Published on e-First 9 February 2021

Case Note

CAN THERE BE THEFT OF A DISCARDED ITEM?

Parti Liyani v Public Prosecutor
[2020] SGHC 187

In *Parti Liyani v Public Prosecutor* [2020] SGHC 187, the High Court held that a person cannot commit theft of an item that has been discarded by its owner. This note suggests that the High Court's underlying premise for that position may benefit from reconsideration in a future case, as it did not take into account certain important legal nuances. In particular, the court could have considered relevant authorities (both foreign and local) on the law of abandonment by trashing.

Benny **TAN** Zhi Peng[1]
LLB (Hons) (National University of Singapore),
MPhil in Criminological Research (Cambridge);
Advocate and Solicitor (Singapore);
Sheridan Fellow, Faculty of Law, National University of Singapore.

I. Introduction

1 In March 2019, following a trial, the defendant in *Public Prosecutor v Parti Liyani*[2] was convicted by the District Court of four counts of theft-related charges.[3] She was charged for the theft of multiple items variously in the possession of the members of the complainant household. She was sentenced to a global punishment of 28 months' imprisonment. The defendant appealed against the conviction and sentence. A year and a half later, the High Court acquitted her completely of all charges.[4]

2 The scope of this note is restricted to examining the soundness of the High Court's reasoning in acquitting her for stealing one of the items

1 The author is grateful to the anonymous referee for the helpful suggestions. All errors, however, remain the author's alone.

2 [2019] SGDC 57.

3 Specifically, the defendant faced one count of theft as servant under s 381 of the Penal Code (Cap 224, 2008 Rev Ed) and three counts of theft-in-dwelling under s 380 of the Penal Code.

4 *Parti Liyani v Public Prosecutor* [2020] SGHC 187.

in the first charge – a "Pioneer" brand DVD player ("the DVD player").[5] The court's reasons for acquitting her of theft of the other items involve numerous other complex issues, such as the improper motive of some of the complainant household members,[6] and broken chain of custody of evidence,[7] each of which deserves a full treatment in separate articles. This note thus expresses no views with respect to the charges of theft of all the other items.[8]

3 This note's main thesis is that the High Court's underlying reasons for acquitting the defendant *vis-à-vis* the Pioneer DVD player may benefit from reconsideration in a future case, as it did not take into account certain important legal nuances. In particular, the court could have considered relevant authorities, both foreign and local, on the law of abandonment by trashing (or discarding). It appears to have been assumed simply that the offence of theft cannot be disclosed in a case where what an offender has taken was a discarded item.

II. The substantive issue

4 The Prosecution charged the defendant for theft of the DVD player. The act was alleged to have been committed on 28 October 2016, when the player was in the possession of one of the complainants, Liew Mun Leong ("the complainant"). As the High Court pointed out:[9]

> In relation to the Pioneer DVD Player, [the defendant's] defence is that sometime in 2012 or 2013, [the complainant's wife] wanted to throw the DVD player away and it was to be 'given to the *karang guni* man' as it was broken. [The defendant] asked for the Pioneer DVD player as she intended to bring it back to Indonesia to fix it and [the complainant's wife] agreed. On the other hand, the Prosecution's case is that the said … player did not break down and [the complainant's wife] had never given it to [the defendant].

5 Not be confused with the "Phillips" brand DVD player, which is the subject of the second charge.

6 See generally *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [34]–[52].

7 *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [56]–[61].

8 Given that the focus of this note is on the law of abandonment, the points canvassed herein would also be relevant to the charges against the defendant of theft of various other items the defendant argued has been discarded by the respective complainant household members (for example, the two Longchamp bags in the first charge, the two watches and two white iPhone 4s in the second charge, and the two watches in the third charge). However, whether the defendant is guilty of theft of these other items is complicated by various other issues (such as whether they previously even belonged to the respective household members); hence, no direct views are expressed in relation to these items.

9 *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [80].

