AZMI OSMAN

v.

PP

HIGH COURT MALAYA, JOHOR BAHRU
TEO SAY ENG JC
[CRIMINAL APPEAL NO: MTJ 42S(A)-17-2012]
20 MARCH 2014

CRIMINAL LAW: *Money laundering - Elements of offence - Monies obtained as result or in connection of money laundering offence - Corrupt practices of receiving bribes - Unaccounted source of income in bank account - Elements to be proven under s. 4(1) of Anti-Money Laundering and Anti-Terrorism Financing Act 2001 - Whether offence of money laundering proven - Anti-Money Laundering and Anti-Terrorism Financing Act 2001, s. 4(1)(a)*

CRIMINAL LAW: *Money laundering - Forfeiture - Procedure of forfeiture civil in nature - Proof upon balance of probabilities - Prosecution to prove that properties forfeited are subject matter of offence - Unaccounted source of income in bank account - Whether monies obtained as result or in connection of money laundering offence - Whether monies forfeitable - Whether notice to show cause properly issued - Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 50, 51, 55(1) & 61(2)*

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Re-evaluation of earlier decision - High Court previously allowed prosecution's earlier appeal against acquittal at end of prosecution case - Whether High Court in present appeal could re-evaluate earlier decision of High Court in previous appeal to determine if prima facie case established*

EVIDENCE: *Circumstantial evidence - No direct evidence - Money laundering offence - Whether circumstantial evidence pointed irresistibly to guilt of accused - Whether satisfied beyond reasonable doubt test*

WORDS AND PHRASES: *'subject matter of the offence' - Meaning of - Anti-Money Laundering and Anti-Terrorism Financing Act 2001, s. 55(1)*

The appellant ('the accused') was charged with money laundering offences in the Sessions Court under s. 4(1)(a) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the Act').

The appellant was said to be involved in corrupt practices of receiving bribes. It was alleged that the appellant had an unaccounted source of income totalling about RM9,481,414,18. The appellant appealed against the conviction and sentence under ss. 55(1) and 61(2) of the Act. The trial judge ('the judge') had earlier acquitted the appellant at the end of the prosecution case on 7 January 2011. The respondent ('the prosecution') appealed against the decision of acquittal ('the first appeal') whereby the High Court allowed the appeal and ordered the appellant to enter his defence on 29 November 2011. The trial judge convicted the appellant at the end of the defence and ordered a third party notice to be issued in respect of the appellant's properties which were seized earlier on 27 August 2012 under s. 55(1) read with s. 61(2) of the Act. The appellant thus appealed to the High Court ('the second appeal') against the conviction and the order of the third party notice under ss. 55 and 61 of the Act. A preliminary issue was raised as to whether the High Court in the second appeal could re-evaluate the decision made by the High Court in the first appeal that a *prima facie* case against the appellant had been made out on all the charges and that the appellant was to enter his defence. The respondent submitted that as a general rule, there was no necessity for the High Court in the second appeal to 're-evaluate' the decision made by the High Court in the first appeal that a *prima facie* case against the accused had been made out on all the charges unless there was fresh evidence raised by the appellant which could cast a reasonable doubt on the prosecution's case. The appellant on the other hand submitted that an appeal was filed against conviction and sentence after the case had been fully disposed of at the court below and therefore the High Court in the second appeal should determine on reviewing the whole case, whether or not the defence ought to have been called (whether prosecution had made out a '*prima facie* case').

Held (allowing appeal against conviction and sentence; dismissing appeal against issuance of notice under s. 61(2) of the Act):

(1) The High Court in hearing the second appeal, had the power to re-evaluate whether the prosecution had established a *prima facie* case at the end of the prosecution case. The High Court in the first appeal was standing in the shoes of the trial judge in deciding whether the evidence adduced by the prosecution

in the court below had established a *prima facie* case which was overlooked by the trial judge. When the High Court in the first appeal decided that there was a *prima facie* case established at the end of the prosecution case and ordered the accused to enter his defence, it is settled law that the decision was not appealable by the accused as his right had not been finally determined and he could file an appeal only at the end of the full trial that is, after he was found guilty and convicted. Hence, the order of the High Court in the first appeal to call the accused to enter his defence shall be treated as that of the trial judge which could be re-evaluated by the High Court in the second appeal. The duty of the High Court in the second appeal was to ensure that all rulings made at the trial court were in accordance with the evidence adduced. If any ruling or order was made against the weight of evidence, the High Court in the second appeal had the power to correct a miscarriage of justice on appeal. (para 22)

