

**MALAYSIA**

**IN THE HIGH COURT IN SABAH AND SARAWAK AT SIBU**

**[CRIMINAL APPEAL NO: SBW-42S(A)-1/2-2016]**

**BETWEEN**

**MOHAMAD NAZRI DAHERI**

**... APPELLANT**

**AND**

**PUBLIC PROSECUTOR**

**... RESPONDENT**

**(IN THE MATTER OF SIBU SESSIONS COURT CRIMINAL CASE  
NO.: SBW-61R-3/8-2015)**

***CRIMINAL LAW: Corruption - Corruptly accepting gratification - Accepting gratification for purpose of giving protection to offenders of illegal timber logging - Offence under s. 17(a) of Malaysian Anti-Corruption Commission Act 2009 ('MACC 2009') - Action and movement of accused clearly recorded audio-visually - Whether ingredients of s. 17(a) of MACC 2009 proven - Whether presumption under s. 15(1) of MACC 2009 applicable - Whether presumption under s. 15(1) of MACC 2009 rebutted***

***CRIMINAL PROCEDURE: Appeal - Appeal against sentence - Offence under s. 17(a) of Malaysian Anti-Corruption Commission Act 2009 ('MACC 2009') - Imprisonment imposed only for a period of 3 years and 10 months for 3 charges to run consecutively from date of conviction - Whether imposition of fine and imprisonment is mandatory pursuant to s. 24 of MACC 2009 - Whether sentence imposed was manifestly excessive***

**[Appellant's appeal dismissed.]**

**Case(s) referred to:**

*Attan bin Abdul Gani v. Public Prosecutor* [1970] 2 MLJ 143 (*refd*)

*D.A Duncan v. PP* [1980] 2 MLJ 195 FC (*refd*)

*Hamidon bin Mat Yatim v. PP* [1995] 3 CLJ 724 (*refd*)

*Mohamed Mokhtar v. PP* [1972] 1 MLJ 122 (*refd*)

*PP v. Dato' Waad Mansor* [2005] 1 CLJ 421 FC (*refd*)

*PP v. Datuk Haji Harun Bin Idris (No. 2)* [1977] 1 MLJ 15 (*refd*)

*PP v. Jamil Bin Mahmud & Anor* [1998] 4 MLJ 681 (*refd*)

*PP v. Sally Chan Kit Tong* [1991] 1 CLJ Rep 396 (*refd*)

*PP v. You Kong Lai* [1985] 1 MLJ 298 (*foll*)

*PP v. Yuvaraj* [1969] 2 MLJ 89 (*refd*)

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

*Shamim Reza bin Abdul Samad v. PP* [2009] 2 MLJ 506 (*foll*)

*Thavanathan a/l Balasubramaniam v. Public Prosecutor* [1997] 2 MLJ 401 SC (*foll*)

**Legislation referred to:**

Malaysian Anti-Corruption Commission Act 2009, ss. 3, 17(a), 24(1), 50(1), 57

Prevention of Corruption Act 1961, s. 4(a)

**GROUNDS OF DECISION**

**INTRODUCTION**

[1] This is an appeal by the Appellant against the decision of conviction and sentence at the end of the defence case by the

Learned Sessions Court Judge in Sibu, Sarawak (“the learned trial judge”) for the following three amended charges under section 17(a) of the Malaysian Anti-Corruption Commission Act 2009 (“MACC Act 2009”).

## **THE AMENDED CHARGES**

### **The First Amended Charge**

- [2] “That you on 24 August 2014, at about 3.40 p.m., at Restaurant Tekam Cafe, Kapit, in the Kapit Division, in the State of Sarawak, as an agent of Government of Malaysia, to wit, Police Inspector attached to Jabatan Siasatan Jenayah Kapit, Ibu Pejabat Polis Daerah Kapit, did corruptly accepts for yourself a gratification, to wit, cash money of RM3,000.00, from one, Stephen Kon, as an inducement for you to do an act in relation to your principal’s affair, to wit, to give protection on illegal logging happened at Sungai Sut, Kapit and that you have thereby committed an offence under Section 17(a) of the Malaysian Anti-Corruption Commission Act 2009 and punishable under Section 24(1) of the same Act.”

### **The Second Amended Charge**

- [3] “That you on 11 September 2014, at about 11.58 a.m., at the Maybank of Tabuan Jaya branch, 93350 Kuching, in the District of Kuching, in the Kuching Division, in the State of Sarawak, as an agent of Government of Malaysia, to wit, Police Inspector attached to Jabatan Siasatan Jenayah Kapit, Ibu Pejabat Polis Daerah Kapit, did corruptly accepts for yourself a gratification, to wit, cash money of RM5,000.00, from one, Stephen Kon, as an inducement for you to do an act in relation to your principal’s affair, to wit, to give protection on illegal logging

happened at Sungai Sut, Kapit and that you have thereby committed an offence under Section 17(a) of the Malaysian Anti- Corruption Commission Act 2009 and punishable under Section 24(1) of the same Act.”

### **The Third Amended Charge**

**[4]** “That you on 20 October 2014, at about 10.25 a.m., at the River Front Café Restaurant, Kingwood Hotel, 96008 Sibu, in the District of Sibu, in the Sibu Division, in the State of Sarawak, as an agent of Government of Malaysia, to wit, Police Inspector attached to Jabatan Siasatan Jenayah Kapit, Ibu Pejabat Polis Daerah Kapit, did corruptly accepts for yourself a gratification, to wit, cash money of RM8,000.00, from one, Stephen Kon, as an inducement for you to do an act in relation to your principal’s affair, to wit, to give protection on illegal logging happened at Sungai Sut, Kapit and that you have thereby committed an offence under Section 17(a) of the Malaysian Anti-Corruption Commission Act 2009 and punishable under Section 24(1) of the same Act.”