5 The District Court had held that "the crux of the issue was whether the DVD player had been taken without permission",[10] or, put another way, whether the complainant's wife (on the complainant's behalf) had consented to the defendant taking the player for her own purposes. The District Court found that the defendant did not have such permission, as she had admitted as such in one of her statements ("P33 statement").[11]

6 The High Court disagreed and held that the District Court had erred in convicting the defendant by focusing on the issue of permission.[12] The High Court's principal reason for taking this position is as follows:[13]

> The Judge's focus on Q18/A18 [in the P33 statement] wrongly premises the element of 'no consent' on a requirement that [the defendant] had to inform her employers that she was taking an item that they had decided to throw away. It could well have been possible for [the defendant] to have taken the Pioneer DVD player after [the complainant's wife] instructed her to throw the DVD player away and she decided to keep it without informing anyone instead. This would not have constituted dishonest taking of the Pioneer DVD player. In my judgment, the offence of theft as a servant is equally not made out if [the defendant] had appropriated an item that her employers decided to throw away [emphasis added].

Clearly, the High Court's overarching holding is that there cannot be theft in appropriating a *discarded* item. The court's underlying premise appears to be that if an item has been thrown away, it would no longer be in the possession of anyone at the time of a defendant's taking. Since the taking of a moveable property out of someone's possession is an element of theft as defined in the Penal Code,[14] one cannot steal something that is not in the possession of another person.[15] Accordingly, if what a person has taken is a discarded item, it would not matter at all whether the other elements of theft, such as whether the person had permission for such taking, are made out or not. Because the High Court took this position, it focused its attention instead on the issue of whether the DVD player *was spoilt*, so that it could make a finding on whether the complainant's

10 *Public Prosecutor v Parti Liyani* [2019] SGDC 57 at [23].
11 *Public Prosecutor v Parti Liyani* [2019] SGDC 57 at [23].
12 *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [82].
13 *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [84]. See also [94].
14 See s 378 of the Penal Code (Cap 224, 2008 Rev Ed).
15 Given that in *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [84] the High Court framed two seemingly identical scenarios, both of which it held theft would equally not be made out, it likely had in mind an *alternative* premise for this holding. This is that when a person appropriates a discarded item, the element of dishonesty in theft will never be made out. As will be highlighted at para 19 below, this premise may also benefit from a relook in a future case.

wife had discarded the DVD player, and spent minimal time on the issue of consent.[16]

7 Pertinently, however, the prevailing position in Singapore is in fact a more nuanced one. Whether someone is in possession of property for the purposes of making out property-related offences in the Penal Code is predicated on the law on possessory rights in civil law. This is because such property offences are intended to protect civil proprietary rights. This point has been underscored by Steven Chong J (as he then was) in *Wong Seng Kwan v Public Prosecutor*[17] ("*Wong Seng Kwan*"), a case involving the offence of criminal misappropriation:[18]

> *It is important to recognise that civil liability for property claims has a direct bearing on criminal liability in respect of offences under Ch XVII of the Penal Code* …, collectively known as 'Offences Against Property'. *Therefore, an understanding of the scope and content of property rights in civil law is essential for a proper interpretation of criminal law provisions relating to property offences.* As fittingly observed by Lord Macaulay in his book, *Speeches and Poems, with the Report and Notes on the Indian Penal Code* (Riverside Press, 1867) at p 432:
>
> > There is such a mutual relation between the different parts of the law that those parts must all attain perfection together. That portion, be it what it may, which is selected to be first put into the form of a code, with whatever clearness and precision it may be expressed and arranged, must necessarily partake to a considerable extent of the uncertainty and obscurity in which other portions are still left.
> >
> > This observation applies with peculiar force to that important portion of the penal code which we now propose to consider. *The offences defined in this chapter are made punishable on the ground that they are violations of the right of property; but the right of property is itself the creature of the law.* It is evident, therefore, that if the substantive civil law touching this right be imperfect or obscure, *the penal law which is auxiliary to that substantive law*, and of which the object is to add a sanction to that substantive law, must partake of the imperfection or obscurity …
>
> [emphasis in original omitted; other emphasis added]

