NOORDIN SADAKATHULLAH & ORS v. PP

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
KAMARDIN HASHIM JCA
[CRIMINAL APPEALS NO: B-06B-2-01-2017,
B-06B-4-01-2017 & B-06B-6-01-2017]
21 NOVEMBER 2018

CRIMINAL LAW: *Corruption – Corruptly accepting and obtaining gratification – Malaysian Anti-Corruption Commission Act 2009, s. 17(a) – Whether police officers agents of Government of Malaysia – Whether gratification presumed to have been corruptly obtained as inducement – Arrests made of suspects involved in theft of motor lorry – Whether police officers received RM10,000 to secure release of suspects – Failure to make arrest report – Whether clearly showed intention to conceal obtainment of bribe money – Late disclosure of police diary as evidence – Whether ought to be treated as afterthought defence – Whether testimony of interested witness fabricated and ought to be rejected – Whether police officers failed to rebut presumption under s. 50(1) of Malaysian Anti-Corruption Commission Act 2009*

ADMINISTRATIVE LAW: *Public servants – Corruption – Corruptly accepting and obtaining gratification – Malaysian Anti-Corruption Commission Act 2009, s. 17(a) – Whether police officers agents of Government of Malaysia – Whether gratification presumed to have been corruptly obtained as inducement – Arrests made of suspects involved in theft of motor lorry – Whether police officers received RM10,000 to secure release of suspects – Failure to make arrest report – Whether clearly showed intention to conceal obtainment of bribe money – Late disclosure of police diary as evidence – Whether ought to be treated as afterthought defence – Whether testimony of interested witness fabricated and ought to be rejected – Whether police officers failed to rebut presumption under s. 50(1) of Malaysian Anti-Corruption Commission Act 2009*

The appellants were charged under s. 17(a) of the Malaysian Anti-Corruption Commission Act 2009 ('the Act') at the Sessions Court for the offence of obtaining and accepting gratification by agent. On 10 April 2012, PW10, PW11, PW7 and one Noreen were in a Toyota Hilux driven by PW11 when they were stopped by a team of police personnel on the Kesas Highway, Shah Alam. The police, consisting of the three appellants and PW13, ambushed and arrested PW10, PW11, PW7 and Noreen. They were taken to IPD Shah Alam where PW7 and PW10 were interrogated on their involvement in the theft of a motor lorry. PW7 alleged that both the first and second appellants agreed to receive RM10,000 for the purpose of securing the release of PW7, PW10 and PW11. The third appellant was also present during the discussion

A on the payment of the money. Subsequently, PW7 and PW11 were brought by the second appellant to Maybank in Shah Alam where PW7 and PW11 withdrew RM10,000 from their respective accounts and gave it to the second appellant. The four of them were then released. PW4, who was PW10's brother in law, was informed by the investigation officer Inspector Helmi
B that PW10 had been arrested by the Shah Alam police. PW4's wife then informed him that PW10 and his friends were released on the same day after they had paid the bribe money of RM10,000. PW4 subsequently met up with PW10, PW11 and PW7 and hence a decision was made to report the incident to MACC. On 16 April 2012, PW7, PW10 and PW11 went to the
C MACC office to lodge a report. Later, the second appellant contacted PW10 informing the latter that he wanted to return the sum of RM10,000 to PW10. The MACC was subsequently informed about this development and a trap was planned. On 18 April 2012, PW7, PW10 and PW11 together with a team of officers from MACC proceeded to a restaurant where they were met by PW13 who approached their table and returned the money in question to
D them. PW13 was then arrested by the MACC officers, followed by the arrest of the appellants. Based on the above evidence, the trial judge found that a *prima facie* case had been established against the appellants on the charge. The appellants were therefore called upon to enter on their defence. According to the first appellant, during interrogation, PW7 admitted to the first
E appellant that he had sold the lorry that was given by PW10 to DW4 for the price of RM10,000. The first appellant claimed he had received RM10,000 from PW7 to help return the money to DW4. The second appellant in his defence told the court that whilst he was with the first appellant, PW7 had come to the first appellant's room and he heard PW7 say 'Duit RM10,000
F untuk bayar kepada Zul Padang Piul (DW4) dah dapat.' The third appellant's position was that PW7 had asked the help of the first appellant to return the RM10,000 to DW4. The Sessions Court Judge ('SCJ') was of the view that the appellants would not have committed an act that would jeopardise investigations by accepting the bribe money in order to release these
G suspects. The first appellant, moreover, recorded in exh. D14 ('police diary') all actions that were taken relating to the case. The SCJ accepted the appellants' evidence and held that exh. D14 further strengthened the defence of the appellants and was satisfied that the defence had successfully rebutted the presumption under s. 50 of the Act. The High Court Judge ('HCJ'), however, found that, *inter alia*, (i) if PW7, PW10 and PW11 were arrested
H as suspects in a criminal case, an arrest report ought to have been made by the appellants, which was not done; (ii) the appellants' defence that the money was intended to be returned to DW4 at the behest of PW7 was rejected and was dismissed as this line of defence was an afterthought after their wrongdoing was discovered by PW4; (iii) the appellants' conduct

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showed their bad intention in that they had demanded and obtained RM10,000 from PW7, PW10 and PW11 as the bribe money and not for the same to be returned to DW4; (iv) that exh. D14 was only produced for the first time during the defence and therefore ought to be rejected as a mere afterthought. The High Court found the appellants guilty as charged and sentenced each of them to three years' imprisonment and a fine of RM50,000 in default 12 months imprisonment. Hence, the appellants filed these appeals with respect to the conviction and sentence against each of them. The issues that arose were (i) whether the HCJ had seriously misdirected in law and fact when he interfered with the finding of facts of the SCJ and failed to consider and appreciate the defence adequately; (ii) whether the defence was an afterthought; (iii) whether the HCJ rejected the defence on the ground of failure to make a report; (iv) whether DW4 was an interested witness and could the HCJ reject his evidence; and (v) whether exh. D14 could be rejected on the ground of s. 62 of the Act.

Held (dismissing appeals)
Per Idrus Harun JCA delivering the judgment of the court:

(1) The appellants were police officers attached to the Criminal Investigation Division, IPD Shah Alam and as such they were the agents of the Government of Malaysia. Thus, the first element of the offence was established. It was not disputed that PW7 and PW11 had handed over RM10,000 to the appellants, thus the element of the offence of obtaining the gratification from PW7 and PW11 was established. Since these two primary facts were undisputed, the presumption under s. 50 of the Act applied to this case in that the gratification obtained by the appellants 'shall be presumed to have been corruptly obtained' by the appellants as an inducement for or on account of the matters set out in the particulars of the offence, unless the contrary was proved. (para 14)

(2) It was clear that PW7 was a suspect, yet the appellants failed to lodge a police report relating to the arrest. Their explanation that the report was not made because the case exhibit, the motor lorry, was not recovered, was a hollow and mere excuse when the evidence showed that PW10 had given the lorry to PW7 to be sold and in fact he sold it to DW4. The admission that PW7 made to the appellants would require a report to be made, yet no such report was lodged. The appellants also did not refer the arrest of PW7, PW10 and PW11 to the investigation officer namely Inspector Helmi. There was clearly an intention on the part of the appellants to conceal the fact that they had obtained the bribe money from PW7 and PW11. The fact that it took eight days for the money to be returned by the appellants to PW7, PW10 and PW11 through PW13 further showed the corrupt intention on the

part of the appellants. The appellants had no intention to return the money to DW4 and that if they were honest, the appellants would have prepared necessary documentation and made a police report on the alleged return of the money to DW4 or requested both PW7 and DW4 to come to the police station for this purpose. Herein, the appellants' defence was raised as a mere afterthought in the hope that they would be vindicated after PW4 who also worked at IPD Shah Alam had discovered about their misdeed. (paras 27-29)

