HIGH COURT OF MALAYA AT PENANG
IN THE STATE OF PENANG, MALAYSIA
[CRIMINAL APPEAL NO: MT - 42LB - 35 - 07/2015]

BETWEEN

PENDAKWA RAYA ... APPELLANT

AND

FADHIL HASSAN ... RESPONDENT

(In the matter of Sessions Court Butterworth
In the State of Penang, Malaysia.
Arrest Case No: 61 - 11 - 05/2012

PENDAKWA RAYA

LAWAN

FADHIL BIN HASSAN)

CRIMINAL LAW: *Corruption - Corruptly receiving gratification - Accused accepted money as a token of goodwill or 'upah' - Whether word 'upah' itself strongly suggests and closely relates to gratification - Whether presumption under s. 50(1) of Malaysian Anti-Corruption Commission Act 2009 applicable*

CRIMINAL PROCEDURE*: Defence - Denial - Offence under s. 17(a) of Malaysian Anti-Corruption Commission Act 2009 ('Act 2009') - Allegation that accused merely accepted money as a token of goodwill or 'upah' - Whether act of accepting a token of goodwill is an acceptable defence for a charge under s. 17(a) of Act 2009 - Whether active involvement by accused in commission of offence negates defence of accused that he had received money merely as a token of goodwill*

[Appeal by prosecution allowed and the acquittal and discharge of accused is set aside and substituted with a conviction. Accused sentenced to 18 months imprisonment and RM10,000.00 fine in default 3 months' imprisonment.]

Case(s) referred to:

*Attan Bin Abdul Ghani v. PP [1969] 1 LNS 12 HC (**refd**)*

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

*Gan Boon Aun v. PP [2016] 6 CLJ 647 FC (**refd**)*

*Manimaran Amas v. PP & Another Cases [2014] 1 LNS 1412 CA (**refd**)*

*Mat v. PP [1963] 1 LNS 82 HC (**refd**)*

*Mohamad Radhi Yaakob v. PP [1991] 1 CLJ Rep 311 SC (**refd**)*

*Mohd Azam Raja Abdullah v. PP [2015] 1 CLJ 1080 CA (**refd**)*

*Muhammed Hassan v. Public Prosecutor [1998] 2 CLJ 170 FC (**refd**)*

*Nagappan Kuppusamy v. Public Prosecutor [1988] 1 CLJ 283 SC (**refd**)*

*Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC (**refd**)*

*PP v. Abdul Rehman Abdul Hameed [2017] 1 CLJ 317 CA (**refd**)*

*PP v. Datuk Haji Harun Haji Idris (No 2) [1976] 1 LNS 184 HC (**refd**)*

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

*PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC (**refd**)*

*PP v. Adetunji Adeleye Sule [1993] 3 CLJ 113 SC (**refd**)*

*Public Prosecutor v. Mohamed Noor Bin Jantan [1979] 1 LNS 77 FC (**refd**)*

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

Saad Abas & Anor v. PP [1998] 4 CLJ 575 CA (***refd***)

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

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

Woo Chin Chong & Ors v. Public Prosecutor [1955] 1 LNS 171 HC (***refd***)

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

Legislation referred to:

Courts of Judicature Act 1964, ss. 30, 84

Federal Constitution, Art 5(1), 8(1)

Malaysian Anti-Corruption Commission Act 2009, ss. 17(a), 19(1)(d), 24, 50, 50(1)

Prevention of Corruption Act 1961, s. 14

JUDGMENT

Background

[1] The accused was charged with an offence under section 17*(a)* of the Malaysian Anti-Corruption Commission Act 2009 punishable under section 24 of the same Act. At the end of the case for the prosecution, the learned Sessions Court Judge found that the prosecution has failed to prove a *prima facie* case. The accused was acquitted and discharged at the end of the case for the prosecution.

[2] The prosecution was not satisfied with the acquittal and discharge of the accused at the end of the prosecution's case and appealed to the High Court. On appeal, the High Court allowed the appeal by the

prosecution and reversed the decision of the learned Sessions Court Judge. The accused was ordered to enter his defence. In his defence, the accused elected to give evidence under oath. At the end of the case for the defence, the learned Sessions Court Judge decided that the prosecution has failed to prove its case against the accused beyond reasonable doubt. The accused was acquitted and discharged. The prosecution was not satisfied with the decision of the learned Sessions Court Judge and appeals to this court against the acquittal and discharge. In this judgment, reference to the prosecution and the accused will remain.

[3] After evaluating the record of appeal and considering the arguments and submissions of the learned Deputy Public Prosecutor and defence counsel, I allowed the appeal by the prosecution and reverse the decision of the learned Sessions Court Judge. I hold the considered view that the prosecution has succeeded in proving the case against the accused beyond reasonable doubt and that the accused has failed to raise any doubt in the prosecution's case. I allowed the appeal by the prosecution and the accused was accordingly convicted and sentenced to 18 months imprisonment and RM10,000.00 fine in default 3 months imprisonment. The accused is not satisfied with the decision and filed an appeal. This is the grounds for my decision.

The prosecution's case

[4] The charge against the respondent under section 17*(a)* of the Malaysian Anti-Corruption Commission Act 2009 reads-

> "Bahawa kamu pada 9 Januari jam lebih kurang 0020 hrs, bertempat di Perhentian Bas berhadapan Dengan Hospital Kepala Batas, dalam Daerah Seberang Perai Utara, Dalam Negeri Pulau Pinang sebagai seorang ejen Kerajaan Malaysia, iaitu Lans Koperal Tambahan RF/T 13924 Fadhil Bin Hassan yang bertugas di Cawangan Lokap Central Ibupejabat Polis Daerah Seberang

Perai Utara telah secara rasuah memperoleh untuk diri kamu satu suapan iaitu, wang tunai RM200.00 daripada Nazri Bin Sabu, sebagai dorongan untuk melakukan suatu perbuatan berhubung dengan hal ehwal prinsipal kamu, iaitu memasukkan roti canai dan rokok ke dalam Lokap Central Ibupejabat Polis Daerah Seberang Perai Utara kepada Ena Saiful Al Amin Bin Nazri dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 17*(a)* Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan boleh dihukum di bawah seksyen 24 Akta yang sama.".

