MALAYSIA

IN THE HIGH COURT OF SABAH AND SARAWAK AT SRI AMAN

[CRIMINAL APPEAL NO. SRA-42-2/2-2017]

BETWEEN

WONG LIONG SOON ... APPELLANT

AND

MALAYSIAN ANTI-CORRUPTION COMMISSION ... RESPONDENT

[In the matter of Sri Aman Sessions' Court

Criminal Case No. SRA-62R-1/6-2015

Between

Malaysian Anti-Corruption Commission

And

Wong Liong Soon]

BEFORE THE HONOURABLE JUDICIAL COMMISSIONER

YA PUAN CELESTINA STUEL GALID

CRIMINAL LAW: *Corruption - Corruptly offering gratification - Inducement to customs officer not to take action against accused for smuggling liquor and cigarettes - Whether ingredients of offence in charge established - Whether prima facie case established - Malaysian Anti-Corruption Commission Act 2009, s. 17(b)*

CRIMINAL PROCEDURE*: Appeal - Appeal against conviction - Offence relating to corruption - Case was transferred to different court for trial - Whether court has power to order transfer of a criminal cause or matter where interests of justice so requires pursuant to s. 104 of the Subordinate Courts Act 1948 - Whether charge as framed had sufficiently set out all particulars as required under s. 17(b) of Malaysian Anti-Corruption Commission Act 2009*

CRIMINAL PROCEDURE*: Appeal - Appeal against sentence - Appellate intervention - Offence relating to corruption under s. 17(b) of Malaysian Anti-Corruption Commission Act 2009 - Accused sentenced to 4 years imprisonment and fine of RM100,000 in default of 12 months imprisonment - Whether sentence was manifestly excessive - Whether mere fact that an appellate court would have passed a different sentence from that given in the court below provides a ground for interference*

[Appeal dismissed.]

Case(s) referred to:

*Balachandran v. PP [2005] 1 CLJ 85 FC (**refd**)*

*Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC (**refd**)*

*Khoo Hii Chiang v. Public Prosecutor And Another Appeal [1994] 2 CLJ 151 SC (**refd**)*

*Lai Kim Hon & Ors v. Public Prosecutor [1980] 1 LNS 197 FC (**refd**)*

*Mansor Bin Omar v. PP and Another Application [2005] 2 MLJ 344 (**refd**)*

Muhd Zulkifli Abd Ghani v. PP [2012] 1 CLJ 293 FC (***refd***)

Ng Chai Kem lwn. PP [1994] 2 CLJ 593 SC (***refd***)

PP v. Chia Leong Foo [2000] 4 CLJ 649 HC (***refd***)

PP v. Fabian Anuar Mail [2010] 2 CLJ 634 HC (***refd***)

PP v. Fam Kim Hock [1956] 1 LNS 83 HC (***refd***)

PP v. Lee Eng Kooi [1993] 2 CLJ 534 HC (***refd***)

PP v. Ling Leh Hoe [2015] 4 CLJ 869 CA (***refd***)

PP v. Mohamed Nor [1987] 1 LNS 82 HC (***refd***)

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC (***refd***)

Rahim Usoff v. PP [1984] 2 CLJ Rep 439 HC (***refd***)

Shahrullah Abdul Rakeb v. PP [2011] 1 LNS 1721 CA (***refd***)

Tan Kim Ho & Anor v. PP [2009] 3 CLJ 236 FC (***refd***)

Wong Swee Chin v. PP [1980] 1 LNS 138 FC (***refd***)

Yeap Peng Hin v. Public Prosecutor [1991] 4 CLJ Rep 285 HC (***refd***)

Zaidon Shariff v. PP [1996] 4 CLJ 441 HC (***refd***)

Legislation referred to:

Criminal Procedure Code, ss. 173(f)(m), 180, 377(b)

Customs Act 1967, s. 135(1)(d)

Evidence Act, s. 76

Federal Constitution, arts. 5(1), 8(1), 145(3)

Malaysian Anti-Corruption Commission Act 2009, ss. 3, 17(b), 24(1), 50(1), 55(1)

Subordinate Courts Act 1948, s. 104

GROUNDS OF JUDGMENT

[1] The Accused was charged under section 17(b) of the Malaysian Anti-Corruption Commission Act, 2009 ("the Act") and after a full trial, was convicted by the Sessions Court at Sri Aman and sentenced to 4 years imprisonment and to a fine of RM100,000.00 in default of 12 months imprisonment.

[2] The Accused appealed against both conviction and sentenced.

[3] On 23.10.2017, this Court dismissed the appeal by the Accused. The Accused has filed a Notice of Appeal dated 30.10.2017 against this Court's said decision.