(2) To constitute an offence under s. 4(1) of the Act, the prosecution must prove the following elements against the accused: (i) that the accused had received or used the monies ('the first element'); that the monies received or used were the proceeds of an unlawful activity ('the second element'). To prove the proceeds of an unlawful activity, the prosecution must prove the commission of a serious offence known as the predicate offence specified in the second schedule and the monies specified in the charges are the proceeds of the serious offence; and (iii) once these elements are proven, it could be inferred from the objective factual circumstances that the accused knew or had reason to believe, that the monies were the proceeds from any unlawful activity or in respect of the conduct of a natural person, the accused without reasonable excuse failed to take reasonable steps to ascertain whether or not the property was proceeds from an unlawful activity ('the third element'). (para 26)

(3) The circumstantial evidence in this case was not sufficient to constitute a *prima facie* proof of the second element of the offence that is, the monies in the bank accounts were proceeds from unlawful activities. It is trite law that where prosecution is relying on circumstantial evidence, the onus

upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient. The circumstantial evidence adduced by the prosecution failed to satisfy the beyond reasonable doubt test. The High Court Judge had erred in law and in fact in holding that the prosecution had established a *prima facie* case in respect of the four charges against the appellant. The defence ought not have been called in the first place: *PP v. Lin Lian Chen* (refd); *Sunny Ang v. PP* (refd). (para 45)

(4) The procedure of forfeiture of property upon prosecution for an offence under s. 55(1) is civil in nature and the standard of proof required is that of the balance of probabilities and not that of beyond reasonable doubt. The burden is always on the prosecution to prove that the properties which are liable to be forfeited are the subject matters of the offence that is, under s. 4(1) of the Act. (para 64)

(5) In interpreting the phrase 'subject matter of the offence' under s. 55(1) of the Act, it should be interpreted broadly to include not only the properties specified in the charges but also all those properties seized under ss. 50 and 51 of the Act. (para 68)

(6) In order to forfeit the properties under s. 55(1) the Act, the court had to be satisfied on the balance of probabilities that (i) the said properties were in fact the subject matters of the offence; (ii) the accused was not the true and lawful owner of the properties; and (iii) no other person was entitled for the property as a purchaser in good faith for valuable consideration. (para 68)

(7) The circumstantial evidence in totality constituted sufficient proof on the balance of probabilities that the proceeds found in the bank accounts stated in the charges as well as all the other properties seized in respect of the money laundering offence under ss. 50 and 51 of the Act were proceeds of an unlawful activity which constitute the subject matters of the offence and the appellant was not the true and lawful owner of such properties. Hence, the trial judge had rightly issued the notice to show cause under s. 61(2) of the Act. (paras 71 & 72)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Jaferi Ipee v. PP [2013] 3 CLJ 381 CA ***(refd)***
Jayaraman Velayuthan v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP lwn. Sulaiman Saidin [2010] 1 CLJ 184 CA ***(refd)***
Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***

Legislation referred to:
Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 3(1), 4(1), (2), 50, 51, 55(1), 61(2), (4)
Courts of Judicature Act 1964, s. 50
Evidence Act 1950, s. 133

For the appellant - Adam Yap (Sritharan C Nadarajan with him); M/s Nor Affiza & Co
For the prosecution - Hazril Harun (Mohd Farez Rahman with him); DPPs

Reported by Amutha Suppayah

JUDGMENT

Teo Say Eng JC:

Background

[1] This is an appeal by the appellant (the accused) against the conviction and sentence and order issued by the trial judge (Sessions Court Judge) under ss. 55(1) and 61(2) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (hereinafter to be referred to as "the Act").

[2] Prior to the commencement of this appeal, the trial judge has acquitted the appellant at the end of the prosecution case on 7 January 2011.

[3] The respondent (the prosecution) appealed against the decision of acquittal whereby the High Court (hereinafter to be referred to as the High Court in the first appeal) allowed the appeal and ordered the appellant to enter his defence on 29 November 2011.

[4] The trial judge convicted the appellant at the end of the defence and ordered a third party notice to be issued in respect of the appellant's properties which were seized earlier on 27 August 2012 under s. 55(1) to be read with s. 61(2) of the Act.

[5] The appellant hence appealed to the High Court (hereinafter to be referred to as the High Court in the second appeal) against conviction and the order of the third party notice under ss. 55 and 61 of the Act.

Preliminary Issue For Determination

[6] The preliminary issue raised during the appeal before this court is whether the High Court in the second appeal may re-evaluate the decision made by the High Court in the first appeal that a *prima facie* case against the appellant had been made out on all the charges and ordered the appellant to enter his defence.

Respondent's Submission (Prosecution)

[7] The respondent submits that as a general rule, there is no necessity for the High Court in the second appeal to 're-evaluate' the decision made by the High Court in the first appeal that a *prima facie* case against the accused had been made out on all the charges unless there was fresh evidence raised by the appellant which could cast a reasonable doubt in the prosecution case.

[8] The respondent relied on the Court of Appeal case of *PP lwn. Sulaiman Saidin* [2010] 1 CLJ 184; at p. 194, para. 16 and at p. 197, para. 27 to support its contention.