**[5]** The Appellant was found guilty of all three amended charges and sentenced as follows:

- (a) First Amended charge: 12 months’ imprisonment and fine of RM15,000.00 in default of 3 months’ imprisonment.
- (b) Second Amended charge: 14 months’ imprisonment and fine of RM25,000.00 in default of 5 months’ imprisonment. The imprisonment sentence to run consecutively from the 1<sup>st</sup> charge.
- (c) Third Amended charge: 20 months’ imprisonment and fine of RM40,000.00 in default of 8 months’ imprisonment.

The imprisonment sentence to run consecutively from the 1<sup>st</sup> amended charge and 2<sup>nd</sup> amended charge.

## **PETITION OF APPEAL**

- [6] In the Petition of Appeal filed by the Appellant, there are six grounds as against the conviction in respect of the above three amended charges. As against sentence, there are three grounds.

### **WHETHER THE LEARNED TRIAL JUDGE ERRED IN LAW AND FACT WHEN HE HELD THAT THE RESPONDENT HAS PROVED THE INGREDIENTS UNDER SECTION 17(A) MACC ACT 2009 AND THE PRESUMPTION IS TRIGGERED AGAINST THE APPELLANT?**

- [7] Section 17(a) MACC Act 2009 dealt with an offence committed by an agent and Section 3 MACC Act 2009 defines the word “agent”. In the present appeal, the Appellant is a government servant. Since December 2005, he is an officer of Polis Di-Raja Malaysia and the Appellant’s service record (Exhibit P27 (2)) which was kept by PW2, DSP Nur Ashyikin Bt Abdullah who is in charge of the police personnel service records and human resource of IPK Sarawak testified that the Appellant was a police personnel at the material times, that is on the 24<sup>th</sup> August 2014, 11<sup>th</sup> September 2014 and 20<sup>th</sup> October 2014 as per the 3 amended charges.
- [8] The Privy Council in the case of *PP v. Yuvaraj* [1969] 2 MLJ 89 at pages 90-91 held *inter alia* 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”.*

(Emphasis is mine)

[9] Section 4(a) Prevention of Corruption Act 1961 is in *pari materia* with section 17(a) MACC Act 2009. To prove the said three amended charges under section 17(a) MACC Act 2009 against the Appellant, the Respondent needed to prove the following ingredients:-

- (i) The Appellant had accepted gratification; (First Ingredient)
- (ii) At the time the gratification obtained, the Appellant was an agent i.e. an officer of PDRM; (Second Ingredient)
- (iii) Upon proof of these two above ingredients, then the third ingredient arise, that is the gratification was accepted by the Appellant corruptly as an inducement for forbearing to do an act in relation to his principal’s affairs, to wit, for giving protection to PW1, who was allegedly has committed an offence of illegal timber logging activities at Sungai Sut, Kapit. Thus the Appellant shall be presumed that he has accepted the gratification corruptly as stated under section 50(1) MACC Act 2009 unless the contrary

proven in respect of the said three amended charges.  
(Third Ingredient)

## **FIRST INGREDIENT IN RESPECT OF THE THREE AMENDED CHARGES**

[10] (1) In so far as the First Ingredient is concerned, this Court finds that the Appellant had at 3.40pm on 24/8/2014, accepted RM3,000.00, a gratification ie, money from PW1 (as per the First Amended Charge), the Appellant had at 11.58am on 11/9/2014 accepted RM5,000.00, a gratification ie, money from PW1 through the Maybank account of Fitero Bin Rafi'ee (as per the Second amended Charge) and the Appellant had at 10.25am on 20/10/2014, accepted RM8,000.00 a gratification ie, money from PW1 (as per the Third amended Charge).

### **FIRST AMENDED CHARGE**

(2) On 24/8/2014, at 3pm, PW1 went together with PW3 to Tekam café, Kapit to meet the Appellant. The scene of the meeting is shown in the photograph (P3 (1-4)). PW1 and PW3 arrived at Tekam Café first and they were seated at the table whereby the position of PW1 is marked as "S", and the position of PW3 is marked as "D" as in photographs P3 (3 & 4).

(3) During the said meeting, the Appellant introduced himself as Assistant Superintendent of IPD Kapit (ASP Nazri), whereas PW1 disguised himself as "Jimmy", an illegal timber logger. The Appellant informed PW1 that he can give protection for the illegal timber logging activity carried out by PW1, but PW1 must pay the Appellant when there is extraction of timber by PW1 from Sungai Sut, Kapit. The Appellant then asked PW1 as follows, "Bagaimana dengan pembayarannya?" since PW1 wants

to “operate” at Sungai Sut, Kapit. PW1 replied that he can pay RM3,000.00 to the Appellant and the Appellant said “Ok”. PW1 then took out the RM3,000.00 and passed it to the Appellant over the table. PW1 then asked the Appellant to count the said money. The Appellant accepted the said money without any sign of rejection or refusal. The Appellant told PW1 not to worry because he will inform PW1 when and if there is any operation conducted by the police.

