

**Liew Say Koo (D2)**  
AND  
**Public Prosecutor**

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**(High Court of Brunei Darussalam)**  
**(Criminal Appeal No. 3 of 2019)**

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**Supt. Hj Khairur Rijal Bin Hj Abu Salim (D1)**  
AND  
**Public Prosecutor**

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**(Criminal Appeal No. 4 of 2019)**

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**Public Prosecutor**  
AND  
**Supt. Hj Khairur Rijal Bin Hj Abu Salim (D1)**  
**Liew Say Koo (D2)**

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**(Criminal Appeal No. 6 of 2019)**

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Steven Chong, C.J.  
**19 October 2019.**

*Corruption – Whether gratification given and accepted corruptly – Presumption gratification given and accepted corruptly – Abetment by instigation – Duplicity an irregularity and not an illegality – Whether sentence excessive – Commencement of sentence – Penalty – Forfeiture.*

PO Shamshuddin Bin Hj Kamaluddin, DPP Hjh Suriana Bte Hj Radin and DPP Pg Hjh Nor'Azmeena Bte Pg Hj Mohiddin for the Public Prosecutor.

Roy Prabhakaran and Kamal Shaari (M/S Yusof Halim & Partners) for the Defendants.

**Cases cited:**

*Wong Kai Fen v Public Prosecutor* [2008] 2 BLR 264

*Pram Nair v Public Prosecutor* [2017] 2 SLR 1015

*Public Prosecutor v UI* [2008] 4 SLR (R) 500

*Wong Kai Fen v Public Prosecutor* [2008] JCBD 264  
*R v Harvey* (1999) Crim.L.R. 70  
*AG v Chung Fat-Ming* [1978] HKLR 480  
*Public Prosecutor v YAM Pengiran Indera Wijaya Pengiran Dr Hj Ismail bin Pg Hj Damit (D1), Wong Tim Kai (D2)*[2010] 1 JCBD 41  
*Public Prosecutor v Haji Kazi Habibur Rahman* [1993] JCBD 22  
*Public Prosecutor v Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 180  
*Lee Chin Kee v Public Prosecutor* [1935] MLJ 157  
*Regina v Marchese* [2009] 1 WLR 992  
*Hamid Bin Ibrahim v Public Prosecutor* [1965-1986] 2 BLR 264  
*Bong Fook Jing@ Bak Jin v Public Prosecutor* [1991] JCBD 149  
*Public Prosecutor v Loqmanul Hakim bin Buang* [2007] 4 SLR (R) 753

**Steven Chong, C.J.:**

### **Introduction**

These three appeals arise from the judgment and sentence of a Magistrate in MCCT No.2123 of 2016.

On 31 January 2019 the Magistrate convicted D1 after a trial on the following charges:

### **1<sup>st</sup> Charge**

That you, sometime in 2012, in Brunei Darussalam, being an agent, to wit, a Superintendent (Supt.) with the Royal Brunei Police Force, Prime Minister's Office of the Government of Brunei Darussalam did corruptly accept from one Liew Say Koo (Malaysian National NRIC: 50-723928), a Managing Director of Say Koo (Liew) Sdn Bhd and L&E Contractor, a gratification, to wit, a Toyota Hilux vehicle (white in colour) with registration number BAH6986, as an inducement or reward for doing an act in relation to your principal's affairs, to wit by assisting the said Liew Say Koo, who had previously been expelled from Brunei and who is a prohibited immigrant under the Immigration Act as of 17<sup>th</sup> November 2007, to repeatedly enter and exit Brunei Darussalam between 2011 and 2013, by making applications on behalf of the Commissioner of the Royal Brunei Police Force or the Director of the Criminal Investigations Department to the Controller of Immigration and National Registration Department stating that the said Liew Say Koo was allegedly needed to assist in police investigations and you have thereby committed an offence under Section 6(a) of the Prevention of Corruption Act, Chapter 131.

### **2<sup>nd</sup> Charge**

That you, sometime in 2012, in Brunei Darussalam, being a public servant, to wit, a Superintendent (Supt.) with the Royal Brunei Police Force, Prime Minister's Office of the Government of Brunei Darussalam obtained for yourself a valuable thing, to wit a Toyota Hilux

vehicle (white in colour) with registration number BAH 6986 without consideration or for a consideration which you know to be inadequate from one D2 (Malaysian National NRIC: 50-723928), Managing Director of Say Koo (Liew) Sdn Bhd and L&E Contractor, whom you knew to have a connection with the official functions of yourself and you have thereby committed an offence punishable under Section 165 of the Penal Code (Chapter 22).