[9] The respondent further submits that the learned High Court Judge in the first appeal in his grounds of judgment (dated 29 November 2011) had discussed at length as to why the appellant was ordered to enter his defence after finding that a '*prima facie*' case had been made out by the prosecution.

[10] The respondent therefore submits that His Lordship had made the decision based on the correct principles of law, that is, by referring to the Federal Court case of *Balachandran v. PP* [2005] 1 CLJ 85 and the Court of Appeal case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734.

Appellant's Submission (Accused)

[11] The appellant submits that an appeal was filed against conviction and sentence after this case has been fully disposed of at the court below.

[12] This court now shall determine on reviewing the whole case, whether or not the defence ought to be called (whether prosecution has made out a "*prima facie* case").

[13] The court is hearing this appeal by the way of re-hearing. It is imperative for the court to look at the prosecution's evidence again as decided in *Balachandran v. PP* (*supra*).

[14] The appellant has constitutional rights to have two automatic rights of appeal.

[15] In the earlier appeal by the prosecution, the accused was the respondent.

[16] Section 50 of the Courts of Judicature Act 1964 clearly stipulates an automatic two-tier appeals for cases heard from Sessions Courts.

[17] The accused is entitled to be acquitted at the end of prosecution case, hence it goes without saying he has the right to appeal (twice) against any such order wrongly made.

[18] The appellant submits that there were instances where the Court of Appeal ruled that earlier Court of Appeal ought not to have called for the defence in cases where High Court sits as trial court.

[19] The appellant cited the Court of Appeal case of *Jaferi Ipee v. PP* [2013] 3 CLJ 381; [2013] 3 MLJ 467, where the High Court had acquitted the accused at the end of prosecution case. The prosecution appealed to the Court of Appeal which ordered the accused to enter his defence. At the end of the defence, the accused was convicted by the High Court. The accused appealed to the Court of Appeal wherein the central issue was the identification of the accused by the prosecution's witness. This same issue though was again raised, it was considered again by the Court of Appeal hearing the accused's appeal.

[20] The appellant submits that the court hearing this appeal (the High Court in the second appeal) has the power to correct any miscarriage of justice if the *prima facie* ruling was so made against the weight of evidence by the High Court in the first appeal.

[21] The decision made by the High Court in the first appeal does not bind the High Court in the second appeal as both the High Courts are at the same level of jurisdiction.

Ruling Of The Court

[22] Having carefully considered the submissions and the cases cited by the respective parties I am of the considered view that this court in hearing the appellant's appeal against conviction and sentence after he was ordered to enter his defence by the High Court in the first appeal and was found guilty and convicted after his defence by the trial court, has the power to re-evaluate whether the prosecution has established a *prima facie* case at the end of the prosecution case for the following reasons:

(a) The High Court in the first appeal when hearing an appeal by the prosecution against acquittal was standing in the shoes of the trial judge in deciding whether the evidence adduced by the prosecution at the court below had established a *prima facie* case which was overlooked by the trial judge. When the High Court in the first appeal decided that there was a *prima facie* case established at the end of the prosecution case and ordered the accused to enter his defence it is settled law that the decision is not appealable by the accused as his right has not been finally determined and he could file an appeal only at the end of the full trial that is, after he was found guilty and convicted.

In the above circumstances I am of the view that the order of the High Court in the first appeal to call the accused to enter his defence shall be treated as that of the trial judge which could be re-evaluated by the High Court in the second appeal against conviction and sentence by the appellant.

(b) What is more pertinent is that it is the duty of the High Court in the second appeal in hearing an appeal from the Sessions Court against conviction and sentence after the defence case is to ensure that all rulings made at the trial court are in accordance with the evidence adduced. If any ruling or order

is made against the weight of evidence, the High Court in the second appeal has the power to correct a miscarriage of justice on appeal. This view finds support in the Court of Appeal case of *Jaferi Ipee v. PP* [2013] 3 CLJ 381; [2013] 3 MLJ 407 where the facts are similar to our case here. In that case when the Court of Appeal in the earlier appeal had called for the accused to enter his defence, it must be taken that the prosecution had sufficiently proved the identity of the accused as one of the assailants who had caused the death of the deceased. When the accused was found guilty and convicted after he had entered his defence, he appealed against the conviction to the Court of Appeal. The central issue in the subsequent appeal was the identification of the accused which was considered again in the Court of Appeal.

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However the prosecution has relied on another Court of Appeal's case of *PP lwn. Sulaiman Saidin* [2010] 1 CLJ 184 to say that there is no necessity for a subsequent appellate court to re-evaluate the *prima facie* ruling made by the earlier Court of Appeal in ordering the accused to enter his defence unless there is new evidence raised by the defence which could cast doubt in the prosecution's case.

