DALAM MAHKAMAH RAYUAN MALAYSIA, PUTRAJAYA

[BIDANG KUASA RAYUAN]

RAYUAN JENAYAH NO: W-05(SH)-28-02/2021

ANTARA

MOHD ISA BIN ABDUL SAMAD ... PERAYU

DAN

PENDAKWA RAYA ... RESPONDEN

(Dalam perkara Mahkamah Tinggi Malaya di Kuala Lumpur

Dalam Wilayah Persekutuan

Perbicaraan Jenayah No: WA-45-14-04/2019

Pendakwa Raya lwn Mohd Isa Bin Abdul Samad)

KORAM

VAZEER ALAM BIN MYDIN MEERA, HMR
AHMAD ZAIDI BIN IBRAHIM, HMR
S.M. KOMATHY A/P SUPPIAH

BROAD GROUNDS OF JUDGMENT

Introduction

[1] The appellant, who had previously served as Menteri Besar of Negeri Sembilan, and at the material time of the charges held the position

of Chairman of the Federal Land Development Authority ('FELDA'), was charged at the High Court with one charge of criminal breach of trust ('CBT") under s 409 of the Penal Code ('PC') and nine charges of corruptly accepting bribes under s.16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 ('MACCA').

[2] The charges against the appellant revolve around when the appellant held the position of FELDA Chairman and was one of the FELDA Board members between October 2012 and January 2017.

[3] The appellant pleaded not guilty and claimed trial to all the charges.

Background facts

[4] The appellant as FELDA Chairman, was among others, responsible for chairing FELDA board meetings, which were attended by:

(a) the FELDA board members;

(b) the Director General of FELDA and Deputy Director Generals of FELDA, who attended on behalf of the management; and

(c) the company secretary.

[5] In the FELDA Board meeting held on 25 June 2013 ('Meeting No. 303'), the FELDA Board approved the establishment of Felda Investment Corp Sdn Bhd ('FICSB'), a wholly owned subsidiary of FELDA, as a special purpose vehicle ('SPV') to carry out FELDA's strategic investment activities. FICSB's initial investment business plan covered four main areas namely fund management, private financing initiatives, recession-proof investment and internal resource management. FICSB was funded with an initial paid-up capital of RM500 million, which was injected by FELDA in stages. In the said Meeting No. 303, the FELDA board had

agreed that the first three members of the FICSB Board of Directors shall be the (i) appellant, (ii) Datuk Faizoull bin Ahmad (FELDA Director General at the time), and (iii) Muhammad Sufi bin Mahbub (Deputy Director General). The FELDA Board also mandated the FICSB Board of Directors to making investment decisions involving projects worth no more than RM100 million.

[6] Gegasan Abadi Properties Sdn Bhd ('GAPSB') is the owner of Merdeka Palace Hotel & Suites ('MPHS') situated in Kuching, Sarawak. GAPSB offered to sell MPHS to FELDA at a price of RM200 million. However, the Board of Directors of FICSB decided to reject the said offer because the investment was considered not profitable nor viable for FICSB.

[7] Subsequently, through a letter of offer dated 28 March 2014 ('P249') sent to the Chairman of FELDA, GAPSB made another offer to FICSB to sell MPHS at a price of RM165 million. As a follow up to the letter dated 28 March 2014, Ikhwan bin Zaidel ('SP16'), is a director and shareholder of GAPSB, and one Ibrahim bin Baki from GAPSB met the appellant in his office and asked the appellant to reconsider the decision of FICSB based on the new offer. The appellant gave a positive response but did not promise anything because the final decision was with the FICSB Board of Directors.

[8] Before the new offer at the price of RM165 million could be presented at the FICSB Board meeting, SP16 sent a facsimile letter to FICSB containing the latest revised offer by GAPSB to sell MPHS at a price of RM160 million after a further discount of RM5 million. The Chief Executive Officer (CEO) of FICSB (SP15) informed the appellant of this latest offer received from GAPSB. The appellant, nevertheless, instructed

SP15 to proceed with the presentation of the proposal paper to the upcoming FICSB Board of Directors meeting which was the 10th FICSB Board of Directors Meeting.

