

Zulkifli Bin Haji Talip

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 19 of 2022)**

Steven Chong, C.J.

8 March 2023

Criminal law – Corruption - Sentence

Sheikh Noordin Bin Sheikh Mohammad (M/S Sheikh Noordin Mohammad & Associates) for the Appellant.

DPP Hjh Suriana Bte Radin for the Public Prosecutor.

Cases cited:

Wong Kai Fen v Public Prosecutor [2008] 1 JCBD 24

Maimun Binti Hj Omar v Public Prosecutor [2013] 1 JCBD 154

Tan Kiang Kwang v Public Prosecutor [1995] 3 SLR (R) 746

Steven Chong, C.J.:

Introduction

On 17 May 2022 in the Magistrate’s Court the appellant was convicted after a trial of two charges contrary to section 6(a) of the Prevention of Corruption Act:

1st Charge: that you on or about 3 June 2008 did corruptly attempt to obtain from Pea Chong Hin (“Mr Pea”), the Managing Director of Pea’s Company Sdn Bhd (“Pea’s Company”), a gratification of 5% commission of the total value of six projects for the installation of fibre optic cables for Data Stream Technology Sdn Bhd (“DST”) amounting to \$923,593.60 as a reward for recommending the award of these projects to Pea’s Company.

2nd Charge: that you on 23 September 2008 did corruptly accept from Mr Pea a gratification of \$15,000 being part payment of the 5% commission of the total contract value of nine projects for the installation of fibre optic cables for DST amounting to \$943,078.70 as a reward for recommending the award of these projects to Pea’s Company.

The Magistrate sentenced the appellant to imprisonment for one year concurrent.

The conviction followed a retrial after the Magistrate in the first trial was no longer available to complete the trial process.

The appellant appeals against sentence only having abandoned his appeal against conviction before the hearing.

The facts

Briefly summarized the facts were that in April and May 2008 Pea's Company tendered for the fibre optic installation projects stated in the 1st and 2nd Charges ("*the projects*") on the invitation of DST.

Starting from 12 May 2008 the appellant, who was the Acting Senior Manager in DST, initiated a series of meetings with Mr Pea during which the appellant demanded a commission of 5% of the total contract value of the projects as a reward for recommending the award of the projects to Pea's Company ("*the 5% commission*").

Mr Pea reported the appellant to the Anti-Corruption Bureau ("*ACB*") on 15 May 2008. He also recorded some of the conversations between him and the appellant.

On the morning of 25 September 2008 Mr Pea had a prearranged meeting with the appellant in a car park in Gadong. The purpose of this meeting was for the appellant to collect a payment of \$15,000 from Mr Pea being part of the 5% commission. The appellant entered Mr Pea's car and sat on the front passenger seat. Mr Pea handed an envelope containing \$15,000 provided to him by the ACB to the appellant.

After putting the money in his trouser pocket the appellant exited the car whereupon ACB officers on surveillance at the scene immediately arrested him and seized the money.

I should point out that the 2nd Charge erroneously states that the appellant corruptly accepted the \$15,000 bribe from Mr Pea on 23 September 2008 when the evidence was that this event occurred on 25 September 2008. Nothing turns on this error as it was not challenged by the appellant at trial and it has not occasioned a failure of justice.

Magistrate's sentencing remarks

In determining sentence the Magistrate was guided by the observation of this court in *Wong Kai Fen v Public Prosecutor* [2008] 1 JCB 264 [at 270] that unless there are exceptional circumstances anyone convicted of an offence of corruptly accepting or giving a gratification

can expect a starting point custodial sentence of 18 months reduced to 12 months on a guilty plea.

The Magistrate considered the appellant's "*senior position*" in DST when he committed the offences as an aggravating feature and said:

"Notwithstanding his guilty plea, clean track record, genuinely remorseful and inordinate delays, I find that there is no justification for ordering a probation order or even a fine.

Having regard to the serious nature of the offence and aggravating factors present, I am satisfied that a deterrent sentence is necessary in this case so as to reflect the gravity of the offences and also to deter potential offenders from committing the same offence."

The submissions

Counsel for the appellant submits that the sentence imposed by the Magistrate was wrong in principle and excessive essentially on the ground of the delay in the prosecution of the case and the trial.

