

Sabeli Bin Ismail

AND

Public Prosecutor

**(High Court of Brunei Darussalam)
(Criminal Appeal No. 38 of 2016)**

**Steven Chong, Ag. C.J.
6 January 2018**

Corruption – Public body – Sentence.

Hj Mohamad Rozaiman Dato Hj Abdul Rahman (M/S Rozaiman Abdul Rahman Advocates and Solicitor) for the Appellant.

DPP Aldila Binti Hj Mohd Salleh and DPP Sharon Yeo for the Public Prosecutor/Respondent.

Cases cited:

Aidah Binti Tengah b Public Prosecutor [Criminal Appeal No. 18 of 2016];

Mohd Azam Zaki Bin Hj Mohd Zain v Public Prosecutor [Criminal Motion No. 8 of 2017];

Public Prosecutor v Hjh Latifah Binti Hj Junaidi [Criminal Trial No. 18 of 2015];

Tan Kian Kwang v Public Prosecutor [1995] 3 SLR I 746.

Steven Chong, Ag. C.J.:

Charges

On 5 November 2016 in the Magistrate's Court the appellant pleaded guilty to six counts of accepting bribes contrary to section 6(a) of the Prevention of Corruption Act and admitted to five further similar offences to be taken into consideration in sentence pursuant to section 13A of the Criminal Procedure Code.

Sentence

Chief Magistrate Muhammed Faisal Bin PDJLD DSP Hj Kefli (1) imposed a sentence of 4 years imprisonment on each count to be served concurrently; (2) ordered a payment of \$30,250 within 3 months as a penalty or in default 6 months imprisonment; and (3) ordered a payment of \$50,000 being prosecution costs within 3 months or in default 3 months imprisonment.

Appeal

In the Petition of Appeal the appellant appeals against both the concurrent sentences of 4 years imprisonment and the consecutive sentences of imprisonment in default of payment of the penalty and prosecution costs.

Counsel for the appellant now says the appeal is against the concurrent sentences of 4 years imprisonment only.

Background

This is one of a series of cases in which employees of Brunei Shell Petroleum Company Sendirian Berhad ("BSP") accepted bribes from Musfada Enterprise ("Musfada"), a company controlled and managed by David Chong, in return for ordering products from the company.

The appellant was an Administrator in the West Operations Department of BSP and worked on the offshore platform "Fairley 4". His duties included creating "Work Orders" ("WOs") for products required for the operations of Fairley 4 such as cleaning degreasers and chemical spill kits.

In 2005, Steve Liew who was a Musfada employee secured the appellant's agreement to participate in a "Commission Scheme". Musfada would pay a commission of 30% of the price of the Musfada product to the appellant for creating a WO where there would be delivery and a commission of 50% where there would not be delivery.

Whenever the appellant created WOs for Musfada products he informed Steve Liew whether BSP required delivery or not so that the amount of commission could be determined. In this way, between June to December 2008, the appellant received cash amounting to \$51,850 from Steve Liew.

The web of deceit began to unravel in May 2009 with investigations against Musfada by the Anti-Corruption Bureau ("ACB") eventually leading to the arrest and prosecution of the appellant.

Submissions

Broadly, the appellant contends that the sentence should be reduced as (1) there is delay in the prosecution; (2) there is disparity of sentence; and (3) there is no justification for an increase in the sentence simply because BSP is a public body.

Delay in prosecution

The ACB commenced investigations against the appellant in 2009 and he was charged with these offences on 21 May 2015. Counsel for the appellant argues

that this pre-charge delay of 6 years in the prosecution merits a discount in the sentence. No complaint is made of any post-charge delay.

In what circumstances can delay in the prosecution be considered a mitigating factor justifying a discount in the sentence?

The appellant relies on the comments of Mortimer P, delivering the judgment of the Court of Appeal, in *Aidah Binti Tengah v Public Prosecutor* [Criminal Appeal No. 18 of 2016]:

“As the whole corrupt scheme was complex, sophisticated and involved a large number of BSP employers over a long period the investigation into her part was lengthy and we accept that she could not be prosecuted for her full criminality until David Chong had been convicted and sentenced. There was no fault on the prosecution’s part in not pursuing the case against the appellant earlier but in the absence of causing the delay herself she is entitled to raise it in mitigation.

There can be little doubt that she suffered anxiety and stress over the 6 years and that it may well have led to the breakdown of her marriage as she claims. These are matters for which she must be given credit.”

