

MOHD SANIP BIN URA

AND

PUBLIC PROSECUTOR

(High Court of Brunei Darussalam)
(Criminal Appeal No 7 of 2016)

Hairol Arni Majid, J.

17th January 2017

Criminal law - Section 6(a) of the Prevention of corruption Act (cap 131) -
Section 165 of the Penal Code (cap 22) – reliability of video evidence – sexual
services – voluntariness of statement -

*Mr. Mohd Shazale bin Haji Mat Salleh (Messrs. Mohd Shazale Salleh, Advocates and
Solicitors) for Appellant*

DPP Hjh. Anifah Rafiza binti Hj. Abdul Ghani for Respondent / Prosecution

Cases cited:

Kannan S/O Kunjiraman & Anor vs PP [1995] 3SLR 757

Sundara Morthy Lanketharan v PP [1995] 3 SLR 464

Trodd v Brown & Company Limited (Privy Council Appeal No 81 of 1916)

1918 UK PC 44

J U D G M E N T

The appellant was convicted after trial on 4 counts, 2 counts for corruptly accepting bribe of \$350 and gratification in the form of sexual services by a prostitute from a fuel smuggler contrary to section 6(a) of the Prevention of Corruption Act and 2 counts of obtaining the respective cash and sexual services without valuable consideration contrary to section 165 of the Penal Code.

The charges are as follows.

1st charge

That you, between the 12th and 13th day of January 2009, in the vicinity of Marilyn Restaurant, Kuala Belait, Brunei Darussalam, being an agent to wit, a Customs Officer with the Royal Customs and Excise Department, did corruptly accept for yourself a gratification, to wit, the sum of B\$350.00 (Brunei Dollars Three Hundred and Fifty) from one LEE EAK CHUAN (Malaysian), as an inducement or reward for forbearing to do, an act in relation to your principal's affairs, to wit, to take action against the said Lee Eak Chuan for committing offences under the Customs Order 2006 relating to fuel smuggling activities and you have thereby committed an offence under s.6(a) of the Prevention of Corruption Act, Chapter 131.

2nd charge

That you, between the 12th and 13th day of January 2009, in the vicinity of Marilyn Restaurant, Kuala Belait, Brunei Darussalam, being a public servant to wit, a Customs Officer with the Royal Customs and Excise Department, obtained for yourself a valuable thing, to wit, the sum of B\$350.00 (Brunei Dollars Three Hundred and Fifty) without consideration or for a consideration which you know to be inadequate from one LEE EAK CHUAN (Malaysian) who has committed offences under the Customs Order 2006 relating to fuel smuggling activities, whom you knew to have a connection with the official functions of yourself as a Customs Officer whose duty is to enforce the provisions of the Customs Order 2006, and you have thereby committed an offence punishable under section 165 Penal Code, Chapter 22.

3rd charge

That you, on or about the 18th January 2009, at the vicinity of Room 1111, Mega Hotel, Miri, Sarawak, Malaysia, being an agent to wit, a Customs Officer with the Royal Customs and Excise Department, did corruptly accept from one LEE EAK CHUAN (Malaysian), for yourself a gratification in the form of sexual services from a female prostitute, as an inducement or reward for forbearing to do, an act in relation to your principal's affairs, to wit, to take action against the said Lee Eak Chuan

for committing offences under the Customs Order 2006 relating to fuel smuggling activities and you have thereby committed an offence under s.6(a) of the Prevention of Corruption Act, Chapter 131.

4th charge

That you, on or about the 18th January 2009, at the vicinity of Room 1111, Mega Hotel, Miri, Sarawak, Malaysia, being a public servant to wit, a Customs Officer with the Royal Customs and Excise Department, obtained for yourself a valuable thing, to wit, sexual services from a female prostitute without consideration or for a consideration which you know to be inadequate from one LEE EAK CHUAN who has committed offences under the Customs Order 2006 relating to fuel smuggling activities, whom you knew to have a connection with the official functions of yourself as a Customs Officer whose duty is to enforce the provisions of the Customs Order 2006, and you have thereby committed an offence punishable under section 165 Penal Code, Chapter 22.