[9] According to SP15, before he presented the papers on the offer by GAPSB, the appellant informed the FICSB Board of Directors that the Prime Minister had ordered FICSB to review the decision of the FICSB Board of Directors that had rejected the proposed takeover of MPHS. The appellant also suggested that the Board of Directors of FICSB agree to purchase MPHS based on the latest price of RM160 million offered by GAPSB.

[10] FICSB Board of Directors unanimously agreed, without any query, to the proposed acquisition of MPHS, subject to the final price not exceeding RM160 million. Authority was given to the CEO to execute all documents relevant to the proposed acquisition of MPHS.

[11] However, the acquisition of MPHS needed FELDA Board approval since the investment value of MPHS exceeded RM100 million, which was the maximum investment mandate value of the FICSB Board. The appellant, however instructed that the matter need not be presented at the FELDA Board because some of the FELDA Board Members are also FICSB Board Members who had approved the proposed acquisition of the MPHS.

[12] On 27 June 2014, FICSB and GAPSB signed a sale and purchase agreement ('SPA') for the acquisition MPHS by FICSB (P258) at a price of RM160 million. The SPA stated that the purchase consideration was comprised of (i) RM153 million (hotel land and building), (ii) RM6 million (contract and goodwill), and (iii) RM1 million (fixed assets).

[13] On 26 July 2017, the MACC received information related to the appellant, who was said to have abused his position as chairman of FICSB between 2013 and 2016 to allegedly receive bribes for himself in relation to the acquisition of MPHS.

[14] The appellant was later charged with one count of criminal breach of trust under s 409 PC and nine counts of accepting bribes under s 16 MACCA amounting to RM3.09 million from Ikhwan bin Zaidel (SP16) through Muhammad Zahid bin Md Arip (SP21), the appellant's special officer, as payment to the appellant who had helped approve the purchase of MPHS by FICSB at a price of RM160 million.

The Charges

[15] As stated earlier, the appellant was initially charged with a total of ten charges, and the charges read as follows:

(a) The CBT charge under s409 PC

The 1st Charge

Bahawa kamu pada 29 April 2014 di Tingkat 50, Menara Felda, Platinum Park, surat tawaran 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, sebagai seorang ejen iaitu Pengarah Syarikat Felda Investment Corporation Sdn Bhd (surat tawaran Syarikat 1052445-A) dan di dalam kapasiti tersebut diamanahkan dengan harta tertentu iaitu dana syarikat Felda Investment Corporation Sdn Bhd telah melakukan pecah amanah jenayah ke atas dana tersebut, di mana kamu telah dengan curangnya melepaskan harta tersebut dengan meluluskan cadangan pembelian Merdeka Palace Hotel & Suites Kuching, Sarawak dengan harga RM160 juta tanpa kelulusan Ahli Lembaga Pengarah Lembaga Kemajuan Tanah Persekutuan (FELDA) bertentangan dengan keputusan Mesyuarat Ahli Lembaga Pengarah FELDA Bilangan 303 bertarikh 25 Jun 2013 yang dibuat berkenaan pelaksanaan amanah tersebut di mana Ahli Lembaga Pengarah Felda memberi mandat

kepada Ahli Lembaga Pengarah Syarikat Felda Investment Corporation Sdn Bhd dalam membuat keputusan pelaburan yang melibatkan projek yang bernilai RM100 juta ke bawah dan oleh yang demikian kamu telah melakukan suatu kesalahan pecah amanah jenayah iaitu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

(b) The s 16(a)(A) MACCA bribery charges:

2nd Charge

Bahawa kamu di antara 21 Julai 2014 hingga 28 Julai 2014, di Tingkat 49, Menara Felda, Platinum Park, surat tawaran 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM100,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip sebagai upah bagi membantu meluluskan pembelian Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

3rd Charge

Bahawa kamu di antara 21 Julai 2014 hingga 28 Julai 2014, di Tingkat 49, Menara Felda, Platinum Park, surat tawaran 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM140,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip sebagai upah bagi membantu meluluskan pembelian Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

4th Charge

Bahawa kamu di antara 17 Oktober 2014 hingga 24 Oktober 2014, di Tingkat 49, Menara Felda, Platinum Park, surat tawaran 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM300,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip sebagai upah bagi membantu meluluskan pembelian Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

5th Charge

Bahawa kamu di antara 15 November 2014 hingga 22 November 2014, di Tingkat 49, Menara Felda, Platinum Park, surat tawaran 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM250,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip sebagai upah bagi membantu meluluskan pembelian Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

