

**IN THE HIGH COURT OF MALAYA AT IPOH
PERAK DARUL RIDZUAN, MALAYSIA
[CRIMINAL APPEAL NO: 42S-6-04/2016]**

BETWEEN

PUBLIC PROSECUTOR

AND

ESWADI ABDUL RAHIM

CRIMINAL PROCEDURE: Appeal - Appeal against conviction and sentence - Corruption charges - Delay in charging accused - Whether prejudice caused to accused - Whether delay affected testimony of witnesses

EVIDENCE: Documentary evidence - Secondary evidence - Original copy of fax transmissions not produced - Reliance on thermal copies - Whether thermal copies were produced contemporaneously when actual documents were faxed at other end of line - Whether accuracy of thermal copies reached a high degree of reliability and accuracy - Whether contents of document were admissible - Evidence Act 1950, s. 65(1)

CRIMINAL LAW: Corruption - Corruptly receiving gratification - Demand made by accused that his father be made a director of company in return for his assistance in obtaining permits for company - Whether request of accused that his father be made as a director of company amounts to a form of gratification - Whether directorship in company falls within meaning of obtaining any 'office' or 'dignity' in paragraph (b) of definition of "gratification" in s. 2 of Anti-Corruption Act 1997 - Whether presumption of gratification applicable

[Appeal on conviction and sentence dismissed.]

Case(s) referred to:

Davendar Singh Sher Singh v. PP [2012] 1 LNS 261 CA (*refd*)

Gurbachan Singh v. Public Prosecutor [1966] 1 LNS 57 HC (*refd*)

Ming Holdings (M) Sdn Bhd v. Syed Azahari Noh Shahabudin & Anor [2010] 6 CLJ 857 FC (*refd*)

PP v. Chua Beng Seong & Another Case [2016] 5 CLJ 456 HC (*refd*)

PP v. Kamaruzaman Sudin [2009] 1 LNS 396 HC (*refd*)

PP v. Ku Yahya Ku Bahari & Anor [2000] 3 CLJ 162 HC (*refd*)

PP v. Rahiman Selamat & Kes Yang Lain [2015] 3 CLJ 92 HC (*refd*)

PP v. Yuvaraj [1968] 1 LNS 115 HC (*refd*)

Sinarlim Sdn Bhd v. Medallion Builders Sdn Bhd [2012] 1 LNS 609 HC (*refd*)

Thavanathan Balasubramaniam v. Public Prosecutor [1997] 3 CLJ 150 FC (*refd*)

Legislation referred to:

Anti-Corruption Act 1997, ss. 2, 10(a)(aa), 42(1), 44(1)(a)(ii)(iii)

Evidence Act 1950, ss. 65(1)(c), 67(1)(c)

JUDGMENT

Introduction

1. This appeal arises out of corruption charges against the appellant above named at the Ipoh Sessions Court. After a full trial, the learned Sessions Court judge (SCJ) held that the appellant had failed to raise

a reasonable doubt in the prosecution case and convicted and sentenced him accordingly.

2. At the Session's court the appellant was charged as follows:

Pertuduhan Pindaan Pertama:

“Bahawa kamu pada 1.10.2002, bertempat di Syarikat Azamat Hati Sdn Bhd, di alamat No. 276, Jalan Bercham, Taman Medan Bercham, Ipoh, dalam Daerah Kinta, dalam Negeri Perak, secara rasuah meminta daripada Chin Ah Lek melalui Md Ali untuk diri kamu suatu suapan, iaitu memasukkan nama bapa kamu, Abdul Rahim bin Ismail (No KP : 460718-01-5525) sebagai Pengarah Syarikat Azamat Hati Sdn. Bhd, sebagai dorongan kepada kamu untuk melakukan satu perkara, iaitu membantu Chin Ah Lek mendapatkan permit bas bagi Syarikat Azamat Hati Sdn. Bhd. yang memohon permit bas dari Lembaga Perlesenan Kenderaan Perdagangan (LPKP), dan dengan itu, kamu telah melakukan satu kesalahan di bawah seksyen 10(a)(aa) Akta Pencegahan Rasuhan 1997 yang boleh dihukum di bawah seksyen 16 Akta yang sama”.

Pertuduhan Kedua:

“Bahawa kamu pada 17 Januari 2003, bertempat di Bank Bumiputra Commerce, Cawangan Sultan Idris Shah, Ipoh, di dalam Daerah Kinta, dalam Negeri Perak, telah secara rasuah menerima untuk diri kamu satu suapan, iaitu wang tunai RM6,000.00 yang telah dimasukkan ke dalam akaun Bank Bumiputra Commerce kamu, nombor akaun : 12150032037528, daripada Chin Ah Lek Pengarah Syarikat Azamat Hati Sdn Bhd, sebagai dorongan kepada kamu untuk melakukan satu perkara, iaitu membantu Chin Ah Lek mendapatkan permit bas dari Lembaga Perlesenan Kenderaan Perdagangan (LPKP), dan dengan itu kamu telah melakukan satu kesalahan di

bawah seksyen 10(a)(aa) Akta Pencegahan Rasuah 1997 yang boleh dihukum di bawah seksyen 16 Akta yang sama”.

