

R v Ng Mooi LAM

Ng Mooi LAM (the defendant) is charged with:

- (a) 6 charges of aiding or abetting Chummeez Restaurant Ltd in providing false income tax returns to IRD, the falsehood alleged to be the omission of cash sales during the period 31 March 2004 to 31 March 2009.
- (b) 37 charges of aiding or abetting Chummeez Restaurant Ltd in providing false GST returns to IRD, the falsehood alleged to be the omission of cash sales during the period 31 July 2003 to 4 June 2009.
- (c) 72 charges of aiding or abetting Chummeez Restaurant Ltd in providing false Employer Monthly Schedules (EMS) to IRD, the falsehood alleged to be the omission of some employees from EMS during the period 7 June 2003 to 31 March 2009.

The starting point is the presumption of innocence. I must treat the accused as innocent until the Crown has proved her guilt. The onus of proof is on the Crown. That onus rests on the Crown from beginning to end. There is no onus on the accused at any stage to prove her innocence. The presumption of innocence means that the accused does not have to give or call any evidence and does not have to establish her innocence.

She called witnesses in her defence but did not give evidence herself. But, as I have said, she was not required to do so.

The Crown must prove that the accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if, at the end of the case, I am sure that the accused is guilty.

It is not enough for the Crown to persuade me that the accused is probably guilty or even that she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.

What then is reasonable doubt?

A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of the accused after I have given careful and impartial consideration to all of the evidence.

In summary if, after careful and impartial consideration of the evidence, I am sure that the accused is guilty, I must find her guilty. On the other hand, if I am not sure that the accused is guilty I must find her not guilty.

What is it the Crown has to prove?

The Crown must prove beyond reasonable doubt every essential element which make up the offences charged.

The Crown case is that a significant amount of cash takings from Chummeez were understated and therefore have not been returned for income tax purposes. Meaning that the tax reported as owing by the company was significantly less than the real amount due. These charges have the same essential elements:

- (a) That the company provided an income tax return for the relevant tax period.
- (b) That the income tax return was false.
- (c) That the company (through the accused) knew the income tax return was false.
- (d) That the company (through the accused) intended to evade the assessment or payment of income tax; and
- (e) That the accused provided some form of intentional encouragement or assistance in relation to the company's offending.

The GST charges relating to each, relate to the same period of time being the 37 two-monthly GST periods between 1 April 2003 and 31 March 2009 (inclusive). The Crown case is that a significant amount of cash takings from Chummeez were understated and therefore have not been returned for GST purposes. Meaning that the tax reported as owing by the company was significantly less than the real amount due. These charges have the same essential elements:

- (a) That the company provided a GST return for the relevant tax period.
- (b) That the GST return was false.

- (e) That the accused provided some form of intentional encouragement or assistance in relation to the company's offending.

The Defence Case

- (i) The foundations upon which the Crown infers guilt are factually incorrect and the Crown's assumptions are erroneous and not supported by the evidence.
- (ii) Examples of erroneous assumptions made by the Crown relate to the work done by the defendant's 6 daughters and some of their husbands in the restaurant; that the defendant and her husband did not work in the business; that the Crown miscalculated the numbers of non-family staff who worked in the restaurant.
- (iii) That the Crown is relying on indications of false accounting and fraud which were not present in the case of the defendant or, if they were present, are met by an innocent explanation.

The Witnesses

The Crown called evidence from 6 previous employees, 2 of whom did not appear, but their evidence was permitted pursuant to a hearsay application by the Crown. In addition the Crown called 2 witnesses who visited the Restaurant premises in 2008 and 2010 and then 3 expert witnesses. The chief of these was Ms Patel who carried out a 4

year investigation into the affairs of the business, its owners (the defendant and her husband) and the immediate members of the defendant's family.

The defence called the defendant's 6 daughters, 3 of her sons-in-law, her sister and her brother.

The defendant did not give evidence. She was not required to and I draw no inference adverse to her in that regard. I do mention however, that she was interviewed 3 times by Ms Patel on 14 April 2008, 1 July 2008, and 8 June 2010.

The defendant's first language is Cantonese. Suitable arrangements were made for the trial so that all of the proceedings were translated into that language for her. However, at the second and third interviews, the interpreter was a Mandarin speaker. At the first interview, no interpreter was provided.

There was some criticism of these interviews because a Cantonese interpreter was not present. However, at the second and third interviews the defendant's tax agent was present and she obviously could communicate adequately with the defendant. Indeed it was she who advised Ms Patel of the need for a Mandarin speaking interpreter.