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It is to be noted that *Sulaiman Saidin*'s case can be distinguished from our present case that in the former case, no grounds of judgment was prepared by the earlier Court of Appeal in calling for the defence, so the subsequent Court of Appeal had ruled that there was no necessity to re-evaluate the *prima facie* ruling made by the earlier Court of Appeal in the absence of any fresh evidence which could cast a reasonable doubt in the prosecution case. Whereas in the present case, the learned High Court Judge in the first appeal has written his grounds of judgment and has analysed the evidence adduced by the prosecution at the end of the prosecution case.

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I am still of the considered view that the stand taken by the Court of Appeal in *Jaferi*'s case is to be preferred. I am therefore of the considered view that the High Court in the second appeal could, even in the absence of any additional evidence raised by the accused, re-evaluate the earlier High Court decision in calling for the defence to cure a miscarriage of justice if the *prima facie* ruling was made against the weight of evidence.

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Whether The High Court In The First Appeal Erred In Law And In Fact In Ordering The Appellant To Enter His Defence

[23] Having determined that this court has the power to re-evaluate the *prima facie* ruling made by the High Court in the first appeal I shall now proceed to determine whether the High Court in the first appeal had erred in law and in fact in ordering the appellant to enter his defence.

The Charges

[24] The appellant in this case was charged with money laundering offences in the Johor Bahru Sessions Court as follows:

First Charge

> Bahawa kamu di antara 6 Februari 2002 dan 20 Disember 2002 di Malayan Banking Berhad di No. 1, Jalan Haji Kassim, Mentakab di dalam daerah Temerloh, di dalam Negeri Pahang Darul Makmur, telah melibatkan diri dalam pengubahan wang haram iaitu menerima wang hasil daripada aktiviti haram sebanyak RM2,085,300.00 melalui akaun semasa kamu di Malayan Banking Berhad bernombor 00602531564 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 4(1)(a) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

Second Charge

> Bahawa kamu di antara 15 Januari 2003 dan 2 Oktober 2003 di Malayan Banking Berhad di No. 1, Jalan Haji Kassim, Mentakab di dalam daerah Temerloh, di dalam Negeri Pahang Darul Makmur, telah melibatkan diri dalam pengubahan wang haram iaitu menerima wang hasil daripada aktiviti haram sebanyak RM679,850.00 melalui akaun semasa kamu di Malayan Banking Berhad bernombor 00602531564 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 4(1)(a) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

Third Charge

> Bahawa kamu di antara 13 Januari 2004 dan 17 November 2004 di Malayan Banking Berhad di Lot M1-22, Level 3, Johor Bahru City Square, 106-108 Jalan Wong Ah Fook,

di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah melibatkan diri dalam pengubahan wang haram iaitu menerima wang hasil daripada aktiviti haram sebanyak RM941,930.00 melalui akaun semasa kamu di Malayan Banking Berhad bernombor 501011803326 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 4(1)(a) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

Fourth Charge

Bahawa kamu di antara 13 Januari 2004 dan 17 November 2004 di Malayan Banking Berhad di Lot M1-22, Level 3, Johor Bahru City Square, 106-108 Jalan Wong Ah Fook, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah melibatkan diri dalam pengubahan wang haram iaitu menerima wang hasil daripada aktiviti haram sebanyak RM250,000.00 melalui akaun semasa kamu di Malayan Banking Berhad bernombor 501011803326 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 4(1)(a) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

The Law

[25] Section 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (Act 613) reads as follows: Any person who:

(a) engages in, or attempts to engage in; or

(b) abets the commission of,

money laundering, commits an offence and shall on conviction be liable to a fine not exceeding RM5 million or to imprisonment for a term not exceeding five years or to both.

The interpretation of "money laundering" under s. 3(1) of the Act is as follows:

"money laundering" means the act of a person who:

(a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or

A (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity;

where:

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(aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or

(bb) in respect of the conduct of a natural person, the person C without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.

[26] To constitute an offence under s. 4(1) of the Act the D prosecution must therefore prove the following elements against the accused:

(a) the accused has received or used (according to the charge) the monies (first element);

E (b) The monies received or used are the proceeds of an unlawful activity (second element). To prove the proceeds of an unlawful activity, the prosecution must prove the commission of a serious offence known as the predicate offence specified in the Second Schedule and the monies specified in the F charges are the proceeds of the serious offence. It is to be noted that s. 4(2) allows a person to be convicted of money laundering offence irrespective of whether or not he has been convicted of the offence that generated the money (the predicated offence under Schedule 2 of Act).

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(c) Once the above elements are proven, it could be inferred from the objective factual circumstance that the accused knows or has reason to believe, that the monies are the proceeds from any unlawful activity or in respect of the conduct of a natural H person, the accused without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from an unlawful activity (third element).

