

Public Prosecutor

AND

Ramli Bin Timbang (D1)

Public Prosecutor

AND

Sunie Bin Timbang (D2)

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 24 of 2018)
(Criminal Appeal No. 26 of 2018)**

Steven Chong, C.J.
14 March 2019

Corruption – Presumption gratification accepted corruptly – Proof of direct link between a specific act or favour and a particular gratification unnecessary – Sentence – Medical condition of offender – Exceptional circumstances – Discretion of judicial mercy – Delay in prosecution and trial a mitigating factor.

Lt Col (R) Hj Harif Bin Hj Ibrahim (M/S Lt Col (Rtd) Harif Ibrahim) for 1st Appellant (pro bono).
Daud Ismail (M/S Daud Ismail & Co.) for 2nd Appellant.
PO Shamshuddin Bin Hj Kamaluddin for the Public Prosecutor/Respondent.

Cases cited:

Public Prosecutor v Haji Kazi Habibur Rahman [1993] JCBD 22
Public Prosecutor v YAM Pengiran Indera Wijaya Pengiran Dr Hj Ismail Bin Pg Hj Damit and another [2010] 1 JCBD 41
AG v Chung Fat-Ming [1978] HKLR 480
R v Basil Mortimer Bernard [1997] 1 Criminal Appeal R (S) 135
Amiruddin Bin Haji Junaidi v Public Prosecutor [Criminal Motion No. 2 of 2017]
Maimum Binti Haji Omar v Public Prosecutor [2013] 1 JCBD 154

Steven Chong, C.J.:

On 25 August 2018 in the Magistrate's Court the 1st Appellant ("D1"), a Storekeeper in the Water Services Department, was convicted after a trial of two counts of corruptly accepting gratifications contrary to section 6(a) of the Prevention of Corruption Act and two counts of accepting a valuable thing without consideration from a person connected with his official function as a public servant contrary to section 165 of the Penal Code.

The 2nd Appellant ("D2"), a Chief Technical Assistant in the Water Services Department, who was jointly tried with D1, was convicted of one count of corruptly accepting a gratification contrary to section 6(a) of the Prevention of Corruption Act and one count of accepting a valuable thing without consideration from a person connected with his official function as a public servant contrary to section 165 of the Penal Code.

The Magistrate sentenced the appellants to 18 months' imprisonment on the charges under section 6(a) of the Prevention of Corruption Act and 12 months' imprisonment on the charges under section 165 of the Penal Code to run concurrently.

In addition D1 was ordered to pay a penalty of \$12,857 or 6 months' imprisonment in default of payment.

Both D1 and D2 appeal against conviction and sentence.

Prosecution case

In relation to the charges of corruption the prosecution alleges that (a) D1 corruptly accepted the gratifications of \$6,228 and \$6,629 from one Ling Siew Chong ("Ling"), who was the Manager of Gomax Enterprise ("Gomax"), as a reward for inviting Gomax "to participate in the tender" to provide CCTV systems to the Tasek Water Treatment Plant ("the Tasek Plant") and the Mangkubau Water Treatment Plant ("the Mangkubau Plant"); and (b) D2 corruptly accepted a gratification of \$400 from Ling as a reward "to approve" Gomax's quotations in the tender to provide CCTV systems to the Tasek and Mangkubau Plants.

The case for the prosecution hinged upon the evidence of the primary witness Ling. The salient parts of Ling's evidence were that sometime in July 2008, D1 came to his office to see him. D1 said he was in charge of the tender for the supply of CCTV to both the Tasek and Mangkubau Plants and he would "help" Gomax to secure the award of the tender.

D1's scheme was for Ling to put in three quotations from three companies, including Gomax, for each contract. To ensure the award of both contracts to Gomax the quotation of Gomax in each contract must be below \$50,000 whilst the quotations of the other two competing companies must exceed \$50,000. In return Ling was to pay D1 a "commission" of 15% of the amount of the quotation of Gomax for each contract.

Ling enlisted the assistance of two companies, namely, Hinja Engineering and Syarikat JR Qisrinisa to put in quotations exceeding \$50,000 for the two contracts. Gomax's quotations were below \$50,000: for the Tasek Plant it was \$48,360 and for the Mangkubau Plant it was \$48,922.50.