6th Charge

Bahawa kamu di antara 25 Jun 2015 hingga 27 Jun 2015, di Tingkat 49, Menara Felda, Platinum Park, surat tawaran 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM500,000.00

daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip sebagai upah bagi membantu meluluskan pembelian Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

7th Charge

Bahawa kamu di antara 9 Julai 2015 hingga 11 Julai 2015, di Tingkat 49, Menara Felda, Platinum Park, surat tawaran 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM500,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip sebagai upah bagi membantu meluluskan pembelian Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

8th Charge

Bahawa kamu di antara 20 Ogos 2015 hingga 27 Ogos 2015, di Tingkat 49, Menara Felda, Platinum Park, surat tawaran 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM300,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip sebagai upah bagi membantu meluluskan pembelian Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

9th Charge

Bahawa kamu di antara 12 September 2015 hingga 14 September 2015, di Tingkat 49, Menara Felda, Platinum Park, surat tawaran 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM500,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip sebagai upah bagi membantu meluluskan pembelian Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

10th Charge

Bahawa kamu di antara 4 Disember 2015 hingga 11 Disember 2015, di Tingkat 49, Menara Felda, Platinum Park, surat tawaran 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM500,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip sebagai upah bagi membantu meluluskan pembelian Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

The amended charges

[16] However, following the end of cross examination of the prosecution's main witness Muhammad Zahid bin Md Arip (SP21), the prosecution applied to amend all nine charges under s 16(a)(A) of MACCA in respect of the time frame of the dates the alleged bribes were given by SP21 to

the appellant after SP21 received it from Ikhwan bin Zaidel (SP16). This application was objected to by the defence. The High Court allowed the amendments to be made based on the provision of s 158 CPC which empowers the court to amend the charges at any time before the judgment is made. The court took into account that the amendments only involved the dates and did not touch anything else, especially the essence of the charges which remained unchanged. The defence was nevertheless given the opportunity to conduct additional cross-examination of SP21 after the amendments were approved by the court.

[17] The trial court also allowed the defence to recall any prosecution witnesses who had finished testifying to be examined further in respect of the amended dates specified in the nine amended charges. In the circumstance, the learned trial judge was of the view that the amendments did not cause any prejudice or injustice to the appellant. However, the defence chose not to recall any of the prosecution witnesses.

[18] The amended 2nd to 10th charges are found in paragraph 19 of the learned trial judge's Ground of Judgment. Apart from the dates, the substance of the charges remain the same.

Prosecution's case

[19] The learned trial judge had in paragraphs 20 to 137 of his Grounds of Judgment (Pendakwa Raya lwn Tan Sri Mohd Isa bin Abdul Samad [2022] 12 MLJ 747) dealt with the prosecution's case in some detail and we do not wish to restate the same. Suffice to say that reference may be had to the report judgment of the High Court as cited above.

Close of prosecution's case – High Court's Decision

[20] At the end of the prosecution's case, the High Court held that the prosecution had failed to establish a prima facie case on the CBT charge under s 409 PC (1st Charge) and accordingly acquitted and discharged the appellant on that charge. The Public Prosecutor appealed that decision, but later withdrew it.

[21] However, in respect of the nine charges under s 16(a)(A) of the MACCA, the High Court held that prima facie case had been established for all nine charges and accordingly the appellant was called to enter his defence.

The defence case

[22] The essence of the appellant's defence to the nine charges of bribery under s 16(a)(A) ASPRM is he never asked for received any bribes from SP16 through SP21. The appellant vehemently denied the charges, and stated that he had no knowledge of the matters alleged in the nine charges. According to the appellant, this stance has already been expressed in the defence's cross-examination to the prosecution witnesses, especially SP21.

[23] In fact, the defence had submitted a statement of defence before the trial started according to s 62 MACCA. The statement contains the main defences of the appellant, in that the appellant stated that he has no knowledge of the bribes allegedly given by SP16 and denies having received any money from SP21. Reference can be made to the defence statement, for example in paragraphs 9 and 10, as follows:

> 9. Bagi tuduhan menerima suapan, pihak Pembelaan menafikan penglibatan OKT dan beliau juga tidak pernah menerima ataupun memperolehi rasuah serta tidak mempunyai apa-apa pengetahuan berkenaan dengan penerimaan rasuah tersebut. OKT juga tidak pernah menerima apa-apa wang rasuah

daripada Ikhwan bin Zaidel melalui Zahid Md Arip sepertimana yang telah dipertuduhkan.