(4) PW3 witnessed and heard the above meeting between PW1 and the Appellant. The conversation which transpired between PW1 and the Appellant was recorded in audio-video recording device (P4). After that, PW7 handed the said audio-video recording device (P4) to PW1 for the purpose of recording inspection and the said audio-video recording device (P4) was kept by PW10 before it was handed to PW11 as an exhibit. The recording on the incident dated 24/8/2014 (P4) and the transcript (P5) showed clearly that there was a demand and acceptance of RM3,000.00 by the Appellant from PW1 in order to give protection for PW1’s illegal timber logging activities at Sungai Sut, Kapit. The transcript (P5) showed the solicitation of corrupt money by the Appellant and the protection given by the Appellant if PW1 carry out illegal timber logging activities at Sungai Sut, Kapit,

(5) The Appellant then left Tekam Café and then followed by PW1 and PW3. PW1 lodged a report relating to the incident at Tekam Café on 24/8/2014 which is marked as Borang Aduan SPRM No: 255/2014 dated 27/8/2014 (P6). On 9/9/2014, PW1 received several text messages from the handphone no: 0198196900 which was used by the Appellant. The said text messages from the Appellant to PW1 clearly showed that the



Appellant's corrupt mind to solicit money from PW1. The said text messages are shown in the Forensic Report (P7).

(6) The Forensic Report (P8) is the forensic analysis pertaining to the handphone no: 0198196900 which was used by the Appellant and the SIM card as well and they corroborated Exhibit P7 in that the same content of the text messages as abovesaid is shown in Lampiran 2.2, page 16-17 of P8.

### SECOND AMENDED CHARGE

(7) On 11/9/2014, PW1 informed his superior, Tuan Zacharias Kho about the solicitation of the Appellant *via* SMS dated 9/9/2014, who then asked PW10 to prepare RM5,000.00 as *per* Senarai Wang Bertanda (P10) and PW10 passed the RM5,000.00 to PW1. PW10 also recorded a tele-conversation between PW1 and the Appellant in order to confirm that there was indeed a solicitation of RM5,000 from the Appellant as shown in the said SMS. The said tele-conversation on 11/9/2014 between the Appellant and PW1 (P9) was recorded by PW10 and the content of the said conversation is reflected in the transcript (P9(1)). The transcript (P9(1)) clearly showed that the Appellant confirmed that Maybank Account no: 161097026746 under the name of Fitero bin Rafiee *via* SMS to PW1, is correct and asked PW1 to bank in RM5,000.00 into this bank account. PW1 told the Appellant that he will inform the Appellant *via* SMS after PW1 banked in RM5,000.00 into the said bank account.

(8) PW1 deposited RM5,000.00 into the said bank account immediately after the abovesaid telephone-conversation which was recorded by PW10. The proof of deposit of RM5,000.00 into the said bank account is stated in the Bank-in Slip (P11). There were several text messages between PW1 and the

Appellant after the deposit of the RM5,000.00 into the said bank account on 11/9/2014 as shown in the Forensic Report (P7) which is the forensic analysis of handphone no: 0146841617 and the SIM card which were used by PW1.

(9) PW1 then lodged another report pertaining to the deposit of RM5,000.00 into Maybank Account no: 161097026746 under the name of Fitero bin Rafiee as requested by the Appellant on 11/9/2014. The said report is Borang Aduan SPRM No: 279/2014 dated 12/9/2014 (P12).

(10) On 23/9/2014, PW1 received a text message from the Appellant, requesting him to call him urgently. The said text message is shown in lampiran C, page 15 of P7 and page 15 of P8. The telephone conversation between PW1 and the Appellant was recorded by PW11 and the content of the said conversation is reflected in the transcript (P13 (1)). The transcript (P13 (1)) clearly showed that the Appellant asked PW1 not to carry out any timber logging activities at Kapit because MACC has joint operation with Forestry department at Kapit by 24/9/2014.

(11) On 2/10/2014, PW1 received another text message from the Appellant requesting him call him urgently. The said text message is shown in lampiran C, at page 15 of P7. The telephone conversation between PW1 and the Appellant was recorded by PW10 and the content of the said conversation is reflected in the transcript (P14 (1)). The transcript (P14 (1)) clearly showed that the Appellant asked PW1 to find out whereabouts of PW3 since PW3 is untraceable by the Appellant. The Appellant would like to know whether PW3 has sold the timber which was extracted out from Sungai Sut, Kapit and the Appellant wanted his entitlement to the portion of payment if

the timber was sold by PW3 is agreed by both parties at Tekam Café on 24/8/14.

(12) On the same day, several text messages were exchanged between PW1 and the Appellant and the said text messages are shown in the Forensic Report (P7) which is the forensic analysis pertaining to the handphone no: 0146841617 and the SIM card which were used by PW1.

(13) On 14/10/2014, several text messages were exchanged between PW1 and the Appellant and the said text messages are shown in the Forensic Report (P7) which is the forensic analysis pertaining to the handphone no: 0146841617 which was used by PW1 and the SIM card used by PW1.