D2, who was jointly tried with D1, was convicted of the following charges:

### **3<sup>rd</sup> Charge**

That you, sometime in 2012, in Brunei Darussalam, being the Managing Director of Say Koo (Liew) Sdn Bhd and L&E Contractor, companies registered in Brunei Darussalam, did corruptly give to an agent, namely one Superintendent (Supt.) Hj Khairur Rijal Bin Hj Abu Salim, an officer of the Royal Brunei Police Force, Prime Minister's Office of the Government of Brunei Darussalam, a gratification, to wit, a Toyota Hilux vehicle (white in colour) with registration number BAH 6986, as an inducement or reward for doing an act in relation to his principal's affairs, to wit, by assisting you, who had previously been expelled from Brunei and who is a prohibited immigrant under the Immigration Act as of 17<sup>th</sup> November 2007, to repeatedly enter and exit Brunei Darussalam between 2011 and 2013, in that the said Supt. Hj Khairur Rijal made or instructed to be made applications on behalf of the Commissioner of the Royal Brunei Police Force or the Director of the Criminal Investigations Department to the Controller of Immigration and National Registration Department stating that you were allegedly needed to assist in police investigations and you have thereby committed an offence under Section 6(b) of the Prevention of Corruption Act, Chapter 131.

### **4<sup>th</sup> Charge**

That you, sometime in 2012, in Brunei Darussalam, abetted the commission of an offence by Superintendent (Supt.) Hj Khairur Rijal Bin Hj Abu Salim, who as a public servant, to wit, a Superintendent with the Royal Brunei Police Force, Prime Minister's Office of the Government of Brunei Darussalam did obtain for himself a valuable thing without consideration or for a consideration which you know to be inadequate, to wit, a Toyota Hilux vehicle (white in colour) with registration number BAH 6986 ("the white Hilux") from you, Managing Director of Say Koo (Liew) Sdn Bhd and L&E Contractor, whom you knew to have a connection with the official functions of the said Supt. Hj Khairur Rijal Bin Hj Abu Salim, which offence was committed in consequence of your abetment and you have thereby committed an offence punishable under Sections 109 and 165 of the Penal Code (Chapter 22).

The Magistrate sentenced D1 and D2 as follows:

D1: 30 months' imprisonment on the section 6(a) Corruption offence and 12 months' imprisonment on the section 165 Penal Code offence to run concurrently.

Additionally, D1 was ordered to pay a penalty of \$12,000 or 3 months' imprisonment in default of payment.

D2: 18 months' imprisonment on the section 6(b) Corruption offence and 12 months' imprisonment on the section 165 Penal Code offence to run concurrently.

Criminal Appeal No. 3 of 2019 is D2's appeal against conviction.

Criminal Appeal No. 4 of 2019 is D1's appeal against conviction and sentence.

Criminal Appeal No. 6 of 2019 is the Public Prosecutor's appeal against the Magistrate's refusal to order forfeiture of the white Hilux.

### **Undisputed facts**

The undisputed salient facts are that D1 was the investigation officer in the criminal case in which D2, a Malaysian national, was convicted of killing his wife by a rash or negligent act contrary to section 304A of the Penal Code in 2006. D2 was sentenced to 2 years' imprisonment for this offence.

After D2's release from prison in 2007 having served his sentence he was placed under List A by the Immigration Department prohibiting him from entering Brunei Darussalam. Despite the prohibition order D2 was able to enter Brunei Darussalam on numerous occasions from 2011 to 2013. D1 procured D2's entry into Brunei Darussalam.

There were a total of 36 memoranda from the Commissioner of Police to the Director of Immigration either signed by D1 or his subordinates upon his instructions requesting for a Special Pass to be issued to D2 to enable him to enter Brunei Darussalam (*"the 36 memoranda"*).

Sometime in 2012 D1 began using the white Hilux registered under the name of L&E Contractor (*"L&E"*) which was the sister company of D2's building construction company Say Koo Liew Sdn Bhd.