I have decided to have regard to all interviews, but not on a strict construction basis. Any ambiguity which appears is interpreted in favour of the defendant. As I will mention shortly, it is the fact and timing of the interviews that I regard as significant, rather than the actual content.

Chummeez Restaurant Ltd was incorporated in late 2002 with the defendant and her husband being the directors and equal

shareholders. From December 2002 the company operated a restaurant in Riddiford Street, Newtown, and this continued through to 31 March 2006.

In January 2005 the company opened another restaurant in Lambton Quay, Wellington and this restaurant continued in business until it was sold in 2010.

The defendant and her husband had 6 daughters. They all assisted, from time-to-time, in the running of the business which one of them SHIAU-CHOOT TANG described as a "*family business*". Both the defendant and her husband worked in the business. The defendant's uncle, TAN AH CHIK for a time worked in the business. Three men who later and variously became the defendant's sons-in-law worked in the business. In addition, non-family members from time-to-time worked in the business.

All the charges span the period 31 March 2004 to 31 March 2009.

A critical date is 14 April 2008. It was on that date that Ms Patel went to the premises, interviewed the defendant, and handed her an audit notification letter. Even though there was no interpreter at this meeting and despite the fact that the audit notification letter was written in English, the defendant must have known then that she and the business were under investigation.

Any doubt she might have had about that would have been dispelled when on 1 July 2008 there was a second and much more formal interview. At this interview there was a Mandarin-speaking interpreter and also the defendant's tax agent who assisted with interpretation.

I find that the defendant must have known from mid-2008 that she and her business were under investigation.

As a matter of commonsense if she had been taking steps to evade income tax, GST and PAYE to that point, then she would have been foolish and naive to continue with those evasions or any of them after becoming aware of IRD's interest in her business affairs.

In my view it becomes necessary to examine the charges both before April 2008 and those alleged after that date.

The false income tax return allegations are drafted by reference to successive end of financial year dates. Counts 1 to 5 relate to the period prior to April 2008 and Count 6 relates to the period after that date.

The charges relating to allegations of false GST returns are drafted by reference to the 2 monthly periods for which GST returns were required. Counts 7 to 37 relate to the period prior to April 2008 and Counts 38 to 43 relate to the period after that date.

The charges relating to allegations of PAYE evasion, subdivided upon the same basis are Counts 44 to 104 for the period prior to the end of April 2008 and Counts 105 to 115 thereafter.

Dealing first with the income tax and GST allegations, it is axiomatic that if the defendant suppressed cash sales for a particular period, then the GST returns she filed must have been false for that same period.

The issue then on Counts 1 to 5 and 8 to 37 is whether the Crown has proved, to the criminal standard, that the defendant suppressed cash sales in the restaurant(s) in the period leading up to 14 April 2008?

BEN WEST-WALTER was an investigator employed by IRD. He visited the Lambton Quay premises on 28 January 2008 and again on 11 February 2008. On each occasion he purchased a meal and offered cash in payment. His evidence was that on each occasion the money was put inside the till but no sale was rung up on the till. His experiences in the restaurant in 2008 were that his cash transactions were not recorded in any way.

In cross-examination, the accuracy of his recollections were challenged, but I note that he had been tasked by his employer to carry out transactions of this kind and he made notes of his observations. He was more than just a casual and disinterested observer. He entered the restaurant to carry out and record a specific task and I accord his evidence some reliability accordingly.

Ms Patel's investigations established from the bank statements and returns filed, showed that from October 2007 through to March 2008, there were no cash sales in the restaurant at all. The Crown comment, in closing, on this is "*it defies belief that Chummeez went six months without a single cash sale*".

Once the defendant was notified of the IRD's investigation in April 2008, Ms Patel from her analysis, noted an improvement in the regularity of the returns of cash sales.

Ms Jamison, Ms Patel's supervisor, also gave evidence that in her 15 years experience as an IRD investigator, her experience with other

restaurant and takeaway cases has shown that when the nature of the business is the provision of a high volume of low cost meals, a substantial portion of the daily takings would be cash takings.

Ms Jamison reviewed Ms Patel's investigations and workings. She concluded that the workings produced by Ms Patel showed that the cash deposits for this business were very irregular and cash sales were very low when compared to the volume of Eftpos sales, especially given the nature of the company's business.

I do not over-value the expert evidence given by such witnesses as Ms Jamison, and certainly her evidence is not determinative of the ultimate issue. I do accept the evidence, however, as being helpful as being within her area of expertise and beyond my general knowledge.

Ms Patel examined the company's accounts and bank statements to assess the source of funds transferred from the company to the defendant's personal accounts and credit card accounts. She noted that the company made no profit in the years from 31 March 2003 to 31 March 2009. Direct payments to the defendant and her husband (which the Crown says were as high as \$100,000) could not have been funded by the company's recorded trading activity.

