

CURRENT ISSUES IN THE INVESTIGATION, PROSECUTION AND ADJUDICATION OF CORRUPTION CASES IN BRUNEI DARUSSALAM

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I. INTRODUCTION

Corruption continues to remain as one of the major challenges in countries across the globe, both in developed and developing countries. In order to effectively overcome this challenge, a range of anti-corruption measures have to be put in place.

It is against this backdrop that the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam enacted the Emergency (Prevention of Corruption) Order in 1981 (now known as the Prevention of Corruption Act (Cap 131) followed by the establishment of a sole agency responsible for investigating corruption offences in Brunei Darussalam called the Anti-Corruption Bureau.

In addition to its strong political will as the foundation, the Bureau has developed three core strategies for combating corruption in Brunei Darussalam namely: Investigation, Prevention and Education. Corruption cases are prosecuted in the Courts of Brunei Darussalam by Deputy Public Prosecutors and Prosecuting Officers of the Criminal Justice Division of the Attorney General's Chambers. This paper aims to explain the current challenges in investigating and prosecuting corruption cases in Brunei Darussalam.

II. BRUNEI DARUSSALAM EXPERIENCE IN COMBATING CORRUPTION

The Anti-Corruption Bureau, Brunei Darussalam was established on 1st February 1982. Over the past 30 years since its establishment, the Bureau has investigated a number of cases involving a range of offences varying from petty to grand corruption; as well as other penal code offences such as embezzlement, forgery, criminal breach of trust as well as investigations involving foreign jurisdictions.

The Prevention of Corruption Act (Cap 131) has a wide scope which covers active and passive givers and receivers of corruption, both in the public and private sectors. The Act also extended its scope to criminalize the abettor of the corrupt transactions and provides the provision on illicit enrichment which puts the burden of proof on the accused to show how he legally acquired his wealth, so that if he has unexplained wealth disproportionate to his known source of income, that is considered as corroboration of graft.

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III. CHALLENGES IN INVESTIGATION INTO CORRUPTION CASES

The development of technology and globalization has an impact on the nature of corrupt transactions. Most of the corrupt offenders now are well educated and able to conceal their tracks and hide their corrupt transactions. In response to these changing trends, officers of the Bureau are expected to be specialized and expand their investigation into a much wider scope.

The Bureau has identified few challenges which will be addressed in this paper.

A. Multiple Jurisdictions

In our experience conducting investigation across borders, few limitations were identified such as the obtaining of evidence of bank accounts, location of foreign witnesses, recording of statements of foreign witnesses and location of accused persons. To overcome these obstacles, it is crucial for anti-corruption agencies to establish close coordination and cooperation with other anti-corruption agencies.

Through this, agencies are able to gain mutual understanding in terms of the needs, urgency and the limitations. With good networking, close relations and trust would help such agencies overcome limitations and improve assistance. This would contribute to a more timely and faster investigation process and avoid unnecessary delay.

In this regard, the Bureau would like to share one of our successful cases which involved other jurisdictions, namely the Malaysian Anti-Corruption Commission (MACC), Malaysia and the Corrupt Practices Investigation Bureau (CPIB), Singapore.

This case involved a vendor with the Brunei Shell Petroleum Sdn Bhd who was convicted on 40 charges under the Prevention of Corruption Act and the Penal Code (62 charges were taken into consideration during sentencing) for submitting false claims and bribery to the Brunei Shell Petroleum Sdn Bhd employees in the process.

Prior to his trial, the Brunei Court has issued a warrant of arrest as the defendant had absconded to Malaysia. Through the use of Summons and Warrants Act (special provisions) (Cap 155), the warrant of arrest was executed with the assistance of the MACC and the defendant was subsequently arrested by the MACC and was surrendered to the Anti-Corruption Bureau's officers at the Brunei border.

The defendant pleaded guilty to 40 charges and was sentenced to 6 years and 4 months imprisonment. The court also ordered the defendant to pay a sum of BND180,000.00 for the prosecution's cost and under the Benefit Recovery Order, the defendant was ordered to pay SGD\$219,838.10 and USD326,174.55 from his accounts in Singapore. With the assistance from CPIB Singapore and the Central Authorities of Mutual Legal Assistance from both countries, the Bureau was able to obtain the corrupt proceeds from the accounts which were frozen by the authorities in Singapore.