The appellant was sentenced to 12 months and 6 months custodial sentence each for the corruption and the penal code offences respectively. The magistrate ordered the sentences to be served concurrently and effectively the appellant is to serve 12 months custodial sentence.

Background

The facts of the case is described as per the judgment of the trial magistrate, reproduced here below which are as follows:

“It is the prosecution’s case that Lee was first introduced to the defendant by Kan on 4/12/08. On that day, Lee, Kan, Teoh and one Ah Thong met with Sanip at Marilyn Coffee House in Kuala Belait. At that meeting, the defendant told Lee that Lee had to pay him money at the end of every month based on the number of cars used to smuggle diesel. Lee then proceeded to tell the defendant that he was using 4 cars, 3 with modified tanks and 1 with an unmodified tank. Following that, the defendant told Lee that he had to pay \$100 for each car with a modified tank and \$50 for each car with unmodified tank.”

The defendant then told Lee he was going to be away for an official trip to Kota Kinabalu and that Lee should pay him upon his return. The defendant advised Lee not to make any arrangements with anyone else

while he was away and Lee agreed to pay only when the defendant returned from Kota Kinabalu.

\$200 on 12/1/2009

It is Kan's testimony that in mid January 2009, the defendant contacted him and asked him when Lee was going to pay him the money that Lee agreed to pay him. Another meeting was arranged by Kan for Lee and the defendant at Marilyn Coffee House on 12/1/2009. Apart from Lee and Kan, another undercover officer Teoh and Kan's friend Ah Tong also came to the meeting to meet the defendant.

For this meeting, Lee was wired with a pinhole camera supplied by the technical support of the Malaysian Anti Corruption Commission (MACC) which was placed inside his shirt pocket which was meant to record his meeting and the handing over of the monies to the defendant. This recording was tendered and marked as P6.

At the meeting, Lee sat across the table opposite the defendant. Lee took out \$200 and handed it over to the defendant. The defendant then reminded Lee that he was supposed to pay \$350 for 4 cars. Lee then told the defendant he would pay the balance of \$150 the next day and the defendant agreed.

The prosecution rely on P6 at minute 10:15 to show that Lee had monies in his hand followed by footage showing the absence of monies in his hand as evidence of the handing over of the monies.

Whilst there is no actual footage of the handing over of monies, Lee explained to the court that the pinhole camera might not have captured the hand over because the quality and focus of the camera was affected by movements of his body.

\$150 on 13/1/09

On 13/1/09, Lee met with the defendant again at the same coffee shop with Kan, Teoh and Ah Tong. Lee sat across the defendant again and was again wired with a pinhole camera to record the meeting.

Lee handed over the remaining \$150 to the defendant. The prosecution rely on the video recording tendered and marked as P7 showing footage

in UCO1 at minute 20:57 that Lee was holding the money and from the footage in UCO2 at minute 00:39, that Lee extended his hand and handed over money to the defendant.

Sexual gratification

At the 3rd meeting with Lee on 13/1/09, the defendant told Lee and Kan that he was going to Miri on 18/1/09. The defendant then asked Lee to get Viagra for him as well as a young and sexy Filipina for when he was in Miri. Lee told the defendant that he and Kan would take care of it.

Lee then told the court that on 17/1/09, he and Kan had arranged for a Filipina prostitute to meet with the defendant at the Mega Hotel in Miri. They had also bought the Viagra pills for the defendant. Lee testified that he gave RM\$1,000 to Kan to pay for the prostitute and the Viagra pills.

Kan paid RM\$700 to the prostitute's pimp and used RM\$200 to buy the Viagra pills. Lee also booked the hotel room for the defendant to use with the Filipino prostitute.

Lee gave evidence that on the morning of 18/1/09, he picked up the female prostitute and brought her to Room 1111 at Mega Hotel, Miri to wait for the defendant. Lee then received a call from Kan informing him that the defendant was going to arrive in Miri around 12 noon and Kan was going to meet with the defendant and bring him to the hotel.

