

SPECIALISED CASES & MATERIALS

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Objective

The compilation of specialized cases and materials on Rape, Corruption, Robbery, Commercial Crime and Criminal Breach of Trust is not only timely but a necessity. Experienced judges on the bench would concur that laws on these areas are evolving and expanding, and decisions had to be handed down fast to keep pace with time. The Judiciary has to tap in and marshal all relevant data at its disposal with its available resources to face this challenge. Research time would be shortened, if not made easier with these compiled cases and materials as prelude for more in-depth study of the matter to be decided upon. This compilation attempts to provide the user with quick grasp of the basic principles of law while updating him with the latest cases in Malaysia. It is hoped that it would be refined and improved with constructive feedbacks, comments and input of the user over time.

SPECIALISED CASES & MATERIALS

TABLE OF CONTENTS

[1] RAPE

[2] CORRUPTION

[3] ROBBERY

[4] COMMERCIAL CRIME

[5] CRIMINAL BREACH OF TRUST

CASES AND MATERIALS

RAPE

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RAPE

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Table of Content

	Pages
[1] Introduction	
1.1 Definition	3
What is Rape?	3
The essential ingredients	5
1.2 Whether the charge drawn should set out particular limb under section 375?	5
1.3 Power of the Attorney-General to institute Proceeding for an offence before a court-martial	6
[2] Evidence in rape cases	
2.1 Burden of Proof	8
2.2 Penetration	9
2.3 Corroboration	10
2.4 Prior sexual conduct	13
2.5 Consent of the victim	14
[3] Statutory Rape	
3.1 The complainant/victim's age	15
3.2 Evidence of a child of tender years	16

3.3	When the complainant/victim and accused were in fact lovers	16
3.4	Prior sexual activity cannot be a defence in statutory rape	20
[4]	Incest	21
[5]	Sentencing	22
5.1	Separate and distinct offence	23
5.2	Whether concurrent or consecutive	25
5.3	Whether mandatory punishment under section 376 Penal Code can be substituted with other Punishment	28
5.4	General principles of sentencing	30

Chapter 1

Introduction

1.1 Definition

There are three main laws governing rape case in Malaysia, namely:

- a) Penal Code – defines rape (s 376) as well as providing its punishment.
- b) Criminal Procedure Code – that law that governs the procedure on criminal investigation, detention, prosecution, conviction and sentencing.
- c) Evidence Act 1950 – law pertaining to both the general and specific procedure for the collation, tendering and admission of evidence in a trial

What is rape?

The Penal Code s 375 provides,

A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

First - Against her will.

Secondly – Without her consent.

Thirdly- With her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained

under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception.

Fourthly- With her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent.

Fifthly- With her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly- With or without her consent, when she is under sixteen years of age.

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception - Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognised in the Federation as valid, is not rape.

By section 375 of the Penal Code, a man is said to commit 'rape' if he has sexual intercourse with a woman under circumstances falling within any of the six descriptions. According to the "Explanation" annexed to the section quoted above, penetration is sufficient to constitute sexual intercourse necessary to prove the offence of rape.

The essential ingredients

The essential ingredients of an offence of rape are:

- i. The accused had sexual intercourse with the victim, a female person;
- ii. The sexual intercourse happened under any of the circumstances falling within any of the five descriptions (a) to (e) set out in section 375;
- iii. That there was penetration.

1.2 Whether the charge drawn should set out particular limb under section 375

In **PP v Ab Malek Atan [2002] 4 MLJ 84**, the accused was charged with two counts of rape under s 376 of the Penal Code. The accused claimed trial. He was found guilty and sentence to 10 years imprisonment and 8 strokes of rattan for the first charge and 12 years imprisonment and 10 strokes of rattan for the second charge. The accused appealed against both conviction and sentence. In the appeal, counsel for the accused contended that the charges were defective as they did not set out the particular limb of s 375 of the Code under which the prosecution case proceeded.

It was held that “pursuant to s 375 of the Code, a man who has sexual intercourse with a woman under any of the circumstances enumerated therein is said to commit 'rape'. Sexual intercourse under any of the prescribed circumstances has thus been given the specific name of 'rape'. The corollary is that an offence of rape may be described in the charge by that name only. It is therefore not necessary to identify the specific limb of

s 375 of the Code under which the case of the accused falls. In the circumstances, the charges preferred against the accused are not defective.”

1.3 Power of the Attorney-General to institute proceeding for an offence before a court-martial.

In **Robin Ak Bandang & Ors V. PP [1998] 4 CLJ 524** the three appellants are members of the Armed Forces and were charged under the offence of rape under s. 376 Penal Code. They appealed against the order made by the learned sessions court judge on 17 June 1998 that the Sessions Court had jurisdiction to try the three appellants for the offence of rape under s. 376 Penal Code. All the three appellants contended that since they are members of the Armed Forces, therefore they are subject to service law under the Armed Forces Act 1972. It was held that:-

“The Attorney-General, as a public prosecutor, has the discretion to institute proceedings for an offence under s. 376 of the Penal Code, in the appropriate **civil criminal court** having jurisdiction to hear the same, that is, the **Sessions Court** in the exercise of its criminal jurisdiction under s. 63 of the Subordinate Courts Act 1948. Hence, it is repugnant to hold that a civil criminal court has no jurisdiction to try persons subject to service law for the offence of rape and that they should only be tried by a **court-martial**.

Under service law, rape would be an offence under s. 88 of the Armed Forces Act 1972. Although rape is an offence under s. 88 of the Armed Forces Act 1972 it is to be noted that no person shall be tried for that offence by a court martial unless when he committed the offence he was **on active service** or serving outside the Federation (see s. 88(4)).

Pursuant to s. 3 of the Armed Forces Act 1972 "**on active service**" in relation to a force means that it is engaged in operations against an enemy, or is in a country or territory outside the Federation for the preservation of life or property or is on military occupation of a foreign country, and in relation to a person means that he is serving in or with such a force which is on active service.

The Attorney-General has no power under Art. 145(3) of the Federal Constitution to **institute** or conduct any proceedings for an offence before a court-martial. Therefore, when a crime such as rape has been allegedly committed by the three appellants, the Attorney-General, as public prosecutor, has the discretion to institute proceedings for an offence under s. 376 of the Penal Code, in the appropriate **civil criminal court** having jurisdiction to hear the same that is, the **Sessions Court** in the exercise of its criminal jurisdiction under s. 63 of the Subordinate Courts Act 1948.

Chapter 2

Evidence In Rape Case

2.1 Burden of Proof

In **Amran Bin Ahmad V PP [2006] 5 MLJ 486** the appellant in this case was found guilty and convicted for rape on the victim aged 9 and was sentenced to 15 years imprisonment from the date of conviction and also punished with four strokes of the rattan. The appellant appealed to this court against both conviction and sentence. While the Public Prosecutor appealed against sentence.

The appellant's counsel questioned the absence of the appellant's semen found at the scene and also on victim's vagina to link the accused to the charge. The appellant's counsel also disputed the fact that the mattress was not taken by the police for analysis by the Chemistry Department. Therefore Section 114 (g) of the Evidence Act cannot be used as the Prosecution failed to produce the Chemistry report on the said mattress. The appellant's counsel also referred to the evidence by the Head of Unit and Specialist in Gynecology and Obstetrics in Kuala Terengganu Hospital that there were new scratches in victim's vagina estimated to have happened within 24 hours. The appellant's counsel also questioned the potency test which was not done on the appellant to ensure whether he is capable of intercourse.

The court in this case dismissing the appeal and substituting the 15 years sentence to 18 years as the burden by the prosecution to prove its case against the appellant beyond reasonable doubt is not to prove a 100% perfect case and the failure to take the mattress and send it to the

Chemistry Department does not mean that it is fatal to the prosecution's case.

This is because the examination and analysis of the mattress is not required under the law to prove a case against the appellant.

Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will sufficient".

To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice (see **Hamzah Najdi V PP [2007] 7 CLJ 437**)

2.2 Penetration

Seminal emission is not necessary to establish rape. What is necessary is that there must be "penetration".

In **Paul Barero v Public Prosecutor [1995] 1 LNS 149** it was held that "The absence of spermatozoa cannot negative rape. Seminal emission is not necessary to establish rape. What is necessary is that there must be penetration.

The penile penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape and it must be corroborated.

In **PP v Nasrul Anuar Abd Samad [2005] 1 MLJ 619** it was decided that there must be sufficient evidence to presume penetration and there must be medical evidence to corroborates the evidence of penile penetration.

2.3 Corroboration

The corroboration in rape case is desirable if not mandatory. This is due to the fact that rape is easy to allege and difficult to disprove. The commission of the act is normally in private without witness and where the victim is unable to report the matter early that would result the corroboration through medical evidence is lost.

It is well established that the corroboration as a matter of prudence is necessary, i.e. corroborative evidence confirming in some material particular that intercourse as alleged had taken place, that it had taken place without the complainant's consent and that the defendants were the men who committed the crime.

See e.g. **Chiu Nang Hong v PP [1965] 1 MLJ 40; Gan Leong Gee & Anor v PP [1969] 2 MLJ 76; and James v R (1970) 55 Cr App R 299; Aparav Sathiah v Public Prosecutor [1997] 2 CLJ 391.**

In **Mohamad Bin Najib v PP [1997] 1 MLJ 121** it was held that in a prosecution for rape it is unsafe to convict unless there is corroboration on the allegation of rape and corroboration on the identification of the assailant and the identification parade was unfair to the accused and the subsequent identification in court was of little significance. Therefore the corroboration on the allegation of rape and corroboration on the identification of the assailant is very important.

In **PP v Ridzwan Borhan [2004] 5 MLJ 300** the accused person who was charged for rape was acquitted and discharged by the sessions court on the ground that the medical evidence did not corroborate or support the evidence of the complainant who alleged that the said sexual intercourses

were committed by the accused on her without her consent. The prosecution appealed on the ground that the learned trial judge had not fully considered the complainant's evidence and that he had misdirected himself on the corroborative evidence.

It was held that "it is a rule of practice having the force of law that in sexual offences such as rape, the evidence of the complainant must be corroborated".

On the basis of the evidence adduced in the trial court, the finding of facts do not seem to suggest any act of violence nor any element of threat. Whether or not there is consent on the part of the complainant is a question of fact which has to be proved by way of positive evidence. The medical evidence adduced from Dr. Lian in the instant appeal and as adumbrated above has indeed confirmed that the said sexual intercourses were the result of the combined consensual conduct and behavior of two reasonable adults who were aware of their respective deeds.

The facts and circumstances are more consistent with the existence of consent on the part of the complainant. Although it is true that the grounds of decision of the trial judge are comparatively brief, especially on the question of consent, they are founded upon the evidence adduced before him. Hence, there is no misdirection or miscarriage of justice.

In ***PP V Rajan Sinniah [2007] 8 CLJ 674*** the accused was charged for rapping a female, aged 13 years, under s. 376 of the Penal Code. The accused was found guilty and convicted and was sentenced to a term of imprisonment of 15 years and 5 stroke of whipping. The accused thus appealed against the conviction and sentence.

In this case the victim's (SP4) own evidence was fraught with factual inaccuracies and inconsistencies and could not be relied upon to find a basis for a conviction: - Victim evidence was clear that she was not certain of the identity of the assailant as she had only seen his face from the nose downwards. Her uncertainty as to the identity of her assailant was not explained during the course of re-examination.

Victim's former statement in the police report did not corroborate or lend weight to her evidence but contained a different version of events leading up to the alleged rape. In view of the lack of corroboration of the victim's testimony in court in the police report, coupled with her uncertainty as to the identity of her assailant in cross-examination there was sufficient basis to conclude that her evidence differed in material and relevant particulars. These could not be dismissed as 'fanciful doubts.' There was sufficient number of facts which were at variance.

According to SP9 results of the forensic analysis were negative. By clarifying that negative meant there was no match between the vaginal swab taken from SP4 and the accused's blood sample, a real possibility arose that there could have been a match with some person other than the accused. Despite SP4's allegation that the accused had raped her in the manner described in her evidence, no DNA of the accused was found on or in SP4. The chemist was not called as a witness.

The court of the view that the chemist ought to have been called to enable the prosecution to make out his case. Merely offering him to the defence left gaps in the prosecution case. The attendant result was that it could not be said that the prosecution had discharged its burden of proof. Section 114 (g) of the Evidence Act 1950 should, in these circumstances, have been drawn. The failure to do so was an error of law that had occasioned a miscarriage of justice. As a consequence of the failure to produce this

wholly relevant evidence, the issue of whether the accused raped SP4 remained unsolved. The failure to produce the report was fatal to the prosecution's case.

Evidence of the distress

Evidence of the distress of the victim of a sexual offence, soon after the offence can be regarded as corroboration (per Robert's C.J. in **Public Prosecutor V Emran bin Nasir [1987] 1 MLJ 166 at 171**).

In cases of rape and similar sexual offences, the fact that the complainant made a complaint shortly after the alleged offence, is admissible to show the consistency of such conduct with the complainant's evidence in court (per Augustine Paul JC in **Aziz Muhamad Din v Public Prosecutor**, supra at p 550; per Roberts CJ in **Public Prosecutor V Emran bin Nasir [1987] 1 MLJ 166 at 171**).

On a charge of rape where consent is irrelevant, medical evidence showing any fresh tear in the hymen is sufficient to corroborate the evidence of the victim (see **Syed Abu Tahir a/l Mohamed Esmail v PP [1988] 3 MLJ 485**).

In **Augustine Foong Boo Jang v Public Prosecutor [1990] 1 MLJ 225** the Brunei Court of Appeal accepted the evidence of a doctor that a recent laceration of the hymen was consistent with recent intercourse. The Court there also held that it disagreed with the contention that the recent laceration of the hymen did not amount to corroboration.

2.4 Prior sexual conduct

Prior sexual conduct of the victim is relevant where there had been prior sexual relations by the victim with the accused as it would be relevant to the issue of consent.

2.5 Consent of the victim

Except for statutory rape consent of the victim is the main defence by the accused. Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantages of a coercive environment undermined the victim's ability to give voluntarily and genuine consent.

On issue of honest belief that the victim has consented to sexual intercourse, in **PP v Zainal Abidin & Ors [1987] 2 MLJ 741** it was held that in case where the accused believed the victim had consented, he should not be convicted even though the belief was unreasonable.

In **PP v Teo Eng Chan [1988] 1 MLJ 156** four accused persons were charged with rape. Their defence was that the complainant had consented or if she had not, they believe she had. The defence placed heavy reliance on the case of **PP v Zainal Abidin (supra)** and it was held that the law of consent and mistake of fact are contained in the Penal Code itself. The issue to be considered is whether there was a mistake of fact in the minds of the accused persons when they presumed that the complainant consented. The law on this point is contained in s 79 of the Penal Code, which states that nothing is an offence, which by any person who by reason of a mistake of fact in good faith believes himself to be justified by law in doing it (for example, the court said that sex with a girl over 16 years with her consent is justified by law).

Under s 375 of the Penal Code, it is sufficient if the prosecutor can prove that the accused has sexual intercourse with a woman without her consent. Nevertheless s 375 of the Penal Code is silent about the requirement of mens rea, hence the accused is given the opportunity to raise a defence under s 79 of the Penal Code, and the burden of proof is on him to prove the element of mistake.

Chapter 3

Statutory Rape

3.1 The victim age below 16 – consent irrelevant

Statutory rape refers to an offence of having sex outside marriage with a female person below the age of 16 years old. The so called statutory rape finds a place in the Penal Code under s 375 (d) and (e).

Since consent is of no issue for a charge fall under statutory rape, it was necessary for the prosecution to prove beyond reasonable doubt that the victim was under 16 years of age. The victim age is an essential ingredient in the offence of 'statutory rape'.

How to prove age?

It was held in **Jamaluddin bin Hashim v Public Prosecutor [1999] 4 MLJ 1** that “in cases of statutory rape, the police investigating officer has to primary ascertain that the age of the alleged victim was in fact below 16 years of age at the time of the offence. In the instant case, however, the prosecution had failed to adduced prima facie evidence, let alone prove beyond reasonable doubt, that the victim was below 16 years of age. The police investigation officer had also failed to procure indisputable evidence of age in the form of the complainant’s birth certificate. The identity card of the alleged victim cannot in law be used for proof of her age or date of birth. There is no presumption concerning the contents of identity cards and the burden of proving the truth of any particulars therein lies on the person to whom such identity card was issued or any person alleging the truth of such contents.”

3.2 Evidence of a child of tender years

The court when accepting the evidence of a child of tender years ought to have examined whether the child had sufficient appreciation of the responsibility of telling the truth over the ordinary duty to tell the truth upon pain of punishment for perjury.

On the failure of the trial court to follow the procedure in s 133A of the Evidence Act 1950, the conviction should be set aside. If the trial court had, after an inquiry, decided that 'the child had a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking the oath, over and above the duty to tell the truth which is an ordinary duty of normal, social conduct, the judge would have been on guard when assessing the evidence of a child (see **Yusaini Bin Mat Adam v Public Prosecutor [1999] 3 MLJ 582; Mohamad Terang Bin Amit V PP (1999) 1 LNS 19**).

3.3 When the victim and accused were in fact lovers

In **PP v Munawar Harris [2009] 5 MLJ 567**, the respondent was charged under s 376 of the Penal Code for three charges of raping a girl aged 15 years and 8 months. The complainant and the respondent were in love and following the respondent's act, the complainant became pregnant and delivered a baby. The complainant wanted to marry the respondent but the complainant's father did not permit her. Initially the respondent had requested for trial but after four of the prosecution witnesses testified, the respondent changed his plea to one of guilt. The learned sessions court judge convicted the respondent on all the three charges and passed a seven year imprisonment sentence on each charge. The three imprisonment sentences were ordered to run concurrently with effect from the date of the respondent's arrest.

Deputy Public Prosecutor appeal to the decision of Session Court Judge. It was held that:-

1 - The judge had erred in giving credit to the respondent upon his plea of guilt. This was because there was no defence which could save him from being convicted in this case. Further the respondent had only pleaded guilty after four witnesses including the victim and the victim's father had testified. If the interest of the public seeks a deterrent sentence, the plea of guilt did not automatically qualify an accused to be imposed with a light sentence.

2- The judge had also erred in stating that there was no psychological trauma suffered by the complainant as she loved the respondent and had given in voluntarily to the respondent. This was because the victim had not only given birth to a baby, but was still underage and was not married to the respondent. This situation would cause the victim to feel ashamed and this would cause the victim to suffer psychological trauma.

3 - The question of loving each other could not be a mitigating factor at all as the victim had not reached the age which qualified her to legally give permission for sexual intercourse.

4 - The judge had also erred when he ordered that the three imprisonment sentences to run concurrently from the date of the respondent's arrest. This was because although the victim in all the three charges was the same person but the time the three offences committed by the respondent towards the victim was different.

In a case of **Public Prosecutor v Mohamad Arfah Bin Jasmi, High Court Kuching Cri App No:42-17-2006-11**, the accused had pleaded guilty to two counts of charges of rape on one Nor Izza Shakirah bte Joraini (F), 13 years old under section 376 of the Penal Code. The Respondent was then 20 years. Both complainant and the accused were lovers. That's why she agreed to have sex with him. The act was not

premeditated. There was no force used. In fact the accused wanted to marry her but her parents refused because she was still schooling.

The session court judge sentence the accused to 5 years imprisonment. Since no violence was used in the commission of the offence whipping was not imposed. The accused was discharge not amounting to acquittal in respect of the 2nd Charge.

The DPP appeal to increase sentence and submits that the courts should not be over sympathetic to the accused. The Judge there held that:-

[1] Unlike rape, the exercise of discretion for the sentence for statutory rape cannot be the same; for rape is a violent offence and statutory rape is an offence of passion and that too by consent of parties.

[2] Parliament has balanced this by imposing strict penalties only sex outside marriage with a female below the age of 16 years. For this purpose, it has left the discretion entirely to the court what sentence to be imposed save that there must be a minimum sentence of 5 years which must be imposed and whipping is only optional. I would have thought that whipping should be the mandatory sentence for case of statutory rape and term of imprisonment must be at the option of the court. The reasons for my view have been reflected in **Leken (supra) (Lekan @ Delem ak Gerik (M) v Public Prosecutor [2007] 3 AMR 230; 2007 8 CLJ 158 and [2007] 3 MLJ 730)** which the prosecution had relied on in this case. However, the law does not permit this approach for statutory rape as it stands unless it is amended.

[3] Statutory rape must be seen to be more of a social problem and must be addressed through religion and/or moral education by parents and authorities and imprisonment of offenders will only add to further

social problems. A proper deterrent sentence in lieu of imprisonment in such cases will be whipping to instigate discipline.

[4] For the purpose of our case, the proposition of Justice Rhind (in Brunei case of **Taib Bin Gemok v Public Prosecutor [1984] 1 MLJ 313**) is eye catching when His Lordship says:

“The modern tendency in sentencing, as I understand it, is not to try to fill the jails at every conceivable opportunity, but only to send people to prison where this is essential in the interest of society. I certainly do not regard it as in the interest of society to send people previously of good character, particularly young people, to prison when there are other adequate means of dealing with them.”

[5] The above quote is one which the prosecution must be in a position to comprehend with, at all material times, when it approaches the appellate bench. Besides, I take the view that the sub court must subscribe to the dicta of Justice Rhind according to the facts and justice of the case, unless the law prohibits the court from doing so.

[6] For reasons stated above, the appeal was dismissed.

3.4 Prior sexual activity cannot be a defence against statutory rape

In **Jhonson Yap V Public Prosecutor, High Court, Kota Kinabalu**, the appellant pleaded guilty and was sentenced to 12 years imprisonment and one stroke of rattan for an offence committed under section 376(1) of the Penal Code by the Learned Session Court Judge at Kota Kinabalu. The appellant appealed against conviction and sentence. The complainant lodged report the next day stating she had been raped by the appellant and his friends that consequently brought to their arrest on the same day.

The respondent in this case claimed that conviction on the appellant on his plea was not irregular and in accordance with Section 173(b) Criminal Procedure Code. Court held that:-

“Admission by the accused himself was sufficient to convict the accused as the reports were only meant to corroborate the evidence. Other principles of sentencing for examples punishment, deterrent, public interest and the interest of the victim must also be considered.

The defence that the complainant was sexually active cannot in any way be given any weight as it is not stated in the facts admitted by the accused and even if the complainant was sexually actives, it cannot be a defence against statutory rape and the arrangement between both families bear no significant as it is not stated that it was informed to the trial judge in the notes of proceedings.

Chapter 4

Incest

Incest essentially involves sexual abuse and abuse of power by a person who derives authority over the victim by virtue of blood relation, either involving two adults or an older and a younger member. Incest is a well suppressed and guarded secret that commonly occurs through persuasion and pressure rather than by physical violence.

It is committed and continued with the conspiracy of silence between the parties involved, mainly by fathers (biological, step, adoptive or grand) and his young daughter (biological, step, adoptive or grand) or between an uncle and his young niece. Victims of incest, with a view to keeping the family reputation intact, are generally reluctant to disclose 'the family matter'.

In ***Leken @ Delem ak Gerik (M) v Public Prosecutor [2007] 3 MLJ 730*** it was held that incest and rape are two entirely different types of offences. Rape is seen to be a crime of violence whereas incest is a crime of passion or obsession, though the act is unchaste and deplorable. Further, incest was between consenting parties and rape is otherwise. It was decided in this case that where it is not a violent crime and it is moral nature the reformatory consideration must be foremost in mind when sentencing.

Chapter 5

Sentencing

The punishment for rape under s 376 (2) of the Penal Code is shall be punished with imprisonment for a term of not less than five years and not more than thirty years and shall also be liable to whipping.

As for Incest s 376A of the Penal Code provided the punishment shall be punished with imprisonment for a term of not less than six years and not more than twenty years and shall also be liable to whipping.

In **PP v Mohd Tajuddin Ahmad [1997] 1 CLJ Supp 265**, the accused person was convicted of statutory rape of an under aged girl and was bound over for good behaviour by the trial court. The accused had initially claimed trial to the charge but subsequently he pleaded guilty whereupon he was convicted and bound over for good behaviour with one surety under s. 294 of the Criminal Procedure Code. The Court had exercised its revisionary powers in light of the case of **PP v. Nordin bin Yusmadi [1997] 4 CLJ 25 (High Court); [1997] 3 MLJ 754 (Court of Appeal)** which held that it was wrong for the Sessions Court not to have imposed the minimum sentence of five years imprisonment for an offence of rape. Therefore, the Court had to consider the correctness, legality and propriety of the finding, sentence or order of the sessions court i.e. whether the accused was properly convicted on his own plea of guilt and whether he was sentenced according to the law.

The High Court set aside the order of sessions court, rejected the plea of guilt and reverted the case back to the Sessions Court for retrial. The punishment for rape is an imprisonment of not less than five years and a binding over under ss. 173A or 294 of the Criminal Procedure Code is unlawful. An accused properly convicted must suffer the wrath of the law.

In **Ismail bin Rashid v Pendakwa Raya [1999] 4 AMR 4541**, the appellant appealed for a lighter sentence. The appellant was found guilty of raping his two daughters, and was sentenced to 14 years imprisonment and three strokes of rotan (first sentence) and 15 years of imprisonment and six strokes of rotan (second sentence). The appellant claimed that since he has pleaded guilty and repented, the sentence should be reduced. The judge however ruled that a plea of guilty does not enable offenders to escape the consequences of penalty, and as the incest case is a heinous and despicable act, the sentence passed must reflect the abhorrence of society. The appeal was rejected, and the sentence was substituted with a heavier sentence of 20 years imprisonment and five strokes of rotan for each charge, based on s 316(b) of Criminal Procedure Code.

In another case of **Leken @ Delem ak Gerik (M) v Public Prosecutor [2007] 3 MLJ 730** the appellant was charged in sessions court for 3 separate offences of incest relating to the same person. He was sentenced to 10 years imprisonment and a whipping of 3 strokes for each offence with an order for the sentence to run consecutively. The appellant appeals against sentence. The order of the Sessions judge is set-aside and substituted with heavier sentence of 13 years and three months imprisonment and a whipping of five strokes for each offence.

The sentence of imprisonment to run concurrently, which, is to take effect from the date of arrest.

5.1 Separate and distinct offence

In **Ananthan Subramaniam V PP (2007) 8 CLJ 1** the appellant's appeal against the sentences of 16 years imprisonment and 12 strokes of the cane for the 1st offence and 8 years imprisonment and 8 strokes of the cane for the 2nd offence, both sentences to run consecutively. The 2nd

offence was committed after the commission of the 1st offence. It was held that the 2nd offence was committed after the 1st offence and that hence there were 2 separate and distinct offences.

The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case.

In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see **R v. Saleem [1964] Crim LR 482; R v. Walsh [1965] Crim LR 248**).

For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see **Jayaraman & Ors v. PP [1979] 1 LNS 36; [1979] 2 MLJ 88; Amrita Lal Hazra v. Emperor 42 Cal 957; Chin Choy v. PP [1955] 1 LNS 17; [1955] MLJ 236**). The rule, however, is not absolute.

It is however definitive that "where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive" (*Thomas, Principles of Sentencing*, 2nd ed at 53). "The essence of the one transaction rule appears to be that consecutive sentences are inappropriate when all the offences taken together constitute a single invasion of the same legally protected interest.

The test is not whether the offences were committed one after the other, but whether the offences were committed in the course of a single

transaction. The facts, as stated in the charges and as admitted by the appellant, clearly bore out that the 2nd offence was committed at about the same time and definitely at the same place as the 1st offence. Both offences were clearly connected by proximity of time and place. There was also continuity of action. What was not clear was only the continuity of purpose or design.

The victim was first forcibly abducted at knife point and then forcibly raped. More than not, it would seem that both offences were committed under the same set of facts and circumstances. Under the circumstances, cumulative sentences should not have been passed.

5.2 Whether concurrent or consecutive?

Mansor Meyon V PP (2007) 7 CLJ 561

The appellant's in this case appeal against the sentences of 18 years imprisonment and 8 strokes of the cane for each offence, all to run consecutively.

The question whether the sentences should run consecutively or concurrently must depend upon the particular circumstances of the case. The totality principle requires the court to consider whether the aggregate is just and appropriate and to ensure that the sentence is not excessive.

The combined effect of s. 282 and s. 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see **Ooi Sim Yim v. Public Prosecutor [1990] 1 CLJ 223 (Rep); [1990] 1 CLJ 435; [1990] 1 MLJ 88**). The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction

rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive... For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see **Jayaraman & Ors v. PP [1979] 2 MLJ 88**; **Amrita Lal Hazra v. Emperor 42 Cal 957**; **Chin Choy v. PP [1955] MLJ 236**). The rule, however, is not absolute. As Yong Pung How CJ said in **Kanagasuntharam v. PP [1992] 1 SLR 81 at p 83**:

The totality principle: That sentence must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour...where there were undoubtedly three distinct and separate offences. The sentences must reflect that fact. "If the offences are distinct and separate it will normally be the duty of the judge to pass consecutive sentences, even if the seriousness of the individual offences means that the total sentence will be more than could have been passed in respect of any one of them - the totality principle requires the court in the last instance to take a look at the total and to see whether, in the circumstances, it is just and appropriate and if not to reduce it accordingly.

The question whether the sentences should run consecutively or concurrently must depend upon the particular circumstances of the case: The totality principle requires the court to consider whether the aggregate is just and appropriate and to ensure that the sentence is not excessive.

In **PP v Badron Zamanuddin (2005) 5 CLJ 493** the respondent had pleaded guilty to two separate offences of rape on a child aged 12 years (his niece) for the first offence and the same child when aged 13 years and 4 months old for the second offence.

He was convicted and sentenced to 16 years' imprisonment and ordered whipping of 3 strokes of the rotan. The sentences were ordered to run concurrently from the date of his arrest

The facts of the case which were admitted by the respondent shows that both the offences were committed on two separate dates and at two different places. The court is of the view that when two or more distinct offences had been committed by the accused as in the instant case, on two separate dates and at two different places although on the same victim, the sentence should be ordered to run consecutively as the offences were not committed in the same transaction.

In **Public Prosecutor v. Jafa bin Daud [1981] 1 CLJ 315 at p. 316**, His Lordship Mohamed Azmi J (as he then was) said:

A sentence according to law means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles. In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender. *It is for this purpose that before passing sentence, a Magistrate is required to call for evidence or information regarding the background, antecedent and character of the accuse. (emphasis added)*

In considering whether the sentences imposed by the Sessions Court should run concurrently or consecutively, this court took into account:

(i) that the offence of rape committed by the respondent on a child aged 12 years in respect of the first charge and as for the second charge on the same child then 13 years and 4 months old was clearly a distinct and separate offence and did not arise out of the same transaction;

(ii) In **Public Prosecutor v. Yap Huat Heng [1985] 2 MLJ 414 at p. 416**, His Lordship Shaikh Daud J (as he then was) said:

Where two or more distinct offences had been committed, sentences of imprisonment should not be made to run concurrently. It should only be made concurrent when an offender had been convicted of a principal and a subsidiary offence. In all other cases sentences should be made to run consecutively.

Public interest and justice demands that the court must show its abhorrence and one of the ways was to impose a deterrent sentence. People who commit sexual offences on children and on their own children or blood relatives deserve no mercy from this court. Public interest must be reflected in the sentence imposed by the court to deter other would be offenders especially in cases involving sexual offences on children more so when the victim is a child and blood relative, where as a result of the heinous crime not only the victim has to go through a traumatic experience of the unpleasant experience but that feeling is imposed and shared by the parents as well.

5.3 Whether mandatory punishment under section 376 Penal Code can be substituted with other punishment?

In **PP V Nordin Yusmadi [1997] 3 MLJ 754**, the appellant was convicted by the Sessions Court of a statutory rape of an underage girl, an offence under s 376 of the Penal Code (FMS Cap 45) ('the Code'). The appellant was then 19 years old, a first offender and had pleaded guilty to the charge. After considering the circumstances of the case, the sessions judge ordered the appellant, presumably under s 40 of the Juvenile Courts Act 1947 ('the Act'), to be detained at the Henry Gurney School until he reached the age of 21 years. The Public Prosecutor, not satisfied with the sentence imposed on the appellant, appealed to the High Court. The appellant was released on 16 January 1995. On 27 November 1995, the appeal was heard. The judge allowed the appeal, set aside the order of the Sessions court and imposed the mandatory minimum term of imprisonment of five years provided by s 376 of the Code. The

imprisonment term was to take effect from 27 November 1995, which was after the appellant had served the order of detention. The judge was of the view that pursuant to the mandatory provision of s 376 of the Code, the Sessions judge was wrong in law to impose any other sentence, and that s 40 of the Act was not applicable. The issue was whether the Sessions judge was justified in exercising her discretion under s 40 of the Act.

- (i) The second limb of s 40 of the Act relates to any person as long as he is above 18 years and under 21 years at the date of the making of such order. Taking into consideration the facts of the present case on appeal, and since the appellant was 20 years old when he was charged in the sessions court, the second limb of s 40 of the Act was squarely applicable to him. Although a youth above the age of 18 can be sent to prison, in cases where the court is of the view that it would be undesirable to send him to prison, a sessions court or a magistrate of the first class is conferred with special and additional powers to act under the second limb of s 40 of the Act, and order such a youthful offender to be detained in a Henry Gurney School until he attained the age of 21 years, provided that at the time of the making of the order, he was between the ages of 18 years and below 21 years. Therefore, in the circumstances of this case, it was proper for the learned sessions judge to act under the second limb of s 40 of the Act. It would be wrong to say that, in view of the mandatory nature of s 376 of the Code, s 40 of the Act is irrelevant. Thus, s 40 of the Act is relevant and applicable even in cases where a sentence of imprisonment is mandatory, provided the circumstances of the case justify it.

- (ii) In imposing the five years' imprisonment to take effect after the appellant had served the order of detention, the appellant had, more or less, been imposed two sets of sentences from a conviction upon one charge, and the appellant had, therefore,

'suffered a greater punishment for an offence than was prescribed by law' prohibited by art 7 of the Federal Constitution.

5.4 General principles of sentencing

Harani Sulong v PP [1993] 2 CLJ 79

This is an appeal against both the conviction and sentence of 10 years imprisonment and 4 whipping.

It was held that the crime should in any event be treated as aggravated by any of the following factors:

- [1] violence is used over and above the force necessary to commit the rape;
- [2] a weapon is used to frighten or wound the victim;
- [3] the rape is repeated;
- [4] the rape has been carefully planned;
- [5] the defendant has previous convictions for rape or other serious offences of a violent or sexual indignities or perversions;
- [7] the victim is either very old or very young;
- [8] the effect on the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate

sentence. The amount of such reduction will of course depend on all the circumstances, including the likelihood of a finding of not guilty had the matter been contested.

The fact that the victim may be considered to have exposed herself to danger by acting imprudently (for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous good character is of only minor relevance.

I would add another aggravating factor, that is, the likely subsequent negative effect of the offence on the victim psychologically, emotionally and socially in relation to the community she belongs to.

In this case which was a contested one, the appellant was in the position of trust or responsibility towards the complainant being the paternal uncle. The aggravating factors were that;

- (i) the complainant was below the age of 16 years and therefore the offence was one of statutory rape;
- (ii) though there was no evidence of further sexual indignities or preversions, the appellant harassed the complainant by strangling and pushing her down when she threatened to tell her parents; and
- (iii) there would be likely subsequent negative effects of the offence on the complainant psychologically, emotionally and socially in relation to the community she belongs to.

Even though the law allows for punishment by jail and canning in rape and incest cases, but to prove someone's guilt is another round of judicial or trial process and the burden is always on the prosecution to prove its case beyond reasonable doubt.

It had been a long recognized objective of the criminal justice system that penalties should be adequate to reflect the gravity of the crime. After all, justice must not only be done, but must seen to be done.

To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice.

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CASES AND MATERIALS

CORRUPTION

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CORRUPTION

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Preface

Prior to the operation of the Malaysian Anti-Corruption Commission Act 2009, all offences in relation to corruption in Malaysia are governed by the Anti-Corruption Act 1997, which superseded the Prevention of Corruption Act, 1961. The objects of the Malaysian Anti-Corruption Commission Act 2009 which operated since 1st January 2009 are to provide for the establishment of the Malaysian Anti Corruption Commission (MACC), to make further and better provisions for the prevention of corruption and for matters necessary thereto and connected therewith. The establishment of MACC is a reform to the Anti-Corruption Agency (ACA) to give it independent power and to ensure its effectiveness, transparency and accountability will be considerably raised while public trust in its integrity and independence be quickly renewed, if not refreshed.

There are many cases concerning Anti Corruption Laws in Malaysia. Therefore, the main aim of Anti Corruption Bench book is to compile cases relating to corruption offences reported in Malaysia as guidelines to all officers on corruption cases. And, to update themselves with the development of law in this field and the trend of sentencing. Their kind and invaluable support in perusal of selected cases had contributed immensely to the success of this compilation, and is hereby acknowledged. This book is intended to assist the legal officers with the information and reported cases as quick reference on the bench or as prelude to detail research. It is hoped that this objective will be achieved. With time and more input, this bench book shall be distilled, if not improved in stature and content.

Table of Contents

	Pages
[1] Introduction	1
[2] Definitions	7
[3] Burden of Proof	19
[4] Procedure	44
[5] Evidence	
5.1 Corroboration	75
5.2 Accomplice	79
5.3 Circumstantial	96
5.4 Agent provocateur /Entrapment	100
[6] Protection of witnesses	110
[7] Defence	114
[8] Sentencing	128

Chapter 1

Introduction

When we think of corruption we recognize it as a clearly bad and damaging description for any person to allow it. Still, the concept may be vague because corruption is such a complex concept, it must be explained in terms of classifications, breadth, situations, and the levels in which it can occur¹. Even if there is no evidence of improper actions, a conflict of interest can create an appearance of impropriety that can undermine confidence in the ability of that person to act properly in his or her position. Hence, in every corruption case, each case is adjudged on the principles of law applicable to each case on the basis of its different facts and circumstances. Modus operandi is seldom similar.

Every case bears its own different facts or circumstances:

a) “In a corruption case, there is always the giver and the taker”

1. Abdul Rahman Sahir & Anor. v. Public Prosecutor [1995] 1 CLJ 333

High Court Malaya, Kuala Lumpur, Dato' Syed Idid J.

State relevant provisions / section of law:

S. 4(a) of the Prevention of Corruption Act 1961 (Revised 1971)

¹ <http://www.unodc.org/pdf/crime/gpacpublications/manual.pdf>

Brief facts:

Both accused were police constables. PW4 was a proprietor of a company. His two employees, one driving van BCE 6501, were stopped as the van had no haulage permit, while they were on their way to sell and deliver rice. The two employees took both accused to the Syarikat to meet their "towkay" PW4. The two accused went into PW4's office within the shop. The accused at first demanded for RM300 in return for not detaining the van. Both accused then left the shop. They returned the identity cards and driving licence to the two employees. PW4 had agreed to make monthly payments of RM60 "supaya beliau (the police) tidak buat kacau terhadap van saya". The discussion took place for some good "20 minutes". Then on 12 March 1988, accused 1 went to the shop to receive the agreed monthly sum whereupon the ACA officers arrested him.

Principles of law decided in the case:

In a corruption case, there is always the giver and the taker. There are different types of givers. In its wisdom, Parliament has seen it fit to enact **s. 18 Prevention of Corruption Act 1961** because a giver of a bribe is in strict law an accomplice and if corroboration of his evidence is required in any case, it would lead to unjust acquittal of the takers. **Ng Kok Lian & Anor. V. Public Prosecutor [1983] CLJ 293**. Independent evidence from outside will then be required. This may be impossible as corruption is in the main a transaction between the "authority" (i.e. one who has power to issue a licence or to arrest) and the "underdog" (i.e. the other who requires the licence or has transgressed the law).

b) "Corrupt is a question of intention. If the circumstances show that what a person has done or has omitted to do was moved by an evil intention or a guilty mind, then he is liable under the section."

2. PP v Mastor Ibrahim

[2007] 1 SUC 0001

Sessions Court (Melaka)

Relevant provisions / section of law:

Section 10 (a) (bb) of the Anti-Corruption Act 1997 (Act 575).

Section 29 (b) of the same Act

Brief facts:

The accused was a police officer and the charges were that the accused received gratification money through someone (as named therein) as an inducement to reduce the amount of summonses against a lorry owner, and that the accused was delaying the ACA officer in executing their duty under the Act when the accused ran away while on the way to the ACA office for investigation.

Principles of law decided:

1. Corrupt is a question of intention. If the circumstances show that what a person has done or has omitted to do was moved by an evil intention or a guilty mind, then he is liable under the section

[PP v Datuk Haji Harun Bin Haji Idris No. 2 (1997) 1 MLJ 15].

1. Tan Kwang Joo v Public Prosecutor

[1989] 3 MLJ 26.

High Court, Singapore.

Sections 6(a) & 13(1) Prevention of Corruption Act, Singapore.

Appellant as a clerk of the Housing and Development Board, corruptly obtained gratification from a subcontractor involved in tiling works for his employer.

Corrupt is a question of intention as to what a person has done or has omitted to be done, i.e. evil intention or guilty mind.

2. PP v Mohamed Ali Bin Mohamed Amin & Anor

[1979] 2 MLJ 57

High Court (Singapore)

State relevant provisions / section of law:

An offence under s 6 (a) of the Prevention Corruption Act for accepting gratification.

Brief facts:

The respondents were Immigration Officer attached to the Singapore Airport at all material times. Their duties include checking passports and Disembarkation Forms against a book containing names of wanted persons and the collection and sorting out of Disembarkation Forms which incoming passengers had to fill up. The completed Disembarkation Forms contain the names, places of stay and duration of stay of incoming passengers together with their flight numbers. The information contained in these forms was for survey and security purposes.

There was a standing instruction to all Immigration Officers that the information contained in these forms could not be divulged to members of the public. On the appointed day, instead of the 1st respondent, the 2nd respondent met the tourist tout at the Airport arrival hall and they proceeded to the Airport toilet room where the 2nd respondent handed the tourist tout the said list and in exchange received \$30 in cash.

Ratio decidendi of the case:

The fact that they had supplied to a tourist tout information which was available to them only because they were Immigration Officers attached to the Singapore Airport for a gratification and the circumstances under which they extracted the particulars contained in the Disembarkation

Forms and passed on those particulars to the tourist tout are sufficient proof, unless rebutted, that they had “corruptly” accepted the \$30 from the tourist tout.

... the aim of section 15(1) of the Anti Corruption Act 1997 is to strike at any act done by a public officer whereby he used his public position to obtain gratification.

3. Thomas Kandadi v PP

[2009] 7 CLJ 561 High Court

Relevant provisions / section of law:

Whether the accused use his position for gratification when he sign to certify the work had been completely done and committing an offence under s 15 (1) of the Anti-Corruption Act 1997.

Brief facts:

The accused had signed to certify that the works had been satisfactorily carried out. This of course was untrue as the work had not been completed. It must be noted however that the charge does not allege that the certification was false. Therefore it is not part of the prosecution case that the accused had certified a document that contained false material particulars with intent to mislead his principal. There is no dispute that when the accused signed the LPO on 22 December 2003 he did so under the instruction the superior and Head of department.

Ratio decidendi:

It is immaterial that the accused was instructed by the Head of Department to sign the certification column ... the aim of section 15(1) of the Anti Corruption Act 1997 is to strike at any act done by a public officer whereby he used his public position to obtain gratification. In other words the law aims to strike at the abuse by the accused from his act of certifying that the project had been completed to satisfaction. What is material is

that the accused was in a position to make the certification, that he in fact made it (whether under instruction or not) and then abused this position that he was in to obtain the gratification.

Chapter 2

Definitions

Generally, corruption is an act done with intent to give some advantage inconsistent with official duty and the rights of others. It includes bribery, but is more comprehensive; because an act may be corruptly done, though the advantage to be derived from it is not offered by another.

The Concise Oxford Dictionary lists out the words of corrupt inter alia means "rotten", "depraved", "wicked", "bribe". In **Public Prosecutor v. Datuk Haji Harun bin Idris (No. 2)[1977] 1 MLJ 15** Raja Azlan Shah FJ (as he then was) said of the word "corrupt": "Corrupt" means "doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions" and "purposely doing an act which the law forbids".

In **R v. Wellburn 69 Cr. App. R 254** Lawton J said :

Corruptly is a simple English adverb and I am not going to explain it to you except to say that it does not mean dishonestly. It is a different word. It means purposely doing an act which the law forbids as tending to corrupt.

In **R v. Mills 68 Cr. App. R 154** Geoffrey Lane LJ said, although in obiter:

... nevertheless we feel it right to say that in our judgment it is enough that the recipient takes the gift knowing that it is intended as a bribe. By accepting it as a bribe and intending to keep it he enters into a bargain despite the fact that he may make to himself a mental reservation to himself that he is not going to carry out his side of the bargain. The bargain remains a corrupt bargain, even though he may not be intending to carry out his intended corrupt act. Such a private determination avails him no more than would a private determination that a similar payment in respect of past favours was received by him because of innocent matters other than a past favour.

Hence, this chapter is a compilation on definition, discussed in some of the cases.

2.1 “Agent”

"Person" in the definition of "agent" in s. 2 Prevention of Corruption Act 1961 is a natural person and the expression "holder of the office" must therefore mean the person holding the office. The "agent", in other words, must be the functionary.

Section 2 of the Prevention of corruption Act states that an **agent** means any person employed by or acting for another, and includes a trustee, administrator and executor, and a person serving under any public body, and for the purposes of section 14 includes a sub-contractor and any person employed by or acting for such sub-contractor. Interpretation of “agent” also discussed in the cases below:

Relevant cases:

1. Wee Toon Boon v PP

[1976] 2 MLJ 191

The question what is an “agent” within the meaning of section 2 of the Prevention of Corruption Act for the purposes of section 6(a) of the act has to be determined by construing the words of the sections and by applying the sections to the holder of the office of a Minister, appointed by the President on the advice of the Prime Minister under the Constitution. The definition covers a person who is employed by another or who is acting for another or who is serving the Government.

2. Voon Ah Shoon v Public Prosecutor

[1979] 2 MLJ 131

Which is an appeal from the Magistrate’s Court to the High Court of Kuching.

Section 2 and 4 Prevention of Corruption Act 1961.

The definition of the word “agent” in Section 2 of the **Prevention of Corruption Act** which deals with **criminal liability** of an individual cannot be equated with the definition of the same word in the **Contracts Act** which deals with **civil rights and liabilities** of a person. Both laws are not *in pari materia* and the position and liability of an agent in each respective law are totally different.

Principle(s) of law decided:

Section 2 of Prevention of Corruption Act sets out that an agent, being a person serving under a public body and “public body” is defined to include the Government of Malaysia.

Government works through its agencies (all ministries, employees, etc are agents) and an offence may be committed on the Government through these agents or agencies.

In this case, the prosecution need not prove that the agent has been corrupted as distinct from the previous two sections 4(a) and 4(b) of the Prevention of Corruption Act.

3. William Minggu A/K Nyegag & Anor v Public Prosecutor

[2002] 3 MLJ 583

HIGH COURT (SIBU)

Relevant provisions / section of law:

Section 2 of the Anti-Corruption Act 1997

In this case, the words ‘and any person receiving any remuneration from public funds’ was carefully discussed. It was held that the words ‘**and any person receiving any remuneration from public funds**’ were to be given a disjunctive reading in the definition of ‘public body’ under s 2 of

the Act because if it was intended that a person is to be regarded as an officer of a public body only if it is shown that he is both a member or officer of a public body and receives remuneration from public funds, then there would be no need for the words 'and any person' to appear in the definition. Their use indicates that they are meant to refer to persons not already referred to in the earlier part of the definition. It is a rule of statutory interpretation that a court is not at liberty to treat words of a statute as mere tautology or surplusage unless they were wholly meaningless

A second reason for giving the words 'and any person receiving any remuneration from public funds' a disjunctive reading was because after the words 'Federal Court' a comma appeared and was followed by the conjunction 'and' which indicated that a disjunctive reading must be given to the words following thereafter (see p 590A); *Dato Mohamed Hashim Shamsuddin v Attorney-General, Hong Kong* [1986] 2 MLJ 112 followed. The court was of the view that the appellants' interpretation of the definition of an officer of a public body could not be sustained because that interpretation would practically negate the provisions of paras (e) and (f) of s 2 of the Act of the definition of a 'public body', which could not have been the intention.

Brief facts of the case:

This is an appeal against the decision of the learned Sessions Court Judge, Sibuluan who convicted the first and second appellants of an offence under s 10(a)(bb) of the Anti-Corruption Act 1997 ('the Act'). The appellants complained that in coming to her finding, the learned sessions court judge had erred in law as she had failed to direct her mind adequately or at all to the question of whether they were 'agents' of the Government of Malaysia. The appellants contended that as they were charged with an offence under s 10(a)(bb) of the Act, that section imposed

on the prosecution a duty to prove that they were officers of a public body. The appellants contended that the prosecution had failed to do as no evidence had been adduced to prove that they were paid from public funds.

2.2 "GRATIFICATION"

Section 2 of the Prevention of Corruption Act interprets that "gratification" includes -

- (a) money or any gift, loan, fee, reward, valuable security or other property or interest in property of any description, whether movable or immovable;
- (b) any office, dignity, employment, contract or services, and any agreement to give employment or render services in any capacity;
- (c) any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part;
- (d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;
- (e) any forbearance to demand any money or money's worth or valuable thing;
- (f) any aid, vote; consent or influence, or pretended aid, vote, consent or influence, and any promise or procurement of, or agreement or endeavour to procure, or the holding out of any expectation of, any gift, loan, fee, reward, consideration or gratification within the meaning of this paragraph;
- (g) any other service, favour or advantage of any description whatsoever, including protection from any penalty or disability

incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and

- (h) any offer, undertaking or promise of any gratification within the meaning of paragraphs (a) to (g);

Relevant cases:

**1. PP v Chan Kit Tong Sally
[1991] 1MLJ 358
Supreme Court/ Ajaib Singh SCJ**

Prevention of Corruption Act 1961, ss 2 and 3

The interpretation of gratification in the Prevention of Corruption Act 1961 is wide enough to include the sum of \$15,000 paid as under counter money. The person who receives the gratification need not be a public officer.

