MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Abdul Rahman Sebli, JCA; Kamardin Hashim, JCA; Kamaludin Md Said, JCA

Amir Hassan Bin Ali Usin v Public Prosecutor

Citation: [2018] MYCA 274 **Suit Number:** Criminal Appeal No. S-09-364-10/2017

Date of Judgment: 09 August 2018

Criminal law – Offence of intending to deceive principal by agent – Conviction – Enhancement of sentence on appeal to High Court – Appeal – Sections 18 and 24, Malaysian Anti-Corruption Commission Act 2009

Sentencing – Factors to be taken into consideration by a trial judge in assessing appropriate and just sentence – Principles governing appellate intervention in sentencing

JUDGMENT

[1] The appellant was charged and tried before the learned Sessions Court Judge ('trial judge') with an offence of intending to deceive principal by agent, under section 18 of the **Malaysian Anti-Corruption Commission Act 2009 ('Act 694')**. The offence on conviction is punishable under section 24(2) of the same Act.

[2] The charge reads:

> *"Bahawa kamu antara 30.12.2009 dan 7.1.2010, dalam daerah Kota Kinabalu, telah memberi seorang ejen Josephine Sherilyn Joe Liew Apok, Ketua Seksyen Bayaran Jabatan Akauntan Negara Malaysia Kota Kinabalu, dengan niat memperdayakan pinsipalnya iaitu Jabatan Akauntan Negara Kota Kinabalu satu dokumen iaitu pesanan Kerajaan P 1533 yang mana prinsipalnya itu mempunyai kepentingan mengenai dokumen tersebut dan yang kamu mempunyai sebab mempercayai mengandungi butir matan yang palsu iaitu perakuan kamu bahawa barang-barang iaitu pakaian sukan serta pakaian seragam (Lelaki/ Perempuan) untuk kanak-kanak Tabika KEMAS tahun 2009 seperti di sebutharga nombor 2/2009 telah dibekalkan yang mana sebenarnya pembekalan pakaian sukan serta pakaian seragam (Lelaki/ Perempuan) tersebut tidak dibekalkan sepenuhnya, yang dimaksudkan untuk mengelirukan prinsipalnya, dan dengan itu, kamu telah melakukan satu kesalahan di bawah Seksyen 18 Akta Suruhanjaya Pencegahan*

Rasuah Malaysia 2009 dan boleh dihukum di bawah Seksyen 24(2) Akta yang sama."

[3] At the end of the trial, the learned trial judge convicted the appellant and sentenced him to three (3) years imprisonment and a fine of RM10,000.00 in default three (3) months imprisonment. However, the sentence of imprisonment was stayed by the learned trial judge pending appellant's appeal to the High Court on condition that the fine was to be paid instantly. The appellant paid the fine.

[4] The appellant's appeal against the conviction to the High Court Judge was dismissed. However the learned High Court Judge enhanced the sentence from 3 years to eight (8) years imprisonment and maintained the RM10,000.00 fine in default 3 months imprisonment.

[5] Aggrieved by the decision of the learned High Court Judge, the appellant appealed to this Court. We heard the appeal on 16.7.2018, and after hearing the parties, we unanimously allowed the appellant's appeal partly. We affirmed the conviction but we allowed the appellant's appeal against sentence. We set aside the sentence imposed by the learned High Court Judge and we restored the sentence imposed by the learned trial judge.

[6] We now give our reasons in allowing the appellant's appeal against sentence and in affirming the conviction.

[7] The factual matrix of this case had been summarised by the learned trial judge in his grounds of judgment. They are as follows (pages 31-38 of the Appeal Record Volume 2):

"1. Pada 14hb Mei 2009 Syarikat OKT iaitu Pemborong Idamanku telah terpilih sebagai penyebutharga yang Berjaya dalam satu mesyuarat Lembaga pemutus sebutharga bagi Kerja-kerja membekal dan menghantar pakaian sukan dan seragam (Lelaki/ Perempuan) untuk Kanak-kanak Tabika KEMAS tahun 2009 dengan nilai kontrak sebanyak ***RM446,220.00. (keterangan SP47-Kamaruzaman bin Ismail; NOP m/s 135, baris 26-33, Exhibit P11 & P11A);***

