property. This had the effect of putting the interests of IWM at serious risk and deceiving the Bank into providing credit facilities which, in the event, resulted in the Bank sustaining substantial losses. Even on D1's case, the mortgages were for $40 million.

68. We are asked to view this matter in effect as a fraud amounting to $40 million. As there has been no resolution so far to civil proceedings which are in progress, we propose, as the judge appears also to have done, to deal with the case on this basis.

69. Bearing in mind that D2 received a sentence of seven and a half years' imprisonment, it was argued that this left a considerable disparity between his sentence and D1's. Mr Poon submitted that whilst D1 may have made the whole venture possible and was deserving of a sentence no less than seven and a half years, a three-and-a-half-year difference between her sentence and that of her brother (D2) was too great.

70. We consider that this is a case which can properly be looked at as a whole. While there were four counts, the two sets of forged documents were used to obtain the two mortgage loans amounting to approximately $40 million. Had this been a single charge of theft of $40 million, which in effect this is, the sentence could have been no more than the statutory maximum of ten years for theft.

71. This was, so far as IWM was concerned, a considerable breach of trust on the part of D1. She was a shareholder and director who, behind the backs of the others, mortgaged the Property which was being held in trust for Mr Lau. This provides an aggravating factor which alone justified the judge in taking a much more serious view of D1's role. Furthermore, as the judge remarked, D1 was the majority shareholder of Tacglory and must have stood to gain substantially from the fraud.

72. We derived little assistance from the large number of previous decisions of this count in other cases where large sums of money have been taken dishonestly by a variety of means. There are no guidelines for sentencing purposes and each case must be decided on its own facts. Having regard to the grave breach of her fiduciary duty towards the other shareholders and directors of IWM, and remembering that there has been no hint of remorse and no attempt to repay any part of the loss, we consider that a sentence of nine years' imprisonment was appropriate for the criminality involved in D1's conduct. In saying this, we are satisfied that a sentence of 11 years' imprisonment was manifestly excessive.

73. Accordingly, we shall give leave and treating the hearing as the appeal, we allow the appeal to the extent that D1's sentence is reduced by two years to nine years' imprisonment on counts 1 and 2. The concurrent sentences of six years' imprisonment on counts 3 and 4 will remain. All these sentences are to run concurrently, making nine years in all.

(M. Stuart-Moore)	(Frank Stock)	(Michael Lunn)
Vice-President	Justice of Appeal	Judge of the Court of First Instance

Mr Simon Tam, SGC, of the Department of Justice, for the Respondent.

Mr Albert Poon and Mr Vincent Poon, instructed by Messrs K.Y. Woo & Co., for D1/Applicant.

Mr Christopher Grounds and Ms Lydia L.K. Sun, instructed by Messrs Chiu, Szeto & Cheng, for D2/Applicant.