

The Law on Presumption in Corruption Cases in Malaysia

ROHANA ABDUL RAHMAN

<http://orcid.org/0000-0001-5131-0330>

hana@uum.edu.my

Universiti Utara Malaysia
Sintok, Malaysia

ASMAH LAILI YEON

<http://orcid.org/0000-0002-3159-6973>

asmahyeon@gmail.com

Universiti Utara Malaysia
Sintok, Malaysia

ZAINAL AMIN AYUB

<http://orcid.org/0000-0003-1374-9726>

zainalaminayub1975@gmail.com

Universiti Utara Malaysia
Sintok, Malaysia

MADYA NURRETINA AHMAD SHARIFF

<http://orcid.org/0000-0002-3419-8154>

norashariff1965@gmail.com

Universiti Utara Malaysia
Sintok, Malaysia

ABSTRACT

From a legal perspective, bribery and corruption cases can be unduly complicated and difficult to prove because there is no real victim. In many corruption cases, the prosecution faces hostile or uncooperative witnesses who refuse to assist the prosecution in such cases. To reduce the complexity of proving that any advantage was given corruptly, the law on presumption of corruption has been incorporated in the old Prevention of Corruption Act 1961, and later in Anti-Corruption Act 1997 and currently the Malaysian Anti Corruption Commission Act 2009. There has been mixed reaction from the prosecution and defense lawyers with respect to the law on presumption of corruption in bribery and corruption cases. This paper seeks to highlight the application of the presumption of corruption in certain circumstances as provided in the statute, the right to defend on balance of probability and whether such presumption is contrary to human rights. The paper argues that once statutory presumption of corruption is invoked, it can be challenging to rebut and the burden of proof must remain on the prosecution to prove their case beyond reasonable doubt. The paper stresses that presumption of corruption is rebuttable if the accused is able to discharge his burden of proving on a balance of probabilities that his receipt of the same was not a gratification.

Keywords - Social Science, corruption, gratification, presumption, integrity, descriptive design, Malaysia Anti-Corruption Commission, Malaysia

INTRODUCTION

Anti-corruption laws have long been in existence in Malaysia. In recent times, new development in the law against corruption has contributed to a higher rate of conviction in corruption cases. Better equipped anti-corruption enforcement agency with well-trained officers and transparent rules have caused the fight against bribery to bear fruits.

According to Rt Hon Justice Tan Sri Dato Seri Zulkefli bin Ahmad Makinudin (Chief Judge of the High Court of Malaya) (2013), all trial judges have been directed to expediate the trial of corruption cases and ensure the disposal of such cases within one year. To achieve this, the 14 special Corruption Sessions Courts at the major cities and towns in Malaysia were established on 16 February 2011 to specifically handle corruption cases. Judges of these corruption courts shall

ensure all procedures in the Criminal Procedure Code (CPC), Malaysian Anti-Corruption Commission Act 2009 (MACC) and other relevant statutes must be strictly complied to accelerate the hearing of cases.

Furthermore, Rt Hon Tun Arifin Zakaria (Chief Justice of Malaysia) (2014), had indicated that the Corruption Courts in 2012 had achieved 81% clearance rate, which exceeded the target of 70% set by National Key Performance Indicator (NKPI). In 2013, the disposal rate of corruption cases in the courts was at 81% which is slightly below the 85%, target set by NKPI.

In 2011, 75.6% of the trial cases on corruption were completed within a year from the date of registration when compared to only 36.8% for year 2010. The establishment of the special corruption sessions courts to hear corruption cases in 2011 has resulted a significant increase in the statistics of disposition of corruption cases as compared with the years before 2010.

On the success of the prosecution of corruption cases before the courts in 2011, a total of 472 persons were convicted on corruption offenses such as bribery, misappropriation and abuse of power. Some of these cases caught the attention of the public as the sentences meted out had reflected the seriousness of the crime.

The Federal Court in *PP v Dato' Waad Mansor* (2005) reflected that "... the offense of corruption, if unabated or undeterred, is more far-reaching in its consequences than the crimes of robbery, criminal breach of trust or rape and thus, it was felt that the sentences imposed for offenses of corruption should be deterrent in nature so as to reflect the gravity of the offenses..."

Public interest requires the sentencing principle of deterrence to predominate in cases of corruption while not neglecting other relevant considerations such as the culpability of the offender, the circumstances of the offense, the aggravating and mitigating factors as well as the sentences imposed in similar cases.

On another note, one of the reasons why corrupt offenders were difficult to be nabbed is due to the inexplicable process of proving that such fraudulent incidents have occurred and difficulty in ascertaining the relevant facts and law thereof.