2. Syarikat Pemborong Idamanku adalah dimiliki secara tunggal oleh OKT. ***(Rujuk Ekshibit D7 dan D8).***

3. Jabatan KEMAS Negeri Sabah melalui ***Ekshibit P14*** *telah menawarkan kerja iaitu "Perkhidmatan bekalan dan menghantar pakaian sukan dan seragam Tabika KEMAS bagi tahun 2009" kepada Syarikat OKT. Berdasarkan helaian ketiga Ekshibit P14, OKT selaku pengurus Syarikat Pemborong Idamanku telah menerima tawaran tersebut dan berjanji mematuhi semua syarat seperti yang dinyatakan dan mematuhi semua skop seperti mana terkandung di dalam surat tawaran tersebut.*

4. Satu Pesanan Kerajaan berkaitan pembekalan ini kemudian telah disediakan dan dikeluarkan oleh pihak Jabatan KEMAS Negeri Sabah. Pesanan Kerajaan tersebut telah disediakan oleh ***Saksi Pendakwaan ke-4 (SP4)*** *iaitu Puan Rajilah Binti Abdullah. Nombor Pesanan Kerajaan tersebut adalah 1533 bertarikh 09/07/2009* ***(Rujuk Ekshibit P3a dan keterangan SP4 melalui***

PWS-2).

5. Selepas mendapat tandatangan daripada Pengarah Jabatan KEMAS Negeri Sabah pada masa itu iaitu Encik Mohd Khadri bin Ahmad, SP4 telah menghantar 2 set Pesanan Kerajaan ***(Ekshibit P3a)*** *kepada pembekal iaitu OKT.* ***(Rujuk PWS-2, para 5)***.

6. Seterusnya pada 10hb Julai 2009 melalui satu surat daripada Syarikat OKT kepada Pengarah Jabatan KEMAS Negeri Sabah, OKT telah membuat permohonan bayaran pendahuluan ***(advance payment)*** *sebanyak RM100,000.00 untuk menyediakan bekalan dan menghantar pakaian sukan serta pakaian seragam Tabika KEMAS (Lelaki/ Perempuan) tahun 2009. Permohonan OKT ini telah diluluskan oleh pihak Jabatan KEMAS dan pembayaran telah dibuat.* ***(Rujuk keterangan SP4 melalui PWS-2, para 6-8, Ekshibit P10a-f, keterangan SP2 Nota Keterangan m/s 50, baris 18-34 sehingga m/s 54, keterangan SP47 Nota Keterangan m/s 136 baris 16-34 sehingga m/s 137 baris 24)***.

7. Pada 01hb Oktober 2009, OKT telah membuat permohonan pinjaman dari pihak MARA, Negeri Sabah dan permohonan tersebut telah diluluskan oleh pihak MARA, Negeri Sabah pada 05hb November 2009. ***(Rujuk exhibit P44 dan P45, keterangan SP30 melalui PWS-28)***. *Tujuan pinjaman adalah untuk membiayai pembekalan pakaian sukan serta pakaian seragam Tabika KEMAS (Lelaki/ Perempuan) tahun 2009.*

8. Selanjutnya, berdasarkan kepada ***exhibit P4a*** *iaitu satu invois atas nama Syarikat Pemborong Idamanku bertarikh 30.12.2009 yang ditujukan kepada Pengarah KEMAS Negeri Sabah, OKT kemudian telah menuntut bayaran pembekalan pakaian sukan serta pakaian seragam tabika KEMAS (Lelaki/ Perempuan) tahun 2009. Nilai tuntutan adalah sebanyak RM446,220.00.*

9. Berdasarkan ***Ekshibit P4a*** *juga, OKT telah menandatangani ruangan* ***Perakuan mengenai Mutu*** *yang membawa maksud OKT memperakui bahawa Syarikatnya telah membekalkan pakaian sukan serta pakaian seragam Tabika KEMAS (Lelaki/ Perempuan) tahun 2009 seperti dalam sebutharga no 2/2009* ***(Ekshibit P13)***.