The Charge

[4] The Charge against the Accused reads as follows-

"*That you, on 19th September 2014, at about 11.30 a.m., at Ying Miew Holding Sdn Bhd., in the District of Betong, in the Betong Division, in the State of Sarawak, did corruptly offered a gratification, to wit, cash money of RM10,000.00 to an agent of Government of Malaysia, to wit, Customs Officer (Gred W22) Abdul Gaffar bin Abdul Wahab, attached to Bahagian Penguatkuasaan Kastam DiRaja Malaysia, Kuching, Sarawak, as an inducement for him to do an act in relation to his principal affairs, to wit, not to take action against you who has allegedly storing various type of liquor and cigarettes, which is an offence under section 135(1)(d) Custom Act 1967 and that you have thereby committed an offence under Section 17(b) Malaysian Anti-*

Corruption Commission Act 2009 and punishable under Section 24 of the same Act.

Penalty:

Section 24(1) of the Malaysian Anti-Corruption Commission Act 2009; shall on conviction be liable to:

(a) Imprisonment for a term not exceeding twenty years; and

(b) A fine of not less than five times the sum or value of the gratification which is the subject matter of the offence where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higher."

[5] Section 17(b) of the Act provides that-

"A person commits an offence if-

...

(b) he corruptly gives or agrees to give or offers any gratification to any agent as an inducement or a reward for doing or forbearing to do, or for having done or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business."

[6] Section 24(1) of the Act provides the penalty for an offence under section 17(b) as-

"(1) Any person who commits an offence under sections 16, 17, 20, 21, 22 and 23 shall on conviction be liable to-

(a) imprisonment for a term not exceeding twenty years; and

(b) a fine of not less than five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higher."

The Sessions Court's decision

[7] The learned Sessions Court Judge identified that there were 3 ingredients making up the offence as stated in the Charge as follows-

(a) offer of gratification to a public servant;

(b) as an inducement not to take action against the Accused; and

(c) is in relation to the principal's affairs.

[8] With regard to the first ingredient, the learned Sessions Court Judge was satisfied that Abdul Gaffar Bin Abdul Wahab (PW2) was a public servant attached with the Customs Department whose affairs amongst others were to enforce laws and regulations relating to customs. In doing so, the learned Sessions Court Judge accepted the evidence of Siti Aisyah Hkairun-Nisaa Binti Abd Rahanuddin (PW1) who tendered the departmental certification and service record of PW2.

[9] As for the second ingredient, the learned Sessions Court Judge held that even without the aid of presumption under section 50 of the Act, i.e. that gratification shall be presumed to have been corruptly offered as an inducement or a reward for not taking action in the raid, there was sufficient evidence to show that the RM10,000.00 offered to PW2 was an inducement for him not to take action in the raid or inspection led by PW2.

[10] The learned Sessions Court Judge was satisfied that a *prima facie* case was established that the Accused had offered the sum of RM10,000.00 and that he was the person who opened the door of the premises and was at the premises during the raid with the raiding team.

[11] The learned Sessions Court Judge did not accept the evidence of the Accused that he had never entered the premises during the inspection by the raiding team and that he had not seen the *Tsingtao* box (exhibit "P3") in which the RM10,000.00 was kept and that he had only seen it during the trial. In so doing, the learned Sessions Court Judge disbelief the evidence of the other defence witnesses, DW2 and DW3 whom the learned Sessions Court Judge found to have made up their stories in order to discredit the Prosecution witnesses.

This Court's decision

[12] The Accused had listed 19 grounds of appeal in his Petition of Appeal dated 19.07.2017. However, looking at these grounds of appeal, I was of the view that the issues before this Court on appeal were as follows-

(a) whether the criminal proceedings against the Accused were properly instituted;

(b) whether the decision of the Sessions Court to hold the trial in the Kuching and Kota Samarahan Sessions Court and not at Betong, where the offence was committed was wrong in law and without jurisdiction;

(c) whether the Charge was defective in law;

(d) whether a *prima facie* case had been established;

(e) whether the defence of the Accused had raised reasonable doubt; and

(f) whether the sentence was manifestly excessive and/ or not within the law.

Whether the criminal proceedings against the Accused were properly instituted

[13] It was submitted that the learned Sessions Court Judge did not make a ruling or finding of the complaint by the Accused that the Assistant Investigating Officer (PW7) did not have the power in law to make and decide and to institute criminal proceedings against the Accused contrary to Article 145 of the Federal Constitution.