[5] According to the prosecution, PW3 received a complaint from one Nazri Bin Sabu (PW6) on 08.01.2012. The complainant's son was detained at the Central Lock-Up at the Seberang Perai Utara police headquarters ("IPD Seberang Perai Utara"). The complainant gave evidence that the day before (07.01.2012), he received a call from someone that his son had asked for some roti canai to be sent to the Central Lock-Up, IPD Seberang Perai Utara.

[6] The complainant was given a number to call. When he called up the number, he managed to speak to a man who said that if he wanted to send the roti canai to his son at the lock-up, he must pay RM200.00 on 07.01.2012 at about 10:00 pm. The complainant later called up the number again and tried to excuse himself by telling the man that he does not have the money and asked for time. The man told the complainant to pay the money the next day (08.01.2012) at 12:00 midnight.

[7] PW6's son (PW1), who was detained at the Central LockUp IPD Seberang Perai Utara, confirmed that it was the accused who had asked for RM200.00 from him when he asked the accused to allow his father (PW6) to send roti canai to him in the lock-up. According to PW1, after PW1 told the accused that he had wanted his father to send him roti canai, the accused had brought him to an alleyway towards the women's

lock-up for PW1 to call his father. At this time, the accused told PW1 to ask his father to send RM200.00 as well being the *"upah"* for the accused to bring in food into the lock-up for PW1. PW1 used a cell phone given by the accused and made call to his friend "Kaon". PW1 cannot remember his father's telephone number and had asked "Kaon" to inform his father to return his call using the same number as that of the cell phone which the accused gave him to use. Moments later, the accused's sister, Ena Nurul Samira, called. PW1 told his sister that he wanted to speak to their father and for their father to return call using the same number. PW1 then hung up. PW1 waited for this father to call but there was no call then. PW1 later returned to the lock-up.

[8] After PW1 was back in the lock-up, the accused had a chat with him in front of the lock-up. PW1 then heard the accused's cell phone rang and the accused went away from PW1, presumably to answer the call. Within a few minutes, the accused returned to PW1 and told PW1 that PW1's father could not come that day. He will come tomorrow.

[9] Based on the complaint, PW3 and other officers from the Malaysian Anti-Corruption Commission held a briefing and set up a trap. Arrangements were also made to have telephone conversations between the complainant and the targeted man recorded. The RM200.00 trap money was prepared and the serial numbers for the RM200.00 marked notes were taken down and recorded. The RM200.00 was later handed over to the complainant.

[10] On 08.01.2012 at about 11:15 pm, PW3 and his team together with the complainant reached the rendezvous point at a bus stop near Hospital Kepala Batas. PW4 took the complainant to a nearby nasi kandar restaurant and bought roti canai, teh tarik and a pack of 20s Dunhill cigarettes and gave them to the complainant. They waited. The accused did not come. PW3 gave instructions for the complainant to call up the accused.

[11] The complainant called up the accused and the accused told the complainant to wait. At about 12:20 midnight, the accused came to the rendezvous point driving a Proton Waja. The complainant delivered the package containing the roti canai, teh tarik and cigarettes and also handed to the accused the RM200.00 marked notes. When the accused was about to leave the scene, PW3 drove his car towards the accused's car and intercepted it. The package containing the roti canai, teh tarik and cigarettes was found inside the accused's car. The RM200.00 marked note was also found on the accused. The accused was arrested.

[12] The recorded telephone conversation between the accused and the complainant was transcribed and tendered as Exhibit P8. For a better appreciation of the case for the prosecution and the defence, it is useful to reproduce the transcribed recorded telephone conversation. According to the complainant, Voice A is him and Voice B is the accused. From the transcribed recorded telephone conversation, the complainant identified the accused's voice at paragraph 10. The transcribed recorded telephone conversation (Exhibit P8) reads-

"Suara A: Hello Assalamualaikum

Suara B: Hello

Suara A: Assalamualaikum

Suara B: Hello

Suara A: Ni … siapa ni aa?

Suara B: Nah Abah …

Suara A: Hello assalamualaikum

Suara B: Hello

Suara A: Hello assalamualaikum

Suara B: Hello

Suara A: Abang aa?

Suara B: Hah ada pa?

Suara A: Ni nak pi kat anak tu

Suara B: Siapa dia?

Suara A: Saiful

Suara B: Hah kenapa dengan Saiful?

Suara A: Ni sapa hah?

Suara B: Hah?

Suara A: Ni sapa hah?

Suara B: Saya (kurang jelas)

Suara A: Dulu saya nak hantar roti canai kat anak …

Suara B: Pukul berapa antar?

Suara A: Semalam kata pukul dua belas

Suara B: Aa … pukul dua belas tu eh …

Suara A: Hah antar kat mana?

Suara B: Spare bawak mai la apa-apa duit poket tu

Suara A: Tu aa … kalu …

Suara B: Selalu dok bagi dua la eh … nak bawa masuk dalam (kurang jelas)

Suara A: Tu haaa …

Suara B: Selalu … selalu … depa dok kepai bagi dua ratus pa selalu eh …

Suara A: Hmmm …

Suara B: Saya … saya cuma pi ambil kat luar aa … pi ambil masuk empat orang, lima orang kat dalam tu … yang jaga

Suara A: Haa … Cik

Suara B: Hmmm

Suara A: Saya nak bagi rokok boleh tak?

Suara B: Hah … boleh

Suara A: Boleh aa?

Suara B: Aa … satni dalam pukul berapa?

Suara A: Dalam pukul … awal sikit boleh tak?

Suara B: Saya masuk … kami masuk masuk 12:00

Suara A: Pukul 12:00 eh … tu nak jumpa kat mana?

Suara B: Ni … dalam 11:30 ah 11:45

Suara A: Haa OK …

Suara B: Naaa

Suara A: Jumpa depan (kurang jelas) hospital saya pi ambil

Suara B: Haa

Suara A: Saya nak masuk kerja saya pi ambil terus

Suara B: Haa OK. OK.

Suara A: Depan hospital naa

Suara B: Depan hospital Kepala Batas

Suara A: Hah … hah ada la (kurang jelas) stesen bas depan tu … tunggu di situ ar

Suara B: Haa OK, OK, OK, OK

Suara A: Naik apa … naik apa satni?