(3) The late disclosure of exh. D14 at the defence stage and the circumstances in which it was produced merely went to show the weight that the court should attach to the appellant's defence. Such late disclosure went some way to support the case for the prosecution. The defence clearly had the opportunity to produce exh. D14 , but they did not do so, neither did they question the prosecution witnesses regarding the said exhibit. Instead, the defence waited until the first appellant was cross-examined by the deputy on this issue, then only it was tendered as an exhibit after the second appellant had completed giving his evidence. The omission to put questions relating to the diary and its contents during the prosecution case and the belated disclosure of the same in the manner described above were really nonsensical steps taken by the defence and when considered against the position adopted by the prosecution, rendered such evidence unacceptable and affected the appellants' credibility. The HCJ was therefore justified in treating exh. D14 as an afterthought defence and not one that the court considered was more likely to be true. (paras 36 & 37)

(4) The irrefragable fact was that exh. D14 was never delivered to the prosecution pursuant to s. 62 of the Act before commencement of the trial. Section 62(a) mandatorily requires the appellants to deliver a copy of any document which would be tendered as part of the evidence for the defence to the prosecution. This failure was fatal to the defence case particularly when serious allegations had been made that the MACC officer refused to accept the said exhibit when the first appellant wanted to surrender it. Thus, the manner in which exh. D14 was tendered and its rejection by the High Court rendered the defence untenable and did not rebut the presumption under s. 50(1) of the Act. (paras 39-40)

(5) DW4 was called by the defence to support the appellants' evidence that the money in the sum of RM10,000 they received from PW7 and PW11 was intended to be paid to DW4. The first appellant in his evidence testified that he met DW4 one day after his statement was recorded by MACC. DW4 alleged that when the first appellant could not contact him, PW7 lodged a report with the MACC alleging that the first

appellant had obtained the bribe money. PW7 was not cross examined on this evidence. Further, despite the meeting with DW4, the first appellant did not take DW4 to the MACC or to his superior to explain what truly happened. The first appellant had the earliest opportunity to explain to the MACC or his superior, yet he did not do so. This omission suggested that the testimony of DW4 was a fabrication. The HCJ was correct when rejecting the defence of DW4. (paras 42-47)

(6) The appellants clearly failed to rebut the presumption under s. 50(1) of the Act on the balance of probabilities. The grounds urged on behalf of the appellants were without any merit and were not one that could be treated as palatable fact. The prosecution succeeded in proving their case against the appellants beyond reasonable doubt. The HCJ did not misdirect himself when, upon considering the entire evidence very carefully, found the appellants guilty as charged. The decision of the High Court was thus affirmed. (para 48)

Bahasa Malaysia *Headnotes*

Perayu-perayu dituduh bawah s. 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta') di Mahkamah Sesyen atas kesalahan memberi atau menerima suapan oleh ejen. Pada 10 April 2012, PW10, PW11, PW7 dan seorang bernama Noreen berada dalam sebuah Toyota Hilux yang dipandu oleh PW11 apabila mereka diberhentikan oleh satu pasukan polis di Lebuhraya Kesas, Shah Alam. Ahli pasukan polis itu, yang terdiri daripada ketiga-tiga perayu dan PW13, menyerang hendap dan menahan PW10, PW11, PW7 dan Noreen. Mereka dibawa ke IPD Shah Alam di mana PW7 dan PW10 disoal siasat berkenaan penglibatan mereka dalam kecurian sebuah lori motor. PW7 mendakwa kedua-dua perayu pertama dan kedua bersetuju untuk menerima RM10,000 untuk tujuan menjamin pelepasan PW7, PW10 dan PW11. Perayu ketiga juga hadir semasa perbincangan berkenaan bayaran itu. Seterusnya, PW7 dan PW11 dibawa oleh perayu kedua ke Maybank di Shah Alam dan PW7 dan PW11 mengeluarkan wang berjumlah RM10,000 dari akaun masing-masing dan memberikannya kepada perayu kedua. Mereka berempat kemudiannya dilepaskan. PW4, abang ipar kepada PW10, dimaklumkan oleh pegawai penyiasat Inspektor Helmi bahawa PW10 telah ditahan oleh polis di Shah Alam. Isteri PW4 kemudiannya memaklumkan PW10 dan kawan-kawannya dilepaskan pada hari yang sama mereka membayar wang rasuah berjumlah RM10,000. PW4 seterusnya berjumpa dengan PW10, PW11 dan PW7 dan dengan itu satu keputusan dicapai untuk membuat laporan kepada SPRM. Pada 16 April 2012, PW7, PW10 dan PW11 ke pejabat SPRM untuk membuat laporan. Kemudiannya, perayu kedua menghubungi PW10 dan memaklumkan

bahawa dia ingin mengembalikan wang RM10,000 kepada PW10. SPRM diberitahu berkenaan perkara ini dan satu perangkap dirancang. Pada 18 April 2012, PW7, PW10 dan PW11 serta satu pasukan pegawai-pegawai dari SPRM telah mengunjungi sebuah restoran di mana PW13 telah mengembalikan wang yang dipertikaikan itu kepada mereka. PW13 kemudiannya ditahan oleh pegawai-pegawai SPRM, diikuti dengan tangkapan ke atas perayu-perayu. Berdasarkan keterangan di atas, hakim bicara mendapati satu kes *prima facie* telah dibuktikan terhadap perayu-perayu atas pertuduhan itu. Perayu-perayu kemudiannya telah dipanggil untuk memasukkan pembelaan. Menurut perayu pertama, semasa soal siasat, PW7 telah mengakui pada perayu pertama bahawa dia telah menjual lori yang diberikan oleh PW10 kepada DW4 untuk harga RM10,000. Perayu pertama mendakwa kemudiannya dia telah menerima RM10,000 daripada PW7 untuk menolong mengembalikan wang itu kepada DW4. Perayu kedua dalam pembelaannya memberitahu mahkamah bahawa semasa dia berada dengan perayu pertama, PW7 telah datang ke bilik perayu pertama dan dia mendengar PW7 menyatakan 'Duit RM10,000 untuk bayar Zul Padang Piul (DW4) dah dapat.' Kedudukan perayu ketiga pula adalah PW7 telah meminta pertolongan perayu pertama untuk mengembalikan RM10,000 kepada DW4. Hakim Mahkamah Sesyen ('HMS') berpendapat bahawa perayu-perayu tidak akan melakukan tindakan yang akan menjejaskan siasatan dengan menerima wang rasuah supaya boleh melepaskan suspek-suspek ini. Perayu pertama juga telah merekodkan dalam eks. D14 ('diari polis') segala tindakan yang diambil berhubungan kes ini. Hakim Mahkamah Sesyen telah menerima keterangan perayu-perayu dan memutuskan eks. D14 mengukuhkan lagi pembelaan perayu-perayu dan berpuas hati pembelaan telah berjaya menyangkal anggapan bawah s. 50 Akta. Hakim Mahkamah Tinggi ('HMT'), walau bagaimanapun, mendapati, antara lain (i) jika PW7, PW10 dan PW11 ditahan sebagai suspek-suspek dalam satu kes jenayah, satu laporan tangkapan harus dibuat oleh perayu-perayu, tetapi mereka gagal berbuat demikian; (ii) pembelaan perayu-perayu bahawa wang yang dirancang untuk dikembalikan kepada DW4 mengikut perintah PW7 ditolak kerana pembelaan ini adalah satu fikiran semula selepas perbuatan salah mereka dibongkar oleh PW4; (iii) tindakan perayu-perayu menunjukkan niat jahat mereka meminta dan memperoleh RM10,000 daripada PW7, PW10 dan PW11 sebagai wang rasuah dan bukan untuk dikembalikan kepada DW4; (iv) bahawa eks. D14 hanya dikemukakan untuk kali pertama semasa pembelaan dan oleh itu harus ditolak sebagai satu fikiran semula. Mahkamah Tinggi mendapati perayu-perayu bersalah dan menjatuhkan hukuman tiga tahun penjara dan saman RM50,000, jika tidak dibayar, 12 bulan penjara. Oleh itu, perayu-perayu memfailkan rayuan-rayuan ini berkenaan sabitan dan hukuman yang dikenakan terhadap mereka. Isu-isu yang timbul adalah (i) sama ada HMT tersalah arah dari segi undang-undang dan fakta apabila

