Haji Mazlan Bin Haji Shahbuddin

AND

Public Prosecutor

(High Court of Brunei Darussalam)
(Criminal Appeal No. 50 of 2015)

Steven Chong, J.
6 October 2016

Corruption – Delay in trial – Sentence reduced.

Mohd Shazale Bin Haji Mat Salleh (M/S Mohd. Shazale Salleh Advocates and Solicitors) for the Appellant.
DPP Hajah Anifa Rafiza Bte Haji Abd Ghani for the Public Prosecutor/ Respondent.

Cases cited:
Bong Fook Jin @ Bak Jin v Public Prosecutor [1991] JCBD 149.
Dong Sui Hung v Public Prosecutor [2009] 2 JCBD 224.
Hamid Bin Ibrahim v Public Prosecutor [1965-1986] 2 BLR 264.
Maimun Binti Haji Omar v Public Prosecutor [2013] 1 JCBD 154.
Makin v Attorney General for New South Wales [1894] A.C. 57.
Ridzwan Bin Haji Mansor v Public Prosecution [2007] 2 JCBD 172.
Wong Kai Fen v Public Prosecutor [2005] 1 JCBD 264.

Steven Chong, J.:

On 29 August 2015 in the Magistrate's Court Haji Mazlan Bin Haji Shahbudin *("the appellant")* was convicted after a trial of two counts: (1) corruptly accepting a gratification of $400 from Kan Tet Hiong as an inducement or reward for forbearing to take action against him for fuel smuggling contrary to section 6(a) of the Prevention of Corruption Act; and (2) obtaining the same $400 without consideration or with inadequate consideration from Kan Tet Hiong whom the appellant knew to have a connection with his official function as a customs officer contrary to section 165 of the Penal Code.

The Magistrate sentenced the appellant to concurrent terms of 18 months' imprisonment on the section 6(a) charge and 10 months' imprisonment on the section 165 charge.

This is an appeal against conviction and sentence.

Prosecution case

The case for the prosecution rests primarily on the evidence of Teoh Ting Kiong *("Teoh")* and Kan Tet Hiong. The salient parts of their evidence are as follows.

Teoh's evidence

Teoh was an anti-corruption officer in the Malaysian Anti-Corruption Commission *("ACC")*. He took part in a joint operation between the ACC and the Brunei Anti-Corruption Bureau *("ACB")* over a period of 3 months from December 2008 with the objective of rooting out corrupt Brunei customs officers stationed at Sungai Tujoh, Kuala Belait and Kuala Lurah Customs Posts who were receiving bribes from diesel fuel smugglers.

Kan Tet Hiong who is known by the moniker *"Ah Kan"* was a diesel fuel smuggler. So too, Hiew Yen Shung who is known by the moniker *"Ah Tong"*. Both smugglers, however, had become ACC informers. On 18 January 2009 Teoh was informed by Ah Kan that the appellant had asked for a bribe of $400. Teoh told Ah Kan that he would accompany him to pay the bribe and to introduce himself as Ah Kan's smuggling *"partner"*.

On 19 January 2009 Ah Kan contacted the appellant to confirm the meeting between them on that day. The appellant told Ah Kan he was not working that day and agreed to meet in Seria or Kuala Belait. Ah Kan told the appellant he would phone him once he reached Sungai Tujoh. Teoh immediately obtained a *"pen drive"* camera from the ACC technical officer which Ah Kan would use to record the meeting with the appellant. Teoh also secured $400 to pay the bribe.

Teoh and Ah Kan set off from Miri to Sungai Tujoh in Teoh's car. Reaching Sungai Tujoh Ah Kan phoned the appellant to discuss the location where they were to meet. The meeting place was at the vicinity of the Seria/Belait bypass.

The appellant was waiting at the rendezvous in his Suzuki Vitara parked on the road side. Teoh and Ah Kan got into the appellant's car. Teoh sat at the back whilst Ah Kan, who was fitted with the *"pendrive"* camera concealed under his shirt sat on the front passenger seat. Ah Kan introduced Teoh to the appellant as his *"new partner"*. The appellant asked Ah Kan what Teoh was smuggling. Ah Kan replied that Teoh was also smuggling diesel fuel. The appellant asked Ah Kan whether he was still smuggling rice. Ah Kan answered that he was smuggling rice and diesel fuel. The appellant asked Ah Kan how many cars he was using to smuggle diesel fuel. Ah Kan said he was still using four cars.