The defence argues that these funds could have been sourced from an inheritance paid to the defendant by her brother and regular cash gifts made to her by her daughter SHIAU-CHOOT TANG. I reject the evidence of both of these witnesses. I found the evidence of the brother LAM MENG utterly incredible. I will discuss it more fully shortly. I found the evidence of SHIAU-CHOOT TANG in this respect, lacked credibility. Again, I will give my reasons for this shortly.

I find this point made by Ms Patel to be strongly inferential in favour of the Crown case.

The evidence also supports the suggestion put forward by the Crown that the failure to use a cash register reinforces the inference of suppressed cash sales. Although I place little weight on what the defendant is alleged to have said when interviewed, what she is alleged to have said was supported by the evidence of Mr West-Walker and, after 27 May 2010 by MR ELIOT ROLSTON.

Mr Rolston was an IRD investigator like Mr West-Walker and he went to the premises on 27 May 2010 and paid cash for a meal. He said his order and payment were never rung up on the till.

There was a record of Mr Rolston's order kept. When Ms Patel interviewed the defendant on 14 April 2008, she advised the defendant to start keeping records that showed the daily cash sales and all Eftpos sales. Of course the simplest and most efficient way of doing this would have been to process all transactions through the till. The defendant did not commence doing this. Instead she adopted a handwritten system which recorded the payment made by a customer and recording the table at which the customer was seated.

Such a method was in place during Mr Rolston's visit on 25 May 2010 and his order was able to be identified accordingly when he gave evidence.

The evidence points to there being no effective use of the cash register prior to 14 April 2008. There are 2 comments:

- (a) The method of recording cash sales was not in place on 14 April 2008 when Ms Patel visited but it was in place later on 27 May 2010 when Mr Rolston made his check.
- (b) The method adopted was cumbersome and potentially inefficient. The proper use of the cash register would have provided this information in an efficient way.

Ms Patel's analysis of the company's records and the individual's bank accounts also lead her to conclude that suppressed cash sales was a source of funds for the everyday expenditure of the defendant and her husband. Her analysis revealed that from the cash drawings taken by the shareholders very little was used to fund day-to-day expenditure. She instanced expenses such as petrol, supermarket expenditure, domestic and overseas travel, Sky television and dining out expenses. In its closing remarks, the Crown submitted that a family could not live on the minimal level of expenditure shown through the defendant's bank account.

In relation to this particular inference, the defence says that the Crown has overlooked the cash supplied by the defendant's brother and her second daughter. For reasons which I will discuss, I do not accept the evidence of either of these two.

I accept that the inference drawn by Ms Patel is strongly supportive of the Crown's case.

Ms Patel said that the gross profit percentage of a business should not fluctuate from year to year unless there were major pricing changes in a business. Her view was that there had been "*significant*" fluctuations

in the returns of the defendant's business over the period in question. She noted these as follows:

* Year ending 31 March 2004	...	55%
* Years ending 31 March 2004 and 31 March 2006		58%
* Year ending 31 March 2007	...	48%
* Year ending 31 March 2008	...	50%
* Year ending 31 March 2009	...	57%

The Crown argued that the 7% increase between the 2008 and 2009 financial years was an important fluctuation coming as it did after the defendant had been notified of the audit in April 2008. The Crown submits that the inference supports the allegations of suppressed cash sales prior to the date of notification.

While I take that inference into account, I do not accord to the Crown case the overall weight which is suggested based on the business' gross profit percentages. There was one aspect of the evidence that made me draw back from doing so and that arises from defence Exhibit "D". Exhibit "D" is an IRD industry benchmark brochure relative to small cafes and restaurants. Its projections for a business similar to the defendant's business indicate a median gross profit ratio of 56% and Ms Patel's calculations are not dissimilar.

The Crown also submitted that an inference in support of its case was available from a perusal of the cash returned by the business relative to sales. The Crown called MICHAEL DUGGAN as an expert witness. He compared the performance of 8 anonymous, but similar businesses with that of Chummeez Restaurant Ltd in this respect. He concluded that Chummeez Restaurant Ltd had a lower cash percentage than any

of the other 8 businesses and he inferred from that, that the defendant's business was suppressing cash sales.

The difficulty that remains for me with Mr Duggan's evidence is that the time period analysed for Chummeez was 1 April 2004 to 31 March 2009 and that for the 8 comparison businesses was 1 April 2010 to 31 May 2012. The defence makes a point between comparing apples and oranges and it is difficult not to agree.