Suara B: Naik moto

Suara A: Hah … hah tunggu situ saya sampai naik kereta satni

Suara B: Haaa OK, OK, OK

Suara A: Haa 11:45 lagu tu aa

Suara B: Orait

Suara A: Baik … Baik

Suara B: OK terima kasih bang

Suara A: Sama baik"

[13] After the prosecution closes, the learned Sessions Court Judge finds that the prosecution has failed to prove a *prima facie* case against the accused and had acquitted and discharged the accused without his defence being called. On appeal by the prosecution, the High Court allowed the appeal by the prosecution and reversed the decision of the learned Sessions Court Judge. The accused was ordered to enter his defence. In his defence, the accused elected to give evidence under oath.

The defence's case

[14] In his defence, the accused (SD1) gave evidence that in the year 2012, he was attached to the Central Lock-Up at IPD Seberang Perai Utara. While on duty a day before he was arrested, he met one of the detainees at the lock-up named Saiful Al Amin ("Saiful") and had a chat. Saiful had asked the accused to get him roti canai. Saiful had also asked the accused to allow him to speak to his father and with the accused's help, Saiful managed to call his father from the lock-up. The accused had given Saiful a cell phone for him to call his father. After briefly talking to his father on the cell phone, Saiful handed it to the accused and the accused talk to Saiful's father. According to the accused, in the telephone conversation between the accused and Saiful's father, Saiful's father had requested the accused to deliver roti canai and cigarettes to Saiful in the lock-up.

[15] On the date in question, the accused was on duty for the 12:00 midnight to 8:00 am shift. Later, the accused received a call from Saiful's father. In the telephone conversation, Saiful's father asked the accused to pick up the roti canai and cigarettes from him at a bus stop near Hospital Kepala Batas. The accused later took his car and went to meet up with Saiful's father at the appointed place.

[16] According to the accused, upon arrival at the bus stop a male Malay came over to his car and gave him the roti canai and cigarettes in a package. There was also money together with the roti canai and cigarettes but according to the accused, he did not know how much it was at that time. As he was making his way back, suddenly his car was blocked by another car. A group of men got out of that car and introduced themselves as officers from the Malaysian Anti-Corruption Commission. The officers seized the package given by Saiful's father and the accused was arrested. According to the accused, it is not his duty to bring the roti canai and cigarettes to the detainee. It is also not

part of police work. The accused added that a disciplinary action could be taken against him by his superiors if he got caught. The accused maintained that the act is a disciplinary offence but it bears no relation to police work.

[17] At the end of the defence's case, the learned Sessions Court Judge again acquitted and discharged the accused after finding that the prosecution has failed to prove its case beyond reasonable doubt because the prosecution has failed to prove that the delivery of roti canai and 20s pack of cigarettes to the detainee in the Central Lock-Up IPD Seberang Perai Utara is not an act in relation to the affairs of the accused's principal.

The decision of the trial court

[18] In acquitting and discharging the accused at the end of the defence case, the learned Sessions Court Judge made a maximum evaluation of the totality evidence presented by the prosecution and finds that the prosecution has failed to prove its case against the accused beyond reasonable doubt. The learned Sessions Court Judge made a finding that the act of taking roti canai and cigarettes by the accused to PW1 who was detained in the lock-up is not related to the affairs of the accused's principal. The learned Sessions Court Judge also made a finding that the accused was a truthful witness and gave evidence that he received the RM200.00 from PW6 to deliver the roti canai and cigarettes by the accused to PW1 who was detained in the lockup.

[19] The learned Sessions Court Judge further made a finding that the presumption under section 19(1)*(d)* of the Malaysian Anti Corruption Commission Act 2009 has the effect of restricting the accused's defence. As such, its use by the prosecution has, in effect, destroyed the defence's case and the accused lost the opportunity to reconstruct his defence on a new footing. The learned Sessions Court Judge hasten

to add that he was not making a declaration that section 19(1)*(d)* of the Malaysian Anti Corruption Commission Act 2009 is unconstitutional but that the accused's defence was effectively rebutted by section 19(1)*(d)* of the Malaysian Anti-Corruption Commission Act 2009.

The deliberation

The prosecution's arguments

[20] The prosecution contends that since the High Court has reversed the decision of the learned Sessions Court Judge at the end of the prosecution's case and ordered the accused to enter his defence, it is impliedly understood to mean that the High Court found that the prosecution has succeeded in proving a *prima facie* case against the accused. It follows that where a *prima facie* case has been proved against the accused, the rebuttable presumption under section 50(1) of the Malaysian Anti-Corruption Commission Act 2009 applies unless the contrary is proved, namely that the gratification has been corruptly obtained as an inducement or a reward for the matters set out in the charge. The learned Deputy Public Prosecutor refers to the decision of the Privy Council in the case of *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89 PC; [1968] 1 LNS 115 which was based on the repealed Prevention of Corruption Act 1961whereby it was observed as follows:

> "Where a defendant is charged with an offence under section 4*(a)* of the Prevention of Corruption Act 1961, to which section 14 also applied, the onus lies upon the prosecution to prove the first two factual ingredients of the offence viz. (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift or receipt he was in the employment of a public body. Upon proof of these two ingredients the existence of the third ingredient, viz. (3) that the gratification was paid or given or received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs of

that public body, is to be presumed "unless the contrary is proved".

[21] The learned Deputy Public Prosecutor contends that once the statutory rebuttable presumption under section 50(1) of the Malaysian Anti-Corruption Commission Act 2009 applies, the onus is on the accused to rebut the presumption of a balance of probabilities that he did not obtained the gratification corruptly as decided in the case of *Thavanathan a/l Balasubramaniam v. PP* [1997] 3 CLJ 150; [1997] 2 MLJ 401 SC; [1997] 3 AMR 2289. The learned Deputy Public Prosecutor further contends that the explanation given by the accused must be one which is reasonably sufficient to invite belief in its probable truth to rebut the presumption under section 50(1) of the Malaysian AntiCorruption Commission Act 2009 as decided in the case of *Attan Bin Abdul Ghani v. PP* [1969] 1 LNS 12; [1970] 2 MLJ 143 in the words of His Lordship Sharma J. (as he then was) as follows:

> "The presumption cannot be said to have been rebutted without sufficient evidence, *i.e.* such evidence as is reasonably sufficient to invite belief in its probable truthfulness.".