The point has similarly been made by criminal law scholars elsewhere.[19]

8 A person loses possession of a property only when one has *abandoned* such possession. Abandonment is a *legal* concept. The

16 See *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [83]–[96].
17 [2012] 3 SLR 12.
18 *Wong Seng Kwan v Public Prosecutor* [2012] 3 SLR 12 at [2].
19 See, for example, Andrew Simester *et al*, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 7th Ed, 2019) at p 529.

physical act of throwing an item away *is but one piece of evidence to prove abandonment*. Appositely, Chong J held in *Wong Seng Kwan* that:[20]

> The significance of this ingredient is that the offence does not arise if the lost chattel has been abandoned since in such a case there is really no owner to speak of. In this case, there can be no suggestion that Ms Sun had abandoned her wallet. Whether a lost chattel has been abandoned is essentially a question of fact to be inferred from the surrounding circumstances. Factors such as (a) the place where the chattel was found; (b) the nature of the chattel; and (c) the value of the chattel are relevant considerations to determine whether the owner had intended to abandon the chattel. It is ultimately an exercise of common sense. The higher the value of the lost chattel, the less likely it has been abandoned by the owner.
>
> The topic of abandonment of property was recently comprehensively surveyed by Associate Professor Saw Cheng Lim in *The Law of Abandonment and the Passing of Property in Trash* (2011) 23 SAcLJ 145, where the learned author explained at p 167 that the circumstances surrounding the discarding of chattels should raise the irresistible inference that the original owners had clearly abandoned them – both possession and ownership. Associate Professor Saw concluded at p 173 that given that it is difficult to predict with any certainty how much proof is required to establish a specific and unequivocal intention on the part of the original owner to abandon the property in question, the courts should be slow to make any finding of abandonment except in the clearest of cases. I agree with the view expressed by Associate Professor Saw.

9 Even more crucially, our Court of Appeal has held in the 2018 case of *Lee Chen Seong Jeremy v Official Assignee*[21] ("*Lee Chen Seong*") that:[22]

> In our judgment, abandonment would be made out when there has been a *unilateral relinquishment* of a particular property: *Edward J Kearns v T A Dilleen (Inspector of Taxes)* [1997] 3IR 287 at 298; Saw Cheng Lim, "The Law of Abandonment and the Passing of Property in Trash"(2011) 23 SAcLJ 145 at para 6. Although Professor Saw's article mainly concerns physical property, *the same principles* could apply in the realm of intangible property (as Professor Saw postulated, using the example of intellectual property rights; see also Tan Yock Lin, *Personal Property Law* (Academy Publishing, 2014) at para 02.068). *We find the two-element test propounded by Professor Saw – namely, that there must be an overt act of abandonment and a subjective intention to completely relinquish a property – to be a usable analytical framework. We note parenthetically that the two elements are intertwined – a subjective intention to abandon is to be established inferentially from the overt acts and conduct of the proprietor. We also note that the court should be slow to make any finding of*

20 *Wong Seng Kwan v Public Prosecutor* [2012] 3 SLR 12 at [21]–[22].
21 [2018] 2 SLR 820.
22 *Lee Chen Seong Jeremy v Official Assignee* [2018] 2 SLR 820 at [26].

> *abandonment except in the clearest of cases*: *Wong Seng Kwan v Public Prosecutor* [2012] 3 SLR 12 at [22].
>
> [emphasis in original omitted; other emphasis added]

10 In Saw Cheng Lim's article, which was cited with approval by the Court of Appeal in *Lee Chen Seong*, Saw explained that:[23]

> From a brief survey of US and Canadian case law, it is apparent that two requirements must be satisfied in order to effect a proper abandonment of property … There must … be, in addition to the overt act of abandonment itself, a specific *intention/motive* on the part of the original owner to completely relinquish all rights of ownership – voluntarily and, more importantly, without regard as to who may subsequently take possession of the property. It bears repeating that such relinquishment must be to the extent where the former owner is *completely indifferent* as to the fate of the discarded object (*ie*, as to what/who may await the abandoned property). In other words, if anyone else takes and uses the abandoned property in whatever manner, that is a matter of no consequence to him [emphasis in original].