First Element Proven

I **[27]** It is not disputed by the appellant that the first element of the offence in respect of all the four charges has been proven by the respondent (the prosecution) that is, all the monies that were

banked into the appellant's Maybank Mentakab account through the cash deposit and ATM machines at Lumut, Sitiawan in respect of the first and second charges and all the monies were deposited by the appellant's wife Puan Maznah into the appellant's Maybank account in Johor Bahru in respect of the third and the fourth charges.

Whether Second Element Proven

[28] The crux of the appellant's contention is that the prosecution had failed to adduce *prima facie* evidence on the second element of the offence as per the four charges that is, the monies in the accused's Maybank accounts were proceeds from the illegal activities.

Appellant's Submission

[29] The prosecution failed to prove the second element of the offence, to wit, the monies which were banked into the appellant's Maybank accounts were proceeds from illegal activities for the following reasons:

(a) There is no presumption under the Act that any money which cannot be accounted for shall be presumed to be proceeds from illegal activities.

It is the duty of the prosecution to prove affirmatively that the monies found in the appellant's Maybank accounts were proceeds from illegal activities.

The appellant submits that the prosecution should have called Puan Maznah who had deposited the monies in the Johor Bahru Maybank account to explain the source of the monies. An adverse inference should be drawn by the court on failure to call the said witness to testify in court.

(b) The prosecution only relied on the evidence of SP19, SP20 and SP21 to prove that the monies found in the two Maybank accounts were proceeds from the illegal activities.

The evidence adduced through SP19, SP20 and SP21 may be summarized as follows:

(i) The evidence established at the court below is that SP19 acted as 'orang tengah untuk kutip wang untuk accused.' Whereas SP20 said he was an illegal lottery operator and he paid RM1,500 per month to the appellant through

SP21 to ensure that his business was not disturbed. He said he only paid for two years. After that he stopped paying because SP21 told him that the appellant was transferred and no longer in charge of the place of gambling.

(ii) SP21 said he was operating some gambling machines in 1999 or 2000. He was introduced by SP19 to the appellant. SP21 said he would take the money from SP20 (RM1,500) including his own money (RM3,000) and put them in an envelope and gave it to the appellant for every meeting he had with the appellant.

(iii) All this happened in 1999 and/or 2000 and 2001.

[30] The appellant submits that the High Court in the first appeal had erred in law and in fact in accepting the evidence of SP19, SP20 and SP21 for the following reasons:

(i) SP19, SP20 to SP21 were in fact accomplices and their evidence was not corroborated;

(ii) Their evidence was full of inconsistencies and was therefore not reliable; and

(iii) Their evidence was previous bad character evidence of the appellant which was not related to the time and dates stated in the four charges and should be rejected by the court.

[31] The appellant further submits that even if the court were to accept the evidence of SP19, SP20 and SP21, the date of payment of the monies by the SP20 and SP21 to the appellant started in 1999 and stopped in 2001 and was too far apart from the dates of the offence stated in the four charges against the appellant.

[32] The appellant further submits that it is not proven that the monies purportedly paid by SP20 and SP21 for two years were banked into the appellant's account let alone which particular account of the appellant.

[33] For the above reasons, the appellant submits that the High Court in the first appeal erred in law and in fact in ruling that the prosecution has established a *prime facie* case by failing to subject the prosecution evidence to a maximum evaluation test and the said ruling was made against the weight of the evidence.

Respondent's Submission (Prosecution)

[34] The respondent submits that the High Court in the first appeal has rightly ruled that the prosecution has established a *prima facie* case and ordered the appellant to enter his defence based on the following evidence adduced at the court below:

(a) The prosecution had adduced evidence through SP19, SP20 and SP21 that the appellant had received the proceeds from the illegal activities amounting to RM30,000 or more;

(b) It has also been proven through the bank staffs that is, SP8, SP9, SP10, SP15 and SP16 the following sums of monies had been paid into the two Maybank accounts belonging to the appellant:

(i) RM2,085,300;

(ii) RM679,850;

(iii) RM941,930;

(iv) RM250,000.

(c) Evidence has also been adduced through SP3 ASP Wan Mustafa on the salary of the appellant which was paid into the appellant's CIMB's account which does not commensurate with the huge amounts of cash found in his two Maybank accounts;

(d) One Executive Officer from SSM Johor, SP4 Encik Azrin bin Mohd Ripin had testified from the records of SSM that the appellant was not involved in carrying out any form of business activities. Neither was he a director of any company;

(e) SP24 a forensic officer from the forensic branch Ibu Pejabat BPR Putrajaya told the court he had prepared a 'Laporan Forensik Perakaunan' (exh. P98) which reveals that the appellant had an unknown source of income of about RM9,481,414.18 without taking into account his alleged commission from Shah.

[35] The prosecution submits that the High Court in the first appeal has carefully evaluated the evidence adduced at the court below and had correctly applied the principles of law to the facts as found and ruled that the prosecution had established a *prima facie* case on all the four charges against the appellant.