[14] Indeed, there was no mention of this issue in the Grounds of Judgment by the learned Sessions Court Judge. However, I was of the view that that by itself did not vitiate the decision of the learned Sessions Court Judge. For one, the complaint was a non-starter as the prosecution was not conducted by PW7 as alleged by the Accused but by one Ms. Katherine Nais pursuant to a "Consent to Prosecute" dated 26.05.2015 (exhibit "A") and "Letter of Authorisation" dated 13.07.2010 (exhibit "B") issued by the Deputy Public Prosecutor on behalf of the Public Prosecutor under section 377(b) of the Criminal Procedure Code ("CPC") which, *inter alia*, expressly provides as follows-

> "Every criminal prosecution before any court and every inquiry before a Magistrate shall, subject to the following sections, be conducted-
>
> ...

(b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorised in writing by the Public Prosecutor:

...

(5) any officer of any statutory authority or body;..."

[15] Further, I did not view the submission by the learned counsel for the Accused that PW7 had no authority to institute criminal proceedings under Article 145(3) of the Federal Constitution to have had any merit as the Consent to Prosecute explicitly indicated that the Public Prosecutor had consented for the institution of such criminal proceedings.

Whether the decision of the Sessions Court to hold the trial in the Kuching and Kota Samarahan Sessions Court and not at Betong, where the offence was committed was wrong in law and without jurisdiction

[16] The Accused complained that the trial was held in Sri Aman whereas the offence was allegedly committed in the Betong District, thus, the trial should have been held in the Betong Court instead. The learned counsel for the Accused submitted that since there was no formal application for the transfer of the case, the learned Sessions Court Judge had acted *ultra vires* his power as a judge and that the Accused was taken by surprise.

[17] The learned Sessions Court Judge held that while the Charge was properly instituted in Sri Aman Sessions Court, the trial was thereafter continued in the Kuching Sessions Court for the convenience of all parties. This was because most of the witnesses were from Kuching as well as the defence counsel.

[18] On this issue, I found merits in the contention by the learned Deputy Public Prosecutor ("DPP") that it was too late in the day for the

Accused to complain about this issue when there was no objection raised at the material time. This is evident in the following Notes of Proceeding ("NOP")-

"DPP: Request for the case to continued at Kuching as most of the witnesses are from Kuching.

Court: The application for the trial to be continued in Kuching is to be considered later depending on logistic availability and conveniences and parties are to be informed beforehand."

[lines 2 - 9, p. 48, ROA (Vol. 2)]

Court: Just want to hear from counsel as regard the trial to be continued in Kuching.

DC: Prosecution of criminal cases is the prerogative of the Public Prosecutor under Article 145 of the Federal Constitution. I don't think I can say anything at this moment. The bowl (sic) is at the prosecution feet for whatever they want."

[lines 9 - 17, p. 50, ROA (Vol. 2)]

[19] Thus, the submission by the learned counsel for the Accused to that the Accused was taken by surprise was without any support. As evident from the above excerpts of the NOP, the learned Sessions Court Judge did inquire from the defence counsel as to this issue. It was only thereafter that the learned Sessions Court Judge held as follows-

"Court: Trial may be continued at Kuching for convenience of all parties namely the witnesses, the DPP and the counsel as

they are all from Kuching except that the presiding officer is from Miri."

[lines 20 - 23, p. 50, ROA (Vol. 2)]

[20] That being the case, I did not find that the transfer of the case to be tried in Kuching Sessions Court prejudiced the Accused in any way. This, bearing in mind that section 104 of the Subordinate Courts Act, 1948 gives power to the Sessions Court to order the transfer of a criminal cause or matter where the interests of justice so require - also see: *Mansor Bin Omar v. PP and Another Application* [2005] 2 MLJ 344.

Whether the Charge was defective in law

[21] It was submitted for the Accused that the Charge was defective as it failed to comply with the requirements under section 158 of the CPC, including failing to state the place where the alleged offence was committed. It was further alleged that the alleged offer of the bribe stated in the Charge was to PW2 whereas the Prosecution's evidence was that the bribe was offered to all members of the raiding party. It was therefore contended that the Charge was misleading, scandalous and lacked precision and based on *PP v. Lee Eng Kooi* [1993] 2 MLJ 322, reasonable benefit of doubt should be given in favour of the Accused.

[22] I agreed with the learned DPP on this issue that the Charge as framed had sufficiently set out all the particulars as required under section 17(b) of the Act as well as the ingredients of the offence. Contrary to the submission by the learned counsel for the Accused, the Charge did state the place of the offence as being "*at Ying Miew Holding Sdn Bhd., in the District of Betong, in the Betong Division, in the State of Sarawak...*"

[23] In any event, even if the Charge was defective as alleged, any error or omission therein should not be regarded unless the Accused was in fact misled by such error or omission under Section 156 of the Criminal Procedure Code ("CPC") and that any error, omission or irregularity in the Charge was curable under Section 422 of the CPC.