It is worth mentioning that in adopting Saw's views, the Court of Appeal can be taken to have preferred the English position on this issue over the position taken elsewhere, which is that the act of trashing an item is *ipso facto* sufficient proof of abandonment.[24]

11 There was no mention of *Lee Chen Seong*, *Wong Seng Kwan* or Saw's article in the High Court's decision. This is a tad curious. Some might go as far as to argue that the position taken by the Court of Appeal in *Lee Chen Seong* was binding on the High Court, *vis-à-vis* the High Court's premise that a person cannot have committed theft of a discarded item because he would not have taken it out of anyone's possession.

12 What difference would it have made had the High Court duly applied the law in its more nuanced form? As a matter of principle, it is hence not right to say that so long as what a defendant has taken is an item that has been discarded, theft simply cannot be made out. Instead, the act of discarding would be proof of an overt act of abandonment, but there is need to go on to consider whether the item's owner had (subjectively) intended to relinquish the item to the extent that he or she is completely indifferent as to the fate of the discarded item. The factors from which the owner's subjective intention can be inferred include the ones Chong J stated in *Wong Seng Kwan*.[25]

---

23 Saw Cheng Lim, "The Law of Abandonment and the Passing of Property in Trash" (2011) 23 SAcLJ 145 at 148, para 6.

24 Saw Cheng Lim, "The Law of Abandonment and the Passing of Property in Trash" (2011) 23 SAcLJ 145 at 149–162, paras 9–34.

25 See para 8 above.

13 From a practical perspective, this means that in the case in question here, the first question would be whether the complainant's wife had *abandoned* (as defined above) the DVD player at the time of the defendant's taking. If the former had abandoned possession of it, then theft cannot be disclosed.[26] Notably, it is the defendant's *own case* that the complainant's wife had instructed the defendant to throw away the player by giving it to a *karang guni* man.[27] These are rag-and-bone men whose business is to visit residences in Singapore door-to-door to collect unwanted items,[28] and they often pay a small fee to the household based on the value of the unwanted items taken. Hence, according to the defendant's case, the complainant's wife had not intended to completely relinquish the DVD player on the complainant's behalf, and so the complainant remained in possession of it at the material time.

14 Two English cases provide useful illustration. In *Williams and Phillips*,[29] two dustmen had taken certain commercially valuable items from rubbish which they collected from factories and other places. They were charged with and convicted of theft, and the conviction was affirmed by the English Court of Appeal. In particular, Goddard LCJ held that:[30]

> The first point that is taken here, that the property was abandoned, is on the face of it untenable. Of course, that is not so. If I put refuse in my dustbin outside my house, I am not abandoning it in the sense that I am leaving it for anybody to take away. I am putting it out so that it may be collected and taken away by the local authority, and until it has been taken away by the local authority it is my property. It is my property and I can take it back and prevent anybody else from taking it away. It is simply put there for the Corporation [the employer of the dustmen] or the local authority, as the case may be, to come and clear it away. Once the Corporation come and clear it away, it seems to me that because I intended it to pass from myself to them, it becomes their property. Therefore, there is no ground for saying that this is abandoned property. As long as the property remains on the owner's premises, it cannot be abandoned property. It is a wholly untenable proposition to say that refuse which a house holder puts out to taken away is abandoned. Very likely he does not want it himself and that is why he puts it in the dustbin. He puts it in the dustbin, not so that anybody can come along and take it, but so that the Corporation can come along and take it.

---

26 Shriniwas Gupta & Preeti Mishra, *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code, 1860* (Bharat Law House, 28th Ed, 2018) at pp 2752–2753. See also Andrew Simester *et al*, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 7th Ed, 2019) at pp 546–547.

