YAM Pg Indera Wijaya Pg Dr Hj Ismail Bin Pg Hj Damit

AND

Public Prosecutor

(Court of Appeal of Brunei Darussalam)
(Criminal Appeal No. 6 of 2010)

Mortimer, P.; Davies and Leonard, JJ.A.
9th December, 2010.

Appellant convicted of 3 offences under section 6 (a) of the Prevention of Corruption Act Cap.131 and 7 offences under section 165 of the Penal Code, Cap22. Appeal against conviction on the judge's findings on questions of fact dismissed. Appeal against sentences totalling 7 years with financial penalties also dismissed.

Mr Balwant Singh Sidhu & Mr Ahmad Basuni Hj Abbas of Messrs. Abrahams Davidson & Company for the appellant.
Ms Charlotte Draycott, S.C., Ms. Maggie Wong, DPP Aldila Hj Mohd Salleh & DPP Dk Hana Molina Bte Pg Hj Mohammad for the Public Prosecutor/Respondent.

Cases cited in the Judgment:

HKSAR v Lui Kin-hong Jerry (No. 2){2001} 2 HKC 513 at p. 537A
HKSAR v Wong Kwok Wang [2008] 4 HKLRD 404 at p. 414
R v Foxley, (1995) 16 Cr App R (S) 879
R v Harrison 14 Cr App R (S) 419 CA
R v Kwok Chi-keung [1993] 2 HKCLR 294
R v Ronson and Parnes 13 Cr App R (S) 153 CA

Mortimer, P.; Davies and Leonard, JJ.A.:

On 17 February 2010 Lugar-Mawson J convicted the appellant after trial of 3 offences of accepting gratifications under section 6 (a) of the Prevention of Corruption Act Cap.131 and 8 offences of accepting valuable things as a public servant under section 165 of the Penal Code Cap.22. The appellant was sentenced to a total of 7 years imprisonment together with financial orders. The appellant appeals against both his convictions and his sentences.

The background

The appellant, YAM Pg Indera Wijaya Pg Dr Hj Ismail Bin Pg Hj Damit**,** was Minister of Development in the Government of Brunei from 1986 until 28th of May 2001 when he was dismissed. Since the late 1970s under the command of His Majesty the Sultan, he also held the office of Istana Project Supervisor (IPS).

In these capacities he was responsible for the Housing Development Department, the Public Works Department and the IPS office. This involved ultimate control of the planning, contracting and carrying out of all public works and housing programs in the State. His responsibility as IPS was for government projects which could be

funded from outside the annual budget. These were sometimes commissioned by members of the Royal Family. Although the projects (d), (e) and (h) of the first 3 Charges were designated as IPS projects they were ultimately paid for by government money pursuant to government contracts.

During his period in office the appellant held considerable influence and power.

The gratifications and valuable things accepted by the appellant were provided by the 2nd defendant (D2), Wong Tim Kai or the company he controlled. Since 1979 D2 was the managing director and majority shareholder of TED Sendirian Berhad (TED). TED was a substantial building and engineering contractor in Brunei which carried out numerous contracts with the Brunei government. D2 failed to attend trial and was tried and convicted in his absence of the matching offences of giving the gratifications and valuable things.

As found by the judge the appellant accepted the gratification and valuable things from D2 over a period from July 1992 until April 1999. Contemporaneously, between 28 November 1992 and 1 May 2000 TED was awarded 42 government contracts to the total value of B$327,013,506.00. These contracts (including those particularised in Charges 1 to 3) were listed (ex P354) on 29 July 1999 in a letter from the appellant to His Majesty the Sultan following His Majesty's request for information.

The offences

The first 3 Charges on the indictment allege the acceptance of 3 gratifications contrary to section 6(a) of the Prevention of Corruption Act. By way of example we set out Charge 1:

> *"First Charge:*
>
> *That you, between July 1992 and 28th day of May 2001 in Brunei Darussalam, being an agent, namely the Minister of Development and Istana Project Supervisor (IPS) in the Ministry of Development of the Government of Brunei Darussalam, did corruptly accept from Wong Tim Kai, Managing Director of Ted Sendirian Berhad (TED), for yourself a gratification, namely a house built by TED at Lot 30823 Kampong Pengkalan Gadong together with B$465,000.00 from purported monthly rentals of B$5000.00 in respect of the said property, as an inducement or reward for doing or forbearing to do or for having done or forborne to do acts in relation to your principal's affairs or business, namely,*
>
> > *(a) making representations to civil servants in relation to TED's application for temporary occupation licence of land at Mulaut Industrial Area and appeals there from in 1992 and 1992;*
> >
> > *(b) awarding the Kampong Tungku Phase III Housing Package 3, Landless Citizens Scheme worth B$5,485,618.00 to TED in December 1993;*
> >
> > *(c) making representations to civil servants regarding TED's application for temporary occupation licence of land at Mulaut Industrial Area and appeals there from in 1994;*

(d) awarding the Drainage and Road works for the Lot 701, Kampong Kiarong project worth B$1,884,925.00 to TED in March 1995;

(e) awarding the Kampong Lambak Kiri, Landless Citizen Scheme Housing Project worth B$3,105,378.50 to TED in July 1995;

(f) awarding Variation Order No.1 in respect of Drainage and Road works for the Lot 701, Kampong Kiarong project worth B$224,909.18 to TED in September 1995;

(g) awarding Variation Order No.2 in respect of Drainage and Road works for the Lot 701, Kampong Kiarong project worth B$5,418,413.00 to TED in October 1995;

(h) awarding the Bangunan Mufti Kerajaan dan Dewan Sultan Haji Omar Ali Saifuddien 'Earthworks' project worth B$9,973,274.00 to TED in December 1995;

(i) (awarding Variation Order No.3 in respect of Drainage and Roadworks for the Lot 701, Kampong Kiarong project worth B$5,573,475.00 to TED in July 1996;

(j) awarding Variation Work Order No.4 in respect of Drainage and Road works for the Lot 701, Kampong Kiarong project worth B$134,116.00 to TED in January 1997;

(k) awarding Variation Order No.5 in respect of Drainage and Road works for the Lot 701, Kampong Kiarong project worth B$715,738.68 to TED in January 1997;

and you have thereby committed an offence contrary to Section 6(a) of the Prevention of Corruption Act, Chapter 131 and punishable under section 7(1) of the same."

Charge 2: alleges that between November 1993 and March 1997 the appellant accepted 8 shophouses on Lot 833999.

Charge 3 alleges that between April 1995 and April 1999 the appellant accepted a forbearance to pay for a shophouse on Lot 701 for his daughter.

Charges 4, 5, 6, 8, 9, 10, 11 and 12 allege acceptance of valuable things as a public servant under section 165 of the Penal Code.