### THIRD AMENDED CHARGE

(14) PW1 informed Tuan Zacharias Kho about the request of the Appellant *via* the said SMSes dated 14/10/2014 and 16/10/2014 respectively who then decided to set up an entrapment of the Appellant on 20/10/2014. On 19/10/2014, PW1 went to Sibu and attended a briefing which was chaired by Mr Fadlyzal Mohd Zain. The other MACC officers who attended the said briefing were Omar Mokhtar Bin Jahari, Abdul Hakim Bin Saadan, Affiq Bin Aziz, Jawa Ak Milu and Harmawan Bin Waren. The said briefing was about the entrapment of the Appellant which would be carried out at the River Front Café of Kingwood Hotel on 20/10/2014 between 10am to 11am. PW1 will take off his spectacles as a signal to the other MACC officers who will be waiting at the vicinity of the said Café when the trap money of RM8000.00 is handed to the Appellant. Besides that, PW1 was given RM8,000.00 (P15 (1)) as per the Senarai Wang Bertanda (P15). An audio-video recording device

(P18) was given by PW9, Mr. Jackson Ak Gikian to PW1 in order to capture the incident that will transpire at the River Front Café of Kingwood Hotel on 20/10/2014. Prior to that, PW9 and PW1 checked to ensure that the said audio-visual recorder was in good working condition.

(15) On 19/10/2014, several text messages were exchanged between PW1 and the Appellant and they are shown in the said Forensic Report (P8). The said text messages showed *inter alia* showed that the Appellant confirmed with PW1 regarding the meeting at River Front Café of Kingwood Hotel on 20/10/2014 at 10.30am.

(16) Prior to that meeting, PW1 was equipped with the audio-visual recorder that given by PW9. On 20/10/2014, at about 10am at River Front Café of Kingwood Hotel, PW1 met the Appellant for the second time and PW7 brought RM8,000.00 (P15(1)) to the said café, and sat at table which is shown in photograph P16(6) and waited for the Appellant. Before the arrival of PW1, the other MACC officers namely PW6, Harmawan Bin Waren and Mr Anthonio James took the positions at the table which marked as “HA”, “HE” and “AN” respectively as shown in photograph P16(7).

(17) PW1 then sent a text message to the Appellant and informed the Appellant that he has arrived at the said café. The Appellant arrived at the said café, 5 to 10 minutes after the arrival of PW1 and sat next to PW1.

The Appellant also brought a “Swee Gear” bag which is black in colour (P17) with him when he arrived at the said café. During the meeting, PW1 informed the Appellant that he brought the RM8000.00 and the Appellant told PW1 that he was alright with that. When PW1 asked the Appellant that whether he want him

to put the said trap money inside the said bag (P17), the Appellant instructed PW1 to put the said trap money into his bag (P17). PW1 did as requested by the Appellant and then took off his glasses as signal to PW6 and the other MACC officers. The meeting and conversation which transpired between PW1 and the Appellant was recorded in the audio-video recording device (P18). The transcript (P18(1)) as per said audio-video recording (P18) showed the acceptance of the said trap money by the Appellant and the protection which could be given by the Appellant if PW1 carry out illegal timber logging activities at Sungai Sut, Kapit.

(18) This Court is guided by the case of *PP v. Jamil Bin Mahmod & Anor* [1998] 4 MLJ 681 where the court held at page 682 as follows:

*“since the respondent solicited the gratification, the acceptance of the trap money could not have been inadvertent. The respondent had knowingly accepted the money and there was cogent evidence that the money was intended as a gratification or reward for not issuing the summons...”*

(19) Further in the case of *Mohamed Mokhtar v. PP* [1972] 1 MLJ 122, the court at page 123 held *inter alia* as follows:

*“The act of handing over of the currency notes in the envelope was seen by P.W 14 and P.W 15 (P.W 14 and P.W 15 testified that they saw P.W 12 handing over that envelope to the appellant). I do not know what is corroboration if that is not corroboration. The money was not only handed over to the appellant but also found with the appellant before he was finally arrested. In the case of*

*Ramly Md. Yasin & Ors v. PP [1982] CLJ (Rep) 724 at page 725:-*

*“[2] The discoveries of the marked notes from each of the appellants are independent corroborative evidence which led to one and only irresistible conclusion that the appellants received the money from PW12. The presumption under s. 14 of the Act that the gratification is deemed to have been given and received by the appellants corruptly as an inducement or reward, arises.”*

(20) In the light of this Court’s findings, this Court finds that the Respondent had proved the First Ingredient of the said amended three charges against the Appellant.

## **SECOND INGREDIENT IN RESPECT OF THE THREE AMENDED CHARGES**

[11] As regards the Second Ingredient of the 3 Amended charges, this Court finds that at the time the gratifications was accepted, the Appellant was an agent ie, the officer of PDRM. Since the month of December 2005, the Appellant was an officer of PDRM. In the year 2014, the Appellant held the post of Inspector of PDRM and was attached to Jabatan Siasatan Jenayah IPD Kapit, Sarawak as stated in the Perakuan Tentang Kedudukan atau Jawatan Yang DiPegang Oleh Mohamad Nazri Bin Daheri (P27(1)) and the Appellant’s service record (P27 (2)) that kept by PW2, DSP Nur Ashyikin Bt Abdullah who is in charge of the police personnel service records and human resource of IPK Sarawak that the Appellant was a police personnel at the material time, ie, (24<sup>th</sup> August 2014, 11<sup>th</sup> September 2014 and 20<sup>th</sup> October 2014) as per the 3 amended

charges. This fact also was never disputed or challenged at all by the Appellant.

### **THIRD INGREDIENT IN RESPECT OF THE THREE AMENDED CHARGES**

[12] (1) As regards the Third Ingredient of the 3 amended charges, this Court finds that the Appellant accepted the money (gratification), for giving protection to PW1, who allegedly committed an offence of illegal timber logging activities at Sungai Sut, Kapit in respect of the said three amended charges.