27 See para 4 above.

28 Adam Brown, *Singapore English in a Nutshell: An Alphabetical Description of Its Features* (Federal Publications, 2000) at p 121.

29 (1957) 41 Cr App R 5.

30 *Williams v Phillips* (1957) 41 Cr App R 5 at 8.

If putting trash in a dustbin outside one's house is not abandonment,[31] it would *a fortiori* be harder to see how it would be abandonment to leave items aside for collection specifically by a *karang guni* man.

15 The other English case, which is arguably even more analogous to the case in question here, is *Ricketts v Basildon Magistrates' Court*.[32] In that case, the defendant was charged for theft of items belonging to two charity organisations. Donors would leave items they wished to donate to these charities outside the charity shops operated by the charities. The defendant was caught appropriating various items from outside these shops. The English High Court affirmed that these items had not been abandoned, and so the trial court was entitled to find the defendant dishonest and convict him of theft.

16 There is also the Indian case of *Moti v Emperor*.[33] There, a currency note was cancelled by the Currency Officer and sent for destruction. As part of the destruction, certain significant parts of the note were torn off, before being sent to be cut into pieces and burnt. The first accused was responsible for cutting the note into pieces, but he appropriated the note instead. He was convicted of theft of the note. The court held that:[34]

> A very clear distinction must be drawn between an intention to destroy and to abandon and an actual destruction and abandonment. The very fact that the owner of the property intends to destroy or abandon that property and hands it

31 See also *Vestwin Trading Pte Ltd v Obegi Melissa* [2006] 3 SLR(R) 573 and *Obegi Melissa v Vestwin Trading Pte Ltd* [2008] 2 SLR(R) 540. Further, for an interesting discussion in the English context on whether appropriating trash amounts to theft, see Sean Thomas, "Do Freegans commit theft?" (2010) 30(1) Legal Stud 98 (though note the definition of dishonesty in England and Wales is not identical to that in Singapore).

32 [2010] EWHC 2358 (Admin).

33 (1925) 26 Cri LJ 189 (Sind Judicial Commissioner's Court).

34 *Moti v Emperor* (1925) 26 Cri LJ 189 at 189 (Sind Judicial Commissioner's Court). On the issue of sentencing, the court went on to say (at 189–190) that:

> It is true that this piece of paper had in itself no value but that does not make the offence of stealing it an offence which can be dealt with as an offence of no importance so that punishment should not be inflicted upon the thief. A piece of paper on which is written some important military or political secrets has also no cash value but it cannot be said the theft of such a document is insignificant and it is obvious enough why the Currency Office should object to a note cancelled but still capable of deceiving passing into the hands of the public. It is impossible, therefore, to treat this as a trivial theft.

For an Indian case in contrast where abandonment was found, see Shriniwas Gupta & Preeti Mishra, *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code, 1860* (Bharat Law House, 28th Ed, 2018) at p 2744 ("Where a man buried the carcass of a bullock suspecting it to have been poisoned and another person dug it up and carried it away, it was held that no theft was committed, because property as well as possession in it were abandoned.": (1869) 4 MHC (Appx) 30; 1 Weir 384).

> over to some person to effect these purposes is in our opinion a clear indication that, he still maintains his rights as the owner of that property and that those rights subsist until the abandonment or destruction is completed … As long as the destruction or abandonment is not fulfilled and as long as it is still in the hand of the owner to counter-mand such destruction or abandonment the property is still the property of the owner and the taking it out of his possession is theft and improper use of it is breach of trust.

17 Returning to the present case, on the defendant's case, the complainant should not be said to have abandoned possession of the DVD player. It might be contended that the wealthiness of the complainant's household as well as the condition of the DVD player plausibly allows for the inference that the complainant's wife had intended to completely relinquish the player. However, quite apart from the fact that such a stance arguably goes against the conclusions made in the English cases discussed above, the contention also has to be weighed against the complainant's wife specifically identifying a person to which the DVD player is to be given, and that this identified person plays a specific role.[35] The applicable threshold is that courts should be slow to make any finding of abandonment *except in the clearest of cases*. Even assuming this author is wrong on this point, it would have been much better if the High Court had considered the above authorities and clarified that its holding is that there was abandonment *on the specific facts* of the case. Instead, its position[36] gives rise to the impression that its holding is that *as a matter of law*, throwing away an item would *ipso facto* always constitute abandonment.[37] Considering what has been held in cases such as *Wong Seng Kwan* and *Lee Chen Seong*, such an impression is liable to create confusion, especially for the lower courts.