Charge 11 is an example of the offences alleged under section 165 of the Penal Code:

"11th Charge:

That you, between November 1998 and April 2001, in Brunei Darussalam, being a public servant, namely the Minister of Development in the Ministry of Development of the Government of Brunei Darussalam, did accept for yourself, a valuable thing, namely, a total of B$3,928,322.11 in repayments of your loan with Baiduri Bank Berhad in relation to the development of Lot.33999 Kampong Katok, Gadong, for no consideration or a consideration which you knew to be inadequate, from Wong Tim Kai, Managing Director of

TED Sendirian Berhad, whom you knew to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by you and you have thereby committed an offence punishable under section 165 of the Penal Code, Chapter 22."

Each acceptance was from D2 and the charges relate one to another in the following ways:

1st Charge: The acceptance of the house on Lot 30823 and rental proceeds. The house was built by TED and D2 on the appellant's land and then rented from the appellant by D2.

4th Charge: The acceptance of the house on Lot 30823.

2nd Charge: The acceptance of 8 residential houses to be developed on Lot 33999

5th Charge: The acceptance of the land upon which the 8 residential houses were to be developed on Lot 33999.

6th Charge: The acceptance of the 8 residential houses on Lot 33999.

8th, 9th and 10th Charges: The acceptance of 3 personal guarantees provided by D2 securing the appellants bank loans concerned with the development of Lot 33999.

11th Charge: The acceptance of repayments by D2 of the appellant's bank loan with Baiduri Bank Berhad of $3,928,322.11 concerned with Lot 33999.

3rd Charge: The acceptance for his daughter of the forbearance to pay the purchase price for a shop house at Lot 701.

12th Charge: The acceptance for his daughter of the shop house at Lot 701.

The Law

The judge set out the law accurately and fully. This enables us to do so briefly.

- *Prevention of Corruption*

Sections 6 (a) of the Prevention of Corruption Act provides:

"*If –*

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;

he shall be guilty of an offence….."

Section 7 (1) of the act provides:

> *"7. (1) A person convicted of an offence under section 5 or 6 shall, where the matter or transaction in relation to which the offence was committed was a contract or a proposal for a contract with any public body, or a sub-contract to execute work comprised in such a contract, be liable to a fine of $30,000 and to imprisonment for 10 years."*

When the prosecution establish beyond reasonable doubt that the appellant;

a) accepted a gratification
b) as an agent

a presumption arises under section 25 of the Act which provides:

> *"25. Where, in any proceedings for an offence under this Act it is proved that the accused gave or accepted a gratification, the gratification shall be presumed to have been given and accepted corruptly as such inducement or reward as is alleged in the particulars of the offence unless the contrary is proved."*

The burden of proof on a balance of probabilities then shifts to the appellant to establish that he did not accept the gratification corruptly.

Importantly section 8 (1) of the Act is relevant to the proof of corruption. This enacts:

> *"8. (1) Where in any proceedings against any agent for an offence under section 6(a) it is proved that he accepted, obtained or agreed to accept or attempted to obtain any gratification having reason to believe or suspect that the gratification was offered as an inducement or reward for his doing or forbearing to do any act or for showing or forbearing to show any favour or disfavour to any person in relation to his principal's affairs or business he shall be guilty of an offence under that section notwithstanding that he did not have the power, right or opportunity so to do, show or forbear or that he accepted the gratification without intending so to do, show or forbear or that the act, favour or disfavour was not in relation to his principal's affairs or business.*

On this point the Brunei Courts apply the section and it is unnecessary to examine authorities on the common law to a similar effect.

- *Section 165 of the penal code*

Section 165 of the penal code provides:

> *"Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing, without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment for a term which may extend to 7 years and with fine."*

At trial, and repeated before this court, only one legal issue is raised. It was submitted on the appellant's behalf that when acting as IPS he was not acting as agent for "a public body" under section 7(1) of the Prevention of Corruption Act nor as a "public servant" as defined in section 21 of the Penal Code. We consider this submission when we turn to the offences.

The appeal

This legal issue can properly be described as peripheral. Even if the appellant's submission were correct it would not provide a defence to the charges. It relates only to some of the allegations of acts particularised in (a) to (k) in charges 1 to 3.

Otherwise the appeal is on fact. Mr Sidhu, for the appellant, contends that the judge's findings that the appellant accepted the 3 gratifications are plainly wrong. He says that the contemporary documents and oral evidence given of events many years ago show that each alleged gratification was a proper business arrangement between himself and D2 and the judge ought to have so held.

Further, he submits that it follows that consideration was given for the "valuable things" allegedly received in the section 165 offences.

Mr Sidhu realistically accepts that he has an uphill task to persuade this appellate court to reverse the judge's finding of fact. It is trite law that only if a finding of the judge is demonstrated to have been plainly wrong will we interfere.

Mr Sidhu also candidly concedes that any business relationship, however proper, between the appellant and D2 would be imprudent. After all, contemporaneously D2 and TED were being awarded many valuable contracts under the appellant's control. There was a continuous relationship between the departments controlled by the appellant and contracts awarded to TED.

If he fails on these submissions and presumptions arise he argues that the judge was plainly wrong to find that presumptions had not been disproved.

It follows that central to the judge's finding, and central to this appeal, is the proof that the gratifications and valuable things were received without, or for inadequate, consideration.

We therefore turn to consider the importance of this proof and the judge's finding upon it.

The importance of proof of the gratifications/things received without or for inadequate consideration

As we have indicated the elements of the offence under section 6 (a) of the *Prevention of Corruption Act* are:

1. that the appellant was an agent;

2. that he accepted a gratification;

3. the gratification was an inducement or reward for doing or having done an act or for showing favour to a person;

4. in relation to his principal's business.

Once the first two elements of this offence were proved, there arose a presumption under section 25 of the Act that the gratification was accepted corruptly as such inducement or reward as was alleged.

For the offences under section 165 of the *Penal Code* the prosecution had to prove:

1. that the appellant was a public servant;

2. that he accepted a valuable thing without consideration or for inadequate consideration;

3. from a person whom he knew was concerned in business transacted or about to be transacted by the public servant.

It was conceded, or at least not disputed, that proof of acceptance of a gratification was also proof of acceptance of a valuable thing without consideration or for inadequate consideration; and vice versa.

It was also conceded, or at least not disputed that proof that, at least in all cases when he was acting as Minister of Development, the fact that the appellant was an agent for a principal was proved by proving that he was a public servant; and vice versa.
However it was argued by the appellant that, when he was acting as Istana Project Supervisor he was neither an agent of the Government nor a public servant. There is no substance in that submission for a number of reasons.