10. Malah, jika dilihat kepada tuduhan yang dikemukakan, hanya menunjukkan penglibatan Zahid Md Arip sahaja. Bahkan semua pembayaran wang telah dibuat kepada Zahid Md Arip sepertimana yang disebutkan di dalam pertuduhan terhadap OKT. Tiada sebarang keterangan yang menunjukkan pembayaran wang rasuah telah dibuat kepada OKT oleh Zahid Md Arip.

[24] The appellant testified under oath and called a further 5 witnesses, as part of his defence. After the defence case, the High Court found that the appellant had failed to raise any reasonable doubt on all the nine charges.

[25] The appellant was found guilty and sentenced to six years imprisonment for each conviction, where the sentences of imprisonment were to run concurrently. The appellant was also ordered to pay a fine of RM15,450,000 and in default of payment a two-year imprisonment sentence was imposed. This default term of imprisonment was to run consecutive to the six years imprisonment for each of the nine conviction.

[26] Being dissatisfied with the judgment of the High Court, the appellant appealed to this Court against both conviction and sentence in respect of all the nine charges under s 16(a)(A) of the MACCA.

Issues raised in this appeal

[27] Learned counsel for the appellant raised several issues in this appeal and they may be stated as follows:

(i) The learned trial judge erred when he decided that the prosecution had successfully proved a prima facie case at the end of the prosecution case for charges under s 16(a)(A) MACCA, when he

had made a finding that there was no dishonest intention by the appellant in the charge of breach of trust under s 409 PC;

(ii) The learned trial judge erred when making 3 different and inconsistent findings as to the purpose of gratification;

(iii) The learned trial judge erred in failing to appreciate that SP21 was an interested witness;

(iv) The learned trial judge erred in giving insufficient judicial appreciation to the defence raised by the appellant during the prosecution's case;

(v) The learned trial judge misdirected himself when he failed to sufficiently evaluate the credibility of SP21;

(vi) The learned trial judge erred when making his findings in relation to one of the elements of the charge, namely, "upah membantu kelulusan pembelian hotel MPHS oleh FICSB";

(vii) The learned trial judge erred in failing to give adequate consideration and judicial appreciation to appellant's defence when compared to the evaluation of the evidence given by the prosecution witnesses.

Duty And Function Of The Appellate Court

[28] In considering the arguments advanced by the appellant in respect of the several issues raised in this appeal, we have reminded ourselves of our appellate role. This Court has in *Dato' Sri Mohd Najib Hj Abd Razak v. PP* [2022] 1 CLJ 491 restated the duty and function of the appellate court as follows.

[63] The duty and function of an appellate court when hearing and determining a criminal appeal is well laid down by high authority. In *Periasamy Sinnappan v. PP* [1996] 3 CLJ 187; [1996] 2 MLJ 557, Gopal Sri Ram JCA (later FCJ) explained the principle in the following terms:

> In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
>
> In *Lim Kheak Teong v. PP* [1984] 1 CLJ Rep 207; [1985] 1 MLJ 38, the Sessions Court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed s. 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ, Malaya) said (at pp 39-40):
>
> > ... we gave leave because firstly we felt that there was no proper appraisal of *Shea Swarup v. King-Emperor AIR* [1934] PC 227 and secondly purporting to follow Terrell Ag CJ in *R v. Low Toh Cheng* [1941] MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.
>
> With respect, what Lord Russell of Killowen said in *Shea Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred 'the High Court should and will always give proper weight and consideration to such matters' as:
>
> (1) the views of the trial judge on the credibility of the witnesses;
>
> (2) the presumption of innocence in favour of the accused;

(3) the right of the accused to the benefit of any doubt; and

(4) 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.

Lord Reid reiterated this same principle in *Benmax v. Austin Motor Co Ltd* [1955] AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt (or Thomas) v. Thomas* [1947] 1 All ER 582 that:

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

The learned appellate judge held that the learned President had "misdirected himself on the explanation of the accused". Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was "plainly unsound"? (Watt (or Thomas) v. Thomas). On the facts of this case we do not think so.

