

PROSECUTING CORRUPTION AND MONEY-LAUNDERING: THE NAJIB RAZAK EXPERIENCE

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I. BACKGROUND

Although the investigation into the matter began as early as 2015, only on 4 July 2018 was former prime minister of Malaysia Dato' Seri Mohd Najib bin Hj Abdul Razak charged with two (2) sets of offences, the first being a charge for using his office for gratification under the Malaysian Anti-Corruption Commission Act, the second being three (3) charges for criminal breach of trust under the Penal Code. On the 7 August 2018, three (3) charges for receiving proceeds of unlawful activities were brought against him under the Anti-Money-Laundering Act. Trial commenced on 3 April 2019, and the former prime minister was called to enter his defence on 11 November 2019 on all seven charges.

II. THE MALAYSIAN ANTI-MONEY-LAUNDERING ACT

The Malaysian Anti-Money-Laundering Act¹ (“AMLA”) provides a very wide definition of what constitutes money-laundering under Malaysian law. Section 4 of AMLA makes it an offence if someone, in relation to proceeds of an unlawful activity or instrumentalities of an offence, engages in a transaction,² or, acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes or uses³ said proceeds, or, removes from or brings into Malaysia⁴ said proceeds, or, conceals disguises or impedes the true nature origin location, movement, disposition, title of, rights with respect to, or ownership of said proceeds.⁵

The law allows for the court to draw an inference from any objective factual circumstances that a person knows, has reason to believe or has reasonable suspicion that the property is the proceeds of unlawful activities,⁶ or without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is the proceeds of an unlawful activity or an instrumentality of an offence.⁷

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¹ Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2011 [*Act 613*].

² Section 4(1)(a) AMLA.

³ Section 4(1)(b) AMLA.

⁴ Section 4(1)(c) AMLA.

⁵ Section 4(1)(d) AMLA.

⁶ Section 4(2)(a) AMLA.

⁷ Section 4(2)(b) AMLA.

In proving the *mens rea* of an accused under AMLA, the Malaysian Court of Appeal ruled in *Azmi Osman v PP* and another appeal⁸ as follows:

The doctrine of willful blindness imputes knowledge to an accused person *who has his suspicion aroused to the point where he sees the need to inquire further, but he deliberately chooses not to make those inquiries*. Professor Glanville Williams has succinctly described such a situation as follows: “He suspected the fact; he realised its probability but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone is willful blindness.” (Glanville Williams, *Criminal Law* 157, 2nd edn, 1961). Indeed, *in the context of anti-money laundering regime, feigning blindness, deliberate ignorance or willful ignorance is no longer bliss. It is no longer a viable option. It manifests criminal intent*.

The prosecution need not prove that the proceeds are from a specific unlawful activity in the event that the proceeds are derived from one or more unlawful activities⁹ and that a person may be charged and convicted of an offence irrespective of whether there is a conviction in respect of a serious offence, or foreign serious offence or that prosecution has been initiated for the commission of a serious offence or foreign serious offence.¹⁰

The above was affirmed by the Malaysian Court of Appeal in *Aisyah Mohd Rose & Anor. v PP*¹¹ which decided as follows: “... we acknowledge that pursuant to s. 4(2) of AMLATFA, the conviction for an offence under s. 4(1) can be sustained even without the conviction for a predicate offence...”

III. THE MALAYSIAN ANTI-CORRUPTION COMMISSION ACT

In relation to the Malaysian Anti-Corruption Commission Act¹² (‘MACCA’) offence of using office for gratification, the law provides that the prosecution needs to show that the accused is an officer of a public body, and that he had used his position to obtain gratification, whether for himself, or his relative or associate. What the prosecution needs to prove is that the person charged was an officer of a public body¹³ and had abused his position for gratification, whether for himself or another person who is his relative or associate. In the absence of direct evidence to show that the position or office was abused by the accused, the law presumes that there was such an abuse when the accused makes a decision or takes any action in relation to a matter either the accused or his relative had an interest in.¹⁴ In relation to the gratification received, the law presumes that in the event that it was proven that gratification has been received, accepted, obtained, solicited, given, promised, offered, or any agreement or attempt to do any of the aforementioned, it was presumed to have been done corruptly.¹⁵

⁸ [2015] 9 CLJ 845.

⁹ Section 4(3) AMLA.

¹⁰ Section 4(4) AMLA.

¹¹ [2016] 1 CLJ 529.

¹² Malaysian Anti-Corruption Commission Act 2009 [*Act 694*].

¹³ Section 3, MACCA.

¹⁴ Section 23(2), MACCA.

¹⁵ Section 50, MACCA.

IV. CHALLENGES FACED

The prosecution was unable to call Nik Faisal Ariff Kamil ('Nik Faisal') and Low Taek Jho ("Jho Low") as witnesses. They both remain wanted by the Malaysian authorities. Nik Faisal wore several hats in the SRC incident. He was appointed as the CEO and a director of SRC International Sdn. Bhd. ("SRC International"), and he was also made to be the "Authorized Personnel" to deal with the personal bank accounts of the former prime minister. Jho Low, however, held no official position in SRC International or any of the other companies involved. However, he was painted to be the invisible hand behind the entire scheme.

As the prosecution was unable call Nik Faisal and Jho Low as witnesses, the prosecution had no choice but to rely on contemporaneous documentary evidence. The documents seized by the authorities, however, were both voluminous and a mixed bag of original documents and copies of documents, which fell short of the primary evidence rule. In dealing with this, the MACCA and AMLA provides that documents, including copies of documents obtained by the investigating authority, are admissible in evidence in any proceeding.

Section 41A of the MACCA provides:

Where any document or a copy of any document is obtained by the Commission under this Act, such document shall be admissible in evidence in any proceedings under this Act, notwithstanding anything to the contrary in any other written law.

Section 71 of AMLA provides:

Where the Public Prosecutor or any enforcement agency has obtained any document or other evidence in exercise of his powers under this Act or by virtue of this Act, such document or copy of the document or other evidence, as the case may be, shall be admissible in evidence in any proceedings under this Act, notwithstanding anything to the contrary in any written law.

It was the contention of the accused that the bulk of the documents adduced by the prosecution were not admissible by virtue of the fact that the documents produced were not primary evidence, the requirements of admitting secondary evidence were not met, the makers of the documents were not called, there was no proof of the execution on the documents produced and that section 41A of the MACCA was not applicable as it does not apply retrospectively as it only came into force in October 2018.

The prosecution contended that the documents produced are admissible, as the accused was in essence, merely challenging the irregularity and inadequacy of the method of production of the documents, and that such challenges should be raised at the earliest possible moment and failure to do so would amount to a waiver of the right to object to, and admission of, the documents. Further to the above, it was also submitted that the documents were admissible by virtue of the non-obstante clauses in both the AMLA and MACCA, i.e. sections 41A of the MACCA and 71 of AMLA, respectively.

V. FINDINGS OF THE HIGH COURT

The High Court ruled that the prosecution had proven a prima facie case and that the former Prime Minister was called upon to enter his defence. In relation to the argument concerning the documents and the applicability of section 41A of MACCA and section 71 of AMLA, no oral pronouncement of the ruling was made in open court. However, the Court relied on the contested documents indicating that it was accepted to form part of the evidence admitted before the court.