[24] However, except for the submission by the learned counsel for the Accused that the Charge was allegedly misleading, scandalous and lacked precision nowhere was it shown as to how it had allegedly misled the Accused. Of significance was the fact that there was nowhere in the NOP where it was recorded that the defence had raised an objection regarding the alleged defective Charge at all. Thus, such ground cannot be sustained on appeal -see: *Thenegaran a/l Murugan & Anor v. Public Prosecutor* [2013] 2 MLJ 855.

Whether a prima facie case had been established

[25] The following 3 ingredients made up the offence as stated in the Charge against the Accused-

(a) that the Accused had offered a gratification to PW2;

(b) that at the time of the said offer, PW2 was an agent or Customs Officer; and

(c) that the gratification was offered corruptly as an inducement to forbear to do an act in relation to PW2's principal affairs, which in this case was to forbear from taking an action against the Accused who was suspected of storing various types of liquor and cigarettes under section 135(1)(d) of the Customs Act, 1967.

[26] I will first deal with the second ingredient of the Charge.

[27] Section 3 of the Act defines "agent" as to mean-

"any person employed by or acting for another, and includes an officer of a public body or an officer serving in or under any public body, a trustee, an administrator or executor of the estate of a deceased person, a subcontractor, and any person employed by or acting for such trustee, administrator or executor, or subcontractor."

[28] The "agent" in the present case was PW2 who was one of the raiding team members. During the trial, PW2 testified that his occupation was as a Senior Officer with the Customs Enforcement Unit.

[29] PW1 who testified before PW2 had earlier given evidence that as a "*Penguasa Kastam W41*" with the Customs Department, she was able to access documents pertaining to the employment history of PW2. PW1 confirmed that PW2 was at the material time working with the Customs Enforcement (Prevention) Unit, Kuching. She also produced the records of employment of PW2, which was marked as Exhibit P1.

[30] Exhibit P1 clearly shows that PW2 was an officer with the Customs Department since his appointment on 28.11.1983. As at the date of the offence on 19.09.2014, it was shown in exhibit P1 that PW2 was a Customs Officer Grade W22.

[31] In cross-examination, apart from asking the obvious and which were apparent from the document itself such as the number of pages contained in Exhibit P1, whether there were signatures on the certified true copy stamps and whether the documents attached to exhibit P1 were computer generated or had 29 paragraphs, learned counsel for the Accused merely suggested to PW1 that other Customs officers were able to access to the documents in the possession of the person having custody of the documents, to which PW1 disagreed.

[32] However in submission, learned counsel for the Accused attacked exhibit P1 in all possible imaginable angles including that the

document was inadmissible for allegedly not having been certified in accordance with section 76 of the Evidence Act, 1950, that exhibit P1 was allegedly not the same as the document known as "*buku rekod perkhidmatan*" allegedly held in PW1's hand during the trial and never tendered in Court, that the person named in exhibit P1 was not the same as PW2 although they may have the same name, that the person who certified the document as a true copy, one Fazlinna Binti Ismail was not called as a witness and that exhibit P1 was a photocopy and not the original.

[33] Contrary to established legal principles - see for instance, *Wong Swee Chin v. PP* [1981] 1 MLJ 212, all these complaints by the learned counsel for the Accused were never raised in the cross-examination of PW1 or any of the other Prosecution witnesses, for that matter. For that reason, I did not view any merits to the submissions by the learned counsel for the Accused on this issue.

[34] In any event, having considered the evidence by PW1 and the exhibit P1, I saw no reason to disbelief that PW2 was indeed a Customs Officer at the time of the offence. As can be seen in the NOP, there was no objection by the learned counsel for the Accused as to the admissibility of exhibit P1 when it was tendered. Further, PW2 was shown exhibit P1 and he confirmed that the document contained his yearly record of employment.

[35] More importantly, exhibit P1 includes the Certificate issued by one Mohd Apendai bin Salleh as the *Penolong Kanan Pengarah Kastam I* under section 55(1) of the Act which provides that-

> "A certificate issued by a principal or an officer on behalf of his principal **shall be admissible in evidence** in any proceedings against any person for any offence under this Act as *prima facie* proof that the person named in such certificate-

(a) held the position, office or capacity as specified in such certificate and for such period as so specified; and

(b) received emoluments as specified in such certificate."

[Bold added.]

[36] It is also provided in subsection (2) that-

"A certificate issued under subsection (1) shall be *prima facie* proof that it was issued by the person purporting to issue it as principal or on behalf of the principal **without proof of the signature of the person who issued such certificate** and without proof of the authority of such person to issue it."