In *Wilayat Khan v. State of Uttar Pradesh AIR* [1953] SC 122 at pp 123 and 125, Chandrasekhara Aiyar J, when delivering the judgment of the Supreme Court said:

> Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end; the second is that great weight should be attached to the view taken by the Sessions Judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.

> Interference with an order of acquittal made by a judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence or the facts.

This principle was reiterated by Haidar Mohd Noor FCJ (later CJM) in *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457, where the Federal Court noted:

> It is an established principle that an appellate court should be slow to disturb the finding of facts of the lower court especially here where there are concurrent findings of facts by two courts namely the High Court and the Court of Appeal. Unless it can be shown that the finding of facts are not supported by the evidence or it is against the weight of evidence or that it is a perverse finding it is not for us to disagree.
>
> Though there are no concurrent findings, and the findings on appeal are only that of the High Court, nevertheless, the principle is that when it comes to findings of facts by the trial judge, the appellate court would be slow to disturb those findings, unless the findings are perverse, unsupported by evidence, or go against the weight and grain of evidence.

In *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, Gopal Sri Ram JCA (later FCJ) speaking for the Court of Appeal summarised the principle and said that it is not the place of the appellate court to make its own findings of fact:

> Now, it is settled law that it is no part of the function of an appellate court in a criminal case or indeed any case - to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lack the audio-visual advantage enjoyed by the trial court.

Then in *Mohd Yusri Mangsor & Anor v. PP* [2014] 7 CLJ 897 the Court of Appeal speaking through Mohd Zawawi Salleh JCA (now FCJ) held:

[4] We have heard learned counsel for the appellants and learned Deputy Public Prosecutor ("DPP") at some length. We have also scrutinised the records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions.

Where:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion,

then an appellate court will intervene to rectify that error so that injustice is not occasioned (See *Perembun (M) Sdn. Bhd. v. Conlay Construction Sdn. Bhd.* [2012] 1 LNS 1416; [2012] 4 MLJ 149, (CA); *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545 (CA); [1995] 3 MLJ 395 (CA)).

These pronouncements of the law are binding precedents for this court to follow. Though the principle is that the appellate court should be slow to disturb

or interfere with the factual findings of the trial court, that does not, however, fetter the appellate court from scrutinising the findings and the circumstances leading to the findings of fact to ascertain if there are any compelling reasons for disagreeing with those findings. This rider to the general principle was reaffirmed by the Federal Court in *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737, in the following words:

> Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh's* case (supra) "there are substantial and compelling reasons for disagreeing with the finding". Otherwise, no judgment would ever be reversed on question of fact and the provision of s. 87 CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

And in the final analysis, the duty of the appellate court hearing a criminal appeal is to ascertain if the conviction is right and that it is safe for the conviction to stand. This was reaffirmed by the Court of Appeal in *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389; [2005] 5 MLJ 409, where the court held that in a criminal appeal:

> Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe. See *Mohammad Hussain v. Emperor AIR* [1945] Nag 441; *Zahari bin Yeop Baai v. Public Prosecutor* [1977] 1 LNS 162; [1980] 1 MLJ 160.

Based on the principles stated in the cases mentioned above, it can be concluded that the court hearing the appeal is ordinarily not to disturb findings of fact, however it is obliged to interfere with a trial court's factual findings if it is

found that the trial court had misdirected itself in some way, or if there are substantial and compelling reasons for disagreeing with the findings, or if the finding of fact is plainly wrong. It is also a well-established principle that in exercising its appellate jurisdiction, this court is not constrained from re-evaluating the whole of the evidence that has been presented at the prosecution and defence stages. In re-evaluating the whole of the evidence, the court has to evaluate the defence presented by the appellant in totality with the evidence adduced through the prosecution witnesses.

[29] In deciding this appeal, we have taken heed of these principles of appellate intervention in considering the issues raised by the appellant's learned counsel and the learned Deputy; and were guided by the principle that in a criminal appeal, the duty of the appellate court is to consider whether the conviction is right and safe.

Analysis of the issues

1st Issue – Whether the learned trial judge erred when he decided that the prosecution had successfully proved a prima facie case at the end of the prosecution case for the charges under s 16(a)(A) MACCA?