Ruling Of The Court On The Second Element

[36] It is the duty of the prosecution to prove the second element of the offence against the appellant beyond reasonable doubt. There is no presumption of law or fact as to what constitutes "monies or proceeds from unlawful activities" under the Act. The prosecution has to adduce evidence, direct or circumstantial to prove that the monies in the two Maybank accounts are proceeds from the unlawful activities. Once it is proven that the monies in the appellant's Maybank accounts are proceeds from unlawful activities the prosecution may invoke (i) s. 3(1)(aa) to infer from the objective factual circumstances, that the appellant knew or had reasons to believe that the property was proceeds from the unlawful activity or (ii) s. 3(i)(bb) that in respect of the conduct of a natural person, the person (the appellant) without reasonable excuse failed to take reasonable steps to ascertain whether or not the property was the proceeds from any unlawful activity.

[37] I have perused the findings of the High Court Judge in the first appeal in his grounds of judgment and the evidence adduced pertaining to the second element of the offence at the court below. I find that the learned High Court Judge had relied on the evidence of SP19, SP20 and SP21 who were alleged to be accomplices to prove the second element of the offence.

[38] I agree with the contention of the appellant that SP19, SP20 and SP21 were accomplices whose evidence must be corroborated by credible evidence. However the law permits the court to convict on the evidence of an accomplice in the absence of corroborating evidence if it feels safe to do so and to decide on the weight to be given to such evidence: See s. 133 of the Evidence Act 1950.

[39] Having reviewed the evidence of SP19, SP20 and SP21, I find that it is safe to rely on their evidence since there were no criminal charges pending against them at the time they testified in court and they had nothing to gain by testifying against the appellant.

[40] I also find that the contention of the appellant that the evidence of SP19, SP20 and SP21 is tantamount to evidence of bad character of the appellant is totally without merit. First, I am of the view that whether the monies received by the appellant

were proceeds of unlawful activity is a fact in issue and is relevant to the charge. It does not matter that the monies received by the appellant from SP20 and SP21 were earlier than the dates stated in the charges so long as the prosecution could prove the link of the corrupt monies to the monies in the two Maybank accounts.

[41] I therefore find that the learned High Court Judge in the first appeal has correctly relied upon the evidence of SP19, SP20 and SP21 to prove the second element of the offence.

[42] The next question arises is whether the evidence of SP19, SP20 and SP21 that the appellant had received a certain sum of corrupt monies for two years prior to the dates of the charges is sufficient to constitute *prima facie* proof that the monies found in the two Maybank accounts belonging to the accused were proceeds of unlawful activities.

[43] Having reviewed the evidence adduced, I find that the learned High Court Judge in the first appeal had erred in fact and in law in ruling that "apabila terbuktinya yang wang-wang yang dimaksudkan itu telah diterima oleh responden (tertuduh) melalui akaun yang dimaksudkan itu, makanya bebanan adalah tertanggung di pihak responden untuk menjelaskan tentang kedudukan serta status wang-wang tersebut sama ada ianya adalah merupakan hasil daripada aktiviti judi ekor haram yang diperolehi oleh responden daripada ketiga-tiga saksi tersebut." I find that the learned High Court Judge had committed two errors in his grounds of judgment, that is, one is that his finding of *prima facie* case is made against the weight of evidence and two, his finding on the burden of proof was incorrect as there is no legal burden on the part of the appellant to explain that the monies which he received from SP19, SP20 and SP21 were not proceeds from illegal activities. The burden to prove the offence beyond reasonable doubt is always on the prosecution and it never shifts throughout the trial. The only duty of the appellant after the defence is called is either to create any reasonable doubt in the prosecution case or to rebut the inference invoked under s. 3(1)(aa) or (bb) of the Act on the balance of probabilities.

[44] As regards his finding of facts, I find that there is no direct evidence adduced by the prosecution to prove that the illegal proceeds collected from SP20 and SP21 were paid into the Maybank accounts. The only question arises here is whether the evidence adduced (circumstantial) is sufficient for the trial judge to

come to the conclusion that the monies collected from SP20 and SP21 were banked into the appellant's Maybank accounts. However I am satisfied that the prosecution has established the following circumstantial evidence:

(i) Substantial sums of monies amounting to RM3,957,080 were banked into the Maybank accounts belonging to the appellant;

(ii) The appellant had received a certain sum of corrupt monies for about two years from SP20 and SP21 prior to the dates stated in the four charges;

(iii) His income as a police officer was around RM4,000 per month and he was not involved in any form of business and had no other source of income;

(iv) Laporan Forensik Perakaunan prepared by SP24 reveals that the appellant had an unaccounted source of income totalling about RM9,481,414.18 without taking into account his alleged commission from Shah.

[45] I am of the considered view that the sum total of the above circumstantial evidence is still not sufficient to constitute a *prima facie* proof of the second element of the offence that is, the monies in the Maybank accounts were proceeds from the unlawful activities because there was no link that the corrupt monies collected from SP20 and SP21 were actually banked into his Maybank Accounts.