B. Evidence Management

Many corrupt givers or receivers now are able to camouflage the corrupt funds in the forms of commodities such as loans, benefits or other concessions. Unlike the crime of murder, investigators do not have the opportunity to mount a crime scene investigation, but instead investigators are required to do money-trailing investigation and compile

documentary evidence to support their cases.

Therefore the analysis of documentary evidence such as bank accounts, contract agreements, phone records, log books, etc. is important to build up the case which will eventually result in successful conviction. This requires expertise and additional efforts by anti-corruption officers.

In this regard, the Bureau has over the years invested in creating specialized officers with computer, accounting and legal backgrounds. The officers are tasked to make analysis of bank accounts or payment vouchers relating to corruption which has already been committed. These officers are also tasked to extract evidence or records stored in a computer or database to be used as corroborating evidence. Officers with legal backgrounds are also required to study special conditions imposed on contract agreements and legal documents pertaining to the case investigated when required.

The Bureau also placed great importance in the ability to obtain evidence stored in electronic devices such as mobile phones and computers. The Bureau has continuously trained officers to keep them up to date with the latest development of technology and how to acquire evidence from electronic devices legally and professionally. This also includes the ability to digitize hard copy evidence, and this has proven to assist investigating officers in saving a lot of time sifting through the evidence as the information has been streamlined and focused on the chain of events. This has also enabled investigators to make better presentations to the Prosecutors before the case is brought to court for prosecution.

C. Electronic Surveillance

Following the changing trends of corrupt transactions, our investigators have been tasked to shift from the conventional ways of investigation into more proactive and sophisticated investigation. The usage of special investigative means such as wire-tapping, undercover officers, telecommunication interception and consensual recordings are regarded as one of the important tools in obtaining evidence of corrupt acts.

However it requires skilled officers to mount these special investigative techniques and the deployment of undercover officers to obtain the evidence. One of the most important things to note is that, in order to use evidence obtained by these techniques, it must meet the legal requirements to be presented in court as well as internal safeguards to prevent abuse.

D. Interviews

Many would agree that an interview is the main integral and perhaps the most challenging part of investigation. This is because corrupt transactions often do not involve any eyewitness and investigators often have to rely on documentary evidence or leads based on the information received.

Most of the corrupt offenders or witnesses are frequently hostile when being interviewed. This is due to negative perception or fear of being implicated to the crime. As such, before conducting the interviews, ample time was given to the recording officers to study a comprehensive chronology of events, case backgrounds, supporting documents and antecedents to equip them during the interview.

It is important to note that, recording officers should possess strong interviewing skills, be well versed in laws and procedures, possess patience and persistence and should be able to

exercise discretion. With these skills, interviewing officers will be able to obtain accurate and reliable information from witnesses efficiently and professionally.

IV. CHALLENGES IN PROSECUTING CORRUPTION CASES

“Where corruption is concerned, one can readily see the need—within reason of course—for special powers of investigations and provisions such as ones requiring an accused to provide an explanation. Specific corrupt acts are inherently difficult to detect let alone prove in the normal way”—*Bokhary JA in AG v Hui Kin-hong [1995] 1 HKCLR 227*.

It has long been recognized that corruption is not only challenging to investigate but also challenging to prove in court. Prosecution of corruption is a particularly difficult endeavor, and it is not without its challenges which will be outlined below.

In Brunei Darussalam, no prosecution for an offence under the Prevention of Corruption Act (cap 131) shall be instituted except with the consent of the Public Prosecutor. So the Public Prosecutor’s consent will not only operate as a statutorily imposed obligation upon the Public Prosecutor to take special care in the decision to prosecute but it also serves as a check and balance. Hence the importance of the Public Prosecutor’s consent reflects a recognition by the legislature that the crime of corruption has special difficulties associated with it and very great care is needed in determining whether or not to prosecute any given corruption case.

A. Prosecutorial Decision

The first challenge in prosecuting a corruption case lies in the decision making of whether or not to prosecute and secondly who to prosecute. The first hurdle is usually easy to overcome when the investigation clearly shows enough evidence to prosecute a certain party. The second challenge is also not daunting when investigation shows one party is more credible and reliable; then, he/she will not be charged and will be used as a witness against the other party.

The difficulty lies when the evidence gathered are just showing the words of the giver against the words of the receiver without any other supporting evidence. Who would be more believable in this case? Should we charge both the parties without the availability of any other independent evidence? Should we charge the person who reports to the ACB first? These are the questions that come to mind before such a decision is made in these circumstances.