[30] Based on s 16(a)(A) MACCA and the nine charges, the prosecution needs to prove the three main elements of the charges. First, the accused has personally or through others (such as SP21) received gratification from SP16 as alleged in each charge. Secondly, the acceptance by him of the said gratification was a quid pro quo for his assistance as board member of FICSB to approve the purchase of MPHS; and thirdly, the acceptance of the bribes by the accused is corrupt. According to the appellant, the learned trial judge erred when he found that the prosecution had succeeded in proving a prima facie case at the end of the prosecution

case for the charges of accepting bribes under section 16(a)(A) MACCA as the elements of the charge had not been proven.

[31] The 9 charges under s.16(a)(A) MACCA are similar except for the date of the offence and the amount of gratification, and if we were to look at the 2nd Charge it reads:

> 2nd Charge
>
> Bahawa kamu di antara 21 Julai 2014 hingga 28 Julai 2014, di Tingkat 49, Menara Felda, Platinum Park, ~~surat tawaran 11,~~ Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM100,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip sebagai upah bagi membantu meluluskan pembelian Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

[32] The prosecution in their opening statement at paragraph 18 stated as follows:

> [18] Bagi sembilan (9) pertuduhan di bawah Seksyen 16(a)(A) ASPRM 2009, pihak Pendakwaan akan mengemukakan keterangan yang menunjukkan Tertuduh telah mengarahkan Muhammad Zahid Md Arip, Pegawai Khas Tertuduh untuk mendapatkan suapan daripada Ikhwan bin Zaidel, Pengarah Syarikat Gagasan Abadi Properties Sdn Bhd sebagai upah kepada Tertuduh kerana telah membantu meluluskan pembelian MPHS oleh pihak FICSB bernilai RM160 juta.

[33] Hence, in order to establish a prima facie case for each of these 9 charges, it was incumbent upon the prosecution to establish the fact that

the appellant had directed SP21 to obtain the sum of money as stated in the charges from SP16 as gratification for the appellant assisting in the approval by FICSB to purchase MPHS from Syarikat Gagasan Abadi Properties Sdn Bhd, and that he did receive the money from SP16 through SP21.

[34] Now, let me start with the prosecution's allegation that the appellant received gratification from SP16 for his assistance in the approval of the purchase of MPHS by FICSB from Syarikat Gagasan Abadi Properties Sdn Bhd. The learned trial judge had in dismissing the CBT charge found that though the appellant was a board member of FICSB, the decision to purchase MPHS was a collective decision of the board of FICSB. The following findings by the learned trial judge in his Grounds of Judgment is instructive:

> [228] **Tidak boleh dinafikan bahawa pembelian MPHS yang memerlukan bayaran RM160 juta oleh FICSB diluluskan oleh Lembaga Pengarah FICSB. Ianya bukan diluluskan oleh tertuduh.** Ianya juga tidak boleh diluluskan oleh tertuduh bersendirian kerana undang-undang syarikat dan peraturan tata-urus FICSB meletakkan kuasa melulus pembelian atau pelaburan tersebut bukan di atas tertuduh atau mana-mana pengarah secara individu, tetapi ke atas Lembaga Pengarah FICSB secara kolektif.
>
> [229] Ini tidaklah memeranjatkan kerana tata urus kelola syarikat yang baik tidaklah patut dijalankan sebegitu, lebih-lebih lagi dalam kes ini di mana amat jelas kehendak FELDA sebagai pemegang saham tunggal FICSB adalah supaya kelulusan melebihi RM100 juta diangkat ke Lembaga FELDA dan bagi yang bernilai RM100 juta dan ke bawah pula, di bawah autoriti Lembaga Pengarah FICSB (bukan mana-mana pengarah individu). **Mahkamah sekali lagi menekankan bahawa minit mesyuarat ke-10 Lembaga Pengarah FICSB pada 29 April 2014 (P41) secara terangnya merekodkan pembelian MPHS pada harga RM160 juta secara fakta dan undang-undangnya telah diluluskan oleh Lembaga Pengarah FICSB.**