[46] The law on circumstantial evidence is that: It is trite law that where prosecution is relying on circumstantial evidence, the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient: *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; [1992] 2 MLJ 561; *Sunny Ang v. PP* [1965] 1 LNS 171; [1966] 2 MLJ 195.

[47] In fact the irresistible conclusion test was synonymous with the standard of proof of beyond reasonable doubt as was held by our Federal Court in *Jayaraman Velayuthan v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130; [1982] 2 MLJ 306.

[48] Applying the principles relating to the circumstantial evidence to the facts of the case, I find that the circumstantial evidence adduced by the prosecution has failed to satisfy the beyond reasonable doubt test.

[49] For the above reasons, I find the learned High Court Judge had erred in law and in fact in holding that the prosecution has established a *prima facie* case in respect of the four charges against the appellant. I am therefore of the view that the defence ought not to be called in the first place. I allowed the appeal against the conviction and sentence in respect of the four charges. I hereby set aside the finding of guilt and conviction and sentence by the trial judge and acquitted and discharged the appellant of all the four charges.

The Defence

[50] I shall now proceed to consider the defence put forward by the appellant on the assumption that a *prima facie* case has been established by the respondent (prosecution).

[51] I have perused the findings of the trial judge in her grounds of judgment and the defence adduced by the appellant. I find that she has carefully considered the evidence of each defence witness and the documents tendered by the defence.

[52] She has dealt with each document and held that they were of no evidential value and she has given her reasons for her findings. The trial judge held that the appellant's story that he had received RM6.25 million just by introducing customers to Shah was not reasonable and unbelievable. I find that she has correctly applied the principles of law to the facts as found.

[53] All considered, I find that the court below has rightly rejected the defence and ruled that it has failed to create any reasonable doubt in the prosecution case.

On Forfeiture Of Property Upon Prosecution For An Offence Law

[54] The law governing forfeiture of property upon prosecution of an offence is laid under s. 55 to be read with s. 61 of the Act which may be summarised as follows:

(i) Section 55(1) provides two situations in any prosecution for an offence under s. 4(1), where the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence ... where:

(a) the offence is proved against the accused; or

A (b) the offence is not proved against the accused but the court is satisfied:

(i) that the accused is not the true and lawful owner of such property; and

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(ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration;

(ii) In determining whether the property is the subject matter of the offence ... the court shall apply the standard of proof in C civil proceedings.

[55] In the case before us, since I have ruled that the prosecution has failed to prove the four charges under s. 4(1) of the Act against the appellant the procedure of forfeiture falls under D the second situation stipulated in s. 55(1) of the Act.

[56] Under the second situation, the court shall make an order of forfeiture if the following requirements can be satisfied on the balance of probabilities:

E (i) the property concerned must be the subject matter of the offence;

(ii) the accused is not the true and lawful owner of the property;

F (iii) No other person is entitled to the property as a purchaser in good faith for valuable consideration.

[57] Once the above requirements have been proved on the balance of probabilities, the court shall then issue a third party notice by way of gazette calling upon any third party who claims G to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited: Section 61(2).

[58] The court shall return the property to the third party when H it is satisfied that:

(i) The claimant is a purchaser in good faith for valuable consideration;

(ii) The claimant has a legitimate legal interest in the property;

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(iii) No participation, conclusion or involvement with respect to the offence under sub-s. 4(1) which is the object of the proceedings can be imputed to the claimant;

(iv) The claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge did not freely consent to its illegal use;

(v) The claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and

(vi) The claimant did all that could reasonably be expected to prevent the illegal use of the property: See s. 55(1)(b)(ii) and s. 61(4) of the Act.

[59] When the third party fails to satisfy any of the above requirements, the court shall forfeit the said property.

Issues For Determination

[60] The main contention of the appellant is that the prosecution must prove on the balance of probabilities that the properties concerned are the subject matters of the offence. The appellant submits that the subject matter of the offence stated in s. 55(1) should only be confined to those properties specified in the four charges and should not be extended to those properties seized under ss. 50 and 51 of the Act, namely: exhs. P100-P112.

[61] The burden of proof is still on the prosecution to prove that the monies specified in the four charges are proceeds of unlawful activities on the balance of probabilities. The appellant submits that the prosecution has failed to prove the monies in the Maybank accounts were in fact proceeds of crime on the balance of probabilities. Neither was there evidence to show that the properties seized under ss. 50 and 51 were acquired from the monies in the Maybank accounts or from any source.

[62] For the above reasons, the appellant submits that the trial judge had erred in issuing the third party notice under s. 61(2) since the requirements under s. 55(1) have not been satisfied.