[22] The learned Deputy Public Prosecutor submits that the accused's defence has in fact bolstered the prosecution's case and that the learned Sessions Court Judge had erred when he finds that the prosecution has failed to prove its case beyond reasonable doubt in light of such a defence put forth by the accused. The fact that the accused received RM200.00 from PW6 to deliver roti canai and cigarettes to PW6's son (PW1) who was detained at the Central Lock-Up IPD Seberang Perai Utara is in not dispute by the defence.

[23] The crux of the defence is that the act of taking roti canai and cigarettes to PW1 who at the time was detained at the Central Lock-Up IPD Seberang Perai Utara is not part of police duties and as such it cannot be an act in relation to his principal's affairs. This line of

defence when viewed in light of the burden cast upon the defence to offer an explanation which is "reasonably sufficient to invite belief in its probable truthfulness" as *per Attan Bin Abdul Ghani (supra)* and the factual matrix of the prosecution's case including the receipt by the accused of the RM200.00 marked notes is not capable to rebut the presumption under section 50(1) of the Malaysian Anti-Corruption Commission Act 2009. The learned Deputy Public Prosecutor contends that the defence is bare denial at best and there is no evidence to support the accused's denial.

[24] The learned Deputy Public Prosecutor further argues that it is clear that the accused had corruptly obtained the RM200.00 from PW6. The accused in cross-examination said-

> "Ya, saya ambil roti canai dan rokok.
>
> Ya, roti canai dan rokok adalah untuk Saiful.
>
> Ya, kalau SPRM tidak tangkap saya, rokok dan roti canai saya akan serah kepada Saiful.",

and this is evidence of the intention of the accused to perpetuate the forbidden act. The learned Deputy Public Prosecutor refers to the case of *PP v. Datuk Haji Harun Bin Haji Idris (No. 2)* [1977] 1 MLJ 15; [1976] 1 LNS 184 whereby His Royal Highness, the late Raja Azlan Shah FJ (as he then was) observed-

> "Corrupt" means "doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions." (see *Lim Kheng Kooi v. Reg* [1957] MLJ 199); "purposely doing an act which the law forbids" (see *R v. Smith* [1960] 1 All ER 256). "Corrupt" is a question of intention. If the circumstances show that what a person has done or has omitted to do was moved by an evil intention or a guilty mind, then he is liable under the

section. Thus if the accused used his position to solicit gratification with a guilty mind, he is caught within the *ambit* of the section.".

[25] The learned Deputy Public Prosecutor submits that the accused has failed to rebut the presumption of corruptly received gratification under section 50(1) of the Malaysian Anti-Corruption Commission Act 2009 as the act of taking the roti canai and cigarettes to PW1 in the lock-up are clearly against the Lock-Up Rules 1953 as confirmed by PW9 in evidence. It is also an incontrovertible fact that when a person is detained in a lock-up, his movements and liberty are restricted including the food which he may take being the subject of regulation by the authority in charge of the lock-up. When the accused attempted to bring in the roti canai and cigarettes illegally and secures a monetary benefit for doing it, that is clearly a wrongful act which could not, on any account, be taken as being capable to rebut the presumption section 50(1) of the Malaysian Anti-Corruption Commission Act 2009.

[26] The learned Deputy Public Prosecutor further argues that the learned Sessions Court Judge ought not to have made the same findings at the close of the case for the defence as that which he has made at the end of the prosecution's case when his decision at the end of the prosecution's case has been reversed by the High Court on appeal. The effect would be that the learned Sessions Court had acquitted and discharged the accused at the close of the case for the defence on the same exact reasons he did so at the end of the prosecution's case. In the case of *Saad Abas & Anor v. PP* [1998] 4 CLJ 575; [1999] 1 MLJ 129 CA is instructive of the role of the Sessions Court Judge in such a situation whereby the Court of Appeal observed as follows:

"Similarly, when a High Court judge rules at the end of an appeal by the prosecutor in a case where the accused has been acquitted at the end of the prosecution case that the accused must enter his

> defence, it is as good as saying that the Sessions Court Judge himself has decided to call for the defence assuming that he has analysed the case in the way that the High Court Judge has done."

[27] The learned Deputy Public Prosecutor also refers to the decision of the Court of Appeal in the case of *Manimaran a/l Amas v. Public Prosecutor* [2014] 1 LNS 1412; [2015] 1 MLJ 18 CA whereby Her Ladyship Tengku Maimun Binti Tuan Mat JCA, speaking for the Court of Appeal, made the following observations:

> "In the instant appeal, since all the appellants were called upon by the Court of Appeal to enter on their defence, it must necessarily mean that the Court of Appeal was satisfied that the prosecution had proved all the ingredients of the charge, including the element of common intention, before concluding that a *prima facie* case had been made out by the prosecution. There was therefore no necessity for us to revisit the issues on whether a *prima facie* case had been made out. What we need to consider was whether the evidence from the defence had cast a reasonable doubt on the prosecution's case.",

and contends that the learned Sessions Court Judge should not have continued to rely to his earlier findings at the end of the prosecution's case since the High Court was satisfied that the prosecution has succeeded in establishing a *prima facie* case against the accused. What the learned Sessions Court Judge should indulge in at the defence stage is to consider whether the accused has succeeded in rebutting the presumption on a balance of probabilities.

[28] It was also argued by the learned Deputy Public Prosecutor that the learned Sessions Court Judge erred in fact when he finds that the act of taking the roti canai and cigarettes to PW1 who was detained in the lock-up is not an act in relation to the accused principals' affairs by considering the evidence of PW2, the Head of Administration

Division at IPD Seberang Perai Utara. The learned Deputy Public Prosecutor compares PW1's evidence with that of the accused himself who agreed in cross-examination that he is responsible to supervise movements of food in the lock-up. The accused in various parts of the cross-examination said-

> "Ya, saya bertanggungjawab mengawal selia keluar masuk makanan.
>
> Ya, pergerakan keluar masuk makanan adalah diselia di bawah Kaedah-Kaedah Lokap.
>
> Ya, berpandukan Kaedah-Kaedah ini, makanan tidak boleh sesuka hati dibawa masuk ke lokap.
>
> Ya, saya bertanggungjawab untuk mematuhi kehendakkehendak lokap.
>
> Ya, Kaedah-Kaedah ini terpakai untuk keluar masuk makanan di dalam lokap.
>
> Ya, saya bertanggungjawab untuk mengikuti Kaedah-Kaedah ini.".