campur tangan dengan dapatan fakta HMS dan gagal mengambil kira pembelaan dengan secukupnya; (ii) sama ada pembelaan adalah satu fikiran semula; (iii) sama ada HMT menolak pembelaan atas alasan kegagalan membuat laporan; (iv) sama ada DW4 saksi berkepentingan dan sama ada HMT harus menolak keterangannya; dan (v) sama ada eks. D14 harus ditolak atas alasan s. 62 Akta.

Diputuskan (menolak rayuan-rayuan)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Perayu-perayu adalah pegawai polis yang bekerja dengan Jabatan Siasatan Jenayah, IPD Shah Alam dan dengan itu mereka adalah ejen-ejen Kerajaan Malaysia. Oleh itu, elemen pertama kesalahan dibuktikan. Tidak dipertikaikan PW7 dan PW11 telah menyerahkan RM10,000 kepada perayu-perayu, oleh itu elemen kesalahan menerima suapan daripada PW7 dan PW11 dibuktikan. Oleh kerana kedua-dua fakta utama ini tidak dipertikaikan, anggapan bawah s. 50 Akta terpakai dalam kes ini kerana suapan yang diperoleh perayu-perayu 'shall be presumed to have been corruptly obtained' oleh perayu-perayu sebagai dorongan atau atas perkara-perkara yang dibentangkan dalam butir-butir kesalahan, melainkan bertentangan dengan apa yang telah dibuktikan.

(2) Amat jelas bahawa PW7 adalah seorang suspek tetapi perayu-perayu gagal membuat laporan polis berhubungan tangkapan. Penjelasan yang diberikan bahawa laporan tidak dibuat kerana kes ekshibit, iaitu motor lori tersebut tidak dijumpai, adalah alasan semata-mata apabila keterangan menunjukkan PW10 telah memberikan lori itu ke PW7 untuk dijual dan PW7 telahpun menjualnya kepada DW4. Pengakuan yang dibuat PW7 kepada perayu-perayu memerlukan laporan untuk dibuat, tetapi laporan tidak pun dikemukakan. Perayu-perayu juga tidak merujuk tangkapan PW7, PW10 dan PW11 kepada pegawai penyiasat iaitu Inspektor Helmi. Jelas terdapat niat pada pihak perayu-perayu untuk menyembunyikan fakta bahawa mereka telah memperoleh wang rasuah daripada PW7 dan PW11. Fakta bahawa ia mengambil lapan hari untuk wang itu dikembalikan oleh perayu-perayu kepada PW7 , PW10 dan PW11 melalui PW13 juga menunjukkan niat tidak berakhlak perayu-perayu. Perayu-perayu tidak mempunyai niat mengembalikan wang kepada DW4 dan jika mereka jujur, perayu-perayu akan menyediakan dokumentasi-dokumentasi yang perlu dan membuat laporan polis berkenaan pengembalian wang yang didakwa kepada DW4 dan meminta kedua-dua PW7 dan DW4 datang ke balai polis untuk tujuan ini. Oleh itu, pembelaan perayu-perayu yang dibangkitkan adalah fikiran semula semata-mata dengan harapan membersihkan nama mereka selepas PW4 yang juga bekerja di IPD Shah Alam telah mendapat tahu kesalahan mereka.

(3) Pendedahan lewat eks. D14 pada peringkat pembelaan dalam keadaan dan cara ia dikemukakan menunjukkan mahkamah tidak patut mengambil kira dengan serius pembelaan perayu-perayu. Pendedahan lewat seperti itu menyokong kes pendakwaan. Pembelaan mempunyai peluang untuk mengemukakan eks. D14, tetapi gagal berbuat demikian, dan mereka juga tidak menyoal saksi-saksi pendakwaan mengenai ekshibit tersebut. Pembelaan hanya menunggu perayu pertama diperiksa balas oleh timbalan berkenaan isu ini, dan ia hanya dikemukakan sebagai ekshibit selepas perayu kedua selesai memberikan keterangan. Peninggalan meletakkan soalan berhubungan diari dan kandungan-kandungannya semasa kes pendakwaan dan pendedahan lewat yang sama dalam cara digambarkan adalah langkah-langkah agak karut yang diambil oleh pembelaan dan apabila diambil kira kedudukan yang dipakai oleh pendakwaan, menyebabkan keterangan itu tidak diterima dan menjejaskan kredibiliti perayu-perayu. Hakim Mahkamah Tinggi dengan itu mempunyai justifikasi dalam menganggap eks. D14 sebagai fikiran semula dan bukan satu keterangan yang mahkamah ini menganggap sebagai benar.

(4) Fakta yang tidak boleh disangkal adalah eks. D14 tidak diserahkan pada pihak pendakwaan menurut s. 62 Akta sebelum permulaan perbicaraan. Seksyen 62(a) secara mandatori memerlukan perayu-perayu menyerahkan salinan apa-apa dokumen yang akan dikemukakan sebagai sebahagian keterangan untuk pembelaan kepada pihak pendakwaan. Kegagalan ini adalah bahaya pada kes pembelaan terutama sekali apabila terdapat dakwaan-dakwaan yang serius bahawa pegawai SPRM enggan menerima ekshibit tersebut apabila perayu pertama ingin menyerahkannya. Oleh itu, cara eks. D14 ditender dan penolakannya oleh Mahkamah Tinggi menyebabkan pembelaan itu tidak dapat dipertahankan dan tidak menyangkal anggapan bawah s. 50(1) Akta.

(5) DW4 dipanggil oleh pembelaan untuk menyokong keterangan perayu-perayu bahawa wang jumlah RM10,000 yang diterima perayu-perayu oleh PW7 dan PW11 adalah bertujuan untuk dibayar kepada DW4. Perayu pertama dalam keterangannya memberi keterangan bahawa dia telah berjumpa dengan DW4 sehari selepas kenyataannya diambil oleh SPRM. DW4 mendakwa bahawa semasa perayu pertama tidak dapat menghubunginya, PW7 telah membuat laporan kepada SPRM dengan dakwaan perayu pertama telah memperoleh wang rasuah. PW7 tidak diperiksa balas berkenaan keterangan ini. Seterusnya, walaupun perayu pertama telah bertemu dengan DW4, perayu pertama tidak membawa DW4 ke MACC atau orang atasannya untuk menjelaskan apa yang benar-benar berlaku. Perayu pertama mempunyai peluang terawal untuk menjelaskan pada SPRM atau orang atasannya, tetapi tidak berbuat

demikian. Peninggalan berbuat demikian menyarankan testimoni DW4 sebagai satu fabrikasi. Hakim Mahkamah Tinggi betul apabila menolak pembelaan DW4.

(6) Perayu-perayu jelas gagal menyangkal anggapan bawah s. 50(1) Akta atas imbangan kebarangkalian. Alasan-alasan yang dibangkitkan oleh perayu-perayu tiada merit dan tidak boleh dianggap sebagai fakta yang menyenangkan. Pihak pendakwaan berjaya membuktikan kes terhadap perayu-perayu melampaui keraguan munasabah. Hakim Mahkamah Tinggi tidak tersalah arah apabila, semasa mengambil kira keterangan secara keseluruhan dengan teliti, mendapati perayu-perayu bersalah. Keputusan Mahkamah Tinggi dengan itu disahkan.