Teoh took the $400 out of his pouch and counted the money before handing it to the appellant and telling him to count it. The appellant took the money and counted it. Ah Kan asked the appellant how much money he had in his hands. The appellant said it was $400. Ah Kan told the appellant in jest that he had only asked for $400. The appellant playfully tapped on Ah Kan's head with the money. Teoh had the impression the appellant and Ah Kan knew each other well.

The appellant asked Teoh for his name and the whereabouts of Ah Tong. Teoh gave his name to the appellant. Ah Kan told the appellant that Ah Tong was in Miri. Teoh and Ah Kan then left the appellant's car and they returned to Miri. Teoh arranged for the recording from the *"pendrive"* camera to be transferred to a CD in the ACC.

Ah Kan's evidence

Ah Kan started smuggling diesel fuel from Brunei to Limbang through Kuala Lurah in 2007. The appellant was a customs officer at the Kuala Lurah Customs Control Post at the time. Ah Kan was introduced to the appellant by a friend. Ah Kan was told the appellant could *"help"* him with his smuggling so that he would not be caught.

A meeting was arranged. Ah Kan met the appellant in a restaurant at Jalan Mulaut. Ah Kan told the appellant he was smuggling diesel fuel and asked for his *"help"* to avoid arrest. The appellant agreed to *"help"* and asked for an initial payment of $200. Ah Kan paid the bribe to the appellant.

In the course of the discussion the appellant indicated he wanted to buy a motorcycle and *"hinted"* that he needed money. The appellant asked for a share of the smuggling profits in return for his help. Ah Kan agreed to *"set aside"* the profit from one of his cars used in the smuggling for the benefit of the appellant.

Following this meeting Ah Kan began smuggling diesel fuel through Kuala Lurah four to five times almost daily. On one occasion a car used in the smuggling belonging to Ah Kan was seized by the Kuala Lurah Customs

Control Post. The car was subsequently returned to Ah Kan with the *"help"* of the appellant. After this incident the appellant advised Ah Kan to move his smuggling to Sungai Tujoh because of the greater risk of preventive customs officers from headquarters conducting operations at Kuala Lurah. The appellant said he had *"many friends"* at the Sungai Tujoh Customs Control Post who were *"not as strict"* and they could *"help"* Ah Kan.

The appellant introduced Ah Kan to a customs officer at the Sungai Tujoh Customs Control Post named Rafi. Ah Kan met Rafi in a restaurant in Kampong Pandan. Ah Kan agreed to pay $5 to the customs officers on duty at the Sungai Tujoh Customs Control Post each time one of his diesel fuel smuggling cars entered or exited Sungai Tujoh. Rafi assured Ah Kan that he would *"take care"* of him and none of his cars would be inspected or seized.

Thereupon, Ah Kan moved his smuggling from Kuala Lurah to Sungai Tujoh. On the appellant's demand Ah Kan now had to pay him $100 for each car used in smuggling instead of the profit obtained from one car as was agreed earlier on. Ah Kan paid the appellant at the end of each month meeting him in Kuala Belait, Seria or Tutong.

After a regulation restricting the amount of fuel Malaysian registered cars could purchase in Brunei was passed, the appellant allowed Ah Kan to store diesel fuel in four drums (which the appellant provided) in the house of the appellant's deceased father in Danau. Further, to evade the restriction, Ah Kan bought a Toyota Corolla belonging to the appellant's late father and two Ford Rangers using the name of the appellant's brother, and these cars were used in the smuggling. Ah Kan paid the monthly instalments for the hire purchase of the Ford Rangers directly to the bank.

By the middle of 2008 the price of diesel fuel in Malaysia had dropped. Ah Kan reduced his smuggling and he did not pay the appellant regularly each month. In November 2008 Ah Kan was investigated by the ACC. Ah Kan admitted to his smuggling and the bribery of Brunei customs officers and agreed to co-operate with the ACC.