[230] Oleh yang demikian walaupun sebagai seorang pengarah, waima juga sebagai pengerusi, beliau telah diamanahkan harta syarikat, tertuduh tidak boleh di bawah undang-undang dianggap telah melakukan pecah amanah jenayah dengan melupuskan harta wang FICSB bagi tujuan pembayaran pembelian MPHS kerana bukan sahaja beliau **secara individu sebagai pengarah dan pengerusi tiada kuasa untuk meluluskan pembelian tersebut, tetapi yang lebih penting lagi, pembelian tersebut telah diluluskan oleh Lembaga Pengarah FICSB yang dianggotai tujuh pengarah syarikat, lima daripadanya hadir di mesyuarat yang meluluskan pembelian MPHS tersebut, termasuk tertuduh dan SP15 yang juga CEO syarikat.**

[231] Minit Mesyuarat ke-10 Lembaga Pengarah FICSB (P41) juga dengan jelasnya merekodkan bahawa:

> The board was agreeable with the Management's opinion and noted there is a potential for investment in MPHS as the overall tourism market study shows a very positive outlook and therefore requested for Management to negotiate further on the offer price. (Penekanan ditambah.)

[232] **Tambahan pula, malah Mohamad Safari bin Abdullah (SP22) yang merupakan pegawai penyiasat kes ini sendiri semasa pemeriksaan balas turut mengesahkan bahawa keputusan pembelian MPHS ini dibuat oleh Lembaga Pengarah secara kolektif dan bukan keputusan seorang Ahli Lembaga Pengarah sahaja.** SP22 juga sebenarnya berkata tiada kesalahan dilakukan.

S: Soalan saya, apabila kita ada Felda Induk dan juga anak syarikat dia, FIC, keputusan yang dibuat oleh FIC saya khususkan kepada FIC apabila melibatkan pelaburan, apabila melibatkan pembelian dan penjualan dan sebagainya, mestilah ianya merupakan satu keputusan board, setuju?

J: Setuju.

S: Maknanya board itu Ahli Lembaga Pengarah?

J: Setuju.

S: Dan saya percaya kamu juga telah membuat penyiasatan tentang hal ini dan telah merampas, mengambil semua dokumen-dokumen iaitu minit-minit mesyuarat, resolusi syarikat dan sebagainya, betul?

J: Setuju.

S: Dan dalam penyiasatan kamu, pastinya kamu telah membuat satu analisa dan membuat keputusan bahawa di dalam kes ini bagi melibatkan pembelian Hotel Merdeka oleh FIC ianya dibuat melalui board, setuju? Ahli Lembaga Felda, sorry, Ahli Lembaga FIC?

J: FIC, ya, board FIC, yes.

S: Betul?

J: Betul.

S: Maknanya tiada langsung keterangan yang menunjukkan bahawa keputusan dibuat oleh salah seorang daripada Ahli Lembaga Pengarah, betul?

J: Betul.

[237] Mahkamah patut merujuk kepada keterangan **SP16 yakni pengarah syarikat Gagasan Abadi Properties Sdn Bhd (GAPSB), pemilik asal dan penjual MPHS, yang mengatakan di perjumpaan beliau dengan tertuduh kali pertama, tertuduh memberitahu SP16 bahawa sebarang kelulusan mengenai pembelian MPHS adalah bergantung kepada keputusan Lembaga Pengarah FICSB.**

S: Kamu jumpa dengan dia Tan Sri Isa jawab begini, apa Tan Sri Isa kata kamu jawab Isa beri respond yang positif dan **akan cuba membantu** kami namun **keputusan bergantung kepada mesyuarat Ahli Lembaga Pengarah** FICSB **tetapi dia tidak menjanjikan apa-apa kepada saya** dan Ibrahim Baki, betul?

J: Betul.

S: **So, even Isa cannot help you. He can only assist you but there is no guarantee because everything up to the Lembaga Pengarah to decide, am I right, he said that very clearly to you and Ibrahim Baki, setuju?**

J: **Ya.**

S: Even the pertemuan itu setengah jam. Zahid Md Arip tiada di situ. Setuju dengan saya bahawa Zahid Md Arip tiada, bukan? Zahid Md Arip sudah atur segalanya dia serahkan kamu kepada Tan Sri Isa, betul?

J: Ya, betul.

S: **Semasa kamu jumpa Tan Sri Isa, this was the only thing yang keluar daripada mulut dia. Saya boleh tolong bantu tetapi saya tidak janji. Pulang kepada Ahli Lembaga Pengarah dan saya juga tidak menjanjikan apa-apa. Itu sahaja yang dia cakap berkenaan pembelian Hotel Merdeka, bukan?**

J: **Ya.**

S: Very nice of him. Panggil ajak makan tengah hari lagi semasa itu, betul?