Brief facts:

In this case the complainant, one Tan Chong Hin, had booked a low cost house from Sally Development. The respondent who owned the majority of the share capital of the company told the complainant that in addition to the approved price of the house he would have to pay \$15,000 as under counter money. A trap was laid and the money was paid over to the respondent in her office. She was arrested and charged under s 3(1)(i) of the Prevention of Corruption Act 1961. She was convicted in the sessions court and sentenced to one day's imprisonment and fined \$6,000 or in default one year's imprisonment and ordered to pay a penalty of \$15,000. On appeal to the High Court the conviction was quashed. Two questions were reserved for the determination of the Supreme Court as follows:

- (a) whether in a prosecution under the Prevention of Corruption Act 1961 under counter money as the term is used in the circumstances of the case is a gratification within the meaning assigned to it under s 2 of the Prevention of Corruption Act 1961;
- (b) if the answer to the above is in the affirmative then whether the person receiving such gratification in the circumstances described in the case received it corruptly.

Principles of law decided:

Under counter money is a gratification and it is an offence as provided under s.3(a)(i) PCA 1961. Not only applicable to public officer.

2.3 “DOCUMENT”

In Printing Presses and Publication Act 1984 ss. 2, 3(2) and Schedule 1 - By section 2 of the Act , "document" meant any paper...on which is printed, typed, written or marked letters, figures...and includes a book and pamphlet. The work books and trial answer papers were documents within the Act.

Section 3 of the EVIDENCE ACT 1950 interprets “document” includes any substance on which is recorded any matter, whether by letters, figures, marks, pictorial or other representation, or by more than one of those means;

Relevant cases:

1. PUBLIC PROSECUTOR V WILSON

[1988] 1 MLJ 243

SUPREME COURT CRIMINAL REFERENCE NO 6 OF 1987

Section 4(c) of the Prevention of Corruption Act 1961:

Principles of law decided in the case:

Interpretation of whether the time sheet record used in the circumstances in the case is a "**document**" within the meaning assigned to it under section 4(c) of the Prevention of Corruption Act 1961. In the instant case, the facts clearly showed that the time sheet record was clearly used as a basis for the respondent's claim to monetary benefits to which he is not entitled and it was therefore a "document" within the meaning assigned to it under section 4(c) of the Prevention of Corruption Act 1961.

The court had referred to the interpretation of the words "other document" in section 4(c), in which it follows the reasoning of the Court of Appeal in *R v Brian Gordon Tweedie* (1984) 79 Cr App R 168, ruled that exhibit P3 (Kertas Waktu Kerja Kakitangan Gaji Bulan) does not fall within the meaning of "other document" in section 4(c) of our Act. In *Tweedie* (1984) 79 Cr App R 168, Court of Appeal, the words "or other document" (also appearing in the U.K. 1906 Act) were construed *ejusdem generis* and Lawton L.J. said:

"A receipt is made out to someone who has paid a debt. An account is rendered by one person to another. The words 'or other document' should, in our judgment, be construed as meaning a document which would pass inter partes."

2.4 “KNOWINGLY AND CORRUPTLY”

“Interpretation of the wording of **knowingly and corruptly** under section 4(c) of the Prevention of Corruption Act 1961 was discussed in the case:

1. PUBLIC PROSECUTOR V WILSON

[1988] 1 MLJ 243

SUPREME COURT CRIMINAL REFERENCE NO 6 OF 1987

Section 4(c) of the Prevention of Corruption Act 1961

"In my view the words of the Act are perfectly clear and unambiguous. The word 'knowingly' is deliberately used in the third paragraph instead of the word 'corruptly', and 'knowingly' does not necessarily involve any element of corruption. The substitution of the word 'knowingly' was probably made because of the great difficulty of proving corruption, and it was thought advisable in a case of the kind dealt with in that paragraph to make the act an offence whether it was done corruptly or not."

Lawrence J. said at p. 177:

"The word '**corruptly**' is used in the first and second branches, and, as my Lord has pointed out, is deliberately omitted from the third. That omission is to my mind readily explained by the fact that it is frequently found impossible to prove that an agent has been corrupted; and in view of that difficulty it was thought sufficient, in order to establish an offence on the part of the giver, to prove that he knowingly gave to an agent a document which contained a statement that was false, erroneous, or defective, intending it to mislead the principal, to prove that the agent, knowing that the document was false, used it with intent to deceive his principal."

2.5 "GIVER"

Section 4 (b) of PREVENTION OF CORRUPTION ACT 1961 states that any person corruptly gives or agrees to give or offers any gratification to any agent as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Act done or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business shall be guilty of an offence.

Relevant cases:

1. Ng Kok Jooi v PP

[1974] 1 LNS 105

Appeal from the Sessions Court to the High Court in Sabah and Sarawak against conviction and sentence of the accused (appellant).

s. 4(b) of the Prevention of Corruption Act 1961.

Brief facts in case:

The accused was caught in a speed trap on 19 June 1972. He met with Inspector Kamar bin Othman who was the officer in charge of the trap and offered \$30 to let the former go and asked Inspector Kamar to meet him at Malayan Banking at 8 p.m. on that day. Inspector Kamar then reported to Inspector Zakariah of the Anti-Corruption Agency and was asked not to keep the appointment with the accused. The next day, the accused came to Inspector Kamar's office and pleaded not to take action against him and gave \$30. In his defence, the accused made a bare statement that he intended to compound the offence.

Ratio decidendi:

The giver of a bribe is motivated partly by fear of being charged in Court; secondly of a desire not to be inconvenienced by spending long hours in police stations and lower Courts waiting to be tried - an exercise which involves him in a tremendous loss of time which to a small trader or individual businessman means loss of income and perhaps disruption of livelihood. To impose sentences on such people as severely as one would impose on public servants to my mind would not be equitable and in the public interest. A sentence of imprisonment in such a case as this is obviously excessive.

Principles of law decided in the case:

There is another type of giver who should be treated with equal if not more severity than public servants and that is the organizer of a syndicate to smuggle drugs to deal in opium traffic, to organize illegal gambling and the like. These givers cannot by any stretch of imagination be treated like the giver in the case before us. For these givers are the very destroyers of society. They deliberately break the law for their own benefit; and in order that they may not be apprehended, that they may escape the law, they offer bribes to those in authority and thus deliberately pervert justice and corrupt the establishment of law and order.

2.6 “willfully’

1. PP v Tan Sri Muhammad b. Muhammad Taib [1999] 2 MLJ 305

High Court Kuala Lumpur

Relevant provisions / section of law:

Section 25(2) of Prevention of Corruption Act (PCA)

Brief facts:

The accused was charged under Section 25(2) of PCA for willfully neglecting or failing to comply with terms of notice to furnish a sworn statement in writing enumerating all moveable or immovable properties belong to or possessed by him, his agent, trustee or immediate family members. Accused complied with the notice but failed to do so for 4 other properties.

The accused was discharged and acquitted after his defence called.

Principles of law decided:

The word **willfully** in Section 25(2) imports into the intent or knowledge—inherent in 'neglects or fails'—the element of contumacious deliberation.

Motive is irrelevant.

Willfully means the act is done deliberately and intentionally, and not by accident.

The maxim of Actus non facit reum, nisi men sit rea (an act does not make a person guilty, unless the intention be also guilty)

Other relevant principle of law decided.

Section 89 & 92 of the National Land Code :

The presumption of ownership of a registered proprietor is not entirely irrebuttable. A party seeking to rebut the presumption must prove his case. The burden was on Defendant to show that while he was the registered proprietor, the right of beneficial ownership was with another.

Chapter 3

Burden of proof

3.1 Burden of Proof

The burden of proof is the obligation on a party to establish the facts in issue in a case to the required degree of certainty (the standard of proof) in order to prove their case. The golden thread of criminal law is that the burden is on the prosecution to prove the facts essential to their case. The exceptions to this general principle are where a statute **expressly** places the legal burden on the accused.

In *PP v. Yuvaraj* [1969] 2 MLJ 89, Lord Diplock, in delivering the judgment of the Privy Council said at page 90 to 91 as follows:

“Where a defendant is charged with an offence under section 4(a) of the Prevention of Corruption Act 1961, to which section 14 also applied, the onus lies upon the prosecution to prove the first two factual ingredients of the offence viz. (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift or receipt he was in the employment of a public body. Upon proof of these two ingredients the existence of the third ingredient, viz. (3) that the gratification was paid or given received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs of that public body, is to be presumed “unless the contrary is proved”.

Thus, under the Prevention of Corruption Act 1961, once the prosecution established that 1) that the accused was a public servant, 2) that he had received gratification, and 3) that the gratification was received corruptly, it is presumed that an offence of corruption has been committed unless the accused can rebut that presumption.

In **Attan bin Abdul Ghani v. PP [1970] 2 MLJ 143, Sharma J** (as he then was) explained the burden of proof in corruption cases as follows:

Once it is proved that the gratification has been paid or received then in the words of section 14 of the Act “Such gratification shall be deemed to have been paid or given or received corruptly . . .” The presumption at once arises under the section. This presumption is a presumption of law and it is obligatory on the court to raise it in every proceeding for an offence under section 3 or 4 of the Act provided it is proved that the gratification had been paid, given or received. The prosecution has not to establish anything more than the payment of money (see *State of Madras v. Vaidyanatha Iyer and Emden v. State of Utar Pradesh*). It then becomes the duty of the accused to disprove what section 14 begins to presume against him.

. . . If payment is not proved the presumption does not arise and consequently there is nothing which the accused is required to prove to the contrary.

The Prevention of Corruption Act 1961 had been repealed by s.61 of Act 575. Act 575 is the Anti-Corruption Act 1997. Section 14 of the 1961 Act is in similar terms with s.42(1) of the 1997 Act, which reads as follows:

Where in any proceeding against any person for an offence under section 10,11,13,14 or 15 it is proved that any gratification has been accepted or agreed to be accepted, obtained or attempted to be obtained, or offered, by or to the accused, the gratification shall be presumed to have been

corruptly accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

3.2 Degree of Proof required of the accused to rebut the Presumption

To rebut the presumption of corruption, the accused will only have to discharge it on the balance of probabilities as applied in civil proceeding i.e., from the defence point of view, is heavier than the burden of casting a reasonable doubt but is lighter than the burden of the prosecution to prove beyond a reasonable doubt (**PP v. Noordin Abu Bakar [2008] 8 CLJ 504, PP v. Ku Yahya Ku Bahari & Anor [2000] 3 CLJ 162**).

In **Thavanathan a/l Balasubramaniam v. PP [1997] 2 MLJ 401**, the then Supreme Court through the judgment of Chong Siew Fai CJ (Sabah & Sarawak) (as he then was) applied the principle in *Yuvaraj's case* to the effect that once the money had been given to or received by the accused, the presumption under s.14 arose that the money had been given and received corruptly and it was for the accused to give an innocent explanation which the court considered more likely than not that it was true ie, on a balance of probabilities as applied in civil proceedings.

In **Rosli Bin Mahat v. PP [2004] 1 LNS 604**, it was held that in the defence case it was for the accused to give an innocent explanation and to rebut the presumption under the old s.14 and the new s.42(1) on a balance of probabilities and that the defence of a mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient.

In **PP v. Chettuvellu Nani [2007] 9 CLJ 533**, it was held that, before invoking the statutory presumption, it is essential for the court to consider whether a connection was established on the evidence, between the performance of the official duty and the demand of the gratification. It would be erroneous to apply s.42 simply upon proof of the asking or soliciting of gratification and then relying on the statutory presumption to establish the facts relating to the inducement.

3.3 Offences under sec.161 -163,165-169 Penal Code

These are also corruption offences but are punishable under the code. Sometimes, the charges filed in court may include either one of these in addition or as alternative to main charge (s). Those offences under the MACCA are specific offences. In this booklet, the cases compiled were mainly based on the statutes (ACA & PCA).

Relevant cases :

1. Sahari Masrom v PP

[2008] 1 LNS 584

High Court Muar, Johor

Sections 10(a)(aa) and 11(a) of ACA 1997

Brief facts:

This is an appeal against the scj decision on the 2 charges preferred against the accused i.e.

(i) that in the month of August 2001 at 10.00 pm at a stall Ikan Bakar Teck Soon, inside Restoran Fook Hwa, Jalan Haji Manan, Kluang Johor the accused, a police Sarjan Polis No. RF 75685 attached to Unit Pengurusan IPD Kluang Johor did corruptly obtained a gratification to wit, cash RM1000.00 for himself from Lee Siew Lian as a inducement to close the investigating paper No. 789/01 based on Kluang Report 4563/01 and

thereby committed an offence an offence under s 10(a)(aa) of ACA 1997 punishable under s 16 of the same;

(ii) that on 26.9.2002, the accused, a police Sarjan Polis No. RF 75685 did corruptly received/accept RM500.00 for himself from one Foo Leng through one Lee Siew Lian an offence under s 11(a) of ACA 1997 as an inducement to close the investigating paper No. 789/01 based on Kluang Report 4563/01 and thereby committed an offence an offence under s 11(a) of ACA 1997 punishable under s 16 of the same Act.

The accused was convicted on both charges and hence the present appeal. Upon appeal the conviction and sentence in respect of the first charge was set aside and the appellant was acquitted of the same. However the appeal against the second charge was dismissed and the conviction and sentence thereof affirmed.

Principles of law:

Burden of proof

1st charge

[1] On appeal it was held that the complainant's (SP1) evidence is too sketchy and obviously wanting and was not consistent with the evidence of SP2, her grandson and helper. It is very apparent that SP2 did not say anything about the appellant telling him to tell SP1 to call the appellant once the RM1000.00 is available. Neither did the appellant repeated his demand for the RM1000.00 at the meeting/occasion. SP1 testified that the appellant had repeatedly visited her to demand for the money but she failed to substantiate the time or dates of such requests.

Ahmad Haji Asnawi JC state, “*In my view not much value can be attached to such evidence. Nor could it be use to strengthened the prosecution’s case that the appellant did indeed demanded the said sum from SP1*”

- [2] SP2’s testimony is very unreliable.
- [3] The Police Report Ex. P4 is a tampered document. The tempering was done at 4 instances with no reasonable explanation to account the same.
- [4] The *pita rakaman* (Ex. P10) and the transcript (Ex P14) was held inadmissible on account that the safeguards as laid down in *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 CLJ SUPP 208; [1998] 4 MLJ 210 was not observed. There was also a break in the chain of evidence in respect of the movement of the said *pita rakaman*.

2nd Charge

- [5] The finding of the scj in respect of the 2nd ingredient that the appellant corruptly accepts or obtains for himself gratification amounting to RM500.00 are findings of facts. The scj had considered every material aspect there is to be considered both on points of facts and law that leave no room for interference.
- [6] The recovery of the trapped money from the appellant’s right trousers pocket constitutes the most cogent corroborative evidence that the appellant had accepted/obtained the said gratification corruptly (*Ramly bin Md Yasin & Ors v. Public Prosecutor* [1982] CLJ 91 and *Hamidon bin Mat Yatim v. Public Prosecutor* [1995] 3 CLJ 724).

**2. Sharif Bunsu B. Sharif Zen & Anor v Public Prosecutor [1999] 1 LNS 47
High Court [SANDAKAN] – Criminal Appeal No. S. 42-04 OF 1999 decided by Richard Malanjum J**

This case concerned Section 3(a)(ii) and Section 4(a) of the Prevention of Corruption Act 1961.

Brief facts:

This is appeal case by the Appellants against their convictions and sentences on two charges under Section 3(a)(ii) and Section 4(a) of the Prevention of Corruption Act 1961. The 1st Appellant was sentenced to two months imprisonment for the each charge, run consecutively; in addition to the sentence for the 2nd charge the 1st Appellant is also to pay penalty in the sum of RM400.00 in default another two months imprisonment. Meanwhile, the 2nd Appellant was sentenced to one month for each charge, run consecutively; in addition he is also to pay penalty in the sum of RM400.00 in default thereof a further one month imprisonment. Both Appellants who were government servant been charged together with 2 charges namely, first, corruptly solicit for themselves a gratification of RM500.00 and second, corruptly receive for themselves a gratification of RM400.00 from Yaw Sim Tiong @ Peter as an inducement or reward for or on account of them forbearing to take any action in connection with the suspected late submission on the Income Tax Return of his business.

Ratio decidendi:

Section 6 of PCA has no application when a charge is under Section 3 of the same Act.

Both the Appellants had common intention namely to solicit and receive gratification.

Principles of the case:

In this case, the learned trial judge made reference to Section 6 when he was discussing on the issue of soliciting gratification as an inducement, however, such reference did not prejudice the Appellant's case as such an element to begin with is not essential to a charge under Section 3(a)(ii) of PCA. He further concluded that the common intention could be inferred "from the words and action of both accused including and particularly the time when they were at PW5's shop on 15.10.1997. As there was no merit to the appeal case, the appeal dismissed.

3. Public Prosecutor V Balveer Singh A/L Mahindar Singh[2009] 1 MLJ 386

High Court (Melaka)

Prevention of Corruption Act 1961 ss 3(a)(ii), 4(a) & 14

Brief facts:

The respondent was initially charged in the sessions' court with three charges under ss 3(a)(ii) and 4(a) of the Prevention of Corruption Act 1961 ('Act'). He stood accused of corruptly soliciting and accepting gratification as inducements from taking action against foreign workers employed at the complainant's construction site. At the close of the prosecution's case, the sessions' court judge acquitted and discharged the respondent without calling for his defence. The prosecution thus appealed to the High Court.

Ratio decidendi:

To establish a prima facie case in respect of offences under ss 3(a) (ii) and 4(a) of the Prevention of the Act, the prosecution must establish that: (i) the accused was at the material time an agent of the Government of Malaysia; (ii) the accused had accepted gratification, in respect of the

offence under s 4(a); (iii) the accused had solicited gratification, in respect of the offence under s3(a)(ii). Upon establishing the ingredients of accepting (in respect of the offence under s 4(a) and soliciting (in respect of the offence under s 3(a)(ii)), the presumption of corruption under s 14 of the Act would then arise.

4. Kee Yiik Kwok @ Kee Yuk Kwok v Public Prosecutor [2005] 1 LNS 75

Criminal appeal from the Sessions' Court to the High Court Sabah & Sarawak, Miri.

Section 11(b) and Section 42(1) Anti-Corruption Act 1997

Facts of the case:

On 27/7/98 at about 4.00 a.m. a police party led by SP2 (Chief Inspector Jemain Jemadi of the PGA) conducted raids at various locations in Pujut Padang Kerbau Miri against illegal immigrants. Also in the police raiding party was SP1 (Inspector Saharam Bin Ibrahim of the PGA). In the early morning operation the police raiding party arrested 18 Indonesian citizen which included 3 of them who were arrested at a brick factory known as King Ming Enterprise, Pujut Padang Kerbau belonging to the appellant. The three that were arrested at King Ming Enterprise were handled by SP2 while SP1 took the rest of the arrested Indonesians to the Central Police Station, Miri for detention. While SP1 was at the CPS handing over the Indonesian detainees he received a telephone call from SP2 asking him to come to the brick factory. SP1 went to the brick factory upon completion of his task at the CPS. When he arrived at the factory SP2 was already there. At the factory SP2 told SP1 that the three Indonesians arrested at the factory had valid passport but two of them did not have working permits while the third had an expired visit pass. According to SP1 he asked the appellant, who was the 'tauke' of the factory why the two passports did not have working permits and the other one had an

expired visit pass. According to SP1 the appellant told him that he had handed the passports to an agent 'untuk diuruskan.' SP1 then asked the agent who came to the factory when the appellant called him over the phone.

The agent told SP1 that the appellant never gave him the passport. SP1 then told the appellant the offence the appellant he had committed. The appellant then allegedly offered SP1 the sum of RM3000.00 to refrain from taking legal action against the appellant. It was alleged that the appellant asked SP1 to wait at the factory while he went to get the money. When the appellant left to get the money, SP1 discussed with SP2 suggesting that SP2 lodged a report with BPR. SP2 then left and came back 15 minutes later with SP4 (Zainuddin bin Abdul Latiff) the BPR officer. SP4 then set up a trap in that he instructed SP1 to give him a pre-arranged signal after the appellant had passed the money to SP1. When the appellant came back with the money and gave it to SP1, SP1 signalled to PW4 with the pre-arranged signal and subsequently the appellant was arrested. Appeal dismissed.

Principle(s) of law decided in the case:

[1] In a corruption case, the prosecution need not adduce evidence that the person who received the bribe had done a favour to the giver or that the giver of the bribe had enjoy or receive the favour promised by the receiver of the bribe. All that is required is to prove that the person who offers the bribes did give the bribe to the person who solicits for it and that person did receive it.

5. Mohd Taufik v PP

[1975]2MLJ58

Relevant provisions / section of law discussed in the case.

Section 4(a) of the Prevention of Corruption Act 1961

Section 6(1) of the Prevention of Corruption Act 1961

Section 18 of the Prevention of Corruption Act 1961

The appellant (a probationary inspector) was convicted on 2 charges under section 4(a) of the act for corruptly obtaining from Wong Yin a gratification of \$500 and \$490 as an inducement to refrain from taking action against Wong Yin as he had in his possession imitation good. The appellant claimed that the bribes were taken on behalf of Inspector Zakariah. The appellant appealed against the conviction on the grounds that:

- [1] The president of the magistrate court made no finding that PW1 was an accomplice.
- [2] This was a straight forward case of extortion
- [3] Prosecution failed to prove that goods were imitation and that means that Wong Yin had not in fact committed an offence which should favour the appellant.
- [4] There was no evidence showing the money was for an inducement.

Ratio decidendi of the case:

In this case, the complainant had not taken any active part in the transaction and was therefore not an accomplice in any event in view of the provisions of section 18 of the Prevention of Corruption Act 1961. The complainant could not be presumed to be unworthy of credit.

This was clearly not a case of extortion as there was no threat and the appellant had solicited and received bribes in favour of refraining from taking action against the complainant.

In view of Section 6(1) of the act, there was no necessity for the prosecution to prove that the person who gave the bribe had committed an offence or that the favour sought was in relation to the principal's affairs.

6. PP v. Noordin Abu Bakar

[2008] 8 CLJ 504

High Court (Johor Bahru)

Section 10 (a) (bb) of the Prevention of Corruption Act 1997

Section 11 (a) of the Prevention of Corruption Act 1997

Section 16 of the Prevention of Corruption Act 1997

Section 42 (1) of the Prevention of Corruption Act 1997

Brief facts in case:

The accused in this case had been charged with 3 charges under the Prevention of corruption Act 1997 whereby the accused who is a police officer on 1 December 2001, had asked for RM1000 from one Tay Soa Eng in order to release him from being charge for selling fireworks and 'mercur'. Upon request of the accused, Tay Soa Eng had given RM500 to the accused. Later on the accused had severally asked for the balance from Tay Soa Eng. However, Tay had refused to give the balance to the accused. In the end Tay had reported the accused act to Badan Pencegah Rasuah and a trap has been set up whereby the accused had fall into it where he received RM500 trap money from Tay Sao Eng. The accused had been convicted for the 3rd charge however the accused had been acquitted for 1st and 2nd charge.

Ratio decidendi of the case:

There are 3 charges against the accused in this case.

The accused has been acquitted from the 1st and 2nd charges due to the fact the prosecution fail to satisfy burden of proving under section 10 (a) (bb) of PCA:

- [1] The accused had asked for bribe from the complainant;
- [2] At the time of commission of the offence, the accused is an public servant;
- [3] Until and unless both of the elements are established only then the third element must be fulfilled that is the bribe is for the purpose the accused not to take any legal action against the complainant.

Under the second charge the prosecution fail to satisfy burden of proving under section 11 (a) of PCA:

- [1] The accused had received bribe from the complainant;
- [2] At the time of commission of the offence, the accused is an public servant;
- [3] Until and unless both of the elements are established only then the third element must be fulfilled that is the bribe is for the purpose the accused not to take any legal action against the complainant.

Both of the 1st and 2nd charges were not proved by the prosecution and there is no supporting evidence to support the charges.

As regards to the 3rd charge, the prosecution had successfully prove all the elements in section 11 (a) of PCA:

- [1] The accused had received bribe from the complainant;
- [2] At the time of commission of the offence, the accused is an public servant;
- [3] Until and unless both of the elements are established only then the third element must be fulfilled that is the bribe is for the purpose the accused not to take any legal action against the complainant.

The offence under the 3rd charge has been proved by corroborating evidence of SP1, SP2, SP3, SP4, SP5, SP6, SP7, SP8 and SP9 as well as RM500 trap money in the accused's pocket.

Principles of law decided in the case:

Burden of prove is on the prosecution to prove that all elements under the law has been fulfilled in order to convict the accused.

Standard of proof which is applicable on the accused to rebut the presumption under section 42 (1) of PCA is balance of probabilities. (PP v. Yuvaraj [1969] 2 MLJ 89

This burden of proof is higher than burden to prove reasonable doubt but lower than burden of prove on the prosecution to prove the offence until there is no reasonable doubt. (PP v. Ku Yahya Ku Bahari [2000] 3 CLJ 162).

**7. Mohamed Alias V Public Prosecutor
[1983] 2 MLJ 172**

ACRJ Kota Kinabalu

Section 4(a) of the Prevention of Corruption Act 1961

Brief facts in this case:

The appellant in this case was convicted by the Magistrate Court on a charge under section 4(a) of the Prevention of Corruption Act 1961, and was sentenced to 4 months' imprisonment and ordered to pay a sum of \$ 60. He appealed against sentence and conviction.

The case for the prosecution was that the appellant as a police officer

demanded and obtained a sum of \$ 60 from P.W. 4 for forbearing to take any action against P.W. 4 in respect of a traffic offence. The defence claimed that the sum of \$ 60 received by the appellant was repayment of a loan which the appellant had made to P.W.4 as evidenced by a letter signed by P.W.4.

There were a number of discrepancies in P.W.4's testimony and the learned trial Magistrate regarded him as an unreliable witness. She, however, did not state whether she rejected the whole of the testimony given by P.W. 4 in her judgment. The defence relied on the evidence of D.W. 2, one Martin Pandan. His testimony if believed, would have corroborated the appellant's story that the \$ 60 was repayment of the loan. The learned trial Magistrate held that "it is unsafe to give great reliance on D.W.2's evidence".

Principles of law decided:

This coupled with the fact that the appellant was a police officer would appear to be sufficient to raise the presumption under section 14 of the Act.

8. Lim Foo Bing v PP

[2007] 1 MLJ 475

High Court, Ipoh

Immigration Act 1959 / 63, S. 56(1)(d)

Evidence Act 1950, S. 114 (g)

Anti Corruption Act 1997, Ss. 11 (b), 16, 42(1)

Case law authorities referred/followed:-

[1] Mohamad Radhi Yaakob v PP [1991] 2 MLJ 169

[2] PP v Ku Yahya [2002] 1 CLJ 113

- [3] PP v Attan [1970] 2 MLJ 143
- [4] PP v Yuvaraj [1969] 2 MLJ 89
- [5] Thavanathan Balasubramaniam v PP [1997] 2 MLJ 401
- [6] Wong Swee Chin v PP [1981] 1 MLJ 213

Brief facts:

The appellant/accused was charged in the Session's court for offering RM500 to an agent of the Malaysian government as an inducement from taking action against the accused for committing an offence under the Immigration Act 1959/63. As a result, the accused in this case committed an offence under s. 11 (b) of the Anti Corruption Act 1997 ('ACA') and punishable under s. 16 of the ACA. On the day in question, Members from the disciplinary branch of the IPD, Ipoh and members from the Anti-Corruption Agency conducted an investigation at the appellant's premises and found an employee without valid passport or working permit. It was the appellant's case that when he was informed that he had committed a crime punishable with a fine, the appellant asked the amount of the fine. One of the members of the said team showed him 5 fingers from his left hand. The appellant claimed that he thought the fine was RM 500, and therefore, the appellant paid the RM 500 to the 3rd prosecution's witness not for the purposes of bribery but for the compoundable offence of a fine.

Ratio decidendi:

- [1] The presumption under s. 42 (1) of the ACA is applicable in all circumstances of the case, as provided under s. 11 of the ACA. In deciding this, the court followed the position in PP v Ku Yahya, whereby the appellant had the burden of rebutting that presumption. Hence, the appellant here has the burden of rebutting the presumption that the RM 500 was not for bribery purposes.
- [2] The appellant's case that the RM 500 was for payment of fine cannot be accepted. The police and immigration had never imposed 'on the

spot' compounds. The accused are given time to pay the compound for compoundable offences. This fact was also never raised to any of the prosecution's witnesses. In arriving at this decision, the court followed the view that 'failure to cross-examine a witness on a crucial part of the case will amount to an acceptance' in PP v Wong Swee Chin.

Principles of law decided:

- [1] The presumption under s. 42 (1) of the ACA is applicable in all circumstances of the case, as provided under s. 11 of the ACA. The accused has the burden of rebutting this presumption (PP v Ku Yahya).
- [2] Failure to cross-examine a witness on a crucial part of the case will amount to an acceptance' (PP v Wong Swee Chin).

9. Mohd Sallehuddin Mohd Yusof v PP

1 LNS 687

High Court, Ipoh

Sections 11(a), 16 (a), (b) and 42(1) Anti Corruption Act 1997

Brief facts:

In this case the respondent, an officer of the wild life ranger department, was charged for corruption after receiving RM 500.00 from one Hu Hoong Choy as an incentive to prevent taking action against Hu Hoong Choy's driver who had transported wild pigs meat out from Perak without any letter of consent from the Jabatan Perhilitan, Perak. The Session's Court convicted and sentenced the accused of the offence. At the accused's appeal, the High Court allowed the appeal and set aside the Session's Court conviction.

Ratio decidendi:

In setting aside the Session's Court conviction and sentence on the accused, the High Court held that the Session's judge had erred in law and in facts and therefore, the High Court has a right to interfere in the trial judge's finding.

The High Court also found that there was no evidence to support that the accused had solicited for corruption money, except for prosecution's witness who was in the state of anger when he was stopped by the accused and his colleague at the Jabatan Perhilitan, Perak. When the presumption under s. 42 of the Anti Corruption Act is invoked, the trial judge should have considered all the surrounding evidences adduced at the trial and also whether or not the presumption has been rebutted during cross-examination by the defence. The mere fact that the RM 500.00 was in the possession of the accused at the material time is insufficient to invoke the presumption under s. 42, as it is a rebuttable presumption.

10. Dato' Hj. Azman Mahalan V PP**[2007]3 CLJ 495**

High Court/ V.T Singham J.

Sections 10(b)(aa) –PCA 1997

Presumption under s. 42(1) PCA 1997

Brief facts:

The appellant was found guilty on 22 August 2005 of the charges of corruptly having given gratification on 6 April 2001 to wit, a sum of RM2,000 on the first charge and further sum of RM5,000 on 9 April 2001 on the second charge as an inducement to Mohd Kamal bin Rabaai (PW1) in order that the said Mohd Kamal will not accept settlement from Pazli bin Abdullah Sani (PW6) so that Pazli bin Abdullah would remain a bankrupt

and would not be qualified to contest against the appellant for the post of Division Head of UMNO; Tapah on 22 April 2001; both the offences are under s. 10(b)(aa) of the Anti Corruption Act 1997. The appellant was convicted.

Ratio decidendi: (also refer to case no 15, Chapter 6; Evidence and Case no 3, chapter 8; Protection of Witness)

The evidence was insufficient to trigger the application of the statutory presumption under s. 42(1) of the Anti Corruption Act 1997. The presumption only came into operation when the alleged payment was made and the appellant raised doubt in the prosecution case whether such payment was in fact made.

Principles of law decided:

The presumption under s. 42(1) of the 1997 Act comes into operation only when the factum or payment is proved to the satisfaction of the trial court.

- [1] Onus of proof rests throughout on the prosecution, it cannot rely on the strengths or weaknesses of the defence case to enhance or bolster its case. It must lead corroborative independent evidence to prove its case.
- [2] This function to determine whether a witness is hostile or not is for the judge to decide.
- [3] The prosecution must offer to the defence during the prosecution case the particular witness who is an important and material witness who may throw light as to the truth of what has been alleged against an accused person in order that the whole of the facts may be before the court. Merely offering witnesses to the defence at the close of the prosecution case does not relieve the prosecution of its duty to produce

[4] The trial court must at the close of the case of prosecution undertake a maximum evaluation of the evidence adduced on behalf of the prosecution which includes 'a positive evaluation of the credibility and reliability of all the evidence so as to determine whether the elements of the offence has been established'.

11. Noordin Abu Bakar v PP

[2008]8 CLJ 504

High Court/ Vernon Ong Lam Kiat J.
ss. 10(a)(bb), 11(a), 16, 42(1) - PCA 1997

Brief facts in case.

Tiga pertuduhan yang dihadapi oleh kesalahan di bawah s. 10(a)(bb); (ii) s. 11(a) Akta Pencegahan Rasuah 1997 dan s. 11(a) Akta Pencegahan Rasuah 1997. Tertuduh telah dilepaskan dan dibebaskan tanpa dipanggil untuk memasukkan pembelaannya. Rayuan terhadap keputusan HMS tersebut telah dibuat oleh pihak pendakwaraya. Manakala, bagi pertuduhan ketiga, HMS telah mendapati bahawa anggapan di bawah s. 42 Akta Pencegah Rasuah 1976 ('APR') telah dibuktikan dan tertuduh telah dijatuhkan hukuman penjara selama enam bulan dan denda RM10,000, tidak bayar enam bulan penjara. Rayuan tertuduh adalah terhadap keputusan HMS ke atas kesabitan dan hukuman

Principles of law decided:

[1] Beban Pembuktian

- Di dalam kes jenayah, beban pembuktian adalah pada standard *prima facie* di akhir kes pendakwaan. Bagi mematuhi standard tersebut, pihak pendakwaan haruslah mengemukakan bukti-bukti credible yang tertuduh telah melakukan kesalahankesalahan seperti dituduhnya.

[2] Presumption

- Sebaik sahaja anggapan dibawah s. 42(1) APR terpakai adalah menjadi beban tertuduh bagi mematahkan anggapan bahawa suapan itu telah diterima secara rasuah. Bagi berbuat demikian, adalah tanggungjawab pembelaan untuk memanggil saksi-saksi material.

12. PP v Ling Tee Huah

[1982] 2 MLJ 324

High Court/ Yusoff Mohamed J.

Prevention of Corruption Act 1961, s 14.

Brief facts:

In the course of investigation the accused was alleged to have offered PW1 a bribe of \$2,000 and a plan was devised to trap him. This occurred on 23 June at a hotel at which place the accused had handed an envelop containing \$500 as part payment to PW1. The accused was arrested as soon as he appeared at the hotel lobby.

Ratio decidendi:

- [1] in law there is nothing to prevent a police inspector to institute investigation into a crime involving his senior officers under the Prevention of Corruption Act 1961, especially when he was under the direction of his OCCI.
- [2] the presumption of law arising from cases of this nature under s 14 of the Prevention of Corruption Act was not considered, though this was brought to attention.
- [3] the accused's defence was one of denial. A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient;

Principles of law decided:

In law, the presumption under s 14 arises for the defence of the accused to be called. See Public Prosecutor v Ng Kee Tiak [1969] 2 MLJ 89 .

13. Dato' Haji Azman Bin Mahalan v. Public Prosecutor [2007] 4 MLJ 142.

HIGH COURT, IPOH

Section 10(b)(aa) of the Anti Corruption Act 1997.

Section 42 (1) of the same Act.

Section 16 of the same Act.

Facts of the case:

The appellant appealed against the decision of the Sessions Court Judge who found the appellant guilty of the charges of corruptly having given gratification to wit, a sum of RM2000 on the first charge and further sum of RM5,000 on the second charge as an inducement to PW1 in order that the said PW1 will not accept settlement from PW-6 so that PW6 would remain a bankrupt and would not be qualified to contest against the appellant for the post of division head of UMNO, both the offences are under section 10(b)(aa) of the Anti Corruption Act 1997 and punishable under section 16 of the same Act. The High Court then allowed the appeal and quashed both convictions and proceeded to record an order of acquittal and discharge the appellant on both the charges.

Ratio Decidendi:

In this case, merely saying by way of lip service that the presumption under section 42(1) of the Act is invoked without any proof and/or offering any reason is not sufficient in law and on the facts. The learned sessions court judge had failed to critically examine the evidence of PW1, PW3,

PW6, PW10, PW11 and PW12 and in particular the position of PW1, the association between PW6 and the investigating officer (PW12) who is previously known to PW6 and the lack of seriousness shown and the conduct of PW12 as the investigating officer in the whole episode.

Principles of law decided:

The presumption under section 42(1) of the Act comes into operation only when the factum or payment is proved to the satisfaction of the trial Court. If the payment is not proven as required by law, the presumption does not arise and consequently there is nothing where the accused is required to prove to the contrary.

14. PP V JAMIL BIN MAHMUD & ANOR

[1998] 4 MLJ 681

High Court - Appeal against acquittal by Session Court set aside and the Accused/respondent to enter the defence.

Section 4(a) and 14 of Prevention of Corruption Act 1961:

Brief facts in case:

The accused/respondent was charged for allegedly solicited from the complainant by requesting RM300 and as consideration, no action would be taken for that the complainant has erected house awning without municipal council's approval. The accused was then an officer to the council.

Ratio decidendi of the case:

The High Court in overturning the decision of the session court states that solicitation (verbal in this case) is not an ingredient to Section 4(a). The ingredient under this section is acceptance.

Principles of law decided in the case:

The High Court found that based on the evidence adduced, it has been established that the accused/respondent had accepted the money and therefore the presumption under Section 14 of Prevention of Corruption Act 1961 applies. Therefore the Session Court must call the accused/respondent to enter his defence in order to rebut the presumption.

Other relevant principle of law decided:

The ingredient between Section 3 and 4 of Prevention of Corruption Act 1961 is not similar. Section 4 does not require for the establishment of solicitation.

15. PP v You Kong Lai [1985] 1 MLJ 298

Court:

Relevant provisions / section of law discussed in the case:

Section 3(a) of the Prevention of Corruption Act 1961 (Revised 1971).

Brief facts in case:

The accused informed the Board of Directors of a Night Club that he could help get a licence renewed. Accused was given \$15,000 incash and a post dated cheque for \$10,000 and would purportedly get in touch with the District Officer (DO). The post dated cheque was paid into the accused's account. Subsequently the licence was renewed. There was no evidence to show that DO was in any way involved in the activities of the accused and according to the DO, he renewed the licence when an appeal was made by the club and because the police authorities did not object to the renewal. The accused was charged under Section 3(a) (ii) of the Prevention of Corruption Act 1961. At the end of the prosecution case, the President of the Sessions Court acquitted the accused on the ground that the prosecution had failed to prove that the DO had in fact been induced to renew the licence by reason of the corrupt payment. The Public Prosecutor Appealed.

Principles of law applied:

[1] It was not necessary for the prosecution to prove that the DO was in fact induced to renew the licences by reason of the payment of the gratification.

[2] The evidence led by the prosecution in this case went to show not only that the accused solicited the payments in question but also that he actually received the moneys. There was therefore some evidence on each essential element of the offence and the defence should have been called.

[3] The prosecution evidence, if rebutted can only lead to the conclusion that the accused was acting in complicity with somebody in the District Office, not necessarily the DO against whom there was no evidence on record.

[4] In view of the unsatisfactory manner in which the records were kept in this case, a re-trial should be ordered before another President of the Sessions Court.

Chapter 4

Procedure

4.1 A matter of procedure

4.1.2 Appeal

Appellate Court only disturbs the findings of the lower court if there is grave error in the exercise of discretion by the Judge.

See cases :

**1. AHMAD ASHAARIE BIN REJIE v PP
CRIMINAL APPEAL NO. 42- 05 -99 – II (HIGH COURT
KUCHING)
SEC 4(c) OF THE PREVENTION OF CORRUPTION ACT
1961 AND SEC 109 OF THE PENAL CODE**

Brief facts in this case.

The 1st and 2nd appellants had been charged under Sec 4(c) OF THE PREVENTION OF CORRUPTION ACT 1961. At the end of trial the appellants were found guilty and convicted as charged. Both appellants appealed against the conviction and sentence. The appellants contended that the charges were defective and it was not shown the 1st appellant had abetted the 2nd appellant in committing the offence. In the Appeal stage, the appellants' appeal been dismissed on the grounds that the charge were not defective as all the ingredients had been proven and sentences against both appellants be reduced.

Ratio decidendi:

All the ingredients of the offence under Sec 4(c) OF THE PREVENTION OF CORRUPTION ACT 1961 had been proven against 2nd appellant and there was proof that the 1st appellant had abetted the 2nd appellant in the commission of the offence. The 2nd appellant could not commit the offence alleged and in regard of the certification in the Invoice because he was carrying out his duties as was required of him in the Treasury Instruction. And the learned trial judge committed no error and there was no ground that warrants appellate interference.

Principles of law decided:

It is a trite law that at the appellate stage, the Appellate Court is slow or will rarely interfere with the finding of the trial judge. However, Appellate court should only interfere where the trial Court has so fundamentally misdirected itself, committed a grave error in the exercise of its discretion or had drawn a wrong inference in the set of facts.

4.2 Adducing fresh evidence at the appellate court

1. CHE DIN BIN AHMAD V. PUBLIC PROSECUTOR [1975] 1 LNS 7

HIGH COURT [ALOR SETAR]

Section 4(a) of the Prevention of Corruption Act 1971

s. 317 of the Criminal Procedure Code

Brief facts:

This is an application under s. 317 of the Criminal Procedure Code for additional evidence to be adduced at the hearing of the appeal. The evidence intended to be adduced is from one Mohd Yusof bin Ladin to the effect that Abdul Jalil bin Nordin (PW8) had committed perjury at the trial of the appellant before the President, Sessions Court, Kangar, on 3 April

1974. The charge against the appellant was for corruptly accepting a gratification under s. 4(a) of the Prevention of Corruption Act, 1961. He was found guilty of the charge by the Learned President, convicted and sentenced to six months imprisonment. In addition a penalty of \$130 under s. 13 of the Act was imposed. Against this conviction and sentence he has now appealed. At the trial the appellant was represented by Counsel.

Ratio decidendi of this case:

S. 317 of the Criminal Procedure Code gives a discretion to the Judge in hearing any appeal to allow additional evidence if he thinks such is necessary. In considering such application the appellate Court has always adopted the attitude that it is only in the most exceptional circumstances, and subject to what may be described as exceptional conditions, that the Court is ever willing to listen to additional evidence. (Mohamed bin Jamal v. PP [1964] MLJ 254, 255, per Thomson LP, quoting Hallett J in the case of R v. Jordan [1956] 40 Cr. App. R 152, 154). It is clear, therefore, that not only the circumstances must be most exceptional but the subject which is proposed to be adduced by further evidence is subject to exceptional conditions. It becomes necessary only if a failure of justice would result if such additional evidence was not taken and allowed when additional facts have come to light since the date of trial. The matter is left entirely to the discretion of the Court.

Principles of law decided in this case:

The principles which the Courts have decided in the course of years may be summarised according to the passage from the judgment of Lord Parker C.J. in the case of R v. Parks [1961] 3 All ER 633, 634:

(i) the evidence sought to be called must be evidence which was not available at the trial;

(ii) the evidence must be relevant to the issues;

(iii) it must be credible evidence in the sense of being well capable of belief; and

(iv) the Court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

4.3 Merely lip service to presumption is fatal.

1. Dato'Haji Azman in Mahalan v. Public Prosecutor [2007]4 MLJ142

HIGH COURT, IPOH

Section 10(b)(aa) of the Anti Corruption Act 1997.

Section 42 (1) of the same Act.

Section 16 of the same Act.

Facts of the case:

The appellant appealed against the decision of the Sessions Court Judge who found the appellant guilty of the charges of corruptly having given gratification to wit, a sum of RM2000 on the first charge and further sum of RM5,000 on the second charge as an inducement to PW1 in order that the said PW1 will not accept settlement from PW-6 so that PW6 would remain a bankrupt and would not be qualified to contest against the appellant for the post of division head of UMNO, both the offences are under section 10(b)(aa) of the Anti Corruption Act 1997 and punishable under section 16 of the same Act. The High Court then allowed the appeal and quashed both convictions and proceeded to record an order of acquittal and discharge the appellant on both the charges.

Ratio Decidendi:

In this case, merely saying by way of lip service that the presumption under section 42(1) of the Act is invoked without any proof and/or offering any reason is not sufficient in law and on the facts. The learned sessions court judge had failed to critically examine the evidence of PW1, PW3, PW6, PW10, PW11 and PW12 and in particular the position of PW1, the association between PW6 and the investigating officer (PW12) who is previously known to PW6 and the lack of seriousness shown and the conduct of PW12 as the investigating officer in the whole episode.

Principles of law decided:

The presumption under section 42(1) of the Act comes into operation only when the factum or payment is proved to the satisfaction of the trial Court. If the payment is not proven as required by law, the presumption does not arise and consequently there is nothing where the accused is required to prove to the contrary.

4.4 Adhere to principles in Stare decisis :

1. Public Prosecutor v Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 276

FC KUALA LUMPUR

Section 43 (1) of the Municipal Ordinance and Section 2 of the Prevention of Corruption Act 1961.

Brief facts in this case:

In this case the 1st accused was the Commissioner of the Malacca Municipality and also the executive chairman and shareholder of a

housing development concern, Almac. Almac had submitted a lay-out plan and two sets of building plans for the approval of the Municipal Council and the plans were passed by the 1st accused. He was charged that in approving the plans he had used his public office for his pecuniary advantage and had thereby committed offences against section 2(1) of the Emergency (Essential Powers) Ordinance, 1970. The second accused was charged with abetment of the offence on the two occasions when he sat in the committee.

At the trial the learned trial judge at the close of the prosecution case held that of the two essential ingredients of the offence against the first accused, the prosecution had established his guilty mind but not that he was a public officer. He therefore acquitted and discharged the accused ([1979] 1 MLJ 166). On appeal by the Public Prosecutor the Federal Court held that on proper construction the first accused was a public officer within the meaning of section 2 of the Prevention of Corruption Act, 1961 and sent back the case to the High Court with the order to call for the defence ([1979] 1 MLJ 174).

At the continuation of the trial, the issue before the High Court was whether the defence had adduced sufficient evidence from which the court could hold that there was no guilty mind or that a doubt had been cast on the prosecution's evidence of the state of mind. The learned trial judge in his judgment considered the ruling of the Federal Court on the issue whether the first accused was a public officer. He expressed the view that the Federal Court was wrong but said that he would nevertheless not disregard the decision of the superior court. He held that the prosecution had failed to prove beyond reasonable doubt that the 1st accused approved the plans with an ulterior motive or that he abused his position as Commissioner for his own pecuniary or other advantage. He therefore

acquitted both the accused ([1980] 1 MLJ 117). The Public Prosecutor appealed.

Ratio decidendi of this case:

In this case at no time did the 1st accused or the 2nd accused ever declare their interests in Almac. They were therefore in breach of the statutory provisions of section 43(1) of the Municipal Ordinance and the doing of the act forbidden by statute supplied the mens rea.

The accused were actively engaged in the development of the housing estate and this clearly showed that they knew that Almac's plans would be submitted for approval. There was evidence of purposiveness and haste in the approval of the plans which further established the knowledge of the accused.

Surely this country and the public must have a right to expect of its public officers a duty to conduct themselves, at all times, with the highest standards of probity and honesty and in accordance with the law. Anything less will inevitably result in loss of confidence in public administration and in the spread of the cancer of corruption in the lower levels.

Nevertheless, the trial court and this court must consider that the plans submitted were in accordance with or within the permissible dispensations of the bye-laws, the technical advisers had recommended their approval and if Datuk Tan had correctly advised himself to disqualify himself and to refer the plans to the State Authority for his action, the plans would have been passed. By not doing so he had clearly committed the offences with which he was charged but in the circumstances the pecuniary or other advantage which had accrued to him by his passing the plans was perhaps, as a matter of criminal culpability and consequence, less

substantial than the case of a public officer who had pocketed money to which he had not any vestige or right to expect or demand.

Principles of law decided in this case:

It is necessary to reaffirm the doctrine of stare decisis which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours, to follow similarly. The doctrine of stare decisis requires more than lip service.

4.5 Error in judgment justified setting aside acquittal order.

1. Public Prosecutor v Abang Abdul Rahman

[1982] 1 MLJ 346 (Criminal Appeal No SG 1 Of 1980 (ACRJ Sri Aman)

Section 4(c) of the Prevention of Corruption Act 1971

Brief facts:

The respondent was charged in the lower court under section 4(c) of the Prevention of Corruption Act. He was the Secretary of the Kalaka District Council, and had applied for leave and for free passages to visit Semenanjung Malaysia during his leave. Both were granted to the respondent. The prosecution alleged that he did not make use of the free passages granted because no air tickets had in fact been bought by him or on his behalf. Hence, in certifying the payment voucher (Ex. p. 6) that he had lost all the relevant air tickets issued to him at a cost of \$ 1,264,00 he had knowingly used Ex. P. 6 with intent to deceive, his principal, the Kalaka District Council in that Ex. P. 6 contained false material particulars, namely that the said sum had been incurred by him and his family when they had not been so incurred. The case for the defence was that the air

tickets had been bought by the respondent through Chop Thong Hwa, a shop which sometimes obtained air tickets on behalf of others from Sin Hua Travel Agent, Sibul. While in the course of making preparations in Kuching to visit Kuala Lumpur with his family, the respondent received news that one of his children was ill and he had to rush back to his house during the course of which he lost the air tickets. Hence, in certifying this in Ex. P. 6 he was merely certifying a fact, and, the cost of the air tickets having been incurred by him and his family, he had not committed the offence charged against him. The learned trial magistrate acquitted the accused of the said charge. The prosecution appealed.

Ratio decidendi:

In the light of the conflicting evidence on material matters in the respective testimonies of PW5, PW6 and the respondent, the learned trial magistrate could not have been in a position to properly weigh the evidence of PW5 and PW6 against that of the respondent particularly on such material matters, as he seemed to have done. This material defect in the judgment of the lower court made it unsound and was sufficient to cast doubt on its correctness and reliability, and justified the setting aside of the order of acquittal of the lower court.

Principles of law decided in this case:

A magistrate should discuss the evidence and the probabilities arising from the circumstances of the case. The reasons for his findings should be stated. The grounds should indicate that he had in fact applied his mind to the evidence produced in the case. In the present case the learned trial magistrate had not adequately done that in his judgment, rendering it defective.