First, all contracts which he signed as Istana Project Supervisor he also signed as Minister of Development. Secondly, all such contracts were in the form of standard Government contracts. Thirdly, payment under all of them came, directly or indirectly from Government funds. And fourthly, as Istana Project Supervisor he took instructions directly from His Majesty, the Executive Government. He was thus, directly an agent of the Government for the purpose of section 6(a) of the Prevention of Corruption Act and, because of the wide definition of "public servant" in section 21 of the Penal Code, a public servant under section 165 of that Code.

We agree with the learned judge's conclusion in this respect.

It was also conceded, or at least not disputed, that the relevant acts relied on to prove the fourth element of the offence under section 6 (a) were done in relation to the principal's business.

It was also conceded, or at least not disputed, that the person from whom the valuable things were allegedly accepted, for the purpose of the offence under section 165, was a person concerned in business transacted or about to be transacted by the appellant within the meaning of the third element of that offence.

It is for these reasons that proof of the gratification (acceptance of a valuable thing without consideration or for inadequate consideration) was of vital importance in this case in respect of the offences under both sections.

Once gratification was proved in respect of each of the offences under section 6 (a), the presumption under that section arose and the onus shifted to the appellant, in each

case, to disprove the third element of that offence. The appellant nevertheless contended that he was able to prove this on the balance of probabilities.

Once acceptance by the appellant of a valuable thing without consideration or for inadequate consideration was proved in respect of each of the offences under section 165 the prosecution case was, in each case, proved. It is undisputed that the appellant was a public servant; the first element of that offence. And it is undisputed that, if he received a valuable thing without consideration or for inadequate consideration, he received it from a person whom he knew was concerned in business transacted or about to be transacted by him; the third element of the offence. It follows that proof of that acceptance was, in each case, proof of the commission of the offence.

The gratifications alleged; the valuable things alleged to have been received without consideration

The gratifications allegedly received by the appellant from D2 were:

1. A house built by TED on lot 30823 between July 1992 and 28 May 1993 together with $465,000 from purported monthly rentals of $5,000 in respect of the property; the first charge.

2. Between November 1993 and March 1997, but actually in late 1993, eight residential houses to be developed on lot 33999; the second charge.

3. Between 18 April 1995 and 29 April 1999, but actually in 1995, a forbearance to pay the full purchase price of $930,000 for a shophouse at unit 9, block D, lot 701 for his daughter; the third charge.

The valuable things allegedly received by the appellant from D2 were:

1. The above house on lot 30823; the fourth charge

2. Lot 33999; the fifth charge;

3. The eight residential houses to be developed on lot 33999; the sixth charge;

4. D2’s personal guarantee in a sum of $1,350,000 as security for the appellant's loan of $1,350,000 with Maybank for the purchase of lot 33999; the eighth charge;

5. D2’s personal guarantee in the sum of $3,333,333.50 as security for the appellant's loan of $5,000,000 with Baiduri Bank for the purchase and development of lot 33999; the ninth charge;

6. D2’s personal guarantee in the sum of $3,161,000 as security for the appellant's loan of $3,161,000 with Baiduri Bank for the purchase and development of lot 33999; the 10th charge;

7. A total of $3,524,322.11 in repayment of the appellant's loan with Baiduri Bank in relation to the development of lot 33999; the 11th charge;

8. For his daughter, the shophouse at unit 9, block D, lot 701 which the appellant accepted from D2 for his daughter; the 12th charge.

Thus, five separate valuable things allegedly received without consideration or with inadequate consideration, for the purpose of section 165 (charges 5, 6, 8, 9 and 10) were together charged as the second gratification. That was, we were told, because it would be easier to prove the corrupt intention, the third element of the offence under section 6 (a), if these were charged as together constituting the gratification under that section.

The transactions

We turn now to the evidence in respect of the transactions alleged to constitute both the gratifications and the valuable things received without consideration or for inadequate consideration.

The first transaction: the building of a house on lot 30823 and the payment of rental thereon by D2.

Prior to 1993 the appellant owned Lot 30823. An adjoining Lot, Lot 30822 was owned by D2's business partner. In 1993, TED, on the instructions of D2, built two similar houses, one on each of lot 30822 and 30823. The houses were completed in May 1993 and D2 commenced to occupy the house on lot 30823 and commenced paying rent to the appellant at the rate of $5,000 per month from September 1993.

The cost of construction of these houses, according to the books of TED, was $838,485.35. On 14 May 1993 D2 paid TED $665,000 for the construction of the two houses and, in June, a further $85,000 was deducted from D2's account with TED, described as a set off of payment for these two houses against money owed by TED to D2 for director's fees.

The appellant said that he agreed to pay D2 $500,000 for the construction of the house on his land and he said that that payment was made in cash. There was no documentary evidence of that payment. The only evidence directly relevant to whether it was paid came from the appellant and his wife. Both said that D2 gave the appellant a handwritten receipt for that payment which the appellant later mislaid. The learned trial judge disbelieved the evidence of each of them.

On the other hand there was documentary evidence of payment by D2 to the appellant of a total of $465,000 being rental payments of $5,000 per month from September 1993 for a period of 8 years.

Mr Sidhu, for the appellant, accepted the difficulty, on appeal, of seeking to overturn findings of fact based on credibility. Appeal courts are understandably reluctant to overturn such findings given the advantage which the trial judge has had in seeing and hearing the witnesses. Nevertheless Mr Sidhu submitted that, for two reasons, that reluctance should not exist here or, at least, should be less than it might be in other cases.

First, he submitted that it was less relevant where the trial judge had disbelieved witnesses when theirs was the only evidence on a question than when there was conflicting evidence between witnesses. We reject that submission. The judge has had the advantage, to which we have referred, in either such case.

Secondly, he submitted that that reluctance should not be so strong where there is contemporaneous documentary evidence which supports the oral evidence. We agree with that submission but not to its application here.

There are two pieces of evidence upon which Mr Sidhu relied for this submission. The first was that the appellant had, in a safe deposit in a bank, nearly $2 million in cash and that, consequently, he would have had sufficient money in cash to make this payment. We do not think that this supports his evidence that, in fact, he paid $500,000 in cash. Indeed, we note that, though he could have made payments in respect of the second transaction, to which we will refer, he chose not to do so. Nor do we think that the evidence that some of the money packets found in the safe deposit, which might well have once contained cash, were empty, supports the evidence of the appellant and his wife that he paid $500,000 in cash.

The second piece of evidence was that, as appears from the internal documentation of TED, D2, by June 2003, had paid TED at least $750,000 for what was described as "2 units" which we accept were probably the two houses to which we have referred. However we fail to understand how a payment by D2 to TED could be relevant to prove a payment by the appellant to D2. In any event, as Ms Draycott for the respondent pointed out, the evidence from the appellant's wife was, in effect, that she counted out the money prior to payment some time late in 1993. Consequently, if the appellant did pay D2 for the construction of the house it was some six months after the construction was completed and after D2 had commenced to occupy it and pay rent to the appellant.