In terms of prosecution, we in Brunei are prepared to prosecute both givers and receivers of bribes, just as can be seen in one of our high profile cases against the ex-Minister of Development of Brunei, where he was charged as the receiver together with the giver of the bribe in one trial. But this kind of prosecution is only done with other independent supporting evidence against both the giver and the receiver of the bribe because if we prosecute all parties in all corruption cases, who is going to give evidence for the prosecution. This can present some challenge especially when there is not much independent evidence apart from what the giver and receiver say about the crime. Hence it is not usual for us to prosecute both receivers and givers of bribes.

B. Handling Difficult Witnesses

In most corruption cases the only people with direct knowledge of the offence are the two people who commit it, the giver of the bribe and the person receiving the bribe. It is for this reason that very often such crimes only come to light when there is a falling out between the two individuals concerned, but in most corruption cases received by the AGC, one party is usually more culpable than the other as the other is usually an accomplice to the crime by way of an imposition, pressure or fear.

Under section 28 of the Prevention of Corruption Act (Cap 131), no witness shall be presumed to be unworthy of credit just because he or she is an accomplice to the corrupt offence. Although our legislation provides sanctity to these accomplices, in reality the accomplices still feel some reservation towards prosecutors and will always minimize their role when telling their side of the story as they fear that they are being incriminated as being guilty in the abetment of a serious offence. Thus, prosecutors face the challenge of procuring information from a person who is reluctant to reveal the whole truth.

C. Multiple Defendants—Joint Trial or Separate Trial

In most cases received by the Attorney General's Chambers the evidence gathered are mostly from one side only, i.e. either from the giver only or from the receiver only. The majority of corruption cases also usually involve one or two defendants who had given or received gratification from or to another individual. However, there has been an increasing number of recent cases where bribes are given by one party to multiple recipients. This has posed a new challenge in prosecuting corruption of multiple defendants. In an attempt to understand the challenges in this rising occurrence, the case, which was recently handled by the Attorney General's Chambers, of a diesel smuggling ring is referenced.

The case is about a Malaysian fuel smuggler, Mr. K, who gave bribe money to various Brunei Customs officers ranging from senior officers to junior officers working at the Brunei border customs control post. Mr. K and his gang were smuggling diesel out of Brunei to Miri, Sarawak because the price of diesel in Brunei is far cheaper than in Miri, Sarawak. The bribes were given in order to allow Mr. K and his gang to come in and out of Brunei from Miri, Sarawak freely without any inspection of his vehicles that were carrying diesel out of Brunei inside big modified fuel tanks, which is an offence under the Customs Order of Brunei.

The bribes given to the senior customs officers were in bigger amounts to ensure that those officers would instruct the junior officers on duty at the customs booth of the Brunei border to not give any problems to Mr. K and his gang whenever they enter or leave the Brunei border and to give information to Mr. K and his gang whenever any raids by customs prevention officers were going to be conducted so that Mr. K and his gang would know when not to come in to Brunei to carry out their fuel smuggling activities. The investigation into this case by the ACB was conducted jointly with the Malaysian Anti Corruption Commission (MACC), and at the end of the operation, 38 customs officers were arrested and investigated.

When the investigation files were submitted to the Attorney General's Chambers, it was clear from the outset that this was a huge case involving many defendants and witnesses and voluminous documents. After painstakingly reviewing and examining the evidence presented, the Public Prosecutor decided to charge 6 senior customs officers and 15 junior customs officers.

The next challenge was to decide whether to hear the case as one trial or separate trials. For all 21 defendants, there were at least five common main prosecution witnesses who hail from Malaysia, so if the cases were split into 21 separate trials, these five foreign witnesses (three MACC officers and two fuel smugglers) would have to come to Brunei at least 21 times. This is one of the main reasons why the prosecution wanted to limit the trial to just two separate trials, one trial for the senior officers and one trial for the junior officers. The prosecution was also aware that there were only six Magistrates, one Intermediate Court judge and two High Court judges for the whole of Brunei who would be able to hear the case on top of the already hundreds of cases they hear. So this was another factor for the Public Prosecutor to consider—that if the trials were separated into 27 trials between just six Magistrates or just one Intermediate Court judge or just two High Court judges, the trial would go on for a very long time. In the end, the prosecution decided to bring the six senior customs officers' cases to be heard in the High Court as there was a lesser chance of the cases getting adjourned compared to hearing the cases in the lower courts.