Later, Gomax's quotations were reduced to \$43,710 for the Tasek Plant and \$46,522.50 for the Mangkubau Plant when the Water Services Department decided on the use of smaller colour monitors. The quotations of Hinja Engineering and Syarikat JR Qisrinisa were also reduced but remained above \$50,000.

Gomax was awarded the CCTV supply contracts and proceeded with installation works at the two Plants. After installation D2, accompanied by D1 and two others, carried out inspection and certified the work had been satisfactorily completed. Gomax claimed \$43,710 for the work done at the Tasek Plant and was paid \$41,524.50 on 21 May 2009 with \$2,185.50 kept by the Water Services Department as a retention sum. As to the work done at the Mangkubau Plant, Gomax claimed \$46,522.50 and was paid \$44,196.37 on 12 June 2009 with \$2,325.13 kept by the Water Services Department as a retention sum.

Within 4 days of Gomax receiving payment in relation to the Tasek Plant, D1 went to see Ling in his office on 25 May 2009 and asked for his 15% commission. Ling paid D1 \$6,228 in cash. D1 signed a Gomax payment voucher with the words "Commission for JKR Water Department Project".

In respect of the Mangkubau Plant, even before Gomax had received payment, D1 went to Ling's office on 8 June 2009 to ask for his 15% commission. Ling gave D1 \$6,629 in cash. D1 signed a Gomax payment voucher with the words "JKR Project Material". Ling could not recall why the payment voucher was described in this manner. The payment voucher was "only meant to be a record for the company account".

Sometime after 8 June 2009 Ling was contacted by D2. They agreed to meet in a restaurant in Gadong. In the restaurant D2 asked Ling for the commission of 15%. Ling told D2 that he had already given D1 the money. D2 was "very unhappy" when he heard this and said he could "make trouble" for Ling and the "retention sums" would not be released to Gomax. Ling then paid \$400 to D2 to appease him.

Several months later Ling received a call from D2 again. D2 told Ling to re-measure the cables that had been installed at the two Plants. D2 said he was afraid there might be investigations by the Anti-Corruption Bureau and insisted that Ling perform additional works. Ling contacted D1 and informed him of D2's demand. D1 said he would "settle the matter" with D2. But D2 was not dissuaded and Ling was forced to carry out additional works costing \$5,556 at the Tasek Plant and \$9,913.35 at the Mangkubau Plant.

Defence case

D1's evidence

In summary the evidence of D1 was that he and other officers were instructed by the District Water Engineer, Hairon Bin Hj Mohd Hussin ("Hairon"), to find a supplier for the installation of CCTV at the two Plants. D1 accompanied Hairon to the Gomax office where they met Ling. In the meeting it was Hairon who discussed the installation of CCTV at the two Plants with Ling whilst D1 only listened.

D1 denied: (i) asking Ling for a 15% commission; (ii) telling Ling to put in three quotations from three companies; and (iii) instructing Ling about the amounts to be stated in the quotations.

The two sums D1 received from Ling totalling \$12,857 were "donations" to the Water Services Department. D1 informed Hairon of the donations. D1 was directed to use the donations for the purchase of goods for the Water Services Department and this included renovation works at Bukit Barun.

D2's evidence

The defence of D2 was simply a flat denial of ever meeting Ling in a restaurant in Gadong and receiving \$400 from him.

D2 only met Ling either at a meeting in the Production Unit of the Water Services Department or at the two Plants during the CCTV installation works.

Decision of the Magistrate

The Magistrate having reviewed the evidence in its totality found Ling was a truthful and reliable witness. The Magistrate accepted Ling's narrative of: (i) D1's scheme to ensure Gomax secured the CCTV supply contracts for the two Plants; (ii) the payment of \$6,228 in cash by him to D1 being his 15% commission in relation to the Tasek Plant; (iii) the payment of \$6629 in cash by him to D1 being his 15% commission in relation to the Mangkubau Plant; (iv) the demand by D2 for the 15% commission; and (v) the payment of \$400 in cash by him to D2.