3. The accused was sentenced with 2 years imprisonment for each charge. He was also ordered to pay a fine of RM10,000.00 in default 6 months imprisonment for the first charge and RM30,000.00 which is 5 times the value of the gratification with regards to the second charge.
4. The appellant, being aggrieved, have now appealed to this court against both conviction and sentence.
5. The relevant sections of the Anti-Corruption Act 1997 (the Act) referred to in the course of this appeal are as follows:

(A) Offence of accepting gratification, Section 10

Any person who by himself, or by or in conjunction with any other person:

(a) *corruptly solicits or receives or agrees to receive for himself or for any other person; or*

(b) *corruptly gives, promises or offers to any person whether for the benefit of that person or of another person,*

any gratification as an inducement to or a reward for, or otherwise on account of-

(aa) *any person doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place; or*

(bb) *any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take*

place, in which the public body is concerned, shall be guilty of an offence.

(B) The word “gratification” is defined under section 2 of the Act to mean:

- (a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description whether movable or immovable, or any other similar advantage;*
- (b) any office, dignity, employment, contract of employment or services, and any agreement to give employment or render services in any capacity;*
- (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;*
- (d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;*
- (e) any forbearance to demand any money or money’s worth or valuable thing;*
- (f) any other service or favour of any description, such as protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and*

- (g) *any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f);*
- (C) The following presumptions in the Act are applicable. The relevant ones are as follows:

Section 42(1) of the Act.

Where in any proceedings against any person for an offence under section 10, 11, 13, 14 or 15 it is proved that any gratification has been accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

Section 44 of the Act which states as follows:

- (1) *Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act:*
 - (a) *no witness shall be regarded as an accomplice by reason only of such witness having-*
 - (i) *accepted, received, obtained, solicited, agreed to accept or receive, or attempted to obtain any gratification from any person;*
 - (ii) *given, promised, offered or agreed to give any gratification; or*

- (iii) *been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence;*
 - (b) *no agent provocateur, whether he is an officer of the Agency or not, shall be presumed to be unworthy of credit by reason only of his having attempted to commit, or to abet, having abetted or having been engaged in a criminal conspiracy to commit, such offence if the main purpose of such attempt, abetment or engagement was to secure evidence against such person; and*
 - (c) *any statement, whether oral or written, made to an agent provocateur by such person shall be admissible as evidence at his trial.*
 - (2) *Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of any accomplice or agent provocateur shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgement to the need to warn itself against the danger of convicting on such evidence.*
6. Before proceeding further this court is mindful that the trial court had the benefit of observing the demeanour of the witnesses of the case. Unless the trial court is plainly wrong in her finding, the Appellate Court should not reverse a finding of fact by the trial judge (*See Ming Holdings (M) Sdn Bhd v. Tuan Syed Azahari Noh Shahabudin & Anor* [2010] 6 CLJ 857; [2010] 4 MLJ 577). Perhaps the role of an Appellate Court is best summed up in *Davendar Singh a/l Sher Singh v. PP* [2012] 1 LNS 261; [2012] 3 AMR 489 where the Court of Appeal states as follows:

“in respect of an appeal, which really turns upon a question of fact, an appellate court is generally very reluctant to disturb a finding of fact by any trial judge for the reason that as trier of fact the trial judge has visual-audio advantage, which we do not have. Nonetheless, it would be upon us to upset the findings made by the trial judge if such a finding is not supported by evidence or the decision is against the weight of the evidence or there is no proper judicial evaluation of the evidence or there is misdirection of law or the trial court has fundamentally misdirected itself.”

Summary of prosecution’s case

7. The central figure in this case is SP4 (Chin Ah Lek), a share holder in a company called Azamat Hati Sdn. Bhd. (the company). The company was an express bus company. SP4 managed the company with the help of his wife Voon Li Peng (SP9) who is a clerk in the company. SP14 (Md. Ali Shah Ayoob Hussain Shah) ran a lorry transport company one floor above SP4’s company. Sometime in early 2002, SP4 requested the assistance of SP14 to obtain permits for express buses (the permits) from the relevant authorities namely the Lembaga Pelesenan Kenderaan Perdagangan (LPKP) for the company. SP14 then suggested to SP4 be made a director of the company. This was to facilitate the obtaining of the permits. Pursuant to this, SP14 was made a director of the company on the 28.2.2002.
8. SP14 then contacted one Salleh bin Ibrahim (Salleh) to help in the obtaining of the permits. Salleh however went missing and could not be traced despite receiving some money from SP14. In the course of seeking Salleh’s assistance the appellant’s name was mentioned by Salleh as a person who could assist in obtaining the permits. SP14 went to the “Pejabat Menteri Pembangunan Usahawan” in Kuala Lumpur to meet the appellant. The appellant was the special officer

to the Menteri Pembangunan Usahawan then. In other words he worked for the minister.

