Hjh Asnah Binti Hj Sairan

AND

Public Prosecutor

(High Court of Brunei Darussalam)
(Criminal Appeal No. 21 of 2018)

Steven Chong, C.J.
10 December 2018

Corruption – Whether gratifications given and accepted as "mere gifts" – S.6(a) of Prevention of Corruption Act – Order for payment of penalty and prosecution costs – Principles.

Rozaiman Abdul Rahman (M/S Hj Mohamad Rozaiman bin Dato Haji Abdul Rahman) for the Appellant.
DPP Sharon Yeo for the Public Prosecutor/Respondent.

Cases cited:

Public Prosecutor v David Chong [2013] 2 JCBD 221
R v Harvey (1999) Crim. L.R. 70
R v Mills (1978) 68 Cr App Rep 154
HKSAR v Lui Kin-hong Jerry (No.2)(2001) 2 HKC 513
Oh Cheng Hai v Ong Yong Yew [1993] 3 SLR (R) 257

Steven Chong, C.J.:

On 14 July 2018 in the Magistrate's Court the appellant was convicted after a trial of 16 counts of corruptly accepting gratifications ranging from $300 to $5,000 contrary to section 6(a) of the Prevention of Corruption Act ("the PCA").

The Magistrate sentenced the appellant to 4 ½ years imprisonment on each count to run concurrently.

Additionally, the appellant was ordered to pay (i) a penalty (erroneously described as a "fine") of $28,300 being the total amount of the bribes accepted or in default of payment 6 months imprisonment; and (ii) prosecution costs of $200,000 or in default of payment 3 months imprisonment.

This is an appeal against conviction and sentence.

Undisputed facts

A Statement of Agreed Facts was tendered in evidence whereby it was agreed, amongst other things, as follows:

(a) The appellant was employed as a Supply Chain Support (Seismic/Geomatics) in the Supply Management Department of Brunei Shell Petroleum Company Sendirian Berhad ("BSP").

(b) The appellant was an "agent" of BSP for the purposes of section 6(a) of the PCA.

(c) BSP was a "public body" for the purposes of section 7 of the PCA.

(d) From time to time the appellant created Purchase Orders (POs) for the purchase of products to be supplied by BSP's registered vendors, which purchases were contracts with BSP. The creation of such POs were acts relating to the affairs of the appellant's principal, BSP.

(e) Musfada Enterprise ("Musfada") was a registered vendor with BSP and supplied products such as office equipment, chemicals, oil spill kits, box pallets and safety equipment to BSP.

(f) In order to increase the sales of Musfada David Chong, who was the manager, decided that gratifications would be offered and given to BSP employees to procure more orders for Musfada from BSP.

(g) Under BSP's rules and guidelines its employees are prohibited from receiving money, loans and gifts of more than $50 from external parties.

Prosecution case

The cornerstone of the case for the prosecution was the evidence of the main witness David Chong. On 28 November 2013, having initially claimed trial, he was convicted on his own plea in the High Court to 40 charges of corruption, fraud and cheating, with 62 similar charges taken into consideration, and sentenced to 6 years and 4 months imprisonment: *Public Prosecutor v David Chong* [2013] 2 JCBD 221.

In essence, it was the evidence of David Chong that he devised a scheme to increase the sales and revenue of Musfada by giving BSP employees gratifications in the form of a commission of 3% of the price of Musfada products as a reward for creating POs for the purchase of Musfada products for BSP (“the Musfada 3% reward scheme”).

Crucially, David Chong recounted that on sixteen occasions between February 2008 and May 2009 he went to the appellant’s house and gave her the gratifications totalling $28,300 as a reward for creating the POs set out in the charges against her; and referring to Musfada’s PO Book, payment vouchers, cheques and invoices, he confirmed that the gratifications individually and in total amounted to 3% of the price of the Musfada products in the POs created by her.

Musfada PO Book

The commission of 3% to be paid by Musfada to BSP employees, which included the appellant, for creating POs was initially calculated by David Chong himself and subsequently by two Musfada employees based on the entries of POs recorded in a Musfada PO Book. The accuracy of the entries was undisputed at trial.

In respect of the appellant the amount of the gratifications given to her by David Chong corresponded to 3% of the total value of the Musfada products in the POs created by her set out in the 16 charges. The accuracy of this calculation was also undisputed at trial.