10. Pada 07.01.2010, Asli Gimir, ***PW9****, telah menyediakan satu baucar bayaran bernombor H5083* ***(Ekshibit P2(1-4))*** *untuk proses pembayaran tuntutan daripada Syarikat Pemborong Idamanku berkaitan kerja-kerja membekal dan menghantar pakaian sukan serta pakaian seragam Tabika KEMAS (Lelaki/ Perempuan) tahun 2009. Menurut* ***SP9****, mengikut prosedur kewangan, bil-bil tuntutan pembayaran perlulah dibayar dalam tempoh 14 hari selepas tuntutan diterima.* ***(Rujuk Ekshibit P2(1-4), keterangan SP9 melalui PWS-7)***.

11. ***SP2*** *telah menjadi Peraku 1 dalam proses pembayaran yang melibatkan* ***Exhibit P(1-4)***. *SP2 membuat perakuan 1 ini dalam sistem eSPKB. Menurut SP2, semasa beliau membuat perakuan tersebut, beliau tidak tahu sama ada pembekalan dan penghantaran pakaian sukan serta pakaian seragam Tabika KEMAS (Lelaki/ Perempuan) tahun 2009 telah dilaksanakan atau tidak. Manakala Peraku 2 adalah SP47.*

12. Berdasarkan exhibit P36, pada 08.01.2010 ***SP5*** *iaitu Josephine Sherilyn Joe Liew Apok, selaku Ketua Seksyen Bayaran di Jabatan Akauntan Negara (JAN) Kota Kinabalu telah meluluskan pembayaran bagi baucar bernombor H5083 iaitu* ***Exhibit P2(1-4)*** *yang diterimanya melalui sistem 'Government Financial Management Accounting System (GFMAS). Walau bagaimanapun, kelulusan dibuat hanya berdasarkan baucar yang dihantar melalui sistem GFMAS tanpa adanya dokumen fizikal SP5 menegaskan bahawa Jabatan yang memproses tuntutan pembayaran apa-apa kerja pembekalan atau perkhidmatan mesti memastikan bahawa pembekalan yang diterima oleh Jabatan haruslah diperiksa sama ada pembekalan diterima sepenuhnya atau tidak. Proses pembayaran boleh dibuat hanya selepas pembekalan telah dilaksanakan sepenuhnya. Sekiranya tidak, bayaran tidak boleh dibuat (exhibit P36, rujuk keterangan SP5 melalui PWS-3 dan Nota Keterangan di m/s 62-65).*

13. Bagaimanapun, berdasarkan keterangan saksi-saksi pendakwaan dan juga keterangan dokumentar, pembekalan dan penghantaran pakaian sukan serta pakaian seragam Tabina KEMAS (Lelaki/ Perempuan) Negeri Sabah bagi tahun 2009 telah tidak dilaksanakan sepenuhnya oleh Syarikat OKT iaitu Pemborong Idamanku.

14. ***SP47*** *menyatakan bahawa berdasarkan Ekshibit P10E, Syarikat OKT dikehendaki untuk menyempurnakan pembekalan dan penghantaran pakaian sukan serta pakaian seragam Tabika KEMAS (Lelaki/ Perempuan) Negeri Sabah tahun 2009 dalam tempoh 4 minggu dari tarikh 14.05.2009. Walau bagaimanapun, Syarikat OKT telah gagal menyempurnakan pembekalan tersebut sepenuhnya.*

15. Berdasarkan kepada Delivery Order bertarikh 30.12.2009 (ekshibit P4b) daripada syarikat OKT yang dilampirkan semasa OKT membuat tuntutan, jelas menunjukkan bahawa OKT telah gagal untuk membekal jumlah pakaian yang sama seperti yang dinyatakan di dalam invois syarikat OKT (Ekshibit P4a).

16. SP47 kemudian telah mengeluarkan lima (5) Surat Peringatan (Ekshibit P15, 16, 17, 18 dan 19) kepada Syarikat OKT di antara bulan Disember 2009 dan Jun 2010 menuntut baki pembekalan pakaian-pakaian tersebut. Berdasarkan surat peringatan pertama iaitu Ekshibit P15 bertarikh 02.12.2009, Syarikat OKT telah didapati masih belum menghantar sepenuhnya pembekalan pakaian sukan dan seragam dan diminta untuk menetapkan masa yang tepat bagi menyelesaikan pembekalan pakaian-pakaian tersebut. Sebagai balasan, OKT telah melalui surat bertarikh 12.12.2009 iaitu Ekshibit P16 telah memberi akujanji dan jaminan untuk menyelesaikan baki pembekalan tersebut selewat-lewatnya pada 31.12.2009. Malangnya, menurut SP47, setakat 06.06.2010 (tarikh surat peringatan (Ekshibit P19) dikeluarkan) syarikat OKT masih gagal menyempurnakan pembekalan sepenuhnya.