In January 2009 Ah Kan received a phone call from the appellant asking him how many cars he was using in his smuggling. Ah Kan told the appellant he was using four cars. The appellant demanded payment and Ah Kan agreed to pay him $400.

Ah Kan's narrative of the events that followed after this phone call from the appellant is similar to the evidence given by Teoh in essential details and it is unnecessary to set it out.

Defence case

The appellant has been a customs officer since 1987. The defence is a simple denial of taking any bribes from Ah Kan. The appellant and Ah Kan became acquainted after the latter's frequent visits to Brunei through Kuala Lurah.

About the Toyota Corolla, the appellant denied he sold the car to Ah Kan. The car was registered under the name of the appellant's sister.

The appellant agreed assisting Ah Kan in the purchase of the two Ford Rangers by persuading his brother to allow his name to be used in the hire purchase. But the appellant was not aware the Ford Rangers were used to smuggle diesel fuel.

As to the meeting on 19 January 2009, the appellant's version was that it was Ah Kan who had phoned him to arrange to see him to *"discuss"* the hire purchase instalment payments on one of the Ford Rangers which had fallen behind. The appellant did not ask for any bribes when he met Ah Kan and he felt *"uncomfortable"* when the $400 was handed to him because he was *"not sure"* whether it was a bribe or payment for the Ford Ranger hire purchase instalments.

The appellant refused to accept the $400 and left it on the car seat next to Ah Kan. The appellant did not see the money on the car seat after Ah Kan left the car.

Decision of the Magistrate

The Magistrate found Ah Kan to be a credible witness and accepted his evidence of the payment by him of the bribe of $400 to the appellant on 19 January 2009 in exchange for the appellant not taking action against him for diesel fuel smuggling. She also accepted Ah Kan's account of the events leading to the bribe and was satisfied that his relationship with the appellant was *"grounded"* on bribes given by him to the appellant in exchange for assistance in his fuel smuggling operation.

No finding was made by the Magistrate in relation to the evidence of Teoh.

Although the Magistrate did not expressly say so, in contrast, it is plain from her findings that she was not impressed with the appellant as a credible witness. She disbelieved the appellant's evidence that the meeting on 19 January 2009 was for the purpose of payment by Ah Kan to the appellant of the hire purchase *"instalments for the Ford Rangers"* because (1) the appellant himself gave evidence that Ah Kan made payments directly to the bank; and (2) the *"pendrive"* camera recording showed Teoh being introduced by Ah Kan as a diesel fuel smuggler handing over the $400 to the appellant followed by *"friendly banter"* between Ah Kan and the appellant.

The Magistrate also disbelieved the appellant's evidence that he had refused to accept the $400 and left it on the car seat next to Ah Kan and the money was no longer there after Ah Kan left, implying that Ah Kan had taken it back. She observed that the *"pendrive"* camera recording clearly showed the appellant receiving the money and there was *"very little movement"* from the appellant to suggest he returned the money to Ah Kan.

Accordingly, the Magistrate was satisfied the appellant had failed, on a balance of probabilities, to displace the presumption in section 25 of the Prevention of Corruption Act that he accepted the gratification corruptly as particularized in the section 6(a) charge.

The Magistrate was satisfied the prosecution had proven beyond reasonable doubt that (1) the appellant accepted the $400 corruptly as particularized in the section 6(a) charge when he was a customs officer at the time; and (2) the appellant obtained the $400 without consideration as particularized in the section 165 charge. The appellant was therefore convicted of both charges.

Grounds of appeal

In summary the grounds of appeal against conviction are: firstly, the Magistrate was wrong to admit and rely on evidence of previous bribes accepted by the appellant from Ah Kan to convict him of the charges; and secondly, the Magistrate was wrong to accept the evidence of Ah Kan because there were serious discrepancies.