Case(s) referred to:
Akin Khan v. PP [1987] 1 CLJ 348; [1987] CLJ (Rep) 40 SC ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC ***(refd)***
PP v. Datuk Hj Harun Hj Idris (No 2) [1976] 1 LNS 184 ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC ***(refd)***
Teng Howe Sing v. PP [2009] 3 CLJ 733 FC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 51A
Malaysian Anti-Corruption Commission Act 2009, ss. 17(a), 50(1), 62(a), (b)
Penal Code, ss. 411, 414

For the prosecution - Wong Poi Yoke; DPP
For the appellant - MM Athimulan; M/s Athimulan & Co

[Editor's note: Appeal from High Court, Shah Alam; Criminal Appeal No: 42LB(A)-1-02-2014 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Idrus Harun JCA:

Introduction

[1] The appellants were charged at the instance of the Public Prosecutor in the Shah Alam Sessions Court under s. 17(a) of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) which is stated as follows:

> Bahawa kamu, bersama, pada 10/04/2012, jam di antara 5.30 petang hingga 10 malam, bertempat di Ibu Pejabat Polis Daerah Shah Alam, dalam Daerah Shah Alam, dalam Negeri Selangor, sebagai seorang ejen Kerajaan Malaysia, iaitu, Sarjan Mejar 89155, Lans Koperal 151150 dan

A Lans Koperal 162847 yang bertugas di Bahagian Siasatan Jenayah, IPD Shah Alam, telah secara rasuah memperoleh untuk diri kamu satu suapan, iaitu, wang tunai berjumlah RM10,000.00 daripada Nor Arman b Abu Samah dan Halid b Usmad sebagai dorongan untuk tidak melakukan suatu perbuatan berhubung dengan hal ehwal prinsipal kamu, iaitu, melepaskan Zulkarnain b Deraman yang disyaki terlibat dalam kes curi lori
B yang merupakan kesalahan di bawah Sekyen 378 Kanun Keseksaan, dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 17(a) Akta SPRM 2009 yang boleh dihukum di bawah seksyen 24 Akta yang sama dan dibaca bersama seksyen 35 Kanun Keseksaan.

[2] The learned Sessions Court Judge acquitted and discharged the
C appellants from the charge at the end of the defence case. Hence, the prosecution filed an appeal against the said acquittal to the High Court. The learned High Court Judge found the appellants guilty and sentenced each of them to three years of imprisonment and fine of RM50,000 in default 12 months of imprisonment. The appeals before this court are filed by the
D appellants with respect to the conviction and sentence against each of them.

[3] To appreciate the subjects of contention that have been raised before this court, it would be desirable to state briefly the material facts which we have garnered from the evidence led by the prosecution. Zulkarnain bin Deraman aka Joe (PW10) lived in Kuala Lumpur where he earned his living
E selling burger and banana fritters (goreng pisang). He hailed from Kampung Felda Bukit Berdamar, Lanchang, Pahang. When PW10 heard rumours that the police were looking for him, he took his ex-fiancee Noreen back to his hometown. Whilst in the hometown, PW10 went to look for Nor Arman bin Abu Samah (PW7) and Halid bin Usmad (PW11) to seek their advice. Both
F PW7 and PW11 advised PW10 to send Noreen to her hometown in Sungai Manik, Perak. On 10 April 2012, PW10, PW11, PW7 and Noreen left Kampung Felda Bukit Berdamar, Lanchang Pahang for Sungai Manik, Perak in Toyota Hilux driven by PW11. At KESAS Highway, Shah Alam, a team of police personnel consisting of the three appellants and Constable Hafiz bin
G Ibrahim (PW13) ambushed and arrested PW10, PW11, PW7 and Noreen. They were taken to IPD Shah Alam where PW7 and PW10 were interrogated on their involvement in the theft of a motor lorry.

[4] PW7 was interrogated by the first and second appellants. He alleged that both the first and second appellants agreed to receive RM10,000 for the
H purpose of securing the release of PW7, PW10 and PW11. The third appellant was also present during the discussion on the payment of the money for the purpose of the release of PW7, PW10 and PW11. PW7 did not have the money. He needed PW11 to help him. When PW11 was brought to the interrogation room, PW7 then asked PW11 how much money he had to
I which PW11 said he did not have much. PW11 therefore contacted his

friend by the name of Mohamad Bakri bin Aziz (PW12) and asked him to deposit RM5,000 in PW11's account. The evidence of PW7 also revealed that he contacted his brother in law namely Nazri bin Nasir and asked him to lend RM5,000 which the latter agreed. The money was subsequently paid into PW7's account. At that point of time, the second and the third appellants were with the first appellant. After the money had been paid into PW7's and PW11's accounts, both of them were brought by the second appellant to Maybank in Shah Alam where PW7 and PW11 withdrew RM10,000 from their respective accounts and gave it to the second appellant.

[5] The second appellant thereafter took PW7 and PW11 to Shell Petrol Station in Seksyen 11 Shah Alam where PW10 and Noreen were waiting in Toyota Hilux belonging to PW11. The four of them were then released after which PW7, PW10 and PW11 proceeded to send Noreen back to Sungai Manik, Perak.

[6] Inspector Mat Nasir bin Bebakar (PW4), PW10's brother in law, came to know about the payment of the said sum of RM10,000. PW4 was attached to IPD Shah Alam at the material time. According to PW4, on 10 April 2012 he was informed by the investigation officer Inspector Helmi in the afternoon that PW10 was arrested by the Shah Alam police. When PW4 returned home, he told his wife about the arrest of PW10 and his friends. PW4's wife thereupon contacted her mother who told her that PW10 and his friends were released on the same day after they had paid the bribe money of RM10,000. PW4 next told his wife to tell her mother to ask PW10, PW7 and PW11 to see him in Kelana Jaya. They came to see PW4 on 11 April 2012 and told him what had happened. Hence, a decision was made to report the incident to MACC.

[7] On 16 April 2012, PW7, PW10 and PW11 went to the MACC office to lodge a report. PW10 was subsequently directed to make a telephone call to the first appellant, but the call was not answered. Later, PW10 received a telephone call and a message by way of short message service from the second appellant informing PW10 that he wanted to return the sum of RM10,000 to PW10. The MACC was subsequently informed about this development. A trap was planned. On 18 April 2012 at about 4pm, PW7, PW10 and PW11 together with a team of officers from the MACC proceeded to Restoran Nawas Maju. PW13 came to the restaurant and approached the table where PW7, PW10 and PW11 were seated and there he returned the money in question to them. PW13 was arrested by the MACC officers.

[8] Based on the above evidence, the learned trial judge found that a *prima facie* case had been established against the appellants on the charge. The appellants were therefore called upon to enter on their defence.

[9] Apart from the appellants who gave evidence under oath, the defence also called Zainal Abidin Yusof aka Zul Felda Padang Piul (DW4) to testify. The first appellant testified that on 4 April 2012 when he interrogated a suspect in relation to a theft case involving a motor lorry, he suspected that PW7 and PW10 were involved in the theft of the motor lorry. On 10 April 2012, PW7, PW10, PW11 and Noreen were arrested at KESAS Highway. During interrogation, PW7 admitted to the first appellant that he sold the lorry that was given by PW10 to DW4 for the price of RM10,000. The first appellant claimed that he wanted to meet DW4 and asked PW7 to take him to see DW4. At that stage, PW7 pleaded with the first appellant and sought his help to return the RM10,000 to DW4 at the time the motor lorry would be seized by the police from DW4. Although the first appellant initially rejected PW7's request, when PW7 agreed to cooperate with the police by becoming a witness against PW10, the first appellant agreed to help PW7 to return the money to DW4. The first appellant then received RM10,000 from PW7. The first appellant testified that he contacted DW4 by telephone during which he informed DW4 that PW7 would return the money to him and he would not be arrested, instead he would be made a witness.