[29] It is the submission of the learned Deputy Public Prosecutor that the evidence is clear that the act of taking the roti canai and cigarettes relate to the accused principal's affairs and that the accused had the authority to supervise them. Based on Rule 3(1) of the Lock-Up Rules 1953, the supervision and general administration of lock-ups and its security by police officers in charge of the lock-ups or placed at the lock-ups are vested in the Chief Police Officer. Rules 15, 16 and 17 of the Lock-Up Rules 1953 are further evidence of the fact that food shall not be freely supplied to detainees.

[30] The learned Deputy Public Prosecutor contends that the learned Sessions Court Judge fell into error when he made a finding that section 19(1)*(d)* of the Malaysian Anti-Corruption Commission Act 2009 has the effect of restricting the accused's defence and his finding that that provision cannot be so used for the reasons aforesaid runs contrary to the very intent and purpose of section 19(1)*(d)*. The learned Deputy Public Prosecutor refers to the decision of His Lordship Abdul Wahab Patail J. (as he then was) whereby the use of presumption in corruption cases under the then Prevention of Corruption Act 1961 was discussed. The High Court in that case observed that use of the presumption is not at the discretion of the trial judge and that the court could not change the meaning of clear and unambiguous provisions of the law. His Lordship Abdul Wahab Patail J. (as he then was) said-

> "The first rule of interpretation is to apply the literal or the plain meaning of the words used as best conveying the intention of Parliament, and where the language of the Act is clear and explicit, the courts must give effect to it. This principle is well established: see *Salomon v. Salomon* [1897] AC 22, 38; *Sutters v. Briggs* [1922] 1 AC 1, 8.".

The defence's arguments

[31] The learned defence counsel contends that the act of taking the roti canai and cigarettes to PW1 in the lock-up is not an act in relation to the accused principal's affairs and as such it cannot be an offence under section 17*(a)* of the Malaysian Anti Corruption Commissions Act 2009. It is also the crux of the defence's case that for the same reason, section 50(1)*(d)* of the Malaysian Anti-Corruption Commissions Act 2009 do not apply.

[32] According to the learned defence counsel, the act of taking the roti canai and cigarettes to PW1 in the lock-up will only subject the accused to disciplinary proceedings but not an offence of corruption as

contemplated by the Malaysian Anti-Corruption Commissions Act 2009. The learned defence counsel reasoned that it is not the duty of police personnel to give "extra goodies" to prisoners in the lock-up and if they do, they would only be put on inquiry in an orderly room in accordance with police procedures.

[33] The learned defence counsel relied heavily of the evidence of PW2, the Head of Administration Division at IPD Seberang Perai Utara, who said in evidence that such an act is not an act in relation to the accused principal's affairs. The learned defence counsel also relied on the evidence of PW1 and his father, PW6, who said that the RM200.00 was meant as an *"upah"* for the accused to bring the roti canai and cigarettes to PW1 who was detained in the lock-up and that by the analogy that the act of taking the roti canai and cigarettes to PW1 in the lock-up is not an act in relation to the accused principal's affairs, the payment of RM200.00 "upah" could not amount to corruption.

[34] The learned defence counsel also questions the credibility of PW9's evidence being in direct contrast to that of PW2 when PW9 said in evidence that no one is allowed to bring in any food or drinks into the lock-up because it contravenes the lock-up rules. PW2 is a much superior officer compared to PW9 who is a rankand-file and as such, PW2's evidence should hold better credit as far as the determination of what are the affairs of the accused's principal is concerned.

[35] The learned defence counsel submits that the presumption under section 50(1) of the Malaysian Anti-Corruption Commission Act 2009 is a rebuttable presumption and that the burden on the accused to rebut the presumption is only on the balance of probabilities. The learned defence counsel refers to the case of *Nagappan a/l Kuppusamy v. Public Prosecutor* [1988] 2 MLJ 53 SC; [1988] 1 CLJ 283 whereby it was observed that-

> "Where the burden is shifted to the defence by a statutory presumption, the test in *R v. Carr Briant* [1943] KB 607 and adopted in *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89 would be applied as applied in civil proceedings, namely, on the balance of probabilities.".

[36] According to the learned defence counsel, the prosecution need not prove that the act of the accused was done in relation to his principal's affairs because once the prosecution has proven that the accused received the money, which is not disputed in this case, the presumption under section 50(1) of the Malaysian Anti Corruption Commission Act 2009 applies.

[37] It is contended that the presumption under section 50(1) of the Malaysian Anti-Corruption Commission Act 2009 may be rebutted by the accused from the evidence adduced during the prosecution's case itself and this has been successfully done by the accused by means of the evidence of PW2. The learned defence counsel refers to the case of *PP v. Adetunji Adeleye Sule* [1993] 2 MLJ 70 SC; [1993] 3 CLJ 113; [1993] 1 AMR 991 whereby His Lordship Edgar Joseph Jr. SCJ (as he then was) observed that-

> "Lest we be accused of an oversight, we have not overlooked the principle that where a statutory presumption is raised against an accused person, so that the legal burden of proof is imposed on him, he may rebut this presumption either by adducing evidence during the case for the defence or by pointing to evidence in the case for the prosecution. What we have said in this judgment does not in any way, conflict with this principle and, indeed, is entirely consistent with it.".

[38] The learned defence counsel also contends that this burden to rebut the presumption is a light burden and can be discharged either during the prosecution's case or the defence's case. The learned

defence counsel refers to the case of *Public Prosecutor v. Mohamed Noor Jantan* [1979] 2 MLJ 80 FC as authority whereby it was held that-

> "It is a well settled rule of evidence as Azmi C.J. (Malaya) (as he then was) held in *Wong Chooi v. Public Prosecutor* [1967] 2 MLJ 180 that where a burden is placed on an accused person to prove anything, by statute or common law, the burden is only a slight one and this burden can be discharged by evidence of witnesses for the prosecution as well as witnesses for the defence.".