Other relevant principle of law decided:

An appellate court can interfere with a finding based on inference; an appellate court before reaching its conclusions upon matters of fact, should and will always give proper weight and consideration to such matters as (a) the views of the trial judge as to the credibility of the witnesses; (b) the presumption of innocence in favour of the accused; (c) the right of the accused to the benefit of any doubt; and (d) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

4.6 De novo trial – discretion of Judge

1. MOHAMED ANUARDIN BIN ABDUL SALAM & ANOR V PENDAKWA RAYA

CRIMINAL APPEAL NO 52-8-1996 HIGH COURT (IPOH)

Prevention of Corruption Act 1961 s 3(a)(ii), 4(a)

Criminal Procedure Code (FMS Cap 6) ss 261, 307(i)

Brief facts of the case:

The first Appellant, was charged in the sessions court under s 3(a)(ii) of the Prevention of Corruption Act 1961 ('the Act') with the offence of corruptly receiving for himself two sums of money, RM3,500 in cash and RM8,000 in cheque, from one Lee Kaw as an inducement for the second appellant, Azizan bin Yahya (an Assistant Secretary, Immigration Unit of the Ministry of Home Affairs) to secure the approval for the renewal and return of the said Lee Kaw's passport.

The second appellant, Azizan bin Yahya, was charged under the same section of the Act with the offence of abetting the offence of corruptly

accepting the two sums from the first appellant for the same purpose as that in the first charge.

In addition, the second appellant also faced a second charge under s 4(a) of the Act of corruptly receiving gratification for himself as an agent of the Government of Malaysia from Lee Kaw the sum of RM6,000 in cash, as payment in relation to his principal's affairs, ie to obtain approval for the renewal and the return of a passport belonging to the said Lee Kaw.

The offences were alleged to have been committed between the months of May and July 1990. The record shows that the trial was commenced on 14 September 1994 before sessions judge, En Mohd Zaki bin Md Yasin. Some 13 witnesses had already been called to give evidence for the prosecution.

On 1 October 1995, before the hearing of the case could be completed, the sessions judge, En Mohd Zaki had to go on transfer as the State Legal Adviser at Kedah. His position at the sessions court was taken over by En Hassan bin Lah. When En Hassan sat on 25 March 1996, he decided to exercise the discretion open to him under s 261 of the Code to continue the case from where En Mohd Zaki had left. He overruled the objections of both counsel for the appellants that the proceedings be heard de novo.

The appellants appealed against the sessions court judge's exercise of his discretionary power under s 261 of the Criminal Procedure Code (FMS Cap 6) ('the Code') in ordering that the case against the appellants which was partly heard by the previous sessions court judge be continued by him from the point where it had been left, and not de novo. Both appellants were charged under the Prevention of Corruption Act 1961. The trial had reached a stage where the prosecution had called some 13 witnesses by the time the later judge took over the proceedings. The key

witness, the complainant, had not finished giving his evidence. The appellants argued that: (i) the judge had wrongly exercised his discretion in not hearing the case de novo; and (ii) having decided not to do so, he committed further error in ruling that the appellants would not be allowed to demand that the witnesses in the earlier voir dire proceedings be resummoned and reheard, contrary to s 261(a) of the Code, which conferred such a right on the appellants.

Ratio decidendi of the case:

- i. Although under s 307(i) of the Code the appellants may appeal against any judgment, sentence or order pronounced by the lower court, they could not do so against an order which is merely procedural in nature (see p 302E-F); PP v Hoo Chang Chwen [1962] MLJ 284 and PP v RK Menon & Anor [1978] 2 MLJ 152 followed.
- ii. Section 261 of the Code conferred on the judge a complete discretion. So long as he exercised that discretion judicially, according to rules of reason and justice and not according to private opinion, the High Court cannot interfere (see p 306B); Oh Keng Seng v PP [1976] 1 MLJ 143 distinguished.
- iii. To hear the case de novo would not be the best course to adopt as the ability of the witnesses to recall events may have diminished with a lapse of six years. It would also unnecessarily prolong the trial and increase the expenses. The judge was also the best person to assess the direction the trial should take. Besides, the court should also take into account the full protection available to the appellants under s 261(a) and (b) of the Code (see p 306G-H); Mohamed Idris bin Hj Mohamed Said v R [1949] MLJ 31 not followed.
- iv. The earlier judge had made a decision in the voir dire. To interpret s 261(a) of the Code without regard for the decision taken would

run counter to the doctrine of res judicata. Although there is no direct precedent that it applies in a voir dire, as the decision in a voir dire is still one adjudicated upon authoritatively after hearing the parties, the principle should apply here as well (see p 308A, F-G); Sambasivam v PP [1950] MLJ 145 followed.

Other relevant principle of law decided in the case, if any.

S.307 CPC:

Under s 307(i) of the Code, any person who is dissatisfied with any judgment, sentence or order pronounced by the lower court may prefer an appeal in respect of any error of law or fact in a criminal case or matter. It is trite law that any order so pronounced by a subordinate court which is merely procedural in nature is not appealable under s 307(i).

A procedural ruling, it was held, was not a judgment, sentence or order within the meaning of s 307(i) of the Code. In so holding, the court followed the earlier case of PP v Hoo Chang Chwen [1962] MLJ 284 . In that case, Rose CJ held that a ruling of the magistrate that a statement applied for by the defence was a first information report -- and not a statement made in the course of police investigation (and must therefore be supplied to the defence) -- was merely a procedural ruling. It was held (at the same page) that to allow such an appeal on the ruling would:

... open the door to a number of appeals in the course of criminal trials on points which are in their essence procedural. The proper time, of course, to take such points would be upon appeal, after determination of the principal matter in the trial court.

Section 261 of the Criminal Procedures Code.

Section 261 of the Code conferred on the judge a complete discretion. So long as a judge in the lower court exercised that discretion judicially,

according to rules of reason and justice and not according to private opinion, the High Court cannot interfere.

4.6.1 Who to prosecute

1. PP v Mat Radi

[1982] 1 MLJ 221

ARCJ Kuching

Article 144(3) of the Federal Constitution (FC)

Section 376(i) & 377 of the Criminal Procedure Code (CPC)

Brief facts:

The accused was discharged and acquitted in Magistrate's Court for a charge under Section 4(b) of Prevention of Corruption Act (PCA). The Magistrate expressed his view that the prosecution should be conducted by a DPP as the accused is personnel of Armed Force and Police Force. Despite the DPP's explanation that they have decided for the prosecution to be conducted by a police officer, the magistrate nevertheless, discharged and acquitted the accused on the ground that the PP is not interested in this case. The prosecution appealed.

Ratio decidendi:

[1] The Magistrate did not discharge the accused for groundless charge but for the fact that the DPP did not appear himself to conduct the prosecution. There was no legal ground for making such order for discharge.

[2] Who to prosecute is not the function of court to decide. It is the prerogative of the Public Prosecutor under Article 144(3) of FC & Section 376(i) of CPC.

[3] Section 377 stipulates that for seizable offences, the criminal prosecution may be conducted by PP, DPP or police prosecuting officer not below the rank of inspector, with an authority from the PP. This case involved a seizable offence and the PP has decided and authorized the police prosecutor to prosecute the accused.

Andrew Lai Siat v PP :

“The conduct of a prosecution is within the province of the Public Prosecutor. Until there is a legislation directing that only a legally qualified officer may prosecute a particular case, no magistrate should attempt to make an order directing that a particular case should be conducted by a Deputy Public Prosecutor”

Principles of law:

[1] It is the sole and wide powers of PP under Article 144(3) of FC & Section 376(i) Of CPC to institute criminal proceedings. The court is the administrator of justice in respect of administration of law, and to see that administration and dispensation of justice is properly done.

[2] Discharge under Section 173(g) is for groundless charge and should not amount to an acquittal – PP v Hettiarashigae LS Perera [1977] 1 MLJ 12.

4.7 Delay in arrest of offender , result of.

1. Dato' Hj. Azman Mahalan V PP

[2007]3 CLJ 495

High Court/ V.T Singham J.

Sections 10(b)(aa) –PCA 1997

Presumption under s. 42(1) PCA 1997

Brief facts:

The appellant was found guilty on 22 August 2005 of the charges of corruptly having given gratification on 6 April 2001 to wit, a sum of RM2,000 on the first charge and further sum of RM5,000 on 9 April 2001 on the second charge as an inducement to Mohd Kamal bin Rabaai (PW1) in order that the said Mohd Kamal will not accept settlement from Pazli bin Abdullah Sani (PW6) so that Pazli bin Abdullah would remain a bankrupt and would not be qualified to contest against the appellant for the post of Division Head of UMNO; Tapah on 22 April 2001; both the offences are under s. 10(b)(aa) of the Anti Corruption Act 1997. The appellant was convicted.

Ratio decidendi of the case:

[1] The SCJ failed to hold that fingerprint evidence on the relevant currency notes ought to have been obtained since the appellant had challenged and contended that they were not given by him to PW1.

[2] A witness should not be withheld and treated as a hostile witness unless he is tested in the witness stand.

[3] Failing to produce DW2 during the prosecution case led to an adverse inference being drawn up against the prosecution under s. 114(g) of the Evidence Act 1950. The SCJ failed to do so.

[4] It took three years for the ACA to obtain the statement from the appellant to conclude the investigation. No adequate or satisfactory explanation was given for the delay. The failure of the ACA to arrest the appellant at the earliest opportunity when all the evidence was already available raised a doubt in the prosecution case. There was also no evidence whether any further investigation was carried out after the appellant made his statement on the same day he was charged in court.

[5] The SCJ could not just dismiss the appellant's statement as a bare denial since it was recorded three years after all the material evidence was already in the possession of the investigative agency. Forgetfulness and failure to recall exactly certain events does not necessarily shake a witness' credibility or render other parts of his story unworthy of belief.

[6] The evidence was insufficient to trigger the application of the statutory presumption under s. 42(1) of the Anti Corruption Act 1997. The presumption only came into operation when the alleged payment was made and the appellant raised doubt in the prosecution case whether such payment was in fact made.

4.8 When arrest should be effected.

1. Public Prosecutor v Mohd Noor bin Yusof

[2008] 2 MLJ 518

A criminal appeal case from the Session's Court to the Taiping High Court.
Section 11(b) Anti-Corruption Act 1997

Facts of the case :

The accused, as one of the Location Officer employed at District and Land Office, Larut Matang, Taiping was charged with corruption where he agreed to accept for himself a bribery, ie, RM1,000 cash from SP4, being

gift for recommending his extension application for sand permit, an offence under s 11(a) Anti-Corruption Act 1997. SP4, the complainant was a contractor who bought/sold sand. In May 1999, SP2 had entered into an agreement with Tan Cheok Luan wherein SP2 had leased his sand permit to Tan Cheok Luan. However, the work for extraction of sand was managed by SP4. On 22 November 2000 SP2 applied via P7A and P7B for renewal of river sand permit for the period of three months with effect from 1 January 2001 until 31 March 2001. On 23 November 2000 the said file pertaining to the applications was provided to the accused for his recommendation report.

In December 2002, the accused was alleged to call SP4 to inform him that the sand permit will be expiring soon and he made a recommendation letter for renewal. The accused later requested for coffee money from SP4 for the recommendation letter but the accused did not mention about his desired coffee money. SP4 offered between RM200 to RM300 but it was rejected by the accused saying that 'the money was not even sufficient for a child to buy candy'. Thereafter SP4 offered RM500 but the accused requested him to drop by into his house later in the afternoon on the same day whereby SP4 went to the accused's house in Simpang, Taiping and during the meeting SP4 once again offered RM500 but the accused requested SP4 to wait for the permit first. On 4 January 2001 SP4 lodged a corruption report against the accused at ACA office. On 10 January 2001 the accused rang SP4 and told SP4 that he had made the recommendation letter for the sand permit and requested a sum of RM1,000. SP4 asked for the said sum to be reduced but the accused replied if there was no sum of RM1,000 then don't even think for renewal of permit. The accused also instructed that the sum of RM1,000 to be handed over to him at his house on the very next day. On 11 January 2001, SP4 had deliver the trap money marked as RM1,000 as requested by the accused at his house. On 12 January 2001 a permit he applied was

approved. Then a team of ACA officers led by SP7 went to the accused's house on 12 January 2001 and arrested the accused. The trap money of RM1,000 was found in motorvan parked in the gated area of his house. The accused claimed for trial to charges framed against him. At the end of defence case, the trial judge had discharged and acquitted the accused from charges. The prosecution appealed against the said decision. Appeal allowed with sentencing 18 months imprisonment and fine for RM5, 000 or six months imprisonment.

Ratio decidendi :

The law does not state that an arrest should be made immediately after the bribe money is delivered. Nothing in the law states that the bribe money must be found from accused so that the accused could be found guilty.

Principles of law discussed in the case :

- [1] When an arrest is appropriate should depend on the circumstances of each case.
- [2] Only need to prove whether an accused had accepted the bribe money so that he could be found guilty.

4.8.1 Defective Seizure List

1. PP v Sulaiman Pawanteh

[2004] 1 LNS 36

High Court, Penang

Section 10 (a), 11 (a), 16, 25 of Anti Corruption Act 199

Brief facts:

The Respondent faced two charges under the Anti Corruption Act 1997. The Respondent, a technician with the Tenaga Nasional Board (TNB) inspected the electrical meter of the complainant SP4. He then informed SP4 that his meter had been tampered with. According to SP4 the Respondent had told him that since the meter was tampered with, the owner would be fined and further the meter would not be changed. SP4 is the nephew of the house-owner and he was looking after the said house. The Respondent had told him that he would not report the matter to the TNB and that he could change the meter. SP4 then asked the Respondent whether RM100/- would be sufficient. The Respondent then told SP4 that the usual sum to be paid to settle such similar matters was RM500.00. SP4 then counter-offered with a sum of RM250.00. SP4 then saw the Respondent make a telephone call. SP4 testified overhearing the conversation. He heard the Respondent say that since SP4 was a student, therefore RM250.00 was sufficient. It was then agreed that the payment would be made the next day. SP 11 who was present throughout this conversation, confirmed this in his evidence. SP4 & SP11 then decided to lodge a report with the Anti Corruption Agency (the ACA) the following day. The Respondent was acquitted on both charges without his defence being called. The 1st charge was for soliciting and the 2nd charge was for receiving. Dissatisfied with the decision of the Sessions Court, the Public Prosecutor appealed.

Ratio decidendi:

The acquittals by the Sessions' Court was upheld by the High Court on the grounds that the search list pursuant to s. 25 of the Anti-Corruption Act 1997 did not contain the details and particulars of the said five fifty dollar notes in question. The search list only contained the details prepared before the seizure.

Principles of law decided:

Failure to comply with the statutory requirements of section 25 of the Anti Corruption Act 1997 could amount to a discharge and acquittal of an accused.

4.9 Involuntary statement may vitiate proceedings at trial

1. Haji Johari bin Haji Abd Karim v Public Prosecutor [1989] 2 MLJ 276

A criminal appeal case from the Magistrate's Court to the High Court (Bandar Seri Begawan).

Criminal Procedure Code ss 271, 285, 285A, 288, 291, 371.

Interpretation and General Clauses Act (Cap 4) ss 2(1), 37(2).

Penal Code s 16.

Prevention of Corruption Act (Cap 131) ss 5, 22, 24A, 28.

Facts of the case:

The defendant/appellant was originally charged before a magistrate on 37 charges under the Prevention of Corruption Act. ('the Act'). In the course of trial, either the prosecution offered no further evidence, or the magistrate found that the defendant had no case to answer, on 35 of these charges, of which the defendant was convicted by the magistrate and sentenced to 9 months' imprisonment on each charge, these sentences to run consecutively. The defendant now appeals both the convictions and sentences imposed.

The magistrate, at the conclusion of that evidence, duly admitted the five statements which the defendant had made on 21, 22, 23 and 24 February and 2 March to ASI Hadanan at the ACB office. As the magistrate noted, when admitting these statements, on the first occasion ASI Hadanan, before he began to record the defendant's statement, drew his attention to

s 22 of the Prevention of Corruption Act (Cap 131). Accordingly dismiss the appeal against conviction.

Ratio Decidendi:

Section 22 of the Act does not itself make the failure of any person to render a statement under that section an offence, although there is a duty to do so. However, s 24A of the Act is sufficiently wide to include such a statement but it must be voluntary.

Principle(s) of law decided:

- [1] Section 22 of the Act does not itself make the failure of any person to render a statement under that section an offence, although there is a duty to do so. However, s 24A of the Act is sufficiently wide to include such a statement but it must be voluntary. The magistrate did not appear to have considered whether the reference made by the officer to an offence and a fine for the failure to comply with a request under s 22 of the Act amounted to a threat so as to vitiate any subsequent confession.
- [2] The appellate court should only interfere with a finding of fact in rare instances and if it is clear that the trial court was seriously at fault. Although parts of the testimony of the two witnesses were contradictory, the trial court can believe the evidence of any witness so far as its essentials are concerned without having to accept as true everything which the witness said.

4.10 Written statement by counsel in place of oral testimony

1. Abdullah Jacomah v PP

[2002]8 CLJ 1

High Court

Section 11(a) Akta Pencegah Rasuah

Section 16 Akta Pencegah Rasuah

Section 173(k) Criminal Procedure Code

Section 173(j) (iii) Criminal Procedure Code

Section 255 Criminal Procedure Code

Article 5(3) Federal Constitution

Brief facts:

The appellant was convicted under section 11(a) and had been sentenced to 18 months imprisonment and a fine of Rm10K in default 6 months imprisonment by the Sessions Court. The appellant was a police officer and convicted of receiving a bribe of Rm200 as inducement to make sure Mohd Noor's Case didn't go to court. The appellant appealed to the High court on the ground that the Sessions Court disallowed the defence in the form of a written statement which was prepared by the counsel. The Sessions court also disallowed the accused's application to give sworn evidence after he had completed making his statement from the dock as the witnesses had not been called yet.

Ratio decidendi of the case:

A written statement which was prepared by the defence counsel can be produced by the court and the same thing would apply for oral statements that are prepared with the assistance of the counsel.

The right to adduce evidence that are relevant is necessary and admissible when the accused is required to testify.

The accused cannot be denied the right to participate fully in the proceeding in any manner chosen by the accused to advance his defence. This is to make sure there is no miscarriage of justice.

It is the responsibility of the prosecution to negate any doubt that has been raised by the defence.

4.11 Transfer of case to court of co-ordinate jurisdiction

1. Manshor Bin Omar v. Public Prosecutor and Another Application.

[2005] 2 MLJ 344.

This is a decision by Abdul Hamid Embong J. It's a Criminal Revision. The High Court of Kuala Lumpur had decided this case.

Anti-Corruption Act 1997 ss 10(a)(aa), 11(a)

Section 104 Subordinates Court Act.

Section 99A of the same Act.

Para 3(2) of the Third Schedule of the Subordinates Court Act 1948.

Facts of the case:

The Sessions Court Judge had ordered for the transfer of both the applicants' cases to the Sessions Court at Ampang to be jointly tried with another case. The five charges against the applicants were in relation to offences which were said to have been committed in Kuala Lumpur, whilst the Ampang charge concerned offences which allegedly occurred in Selangor. The applicants applied for a revision of that Order. The High

Court dismissed the said application and affirmed the Order of the Sessions Court.

Ratio Decidendi:

The term “where the interest of justice” merely means that when a judge makes a ruling or order he has, utmost in his mind, the fundamental of the requirement of fairness and justice. The order of transfer of these cases will tend to the general convenience of the parties and witnesses. Although the charges referred to offences which took place in different places, they were all in the vicinity of the Klang Valley. The applicants’ interest would not be prejudiced by having their cases tried in the same Court at Ampang.

Principles of law decided:

The power of a subordinate court to transfer cases to another court of co-ordinate jurisdiction is provided by section 104 of the SCA 1948. That power is further amplified by section 99A of the same Act as well as Paragraph 3(2) of the Third Schedule of the said Act.

4.12 Irregularity and s. 422 of CPC

1. SHAIFUL IDZAM SULAIMAN v. PP

[2004] 2 CLJ 121

High Court Malaya, Kuala Lumpur

s. 11 of the Anti Corruption Act 1997 (1997 Act)

s. 42(1) of the Anti Corruption Act 1997 (1997 Act)

s. 422 of the Criminal Procedure Code

Brief facts:

The appellant was convicted of an offence under para. (a) of s. 11 of the Anti Corruption Act 1997 (1997 Act). There were several grounds of appeal but these grounds all appear to have stemmed from the way in which certain issues have been addressed by the learned Sessions Court Judge. The mainstay of the arguments of the appellant was that there were misdirections particularly on the standard of proof in relation to the application of s. 42(1) of the 1997 Act that is a statutory presumption.

Ratio decidendi:

To be an accomplice the witness who received the bribe must be the one who was abetting the offence of giving it committed by the accused, the giver. Only then would the receiver be regarded as *particeps criminis*. This means that just as the giver as a principal offender requires *mens rea*, so does an accomplice witness who received the gratification. If he received the gratification innocently or without any corrupt motive or if he did not receive it at all, although it was given to him, as far as he is concerned the gift did not change its character to become an illegal gratification just because the giver (the accused) gave it with corrupt motive or with evil intention. Thus in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his *actus reus*. The whole idea is completely contrary to the basic concept of criminal liability.

Having examined the evidence, it is true that the Sessions Court Judge did not make a ruling on the burden that has been shifted on the appellant and that he never stated whether the burden is discharged. But throughout he did use the words "*prima facie*", "telah dibuktikan", "telah disokong", "mengesahkan", "disaksikan". Such words to mind reveal that the Sessions Court Judge did consider the ingredients material to the charge.

The question is therefore whether there has really been occasioned a failure of justice as alleged by counsel for the appellant. The answer is in s. 422 of the Criminal Procedure Code and the recent decision of *PP v. Ishak Hj Shaari & Ors Appeals* [2003] 3 CLJ 843 wherein the Court of Appeal in the judgment of Mohd. Noor Ahmad JCA (as he then was) indicated the following:

Section 422 of the CPC is couched in comprehensive form. Sub-section (a) of the section only states "any error, omission or irregularity ...". It does not mention "illegality". Be that as it may, as stated by case law, the distinction drawn in many of the cases in India between an illegality and an irregularity is one of 'degree' rather than of 'kind'. To our mind, the non-mention of 'illegality' in the sub-section reflects the wisdom of Parliament in that, the court is given the discretion to decide whether in a particular case any error, omission or irregularity is curable but with the caveat that such error, omission or irregularity has not occasioned a failure of justice. And in the exercise of that discretion it is incumbent on the court to have regard to the promotion of the basic principle on which the CPC is based in the light of case law. Therefore, the errors in the judgments in the form of a misdirection on the standard of proof in these appeals should not be struck down automatically as illegalities, or as it were, by rule of thumb without first considering whether the accused has had a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice and thereafter, to decide whether the misdirection has occasioned a failure of justice otherwise the intention of Parliament in enacting s. 422 is defeated.

But if the trials were conducted substantially in the manner prescribed by the CPC, but some irregularities occurred in the course of such conduct the irregularity could be cured under s. 422 and nonetheless so because the irregularity involved, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the CPC.

Whatever it is what remains to be considered is whether there is sufficient evidence to support the conviction in a particular case and if there is, that would be a good ground for holding that there was no miscarriage or failure of justice. The same consideration applies to the misdirection at the end of the case. Therefore, we conclude that the misdirection on the standard of proof in a trial which has been conducted in substantial compliance with the CPC is curable under s. 422 of the CPC provided that there is sufficient evidence to support the conviction, as the error has not occasioned a failure of justice.

There had not been any failure of justice on account of the Sessions Court Judge's failure to record in more details his reasons while evaluating the evidence.

4.13 Amendment of Petition of Appeal

1. PP v. Romanus Clement Ungkin; Rechi John Chuhing

[2005] 1 LNS 261

HIGH COURT [FEDERAL TERRITORY, LABUAN]

Relevant provisions / section of law discussed:

Section 11(a) of the Anti Corruption Act, 1997

Brief facts:

Essentially Romanus and Rechi were jointly charged that they had acted with a common intention in receiving a sum of RM740 from the Chin Hong Kin on 20th October, 1998 at his workshop as an inducement for forbearing to take any legal action against the complainant who was said to be in possession of jackpot machines.

The submission of the Deputy Public Prosecutor is at enclosure 22 and this was read in full by him to the Court.

Two significant points need to be mentioned here and these are as follows:-

[1] the 1st respondent who was on bail failed to appear at all our hearings. His learned counsel, Mr. Rakhbir Singh could not reach him and consequently he was unable to get any instruction. He asked to be discharged and since there was no objection either from the learned Deputy Public Prosecutor representing the appellant, or the learned Encik Zahir Hussin Ahmad Shah counsel for the 2nd respondent, I allowed the request. In the meantime, a warrant of arrest was issued against the 1st respondent. With the concurrence of both parties, the appeal against the 2nd respondent had to go ahead considering that he was a suspended Government Officer there is a need to proceed on such cases expeditiously as after all the 2nd respondent was charged on 9th September, 1999, more than 5 years ago;

[2] learned counsel for the appellant applied for an amendment to the petition of appeal. After hearing arguments from both sides, I declined to grant the application for a number of reasons which include *inter-alia*:-

(a) Notice of Motion was not initially served on to learned counsel for the 2nd respondent and when it was finally served only two days notice was only given during which time the submission of the learned counsel for the 2nd respondent had been prepared and delivered to this Court;

(b) Following the decision in *Jumari bin Mohamed v. PP* [1981] 1 LNS 163 which provides that such amendment should not be granted as a matter of course but on very exceptional circumstances as per Tee Ah Seng, J in *Dyca ak Rawing v. PP* [1998] 1 LNS 345;

(c) Some 8 months delay in the filing of the application to amend the petition of appeal;

(d) Such application should be allowed in order that substantial justice may be done, see *Veerasingam v. PP* [1957] 1 LNS 93 but I found that the ground for the delay in filing the application was not explained in the affidavit of learned counsel Encik Amir Hadi bin Abdul Hadi deposed on 12th April, 2004;

(e) and finally I am unable to find any exceptional circumstances to allow such application.

Eight main points of appeal were raised in the petition of appeal but paragraphs 4.2 and 4.8 are combined together by the learned deputy as he claimed that they deal with the same issue of corroboration.

Ratio decidendi:

It can therefore be observed that the learned Sessions Court Judge entertained serious doubts on the prosecution's case. It is settled law that even if the court does not believe the story of the accused but finds that his story or explanation has raised a reasonable doubt on the truth of the prosecution case or that the explanation was consistent with his innocence, the accused is entitled to an acquittal, see *Periasamy Sinnappan v. Pendakwa Raya* [1996] 3 CLJ 187 (CA) and the oft-quoted case of *Mat v. Public Prosecutor* [1963] 1 LNS 82; [1963] MLJ 263 per Suffian J (as he then was). In this instant case not only did the learned Sessions Court Judge entertain serious doubts but the reply made by Rechi was acceptable to her. It could be seen here that although it was the contention that the prosecution has proved its case beyond any reasonable doubt, the Judge did not share this view. She entertains doubts and it has been explained why and is based substantially on the credibility of witnesses called. Such being the case, this Court must be

slow to disturb the findings of a trial judge unless such findings were plainly wrong or against the weight of evidence see *PP v. Abdul Rahman Mohamad* [2005] 1 CLJ 700. Here I am not convinced that the decision of the learned Sessions Court Judge is wrong.

Principles of law decided in the case:

Court must be slow to disturb the findings of a trial judge unless such findings were plainly wrong or against the weight of evidence

Chapter 5

Corroboration

5.1 General Rule

Under the Evidence Act, sec. 134 :

No particular number of witnesses shall in any case be required for the proof of any fact.

Indeed, it is said that the section embodied the principle that evidence has to be weighed and not counted. When the evidence of a witness is required to be supported by other evidence, this is called corroboration.

5.1.1 Definition

This is explained in *R v. Baskerville* [1916] by Lord Reading CJ:

“... [It is] independent testimony that affect the accused by connecting or tending to connect him with the crime. It must be evidence which implicates him ,that is, which confirms in some material particular not only the evidence that a crime has been committed ,but also the at the prisoner committed it...”

In *Sharma J in Attan bin Abdul Ghani v Public Prosecutor* [1969] 1 LNS 12; [1970] 2 MLJ 143 said :

“ There was more than ample tangible corroboration to be found in this case. There is no magic in the use of the word "corroboration." The existence of corroboration is not dependent upon the use of that word. The main thing to look for is whether it exists. In some cases it may require some effort, examination and analysis of the evidence to find it,

while in others, as in this case it may appear undisguised and manifest on the face of the record itself. I have already in the case of *Chua Beow Huat v. PP* [1970] 2 MLJ 29 held that the appellate Court is at liberty to look for and find corroboration in the evidence even if the trial Court had omitted to do so. The point has again been raised in this appeal and I need not repeat what I have already said in *Chua Beow Huat v. PP*. The position, perhaps, may be different in the case of a jury trial.

The law as to corroboration as enunciated by the various authorities may be summarised thus:

It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear:

[1] It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

[2] The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

[3] The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.

[4] The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.

[5] Corroboration must be in material particulars but it is not necessary that the whole prosecution story or all material articular should be corroborated.

[6] Corroborative evidence required for accepting the testimony of an accomplice need not by itself conclusively establish the guilt of the accused. It is sufficient if it is a piece of circumstantial evidence which tends to conned the accused with the crime with which he is charged.

[7] Though a trap-witness is not an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely upon his evidence without corroboration. His evidence is not a tainted one; it would only make a difference in the degree of corroboration required rather than the necessity for it.

[8] Corroboration need not be by direct evidence. It may be by circumstantial evidence in which case the rule relating to proof from circumstantial evidence would apply and the circumstance must be consistent with the innocence of the accused against whom the circumstance is offered as evidence.

[9] There must be corroboration in one or more material particulars but that does not mean in every particular or detail. Corroboration, as the grammatical meaning of the word itself implies, means only support, or in other words, an assurance of truth which is lent to the evidence of the accomplice or the complainant by other evidence. It does not mean that the whole evidence given by the accomplice (or complainant) must be repeated wholly or in parts by witnesses other than the accomplice (or the complainant).

[10] The minimum corroboration which the law ordinarily requires of the evidence of an accomplice is evidence of at least one material fact

pointing to the guilt of the accused person. The weight of such corroborative evidence which is necessary depends on the particular facts and circumstances of the case.”

In Attan's case, the appellant was charged under sec.4 (a) of the Prevention of Corruption Act, 1967 (PCA). PW1 was detained for operating a pirate taxi on 14 April 1969. PW1 asked to meet the Appellant at a coffeeshop. He also asked the Appellant to consider charging him for a lesser charge. The appellant said he could help but had to refer the matter to his superior. He didn't see his superior officer. But, on 28 April, 1969, he was arrested after he received the trapped money given by PW1 in an entrapment.

The learned Judge ruled that the statutory presumption under sec.14 of the said Act arose by virtue of the money having been received by the appellant, and there was ample corroboration of evidence by witnesses in respect of (a) PW2 meeting PW1 to inform that the appellant wanted to see him, and as a result of which it was agreed that PW1 would give him RM 50.00 at a shop no.65; (b) that he was seen by the entrapment witnesses that he went to the shop in question; (c) trapped money was received or accepted by the appellant. The learned Judge also found that the appellant had failed to displace the presumption.

5.2. Former statement of witness –s.157 of Evidence Act

The rules in *R v. Baskerville* seemed to be modified in *Lim Guang Eng v. PP* [2000] 2CLJ 541, FC in that former statement of witness may be used to corroborate that witness himself. However, this exemption seems to apply when such earlier statement was made at the “*first reasonable opportunity or as speedily as could reasonably be expected*” (see: *PP v. Mohammmad Terang bin Amit* [1999] 1MLJ 154; *Kesavan Senderan v. PP* [1999] 1CLJ 343).

Accomplice Evidence

5.2 General Rule

Accomplice is a person who participates in a crime in relation to the offence charged.

It is crucial to treat accomplice evidence with suspicion, and this is stated in the case of *Tan See Boon v. PP* [1966]1 MLJ 219, FC :

“...an accomplice is an infamous person and as such not deserving of belief. He has an obvious interest in diverting blame from himself to the person against whom he testifies. He also has an obvious interest in currying favour with the authorities in whose hands his own fate lies and by reason of his knowledge as an accomplice he is in a peculiarly favourable position to concoct plausible false evidence.”

Sec.133 of the Evidence Act states :

An accomplice is a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice..”

However, it is within the court's discretion to determine whether it needs corroboration as sec 114 illustration (b) states :

“The court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars.”

In *Dalip Bhagwan Singh v. PP* [1998]1MLJ 1FC, it was held that “the judge's mere act of warning himself will not be sufficient to prevent quashing of the conviction when he, without the necessary corroborative evidence, nonetheless decides so to convict because he is convinced by the complainant's evidence despite the risk, unless he says further that the case has been proved beyond a reasonable doubt.’

In corruption cases, sec.44(2) of the Act (now sec.52 (2) of MACCA) states :

“ Notwithstanding any written law or rule of law to the contrary , a conviction for any offence under this Act solely on the uncorroborated evidence of any accomplice or agent provocateur shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence.”

Thus ,it may be said that sec.52(2) of MACCA allows for conviction on uncorroborated evidence of accomplice or agent provocateur, which may mean another dilution to the principles on corroboration ,and even if there was no warning or that there was omission of such warning of the danger of acting on such uncorroborated evidence in the grounds of decision.

Previous cases ,however,suggested that uncorroborated evidence was unsafe to act upon,and therefore warning is necessary .

In Ng Kok Lian v.PP [1983]2MLJ 379 ,it was stated by Salleh Abas ,LP :

“There can be no automatic application of the rule as to the accomplice’s evidence to any witness nor could a witness be prima facie an accomplice without first examining his evidence to find out whether he is an accomplice or not;least of all to be held an accomplice just because money was given to him or because he received it.

To be an accomplice the receiver of the bribe must also be abetting the offence of giving it which was committed by the accused,the giver.Only then would the receiver be regarded as *particeps criminis* .This means that just as the giver as the principal offender require mens rea, so does an accomplice witness who received the gratification.If he received the gratification innocently or without any corrupt motive or if he did not receive at all ,although it was given to him,as far as he is concerned the gift did not

change character to become an illegal gratification just because the giver (the accused) gave it with corrupt motive or with evil intension .Thus, in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his actueus Reus. The whole idea is complete contrary to the basic concept of criminal liability.

The above view was also quoted in SHAIFUL IDZAM SULAIMAN v. PP [2004] 2 CLJ 121 (supra pg.82).

As to the distinction between an agent provocateur and an accomplice – see **Tee Thian See v. PP [1996]3MLJ 209**

Relevant cases

1. PP v Mastor Ibrahim

[2007] 1 SUC 0001

Sessions Court (Melaka)

Section 10 (a) (bb) of the Anti-Corruption Act 1997 (Act 575).

Section 29 (b) of the same Act

Brief facts:

The accused was a police officer and the charges were that the accused had received gratification money through someone (as named therein) as an inducement to reduce the amount of summonses against a lorry owner, and that the accused had delaying the ACA officer in executing their duty under the Act when the accused escaped while on the way to the ACA office for investigation.

Principles of law decided :

[1] Where there are two conflicting accounts of what has actually transpired, therefore there will be two inferences and the one most

unfavourable to the accused ought to be accepted. Case referred to PP v Mok Kar Poh (2001) 5 CLJ 206.

[2] Corrupt is a question of intention. If the circumstances show that what a person has done or has omitted to do was moved by an evil intention or a guilty mind, then he is liable under the section [PP v Datuk Haji Harun Bin Haji Idris No. 2 (1997) 1 MLJ 15].

[3] Flight per se is not proof of guilty mind [PP v Mohd Radzi bin Abu Bakar (2006) 1 CLJ 457.

[4] An accomplice evidence, the court is entitled to presume the unworthy of credit unless corroborated in material particulars and the court must warn itself of the danger of convicting on the uncorroborated evidence of the accomplice [Ghazali bin Salleh & Anor v PP(1993) 3 CLJ 638.

In the case,it was noted that the learned Sessions Judge did not see it fit to convict the accused based on uncorroborated evidence of the witness (giver) although it was in evidence that the trap money was found on the body of the accused.Apparently,sec.44(2) was not applied in that case notwithstanding that the case occurred in 2004 after the amendment to PCA.The learned Sessions Judge found as a fact that PW1 was unsupported by other witnesses as regards the accused asking money from PW2 to lower summons ,and that he (PW1) was collecting it for the accused.PW2 ,in his evidence,did not know to whom the money was to be paid,nor ever met the accused.

2. PP V SELVARAJOO RAMACHANDRAN & ORS [2005] 6 CLJ 114

HIGH COURT MALAYA, JOHOR BAHRU

SS 3(a)(ii), 4(a) and s18 Prevention of Corruption Act 1961

Brief facts in case:

The three respondents were charged for soliciting and accepting gratification under ss 3(a)(ii) and 4(a) of the Prevention of Corruption Act 1961 from one Khairul (PW3) and PW4, instead of taking action against them for allegedly possessing six forged passports belonging to Indonesian citizens. They were discharged and acquitted at the close of the prosecution's case on the ground that a prima facie had not made out against them. Dissatisfied with that finding, the Public Prosecutor appealed.

Briefly the facts are as follows;

PW4 and his wife PW7, on the 27/8/1997 at about 9.40 p.m, while on their way to Masai, was stopped by the 3 respondents, travelling in a police car. PW4 was driving a Honda civic, belonging to PW3. The 3 respondents searched the said Honda and found 6 Indonesian passports in the booth of the car. PW4 could not confirm whether those passports were genuine or otherwise, as they were not his. 1st respondent then drove the Honda civic together with the 3rd respondent, PW4 and PW7 back to the construction site at Taman Sri Alam. 2nd respondent followed them from behind in a police car. Upon arrival, all of them got out from the cars except PW6. All the respondents then told PW4 and PW7 that those passports were false and demanded RM10,000.00 to close the case. PW4 then called PW3 to settle the matter with the respondents. PW3 said that the said passports were genuine and belonged to his employer who had asked him to apply for work-permits for the passport holders. The respondents refused to accept the explanation and threatened to seize the

cars and arrest them if the money was not paid. PW3 then paid RM1000.00 and PW4 paid RM3000.00 before they were released. The following day, PW3 made a police report to the Anti Corruption Agency (ACA).

Ratio decidendi:

In corruption cases, to be an accomplice, the witness who received the bribe must have the same mens rea with the principal offender, the giver. He must be the one who was abetting the offence of giving the bribe committed by the accused, by receiving it. If he received gratification innocently, the gift did not change its character to become an illegal gratification just because the giver gave it with corrupt motive or with evil intention.

In every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule or evidence that a witness is automatically an accomplice just because of his actus reus. The whole idea is completely contrary to the basic concept of criminal liability.

Principles of law decided:

Whether prosecution's witnesses (PW3, PW4 and PW7) were accomplice witness and thus unworthy of credit?

From the evidence, the witnesses did not offer bribe to the respondents but it was the respondents who took the initiative by demanding money from them. The witnesses have to accede to the respondents' demand and threat by giving them the money.

It follows therefore that these witnesses should not be presumed to be unworthy of credit. Thus s 18 of the Act applies to PW3, PW4 and PW7.

Other relevant principle of law decided in the case, if any:

At the appeal stage, the appellate court may reverse the finding of facts of the court below if the so-called finding of facts suffer from serious error or the decision is against the weight of evidence and in the process of arriving at the conclusion of fact the trial judge misdirected itself as to the law.

3. Mahmud Jamili Bin Zaudin & Anor v. PP

[1995] 4 MLJ 243

HIGH COURT (KANGAR)

Section 3 (a) (ii) of the Prevention of Corruption Act 1961

Section 4 (a) of the Prevention of Corruption Act 1961

Brief facts:

The first appellant, in Case No 61-1-89 was convicted for an offence of accepting a gratification to wit RM100, an offence under s 4(a) of the Act and punishable under s 4 and was sentenced to four months' imprisonment and a fine of RM1,000 in default two months imprisonment. In Case No 61-2-89 he was convicted for an offence of corruptly soliciting a gratification to wit RM400, an offence under s 3(a)(ii) of the Act and punishable under s 3 of the same Act. He faced a similar sentence as the first offence. As for the second appellant, he was convicted for an offence under s 4 (a) of the Act, ie abetment of an offence of corruptly accepting a gratification and faced a similar sentence.

Ratio decidendi of the case:

The appellant in this case cannot be convicted via corroborative evidence from his accomplice.

Principles of law discussed:

Evidence from accomplice can not bind the main offender;
Corroborative evidence must be corroborated with other evidence which is independent. Corroboration of co-accomplice is insufficient.

Other relevant principle of law decided in the case, if any.

The prosecution must raise reasonable doubt in order to rebut the defence of alibi.

4. ABDUL RAHMAN SAHIR & ANOR. v. PUBLIC PROSECUTOR [1995] 1 CLJ 333

HIGH COURT MALAYA, KUALA LUMPUR, DATO' SYED IDID J.
S. 4(a) of the Prevention of Corruption Act 1961 (Revised 1971)

Brief facts of the case.

Both accused were police constables. PW4 was a proprietor of a company. His two employees, one driving van BCE 6501, were stopped as the van had no haulage permit, while they were on their way to sell and deliver rice. The two employees took both accused to the Syarikat to meet their "towkay" PW4. The two accused went into PW4's office within the shop. The accused at first demanded for RM300 in return for not detaining the van. Both accused then left the shop. They returned the identity cards and driving licence to the two employees. PW4 had agreed to make monthly payments of RM60 "supaya beliau (the police) tidak buat kacau terhadap van saya". The discussion took place for some good "20 minutes". Then on 12 March 1988, accused 1 went to the shop to receive the agreed monthly sum whereupon the ACA officers arrested him.

Ratio Decidendi:

Identification parade:

Was the absence of an identification parade fatal? **Public Prosecutor v. Mohamed Bin Majid[1976] 1 LNS 104** is not applicable as there the identification parade was unfair to the accused. The fact that the witness could identify the two accused in Court on reasonable grounds which he explained is sufficient to make a parade unnecessary. The court had also accepted that PW4 could not identify the ACA officer who briefed him "kerana terdapat ramai sangat pegawai-pegawai" whereas the two accused were face-to-face in his shop.

The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance. **Law of Evidence** [1968] 12th Edition: Woodroff & Ameer Ali. The substantive evidence of a witness is his statement in Court. **Sarkar on Evidence** 11th Edition page 89. It was said in **Public Prosecutor v. Sarjeet Singh & Anor [1994] 3 CLJ 95** that "... the lack of an identification parade ... may not vitiate the trial ..."

Accomplice and corroboration of evidence:

The evidence of an accomplice requires corroboration in material particulars implicating the accused. **See s. 114(b) Evidence Act . Goh Ah Yew v. Public Prosecutor[1948] 1 LNS 13** provided a meaning of accomplice but the picture cannot fit PW4 in this case. While it is settled law that a person cannot corroborate himself, the nature and extent of corroboration necessary must depend on and vary according to the particular circumstances of each case.

In any case even where a witness is an accomplice only by reason of making a corrupt payment he is not presumed to be unworthy of credit. There are degrees of complicity of evidence and such status must always be considered in deciding whether or not corroboration can be dispensed with. In **Emperor v. Chatterbhug Sahu ILR. 38 Cal. 96** Doss J said:

If the witness has made himself an agent for the prosecution before associating himself with the wrong doers or before the actual perpetration of the offence, he is not an accomplice; but he may be an accomplice if he extends no aid to the prosecution until after the offence has been committed.

5. Tengku Mahmood v PP

[1974] 1 LNS 176

High Court Kota Bharu

Section 4(a) of Prevention of Corruption Act (PCA)

Brief facts:

The accused was convicted for agreeing to accept from the complainant a gratification, which is an offence under Section 4(a) of PCA. The accused was convicted on an uncorroborated evidence of the complainant and was subsequently sentenced to 1 day imprisonment and a fine of RM2,000 in default of payment 9 months imprisonment. The accused appealed against his conviction and his appeal was allowed.

Ratio decidendi:

[1] Complainant in this case, who alleged to have offered gratification of RM800 to the accused to get him a job (which he was turned down by the accused on the first round) is an accomplice. His evidence is to be regarded as accomplice evidence and needs to be corroborated. It is unsafe to convict upon accomplice evidence without corroboration.

[2] If a trial judge chooses to convict an accused on such evidence based on demeanor credibility alone, he must warn himself as to the danger and apply this test : Whether it is safe to convict on uncorroborated evidence of an accomplice based on demeanor alone?

- [3] Impression as to demeanor of a witness must be critically tested against the totality of his evidence as per *Tara Singh v PP* [1949] *MLJ* 88.
- [4] A judge of fact should always test the complainant's evidence against the totality of his evidence and the probabilities of the case. Failure to do so amounts to misdirection. An allegation of corruption is a grave issue hence the conclusion as to credibility of the complainant must be satisfactorily done.
- [5] Reports/complaints must be made voluntarily and at the earliest convenient. It must not be made after a long lapse of time (in this case 13 days) as to allow fabrication hence inadmissible.

Other principles of law decided:

An evidence of accomplice must be corroborated unless the trial judge has taken all the necessary steps and tests to come to a conclusion that the complainant/accomplice is a credible witness and his demeanor satisfactory. A trial judge must direct himself to weight the complainant's evidence against the totality of his evidence and the probabilities of the case. An allegation of corruption is a serious one, what more when the complainant is the person who alleged to have offered the gratification. Thus issue on demeanor and credibility must be thoroughly and critically given consideration and be dealt with.

6. PP Iwn. Noordin Abu Bakar

[2008] 8 CLJ 504

High Court Malaya, Johor Bahru

Sections 10(a)(bb); 11(a) , 16 & 42(1) Anti Corruption Act 1997

Brief facts:

This is an appeal against the Sessions Court Judge's decision on the 3 charges preferred against the accused (i) that on the 1.12.2002 at Pasar Malam Taman Tuanku Ungku Tun Aminah, Skudai, Johor the accused, a police officer with PDRM did corruptly obtained a gratification to wit, cash RM1000.00 for himself from Tay Soa Eng not to take action on him for selling fire crackers an offence under s. 10(a)(bb) of ACA 1997; (ii) that on 1.12.2002, the accused, a police officer did corruptly received/accept RM500.00 for himself from Tay Soa Eng an offence under s 11(a) of ACA 1997 and (iii) that on the 12.1. 2002, the accused, a police officer had corruptly received/accept RM500.00 from Tay Soa Eng an offence under s 11(a) of ACA 1997.

The accused was acquitted and discharge from the 1st and 2nd charges. The prosecution appeal against the acquittal and discharged. For the 3rd charge, scj of the finding that the presumption under s. 42 of the Act applies and the accused was called to enter his defence. The accused gave his defence and no other witnesses called. The accused was sentenced to 6 months imprisonment and fine RM10,000.00 in default 6 months imprisonment. The accused appeal against conviction and sentence.

Principles of law:

- [1] The independent evidence of the complainant Tay Soa Eng (SP1) was not corroborated and had failed to prove the first element of the 1st and 2nd charges. Hence the presumption under s. 42(1) of ACA 1997 does not arise at all.
- [2] For the 3rd charge, SP1 evidence were corroborated with the evidence of SP3, SP4, SP6 and SP9. Furthermore the trapped money which was found in the accused trouser's pocket, is a clear proof of the offence committed.

[3] Once the presumption under section 42(1) of ACA 1997 applies, the burden shift to the accused to rebut the presumption on the balance of probabilities. The legal burden is higher than to raise reasonable doubt but lighter than the burden of the prosecution to prove his case beyond reasonable doubt.

Corroboration – see *Attan bin Abdul Ghani v Public Prosecutor* [1969] 1 LNS 12; [1970] 2 MLJ 143 (supra,pg.90)

7. Mohamed Din v. Public Prosecutor

[1985] 2 MLJ 251.

This is a decision by Gunn Chit Tuan J. It's a Criminal Appeal. The ACJR of Kuala Lumpur had decided this case.

Section 3(a) (i) Prevention of Corruption Act 1961;

Section 4(a) of the same Act.

Section 2 of the same Act.

Facts of the case:

The appellant was charged in the Sessions Court with two offences under the Prevention of Corruption Act 1961. He was acquitted on the first amended charge under Section 3(a)(i), but was convicted on the Second amended charge under Section 4(a) of the Act for corruptly accepting a gratification of \$23,773.50, and was sentenced to one day's imprisonment and a fine of \$5,000 in default of one year's imprisonment. He was also ordered to pay a penalty of \$23,773.50. The appellant appealed to the said Order. The appellant averred that the learned trial Judge had failed to make any finding as to whether or not PW12 was an accomplice or whether or not he was a credible witness, and there was no corroborative evidence; and prima facie case had not been made out. The High Court had allowed that appeal.

Ratio Decidendi:

In this case, there was no independent evidence to corroborate the evidence of PW12.

Principles of law decided:

PW12 was an accomplice whose evidence should be treated with great suspicion and whose evidence should be independently confirmed on every material circumstance.

8. THAVANATHAN BALASUBRAMANIAM V PUBLIC PROSECUTOR [1997] 3 CLJ 150

FEDERAL COURT, KUALA LUMPUR

Evidence Act 1950, Ss 6, 7, 8, 9, 10

S66 of the Courts of Judicature Act 1964 (repealed 24/6/1994)

Brief facts in case:

The applicant (the accused in the Sessions' Court) was charged under s3(a)(i) of the Prevention of Corruption Act 1961, for corruptly soliciting for himself a sum of RM15,000.00 from one Wong Sow Ying through one Por Choo Aik alias William and under s4(a) of the same Act for corruptly accepting for himself the said RM15,000.00 from one Por Choo Aik through one Ong Leong Chuan as an inducement to acquit and discharge the said Wong Sow Ying of an offence in a criminal case. He was discharged and acquitted by the Session's Court Judge on both charges, but on appeal by the SFC, he was ordered to enter defence on the second charge under s4(a) for corruptly accepting the said sum before the same presiding judge whom later ordered him to be discharged and acquitted. On appeal before another High Court Judge by the SFC, he was found

guilty and convicted and was sentenced to 3 years imprisonment and a fine of RM5000.00 in default 12 months imprisonment.

Ratio decidendi of the case:

The question of law referred to the Federal Court under s66 of Court of Judicature Act 1964 should not be questions that are of personal interest only to the accused or to the Public Prosecutor but should be questions that are of public interest, so that the references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court.

Principles of law decided:

The issue: Whether it is opened to a second Appellate Court to analyze, comment and take into account the evidence adduced on a charge of which an accused person had been acquitted to support his conviction on a second remaining charge.

The answer is in the affirmative as it is not only the right, but also the duty of the Court to see that justice is done and seen to be done in all cases brought before it. If there was reasonable suspicion of a wrong conviction of the offence, opportunity ought, in the public interest, be given to have it reconsidered and, if appropriate, be corrected.