The Magistrate also accepted the evidence of Hairon that he had neither gone to the Gomax office nor met Ling and he had no knowledge of any donation from Gomax to the Water Services Department.

Furthermore, the Magistrate accepted the evidence of Siti Zainab that on the instruction of Ling she recorded the payment of a sum of \$400 to \$500 to D2 by Ling in the Gomax office computer.

Appeal against conviction

Counsel for D1 argues that as the appellants were jointly tried the prosecution must prove the element of common intention under section 34 of the Penal Code; there was no evidence of a joint enterprise between them in the commission of the offences. I disagree.

I agree with Counsel for D2 that since the appellants faced separate charges the issue of common intention does not arise for determination. The prosecution did not have to prove that D1 and D2 in furtherance of the common intention of both committed the offences which they were separately charged with.

That said, I disagree with the contention of Counsel for D2 that the Magistrate wrongly found the appellants guilty of common intention in committing the offences. The relevant passage in the Judgment of the Magistrate impugned is as follows:

“D2, did not have a clear link with PW2 (Ling) at a first glance. However, after looking at the prosecution case in its entirety, it is clear that D2 was involved in the scheme together with D1. I am satisfied that the prosecution has brought witnesses to give evidence that D2 is the supervising officer for the 2 water treatment project. As the supervising officer, he had the opportunity to see the tender process and leverage Gomax to a position where it will win the tender. As supervising officer, he would also be the person to finalize the project and allow the retention money to be released, or be withheld further. Furthermore, as the Acting Chief Technical Assistant and Supervising Officer, he had ability, opportunity and knowledge to see if the specification of the project was to be carried out by the vendor.”

The Magistrate, in other words, was satisfied on the totality of the evidence that D1 and D2 acted in collusion to ensure Gomax would be awarded the tender to supply CCTV to the Tasek and Mangkubau Plants in return for a commission of 15%. The Magistrate was justified to reach this conclusion on the evidence adduced by the prosecution which he accepted as truthful and reliable. The Magistrate did not, however, make the mistake of convicting the appellants of committing the offences in furtherance of their common intention as each of them was separately charged albeit jointly tried.

Both appellants challenge the Magistrate’s findings regarding the credibility and reliability of the main prosecution witness Ling. 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 Ling testify in the trial he was entitled to find that he was a truthful witness and to accept his evidence that (a) D1 had offered to assist Gomax to secure the tender for the supply of CCTV to the Tasek and Mangkubau Plants in the manner he described and in return a commission equivalent to 15% of the amount of the quotation of

Gomax for the said supply would be given to D1 on completion of the works; (b) he did give and D1 did accept the gratifications averred in the two charges amounting to a total of \$12,857; and (c) D2, too, had asked him for the commission of 15% and he gave and D2 accepted the gratification of \$400 averred to in the charge. The Magistrate's conclusion is unsurprising it being undisputed that the amount of the gratifications given to D1 corresponded precisely to 15% of the sums which Ling received in payment for the work Gomax carried out in the Tasek and Mangkubau Plants which supported Ling's narrative of the events.

In finding Ling to be a witness of truth it follows that the Magistrate must have found the appellants to be untruthful witnesses and rejected their evidence on the material issues although he did not specifically say so since their evidence was directly opposite to Ling's evidence.

Once it is proven that an accused has accepted a gratification the presumption arises under section 25 of the Prevention of Corruption Act that the gratification was accepted corruptly as such reward as is alleged in the particulars of the offence unless the contrary is proved. Plainly, D1 and D2 failed to displace the presumption that they accepted the gratifications corruptly.

Counsel for D2 submits that there is no evidence to show D2 accepted the gratification of \$400 as a reward "to approve" Gomax's quotation in the tender to supply CCTV to the Tasek and Mangkubau Plants as stated in the charge. This submission does not help D2.

Proof of a direct link between a specific act or favour and a particular gratification is not necessary to prove a charge of corruption under section 6(a) of the Prevention of Corruption Act: see *Public Prosecutor v Haji Kazi Habibur Rahman* [1993] JCBD 22.

In a charge under section 6(a) of the Prevention of Corruption Act it is the intention of the giver and the recipient that is material and it is no defence that the recipient of the benefit did not show favour to the party conferring it: see *Public Prosecutor v YAM Pengiran Indera Wijaya Pengiran Dr Hj Ismail Bin Pg Hj Damit and another* [2010] 1 JCBD 41.