[39] The learned defence counsel contends that the rebuttal has been successfully brought about by the evidence of PW2 during the prosecution's case and that the accused should not have been called upon to enter his defence. The learned defence counsel relies on the case of *Woo Chin Chong & Ors. v. Public Prosecutor* [1956] MLJ 130; [1955] 1 LNS 171 whereby it was observed as follows:

> "In a case of this nature, where by doing an act a presumption under the Ordinance is raised against accused persons, if the prosecution have the evidence which rebuts that presumption in their possession to the knowledge of the accused persons, but do not use it, then I think it can be said that no presumption properly arises against the accused persons, as the prosecution have not brought out evidence in favour of the accused in their possession rebutting such presumption which they should have done.".

[40] The learned defence counsel also submits that section 19(1)*(d)*of the Malaysian Anti-Corruption Commission Act 2009 strikes directly at section 50(1). According to the learned defence counsel, section 19(1)*(d)* of the Malaysian Anti-Corruption Commission Act 2009 effectively prevents the accused from contending that the act was not one which relates to the affairs of the accused's principal whereas section 50(1) of the Malaysian Anti-Corruption Commission Act 2009 allows the accused to rebut the presumption under section 19(1)*(d)*. The

learned defence counsel contends that section 50(1) of the Malaysian AntiCorruption Commission Act 2009 conflicts with section 19(1)*(d)* and where there is a conflict, the court should adopt the provision which is more favourable to the accused. The learned defence counsel refers to the case of *Public Prosecutor v. Tan Tatt Eek & Other Appeals* [2005] 2 MLJ 685 FC; [2005] 1 CLJ 713; [2005] 2 AMR 353 whereby the Federal Court cited the decision in *Muhammed Bin Hassan v. Public Prosecutor* [1998] 2 MLJ 273 FC; [1998] 2 CLJ 170; [1998] 1 AMR 829 which held that-

> "Also, generally speaking, if the words in a statute admit of two interpretations, then they are not clear, and if one interpretation is more favourable to an accused than the other, the court will adopt the one more favourable to the accused.".

[41] It is the position taken by the learned defence counsel that section 50 of the Malaysian Anti-Corruption Commission Act 2009 prevails over section 19(1)*(d)* because the former which allows the presumption to be rebutted is more favourable to the accused compared to the latter.

[42] The learned defence counsel further echoes the findings of the learned Sessions Court Judge at the end of the defence case and took the view that section 19(1)*(d)*of the Malaysian Anti Corruption Commission Act 2009 is unconstitutional as it contravenes the fundamental right of the accused under Article 5(1) and 8(1) of the Federal Constitution because section 19(1)*(d)*of the Malaysian Anti-Corruption Commission Act 2009 denied the accused a fair trial. The learned defence counsel relies on the authority of *Gan Boon Aun v. PP* [2016] 4 MLJ 265 FC; [2016] 6 CLJ 647; [2016] 4 AMR 297.

Evaluation and decision

The principles

[43] In respect of the principles of appellate intervention, this court refers to the observation made by the Federal Court in the case of *Tan Kim Ho & Anor. v. Public Prosecutor* [2009] 3 MLJ 151 FC; [2009] 3 CLJ 236 remarked that-

> "It is an established principle of law that when dealing with finding of facts, the trial judge is more often than not, in a better position to decide. The appellate court must be reluctant to interfere with such findings, unless the facts obviously disclose the courts below had clearly and wrongly evaluated the facts.".

[44] The principles are clear. Where the decision of the trial court in acquitting and discharging the accused at the end of the prosecution's case is reversed by an appellate court, it is implicit that as a matter of law, the appellate court found that a *prima facie* case has in fact been proved by the prosecution. The only issue for the trial judge to consider is whether the explanation of the accused in his defence casts a doubt in the prosecution's case. (See: *Mohd Azam Raja Abdullah v. PP* [2015] MLJU 2128; [2015] 1 CLJ 1080 CA, *PP v. Abdul Rehman Abdul Hameed* [2016] MLJU 970 CA; [2017] 1 CLJ 317).

[45] In the case of *Balachandran v. Public Prosecutor* [2005] 2 MLJ 301 FC; [2005] 1 CLJ 85; [2005] 1 AMR 321, the Federal Court reiterated the position of the law in the following manner:

> "As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However, it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond

reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The *prima facie* evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt."

[46] At the end of the defence's case, it is trite that the duty of the accused is only to cast a reasonable doubt in the prosecution's case. There is no necessity for the accused to prove his innocence beyond reasonable doubt. (See: *Mohd Radhi Bin Yaakob v. PP* [1991] 3 MLJ 169 FC; [1991] 1 CLJ (Rep) 311). And in the case of *Tan Kim Ho & Anor. (supra)*, the Federal Court observed as follows:

"In our adversarial system of justice, the duty of each party is to show that his case is the truth. This is done by him adducing his own witnesses to support his contention. When it is the plaintiff or prosecutor who is adducing the evidence, his witnesses are subject to cross-examination by the defence or the accused person. When a prosecution witness makes a statement of fact which is disagreed to by the defence it becomes the defence's duty to, in whatever way, put to the plaintiff or prosecution witness that what the witness has said is not true. In addition, he

could also use the plaintiff's or prosecution's witnesses to adduce evidence to support his defence and to indicate what his defence is. This he is required to do to enable the plaintiff or prosecution to bring out evidence to disprove what the defence intends to adduce. If the defence does not in any way indicate by cross examination of those facts, those statements made by the plaintiff's or prosecution's witnesses must be accepted as true. Even if the plaintiff's or prosecution's witness does not say anything relating to the defence case, it is still the duty of the defence to bring out his case during the plaintiff's or prosecution's case. In fact, this duty to disclose his defence during the prosecution's case is more relevant in criminal cases than in civil. This is particularly so when the plaintiff or prosecution's witness is relevant to the fact in issue. In criminal cases, the prosecution does not know what the defence is going to be, except in alibi, until the defence adduces its evidence."