D1 instructed his subordinates L/Cpl Suhaimi and L/Cpl Hj Kasah to remove the bullbar, bumper and snorkel from a black Toyota Hilux vehicle, which was in the custody of the police after it had been forfeited to the State in connection with a theft case, and install these parts on the white Hilux. L/Cpl Suhaimi also renewed the insurance policy for the white Hilux on D1's instruction.

Subsequently, D1 purchased a set of sports rims which were then installed on the white Hilux. D1 also told his subordinate Sgt. Bahrin to drive the white Hilux to a workshop as he was considering having the vehicle repainted.

The white Hilux was seized by the Anti-Corruption Bureau (“ACB”) from a workshop where the vehicle was undergoing modification. This was on 3 March 2015.

### **Prosecution Case**

The prosecution contends that D1 corruptly accepted and D2 corruptly gave the white Hilux as a reward for D1 procuring the repeated entry of D2 into Brunei Darussalam defeating the prohibition order using the pretext D2 was required to assist in police investigations.

In summary the evidence of the key witnesses are as follows.

### **Evidence of ASI Pg Asmawi**

Investigation carried out by ASI Pg Asmawi of the ACB revealed that D1 made numerous written applications under the title of Director of CID to the Director of Immigration seeking permission for D2’s entry to Brunei Darussalam to assist in police investigations into “serial robbery cases and vehicle thefts” in connection with seven criminal files.

None of the criminal files had anything to do with D2. One of the criminal files concerned an employee who left an employer without giving notice and was unrelated to any robbery or vehicle theft.

### **Evidence of the Commissioner of Police**

Pehin Orang Kaya Pendekar Alam DPS Hj Hasrin (“*Pehin Hasrin*”) was the Commissioner of Police from 2010 to 2013. He said D2’s application for permission to visit Brunei Darussalam after being placed under List A was not supported by the police and the Director of Immigration was informed of this.

According to CP Pehin Hasrin he never received any application from the Director of CID or any other officer to permit D2 to enter Brunei Darussalam to assist in police investigations. The 36 memoranda should have been signed by himself and not by any other officer.

CP Pehin Hasrin said he could not recall seeing the two intelligence reports in which D2 was mentioned (“Exhibits D6 and D7”).

### **Evidence of the Deputy Commissioner of Police**

Pg Dato Paduka Hj Wahab (“*DCP Pg Wahab*”) retired as the Deputy Commissioner of Police in 2015. He was Director of CID from 2008 to 2014 and he has known D1 since 2003 when D1 was his subordinate in the Serious Crime and Task Force Unit.

In summary it was the evidence of DCP Pg Wahab that D1 was not authorized to sign any memorandum on behalf of the Commissioner of Police or the Director of CID. He did not instruct D1 to sign any memorandum on behalf of the Director of CID to request for a special pass to be issued to D2 for entry into Brunei Darussalam from the Director of Immigration. Nor did he authorize D1 to instruct any other officer to sign such a memorandum. He was never informed by D1 that D2 had been brought back to Brunei Darussalam to assist in police investigations.

DCP Pg Wahab said he could not recall seeing Exhibits D6 and D7. These documents were not found in the Commissioner of Police Secretariat or the Director of CID's office as one would expect if they had been forwarded to the Commissioner of Police.

### **Evidence of Lee Chiong Foh ("Lee")**

Lee is D2's half brother and is in charge of work projects undertaken by Say Koo Liew Sdn Bhd.

The white Hilux was purchased by L&E Contractor on 15 May 2012.

D1 "lent" the white Hilux to D2 to use.

### **Evidence of D1**

D1 joined the police in 2000 and from the start served with total dedication and loyalty. The "constant difficulty" that D1 and his colleagues faced in criminal investigations was the lack of intelligence on robbery gangs, secret society groups and gambling syndicates as most of the members comprised foreigners.

In 2006 D1 got to know D2 when he became the investigating officer in the murder case involving D2. D1 discovered that D2 had "*extensive knowledge of foreign individuals residing in Brunei*" because of his "experience and connection in construction business" and "*knowledge of certain important individuals*".