(2) The telephone conversation recording (P13) and the transcript (P13(1)) showed that the Appellant told PW1 not to carry out any timber logging activities at Kapit because MACC has a joint operation with Forestry department at Kapit on 24/9/2014. Furthermore, the audio-video recording (P4), transcript (P5), audio-video recording (P18), the transcript (P18(1)) also showed that the Appellant has requisite authority to protect any illegal timber logging activities carried out by PW1 at Sungai Sut, Kapit.

(3) It is immaterial whether the Appellant gave any protection to any illegal timber logging activities carried out by the PW1 or not. This Court is guided by the case of *PP v. You Kong Lai* [1985] 1 MLJ 298 where Shankar J (as he then was) at pages 300-301 held as follows:-

*“The presence of the word “solicit” in the section, to my mind, clearly shows that if a person invites the payment of monies so that he may allegedly use the same to bribe a member of a public body, he has already committed an offence. The fact that the corrupt purpose was not carried out does not matter”.*



(4) Further the Supreme Court in the case of *PP v. Sally Chan Kit Tong* [1991] 1 CLJ (Rep) 396 at page 397 had held:

*“[3] .... Any such demand solicited secretly, to be paid without the knowledge of the State Government would amount to corruption under.*

*[4] Section 3(a)(i) clearly states that any person who corruptly receives any gratification “for himself or for any other person” shall be guilty under the section.*

At page 399, the court further held;

*“... Any such demand solicited secretly and sought to be paid under the counter without the knowledge of the State Government would certainly amount to corruption under the Prevention of Corruption Act.*

*... We find no merit in this submission as s. 3(a)(i) clearly states any person who corruptly receives any gratification “for himself or for any other person” shall be guilty under the section. In the case of *Datuk Haji Harun bin Haji Idris v. PP* [1977] 2 MLJ 155 the accused was found guilty of corruption under the Prevention of Corruption Act 1961 although the sum of RM250,000 which he had received from the Hongkong and Shanghai Banking Corporation was not for his own personal benefit but was for the funds of UMNO”*

(5) This Court finds that the wording employed in the section 19 of MACC Act 2009 showed that it is immaterial because the words used was, “...to do anything in respect of any matter or transaction, actual, or proposed or likely to take place”. Thus it is immaterial whether there is any form of protection given by the Appellant to PW1 or not.



(6) In the light of this Court's above findings, this Court finds that the Respondent has proved the third ingredient of all the three amended charges against the Appellant.

[13] This Court finds that once the first two of the above ingredients had been proved by the Respondent, the Appellant shall be presumed to have accepted the said gratifications corruptly from PW1 for the said three amended charges.

[14] In the case of *PP v. Datuk Haji Harun Bin Idris (No. 2)* [1977] 1 MLJ 15 at page 22, Y.A Raja Azlan Shah J (as His Lordship then was) defined and explained the meaning of "corrupt" as follows:-

*"Corrupt" means "doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions". (see Lim Kheng Kooi Reg) "purposely doing an act which the law forbids" (see R Smith)*

*"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....."*

At page 23, His Lordship further held that:

*"The word "inducement" evidently refers to a future act. What is forbidden, generally speaking, is soliciting a gratification as an inducement to do any matter or transaction in which the State Government is concerned. The gravamen of the offence is soliciting a gratification as an inducement to do any official act or conduct. This need not be proved by explicit evidence but may be inferred from surrounding circumstances."*

- [15] This Court finds that all the ingredients of the three amended charges have been proved by the Respondent in respect of the said three amended charges preferred against the Appellant. Since all the essential ingredients have been proved, the presumption under section 50(1) MACC Act 2009 applied, that is the Appellant shall be presumed to have accepted the said sum of RM3,000.00, as a gratification ie, money from PW1 (First amended Charge) on 24 August 2014, at about 3.40 p.m., accepted the said sum of RM5,000.00 as gratification ie, money from PW1 through the Maybank account of Fitero Bin Rafi'ee (Second amended Charge) on 11/9/2014 at about 11.58am and accepted the sum of RM8,000.00 as gratification ie, money from PW1 (Third amended Charge) on 20/10/2014 at about 10.25am.
- [16] This Court is guided by the case of *Thavanathan a/l Balasubramaniam v. Public Prosecutor* [1997] 2 MLJ 401 at page 421 where the Supreme Court held as follows:-

*“In the instant case, once it was proved that the money RM15,000 had been given to or received by the accused, the presumption under s. 14 of the Prevention of Corruption Act 1961 arose that the money had been given and received corruptly as an inducement or reward to acquit and discharge PW2 of the offence in the criminal case, and it was for the accused to give an innocent explanation which the court considered more likely than not that it was true, ie on a balance of probabilities, the test applied in civil proceedings: PP v. Yuvaraj [1969] 2 MLJ 89 (PC) ”.*

(Emphasis is mine)

- [17] Further in the case of *Attan bin Abdul Gani v. Public Prosecutor* [1970] 2 MLJ 143, at page 145, the court held *inter alia* as follows:-

*“Once it is proved that the gratification has been paid or received then in the words of section 14 of the Act “Such gratification shall be deemed to have been paid or received corruptly...” The presumption at once arises under the section. This presumption is a presumption of law and it is obligatory on the court to raise it in every proceeding for an offence under section 3 or 4 of the Act provided it is proved that the gratification had been paid, given or received. **The prosecution has not to establish anything more than the payment of money (See State of Madras v. Vaidyanathan Iyer and Emden v. State of Uttar Pradesh). It then becomes the duty of the accused to disprove what section 14 begins to presume against him.**”*