Assessment of the defence

[47] In evaluating the case for the defence, I am of the view that the accused cannot be said to be merely accepting the RM200.00 from the detainee's father (PW6) on the date as stated in the charge as a token of goodwill or *"upah"* for taking roti canai and a pack of 20s cigarettes to the detainee in the Central Lock-Up IPD Seberang Perai Utara as there was evidence of his active involvement in-

(a) seeking to establish contact with the detainee's father (PW6);

(b) making a demand from detainee's father (PW6) for the sum of RM200.00;

(c) insisting on payment of the sum of RM200.00 by agreeing to meet with the detainee's father (PW6) the following night

for PW6 to deliver the RM200.00 to the accused after PW6 said that he do not have money when PW6 first talked to the accused on the cell phone and PW6 asked for time to deliver the money to the accused; and

(d) telling PW6 to wait for him because he had clocked in for duty that night and needed to get time-out permission from his superior officers before he can go out.

[48] In considering the totality of the accused's defence, I am of the considered view that such active involvement perpetrated by the accused towards the commission of the offence coupled with the fact that the accused had took it upon himself to go out to an area near a bus stop in front of Hospital Kepala Batas effectively and conclusively negates the underlying defence of the accused that he had received the RM200.00 merely as a token of goodwill or *"upah"*, as he put it, for taking roti canai and a pack of 20s cigarettes to the detainee in Central Lock-Up at IPD Seberang Perai Utara.

[49] I hold the considered view that an act of merely accepting a token of goodwill or *"upah"* as suggested by the accused in his defence may be said to have taken place where the accused is not involved in any overt act or active participation in relation to the act of accepting of the token of goodwill or *"upah"*. This however, is not a finding that an act of accepting a token of goodwill or *"upah"* by an accused is an acceptable defence for a charge under section 17*(a)* of the Malaysian Anti-Corruption Commission Act 2009. As a matter of fact, the word *"upah"* itself strongly suggests and closely relates to gratification. In Kamus Dewan Edisi Keempat, the word *"upah"* is defined as follows:

> "wang dan lain-lain yang diberikan kepada orang yang disuruh mengerjakan sesuatu, bayaran sebagai pembalas jasa, ganjaran untuk tenaga orang yang telah digunakan:

(a) bekerja dengan mendapat upah;

(b) menerima upah kerana mengerjakan sesuatu;

(c) menerima rasuah, makan suap; berupah (melakukan sesuatu) dengan mendapat upah, menerima upah, dengan upah:

mengupah menyuruh membuat sesuatu pekerjaan dengan membayar upah, menyuruh bekerja dengan memberi upah."

[50] The accused, by taking the line of defence which he did, would be out of reasonable explanation if his contention that the taking of roti canai and cigarettes are found to be in fact acts in relation to his principal's affairs. That is exactly the case. The accused is fried by his own defence.

"any act in relation to his principal's affairs or business"

[51] Whether or not the taking of roti canai and cigarettes to detainees by police personnel in charge of lock-up duties are part of police duties must be examined in relation to rules applicable to lock-ups. By no stretch of imagination can it be said that the act of taking roti canai and cigarettes are part of police duties in charge of lock-up security.

[52] Management of the lock-up and detainees detained in lockups are very much a regulated affair. The Lock-Up Rules 1953 is testament to this. In fact, the Lock-Up Rules 1953 specifically regulates the management of lock-ups including the giving of food and drinks to by detainees. There are no "tapau" or takeaways for detainees in lock-ups. This to my mind is the act in relation to the accused principal's affairs, namely in complying with the Lock-Up Rules 1953.

[53] With respect, I am also unable to agree with the arguments by the learned defence counsel that the act of taking of roti canai and cigarettes could not be an act in relation to the accused principal's

affairs simply because PW2, the Head of Administration Division at IPD Seberang Perai Utara, said in evidence that it is not. I hold the considered view that the evidence of PW2 is cross-examination as quoted by the learned defence counsel has been taken in isolation to the relevant facts of the case and deciphered out of its contextual meaning. I am of the view that what is meant by the evidence of PW2 that the taking of roti canai and cigarettes is not an act in relation to the accused principal's affairs is in relation to the act *per se*. It is not an issue that such an act is not in relation to the accused principal's affairs. It cannot be. But such an act is a direct contravention of the duties of the accused in complying with the Lock-Up Rules 1953 and that, without doubt, is in relation to the accused principal's affairs. This is clear from the evidence of PW2 in cross-examination when he said-

> "Ya, saya mahir dengan tugas-tugas dan urusan-urusan polis.
>
> Ya, bukan tugas polis untuk ambil roti canai dan beri kepada tahanan.
>
> Ya, ia tidak berkaitan dengan urusan polis."

[54] In fact, this is the only evidence which the learned defence counsel elicited from PW2 in his cross-examination as distinguished from the evidence of PW9, the Supervisor for LockUp Sentry at the Central Lock-Up IPD Seberang Perai Utara, who said in examination in-chief that-

> "Mengikut peraturan, sesiapa pun tidak boleh bawa makanan atau minuman di dalam lokap. Ini peraturan lokap.".

[55] PW9 was not cross-examined at all by the learned defence counsel. It is incumbent upon the defence to challenge this piece of evidence if it is intended to form part of the defence and as decided by the Federal Court in the case of *Wong Swee Chin v. Public Prosecutor*

[1981] 1 MLJ 212 FC; [1980] 1 LNS 138, failure to cross-examine a witness on a crucial part of the case amounts to acceptance of the witness' testimony.

[56] Even if the arguments postulated by the learned defence counsel were to be taken as correct, the learned defence counsel himself suggested that a breach of the Lock-Up Rules 1953 would only result in a disciplinary action being taken by the police. Why then would a disciplinary action be taken against police personnel for taking roti canai and cigarettes to detainees in the lock-up? Would it not be because it is an act which is prohibited and in direct contravention of duties of police personnel in charge of lockup duties? With respect, the answer is obvious and the same goes with the arguments advanced by the learned defence counsel.

The presumption

[57] The presumption under section 50(1) of the Malaysian Anti-Corruption Commission Act 2009 may be invoked where it is established that money has been given or received by the accused. This position has been clearly illustrated by the then Supreme Court in the case of *PP v. Thavanathan a/l Balasubramaniam (supra)* which was decided based on the equivalent section 14 of the then Prevention of Corruption Act 1961. On the other hand, section 19(1)*(d)* of the Malaysian Anti Corruption Commission Act 2009. This is a presumption that the gratification was corruptly received or obtained where it is proved the gratification has been received or obtained by the accused. The accused is entitled to rebut this presumption by proving otherwise, namely that the gratification was not received or obtained corruptly.