D1 received "*positive feedback*" from individuals who knew D2. In 2010 D1 was in Miri gathering intelligence concerning a robbery case when he met D2. D1 asked D2 to assist the police by using his building construction company to recruit "*those foreigners whom we have identified as robbers posing as construction workers*" and gathering intelligence on individuals in Brunei Darussalam associated with secret societies.

The answer from D2 was an "*emphatic no*" as he feared for his safety following the "*recent mid-day shooting cases*" in Sarawak of individuals suspected of being police informers. D1 had anticipated D2's negative response and was prepared. D1 told D2 that his building construction company in Brunei Darussalam was being "*mishandled*" and there were "*rumours*" one of his supervisors was "*siphoning money*". D1 urged D2 to "find out the truth" himself.

A few weeks after that meeting D1 made another visit to Miri and contacted D2 who appeared *“visibly quite upset”*. D2 said he had *“confirmed”* D1’s information about his building construction company and he was prepared to assist the police as this would *“solve his own problems”*.

D1 remembered that he had already obtained permission *“verbally”* from CP Pehin Hasrin to bring D2 to Brunei Darussalam. D1 had also informed DCP Pg Wahab about his meeting with D2 in Miri. D1 proceeded to arrange with the Immigration Department for D2 to be issued with a Special Pass to enter Brunei Darussalam.

In January 2011 D2 made his first entry into Brunei Darussalam and was met by D1 and other police personnel at the Sungai Tujoh Post. D2 provided *“regular intelligence”* and also assisted in the *“hot pursuit”* of robbers of the *“Malik Gerhana Group”*. D2’s assistance can be seen in the documents named *“OPS GERHANA REPORT”* (Exhibit D7) and *“GENG HUA KEE ZOH-MIRI REPORT”*. D2’s assistance to the police continued even while D1 was in the United Kingdom pursuing a Masters Degree.

D1 was instructed by DCP Pg Wahab to investigate individuals associated with secret societies *“allegedly covered by the police”* in 2012. D1 used two of his informers, one of them being D2, to locate the *“current residences”* of the *“person of interest”* and the resulting *“SURAT LAYANG REPORT”* (Exhibit D6) showed D2’s profile as an informer. D1 prepared D6 upon the instruction of CP Pg Hasrin *“through”* DCP Pg Wahab. Both CP Pehin Hasrin and DCP Pg Wahab were shown Exhibit D6 by D1.

The lack of unmarked vehicles police for covert operations was so bad that officers had to resort to borrowing vehicles from family and friends to be used. Sometime in 2012 D1 spoke to D2 about renting vehicles from L&E to be used in police operations. D1 thought the use of L&E vehicles would *“reinforce the deception of L&E being used as a front company to lure foreign gang robbers posing as constructing workers”*.

D1 felt that he needed to protect the Hilux which he was using by installing *“some safety protection bumper”* since our *“job scope is dangerous and there is confrontation”*. D1 made plans to purchase the necessary accessories from Kota Kinabalu for installation on the Hilux. Meanwhile, D1 instructed his subordinates to *“transfer”* the accessories from a forfeited vehicle to the Hilux. D1 told D2 that had ordered a new set of accessories for the Hilux and promised to repaint the vehicle before returning it to L&E.

The Hilux was not a gift to D1. It was borrowed by D1 from L&E for police use. Each of the Hiluxes borrowed by D1 from L&E had a *“Chinese Amulet”* hanging prominently on its rear view mirror. Being a Muslim D1 would prefer not to have such an object in the vehicles but he could not dispose it because the vehicles were not his and it was *“useful”* as no one would suspect the vehicles were being used by the police.

## **Evidence of D2**

D2 was in the building construction industry in both Malaysia and Brunei Darussalam. After his release from prison in 2007 he returned to Malaysia. He sought permission to enter Brunei Darussalam as he had business and family interests but this was refused. Consequently, his wife and brother took over the management of his business in Brunei Darussalam whilst he acted as a “consultant” and this proved to be a satisfactory arrangement.

Sometime in 2010 he met D1 in Miri. D1 persuaded him to become a police informer and to “infiltrate” gangs in Brunei Darussalam. He had “long-standing connections with gangster syndicates” in Malaysia and Brunei Darussalam. D1 told him his building construction company in Brunei Darussalam was “struggling” and needed his attention or it would “go down”. He therefore decided to assist D1 and made his first entry into Brunei Darussalam in early 2011.