Other relevant principle of law decided:

(a) Evidence – corroboration;

Three (3) requirements need to be present before evidence can constitute corroboration;

- (i) The evidence in itself be admissible;
- (ii) The evidence must come from a source independent of the evidence requiring to be corroborated; and

- (iii) The evidence be such as to tend to show, by confirmation of some material particular, not only that the offence charged was committed, but also it was committed by the accused..

(b) Evidence – Relevancy

The cardinal rule relating to relevancy is that, subject to the exclusionary rules, all evidence which is sufficiently relevant to the facts in issue is admissible.

Relevant evidence is evidence which makes the matter which requires proof more or less probable.

9. Mazlan Bin Lemman Vs public Prosecutor

[2002] 1 LNS 63

High Court (Kuala Lumpur)

Section 45 (3) of the Prevention of Corruption Act, 1961

Section 18 of the Prevention of Corruption Act, 1961

Brief facts of the case:

The appellant in this case was charged with accepting a bribe or RM100.00 to wit as an encouragement or to prevent him from seizing a trishaw owned by one Ali B. Munir who was conducting a business as a hawkers without a valid license. The accused was then found guilty and was sentence to one month imprisonment and fine of RM10,000.00 and in default 3 month imprisonment. Unsatisfied with the decision the appellant filed an appeal to the High Court.

Ratio decidendi:

Defence counsel raised a preliminary objection that cautions statement under section 45(3) are inadmissible. The learned Judge findings that section 45 (3) of the Prevention of Corruption Act, 1961 clearly states that:

“hendaklah, walau apa pun mana-mana undang-undang bertulis atau rukun yang berlawanan, boleh diterima sebagai keterangan dalam perbicaraan orang itu”.

Principles of law decided:

Based on section 18 of the Prevention of Corruption Act 1961 the Learned Judge found that even if the complainant was an “accomplice”, but if his statement is corroborated “materially” by an independent witness, this would not render he is an “accomplice per se”.

Section 44 of the Prevention of Corruption Act 1961 also referred:

Section 44 (1)(a) Tiada saksi boleh dianggap sebagai rakan jenayah hanya semata-mata kerana saksi itu telah:-

(ii) memberikan apa-apa suapan; atau

Circumstantial Evidence

5.3 Circumstantial Evidence:

5.3.1 Introduction:

Circumstantial Evidence in corruption cases can be seen on indirect evidence leading to the commission of the offence. It must connect the Accused and the crime. It is distinguished from direct evidence, which, if believed, proves the existence of a particular fact without any inference or presumption required. Circumstantial evidence relates to a series of facts leading to the commission of the offence other than the particular fact sought to be proved.

Many circumstances can create inferences about an accused's guilt in a criminal matter, including the accused's resistance to arrest; the presence of a motive or opportunity to commit the crime; the accused's presence at the time and place of the crime; any denials, evasions, or contradictions on the part of the accused; and the general conduct of the accused.

In *Ratanlal and Dhirajlal in Law of Crimes (5th Edition)*, Vol. 2 sets out the law on circumstantial evidence that:-

"..In a case where there is a plethora of circumstances which are plenty and overlapping and are so twined so as to form a stout cord which rope in the accused in such a way that the escape from the conclusion of their guilt becomes difficult, may, impossible, the conviction may be based on circumstantial evidence. For a crime to be proved, it is not necessary that the crime must be seen to have been committed and must in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. The offence can be proved by

circumstantial evidence also. The principal fact or 'factum probandum' may be proved indirectly by means of certain inferences drawn from 'factum probans', that is the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together, they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed..."

However it is equally clear that no conviction of guilt can be made unless the circumstances and evidence point unerringly to the guilt of the accused person. In other words, the circumstances should be such that no other conclusion can be reached save that of the guilt of the accused. In considering the circumstances it is the cumulative effect of the chain of continuing circumstances that must be taken into account. In *Naseem Ahmed v. Delhi Administration* AIR [1974] SC 691, Chandrachud J. .

"Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope" (see **Chun Chwen Kong v. Public Prosecutor** [1962] 1 LNS 22; [1962] MLJ 307).

Relevant case :

1. Abd Khalid bin Abd Hamid v Public Prosecutor [1995] 1 MLJ 692

High Court (Kuala Lumpur)

Section 3(a) ii of Prevention of Corruption Act 1961

Section 2 of the Act – *Terms "public body" and "public officer"*

Section 30 of the Evidence Act 1950 – *Consideration of proved confession affecting person making it and others jointly under trial for same offence.*

Brief facts:

The appellant was a public officer serving in the Ministry of Finance, Malaysia. The prosecution alleged that the appellant abetted one Paramadas, a clerk attached to the Department of Inland Revenue, to corruptly solicit and receive a gratification of RM1,300.00 from the proprietor of Evergreen Horticulture Nursery and Trading Co ('Evergreen'), as a reward for the appellant to expedite the issuance of an approval letter ('the approval letter') for registration of Evergreen with the Ministry of Finance as one of its contractors, in contravention of s 3(a)(ii) of the Prevention of Corruption Act 1961 ('the Act') read in conjunction with s 109 of the Penal Code. The appellant was sentenced to ten months' imprisonment and fined RM7,000 in default six months' imprisonment by the Sessions Court Judge. The appellant appealed against his conviction and sentence. Paramadas, who was the second accused, was convicted on a charge under s 3(a)(ii) of the Act, but did not appeal. The appeal was dismissed and sentence confirmed.

Principles of law:

- [1] After having proved that Paramadas was a 'public officer' within the meaning of the Act and that the gratification solicited had been paid and received by Paramadas, it is unnecessary for the prosecution to prove that it was within the power of Paramadas to do the act represented by him to Evergreen.

- [2] There was sufficient circumstantial evidence connecting the appellant with Paramadas and the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.

- [3] The purposed of adducing evidence of similar facts was justifiable. They were admissible in evidence as their probative value outweighed their prejudicial value.
- [4] Where a co-accused gives evidence on his own behalf against the other co-accused, the co-accused who has given the incriminating evidence is not to be regarded as an accomplice. Thus, corroboration of Paramadas's evidence was not needed. However, this rule applies only to witnesses called for the prosecution.

Agent Provocateur / Entrapment

5.4 Definition

Generally, an *agent provocateur* is a person employed by the police or other entity to act undercover **to entice or provoke** another person to commit an illegal act. More generally, the term may refer to a person or group that seeks to discredit or harm another by provoking them to commit a wrong or rash action. An agent provocateur is normally employed to associate with suspected individuals or groups with the purpose of inciting them to commit acts that will make them liable to punishment.

Entrapment on the other hand is the act of a law enforcement agent *inducing* a person to commit an offense which would be illegal and the person would otherwise have been unlikely to commit.

There is no legal definition on the term 'agent provocateur' but in Black's Law Dictionary (7th Ed), it defines an agent provocateur as:

"[1] An undercover agent who instigates or participates in a crime, often by infiltrating a group involved in suspected illegal conduct, to expose and punish criminal activity;

[2] Person who entraps or entices another to break the law and then informs against the other as a lawbreaker."

While the Concise Oxford Dictionary (9th Ed) defines an agent provocateur as:

"a person employed to detect suspected offenders by tempting them to overt self-incriminating action. [French, = provocative agent]"

Archbold, Criminal Pleading Evidence and Practice (2002 Ed) carries the definition of the UK Royal Commission on Police Powers 1928, which defined on agent provocateur as:

“... a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such offence.”

The keywords in the above definitions of an agent provocateur are closely related to the activities of instigation, participation, enticement and temptation that resulted in an entrapment of the suspect or accused person. Therefore, since search and references to case law does not render much help as to the definition of an agent provocateur. Nevertheless the cases do throw some light as to what sort of activity or transaction that can transform an agent into an agent provocateur. In short there must be an overt act or acts of the agent to instigate by way of active participation that eventually enticed and tempted the intended target to commit the criminal offence.

5.4.1 Application in cases

In many jurisdictions, the presence of agent provocateur is accepted as a mitigating for a crime while entrapment is a possible defense against criminal guilt. Evidences given by an agent provocateur must not be accepted by the court without any corroboration for it is dangerous for the court to convict an accused solely on the evidences given by an agent provocateur when such offence was enticed or provoked.

1. MOHD ALI JAAFAR V PUBLIC PROSECUTOR

[1998] 4 MLJ 210

HIGH COURT (MELAKA)

Prevention of Corruption Act 1961 ss 3(a)(ii) & 4(a)

Brief facts:

The appellant was found guilty by the sessions court judge ('the judge') for soliciting sexual favours from the complainant at the Immigration Office, Melaka under s 3(a)(ii) of the Prevention of Corruption Act 1961 ('the Act') -- the first charge -- and for attempting to obtain sexual favours from her under s 4(a) of the Act -- the second charge. He was convicted on both the charges and sentenced to three years' imprisonment in respect of the first charge and 11/2 years' imprisonment in respect of the second charge. The appellant appealed against the convictions and sentences imposed. The appeal was confined to the following grounds: (i) the admissibility of several tape recordings and transcripts adduced at the trial; (ii) that the oral evidence adduced was insufficient to support a conviction even if the tape recordings were admissible; and (iii) whether on the facts of the case there was an attempt to obtain sexual favours with regard to the second charge.

Ratio decidendi of this case:

It is irregular to hold a trial within a trial in order to admit a tape recording in evidence. It is admissible upon being tendered through its maker after proof of the matters referred to in *Parsons*. The maker would be the person who participated in the recorded conversation. In this case, it would be the complainant. To hold a trial within a trial to determine such matters would, as Kilner Brown J said in *Stevenson*, lead to the ludicrous situation that in every case where it is alleged that the prosecution evidence is fabricated such an inquiry would have to be undertaken.

However, a trial within a trial is required to admit a tape recording if its admissibility is subject to conditions like, for example, voluntariness.

The proof of a tape recording, being a document within the meaning of s 3 of the Evidence Act 1950, is governed by ss 61 to 66 of the same Act pursuant to which the recording must be proved by being produced for the inspection of the court or by secondary evidence. Thus the tape recording must be played over in court before it can be admitted in evidence. In determining the admissibility of a tape recording, it is necessary to bear in mind what it is that is being sought to be admitted.

It is perhaps appropriate at this stage to consider the matters that must be established when introducing evidence of a tape recording. They are as follows:

- (a) the tape was run through and found to be clean before the recording was made;
- (b) the machine was in proper working order;
- (c) the tape was not tampered with or altered in any way -- it should be established in whose possession the tape was at all times;
- (d) the officers (or other witnesses) played the tape over after making the recording and heard voices which they can identify;
- (e) a transcript was prepared of the voices; if it was just taken down in shorthand and the typed transcript prepared from the shorthand notes then the notes should be saved;
- (f) the officers (or other witnesses) played over the recording and checked it with the transcript as to the identity of the voices and as to the conversation.

Other principles of law decided:

There was sufficient evidence to show that the appellant had attempted to obtain sexual favours from the complainant. There were steps taken towards the actual commission of the offence.

The case of *Ramli Sutu v Public Prosecutor [1998] 5 CLJ 671* is a case whereby the accused was convicted in the Sessions Court under Section 4(a) of the PCA for corruptly accepting gratification of RM1000 from PW1. His defence was that the money was accepted as sponsorship given by PW1 for a certain sport event organized by the accused's department. Accused appealed against the said conviction and his appeal was allowed.

It was held that an evidence of trap witness must be corroborated by independent evidence and shall not be corroborated by another trap witness evidence. When there is an evidence of innocence (rebuttal to Section 14 of PCA) in the earlier part of the case (i.e investigation), it must be investigated and form part of the prosecution's case. When there is discrepancy in evidence, it must be resolved in the accused favour as such evidence is unreliable without any corroboration.

In *Dato'Haji Azman Bin Mahalan v Public Prosecutor [2007] 4 MLJ 142*; the appellant appealed against the decision of the sessions court judge who found the appellant guilty of the charges of corruptly having given gratification to wit, a sum of RM2,000 on the first charge and further sum of RM5,000 on the second charge as an inducement to Mohd Kamal bin Rabaai (PW1) in order that the said Mohd Kamal will not accept settlement from Pazli bin Abdullah Sani (PW6) so that Pazli bin Abdullah would remain a bankrupt and would not be qualified to contest against the appellant for the post of division head of UMNO, both the offences are

under s 10(b)(aa) of the Anti Corruption Act 1997 ('Act') and punishable under s 16 of the same Act.

The charge against the appellant read as follows :-

First charge

Bahawa kamu pada 6 April 2001, jam lebih kurang di antara 6 hingga 7 petang, di rumah No 29, Lengkok Pasar, Rapat Setia, Ipoh, di dalam Daerah Kinta, di dalam negeri Perak, secara rasuah telah memberi suapan iaitu, wang tunai sebanyak RM2,0000 kepada Mohd Kamal bin Rabaai, sebagai dorongan untuk Mohd Kamal bin Rabaai supaya tidak menerima tawaran penyelesaian daripada Pazli bin Abdullah Sani, yang telah dihukum muflis akibat tuntutan hutang ke atasnya oleh Mohd Kamal bin Rabaai agar Pazli bin Abdullah Sani akan kekal muflis dan tidak layak bertanding menentang kamu bagi jawatan Ketua UMNO bahagian Tapah pada 22 April 2001 dan dengan demikian, kamu telah melakukan suatu kesalahan di bawah s 10(b)(aa) Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia Akta 575) dan boleh dihukum dibawah s16 Akta yang sama

Second Charge

Bahawa kamu pada 9 April 2001, jam lebih kurang di antara 8.30 hingga 11 malam, di rumah No 29, Lengkok Pasar, Rapat setia, Ipoh, di dalam Daerah Kinta, di dalam negeri Perak, secara rasuah telah memberi suapan iaitu, wang tunai sebanyak RM5,0000 kepada Mohd Kamal bin Rabaai, sebagai dorongan untuk Mohd Kamal bin Rabaai supaya tidak menerima tawaran penyelesaian daripada Pazli bin Abdullah Sani, yang telah dihukum muflis akibat tuntutan hutang ke atasnya oleh Mohd Kamal bin Rabaai agar Pazli bin Abdullah Sani akan kekal muflis dan tidak layak

bertanding menentang kamu bagi jawatan Ketua UMNO bahagian Tapah pada 22 April 2001 dan dengan demikian, kamu telah melakukan suatu kesalahan di bawah s 10(b)(aa) Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia Akta 575) dan boleh dihukum dibawah s 16 Akta yang sama.

It was held by the appeal court that the learned session's judge was wrong in accepting the evidence of PW1 whom acted as an agent provocateur in the commission of the crime and when giving his evidence he had exceeded his role as a witness and therefore should have made him an accomplice in the crime. Being an agent provocateur or accomplice in the crime then renders his evidence to be corroborated by another witness with no interest in the matter.

For a witness to not fall into the category of an accomplice but rather an agent provocateur, one would have to prior to the committing of the crime submit to the authorities by giving timely information with a view of protecting his own interest or that of others and pretends to associate with the culprit with the objective of preventing such offence.

An agent provocateur however also plays a role similar to an accomplice in most cases where traps are laid. Although similar, they are not the same. They can be said to be two peas in a pod. However, this particular fact is the reason why their evidences must be fully and carefully scrutinized by the courts before convicting an accused. In *Lietenant Hector Thomas Huntley v Emperor 2944 AWR (FC) 66*; it was laid by the court that:-

“A charge under section 161, Indian Penal Code, is one which is easily and may often be lightly made, but it is the very nature of things difficult to establish, as direct evidence must in most cases

be meagre and of a tainted nature. These considerations cannot however be suffered to relieve the prosecution of any parts of the burden which rests upon it to establish the charge beyond reasonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exist for taking the view that however strong the suspicion raised against the accused every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal.”

However, it must be noted that where a crime is promoted by a police officer from beginning to the end, then the trap laid by him must be considered illegitimate. This was supported by the case of *Veeral alias Kanal, In re* 1970 Cr LJ 1020 at pg 1025 : AIR 1970 Mad. 298 : 1969 Mad Lw (Cr) 231 : (1970) 1 MLJ 560 : 1970 MLJ (Cr) 346; it was held that the witness was no better than an accomplice and her testimony, because of her subsequent conduct in not disclosing to anyone the fact that the accused had killed her own newborn after the accused was brought to her house was not above suspicion.

An opposite example of the above where the evidences of a witness who does not fall into the category of an accomplice can be seen in the case of *Pingal Khadia and others v The State* 1969 Cr LJ 1255 at p.1257 : AIR 1969 Orissa 245; see *Veeral In re*, 1970 Cr LJ 1020 at pg 1025 : AIR 1970 Mad. 298 : 1969 Mad Lw (Cr) 231 : (1970) 1 MLJ 560 : 1970 MLJ (Cr) 346; where the accused invited the prosecution witness to take liquor at a certain place but instead of serving the witness with liquor, the witness saw the victim's dead body tied with ropes and was being removed towards a nearby paddy field. The defence in the case had failed to suggest as to why the witness deposed against the accused to falsely implicate him. It was held that the witnesses were not accomplices and that their evidence could be relied upon without any corroboration.

But bear in mind that no matter how noble an intention is, but if such intention instigates the commission of a crime, then such witness under the law is an abettor and therefore would fit him in the category of an accomplice. Trap witnesses i.e. agent provocateurs being partisan in nature do require corroboration before implicit reliance can be placed upon them. Their Lordships of the Supreme Court in *State of Bihar v Basawan Singh AIR 1958 SC 500* observed the correct rule to be : “if any of the witnesses are accomplices who are *particeps criminalis* in respect of the actual crime charged, their evidence must be treated as the evidence of an accomplice is treated, if they are not accomplices but are partisan or interested parties who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case, the court may even look for independent corroboration before convicting the accused.”

The case of *Bhanuprasad Hariprasad Dube v State of Gujerat AIR 1968 SC 1323 : 1968 Cr LJ 1505 : 1968 Cr AR 144 : 1968 SCD 1026 : 9 Guj LR 853*; the Supreme Court held that for the evidence given by partisan witnesses, the corroboration required is a general corroboration and not material corroboration as in the evidence of an accomplice. (*Khembu Ram v The State, 1972 Cr LJ 381, 384-385 : 1971 Sim LJHP 289*)

Sadavisam J quoted with the approval from Soonavala Law in reference to Bribery and Corruption as follows :-

“There are two kinds of trap: ‘a legitimate trap’ where the offence has already been born and is in its course, and ‘an illegitimate trap’ where the offence has not yet been born and a temptation is

offered to see whether an offence would be committed, succumbing to do or not.”

Therefore, as a rule of prudence the evidence of a trap-witness i.e. agent provocateur connecting the accused with the crime of bribery, where against that witness allegation of ill-will towards the accused are made, requires corroboration as stated in *Major Barsav v State of Bombay AIR 1961 SC 1762*; where the Supreme Court emphasized on the proposition that although a trap witness is not an approver, he is certainly an interested witness in the sense that he is interested to see the trap laid by him succeeded. But the evidence of a trap-witness is not tainted evidence and it would only make a difference in the degree of corroboration required rather than of necessity for it. (*Ganadhesh v Khandeparkar, 1968 Cr LJ 925, 926 : AIR 1968 Goa, Daman and Diu, 63*)

In short, the court plays an important role when it records the evidence of a trap-witness i.e. agent provocateur for the court would have to determine the role played by the agent and his interest in the matter to come to a conclusion if the witness is an independent witness or an accomplice.

Chapter 6

Protection of witnesses

6.1.1 Introduction

Can a witness be charged and considered as an accomplice in a corruption case? This has been an issue long discussed. In order to discuss the said issue, case law should be the perfect medium to differentiate between an accomplice and a mere witness.

6.1.2 Case Law

1. Ahmad Shah Bin Hashim v Public Prosecutor

[1980] 1 MLJ 77

Federal Court, Kuala Lumpur,

Raja Azlan Shah Ag LP, Chang Min Tat, Syed Othman FJJ

Background of the case

The accused was charged with corruption in relation to a recommendation to the government to purchase a certain type of aircraft. The accused in this case was an Air Force Officer. The accused alleged that although he solicited the amounts alleged he did so at the request and on behalf of another air force officer. In his statement to the police which was put in by the prosecution, the accused mentioned the allegations against the other officer. The person alleged to have given the bribes gave evidence for the prosecution.

Held by the High Court:

[1] On the facts, the defence had not raised any reasonable doubt in the prosecution's case and therefore the accused must be convicted;

[2] Although the statement of the accused, to the police was put in by the prosecution and contained allegations which seem to contradict the evidence led by the prosecution, the court was entitled to assess the evidence and in so doing accept part of the statement and reject the rest;

[3] Although the person who gave the bribes was an accomplice, it was the accused who solicited the bribe, and therefore that person could not be classified as an accomplice of the first degree, and in any event there was corroboration by documentary and circumstantial evidence.

Held at the Federal Court:

[1] As the finding of the trial court depended on an assessment of the credibility and reliability of the witness, it is not the practice of the court sitting on appeal to refuse to accept it;

[2] There was no reason to disturb the High Court's findings of fact or the conviction and sentence.

2. Zainal bin Hassan @ Jahinal

[2009] 8 MLJ 878

High Court (Kota Kinabalu)

Criminal Appeal No. K42-12 Of 2005

Yew Jen Kie JC

Background of the case

The appellant was charged at the session's court on two charges of corruption. PW8 had applied to Ranau District Council to rent certain premises. The appellant had asked PW8 for RM60,000.00 to facilitate her application. PW8 reported the matter to ACA and a trap was planned.

Counsel for the accused submit that the learned trial judge had erred in finding that PW8 was not an accomplice given that she was an active participant in the crime. As PW8 was an accomplice, argued counsel, as a rule of prudence her evidence ought to be corroborated.

Held by the High Court:

The High Court judge in this case fully agrees with the learned trial judge's finding that PW8 is not an accomplice. The evidence shows that after her successful application for renting certain premises at Ranau to run a gymnasium and cafeteria, she forwarded the duly completed draft lease agreement to Ranau District Council for their further action. She heard nothing from the council for a long time after which led her to make inquiry at the council. At the council, she met the appellant who told her that it was still under process and that he would help her with the matter. At their second meeting in March 1998, she asked the appellant about the agreement and the appellant told her that it would require some "pengorbanan", that is, money to get the signature for the agreement. The appellant then asked for RM60,000.00. The foregoing facts shows that the appellant had taken advantage of PW8's anxiety and eagerness to get the lease agreement signed and executed by demanding money from her. PW8 was put in a spot, for she could be either accede to the demand or reported the matter to the Anti-Corruption Agency. She opted the latter. Although the learned trial judge did not make a finding whether PW8 was a trap witness, the evidence that she had reported the matter to the ACA

and subsequently took part in the trap to arrest the appellants is sufficient to make her a trap witness.

6.1.3 Conclusion

In protecting a witness from being charged as an accomplice, the above cases showed that the manner and conduct of the witness plays an important factor. In both cases although the witnesses plays an active role which can be regarded as accomplice but they are merely “trap witnesses” and they also plays an active in reporting the offence to the ACA and in the apprehension of the accused.

Chapter 7

Defence

7.1.1 Onus of proof on the defence

At the defence stage, no doubt the accused person has to discharge the onus of proof on the balance of probabilities. However, it was also noted that while in the process of discharging the onus, and giving his explanation, it is expected that the court must assess whether the accused succeed in creating a doubt. On the other hand, even if the accused may fall short of that, the court must also determine whether the prosecution has proved the offence beyond reasonable doubt. This is because, relying on the statutory presumption alone may not be safe.

In the case of *Asman bin Zaini & Ors c, PP [2008]MLJU 278*, the appellants were employees of Dewan Bandaraya Kuching Utara. Each charged under sec.11(a) of the Anti-Corruption Act 1997, and the prosecution relied on presumption under sec.42 as to the gratification having been corruptly received. All were convicted and sentenced to imprisonment for a term of 6 years for conviction on each charge together with a fine of RM 10,000 in default 3 months' imprisonment. The sentence was to run concurrently.

On appeal, Linton Albert J, allowed the appeal as convictions were unsafe on account of serious error in judgment which occasioned a failure of justice, and fatal to conviction and incurable under sec.422 of the Criminal Procedure Code. A retrial was ordered. In that case, it was held:

[1] The learned Sessions Court Judge was decidedly justified in disbelieving the common defence put forth by the appellants and on that basis finding that the appellants had not rebutted the presumption of receiving

the gratification. That however did not detract from the all –important requirement that it was incumbent upon the trial judge to go further and consider whether ,regardless of the falsity of the defence,the appellants had nevertheless cast a reasonable doubt on the prosecution case. The statutory presumption under sec.42 merely relieved the prosecution from having to prove one of the essential ingredients of the offence under sec.11(a) ,but did not relieve the prosecution of proof of the other essential ingredients of the offence for which the appellants were charged;

[2] Where ,as here,a conviction was recorded simply and automatically from a finding that the appellants had failed to rebut the statutory presumption on one of the several essential ingredients which constituted the offence,it invariably mean that the conviction was premised on that ground alone and the failure to consider whether the appellants had on the whole evidence adduced failed to cast a reasonable doubt on the prosecution case constituted a serious error which rendered the convictions unsafe. The finding of guilt upon the failure of the appellants to rebut a statutory presumption on one of the ingredients of the offence on a balance of probabilities defied the fundamental principles of our criminal law on two important aspects : firstly,the trial judge must,at the end of the case for the defence consider all the evidence adduced at the trial and determine not only whether the prosecution had discharged the legal burden of establishing its case beyond reasonable doubt but also whether the defence had discharged the evidential burden of raising a reasonable doubt in the case for the prosecution;secondly ,the standard of proof required to discharge the evidential burden placed on the defence was certainly lighter than that required to rebut the statutory presumption relied on by the prosecution at the trial.

1. ROSLI MAHAT v. PUBLIC PROSECUTOR

[2004] 1 LNS 604

HIGH COURT MALACCA – CRIMINAL APPEAL NO 61-2 YEAR 2001

WIRA LOW HOP BING J

Section 11(a) of the Anti Corruption Act 1997

Section 422 of the CPC

On validity of charge challenged by the defence

Brief facts:

This is appeal case by the Appellant against the decision of the learned sessions court judge (“the trial judge”) who was found the accused guilty and convicted him for the offence under Section 11(a) of the Anti Corruption Act 1997 and punishable under Section 16 of the same Act (Law of Malaysia Act 575). The Appellant who was police officer on duty in the Crime Prevention Unit of the Police Station in Masjid Tanah, Alor Gajah, Melaka did corruptly accept for himself a gratification, to wit, RM200 from one Mohd Sani B Mohd Hassan as inducement for forbearing to take legal action against him who was alleged to have sold pirated compact disc and for deleting his name which was said to be listed in the Alor Gajah Police Station for commercial crime and motorcycle offence.

Ratio decidendi:

[1] Section 422 of the CPC may be invoked so that the finding, sentence or order made by the sessions court shall not be reversed or altered on account of any error, omission or irregularity in the charge unless such error has occasioned a failure of justice.

[2] For the burden of proof, the judge applied the lighter burden of casting a reasonable doubt which is more favourable to the accused who has to rebut the statutory presumption on a balance of probabilities.

Principles of the case:

From day one when the charge was preferred against the accused in the session's court and earlier appeal, no challenge to the charge was ever raised by the defence and therefore, the learned judge was unable to uphold the defence contention on this ground. Besides that, the learned judge has affirmed that once ingredients under Section 11(a) of the Anti Corruption act 1997 successfully proved, then presumption under Section 42(1) arises, and the burden is shifted to the accused to rebut it on a balance of probabilities.

In this case, the defence counsel prays for the sentence to be reduced as the sentence passed by the trial judge was excessive. However, the learned judge affirmed the decision by the trial judge as the sentence of two months imprisonment is within the term described under Section 16(a), while the fine of RM10,000 is obviously within the statutory limit prescribed in Section 16(b).

Relevant cases:

1. Sahari Masrom v PP

[2008] 1 LNS 584

High Court Muar, Johor

Sections 10(a)(aa) and 11(a) of ACA 1997

Brief facts:

This is an appeal against the scj decision on the 2 charges preferred against the accused i.e.

(i) that in the month of August 2001 at 10.00 pm at a stall Ikan Bakar Teck Soon, inside Restoran Fook Hwa, Jalan Haji Manan, Kluang Johor the

accused, a police Sarjan Polis No. RF 75685 attached to Unit Pengurusan IPD Kluang Johor did corruptly obtained a gratification to wit, cash RM1000.00 for himself from Lee Siew Lian as a inducement to close the investigating paper No. 789/01 based on Kluang Report 4563/01 and thereby committed an offence an offence under s 10(a)(aa) of ACA 1997 punishable under s 16 of the same;

(ii) that on 26.9.2002, the accused, a police Sarjan Polis No. RF 75685 did corruptly received/accept RM500.00 for himself from one Foo Leng through one Lee Siew Lian an offence under s 11(a) of ACA 1997 as an inducement to close the investigating paper No. 789/01 based on Kluang Report 4563/01 and thereby committed an offence an offence under s 11(a) of ACA 1997 punishable under s 16 of the same Act.

The accused was convicted on both charges and hence the present appeal. Upon appeal the conviction and sentence in respect of the first charge was set aside and the appellant was acquitted of the same. However the appeal against the second charge was dismissed and the conviction and sentence thereof affirmed.

Principles of law:

Legal Presumption under s 42 of ACA 1997

On account that the second ingredient of the offence (2nd charge) has been proven, the burden now shifted to the appellant to rebut the said presumption on a balance of probabilities. The rule in *Thavanathan a/ Balasubramaniam v PP* [1997] 3 CLJ 150; [1997] 2 MLJ 401, 402 was “...it was for the accused to give an innocent explanation which the court considered more likely than not that it was true...” (also *Attan bin Abdul Ghani v Pendakwaraya* [1996] 1 LNS 12; [1970] 2 MLJ 143 and *PP v Ku Yahya Ku Bhari & Anor* [2002] 1 CLJ 113).

2. Chew Chee Sun v PP

[1975] 2 MLJ 58

Supreme Court, Singapore

Legislative authorities referred/followed:-

Ss 6, 8 and 13 Prevention of Corruption Act (Cap. 104)

Case law authorities referred/followed:-

PP v Yuvaraj [1969] 2 MLJ 89

Brief facts:

This was an appeal against the conviction of the appellant on two charges of corruption under the Prevention of Corruption Act. The appellant was in the employment of the Ministry of National Development and it was proved that he had received two sums of money from a company, which had a construction contract with a department of the Ministry. The defence was that the two sums were paid to and received by the appellant as the agent of his brother in connection with the sale of a piece of land in Penang.

Ratio decidendi:

In dismissing the appeal, the judge reasoned that the appellant had failed to discharge on a balance of probabilities the onus of showing that the qualification was not paid or given or received corruptly as a reward for doing or forbearing to do an act in relation to the affairs of the Government and therefore the appellant was rightly convicted of the offences. The presumption under our section 8 is less wide and is limited to acceptance of a gift in cash or in kind "from a person or agent of a person who has or seeks to have any dealing with the Government or any department thereof or any public body". He opined that the observations as regards corruption in the public service made by the Privy Council apply with much greater force in Singapore.

**3. PP v LEONG CHEN KONG
CRIMINAL APPEAL NO. 42 – 16 –OF 1997 (HIGH COURT
SANDAKAN)**

SEC 2 (1) ORD 22 EMERGENCY 1970, SEC 2 OF THE PREVENTION OF CORRUPTION ACT 1961 AND SEC 180 OF THE CRIMINAL PROCEDURE CODE

Brief facts:

The Respondent had been charged under Sec 2 (1) Ord 22 Emergency 1970. The learned Sessions Court judge had DNA the Respondent. The Counsel for the Respondent contended that the decision made by the learned Session Court Judge should be affirmed as even the standard of proof that was relied at the end of the Prosecution case was error prevailing standard of 'beyond reasonable doubt'. The learned DPP replied the test used was wrong and urged the Court to retrial. The learned Counsel objected to it. In the Appeal stage, the High Court dismissed the appeal by the appellant and no order for retrial.

Ratio decidendi of this case:

In the present case the act complained of was committed in 1992. The charge was filed before 31.01.1997. Accordingly the test applicable at the end of the Prosecution case should have been one of 'beyond reasonable doubt'. The test applied before in the trial court as well as the in the 1st Appeal, namely on 'Prima Facie' at the end of the Prosecution case was therefore wrong and misdirected.

The order for retrial had been refused by the High Court on the grounds that it would be undue prejudice to the Respondent as the error had nothing to do with him personally but left it to the professionals and it was unfair to him if he has to bear the additional burden in term of time, anxiety and expenses if retrial is ordered. Logically, Appeal should be allowed in

this case where the miscarriage of justice occurred to the detriment of an accused person. However, in this case, the Respondent was acquitted and there is no question of miscarriage of justice upon him had occurred. Therefore, no order for retrial.

Principles of law decided:

The test to be applied at the end of the Prosecution case and before calling for the defence in act or omission rendering the offence prior 31.01.1997 is that 'beyond reasonable doubt'. The new amendment of Sec 180 of CPC regarding the test at the end of the Prosecution case was effective from 31.01.1997 and the test to be applied is 'Prima Facie' test and no retrospective effect on this.

An order for retrial should be appropriate owing to the error in law. However, it is a matter of discretion of the Court whether or not to order for retrial should be entitled to consider other factors as well.

The order for retrial will not be raised if there is no issue of the miscarriage of justice occurred to the detriment of an accused person.

[Now applicable law see :PP v.Mohd Radzi Abu Bakar [2006]1CLJ

457;PP v.Haniff Basree Abdul Rahman [2008]4 CLJ 1]

4. Nordin Bin Atan & Anor v Public Prosecutor

[1999] 1 LNS 45

High Court (Tawau)

Section 3 (a) (ii) and Section 4 (a) of the Prevention of Corruption Act 1961

Brief facts:

This is an appeal by both the Appellants against their convictions on charges under the Prevention of Corruption Act 1961 (PCA). There were three charges preferred against the Appellants with two charges against both while the third was against the 2nd Appellant only. The Appellants were convicted on 10.12.1998 by the learned Sessions Court Judge Tawau (SCJ) on all the charges and sentenced as follows:

- a. for the 1st charge both the Appellants were sentenced to a fine of RM500.00 each in default one week imprisonment and one week imprisonment;
- b. for the 2nd charge both the Appellants were sentenced to a fine of RM1,000.00 each in default two weeks imprisonment and one week imprisonment;
- c. for the 3rd charge the 2nd Appellant was sentenced to a fine of RM500.00 in default one week imprisonment and one week imprisonment.

The terms of imprisonment were ordered to run concurrently. There is also a cross-appeal by the Prosecution against the inadequacy of the sentences passed upon the Appellants.

Principles of law:

To that this Court being an appellate court is not in the position to interfere since I have not seen the witness in the witness box. (see: Periasamy s/o Sinnappan & Anor v Public Prosecutor [1996] 2 MLJ 557 C.A.). After all the true test of whether to accept or reject the evidence of a witness is to consider consistency of the story itself, how it stands whilst under cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. (see: Bhojraj v Sitaram 1936 AIR 60 PC cited in Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ

[1] In short it is the probability or improbability of the story viewed in the light of the evidence of the case as a whole.

As to the assessment of the evidence I think this Court as an appellate court should be slow to interfere lest it may be taken as usurpation of the function of the trial court. In the case of Periasamy s/o Sinnappan & Anor v Public Prosecutor (supra) Gopal Sri Ram JCA said this at page 580:

"...the appellate judge when rejecting the defence of the first appellant - which had been accepted as true by the sessions court - undertook his own assessment of the first appellant as a witness, when he had not had the benefit of having observed him in the witness box; an advantage which the trial judge distinctly had. This is utterly wrong and smacks of an unwarranted usurpation by the appellate judge of a role that was strictly not his."

5. PP v Ismail MD Russ

[2000] 1 LNS 124

It is wrong to focus on a discrepancy or even an assumption and rely upon it to make a decision. A well considered decision must consider the assumption or discrepancy and to weigh whether in the context that they appear, they are material. A proper balanced consideration takes into account the proper perspective.

6. PP lwn. Noordin Abu Bakar [2008] 8 CLJ 504

High Court Malaya, Johor Bahru

Sections 10(a)(bb); 11(a) , 16 & 42(1) Anti Corruption Act 1997

Brief facts:

This is an appeal against the Sessions Court Judge's decision on the 3 charges preferred against the accused (i) that on the 1.12.2002 at Pasar

Malam Taman Tuanku Ungku Tun Aminah, Skudai, Johor the accused, a police officer with PDRM did corruptly obtained a gratification to wit, cash RM1000.00 for himself from Tay Soa Eng not to take action on him for selling fire crackers an offence under s. 10(a)(bb) of ACA 1997; (ii) that on 1.12.2002, the accused, a police officer did corruptly received/accept RM500.00 for himself from Tay Soa Eng an offence under s 11(a) of ACA 1997 and (iii) that on the 12.1. 2002, the accused, a police officer had corruptly received/accept RM500.00 from Tay Soa Eng an offence under s 11(a) of ACA 1997.

The accused was acquitted and discharge from the 1st and 2nd charges. The prosecution appeal against the acquittal and discharged. For the 3rd charge, scj of the finding that the presumption under s. 42 of the Act applies and the accused was called to enter his defence. The accused gave his defence and no other witnesses called. The accused was sentenced to 6 months imprisonment and fine RM10,000.00 in default 6 months imprisonment. The accused appeal against conviction and sentence.

Principles of law:

[1] The independent evidence of the complainant Tay Soa Eng (SP1) was not corroborated and had failed to prove the first element of the 1st and 2nd charges. Hence the presumption under s. 42(1) of ACA 1997 does not arise at all.

[2] For the 3rd charge, SP1 evidence were corroborated with the evidence of SP3, SP4, SP6 and SP9. Furthermore the trapped money which was found in the accused trouser's pocket, is a clear proof of the offence committed.

[3] Once the presumption under section 42(1) of ACA 1997 applies, the burden shift to the accused to rebut the presumption on the balance of probabilities. The legal burden is higher than to raise reasonable doubt but lighter than the burden of the prosecution to prove his case beyond reasonable doubt.

Other relevant principle of law:

[1] Corroboration per Sharma J in *Attan bin Abdul Ghani v Public Prosecutor* [1969] 1 LNS 12; [1970] 2 MLJ 143

It is necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should be in itself sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

The independent evidence must not only make it safe to believe that the crime was committed but must in some other way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

The corroboration must come from independent source. It is sufficient if it is merely circumstantial evidence of his connection with the crime.

[2] Calling of material witnesses by the Defence once the Presumption under s.42(1) of ACA 1997 applies –

PP v. Mohd Farid bin Mohd Sukis & Anor [2002] 8 CLJ 814; [2002] 3 MLJ 401 where the court held:

“Generally, in a criminal trial, there is no burden on an accused to call witnesses (see *Goh Ah Yew v. PP* [1948] 1 LNS 13; [1949] MLJ 150).

Thus, no adverse inference can be drawn against the defence for a failure to call witnesses. However, such an inference may be drawn where there is an onus on the accused to prove an issue. (see *Baharom v. PP* [1960] MLJ 249). An onus may be placed on an accused in certain instances by statutory presumptions. The legal burden is then on the accused to negate the presumed fact. In order to discharge the burden, there will be an onus on the defence to call material witnesses (see *Liew Siew & Anor v. PP* [1969] 1 LNS 90; [1969] 2 MLJ 232). Failure to do so will warrant the drawing of an adverse inference.”

7. Mohd Sallehuddin Mohd Yusof v PP

1 LNS 687

High Court, Ipoh

Sections 11(a), 16 (a), (b) and 42(1) Anti Corruption Act 1997

Brief facts :

In this case the respondent, an officer of the wild life ranger department, was charged for corruption after receiving RM 500.00 from one Hu Hoong Choy as an incentive to prevent taking action against Hu Hoong Choy's driver who had transported wild pigs meat out from Perak without any letter of consent from the Jabatan Perhilitan, Perak. The Session's Court convicted and sentenced the accused of the offence. At the accused's appeal, the High Court allowed the appeal and set aside the Session's Court conviction.

Ratio decidendi:

In setting aside the Session's Court conviction and sentence on the accused, the High Court held that the Session's judge had erred in law and in facts and therefore, the High Court has a right to interfere in the trial judge's finding.

The High Court also found that there was no evidence to support that the accused had solicited for corruption money, except for prosecution's witness who was in the state of anger when he was stopped by the accused and his colleague at the Jabatan Perhilitan, Perak. When the presumption under s. 42 of the Anti Corruption Act is invoked, the trial judge should have considered all the surrounding evidences adduced at the trial and also whether or not the presumption has been rebutted during cross-examination by the defence. The mere fact that the RM 500.00 was in the possession of the accused at the material time is insufficient to invoke the presumption under s. 42, as it is a rebuttable presumption.

Chapter 8

Sentencing

8.1.1 Introduction

Sentencing in each and every proceeding is a final order disposing of a case. Sentence imposed must be “according to law”.

In the case of Jafa bin Daud [1981] 1 MLJ 406 as held by Mohamed Azmi J:

“A sentence according to law means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established principles. In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender....”.

8.1.2 Relevant Provisions

Penalty for Offences under sections 10, 11, 13, 14, and 15

Section 16 of the Anti-Corruption Act 1997 (Act 575) lays down the penalties for offences committed under part III of the said Act. Section 16 read as follows:

16. Any person who is found guilty of an offence under section 10, 11, 13, 14 or 15 shall on conviction be liable to:

- a) Imprisonment for a term of ***not less than fourteen days and not more than twenty years***; and
- b) ***a fine of not less than five times*** the sum or value of the gratification which is the subject-matter of the offence where

8.1.3. Relevant Cases

1. Zainal Bin Hassan @ Jahinal v Public Prosecutor

[2009] 8 MLJ 878

High Court (Kota Kinabalu)

Criminal Appeal No. K42-12 of 2005

Yew Jen Kie JC

The accused in this case was tried for 2 charges:

- a) First charge is under section 10(a)(bb) Anti Corruption Act 1997

- b) Second charge is under section 11(a)(bb) Anti Corruption Act 1997

This is appeal by the Appellants against the decision of the learned Sessions Court Judge (“the trial Judge”) whom after full trial found the Accused guilty as per charged and he was then sentenced him to:

- a) For the first charge the accused was sentenced to 12 months imprisonment and fined RM300,000.00, in default of payment, six month imprisonment.

- b) For the second charge the accused was sentenced to 12 months imprisonment, and fined of RM100,000.00 in default of payment, three months imprisonment.

The appellant appeal and one of the grounds of appeal was term of imprisonment and fine were excessive.

Held:

Appeal by the appellant was dismissed. As held by the judge on the point of sentencing is that even if the trial judge had considered the appellant’s

mitigation, it would not have had much difference to the sentencing in view of the seriousness of the offence. The imprisonment term and the fine imposed were not excessive.

The learned trial judge also had considered the gravity of the offence and the element of public interest in sentencing.

2. Heng Ah Yai v Public Prosecutor

[2008] 8 MLJ 175

High Court (Kuching)

Criminal Appeal No. 42-21 of 2007-III

David Wong J

The accused in this case was tried for 3 charges under the Anti Corruption Act 1997:

a) First charge is under section 10(a)(aa) of the Anti Corruption Act 1997 (RM30,000.00)

b) Second charge is under section 10(a)(aa) of the Anti Corruption Act 1997 (RM50,000.00)

c) Third charge is under section 10(a)(aa) of the Anti Corruption Act 1997 (RM30,000.00)

Accused filed an appeal and the appeal was later dismissed.

Sentencing:

a) First charge:

2 years imprisonment and fine of RM150,000.00 and in default of payment thereof to six months imprisonment.

b) Second charge:

2 years imprisonment and fine of RM250,000.00 and in default of payment thereof to six months imprisonment.

c) Third charge:

2 years imprisonment and fine of RM250,000.00 and in default of payment thereof to six months imprisonment.

The accused was sentenced to the maximum fine and the said sentence was re-affirmed by the High Court and the amount and seriousness of the offence was the main factor taken into consideration in sentencing.

8.1.4 Factor to be taken into consideration in sentencing

8.1.5 Mitigating factors:

- a) Age of the offenders;
- b) Record of the offenders;
- c) The plea of guilty;
- d) Effects of convictions or sentence;
- e) Circumstances before commission of the offence;
- f) Health of the offender; and
- g) Behavior of offender after commission of offence;

8.1.6 Aggravating factors:

- a) Previous convictions or bad record;
- b) Prevalence or rampancy of the offence;
- c) Status of offender; and
- d) Use of violence;

Other relevant cases:

1. Nordin Bin Atan & Anor v Public Prosecutor

[1999] 1 LNS 45

High Court (Tawau)

Section 3 (a) (ii) and Section 4 (a) of the Prevention of Corruption Act 1961

Brief facts:

This is an appeal by both the Appellants against their convictions on charges under the Prevention of Corruption Act 1961 (PCA). There were three charges preferred against the Appellants with two charges against both while the third was against the 2nd Appellant only. The Appellants were convicted on 10.12.1998 by the learned Sessions Court Judge Tawau (SCJ) on all the charges and sentenced as follows:

- d. for the 1st charge both the Appellants were sentenced to a fine of RM500.00 each in default one week imprisonment and one week imprisonment;
- e. for the 2nd charge both the Appellants were sentenced to a fine of RM1,000.00 each in default two weeks imprisonment and one week imprisonment;
- f. for the 3rd charge the 2nd Appellant was sentenced to a fine of RM500.00 in default one week imprisonment and one week imprisonment.

The terms of imprisonment were ordered to run concurrently. There is also a cross-appeal by the Prosecution against the inadequacy of the sentences passed upon the Appellants.

Principles of law decided in this case:

Public interest should be taken into account when determining not only as to the nature of punishment to be imposed but also as to the length of custodial term if it is to be imposed.

2. PUBLIC PROSECUTOR V. LAI SIEN KON

[1978] 2 MLJ 110

HIGH COURT, SEREMBAN (Criminal revision)

Prevention of Corruption Act 1961, s 13

Criminal Procedure Code, s 283

Entertainment Duty Rules, Rule 8(3)

Brief facts in case:

The accused was charged and convicted on his own plea of guilty on 2 counts of charges; (i) that he resold 17 cinema tickets, an offence under Entertainment Duty Rules; and (ii) that he corruptly offered a gratification of \$29 to a police constable as an inducement of forbearing to take action against him under the Entertainment Duty Rules. He was fined \$200 in default one month imprisonment for the first charge and sentenced to \$500 in default four months imprisonment for the second charge. He was also ordered to pay \$29 by virtue of s13 of the Prevention of Corruption Act to the government in default one week's imprisonment.

Ratio decidendi of the case:

- a) The penalty ordered under section 13 of the Act is not to be treated as a fine in default of which a term of imprisonment may be imposed. It is only to be treated as a fine only to the extent of its recovery.

3. Lee Mun Foong v Public Prosecutor

[1976] 1 LNS 57

Federal Court (Kuala Lumpur)

Section 4(a) of the Prevention of Corruption Act, 1961

Section 13 of the Prevention of Corruption Act, 1961

Brief facts:

The appellant, being an agent of Government of Malaysia, namely, an Assistant Examiner attached to Inland Revenue Department, Ipoh was found guilty by scj of an offence under s. 4(a) of the Prevention of Corruption Act, 1961 and was sentenced to two years imprisonment. Hence appeal.

His appeal against conviction and sentence was dismissed and on the DPP drawing the court's attention to the provision of s. 13 of the Prevention of Corruption Act 1961, and the rectification by the Federal Court of a similar omission to apply this statutory provision in *Mohamed bin Long v P.P.* [1972] 1 MLJ 76, the High Court imposed a penalty of \$1,000 on the appellant to be paid within three months to the Anti-Corruption Agency and in default to undergo six months imprisonment.

On an application made on behalf of the appellant, the High Court reserved the following question of law which the court considers to be of public interest for the decision of the Federal Court:

“Whether the provision of s. 13 of the Prevention of Corruption Act 1961 are applicable in every case of a conviction under the said Act or whether the application of s.13 is restricted only to instances where the money, the subject matter of the offence, has not been recovered.”

Principles of law:

Wan Suleiman FJ held the mandatory penalty under s. 13 of the Act must be imposed regardless of whether the gratification given is recovered or not.

High Court is correct in holding that s. 13 should operate independently of the provision of s. 30 of the Act which is payment towards a civil debt. Section 30 is merely reaffirmation of a rule of law in the relation between agent and principal, a remedy which the principal would have even without the enactment of s. 30. This rule of common law is set out in Art. 54 of the 12th Edn. Of Bowstead on Agency: “No agent is permitted to acquire any personal benefit in the course of, or by means of, his agency without the knowledge and consent of the principal” and this rule extends to monies earned by the agent through criminal acts.

4. Ng Kok Jooi v. Public Prosecutor

[1974] 2 MLJ 150

Appellate Court at Kuantan

S.4 (b) of Prevention of Corruption Act

Brief facts:

The appellant was convicted of giving bribes to a police inspector after he had been caught in a speed trap. He was sentenced to a four (4) months' imprisonment and he later appealed against the conviction and sentence. The appeal against the conviction was dismissed but allowed against the sentence. The sentence was substituted with a \$300 fine.

Ratio decidendi:

The Court should take the circumstances of the case into consideration in passing the sentence.

Principles of law decided:

The law makes the giver of bribes equally culpable with the receiver of bribes.

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**CASES AND MATERIALS
ON
ROBBERY**

CASES AND MATERIALS

ROBBERY

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Summary of Cases

Penal Code

Robbery and Gang-Robbery

390. Robbery.

In all robbery there is either theft or extortion.

Theft is "robbery", if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death, or hurt, or wrongful restraint, or fear of instant death, or of instant hurt, or of instant wrongful restraint.

Extortion is "robbery", if the offender, at the time of committing the extortion, is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation - The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

ILLUSTRATIONS

(a) A. holds Z. down, and fraudulently takes Z.'s money and jewels from Z.'s clothes, without Z.'s consent. Here A. has committed theft, and in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A. has therefore committed robbery.

(b) A. meets Z. on the high road, shows a pistol, and demands Z.'s purse. Z., in consequence surrenders his purse. Here A. has extorted the purse from Z. by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A. has therefore committed robbery.

(c) A. meets Z. and Z.'s child on the high road. A. takes the child, and threatens to fling it down a precipice, unless Z. delivers his purse. Z., in consequence, delivers his purse. Here A. has extorted the purse from Z., by causing Z. to be in fear of instant hurt to the child, who is there present. A. has therefore committed robbery on Z.

(d) A. obtains property from Z. by saying - "Your child is in the hands of my gang, and will be put to death unless you send us one thousand ringgit". This is extortion, and punishable as such; but it is not robbery, unless Z. is put in fear of the instant death of his child.