[58] If the accused fails to rebut the presumption under section 50(1) of the Malaysian Anti-Corruption Commission Act 2009, then section 19(1)*(d)* of the Malaysian Anti-Corruption Commission Act 2009 will

be invoked, namely that the accused will be presumed to have committed the offence notwithstanding that the act was not in relation to his principals' affairs or business.

[59] This to my mind, is the effect of section 19(1)*(d)* of the Malaysian Anti-Corruption Commission Act 2009. Section 19(1)*(d)* of the Malaysian Anti-Corruption Commission Act 2009 is an added armoury of the Malaysian Anti-Corruption Commission in its effort to effectively combat corruption and its menacing effects on society which has been passed by Parliament. In a charge under section 17*(a)* of the Malaysian Anti-Corruption Commission Act 2009, the accused should in the first instance rebut the presumption of corruptly receiving of obtaining the gratification under section 50(1) of the Malaysian Anti-Corruption Commission Act 2009 by adducing evidence to show that that he did not obtain the gratification corruptly or any explanation which is "reasonably sufficient to invite belief in its probable truthfulness".

[60] The accused in the present appeal did not do so but chose to adopt a different line of defence, namely that the accused did receive the RM200.00 as *"upah"* to bring roti canai and cigarettes to PW1 who was detained in the lock-up effectively confirming instead of rebutting the presumption under section 50(1) of the Malaysian Anti-Corruption Commission Act 2009. This is my considered view has led to the defence being caught under section 19(1)*(d)* of the Malaysian Anti-Corruption Commission Act 2009. With respect, I am of the considered view that the learned Sessions Court Judge did not carve out the correct interpretation of the law as far as the statutory presumption under section 19(1)*(d)* of the Malaysian Anti-Corruption Commission Act 2009 is concerned. Thus, in respect of the presumptions under section 50(1) and section 19(1)*(d)* of the Malaysian Anti-Corruption Commission Act 2009, I am of the considered view that there is no merit in the defence's contention.

[61] This court is entitled to presume the constitutionality of Section 19(1)*(d)* of the Malaysian Anti-Corruption Commission Act 2009 as reiterated by the Federal Court in the case of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 3 MLJ 72 FC; [2002] 4 CLJ 105; [2002] 3 AMR 2817 whereby the Federal Court remarked that-

> "It should be borne in mind that there is a strong presumption of the constitutional validity of an enactment or the impugned section with the burden of proof on whoever alleges otherwise. (*Public Prosecutor v. Datuk Harun bin Haji Idris & Ors*. [1976] 2 MLJ 116 at p. 117; *PP v. Su Liang Yu* [1976] 2 MLJ 128).".

[62] If the learned defence counsel is minded to challenge the constitutionality of Section 19(1)*(d)* of the Malaysian AntiCorruption Commission Act 2009, he should make an application to the Sessions Court to refer the question of constitutional issue to the High Court under section 30 of the Courts of Judicature Act 1964. Once this question is so referred by the Sessions Court to the High Court, the High Court will then consider and determine whether there is a question on constitutional issue necessary for the determination of the Sessions Court in proceedings pending before it. If there is, the High Court must, in the form of a special case and transmit to the Federal Court under section 84 of the Courts of Judicature Act 1964, state the question which will permit an affirmative of negative answer which in the opinion of the High Court had arisen touching the constitutional issue. If the High Court considers that there is no such question on constitutional issue, the case will be sent back to the Sessions Court for continued hearing. This is the position as illustrated by the Federal Court in the case of *Gan Boon Aun (supra)*. In the present appeal, there is no such application being made by the learned defence counsel to the Sessions Court, neither is there any such reference by being made by the Sessions Court.

Decision

[63] It is useful to remind myself of the guidelines propounded by the Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 whereby it was observed as follows:

> "For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case-
>
> (i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
>
> (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "No" then, a *prima facie* case has not been made out and the accused should be acquitted;
>
> (iii) after the defence is called, the accused elects to remain silent, then convict;
>
> (iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. Public Prosecutor [1963] 1 LNS 82*; [1963] MLJ 263.".

[64] And in *Mat v. PP* [1963] 1 LNS 82, His Lordship Suffian J. (later LP) left a plain but yet very useful guide in the following terms:

"The position may be conveniently stated as follows:

(a) If you are satisfied beyond reasonable doubt as to the accused's guilt ..... Convict.

(b) If you accept or believe the accused's explanation.. Acquit.

(c) If you do not accept or believe the accused's explanation..

Do not convict but consider the next steps below.

(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt..... Convict

(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt.. Acquit.".

[65] Having scrutinised the evidence led by the defence, I am of the view that the findings made by the learned Sessions Court Judge in acquitting and dismissing the accused at the end of the prosecution's case is against the weight of evidence and the clear words of section 19(1)*(d)* of the Malaysian Anti-Corruption Commission Act 2009. Upon a maximum evaluation of the evidence of the prosecution, I am of the view that there is overwhelming evidence of the commission of an offence by the accused under section 17*(a)* of the Malaysian Anti-Corruption Commission Act 2009 and that the accused has failed to raise a reasonable doubt in the prosecution's case.

Pronouncement

[66] Based on the reasons discussed, I allow the appeal by the prosecution and the acquittal and discharge of the accused is hereby set aside and substituted with a conviction under section 17*(a)* of the Malaysian Anti-Corruption Commission Act 2009.

Sentence

[67] I have considered the mitigating factors advanced by the learned counsel and the aggravating factors submitted by the learned prosecutor. Taking into consideration these factors, the sentence passed by this court manifests its stance against the prevalence of corruption and its disruptive effects and the balance this court has to strike based on the mitigating factors so advanced by the learned counsel. The accused is hereby sentenced to 18 months imprisonment and RM10,000.00 fine in default 3 months' imprisonment.

Dated: 20 NOVEMBER 2017

(AHMAD SHAHRIR MOHD SALLEH)
JUDICIAL COMMISSIONER
HIGH COURT PENANG

Counsel:

For the appellant - DPP Ahmad Ghazali Muhamad Nadzri; Malaysian Anti-Corruption Commision

For the respondent - Ang Chun Pun; M/s C P Ang & Company