[Bold added.]

[37] On the issue of such certificate, it was held by Abdul Rahman Bin Sebli JC (now JCA) in the case of *PP v. Fabian Anuar Mail* [2010] 2 CLJ 634 that-

"There is another and simpler way of proving that the respondent was an 'agent' and that is by producing the certificate under s. 47 of the Act (PCA 1997). If produced the certificate would have provided "*prima facie*" proof that the respondent was a public servant and therefore an agent of the Government."

[38] Thus, a *prima facie* case had been established on the second ingredient of the Charge.

[39] As regard the first ingredient, PW2 testified that on 18.09.2014, a day before the raid, he received instructions from his superior, Suhaili Bin Embeng about a joint operation with SPRM (the MACC). Together with PW3 and a driver, PW2 went to the location and met up with a SPRM officer named Matson at the Popular Food Court

where they were briefed about the premises which was suspected to store uncustomed goods. Thereafter, at around 1.00 am, they conducted surveillance of the suspected premises. At 9.00 am on 19.09.2014, the raiding team consisting of PW2, PW3, Norman, PW4, PW5 and PW6 raided the suspected premises.

[40] PW2 further testified that upon reaching the premises, they met and introduced himself and the team to one male Iban (later identified as DW2). When asked whether he was the owner of the premises, the said male Iban replied that he was a worker there. PW2 asked him to call the owner of the premises to which he did. Less than half an hour later, a male Chinese (later identified as the Accused) came and admitted that he was the owner of the premises.

[41] PW2 said he informed the Accused that the premises was suspected to store uncustomed goods and requested the Accused to open up the premises. Inside, they saw various types of liquor and cigarettes. PW2 asked the Accused to produce the Customs Forms No. 1 or No. 3 or invoices to show the purchase of the said goods but the Accused said that he did not have those documents. PW2 then informed the Accused that he had committed an offence under section 135(1)(d) of the Customs Act.

[42] Following from that, PW2 said that the Accused then asked PW2 not to confiscate the said goods and offered RM10,000.00 to them in return. PW2 told him not to do that and that the Accused thereafter went away only to come back about half an hour later with exhibit P3. The Accused set exhibit P3 down on one of the liquor boxes at the back of the store and asked PW2 to take it and leave the premises. PW2 testified that by that, he understood the Accused to offer the bribe of RM10,000.00 to all the raiding team members.

[43] As PW4 was carrying exhibit P3 from the back of the store to the front of the premises, some of the cash inside fell out and it was then

that the Accused attempted to run away but was apprehended by PW5.

[44] PW2's above evidence was corroborated by the evidence of the other raiding team members namely PW3, PW4, PW5 and PW6 during the trial. Pausing here, it will be appropriated to deal with the ground of appeal of the Accused that the learned Sessions Court Judge erred in finding that the Prosecution witnesses were credible and reliable in their testimonies.

[45] The learned Sessions Court Judge had considered the evidence of the prosecution witnesses and found that they were-

"... all creditworthy and that their evidence can be relied upon

particularly what was (sic) transpired during the raiding at the premises." This court finds there is no reason for any of the member of the raiding team, be it from the MACC side or the Customs enforcement side who were most of them called as a witness had set up or fabricated evidence against the accused. This court finds the evidence of the witnesses was relating to what was (sic) transpired and there is no reason for this court not to believe their evidence in that regard."

[46] It is trite law that an appellate court should be slow in disturbing or interfering with the finding of facts by the trial court - see *Ng Chai Kem lwn. Pendakwa Raya* [1994] 2 MLJ 210, *Shahrullah Bin Abdul Rakeb v. PP* [2012] 4 MLJ 592 and *Tan Kim Ho & Anor v. PP* [2009] 3 MLJ 151. In any event, I have perused the NOP and while there were some inconsistencies in the evidence between the Prosecution witnesses, I did not view them to be material so as to dissuade this Court from believing any or all of them - see *Lai Kim Hon & Ors v. Public Prosecutor* [1981] 1 MLJ 84.

[47] I saw no reason to interfere with the finding of the learned Sessions Court Judge that there was evidence that the Accused had offered gratification in the sum of RM10,000.00 to PW2, thus fulfilling the first ingredient of the offence as stated in the Charge.