18 To be sure as well, the defendant may have had control over the DVD player for the purposes of selling it to the *karang guni* man when he comes to the residence, but that control is an inferior right to the complainant's possessory right.[38] Consequently, to decide whether the defendant should be convicted for theft of the DVD player, it becomes necessary to determine whether the other elements of theft can be made

35 See para 13 above.
36 As framed in *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [84].
37 See para 6 above.
38 This is the idea of relativity of title (see David Ormerod & Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (Oxford University Press, 15th Ed, 2018) at pp 853–854 and *Wong Seng Kwan v Public Prosecutor* [2012] 3 SLR 12 at [29]). On a separate note, it might be wondered whether instead of theft, the more appropriate offence against the defendant is criminal breach of trust. It is submitted that it is highly doubtful that any control the defendant might have had would qualify as entrustment. Even assuming there was entrustment, illustrations (*d*) and (*e*) to s 378 of the Penal Code (Cap 224, 2008 Rev Ed) makes clear the offence of theft is still appropriate.

out.[39] In particular, was the defendant dishonest in taking the DVD player, and did she have the requisite permission or consent to take it?[40]

19 Flowing from the above discussion on the law on abandonment, it should also be apparent that, as a matter of principle, a person *can be* found dishonest in taking a discarded item.[41] It would depend on the evidence. An offender does an act dishonestly if he does that act with the intention of causing wrongful gain to himself or another person, or wrongful loss to another person.[42] A wrongful gain is a gain by unlawful means of property to which the offender is not legally entitled while a wrongful loss is a loss by unlawful means of property to which the person losing it is legally entitled.[43] Thus, dishonesty can be disclosed when an offender takes *a discarded but not abandoned* item if he had the intention of causing wrongful gain or loss. This might, for instance, be where he was aware that the discarded item was meant for someone else and he is therefore not legally entitled to take it without first obtaining consent. In such a situation, it would be open to a court to infer that the offender did intend to cause wrongful gain or loss by such taking.[44]

---

39 For the elements of theft (*simpliciter*), see s 378 of the Penal Code (Cap 224, 2008 Rev Ed): "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."

40 As has been discussed at some length in Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 3rd Ed, 2018) at paras 13.41–13.45, there is an alternative interpretation of s 378 in that the consent element is part of the mental element that the Prosecution must prove – that is, the accused *intended to take without consent*, as opposed to it being part of the physical element, which is that the accused *in fact had not obtained consent*. In this note the latter interpretation is adopted since that is clearly the position adopted by both parties in the case. See also Shriniwas Gupta & Preeti Mishra, *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code, 1860* (Bharat Law House, 28th Ed, 2018) at p 2756.

41 See in particular n 13 above.

42 Section 24 of the Penal Code (Cap 224, 2008 Rev Ed), as it stood at the time of the defendant's alleged offending, defines "dishonestly" as doing an act with the intention of causing wrongful gain to one person, or wrongful loss to another person. The definition of "dishonestly" has since been expanded (with effect from 1 January 2020) but that expansion does not affect anything discussed in this note.

43 Section 23 of the Penal Code (Cap 224, 2008 Rev Ed), as it stood at the time of the defendant's alleged offending, defines "wrongful gain" to mean gain by unlawful means of property to which the person gaining it is not legally entitled, and "wrongful loss" as loss by unlawful means of property to which the person losing it is legally entitled. The definitions of "wrongful gain" and "wrongful loss" have since been expanded (with effect from 1 January 2020) but that expansion likewise does not affect anything discussed in this note.