Splitting of POs

The appellant’s approval limit for POs was $10,000. If the value of the PO exceeded that amount she had to seek the approval of her superior before releasing the PO to the vendor.

There was evidence the appellant split her purchases into multiple POs each below her approval limit of $10,000 instead of creating a single consolidated PO. An instance of this system was on 3 June 2008 when the appellant created a PO for the purchase of 60 “Box Pallet” at a price of $9,000 and another PO for the purchase of 30 “Box Pallet” at a price of $4,500. Both POs were for the same product to be purchased from the same vendor, Musfada, and for the same end user in BSP.

Staggering of POs

The appellant also staggered her creation of POs by creating multiple POs one day apart for the purchase of identical Musfada products. An example of this method can be seen on 1, 2 and 3 April 2008 when the appellant created three POs for the purchase of identical quantities of the same Musfada product: 50 “Box Pallet” c/w Steel Bracket at a price of $10,000.

Appellant's statement

On the evening of 7 October 2009 the appellant gave a statement to the Anti-Corruption Bureau ("ACB"). She challenged the admissibility of the statement on the ground that it was involuntary. The Magistrate was satisfied the statement was voluntary and admitted it in evidence having adopted the Alternative Procedure to determine the issue of admissibility.

At the end of the statement the appellant was asked this question: *"Have you ever received money from David Chong for helping to make the purchase orders for Musfada?"*

The appellant answered: *"I confess that I have received money from David Chong at my house as follows: (a) $700 in a brown coloured envelope which was given personally by him on 13 October 2008; (b) $1,000 plus put inside a brown coloured envelope that was given personally by him in the year 2008; and (c) $2,000 plus put inside a brown coloured envelope that was given personally by him in the year 2008."*

In the earlier part of her statement the appellant explained that she had at first rejected David Chong's offer to her of $700 but then accepted the money after he told her it was "Just a courtesy"; in 2008 she bought a dining table costing about $1,000 with money given to her by David Chong; and in the same year she "booked" a kitchen cabinet costing around $2,000 "using the money given by him for helping to make purchase orders for Musfada".

Defence case

The appellant's defence in her statement made under section 117B of the Criminal Procedure Code was simply a denial of receiving any gratifications from David Chong. She admitted creating the POs mentioned in the sixteen charges but asserted she did so as it was her "responsibility and duty as a buyer".

According to the appellant she was "acquainted" with David Chong and he had only given her "hampers" during the festive season of Eid.

In evidence-in-chief in court, however, the appellant when referred to her ACB statement by her counsel then admitted she had received $700 from David Chong (9th Charge). She said she accepted the money because he told her it was "just a courtesy and a gift".

As to the admissions in her ACB statement of receiving two other sums of "$1,000 plus" and "$2,000 plus" from David Chong, the appellant claimed she did not in fact receive those gratifications. She said she was "already in stress" and "not feeling well" and "they just asked me to admit it".

Decision of the Magistrate

The Magistrate found David Chong to be a credible witness and that as he had already been convicted of the corruption charges relating to his payment of bribes to BSP employees there was no reason for him to give false evidence implicating the appellant.

Accordingly, the Magistrate accepted the evidence of David Chong that his scheme to increase the sales and revenue of Musfada involved the payment by him to BSP employees commissions of 3% of the price of Musfada products in POs created by them; and he gave gratifications amounting to a total of $28,300 to the appellant on sixteen occasions from February 2008 to May 2009 as a reward to her for creating POs for the purchase of Musfada products as stated in the charges against her.

Turning to the appellant's evidence the Magistrate did not find her to be a truthful witness and rejected her evidence on the material issues. She pointed out the inconsistencies in the appellant's evidence. For example, the appellant had initially denied receiving any gratifications from David Chong but later admitted she did receive $700 from him as a "gift".

The Magistrate concluded that the appellant did corruptly accept the gratifications totaling $28,300 from David Chong as charged. She commented that the gratifications could not have been accepted by the appellant as "mere gifts" having regard to (i) the substantial sum of $28,300 in total received by her from David Chong who she said was no more than an acquaintance; and (ii) the manner in which she created the POs by splitting and staggering them to keep within her approval threshold and thus "bypassing" her superiors approval.