The underlying concern affecting the complexity of corrupt activities is the fact that there is no real victim in a bribery case. In most circumstances, both perpetrators or parties to such sneaky bribery transaction had gained an advantage or favour. When there is no victim involved, then the job of proving that such incident has occurred could be tough on the prosecutors.

Although corrupt activities recognize no boundary in public or private sectors, the prevailing view indicates that corrupt activities involving employees in public bodies do not augur well for the overall political, social and economic development of Malaysia. To curb escalating corrupt vices in the public bodies, the law against corruption has sought to invoke statutory presumption that corruption is deemed where gratification received by employees of public bodies.

OBJECTIVES OF THE STUDY

This paper explores the legal provision relating to such presumption of corruption in certain circumstances that have been utilized by the prosecutors in corruption cases against rogue employees in public bodies. The issue of whether the application of the presumption of corruption is anti thesis to fundamental liberties would also be touched.

RESULTS AND DISCUSSION

Elements of corruption to be established

A corruption offense is a crime punishable under the law. The MACC defines corruption offense to include prescribed offenses under the Penal Code, the Customs Act 1967 and the Election Offenses Act 1954.

Under the MACC, sections 16, 17, 18, 19, 20, 21, 22 and 23 list out the corruption offenses covered by the statute.

MACC	OFFENSES OF ACCEPTING GRATIFICATION
S.16	Offenses of accepting gratification
S.17	Offenses of giving or accepting gratification by agent
S.18	Offense of intending to deceive principal by agent
S.19	Acceptor or giver of gratification to be guilty notwithstanding that purpose was not carried out or matter not in relation to principal's affairs or business
S.20	Corruptly procuring withdrawal of a tender
S.21	Bribery of officer of public body
S.22	Bribery of foreign public officials
S.23	Offenses of using office or position for a gratification

In relation to offense of accepting gratification, S.16 of MACC provides any person corruptly solicits or receives or agree to receive; or corruptly gives, promises or offers to any person, any gratification as inducement to or reward

for that other person or any officer of a public body doing or forbearing to do anything in respect of any matter or transaction; commits an offense.

Gratification is defined under the MACC to include money, donation, gift, loan, fee, reward, discount, commission, rebate, bonus, and also moveable and immovable property. In short, almost anything will suffice.

Whereas a public body is defined to include Government of Malaysia and the states, local authority and other statutory authority, any registered society or co-operative society, trade union or youth and any other body as the Minister may prescribe by order published in the Gazette. Officer of a public body has been defined to include a member, officer, employee or servant of a public body, including members of Parliament and States Legislature and judges of the High Court, Court of Appeal and the Federal Court.

Since a corruption offense is a crime triable in a criminal court, the burden of proving all the essential ingredients of a corruption charge remains with the prosecution (M Jefree Md Yusoff, 2009). The burden must be beyond reasonable doubt, and the standard is on a prima facie basis—there must be no break in the chain of evidence. All elements of the corruption offense must be sufficiently proved by the prosecution. At the end of the trial, the prosecution has to prove its case beyond reasonable doubt.

Under the CPC, there is a statutory duty for the prosecution to establish a prima facie case before the court is obliged to call for the defense. To succeed in his defense, an accused has to raise reasonable doubt on the prosecution's case.

Sharma J in *Attan bin Abdul Gani* (1970) held that for the purpose of establishing a prima facie case under s 4(a) of the Prevention of Corruption Act 1961, the prosecution has to prove the following ingredients i.e. a gratification has been accepted by the accused; and at the time of the acceptance, the accused is a member of a public body. The prosecution may then invoke the presumption of corruption that such gratification was paid or given or received corruptly unless the contrary is proved.

The Application of Statutory Presumption of Corruption

The provisions on presumption of corruption in certain offenses under the Prevention of Corruption Act 1961, and later in Anti Corruption Act 1997 and currently, the Malaysian Anti Corruption Commission Act 2009 are quite similar.

Section 50 of the MACC states that:

(1) Where in any proceedings against any person for an offense under section 16, 17, 18, 20, 21, 22 or 23 it is proved that any gratification has been received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly received or agreed to be received, 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 offense, unless the contrary is proved.

It is patently clear that the presumption under s. 50 (1) of the MACC can be invoked against an accused when it is proven beyond reasonable doubt that any gratification has been “received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered, by or to the accused...”.

In Thavanathan Balasubramaniam (1997), the Federal Court held that:

[T]he degree or extent to which defense evidence needs to be examined would depend on the particular facts and circumstances of each case and the issues involved. In the instant case, once it was proved that the money \$15,000 had been given to or received by the accused, the presumption of corruption arose that the money had been given and received corruptly as an inducement or reward to acquit and discharged a person of the offense in a criminal case. It was for the accused to give an innocent explanation which the Court considered more likely than not that it was true, i.e. on a balance of probabilities, the test applied in civil proceedings as decided in PP v. Yuvaraj (1969) 2 MLJ 89 PC.