Mr Sidhu also criticised a reason given by the learned judge for disbelieving the appellant's wife. The relevant passage in the judge's reasons is:

> *"She floundered on the details she had not thought about such as the denomination of the notes she allegedly helped count and when exactly the alleged payment took place."*

If the learned judge had been saying merely that, because the appellant's wife could not recall, seven years after the event, the denominations of the money she counted out or when exactly this occurred, he disbelieved her, there would have been merit in this criticism. However, even without looking at the context in which this passage appears, it is plain that that is not what the judge was saying. Rather, it seems to us, he was speaking about her demeanour rather than about the content of her evidence. Moreover, this passage should be seen in the context of the paragraph in which it appears which was in the following terms:

> *"I found Hjh Norsiah evasive, argumentative and (as Mr Macrae put it in his final submissions) "... quixotically defensive of her husband". She floundered on details she had not thought about, such as the denominations of the notes she allegedly helped count and when exactly the alleged payment took place. She displayed an equally casual attitude as her husband to the matter. Like his, her evidence on this matter beggars belief. She was not a witness of truth on whom I can rely."*

It can be seen from this, and from the paragraphs which preceded this, that the learned judge was also relying on the inherent improbability of her evidence; the fact that this was a transaction which, in the circumstances, it might have been thought that the appellant would have entered into with considerable care and detailed documentation; the improbable explanation for the missing receipt; and the absence of any documentation in the records of D2 or TED, in contrast with the detailed documentation of the rental payments; all of which he mentions in those preceding paragraphs.

We should also add that the learned judge no doubt did, as he was entitled to, in assessing the credibility of the appellant and his wife on this issue, consider also the appellant's credibility on each of the other issues. This criticism is therefore without substance.

We conclude that the learned judge was entitled to disbelieve the appellant and his wife on this issue. It follows, as we have explained, that the appellant was guilty of the fourth charge and that, on the first charge, he assumed the burden of proving, on the balance of probabilities, that he did not receive the gratification in the first charge as an inducement or reward for doing or having done an act or for showing favour to D2.

The second transaction; the purchase of lot 33999, the construction of twentyfour residential houses thereon and the sharing of profits therefrom

According to the appellant, some time in early 1994 he and D2 agreed to purchase and develop lot 33999 by the construction thereon of 24 houses for sale or investment, the proceeds to be shared as to 16 houses to D2 and 8 to the appellant. The land was purchased for $1,500,000 in the appellant's name. However, as the appellant admitted in evidence, no part of the purchase price or of the development cost was ever paid by him.

A deposit of $150,000 was paid to the vendor by D2. The balance of the purchase price of $1,350,000 was financed initially by a loan of that amount to the appellant by Maybank. It was a term of the loan that that sum be paid directly to the vendor. It was secured by the following documents all executed on 10 February 1994:

1. A charge over the land;

2. A letter of undertaking by D2 and his wife that they would not seek to withdraw from a fixed deposit of $2,700,000 any sum in excess of $1,350,000;

3. A guarantee for $1,350,000 by D2.

As Mr Sidhu pointed out, the mortgage contained a personal covenant to pay by the appellant.

That loan was paid out and the securities discharged by a loan from Baiduri Bank of $5 million in March 1995. The purpose of the loan, as outlined in the letter of offer of 28 February, 1995, was to pay out the Maybank loan and to finance the proposed construction of 24 houses on lot 33999. This loan was secured by:

1. A charge over the land and deposit of the documents of title;

2. A guarantee for $3,333,333 by D2 executed on 24 March 1995; and

3. Assignment of the proceeds from sales of houses executed, as to 8 houses by the appellant and as to 16 houses by D2.

Development of the land commenced about that time.

Although this loan was repayable on demand, there was also a provision for review in February 1996. That review took place and the loan was renewed on the same terms in August 1996.

By February 1999 the development had been completed, 13 of the shophouses had been sold and the amount owing under this loan had been reduced to $3,161,000. On 10 February 1999 the loan was restructured as a term loan of 60 months with 60 monthly payments of $52,683 33, those payments to come from the appellant's current account. This loan was secured by:

1. Deposit of the titles to shophouses;

2. Assignment of the proceeds of the remaining 11 shophouses; and

3. A guarantee for $3,161,000 by D2 executed on 21 April 1999.

It is not without significance that the guarantee given by D2, pursuant to the above terms, on 21 April, 1999, was for the whole of the loan, not just for two thirds of it.

Thereafter, payments of the loan account were made by payment from D2 into the appellant's loan account. It was wholly repaid by D2.

On 3 July, 1999, His Majesty the Sultan wrote to the appellant seeking an explanation for the guarantee of 24 March, 1995. It is not clear whether His Majesty was aware of the guarantees of 10 February, 1994 and 21 April, 1999 but that seems unlikely.

Before he replied to that letter, on 27 July, 1999, the appellant and D2, at the instance of the appellant, went to Baiduri Bank where they each signed guarantees of the appellant's loan, the appellant for $1,053,667 and D2 for $2,107,323. These were in substitution for D2's guarantee of 21 April, 1999 of the whole of the loan of $3,161,000. Of course, the appellant's purported guarantee of his own debt was ineffective but it is unclear whether the execution of this document was at the instance of the appellant or of the Bank.

Nevertheless the timing of this visit and the substitution of D2's guarantee of the whole debt with a guarantee by him of only two thirds of the debt, so soon after the execution of that earlier guarantee is of considerable significance, particularly when one comes to consider the appellant's reply to the His Majesty Sultan's letter which was dated 31 July, 1999. It was not suggested, on the appellant's behalf, that there had been any change in circumstance, other than the letter from His Majesty, between those dates. The only reasonable inference from these events, we think, is that it was the His Majesty Sultan's letter which caused this visit, and this change of security.

The appellant's letter is instructive as to the appellant's honesty, specifically relevant to the question whether he accepted the gratifications as an inducement or reward, and relevant, generally, to a consideration of the truth, indeed honesty, of his evidence. The letter is false both in what it says and what it omits.

Before turning to the terms of that letter it should be said that, by the time that he wrote it, the appellant had had considerable time to consider what to say and it might reasonably be thought that, by this time, he would have been very careful to be accurate in what he said. With that in mind we turn to the terms of that letter.