(Emphasis is mine)

- [18] The Appellant must offer an explanation that is “reasonably sufficient to invite belief in its probable truthfulness” to rebut the statutory presumption under section 50(1) MACC Act 2009 as stipulated in the case of *Attan bin Abdul Gani v. Public Prosecutor (supra)* where the court at page 145 held as follows:

*“The presumption cannot be said to have been rebutted without sufficient evidence, ie, such evidence as **is reasonably sufficient to invite belief in its probable truthfulness.**”*

(Emphasis is mine)

- [19] The Appellant bears the burden of rebutting the presumption on a balance of probabilities and this is what the case of *Public*

*Prosecutor v. Ku Yahya Ku Bahari & Anor* [2000] 3 CLJ 162, held at page 168:

*“When the prosecution is minded in invoking the presumption, then the particular burden of proof, as opposed to a general burden, shifts to the defence to rebut such presumption on a balance of probabilities. **This from a defence point of view is heavier than the burden of casting a reasonable doubt, but is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt**”.*

(Emphasis is mine)

**WHETHER THE LEARNED TRIAL JUDGE ERRED IN LAW AND IN FACT THAT IN CONVICTING THE APPELLANT BASED ON THE UNCORROBORATED HEARSAY EVIDENCE?**

[20] The Appellant complained that the learned trial judge convicted the Appellant based on the hearsay evidence namely the testimony of PW3 because PW3 heard from the public that the Appellant gave protection to the illegal logging activity prior to the incident at Tekam Café, Kapit.

[21] This Court finds that this contention of the Appellant has no merits as the learned trial judge did not convict the Appellant solely based on this piece of evidence of PW3. In so far as the first amended charge is concerned, the solicitation was in the form of oral request made by the Appellant before PW1 passed the said sum of RM3000.00 to the Appellant. This is evidenced by in the audio-video recording (P4) and transcript (P5). For the amended second charge, the solicitation was in the form of text messages stated in the forensic reports (P7 & P8) before PW1 deposited RM5000.00 into the account of Fitero Bin Rafi’ee as

requested by the Appellant. For the third amended charge, the solicitation was in the form of text messages stated in the forensic reports (P8) before the entrapment on 20/10/2014.

- [22] Furthermore, even if this Court excludes the testimony of PW3, PW1'S testimony is corroborated by the audio- video recording (P4), transcript (P5) in respect of the first amended charge. For the second amended charge, the testimony of PW1 is corroborated by the tele-conversation recording (P9), the transcript (P9(1)), the said text messages stated in the forensic reports (P7 & P8), the bank in slip (P11) and the statement of Fitero Bin Rafi'ee (P56). Besides that, the testimony of PW1 is also corroborated by the audio-video recording (P18), the transcript (P18(1), the said text messages stated in the forensic reports (P7 & P8), and the said trap money (P15(1)) which was found inside the bag (P17) carried by the Appellant when the Appellant was caught red-handed on the spot in respect of the third amended charge. In the light of the above evidences, this Court finds that there are credible evidences to corroborate the testimony of PW1 for the said three amended charges against the Appellant.

**WHETHER THE LEARNED TRIAL JUDGE WAS ERRED IN LAW AND FACT THAT HE FAILED TO CONSIDER THE DEFENCE AS WHOLE AND THE RESPONDENT FAILED TO PROVE ITS CASE BEYOND REASONABLE DOUBT?**

- [23] In his defence, the Appellant (DW1) testified *inter alia* that he has never solicited any corrupt money from PW1 in respect of the said three amended charges. As regards the incident at Tekam Café on 24/8/2014, the Appellant contended that PW1 sought help from the Appellant and asked the Appellant to play the role of a “middleman” between PW1 and the village folks at

Sungai Sut, Kapit because PW1 wanted the Appellant to solve the dispute between PW1 and the affected village folks in relation to the timber logging activity which was carried out by PW1. The Appellant agreed with the proposal of PW1 and said that he will appoint a “middleman” who was known as Fitero to solve the dispute as well as the compensation to be paid by PW1 to the affected villager folks because the Appellant thought that he has the responsibility to ensure the safety of the parties involved as well as to keep the public in peace. Thus the Appellant decided to help PW1 and the affected village folks to avoid any dispute which could cause any death amongst the parties involved.

**[24]** The Appellant further testified that he then requested the said Fitero to be a “middleman” to help PW1, to pay the affected village folks compensation as PW1 has operated the timber logging activities within the area of the affected village folks regardless of PW1 has a valid licence or not. The Appellant further contended that it is normal practice when it involves a timber company and the affected village folks to pay compensation notwithstanding that there is no legal requirement to do so.

**[25]** The Appellant also contended that he never received any money from PW1 at Tekam Café although PW1 took out some money and showed to the Appellant. As regards the incident at the café of Kingwood Hotel, the Appellant contended that he met PW1 for getting the money from PW1 as compensation to be paid to the affected village folks, because the said Fitero informed the Appellant that PW1’s company has extracted the timber logs without the knowledge of the affected village folks who complained about it. The Appellant believed what was told to him by the said Fitero. The Appellant tried to look for Fitero

because he wanted to know what Fitero did with the money which was banked in by PW1 into Fitero's bank account but the said Fitero cannot be found.