17. Akhir sekali, Awang Asri Abdul Rahman, SP10, iaitu Penolong Pengarah Operasi 1 KEMAS Negeri Sabah menyatakan pembekal sepatutnya menghantar pakaian sukan dan seragam tersebut terus ke Pejabat KEMAS Daerah seluruh Sabah. Walau bagaimanapun, terdapat penghantaran pembekalan pakaian seragam dan sukan yang dibuat terus ke pejabat KEMAS Negeri Sabah dalam bulan Mac 2011. (Rujuk keterangan SP10 melalui PWS-8, Ekshibit P38).

18. Antara Pejabat-pejabat KEMAS Daerah yang telah menerima pakaian sukan dan seragam tersebut adalah seperti berikut:

(a) Pejabat KEMAS Daerah Kota Kinabalu (Rujuk Ekshibit P21, keterangan SP7 melalui PWS-5).

(b) Pejabat Jabatan KEMAS Negeri Sabah (Rujuk Ekshibit P38, keterangan SP16 melalui PWS-14)

(c) Pejabat KEMAS Beaufort (Rujuk Ekshibit P22, keterangan SP17 melalui PWS-15 dan keterangan SP19 melalui PWS-17).

(d) Pejabat KEMAS Penampang Putatan (Rujuk Ekshibit P20, keterangan SP18 melalui PWS-18).

19. Manakala Pejabat-pejabat KEMAS Daerah yang tidak menerima pakaian sukan dan seragam bagi tahun 2009 adalah seperti berikut:

(a) Pejabat KEMAS Daerah Penampang (Keterangan SP20 melalui PWS-18).

(b) Pejabat KEMAS Parlimen Silam (Keterangan SP44 melalui PWS-42).

(c) Pejabat KEMAS Parlimen Tawau (Keterangan SP45 melalui PWS-43).

(d) Pejabat KEMAS Parlimen Tawau (Keterangan SP46 melalui PWS-44).

(e) Pejabat KEMAS Parlimen Kimanis dan Papar (Keterangan SP50 melalui PWS-47).

(f) Pejabat KEMAS Parlimen Sepanggar (Keterangan SP24 melalui PWS-22).

(g) Pejabat KEMAS Parlimen Tenom (Keterangan SP43 melalui PWS-41).

(h) Pejabat KEMAS Parlimen Tawau (Keterangan SP42 melalui PWS-40).

(i) Pejabat KEMAS Parlimen Kinabatangan (Keterangan SP41 melalui PWS-39).

(j) Pejabat KEMAS Parlimen Libaran (Keterangan SP40 melalui PWS-38).

(k) Pejabat KEMAS Parlimen Batu Sapi (Keterangan SP39 melalui PWS-37).

(l) Pejabat KEMAS Parlimen Sandakan (Keterangan SP38 melalui PWS-36).

(m) Pejabat KEMAS Parlimen Pensiangan (Keterangan SP37 melalui PWS-35).

(n) Pejabat KEMAS Parlimen Beluran (Keterangan SP36 melalui PWS-34).

(o) Pejabat KEMAS Parlimen Kalabakan (Keterangan SP35 melalui PWS-33).

(p) Pejabat KEMAS Parlimen Kudat (Keterangan SP34 melalui PWS-32).

(q) Pejabat KEMAS Parlimen Kota Marudu (Keterangan SP33 melalui PWS-31).

(r) Pejabat KEMAS Parlimen Tambunan dan Keningau (Keterangan SP32 melalui PWS-31).

(s) Pejabat KEMAS Parlimen Tuaran (Keterangan SP23 melalui PWS-21)."

[8] Based on those facts and upon maximum evaluation of the same, the learned trial judge found the appellant guilty and convicted him on the preferred charge. The learned High Court Judge agreed and affirmed the appellant's conviction.

[9] Before we could hear the merits of the appeal, learned counsel for the appellant informed us that the appellant was withdrawing his appeal against conviction and would proceed with the appeal against sentence. After hearing both parties, we allowed the appellant's appeal against sentence.