McMullin, J. in *AG v Chung Fat-Ming* [1978] HKLR 480 explained the policy behind section 4 of the Prevention of Bribery Ordinance, Cap.201 at p.488 (similar to section 6 of the Prevention of Corruption Act):

"What a public servant is entitled to in return for the performance of his duty is his official wage with whatever allowances and prerequisites that may include – and nothing more. It is corrupt to accept a gift for carrying out one's public duty even if one intends to carry it out properly; even if one has carried it out properly. The evil of so doing is that the other party, and any other person who may be aware of the transaction; will not know or will not believe in the purity of one's intention to perform one's duty properly whether gratified or not. By any such act the confidence which private citizens ought to be able to repose in the impartial performance of their duty by public officials is eroded."

The account from Ling of D2's demand from him for a commission of 15%, accompanied by a threat of not releasing the retention sums in relation to the tender for the supply of CCTV to the Tasek and Mangkubau Plants when informed payment had already been made to D1, provides cogent evidence the gratification of \$400 was given by Ling corruptly and accepted by D2 corruptly.

I find no basis to disturb the Magistrate's conviction of the appellants of all the charges.

Appeal against sentence

Counsel for D1 urged the court to reduce the sentence on the ground of his "deteriorating" medical condition. The medical report concerning D1 shows he is receiving treatment for a number of serious ailments including demyelinating polyneuropathy, coronary heart disease, pulmonary tuberculosis and diabetes mellitus. D1 is bedridden in Tutong Hospital; requires "assistance for activities of daily living"; and is "not fit to return to prison".

A serious medical condition, even when it is difficult to treat in prison does not automatically entitle an offender to a lesser sentence than would otherwise be appropriate; but an offender's serious medical condition may enable a court, as an act of mercy, in the exceptional circumstances of a particular case, rather than by virtue of any general principles, to impose a lesser sentence than would otherwise be appropriate: see *R v Basil Mortimer Bernard* [1997] 1 Criminal Appeal R (S) 135, followed in *Amiruddin Bin Haji Junaidi v Public Prosecutor* [Criminal Motion No. 2 of 2017].

The prosecution rightly concedes that it would not be in the interest of justice for D1 to remain in prison custody in view of his medical condition. I consider that in the exceptional circumstances of this case it is appropriate as an act of judicial mercy to reduce the sentence of D1 so as to allow him to be released from prison custody immediately.

Turning to D2, it is argued by Counsel that the Magistrate failed to take into account the delay of about 5 years in the prosecution and a further delay of nearly 4 years in completing the trial. The prosecution was unable to offer any satisfactory explanation for the delay and agreed that some discount in the sentence ought to have been given.

Delay in the prosecution and in the trial of an accused person may be considered a mitigating factor justifying a lesser sentence than would otherwise be proper: see *Maimum Binti Haji Omar v Public Prosecutor* [2013] 1 JCB 154.

The delay in this case is significant and in the absence of any reasonable explanation I think a discount of 3 months in the sentence is appropriate.

There is one matter which the Magistrate failed to address. Whilst D1 was ordered to pay a penalty sum equivalent to the gratifications he corruptly accepted the Magistrate did not make a similar order in relation to the gratification which D2 was found to have corruptly accepted.

The court below was required to order D2 to pay the penalty pursuant to section 17 of the Prevention of Corruption Act. I see no reason why D2 should not be ordered to disgorge the corrupt payment he received.

Conclusion

For the foregoing reasons the order of the court is as follows:

- (a) D1's appeal against conviction is dismissed.
- (b) D1's appeal against sentence is allowed and his sentence is reduced so as to permit him to be released from prison custody forthwith.
- (c) D2's appeal against conviction is dismissed.
- (d) D2's appeal against sentence is allowed and his sentence of 18 months' imprisonment is quashed and substituted with a sentence of 15 months' imprisonment.
- (e) D2 shall pay a penalty of \$400 or one month's imprisonment in default of payment.

DATO PADUKA STEVEN CHONG
Chief Justice