[10] On 10 April 2012, the first appellant contacted DW4 again and the latter agreed to return the motor lorry and accept RM10,000. The first appellant was told by DW4 to meet him in Jerantut on the next day. However, the first appellant did not go to Jerantut after DW4 could not be contacted. On 12 April 2012, the first appellant contacted PW7 to return the money but was told by PW7 that he could not come. In the event which happened, on 18 April 2012 the money was returned to PW7 through PW13. The first appellant could not return the money to PW7 himself as he was on duty outside the district on the day in question. The first appellant was arrested on 19 April 2012 at about 6.30pm.

[11] The second appellant in his defence told the court that whilst on the way back to IPD Shah Alam after carrying out the operation at KESAS Highway on 10 April 2012, he had to return home upon receiving a telephone call from his wife. When he returned to IPD Shah Alam subsequently, he asked the first appellant about the case. Whilst he was with the first appellant, PW7 came to the first appellant's room and he heard PW7 said "Duit RM10,000 untuk bayar kepada Zul Padang Piul dah dapat. Cuma tunggu duit masuk dalam akaun."

[12] The third appellant's position is that he was in the first appellant's room when PW7 was being interrogated by the first appellant. He further said that PW7 asked the help of the first appellant to return the RM10,000 to DW4.

[13] DW4 in his evidence testified that he bought the lorry from PW7 for RM10,000. DW4 also told the court that he received a telephone call from the first appellant enquiring about the lorry that was bought from PW7 adding that PW7 asked him to surrender the lorry to the police. DW4 also asked for the money from PW7.

The Sessions Court's Decision

[14] In calling for the defence to be entered, the learned Sessions Court Judge was satisfied that the appellants were the police officers attached to the Criminal Investigation Division, IPD Shah Alam. As such, they were the agents of the Government of Malaysia. This evidence was not disputed. Thus, the learned trial judge found that the first element of the offence was established by the prosecution. It was not disputed that on 10 April 2012, the appellants were involved in an operation to arrest PW7, PW10, PW11 and Noreen. PW7 and PW10 were interrogated on their suspected involvement in the theft of a motor lorry. It was not in dispute that after the interrogation, PW7 and PW11 handed over RM10,000 to the appellants. The defence did not deny that the said sum of RM10,000 was received by the appellants. Therefore, the second element of the offence of obtaining the gratification from PW7 and PW11 on the day in question was also established by the prosecution. Since these two primary facts were undisputed, the learned trial judge held that the presumption under s. 50 of Act 694 applied to this case in that the gratification obtained by the appellants "shall be presumed to have been corruptly obtained" by the appellants as an inducement for or on account of the matters set out in the particulars of the offence, unless the contrary is proved. Accordingly and as earlier stated, the appellants were ordered to enter on their defence.

[15] In considering the defence, the learned Sessions Court Judge observed that there was no police report lodged by the appellants relating to the arrest of PW7, PW10 and PW11. However, the learned trial judge accepted that the arrest was made with full knowledge of their superior officer. He added that the appellants would not have committed an act that would jeopardise investigation by the investigation officer namely Inspector Helmi by accepting the bribe money in order to release these suspects. The first appellant, moreover, recorded in exh. D14 (which was his 'Perharian Rasmi 2012' or police diary) all actions taken relating to the case. Despite the fact that exh. D14 was not shown to the prosecution witnesses, the trial judge accepted the contents of the same as evidence. He emphasised that the defence evidence was supported by the evidence of DW4 which showed that the money that was taken by the first appellant from PW7 was meant for him. The sum of RM10,000 was the amount DW4 paid when he purchased the stolen motor lorry. Hence, when PW7 asked DW4 to surrender the lorry to the police, DW4 asked PW7 to return the money to him. The learned trial

judge accepted this evidence and held that exh. D14 further strengthened the defence of the appellants. For these reasons, the learned trial judge was satisfied that the defence had successfully rebutted the presumption under s. 50 of Act 694 and in the result the appellants were acquitted from the charge.

The High Court's Decision

[16] In His Lordship's grounds of judgment, the learned High Court Judge agreed with the finding of *prima facie* case made by the learned trial judge. His Lordship also found that nowhere in the evidence of PW7 did he say that the money in the sum of RM10,000 was meant to be returned to DW4 because he sold the stolen motor lorry to DW4. The learned judge also found that after PW7 had paid RM10,000, PW7, PW10, PW11 and Noreen were released without any condition and that there was no official documentation relating to or which recorded the payment of the money during the time the money was given by PW7 to the second appellant for the purpose the appellants had alleged. Furthermore, if PW7, PW10 and PW11 were arrested as suspects in a criminal case, an arrest report ought to have been made by the appellants. However, in this case, no such police report was made by the appellants upon returning to IPD Shah Alam which was the standard procedure followed by the police.

[17] The learned High Court Judge also considered the appellants' explanation as to why no arrest report was made which was that PW7, PW10 and PW11 were not detained as suspects, instead it was ordinary or routine arrest for interrogation. This reason was rejected by the learned High Court Judge for the reason that if they were not suspects was there any need to arrest and interrogate them in the first place. Their action was clearly an abuse of their power.

[18] The appellants' defence that the money was intended to be returned to DW4 at the behest of PW7 was also rejected by the learned High Court Judge. His Lordship dismissed this line of defence as an afterthought to exonerate themselves from the crime they had committed after their wrongdoing was discovered by PW4. In desperation, the first appellant prepared exh. D14 and made their efforts to return the money to PW7. But the appellants kept the money for eight days from 10 April 2012 until 18 April 2012 before it was returned to PW7, PW10 and PW11 through PW13.

[19] The learned High Court Judge also found that there was no evidence to show that the appellants knew that DW4 had purchased the lorry from PW7 for RM10,000 before PW7, PW10 and PW11 were arrested by them. His Lordship next proceeded to consider the omission on the part of the appellants to refer PW7, PW10, and PW11 to Inspector Helmi who was

investigating the theft case of the motor lorry which was the normal procedure followed by the police. Clearly, the learned judge held, their conduct showed their bad intention in that they demanded and obtained RM10,000 from PW7, PW10 and PW11 as the bribe money and not for the same to be returned to DW4.

[20] As regards DW4's testimony, the learned High Court Judge cautioned that DW4 was an interested witness and he had committed an offence under ss. 411 and 414 of the Penal Code for purchasing a stolen motor lorry. DW4 knew the lorry was stolen because he bought the lorry at a cheap price. The learned judge also considered exh. D14 and observed that it was produced for the first time during the defence. Moreover, only the first appellant produced the document, the other two appellants did not. The learned judge therefore rejected the evidence relating to exh. D14 as a mere afterthought. According to the learned judge, the document was crucial to the defence, yet this document was never raised during the cross-examination of the prosecution witnesses. The issue in connection with exh. D14 was only raised after the second appellant had given his evidence when the first appellant was recalled to give evidence specifically on exh. D14. In any event, the production of this exhibit was not in accordance with sub-ss. 62(a) and (b) of Act 694, the learned judge held. The trial judge did not consider the above. In view of the foregoing, the learned High Court Judge allowed the appeal, found the appellants guilty as charged and sentenced each of them to three years of imprisonment and fine of RM50,000 in default 12 months imprisonment.