[10] Before we proceed any further, for ease of reference, we reproduce below the provisions of sections 18 and 24 of **Act 694**, as follows:

18 Offence of intending to deceive principal by agent

A person commits an offence if he gives to an agent, or being an agent he uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which he has reason to believe contains any statement which is false or erroneous or defective in any material particular, and is intended to mislead the principal.

24 Penalty for offences under sections 16, 17, 18, 20, 21, 22 and 23

(1) Any person who commits an offence under sections 16, 17, 18, 20, 21, 22 and 23 shall on conviction be liable to-

(a) imprisonment for a term not exceeding 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 such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higher.

(2) Any person who commits an offence under section 18 shall on conviction be liable to-

(a) Imprisonment for a term not exceeding twenty years; and

(b) a fine of not less than five times the sum or value of the false or erroneous or defective material particular, where such false or erroneous or defective material particular is capable of being valued, or of a pecuniary nature, or ten thousand ringgit, whichever is the higher.

[11] Before imposing the sentence against the appellant, the learned trial judge had considered the

following factors (at pages 49-50 of the Appeal Record Volume 2):

"Dalam rayuannya, OKT memohon agar dikenakan hukuman yang ringan kerana OKT sudah lama menganggur dan kini menyara keluarga dengan perniagaan jualan langsung (direct selling) dengan pendapatan yang tidak tetap. OKT juga menanggung anak-anak yang masih bersekolah. OKT mempunyai 5 orang anak, yang sulung belajar di UiTM, yang kedua di UPSI dan tiga lagi anak masih bersekolah di Tingkatan 5, darjah 5 dan yang bongsu dalam darjah 3. OKT telah diisytiharkan sebagai seorang bankrupt sejak tahun 2012. Isteri OKT bekerja sebagai seorang guru di Semporna. Menurut OKT lagi, dia telah berusaha sedaya upaya untuk menyempurnakan pembekalan pakaian seragam dan sukan tersebut tetapi gagal akibat mengalami kerugian yang teruk dalam perniagaan dan syarikatnya telah tidak dapat meneruskan operasi. OKT memohon agar dikenakan hukuman yang ringan kerana ini merupakan kesalahannya yang pertama. OKT tidak mempunyai sebarang rekod jenayah sebelum ini.

Seterusnya, setelah menimbangkan rayuan OKT dan mengambil kira mitigating and aggravating factors, mengambil kira prinsip-prinsip penghukuman (principles of sentencing), serta setelah mengambil kira kepentingan awam dan mengambil kira kesalahan yang dilakukan oleh OKT telah menyebabkan kerugian kepada Kerajaan dan wang awam, maka mahkamah telah menjatuhkan hukuman Penjara 3 tahun mulai tarikh hukuman iaitu pada 10/10/2016 dan denda RM10,000.00 jika gagal bayar 3 bulan penjara.

Dalam hal ini, Mahkamah merujuk kepada kes ***PP v. Loo Choon Fatt*** *(1976) 2 MLJ 256, YA Hakim Hashim Yeop A Sani telah menekankan bahawa:*

> "One of the main considerations in the assessment of sentences is of course the question of public interest."

Seterusnya dalam sesuatu proses untuk mencapai keadilan, Mahkamah perlulah mendahulukan kepentingan awam berbanding dengan kepentingan tertuduh. Oleh itu, sebagai 'custodian of public interest', Mahkamah dalam menjatuhkan hukuman perlu menimbangkan factor-faktor berikut:

i) The extent and seriousness of the offence committed;

ii) The guilty person's antecedents; and

iii) The public interest factor.

Rujuk kes Samsudin v. PP (1999) 4 CLJ 391."*.*

[12] We observed that there was no cross-appeal by the prosecution against the sentence imposed by the learned trial judge. Yet, the learned High Court Judge enhanced the sentence of imprisonment term from 3 years to 8 years.

[13] The principle for an appellate court to disturb the sentence imposed by the lower court can be found in the judgment of Abdul Hamid CJ in **PP v Mohamed Nor & Ors** [1985] 1 LNS 25; [1985] 2 MLJ 200 where the learned judge said:

> "The question now remains whether we should disturb the sentence in the instant case.
>
> In this regard we would observe that it is the established principle that an appellate court should be slow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. And 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.".