Kan picked up the defendant from the Imperial shopping mall and dropped him off at the Mega Hotel. Lee then met with the defendant at the lobby of the hotel and brought him up to Room 1111.

The prosecution rely on P8 and P9 to show that the defendant did indeed have sexual intercourse with the female prostitute."

Grounds of appeal

There are four main issues raised in this appeal.

1. *Whether the trial magistrate was correct in accepting the evidence of the main witnesses.*
2. *Whether the trial magistrate erred in relying on the video evidence purporting showing the receipt of gratification by the appellant.*

3. *Whether the trial magistrate was correct in his finding that the appellant's statement was voluntarily made.*
4. *Whether the convictions were safe or against the weight of the evidence.*

Ground 1 and 2

The main point of contention by the appellant here is that the magistrate erred in accepting the evidence of Lee Eak Chuan (PW3) and Kan Tak Hiong (PW4). PW3 gave evidence that he had recorded the exchanges of the bribe of \$206 and was adamant that the footage showed the handover of the money. Mr. Shazale for the appellant argued that contrary to PW3's claim, the footage does not show that the appellant accepted or received the money, at best he argued that it merely shows footage of the appellant seated across the table from PW3 and the latter holding some cash.

Mr. Shazale submitted that PW3's explanation that he had no control over the recording was an afterthought on his part. Given that PW3 was able to record the early part of the meeting, he argued that there should be no reason why this footage was short of its intended object. As well, the technical officer responsible for setting up the pin hole camera did not allude to any technical problems with the camera or anything of sort associated with the recording by PW3. He submitted that PW3 gave unconvincing testimony and given that this was a sting operation with both main prosecution witnesses acting as agent provocateur, it is more probable than not that they had tailored their evidence to secure a conviction.

Miss Anifah for the respondent replied that this issue had been raised in the appellant final submission below and the trial magistrate had taken note of the footage not showing the appellant receiving the money and yet still accepts PW3's version of the event while rejecting the appellant's, which she was entitled to do.

As regards the video recording in relation to the handing over of the \$150 on the 13th January 2009, Mr. Shazale claimed that the trial magistrate had completely misstated the evidence saying that the video recording was made by PW3 when in actual fact it was recorded by one Teoh Ting Kiong, who the prosecution fails to call as a witness.

Mr. Shazale also argued that following his objection to the admission of the video recording as evidence, the trial magistrate made a ruling that the same be re tendered through the said Teoh Ting Kiong. However, the latter was never called and Mr. Shazale postulated that there was in effect no video recording

evidence during the trial that the magistrate could rely upon as evidence. As such, it is argued that given there was no record that the video evidence was properly tendered, the magistrate finding that the appellant had accepted \$150 was untenable and unsafe.

In response, Miss Anifah argued that the said video recording was tendered as evidence in court as (P7) via Mohd. Nariza Adnan (PW2), a technical officer who extracted the content from the pin-hole camera that was used by Teoh. The content was transferred to a CD and she claimed that the appellant never objected to the same being tendered through PW2 during the trial.

As regards the magistrate's finding of gratification of sexual services, Mr. Shazale argued that this finding was not supported by evidence and the trial magistrate should not have accepted PW3 and PW4's evidence. He claimed PW4 had given an inconsistent statement in another case citing that he completely stopped his smuggling activity due to the drop in the price of diesel in Malaysia. Yet in this case he claimed he continued the activity.

Mr. Shazale claimed that the fact that PW4 was given immunity from prosecution and by his own admission that he bore a grudge against a particular custom officer, PW4 has every motive to save his own skin by agreeing to implicate the custom officers. PW4's evidence that no money was paid for January and February 2009 despite the appellant's demand means that it totally contradicts the prosecution case that the appellant had been the one who asked for and received the regular monthly bribe payment.

Miss Anifah argued that when PW4 said in another case that he had stopped diesel smuggling in August 2008, he meant he stopped doing so using modified tanks but not using the normal non-modified tank vehicle to the extent he confessed that his smuggling activity was thus reducing.