Our Deliberations And Decision

[21] Before this court, six points were raised by learned counsel for the appellants as their grounds of appeal. These are:

(a) the learned High Court Judge seriously misdirected in law and fact when he interfered with the finding of facts of the learned Sessions Court Judge;

(b) the learned High Court Judge failed to consider and appreciate the defence adequately;

(c) whether the defence is an afterthought;

(d) whether the learned High Court Judge rejected the defence on the ground of failure to make a report;

(e) whether DW4 is an interested witness and can the learned High Court Judge reject his evidence; and

(f) whether exh. D14 can be rejected on the ground of s. 62 of Act 694.

[22] It is of some significance to observe that these issues are inextricably linked and the gravamen of the appellants' complaints turns upon a pure question of fact. That being the case, we propose to deal with these points together in our decision. As a convenient starting point, it ought to be emphasised that by virtue of s. 50 of Act 694, in a proceeding against a person for an offence under sub-s. 17(a) thereof, where it is proved that a gratification has been obtained, the gratification shall be presumed to have been corruptly obtained as an inducement for or on account of the matters set out in the particulars of the offence, unless the contrary is proved. It is necessary to mention that s. 50 of Act 694 has been reproduced above in a redacted fashion so as to show only the provisions relevant to the appeal herein.

[23] The learned trial judge correctly stated the law that for an offence under sub-s. 17(a) of Act 694 to be proved, two elements need to be established before the presumption under s. 50 thereof could be invoked. These are:

(a) the appellants were the agents of the Government of Malaysia; and

(b) the appellants obtained the gratification for themselves from PW7 and PW11.

[24] Once these two elements have been proved, the third element of the offence *viz*, the gratification was corruptly obtained as an inducement for or on account of the matters set out in the charge shall be assumed unless the contrary is proved. The first two elements have been proved by the prosecution. In fact, the learned trial judge found that this evidence was not disputed. The burden to rebut the presumption of this existence of the third element thus shifts to the appellants. They have to prove the third element does not exist. The words "unless the contrary is proved" appearing in s. 50 of Act 694 requires the appellants to show on the balance of probabilities that the fact as alleged in the charge does not exist. This is the trite and settled principle of law laid down by the Privy Council in the seminal case of *Public Prosecutor v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89. Lord Diplock there lucidly stated:

> In their lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it, it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities.

This is a heavier burden than the ordinary burden of proof upon an accused on the defence being called. The Supreme Court in the case of *Akin Khan v. Public Prosecutor* [1987] 1 CLJ 348; [1987] CLJ (Rep) 40; [1987] 2 MLJ 217 on this point held:

> The next limb ie, "it could be considered to be reasonably true on a balance of probabilities" is the heavier burden which the law places upon an accused once the presumption comes into effect, as was held in *Rex v Carr Briant* [1943] KB 607 referred with approval in *Public Prosecutor v. Yuvaraj (supra).*

[25] The learned High Court Judge considered the appellants' defence very carefully and held that their defence was an afterthought. We would significantly emphasise that the three appellants testified that PW7, PW10 and PW11 were arrested as they were suspected of being involved in the theft of a motor lorry and they were interrogated on suspicion of their involvement in this offence. The appellants during examination-in-chief told the court that PW7 admitted that he sold the lorry to DW4 for RM10,000. The learned High Court Judge found, and we think His Lordship was right, that there was no arrest report made by them and when they were released, there was no documentation prepared. All the appellants admitted in their evidence that PW7, PW10 and PW11 were released after RM10,000 was paid to them.

[26] Cross-examined by the learned Deputy Public Prosecutor (the learned Deputy) on the same point, the appellants explained that this was a routine arrest for the purpose of interrogation as such no police report was necessary. However, the first and second appellants testified that PW7 admitted to selling the motor lorry to DW4. This is what the first appellant said during examination-in-chief:

> Selepas beberapa kali disoal siasat, PW7 ada mengaku menjual sebuah lori dengan harga RM10,000.00 kepada seorang lelaki Melayu nama panggilan Zul Felda Padang Piul. Penjualan berlaku di Plaza Tol Karak.

During cross-examination, the first appellant testified:

> Q: SP7, apa status dia?
>
> A: Dia penjual lori curi.
>
> Q: Dia suspek?
>
> A: Benar.

Likewise, the second appellant and the third appellants' evidence was consistent with the first appellant's evidence in that it was PW7 who sold the stolen lorry to DW4 and the said lorry was given by PW10 to PW7 to be sold.

[27] Accordingly, based on the evidence of the appellants, it is clear to us that PW7, was a suspect yet the appellants treated this case as a normal or routine arrest and failed to lodge a police report relating to the arrest. Their explanation that the report was not made because the case exhibit, that is, the motor lorry was not recovered was a hollow and mere excuse when the

A evidence shows that PW10 gave the lorry to PW7 to be sold and he in fact sold it to DW4. The admission that PW7 made to the appellants would require a report to be made, yet no such report was lodged. The appellants also did not refer the arrest of PW7, PW10 and PW11 to the investigation officer namely Inspector Helmi. It is significant to mention that the first B appellant in his evidence-in-chief testified that he was involved in the investigation in the case involving the theft of the motor lorry and therefore, in our judgment, it would be a logical step to take to report the matter with the police and subsequently refer the case to Inspector Helmi.

[28] In fact, we could glean from the evidence of the first appellant that on C 4 April 2012, the first appellant together with several other police personnel had arrested a Malay suspect by the name of Mohd Zahirul bin Ismail also known as Pendek in front of a flat, at Flat Langkawi 1, Jalan Melati Gombak, Selangor. The lorry was not recovered from him, yet the suspect was detained in a police lock-up at IPD Shah Alam. He admitted that he was D involved and a police report was lodged at IPD Shah Alam. We could discern a similarity between this case and the case involving the said Malay suspect and both arrests were related to the same case, yet in the arrest involving the appellants, despite their admission, no police report was lodged and they were subsequently released on the same day. Such glaring omission in our judgment, clearly evinced an intention on the part of the appellants E to conceal the fact that they had obtained the bribe money from PW7 and PW11. The fact that it took eight days for the money to be returned by the appellants to PW7, PW10 and PW11 through PW13 further shows the corrupt intention on the part of the appellants. They would not have kept the money for eight days if they did not have the corrupt intention. We agree F with the learned High Court Judge that the appellants had no intention to return the money to DW4 and that if they were honest, the appellants would have prepared necessary documentation and made a police report on the alleged return of the money to DW4 or requested both PW7 and DW4 to come to the police station for this purpose.

G **[29]** In his defence, the first appellant admitted that out of 35 years in police force, this was the first time he agreed to help a suspect and that he would be made a witness. We cannot accept this evidence. The question whether a suspect would be made a witness is not for the first appellant and the other two appellants to decide. That power is under the law vested with H the prosecution. It is doubtful that the appellants had promised PW7 that he would be made a witness. The defence is in our view a fabrication and devoid of any merit. In our judgment, the learned High Court Judge is justified when His Lordship found that the appellants' defence was raised as a mere afterthought in the hope that they would be vindicated after PW4 who also I worked at IPD Shah Alam had discovered about their misdeed.