In the first place the appellant said, in par (a), that he bought lot 33999 in 1996, two years after he did so. Ms Draycott, for the respondent, submitted that this error was unlikely to have been accidental, as the appellant contended; that it was much more likely to have been intended to mislead His Majesty into believing that his relationship with D2 arose more recently than in fact it did and that, consequently, it was of much shorter duration than in fact it was. There is support for that submission in what followed which, amongst other things, omitted entirely the first and third transactions alleged to have given rise to the first and third gratifications; together with the second transaction, these showed that this relationship commenced in 1993, was continuing at the time of the letter, and was much more extensive than might appear from that letter.

The appellant also entirely omits from that paragraph the facts that D2 paid the deposit on the purchase of that lot, executed a guarantee in favour of Maybank of repayment of the whole of the balance of the purchase price and executed a pledge of a fixed deposit to the extent of the whole of that balance to secure that repayment.

The misstatement as to dates was repeated in par (b) where the appellant said that the Baiduri loan was in early 1997; it was in early 1995. Moreover, it must have been abundantly clear to him that, when Maybank had insisted upon both a guarantee and a pledge of money from D2, Baiduri would not lend him a much larger sum without a guarantee from D2. His explanation of the giving of this guarantee in par e), c) was incredible and, it may be reasonably inferred, dishonest.

The most blatant lies in this letter are in para (d) and para (e), (d). In the first of these the appellant said that all of the payments for the development were borne by him using the loan facility from Baiduri Bank. That was knowingly false. He failed to mention that, by the time he wrote the letter, the facility had been replaced by a term loan, the whole of which had been secured by a new guarantee by D2. Even more importantly, all three monthly repayments of that loan, to the date of his letter had been made by D2 and, as he must have known, that was intended to continue.

In the second of those paragraphs he said that he had never received any profit from the development. That was literally true. But it must have been plain to the appellant, by the time he wrote that letter, that D2 would continue to make the monthly repayments, as indeed he did, and that he, the appellant, would be left with a substantial profit.

The appellant admitted at trial that he never paid anything for the land or the development on it. Mr Sidhu contended, nevertheless, that he was liable on the personal covenant in the mortgage to Maybank. That is no doubt true. But the practicality was that he never did pay anything under any of the loans and it was never expected, by either party, that he would.

It follows, in our opinion, that the gratification in the second charge was proved, that each of lot 33999 and the personal guarantees was a valuable thing accepted by the appellant without consideration and that the sum of $3,524,322.11, the amended total of monies paid by D2 into the appellant's account, was also such a valuable thing.

The third transaction: the acquisition, in the name of the appellant's daughter, of a shophouse on lot 701

By a sale and purchase agreement dated 18 April, 1995, D2 and his business partner, Chang Chai Woon appeared to sell to the appellant's daughter a shophouse described

as unit 9, block D on lot 701 for $930,000. The agreement provided for the purchase price to be paid by a deposit of 10% on execution, four instalments of 15% each upon stated events, two instalments of 10% each upon stated events and two further instalments of 5% each upon stated events.

The respondent's counsel contended that there is no credible evidence that any payment was made under this agreement before the Anti Corruption Bureau commenced making inquiries in relation to lot 701 in 1998. In the meantime, it was an agreed fact, the construction of the shophouse was completed and it was rented to a tenant, LAH Consultants who commenced paying rent on 15 May, 1996. Between that date and December, 2000, such rents totalling $260,000 were paid into the account of the appellant's daughter.

There are in evidence two loan offers by Baiduri Bank to the appellant's daughter, one dated 12 June, 1996, the other dated 15 September, 1996, each of a facility of $630,000. The only readily apparent difference between them is that the first stated interest to be at 2% above the Bank's prime lending rate while the second stated the rate at 1.75%. The offer required a guarantee of repayment of that sum from the appellant, an assignment of the leasehold property and an assignment of rental income. The appellant's daughter executed an assignment of rental agreement on 25 October, 1996. It is unclear whether any of the other security documents was ever executed.

The loan was not drawn down until 21 April, 1999. The circumstances in which it was drawn down are not clear. However, the respondent submits that, although this was before the letter of His Majesty of 3 July 1999, it was after the Anti Corruption Bureau had asked for the files in relation to lot 701 drainage and roadworks project in 1998. The respondent therefore invited the Court to infer that it was never the intention of the appellant or D2 that this loan would ever be drawn down. The appellant admitted that D2 had never asked for payment under this contract.

The appellant submitted, here and below, that the timing of the drawdown of this loan was at the option of and was in fact the choice of the Bank. The trial judge rejected that submission, in our opinion rightly. Having received an offer of a loan it is the choice of the borrower, alone, as to whether to draw it down. That it was not drawn down for three years after execution of the sale and purchase agreement is evidence of the fact that D2 was not seeking payment under that agreement, notwithstanding the passing of ownership of the shophouse to the appellant's daughter and, indeed, he never did. That it was drawn down when it was must have been the choice either of the appellant or his daughter. However the memoranda to which we refer below make it plain that the appellant was, in reality, the purchaser and borrower.

The following Bank memoranda show clearly what the appellant told the Bank. Both are undated but it is plain from their context that the first was after the application for the loan but before the Bank offer on 12 June 1996; and the second was after the first offer but before the second Bank offer on 15 September 1996.

In the first of these there appears the following:

> *"Dayangku is the elder daughter of Pg Dato Dr Ismail, the Minister of Development. In view of Pg's position in the Ministry, instead of booking the loan in Pg's name this application will be booked in her daughter's name.*

Estimated networth of Pg is about BND 10.0m. There is no retirement age for Pg and retirement for Pg is at the pleasure of His Majesty The Sultan."

In the second there appears the following:

"A Term Loan of BND630k was approved RB96049 dated 25 Mar 96. Purpose of the Loan was to assist Pg Dato Dr Ismail, Minister of Development to purchase a unit of shophouse at the Kiarong Complex. Although the loan was under Dayangku's name the responsibility in servicing the loan will be Pg.

We have imposed by the interest rate at Prime+ 2%. Pg has requested for the interest rate to be reduced to Prime+1.75% which is in line with the Overdraft facility that the Bank has granted to him. To date the Overdraft of BND5.0m has not been fully utilised. Outstanding in the account stood at BND1.638m."

The relevance of these passages lies not in their truth but as evidence of what the appellant told the Bank. And it is plain that the appellant told the Bank that it was he, in truth, who was acquiring this shophouse. They are also relevant as showing that the appellant saw a need to conceal the fact that he was acquiring property from D2.

The appellant and his wife made much of their daughter's absence overseas as an explanation of why the loan was not drawn down until 1999. Both claimed not to know much about it. However, at least as far as the appellant is concerned, that is inconsistent with what he must have told the bank officers who made the above memoranda. It was correct to infer that the loan was drawn down only because of the Anti Corruption Bureau inquiry. Had there not been any such inquiry it would never have been drawn down.