9. At the meeting with the appellant, SP14 narrated the background as stated above and to seek the appellant's help in obtaining the permits. The appellant intimated that he was willing to assist in obtaining the permits for the company. Before returning to Ipoh SP14 noted down the appellant's phone number.
10. On returning, SP14 discussed with SP4 regarding SP14's meeting with the appellant. They decided to meet the appellant at a restaurant "kepala ikan" in Sentul to discuss further with the appellant on the obtaining of the permits. A meeting was held at the stated place. The appellant told SP4 that a new application for permits needed to be made through the appellant.
11. Following the above meeting, SP4 received a fax from the appellant on 1.10.2002. The faxed document contained a sample letter to the Menteri Pembangunan Usahawan. It was marked P12. The fax originated from the fax machine of the Kementerian Pembangunan Usahawan (KPU) and had the fax number 03-2919017. It was sent to the office of the company.
12. On the same day 1.10.2002, the appellant telephoned SP4 and SP14. The appellant informed them that one of the conditions for the obtaining of the permits was that the appellant's father, namely Abdul Rahim bin Ismail be made a director of the company. The appellant stated that he would fax the identity card of his father to the company pursuant to this requirement.
13. On the 1.10.2002, the appellant faxed the identity card of his father. The faxed document showed that it also originated from the fax machine of the Kementerian Pembangunan Usahawan. The fax number was also that of the previous faxed document. This document

was marked P17. Subsequently SP4 met up with SP14. SP14 explained to SP4 the reason why P17 was sent. Thereafter SP4 agreed to the appellant's request that Abdul Rahim bin Ismail be made a director of the company.

- 14.** Sometime after that SP14 and the appellant himself together with others went to meet the company secretary Mirawati bt. Sulaiman (SP2) at her office and handed over the photostat copy of the identity card of Abdul Rahim bin Ismail to her. Abdul Rahim bin Ismail was appointed as the director of the company on 20.12.2002. This is reflected in the Borang 49 which was exhibited as P8.
- 15.** Subsequently on 15.1.2003, SP14 had prepared 2 "Borang Permohonan Bas Express" which were marked P13 and P81 respectively and submitted them to LPKP on behalf of the company. The company requested for 60 permits in total for various bus routes along different parts of the country. One common factor in P13 and P81 was that they named the father of the appellant, Abdul Rahim bin Ismail, as the director of the company together with SP4 and SP14.
- 16.** On 15.1.2003 the Ketua Penolong Setiausaha LPKP, Zainal Kasim bin Darus (SP10) received the 2 forms (P13 and P81) together with a "memo" (P18) from the minister with the message "Saudara Zainal (LPKP), "Sila process untuk kelulusan" and bore the cop of "Azamat Hati Sdn. Bhd.". Thereafter SP10 gave P13 and P81 to the clerk to be processed following what was stated in the memo P18.
- 17.** The appellant had faxed the minister's memo (P18) to SP4 at Pejabat Syarikat Azamat Hati Sdn. Bhd on 15.1.2003.
- 18.** SP9 is the wife of SP4. She read the faxes received, that is. P12, P17 and P18 to SP4 as SP4 could not read Malay. SP9 also wrote in pen the date 01-OCT-2002 on P12 and P17. Her explanation was that the

date in the thermal copies were incorrect as the date in the fax machine was not correctly set at the time the faxes were received.

- 19.** On 17.1.2003, the appellant telephoned SP4 and asked for the sum of RM6,000.00 to be banked to the appellant's account in Bank Bumiputra Commerce Bhd. as inducement to obtain the permits for Syarikat Azamat Hati Sdn. Bhd. The appellant had also given his bank account number No: 12150032037528 to SP4. On the same day, SP4 banked in the sum of RM6,000.00 to the appellant's account at the Ipoh Branch through the cash deposit slip dated 17.1.2003 (P1).
- 20.** On the same day 17.1.2003 at about 4.30 pm, while SP4 was in his office, he received a phone call from the appellant. During the conversation, the appellant asked SP4 to provide a house, a car and a monthly salary RM20,000.00 for his father and father in law after receiving the approval from the LPKP. The appellant asserted that if the request was not complied with the permits would not be issued to Azamat Hati Sdn. Bhd. SP4 agreed with the appellant's request. The appellant told SP4 that he would fax two letters that would contain a list of his request to SP4 and asked SP4 to sign and stamp the company's stamp on the letters and fax them back to him. Next at about 4.50 pm, SP4 received 2 faxed letters from the appellant. SP4 then signed, stamped and faxed the letters back to the appellant after having discussed with SP14. The originals of the re-faxed letters duly signed and stamped were tendered as Exhibits P92 & P93.
- 21.** A few days later, SP14 was called to attend an interview at the LPKP office as a formality and thereafter on 28.1.2003 LPKP issued a notification to collect the offer letters approving 60 "Lesen Kenderaan Perdagangan" (P19) to Azamat Hati Sdn Bhd. The appellant himself had handed over the said notification letter to SP4 and SP14 at the "restoran kepala ikan", Kuala Lumpur. The appellant