Unfortunately, the prosecution lost the argument in the High Court to have all six senior customs officers tried in a single trial as the court ruled that each defendant had different major roles in the corrupt activity and that the bribes received from Mr. K were at different times and places so the High Court referred the six senior customs officers' cases to the Magistrate Court for separate trials.

With regard to the 15 junior customs officers' cases, the prosecution had a better chance of having it heard in a single trial in the Intermediate court because in the end prosecution preferred an additional single conspiracy charge against all 15 defendants to glue them together as the offences committed by all 15 defendants were very similar in nature and were very close in proximity of time and also committed at the same place.

The trials for the six senior customs officers started in 2010 and to date only two out of the six trials have concluded—the defendants were found guilty. The other four are still waiting for the conclusion of trial. With regard to the case of the 15 junior customs officers, the trial never even started as there were too many delays caused by the unavailability of court dates, and finding a common date for all parties (the court, the 1 DPP and the eight defence counsels handling the matter) was sometimes impossible; then there was also the issue of the main prosecution witnesses' unavailability and that their availability was something to fight for between this case and the cases of the other six senior customs officers' trials as well. So in the end after not starting the trial of the 15 junior customs officers for three years after they were all first charged, the Public Prosecutor decided to enter *Nolle prosequi* on all charges against the 15 defendants, and they were all discharged not amounting to acquittal in order to give way for them to be dealt with administratively by another penal authority.

D. Dealing with Foreign Witnesses and Foreign Jurisdictions

In Brunei, we do not have the power to compel a foreign witness to give evidence in our courts unless the witness is from Singapore or Malaysia: witnesses from these countries may be compelled to testify by our courts under the Summonses and Warrants (Special Provisions) Act. Hence, if the prosecution wishes to call a foreign witness there is no guarantee that we could secure their attendance without their own voluntariness to come to Brunei to give evidence. The AGC once conducted a trial which involved witnesses from Indonesia who had given bribes to a Bruneian who was working as a Counselor at the Brunei Embassy in Jakarta. The said Counselor had demanded moneys from these witnesses who were

freelance human resource agents as a reward for processing their application which were not supposed to be allowed by the Embassy at the time. Some of these witnesses hesitated to come to Brunei to give evidence against the Counselor as they feared for their safety, especially in a foreign land. Since Brunei does not have a witness protection scheme/programme, the prosecution was unable to give them any assurance with regards their safety so in the end prosecution had to drop a few charges against the Counsel just because the main prosecution witness who was a foreigner did not want to come to Brunei to give evidence.

For those foreign witnesses who are compellable to give evidence in Brunei just as in the diesel smuggling case mentioned above, another set of challenges were presented to prosecution. It is the usual practice for Magistrates to reserve two weeks for a trial. However, these trial dates are prone to be taken away by other higher-priority cases (usually partly heard trials) heard before the same Magistrate. It was also not unusual for the trial to be postponed due to an illness on the defendant, defence counsels, witnesses, magistrates or prosecutor.

This problem affects the timing of when the foreign witnesses should fly in from Malaysia. The prosecution requires a specific time for those witnesses to appear in order to get the necessary approval from the authorities to purchase air tickets and accommodations. There were a lot of instances where those foreign witnesses had come to Brunei but the trial is suddenly adjourned due to the earlier mentioned reasons. These adjournments do not only mean waste of time for those foreign witnesses who had to be flown in to Brunei but also cancellations of hotel rooms and re-booking of air tickets which is administratively and financially burdensome.

The prosecution also had to deal with personal problems of those foreign witnesses especially the fuel smugglers. At the beginning of the prosecution, the fuel smugglers were afraid for their own personal security because of the perceived threats from the senior customs officers, especially when they go through the control posts so they were a bit reluctant to come to Brunei at first, but constant protection and close cooperation by the ACB with the fuel smugglers succeeded in reducing their fear.

V. CONCLUSION

The crime of corruption is becoming more complex and sophisticated in nature. Anti-corruption agencies need to strive to always be steps ahead by continuously raising the bar to improve the quality of investigation through capacity building. In addition, there is a need to review the existing laws and legislation in order to overcome the loopholes created by the changing trends of corrupt practices which are taking place.

Brunei Darussalam has adopted a holistic and continuous approach in accordance with the country's strong political will in preventing corruption. The overall approach involves the mobilization and cooperation of all sectors of the government, private sector, as well as members of the society. Every component or sector needs to engage in collective action and needs to do its part in promoting the cohesiveness of the overall anti-corruption effort in Brunei Darussalam.