(e) Z is walking along a road. A on a motorcycle snatches Z's handbag and in the process causes hurt to Z. A rides away with Z's handbag. A has therefore committed robbery.

391. Gang-robbery.

When two or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and of persons present and aiding such commission or attempt, amount to two or more, every person so committing, attempting, or aiding, is said to commit "gang-robbery".

392. Punishment for Robbery.

Whoever commits robbery shall be punished with imprisonment for a term which may extend to fourteen years, and he shall also be liable to fine or whipping.

393. Attempt to commit robbery.

Whoever attempts to commit robbery shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

394. Voluntarily causing hurt in committing robbery.

If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine or to whipping.

395. Punishment of gang-robbery.

Whoever commits gang-robbery shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

396. Gang-robbery with murder.

If anyone of two or more persons, who are conjointly committing gang robbery, commits murder in so committing gang-robbery, every one of those persons shall be punished with death or imprisonment for a term which may extend to thirty years, and, where the punishment is not death, shall also be liable to whipping.

397. Robbery when armed or with attempt to cause death or grievous hurt.

If at the time of committing or attempting to commit robbery, the offender is armed with or uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, such offender shall be liable to be whipped, in addition to any other punishment to which he may be liable under any other section of this Code.

399. Making preparation to commit gang-robbery.

Whoever makes any preparation for committing gang-robbery, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to whipping.

400. Punishment for belonging to gang of robbers.

Whoever shall belong to a gang of persons associated for the purpose of habitually committing gang-robbery, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

401. Punishment for belonging to wandering gang of thieves.

Whoever shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being gang-robbers, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine or to whipping.

402. Assembling for purpose of committing gang-robbery.

Whoever shall be one of two or more persons assembled for the purpose of committing gang-robbery, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine or to whipping.

Summary of cases

1. Mohd Noh bin Ramli & Anor v Public Prosecutor [1995] 1 LNS 137

Court of Appeal (Brunei Darussalam)

K.T Fuad, J, Alan Hugging, J, Derek Cons, J

Gang Robbery and murder under Section 396 of the Penal Code

Brief facts of the case:

The accused robbed and murdered a 15 year old boy who operated a water taxi. His dead body was found floating face-downwards in the river behind the post office in the Old Airport area in the morning of 23 August 1993. The body's hands and legs were tied to an iron pipe.

Ratio decidendi of the case:

The wording of s. 396 of the Penal Code makes it clear that once it is proved that two or more persons conjointly commit gang robbery as defined, then if any one of those persons commits murder (as defined) in the course of committing the gang robbery then each of those committing the robbery is liable to the mandatory death penalty.

Principles of law decided in the case:

Mallal's Digest 988 Penal Code (Malaysia) - s. 396 - Gang robbery with murder - Whether proof of common intention is necessary.

The appellant was charged that on 16 June 1948, he committed gang robbery and in the commission of the said gang robbery, murders were

committed by one of the robbers and he thereby committed an offence under s. 396 of the Penal Code. In directing the assessors, the trial Judge said in effect that the accused could be guilty if there was a common intention to commit the robbery. **Held:** the guilty act of a gang robber who commits murder in the case of a gang robbery is imputed to all the others who conjointly commit the gang robbery and there is, therefore, no need in such a case to have recourse to s. 34 of the Penal Code or to consider the question of common intention.

Wong Kim Wah v. Public Prosecutor [1948-49] MLJ Supp. 134 Court of Appeal, Kuala Lumpur (Willan CJ, Pretheroe and Spenser Wilkinson JJ)

2. Public Prosecutor v Mohd Tonik bin Mion & Anor [1997] MLJU 366

High Court (Alor Setar)

Y.A. Tuan K.N Segara

s.376 of the Penal Code

s.392 of the Penal Code read together with s.34 of the Penal Code, for the offence of robbery

Brief facts of the case:

Badriyah binti Ibrahim (PW7) was aged 19 and unmarried at the time of the incident. She was together with her boy-friend, Anas bin Ahmad (PW8), in his car on their way to Jitra along the highway when Anas decided to stop his car at about the 30.4 km. Alor Setar/Bukit Kayu Hitam road to answer the call of nature. While Anas was still inside the stationary car, two male Malays, whom Badriyah later identified as the 1st and 2nd accused, came upon them.

According to Badriyah what happened next was that one of the said male Malays (the 1st accused) broke the right hand side glass window of the car. At this juncture Anas tried to re-start the engine. The same male malay caught hold of the steering wheel from the outside of the car and turned it towards the left, causing the front of the car to fall into the drain. A struggle ensued between Anas and the male Malay and, in the process Anas' spectacles fell into the car, and, he was thereafter without it. His vision was accordingly impaired and this probably explains as to why he could not identify the accused at the identification parade, subsequently conducted by the police, in the course of their investigations.

Ratio decidendi of the case:

Burden Of Proof

The evidence, on record, clearly establishes that the prosecution have proved beyond a reasonable doubt and the Sessions Court judge's finding that the charges had been proven before she in fact called upon the defence, as indicated in her judgment, is consistent with the higher degree of proof called for in Arulpragasam's case, notwithstanding the commonly used phrase "prima facie" appearing in her judgment.

Corroboration

Even if there was no corroboration, the fact that the Sessions Court judge had accepted PW7 as an honest witness, would render the convictions even on her own testimony alone, unassailable. The fact that she had not warned herself of the danger of convicting on the uncorroborated evidence of PW7 does not arise, in the circumstances of this case. Nevertheless, such a failure is not a sufficient ground to set aside a conviction, in the absence of any miscarriage of justice, upon a review of all the evidence on record.

Principles of law decided in the case :

The use of the phrase "prima facie", does not give rise to a misdirection per se, in the law concerning the burden of proof on the prosecution even based on the higher standard required in ARULPRAGASAN's case.

A failure to warn oneself of the danger of convicting on the uncorroborated evidence is not a sufficient ground to set aside a conviction, in the absence of any miscarriage of justice, upon a review of all the evidence on record.

3. Mohd Anuar bin Mohamad Iwn Pendakwa Raya [1995]

MLJU 7

Mahkamah Tinggi (Kota Bahru)

Nik Hashim PK

392/397 Kanun Keseksaan dan dibaca bersama di bawah seksyen 34 undang-undang yang sama."

Brief facts of the case:

Keterangan kes secara ringkas ialah pada 17 Mac 1993 jam 3.00 pagi semasa sedang tidur Siow Tek Liong (SP2) pengadu dalam kes ini, telah dikejutkan oleh dua orang lelaki Melayu yang tidak dikenali. Seorang bersenjatakan pisau manakala seorang lagi menggunakan skru driver. Pengadu telah diikat bersama isteri serta ibu mertuanya. Mereka diberi amaran supaya jangan membuat sesuatu jika tidak mereka akan dibunuh. Kedua perompak itu telah melarikan diri dengan barangan termasuk barang kemas, seperti rantai leher, gelang tangan, cincin, subang, kamera, jam tangan, kain baju dan wang tunai, jumlah kerugian sebanyak RM 6,930.00.

Dalam perbicaraan terhadap perayu, SP5, SP6 dan SP7 telah memberi keterangan bagi pihak pendakwa. Ketiga-tiga saksi ini telah memberikan

keterangan yang hampir sama tentang rompakan yang mereka bersama-sama lakukan.

Ratio decidendi of the case:

- [1] Section 34 of the Penal Code could not be invoked to punish a person other than the one who exhibited the firearm;
- [2] Section 397 of the Penal Code does not create any substantive offence and is merely a rider to section 394. Its provisions can be invoked only against an offender who actually acts in contravention of that section and against no other person, no matter how much that person may have acted in concert and in furtherance of the common intention to commit robbery."
- [3] The co-accused giving evidence on his own behalf is not regarded as an accomplice giving evidence for the prosecution and therefore the rule regarding corroboration did not apply.
- [4] Corroborative evidence need not be direct. It is sufficient if it is merely circumstantial evidence of the accused's connection with the offence.

Principles of law decided in the case:

Niat bersama di bawah seksyen 34 tidak memperpanjangkan kepada seksyen 397 Kanun Keseksaan. Oleh yang demikian, seksyen 397 tidak terpakai sekiranya tertuduh pada masa rompakan, tidak menggunakan apa-apa senjata dalam peranannya sebagai seorang perompak yang mengawal di luar rumah. Oleh itu, tertuduh sepatutnya disabitkan di bawah seksyen 392.

4. Wong Tang Yaw v Pendakwa Raya [1993] MLJU 75

Mahkamah Tinggi (Seremban)

Faiza Tamby Chik H

Offence punishable under Section 392 and 397 of the Penal Code to be read together with Section 34 of the same Code.

Brief facts of the case:

Dapat diperhatikan bahawa Hakim Mahkamah Sesyen yang bijaksana itu telah menggunakan sengkatan atau kependekan dalam mencatatkan pli (plea –akuan) kedua-dua orang tertuduh itu dan bagi pli (akuan) OKT 1 dicatatkan seperti berikut:–

"OKT 1 – 2CREU.CT.UNCP."

yang bermaksud, "two charges read, explained and understood. Claims Trial, Understood, Nature, Consequence of Plea."

Ratio decidendi of the case:

Semasa mengambil notaaya berpandangan semasa mengambil nota keterangan sesuatu kes itu tidaklah salah sekiranya seseorang Majistret atau Hakim Sesyen menggunakan sengkatan atau kependekan bagi mempercepatkan pengambilan nota sesuatu kes terutamanya hal perkara yang telah menjadi suatu kebiasaan di kalangan para Majistret dan Hakim Sesyen; akan tetapi apabila nota keterangan sesuatu kes itu disediakan untuk tujuan rayuan ke Mahkamah Tinggi, adalah lebih teratur dan kemas jika sengkatan-sengkatan atau kependekan-kependekan yang digunakan itu dituliskan dengan secara lengkap supaya nota tersebut lebih jelas dan bermakna supaya hakim rayuan dapat memahaminya dan menelitinya dengan lebin mudah lagi. Dengan berbuat demikian maka para Majistret dan Hakim Sesyen dapat mengelakkan daripada membuat kesalahan-kesalahan yang mungkin berlawanan dengan kehendak-kehendak Kanun

Prosedur Jenayah (KPJ) oleh kerana kebiasaan mereka menggunakan sengkatan atau kependekan itu selalunya dilakukan secara automatik, iaitu dilakukan seolah-olah tanpa berfikir.

Principles of law decided in the case:

Peruntukan s.173(c) KPJ ini adalah mandatori atau termesti oleh kerana dalam kes-kes di mana OKT mengaku bersalah, maka seseorang Majistret atau Hakim Sesyen hendaklah menentukan bahawa pengakuan bersalah itu dilafazkan oleh OKT itu sendiri dan didengari oleh peguamnya jika beliau hadir dan bukannya dinyatakan melalui peguamnya.

Seksyen 173(b) menghendaki bahawa jikalau tertuduh mengaku bersalah atas pertuduhan itu sama ada pertuduhan asal ataupun yang telah dipinda maka pengakuan bersalahnya itu hendaklah direkodkan dan dengan itu bolehlah disabitkan dengan syarat sebelum direkodkan pengakuan bersalahnya itu maka mahkamah hendaklah menentukan tertuduh itu faham akan jenis dan akibat pengakuan bersalahnya itu dan beliau mahu mengaku bersalah tanpa syarat terhadap kesalahan yang dipertuduhkan terhadapnya.

5. Gan Tsian Hua v Public Prosecutor [1993] MLJU 146

High Court (Shah Alam)

Mohd Hishamudin JC

Offence punishable under Section 392 and 397 of the Penal Code to be read together with Section 34 of the same Code.

Brief facts of the case:

The accused has pleaded guilty. At the time of the offence he was eighteen years old. In exercise of his powers under section 40 of the

Juveniles Court Act 1947, the learned Magistrate made an order that the accused be detained at the Henry Gurney School until he attains the age of 21. The accused appealed against the order and applied for bail pending the disposal of the appeal. Bail was granted.

On 19th February, 1991 the Magistrate Court Rawang posted to the accused's counsel the grounds of judgment. However, the accused failed to file his petition of appeal. Accordingly, the learned Magistrate by a letter dated 21st March, 1991 notified the accused's counsel that the appeal was deemed to have been withdrawn since no petition of appeal had been filed. A warrant of arrest was issued but there was nothing on record to show that the warrant was ever executed.

Also, there was nothing on record to show what further action was taken by the Magistrate Court to enforce the order that was previously made on 31st July, 1990. The accused, it would appear had remained on bail, notwithstanding the fact that his appeal was deemed to have been withdrawn.

Ratio decidendi of the case:

Upon learning that the accused had failed to file his petition of appeal, what the learned Magistrate ought to have done was, instead of issuing a warrant of arrest (which in any event was never executed!), to issue a notice to the bailor to produce the accused before the Magistrate Court so that the order that he had earlier made could be enforced.

As a matter of procedural propriety, no bail should be granted in such as this where there has been a failure by an accused to file in his petition of appeal, unless and until the High Court has granted the extension of time.

Principles of law decided in the case:

An order made by a Court may be a legal and proper order at the time it was made, but it is possible for the order to cease to be a proper order as a result of a change of circumstances.

Due to a change of circumstances, that is to say, a change in the age of the accused, coupled with the failure on the part of the learned Magistrate to enforce his order when the accused failed to file his petition of appeal, that order made by the learned Magistrate, although still legal, nonetheless, has now ceased to be a proper order.

6. Manickam & Ors v PP [1982] CLJ 162

High Court Malaya, Seremban

s. 395 of the Penal Code

s. 388(i) of the Criminal Procedure Code

Brief facts of the case:

This is an application for bail pending trial under s. 388(i) of the Criminal Procedure Code by the five accused jointly charged with an offence of gang robbery under s. 395 of the Penal Code. The accused, the applicants in these proceedings, were arrested on 26 October 1981, and were eventually produced before the President, Sessions Court, Seremban, on 11 November 1981, when their application for bail was refused by the learned President. The trial of the accused was fixed on 22 and 23 March 1982, before the President. It appears that in the Sessions Court, the prosecuting officer did not object to the application for bail and that the decision of the President to refuse bail was based solely on the judgment of Abdul Razak J in *Yanasengam & Ors. v. PP* [1978] 1 MLJ 269 a case involving gang-robbery, in which the learned Judge dismissed the application for bail.

Ratio decidendi of the case:

The answer to the matter depends on the interpretation of the words "Imprisonment for a term which may extend to twenty years" appearing in s. 395 of the Penal Code. In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. It may be noted that after the amendment s. 130A(b) of the Penal Code expressly stipulates that imprisonment for life means imprisonment until the death of the person on whom the sentence is imposed in contradistinction with imprisonment for twenty years. In section 125A of the Penal Code, the custodial sentence thereunder is imprisonment for life (which in the context means the natural life of the accused as in the case of imprisonment for life under the Firearms (Increased Penalties) Act 1971) or, in the alternative, imprisonment for a term which may extend to twenty years. Thus, besides death sentence we have now under our law (1) imprisonment for life until the death of the convicted accused (a sentence unknown to Malaysian criminal law until very recent years), (2) imprisonment for life reckoned or deemed to be twenty years, and (3) imprisonment for a term which may extend to twenty years. The question for determination is whether the expression "imprisonment for a term which may extend to twenty years" is the same as "imprisonment for life".

Although s. 57 of the Penal Code and s. 3 of the Criminal Justice Ordinance provide that imprisonment for life shall be reckoned or deemed to be imprisonment for twenty years, I do not think, as a corollary or logical conclusion, it can safely be said or construed that if a person is punished with imprisonment for a term which may extend to twenty years, he is punished with imprisonment for life. The words of s. 395, as amended, are plain and clear. The maximum custodial sentence now for gang-robbery shall not exceed twenty years under s. 395. To hold that a prison term not exceeding twenty years (that is a term from anything up to twenty years) is

synonymous with or equivalent to imprisonment for life is to overstretch the rule of construction. It is a well-established principle that a penal legislation such as the Penal Code should be construed strictly, rather than liberally. In construing the clear provisions of the amended s. 395, I need not take into account the explanatory statement to the Bill except for the limited purpose of understanding the background and antecedent state of affairs leading to the legislation. Prior to the amendment, the Court could either sentence the accused to imprisonment for life or to a maximum term of ten years. Ironically, it could not pass a sentence of between ten and twenty years.

Principles of law decided in the case:

The amount of every bail bond should not be excessive but be reasonable in the circumstances the case as being sufficient to secure the attendance of the person arrested or charged with an offence. An excessive bail bond may defeat the granting of bail as the accused may find difficulty in getting a bailor acceptable to the Court. The reason arises from the principle and basis of our criminal law that the accused is presumed to be innocent until proven guilty. In the circumstances of the case, the accused should be granted bail in the sum of RM4,000 each in one surety, the bail bond to be executed in the Sessions Court, Seremban.

7. PP v. Kamaruzaman Mahmud & Anor [2006] 4 CLJ 792

High Court Ipoh

s. 392/397 of the Penal Code

Brief facts of the case:

In this case, both the accuseds were charged at the Magistrate's Court, Batu Gajah on 21 October 2000 for robbery armed with a deadly weapon,

an offence under s. 392/397 of the Penal Code and punishable under the same section. The first and second accused were 30 years and 23 years old respectively at the time of the commission of the offence. Both the accused had pleaded not guilty to the charge from the first day they were charged in court on 21 October 2000 and continued to claim trial on all the dates when the case was called up for hearing over a period of four years but the hearing never proceeded. Finally, on 9 December 2004, both the accused who were represented by counsel had pleaded guilty to the charge. As the facts of the case was not ready on 9 December 2004, the case was adjourned to the next day on 10 December 2004 on the application of the prosecuting officer. On 10 October 2004, both the accused maintained their plea of guilty and admitted to the facts (exh. P1) of the case as presented by the prosecution and they were found guilty and convicted. The learned Magistrate ordered both the accused to be released on entering into a bond with one surety in the sum of RM10,000 and without any security and to keep the peace and be of good behaviour for a period of one (1) year pursuant to s. 294 of the Criminal Procedure Code. The Deputy Public Prosecutor being dissatisfied with the said Order of Binding Over under s. 294 of the Criminal Procedure Code filed a notice of appeal against the said order to the High Court on 17 December 2004.

Ratio decidendi of the case:

This court is of the view that if a crime, like armed robbery has been committed which is one 'calculated to inspire great alarm', as manifesting a very mischievous disposition, or especially rife in a particular district or throughout the country, it may be necessary to award a very severe punishment and to take away from the offender the power of committing such a crime or any crime for a long period. (See *Choh Wai Sung v. Public Prosecutor* [1946] 1 LNS 2; [1946] 12 MLJ 119 at p. 123).

There is a pressing need to protect the public from serious harm such as offences of robbery and violence and one of the ways to give the necessary protection is to keep the offenders away from society and if the facts so warrant for a longer period. While the need to impose a non custodial sentence against first offender and those who plead guilty is to be taken into consideration, so was the need to ensure that public safety, their property and belongings are also well protected. Clearly, the offence of robbery with a deadly weapon, being parang, is one calculated to inspire great alarm and is especially rife in most robbery offences. In the instant case, the admission by both the accused that the parang was carried in the course of the commission of robbery as a protection to personal safety cannot be considered on the facts as a true mitigating circumstances as only if the victims had resisted, protested, challenged or raised an alarm the parang would have been inevitably used upon the victims and consequently the result would have been a great disaster. Society is terrified by robbers and especially those who are armed. Robbery, and particularly armed robbery, is an offence against the person, as well as an offence against property. (See Reg v. Sargeant [1974] 60 Cr. App. R. 74, Public Prosecutor v. Teh Ah Cheng [1976] 1 LNS 116; [1976] 2 MLJ 186, Public Prosecutor v. Loo Choon Fatt [1976] 1 LNS 102; [1976] 2 MLJ 256 at p. 257-258, Reg v. Davies [1978] 67 Cr. App. R. 207, Public Prosecutor v. Leo Say & 2 Ors [1985] 2 CLJ 155; [1985] CLJ (Rep) 683, Low Thim Fatt v. Public Prosecutor [1988] 1 LNS 218; [1989] 1 MLJ 304, Public Prosecutor v. Chot Saik Kam [1990] 1 LNS 154; [1991] 1 MLJ 193, Public Prosecutor v. Muhari bin Mohd Jani & Anor [1999] 8 CLJ 430, Zaidon Shariff v. Public Prosecutor [1996] 4 CLJ 441, Public Prosecutor v. Govindnan a/l Chinden Nair [1998] 2 CLJ 370, Tan Lay Chen v. Public Prosecutor [2000] 4 CLJ 492).

The Court of Criminal Appeal has said in many cases that the range of sentences imposed for serious armed robbery offences should be much

higher than those in fact imposed by sentencing judges. Observations were passed by the court as long ago as 1984 in R v. Hayes [1984] 1 NSWLR 740 at 743; [1984] 11 A Crim. R 187, repeated in Ellis [1993] 68 A Crim. R 449 where Hunt CJ at CL observed that reference to the judgments in Flack And Smith (unreported, NSW CCA, 12 December 1989) demonstrated that a higher range of sentence for armed robbery was required, and gave a clear indication that sentences should be increased for that crime. In Vu (Manh Hung) (unreported, NSW CCA, 11 November 1993), the court stated that "the time has more than come for far more deterrent sentences to be imposed for those offences of serious armed robbery".

In R v. Spiero [1979] 22 SASR 543, King CJ said at 549:

It must be made clear beyond misunderstanding that when a person engages in robbery, while armed with a weapon, he can expect, when apprehended and convicted, a long sentence of imprisonment. Armed robbery is a crime which leaves little scope for leniency even when mitigating factors are present. In this case mitigating factors are few. The appellant has a criminal record. He is addicted to heroin. One feels sympathy for a person who has become entangled in drug addiction, but the courts cannot treat addiction as an excuse, or even a mitigating factor, in relation to serious crime. Those who are addicted to drugs must understand that if they allow their addiction to lead them into serious crime, they must expect to receive the same severe punishment as would be received by others.

8. PP v. Kamaruzaman Mahmud & Anor [2006] 4 CLJ 792

High Court Ipoh

s. 392/397 of the Penal Code

Brief facts of the case:

In this case, both the accuseds were charged at the Magistrate's Court, Batu Gajah on 21 October 2000 for robbery armed with a deadly weapon, an offence under s. 392/397 of the Penal Code and punishable under the same section. The first and second accused were 30 years and 23 years old respectively at the time of the commission of the offence. Both the accused had pleaded not guilty to the charge from the first day they were charged in court on 21 October 2000 and continued to claim trial on all the dates when the case was called up for hearing over a period of four years but the hearing never proceeded. Finally, on 9 December 2004, both the accused who were represented by counsel had pleaded guilty to the charge. As the facts of the case was not ready on 9 December 2004, the case was adjourned to the next day on 10 December 2004 on the application of the prosecuting officer. On 10 October 2004, both the accused maintained their plea of guilty and admitted to the facts (exh. P1) of the case as presented by the prosecution and they were found guilty and convicted. The learned Magistrate ordered both the accused to be released on entering into a bond with one surety in the sum of RM10,000 and without any security and to keep the peace and be of good behaviour for a period of one (1) year pursuant to s. 294 of the Criminal Procedure Code. The Deputy Public Prosecutor being dissatisfied with the said Order of Binding Over under s. 294 of the Criminal Procedure Code filed a notice of appeal against the said order to the High Court on 17 December 2004.

Ratio decidendi of the case:

This court is of the view that if a crime, like armed robbery has been committed which is one 'calculated to inspire great alarm', as manifesting a very mischievous disposition, or especially rife in a particular district or throughout the country, it may be necessary to award a very severe punishment and to take away from the offender the power of committing

such a crime or any crime for a long period. (See *Choh Wai Sung v. Public Prosecutor* [1946] 1 LNS 2; [1946] 12 MLJ 119 at p. 123).

There is a pressing need to protect the public from serious harm such as offences of robbery and violence and one of the ways to give the necessary protection is to keep the offenders away from society and if the facts so warrant for a longer period. While the need to impose a non custodial sentence against first offender and those who plead guilty is to be taken into consideration, so was the need to ensure that public safety, their property and belongings are also well protected. Clearly, the offence of robbery with a deadly weapon, being parang, is one calculated to inspire great alarm and is especially rife in most robbery offences. In the instant case, the admission by both the accused that the parang was carried in the course of the commission of robbery as a protection to personal safety cannot be considered on the facts as a true mitigating circumstances as only if the victims had resisted, protested, challenged or raised an alarm the parang would have been inevitably used upon the victims and consequently the result would have been a great disaster. Society is terrified by robbers and especially those who are armed. Robbery, and particularly armed robbery, is an offence against the person, as well as an offence against property. (See *Reg v. Sargeant* [1974] 60 Cr. App. R. 74, *Public Prosecutor v. Teh Ah Cheng* [1976] 1 LNS 116; [1976] 2 MLJ 186, *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 at p. 257-258, *Reg v. Davies* [1978] 67 Cr. App. R. 207, *Public Prosecutor v. Leo Say & 2 Ors* [1985] 2 CLJ 155; [1985] CLJ (Rep) 683, *Low Thim Fatt v. Public Prosecutor* [1988] 1 LNS 218; [1989] 1 MLJ 304, *Public Prosecutor v. Chot Saik Kam* [1990] 1 LNS 154; [1991] 1 MLJ 193, *Public Prosecutor v. Muhari bin Mohd Jani & Anor* [1999] 8 CLJ 430, *Zaidon Shariff v. Public Prosecutor* [1996] 4 CLJ 441, *Public Prosecutor v. Govindnan a/l Chinden Nair* [1998] 2 CLJ 370, *Tan Lay Chen v. Public Prosecutor* [2000] 4 CLJ 492).

The Court of Criminal Appeal has said in many cases that the range of sentences imposed for serious armed robbery offences should be much higher than those in fact imposed by sentencing judges. Observations were passed by the court as long ago as 1984 in *R v. Hayes* [1984] 1 NSWLR 740 at 743; [1984] 11 A Crim. R 187, repeated in *Ellis* [1993] 68 A Crim. R 449 where Hunt CJ at CL observed that reference to the judgments in *Flack And Smith* (unreported, NSW CCA, 12 December 1989) demonstrated that a higher range of sentence for armed robbery was required, and gave a clear indication that sentences should be increased for that crime. In *Vu (Manh Hung)* (unreported, NSW CCA, 11 November 1993), the court stated that "the time has more than come for far more deterrent sentences to be imposed for those offences of serious armed robbery".

In *R v. Spiero* [1979] 22 SASR 543, King CJ said at 549:

It must be made clear beyond misunderstanding that when a person engages in robbery, while armed with a weapon, he can expect, when apprehended and convicted, a long sentence of imprisonment. Armed robbery is a crime which leaves little scope for leniency even when mitigating factors are present. In this case mitigating factors are few. The appellant has a criminal record. He is addicted to heroin. One feels sympathy for a person who has become entangled in drug addiction, but the courts cannot treat addiction as an excuse, or even a mitigating factor, in relation to serious crime. Those who are addicted to drugs must understand that if they allow their addiction to lead them into serious crime, they must expect to receive the same severe punishment as would be received by others.

9. Rianto Sumiran v PP [1994] 4 CLJ 423

High Court Malaya, Kuala Lumpur

Armed robbery - Firearms (Increased Penalties) Act 1971 s. 4

Brief facts of the case:

This was an appeal by the accused against conviction and sentence in respect of two charges of armed robbery under s. 4 of the Firearms (Increased Penalties) Act 1971 for which he was sentenced by the Sessions Court to imprisonment for the duration of his natural life and six strokes of whipping on each of the charges. Before the Sessions Judge, the accused was not represented by Counsel as he chose to appear in person.

The evidence showed that on 7 September 1991 at about 1.20 a.m, a robbery took place at house No 54, Kg. Chubadak Jaya, Sentul, Kuala Lumpur, in which two persons had been placed in fear of hurt and been robbed of their valuables by a gang of five persons including the accused. The robbery lasted for about 3 or 4 minutes during which one of the robbers was seen to exhibit and be armed with a revolver. At an identification parade held later by the police, one of the victims and an occupant of the premises where the robbery took place, identified the accused as the armed robber.

The facts further showed that following a police raid on the premises occupied jointly by the accused and one Ahmad Rosli, two incriminating watches were recovered from the said premises. A search list in respect of the recovery of these items was later issued to Ahmad Rosli by the police. Subsequently, on the information given by Ahmad Rosli, the police had also recovered the firearm in question, which was hidden in the ceiling of the bathroom of the said premises. The actual spot where the firearm was found hidden was pointed to the police by the said Ahmad Rosli.

The Sessions Judge, in calling for the defence and in subsequently convicting the accused, had drawn adverse inference against the accused on account of his failure to prove the involvement of Ahmad Rosli and had thus ruled that there were material circumstantial evidence connecting the accused with the robbery.

Ratio decidendi of the case:

The prosecution was right in preferring two separate charges against the accused. Although there was some inter-relation between the two charges as the events against the two victims arose out of the same robbery, it is clear that the act of exhibiting the firearm generally and specifically against each of the victims in turn and then taking their valuables, was certainly a case of two distinct offences. In the circumstances, to prefer a single charge would be bad for duplicity and would lead to confusion as a distinct finding must be made regarding the act done by the assailant against each of the named victims, how each of them felt and the loss that each of them sustained.

**10. Fairus Nizam bin Shueb vs. Public Prosecutor [2001]
5 MLJ 224.**

High Court (Ipoh).

Section 394 of Penal Code.

Section 326 of Penal Code.

Brief facts of the case:

The Appellant was charged under s 394 of the Penal Code and under s 326 for voluntarily causing grievous hurt with a knife. As there was no police report lodged by the victim on the attack, the Court reduced the charge under s 326 to s 325 of Penal Code and convicted the Accused

under s 325. The Accused was sentenced to 18 months imprisonment and cross appealing against the decision while the PP appealed against acquittal under s 394 and amendment of charge of s 326 to s 325.

Ratio decidendi of the case:

Appeal by the DPP was allowed and cross appeal by the appellant was dismissed as the trial judge for failure to evaluate and to further cite the reasons for accepting or rejecting the evidence of the appellant, the victim or any other witnesses.

Despite the evidences adduced by the victim (PW4) was subjected to the attack of the defence counsel (as it was never being lodged by PW4) due to lack of corroboration, the lack of such police report by PW4 does not in anyway vitiate his evidence in this case, as his evidence was corroborated by evidence of his wife (PW5). There is no mandatory requirement for any corroboration of witness's evidence in criminal trials of this nature as long as the learned sessions court judge accepted the truth of his evidence, it is enough.

Therefore, there was sufficient evidence to establish beyond reasonable doubt conviction under s 394 of the Penal Code as there was attempted robbery despite nothing was taken from the victim. The learned sessions court judge decision of reducing the charge from s 326 to s 325 was erroneous as there was sufficient evidence to establish s 394 beyond reasonable doubt.

As such act by the Appellant is a dastardly crime coupled with permanent injuries i.e. scarring to the victim's facial and also the rampancy of such crime, the sentence of 18 months under s 325 is set aside and the appellant is sentence to 5 years under s 394.

Principles of law decided in the case:

In giving his grounds of decision under s 307(iii) of the CPC, a Magistrate should state, except in the simplest cases, reasons why he believed or disbelieved the evidence given on behalf of the prosecution or the accused, and not merely I believe the evidence of the accused (Murugiah v PP [1941] 1 MLJ 17)

11. Lim Kim Poh v PP [2000] 3 MLJ 411.

High Court (Shah Alam)

Section 395, 397 read with s 34 of Penal Code.

Section 173 and 294 of Criminal Procedure Code.

Brief facts of the case:

The Appellant was charged of an offence of committing armed gang robbery contrary to ss 395 and 397 read with s 34 of the Penal Code. He pleaded guilty and sentenced to 6 years imprisonment and 5 strokes of whipping.

Ratio decidendi of the case:

There was no material substance to be considered by the sessions court judge not to impose sentence of imprisonment and whipping despite the fact that the appellant was induced to change his plea to guilty. The Appellant appealed against the decision as he hope that on the basis of his plea of guilt to the offence, the sessions court judge ought to have bound over the appellant under either s 173A or 294 of the CPC and such sentence imposed on him was excessive.

However, the offence committed by the Appellant was a grave act that required the sessions court to consider public interest rather than his

personal interest, therefore it is deemed justifiable for his plea to be bound by s 173A or 294 of CPC be rejected.

Furthermore, such decision was arrived on the fact that the Appellant had also committed the same offence in the other two charges.

Principles of law decided in the case:

Section 173A of CPC as submitted by the Appellant is unacceptable as it was clearly stated in the records that the appellant pleaded guilty after the charge being read to him. There was hardly any material of substance for consideration not to impose sentence of imprisonment and to order the Appellant be bound by s 173A or 294 CPC. Therefore, after due consideration and taking into consideration of the two other offences, the imprisonment of 6 years is not excessive.

12. Muhammad Taufik bin Kamaluddin Iwn Pendakwa Raya [2007] 4 MLJ 288.

Mahkamah Tinggi (Johor Bahru).

Section 392 of Penal Code.

Brief facts of the case:

The accused with two others was charged under s 392 of PC. Before the learned Sessions Court Judge the preferred charge was read to the accused whereby the accused with two others had on the 25.11.2005 at about 1.45 a.m. at No. 32, Kg. Johor Lama, Telok Sengat in Kota Tinggi district committed the act of robbery as against Mohd Aerin Bin Mohd Saif and took his belongings amounting to the sum of RM22,340.40. The accused pleaded guilty and he was sentenced to 10 years imprisonment

and 8 strokes of whipping. Thus, the accused appealed to the High Court against the sentencing.

Ratio decidendi of the case:

- [1] Decision arrived by the learned Session Court Judge was based on the facts of the case before him/her and in this case the High Court in opinion that the learned Sessions Court Judge had taken into consideration of the accused relevant mitigation and also the gravity of the offence committed by the accused.
- [2] The paramount consideration in arriving to his/her decision is public interest as robbery has become a rampant case nowadays and such sentencing arrived at is for the purpose of deterrent.
- [3] The sentence was therefore appropriate and not wrong or against any principles of law and no reasons for the High Court to interfere with the learned Sessions Court Judge's decision.

Principles of law decided in the case:

It is a trite law that the High Court will not interfere the decision of the lower court unless it is obvious that such decision arrived at is manifestly excessive, vice versa. As long as in arriving to such decision the relevant principle of sentencing is adhered to by the presiding judges. This is stated in the case of Bhandulananda Jayatilake vs PP [1982] 1 MLJ 83 whereby it was held by Raja Azlan Shah (FCJ) "...is the sentence harsh and manifestly excessive?... it is for this reason that this court had said it again and again it will not normally interfere with sentences..."

Public interest is the paramount consideration in arriving to a decision. Such act of robbery must be dealt accordingly as this is a very serious

offence and sentencing must served also as a deterrent punishment to the accused due to the rampant act of robbery i.e. in Johor Bahru.

13. Public Prosecutor vs Kamaruzaman bin Mahmud & Anor [2007] 1 MLJ 750.

High Court (Ipoh).

Section 392/397 of Penal Code.

Brief facts of the case:

The Appellant was charged under s 392/397 of the Penal Code and was ordered by the Magistrate entering into a bond under s 294 of CPC. Order was appealed by the DPP. It was discovered by the appellate court that there was several exhibits which were not relevant to the offence whereby the accused pleaded guilty and admitted to the fact.

Ratio decidendi of the case:

Appeal by the DPP was allowed on the fact that both accused had pleaded guilty to the offence is not sufficient ground to invoke s 294 of CPC. The court must consider and grant sufficient weight to gravity of offence.

The court had recognized the plea of guilty from both accused and there has been error of law and violation of principles of sentencing as the interest of administration of justice required custodial sentencing.

The accused is therefore sentenced to 30 months of imprisonment in the light of the gravity of such offence committed by both accused, the circumstances of the offence committed and facts as admitted by the accused.

Principles of law decided in the case:

In appealing against sentence it is established principle that the sentence of the court of the first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or being unsuitable to proved facts and circumstances (PP vs. Fam Kim Hock [1957] MLJ 20).

The High Court sitting in exercise of its [appellate] powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence, having regard to all facts disclosed on the record or that the lower court clearly erred in applying the correct principles in the assessment of sentence passed (PP vs. Loo Choon Fat [1976] 2 MLJ 2560).

14. Sugumaran a/l Kannan vs. Public Prosecutor [2007] 3 MLJ 121.

High Court (Muar).

Section 394 of Penal Code.

Read together with Section 34 of Penal Code.

Brief facts of the case:

The accused pleaded guilty to an offence under s 394 read with s 34 of the Penal Code before the presiding Sessions Court Judge (SCJ) and he was sentenced to 10 years imprisonment and 6 strokes of whipping. Thus, the accused appealed to the High Court against the excessive sentencing

Ratio decidendi of the case:

That the High Court allowed the appeal as the SCJ failed to consider the plea of guilt entered on the first day the accused was produced before the

lower court. As the injury caused to the victim was only superficial and not life threatening, it is not right for the SCJ to follow the principles of Ahmad Zaini bin Mohd Salleh v PR and Malacca Criminal Appeal No. 42-15 of 1995 without any consideration of facts in arriving to his decision. Unlike, this present case, the circumstances of the precedent case was far much greater as serious injury were inflicted to the victim.

In sentencing an accused the SCJ must assessed the facts of the case individually and in this case the accused had presented his mitigation on his behalf without the assistance of any counsel and the SCJ should have consider the personal circumstances of the accused.

Appeal was allowed by the High Court and sentence was reduced to 7 years.

Principles of law decided in the case:

In appealing against sentence it is established principle that the sentence of the court of the first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or being unsuitable to proved facts and circumstances (PP vs. Fam Kim Hock [1957] MLJ 20).

It is [also] an established principle that an appellate court should be slow to interfere with or disturb a sentence passed by the court below...the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in assessment of the sentence (DPP vs. Mohamed Nor & Ors [1985] 2 MLJ 200).

The High Court sitting in exercise of its [appellate] powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise

not a proper sentence, having regard to all facts disclosed on the record or that the lower court clearly erred in applying the correct principles in the assessment of sentence passed (PP vs. Loo Choon Fat [1976] 2 MLJ 2560.

CASES AND MATERIALS

COMMERCIAL CRIMES

CASES AND MATERIALS

COMMERCIAL CRIMES

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Table of content

	Pages
[1] Introduction	2
[2] Penal Code Offences	
2.1 Criminal Breach of Trust	3
2.2 Cheating	12
2.3 Forgery	19
[3] Other Statutory Offences	
3.1 Copyright Offences	26
3.2 Custom Offences	30
3.3 Income Tax Offences	36
3.4 Offences under Companies Act 1965, Securities Commissions Act 1983 and Securities Industries Act 1983	54
3.5 Offences under Printing Presses and Publication Act	59

Chapter 1

Introduction

There are no statutory definitions for commercial crimes. It was often thought that commercial crimes were confined to white collar crimes where they involved individuals from higher strata of the society. E.H. Sutherland, a criminologist defined white-collar crime as “crime committed by a person of respectability and high social status in the course of his occupation.”¹ However, two decades later, Edelhertz came up with a wider definition to white collar crimes. He defined it, “an illegal act or series of illegal acts committed by non-physical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or obtain business or personal advantage.”² An obvious absence would be the status of the perpetrator of such crimes. The offenders are no longer confined to those in the higher echelon.

The Registrar of the High Court of Sabah and Sarawak had on 15 October 2009 issued a circular pertaining to the priority of disposal for commercial cases. The cases identified as commercial cases include criminal breach of trust, criminal misappropriation of property and money laundering. They may also include cheating, forgery, customs offences, companies and securities commission cases, copyright offences and the like. In short, commercial crime is a classification of myriads of offences which effect the business community.

This project is aimed at providing quick and easy access to various cases or materials pertaining to offenses or infringement which have commercial impact.

¹ Sutherland, E. H. (1949) White Collar Crime (New York: Dryden Press)

² Edelhertz, H. (1970) The Nature, Impact and Prosecution of White Collar Crime, U.S. Department of Justice.

Chapter 2

Penal Code Offences

2.1 Criminal breach of trust

2.1.1 Introduction

Criminal breach of trust (CBT) is said to be committed when someone who is entrusted with property, dishonestly misappropriates or converts to his own use of that property, touching the discharge of such trust. It is an offence punishable under section 406 of the Penal Code.

2.1.2 Scope

Section 405 of Penal Code provides that:

“Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".”

CBT applies to all forms of properties and not just movable property. The elements to constitute CBT under Section 405 are as follows:

The ‘precondition’: the accused has been entrusted with property or with dominion over property

The physical element:

- (1) Misappropriation
- (2) Conversion
- (3) Use or disposal in violation of a direction of law

(4) Use or disposal in violation of a legal contract

(5) Suffering another person to do any of (1) to (4)

The fault element for (1) to (4) is dishonestly. The fault element for (5) is willfully.

2.1.3 Cases

- (1) PUBLIC PROSECUTOR V. WONG KIM FATT (1991) 3 CLJ 620 (REP)
- (2) PUBLIC PROSECUTOR V CHEW CHEE WAH (1996) 1 CLJ 94
- (3) CHIN TED LIT V. PUBLIC PROSECUTOR (1994) 1 CLJ 362
- (4) LEE KOK NAM V. PP (1999) 5 CLJ 283
- (5) TAN SRI ERIC CHIA V. PP (2006) 2 CLJ 544
- (6) PUBLIC PROSECUTOR V. LIM SWEE GUAN (1968) 2 MLJ 169
- (7) MD YUSRI SAHADAN V PP [2009] 1 LNS 513

1. PUBLIC PROSECUTOR V. WONG KIM FATT

[1991] 3 CLJ 620 (REP)

HIGH COURT MALAYA, JOHOR BAHRU

Sections 44, 408, 409 and 477A of the Penal Code

Whether the accused was a salaried partner of the legal firm

Whether the he was authorized to operate and manage bank accounts and negotiate professional fees.

Brief facts:

The accused faced two charges, the main being criminal breach of trust of fees and money received in his capacity as an employee of a legal firm under s.408 of the Penal Code and the alternative charge was for falsification of bill under s.477A of the same Code.

Ratio decidendi of the case:

The accused was held to be a salaried partner based on evidence and he had dominion over all fees or moneys received between 1976 and 1977 and the accused had prepared the substituted bills after the clients had settled the original bills for professional fees and this led to him

misappropriating RM15, 500.00. On the alternative charge, the court led that there was indeed falsification of the bill because the new document contained false information and the accused willfully did so to defraud.

Principles of law decided in the case (Brief Summary):

The term “willfully” in s. 477A of the Penal Code means “intentionally” or “deliberately”. Doctrine of holding out could not be applied to show that the person who was holding out was in fact a partner in order to absolved himself from criminal liability.

2. PUBLIC PROSECUTOR V CHEW CHEE WAH

[1996] 1 CLJ 94

HIGH COURT MALAYA, JOHOR BAHRU

Section 294 (i) of the Criminal Procedure Code

Section 408 of the Penal Code

Whether binding over appropriate of offence of criminal breach of trust by a clerk or servant.

Brief facts:

The accused committed criminal breach of trust of cash and cheques amounting to RM45,544.90. He pleaded guilty to the charge and was bound over in the sum of RM3,000.00 cash for a period of three years. It was noted that he misappropriated the amount within two weeks after being employed. The prosecution submitted that the sentence was manifestly in adequate especially when there is a minimum sentence of one year under the new provision of s. 408 of the Penal Code.

Ratio decidendi of the case:

Section 294 (i) would have been available to the accused who is not a youthful offender for him to be bound over, However, in view of the accused calculated action in collecting the amount within thinking of the consequences, a minimum sentence of one year imprisonment and 2 strokes of whipping was imposed.

Principles of law decided in the case (Brief Summary):

Section 294(i) may be applied and imprisonment term be suspended for accused who are not youthful offenders but it may open the floodgate for white collar criminals.

3. CHIN TED LIT V. PUBLIC PROSECUTOR

[1994] 1 CLJ 362

HIGH COURT, KUCHING

Section 405 of the Penal Code

Whether the payment for repairs to the electricity line 'entrusted' to the accused is to be made to his employer

Whether he received the payment in his personal capacity or official capacity

Brief facts:

The accused was in the employ of the Sarawak Electricity Corporation (SESCO). He personally looked into a report by Liew Shen on a damaged electricity line. He came together with SESCO workers in a SESCO van to repair the line. He agreed to repair it for RM350.00. After it was repaired the said amount was handed to him but no receipt was given to Liew Shen's son. He said that the whole matter was a 'secret' and no receipt could be given.

Ratio decidendi of the case:

It was clear that Liew Shen (PW7) had intended to contract with SESCO and not with the accused in the latter's personal capacity. The money was entrusted to the accused to the benefit of SESCO. There was dishonest intention of retaining the money for himself when he clearly said that the whole matter was a secret.

Principles of law decided in the case (Brief Summary):

"The term 'entrusted' used in s. 405 of the Penal Code preceded by the phrase "in any manner" and includes all cases in which goods are handed

over, even voluntarily, for a specific purpose or with some direction as to how it should be dealt with.”

4. LEE KOK NAM V. PP

[1999] 5 CLJ 283

HIGH COURT MALAYA, PULAU PINANG

Section 409 of the Penal Code

Section 316 (a) and (b) of the Criminal Procedure Code

Sections 63 (b) and 65 of the Evidence Act 1950

Whether there was miscarriage of justice when evidence on photostat tendered.

Whether evidence of Photostat admissible when defence failed to object.

Whether there should be a retrial in view of the above.

Brief facts:

The accused was convicted and sentenced to three years imprisonment and a fine of RM2,000.00 for criminal breach of trust of 13 units of Tsurumi Submersible Aerators by dishonestly disposing them an offence punishable under s. 409.

Ratio decidendi of the case:

Photostated copies of documents being secondary evidence would be admissible only when explanation is given as to the non production of the original pursuant to ss. 65 and 63(b) of the Evidence Act 1950. Defence failure to object would not make them admissible.

Principles of law decided in the case (Brief Summary):

Retrial would not normally be granted for the prosecution to have the second chance to adduce evidence when the evidence was available but the Appellate Court would have to decide on interest of justice as to whether a retrial would be proper.

2.1.4 Evidence

Gathering of evidence and statements of witnesses during the course of investigation may entail the cooperation of foreign government. The Mutual Assistance in Criminal Matters Act 2002 (MACMA) would be necessary for that purpose.

5. TAN SRI ERIC CHIA V. PP

[2006] 2 CLJ 544

COURT OF APPEAL, PUTRAJAYA

Section 8(3) of the Mutual Assistance in Criminal Matters Act 2002 (MACMA)

Section 33 of the Evidence Act 1950 (EA)

Section 323 of the Criminal Procedure Code (CPC)

Whether evidence obtained abroad pursuant to MACMA must comply with the requirements of s. 33 of the EA.

Brief facts:

The Accused/Appellant was charged before the Sessions Court for criminal breach of trust when the Prosecution applied for the evidence obtained in Hong Kong by a Magistrate of Hong Kong under MACMA to be admitted at the trial. The learned Sessions judge refused the application because the precondition under s.33 of the EA which applied to such evidence had not been fulfilled. The High Court revised the order on revision on the application of the Attorney General on the ground that s. 33 of the EA did not apply to Evidence obtained in Hong Kong.

Ratio decidendi of the case:

Section 33 of the EA does not apply to evidence obtained under section 8(3) of MACMA because the former pertains to the circumstances for the admission of previous testimonies. Section 8(3) of MACMA however, is a mode of gathering testimonies of witnesses in foreign states.

Principles of law decided in the case (Brief Summary):

Section 33 of the EA does not apply to evidence obtained under section 8(3) of MACMA.

6. PUBLIC PROSECUTOR V. LIM SWEE GUAN

[1968] 2 MLJ 169

HIGH COURT PENANG

Section 408 of the Penal Code

Sections 163, 322 and 310 of the Criminal Procedure Code

Whether charge was bad in law when the time between the first and last date of offences exceeded one year.

Brief facts:

The accused was convicted on his plea of guilty for committing criminal breach of trust of \$165,000.00 cash which was entrusted to him while he was in the employment of United Malayan Banking Corporation Ltd. The dates of the commission of the offences were between 9 March 1965 and 20 November 1967.

Ratio decidendi of the case:

The conviction was set aside and retrial was ordered because the charge contravened s. 163(2) of the Criminal Procedure Code and therefore was bad in law.

Principles of law decided in the case (Brief Summary):

It was proper for the Appellate Court to order a retrial after having regard ss 322 and 310 of the Criminal Procedure Code. It was no an appropriate case for the court to follow *Cheah Yew Fatt v Public Prosecutor* (1960) MLJ xlvii where the conviction was quashed and it was left to the Public Prosecutor to exercise his discretion.

7. MD YUSRI SAHADAN V PP

[2009] 1 LNS 513

HIGH COURT, IPOH

Section 409 Penal Code

Under section 2(2) of the Ordinance, the prosecution will have to prove the following:

- [1] That the accused was a member of the administration; and
- [2] That in such capacity:-
 - (i) he used his position for his pecuniary or other advantage; or
 - (ii) he took part in the Executive Council on a matter relating to his trade, business or profession; or
 - (iii) he took part in any decision likely to affect his pecuniary interest therein.”

Section 417 of the Penal Code:

- [1] By the reason of the deception
- [2] the person deceived is induced to part with any property or to do or to omit to do anything which he would not do or omit to do but for the deception; and
- [3] which commission or omission caused or was likely to cause him some harm or damage in body, mind, reputation or property

Brief facts:

The appellant was charged in the Ipoh Sessions Court for an offence under the Banking and Financial Institutions Act 1989 (BAFIA) in case No. 62-55-91, three charges each in cases No. 62-56-91, 62-57-91 and 62-58-91 for an offence of criminal breach of trust.

Ratio decidendi of the case:

“A judge sitting alone under s. 180 of the Criminal Procedure Code must subject the prosecution evidence to maximum evaluation at the close of the prosecution case.”

“A court must consider carefully whether a defence that has been put forward is capable of raising a reasonable doubt in the prosecution’s case.”

“Failure to consider or an improper consideration of a possible legal defence is a miscarriage of justice.”

Principles of law decided in the case (brief summary):

“It is trite that once a matter is before the court and the court has jurisdiction to hear the matter, the court ought not to concern itself with the manner in which it comes before the court (See: PP v. Tan Kok Lee [1998] 2 MLJ 65). If evidence is relevant it is advisable and the court is not concerned with how it is obtained.”

Other relevant principle of law decided in the case, if any:

“The principle governing sentence is well settled. An appellate court should be slow to interfere or disturb the sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to proved facts and circumstances. The mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.”