[14] This Court in **Cha Siang Hock v PP** [2018] MYCA 122, Idrus Harun JCA delivering judgment of the Court emphasised that:

> "[5] In considering an appeal against sentence, it is necessary to draw attention to the trite principle that an appellate court should be slow to interfere with the sentence passed by the court below if the trial court applies the correct principles in the assessment of the sentence. However, where it can be shown that the sentencing court have erred in principle in that it has passed a sentence which is manifestly wrong in the sense of being illegal or of being unsuitable to the proven facts and circumstances, it would be legitimate for the appellate court to intervene in order to come to a correct and just sentence. This Court in the case of Wong Chee Kheong v. PP & Other Appeals [2016] 7 CLJ 68 in discussing the above principle had referred to the case of PP v. Karthiselvam Vengatan [2009] 4 CLJ 632 in which it was said at page 635-
>
> > An appellate court should not intervene unless the court below has erred in principle, that is to say, it took into account irrelevant consideration or failed to take into account relevant considerations or passed a sentence that is manifestly excessive or manifestly inadequate or not permitted by law. In short, an appellate court has no original discretion of its own but may act when sentencing court has gone wrong in the sense just discussed.
>
> The above principle provides a useful sentencing guide in determining appropriate sentence in the instant appeal."

[15] What relevant factors to be taken into consideration by trial judge in assessing appropriate and just sentence had been comprehensively listed by Abdul Malik Ishak, JC (as he then was) in **PP v Mohd. Nooh Bin Yusof & 2 Ors** [1993] 4 CLJ 277 which we reproduce it below:

> "In passing sentence, I have taken into consideration a long list of factors, namely:
>
> (1) the question of public interest (Kenneth John Ball (1951) 35 Cr. App. R. 164);
>
> (2) the age of the offender, his wealth, his character and background, the nature of the offence, the circumstances and the manner in which the offence is committed (*Mohd. Jusoh bin*

Abdullah v. PP [W47] 13 MLJ 131 and *Nordin bin Kaman & Ors. v. Public Prosecutor* [1983] 1 CLJ 313);

(3) the need to strike a balance between the interests of the public and the interests of the offender (*Public Prosecutor v. Lao Choon Fatt* [1976] 2 MLJ 256);

(4) the question of deterrence to the offender and to would be offenders (see *Reg v. Currran* [1973] 57 Cr. App. R 945 where MacKenna J. said: "As a general rule it is undesirable that a first sentence of immediate imprisonment should be very long, disproportionate to the gravity of the affence, and imposed ... for reasons of general deterrence, that is as a warning to others. The length of a first sentence is more reasonably determined by considerations of individual deterrence)";

(5) society's abhorrence to this type of offence;

(6) the rampancy of the offence;

(7) the plea in mitigation (*Raja Izzuddin Shah v. Public Prosecutor* [1979] 1 MLJ 270);

(8) when a convicted man is sent to prison, he is branded with a social stigma which he carries for the rest of his life;

(9) the English warning in a passage found in "The English Sentencing System" by Cross 3rd Edn., at p. 141 to the following effect:

> Prolonged and repeated imprisonment is destructive of family relationships and, by encouraging the prisoner's identification with the attitudes of the prison community, increases his alienation from normal society. In addition, long-term institutionalization is all too likely to destroy a prisoner's capacity for individual responsibility and to increase the problems he must face when he returns to society.

(10) had the case proceeded for trial under the amended charge, it would take at least two weeks to complete it, thus by pleading guilty to the amended charge a great deal of time and expense had been saved. The full trial would cost the general public much expense as 18 witnesses were involved.

Last, but by no means least, I also gave a one-third discount or credit for their plea of guilt, following the Supreme Court's decision in Mohamed Abdullah Ang Swee Kang v. PP [1988] 1 MLJ 167 SC.".

[16] There are many factors that need to be taken into account in assessing the appropriate sentence based on the facts and circumstances of each case such as the nature of the offence, the circumstances in which it was committed, the mitigating factors, the aggravating factors and the trend of sentencing. Another important factor to be considered is whether the offender is a habitual offender or a first offender. The list never be exhaustive.

[17] But as a general rule, the appellate court should not vary a sentence just because it would have passed a different sentence from that imposed by the court below unless it is manifestly excessive or manifestly in adequate or not in accordance with law (**PP v Sulaiman bin Ahmad** [1993] 1 MLJ 74).