I do not draw inference supportive of the Crown case arising out of Mr Duggan's evidence.

The defence case relating to suppressed cash sales falls into 2 categories:

1. The defence says there is no evidence of accumulated cash such as cash gifts to friends, money being spent overseas, a gambling problem or an accumulation of lifestyle assets.
2. The defence says that the evidence of the defendant's brother and her second daughter provides an explanation for cash resources of the defendant not provided by the company's trading.

As to the first point, there can be more uses for cash than those pointed to by the defendant. This was a "*family*" business and suppressed cash may have been used for the purposes of the family as a whole.

The defendant's daughters and sons-in-law all said they worked in the restaurant(s) from time-to-time as their studies, professional lives or relationships permitted. They all said that their work, for the most

part, was on a voluntary basis. The daughters said they provided their labour out of a sense of familial duty and the sons-in-law because of the desire to be close to a particular daughter.

I accept that such work was carried out. However, I am troubled by the credibility of these witnesses by items of evidence which lead me to doubt that their work was entirely on a voluntary basis. The evidence which leads me to this view is:

- (a) An examination of the bank accounts of some of the daughters showed a pattern of regular deposits which were unexplained and inexplicable by the prevailing circumstances at the time.
- (b) Several large deposits which went through the accounts of 2 of the daughters which were unremembered by them.
- (c) The cost of everyday living expenses which must have arisen and been met by funds which were never channelled through their bank accounts.

I find that the educational and other living costs of the daughters were met by funds provided by the business. In return, the daughters and their spouses provided labour for the running of the business. The source of funds was cash generated out of the business for which no apparent records are available.

Next I turn to consider the evidence from the defendant's brother, LAM MENG. He said that between 2001 and 2011 he gave the defendant some R240,000 in Malaysian currency. He said he accumulated this sum by monthly instalments of R2,000 and would hand these funds over to the defendant when she visited Malaysia occasionally. He said,

for family reasons, these funds had to be handed to the defendant in the presence of their mother in Malaysia.

Under cross-examination, this account changed. Mr Meng said that on 4 or 5 occasions he had handed sums of R10,000 to friends of the defendant who were to take the money back to her in New Zealand. He conceded he did not possess a single document to support his claim of these payments to his sister. He said he knew that funds could be transferred through the banking system, but did not use that option because his mother had to witness the handing over of the funds.

I found Mr Meng's account utterly incredible. I did not believe him.

The other witness the defence put forward as a possible source of funds to the defendant was her daughter SHIAU CHOOT TANG.

Ms Tang's evidence was that since she had commenced employment in 2004, she had provided her mother with fortnightly cash payments. These continued through to 2007 when she and her partner purchased a house. The payments resumed in 2008 and continued through to 2012, ceased while she was on maternity leave and resumed when she recommenced paid employment.

She said that typically until she purchased her house the payments which she described as "*huge*" would range from \$400 - \$700 per fortnight. They reduced after the house purchase. She had no idea of how much she had paid her mother overall.

She acknowledged she had a student loan and a mortgage to pay. She acknowledged that sometimes she went into overdraft to maintain these payments to the defendant. She said that when she first started work her nett per fortnight salary was \$1,038.

In my view the amounts claimed to have been paid were simply not sustainable. I accept Ms Tang did provide some funds to the defendant but at a lower level and, in any event, of a total amount insufficient to provide a full answer to the Crown's allegations.

These payments were never mentioned by the defendant in any of her interviews with Ms Patel.

In terms of Counts 1 to 5 I find, in terms of the issue I posed, that the Crown has proved beyond reasonable doubt that the defendant suppressed cash sales in the restaurant(s) in the period leading up to 14 April 2008.

In terms of the essential elements of these charges and of Counts 7 to 37, I find them all to be proved to the criminal standard.

I find the defendant guilty on Counts 1 to 5 and 7 to 37.

I find the defendant not guilty on Count 6. There is evidence that the defendant took seriously the warning implicit in Ms Patel's visit on 14 April 2008.

Ms Patel noted that the reporting of cash sales thereafter became much more regular.

Although talking in respect of gross profit percentage, what Ms Jamison said about the effect of a warning to a taxpayer is apt in this case:

... for every case that I have been involved in, invariably once an audit has started and another return gets filed further down the track, the gross profit on that return always increases from the gross profits in the period that the investigation has been based on. I have never seen it go down, it always goes up.

This is in keeping with Ms Patel's evidence of a 7% increase in the gross profit ratio from the 2008 financial year to the 2009 financial year.

I am not satisfied beyond reasonable doubt that the defendant suppressed cash sales for the period 1 April 2008 to 31 March 2009.