2.2 Cheating

2.2.1 Introduction

Cheating is the fraudulent obtaining of someone's property through the use of a false symbol or token or by deceitful or illegal practices.

2.2.2 Scope

Section 415 of Penal Code provides that:

“Whoever by deceiving any person, whether or not such deception was the sole or main inducement,-

(a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property;

(b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property.”

To constitute cheating, there must be:

- [1] Deception of any person and thereby
- [2] (a) fraudulently and dishonestly inducing that person-
 - (i) to deliver any property to any person; or
 - (ii) to consent that any person shall retain any property, or
- (b) intentionally inducing that person to do or omit to do anything which if he were not so deceived and which act or omission causes or is likely to cause harm to that person in body, mind, reputation or property.

2.2.3 Cases

- (1) PP V TAN SRI KASITAH GADDAM [2009] 1 LNS 741
- (2) MOHD JALANI SALIMAN & ANOTHER V. PUBLIC PROSECUTOR (1998) 1 CLJ 123

- (3) MOHD IRWAN ABDULLAH V PUBLIC PROSECUTOR (1986) CLJ (REP) 539
- (4) PASUPATHY KANAGASABY V. PP [2005] 1 CLJ 442

Case Summaries

1. PP V TAN SRI KASITAH GADDAM

[2009] 1 LNS 741

HIGH COURT KUALA LUMPUR

Emergency (Essential Powers) Ordinance No. 22 of 1970

Section 417 of the Penal Code

Under section 2(2) of the Ordinance, the prosecution will have to prove the following:

- [1] That the accused was a member of the administration; and
- [2] That in such capacity:-
 - (i) he used his position for his pecuniary or other advantage; or
 - (ii) he took part in the Executive Council on a matter relating to his trade, business or profession; or
 - (iii) he took part in any decision likely to affect his pecuniary interest therein.”

Section 417 of the Penal Code:

- [1] By the reason of the deception
- [2] the person deceived is induced to part with any property or to do or to omit to do anything which he would not do or omit to do but for the deception, and
- [3] which commission or omission caused or was likely to cause him some harm or damage in body, mind, reputation or property

Brief facts:

The accused was tried on two charges. One was preferred under the Emergency (Essential Powers) Ordinance No. 22 of 1970 (“Ordinance

22”) for conflict of interest when he took part in the Executive Council on matters relating to his business.. The other was made pursuant to section 417 of the Penal Code (F.M.S. Cap. 45) for cheating. They both arose from one transaction i.e at a meeting held by the Sabah Land Development Board (“SLDB”) on 22 October 1996 at a Meeting Room in Fairlane Hotel, Kuala Lumpur.

Ratio decidendi of the case:

The prosecution failed to call the 6 other board members who were at the meeting on 22 October 1996. It was fatal to the prosecution case. The accused was entitled to invoke section 114 (g) of the Evidence Act 1950 to draw an adverse inference against the prosecution. The law as it stand is that all the members of the board function as one entity. Every member is entitled to vote. In view of that reason there was a gap in the prosecutions case as to whether the board members were actually cheated by the accused.

Principles of law decided in the case (brief summary):

The absence of deception which is one of essential elements for offence of cheating under section 417 of the Penal Code, there could not be any inducement of its members to part with any property.

Other relevant principle of law decided in the case, if any:

“A maximum evaluation of the credibility of every prosecution witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.”

**2. MOHD JALANI SALIMAN & ANOTHER V. PUBLIC PROSECUTOR
[1998] 1 CLJ 123**

HIGH COURT MALAYA, JOHOR BAHRU

Section 415 and 420 of the Penal Code

Whether the accused deceived the complainant

Whether the complainant was deceived

Whether the accused were liable for breach of contract

Brief facts:

The accused persons being the managing director and general manager respectively of Shetraco Trading Company (Shetraco) had received orders for plywood from 3 foreign buyers. The payment was by letters of credit with UMBC bank as negotiating bank. The purchase price was agreed and debited to UMBC but no plywood was in fact loaded on board MV Sim Lee by Shetraco. The trial court found that the documents in the form of packing lists and invoices contained false particulars.

Ratio decidendi of the case:

For the charge to be sustained against the accused there must be deception which induced the complainant to deliver the money. In this case, the when the accused presented documents to the UMBC Bank was convinced the latter that the terms of the letters of credit had been complied. There was common intention between the accused to commit the offence especially so when they were in the agreement to supply the plywood in this case. The accused persons knew that the documents contained false information. There was no miscarriage of justice when the learned magistrate used the word 'prima facie' in calling for defence because it was the prevailing law.

Principles of law decided in the case (Brief Summary):

The subtle distinction between breach of contract and cheating is dependent on the intention of the offender at the material time. The trial court was not required to expressly record the reasons for calling the defence as there was no statutory provision to that effect. Failure on the part of the prosecution in not calling the investigating officer was not detrimental to the case because the exhibits were documents not physical exhibits where identity might be in issue.

3. MOHD IRWAN ABDULLAH V PUBLIC PROSECUTOR
[1986] CLJ (REP) 539

High Court Malaya, Kuala Lumpur

Section 417 and 420 of the Penal Code

Whether the Appellate Court should exercise its power to substitute the charges and frame them under s.417 of the Penal Code.

Brief facts:

The accused pleaded guilty to three charges of cheating under s. 420 of the Penal Code wherein he was alleged to have cheated a marketing executive of the New Straits Times by deceiving the latter that the cheques for the payment of advertisements in the Malay Mail would be honoured. It was dishonoured upon presentation. He was convicted of the same and sentenced accordingly. Both he and the Public Prosecutor appealed against sentences.

Ratio decidendi of the case:

The conviction was set aside for the three charges were a nullity in that no offence under s. 420 had been disclosed. The Court declined to exercise the power to substitute the three charges to that under s. 417 of the Penal Code because the facts were insufficient to warrant it.

Principles of law decided in the case (Brief Summary):

The Appellate Court should be cautious in substituting charges in view of the Federal Court decision in *Sivalingam v. PP* (1982) CLJ (Rep) 330

4. PASUPATHY KANAGASABY V. PP
[2005] 1 CLJ 442

Court of Appeal, Putrajaya

Section 415 of the Penal Code

Section 420 of the Penal Code

Section 109 of the Penal Code

Section 422 of the Criminal Procedure Code

The victim had been deceived,

There had to have been an inducement such that the victim delivered any property to any person,

Finally there had to have been a dishonest or fraudulent intention on the part of the deceiving person to induce the victim to deliver the property.

Brief facts:

The accused appellant was charged in the Sessions Court Johor Bahru for an offence of abetting one Janakee d/o Sangaran Nair (PW1) in cheating Malayan Banking Berhad (MBB) on 22 April 1988 by dishonestly inducing its officer Mohamed Saat bin Jalil (PW9) to deliver to her RM21,076.05 against Employees Provident Fund (EPF) Warrant No. 390692 (P2) by deceiving the said PW9 into believing that she (PW1) was Agnes d/o Valentine Selix Morris, the person named in the said EPF Warrant P2 which money would not have been so delivered had PW9 not been so deceived. He was found guilty and convicted and was sentenced to a term of three years' imprisonment and fined RM5,000 or five months' imprisonment in default. He failed in his appeal in the High Court against both conviction and sentence and hence came before the COA.

Ratio decidendi of the case:

It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

Principles of law decided in the case (brief summary):

The confession of a co-accused was adduced in support of the case against another co-accused and the Federal Court on affirming the conviction held that though s. 30 of the Evidence Act 1950 (EA) permits the confession of a co-accused implicating another co-accused to be used

against that other, such confession may only be called in aid of and to lend assurance to other positive evidence which evidence must be sufficient to sustain a conviction.

2.3 FORGERY

2.3.1 Introduction

Forgery means forging, imitating fraudulently. Generally, the forging of documents is with intent to cheat cheating. This may be in the form of false or misleading appearance in contract documents, certificates and the like. To forge is to make an illegal copy of something in order to deceive.

2.3.2 Scope

Section 463 of Penal Code provides that:

“Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.”

The requirements to constitute the offence of forgery may be broadly stated as follows:

- [1] The document or the part of the document must be false in fact;
- [2] It must have been made dishonestly or fraudulently within the meaning of the words as used in section 464 Penal Code;
- [3] It must have been made with one of the intents specified under section 463 Penal Code.

Apart from making a false document, the person should have the intention to cause damage or injury either to the public or to any person and then only it would amount to forgery.

2.3.3 Cases

- (1) TIO TECK HUAT V. PENDAKWA RAYA (1993) 2 CLJ 570
- (2) PUBLIC PROSECUTOR V. MOHAMED FATHI BIN HAJI AHMAD (1979) 2 MLJ 75
- (3) CHEONG KHEAN SHENG V. PUBLIC PROSECUTOR (1970) 2 MLJ 175

- (4) TEE THIAN SEE V. PUBLIC PROSECUTOR [1997] 5 CLJ 654
- (5) RAZAK ABU V. PP [2008] 8 CLJ 252

Case summaries

1. TIO TECK HUAT V. PENDAKWA RAYA [1993] 2 CLJ 570)

HIGH COURT, KUALA LUMPUR

Section 467 of the Penal Code

Whether expired and cancelled credit cards could be considered valuable securities.

Brief facts:

The accused was charged for possessing two credit cards knowing them to be false and he fraudulently or dishonestly intended to use them as genuine when he was arrested on 8 May 1991. One card Exhibit P2, had been used for 4 transactions between April and May 1991 even though the expiry date was November 1990 but it was not revealed that the accused was the purchaser. Another card Exhibit P6 was cancelled on 7 May 1991. The accused was convicted and sentenced to 6 years imprisonment.

Ratio decidendi of the case:

The two cards which had expired and cancelled were no considered valuable securities because no liability or right accrued from them. There was no evidence that the accused had used Exhibit P2.

Principles of law decided in the case (Brief Summary):

Expired or cancelled cards could not be regarded as valuable securities. The evidence that a card had been used was prejudicial to the accused as there was no evidence that he had used it. The probative value had been outweighed by the prejudicial effect of that evidence.

2. **PUBLIC PROSECUTOR V. MOHAMED FATHI BIN HAJI AHMAD [1979] 2 MLJ 75**

HIGH COURT, KUALA LUMPUR

Section 471 and 465 of the Penal Code

Section 163, 173A and 422 of the Criminal Procedure Code (Cap 6) (CPC)

Whether the charge was bad for duplicity, in that it did not comply with s. 163 of the CPC

Whether was irregular and curable.

Brief facts:

There were initially four charges preferred against the accused. They were later reduced to three charges and finally, they were amended into one charge whereby, the accused as a partner of a travel agency was charged for having fraudulently used as genuine four documents, to wit Waran Perjalanan Udara Nos. 9036,9089, 19032 and 19040 which he knew to be forged documents and offence under s. 471 and punishable under s.465 of the Penal Code. No conviction was recorded against him because the learned magistrate invoked s.173A of the Criminal Procedure Code (Cap 6) in binding him over of good behavior for three months.

Ratio decidendi of the case:

The charge was held to be bad for duplicity but it was an irregularity and could be cured by s. 422 of the CPC. Binding over under s. 173A of the CPC was inappropriate in this case. The accused was sentenced to a fine of RM10,000.00 in default 2 years imprisonment.

Principles of law decided in the case (Brief Summary):

An irregular charge may be cured under s. 422 of the CPC

3. CHEONG KHEAN SHENG V. PUBLIC PROSECUTOR

[1970] 2 MLJ 175

HIGH COURT, KUALA LUMPUR

Section 471 and 465 of the Penal Code

Whether the accused had had knowledge that the document was forged.

Brief facts:

The accused had applied to exchange his Singapore identity card for a Federation identity card. When he presented his card to the registration officer, it was found to be a forgery. He was charged for dishonestly using it as genuine and that he knew that it was forged. He was convicted as charged and sentenced to an imprisonment of six months.

Ratio decidendi of the case:

The court held that there was sufficient 'use' of the identity card as genuine when he presented it to the registration officer and therefore he knew it was a forgery.

Principles of law decided in the case (Brief Summary):

Sufficient 'use' of forged document would lead to inescapable conclusion that when it was used, the accused knew it was a forgery.

4. TEE THIAN SEE V. PUBLIC PROSECUTOR

[1997] 5 CLJ 654

High Court Malaya, Kuala Lumpur

Section 467 of the Penal Code

Section 472 of the Penal Code

[1] That the accused had in his possession 28 plates and that he knew them to be counterfeit;

[2] That such plates were made to produce impressions;

[3] That the plates were intended to be used for the purpose of committing forgery;

[4] That such forgery was punishable under S.467 i.e. in this case that the plates were intended to be used to forge documents which purport to be "valuable securities."

Brief facts:

The appellant had in his possession counterfeit plates, or instruments, to wit twenty-eight credit cards as per attached list, knowing the same to be counterfeit, intending that the same shall be used for the purpose of committing any forgery.

Ratio decidendi of the case:

An accomplice confesses himself a criminal, and may have a motive for giving information, as it may purchase immunity for his offence. A spy, on the other hand, may be an honest man, he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men.

Principles of law decided in the case (brief summary):

The evidence of an agent provocateur is not that of an accomplice and does not require corroboration.

5. RAZAK ABU V. PP

[2008] 8 CLJ 252

HIGH COURT MALAYA, SHAH ALAM

Section 467 of the Penal Code

Section 45 of the Evidence Act 1950

Section 47 of the Evidence Act 1950

Section 73 of the Evidence Act 1950

The ingredients of the offence that have to be proved in this case are:

- [1] The appellant must have forged a document; and
- [2] The document must be one of the classes specified in the section. (see Law of Crimes by Ratanlal & Dhirajlal 3rd Ed. at page 2346; A Practical Handbook on Criminal Prosecution in the Subordinate Courts' Teo Say Eng 2000 at page 336)

Brief facts:

The appellant in this appeal, was convicted on a charge of forging documents which purported to comprise valuable security, namely fifteen cheques belonging to one Afizah bte Ibrahim ('SP1') totaling RM37,745.39 (Ringgit Malaysia Thirty Seven Thousand, Seven Hundred and Forty Five and Thirty Nine Sen) which sum of money he employed for his own use, in contravention of s. 467 of the Penal Code. He was sentenced to two weeks imprisonment and a fine of RM40,000 (Ringgit Malaysia Forty Thousand) in default of which a term of five years' imprisonment was imposed. He appeals against both his conviction and sentence. The sentence has been stayed pending this appeal.

Ratio decidendi of the case:

The grave financial loss suffered by SP1 will not be compensated by the imposition of a fine for forty thousand ringgit, as SP1 is not the beneficiary of the fine. In order for SP1 to recover her loss, a civil suit would have to be instituted to recover the monies she has lost.

Principles of law decided in the case (brief summary):

In the absence of such direct evidence it is open to the court to rely on circumstantial evidence to aid it in arriving at a conclusion on the issue of ascertaining proof of 'Forgery' in the absence of a Definitive opinion from the handwriting expert. In Dato' Mokhtar Hashim & Anor. v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 at p. 116.

Other relevant principle of law decided in the case, if any:

An appellate court should always be slow to interfere with the exercise of discretion by the sentencing judge.

Chapter 3

Other Statutory Offences

3.1 Copyright Offences

3.1.1 Introduction

Copyright essentially means the right to control others from copying the work of the author. It also includes the right to stop or preventing others from doing so. One cannot gain from the work done by the copyright owner. Reproduction of the work without permission of the author is an infringement under the Copyright Act 1987.

Apart from civil action, a copyright owner may choose to enforce his rights by way of criminal proceedings. The offences which are liable to be prosecuted are provided for under Section 41 (1) of the Copyright Act 1987. It reads:

“Any person who during the subsistence of copyright in a work or performers’ right –

- (a) makes for sale or hire any infringing copy;
- (b) sells, lets for hire or by way of trade, exposes or offers for sale or hire any infringing copy;
- (c) distributes infringing copies;
- (d) possesses, otherwise than for his private and domestic use, any infringing copy;
- (e) by way of trade, exhibits in public any infringing copy;
- (f) imports into Malaysia, otherwise than for his private and domestic use, an infringing copy;
- (g) makes or has in his possession any contrivance used or intended to be used for the purposes of making infringing copies;
- (h) circumvents or causes the circumvention of any effective technological measures referred to in subsection (3) of section 36;
- (i) removes or alters any electronic rights management information without authority; or
- (j) distributes, imports for distribution or communicates to public, without authority, works or copies of works in respect of which

electronic rights management information has been removed or altered without authority,

shall, unless he is able to prove that he had acted in good faith and had no reasonable grounds for supposing that copyright or performers' right would or might thereby be infringed, be guilty of an offence..."

There is an obvious necessity in view of the nature of the offence for searches to be conducted in to trace infringing copies in copyright matters. They however subject to the provisions of the Copyright Act 1987 in that, there must a warrant having been obtained from a magistrate before one could enter into any house or premises.

Section 44 of the Act provides for search warrants to be issued under the hand of a magistrate. They are to be executed by any Assistant Controller or police officer not below the rank of an Inspector. The warrant may be executed at any time.

The power the prosecute remains with the Public Prosecutor. There must be consent in writing from the Public Prosecutor before any prosecution under the Act could be instituted. (Section 53 of the Copyright Act 1987)

3.1.2 Cases

[1] PUBLIC PROSECUTOR V. KM BASHEER AHMAD (1982) 2 MLJ 78

[2] PUBLIC PROSECUTOR V. THEN MEE KOM AND PUBLIC PROSECUTOR V. CHAN KAM LAI (1983) 2 MLJ 344

Case Summaries

1. PUBLIC PROSECUTOR V KM BASHEER AHMAD

[1982] 2 MLJ 78

MAHKAMAH TINGGI MALAYA, KUALA LUMPUR

Section 15 (1) (d) Copyright Act 1969 (Act 10)

Section 422 Criminal Procedure Code (FMS Cap.6)

Whether fiat from Public Prosecutor required in instituting prosecution

Whether absence of fiat curable

Brief facts:

The accused was charged for possessing in his bookshop 18 copies of literary work which infringed the Copyright Act 1969. An advocate and solicitor had instituted and conducted the prosecution on the charge under s 15 (1) (d) of the Act. In view of the amendment to the Act, the offence was then a non-seizable offence and no prosecution could be conducted without the fiat of the Public Prosecutor.

Ratio decidendi of the case:

The private prosecution in this case was a nullity for want of fiat from the Public Prosecutor. It was not curable under section 422 of the Criminal Procedure Code. As such, the order of acquittal was set aside and substituted with an order of discharge not amounting to an acquittal.

Principles of law decided in the case (brief summary):

Private prosecution in non-seizable offence under the Copyright Act 1969 requires a fiat from the Public Prosecutor.

2. PUBLIC PROSECUTOR V THEN MEE KOM AND PUBLIC PROSECUTOR V CHAN KAM LAI**[1983] 2 MLJ 344**

HIGH COURT, IPOH

Section 15 of the Copyright Act 1969 (Act 10)

Whether search warrant issued valid

Whether criminal proceeding must be instituted within six months from seizure under s. 15(4) of the said Act.

Brief facts:

There were two arrest cases for revision before the court involving two different accused persons. They were charged for similar offences under s.15 (1) of then Copyright Act 1969. Their counsel argued that the seizure of the video tapes in those cases took place more than six months before they were charged. Further, it was contended that the proceedings should

deemed to be instituted upon their arrest and since they had exceeded the six month period, the proceeding was null and void. The search warrants were not issued by a magistrate but by the Registrar of the Sessions Court.

Ratio decidendi of the case:

It was held that, the institution or commencement of proceedings occurs with the arrest of an accused person (s.15 (4) of the Copyright Act 1969). In this case, since the magistrate did not sign the search warrants in both cases, the warrants were rendered null and void. The failure to date the warrant in CAC 675/81 was also a serious defect and it could not be acted upon.

Further, the learned magistrate has no jurisdiction to hear the case CAC675/81 because the seizure was unlawful and the arrest of the accused person had exceeded the six months period for the institution of the proceedings. The seizure of copies of video tapes in CAC 185/81 was illegal in view of the serious irregularity of the search warrant. The subsequent arrest of the accused in the two cases was therefore invalid.

Principles of law decided in the case (Brief Summary):

The institution or commencement of proceedings is deemed to take place with the arrest of an accused person pursuant to s.15 (4) of the Copyright Act 1969). The issuing of search warrant could not be delegated to the Registrar of the Sessions co

3.2 Customs Offences

3.2.1 Introduction

Customs Act 1967 evolved on 2 November 1967. It replaced the three Ordinances which were enforced in separate jurisdiction i.e the Customs Ordinance 1952 of the States of Malaya (F.M. Ordinance No.42 of 1952, the Customs Ordinance of Sabah (Sabah Cap.33) and the Customs Ordinance of Sarawak (Sarawak Cap.26).

It is a very technical Act. It is one of the revenue laws of the country, albeit not merely dealing with duties. It is also an Act that controls the importation and exportation of goods. Once import and export are mentioned, one thing would immediately come to mind - smuggling. It is not the intention here to expound on Customs law save to highlight certain customs offences - smuggling being the main offence.

It is undeniable that smuggling is committed to evade the payment of duties leviable on certain goods. It also happens in respect of prohibited goods or uncustomed goods.

3.2.1 Offences

Section 135 (1) of the Customs Act 1967 listed out the following customs offences namely:

- (a) being concerned in importing or exporting uncustomed, or prohibited goods;
- (b) shipping, unshipping and delivering (or assisting or is concerned therewith) of uncustomed or prohibited goods;
- (c) illegally removing or withdrawing of goods from customs control or assisting thereof or being concerned therewith;
- (d) knowingly harbouring, keeping, concealing or is in possession of uncustomed or prohibited goods or permitting, suffering or causing or procuring the same;
- (e) knowingly concerned in conveying, removing, depositing, or dealing with dutiable, uncustomed or prohibited goods with intent to defraud the government of duties thereon or to evade any provisions of the Act or any prohibition applicable to the goods;

- (f) possession of dutiable or prohibited goods after having denied the same;
- (g) knowingly concerned in any fraudulent evasion or attempt at fraudulent evasion of duties or prohibition of import or export.

3.2.3 Permission for Local Crafts

Section 49 (1) and (2) of the Customs Act 1967 provide:

“[1] No goods of a class dutiable on import or export or prohibited goods shall be carried in any local craft except with the permission of the Director General and subject to such conditions as the Director General may impose.

[2] Such permission may be granted either generally by notification in the gazette, in respect of all local craft or any class or classes of local craft, or specially, in writing under the hand of the Director General or an officer authorized by him in that behalf, in respect of a particular local craft.”

The above provision may appear to be a strict liability offence but it would appear that one may raise defence of necessity as could be seen in the case of *Public Prosecutor v. Ali Bin Umar & Ors.* (1982) 2 MLJ 51.

3.2.4 Cases

[1] PUBLIC PROSECUTOR V. SIA PUNG KOK & OTHERS
(CRIMINAL APPEAL NO. 43 OF 1992) (UNREPORTED)

[2] PUBLIC PROSECUTOR V. KEE AH BAH (1979) 1 MLJ 26

[3] PUBLIC PROSECUTOR V ALI BIN UMAR & ORS (1982) 2 MLJ 51

[4] CHIA SIA CHEK V KETUA PENGARAH KASTAM, JABATAN KASTAM DIRAJA MALAYSIA & ORS (2009) 2 CLJ 286 / (2008) 1 LNS 698

Case Summaries

1. **PUBLIC PROSECUTOR V. SIA PUNG KOK & OTHERS (CRIMINAL APPEAL NO. 43 OF 1992) (UNREPORTED)**

HIGH COURT, BORNEO

Section 119 of the Customs Act 1967.

Whether goods herein were dutiable, uncustomed or prohibited.

Brief facts:

The three accuseds had been charged for conveying uncustomed beer with intent to defraud the government of duties. They were acquitted and discharged without calling for their defence at the end of the prosecution case. The prosecution appealed.

Ratio decidendi of the case:

The burden is on the prosecution to prove that the goods were dutiable, uncustomed or prohibited in customs cases. In this case, the prosecution had not proved that the goods were imported and in fact, the accused persons had produced documents to show that duty had been paid.

Principles of law decided in the case (Brief Summary):

The prosecution may rely on section 119 of the Customs Act 1967 in appropriate circumstances. That section allows a customs officer to seize goods when he suspects them to be uncustomed.

2. **PUBLIC PROSECUTOR V. KEE AH BAH [1979] 1 MLJ 26**

HIGH COURT, JOHORE BAHRU

Section 135 of the Customs Act 1967

Whether the accused knowingly kept uncustomed goods in attempting to fraudulently evade export duty of tin ore.

Brief facts:

The accused was charged for having knowingly concerned in an attempt to fraudulently evade export duty of 21 bags of tin ore weighing 9.45 piculs, an offence under section 135 (1) (i) of the Customs Act 1967. The accused was apprehended after he attempted to escape in a car which was found to have special compartments for the tin ores. The learned President held that there was no case for the accused to answer.

Ratio decidendi of the case:

There were acts immediately leading to the commission of the offence when the accused failed to stop within the area of customs check point. In fact, he reversed his car and drove off. The remote act of leading to the commission of the offence could be seen from the making of the secret compartments for storing the tin ore. The surrounding circumstances considered as a whole showed that the accused had indeed attempted to fraudulently evade export duty.

Principles of law decided in the case (Brief Summary):

An attempt to commit the offence is constituted once acts immediately leading or immediately connected to the commission of the offence had been proved.

3. PUBLIC PROSECUTOR V ALI BIN UMAR & ORS**[1982] 2 MLJ 51**

HIGH COURT, JOHORE BAHRU

Section 49(1) of the Customs Act 1967 (Act 235)

Whether knowledge is relevant in strict liability offence.

Whether defence of necessity could be accorded to the accused.

Brief facts:

The accuseds were charged for carrying tin ore in local craft without obtaining permission from the Director-General of Customs. The Defence raised defence of necessity because a broken rudder caused the craft to drift in distress into Malaysian waters. The learned Magistrate agreed that

no offence under section 49(1) of the Customs Act had been committed but held that it was in transit. The prosecution appealed on the ground that no mental element or knowledge is required in a strict liability offence such as this.

Ratio decidendi of the case:

The accused persons were justified in raising the defence of necessity when the boat they were travelling in was in distress. It was possible for them to prove on a balance of probabilities that knowledge of the existence of the law was absent.

Principles of law decided in the case (Brief Summary):

It was open to the accused to prove that he had no knowledge of the offence in strict liability cases depending on the subject matter of the statute.

A maximum evaluation of the prosecution's case does not mean that the prosecution must prove its case beyond a reasonable doubt at that stage. What it means is that the prosecution must prove each and every essential ingredients of the offence by credible and reliable evidence which has been filtered and sieved through the positive process of evaluation. There should not be any material gaps in the evidence (see *Abdullah Zawawi v. Public Prosecutor* [1985] 2 MLJ 16) and if the evidence admits of 2 or more inferences (see *Kassim bin Soeb* [1974] 1 MLJ 230 and *Abdullah Zawawi Yusoff v. Public Prosecutor* [1993] 4 CLJ 1), then the inference that is most favourable to the accused shall be drawn.

4. CHIA SIA CHEK V KETUA PENGARAH KASTAM, JABATAN KASTAM DIRAJA MALAYSIA & ORS

[2009] 2 CLJ 286 / [2008] 1 LNS 698

HIGH COURT MALAYA, ALOR SETAR

Section 114 (1) Customs Act 1967

Section 115 Customs Act 1967

Section 135 Customs Act 1967

Article 13 (1) Federal Constitution

Whether there no reasonable cause to suspend motorcar was uncustomed goods.

Whether detention lawful.

Brief facts:

The Plaintiff had sought for a declaration that he is the legal owned of on motorcar a Honda Civic 1.6 EFI (A) bearing the registration number PDD 8281. It was seized under s.115 of the Act and he applied for the same to be returned to him. It was seized by the customs officers from the Jabatan Kastam Diraja Malaysia, Sungai Petani as it was suspected to be uncustomed goods under the Act.

Ratio decidendi of the case:

The power to seize the Honda motorcar pursuant to s.114(1) of the Act is applicable when there is reasonable cause to suspect the vehicle was uncustomed goods.

Principles of law decided in the case (brief summary):

The reasonable cause of suspicion either exist before or at the time seizure, otherwise the seizure would be illegal.

3.3 Income Tax Offences

3.3.1 Introduction

The principal legislation for income tax in Malaysia is the Income Tax Act 1967. Prior to that the law in force in the then Malaya was the Income Tax Regulation since year 1947. During that time, the law in force was the Income Tax Ordinance, No. 48 of 1947. The Income Tax Act 1967 has since provides for new provisions which were not present in the Ordinance.

Section 3 of the Income Tax Act 1967 states that:

“Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia.”

Income tax simply means a tax on income. Lord MacNaghten in **London County Council v. Attorney General** (1901) AC 26 had this to say:

“Income Tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct.”

3.3.2 Income Tax Act 1967

The Act provides almost a complete guidance and regulations on the enforcement of income tax law. This includes, among others, the specification of personal chargeability, ascertainment of chargeable income, the requirement to submit correct returns for the persons chargeable and the assessment of tax.

The Act under its Part VIII specifies the offences under the Act and the penalties as the consequences of them.

3.3.3 Jurisdiction of the court

Section 121(a) of the Act provides the additional provisions as to offences under section 113, 115, 116, 118 and 120. No proceedings for an offence under these provisions shall be instituted more than twelve years after the offence was committed. Clause (b) provides that any person who aids, abets or incites another person to commit an offence under sections 113, 115, 116 or 118 shall be deemed to have committed the same offence and shall be liable to the same penalty.

Under section 126 of the Act, the subordinate court (as described in Schedule 5 of the Act) shall have power to try any offence under this Act and on conviction to impose the full penalty for the offence.

The following are some of the common offences committed under this Act.

3.3.4 Cases

- (1) DATO' MUHAMAD FARID HJ AHMAD RIDHWAN v PP [2009] 8 CLJ 558/ [2009] 1 LNS 120
- (2) PUBLIC PROSECUTOR v. MOHD. ZOLKIFLY BIN HARUN [1993] 1 LNS
- (3) PUBLIC PROSECUTOR v. PERIASAMY [1968] 1 LNS 111
- (4) PUBLIC PROSECUTOR v. LEE SENG HEE [1966] 1 LNS 142
- (5) PUBLIC PROSECUTOR v. CHOO SWEE HUAT (1902) 1 LNS 121
- (6) KETUA PENGARAH HASIL DALAM NEGERI v. KIM THYE & CO. [1993] 1 MLJ 25
- (7) NG CHWEE POH v. PUBLIC PROSECUTOR [1977] 1 LNS 80
- (8) TAI CHOI YU v. THE GOVERNMENT OF MALAYSIA & ORS [1993] 3 CLJ 394
- (9) TAI CHOI YU v. THE GOVERNMENT OF MALAYSIA & ORS [1994] 2 CLJ 174
- (10) TEE TEONG TONG v. PUBLIC PROSECUTOR [1964] 1 LNS 204
- (11) ONG LOCK MUI V. DEPUTY PUBLIC PROSECUTOR [1971] 1 LNS 97
- (12) ONG LOCK MUI V. DEPUTY PUBLIC PROSECUTOR [1971] 1 LNS 97

(a) Failure to furnish return or give notice of chargeability.

Part V of the Act provides for the responsibility of the taxpayer to submit their return and the power of the Comptroller to call for the specific returns and production of account books of the taxpayer for the purpose of assessment of the tax. Failure to submit the return is an offence under s. 112 of the Act.

Case summaries

**1. DATO' MUHAMAD FARID HJ AHMAD RIDHWAN v PP
[2009] 8 CLJ 558/[2009] 1 LNS 120**

MAHKAMAH TINGGI MALAYA, KUALA LUMPUR

Rule 10 (1) Income Tax (Deduction from Remuneration) Rules 1994

Rule 17 Income Tax (Deduction from Remuneration) Rules 1994

Section 75 Income Tax Act 1967

Whether prosecution based on s. 75 Income Tax Act.

Whether charges defective and ultra vires

Brief facts:

There were 47 charges preferred against the accused before the Magistrates Court. All were pursuant to Rule 10 (1) of the Income Tax (Deduction from Remuneration) Rules 1994. They were for failure on his part as a company director to remit the amount of tax required to be deducted and paid from the employees' remunerations to the Director General of Income Tax. The court had at the end of the case for the prosecution amended the charges by inserting s. 75 of the Income Tax Act 1967 to the same. The accused was convicted and sentenced to a fine of RM550.00 in default 5 day imprisonment term for every charge. He was further directed by the court to pay the outstanding amount of tax pursuant to Rule 17 Income Tax (Deductions from Remuneration) Rules 1994. The sum of RM107,395.00 was to be paid by way of installments until full and final settlement.

Ratio decidendi of the case:

- [1] The prosecution pursuant to s. 75 of the Income Tax Act 1967 and the penalty under Rule 17 Income Tax (Deductions from Remuneration) Rules 1994 was held null and void. Rule 17 of the said Rules was ultra vires s. 75 of the Income Tax Act albeit a valid provision under s. 154 (1) of the said Act.
- [2] The insertion of s. 75 of the Income Tax Act 1967 into the charges had turned the action into a civil action.
- [3] Rule 17 of the Income Tax (Deduction from Remuneration) Rules 1994 was specifically created for infringement of matters specific to rules 3, 7, 13 dan 10(1) and not applicable to s. 75 of the Income Tax Act 1967.

Principles of law decided in the case (brief summary):

Any amount outstanding could only be claimed in a civil action as provided under s.106.

Other relevant principle of law decided in the case, if any:

It is a general principle that subsidiary legislation is created or enforced based on the powers conferred to it by the parent Act. If it exceeds the powers conferred by the parent Act, any action made there under may be rendered ultra vires and null and void.

2. PUBLIC PROSECUTOR v. MOHD. ZOLKIFLY BIN HARUN [1993] 1 LNS

High Court Taiping

Section 78(a) of Income Tax Act 1967

Whether the learned Magistrate had taken into consideration the failure to submit information by the respondent had severely impeded the government's attempt to fill its coffers.

Brief facts:

The respondents in this case were charged for failing to furnish to the comptroller the return together with the audited accounts after being served with a notice by the comptroller under section 78(a) of the Income Tax Act to do so. The respondent who pleaded guilty to the charge was sentenced with a fine of MR 80.00 in default of 8 days' imprisonment. The deputy public prosecutor appealed against the inadequacy of the sentence.

Ratio decidendi of the case:

Appellate courts should be slow in disturbing the sentence passed by the court below unless there is an urgent need to do so i.e. when the sentence was manifestly inadequate or excessive or when the trial judge passed the sentence on a wrong ground.

The court held that the Magistrate in income tax cases should pass a deterrent sentence because income tax offences affects the country's revenue and in effect affects the country as a whole. Sentence was varied and fine is increased with an additional MR 40.00 and a week imprisonment in default of payment.

Principles of law decided in the case (brief summary):

Appellate courts are slow to disturb sentence passed by the court below unless it was manifestly inadequate or excessive or when the sentence was wrong in law.

3. PUBLIC PROSECUTOR v. PERIASAMY**[1968] 1 LNS 111**

High Court Ipoh

Section 61A of the Income Tax Ordinance, No. 48 of 1947

Whether the sentence was adequate

Brief facts:

This is an appeal by the DPP against the Magistrate's sentence sanctioning and discharging the respondent on his plea of guilty under section 61A of the Income Tax Ordinance, No. 48 of 1947 for failure to submit his returns.

Ratio decidendi of the case:

The sentence was set aside and a fine of \$150 was imposed. Appellate courts should be slow in disturbing the sentence passed by the court below unless there is an urgent need to do so i.e. when the sentence was manifestly inadequate or excessive or when the trial judge passed the sentence on a wrong ground.

Principles of law decided in the case (brief summary):

Appellate courts would not disturb sentence, unless it was manifestly inadequate or excessive or it was wrongly passed.

4. PUBLIC PROSECUTOR v. LEE SENG HEE**[1966] 1 LNS 142**

High Court Kuala Lumpur

Section 59(1) of the Income Tax Ordinance, No. 48 of 1947

Whether the sentence was adequate

Brief facts:

The respondent was charged with three offences under section 59(1) of the Income Tax Ordinance for failure to furnish within 21 days returns of income for the years 1963, 1964 and 1965. He was unrepresented and pleaded guilty to each charge. He was then sentenced to a fine of \$25 on each charge. The DPP appealed against these decisions.

Ratio decidendi of the case:

Fine enhanced to \$125 for each charge

It is only when a sentence appears to be wrong in law or is manifestly excessive or inadequate having regard to the facts and circumstances that an appellate court will interfere in the decision of the trial court.

Income tax offences are of a very grave character and must be treated as such. The trial judge must give the most earnest attention to the public interest. In future income tax cases, magistrates should take more serious view of the situation.

Principles of law decided in the case (brief summary):

The court will not interfere with sentencing unless it is wrong in law or is manifestly excessive or inadequate and not in public interest.

**5. PUBLIC PROSECUTOR v. CHOO SWEE HUAT
[1902] 1 LNS 121**

High Court, Alor Star

Section 59 of the Income Tax Ordinance, No. 48 of 1047.

Whether the sentence was adequate

Brief facts:

The respondent was charged with four charges under section 59 of the Income Tax Ordinance, No. 48 of 1047 for failure to give notice of chargeability. The respondent pleaded guilty and was sentenced to a fine of \$50 for the first charge, and cautioned and discharged from the other three.

Ratio decidendi of the case:

The Court varied the sentence passed by the Magistrate and increased the fine to a \$250 for each charge.

In assessing sentence in income tax cases, the trial judge must remember that income tax forms part as the revenues of the country, which are required to pay for schools, hospitals, rural developments and other multifarious services. A serious effect of evasion may be to persuade the government to cut down on services or to increase the rates of taxes payable by willing members of the community.

Principles of law decided in the case (brief summary):

Principle of sentencing in income tax cases requires the trial judge to take into consideration that income tax forms part as the revenues of the country.

(b) Failure to furnish correct return.

The taxpayer had not only the responsibility to submit returns, but they must also submit a correct return to assist the government to ascertain the real amount of tax on their income. Failure to do so is an offence under section 113 of the Act. In the decided case appended below, it also showed that the assessment made by the Comptroller is appealable to the Special Commissioner by way of reference by the Comptroller (please refer Chapter 2 to Part VI of the Act).

6. KETUA PENGARAH HASIL DALAM NEGERI v. KIM THYE & CO. [1993] 1 MLJ 25

Supreme Court, Kuala Lumpur

Section 113 of the Income Tax Act 1967

Section 99 of the Income Tax Act 1967

Whether the imposition of penalty under section 113(2) of the Act is appealable to the Special Commissioner under section 99(1) of the Act being an assessment.

Brief facts:

The respondents (taxpayer), using a heading entitled "Purchase of Logs" in their income tax returns, amongst others, had apparently caused the Director General of Inland Revenue (DGIR) to miscalculate the timber

profit tax. When the DGIR realized it, they assessed and charged the timber profits tax which the taxpayers duly paid without protest and there has been no appeal from this assessment. The DGIR subsequently further imposed a penalty under section 113(2) of the Act on the ground of the incorrect return of information, the penalty being in effect 100% of the timber profits tax collected earlier. The taxpayer did not agree with the penalty. They then write to the DGIR to refer their appeal to the Special Commissioner under section 99(1) of the Act. The DGIR rejected the taxpayer's appeal and insisted them to pay the penalty imposed on them as soon as possible.

Ratio decidendi of the case:

Although there was an ambiguity in the provisions of the Act on whether or not the penalty under section 113(2) of the Act is part of assessment or not, since the provision is penal in nature, then benefit must be given to the taxpayer. It is decided that the penalty is part of the assessment by the DGIR. The Court then affirmed the decision of the High Court in quashing the decision of the DGIR not to refer the taxpayer's appeal against the imposition of the penalty to the Special Commissioner and that the DGIR is ordered by the court to refer the taxpayer's appeal to the Commissioner.

The penalty under section 113(2) of the Act is in fact an assessment made by the DGIR. It is thus appealable to the Special Commissioner. The discretion by the DGIR under section 113(2) of the Act is not an unfettered discretion. It must have a legal limit. It is wrong for the DGIR to reject the appeal by the taxpayer and not referring it to the Special Commissioner.

The element of mala fide or dishonesty in submitting an incorrect return in section 113(1) of the Act, is only relevant with regards to the prosecution of the taxpayers in court. It is not relevant to be considered by the DGIR in assessing the penalty under section 113(2) of the Act.

Principles of law decided in the case (brief summary):

The penalty under section 113 (2) of the Act being an assessment made by the DGIR is appealable to the Special Commissioner.

(c) Willful evasion of tax.

Payment of income is an obligation. No person liable to pay the same should be allowed to evade without being subject to penalty. It is necessary therefore, for a mechanism to prevent the requirement of this Act from being trifled with. Section 114 of the Act prescribes that it is an offence for any person to willfully and with intent evade or assist any other person to evade tax. Evasion is said to be done through several ways listed in the provision.

In the case of **Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co.** (supra), the DGIR was of the opinion that the taxpayer was trying to evade tax by way of submitting incorrect return of their income. The DGIR then imposed a penalty under section 113(2) of the Act on the taxpayer. Note that the DGIR has a discretion to impose whether a penalty on the taxpayer or to prosecute them in a criminal court. This is one of the ways to penalize the tax evaders.

7. NG CHWEE POH v. PUBLIC PROSECUTOR

[1977] 1 LNS 80

High Court, Kuala Lumpur

Section 96(1)(a) and section 96(1)(c) of the Income Tax Act

[1] Whether willful and intention to evade tax on the part of the taxpayer is negated by his contention that the omission was due to the negligence of his bank manager and accountant and the allegory that the taxpayer is illiterate.

[2] Whether the Act recognize a partnership as a distinct taxable person.

Brief facts:

The appellant was convicted by a district court on nine charges under section 96(1)(a) and section 96(1)(c) of the Act for an omission of his

income from seven fixed deposits from the net worth statement prepared by an officer of the Inland Revenue (the Revenue) by way of investigation into the financial affair of the taxpayer. He was sentenced to nine months' imprisonment and to pay a penalty of \$467,909.10 on the first charge, and on each of the other eight charges to six months' imprisonment and to pay a total penalty of \$51,002.40; all the terms of imprisonment to be concurrent. The appellant appealed against the decision.

Ratio decidendi of the case:

Based on the active involvement of the taxpayer in the administration of the fixed deposit in the bank, and the way that he managed his financial affair, the court dismissed the appeal.

In deciding whether a person has acted willfully with intent to evade tax, the trial judge must satisfy himself that the taxpayer has acted willfully and that his willful act was done with intention to evade tax.

The partnership is only liable to lodge a return of income through its partners. The next step then is for the Revenue to determine first the taxable income of the partnership on the basis of what is submitted in the partnership return, and the Revenue will then apportion such taxable income among the partners according to their rights to share in the profits of the partnership and such apportioned taxable incomes accrued to the individual partner's return of income.

Principles of law decided in the case (brief summary):

The Act does not recognize a partnership as a distinct taxable persona.

(d) Offence of leaving Malaysia without payment of tax

Section 115 of the Act explains that a person who, knowing that a certificate has been issued in respect of him under section 104 of the Act (certificate issued by the DG of the Inland Revenue to any Commissioner of Police or Director of Immigration to prevent a person who has tax debts

from leaving Malaysia unless and until he pays all the tax), voluntarily leaves or attempts to leave Malaysia without paying all the tax, has committed an offence.

**8. TAI CHOI YU v. THE GOVERNMENT OF MALAYSIA & ORS
[1993] 3 CLJ 394**

High Court, Kuching

Section 104 of the Income Tax Act 1967

Whether there is any pre-requisite under section 104 of the Act for the DGIR to issue a notice before issuing the certificate?

Brief facts:

A total sum of RM246,482.39 was due and owing by the plaintiff as income tax. A certificate pursuant to section 104 of the Act was issued by the DGIR to the Director of Immigration with regards to the plaintiff who was not informed of the issuance of the certificate. The plaintiff applied for the renewal of his passport as the pages of his then existing passport had been used up although its validity had not yet expired. The plaintiff's passport was not renewed and his main complaint was the issuance of the certificate as it had affected his liberties and rights under the Constitution and that he has thereby suffered loss and damages.

Ratio decidendi of the case:

It is up to the DGIR to make a subjective test in issuing a certificate under section 104 of the Act. It cannot be substituted by an objective test in a Court of law. It is also not for the court to consider whether there was reasonable cause or grounds for the DGIR to form its opinion and thereby issues the certificate.

There is no need for the DGIR to issue a notice under section 104 of the Act before issuing the certificate as it will defeat the intention of the legislator of the law i.e. to see that the income tax is collected.

The liberty of the plaintiff is not being deprived by the mere withholding of the renewal of his passport. Article 5 of the Constitution does not extend a person's liberty to travel abroad. The court dismissed the action with cost.

Principles of law decided in the case (brief summary):

The DGIR exercises a subjective test in issuing a certificate under section 104 of the Act and it cannot be substituted by an objective test in a Court of law. It is for the DGIR to form its opinion and thereby issues the certificate.

9. TAI CHOI YU v. THE GOVERNMENT OF MALAYSIA & ORS [1994] 2 CLJ 174

Supreme Court, Kota Kinabalu

Section 104 of the Income Tax Act 1967

Whether there is any pre-requisite under section 104 of the Act for the DGIR to issue a notice to the appellant and hear him before issuing the certificate.

Whether the word “leaving Malaysia” in section 104 of the Act means leaving Malaysia permanently.

Brief facts:

A total sum of RM246,482.39 was due and owing by the appellant as income tax. A certificate pursuant to section 104 of the Act was issued by the DGIR to the Director of Immigration with regards to the appellant who was not informed of the issuance of the certificate. The appellant applied for the renewal of his passport as the pages of his then existing passport had been used up although its validity had not yet expired. The appellant's passport was not renewed and his main complaint was the issuance of the certificate as it had affected his liberties and rights under the Constitution and that he has thereby suffered loss and damages. The High Court at Miri heard his application and dismissed it. The appellant appealed.

Ratio decidendi of the case:

The purpose of the issuance of the certificate under section 104 of the Act is to ensure that the taxpayer cannot evade from paying his tax debt by

fleeing country. To say that the DGIR must issue a notice and hear the taxpayer first before issuing the certificate would defeat the object and purpose of the certificate. If a notice to show cause is issued to the appellant it would only serve as a warning of the action about to be taken against him, and this would afford him the opportunity to leave the country before the certificate can be issued.

The word leaving Malaysia in section 104 and section 115 of the Act does not mean leaving Malaysia permanently. If it does, the legislator would have inserted it into the provision. Also, the DGIR would not be able to read the mind of the appellant, and neither would the appellant tell the DGIR if he intends to leave Malaysia without settling his debt.

Principles of law decided in the case (brief summary):

The word 'leaving Malaysia' in sections 104 and 115 does not mean leaving Malaysia permanently.

(e) **Obstruction of officers.**

10. PUBLIC PROSECUTOR v. HUNTSMAN

[1965] 1 LNS 138

High Court, Ipoh

Section 61, section 90 and section 93A of the Income Tax Ordinance 1947

Whether the issue of no notice served on the respondent by the comptroller under section 61B of the Ordinance was repugnant to the provisions of the Ordinance.

Whether the comptroller is entitled to demand for the account book of the taxpayer to be produced for the purpose of inspecting and making extracts from them, because appeals have been lodged against additional assessments upon the taxpayer and the comptroller considers it necessary in the execution of his duties under the Ordinance to reconsider its evidence.

Brief facts:

The respondent was charged under section 93A of the Income Tax Ordinance 1947 (the Ordinance) for hindering an officer of the Department of Income Tax in the discharge of his duties. The comptroller issued additional assessment of the respondent's company with regards to an estate leased out by the respondent's company to another. The respondent appealed to the Board of Review. The comptroller then through its officers exercising his powers under section 61B of the Ordinance demanded the respondent to surrender his company's account book and the respondent refused to comply. Hence, the charge against the respondent. The trial judge held that since section 61B of the Ordinance fell within Part X headed "Return", the power of the comptroller to ask for the production of account book was limited to the purpose of verifying the returns of income furnished under such Part. The respondent was acquitted and the DPP appealed.

Ratio decidendi of the case:

The power of the comptroller to call for and examine account books for the purpose of verifying returns is already provided for by section 61 of the Ordinance and it would be repugnant to the rules of construction to presume that the powers given in one section are coextensive with the powers given in another section.

Service of a notice is not mandatory for the exercise of the power under section 61B and section 90(1) of the Ordinance.

An appeal against an assessment does not operate as a stay of execution.

To say that the comptroller could exercise administrative control over the appellant in any form in regard to the conduct of the appeal, in this case the demand of the production of the account book, after the Board of Review had become seized of the matter, would be repugnant to the rules of judicial procedures and the concept of equality before the law.

Principles of law decided in the case (brief summary):

The power of the comptroller to call for and examine account books for the purpose of verifying returns is already provided for by section 61 of the Ordinance and it would be repugnant to the rules of construction to presume that the powers given in one section are coextensive with the powers given in another section.

Service of a notice is not mandatory for the exercise of the power under section 61B and section 90(1) of the Ordinance.

An appeal against an assessment does not operate as a stay of execution.

(f) Other offences.

Some other kind of offences under this Act is also provided under section 120 of this Act. This includes failure to submit returns with audited accounts, and failure to produce account book.

Case summaries

11. TEE TEONG TONG v. PUBLIC PROSECUTOR

[1964] 1 LNS 204

High Court, Kuala Lumpur

Section 59 of the Income Tax Ordinance, No. 48 of 1947

Whether the Comptroller had the power under section 59(1) of the Ordinance to ask for audited accounts and balance and that such accounts and balance could only have been called for under the provisions of s. 61 of the Ordinance.

Brief facts:

The appellant was charged under section 59 of the Ordinance for failing to furnish return of income for the year of assessment 1962 together with a certified true copy of the audited trading and profit and loss accounts and an audited balance sheet after been issued the notice, without reasonable

excuse. The appellant was convicted and sentenced to a fine of \$500 in default three months' imprisonment.

Ratio decidendi of the case:

Section 59(1) of the Ordinance (which is similar to section 77 of our current Act) gives the Comptroller the power to require any person to furnish not only a return of income but "such particulars as may be required for the purpose of ascertaining the income". Section 61 of the Ordinance (which is similar to section 78 of our Act) gives the Comptroller the same power and the additional power of requiring the production of any books, documents, accounts and returns as well as personal attendance of the party concerned.

The court held that the appellant had been correctly served with the notice under section 59(1) of the Ordinance and therefore was correctly convicted. Appeal was dismissed.