He contacted D1 whenever he wanted to enter or exit Brunei Darussalam and D1 would make the necessary arrangements. On each visit he was issued with a special pass. He stayed for several days or weeks each time and established a “network of reliable sources” to gather intelligence on crime syndicates in Brunei Darussalam. He would then meet D1 in a “quiet and secluded place” to pass on information. On one occasion he accompanied D1 on “reconnaissance” to ascertain gambling dens in Tutong.

D1 said the police had a shortage of unmarked vehicles for use in covert operations. He decided to lend D1 a company vehicle.

Towards the end of 2012 he felt he was “being watched” and became concerned about his safety and that of his family. He made his last entry into Brunei Darussalam in March 2013. But he continued to provide information obtained from his own informers in Brunei Darussalam to D1.

## **Decision below**

The Magistrate concluded that:

- (a) On the evidence of CP Pehin Hasrin and DCP Pg Wahab that D1 was not authorized to sign any Memorandum on behalf of the Commissioner of Police or the Director of CID.
- (b) There was evidence to suggest D2 did to “some degree assist D1 by being his informer” but the extent of that assistance was “exaggerated by the defence”.

- (c) The evidence of D1's conduct in the use of the white Hilux for a period of over 3 years from 2012 to 2015 during which he installed sports rims and other accessories suggests that it belonged to him and not that he borrowed it.
- (d) D1 and D2 were not credible witnesses and they had failed to rebut the presumption that D1 corruptly accepted and D2 corruptly gave the gratification as particularized in the corruption charges.
- (e) The prosecution had established beyond reasonable doubt the guilt of D1 and D2 on all four charges.

Turning to sentence the Magistrate decided that:

- (a) D1 being a senior police officer when he committed the offences was an aggravating factor and this warranted an overall sentence of 30 months' imprisonment.
- (b) D1's detention under the Internal Security Act was "*unrelated to the matter at hand*" and the sentence would run from the date it was passed.
- (c) D1 was to pay a penalty of \$12,000 for the "*use*" of the white Hilux pursuant to section 17 of the Prevention of Corruption Act.
- (d) No order for forfeiture of the white Hilux would be made "*pending the results of the defendants' appeals against conviction which the court has already taken note of that they intend to appeal*".

### **Appeal against conviction (D1 and D2)**

The contention in essence is that the Magistrate erred in convicting D1 and D2 of the corruption charges having found that D2 was a police informer which "*inevitably rendered a benefit*" to D1's principal and the element of "*doing an act in relation to the principal's affairs*" has not been proven beyond reasonable doubt.

In short, the argument is that the prosecution has failed to prove the gift of the white Hilux to D1 from D2 as a *quid pro quo* for D1 procuring D2's entry into Brunei Darussalam.

Counsel for D1 and D2 submits that the evidence supports the defence narrative that the white Hilux was borrowed by D1 from D2 for use in police operations and not for personal use; and

D2's entry into Brunei Darussalam in January 2011 cannot be linked to the Hilux being borrowed by D1 in 2012.

As to the charges under section 165 of the Penal Code the contention is that the charges are defective for duplicity; there was adequate consideration for the use of the white Hilux since D1 maintained the vehicle and installed accessories on it in return for using it and the police benefited from its use in police operations; and D2 could not have abetted the offence as there is no evidence he instigated D1 in the commission of the offence.

### **Appeal against sentence**

On D1's sentence it is argued, firstly, that 30 months' imprisonment is excessive. On the authority of *Wong Kai Fen v Public Prosecutor* [2008] 2 BLR 264, a sentence of 18 months' imprisonment is appropriate on conviction after a trial in respect of offences of this nature.

Secondly, it is argued that the Magistrate was wrong to order the sentence of imprisonment to start on the date it was passed when D1 was granted bail after he was charged but was then detained under the Internal Security Act. There is no difference between detention on the ground of security risk and remand pending trial. Both involve a loss of liberty and D1's detention should have been taken into account in the sentence imposed.

Thirdly, it is argued that the Magistrate erred in ordering D1 to pay a penalty for the use of the white Hilux when he was convicted of accepting the vehicle.