instructed them to go to the LPKP office to collect the award letters approving the “Lesen Kenderaan Perdagangan”.

22. Meanwhile on the 30.1.2003 Zainal Kassim (SP10) had taken and kept the 60 award letters (P20-79) which were received from the Penolong Pegawai Tadbir LPKP, Azizah bt. Sahar (SP8) as was stated in the minute sheet of the file pertaining to Syarikat Azamat Hati Sdn Bhd. (P85).
23. Following this SP14 went to the LPKP office and showed P19 to Zainal Kassim (SP10). To SP14’s surprise only 2 of the award letters were given to him namely P20 and P21. He was told by SP10 to obtain the rest of the letters (P22-P79) from the accused.
24. Shortly thereafter the accused brought his father Abdul Rahim bin Ismail to meet SP10 in his office. The accused introduced his father as one of the director of the company. On that every day SP10 handed over the remaining 58 award letters (P22-79) to Abdul Rahim. This was stated in the minute sheet (P85) in the of Azamat Hati Sdn Bhd file.
25. Subsequently SP14 met the accused in Putra Café in Kuala Lumpur for the remaining 58 award letters to be handed over to him. It was then that the accused introduced the new conditions as stated in P92 and P93 that needed to be fulfilled before the remaining award letters could be given to SP14. The accused then requested an additional bungalow and car for other LPKP officers who he said helped in the obtaining the permits for the company.
26. SP14 reiterated the new conditions to SP4 who refused them outright. On being informed of SP4’s decision the accused informed SP14 that the permits would be withdrawn.

27. Following was followed with the remaining 58 letters of award (20-P79) being sent to the company by Abdul Rahim by way of courier.
28. Things did go according to plan as the LPKP refused to register the remaining 58 permits when SP14 went to the LPKP office. He was informed that the Minister had withdrawn the permits. SP14 then went to see the minister to inquire about the withdrawal of the permits. According to SP14 no explanation was given. The Minister however promised that 10 of the permits would be utilised but nothing came out of this. SP1's further attempts to see the Minister also did not materialise.
29. Siti Fatimah Nur bt Hussain (SP11) the Penolong Pengarah at the Jabatan Pendaftaran Negara Putrajaya evinced that Abdul Rahim bin Ismail is the father of the accused. Her evidence was not challenged.
30. Haslina bt Abdul Malik (SP12) the Penolong Pengurus at Khidmat Pelanggan in CIMB Bank Kajang Branch confirmed that the account number 12150032037528 belonged to the accused. She also confirmed that the sum of RM6,000.00 was deposited into the account on 17.1.2003.
31. Iskandar bin Yahya (SP15) who was the Pengurus Perkhidmatan Pembangunan at Bank Islam Batu Pahat branch confirmed that the account number 1032010024919 belonged to Abdul Rahim bin Ismail who is the father of the accused.
32. Based on the evidence adduced in the prosecution case, the learned SCJ was correct in invoking the statutory presumption under s. 42 of the Act where it is presumed that the money was given and received corruptly and it was then for the appellant to rebut the said presumption on a balance of probabilities. See *PP v. Ku Yahya Ku Bahari & Anor* [2000] 3 CLJ 162, *Thavanathan Balasubramaniam v.*

Public Prosecutor [1997] 3 CLJ 150 and *PP v. Yuvaraj* [1968] 1 LNS 115; [1968] 1 MLJ 238.

33. This court is also of the view that the SCJ was correct in finding that the prosecution had proven a *prima facie* case at the end of the prosecution's case and called upon the appellant to enter his defence for both charges.

The Defence

34. The appellant gave evidence on oath and called two other witnesses. The appellant in his defence explained that the only reason he initially met up with SP4 and SP14 was to hear SP4 complaint against Ibrahim Salleh.
35. The appellant denied having any knowledge in the procurement of bus permits as he was only the special officer to the minister. He states that he was offered a job by SP14 to be the director of the company. He declined the offer as he was working with the minister at that time. The appellant however suggested that his father take up the position as a director of the company. The appellant asserted that he never promised SP14 or SP4 anything.
36. The appellant does not deny that RM6,000.00 was deposited into his own account. His explanation on this was that he was to fly to London on a work assignment. He owed the credit card company RM6,000.00. He did not have the money for expenses for the trip and therefore borrowed the money from the SP4. He promised to repay the money upon getting his claims. He gave them his father's account number as well for their convenience. He stated that he tried to contact SP4 to repay the purported debt but could not get in touch with him. The repayment was only made in 2005 when he found out that he was being investigated by the authorities for corruption.