[48] With regard to the third ingredient, and relying on the case of *PP v. Chia Leong Foo* [2000] 6 MLJ 705, it was contended for the Accused that notices must be given to the defence before the presumption under section 50 of the Act could be invoked. It was further contended that the presumption under section 50 of the Act was in conflict with the presumption of innocence and the constitutional protection given to an accused person under Articles 5(1) and 8(1) of the Federal Constitution. It was further alleged that the proviso to section 50 of the Act gave undue advantage to the prosecution to prove its case just by adducing basic facts and without having to prove beyond reasonable doubt as required by common law and section 173(m) of the CPC. The learned counsel urged the Court to declare section 50 of the Act as being unconstitutional for being arbitrary, unfair, unconscionable or unreasonable and also being in conflict with Articles 5(1) and 8(1) of the Federal Constitution.

[49] With respect, I found this ground of appeal to be a non-starter as it was clear from his Grounds of Judgment that the learned Sessions Court Judge did not rely on the presumption under section 50(1) of the Act in coming to his conclusion that the Prosecution had established a *prima facie* case against the Accused. This is what the learned Sessions Court Judge had stated-

"This court finds, **even without the aid of the presumption of section 50** that gratification shall be presumed to have been corruptly offered as an inducement or reward for not to (sic) take action in the raid conducted at the said place at the material time, **there is sufficient evidence** to show the money in the sum of RM10,000.00

offered to PW2 Abdul Gaffar Bin Abdul Wahab was an inducement not to take action in the raid or inspection led by him."

[Bold added.]

[50] I agreed with the learned Sessions Court Judge that the third ingredient was *prima facie* proved even without the aid of the presumption under section 50 of the Act. It will be remembered that the raid was a joint operation between the Customs Department and SPRM. The premises was suspected to have stored uncustomed goods and it was in evidence that when opened by the Accused, the premises was found to contain various types of liquor and cigarettes - see exhibit P2(11-94). PW2 said that he had asked the Accused whether he had documents relating to the said goods to which the Accused said he did not. PW2 then told the Accused that he had committed an offence under the Customs Act and that it was then that the Accused made the offer of the sum of RM10,000.00 in return for the goods not being confiscated. Despite being told to refrain from doing so, the Accused went ahead and placed the said sum of RM10,000.00 in exhibit P3 and asked PW2 to take it and leave the premises. The above evidence when taken together clearly point to the fact that the Accused had offered PW2 the sum of RM10,000.00 as an inducement for him not to take action against the Accused in relation to the uncustomed goods in the premises.

[51] Before leaving the issue of whether a *prima facie* case had been established by the Prosecution, it would be appropriate to deal with the submissions by the learned counsel for the Accused that the learned Sessions Court Judge did not carry out a maximum evaluation of the evidence as required under section 173(f) and section 180 of the CPC and contrary to the decided cases such as *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85, *PP v. Mohd*

Radzi Abu Bakar [2006] 1 CLJ 457 and *Khoo Hii Chiang v. Public Prosecutor and another appeal* [1994] 1 MLJ 265.

[52] It was contended by the learned counsel for the Accused that the learned Sessions Court Judge had merely used the words "positive evaluation" in his Grounds of Judgment but did not disclose therein as to what the ingredients and/or evidence or each ingredient that the Accused had to rebut or explain. It was further contended that the alleged failure by the learned Sessions Court Judge gravely prejudiced the Accused as the Accused was allegedly left in the dark on what the evidences were that had been established against him.

[53] Indeed, one could not find the words "maximum evaluation" any where in the Grounds of Judgment of the learned Sessions Court Judge. However, in my view, that was not to say that the learned Sessions Court Judge did not subject the evidence before him with maximum evaluation. From the Grounds of Judgment, it can be seen that the learned Sessions Court Judge did consider what were the evidence making up the 3 ingredients of the offence as stated in the Charge before coming to the conclusion that the Prosecution had established a *prima facie* case against the Accused.

[54] I also found that contrary to the submissions by the learned counsel for the Accused, the Accused was not prejudiced in that he was not able to know what were the evidences against him. It was explicit from the Charge as to what were the ingredients of the offence that were to be proved by the Prosecution and having being called to enter his defence on the Charge, it can hardly be said that the Accused was "in the dark" as to what were the evidence that had been established against him. That this was not the case could also be seen from the cross-examination questions by the learned counsel for the Accused of the Prosecution witnesses and from the evidence led by the defence.

[55] In addition, the learned Sessions Court Judge did, in his Ruling at the end of the Prosecution's case (at page 459, Vol 2b of the ROA), clearly stated that there was evidence of the Accused having offered RM10,000.00 to PW2 as an inducement not to take action in the raid of the premises suspected to store various types of liquor and cigarettes and that the court was satisfied that PW2 was a public servant with the Customs Department whose affairs amongst others were to enforce laws and regulations relating to customs. The learned Sessions Court Judge also stated that there was evidence of the accused having placed the RM10,000.00 in exhibit P3.