### **Appellate intervention**

The role of an appellate court in an appeal against conviction is not to reassess the evidence in the same way that a trial judge would. An appellate court is restricted to considering:

- (a) whether the judge's assessment of witness credibility is plainly wrong or against the weight of the evidence;
- (b) whether the judge's verdict is wrong in law; and
- (c) whether the judge's decision is inconsistent with the material evidence on record: *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015.

As to an appeal against sentence it is well established that an appellate court will not ordinarily intervene unless satisfied:

- (a) the judge erred on the factual basis for sentencing;

- (b) the judge failed to give adequate weight to relevant factors placed before the court;
- (c) the sentence was either manifestly excessive or manifestly inadequate; or
- (d) the sentence was wrong in principle: *Public Prosecutor v UI* [2008] 4 SLR (R) 500.

### **Applying the principles**

#### **Corruption offences**

In order to convict D1 and D2 on the corruption offences the court must be satisfied the prosecution has proven beyond reasonable doubt that:

- (a) D1 accepted (or in D2's case that he gave) the gratification particularized in the charge as defined in section 2 of the Prevention of Corruption Act ("the Act") and that at the time when each did so;
- (b) D1 was an agent as defined in section 2 of the Act.

Upon proof of the above two elements section 25 of the Act provides that:

*“. . . 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.”*

Once the presumption under section 25 of the Act arises the onus is on the defendants to show on a balance of probabilities in D1's case that he did not receive and in D2's case that he did not give the gratification corruptly as is alleged in the offence.

In deciding whether the gratification was given or accepted corruptly the court must be satisfied beyond reasonable doubt that there was a corrupt element in the transaction and a corrupt intent present on the part of the accused persons. Whether a transaction has a corrupt element is an objective inquiry that is essentially based on the ordinary standard of the reasonable man and corrupt intent refers to the question of whether the accused knew what he did was corrupt by the ordinary and objective standard: *Wong Kai Fen v Public Prosecutor* [2008] JCB 264.

In *R v Harvey* (1999) Crim.L.R. 70, the English Court of Appeal in considering section 1 of the Prevention of Corruption Act 1906, similar to section 6 of the Act, held:

*“The word “corruptly” for the purposes of that section, 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. It did not mean dishonestly, which was a different concept.”*

And in *AG v Chung Fat-Ming* [1978] HKLR 480, Mc Mullin, J in dealing with section 4 of the Prevention of Bribery Ordinance, Cap.21, analogous to section 6 of the Act, said at 488:

*“What a public servant is entitled to in return for the performance of his duty is his official wage with whatever allowances and perquisites that may include – and nothing more. It is corrupt to accept a gift for carrying out one’s duty 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 grounds of appeal against conviction involve an invitation to this court exercising appellate jurisdiction to interfere with a trial court’s evidential appraisal. An appellate court defers to a first instance judge’s assessment of the veracity and reliability of the evidence of witnesses having seen and heard them testify in the trial.

On the totality of the evidence which was accepted by the Magistrate which included the unequivocal statements of CP Pehin Hasrin and DCP Pg Wahab to the effect that (a) D2’s application to enter Brunei Darussalam after being placed on List A was not supported by the police, (b) the 36 memoranda should have been signed by CP Pehin Hasrin himself and not any other officer, (c) D1 was not authorized to sign any memorandum on behalf of the Commissioner of Police or the Director of CID, DCP Pg Wahab, (d) DCP Pg Wahab was never informed by D1 that D2 had been brought into Brunei Darussalam to assist in police investigations, and (e) neither CP Pehin Hasrin nor DCP Pg Wahab recalled having seen the two intelligence reports in which D2 was mentioned, and the evidence of ASI Pg Asmawi that none of the seven criminal files referred to in the 36 memoranda had any connection with D2, the Magistrate was amply justified to conclude that notwithstanding D2 to “*some degree*” assisted D1 by being a police informer, the defendants’ narratives defied belief and they had failed to rebut the presumption under section 25 of the Act that the white Hilux was accepted by D1 and given by D2 corruptly as an inducement or reward for procuring the repeated entry of D2 into Brunei Darussalam under the pretext D2 was required to assist in police investigations.

The Magistrate was entitled on the evidence before him to reject the defence narrative that D1 had borrowed and D2 had lent the white Hilux for the purpose of using the vehicle for police operations as being contrived. This conclusion is unsurprising considering the conduct of D1 once he took possession of the white Hilux, such as the installation of sports rims on the vehicle at his own expense, which suggested ownership rather than temporary use of the vehicle.