It follows from that, that not guilty verdicts must follow on Counts 38 to 43 which fall within the same period covered by Count 6.

The charges relating to Employer Monthly Schedules (MES) and PAYE tax

The 2 restaurants operated in overlap (but at different times of the day) for a period of time. The staff required to run the restaurant(s) would have been various from time-to-time. Various witnesses spoke of staff numbers either as co-workers or as observed in the premises.

Mr <u>Kah-Fung TOON</u>	...	6
Mr <u>Lam LOUNG</u>	...	4 – 5 with additional waiters/waitresses
Mr <u>WEST-WALKER</u>	...	7 on each shift
Mr <u>Eliot ROLSTON</u>	...	6
Ms <u>Haimin WU</u>	...	3 waitresses but unsure of how many in kitchen
<u>Sopheak HENG</u>	...	4 – 6
<u>Chun Mai SONG</u>	...	5/6 IN Riddiford Street
	...	6 in Lambton Quay
Ms <u>PATEL</u>	...	8

There was an available pool of labour from the defendant's family and extended family. This was comprised of the defendant, her husband, 6 daughters and 3 sons-in-law. Not all of these people were constantly available, although the defendant was and, in the latter years of investigation, her husband was.

As the daughters grew older and progressed through tertiary education, employment and overseas travel, they became less available. I find, however, that in various combinations and from time-to-time they assisted to a considerable degree.

I have already recorded my findings that the daughters (and their spouses) worked without payment. They were not paid wages but this was a family business and I find there was a tacit understanding that the needs of the daughters would be financed as and when they arose.

Given the nature of the business, a vital employee would be the chef. From the commencement of the business, the chef was the defendant's uncle TAN AH CHIK. I find that he was employed as such through to October 2005. He was replaced then by TOON KAH FUNG who was employed to April 2006. The next chef was CHEW WAI KHOONS who I find was employed from April 2006 to February 2007. The evidence was that in February 2007 the chef's role was undertaken by the defendant's husband.

The defendant and her husband did not initially pay themselves wages. Ms Patel spoke to the defendant about this and in January 2009 the defendant and her husband began to draw, and record, wages. In March 2009, two of the daughters also began to draw wages. All of the details and those relating to the chefs were included in the EMS.

The Crown raises a number of items in support of its allegations and I deal with the ones that I see as significant.

First the Crown points to a 3 month period between March 2007 and May 2007. The EMS for this period indicates that there were no employees during this period. The chef Khoons had been dismissed or arrested in February 2007 for attempting to rape one of the defendant's daughters. There is no doubt that the restaurant remained open during the March – May period and staff would have been required.

The defendant and her husband took up, or shared the chef's role once Khoons departed. The Crown submits that at this particular point in time none of the daughters were available to assist. The 2 eldest were working elsewhere, 2 were at Otago University, the daughter who had been the victim of the attempted rape was not fit to work and the youngest was at school. None of the sons-in-law were available either.

The defence says there was no evidence that there was anyone assisting the defendant and her husband during this period and it is possible they ran the restaurant together and without assistance. I reject this because the history of staffing levels at the Lambton Quay restaurant shows that more than just two staff were required.

The defence also says the attempted rape must have been a great shock to the defendant and her family and that, as a result, she could have overlooked the recordkeeping for the temporary workers she must have engaged to keep the restaurant open. I accept that is a reasonable possibility.

Next the Crown focuses on the payments recorded as having been made to the defendant's uncle, TAN AH CHIK. It seems the payments to him exceeded by \$40,021.35 the sum of the wages recorded as having been paid to him. As noted, he was the defendant's uncle and had an indirect financial involvement in the setting up of Chummeez Restaurant Ltd. It is a reasonable possibility that these extra payments arose out of some inter-family financial dealing. Indeed it is possible that TAN AH CHIK practised a deception on his sister.

The Crown also refers to various cheque book butts which record "wage" payments to some people who were never subsequently listed on EMS. The Crown says these were KIM WA CHING; HUANA; SANG HANG CHANG; LAM LOUNG and HK.

The possibility of clerical error remains high given the period under investigation and a business, the clerical side of which was poorly organised.

The defence says the Crown has simply not proved the allegations in Counts 44 to 115 beyond reasonable doubt. I have to agree, even although there is a level of suspicion on my part.

The defendant will be acquitted on Counts 44 to 115.

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VERDICTS

Counts 1 – 5 (inclusive)	...	Guilty
Count 6	...	Not Guilty
Counts 7 – 37 (inclusive)	...	Guilty
Counts 38 – 43 (inclusive)	...	Not Guilty
Counts 44 – 115 (inclusive)	...	Not Guilty