I think it is useful to consider the decision of the Singapore High Court in *Tan Kian Kwang v Public Prosecutor* [1995] 3 SLR (R) 746 in which Yong Pung How CJ said at [20]:

“In my view, it is clear that delay in prosecution cannot affect the question of liability. Delay in prosecution simpliciter may not even be a mitigating factor. Nonetheless, in appropriate cases, the court may exercise its discretion to order a “discount” in sentence, if there has been significant delay in prosecution which has not been contributed to in any way by an accused person, if it would otherwise result in real injustice or prejudice to the accused. There are two main considerations in this regard. Firstly, the accused may have to suffer the stress and uncertainty of having the matter hanging over his head for an unduly long or indefinite period. The argument may carry more force if the delay sets in after an accused has been charged, since it is only then that the charge can be said to “hang over his head”. This was evidently considered important by Roberts CJ in Yau Kong Kui’s case ([9] supra). The argument may be wholly negated, however, if the offence in question is serious, or where the accused has numerous antecedents, or has taken steps to avoid detection. A fortiori, where the accused has actively misled the police in the course of investigations, he cannot complain of the delay in prosecution, much less seek to extract some mitigating force from it. Secondly, if there is evidence that the accused has changed for the better between the commission of the offence and the date of sentence, the court may also properly take this into account in appropriate circumstances. The

question of weight to be attached to either consideration depends very much on the circumstances of each case.”

Adopting the approach of the court in Tan Kian Kwang’s case I hold the view that the gravity of the offences and the culpability of the appellant outweighs any benefit he should be accorded on account of any stress he may have suffered because of the delay in the prosecution.

Disparity of sentence

The contention is that there is disparity between the appellant’s sentence and that of the defendant in *Public Prosecutor v Hjh Latifah Binti Hj Junaidi* [Criminal Trial No. 18 of 2015]. Since Hjh Latifah was sentenced to 3 years 8 months imprisonment for accepting bribes amounting to \$36,073 the appellant deserves a similar or lower sentence as he received a lesser amount of bribes (\$30,250) in relation to the six charges he pleaded guilty to.

I disagree. Each case must be decided on its own facts. The Deputy Public Prosecutor rightly points out that the culpability of the appellant is higher in the scales compared to Hjh Latifah.

First, the appellant played a pivotal role in the fraud against BSP. The deception started with the creation of WOs by the appellant. No purchase of products from Musfada could have been made without the appellant initiating it whereas Hjh Latifah’s role was to issue Purchase Orders which was at the end stage of the procurement process.

Second, the appellant was paid bribes equivalent to 50% of the price of Musfada products compared to 3% paid to Hjh Latifah. In a shorter period (6 months) compared to Hjh Latifah (38 months) the appellant obtained bribes of an amount in total only about \$6,000 less than her.

Third, unlike Hjh Latifah, the appellant knew whether there would be delivery of the Musfada products.

BSP a public body

Counsel for the appellant submits that it is wrong to “politicize” the offence by imposing a higher sentence “based on the fixation the public body involved was BSP”.

The argument is misguided. In *Public Prosecutor v Aidah Binti Tengah* [Criminal Trial No. 5 of 2015] I said:

“.....the corrupt acts concerned a breach of trust in the oil and gas industry which is of strategic importance to the economy of Brunei

Darussalam. BSP is a public body and it is important to safeguard public funds and public confidence in its administration.”

I considered that to be an aggravating factor which warranted an increase in the sentence. The Court of Appeal endorsed this approach in *Aidah Binti Tengah v Public Prosecutor* [Criminal Appeal No. 18 of 2016].

Conclusion

The Chief Magistrate took a starting point sentence of 6 years imprisonment to reflect the overall criminality of the offences and reduced it to 4 years' imprisonment on account of the guilty plea.

No criticism can be made of that starting point in light of the following observation of the Court of Appeal in *Mohd Azam Zaki Bin Hj Mohd Zain v Public Prosecutor* [Criminal Motion No. 8 of 2017]:

“Starting point chosen in David Chong’s case as the planner instigator and main beneficiary of this corrupt enterprise was 8 years. For those Shell employees who took a full part in the plan and accepted considerable gratifications a starting point after trial in the region of 6 years imprisonment is now recognized by Brunei courts as appropriate. With this we readily agree.”

The sentence of 4 years imprisonment is neither excessive nor wrong in principle and the appeal is accordingly dismissed.

Dato Paduka Steven Chong
Acting Chief Justice