Much was made by counsel for the defendants of the *quid pro quo* issue: that as D2 had started entering Brunei Darussalam in January 2011 and D1 began using the white Hilux only in 2012

the prosecution had failed to establish that D1 accepted and D2 gave the vehicle as a favour for D1 procuring D2's entry into Brunei Darussalam. This submission is misguided.

Proof of a direct linkage between a specific act or favour and a particular gratification (the *quid pro quo*) is not a necessary precondition to proof of a corruption offence, in the sense of showing that A received a particular gratification from B as an inducement or reward for a specific act on his part. In a course of conduct spanning several years (as is the case here) it may not always be obvious whether a particular gratification was intended as an inducement for future acts on A's part, or as a reward for past acts, or both: *Public Prosecutor v YAM Pengiran Indera Wijaya Pengiran Dr Hj Ismail bin Pg Hj Damit (D1), Wong Tim Kai (D2)*[2010] 1 JCBD 41.

### **Section 165 Penal Code offences**

The prosecution, to establish a charge under section 165 of the Penal Code, must prove that:

- (a) D1 was a public servant;
- (b) D1 accepted or obtained a valuable thing;
- (c) D1 did not give consideration for it, or, if there was, it was for a consideration which he knew to be inadequate; and
- (d) D1 knew that the person from whom he accepted the valuable thing was concerned in his official function as a public servant.

A public servant is not allowed to place himself in a compromising position by receiving a valuable thing from someone with whom he has, or is likely to have, official dealings. No corrupt element or motive need be shown or proved: *Public Prosecutor v Haji Kazi Habibur Rahman* [1993] JCBD 22.

Section 107 of the Penal Code provides that a person abets the doing of a thing who "instigates" any person to do that thing. In *Public Prosecutor v Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 180, Abdoolcader, J said at 196:

*"Instigation consists of acts which amount to active suggestion or support or stimulation for the commission of the main act or offence."*

In *Public Prosecutor v YAM Pengiran Inderwa Wijaya Pengiran Dr Hj Ismail bin Pg Hj Damit (D1), Wong Tim Kai (D2)*(supra), Lugar-Mawson JC, after reviewing the authorities on abetment of section 165 Penal Code offences concluded that there can be "*no clearer example of an*

*instigation*” on the abettor’s part than the making of a “*deliberate*” gift to the principal offender.

The Magistrate, in light of his finding that the white Hilux was accepted by D1 and given by D2 corruptly was entitled to conclude that the defendants were guilty of the section 165 Penal Code offences.

### **Duplicity**

Counsel for the defendants contended that the section 165 Penal Code charges are defective for duplicity. The charges allege two different elements in the offence: (1) acceptance of the white Hilux without consideration or (2) for a consideration which the defendant knew to be inadequate.

I agree the charges are technically duplicitous and the prosecution should have alleged one element and not both elements in one charge: see the sample section 165 Penal Code charge in *The Law of Crimes, Ratanlal and Dhirajlal, Twenty Second Edition*.

Duplicity, however, is an irregularity and not an illegality; if the irregularity has not occasioned a failure of justice the conviction is safe: *Lee Chin Kee v Public Prosecutor* [1935] MLJ 157, per Sir Samuel Thomas CJ.

Similarly, in *Regina v Marchese* [2009] 1 WLR 992, the English Court of Appeal held that the rule against duplicity dealt with form, not substance, and the fact that a count was duplicitous did not automatically lead to the quashing of a conviction since a duplicitous count was not a nullity; that it was necessary to consider whether the form of the indictment had resulted in the risk of injustice to the defendant.

Section 371 of the Criminal Procedure Code provides that:

“(1) . . . no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on account of –

- (a) any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;

. . . .

unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice.

(2) In determining whether any error, omission or irregularity in any proceedings under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

At trial the defendants could have but did not raise any objection to the form of the section 165 Penal Code charges. The defence advanced was that adequate consideration was provided by D1 to D2 for the use of the white Hilux by way of installation of accessories and maintenance to the vehicle at D1's expense.

The defendants were neither embarrassed nor prejudiced by the form of the section 165 Penal Code charges and no miscarriage of justice occurred.