[30] PW7 in his evidence was firm on the issue of the payment of RM10,000. This is what he said:

> Saya tanya lagi dia, "Berapa Encik Nak?"
>
> Kemudian ada satu anggota lain masuk ke dalam bilik itu. Kami berbincang mengenai bayaran dengan pembayaran yang hendak dibuat.
>
> Saya boleh cam anggota lain itu iaitu anggota yang dikenali dengan panggilan Wan Kedah.
>
> Wan Kedah ada di dalam Mahkamah. Dia duduk di tengah kandang tertuduh.
>
> Mahkamah: OKT2 dicamkan.
>
> **Di dalam perbincangan kami itu saya bersetuju untuk memberi imbuhan sebanyak RM5,000.00**
>
> SM Noordin beritahu jika saya beri RM5,000.00 lagi baik dia hantar saya pergi buat road show.
>
> Saya takut. Saya minta izin SM Noordin untuk panggil kawan saya bernama Halid.
>
> Saya panggil Halid masuk ke dalam bilik itu.
>
> Kami tanya lagi berapa yang kami perlu tambah. Salah seorang beritahu, "Awak agak-agak lah"
>
> Saya tanya Halid, "Kamu ada duit ke?"
>
> Halid jawab dia ada RM5,000.00.
>
> Setelah kami tanya, saya terus cakap mahu beri RM10,000.00.
>
> **Saya tanya kepada mereka, "Kalau RM10,000.00 ini kami boleh bebas ke, dan SM Noordin jawab, "Beres belaka" yang bermaksud selesai semua.**
>
> Selepas daripada itu saya meminta SM Noordin memulangkan handphone saya untuk saya menghubungi adik ipar saya untuk pinjam wang sebanyak RM5,000.00.
>
> Adik Ipar saya ialah Nazri bin Nasir. (emphasis added)

The evidence also revealed that after RM10,000 was paid by PW7, they were released without condition and, as we have stated earlier, no formal documentation in relation to the payment was made.

[31] In addition, according to PW7, after he lodged a report with the MACC in relation to the money that was obtained by the appellants, he received a telephone call from the second appellant asking PW7 how did IPD Shah Alam come to know about this case. This is made manifest when PW7 testified:

A

> Selepas saya buat repot En. Kedah telefon saya dia tanyakan kepada saya macam mana kes ini bleh sampai ke IPD tahu. Saya jawab saya pun tidak tahu sebenarnya.
>
> En. Kedah berjanji memulangkan semula duit yang dia ambil. Selepas itu dia cakap dengan saya nanti kalau apa-apa saya berurusan dengan satu anggota polis yang dipanggil dengan panggilan Jebat (PW13).
>
> (emphasis added)

B

A pertinent point to mention at this stage is that En Kedah was identified by the PW7 as the second appellant.

C **[32]** Raja Azlan Shah FCJ (as His Royal Highness then was) in *Public Prosecutor v. Datuk Haji Harun Haji Idris (No. 2)* [1976] 1 LNS 184; [1977] 1 MLJ 15 explained the meaning of "corrupt" as follows:

D

> **"Corrupt" means "doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions." (see *Lim Kheng Kooi v. Reg* [1957] MLJ 199); "purposely doing an act which the law forbids"** (see *R v. Smith* [1960] 1 All ER 256).
>
> **"Corrupt" is a question of intention. If the circumstances show that what a person has done or has omitted to do was moved by an evil intention or a guilty mind, then he is liable under the section.** Thus if the accused used his position to solicit gratification with a guilty mind, he is caught within the ambit of the section. The real point is whether there is soliciting a political donation with a corrupt intention.
>
> **The manner in which the payments were made is a relevant consideration in the present case.** (emphasis added)

E

F Mindful of the above Federal Court decision, it is plain that their conduct demonstrates their guilty intention that when they did not lodge a police report relating to the arrest of PW7, PW10 and PW11, this omission was intended to conceal the fact that they had obtained RM10,000 from PW7 and PW11 corruptly. The explanation given is, in our judgment, completely unreasonable and such conduct in not reporting the arrest case is not consistent with their innocence.

G

[33] It is also manifestly unreasonable that, having carried out their investigation into the theft case culminating with the operation on KESAS Highway leading to the arrest of PW7, PW10, PW11 and Noreen, the appellants acting on their own, released them without the investigation being carried out to its logical completion. Such investigation, in our judgment, could lead to the ultimate arrest of the prime suspect.

H

I

[34] What comes into focus as the next issue in the contention of learned counsel concerns exh. D14. This is, as earlier explained, the first appellant's "Perharian Rasmi 2012" or police diary which contains his records of daily activities at the material time. We would start off, on this issue, by laying emphasis to the fact that exh. D14 was raised for the first time on 4 December 2013 during the cross-examination of the first appellant. DW1 was asked by the learned Deputy whether he recorded in his daily report diary the arrest of PW7, PW10, PW11 and Noreen. However, the said diary was only tendered as exh. D14 when the first appellant was recalled after the second appellant had completed giving his evidence on 15 January 2014. We are mindful that the production of exh. D14, although it took place after the first appellant was recalled, was intended to support the defence version that the sum of RM10,000 obtained by the first appellant from PW7 and PW11 was not a corrupt payment. However, the question relating to exh. D14 was never suggested to the prosecution's witnesses. This is plainly necessary because the first appellant had alleged that he wanted to surrender exh. D14 to the MACC but it was not accepted and he even called the MACC officer to come to his office to take the diary but was told that it was not necessary.

[35] We accept that questions were put to the prosecution witnesses in particular the investigation officer (PW14) in connection with the appellants' defence that the money was meant to be returned to DW4, yet it was never put to them that the first appellant had made an entry relating to the same in exh. D14. Also, the question relating to the alleged refusal on the part of the MACC officer to accept exh. D14 was never suggested or put to any of the prosecution witnesses. This is a crucial piece of evidence, the defence however did not consider it important enough to cross-examine the prosecution's witnesses on the contents of exh. D14. Neither did the defence consider it necessary to examine the first appellant on exh. D14, nor make an attempt to also produce the second and third appellants' daily report diaries to the court if indeed these so-called contemporaneous documents contained the truth. In our view, the late disclosure of exh. D14 at the defence stage and the circumstances in which it was produced merely goes to show the weight that the court should attach to the appellant's defence. And we say that this we are by law permitted to do (see the Federal Court's decision in *Teng Howe Sing v. PP* [2009] 3 CLJ 733; [2009] 3 MLJ 46 at pp. 48 and 61 para. 30). In *Public Prosecutor v. Badrulsham Baharom* [1987] 1 LNS 72; [1988] 2 MLJ 585, such late disclosure goes some way to support the case for the prosecution.

[36] This court is indeed curious to know why, if exh. D14 existed, it took the prosecution to raise this question to the first appellant during his cross-examination. According to the first appellant, his superior officer would certify his diary every month. If it is true that the MACC did not want to

A accept the diary from the first appellant, then his superior officer who certified the diary could have surrendered the diary to the MACC as this evidence, is of utmost importance to the defence since it could absolve the appellants of the crime. Or the first appellant could have asked his counsel to surrender the diary to the MACC to ensure that the appellants would have
B a good defence. The defence clearly had the opportunity to produce exh. D14, but they did not do so, neither did they question the prosecution witnesses in particular PW14 regarding the said exhibit. Instead the defence waited until the first appellant was cross-examined by the learned Deputy on this issue, then only it was tendered as an exhibit after the second appellant
C had completed giving his evidence. Such belated disclosure significantly, was not followed with the production of the diaries belonging to the second and third appellants. The omission to put questions relating to the diary and its contents during the prosecution case and the belated disclosure of the same in the manner described above are really a nonsensical step taken by the defence and when considered against the position adopted by the
D prosecution, renders such evidence unacceptable and affects the appellants' credibility and the weight that could be attached to it.

[37] We would on this point refer to the Federal Court's decisions in *Siew Yoke Keong v. PP* [2013] 4 CLJ 149, *Alcontara Ambross Anthony v. Public*
E *Prosecutor* [1996] 1 CLJ 705 and *Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138; [1981] 1 MLJ 212 as the authoritative case authorities to support the above proposition that the failure by the defence to put its case to such of the prosecution witnesses as might be in position to admit or deny it, did have a serious implication on the accused's credibility and the weight to be
F attached to his evidence. The whole point and purpose of the defence having to put its case to such prosecution witnesses is to enable the prosecution to check on whether the accused's version of the facts is true or false and thus avoid the adverse comment. The learned High Court Judge was therefore justified when His Lordship treated exh. D14 as an afterthought defence and not one that the court considered was more likely to be true.