37. The appellant went on to say that he was surprised that upon his return from London he was informed by SP10 that the application for the permits had been approved. His father was also taken aback on being made a director of the company when he did not sign any document to that effect. He denies meeting SP10 with his father to collect the letters of award for the permits.
38. Finally, regarding the memo signed by the minister (P18, P82 and P83). The minister in his evidence stated that it was not unusual that documents with his signature appear on documents and correspondences. He cannot however remember the matter pertaining to the memo. He nevertheless does not deny the memo bears his signature. He stated that the fax machine in his office was only for his own use. The other fax machines could be used by anyone else. he denied any knowledge of the company Azamat Hati Sdn Bhd. The minister's evidence must be read in the light of SP13's evidence. He stated that the fax machine outside the minister's office could be used by any of the three special officers (which would include the appellant) the "setiausaha sulit" and other workers there.
39. From her grounds it is clear that the SCJ did take into account the defence put forward by the appellant during the trial. She also considered the various issues raised by the appellant.

Issues in this Appeal

40. Learned counsel for the appellant brought up several issues during submission which will be discussed here. These issues were:
- a) Delay in Charging the Appellant
41. The offences were committed in the year 2002. The appellant was however only charged in 2008, six years later. The appellant contends that there was an inordinate delay in charging him. The

delay had put him in a disadvantage as memory fades and important documents become unreadable or are destroyed. The appellant also submitted that no explanation by prosecution as to the reasons for the delay.

- 42.** This court is of the view that although there was the delay in charging the appellant, there was upon a consideration of all the circumstances, no prejudice caused to the appellant. While there is no limitation period in the preferring of criminal charges it behooves this court to scrutinize the notes of proceedings to see whether the delay had caused any injustice to the accused. In going through the notes of proceeding I cannot find any indication that the delay had in any way affected the testimony of the witnesses. The documentary evidence supported the oral testimonies of the prosecution witnesses in material particulars. There is no indication of any tempering of witnesses either. I therefore find no merit in the contention of the appellant on this issue.

b) The element of “Membantu” or “assisting” in the charges.

- 43.** Counsel contended that the words “membantu Chin Ah Lek mendapatkan permit bas dari Lembaga Perlesenan Kenderaan Perdagangan (LPKP) ...” signified that the prosecution must prove that the appellant had in actual fact assisted Chin Ah Lek (SP4). It was counsel’s contention that the appellant had neither the authority nor power to “membantu” or assist SP4 to obtain the express permits. Counsel had quoted the case of *PP v. Chua Beng Seong and Another Case* [2016] 5 CLJ 456 to support his contention. Learned counsel contrasted this case with those where the word “kononnya” preceded the word “membantu”. In those cases, learned counsel argued that the prosecution need not prove the actual fact of “membantu”.
- 44.** It is this court’s view that merely because the charge reads that the appellant “membantu” or assisted does not mean the prosecution

would have to prove that the appellant had actually assisted in getting the permits. Furthermore, it is this courts view that there is no requirement under Section 10(a)(aa) of the Act that the appellant himself must have the capability or capacity to assist SP4 to obtain the bus permits. It is enough that the appellant had held himself out or represented that he will assist Chin Ah Lek to obtain the permits. On the facts, this was adequately proven.

45. I find support in this proposition in *Gurbachan Singh v. Public Prosecutor* [1966] 2 MLJ 125 where Yong J stated as follows:

*In the case of Charles Victor Carr (1956) 40 Cr App Rep 188; [1957] 1 WLR 165; [1956] 3 All ER 979, the Court of Criminal Appeal laid down the principle that on a charge of receiving bribe under the Prevention of Corruption Act, 1906, it was not necessary to prove that favour had been shown. "Prosecution have merely to prove that the accused person did receive a bribe as an inducement to show favour: **they are not required to prove that he did actually show favour in consequence of having received the bribe.**" This legal point had been correctly dealt with by the learned president in his ground of judgment and no valid reason had been shown for disturbing his conclusions. (Emphasis added)*

Similarly in the See also *Md Zaki Fadzil bin Maon v. Pendakwa Raya* [2010] MLJU2060 and *PP v. You Kong Lai* [1985] 1 MLJ 298.