Principles of law decided in the case (Brief Summary):

The comptroller has the power to require any person to furnish returns of income as well as "such other particulars as may be required for the purpose of ascertaining the income" pursuant to ss. 77 and 78 of the Act.

12. ONG LOCK MUI V. DEPUTY PUBLIC PROSECUTOR

[1971] 1 LNS 97

High Court, Johore Bahru

Section 90 (1) of the Income Tax Ordinance 1947

Schedule 9 of the Income Tax Act 1967

Whether a notice issued after the year 1967 under section 90(1) of the Ordinance is enforceable bearing in mind the Ordinance had been repealed by the Income Tax Act 1967 (the Act).

Brief facts:

The appellant was charged with two offences under section 90(1) of the Income Tax Ordinance 1947 (the Ordinance) for failing without reasonable cause to furnish his income returns in respect of years of assessment 1959 and 1966 within the period of 40 days as required by notices issued to him. At the conclusion of the trial, the appellant was convicted and sentenced to a fine of \$150 for each charge. The appellant appealed against the conviction.

Ratio decidendi of the case:

The Act and the Ordinance can co-exist. Para 3(1) of Schedule 9 of the Act provides that the repealed law of the Ordinance shall remain in force for all purposes in relation to the year of assessment 1967 and to the previous years of assessment under that law.

The notice issued after the year 1967 by the comptroller under the law of the Ordinance in respect of years of assessment 1959 and 1966 is valid and enforceable. The appeal was dismissed.

Principles of law decided in the case (brief summary):

Para 3(1) of Schedule 9 of the Act provides that the repealed law of the Ordinance shall remain in force for all purposes in relation to the year of assessment 1967 and to the previous years of assessment under that law.

3.4 Offences Under Companies Act 1965, Securities Commission Act 1993 And Securities Industry Act 1983

3.4.1 Introduction

The main Act that governs the formation and regulation of companies is the Companies Act 1965. There are other various other subsidiary regulation relating to companies like Companies Winding –Up Regulations 1966 and the Companies (Winding-Up) 1972 just to mention two. The said Act also governs the issuance of company shares. There are other specific legislation that govern the regulation of securities and futures and they could be found in the Securities Commission Act 1993 And Securities Industry Act 1983.

3.4.2 Cases

1. PP V. TAN SIEW HUI (2008) 8 CLJ 142 SUPP.
2. LIM FOO YONG V PUBLIC PROSECUTOR (1976) 2 MLJ 259
3. G CHOUDHURY V. PUBLIC PROSECUTOR [1980] 1 LNS 20
4. PUBLIC PROSECUTOR V CHUA SENG HUAT (1999) 3 MLJ 305

Case Summaries

1. PP V. TAN SIEW HUI

[2008] 8 CLJ 142 SUPP.

High Court Malaya, Kuala Lumpur

Section 32B(1)(c)(aa) Securities Commission Act 1993

Sections 91 and 92 Evidence Act 1950

Whether false information regarding employee allocation of shares submitted to Securities Commission.

Whether there was false or misleading information; and

Whether the submission of such false information was caused by the accused.

Brief facts:

The accused was charged with an offence under s. 32B(1)(c)(aa) of the Securities Commission Act 1993 (the Act) for presenting to the Securities Commission false information in a revised Pink Form allocation list dated 27 December 1996 which was attached a letter dated 6 January 1997. The prosecution claimed that the information regarding the 20 of the employees of the company in the revised list submitted to the Securities Commission was false regarding because they were not entitled to the shares as allocated to them.

The learned Sessions Court Judge having found that the prosecution had failed to establish that the information was false or misleading information and the accused submitted false acquitted and discharged the accused at the end of the prosecution's case.

Ratio decidendi of the case:

In view of the minimal change in the actual share allocation with the one approved by the Securities Commission earlier, it could not be said that the list contained false information.

The allocation of shares in this case was not false. Save for proving that the Pink Form allocation had to be submitted to the Securities Commission the prosecution had not proved that it contained false information and the submission of the false information was by the accused. The accused being an employee of the company had no authority to cause the allocation list to be submitted to the Securities Commission.

Principles of law decided in the case (Brief Summary):

Pursuant to ss. 91 and 92 of the Evidence Act 1950, oral evidence cannot contradict, vary add or subtract the terms in a document.

2. LIM FOO YONG V PUBLIC PROSECUTOR

[1976] 2 MLJ 259

HIGH COURT, KUALA LUMPUR

Section 13 (1) Companies Act (Malaysia)

Whether the accused had any knowledge of the contract requiring declaration of interest.

Brief facts:

The accused had entered into a contract with a company. He was also the managing director of the company. He was charged for an offence of failing to declare his interest in that contract. The learned President of the Sessions Court found him guilty of the charge.

Ratio decidendi of the case:

The evidences were circumstantial. The learned President had not duly considered the whole evidence on all angles and the court could not say if she had done so, she would have arrived to the conclusion that the accused was guilty.

Principles of law decided in the case (Brief Summary):

Where circumstantial evidences were adduced, they must point irresistibly to the guilt of the accused.

3. G CHOUDHURY V. PUBLIC PROSECUTOR

[1980] 1 LNS 20

HIGH COURT SINGAPORE

Section 132A (8) Companies Act

Whether the first six charges disclosed offences under s.132A(8) of the Companies Act

Brief facts:

The appellant faced 112 charges under the Companies Act 1965 before the 9th District Court. They were alleged to have been committed between June 19, 1978 and July 25, 1978. The first 6 charges were under s.132A (8) (The 1st charge is set out in Annex A), the 7th and 8th charges under s.364A, the 9th to the 60th charges under s.135 (9) and the 61st to the 112th charges under s.135A(2). The appellant being dissatisfied with the convictions on the first seven charges and the sentences imposed has appealed both as to conviction and sentence.

Ratio decidendi of the case:

Whether a company is afflicted with financial crisis depended very much on opinion or of judgment. It is therefore subjective. In this case, it was found in evidence that the accused was aware of the company's financial position in view of his having access to the information relating to the financial health of the company.

Principles of law decided in the case (brief summary):

'Specific information' connotes not merely that it is precisely definable but that its entire content can be precisely and unequivocally expressed and discerned.

4. PUBLIC PROSECUTOR V CHUA SENG HUAT

[1999] 3 MLJ 305

HIGH COURT KUCHING

Section 90 Securities Industry Act 1983

Whether the management of accounts in this case are specific

Whether the accuracy of accounts relevant in this case

Whether there was improper use of information

Whether it was incumbent on the prosecution to show what an ordinary managing director in similar position would do.

Brief facts:

The accused was charged for insider trading under sections 89 and 90 of the Securities Industries Act 1983. They involved the sale of two shares of Kim Hin Industries Bhd on two separate occasions. He was the managing director of the said company when it happened. It was alleged the he had the information of the performance of the company shares. The accused was acquitted and discharged because the lower court held that section 90 did not apply to managing directors or other directors of public listed companies.

Ratio decidendi of the case:

The term 'any person' in s.90 of the Act covers all persons, be they government or public officers of public or private companies. The discharge and acquittal on the ground that that section was not applicable was therefore wrong.

Evidence revealed that the accused was aware of the decline in the profit of the company. The accuracy of the accounts was not relevant. The accused was found to have knowledge of the information which affect the price of the shares and that he had professional knowledge of the same.

Principles of law decided in the case (Brief Summary):

The term 'any person' in s.90 of the Act includes all persons be they government or public officers of public or private companies.

3.5 Offences Under Printing Presses and Publication Act

3.5.1 Introduction

It is an offence under the Printing Presses and Publication Act 1984 to print any newspaper without a permit or where permit has been revoked or suspended. Likewise, any person who imports, publishes, sells, circulates or, distributes or, offers to publish, offers to sell, offers to circulate, offers to distribute any newspaper printed in Malaysia or in Singapore without permit may be deemed to have committed an offence under the said act.

3.5.2 Case summary

1. ZABIDI MORAD V PP

[2004] 1 CLJ 165

MAHKAMAH TINGGI MALAYA, KUALA LUMPUR

Section 5(2)(b) Printing Presses and Publications Act 1984

Section 14 Printing Presses and Publications Act 1984

Whether the charge herein was defective;

Whether the presumption section could properly be invoked in the circumstances; and

Whether upon the proper interpretation of s. 5(2)(b) of the Act the conviction was a nullity

Brief facts:

The appellant was initially charged for selling 545 copies of "Haraki" newspapers without permit from the Minister. It was later amended to an offence of possession of the same under s.5 (2) (b) of the Printing Presses and Publications Act 1984 ('the Act'). Upon conviction he was fined RM5,000 in default to two months' imprisonment. He appealed on the ground that the offence was not known to law. The court relied on the presumption section under section 14 of the said Act to establish possession.

Ratio decidendi of the case:

- [1] Section 5(2)(b) of the Act encompasses multiple offences. The element of possession must be proved pursuant to the limb which stipulates that, "any person who... has in his possession for any such purpose". This part creates another category in respect of which possession is an element.

- [2] For possession to be established in such offence there must be certain purpose eg. importing, publishing, selling, circulating, or distributing or offering to publish, offering to sell or offering to circulate.

Principles of law decided in the case (brief summary):

For s. 14 presumption to be invoked there must be evidence that a person is in possession or custody or control of publication which contravened sub-s. 5(1) or (2) of the Act, the possession of which is for the purpose in para. (a) or (b) of sub-s. 5(2) whichever is applicable.

CASES AND MATERIALS
CRIMINAL
BREACH OF TRUST

CASES AND MATERIALS

CRIMINAL BREACH OF TRUST

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Table of content

	Pages
[1] Introduction	2
[2] Ingredients	4
[3] Classification of Types	14
[4] Procedures in Prosecuting	35
4.1 The Charge	35
4.2 Transfer of Cases	42
4.3 The Bail	44
4.4 The Evidence	46
[5] Burden of Proof	52
[6] Presumption	64
[7] Defence	71
[8] Sentencing	77

Chapter 1

Introduction

Breach of Trust may be a civil or criminal

Breach of Trust as defined by dictionary is a term susceptible of wide application, comprehending derelictions by persons in all confidential and fiduciary relationships, but applicable particularly to a violation of duty by a trustee, whether it be willful or fraudulent, occurring by negligence, or arising from mere oversight or forgetfulness¹. Breach of Trust as a concept will justify a claim for damages. Mental element will differentiate whether it fall under civil cases or criminal breach of trust². Criminal Breach of Trust (hereinafter referred as CBT) is a common example of economic crime³. Therefore, this paper will be divided into several topics that dealt with CBT in Malaysia. It consists of element or ingredient of CBT, classification of CBT, procedure, presumptions, principle in sentencing CBT offences and conclusion. Last but not least, this paper will also include discussion on the latest cases on CBT.

A breach of trust may be criminal or civil. The difference between the two is as follows: Every civil breach of trust gives rise to suit for damages. Thus where a trust property is lost due to negligence it may make the person so entrusted civilly responsible. The special element in criminal breach of trust is that there is evidence of a mental act of dishonest misappropriation.

¹ Ballentine's Law Dictionary, Copyright (c) 1969 Lexis Law Publishing, a division of Reed Elsevier, plc

² Translated version from "Undang-Undang Jenayah di Malaysia, Dato Hj. Mohamad Shariff Hj Abu Samah & Datin Hjh Asidah Hj Mohd Ali, ILBS, 2008" at page 391

³ Criminal Breach of Trust, Chai Yong Seng LLM (NUS) of Lincoln's Inn, Barrister-at-Law, [1994] 2 MLJ xcvi; [1994] 2 MLJA 97

CBT is a sizeable offence. Therefore, it is a case where the police may arrest the person without warrant by virtue of 1st Schedule of Criminal Procedure Code. On the other hand, if we referred to the statistic given by the Royal Malaysian Police, in 2006 alone, Criminal Breach of Trust reported were in the total sum of 1850 cases⁴ and ranks second highest case of commercial crime cases. Such statistics show how serious CBT as commercial crime cases were and could not escape our special attention.

⁴ <http://www.rmp.gov.my/>

Chapter 2

Ingredients Of Criminal Breach Of Trust

2.1 The ingredients of the offence.⁵

CBT and its variations are described and set out under ss. 405 to 409 of the Penal Code.

The common ingredients of the CBT offence are as follows:

[1] The accused must be entrusted with property or with dominion over property.

[2] The accused must have:

(a) dishonestly misappropriated or converted the property to his own use,
or

(b) dishonestly used or disposed of the property in violation of:

(i) any direction of law prescribing the mode in which the trust is to be discharged, or

(ii) any legal contract made touching or concerning the discharge of such trust,

(c) wilfully suffered any other person to:

(i) misappropriate or convert the entrusted property to his own use,
or

(ii) use or dispose of the property in violation of any direction of law or any legal contract concerning the discharge of such trust.

S 405 of the Penal Code is the CBT simpliciter which is punishable under s 406 of the Code ,and carries an imprisonment for a term which shall not

⁵ Criminal Breach of Trust, by Mary George ,supra

be less than one year and not more than ten years and with whipping and shall also be liable to a fine.

2.1.1. The elements explained:

1. In any manner

This relates to the expression "entrusted" in section 405 which has been used in a wide sense, in compassing all cases in which goods are entrusted, that is, voluntarily handed over for a specific purpose and are dishonestly disposed of in violation of any direction of law or in violation of the contract. This includes constructive trust, which is not trust created by settlor, rather it arises by operation of law. Prosecution must establish the accused's dominion over property was the result of entrustment.

2. Entrustment of Property and the Existence of Trust

Section 405 covers those persons whose positions are analogous to those of trustees. The Supreme Court of India in the case of Harihar Prasad Dubey v. Tulsi Das Mundhra & Ors. AIR [1981] SC 81 reaffirmed this as follows:

When section 405 which defines criminal breach of trust speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody

of the property to be kept or disposed of by him for the benefit of the other party.

2.2 Dominion over Property

Under s. 405, the prosecution must establish that the accused was either:

[1] entrusted with property, or

[2] entrusted with dominion over property.

In an Indian case the Court held that the prosecution must show that his dominion was the result of an entrustment. Mere existence of the accused's dominion is not enough.

A person who is entrusted with property possesses certain indicia of apparent ownership. He is actually in charge of the trust property and, except for restrictions imposed by the trust, he is free to use the property in any way he chooses. Whereas a person who is entrusted with dominion over property does not have the same rights over it.

The issue on control de facto or de jure over the property, irrespective of whether the accused is entrusted with property or entrusted with dominion over property is important to determine whether CBT is constituted. .

2.3. Property

Property includes incorporeal property, but the offence does not depend on its definition, rather the acts covered under the section. It does not matter whether it was immovable or moveable property. The offence is concerned with entrustment. So long as there is entrustment, that matters.

The actus reus of s. 405 is as follows:

- (i) misappropriation.
- (ii) conversion.

- (iii) use or disposal in violation of any direction of law.
 - (iv) use or disposal in violation of any legal contract.
 - (v) the sufferance of any other person to commit any of the four above-mentioned acts.
- (i) and (ii) Misappropriation and Conversion

To 'misappropriate' means to improperly set property aside to the owner's exclusion. To convert means to appropriate and deal with another's property, without right, as if it is one's own. Thus misappropriation is equivalent to wrongful taking or using of property but not necessarily to one's own use while if property is converted the element of personal use must be present.

(iii) Use or Disposal in Violation of any Direction of Law

The property that is entrusted must be used in accordance with the prescribed directions. [In PP v. Teoh Teck Chye [1981] 2 MLJ 176 the accused was a bank manager who was alleged to have approved payment of cheques to a customer in excess of his overdraft, and found guilty of criminal breach of trust because his acts were done in violation of the law prescribing the mode in which the entrustment should be discharged. However, the Federal Court held that the accused's acts were in breach of a legal contract concerning the discharge of the trust, not a criminal offence.

(iv) Use or Disposal in Violation of Legal Contract

The requirement here is that the contract must be a legal or valid one.

(v) Suffers any person "so to do" Acts

In Federal Court in the case of Yeoh Teck Chye [1981] 2 MLJ 176 stated the CBT elements as follows:

- (i) entrusted with property;
- (ii) (a) that he should dishonestly misappropriate or convert it to his own use or
(b) dishonestly use or dispose of the property or wilfully suffer any other person so to do in violation of
- (iii) (a) any direction of law prescribing the manner in which such trust is to be discharged or
(b) of any legal contract made touching the discharge of such trust.

It was submitted 'wilful suffering' clause only applies to violations of directions of law or contract and not to misappropriation and conversion.

In that case, the accused was convicted for willfully suffered another person to suffer to misappropriate property entrusted to the accused. However, "willfully" was not defined under the code.

2.4 The two mens rea terms.

These are:

1. Dishonestly
2. Wilfully (Wilfulness)
 1. Dishonestly is associated with the first four acts, while
 2. Wilfulness relates to the fifth act.

"Dishonestly" is defined in s. 24 of the Code as "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person to do that thing dishonestly. But the term 'wilfully has

not been defined in the Penal Code. It cannot mean dishonestly as that would be superfluous.

The Mens rea Component

The mens rea element is reflected in the dishonest use of the money in his own business violating the express or implied contract touching the discharge of such money. "Dishonesty" reflects the guilty mind and raises the elements of wrongful gain or wrongful loss. A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property as well as when such person is wrongfully deprived of property.

Sections 407, 408 and 409 have one common feature. A high degree of trust and confidence is placed on these persons and accordingly they have been awarded stiffer punishments. Another outstanding feature is that the Code includes corporate liability for criminal breach of trust.

Relevant Cases:

1. Ng Chye Giat v. Rex

[1938] 1 MLJ 126.

This is a decision by Howes J. It's a Magistrate's Appeal. The Appellate Criminal Jurisdiction of Penang had decided this case.

Relevant Provision :

Section 405 the Penal Code.

Facts of the case :

In this case the Appellant borrowed the jewellery on 17.05.1937. Then the Appellant pawned the said jewellery on 19.05.1937. When asked by the Complainant for its return, the Appellant suggested the jewellery was safer with him, locked in his safe. On these facts the Appellant was arrested, charged with criminal breach of trust of which he was convicted. On appeal, the Court quashed the conviction.

Ratio Decidendi of the Case:

The position of the parties is that of bailer and bailee. Where a chattel is lent by its owner to the bailee for the express purpose of conferring a benefit upon the latter, without any corresponding advantage of the owner how then can it be suggested that any trust was created in favour of the complainant or for her benefit? Clearly, if there were no trust, actual or constructive, there can be no breach of trust.

2. Tan Liang Chew & Ors v. Public Prosecutor [1997] 5 MLJ 338

High Court (Kuala Lumpur)

S. 409 and s. 420 of the Penal Code.

Brief facts in case:

The first accused was the director of Koperasi Kewangan Perindustrian Malaysia and also sat in its committee that made recommendation to its Board of Director to approve applications for housing loan. All the accused signed a cheque for the loan amount applied for even before the Board sat to consider the application. The first accused was charged with criminal breach of trust and the second and third were charged for abetting the offence.

Ratio decidendi of the case:

Although a managing director of a company has been held by the general law to be an agent of a company, s.409 of the Penal Code refers to person who are professional agents and not to casual agents such as a managing director.

Principles of law decided in the case:

Dishonesty is an element in s.409 of the Penal Code that must be proven in order to secure conviction.

Other relevant principle of law decided in the case:

In drafting a charge, if a public servant is charged for criminal breach of trust under s. 409 of the Penal Code, he should be charged with being entrusted with property or with dominion over property 'in his capacity of a public servant'. If, however, an agent is charged, he should be charged for being entrusted with property or with dominion over the property 'in the way of his business as ... (an) agent'.

2.5 Wrongful gain and wrongful loss

"Wrongful gain" and "wrongful loss" are in turn defined in s. 23 as follows:

"Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled. 'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled.

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property."

2.6 The value of the amount taken is irrelevant.

Relevant case:

3. Muhammad Faizal Sundrajan bin Abdullah v Public Prosecutor [1998] 7 MLJ 465

This is a criminal appeal case from the Sessions' Court to the High Court Shah Alam.

Section 409 Penal Code

Facts of the case:

This is criminal appeal case. The appellant was charged for an offence under s 409 of the Penal Code ('the Code') for criminal breach of trust. It was alleged that the appellant ,being an agent of Syarikat Singer (M) Sdn Bhd's branch in Klang ('the company') had committed breach of trust by handing over a sale receipt without the sale proceeds of RM15,407 to the manager of the company and that the appellant had used the said proceeds for his own benefit. The appellant was convicted of the offence and sentenced to three years jail and two strokes of rotan. The appellant appealed against both the conviction and sentence. Initially, the appellant put forth seven grounds of appeal but abandoned the third ground during submissions.

The grounds of appeal includes: (i) the trial judge accepted and believed the testimony of PW1 and PW2 notwithstanding the absence of documentary evidence to support their testimony; (ii) the evidence of PW4 was uncertain as to the extent of how much of the payments made by PW4 was actually received by the appellant and that by third parties which the appellant cannot be held responsible for; (iii) there were inconsistencies in the evidence of PW7, the manager of the company as to the actual amount allegedly not paid to the company; (iv) the maker of

P3, the statement of outstanding accounts, was not called to testify; and (v) there was no evidence tendered to prove that the appellant was an agent of the company other than the customer's copy of the record of payment which was tendered for identification as ID1 but not formally put in as an exhibit. The appeal was dismissed.

Ratio decidendi:

In a charge under s 409 of the Code, the amount taken is not an ingredient of the offence but merely an ingredient of the element of dishonest taking or converting for own use property one is entrusted with. The value of the amount taken is essentially irrelevant to the offence but merely a factor to consider in sentencing only.

Chapter 3

Classification Of Types Criminal Breach Of Trust

3.1 Criminal Breach of Trust in general

In general, CBT was governed under provisions of the Penal Code, in particular from Section 405 till Section 409B of Penal Code. The terms of s. 405 are very wide. This section embraces the case of all those offenders not specifically provided for in ss. 407, 408 and 409. As mentioned earlier, in CBT there is the dishonest misappropriation of property by a person in whom confidence is placed or who is entrusted with the custody or management of such property. In all criminal offenses two elements must be established before the accused is convicted. They are the guilty act and the guilty mind. In Latin, these are known as the *actus reus* and *mens rea* of an offence respectively⁶.

Section 405 of Penal Code reads :

Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person, dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that, dishonestly misappropriates, or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

⁶ Criminal Breach of Trust Under Malaysian Law: A Review by Mary George, [1990] 1 CLJ i (Part I) and x (part II)

3. 2. Criminal Breach of Trust by Carrier

Whoever, being entrusted with property as a carrier, wharfinger or warehouse keeper commits CBT in respect of such property, shall be punished with imprisonment for a term which may extend to ten years and shall also be liable to fine". The offence of CBT found its way into the Code approximately one hundred and twenty-nine years ago. CBT occurs when persons who hold positions of trust, confidence and responsibility violate the trust, confidence and responsibility so imposed. But the concept of the offence has changed dramatically from the time when Lord Macaulay first drafted the criminal liability of the clerk or servant or carrier or wharfinger or warehouse keeper of the late 1930's to the complex commercial fraud as shown in the local case of Mohd. Abdullah Ang Swee Kang v PP [1987] 2 CLJ 405 of the present time.

3.3 Criminal Breach of Trust By Clerk or Servant

Section 408 of the Penal Codes states :

Whoever, being a clerk or servant or employed as a clerk or servant and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment and shall also liable to fine.

In general, a clerk is an employee who deals with filing, records, correspondence and accounts. However the job scope is not exhaustive since the scope of work depends on the fact and nature when a clerk carries out his duty. Whereas, a servant is a person where he is under master and servant relation by giving his assistance since his own skill and labour is not sufficient to carry the business. He is a person who acts under the control or supervision of his master and bound to conform to all of the orders given in his course of carrying his duty. A servant or a clerk

must be employed either implicit or explicit. As long as he employed in the course of his work and carrying out accordingly, he is considered as employed.

The clerk or servant must be entrusted with the property or dominion over property. "Entrusted in such capacity with the property" or "Dominion over the property" refers to the state of fact when the clerk or the servant in carrying his duty. The clerk and the servant must then breach the trust of the said property that he is entrusted to or having dominion over. In Ratanlal at page 2068 and 2069, a breach of trust can occur where the clerk or servant dishonestly:

- i. Misappropriated
- ii. Converted to his own use
- iii. Used
- iv. Dispose of the said property and it must be done in violation of any direction of law and contract (express or implied) which the trust was discharged to him.

It must be noted that the offence committed does not require any losses on the part of the victim/complainant of the said property. What is important the property is misappropriated, converted, used or dispose by the clerk or the servant in violation of the trust or dominion over it.

When a criminal breach of trust is committed, it will also give rise to civil liability whereby the civil claim if instituted does not bar criminal litigation against the accused by the state.

Relevant Cases:

1. Yeoh Bah Kow v Public Prosecutor

[1961] 27 MLJ 6

Penang Criminal Appeal No. 35 of 1959
Section 408 of Penal Code

Brief facts of the case:

This is an appeal from the decision of President of the Sessions Court in Penang, whereby the appellant was convicted of CBT, and sentenced to 18 months imprisonment.

The particulars of the charge upon which the appellant was convicted were that he between the 1st day of May, 1959, and 27th day of August, 1959, at No. 7, Weld Quay, Penang, being a manager in the employment of Ahmad bin Haji Jamal, the proprietor of Penang Travels, Penang, and in such capacity, being entrusted with certain property, to wit, cash and cheque deposits, amounting to \$6,503.80 did commit CBT in respect of the property.

The complainant on his own admission said that he had no idea of the money he had advanced to the appellant to start the business. The sole evidence as to the moneys the appellant had received from the complainant consisted of a receipt Exhibit P24 dated 24.8.1959 for \$15,059.18 and signed by the appellant.

Two receipt books were produced in evidence – Exhibit P20 and P21. In P20 the appellant kept the total amount of all the money he had received in the course of the business i.e. contained receipts for moneys to a total sum of \$7,651. In P21, the appellant recorded the items he had paid over directly to the complainant i.e. contained receipts for moneys to a total sum of \$1,886.50. The complainant signed all the receipts in P21.

In the course of his judgment the learned President stated:-

“The sums shown in P20 and Ex. P21 have no connection with the \$15,059.18 which was spent as a capital for the formation of the company”.

The learned DPP intimated at an early stage of the appeal that in the circumstances of the case he could not properly support the conviction. Hence the appeal was allowed and the conviction and sentence was quashed.

Principles of law decided in the case:

The conviction and sentence was quashed on appeal as evidence adduced was contrary to section 408 of the Penal Code of criminal breach of trust.

The finding of the learned President that *“The sums shown in P20 and Ex. P21 have no connection with the \$15,059.18 which was spent as a capital for the formation of the company”* is contrary to the evidence.

The complainant himself had no idea how much money he had advanced to the appellant for the formation of the company and he has no accounts of such advances. The figure \$15,059.18 advanced as capital was the appellant's own figure, a figure which the complainant accepted as correct.

Further Ex. P24 expressly states that the amount was made up of “various sums during the period 1st May – 24th May, 1959” and supports appellant's case that the sum did not consist of specific advances in cash by the complainant at any one time, but also included the total sums of money collected by the appellant in the course of the management of the business. There was no rebuttal of evidence as to how appellants spent money in the business, and establishing that he converted the money to his own private use. In that case, it was obvious that the complainant's evidence was unsupported by proper records, and he relied on the

accused's figures in regard to the amount given as capital for the business.

2. Syed Abdul Rahman Wan Akil vs PP

[2008] 2 CLJ 871

High Court Kuching (Criminal Appeal)

Section 409 Penal Code

Section 173 (h) (ii) Criminal Procedure Code

Section 422 Criminal Procedure Code

Brief facts of the case:

The appellant was charged fro committing criminal breach of trust in his capacity as a government servant/treasury clerk in respect of certain property to wit cash amounting to RM253, 848. 09. The accused was acquitted by the Sessions court for the charge on the amount of RM253, 848. 09 It was further amended and charge in respect of quantum of money only to RM207, 210. 29.

Ratio decidendi of the case:

In this case, from the evidence from the prosecution, there is no clear substantiation to show that the money as stated in the charge was entrusted to the appellant. According to Ratanlal's Law of Crimes (24th edition) at page 1964 states that the word "entrusted" when used with respect to money means that the money has been transferred to the accused under circumstances which show that notwithstanding its delivery to the accused, the property in it continues to vest in the prosecution and the money remains in the possession or control of the accused as a bailee and in trust for the prosecutor as bailor, to be restored to him or applied in accordance with the instruction.

3. Azlan Alias v PP,

[2009] 1 LNS 534

Court of Appeal at Putrajaya dismissed accused appeals and affirmed decision of High Court where the High Court affirmed conviction and sentences by Magistrate Court.

Section 408 of Penal Code

Brief fact of the case:

It is to be noted that SP4 was the internal auditor based at the Bank Pertanian Head Office in Kuala Lumpur on the material dates. He has given oral evidence of his knowledge of the operations of and access to Bank Pertanian's computer, from which he could view and obtain the documents of the branches. He had obtained the aforesaid documents which were the printouts from the computer in the course of its ordinary use. These computer-generated documents have been tendered as the exhibits tabulated above. We are of the view that these documents have satisfied the requirements of s. 90A. There were five ground of appeal that put forward by counsel for the accused among others as follows;

[1] Accused remains silent

[2] Admissibility of Computer Documents

[3] Accomplice Evidence

[4] Drawing, Clearance and Return of Cheques

[5] Accused Remains Silent

Principle of Law Decided In The Case:

For ground no. 4, It was contended for the defence that the MBB cheques, being bills of exchange drawn by the accused between 6 and 9 July 1997,

were validly and properly presented for clearance, but by 9 July 1997 they had yet to be cleared, in which case, the said cheques or the underlying transactions could not form the basis of any charge framed under s. 408 between 6 and 9 July 1997.

COA ruled out that the accused main intention in directing SP6 and SP7 is to cash his MBB cheques was to make the above payments to the recipients. The corroborative evidence of SP9 and SP10, as two of the recipients, points to his conduct in ensuring that the monies deposited in the Bank Pertanian Machang branch could be paid out to the recipients on the respective dates, thereby causing wrongful loss to Bank Pertanian and wrongful gain to the recipients. This is the evidence of the element of dishonesty on the part of the accused as stated under Section 405 of Penal Code which is to be read together with Section 23 and 24 of the same Code.

Other principle of law applicable in the case:

Section 90A of the Evidence Act 1950

What is pertinent to discuss here is for ground no. 2 for admissibility of computer documents. Defence counsel stated that the computer-generated documents viz exh. P9, P11, P13-16 and P18-P21 tendered through SP4 were inadmissible, as they had not satisfied the requirements of s. 90A of the Evidence Act 1950, and SP4 was not the person responsible for the computer that produced the documents but had merely examined them in Bank Pertanian Machang, without explaining how and where he got the documents, as a result of which, there was no proof as to the movement of funds in the accused or other beneficiaries' accounts. However, the court ruled otherwise in that the documents were admissible as SP4 had collected the documents from the branches, such

documents being computer printouts from computer in the course of the bank's ordinary use. Thus, the requirement under s.90A was satisfied.

3.4 Elements of Criminal Breach of Trust by Banker, Merchant, Factor, Agent, Public Servant, etc. - s. 409

Corporate liability for criminal breach of trust were attributed to the activities of the officers to the corporation itself.

This section classes together public servants or agents. With the exception of public servant, all the other terms have not defined under the Code. As a rule the duties of such persons are of a highly confidential character, involving great powers of control over the property entrusted to them; and a breach of trust by such persons may often induce serious public and private calamity. Plowden J in the case of Bhag Singh [1876] PR No. 24 of 1876 said:

In order to bring a case within s. 409 it is necessary to show that property was entrusted to a public servant and that he accepted the property entrusted being in his public capacity required or authorized to accept it. Otherwise in accepting the property he acts as a mere volunteer and is not entrusted with it in his capacity of a public servant. It is not sufficient to show merely that a person delivered property to him because he was a public servant. The motive which induced the person to deliver the property cannot alone determine the quality of the trust created. The mistaken belief of the person delivering the property or the person accepting it, or of both, that the latter was authorized to receive it in his public capacity cannot alter the facts and supply the deficient and requisite authority so as to convert simple breach of trust into breach of trust by a public servant.

This section presupposes entrustment. In the case of Gopesh Chandra v Nirmal Kumar [1950] 51 Cr LJ 388 the Court said that when a person opens a current account in a bank, there is no question of entrustment.

The relationship between the bank and the customer is one of creditor and debtor. Hence there can be no case against a bank or its officer for committing an offence under this section in respect of the money deposited by a customer. It is to be noted that the Judge only spoke of current account. This section does not include an intention to misappropriate at a future date. Dishonesty is a pre-requisite for a prosecution under this section.

Relevant case:

**1. TAN SRI TAN HIAN TSIN V PUBLIC PROSECUTOR
[1979] 1 MLJ 73**

FEDERAL COURT CRIMINAL APPEAL NO 51 OF 1977
Section 409 of Penal Code

Brief facts in case:

The appellant was convicted on a charge of criminal breach of trust of the sum of \$ 200,000 belonging to a company which the appellant was the Chairman and Managing Director. The cheque had been issued in payment of an alleged debt to a company in Taiwan but it had been paid into the account of a company which the appellant and his wife were the only shareholders.

Ratio decidendi of the case:

The appeal was dismissed. The learned trial judge was justified on the evidence in calling upon the defence and in finding that the appellant had not cast any doubt upon the truth of the prosecution evidence. The accused failed to explain why the cheque was given to one Zee, and not paid directly to creditor. The explanation of the accused was at variance with documents. The evidence pointed to the accused having converted the money for own use.

Principles of law decided in the case:

No offence of criminal breach of trust is committed if the money is used to reduce the company's indebtedness to one of its creditors. But, with respect, this statement of the law is predicated on the assumption that at no time before the use of the money to reduce the indebtedness, the person who effected the payment, had converted the money to his own use, for however short a period of time. If he does so, then he is as guilty of the offence as the person who dips his hands in the company's till on a Saturday morning for his own use, say for instance, a week-end's flutter at the races or the casino, even though he has every intention to repay the money and in fact does so the first thing on the following Monday morning. The court rejected any suggestion by the Defence submissions that the learned judge had required the accused to prove his innocence beyond reasonable doubt.

Other relevant principle of law decided in the case:

42(2) (c) of the Companies Act, 1965

The minutes of Folex, indicated that the turn-key contracts were advised to the Board of Directors in three separate meetings, as perhaps required because of the different dates they bore but no copy of any such contracts was ever attached to them. The failure to do so must indeed be a curious, if not a significant, feature of the proceedings. But the Board, according to these minutes, was never told about the service contracts. The significance of such an absence will perhaps be fully seen when a statutory declaration affirmed by the accused to comply with the requirements of section 42(2)(c) of the Companies Act, 1965 is considered but before that is gone into, it is to be noted, shortly, that the turn-key contracts made the service agreements entirely unnecessary.

Section 42(2) (c) of the Companies Act requires the registration of the prospectus of a company before it can be circulated or distributed. The copy for registration is required to contain, *inter alia*, a statement or a copy of any agreement entered into by the company, and the registration is effected by a supporting affidavit by a proper officer of the company.

Other principle of law applicable in the case:

Evidence Act, 1950, ss 63(b) and 65 discussed about secondary evidence of documents.

What were produced in court were not the original documents but photo-stat copies. The question of admissibility arose. Being primary evidence, the originals should be produced. But there was evidence that after a search of the Company's records which was carried out at the request of the Police, the original documents could not be discovered, and in the circumstances, secondary evidence of the documents becomes available under the combined provisions of sections 65 and 63(b) of the Evidence Act 1950.

3.5 Elements of s. 409 Explained

Public servants have been defined in s. 21 of the Code.

For a charge under s. 409 to succeed, the prosecution must prove:

- [1] a public servant or an agent;
- [2] in capacity as public servant or an agent;
- [3] that he was in such capacity entrusted with the property in question or had dominion over it; and
- [4] that he committed criminal breach of trust in respect of it.

When dealing with the subject of criminal breach of trust, it is essential to understand the concept of fraud and conspiracy because fraud is dishonest criminal deception and criminal breach of trust usually involves more than one person. Therefore, let us examine the concepts of fraud and conspiracy. Firstly, fraud. "Fraud" is not defined under the Code. Fraud is defined in the Chambers 20th Century Dictionary, as "deceit, imposture, a snare". In the Oxford Dictionary, fraud is defined as "criminal deception"; use of false representation to gain unjust advantage; dishonest artifice or trick". Fraud in criminal breach of trust offenses appears when the criminal breach of trust offender depends upon his victim's lack of expert knowledge –

[1] concerning the kind of transaction in which the victim and the offender are engaged;

[2] concerning the background of the offender; and

[3] concerning his business which employs credit instruments and hi-tech gadgetry.

The victim fails to ignore into the impending crash of his business because he does not foresee the fraudulence of the offender. The offender is a smooth operator. He does not hurt openly. Usually, he just cannot be found when the wound is raw. Section 25 of the Code defines fraudulently as "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise". Cases shriek of fraud, but defraud is not defined in the Code. Examples of fraud: Theft: s. 378, Criminal breach of trust: ss. 405-409, Cheating: s. 415, Fraudulent deeds and dispositions of property: ss. 421 to 461.

3.6 Fraud and Conspiracy

The common elements in all the offenses referred to above are:

[1] the fraudulent or dishonest act, and

[2] causing a loss to another or gain to the doer. Punishment for the above offenses range from one year imprisonment with fine to the more serious case where the punishment extends to seven years imprisonment and fine.

The offence of criminal breach of trust sometimes involves conspiracy where the act involves more than two persons. The offence of conspiracy is defined under the Code. The act of conspiracy is a banding together for a purpose, often secret, usually unlawful; it is also a plot, joint action or concurrence for an unlawful purpose/plot. There is also silence where the agreement is to say nothing about a matter.

Conspiracy, in criminal law is a mode of participation in crime. It is a substantive offence. The essence of conspiracy lies in the agreement of two or more persons in doing or causing to be done an unlawful act or a lawful act by unlawful means. Proof of conspiracy would lie in the agreement, in the unlawful act/the unlawful means employed. The law of conspiracy straddles both civil and criminal law. It forms an important constituent element in making men free or liable in tort and in crimes. An aspect of criminal conspiracy that presents problems is the requirement of overt and covert acts.

An overt act is necessary in the abetment of conspiracy - s. 107(2); in the doing of illegal acts which are not offenses - s. 120A; and in resorting to illegal means for doing lawful acts - s. 120A. But an overt act is

unnecessary in a criminal conspiracy to commit offenses. That means a covert act is sufficient. What is overt and covert is not defined in the Code. Etymological meanings will have to be resorted to. How does conspiracy fit in with criminal breach of trust? Where two or more persons conspire to defraud a bank or a cooperative or an orphanage or a company, they can be convicted of the offences of either criminal breach of trust or cheating, read along with s. 120A of the Code (that is, conspiracy). The part played by each conspirator may be separate in one integrated and united effort to achieve the common purpose.

In *Hussain Umar v. Dalipainnghji* AIR [1970] SC 45 Baghawat J explained the nature of criminal conspiracy under s. 120A of the Indian Penal Code as follows:

The evil scheme may be promoted by a few, some may drop-out and some may join at a later stage but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be general plan to accomplish the common design by such means as may from time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan.

The Supreme Court of India in *Noor Mohammad Mohd. Yusof Mimin (appellant) v. The State of Maharashtra* AIR [1972] SC 885 (respondent) said that from its very nature, a conspiracy is hatched in secret and it can be proved by circumstantial evidence founded on solid facts.

The problems associated with conspiracy and the covert acts are exacerbated with;

[1] the inroads made into efficient transportation system where conspirators can move from country to country with fluidity and provisions of law are made difficult in proof,

[2] with hi-tech gadgetry. Therefore, fraud and conspiracy are linked to criminal breach of trust where two or more persons conspire to defraud a bank or a cooperative or an orphanage and they can be made criminally liable for the offenses of criminal breach of trust, read along with s. 120B of the Code.

In order to understand the meaning of, and difference between, criminal and civil liability, one has first of all to understand the meaning of liability. What is liability? Liability means subject to an obligation; or the obligation itself. He who commits a wrong or breaks a contract of trust is said to be liable or responsible for it. Liability is civil or criminal according to whether it is enforced by the civil or criminal Courts.

It is generally accepted that any act or neglect on the part of a trustee which is not authorized or excused by the terms of the trust instrument or by law is called a breach of trust. So, a trustee can be liable for positive acts, such as investments that are unauthorized by the Trustee Act 1949 or the trust instrument or for omissions such as failure to invest property at all. Liability does not depend solely on fault or even negligence. A breach of trust which is completely innocent is nonetheless actionable. Liability is not dependent on loss as such to the trust; the beneficiaries can claim any profit made by the trustees by virtue of an innocent and technical breach of trust.

3. 7. Criminal Breach of Trust by Public Servant or Agent

Section 409 of Penal Code deals with elements of Criminal Breach of Trust by Banker, Merchant, Factor, Agent, and Public Servant. This section classes together public servants, bankers, merchants, factors, brokers, attorneys and agents. With the exception of public servant, all the other terms have not defined under the Code. As the rule of the duties of such persons are of a highly confidential character which involve great powers of control over the property entrusted to them ,a breach of trust by such persons may often induce serious public and private calamity.

In India, the term "banker" signifies any person not in a technical sense who discharges any of the customary functions of banking and also includes a firm that carries on such business. Again, a banker is a person who receives money to be drawn out, as the owner demands, and he has the added obligation of honoring the customers' cheques up to the amount of the money received and remaining in the banker's possession. A merchant buys and sells goods or trades with foreign countries. A banker deals in money or in exchange while a "merchant" designates a dealer in goods. The term "merchant" is wide enough to include large manufacturers of goods. It is doubtful whether petty shopkeepers are covered as there is scarcely any trust between an ordinary shopkeeper and his customer. How is a trust created for bankers? It is common knowledge that bankers have control or dominion over the monies in their banks. These monies or funds are to be utilized for specific purposes mentioned in the former Banking Act 1973 like permitted loans and advances. This constitutes the trust. Where a banker disburses any such fund in breach of the prescribed purposes, this may amount to CBT under

s. 409. In Malaysia there have been a few cases of criminal breach of trust by bankers⁷.

Managers or directors of companies would be regarded as merchants. It is not necessary that the property of the company should have been entrusted to them directly. If a person has obtained or assumed the control of the property of another person under circumstances whereby he becomes entrusted or whereby his receipt becomes receipt for an account of another person and fraudulently converts it or the proceeds, then he has committed an offence under the section. Hence, where property was entrusted to a company, the director of the company, as the person active in the financial affairs of the company, may be prosecuted for misappropriation of that property. This is so, even when a director owns the majority of the shares in the company, for the assets or monies of the company, are not his property.

For a charge under s. 409 to succeed, the prosecution must prove:

- [1] that the accused was a banker, a merchant, a factor, a broker, an attorney, an agent or a public servant;
- [2] that he was in such capacity entrusted with the property in question or had dominion over it; and
- [3] that he committed criminal breach of trust in respect of it.

⁷ Mary George, Criminal Breach of Trust Under Malaysian Law : A Review, [1990] 1 CLJ i (part I) and x (part II)

Relevant cases:

1. Public Prosecutor v Natu ak Suhai

[2008] 8 MLJ 503

High Court

Section 409 of Penal Code

Principle of Law Decided in the case:

His Lordship David Wong J held that the ingredients for criminal breach of trust under s 409 of the Penal Code are as follows: (i) the accused was a public servant at the material time of the offence; (ii) the accused was in such capacity entrusted with the property in question or with control over it; and (iii) the accused committed criminal breach of trust in respect of the property.

In the case, the learned Judge stated that the accused in his defence had failed to put forth his case at the prosecution case that PW11 was the one who committed the offence and not him. As such, it would not be a defence if it was only raised later. His Lordship said :

“To further emphasise on this point, I can no better than quote what Gopal Sri Ram JCA said in Mohd Abbas bin Danus Bakan v Public Prosecutor [2006] 5 MLJ 332, at p 338:

In so far as the appreciation of the appellant's unsworn statement is concerned, we have already discussed earlier the way in which such statements are to be treated as a matter of law. So far as factual treatment is concerned, it is clear from the judgment under appeal that the learned commissioner went through all the points made in the unsworn statement and found them to be wanting. Some of the matters raised in the unsworn statement were never put to prosecution witnesses. That, of course, will have the effect

of diminishing the probative value that is to be attached to the unsworn statement.”

2. Bhag Singh v PP

[1876] PR No. 24 of 1876.

Plowden J in the case of Bhag Singh said:

“In order to bring a case within s. 409 it is...necessary to show that property was entrusted to a public servant and that he accepted the property entrusted being in his public capacity required or authorized to accept it. Otherwise in accepting the property he acts as a mere volunteer and is not entrusted with it in his capacity of a public servant. It is not sufficient to show merely that a person delivered property to him because he was a public servant. The motive which induced the person to deliver the property cannot alone determine the quality of the trust created. The mistaken belief of the person delivering the property or the person accepting it, or of both, that the latter was authorized to receive it in his public capacity cannot alter the facts and supply the deficient and requisite authority so as to convert simple breach of trust into breach of trust by a public servant.”

3. Baharu Zaman Bin Ali v. Public Prosecutor

[1949] 15 MLJ 23

Ipoh Criminal Appeal – App. Crim. Juris. (Storr, J.) July 17, 1948

Sections 406 of Penal Code – Punishment of CBT

Section 409 of Penal Code – CBT by Public Servant or agent

Brief facts of the case:

The appellant were charged before the District Judge, Ipoh and convicted of CBT of money entrusted to him as clerk in Parcels Office, Malayan Railways. The evidence was that a passenger handed 50 cents to

appellant as demurrage charge but was not issued any receipt for the payment. On appeal it was argued inter alia (a) that there was no evidence of misappropriation and (b) that the money was not due to the Railway and therefore there could be no criminal breach of trust of it.

Principles of law decided of the case:

- [1] The denial of the receipt of money proved to have been received by an accused person is evidence of dishonest misappropriation;
- [2] That when money is given to any person in his official capacity whether he has any right to take it or not, he is entrusted with it within the meaning of the section 406 Penal Code.

Chapter 4

Procedures

4.1. The Charge

4.1.2 Joint trial in contravention of Criminal Procedure Code

Relevant Cases:

1. **Cheong Sik Kwan v PP (1959) MLJ 189**

Court Of Appeal/ Thomson C.J

Penal Code, ss 408 and 477A — Series of operation

ss 153 (ii), 163, 164, 165 and 170 of Criminal Procedure Code (Cap 6)

Brief facts in case:

In this case the appellant was convicted for four offences criminal breach of trust in contravention of s 408 and three offences of falsification of accounts in contravention of s 477A of the Penal Code. The only ground of appeal was that the charges against the appellant were joined and tried together in contravention of the provisions of the Criminal Procedure Code and therefore by reason of the effect attributed to these provisions in the case of *Subramania Ayyar v King-Emperor* 28 IA 257, PC the conviction should be set aside.

Ratio decidendi of the case:

The case was covered by s 165(i) of the Criminal Procedure Code because the alleged offences were committed in a series of acts so connected together as to form the same transaction.

Principles of law decided in the case:

Where charges are tried together in contravention of any provisions of the Criminal Procedure Code there is an illegality which cannot be cured, and any conviction had cannot be sustained. Subramania Ayyar v King-Emperor 28 IA 257, PC.

4.1.3 Alteration of charges & recall of witness

2. Yeow Fook Yuen & Anor. V Regina

[1965]2 MLJ 80

Singapore Court/Wee Chong Jin C.J

Section 24, 109, 406 and 408 of Penal Code on misappropriation of union funds. Acted “dishonestly” What amounts to — Abetment — Criminal breach of trust

Criminal Procedure — Charge — Alteration — Recall of witness — Criminal Procedure Code (Cap 132), s 160

Brief facts in case:

The first appellant, the honorary treasurer of a trade union was charged with two charges of willfully suffering the second appellant, the general-secretary of the union, to dishonestly misappropriate two sums amounting to \$7,500 from the funds of the union contrary to s 406 of the Penal Code. The second appellant was charged with abetment of the offence contrary to Section 109 and Section 406 of the Penal Code. The main defence of both appellants was that the sum of \$7,500 which was taken by the second appellant by way of loan or loans from time to time, and that although these loans were taken without prior approval, they were approved by the executive council of the union at a later date.

Ratio decidendi of the case:

Both appellants acted “dishonestly” within the meaning of s 24 of the Penal Code.

The trial judge was correct in rejecting the application to recall the witness as the appellants had no absolute right under s 160 of the Criminal Procedure Code to recall and examine a witness where the purpose of that application had no reference to the altered charges.

The case was covered by s 165(i) of the Criminal Procedure Code because the alleged offences were committed in a series of acts so connected together as to form the same transaction.

Principles of law decided in the case:

The real question to be decided on the issue of dishonest intention is not the question whether either appellant bona fide believed these takings to be loans but whether either appellant bona fide believed that the first appellant had lawful authority to make these loans to the second appellant. Both appellants acted “dishonestly” within the meaning of s 24 of the Penal Code.

4.1.4 Lumping of various sums of money into one charge

3. Ibrahim Bin Daud v PP

[1955] MLJ 78

High Court

Criminal breach of trust under s 406 of the Penal Code

Brief facts in case:

The appellant was convicted for criminal breach of trust of \$315 under s. 406 of the Penal Code. A list setting out the names of nine persons from

whom the appellant received various sums totaling \$315 was appended to the charge.

Ratio decidendi of the case:

The lumping of various sums of money into one charge is good under the provisions of section 153(ii) of the Criminal Procedure Code. Case referred to Sheikh Hassan v Public Prosecutor (1940) MLJ 69 and Lim Yean Leong v Public Prosecutor (1940) MLJ 272

Principles of law decided in the case:

It was argued that each of the nine transactions was complete by itself and that there were nine distinct offences for which there should have been nine distinct charges; and that to consolidate them into one charge contravenes section 163 of the Criminal Procedure Code, and cases cited in support of the contention;

[1] Abdur Rahim v Emperor AIR 1931 Pat 102, the charge was in relation to not less than eighty separate acts of cheating in which payments were not shown to have been made at one and the same time nor even at the same place.

[2] Nga San Mya v Emperor AIR 1933 Rang 325, the charge was criminal breach of trust for pawning six pairs of gold bangles from time to time. It was held in both cases that each act was complete in itself and there should be separate charges.