G **[38]** Another point that we want to raise as well concerns s. 62 of Act 694. The irrefragable fact is that exh. D14 was never delivered to the prosecution pursuant to s. 62 before commencement of the trial. Section 62 in this regard provides as follows:

H Defence statement

62. Once delivery of documents by the prosecution pursuant to section 51A of the Criminal Procedure Code has taken place, the accused shall, before commencement of the trial, deliver the following documents to the prosecution:

I

(a) a defence statement setting out in general terms the nature of the defence and the matters on which the accused takes issue with the prosecution, with reasons; and

(b) a copy of any document which would be tendered as part of the evidence for the defence.

[39] The relevant provision applicable to this case is sub-s. 62(a) which mandatorily requires the appellants to deliver a copy of any document which would be tendered as part of the evidence for the defence to the prosecution. Exhibit D14 was tendered as part of the evidence for the defence. Accordingly, once delivery of documents by the prosecution pursuant to s. 51A of the Criminal Procedure Code had taken place, it behoved the defence to deliver exh. D14 to the prosecution before the trial commenced. We are mindful of the submission urged for the defence that the prosecution did not raise any objection on the ground of noncompliance with sub-s. 62(b) of Act 694 when the defence sought to tender the same. Granted, that the prosecution did not make an objection when exh. D14 was tendered, but it was not a question of failure to object we are considering herein, it is a question of non-compliance with sub-s. 62(b) which is relevant. The fact remains that where the said section was alleged to have not been complied with, it is incumbent on this court to consider it when our attention is directed to this fact. However, in all fairness to the learned Sessions Court Judge, we note that he did not consider the issue of s. 62 as it was not ventilated before him.

[40] Learned counsel, submitted that s. 62 would only trigger if there was strict compliance by the prosecution of s. 51A of the Criminal Procedure Code since there is no evidence of compliance with the said section. As such, no issue of s. 62 arising in this appeal. To deal with this submission, we would say that even assuming that s. 62 does not apply, the learned High Court Judge did not make any appealable error in rejecting exh. D14. We reach this conclusion stated with no doubt whatsoever because there are as it is clear to us good reasons to justify the rejection of exh. D14 as discussed above. The learned High Court Judge had rightly considered that the issue in connection with exh. D14 was only first raised during the first appellant's testimony and it was never raised during the prosecution's case. If indeed exh. D14 was prepared by the first appellant long time before the trial, surely it would have been produced at the earliest time possible during the prosecution case. We view this failure as fatal to the defence case particularly when serious allegation had been made that the MACC officer refused to accept the said exhibit when the first appellant wanted to surrender it. Thus, the manner in which exh. D14 was tendered and its rejection by the High Court rendered the defence untenable and did not rebut the presumption under sub-s. 50(1) of Act 694.

[41] We would emphasise on this aspect that the learned High Court Judge did not reject exh. D14 on the ground of non-compliance with sub-s. 62(b), but briefly stated that the learned trial judge should have considered the issue of non-compliance with this section before making his decision on the said exhibit. The rejection of exh. D14 by the learned High Court Judge was based on the reasons discussed above. In the event, the issue of the alleged rejection of exh. D14 under sub-s. 62(b) should not be hyped to stoke up argument or interest thereon as it is plain that the learned High Court Judge did not reject the same on the ground of non-compliance with the said section. We are satisfied that there was no misdirection that would vitiate the conviction of the appellants.

[42] There remains the question whether the learned High Court Judge was right in rejecting the evidence of DW4. The argument of the defence before this court was directed on the question that the learned High Court Judge had misdirected himself in treating DW4 as an interested witness and that he had committed a criminal offence under ss. 411 and 414 of the Penal Code. DW4 was called by the defence to support the appellants' evidence that the money in the sum of RM10,000 they received from PW7 and PW11 was intended to be paid to DW4. DW4 in this regard testified that he bought the motor lorry from PW7 at a cheaper price because the owner of the lorry had defaulted in loan repayment to the bank. But DW4 only knew PW7 one day before he bought the lorry and he met PW7 twice.

[43] It ought to be mentioned that when PW7 was cross-examined by learned defence counsel, it was suggested to him that he gave RM10,000 to the appellants to be returned to DW4 because PW7 had a good reputation and that he did not want his name to be tainted to which PW7 denied. Having perused through the evidence of PW7, it is plain that he never intended to return the money to DW4. There was no reason for PW7 to worry that his good name would be tarnished since DW4 himself admitted that he did not know who PW7 was. It would be unthinkable for PW7, PW10 and PW11 to tell anyone about their arrest if they were indeed involved in the theft case in question. Besides, the evidence of PW7 on the soliciting by the appellants for the corrupt payment and the resultant receipt of the bribe money is very clear.

[44] The first appellant in his evidence testified that he met DW4 one day after his statement was recorded by the MACC. DW4 in his evidence told the court that he met the first appellant and during the meeting the first appellant had asked DW4 to be his witness. However, cross-examined by the learned Deputy, DW4 testified that the first appellant did not ask him to be a witness adding that the first appellant merely told him that PW7 had given the first appellant RM10,000 to be given to him. When the first appellant could not contact DW4, PW7 lodged a report with the MACC alleging that the first appellant obtained the bribe money. This is a complete departure from his evidence-in-chief.

[45] Earlier in his evidence-in-chief, DW4 indeed testified that PW7 told him to surrender the motor lorry and both of them would become police witnesses. However on the same day at about 8pm, DW4 further testified, PW7 telephoned DW4 telling him not to surrender the lorry, it was up to DW4 whether he wanted to hide or sell the motor lorry. Upon giving due consideration to the evidence of PW7, we find that PW7 was not cross-examined on this evidence. We do not think that, in the absence of cross-examination of PW7 by the defence on this evidence, any weight can be attached to it. It certainly raises question on this witness' credibility.

[46] As highlighted earlier, DW4 alleged that when the first appellant could not contact him, PW7 lodged a report with the MACC alleging that the first appellant had obtained the bribe money. PW7 was not cross-examined on this evidence either. It is pertinent to note that it was suggested to PW7 during his cross-examination that he conspired with PW10 to report to the MACC that the money was the bribe money meant to be given to the appellants and that they had victimised the appellants by reporting to the MACC that the money was for bribing them. This line of defence is in direct contradiction with the evidence of DW4. There was completely no clarification by the defence on this serious contradiction. Such contradiction in our view goes to the credibility of DW4 and renders the defence case untenable.

[47] One additional point that we would like to make at this stage is that despite the meeting with DW4, the first appellant did not take DW4 to the MACC or to his superior to explain what truly happened. The first appellant had the earliest opportunity to explain to the MACC or to his superior, yet he did not do so. This omission suggests that the testimony of DW4 is a fabrication. The learned High Court Judge was correct when His Lordship rejected the evidence of DW4.

[48] Having subjected the entire evidence of both the prosecution and the defence to our anxious scrutiny, we are satisfied that the grounds urged on behalf of the appellants are without any merit and are not one that can be treated as palatable fact. The appellants clearly failed to rebut the presumption under sub-s. 50(1) of Act 694 on the balance of probabilities. Accordingly, the prosecution succeeded in proving their case against the appellants beyond reasonable doubt. In the upshot, we find that the learned High Court Judge did not misdirect himself when, upon considering the entire evidence very carefully, found the appellants guilty as charged. The decision of the High Court is therefore affirmed.