On the first ground, evidence of similar behavior by an accused person on other occasions is generally inadmissible for the purpose of showing that he is therefore a person more likely to have committed the offence with which he is being charged. Such evidence may, however, be admissible if it is relevant in some other way. As was pointed out by Lord Herschell, L.C. in the decision of the Privy Council in *Makin v Attorney General for New South Wales* [1894] A.C. 57:

> *"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of*

leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts allege to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Thus, evidence of the past bribes received by the appellant from Ah Kan is inadmissible to show his propensity to take bribes and the likelihood of his commission of the offences before the court. But such evidence is admissible to show the gratification in question was indeed a bribe and to rebut the defence that it was for the payment of the hire purchase instalment on one of the Ford Rangers and not a bribe; and it is evident from the judgment of the Magistrate that this was the purpose the evidence of the previous bribes was admitted.

As to the second ground, 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. It is not enough to show that the appellate court would have come to a different conclusion on the evidence from the court below bearing in mind the trial court had the benefit of seeing and hearing the witnesses to assess their veracity and reliability.

The Magistrate had the opportunity to see and hear Ah Kan testify and was entitled to find that he was a credible witness and to accept the truthfulness and accuracy of his evidence on the material issues. Likewise, the Magistrate, having seen and heard the defendant giving evidence, was entitled to disbelieve the defence.

It is not surprising that the Magistrate rejected the defence that the purpose of the meeting on 19 January 2009 between the defendant and Ah Kan was to *"discuss"* the default in the hire purchase instalment payments on one of the Ford Rangers. If that was the true purpose of the meeting why did the defendant say he felt *"uncomfortable"* when the money was handed to him? Why was the defendant *"not sure"* whether it was a bribe or payment for the Ford Ranger? And why did Ah Kan have to make payment through the defendant when all along he had been paying directly to the bank? The defence is incredible.

As to sentence counsel for the appellant complains that the Magistrate failed to take into account the *"delay of 6 years in the disposal of the case"* in passing a sentence of 18 months' imprisonment as she was influenced by the fact that some of the delay was caused by the appellant himself.

I disagree. The Magistrate did consider delay in the appellant's favour because in her *"Reasons for Sentence"* she said:

> *"I also take into account that there was a delay of 2 years in bringing the charge to trial and a further 4 years to complete the trial. I must point out that some of the delay was caused by the defendant himself."*

However, in my opinion, the Magistrate did not give adequate weight to the excessive delay in the trial when a substantial part of this delay was not caused by the appellant such as the period of close to 9 months from completion of the trial on 2 December 2014 to delivery of judgment on 29 August 2015.

Delay was a factor taken into consideration by the Court of Appeal in allowing the appeals against the sentences of the appellants in *Ridzwan Bin Haji Mansor v Public Prosecution* [2007] 2 JCBD 172 and *Maimun Binti Haji Omar v Public Prosecutor* [2013] 1 JCBD 154.

Counsel for the appellant urges the court to reduce the sentence of 18 months to 12 months because of the delay. The Deputy Public Prosecutor, whilst conceding that some reduction in the sentence is warranted due to the delay, argues that 12 months would be unduly lenient. She says 14 months would be appropriate and finds support for this contention in *Dong Sui Hung v Public Prosecutor* [2009] 2 JCBD 224.

In *Dong Sui Hung's* case there was a pre-charge delay of one year and post-charge delay of 2 years, much shorter than the delay in this case. I am therefore inclined to agree with counsel for the appellant that a sentence of 12 months would be fair in the circumstances.

Conclusion

The Magistrate's finding of the appellant's guilt on both charges being amply supported by the evidence is unassailable.

But for the inordinate delay the sentence of 18 months cannot be criticized as it is consistent with the guideline sentences suggested in *Hamid Bin Ibrahim v Public Prosecutor* [1965-1986] 2 BLR 264; *Bong Fook Jin @ Bak Jin v Public Prosecutor* [1991] JCBD 149; and *Wong Kai Fen v Public Prosecutor* [2005] 1 JCBD 264. Because of the inordinate delay I think a sentence of 12 months would be appropriate.

Accordingly, the appeal against conviction is dismissed.

The appeal against sentence is allowed to the extent that the sentence is reduced from 18 months to 12 months.

DATO PADUKA STEVEN CHONG
Judge, High Court