As to the claim that PW4 only agreed to testify against the defendant because he was promised immunity from prosecution and that he bore a grudge against a custom officer, Miss Suhana argued this was purely unsubstantiated and baseless argument.

Ground 3

As regards the admissibility of the appellant's statement, the magistrate attributed the appellant's state of fear to his own state of panic and uncertainty following his arrest and ruled out any allegation he had been interrogated by the recording officer over a two hour period prior to the recording of the statement.

However, Mr. Shazale argued that the evidence shows that the recording officer spent some two hours with the appellant prior to the actual recording of the statement which he claimed to be unusual, if the appellant had been cooperative. Significantly, he argued that the recording officer being the only officer with the appellant during that two hour period would have given rooms and opportunity for the appellant to be interrogated as was indeed the word used in the recording officer section 117B statement.

Mr. Shazale further submitted that upon perusal of the investigation diary of the recording officer, it appeared that the recording officers had been over generous by giving time the appellant to get himself ready i.e. some two hours before recording the statement.

Mr. Shazale also took issue with the trial magistrate usage and understanding of the word “soal siasat” or interrogation. The magistrate herself is argued to have understood the word as imparting a degree of heavy handedness and yet she allowed the statement to be admissible.

Mr. Shazale argued that there were compelling evidence that the recording officer had not forethought as to the extent of his knowledge of the case prior to the recording of the statement. The recording officer’s denial of knowledge of the giver of the bribe would appear to be improbable given there had been an earlier briefing by another ACB officer of the operation. He submitted that the trial magistrate should have found that the recording officers had obviously lied about this.

In assessing the admissibility of the statement, Mr. Shazale argued that the trial magistrate appeared to have placed the burden on the appellant to prove that his statement was voluntary instead of otherwise. The magistrate had referred the fuel smuggler as Ah Han instead of Ah Kan. Mr. Shazale claimed that the recording officer had dictated the tone of the statement recording and how it was to be recorded. As such, by implication Lee’s name should have been recorded because the deal was primarily between Lee (PW3) and the appellant.

Miss Anifah replied that throughout the statement taking and prior to or after the session, the appellant never made any complaint to anyone claiming he was ever threatened by PW5. She submitted that the appellant was given the freedom of recording his statement whenever he was ready. She added that there had breaks in between the session for the appellant to conduct his prayer. These she argued all done to ease and facilitate the appellant.

As to the reference to “Lee” as Ah Han and as well “Ah Han as Kan”, she submitted that this show that the appellant was given the freedom to give his statement as he wished and identified his friends with the names he is comfortable with calling and not dictated by the recorder as alleged.

Ground 4

Mr. Shazale submitted that the prosecution had not proven that subsequent to December 2008 meeting and January 2009, there had been any contact between PW3 and the appellant to suggest any corrupt intent on the part of the latter despite evidence that the former had intention to bribe the latter. As such, Mr. Shazale claimed that the burden imposed by the section 25 of the PCA had been discharged by the appellant and that the trial magistrate’s finding that it had not been discharged was wrong.

Conclusion

Ground 1 and 2

As regards the trial magistrate acceptance of the evidence of PW3 and PW4, it is clear from her judgment, she accepted PW3’s evidence that there was a handing over of the money to the defendant. She accepted that the video footage was short of showing the actual handing over but she finds corroboration in Kan’s testimony whose evidence say he saw the handing over of the money to the defendant.

Similarly, the trial Magistrate finds credence in Lee’s (PW3’s) evidence which were also corroborated by Kan’s as regards to the bribe of \$150 to the defendant. She sums up her finding on this issue as follows:

“I accept Lee’s evidence that he handed \$200 to the defendant in the presence of Kan, Teoh and Ah Thong on 12/1/09. Although the video recording P6 did not show actual footage of the handover of monies, Lee’s evidence was corroborated by Kan who gave evidence that he saw Lee hand over the \$200 to Sanip on 12/1/09. Moreover, the defendant admitted in his own statement, P15 at question no 26 at page 5-6 that he did receive \$200 from Kan’s friend, Lee at their second meeting.