46. In any event there is evidence that at the Mesyuarat Lembaga LPKP did approve the company's application for the permits although this was later on withdrawn. This can be seen from the evidence of SP10.
- c) The admissibility of Exhibits P12, P13 and P14

47. Counsel also contended that exhibits P12, P13 and P18 were inadmissible as they were secondary evidence and that there was no explanation why the original copies of the fax transmissions were not produced. The appellant out rightly denies sending these documents. Learned counsel during oral submission on 28.8.2017 stated that what was produced in court as exhibit was “a photostat copy of a fax copy” and not the original thermal copy.

48. On perusal of the appeal record the first time P12 was mentioned was page 26 of the Rekod Rayuan (RR).

“Ada terima apa-apa fax dari Eswadi?

Pernah.

Boleh cam surat itu?

Boleh.

Satu surat dirujuk - Ini suratnya?

Ya.”

49. The record states “TPR kemukakan surat fax bertarikh 12.9.2000 untuk ditandakan ID12”.

50. As for P17 the first time it was mentioned was at page 39 of RR. The record states “Salinan Kad Pengenalan Abdul Rahim bin Ismail ditandakan ID17”. 3 lines down the record shows to the question “Rujuk ID17 ada terima fax ini? PW4 answered “Bulan Oktober 2002.”

51. Further regarding P18, the first time it was mentioned was at page 40 RR where it was introduced there in the following manner:

Selepas masukkan nama bapa OKT, apa berlaku?

Lepas itu dia faxkan memo menteri-menteri.

Siapa fax?

Eswadi.

Boleh cam memo Menteri itu?

Boleh.

Satu salinan memo dirujuk - adakah ini memonya?

Ya.

Memo Dato' Seri Mohamed Nazri 15.1.2003 ditandakan ID18.

Siapa bacakan memo ini pada kamu?

Isteri saya dan Mat Ali.

Bila kamu terima fax ini?

Januari 2003.”

- 52.** From the RR the exhibits ID12, ID17 and ID18 were made P12, P17 and P18 through SP9 (Voon Li Peng) who is the wife of SP4. The relevant page of RR is at pages 79 and 80 of the RR.

“Ketiga-tiga fax ini kamu telah bacakan pada suami?

Ya.

TPR pohon ID12, 17 dan 18 dijadikan P.

P/B : Ini adalah fax, ID18 maker perlu dipanggil mengenai ID17 authenticity?

Mah : Dokumen-dokumen ini diterima oleh saksi. Oleh sebab itu boleh dijadikan exhibit but not prove to the content.

ID12 - P12

ID17 - P17

ID18 - P18”

- 53.** It is observed that nothing in the notes of proceedings is it mentioned the P12, P13 and P14 were photocopies of the fax transmissions as contended by the learned counsel for the defence. To satisfy myself as to the nature of those exhibits when they were tendered in court during the trial I had to physically examine these exhibits.
- 54.** On examination of the documents this court found that:
- (a) Exhibit P12 it is a photocopy of a fax. At the top left corner is hand written the date 01-OCT-2002 and 9.10am. It also bore the abbreviation of KPU (Kementerian Pembangunan Usahawan) It is a letter To “Mr Ah Lek” from Eswardi Abd.Rahim.
 - (b) Exhibit P17 is the original thermal copy of the fax. It contains the image, back and front, of the identity card of Abdul Rahim bin Ismail bearing number 460718-01-6525. It also contains the “Kad Pesara” of the said Abdul Rahim Bin Ismail. It also had the hand-written date 01-OCT-2002 at the top left corner. Exhibit P17 was attached to a photocopy of the original thermal copy.
 - (c) Exhibit P18 is the original thermal copy of the fax. It contains an official signed memo from “Dato Seri Mohamed Nazri B Abdul Aziz, Menteri Pembangunan Usahawan” the handwritten note reads” Saudara Zainal LPKP Sila process untuk kelulusan” and has the name of the company “Azamat Hati Sdn Bhd” printed on it. It was also attached to a photocopy

of the original thermal copy just as in Exhibit P17. The original of this document was tendered as Exhibit P82.

55. The original thermal copies had faded to such an extent that the letterings on them are hardly discernible thus rendering such a document as good as destroyed. That is why the photocopies were together with the thermal copies in the first place.
56. After having examined the exhibits themselves I am of the view that exhibits P12 is a photocopy of the original thermal copy whereas P17 and P18 are that of the original thermal copies and are therefore secondary evidence. It is common knowledge that the thermal copies were produced contemporaneously when the actual documents were faxed at the other end of the line. The accuracy of thermal copies has reached a high degree of reliability and accuracy. In the case of *Sinarlim Sdn Bhd v. Medallion Builders Sdn Bhd* [2012] 1 LNS 609 her ladyship Mary Lim Thiam Suan J succinctly stated:

I also have no hesitation in concluding that the faxed copies are properly admitted in evidence. The originals of these documents marked as "IDs" are clearly with or in the possession or control of the Defendant. These faxed copies are actually secondary evidence under section 63 of the Evidence Act 1950 [Act 56]. Section 63 defines secondary evidence as including "copies made from the original by mechanical process which in themselves insure the accuracy of the copy". It is without doubt that the faxed copies of the audit confirmations were made from the originals by the mechanical process of the facsimile machine. I have no reason to doubt that such process in itself insures the accuracy of the copy as seen in the documents received by the Court on a daily and routine basis, sent generally by lawyers. These copies sent or received through the facsimile machines have always been

accurate copies of the originals - see Supreme Court decision in Lee Weng Kin v. Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [1991] 1 CLJ 259 (Rep); [1991] 2 CLJ 1301; [1991] 2 MLJ 472. (Emphasis added)

57. I am of the opinion that the circumstances of this case calls for the application of section 65(1)(c) of the Evidence Act 1950 which reads:

65. Cases in which secondary evidence relating to documents may be given.

*(1) Secondary evidence may be given of the **existence, condition or contents of a document admissible in evidence** in the following cases:*

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;.....

*(2) (a) In the cases referred to in paragraphs (1)(a), (c) and (d) **any secondary evidence of the contents of the document is admissible.***” (Emphasis added)

58. I am supported on this point by the Singapore case *Kalki Jewellery (Suing as a Firm) v. Mani Samikkannu* [2000] 2 SLR 179 where Rajendran J. observed as follows which respect to their section 67(1)(c) which is in *pari materia* with our section 65(1)(c):

“32 I will now deal with the objections raised by counsel for the plaintiffs to the admissibility of the copies of the packing lists (DB.14, 15 and 17) on which KR allegedly acknowledged receipt of the three consignments.

Mr Rengarajoo submitted that these three exhibits were not admissible because the original thermal copies of the faxes said to be received were not produced. This submission, however, did not take into account s. 67(1)(c) of the Evidence Act. It is common knowledge that thermal copies of faxes disintegrate and it is almost standard commercial practice to make photo-copies of such faxes for filing. In such a situation, s. 67(1)(c) could apply. The affidavit evidence-in-chief of Mani, however, did not contain any explanation as to why Mani had not produced the original fax that he received. Counsel for Mani, Mr Ramalingam Kasi, sought leave to adduce that evidence. I granted leave. Mani then testified that his fax machine used thermal paper which would fade in time and that it was his practice to photo-copy incoming faxes and keep only the photo-copies. In the light of that evidence I was satisfied that this was a proper case to allow secondary evidence of the contents of the fax to be introduced, I ruled that DB.14, 15 and 17 were admissible in evidence.”
(Emphasis added)

59. Based on the above authorities and section 65 of the Evidence Act 1950 it is this court’s view that P12, P17 and P18 consists of secondary evidence in which the “contents of the document are admissible”.
- d) Whether the prosecution had proved “gratification”
60. Learned counsel for the appellant also contended that the appointment of the appellant’s father did not amount to “gratification” as defined in the Act. I am of the view that the definition of “gratification” is wide enough to cover the demand made by the appellant that his father be made a director of the company in return for his assistance in obtaining the permits for the

company. It is therefore this courts view that the request of the appellant that his father be made as a director of the company amounts to a form of gratification. In the circumstances of this case a directorship in the company would fall within the meaning of obtaining any “office” or “dignity” in paragraph (b) of the definition of “gratification” in section 2 of the Act.

e) Was SP4 an accomplice?

- 61.** There is no doubt that the main witnesses for the prosecution were SP4 and SP14. Counsel contends that they were accomplices. This contention is based on the fact that SP4 had on occasion previous to this bribed a certain individual by the name of Salleh to obtain permits. Counsel had also attacked the credibility of SP4 in that he was willing to do anything to obtain the permits including changing the composition of the company to give an impression that it was a bumiputra thus obtaining certain benefits company when in actual fact he held the reins of the company. In this light counsel contends that SP4 in particular is unworthy of credit and also an accomplice.
- 62.** It is this court’s finding that SP4 was not an accomplice. SP4 depended on SP14 and his wife SP9 in communicating with the accused. His role was only to agree in appointing the appellant’s father as a director. This too was after consulting SP14. It was the appellant who was sending SP4 the faxes on the details of his father and other requests.
- 63.** Further to this section 44(1)(a)(ii) and (iii) of the Act expressly states that “*no witness shall be regarded as an accomplice by reason only of such witness having agreed to give any gratification or had been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence*”. The intent of the section was thus to place such accomplice evidence on the same footing as that of ordinary witnesses and therefore there is no

necessity imposed upon the trial court to warn itself of the dangers of convicting on such uncorroborated evidence. See *PP v. Rahiman Selamat & Kes Yang Lain* [2015] 3 CLJ 92.