[56] Taking the above in totality I found that the learned Sessions Court Judge did not err in holding that a *prima facie* case had been established against the Accused.

Whether the defence of the Accused had raised reasonable doubt

[57] The defence's version of the raid is as follows.

[58] The Accused (DW1) gave evidence that on the day of the raid, he went to the workshop near the premises to have his car serviced. When he got out of his car, 2 persons, one being PW4 held his hand. One of them asked for keys to the premises to which he replied that he did not have and that the shop did not belong to him.

[59] The Accused said that Lo Jen Kong (DW3) arrived and the Customs and SPRM officers spoke to DW3. DW3 had a bag with him containing some keys and monies. DW1 said that one of the officers snatched the keys and monies and used the keys to open up the premises. He said that PW2 took the money and asked the Accused to take the money but that he refused.

[60] The Accused agreed with the Prosecution evidence that he was asked to produce Custom's declaration form, invoices and other related

documents concerning the beers in the premises but that he could not produce them as the goods were not his. He also said that as the goods did not belong to him, it was not true that he had begged the Customs and SPRM officers not to take any criminal action against him.

[61] The Accused said that he knew PW4 as PW4 had previously gone to his karaoke bar to drink but that he did not pay. The Accused also said that PW4 had also requested for the company of massage parlour ladies and for the karaoke to be kept open until the time they left, if not, they would be very unhappy. The Accused said he ignored these requests and that a week later, he was having a case with SPRM.

[62] As for exhibit P3, the Accused said that he had never seen it before the trial in court. He also did not run away when the money fell out of exhibit P3.

[63] The second defence witness, Adrian Anak Story (DW2) gave evidence for the Accused that he was a mechanic in a garage next to the raided premises. On the day of the raid, he said he was approached by a person (whom DW2 later identified as PW2) asking for his "Tauke". He said he was not able to look for his "Tauke", one Mr. Law then as he was away in Miri. DW2 was unsure whether he had informed the person asking him that he wasn't able to look for his "Tauke".

[64] DW2 said that DW1 had arrived at his garage to have his car repaired when he was arrested and taken to DW3's (Lo Jen Kong) shop. DW2 further said that it was DW3 who had given the keys to open the shop. The keys were from inside DW3's sling bag and that DW3 had taken the keys and monies to hand over to the raiding team whom he called "strangers". One of them snatched the keys and monies from DW3 and opened the shop with the keys. According the DW2, all this time, the Accused was being detained by the strangers outside of the shop but was brought into the shop once it was opened.

However, when asked by the learned counsel for the Accused, DW2 immediately said that the Accused did not at any time enter the shop.

[65] DW2 also gave evidence that upon the request by the Accused, he had followed when the Accused was brought to Sarikei and that he had stood as the bailor for the Accused. The bail money of RM20,000.00 was given by DW3 to him.

[66] DW3 testified that he was the owner of the premises that was raided and that he was in business dealing with beers, liquors and cigarettes. When he arrived at the premises on the day of the raid, the Accused and DW2 were already there and that there were strangers there too. He said when asked by one of the strangers, he admitted that the premises belonged to him. One of the strangers snatched the keys and monies from inside his sling bag and had the shop opened with the keys. DW3 said that the monies that were taken from him totaling RM15,000.00 was meant for payment to his suppliers.

[67] DW3 went on to say that the strangers then entered the shop and started opening and drinking the beers while ignoring him even though he was mad. All this while, the Accused was being held by the hand by some of the strangers at the vicinity of the shop. The Accused was then brought away from the vicinity of the shop for around 4 hours before he was brought back. DW3 said that the Accused never entered the shop on that day.

[68] DW3 also testified that he never saw the Accused gave any money to the law enforcement officers at the scene and that the monies seized by them were from him.

[69] DW3 confirmed that the Accused had contacted him to seek for a loan of RM20,000.00 for his bail. DW3 agreed to pass the monies to DW2.

[70] At the onset, when considering the defence of the Accused, I was reminded that the defence was primarily premised on the allegation that the Accused was framed up by PW4 and his team members for allegedly failing to accommodate PW4's requests when patronizing the Accused' karaoke bar.

[71] Arising thereto, a relevant question to be asked was, if that was true, why had the Customs Enforcement and SPRM officers who took part in the raid chosen the premises which allegedly did not belong to the Accused in the first place? This, bearing in mind that it was the evidence of the Accused that he just happened to be at the vicinity of the premises in question during the raid as he had wanted to have his car serviced at DW2's garage nearby.