I also accept Lee’s evidence that he handed over \$150 to the defendant on 13/1/09 in the presence of Kan, Teoh and Hiew. Lee’s evidence was corroborated by Kan and there was video footage from a pin-hole camera in Lee’s shirt pocket, tendered and marked as P7 which showed Lee in a

white shirt, extending his hand, handing over money to the defendant in a blue shirt. Additionally, the defendant admitted in his statement, P15 at page 7 at question 36 that he had received \$150 at the third meeting with Lee on 13/1/09."

Despite there being no actual footage of the appellant receiving the money, the trial Magistrate accepted that this event occurred. She also accepted PW4's testimony who was present during the meeting who corroborates this part of the prosecution's evidence. Realistically, it would have been impossible to capture on record all the intended action or scene to be played out in a passive video recording in this kind of operation. Still, the very best of evidence to be accepted in court is oral, given by the PW3 and PW4. The Magistrate had no qualms or uncertainty in accepting the entire evidence of PW3 and PW4. She finds them to be credible witnesses, having seen and heard them given evidence after a tested and intense cross examination by the appellant's counsel. I can't find any fault on her finding on this.

Similarly, I have no issue that the video recording footage not being tendered through Teoh Ting Kiong. I believe that it is sufficient for the Magistrate to accept as the truth of the video recording and its content. There is no irregularity that the video evidence was tendered through Mohd Nariza Adnan (PW7). PW7 himself is the Technical Officers who had extracted of the footage from the pin-hole camera and transferred them to a CD.

As regards the Magistrate finding on the sexual gratification services, I do not see any reason not to accept the Magistrate reasoning for these. The appellant does not dispute having sexual intercourse with the prostitute at the hotel. She finds corroboration on this part of the evidence as she stated in her judgment.

"I accept Lee's evidence that the defendant had asked Lee and Kan to arrange for him to have sexual services of a prostitute for when he went to Miri on 18/1/09 as well as Viagra tablets. This was corroborated by Kan who subsequently made arrangements for a Filipino prostitute to provide sexual services and the purchase of 2 Viagra tablets. It is not in dispute that the defendant did have sexual intercourse with a Filipino prostitute at the Mega Hotel on 18/1/09.".....

"2) I reject the defendant's evidence that he felt 'threatened' into accepting the payment of monies by Lee. Had he truly felt threatened, the defendant would not have met with Lee at the second meeting for the handover of the \$150 on the 13/1/09, nor would there have been any

subsequent dealings between the parties. However, the defendant went on to meet with Lee and Kan in Miri before his encounter with the Filipino prostitute.

- 3) *In relation to the sexual services, I reject in totality the defendant's claim that he did not ask Kan or Lee to pay for the prostitute and that he did not know they had made payment. The defendant had made use of a hotel room which by his own admission, he did not pay for. I am satisfied that Kan paid \$700 Malaysian Ringgit for the prostitute which is why the sexual service was provided. I am satisfied that the money the defendant gave the prostitute totaling \$20 Malaysian Ringgit was a tip for the sexual service provided. The defendant cannot have been too scared about creating problems by receiving the money of \$200 as he claims in para 9 of his statement, D3, as he was clearly quite comfortable to have Lee and Kan know of his sexual encounter in Miri by having Kan pick him up from Imperial shopping complex to go to the Mega Hotel. These were not the actions of a scared, conflicted man concerned about his dealings and association with a known diesel fuel smuggler despite his position as a Customs Enforcement Officer."*

These are findings of facts which the Magistrate found for the prosecution, having considered the facts before her. She had considered and concluded in quite detail the event leading to the appellant accepting the bribes which I believe to be correct. The appellant's previous and subsequent dealings with PW3 and PW4 ruled out any assumption that he felt threatened into accepting the bribes. He also did not dispute meeting them again in Miri when the latter arranged him with the prostitute.