As to the balance of the purchase price for this unit, $300,000, the appellant again said that he paid this from the cash in his safe deposit. But again, unlike the rental payments for the shophouse, there was no documentary evidence of this and the learned trial judge was, in our opinion, right to disbelieve the appellant. It should be mentioned that this finding, alone - that $300,000 of the purchase price was never paid – was sufficient to prove the gratification charged and the receipt of the shophouse for inadequate consideration.

It follows that the appellant received the gratification alleged in respect of this transaction, namely a forbearance to pay the full purchase price of $930,000 for this shophouse. And it follows that he received the shophouse for no or inadequate consideration.

The only question remaining in this appeal is whether the learned trial judge was wrong in concluding, as he did, that the appellant failed to prove, as he was required to by section 25 of the Prevention of Corruption Act, that any of these gratifications were not accepted corruptly as such inducement or reward as was alleged in the particulars of the offences under section 6(a). We now turn to that question.

Did the appellant rebut that presumption?

It should be said, at the outset, that it was not part of this element of each of these offences that the appellant actually did or forbore from doing anything. That these gratifications were accepted as an inducement for doing or forbearing to do any such

act may be inferred from the circumstances in which the appellant had accepted these gratifications.

Those circumstances, which were undisputed, were:

1. that before, during and after acceptance of each of those gratifications, the appellant was in a position, on behalf of the Government, to accept or refuse tenders made by TED for construction contracts and to grant TOL land to TED;

2. that, throughout that time, the appellant did, on behalf of the Government, accept numerous tenders by TED for construction contracts in circumstances in which either there were competing tenders from other construction companies or there were other competing companies from whom tenders were not sought; and caused TOL land to be granted to TED; and

3. that the appellant gave to His Majesty the Sultan a false and misleading account of his relationship with TED and D2 which minimised the duration and extent of that relationship and falsely concealed the extent to which D2 had contributed financially to the acquisition of each of the properties held to give rise to the gratifications alleged in charges 1, 2 and 3 and found to be proved by the trial judge.

We think that it would have been correct to infer, from those undisputed circumstances alone, that each of the gratifications was accepted as an inducement or reward for accepting those tenders and causing that land to be granted to TED even if those acceptances or that grant conferred no benefit on TED or D2. It therefore may have been unnecessary for the prosecution to allege any specific "act" done or forborne and, because of clear proof of the gratifications alleged, it was unnecessary for the trial judge to deal specifically with those which were alleged.

In any event, as the learned trial judge has shown, there were a number of occasions throughout the period in which these gratifications were accepted, in which the appellant, awarded contracts beneficial to TED and showed favour to TED and D2. We do not find it necessary to discuss these in detail. Each of them was carefully analysed by the learned trial judge and we can find no error in those analyses or the conclusions which the judge reached in each case.

The acts

These are alleged in particulars (a) to (k) in charges 1, 2 and 3. In summary these were awarding TED:

1. 2 Landless Citizens Schemes; Tungku package 3 in 1993 (a); and Lambak Kiri in July 1995 (e);

2. The Mufti earthwork project in December 1995 (h);

3. Drainage and Roadworks for Lot 701 in March 1995 (d) together with 5 Variation Orders in September 1995, October 1995, July 1996 and 2 in January 1997. (f), (g), (i), (j) and (k).

Also, in particulars (a) and (c) it was alleged that the appellant intervened on TED's behalf with the responsible public servants to obtain Temporary Occupation of Land (TOL) in 1992 and 1994.

The judge having found that the gratifications were accepted by the appellant as an agent the presumption under section 25 of the Act arose. The burden was on the appellant to show on the balance of probabilities that these acceptances were not corrupt. The judge correctly approached the evidence concerning these acts with this in mind and found in each case that the appellant had failed to discharge the burden.

Mr Sidhu's contention is that the judge ought to have found that in each case the appellant fulfilled his responsibilities properly without showing special favour to TED. But for reasons already mentioned, that, even if proved, did not discharge the onus on the appellant.

Moreover, in concluding that the burden of showing the receipts were not corrupt had not been discharged it was incumbent upon the judge to take into account the whole of the evidence in the case. To summarise: this included the size and nature of the gratifications; the lies concerning cash payments; the absence of records; the failure to inform His Majesty the Sultan of his personal relationship and dealings with D2; his lack of candour in the letter to His Majesty on 31 July 1999; the appellant's continuing personal interest in the financial well-being of D2; and the contemporaneous receipt of gratifications and financial support from D2 with the granting of major contracts to TED.

In attacking the judge's findings on the "acts" Mr Sidhu has advanced everything that could possibly be said on the appellant's behalf and we are grateful. However on this aspect of the case he faces an impossible task. Even were he to persuade us that the judge was wrong in concluding that in each of these acts the appellant benefited D2, having regard to the evidence we have summarised, a decision that the presumption had been disproved would be perverse.

As it is, the judge heard oral evidence and assessed it with care bearing well in mind that the witnesses were often recalling events of long ago. For example on this point when reviewing the reliability of prosecution witnesses in paragraphs 296 to 300 of his judgment the judge took into account Mr Basuni's detailed submissions on the appellant's behalf on this very point. He also gave weight to the contemporaneous documents which he had reviewed in detail when considering each of the acts.

As to the appellant's own evidence in seeking to discharge the burden the judge said in paragraphs 301and 302;

> *"301. From what I have said so far, it will be clear that I have found D1's evidence to be both unreliable and untruthful. I have already given many instances of where, and why, I find this to be so. His explanations for his acts were too glib. When asked for his explanation for his acts, he was only too prepared to place the blame on others. He went so far as to say at one point in cross-examination that the reason why the contracts took the form they did was because for the 20 years he had been IPS his subordinates had ignored his instructions to have a special IPS form of contract drawn up.*
>
> *302. The obvious correlations in time between the favours (be they the contracts, the benefit of the variation orders, or the grant of the TOL land) and the gratifications were to him "coincidences". I am quite sure that they*

> *were not. Had H.M. The Sultan been informed, as he should have been, when he was asked for his formal approval for a State project, such as for example Tungku Package 3, to be awarded to TED, that the Minister advising him to do so had just received a house built at D2's expense and had already become D2's landlord, and that both he and D2 were about to embark n what was intended to be a lucrative land development deal at Lot 33999, one wonders what H.M. The Sultan would have said and whether he would have consented to the proposal. I doubt very much if His Majesty would have seen the connection as only coincidental. Yet D1 maintains he saw no need to tell His Majesty about these matters because his "conscience was clear". The fact that he was the Minister of Development and IPS with direct access to H.M. The Sultan ought to have made him acutely conscious of the conflict. I am quite sure that he was aware of it, but deliberately chose to ignore it because he was receiving the gratifications from D2 corruptly as that term is understood in law."*

In these circumstances it is futile to engage in the detail of Mr Sidhu's careful submissions on the acts. Even if correct, which they are not, it could not profit him. He cannot succeed on them in the appeal. There is nothing he has advanced which puts into question the judge's well reasoned findings.