It is common ground that there was a lapse of 8 years between the commission of the offences and the appellant's first appearance in the Magistrate's Court on the charges.

Furthermore, the appellant had to go through two trials after the Magistrate who presided in the first trial was "*no longer available*" necessitating a retrial *de novo*.

These "*exceptional circumstances*" it is contended justifies either a probation and community service order or a fine.

Reliance was placed on *Maimun Binti Hj Omar v Public Prosecutor* [2013] 1 JCB 154 in which the appellant pleaded guilty to six offences of forgery in the Intermediate Court and was sentenced to 4 years' imprisonment and a fine of \$6,000. On appeal the Court of Appeal, citing with approval the decision of the Singapore High Court (Yong Pung How, CJ) in *Tan Kiang Kwang v Public Prosecutor* [1995] 3 SLR (R) 746, substituted that sentence with a probation and community service order considering the "*stress*" caused with "*the offences held over the appellant's head*" for 10 years.

The DPP submits that even with the delay in the prosecution, caused by a change of investigators in the course of the investigations and also a change of prosecutors responsible for instituting the charges, the sentence imposed by the Magistrate was proper in view of the following aggravating factors:

1. The appellant had claimed trial to the charges even when confronted with incriminating audio recordings.

2. He held a senior position in DST.
3. The amount of gratification sought was “*not small*” as he wanted a 5% commission of the total contract value of \$943,078.70.
4. His corrupt conduct was not a “*one-off*” occasion. It spanned over several months with the appellant initiating the meetings with Mr Pea.

My decision

The Magistrate’s reasoning behind her sentence is problematic for three reasons.

Firstly, the Magistrate appears to have forgotten the fact that the appellant had been convicted after a trial and she proceeded to sentence him on the basis of a guilty plea because she said:

“Notwithstanding his guilty plea....., I find that there is no justification for ordering a probation order or even a fine.”

Secondly, the Magistrate concluded that a deterrent sentence was necessary in view of the “*aggravating factors*” present in the case but she identified only one factor, i.e., the appellant was in a “*senior position*” in DST.

I interpose here to comment on the submission of the prosecution that the appellant’s decision to claim trial despite the compelling evidence against him was an aggravating factor.

This is wrong. A person accused of committing an offence is entitled to contest the charge and to require the prosecution to prove the case against him. This is a fundamental right of an accused person in criminal law but if he is convicted of the offence after a trial he is not entitled to the discount usually afforded for a guilty plea.

Thirdly, although the Magistrate made reference to the “*inordinate delays*” in the “*conduct of the proceedings*” she failed to address her mind to the question of whether in the circumstances the appellant should be given a discount in the sentence and, if so, the level of the discount.

Undoubtedly, there was an inordinate delay in the prosecution of the case and this was compounded by a retrial. In the absence of any fault on the part of the appellant it is only fair that this delay be considered in his favour in the sentence to be imposed.

That said, I disagree with the proposition of the appellant that this delay provides “*exceptional circumstances*” justifying a non-custodial sentence of a probation and community service order or a fine.

Corruption undermines the rule of law. The court must do what it can to deter corruption in public and commercial life. Those in positions of trust who engage in corrupt practices can expect a substantial prison sentence. A probation and community service order or a fine would be detrimental to the objective of deterrence in the sentence.

There were three readily identifiable aggravating features in this case: first, the senior position held by the appellant in DST and correspondingly the degree of trust reposed in him at the time of the commission of the offences; second, the substantial amount of gratification he attempted to solicit; and third, the duration of his corrupt conduct and persistence in pursuit of the payment of gratification to him.

Applying the guideline sentence in *Wong Kai Fen’s* case, giving credit to the appellant for his clear record, a starting point sentence of 18 months’ imprisonment is appropriate. A reduction of 6 months is proper to account for the delays referred to earlier resulting in a sentence of one year which is what was imposed by the Magistrate.

Thus, while the Magistrate erred in her reasoning she ultimately arrived at a sentence which, even allowing a reduction in the sentence for the delay factor, correctly recognized the gravity of the offences and the culpability of the offender.

Conclusion

For the foregoing reasons the appeal is dismissed.

DATO SERI PADUKA STEVEN CHONG
Chief Justice