44 See *Daniel Vijay s/o Katherasan v Public Prosecutor* [2010] 4 SLR 1119 at [88] and *Ang Teck Hwa v Public Prosecutor* [1987] SLR(R) 513 at [36].

20 Nevertheless, it is not the intention in this note to go further to say whether the elements of dishonesty and lack of consent would be made out. It is also not possible to do so, because there is little evidence potentially relevant to these issues that came out at the trial that is cited in the District Court and High Court decisions. On the issue of consent, the District Court had relied only on the defendant's admission in the P33 statement that she did not obtain such consent.[45] But the High Court (rightly, in this author's view) held that that admission was unreliable.[46] The High Court itself did not go further to consider evidence on the other important issues precisely because, as mentioned, it took the view that if what was taken was a discarded item, theft simply cannot be disclosed. Thus, it just focused on evidence as to whether the DVD player was "spoilt" (which in turn goes towards proving whether the DVD player was discarded),[47] and found that it was so.

III. The procedural issue

21 To be fair to the High Court, it might be contended that there was no need for it to have considered the law on abandonment as discussed above because it would make a practical difference only if it is a portion

45 *Public Prosecutor v Parti Liyani* [2019] SGDC 57 at [23].

46 *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [86].

47 *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [83]–[85] and [87]–[96]. That said, the following observations may be made in passing:

(a) As regards the element of dishonesty, it seems from the way the defendant is running her case that her position was that she was not dishonest because she had obtained the complainant's wife consent to take the DVD player. The corollary of that is that she was well aware that she was not legally entitled to take the player (it was meant for the *karang guni* man), and that was why she had to explicitly ask for permission to take it. This is *in contrast* to her case *vis-à-vis* some of the other items, where her case was that she took the items discarded as trash because she honestly believed she was entitled to appropriate them (see, for example, *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [174]). In that context, it would be difficult to infer that she had any intention to gain wrongfully (see especially *Ang Teck Hwa v Public Prosecutor* [1987] SLR(R) 513 at [36]).

(b) As regards the element of consent, it is noted that in the defendant's P31 statement (which was not affected by the potential interpretation issues that tainted her other two statements) she admitted that the complainant and his wife did not explicitly give the DVD player to her (see *Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [95]). Furthermore, even though the High Court found the complainant's wife testimony that the DVD player was not spoilt to be unreliable (*Parti Liyani v Public Prosecutor* [2020] SGHC 187 at [87]–[94]), that would not necessarily mean that her testimony that she had never given the defendant permission to take the player to be unreliable as well. There would be a need to consider the totality of all the relevant evidence on this issue (which, as highlighted, is not available from both judgments).

of the defendant's own case theory (that is, that the complainant's wife had intended to discard the DVD player by giving it to a *karang guni* man) that is accepted. The Prosecution's corresponding case is that the complainant's wife never discarded the DVD player. In that regard, if the court ultimately convicts the defendant for theft of the DVD player (assuming the evidence can bear this out), it would be based on part of the Prosecution's case – that the defendant had not obtained permission to take the DVD player – and part of the defendant's own case – that the complainant's wife had discarded the DVD player for the purposes of giving it to a *karang guni* man. As a matter of procedure, the High Court might have thought that it was not permitted to convict the defendant in this manner, and therefore there was no point in considering the law on abandonment.

22 There does not appear to be any case law touching specifically on such a situation. There have been cases where the court convicted an accused on an amended charge, where the Prosecution's case is not made out, but the accused's own case discloses a different offence (with the requisite standard of proof met).[48] Further, in *Public Prosecutor v Wee Teong Boo*[49] ("*Wee Teong Boo*"), the Prosecution charged the accused for rape of the victim, and in his defence the accused claimed that he had only digitally penetrated the victim for the purposes of medical examination, that is, with the victim's consent. The High Court acquitted the accused of rape and instead convicted him of sexual assault by digital penetration (because it found that the penetration was sexual in nature). The Court of Appeal agreed that the Prosecution's case against the accused for rape was not made out, but overturned the conviction for digital penetration as well. However, these cases are not really analogous to the present case because they involved convicting an offender, based either entirely or partially on his own case, *of a different offence* (as in a different offence provision altogether).