Conclusion and order

For the foregoing reasons we dismiss the appeal against the convictions and we will so order.

The Appeal against Sentence

The Corruption Charges

The maximum sentence provided for in relation to each of the three charges under Section 6 (a), punishable under Section 7(1) of the Prevention of Corruption Act, Cap 131, was 10 years imprisonment. The starting point selected by the judge for each offence was 8 years. He deducted 1 year to reflect the very long delay in bringing the proceedings to a conclusion and for each of the three offences he imposed a sentence of 7 years imprisonment, the sentences to be concurrent.

This court will not interfere with a sentence unless it is shown to be manifestly excessive or wrong in principle. On this basis it is contended on behalf of the Appellant that the starting point was too high. In a case such as this, however, where a course of corrupt conduct by a man in high and powerful public office, involving very large sums of money, is pursued over many years, punishment and deterrence must be the paramount considerations. As was said in *HKSAR v Wong Kwok Wang* [2008] 4 HKLRD 404 at p. 414;

> "*It would seem that once it becomes known that at the heart of a major company in whose gift it is to award massively lucrative contracts, there sits a corrupt officer willing to sell himself in order to exert influence, many contractors are only too ready to avail themselves of the opportunity. Such officers and such contractors must be made aware that they can expect no quarter from the courts if they are caught. "*

That was a case of private sector corruption but the principle stated is applicable where the corrupt officer sits at the very head of a government department. See for example, *R v Foxley*, (1995) 16 Cr App R (S) 879 where Roch, LJ said:

> *"Sentences of former public servants for taking bribes, especially in cases such as the present where the motive was not some urgent financial necessity but personal enrichment, must contain substantial elements of punishment and deterrence. Over £2 million was obtained by this man. If the appellant and his family were subjected to anxiety and stress over many years while these matters were investigated, that was the appellant's doing…"*

Mr Sidhu submitted that the sentences were excessive, having regard to length of the delay, the Appellant's good character, age and current personal situation, his 'immense contribution', as the judge described it, to the development of Brunei during his tenure of the office as Minister of Development, the consequences of conviction, the distress and anxiety suffered by the Appellant and his family and his reduced circumstances.

The judge explicitly considered how to approach the matter of good character. He said

> *"I know that you are a man of good character, but I have to bear in mind that the men who commit the offences you committed are of good character before they fall prey to corruption. People of bad character are very rarely appointed to high positions in government."*

There is no reason to suppose that the judge was unaware of the appellant's age. As to stress and anxiety suffered during the trial process, the judge said that he found it of mitigating value and that the appellant would receive consideration for it in his assessment of the length of the sentences. He probably had in mind the stress occasioned by the delay, which was the reason for the discount of one year.

As to the appellant's contribution to the development of Brunei, the judge said

> *"I am aware that your contribution to Brunei's development has been immense, but neither can I ignore the fact that the evidence has shown that for about half the time you were the Minister of Development in His Majesty's Government you were also a corrupt civil servant."*

Mr Sidhu submitted that the judge gave insufficient allowance for delay. Investigations began in 1999 and were completed in 2001. It was only in May 2004 that the Appellant was charged in relation to a course of conduct dating back to 1992. The first trial began on 14 February 2005 and continued for 4 years, with long interruptions, and was finally abandoned on 26 February 2009. The new trial began on 28 September 2009 and concluded on 18 February 2010, when sentence was passed. Thus the process of trial and investigation covered a period of no less than 10 years. Miss Draycott has submitted that whilst the investigation and prosecution took time, it was justified in a case of this complexity involving a man in the Appellant's position. Even having regard to the complexity of the case the time taken to investigate was lengthy but not so long as to indicate fault in the absence of an explanation. So far as we know, however, the there has been no explanation for the delay between completion of the investigation at some time in 2001 and the bringing of charges in May 2004. With regard to the first hearing, Miss Draycott suggests that the conduct of the defence case significantly contributed to its length and she has backed up her suggestion with a chronology. Whilst we agree that it appears that the

defence could have been conducted in a manner less likely to delay the conclusion of the trial, the primary responsibility for what occurred must lie with the court. Moreover, the other defendant was actively making his defence at that trial so that it would be difficult to apportion blame for the delay.

The principle that undue delay has a punitive effect and ought to be taken into account is well known and the judge followed that principle in considering sentence. The question is whether, in all the circumstances he should have allowed a greater discount from his selected starting point. We are troubled by the unexplained delay that occurred between the completion of the investigation and the bringing of charges. Taking that into account in addition to the long delay occasioned by the first trial, we might well in an ordinary case have felt it necessary to increase the discount. However, considering all the circumstances of this very serious case and bearing in mind the need for a deterrent sentence, we find that a discount of one year from the starting point selected was not unreasonable. As the judge said:

> *"I have to say that it is hard to imagine a more serious case of corruption than yours. Your sentences must be ones of immediate custodial imprisonment. And they must be for a meaningful period of time; justice and the public interest demand that."*

The judge could have taken a higher starting point, as he might well have done, and allowed a greater discount for delay, arriving at the same end result. It is clear that throughout he was looking at the criminality as a whole and it is the totality that is important.

If the Appellant had pleaded guilty at the earliest opportunity and indicated remorse he could have looked for a discount of one third on his sentence. Having contested the charges, he has deprived himself of the discount.

The Section 165 offences

On each of the 8 charges under Section 165, the judge imposed concurrent sentences of 5 years imprisonment, having taken a starting point of 6 years and given a year's discount for the mitigating factors.

Prior to the 7 May 1997, the maximum sentence for an offence under section 165 of the Penal Code, Cap 22 was 2 years imprisonment. After that date the maximum was increased to 7 years. Unfortunately this matter does not appear to have been brought to the attention of the judge by counsel.

As the Appellant submits and the respondent concedes, the sentences in respect of charges 4, 5, 6, 8 and 9 are unlawful in that the facts of the charges predate the Emergency (Penal Code) Amendment Order, 1997, which increased the maximum sentence from 2 to 7 years. That must be right. The dates for charge 12 straddle the relevant date of 7th May 1997. It is suggested by the respondent that the court may feel it preferable to reduce the sentence on that charge. Whether or not the law requires it, and we have not heard detailed argument on the point, we agree that a reduction of the sentence on Charge 12 is appropriate in this case.

We will reduce the sentences imposed on counts 4, 5, 6, 8, 9 and 12 from 5 years to 18 months concurrent with the other sentences.