[18] Back to the present appeal before us, the learned High Court Judge in her grounds of judgment at pages 13-14 of the Appeal Record Volume 1 gave her reason in enhancing the sentence to 8 years imprisonment. These were her grounds:

> **"That the sentence imposed by the Learned Sessions Court Judge is inadequate**
>
> The charge against the Appellant in this case is one under section 18 of MACC Act which carries maximum penalty of imprisonment for a term not exceeding 20 years and a fine not less than 5 times the sum or value of the false or erroneous or defective material particular is capable of being valued, or of a pecuniary nature, or RM10,000 whichever is higher.
>
> After weighing all mitigating and aggravating factors as well as principle of sentencing, Learned Sessions Court Judge imposed a sentence of 3 years imprisonment form the date of conviction and fine of RM10,000 in default 3 months imprisonment.
>
> This Court is in the opinion that the sentence imposed by the trial court is too low. One should take into consideration that this case has been into a full trial which involves many witnesses and evidence. Furthermore, this kind of cases are what we often see in the medias nowadays. Corruptor are the true rapists of the state's economy.".

[19] Further, when the learned High Court Judge delivered her decision on 11.8.2017 (page 16 of the Appeal Record Volume 1) she had said:

> "We do not condone corruption. We detest corruption. Corruptors are parasites and rapist of the State economy. The MACC worked very hard and at the end of the day if we don't treat it as a disease it is defective.
>
> Appeal dismissed. Conviction is maintained. Sentenced increased to 8 years imprisonment and fine of RM10,000.00 be maintained. Bail sum to be refunded.".

[20] As we alluded to earlier, there was no cross-appeal by the prosecution on the sentence imposed by the learned trial judge. Perhaps, the learned High Court Judge had enhanced the sentence in exercise of her revisionary powers under section 323 of **Criminal Procedure Code**. We are of the view that this revisionary power should be exercise sparingly in a very exceptional circumstances and parties have the right to be informed and invited to address the Court on the learned High Court Judge in her exercise of her revisionary power. We noted that this was not done and certainly it would amount to a breach of the rules of natural justice.

[21] The learned High Court Judge's reasoning in increasing the imprisonment term as such can be discerned from her grounds of judgment that the term imposed by the learned trial Judge was too low

as the matter was disposed off after a full trial. The other reason was the rampancy and the seriousness of the offence committed by the appellant. As to reason of rampancy of the offence, there was no indication that the learned High Court Judge was referred to any statistic or any trend of sentencing cases by the prosecution. On the seriousness of the offence, we noted that this had been duly considered by the learned trial Judge. What the learned High Court Judge did not at all consider was the mitigating factors and the appellant's antecedents. It is important for the learned High Court Judge to consider the mitigating circumstances, more so when they were not contradicted by the prosecution (see **Raja Izzuddin Shah v PP** [1979] 1 MLJ 270 and **Zaidan Shariff v PP** [1996] 4 CLJ 441).

Conclusion

[22] For all the reasons above stated, we find there are merits in the appellant's appeal against sentence. The conviction is affirmed. The appellant's appeal against sentence is allowed. Sentence of the High Court is set aside and the sentence imposed by the session Court Judge of 3 years imprisonment and fine of RM10,000.00 in default 3 months jail is restored. We so ordered.

Dated: 9 August 2018

signed

KAMARDIN BIN HASHIM
Judge
Court of Appeal
Malaysia

COUNSEL

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LEGISLATION REFERRED TO:

Criminal Procedure Code, Section 323

Malaysian Anti-Corruption Commission Act 2009, Sections 16, 17, 18, 20, 21, 22, 23, 24, 24(2)

JUDGMENTS REFERRED TO:

Cha Siang Hock v PP [2018] MYCA 122

PP v Mohamed Nor & Ors [1985] 1 LNS 25; [1985] 2 MLJ 200

PP v Mohd. Nooh Bin Yusof & 2 Ors [1993] 4 CLJ 277

PP v Sulaiman bin Ahmad [1993] 1 MLJ 74

Raja Izzuddin Shah v PP [1979] 1 MLJ 270

Zaidan Shariff v PP [1996] 4 CLJ 441