### **D1's sentence**

#### **Whether sentence is excessive**

Counsel for D1 is right to point out that the court in *Wong Kai Fen's* case (supra) considered a sentence of 18 months' imprisonment to be appropriate where a person is convicted after a trial of a corruption offence under section 6 of the Act. It is important to note, however, that the court in *Wong Kai Fen* made that comment having referred to *Hamid Bin Ibrahim v Public Prosecutor* [1965-1986] 2 BLR 264 and *Bong Fook Jing@ Bak Jin v Public Prosecutor* [1991] JCB 149, where Roberts, CJ suggested a minimum sentence of 12 months' imprisonment upon conviction for uncontested corruption offences under section 6 of the Act.

Whilst sentencing benchmarks are important to achieve consistency in sentences in the interest of fairness they are not meant to hamper judicial discretion to adjust the sentence according to the gravity of the offence in a particular case. Each case must be decided on its own facts and sentences much higher than the minimum sentence suggested in *Wong Kai Fen's* have been imposed in other section 6 corruption cases, for e.g., in *YAM Pengiran Indera Wijaya Pengiran Dr Hj Ismail (D1), Wong Tim Kai (D2)* (supra), a sentence of 7 years' imprisonment was imposed.

Considering the gross abuse by D1 of his position as a Police Superintendent in corruptly accepting a bribe in return for facilitating the repeated entry of a person who had been prohibited from entering the country, the sentence of 30 months' imprisonment is certainly not excessive. Indeed, I think the sentence is rather lenient. A much longer sentence would have been upheld considering the gravity of the offence but as there is no cross-appeal by the prosecution the court will not interfere with it.

Public trust and confidence in the police can be corroded if the criminal acts of its officers are left unchecked: *Public Prosecutor v Loqmanul Hakim bin Buang* [2007] 4 SLR (R) 753. Deterrence must therefore be the dominant consideration in sentencing where criminal acts

are committed by police officers (and members of enforcement agencies) and severe sentences imposed in the public interest.

### **Commencement of sentence**

In my judgment the Magistrate was right to order the sentence of D1 to run from the date of imposition. This is because D1 was not remanded pending trial of the offences but detained under the Internal Security Act which is a wholly separate matter.

If D1 had been in remand pending trial of the offences it would of course have been proper for the Magistrate to exercise his discretion to take this into account in the sentence and order the imprisonment to be backdated to the date when he was first placed in custody.

### **Penalty**

On the application of the prosecution the Magistrate ordered D1 to pay a penalty of \$12,000 or 3 months' imprisonment in default of payment on the basis of the estimated "value" of the "use" of the white Hilux by D1 between 2012 and 2015. This penalty order is untenable.

Section 17 of the Act provides that:

*"Where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Act, then, if that gratification is a sum of money or if the value of the gratification can be assessed, the court shall, in addition to imposing on that person any other punishment, order him to pay as a penalty . . . a sum which is equal to the amount of that gratification or is, in the opinion of the court, the value of that gratification . . . "*

The charge against D1 and his conviction was for the corrupt acceptance of the white Hilux and not the corrupt acceptance of the use of the vehicle from D2 as a gratification.

In the circumstances the proper order for the court was to order the forfeiture of the white Hilux so as to disgorge D1 of the gratification of the white Hilux which he accepted from D2.

### **Forfeiture**

The reason given by the Magistrate for not ordering forfeiture of the white Hilux despite the application of the prosecution, i.e., that the defendants intended to appeal, is erroneous.

As D1 had been convicted of the offences he was charged with, the Magistrate was bound to order the forfeiture of the white Hilux, being the subject matter of the offences, notwithstanding his intention to appeal.

**Conclusion**

For the foregoing reasons I make the following orders:

- (1) Appeal against conviction by D1 is dismissed.
- (2) Appeal against conviction by D2 is dismissed.
- (3) Appeal against sentence by D1 is dismissed.
- (4) Appeal by the Public Prosecutor against refusal of the Magistrate to order forfeiture of the white Hilux is allowed.
- (5) The white Hilux is to be forfeited to the State.
- (6) Penalty order of the Magistrate is quashed.

**DATO SERI PADUKA STEVEN CHONG**  
Chief Justice