Had the judge been made aware of the change of maximum penalty and had sentenced accordingly, it would not have affected the totality of the sentence, since concurrent terms of 5 years were imposed on the other section 165 charges.

The Totality

As was pointed out by counsel for the Respondent, where there is a repeated pattern of offending, a court may award a higher sentence than if there had been only one offence; *R v Kwok Chi-keung* [1993] 2 HKCLR 294.

The judge said:

> *"I regard all your offences, both those offences against section 6 in the Prevention of Corruption Act and those against section 165 of the Penal Code as arising out of one continuous course of criminal conduct and in passing sentence I am going to pass concurrent sentences on you in respect of each of our offences."*

He evidently had the whole scope of the criminality in mind when selecting his starting points and accordingly imposed concurrent sentences to reflect it.

When one considers that the Appellant had committed a series of offences over many years, involving extremely serious breaches of the trust reposed in him as a Government Minister and involving a great deal of public money, offences leading to his enrichment, to the tune of B$4,219,214.60, we consider that the overall sentence of 7 years imprisonment was not a day too long. It should serve as an example to any public servant who is tempted to abuse his position for personal gain. The overall sentence, when it was imposed, was neither wrong in principle nor manifestly excessive.

Mr Sidhu has made a plea for mercy putting forward certain matters that were not before the trial judge. The Appellant has suffered some ill health. We have seen a medical report about that but there is no evidence that the ill health whilst it occurred during the appellant's incarceration, was caused by it or is particularly unusual in a man aged 64 such as the Appellant. Fortunately it appears that as a result of appropriate treatment, he is on the mend. We were told that the appellant is remorseful if his conduct has caused any pain to His Majesty the Sultan and that his incarceration has made him realise that he should have been more circumspect in his associations. According to his counsel he finds prison conditions harsh and he feels depressed. The Appellant has not admitted his guilt or expressed remorse for his crimes. None of the matters urged before us are such as to justify interference with what was and remains a proper overall sentence.

We briefly mention that at the invitation of the court, counsel addressed the question of the effect upon the court's sentencing power of Section 71 of the Penal Code and of section 166(4) of the Criminal Procedure Code, Cap 7. Mr Sidhu has submitted that where a person is convicted on charges laid under different statutes but based on substantially the same facts, and where the maximum sentences provided are different, the sentence should be governed by the lower minimum. We reject that contention.

Even if, in this case, section 71 applies to the offences under section 6 (a) and the offences under section 165 we think that its effect was merely that the appellant could not have been punished, in total, by a sentence of more than 10 years, the maximum

sentence under 6(a) and 7. That did not occur. We doubt whether this case does come under section 71, notwithstanding the concession of Miss Draycott, but, for the reason just given, we do not find it necessary to decide that point.

The Order for Costs

The judge ordered that the appellant pay 90% of part of the prosecution costs. It is submitted by Mr Sidhu that in doing so, the judge erred in fact and law and that a substantial reduction is required.

The discretionary power to award payment by a convicted person of all or part of the costs of the prosecution is vested in the judge by section 382 of the Criminal Procedure Code Cap 7.

It is to be noted that the judge only ordered payment in relation to the costs of the second trial, not the costs of the investigation or of the first trial. The Appellant was ordered to pay within 100 days HK$3,123,183.51, representing 90% of the prosecution costs, with 6 months imprisonment in default, to be served consecutively to the sentences for the substantive offences. The costs are presumably expressed in Hong Kong dollars because both leading counsel for the prosecution and one of his juniors were from Hong Kong. Whilst it is true that there was another defendant who was being tried in his absence, it is clear that the second trial would have taken a similar course if the appellant had been tried alone. Had D2 been taking part, the trial must have been longer and more costly. That is reflected in the fact that D2 was ordered to pay 10%.

The Appellant suggests that the costs should have been divided equally between the defendants and cites for his authority *R v Ronson and Parnes* 13 Cr App R (S) 153 CA and *R v Harrison* 14 Cr App R (S) 419 CA. The former case deals with the problem of how costs should be apportioned where one of several defendants does not have the means to pay. There is no evidence that either defendant in the present case did not have the means to pay. The latter case is authority for the proposition that the judge can apportion costs according to relative culpability. It does not assist the Appellant at all. Moreover, it is clear from *Harrison* that the Court of Appeal did not consider that *Ronson and Parnes* was laying down a test which must be applied in all cases or seeking to limit the discretion given to the court. In the latter case, the court was recognizing that there may be circumstances which justify a different approach, so long as the costs awarded are nonetheless just and equitable. We have no evidence before us as to the appellant's means and we have no ground for holding that he cannot pay the sum ordered, which was only 90% of one part of the overall costs of bringing the matter to a conclusion.

We find that the order made by the judge was fair in all the circumstances and are unable to say that in making it he erred in the exercise of his discretion. There has been no appeal against the sentence of imprisonment provided for in the event of a failure to pay.

Restitution

The judge ordered the appellant to pay, within 100 days, $4,219,242.60 in restitution for the gratifications received, with 12 months imprisonment in default, to be served consecutively. One of the grounds of appeal is that the order as to restitution should be revisited and/or set aside. No argument has been advanced in support of that ground.

The judge found that he could assess the amount of the gratifications and there is no suggestion that his assessment was incorrect. He was thus under the mandatory duty imposed by section 17 of the Prevention of Corruption Act Cap 131 to order the Appellant to pay as a penalty a sum equal to the amount or value of the gratifications, such penalty to be recoverable as a fine. It was not necessary to take into account the Appellant's means. See *HKSAR v Lui Kin-hong Jerry (No. 2)*{2001} 2 HKC 513 at p. 537A, where the Hong Kong Court of Appeal said

> *"It is not open to an offender who has quite clearly benefited in sums over $30m to say that he ought not to make restitution because he has spirited away or spent the proceeds of that corruption. At common law, the agent who accepts bribes is liable to the principal for the full amount of the bribes....in the application of that law, there is no room for a defence which says that the corrupt agent cannot afford to pay."*

We respectfully agree and we find no ground for interfering with the order for restitution. There has been no appeal against the sentence of imprisonment provided for in the event of a failure to pay.

Orders

1. The appeal against conviction is dismissed.

2. The appeal against sentence is allowed to the extent that the sentences of 5 years imprisonment imposed on charges 4, 5, 6, 8 ,9 and 12 will be set aside and a sentence of 18 months on each charge, to be served concurrently with the other sentences, will be substituted.

3. The appeal against sentence in relation to the other charges is dismissed.

4. The appeals against the orders for costs and restitution are dismissed.

There will be no order as to costs of the appeal.

Mortimer, P.

Davies, J.A. **Leonard, J.A.**