23 Here, if the High Court relies on the defendant's part of the case regarding whether there was discarding of the DVD player and ultimately goes on to convict her, it would be the *same offence* (of theft) as the Prosecution is seeking a conviction for. In fact, such a conviction would be based on a charge with elements wholly identical to the one framed by the Prosecution. Not even the date or time of offence would be different. The typical charge for theft will state as follows:[50]

48 See, for example, the outcome of Mas Swan's case in *Public Prosecutor v Mas Swan bin Adnan* [2012] 3 SLR 527. *Mui Jia Jun v Public Prosecutor* [2018] 2 SLR 1087 might also be of some relevance.

49 [2020] 2 SLR 533.

50 See, for example, *Public Prosecutor v Muhammad Izan Mirza bin Mohd Sam Saimon* [2020] SGDC 170 at [4]. See also Shriniwas Gupta & Preeti Mishra, *Ratanlal &*

(cont'd on the next page)

> That you, [details of the accused], on [date and time of offence], at [location of offence], did commit theft, to wit, by dishonestly taking [item alleged to be stolen] valued at [value of said item], out of the possession of [complainant/victim] without his consent, and you have thereby committed an offence …

In this case, whether the complainant's wife had discarded the DVD player or not, the point remains that the complainant remained in possession of the DVD player, and it is that which is an element of the offence. What would differ, depending on which side's case is accepted, is the precise reason for *why the complainant remained in possession* of the player at the material time. On this basis as well, it is doubtful whether ss 138 and 139 of the Criminal Procedure Code[51] (which covers not only convicting an offender of a different offence as in on a different offence provision but also a different offence as in on the same offence provision but a different element (including date of offence) in the charge), as well as the restrictions on their application as held by the Court of Appeal in *Wee Teong Boo*,[52] is relevant in this situation.

24 The issue of whether the High Court can even consider convicting the defendant, as a matter of procedure, partly on the Prosecution's case and partly on the defendant's, should thus probably turn on whether it would be prejudicial to the defendant for it to do so. In *Wee Teong Boo*, the Court of Appeal did not agree with convicting the accused there based partially on his own defence because it found that it was "highly prejudicial" to the accused to do so.[53] Nonetheless, the situation there seems strongly distinguishable from the present case. For example, that case involved convicting the accused "of an unframed charge involving a different offence resting on a wholly different and incompatible theory of the facts".[54] This is evidently not the case here. Moreover, it does not seem that the defendant here would have conducted her defence differently, given that the crux of it is the part relating to her having obtained consent to take the DVD player.[55]

Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code, 1860 (Bharat Law House, 28th Ed, 2018) at p 2768.

51 Cap 68, 2012 Rev Ed.

52 *Public Prosecutor v Wee Teong Boo* [2020] 2 SLR 533 at [88]–[125].

53 *Public Prosecutor v Wee Teong Boo* [2020] 2 SLR 533 at [120]–[124].

54 *Public Prosecutor v Wee Teong Boo* [2020] 2 SLR 533 at [92].

55 Similarly, even if this author is wrong on this, the basic point remains that the High Court should have at least fully ventilated these issues, for instance, by asking the defendant whether, and if so how, she would have conducted her defence differently if the court were to take into account the law on abandonment, before deciding whether to acquit her of theft of the DVD player.

IV. Conclusion

25 Given the above, the following two key points are made. Firstly, it is not the intention, nor is it possible to assess (based on the evidence disclosed in the District Court and High Court judgments alone) whether the High Court should have gone on to ultimately conclude that the defendant was guilty of theft of the DVD player. Secondly, however, some of the High Court's underlying reasons for acquitting the defendant *vis-à-vis* the Pioneer DVD player may benefit from a relook in a future case, as the court could have taken into account several relevant authorities and nuances.