As regards the appellant's argument that PW4 had stopped the smuggling activity and that he has a grudge against a customs officer and also the fact that he was given immunity from prosecution contradicts the respondent's case that he was the one asking for the bribe, I agree with Miss Anifah's submission that these allegations are unsubstantiated there is no evidence which points to this. The magistrate unreservedly believes the testimony of PW3 and PW4.

As to PW4's smuggling activity, PW4's activity had stopped the diesel smuggling in August 2008, only to the extent of him using modified tank but not the non-modified tank vehicle. The Magistrate believes this was so to be the case.

Ground 3

As regards the admissibility of the statement is concerned, I agree with Miss Anifah's submission that there was no evidence that the Magistrate could rely on to concludes that it was not properly recorded or for that matter that he was ever threatened. As to the "soal siasat" issue, the Magistrate noted this in her judgment and she has this to say.

"Why a 'soal siasat' was conducted by a recording officer is beyond me and can only be described as bad practice on the part of the recording officer. However, as it does not from part of the defendant's complain against the recording officer in so far as how it affected his voluntariness in giving his statement, I can only make an observation that such practice should be avoided in the future."

Despite the Magistrate's disagreement with the practice, she found nothing to impede the voluntariness of the statement taking, which she is entitled to do. She had, I believe had weigh the issues and had arrived at the correct conclusion.

On perusal of the note of proceedings and the judgment, there is nothing to suggest that the Magistrate had placed the burden on the appellant to prove his statement was voluntarily made as alleged. I have to agree with Miss Anifah's submission on this, in that the appellant was clearly given the freedom of recording his statement at his own time and given the necessary breaks and time to conduct his prayer.

As well, the appellant was allowed to refer in his statement the name "Lee" as "Ah Han" and "Ah Han" as "Kan". I agree that the appellant was given the freedom to tailor his statement as he wished and referred his friends with the names he is comfortable with calling and not dictated by the recorder as alleged.

Ground 4

As regards the Magistrate finding on the burden imposed on the appellant by section 25 of the PCA, I believe the Magistrate was correct to come to the conclusion as dealt with above. She was correct to reject defendant's version of not daring to help Kan with the smuggling claiming he himself was also involved in conducting operation and raid. She rejects the appellant's evidence of being threatened into accepting the bribes. As well she disbelieved him on his version of sexual services. She found appellant's evidence to be conflicting and his demeanor evasive in answering question.

Section 291 of the Criminal Procedure Code Chapter 7 provide for the High Court its power in its revisionary or appellate role. The section states

“No judgment or order of a Magistrate’s Court shall be revised or set aside unless it is shown to the satisfaction of the court above that such judgment or order was either wrong in law or against the weight of the evidence or in the case of sentence, inappropriate in the circumstance of the case.”

In *Kannan S/O Kunjiraman & Anor vs PP* [1995] 3SLR 757, the court states whether or not there is a corrupt element in the transaction must be a question of facts to be judged according to the circumstances.

As an appellate court when the court examined the evidence, it has to bear in mind that it had neither seen nor heard the witnesses gave evidence’s and had to pay due regards to the trial judge’s findings and reason. See *Sundara Morthy Lanketharan v PP* [1995] 3 SLR 464.

In *Trodd v Brown & Company Limited* (Privy Council Appeal No 81 of 1916) 1918 UK PC 44, delivering the judgment of the court, Earl Lawburn states:

“Court of Appeal recognize the priceless advantage which a judge of first instance has in matter of that kind as contrasted with any judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that in question of veracity so direct and so specific as these, a Court of Appeal will overrule a judge of first instance.”

These are findings by the Magistrate who has seen the appellant’s and witnesses first hand. I am in no doubt that she has addressed the relevant evidence and correctly applied them. Despite Mr. Shazale valiant effort and detailed arguments on the matter, I find nothing in the judgment that was either wrong in law or against the weight of the evidence to justify me to interfere with the conviction. Accordingly I order that this appeal be dismissed.

Dato Paduka Hairol Arni Majid
Judge, High Court