4. Sheikh Hassan bin Sheikh Ibrahim v Public Prosecutor [1939] 1 LNS 108 Court of Appeal

Section 409 Penal Code

Section 477A Penal Code

Section 153 Criminal Procedure Code

Brief facts in case:

(a) The appellant was tried for two charges. The first charge for committing criminal breach of trust of \$23, an offence punishable under s 409 of the Penal Code. The second charge alleged that with intent to defraud he committed falsification of accounts by willfully committing to enter the twenty-three payments in his cash book and the third charge was for omitting to enter in the certificate books particulars of the twenty-three marriages and divorces in respect of which the \$23 were received. The appellant was convicted on the first charge and acquitted on the other two. On appeal, it was held by the Court of Appeal that the first charge was of a general deficiency of \$23, the particulars being not so much particulars of separate misappropriations as indications as to how the deficit was arrived and was a good charge under s 153 (2) of the Criminal Procedure Code.

(b) It was held further that the criminal breach of trust was one offence though made up of twenty-three items and that when the falsifications charged were confined to those items, the criminal breach of trust and the falsification were so closely inter related that the twenty three falsifications became a single offence like the twenty-three breaches of trust which formed a single offence and that the falsifications were related to the criminal breach of trust items.; hence the two charges were properly joined.

Ratio decidendi of the case:

The falsification in respect of the twenty-three dollars was committed in the same transaction as the criminal breach of trust. The criminal breach of trust was one offence. The falsification was a composite offence, one

may say a procedural offence to accomplish the criminal breach of trust, a kind of adjective offence, and just as the misappropriation of the twenty-three dollars over a period of just under a year was one offence, so the falsification by omitting to enter up these twenty-three dollars should be regarded as one offence.

Principles of law decided in the case:

(a) Section 153(2) is confined solely to criminal breach of trust and dishonest misappropriation of money and it does not cover the other two charges. So far as the second and third charges are concerned, the governing section is s 163 of the Criminal Procedure Code.

Section 165 provides that if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every one. The determining words are “the same transaction”.

4.1.5 Factors to be considered whether the accused shall be jointly tried or separately

Relevant Case:

1. LOH SHAK MOW V. PUBLIC PROSECUTOR & WONG HOI PING, ALAN V. PUBLIC PROSECUTOR [1987] 1 MLJ 362

SINGAPORE – MAGISTRATE’S APPEALS

Penal Code, Ss 109, 409, 411 & 420

Criminal Procedure Code, s 175

Evidence Act, Ss 61-65

Brief facts in case:

The first appellant was charged with and convicted on six charges of abetment of cheating under section 420 read with section 109 of the Penal Code and fourteen charges of criminal breach of trust as an agent under section 409 Penal Code. The second appellant was charged with and convicted on three charges of criminal breach of trust as an agent and one charge of dishonestly retaining stolen property. Both appellants appealed against their convictions and sentences.

Ratio decidendi of the case:

The law regarding the functions of an appeal court when dealing with a question of fact in which questions of credibility are involved is clear. The appeal court must not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

Principles of law decided in the case:

It was for the trial judge to decide whether the accused should be tried jointly or separately and the discretion must be exercised judicially. The usual tests applied to decide whether different acts are parts of the same transaction (to bring it within section 175 of the Criminal Procedure Code are proximity of time, unity of place, unity of purpose or design and continuity of action.

4.2. Transfer of Cases

Only extraordinary case - application to transfer case from Session Court to High Court

Relevant Cases:

1. PP v Dato Kee Yong Wee & Ors and PP v Koh Kim Swee [1988] 2 MLJ 198

High Court, Kuala Lumpur.

Section 417(2) and section 417(1)(cc) of Criminal Procedure Code

Section 6 of the Bankers' Books (Evidence) Act 1949 read with section 36(2) of the Banking Act 1973

Case law authorities referred/followed:-

[1] PP v Dato Yap Peng [1987] 2 MLJ 311

[2] Lin v PP [1987] 1 mlj 106

[3] Goh Hooi Yin v Lim Teong Ghee & Ors [1977] 2 MLJ 26

[4] Emmot v The Star Newspaper Company [1892] 62 LJQB 77

Brief facts in case:

In this case the accused were charged with committing criminal breach of trust, an offence punishable under section 409 of the Penal Code and with abetment thereof, an offence punishable under sections 109 and 409. The Public Prosecutor made three applications for orders under section 417(2) of the Criminal Procedure Code that the trial of all three cases be transferred from the Sessions Court to the High Court under section 417(1)(cc). The main ground relied upon by the Deputy Public Prosecutor for the transfer was that such order was expedient for the ends of justice having regard to section 6 of the Bankers' Books (Evidence) Act 1949 read with section 36(2) of the Banking Act 1973. It was agreed that as the

prosecution would seek to admit bank statements in respect of the charges and that if objections were to be made under section 36 of the Banking Act 1973 by "account holders in a bank" as regards these statements, the Sessions Court could not compel officers of the banks concerned to produce these statements or accounts as section 6 of the Bankers' Books (Evidence) Act 1949 only allowed a High Court judge to compel their production. It was also agreed that the joint trial of all three cases would take a considerable length of time and that it was unlikely that the parties would get a continuous hearing at one stretch in the Sessions Court. The other ground relied upon for the transfer was that it was likely that there would arise some questions of law of unusual complexity during the course of the trial.

Ratio decidendi of the case:

The application for transfer to the High Court was dismissed. To successfully invoke S. 417 (1) (b), the case must be an extraordinary one. The issues of law in question were ones that were not of unusual complexities that cannot be dealt with by judicial officers of the Session's Court who are legally qualified and experienced to deal with intricate points of law. In any case, no attempt was made to show what the questions of law of unusual difficulty would be in the cases which were the subject matter of the applications.

Principles of law decided in the case:

For applications for transfer of cases to the High Court under section 417(1)(b) to be successfully invoked today, the case must be an extraordinary one.

Other relevant principle of law decided in the case, if any:

- [1] There was no necessity for the original books of the bank and their entries to be produced for the purpose of the trial. Since copies of relevant entries needed for the trial were already available to the Public Prosecutor and as Bank Negara has given its consent for disclosure, then provided the procedures in ss. 3, 4 and 5 of the Bankers' Books (Evidence) Act 1949 were complied with, the copies maybe received at the trial as prima facie evidence of the entries and of related matters, transactions, and accounts.
- [2] Although only a High Court may make an order in terms -of section of the Bankers' Books (Evidence) Act 1949, nevertheless the application for such an order can well be made before any High Court judge before the trial begins in the Sessions Court as indeed it can be made to a High Court judge while the trial in the Sessions Court is proceeding.

4. 3 The Bail

1. SEK KON KIM V AG

[1984] 1 MLJ 61

Appeal for Application of bail pending extradition proceedings is allowed. Extradition Ordinance 1958, Section 23 Fugitive Criminal Act 1967 and Section 388 of Criminal Procedure Code

Brief facts in case:

This is an appeal by the accused/appellant for bail. The accused was indicted with the offence of CBT in Australia and therefore the Australian authority had applied for the accused to be extradited. The accused was arrested and denied bail pending to the hearing for his extradition.

Ratio decidendi of the case:

On bail, Section 388 of the CPC give the courts unfettered discretion to grant bail after considering the nature, gravity of the offence, means and standing of the applicant and guarantee given. Thus there is no reason why bail should be refused.

Principles of law decided in the case:

In the proceedings for extradition, the power in granting bail must be referred to the CPC. In exercising the bail, the court, must look into:

- [1] the nature and gravity of the offence charged,
- [2] the severity and degree of punishment which conviction might entail,
- [3] the guarantee that the accused person if released on bail would not either abscond or obstruct the prosecution in any way,
- [4] the danger of the witness being tampered with and whether the accused person if released on bail is likely to tamper with prosecution evidence,
- [5] the opportunity of the accused to prepare the defence,
- [6] the character, means and standing of the accused,
- [7] the period of detention of the accused and probability of further period of delay.

4.4 Evidence

Expert evidence & evidence by an accomplice

1. Syed Abu Bakar bin Ahmad v. Public Prosecutor

[1974] 2 MLJ 150

Federal Court at Kuching

S.409 of Penal Code

S.45 of Evidence Act 1950

Brief facts in case:

The appellant who was the Director of National Bureau of Investigation was charged with criminal breach of trust of money belonging to the Government of Malaysia entrusted to him in his position as a public servant and as the operator of the funds known as the Secret Service Funds. He was convicted and sentenced and this is his appeal against the conviction and sentence. The appeal was allowed.

Ratio decidendi of the case:

It is wrong for a judge to form conclusion on a matter which could only be properly concluded with the aid of expert evidence.

Principles of law decided in the case:

[1] Evidence by an accomplice should be treated with the greatest suspicion, and should be critically assessed to determine what credit should be attached to it.

[2] Sufficient motive to tell an untruth statement is a good reason for a judge to reject a witness' testimony.

2. Chang Lee Swee v PP [1985] 1 MLJ 75

High Court Kuala Lumpur / Gunn Chit Tuan J.
S.409 PC

Brief facts in case:

The appellant was charged for the offence of criminal breach of trust by an agent under s 409 of the Penal Code. The prosecution alleged that the appellant being an agent, namely the Executive Director of Finance of Terengganu Development and Management Berhad (TDMB) and in such capacity entrusted with the funds of the said company committed breach of trust by transferring the funds amounting to \$390,000 to another company called Klang Jaya Baru Development Bhd (KJDB) without the approval of the Board of Directors. The appellant was convicted and sentenced to imprisonment for three years by the Sessions Court at Kuala Lumpur.

Ratio decidendi of the case:

[1] if both the documentary and oral evidence in the case had been carefully considered, the learned President would have come to the conclusion that the appellant, even after he was appointed an executive director in charge of financial affairs, was not in a position to manage the funds of TDMB without the overall control of Tan Hooi Bing who was the managing director of TDMB and the appellant was therefore in the circumstances of this case not entrusted with or had complete dominion over its funds;

[2] Whether one would have dishonest intention if the so-called withdrawals or transfers of funds were properly accounted for and recorded in the books of account of the companies concerned. If the learned President had asked the question and considered all the evidence adduced, both oral and documentary, in this case she could have come to

the conclusion that there was no dishonest intention on the part of the appellant to cause wrongful loss to TDMB or wrongful gain to KJDB and should not have called for the defence;

[3] In this case the appeal court was satisfied that not only was there no prima facie case proved against the appellant but also that the evidence adduced by the defence had created a reasonable doubt whether or not the appellant had committed the offence of criminal breach of trust by an agent as alleged by the prosecution;

[4] The conviction should be set aside not only because it was against the weight of the evidence but also because the learned President had failed to consider all the evidence that was before her and in that sense had failed to consider fully the defence evidence.

Principles of law decided in the case:

Entrustment : On the question of whether directors are trustees of the funds of their companies, it will be appropriate here to refer to the following dictum of Ungood Thomas J in the recent English case of *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073.

Dishonest Intention: So in cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account of its use is generally considered to be a strong circumstance against the accused.

See: *Navaratnam v Public Prosecutor* [1973] 1 MLJ 154

Fazl Ali J in Harakrishna Mahatab v Emperor AIR 1930 Patna 209

2. Dato' Yap Peng vs. Public Prosecutor

[1993] 1 MLJ 337

High Court, Kuala Lumpur

S.409 Penal Code (FMS) Cap 45), s.33, 74 Evidence Act 1950

Brief facts in case:

The appellant who was the Chairman of Koperasi Sepadu Bhd (KSB) was convicted on two counts of criminal breach of trust under s. 409 of the Penal Code (FMS Cap 45) for RM2.6millions and RM0.5million respectively. He was alleged to have bought shares in Australia for his own benefit using the said sum of money. He however, claimed that they were proper loans from KSB to buy shares on behalf of KSB and there were no evidence that they were for his own use.

Ratio decidendi of the case:

- a. There was non-compliance of the appellant's instructions in that, no proper documentation was done by his subordinates. Since KSB did not question these giving out of the loans, the Appellant could not be held guilty.
- b. The Appellant had not committed criminal breach of trust because the moneys did not belong to KSB when they were handed over to the Appellant.
- c. The proceedings in Petty Sessions in Western Australia did not show that the Appellant had used the money to buy shares in Australia. In any event, such evidence is inadmissible due to non-compliance of s.33 of the Evidence Act 1950. There was also error in admitting the same under s.74 of the Evidence Act 1950. The Appellant also had no opportunity to cross examine the deponents in Australia because no notice to the effect was served on him. If the court had been duly considered the defence, it could be seen that the issue on the purchase of shares had been discussed in the board meeting with showed that the purchase was done for and on behalf of KSB.

Therefore, the exception to the general rule applies for the Appellant Court to interfere with the findings of the lower court. There were some serious error in that the lower court, “had not given due attention to the significance at the white paper and various documents that speak for themselves.

3. Public Prosecutor v Mohamed Bin Abdul Jabbar [1948] 1 LNS 161

Section 409 Penal Code

Brief facts in case:

The accused, a Johore Records Officer, was charged with criminal breach of trust of cash entrusted to him in his capacity. The only evidence which the prosecution could produce of the misappropriation or misuse of the sum was the fact that the sum was not in his safe, when it was examined.

Ratio decidendi of the case:

The accused was acquitted of the charge of criminal breach of trust. Laville J's reasoning was that before criminality can attach to the non-accounting of sums entrusted to a Government servant, there should be some evidence leading to the unmistakable inference that the non-accounting covered a deliberate misappropriation by the trustee. In this particular case, there was no such evidence.

4.6 Primary and secondary evidence

4. PP v RENGASAMY [1974] 1 MLJ 223

CRIMINAL APPEAL NO. 47 OF 1972 (ACRJ IPOH)

SEC 62 & 63 OF EVIDENCE ACT 1950 AND SEC 409 OF THE PENAL CODE

Brief facts in this case:

The Respondent had been charged under 3 charges at Ipoh Sessions Court under Sec 409 of the Penal Code for committed CBT in respect of the property of Royal Malaysia Police. The Respondent was the chief clerk in the office of the District Police Headquarters. In the lower Court, the Respondent had been DNA on the ground that the analysis cash books used in Government Department for the purpose of recording cash receipts were secondary evidence. In the Appeal stage, the Court had dismissed the appeal on the grounds the Prosecution failed to prove misappropriation and the carbon copy of the cash book is primary evidence.

Ratio decidendi of this case:

Misappropriation could not be proven if there is no evidence to show that the short amount is not been found in the safe. If there is evidence to show the short amount was not found in the safe, then it can be considered the element of misappropriation had been proven.

Principles of law decided in this case:

Carbon copy of the analysis cash books are not secondary evidence under Sec 63 (b) of the Evidence Act 1950. It falls under primary evidence under Sec 62 (exp 2) of the same Act. It is because being documents made by one and the same uniform process as the top copies and therefore they are admissible as primary evidence.

Chapter 5

Burden Of Proof In CBT

Relevant Cases:

1. Datuk Harun Bin Haji Idris & Ors v PP (1978) 1 MLJ 240

Federal Court.

S 406 of the Penal Code, criminal breach of trust by the bank Managing Director (the 2nd appellant).

The first and third appellants had abetted the offence of CBT committed by the second appellant (sections 109 and 406 of the Penal Code).

Brief facts in case:

The 1st appellant was the Chairman of the Bank Kerjasama Rakyat Malaysia (Bank Rakyat). The 2nd appellant was the Managing Director of the said bank. The 3rd appellant was the General Manager and Secretary of the same bank. The second appellant had pledged the stock and shares of the bank which was entrusted to him without prior reference, neither to the bank Board of Director nor to its Executive Committee for subsequent ratification.

Ratio decidendi of the case:

It was enough for the prosecution to prove that the second appellant had dishonestly misappropriated to his own use the shares entrusted to him or that he had dishonestly used them in violation of a direction of law prescribing the mode in which the trust was to be discharged, and also in violation of a legal contract of service which he had made touching the discharge of that trust.

It was not disputed that the shares had been entrusted by the bank to the second appellant and ...on the evidence that he had dishonestly misappropriated them, albeit with the intention of doing so but temporarily, and that despite this the second appellant was guilty because the shares had been pledged without authority from the bank and to benefit an outside body.

As for abetment, the learned judge found that the acts of the first appellant fell within all three limbs of section 107, namely abetment by instigation, conspiracy and intentionally aiding, and that the acts of the third came under the second and third limbs.

2. Gnanasegaran Pararajasingam vs. Public Prosecutor [1997] 4 CLJ 6

Court of Appeal, Kuala Lumpur

S.409 Penal Code, S90A Evidence Act 1950, rr.3(2), 7(1)(a) Solicitors' Account Rules 1978

Brief facts in case:

The accused was charged for Criminal Breach of Trust under s.409 of the Penal Code. Being the complainant's solicitor, the complainant entrusted with two separate amount of money before the computer.

Ratio decidendi of the case:

It was held (per Shaik Daud Ismail JCA):

[1] That misappropriation took place between the dates when the amounts involved were deposited until the closing of the accounts. Since the money had dissipated, there could not be any distribution of the same.

[2] That Section 90A of Evidence Act 1950 should be read together as a provision for the purpose of admitting computer generated documents. It is not incumbent upon the prosecution to produce a certificate under ss(2) where a bank officer had adduced evidence as to the production of such document pursuant to the first part of ss(1). Once the prosecution had proven through the bank officer that the document was computer generated in the light of the deeming provisions of ss(6), the prosecution had proven the second part of ss(1).

Mahadev Shankar JCA concurred as follows:

[1] There is no necessity to call the actual teller or bank clerk once the keying in of data arose out of the ordinary use of the computer. Furthermore, the branch officer's oral evidence weighed more than a certificate if it were to be issued by him.

[2] The accused committed the offence in the first charge once the cheque was deposited into his office account. The delaying of payment if any, will leads to conversion.

[3] It is not for the prosecution to prove a negative. It is for the accused to show pursuant to s.106 of the Evidence Act that, there is another clients account where moneys were reserved to cover liability. Although, r.3(2) of the Solicitor's Account Rules 1978 allows a solicitor to maintain more than one client's account, r.7(a)(i) only allows the withdrawal from those accounts for paying to or on behalf of the client not to other clients.

3. PP v Baldev Singh

[1985] 2 MLJ 453

High Court, Penang

Case law authorities referred/followed :-

Haw Tua Tau v Public Prosecutor [1981] 2 MLJ 49

Ragunathan v Pendakwa Raya [1982] 1 MLJ 139

Public Prosecutor v Abang Abdul Rahman [1982] 1 MLJ 346, 349

Lim Kheak Teong v Public Prosecutor [1985] 1 MLJ 38

Rajoo v Rex [1949] MLJ 250

Brief facts in case:

The Respondent, an advocate and solicitor, was charged with two charges alleging:

(a) that he cheated an insurance company by dishonestly inducing them to pay him \$ 3,500 in respect of an accident claim made by one Mohamad Salleh by falsely representing that Mohamad Salleh was alive when the respondent knew that he was already dead;

(b) that the respondent being an agent of the said Mohamad Salleh and entrusted with a sum of \$ 3,500 committed criminal breach of trust in respect of part of the money. At the close of the case for the prosecution, the learned President of the Sessions Court found, in respect of the first charge, that the prosecution had failed to make out a *prima facie* case against the respondent, who was accordingly acquitted and discharged. With regard to the second charge, the learned President called on the respondent to enter on his defence. After hearing the respondent's evidence on oath and the evidence of his witness, the learned President was satisfied with the defence explanation. He found the respondent not guilty of the charge and acquitted and discharged him. The Public Prosecutor appealed.

Ratio decidendi of the case:

[1] The High Court agreed with the Session's Court decision that the evidence adduced by the prosecution on the first charge was inherently incredible and the ingredients of the charge had not been proved by the Prosecution. The High Court was therefore satisfied that the Sessions Court was fully justified in acquitting the respondent in respect of the first charge without calling his defense.

[2] Regarding the second charge, the High Court agreed with the Session's Court decision to accept the defence explanation who evaluated the evidence of the defence carefully. Hence the High Court held that there was no misdirection in this case and that the Session's Court had come to the right decision in accepting the defence explanation and acquitting the respondent.

Principles of law decided in the case:

At the end of prosecution's case, the Trial Court has to decide only on questions of law. In arriving at a conclusion, the trial court has to examine the evidence before it and if the evidence is inherently incredible or if the prosecution has failed to prove one or more of the ingredients of the charge the Trial Court is justified in not calling upon the accused to enter his defence.

(See cases: Balachandran v. PP [2005] 1 CLJ 85 ; PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457; PP v. Hanif Basree Abdul Rahman [2008] 4 CLJ

[1] These are later authorities as regards close of Prosecution case.

4. Ang Teck Hwa v Public Prosecutor

[1988] 1 MLJ 279

Singapore Magistrate Appeal No. 288 of 1986

Section 409 of Penal Code - Criminal Breach of Trust by agent

Section 405 of Penal Code - Criminal Breach of Trust, dishonest misappropriates, or converts to his own use

Section 24 of Penal Code - whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person is said to do that thing dishonestly

Brief facts of the case:

The appellant was a car dealer and signed a dealer's master recourse agreement with Sim Lim Finance Ltd (SLF). In accordance with the master agreement, SLF purchased second hand car from the appellant and entered into a hire purchase agreement dated 23.10.1982 with one Seow Khee Leng ("Seow") and the loan to be repaid in 35 installments of \$375 each and 1 final installment of \$365. At the end of June 1984, Seow had paid 20 installments and settled the outstanding balance, amounting to \$5,444.80 on July 3, 1984. All installments as well as the final payments were, as required by SLF in their Third Schedule Notice to Seow, paid to the appellant as SLF's dealer. The appellant failed to remit the 20th installment of \$375 and the final payment of \$5,444.80 to SLF. Instead, the appellant used these two sums of money to pay his other expenses. SLF was not informed that Seow fully had settled his account. On June 29, 1984, the appellant applied to SLF for the released of the log book for the vehicle. The reason given was "ROV Vehicle Inspection". The log book was released to the appellant and SLF never got it back.

On these facts appellant was charged for criminal breach of trust as an agent, an offence under s 409 of the Penal Code and convicted and sentenced to 6 months imprisonment. He appealed against both the conviction and sentence.

Principles of law decided in the case:

The burdens of Prosecution for a charge under s 409 of the Penal Code are:

[1] That the appellant had committed breach of trust in that he had been entrusted with dominion over the property as charge and that he had dishonestly misappropriated or converted or used or disposed of the money within the meaning of s 405; and

[2] That in addition, dominion over the money had been entrusted to the appellant in his capacity as agent for SLF.

Entrustment

The issue as to the question of entrustment is whether pursuant to the master agreement the appellant on the receipt of the payments made by Seow, it was contractually bound to remit the same to SLF. If the appellant was entitled to keep such payments and use them for his own purposes then plainly there could be no question of entrustment.

By clause 8 of the master agreement, where payments are made by hirer, the appellant is bound to collect these payments and to hold them on trust for SLF, to be remitted to SLF on the due dates specified and cannot use these monies as his own. The money was SLF's and not the appellant's. The appellant was entrusted with the money.

Dishonest Intention

The act of the appellant using the sum of \$5,819.80 instead of holding them to be remitted to SLF on the due dates as he was supposed to under the master agreement, the appellant had misappropriated or converted to his own use that money. Under the master agreement, the appellant was not entitled to use the money for his own purposes; therefore his doing so would be a wrongful gain to himself and a wrongful loss to SLF.

However, to show dishonesty, it must be shown that the appellant intended to cause wrongful gain or loss. The evidence shows that the appellant had not attempted to conceal these payments in his accounts. These accounts were maintained as required by clause 8 of the master agreement and these same accounts were subject to inspection by SLF at any time.

Whilst the false reason used by the appellant in the application to SLF for the release of the log book may show an intention to conceal the payment made by Seow, the accounts maintained by the appellant on behalf of SLF pursuant to the master agreement indicates otherwise. Besides, as earlier stated, clause 8 showed that the accounts were subject to inspection by SLF and there is no other evidence to show the appellant knew he was not entitled to use money paid by Seow for his own purpose. In such circumstances, the appellant must be given the benefit of doubt. The dishonesty was not proved beyond reasonable doubt.

The conviction was set aside, an acquittal was recorded.

Other relevant principle of law decided in the case:

Agency

Lord Upjohn in *Branwhite v Worcester Works Finance Ltd* [1969] 1 A.C. 552 at page 575-G stated that:

“...so to establish agency the hirer must establish a particular agency to receive [the deposit] on behalf of the finance company or (2) a general agency which at all event included an agency to receive this sum on behalf of the finance company.”

In receiving the payment, the appellant did so as SLF's agent as in the SLF's Third Schedule Notice. It is plain that the payment by Seow to the appellant discharged his liability to SLF under the hire purchase agreement. This could only be so if the appellant was an authorized agent of SLF to receive the payment.

5. MOHAMED ADIL V PP

[1967] 1 MLJ 151

Magistrate's Criminal Appeal to High Court of Malacca.

Section 406 Penal Code

Brief facts in case:

Appellant appealed against conviction and sentence on charge of CBT. The accused was until his conviction the headmaster of the Sekolah Kebangsaan, Bukit Beruang, Malacca. Under him were four teachers, viz. Abdul Rahman bin Baba, Zaiton bte. Dagang, Harun bin Pit and Mohd. Nor bin Haji Adam. All five of them are members of the Malay Teachers' Co-operative Society. According to P.W.7, the Organizer of Schools,

Malacca, it was the duty of the accused to pay the salaries of the teachers and under F.G.O. 122(3) he is authorized to deduct from their salaries sums payable to the Malay Teachers' Co-operative Society and to pay them to the said Society. Such payment had to be made by a crossed cheque. The school has an account with the Malayan Banking Ltd. which account was operated by the accused.

On 10th March, 1965, P.W.1, an audit clerk attached to the Ministry of Education, Kuala Lumpur, carried out his audit checks at the school. He examined the pay sheets of the teachers for the relevant months, namely, November, 1964 to February, 1965. He found that the teachers had received their salaries from the entries in the pay sheets and that deductions had been made towards their contributions to the Co-operative Society. These deductions were set out in a separate sheet prepared by the society. He examined the cheque butts relating to the school accounts. General Orders required the payment to the society to be made by crossed cheque but the evidence showed that some cheques were made out payable to cash and endorsed by the appellant. Contributions had not been paid to the society. Appeal dismissed.

Ratio decidendi of the case:

Non-accounting or temporary retention is not evidence of an offence unless there is dishonest intention.

Principles of law decided in the case:

[1] It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest; but the essential thing to be proved in

case of criminal breach of trust is whether the accused was actuated by dishonest intention or not.

[2] Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made.

**6. P.P. v PETER ANDREW HAMILTON
[2007] 4 CLJ 47**

High Court, Kuala Lumpur
Section 409 Criminal Procedure Code

Brief facts in case:

The accused was an Australian citizen charged in Kuala Lumpur Court for an offence of Criminal Breach of Trust. He was released on bail pending trial on a security of RM50, 000 and also to surrender his Australian passport as a condition of bail. He applied for the release of his Australian passport and was granted order in term on the condition that he writes to court and provide the details of his trip such as place, time and date as well as the duration of the trip together with a copy of a duly acknowledged letter from the Deputy Public Prosecutor's office. The Public Prosecutor was not happy with the decision and applied for a revision by the High Court and that for the accused to apply to court instead by way of a miscellaneous criminal application for the release so that the Public Prosecutor can be called to court to make known their view every time he requests for his passport.

Ratio decidendi of the case:

a. The principles in *PP v Dato' Mat*, the Supreme Court had ruled that it is well within the jurisdiction of a court that has earlier granted the bail to alter or vary the bail's condition based on an application made by the accused and that there is no specific procedure laid in the Criminal Procedure Code in relation to how a person should apply for the alteration or variation.

b. There was a similar order made for the accused to report to the Malaysian embassy while he is out of the country which is similar to the condition for the accused to report to the police station every two (2) weeks when he is in Malaysia and the accused had made at least eight (8) overseas trip prior to the commencement of his trial and had not broken any of the bail conditions imposed on him.

Principles of law decided:

It is settled law that where allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, the burden of proof is the criminal standard of proof beyond reasonable doubt and not on a balance of probabilities. It can not be based on suspicion or speculation merely.

Chapter 6

Presumption

6.1 Definition

Presumption is an act to presume or accepting as true and is a principle of law which permits a court to assume a fact is true until such time there is a preponderance (greater weight) of evidence which disproves or outweighs (rebutts) the presumption. Each presumption is based upon a particular set of apparent facts paired with established laws, logic, reasoning or individual rights. A presumption is rebuttable in that it can be refuted by factual evidence.

6.2 Relevant Laws

Section 409B of Penal Code

In the absence of any direct evidence to establish a dishonest intention the prosecution is entitled to rely on s 409B of the Penal Code ('s 409B') which reads as follows:

Section 409B provides:

- [1] Where in any proceeding it is proved-
- (a) For any offence prescribed in sections 403 and 404, that any person had misappropriated any property; or
 - (b) For any offence prescribed in sections 405, 406, 407, 408 and 409, that any person entrusted with property or with dominion over property had;
 - (i) Misappropriated that property;

- (ii) Used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied which he had made touching the discharge of such trust; or
- (iii) Suffered any person to do any of the acts described in subparagraph (i) or (ii) above,

It shall be presumed that he had acted dishonestly until the contrary is proved.

[2] The presumption under subsection (1) shall apply *mutatis mutandis* to the offences prescribed in sections 109 and 511 of the Code in relation to any of the offences referred to in that section.

This section gives rise to a rebuttable presumption of dishonesty against the accused upon proof by the prosecution of the matters specified. In every case of criminal breach of trust the essential thing to be proved is whether the accused was actuated by dishonest intentions or not. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intention may readily be made.

1. Public Prosecutor v Yeoh Teck Chye and Lim Hong Pung & Anor v Public Prosecutor

[1981] 2 MLJ 176

FEDERAL COURT CRIMINAL APPEAL NO 34 OF 1979 (FC KUALA LUMPUR)

Section 408 of the Penal Code

Brief facts in this case:

In this case the 2nd accused (Lim Hong Pung) was the manager of a bank and it was alleged that he had approved payment of cheques to the 3rd accused (Liew Chin Yam) although in excess of the overdraft facilities given to the 3rd accused and although the 2nd accused had no authority to give such overdraft facilities. The 2nd accused was charged with criminal breach of trust and the 3rd accused with abetment of that charge. The 1st accused (Yeoh Tech Chye) was the Deputy General Manager of the Bank, who had authority to grant overdrafts within limits and some of the cheques passed by the 2nd accused had the initials of the 1st accused in the register of cheques. He was also charged with abetment of the criminal breach of trust by the 2nd accused. The learned trial judge convicted the 2nd accused of criminal breach of trust and the 3rd accused of abetment but he acquitted the 1st accused. The Public Prosecutor appealed against the acquittal of the 1st accused and the 2nd and 3rd accused appealed against their conviction and sentences.

The 3rd accused was also charged with two charges of forgery, the allegation being that he had used false documents namely he had signed application forms to open individual accounts in the name of other persons. Accused No. 1 and No. 2 were charged with abetment. At the trial the other persons stated that they had authorized the third accused to make the applications on their behalf. The learned trial judge found the 3rd accused guilty of both charges of forgery but he acquitted the 1st and 2nd

accused of abetment. The 3rd accused appealed against his conviction and sentence.

Ratio decidendi of this case:

The act of ratification is of no assistance to the defence.

Principles of law decided in this case:

For a person to be guilty of the offence of criminal breach of trust he should be

(i) entrusted with property or dominion over the property;

(a) that he should dishonestly misappropriate or convert it to his own use
OR

(b) dishonestly use or dispose of the property or willfully suffer any other person

so to do in violation of

(a) any direction of law prescribing the manner in which such trustees to be

discharged OR

(b) of any legal contract made touching the discharge of such trust.

2. Tan Siak Heng v Rex

[1950] 1 MLJ 214

APP CRIM JURIS SINGAPORE

Section 408 of Penal Code - Criminal breach of trust

Brief facts in case:

The Appellant in the capacity of a bus conductor employed by the Singapore Traction Co. Ltd., on omnibus entrusted with property, to wit, the collection of fares from passengers, had committed 3 criminal breach of trust by failing to deliver to the Company, the sum of 10 cents he

received for which he issued no ticket and that he thereby committed an offence punishable under section 408 of the Penal Code.

Ratio decidendi of the case:

The appeal was allowed and the conviction quashed. As the records were not compiled by the witness and as he had no personal knowledge of the recorded facts, they should not have been admitted in evidence. There was no evidence of the failure to pay over the money, and the charges were not therefore proved.

Principles of law decided in the case:

In proving a charge of criminal breach of trust, it must be proved that there is appropriation of property. In this case, it was held that the offence is failure to pay over money, not the issue of a used ticket. If the failure to pay over the money had been proved, the issue of the used ticket might have been very material evidence of a fraudulent intent, but, by itself it did not prove the commission of any offence. There is no proof of appropriation of property as the records were not compiled by the witness, he had no personal knowledge of the recorded facts, these records of documents should not have been admitted in evidence.

3. ABDUL AZIZ V. PUBLIC PROSECUTOR

[1962] 1 LNS 1

High Court

Section 408 of Penal Code

Brief facts in case:

An appellant was initially charged with 3 counts of misappropriation for shortage of agropon, for which he could not account at the end of the year on the basis of stock record. In the course of trial, the President of

Sessions Court amended the charge into one charge and stated therein the period in which the said agropon was said missing. There was uncertainty in the actual amount of agropon and the basis of the prosecution rested on the missing item and the appellant had failed to account for them.

Ratio decidendi of the case:

“In a charge of criminal breach of trust mere failure to account is not sufficient evidence of misappropriation. It is necessary to examine from the surrounding circumstances and to be satisfied whether misappropriation can be inferred. In this case the learned President appeared to have drawn such inferences from the loss of the stock book and the failure of the appellant to report such loss to his superior officers. It was clearly in evidence that the stock book was on the table when the appellant was on leave. It was also in evidence that no one in the office at Batu Pahat seemed to have any knowledge what the stock book looked like. To draw inferences of guilt as the learned President had done in this case was in my view clearly unreasonable.” – as per Ali,J. Conviction quashed.

It is the nature of charges of criminal breach of trust and indeed of dishonest misappropriation of property in general, that convictions must depend upon inferences. It is seldom that a suspected person is seen removing money physically; if he is, he will probably be charged with theft. These charges essentially depend upon proving, not that the accused person was seen pocketing money, but that, taking all evidence together, the inference is irresistible that the money which has disappeared must have been appropriated by the accused. – Roberts CJ in Murni bin Hj Mohamed Taha v PP (1982) 1 LNS 121. In the absence of any direct evidence to establish a dishonest intention, the prosecution was entitled to rely on s 409B of the Penal Code to raise the presumption of dishonest

misappropriation. However, before the presumption can be activated, the prosecution must first prove that the accused had misappropriated the sums of money involved - Augustine Paul J in *Hj Maamor bin Hj Abdul Manap v Public Prosecutor* (2002) 6 MLJ 668

If the accused is not proven to have acted dishonestly, the presumption does not arise and consequently there is nothing where the accused is required to prove to the contrary. Therefore, there can be no mechanical or automatic application of the said presumption unless there is sufficient and reliable evidence as alleged in the charges. The quality and substance of the evidence must also be critically examined to consider the application of the said statutory presumption. Hitherto, to invoke the statutory presumption under section 409B of the Penal Code, dishonesty is an element that must be proven in order to secure conviction (*Tan Liang Chew & Ors v PP* (1997) 5 MLJ 338).

Chapter 7

Defence

Relevant cases:

1. Re Ketuna Bibi

[1955] 1 MLJ 155

Revision from Magistrate Court to the High Court.

Section 406 of Penal Code

Brief facts in case:

Ketuna Bibi daughter of Noordin was charged in the Magistrate's Court, Kuala Kubu Bharu with an offence punishable under section 380 of the Penal Code. It was a case of theft in a dwelling house by a wife of property belonging to her husband. When the case came to be heard on the 31st March, 1955 the original charge was amended by the prosecution to one of criminal breach of trust, an offence punishable under section 406 of the Penal Code. The amended charge was explained to the defendant who claimed trial; the evidence of Abdulla Khan son of Noor Mohamed, a prosecution witness, was heard. On the application of the prosecution an adjournment was granted. Proceedings were resumed on the 13th April, 1955, and before any further evidence was heard, the learned Magistrate ruled that the charge was groundless and discharged the defendant under section 173(g) of the Criminal Procedure Code, such discharge not amounting to an acquittal.

Ratio decidendi of the case:

Such unity of interest as there is between husband and wife in English law, does not exist as between husband and wife who profess the religion

of Islam, and in Indian cases it has been laid down that a Mohamedan wife may be convicted of stealing from her husband.

Principles of law decided in the case

... in Mohammedan law there is no such community of interest between husband and wife as to make theft or criminal breach of trust, impossible.

2. PERIASAMY SINNAPPAN v PUBLIC PROSECUTOR

[1996] 3 CLJ 187

Court of Appeal, Kuala Lumpur

Section 405 Criminal Procedure Code

Section 409 Criminal Procedure Code

Section 107 Criminal Procedure Code

Section 109 Criminal Procedure Code

Brief facts in case:

The 1st appellant who was the chief executive officer of the Co-operative Central Bank Limited was charged under 3 counts of criminal breach of trust. The 2nd appellant who was the subordinate officer of the 1st appellant was charged for abetting the offences of the 1st appellant. The Bank granted a RM20million loan to a borrower on the condition that the money shall only be released upon the borrower depositing a sum of RM4million shares in a company to the Bank. There was also a term which allows the bank to dispense with the depositing term. No shares were deposited at the time the 1st appellant signed the release and soon after the release the Bank dispensed such requirement. The 1st appellant were charged for criminal breach of trust as he had released the money before the cancellation of such requirement.

Ratio decidendi of the case:

- a. Section 409 CPC is divided into two (2) parts being:-
 - i. First part applies to cases where it is dominion to a person "*in his capacity of a public servant*";
 - ii. Second part applies to cases on entrustment made to a particular person "*by way of his business as an agent*".
- b. Interpretation of the section clearly show that it refers to persons who are professional agents and not the casual agents such as a company director. Therefore the charge against the 1st accused is bad in law.
- c. A criminal breach of trust offence is an offence relating to property and its commission is directed against the beneficial owner of such property.
- d. The implied term in every entrustment under the express or implied contract as provided under in Section 405 Penal Code, allows the owner to give his express or implied consent to its use or disposal in a manner different from the original term governing its use or disposal. There was clearly a variation allowed in the letter of offer and such variation was indeed made when the bank chose to dispensed with the requirement soon after the release of the money.
- e. On the question whether there can be valid consent subsequent to impugned use or disposal depends on the facts in which had shown that there was true consent in its legal sense.
- f. The appellate court must give weight and consideration to views of trial judge on credibility of witnesses as the presumption of innocence of the accused is up to the end of the trial and when the learned Judge rejected the defence of the 1st appellant which had been accepted as true by the Sessions Judge, he had undertaken his own assessment of the 1st appellant as a witness notwithstanding that he has not had the benefit of

observing him in the witness box. This amounts to an unwanted usurpation by the Judge of a role that is not his.

- g. Failure to observe the followings:-
- i. Treating the *actus reus* as completing the offence when under *Section 405* provides an offence is committed only if the property is converted, appropriated or disposed with dishonest intention;
 - ii. Dismissing the defence of honest belief contrary to the principles of law where the existence of belief on the part of the 1st appellant that papers were in order when he signed the release was not a defence in law;
 - iii. Equated negligence with dishonesty when it is clear under settled law that negligence, even the slightest is not to be equated with dishonesty.
- h. Brushing aside the principles in the case of *Khoo Hi Chiang v P.P.* [1994] 2 CLJ 151 when the decision is binding.

Principles of law decided in the case:

The 1st appellant's charge was bad in law and therefore the charge of abetting should consequently follow suit as the 2nd appellant cannot be held guilty for abetting a non-existing offence. However, offences of abetment when it consists of instigation constitute a separate and distinct offence. An abettor, who instigate the commission or conspires to commit it, may still be convicted notwithstanding that the person with the principal charge had been acquitted.

3. WICKRASOORIYA v PUBLIC PROSECUTOR

[1964] MLJ 281

ACRJ MALACCA – CRIMINAL APPEAL NO 19 OF 1963 decided by
ISMAIL KHAN J

Section 408 Penal Code

Brief facts in case:

This is appeal case by the Appellant against his conviction on the two charges and sentence for the offence punishable under Section 408 Penal Code. He was sentenced to three years imprisonment on each charge, the sentences to run concurrently. The Appellant who was an accountant employed by Sime Darby & Co., Malacca, was convicted on two charges of criminal breach of trust in respect of monies he had received and payable to the company. It was his duty, *inter alia*, to receive monies payable to the company, to bank them and to keep proper accounts. The two sums involved (\$39.70 & \$12.00) related to credit sales by the company, the vouchers for which were removed by the Appellant from the office without authority.

Ratio decidendi of the case:

1. Mere non-accounting or temporary retention of money was not an offence unless there was dishonest intention;
2. In this case the only inference that could be drawn from the surrounding circumstances was that the appellant deliberately withheld the vouchers to ensure that the amounts involved were not credited to the company accounts while he retained the money and that his intention in doing so was dishonest.

Principles of law decided in the case:

The Appellant had received monies payable to the firm and in breach of his duty had failed to credit the firm with the said amounts. It is not

necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest. As the question of intention is not a matter of direct proof, the Courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime. So, in cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. Appeal dismissed.

See also : Public Prosecutor v Mohamed Bin Abdul Jabbar[1948-1949]
Supp MLJ 74 ; Gnanasegaran Pararajasingam .PP [1997]4CLJ6

Possible defences : See Mary George's article ,supra.

Chapter 8

Sentencing

8.1 Principle in sentencing for CBT offences

1. MOHAMED ABDULLAH ANG SWEE KANG V. PUBLIC PROSECUTOR

[1988] 1 MLJ 167

SUPREME COURT, KUALA LUMPUR (Criminal Appeal)

Section 409 of Penal Code

Brief facts in the case:

The appellant was convicted in the High Court, Kuala Lumpur on his plea of guilty to a charge of criminal breach of trust offence under section 409 Penal Code. He was sentenced to 8 years imprisonment and a fine of RM100, 000 in default a further 6 months imprisonment. He appealed against sentence imposed by the High Court judge on the ground that the sentence imposed was manifestly excessive in the circumstances of the case and the learned judge failed to take into account relevant considerations and/or took into account irrelevant considerations.

Ratio decidendi of the case:

In criminal breach of trust cases in general, a term of immediate imprisonment would be inevitable, save in very exceptional circumstances or where the amount of money involved was small. This must be the current sentencing policy even if the accused pleaded guilty.

Principles of law decided in the case:

In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering the following factors;

- [1] The gravity of the offence committed (which must be considered in the light of the particular facts of the offence);
- [2] The facts in the commission of the offence;
- [3] The presence or absence of mitigating factor; and
- [4] The sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy.

The judge must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved, which must necessarily vary from case to case apart from other mitigating factors. Unless there is a proper reason for withholding such credits, failure to do so may result in the judge not exercising his or her discretion judicially in assessing the level of custodial sentence.

At such, in sentencing for CBT offences, few points to be noted:

- [1] If the accused plea of guilty, it would be reduction of one-quarter and one-third of what otherwise would have been the sentence if he had claimed trial.
- [2] The sentence should signify the gravity of the offence.
- [3] The sentence must reflect the full restitution made and other mitigating factors.

2. Public Prosecutor v Lim Swee Guan

[1969] 1 LNS 133

Section 408 Penal Code

Section 310 of Criminal Procedure Code

Brief facts in case:

The respondent, the chief cashier in a bank misappropriated the amount of \$165,000 from his employer. He pleaded guilty to criminal breach of trust. The President of the Sessions Court sentenced him to one year's imprisonment on each of the three charges. The sentence is to run concurrently. The Deputy Public Prosecutor appealed against the sentence imposed on the respondent.

Ratio decidendi of the case:

Ong Hock Sim J allowed the appeal against the sentences, reasons being that the said sentences were inadequate and should be enhanced.

It is necessary to ensure that bank employees should have some regard for their duties and responsibilities. There can be no justification or excuse for the respondent to use the money.

Principles of law decided in the case:

A sentence should only be altered if it is error in principle. The court will only intervene if a sentence is excessive or inadequate to such an extent as to satisfy the court that when it was passed, there was a failure to apply the right principles.

When deciding the appropriate sentence, a court should always be guided by certain considerations, such as public interest. The object of criminal law being enforced publicly is to punish the crime in the hope that it will induce the criminal to turn to an honest living and to prevent future crime by deterring others who might be tempted to commit the crime.

3. PP v Khairuddin

[1982] 1 MLJ 331

Section 408 of the Penal Code

Section 403 of the Penal Code

Brief facts in case:

The accused was a credit controller of a bank. He pleaded guilty to one charge of criminal breach of trust, an offence under section 408 of the Penal Code and to 3 charges of dishonest misappropriation of money under section 403 of the Penal Code.

The PP appealed to the Court of Appeal as to the propriety of the sentences passed by the Sessions Court.

Ratio decidendi of the case:

[1] Although a trial court has the discretionary right and the duty to decide whether to be lenient or severe, such discretion and duty must be discharged according to established principles in assessing sentence

[2] Where a person is charged with more than one offence, it is the duty of the court to pass sentences which would reflect adequately the seriousness of each particular charge.

[3] Public interest demands that cases of this nature involving persons in positions of trust, particularly in financial institutions must be dealt with severely, in the hope that would be offenders would be deterred.

4. PP v Ismail Bin Loyok

[1958] 1 LNS 48

High Court

Section 409 of the Penal Code

Section 249 (1) of the Criminal Procedure Code

Brief facts in case:

The accused was convicted of an offence of CBT as a public servant. He was a clerk and responsible for receiving monies from the public and issuing the receipts. It was also his duty to pay all monies received into the Telecoms account at the Chartered Bank. A surprise check revealed that the accused was \$958.69 short. The magistrate court held that the accused was to be released upon entering into a bond in the sum of \$300 with 2 sureties. He was also to make restitution of the sum of \$958.69. The PP appealed to the high court against the inadequacy of the sentence.

Ratio decidendi of the case:

The consideration for punishment is public interest. The object is not only to punish the offender but to deter others. Although 1st time offenders should be kept from coming into contact with hardened criminals as much as possible, nevertheless there will not be deterrence if others see that the only punishment for succumbing to temptation is only some form of binding over.

5. PP v Tan Koon Swan**[1987] 1 MLJ 18**

OCRJ Singapore

Section 109 read together with Section 406 of Penal Code

Brief facts in case:

The accused pleaded guilty to a charge of abetting another accused in committing a criminal breach of trust by dishonestly paying out the money of Pan-Electric Industries Ltd to a firm of stockbrokers. The accused was a political figure in Malaysia and pressed for no custodial sentence as he has made partial restitution. The accused urged the court to impose a very substantial amount of fine. The accused was then sentenced to 2 years

imprisonment and fine of 500,000 in Singapore Dollars in default of payment, 6 months imprisonment.

Ratio decidendi of the case:

[1] Public interest requires a deterrent sentence to protect Singapore commercial market.

[2] A deterrent sentence should be given as to fit the accused's crime and to deter others from committing the same offence. The conspiracy the accused conspired has brought about the demise of Pan-Electric Group.

[3] Although the accused has made a partial restitution, the losses it has caused to the shareholders have become irreparable. Pan-EI is in provisional liquidation and many others have suffered.

[1] This is not an offence that can be viewed in isolation and it was premeditated.

[2] The offence that the accused committed has struck at the very heart of the integrity, reputation, and confidence of Singapore as a commercial city and a finance centre.

Principles of law decided in the case:

Public interest in this case requires a deterrent sentence as the offence has cause irreparable losses to many, has caused the collapse of Pan-EI and tarnish the reputation of Singapore as a commercial city and a centre of finance.

**6. WONG KAI CHUEN PHILIP v PUBLIC PROSECUTOR
[1991] 1 MLJ 321 (also [1990] SLR 1011)
HIGH COURT (SINGAPORE) – MAGISTRATE’S APPEAL NO 187 OF
1989 decided by CHAN SEK KEONG J**

Brief fact of the case:

This is appeal case by the Appellant against excessiveness sentences passed on him for the two charges punishable under Section 402 & 409 Penal Code (Cap 224, 1985 Ed). He was sentenced to three years’ imprisonment in respect of each charge. The sentences were ordered to run consecutively (6 years imprisonment altogether). The Appellant was an advocate and solicitor practicing on convincing of the Supreme Court of Singapore who had pleaded guilty to two charges of criminal breach of trust. A further four charges were taken into consideration for the purpose of sentence. The total amount that the Appellant misappropriated was \$1,841,232.20. He made no restitution from the amount.

Ratio decidendi of case:

[1] There is not much mitigation value in a professional man turning himself in the face of absolute knowledge that the game is up.

[2] In the offence of criminal breach of trust, the larger the amount dishonestly misappropriated the greater the culpability of the offender and the more severe the sentence of the court;

[3] Where consecutive sentences are passed, the judge must take into account the totality of the cumulative sentences to determine whether it is justified by the criminal behaviour of the offender in the case as a whole;

[4] The offence of criminal breach is by itself a serious offence, but when committed by a solicitor it can be said to be aggravated.

[5] The Appellant had made no restitution, the amounts misappropriated were considerable and the only person who had benefited from this criminal act was the Appellant.

7. Shamuganathan v Public Prosecutor

[1967] 1 MLJ 204

High Court

Section 408 of Penal Code

Section 173A of Criminal Procedure Code

Brief facts in case:

Appellant was convicted of having committed criminal breach of trust of RM150 and sentenced to four months imprisonment. Appellant was 24 years old and has no previous convictions. It was not probable that the appellant could commit a series of breaches of trust without the knowledge of the other employees. After the breaches of trust the appellant's father had paid a sum of RM2, 500 to make good the amount alleged to have been misappropriated by the appellant.

Ratio decidendi of the case:

Having regards to the facts it would not be probable that the series of breaches of trust could have been committed by the appellant without the knowledge of the other employees. It is also shown that the father of the appellant had, having heard of these breaches of trust by the appellant, paid back the company a sum of amounting to RM2500 to pay towards the amount alleged to have been misappropriated by the appellant. In view of the age of the appellant and his clean record, I feel the sentence of imprisonment would not be an appropriate one. I therefore order that the appellant be released on his signing a bond of good behaviour for a period of one year with one surety in the sum of \$1,000. See also; Mohd Faizal Sundarajan v PP (under Chapter 2)

Note : Further reading on sentencing policy –See *Mary George's article, supra.*

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