[72] With the above in mind, in order for the defence to be plausible and thereby raise reasonable doubt, the raiding team must cumulatively have (i) known that the premises was storing beers, liquors and cigarettes (never mind whether they were uncustomed or otherwise) at the time of the raid **and** (ii) known that the Accused would be sending his car for service at the garage nearby the premises at the time of the raid **and** (iii) known that DW3 would be present at the premises with the keys to the premises around the time when the Accused was at DW2's garage. I found no evidence at all to suggest that the raiding team had known all these for a fact before the actual raid so as to support the defence's story that the Accused was in fact innocent but was framed.

[73] Even if the raiding team had suspicion that the premises was storing uncustomed goods, the evidence led including that of the defence was that the team was already there before the Accused arrived at the scene. Had the Accused been framed as alleged, it would have been necessary to ensure that the Accused was present at that premises at that particular time in order for him to be tied to the uncustomed

goods. However, as the defence's story goes, the Accused just happened to be nearby to have his car serviced. The Prosecution's version that DW2 was asked to call the owner of the premises and that thereafter, the Accused arrived was to me, more believable.

[74] As regard the evidence of DW2 and DW3 in support of the defence, the learned Sessions Court Judge had made a finding that both DW2 and DW3 were not credible witnesses. As a trier of facts, the Sessions Court had the benefit of audio visual of the said witnesses' testimonies and this Court sitting as an appellate court should be slow in interfering with that finding - see *Muhd Zulkifli Bin Abd Ghani v. Public Prosecutor* [2012] 2 MLJ 1, *Tan Kim Ho & Anor v. Public Prosecutor* [2009] 3 MLJ 151 and *Yeap Peng Hin v. Public Prosecutor* [1991] 3 CLJ 1907.

[75] Based on all of the above, I therefore found and held that the Accused had failed to cast a reasonable doubt on the Prosecution's case. I further held that the conviction was therefore, not unsafe.

Whether the sentence was manifestly excessive and/ or not within the law

[76] To recapitulate, the Accused was sentenced to 4 years imprisonment and to a fine of RM100,000.00 in default of 12 months imprisonment.

[77] The penalty for the offence under section 17(b) of the Act as provided under section 24(1) of the Act is imprisonment for a term not exceeding twenty years and a fine of not less than five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higher.

[78] In his Grounds of Judgment, the learned Sessions Court Judge had considered that the offence committed by the Accused was to undermine the enforcement authority in carrying out their statutory

duties. The learned Sessions Court Judge also took into account public interest and the deterrent factor in imposing in the sentence.

[79] In deciding this appeal, I had in mind the principle that the sentencing discretion belongs to the court of first instance as the sentencing court - see *Zaidon Shariff v. PP* [1996] 4 CLJ 441 and that that another court would have imposed a different sentence is not sufficient, *per se*, to warrant the court's interference - see *Bhandulananda Jayatilake v. PP* [1982] 1 MLJ 83. It is trite law that the appellate court may only interfere with the lower court's decision on sentencing on several specific grounds. These grounds were identified in *PP v. Ling Leh Hoe* [2015] 4 CLJ 869 by the Court of Appeal as follows-

"(a) the sentencing judge had made a wrong decision as to the proper factual basis for the sentencing;

(b) there had been an error on the part of the trial judge in appreciating the material facts placed before him;

(c) the sentence was wrong in principle; or

(d) the sentence imposed was manifestly excessive or inadequate."

[80] The mere fact that an appellate court would have passed a different sentence from that given in the court below provides no ground for interference - see: *PP v. Mohamed Nor* [1985] 2 MLJ 200, *PP v. Fam Kim Hock* [1957] MLJ 20 and *Rahim bin Usoff v. PP* [1985] 1 MLJ 241.

[81] Having perused the Record of Appeal and considered the submissions by the parties, I did not find any of the circumstances in *Ling Leh Hoe* present in the appeal before me to warrant this Court's intervention in the sentencing by the Sessions Court.

[82] Accordingly, I affirmed the sentence imposed by the Sessions Court of 4 years imprisonment and to a fine of RM100,000.00 in default of 12 months imprisonment.

Conclusion

[83] In the premises and based on all of the above, I dismissed the appeal by the Accused and affirmed the conviction and sentence by the Sessions Court.

Dated: 21 MARCH 2018

(CELESTINA STUEL GALID)
Judicial Commissioner
High Court Kuching

Date of Grounds of Judgment: 21 MARCH 2018

Date of Delivery of Decision: 23 OCTOBER 2017

Counsel:

For the appellant - Voon Lee Shan; M/s Voon & Co Advocates

For the respondent - DPP Law Chin How, Deputy Public Prosecutor, MACC

Notice: This copy of the Court's Grounds of Judgment is subject to editorial revision.