As to sentence the Magistrate decided that the "overall criminality of the offences" warranted a sentence of 4 years and 6 months' imprisonment.

The order of the Magistrate for payment of a penalty of $28,300 or 6 months' imprisonment in default of payment, being the total amount of gratification received, was made pursuant to section 17 of the Prevention of Corruption Act.

Prosecution costs of $200,000 or 3 months' imprisonment in default of payment was ordered by the Magistrate having regard to the "cost orders in other Brunei Shell Petroleum Cases involving Musfada".

Grounds of appeal

The grounds of appeal are that the Magistrate erred in:

(a) "wrongly considering that the gratifications" given by David Chong were bribes and not "mere gifts";

(b) "wrongly considering that the gratifications" given by David Chong "were corruptly received" by the appellant "when in fact they were gifts";

(c) wrongly admitted the appellant's statement to the ACB when there was evidence it was given by her under coercion; and

(d) ordering the payment of a penalty of $28,300 and prosecution costs of $200,000 when the appellant did not have the means to pay.

Discussion

The grounds of appeal against conviction essentially concern the Magistrate's findings regarding the credibility and reliability of the prosecution witnesses and of the appellant. It is trite law that an appellate court will not disturb findings of fact unless they are plainly wrong or clearly reached against the weight of the evidence bearing in mind the trial court had the opportunity of observing the witnesses to assess their veracity and reliability.

As the Magistrate saw and heard David Chong testify in the trial she was entitled to find that he was a truthful witness and to accept his evidence that he had given the appellant bribes in total of $28,300 as a reward to her for creating the POs set out in the sixteen charges against her.

Similarly, the Magistrate saw and heard the appellant testify and she was entitled to find that the appellant was not a truthful witness and to reject her evidence that she did not receive any gratification from David Chong save for $700 which she thought was a "gift". This conclusion by the Magistrate is unsurprising as it is evident that the appellant prevaricated in her evidence on the issue.

The Magistrate having carefully assessed the evidence concerning the circumstances in which the appellant gave her ACB statement was amply justified to reject the allegations of coercion made by the appellant and to accept the evidence given by the ACB officers and to conclude that it was made voluntarily.

On the unequivocal evidence of David Chong, which the Magistrate accepted, it was established that he gave, and the appellant accepted, the gratifications alleged in the charges. The presumption under section 25 of the PCA arises that the gratification was given and accepted corruptly as a reward as alleged in the particulars of the offence in each charge.

The word "corruptly" in sections 6 and 25 of the PCA is not defined. In *R v Harvey* (1999) Crim. L.R. 70, the English Court of Appeal held:

"The word "corruptly" for the purposes of that section [section 1 of the Prevention of Corruption Act 1906], was to be construed as meaning deliberately offering money or other favours, with the intention that it should operate on the mind of the person to whom it was made so as to encourage him to enter into a corrupt bargain."

Counsel for the appellant submits that the appellant was not aware of the Musfada 3% reward scheme devised by David Chong; she was only carrying out her "normal duties"; and she received the gratifications from David Chong as "gifts".

That submission ignores the operation of section 8(1) of the PCA which provides:

"Where in any proceedings against any agent for any 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."

It is plain that under section 8(1) of the PCA it is the intention of the giver and the recipient that is important. It is no defence to a charge under section 6(a) of the PCA that the recipient of the gratification did not show favour to the giver or that the recipient accepted the gratification never intending to show favour to the giver. In *R v Mills* (1978) 68 Cr App Rep 154, a decision of the English Court of Appeal, Geoffrey Lane LJ said at p.159:

". . . in our judgment it is enough that the recipient takes the gift knowing that it is intended as a bribe. By accepting it as a bribe and intending to keep it he enters into a bargain, despite the fact that he may make to himself a metal reservation to the effect that he is not going to carry out his side of the bargain. The bargain remains a corrupt bargain, even though he may not be intending to carry out his intended corrupt act."

The Magistrate rightly concluded that the appellant had failed to displace the presumption under section 25 of the PCA that she received the gratifications corruptly. The proposition that the appellant thought David Chong was simply giving her "gifts" which she accepted not knowing they were bribes is preposterous. On the appellant's own evidence David Chong was only an acquaintance. No explanation was given for the generosity of David Chong in giving the appellant gratifications amounting to a total of $28,300.