- [26] The Appellant also contended that the money he received from PW1 at the café of Kingwood Hotel was compensation to be paid to the affected village folks, because the said Fitero informed the Appellant that PW1's company has extracted the timber logs without the knowledge of the affected village folks. The said money he received from PW1 at the café of Kingwood Hotel is neither a corrupt money nor personal gain for him.

## **EVALUATION OF THE APPELLANT'S DEFENCE**

### **THE FIRST AMENDED CHARGE**

- [27] As regards the first amended charge, the Appellant stated that he never received any money from PW1 notwithstanding that PW1 took out some money and showed them to the Appellant. The action and movement of the Appellant receiving RM3000.00 from PW1 is clearly recorded audio-visually in Exhibit P4 and this was witnessed by PW3 who attended the said meeting with PW1 at Tekam Café, Kapit. The Appellant stated that he never solicited any money from PW1, but his denial is rebutted by the transcript (P5). Furthermore, the Appellant also admitted that the voice 1 belonged to PW1 and that voice 2 was him as stated in the transcript (P5). However, the Appellant claimed that his interpretation of the wordings stated in the Exhibit P5 is that the Appellant appointed Fitero to handle the problem between PW1 and the affected village folks. However this Court noted that the name of Fitero is never mentioned in Exhibit P5 even though the said Fitero played such a vital role in this case. Thus this Court finds that the appointment of Fitero as "middleman" alleged by



the Appellant is only an afterthought because the issue of appointment of Fitero as “middleman” only arises at the defence stage. When the prosecution referred to Lines 58-61, 77-82, 86, 91-94, 117-123, 142-145, 164 of Exhibit P5 during the cross examination of the Appellant, the Appellant kept merely denying the questions posed by the prosecution and failed to give any reasonable explanation. Furthermore, the Appellant also denied that Voice 2 was him when referred to the said transcript (P5) which is contradicted his earlier answer.

**[28]** If indeed the Appellant has nothing to do with the case, the pertinent question to ask is why did he ask for the payment from PW1 since he claimed that Fitero was the “middleman”. The said Fitero himself should be dealing with PW1 directly since he is “middleman” and not the Appellant. Furthermore no one ever met or saw the said Fitero and he has never attend any meeting with PW1. Nor was the said Fitero ever mentioned in any transcripts produced during the prosecution’s case. Thus this Court finds that the said Fitero’s role as a “middleman” is a mere afterthought and simply not credible.

**[29]** As regards the second amended charge, the said sum of RM5000.00 was deposited into Fitero’s bank account under the instruction of the Appellant instead of Fitero. The Celcom statement (P57) confirmed that handphone no: 0198196900 is registered under the name of the Appellant who admitted to this during cross-examination. In Lampiran C, page 16-18 of P7, it showed that the Appellant asked PW1 to pay him money but PW1 informed the Appellant that his boss asked to reduce the amount of payment as the timber is yet to be extracted. PW1 also proposed the amount of payment to the Appellant in the range of RM4000 to RM5000. In response, the Appellant told PW1 to pay him, the sum of RM5000. This showed that the





Appellant was acting on his own as he did not need to refer to the middleman “Fitero” for agreement.

[30] PW1 then asked the Appellant to give him a bank account number for to deposit the said sum of RM5,000.00. The Appellant sent a Maybank account no: 161097026746 under the name of Fitero bin Rafiee to PW1 and asked PW1 to inform the Appellant once the sum of RM5000 is banked into this bank account. Later, the Appellant also ask PW1 whether PW1 has banked in the said sum of RM5000.00 into the said bank account. After PW1 told the Appellant that he has banked in the RM5000.00 into the said bank account, the Appellant was thankful to PW1 for the said deposit of RM5000.00. Later the Appellant confirmed with PW1 that the RM5000.00 was already in the said bank account. This Court finds that the said Foteró’s account was used by the Appellant for PW1, to deposit the said sum of RM5,000.00 for the Appellant’s own benefit.

[31] As regards the third amended charge, the sum of RM8000 was recovered from the bag (P17) which was carried by the Appellant on his arrest at the café of Kingwood Hotel. The action and movement of the Appellant receiving the RM8000.00 from PW1 is recorded audio-visually in Exhibit P18. Lines 15-16 of the transcript (P18(1)) showed that PW1 told the Appellant that the RM8000.00 requested by the Appellant was with him and PW1 asked the Appellant whether there was any problem. The Appellant informed PW1 that there was no problem at all. Lines 27-30 of P18(1) showed that PW1 showed the said trap money to the Appellant and told him that the amount of the money was RM8000.00 and the Appellant replied “OK”. When PW1 asked the Appellant whether he want to put the said trap money inside the said bag (P17), the Appellant instructed PW1 to put the said trap money into his bag (P17). This Court thus

finds that the Appellant accepted the said sum of RM8,000.00 corruptly.

- [32] The Appellant also stated that it was normal practice when it involves a timber company and the affected village folks to pay compensation notwithstanding that there is no legal requirement to do so. This Court finds that such a defence is not admissible pursuant to s. 57 of the MACC Act 2009. Section 57 of the MACC Act 2009 states as follows:

*“In any civil or criminal proceedings under this Act, evidence shall not be admissible to show that any such gratification as is mentioned in this Act is customary in any profession, trade, vocation or calling or on a social occasion.”*

- [33] In the light of this Court’s above findings, this Court finds that the Appellant’s defence is merely a bare denial and an afterthought.