- 64.** Be that as it may, quite apart from the corroboration afforded by the faxed thermal copies P12, P17 and P18 from fax number 03-2919017 which according to SP13 originated from the place of work of the appellant, there are also other corroborative evidence in support of SP4's evidence in the form of (i) the testimonies of SP9, SP10 and SP14 (ii) the fact the appellant himself had gone to meet the company secretary (SP2) at her office to hand over the identity card of his father to be used to formalise the process of appointing his father as a director of the company (Exhibit P82) (iii) the approval of the application for the permits by the minister for whom the appellant work for as a special officer (iv) the appellant and his father had gone to LPKP to meet the assistant secretary to the Kementerian Pembangunan Usahawan dan Koperasi (SP10) to collect the letters of offer (v) the fact that P4 had received and resent by fax P92 and P93 with his signature and company stamp at the insistence of the accused.
- 65.** Viewing the evidence as a whole in its totality the learned trial judge was correct in ruling that PW4 and PW14 were truthful witnesses and that their sworn testimony in respect of the two counts was credible. SP4's testimony was consistent throughout on the material facts. His testimony was also consistent with the testimonies of the other prosecution's witnesses.
- f) The Section 42 Presumption
- 66.** The presumption of gratification being corruptly solicited as inducement under s. 42(1) derives from the basic fact which is the solicitation of the gratification. As for the first charge there is ample evidence the father of the accused had in fact been made the director

of the company. This was pursuant to the condition imposed by the appellant for obtaining his assistance in obtaining the permits. There was also evidence that among other things a house and cars the appellant had also asked for the sum of RM6,000 to be deposited into the appellant's account (Exhibit P1A and B). This was done as can be seen the evidence of SP1 the CIMB bank officer. The gratification is therefore presumed to have been corruptly received. See *PP v. Ku Yahya Ku Bahari & Anorsupra supra*, *Thavanathan Balasubramaniam v. Public Prosecutor supra* and *PP v. Yuvaraj* [1968] 1 LNS 115; [1968] 1 MLJ 238 *supra*. The effect of such presumption has been clearly stated in the case of *PP v. Kamaruzaman Bin Sudin* [2009] 1 LNS 396 as follows:

Sebaik sahaja anggapan di bawah s. 42(1) APR terpakai adalah menjadi beban seorang tertuduh bagi mematahkan anggapan bahawa suapan itu telah diterima secara rasuah. Bagi berbuat demikian, tanggung jawab pembelaan hendaklah memanggil saksi-saksi material.

g) The resignation of the appellant's father

67. It was also argued by learned counsel that the appellant's father, Abdul Rahim bin Ismail, ceased to be a director as on 10.01.2003. He was appointed on the 20.12.2002. The application for the permits was made on the 21.1.2003. Learned counsel contends that the father of the accused had already resigned by then. He contends that the gratification would have ceased to have effect by then.
68. On this issue I would agree with the learned Deputy that for whatever reason the resignation took place the father of the appellant had been made a director based on the fact that the application for the permits would only be approved when his father was made director of the company. At the time of the submission for the application for the permits the appellant's father was included as one of the directors of

the company. As stated earlier SP10 stated that the appellant had represented to him that the father was a director at the time they collected the letter of offer from SP10. As such the resignation of the father as a director did not affect the fact that his appointment was still a form of gratification.

- 69.** After weighing all the evidence, I find that the appellant's version of events goes against the weight of all the evidence presented. It cannot be a coincidence or an accident that the fax number from which P12, P17 and P18 were sent to SP4 from the very work place of the appellant. The same fax number was used for P92 and P93 as well. There was no reason for any other person to fax to SP4 the identity card and other information concerning the appellant's father. It is also unbelievable also that the appellant was not able to trace SP4 after 3 years to return the RM6000.00 but could bank in the money with ease into SP4's account as soon as he realised that the authorities were investigating him.
- 70.** This court would therefore not disturb the findings of the SCJ especially when she had the advantage of seeing and hearing the witnesses during the trial and was in a better position to assess their credibility.

Conclusion

- 71.** In the upshot I agree with the learned SCJ that the appellant had failed to rebut the presumption under section 42 of the Act. The prosecution had therefore proven their case beyond reasonable doubt. I am also of the opinion that the sentence imposed by the learned SCJ is not manifestly excessive considering the nature of the offence where public interest is at the forefront. I therefore dismiss both the appeal against conviction and sentence.

Dated: 21 FEBRUARY 2018



(ANSELM CHARLES FERNANDIS)

Judicial Commissioner

High Court of Malaya

Ipoh

Date of Decision: 21 December 2017

Counsel:

For the appellant - Muhammad Shafee Abdullah & Wan Aizuddin Wan Mohammed; M/s Shafee & Co

For the prosecution - Nurul Wahida Jalaluddin, Timbalan Pendakwa Raya; SPRM Negeri Perak