Augustine Paul J (as he then was) in PP v. Chia Leong Foo (2000) and 725 had elaborated and cautioned the application of presumption:

The clear meaning of the presumption provision is that upon proof of certain facts, another fact shall be presumed to have been proved. The applicability of the presumption provisions must be considered against this background. Their language shows that they have been enacted to provide evidence of the facts to be presumed upon proof of the basic facts. It is these basic facts that raise the presumed facts...[p]resumptions are only a special mode of proving facts that must otherwise be proved by evidence. Presumptions are, therefore, restricted in their operation to instances where there is evidence only of the basic facts.

The presumption of corruption shifts the burden of proving the facts to the accused. The accused is required to rebut the presumption on the balance of probabilities.

As mentioned above, before the presumption can be invoked, the prosecution must prove the first two factual ingredients of the offense. Firstly, the prosecution must prove that a gratification was given or received.

Secondly, at the time of payment or gift, the receiver of the payment or gift is a public officer or in the employment of a public body (Dato' Saidin Thamby, 2012).

Once these two factual ingredients are established, then the existence of the third ingredient of the offense i.e. that the gratification was paid or given or received corruptly as inducement or reward for doing or forbearing to do any act in relation to the affairs of that public officer or the public body concerned is to be presumed, unless contrary is proved by the accused.

The operation of the presumption – burden falls on the accused to show that he did not receive the gratification with corrupt intent. He must do this to raise a reasonable doubt on the prosecution's case against him. Defense in corruption cases arguably has larger feet to fill than in any other type of criminal defense. An accused in a corruption case must, on balance of probabilities, rebut the presumption. The standard of balance of probabilities is a test applied in civil proceedings. It seems that it is not enough to cast a reasonable doubt over the prosecution's case, but the defense has to do more than that. The accused would need to provide evidence of an innocent explanation for such gratification. The accused could not merely assert that an innocent explanation exists. Arguably, if the court is in any doubt whether a payment was made corruptly, then based on the presumption, the court must conclude that it was made corruptly.

In the case of *Ku Yahaya Ku Bahari & Anor (2002)*, the Court of Appeal had this to say:

When the prosecution is minded in invoking the presumption then the particular burden of proof, as opposed to the general burden, shifts to the defense to rebut such presumption on a balance of probabilities. This from a defense point of view is heavier than the burden of casting a reasonable doubt, but is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. So much for the law.

Abdul Malik Ishak, JCA echoed the above judicial stand in *Mardani Hussin v. PP* [2009] 6 CLJ 301, CA:

It must be borne in mind that the burden to rebut the statutory presumption on the balance of probabilities is heavier than the burden of casting a reasonable doubt on the prosecution's case.

Presumption of Corruption and Human Rights

In practice, there is concern as to whether presumption of corruption may breach the principle of human right or fundamental liberties. Notably, everyone charged with a criminal offense shall be presumed innocent unless proven guilty. However, accused persons in corruption cases are presumed guilty instead. It is submitted that presumption of corruption must be reasonably applied by the courts. Careful application is necessary to avoid extra burden on accused person in cases where such presumption is invoked.

Augustine Paul J (as he then was) in *PP v. Chia Leong Foo* (2000) explained that to achieve fairness to any accused person, therefore, demands that the presumption provisions (in this case presumption of corruption) are used only when there is no evidence of the facts to be presumed.

It seems that the arbitrary use of the presumption provisions, without any fixed guidelines, when there is direct evidence of the facts to be presumed may also prejudice an accused person in another way.

For instance, when the presumption of corruption is invoked in one case and not in another although there is direct evidence of the facts to be presumed in both instances there may be a violation of art 8(1) of the Federal Constitution which guarantees equal protection of the law. It is settled law that the guarantee of equal protection applies against substantive as well as procedural laws. In the case of procedural laws, it means that all litigants, who are similarly situated can avail themselves of the same procedural rights for relief and defense without discrimination.

CONCLUSIONS

Fighting corruption is a continuous effort and by and large the anti-corruption laws play a significant role in ensuring the successful conviction of corruption offenders. The legal provision relating to presumption of corruption in certain offenses reduces the difficulty of the prosecution in proving that a gratification

was received or given corruptly.

On the other hand, if the presumption of corruption is invoked, an accused person in a corruption charge has the onus to rebut the presumption of corruption on a balance of probabilities. Although the presumption of corruption may, in no uncertain term, breach fundamental liberty or human right of an accused person, the court has the responsibility to allow its invocation with caution. Reasonable invocation of the presumption of law will safeguard the fundamental liberty of equal protection of the law.

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