The prosecution advanced a formidable case against the appellant. The cumulative evidence comprising (a) David Chong's narrative of the corrupt scheme he devised to bribe BSP employees in order to procure orders for Musfada products and the bribes he gave to the appellant accordingly, (b) the confession of the appellant in her ACB statement that she received three cash payments from David Chong in return for creating POs for Musfada, (c) the substantial amount of the total gratification received by the appellant, (d) the acceptance of the gratifications in breach of BSP's rule prohibiting its employees from receiving gifts of more than $50 which the appellant was cognizant of, and (e) the appellant's pattern of splitting up and staggering the POs to keep the value within her approval limit of $10,000 to obscure the fact she was creating a large numbers of POs for the purchase of Musfada products and obviate the need to seek approval from her superior and thus avoid suspicion, points ineluctably to the gratifications alleged in the charges having been given by David Chong corruptly and received by the appellant corruptly.

Simply describing the gratification as a "gift" does not transform what was clearly a bribe into a "gift". The Magistrate's decision to convict the appellant of the charges against her is unassailable.

Turning to the sentence it is contended by the appellant that the Magistrate was wrong to order her to pay the penalty of $28,300 and the prosecution costs of $200,000 as she did not have the means to do so. There is no merit in this contention.

Section 17 of the PCA provides that where any person is convicted of the acceptance of any gratification, and, if that gratification is a sum of money, the court "shall" order him to pay a "penalty" equal to the amount of that gratification.

Thus, the Magistrate was under a mandatory duty to impose a penalty equal to the amount of gratification in total which the appellant accepted, $28,300. It is right that the appellant should be ordered to disgorge this corrupt benefit. Her means to pay is irrelevant. In *HKSAR v Lui Kin-hong Jerry* (No.2)(2001) 2 HKC 513 the Hong Kong Court of Appeal aptly put in this way at p.537A:

"It is not open to an offender who has quite clearly benefited . . . to say that he ought not to make restitution because he has spirited away or spent the proceeds of that corruption."

Section 382 of the Criminal Procedure Code provides the court with a discretion to order a convicted person to pay the costs of his prosecution. It is instructive to refer to the decision of the Singapore High Court in *Oh Cheng Hai v Ong Yong Yew* [1993] 3 SLR (R) 257, for guidance governing the exercise of this discretion. Yong Pung How CJ said at [28]:

"Of course, it is not in every case that such costs should be ordered. In exercising its discretion, however, the court is entitled to take all the circumstances into account, including the strength of the case against the accused, his knowledge of this and his conduct of his defence. An accused has a right to plead not guilty and to conduct his defence in any manner allowed by the law. Nevertheless if he loses and the court thinks that his defence has been conducted extravagantly and unnecessarily, he then cannot reasonably complain if he is ordered to pay some part of the costs which he caused the prosecution to incur. There is no evidence to

suggest that such costs as ordered are not within the appellant's means: after all, he owns a Mercedes, a flat in Yishun, and a packing business."

The case for the prosecution against the appellant was overwhelming. The appellant was aware the prosecution was conducted by foreign counsel and she must have realized the expenses would be substantial. She was, of course, entitled to claim trial. But having been convicted after a trial which took over two weeks she cannot reasonably complain about having to pay prosecution costs in the circumstances.

Nor can the appellant claim she does not have the means to pay. There was evidence at trial that the appellant received her full monthly salary during the period of her suspension from duty while under investigation. And she received a gratuity of over $355,000 at the end of her service with BSP in 2016.

The Magistrate was justified in ordering both the payment of the penalty and prosecution costs. Where the Magistrate fell into error was in the default sentences ordered. It seems unfair that a lower financial penalty attracts a higher default sentence ($28,300 or 6 months) whilst a higher financial penalty attracts a lower default sentence ($200,000 or 3 months).

Conclusion

For the reasons I have given: (a) the appeal against conviction is dismissed; and (b) the appeal against sentence is allowed to the extent that if the penalty of $28,300 is not paid the default sentence will be 3 months instead of 6 months.

DATO PADUKA STEVEN CHONG
Chief Justice