- [34] Guidance can be found in the case of *Shamim Reza bin Abdul Samad v. PP* [2009] 2 MLJ 506 at page 514 and 518. YA Suriyadi JCA (as he then was) held as follows:

*“[12] Pertaining to the defence of the existence of a third party, the learned judge commented that at no stage of the prosecution was this defence raised and tested. No prosecution’s witness was grilled on this highly relevant issue and hence was an afterthought defence.”*

...

*“[27] We found no evidence of the appellant seriously challenging any of the prosecution’s witnesses at the stage of the cross-examination let alone testing his defence at*

*the earliest opportunity ie at the prosecution's stage. Without such a challenge the credibility of the prosecution's witnesses especially SP10 must remain intact."*

- [35] Suriyadi JCA (as he then was) in *Shamim Reza bin Abdul Samad v. PP* (*supra*) held at page 519 held as follows:-

***"[29] The submission of the existence of a third party, put in another way, is bare denial defence. The effect of that defence is that he did not kill the deceased. Another person did it. Having read the evidence, and without a single good and sufficient reason, we were unable to accept his bare denial as sufficient to create any doubt in our mind as to the non-existence of a third person let alone his denial killing the deceased."***

(Emphasis is mine)

- [36] In the light of this Court's above findings, this Court thus finds that the Respondent has failed to rebut the statutory presumption that the money was also corruptly accepted on a balance of probabilities in respect of the said three amended charges.
- [37] This Court also finds that the defence of the Appellant is a bare denial which is insufficient to rebut the statutory presumption that the money was corruptly accepted in respect of the said three amended charges. In the Federal Court case of *D.A Duncan v. PP* [1980] 2 MLJ 195, at para D, Raja Azlan Shah C.J. (Malaya) (as His Royal Highness then was) held *inter alia* as follows:

***"The defence was, in effect, a simple denial of the evidence connecting the appellant with the four boxes. We cannot see any plausible ground for saying that the four***

*boxes were not his. In the circumstances of the prosecution evidence, the High Court came in our view, to the correct conclusion that **this denial did not cast a reasonable doubt on the prosecution case against the appellant**".*

(Emphasis is mine)

- [38] In the light of the above this Court finds that the defence of the Appellant has failed to cast a reasonable doubt at the end of the defence case. Thus the learned trial judge was right to find the Appellant guilty and convicted him on the said three amended charges.

## APPEAL AGAINST SENTENCES

- [39] This Court finds that the learned trial judge has correctly and adequately considered all the relevant factors including the Appellant's mitigation before imposing the sentences. The learned trial judge has adequately considered the public interest and deterrence factor in imposing sentence. As far as the sentence imposed against the Appellant is concerned, this Court finds that the sentence imposed, is accordance with the law as far as section 17(a) and section 24 MACC 2009 are concerned.

- [40] Corruption is a very serious offence and are very rampant nowadays. The Federal Court in the case of *PP v. Dato' Waad Mansor* [2005] 1 CLJ 421 at page 434 stated as follows;

*"The offence of corruption, if unabated or undeterred, is more far reaching in its consequences than the crimes of robbery, criminal breach of trust or rape. Thus, we feel that the sentences imposed for offences of corruption should be deterrent in nature so as to reflect the gravity of the offences".*

[41] The Federal Court in *Public Prosecutor v. Dato' Wa ad Mansor* (*supra*) further held at page 440-441 as follows:

*“The CA had placed much emphasis on the fact that the respondents political career is destroyed, the positions he once held lost and possibly never to be recovered and his good name tarnished. With respect, these are by no means extenuating circumstances which could attract sympathy.*

*These in fact are considerations that the respondent should have in mind before he embarked upon this nefarious scheme and they certainly should not have an overwhelming effect on the sentencing process as held by the CA”.*

[42] Further guidance can be found in the case of *Hamidon bin Mat Yatim v. PP* [1995] 3 CLJ 724 where the court held at page 736 as follows:

*“Corrupt Government servants should be sentenced severely as examples to other and also to protect the image of the Government service as a whole. It is common knowledge that cases of corruption are difficult to prove but when a case is proved the offender should be imprisoned and such a sentence would be consistent with the enormity of the offence committed by him and, likewise, be in direct proportion to the measure of confidence which the Government has reposed in him. I venture to say that the fact that the appellant here has lost his important post and suffered the anguish of a trial and the appeal cannot be considered to be a mitigating circumstance”.*

[43] Section 24 of the MACC 2009 stipulates the punishment for an offence under section 17(a) MACC 2009. Fine and imprisonment is mandatory. This Court finds that there is no reason to disagree or to interfere with the sentences imposed by the learned trial judge and that the sentence imposed is not manifestly excessive. The imprisonment term imposed on the Appellant is only for a period of 3 years and 10 months for the said 3 amended charges which run consecutively from the date of conviction in respect of the said three amended charges bearing in mind that the maximum term of imprisonment of the offences charged is 20 years. Thus this Court finds that the sentence imposed is not manifestly excessive in the circumstances of the case.

## **ORDER**

[44] In the light of this Court's above findings, this Court finds that there are no merits in this appeal. In the premises, this Court thus dismiss this appeal conviction and sentence.

**Dated:** 13 FEBRUARY 2017

**(LEE HENG CHEONG)**

High Court Judge  
Sibu, Sarawak

## **Counsel:**

*For the appellant - Martin George Musa*

*For the respondent - Law Chin How, Deputy Public Prosecutor-  
Malaysian Anti-Corruption Commission*

*Notice: This copy of the Court's Grounds of Decision is subject to formal revision.*