Respondent's Reply (Prosecution)

[63] The respondent submits that the subject matter of the offence should not be confined to the properties specified in the four charges but should include all those properties seized under ss. 50 and 51 of the Act in respect of the money laundering

offence under s. 4(1) of the Act (P100-P112). The respondent further submits that the prosecution has adduced sufficient evidence on balance of probabilities that the monies in the Maybank accounts specified in the four charges and all the properties seized (exhs. P100-P112) were proceeds from the unlawful activity that is, corrupt practice and the appellant failed to satisfy the court that he was the true and lawful owner of the said properties. The respondent therefore submits that the trial judge had rightly issued the third party notice under s. 61(2) of the Act.

Ruling Of The Court

What Constitutes The Subject Matter Of The Offence?

[64] First and foremost I must reiterate here that the procedure of forfeiture of property upon prosecution for an offence under s. 55(1) is civil in nature and the standard of proof required is that of the balance of probabilities and not that of beyond reasonable doubt. The burden is always on the prosecution to prove that the properties which are liable to be forfeited are the subject matters of the offence that is, under s. 4(1) of the Act.

[65] What is the subject matter of the offence in s. 55(1) should be read with ss. 50 and 51 of the Act. For convenience, I shall append below ss. 50(1) and 51(1):

[66] Section 50(1) reads:

> Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any movable property, including any monetary instrument or any accretion to it, which is the subject-matter of an offence under subsection 4(1) or evidence in relation to the commission of such offence, is in the possession, custody or control of a financial institution, he may, notwithstanding any law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the case may be, by order direct the financial institution not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.

[67] Section 51(1) reads:

> Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any immovable property is the subject-matter of an offence under subsection 4(1) or evidence of the commission of such offence, such property may be seized.

[68] It is clear from the above provisions that the Public Prosecutor is satisfied that the properties seized under s. 50 and s. 51 are the subject matters of the offence under s. 4(1) of the Act. Similarly any properties specified in the four charges are also alleged to be the subject matters of the money laundering offence under s. 4(1) of the Act. I am of the considered view that in interpreting the phrase 'subject matter of the offence' under s. 55(1) of Act it should be interpreted broadly to include not only the properties specified in the charges but also all those properties seized under s. 50 and s. 51 of the Act. The broad interpretation is to promote the underlying purpose or object of the Act. The properties which are before the court consist of monies stated in the four charges and the properties seized under ss. 50 and 51 of the Act which were tendered in court as exhs. P100-P112. The said properties are alleged to be the subject matters of the offence. In order to forfeit the above mentioned properties under s. 55(1) the Act, the court must be satisfied on the balance of probabilities that the said properties are in fact the subject matters of the offence and the accused is not the true and lawful owner of the properties and no other person is entitled for the property as a purchaser in good faith for valuable consideration.

[69] The only issue before this court is to see if the evidence adduced at the court below is sufficient to prove that those properties stated in the charges as well as seized under s. 50 and s. 51 are the subject matters of the offence under s. 4(1) of the Act.

[70] I shall summarise the evidence adduced by the prosecution at the court below as follows:

(i) The appellant was involved in corrupt practices that is, receiving bribes from SP20 and SP21 which is a predicated offence;

(ii) Evidence has been adduced through SP19, SP20 and SP21 that a certain sum of corrupt monies had been paid to the appellant over a period two years prior to the dates stated in the charges;

(iii) A large sum of money amounting to RM3,957,080 was found in the appellant's Maybank accounts and his movable and immovable properties in respect of the offence under s. 4(1) were also seized;

(iv) His salary was only RM4,000 plus a month. (See the evidence of SP3 ASP Wan Mustafa);

(v) The SSM records tendered through SP4 that the appellant was not involved in any form of business and he had no other source of income;

(vi) The appellant failed to account for the monies paid in his two Maybank accounts and the evidence which was led to explain how he obtained the commission of RM6,250,000 from Shah was rejected by the trial judge; and

(vii) SP24, told the court that his investigation revealed that the appellant had an unknown source of income of about RM9,481,414.18 without taking into account his alleged commission from Shah.

[71] I agree that in the prosecution of a criminal offence under s. 4(1) of the Act against the appellant the totality of the above circumstantial evidence may not be sufficient to constitute *prima facie* proof (beyond reasonable doubt standard) that the proceeds were from an unlawful activity. Nevertheless in determining whether a property is the subject matter of the offence in a forfeiture proceeding which is civil in nature, I am satisfied that the aforesaid circumstantial evidence in totality would constitute sufficient proof on the balance of probabilities that the proceeds found in the two bank accounts stated in the four charges as well as all the other properties seized in respect of the money laundering offence under ss. 50 and 51 of the Act are proceeds of an unlawful activity which constitute the subject matters of the offence and the appellant is not the true and lawful owner of such properties.

[72] I find that the trial judge has rightly issued the notice to show cause under s. 61(2) of the Act.

[73] I therefore dismiss the appeal against the issuance of the notice under s. 61(2) of the Act.