J: Betul.

S: Semasa makan tengah hari pun tidak cakap mengenai Hotel Merdeka tentang apa-apa hal. Dia hanya stick to what he had said earlier, am I right?

J: Right.

[238] Pihak pendakwaan sendiri dalam hujahan bertulis mereka juga mengatakan keputusan Ahli Lembaga Pengarah FICSB mengenai cadangan pengambilalihan MPHS pada harga RM160 juta adalah sebulat suara dan direkodkan di bawah 'Perkara 5. PROPOSED ACQUISITION OF MERDEKA PALACE HOTEL & SUITES, KUCHING, SARAWAK' dalam Minit Mesyuarat Lembaga Pengarah FICSB Kali Ke-10 bertarikh 29 April 2014 (P41) yang dipetik seperti berikut:

With no further questions arising, it was RESOLVED:

THAT the Company be and is hereby authorised to proceed with the proposed acquisition of Merdeka Palace Hotel & Suite, Kuching, Sarawak, subject to the final negotiation on the price not exceeding RM160,000,000.

THAT authority be and is hereby given to the Chief Executive Officer to execute all relevant documents in in respect of the proposed acquisition thereof.

[239] Oleh yang demikian, daripada keputusan tersebut, Lembaga Pengarah FICSB memutuskan sebulat suara tanpa sebarang soalan, bersetuju dengan cadangan pengambilalihan MPHS, tertakluk kepada perundingan akhir harga ~~[2022] 12 MLJ 747 at 844~~idak melebihi RM160 juta dan kuasa diberikan kepada CEO untuk melaksanakan dokumen yang relevan dengan cadangan pengambilalihan MPHS tersebut.

[240] Menurut SP15, berdasarkan keputusan yang dibuat oleh Lembaga Pengarah FICSB beliau telah mencatatkan harga RM160 juta pada ruangan 'Approval Sought' pada Kertas Lembaga bertajuk 'FIC Board Paper Meeting Paper surat tawaran 4/4/2014 Proposed Acquisition of Merdeka Palace Hotel & Suites Kuching, Sarawak' (P69) tersebut. **Ini menjelaskan lagi tanpa sebarang keraguan bahawa kelulusan dibuat Lembaga Pengarah FICSB.**

[35] The learned trial judge also rejected the prosecution's assertion that the appellant influenced or forced the board members of FICSB to approve the purchase of MPHS. The following excerpts from the Grounds of Judgment as regards that are very telling:

[254] **Apakah keterangan yang menunjukkan pengarah lain diarah atau dipaksa untuk meluluskan cadangan yang dikatakan dipengaruhi oleh tertuduh? Mahkamah dapati ini tidak dibuktikan oleh pihak pendakwaan. Dapatan mahkamah adalah sebaliknya.** Atas beberapa sebab.

[255] Pertama, walaupun tertuduh Pengerusi FELDA dan FICSB, lantikan Ahli Lembaga Pengarah FICSB (yang mana semuanya kecuali SP15 adalah juga dalam Lembaga FELDA) ke Lembaga FELDA adalah dibuat oleh Menteri yang bertanggungjawab di bawah s 15(2) Akta Kemajuan Tanah 1956, seperti yang dirujuk sebelum ini.

[256] Kedua, Ahli Lembaga Pengarah juga bertanggungjawab secara statutori dan fidusiari untuk membuat keputusan secara jujur bagi menafaat dan kepentingan syarikat. Ini termaktub di dalam s 132 Akta Syarikat 1965 yang terpakai dalam kes ini. Seksyen 132(1) memperuntukkan bahawa 'A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company'. Seksyen 132(3) pula menyatakan sebarang pelanggaran peruntukan seksyen itu oleh mana-mana pengarah adalah suatu kesalahan di bawah Akta tersebut.

[257] Ketiga, sebenarnya SP15 sendiri tidak memberitahu mahkamah bahawa Lembaga Pengarah FICSB membuat keputusan meluluskan pembelian MPHS dan penubuhan anak syarikat baru kerana diarah atau dipengaruhi oleh tertuduh. SP15 hanya menyatakan selepas pembentangan oleh SP15, tertuduh memaklumkan kepada mesyuarat bahawa FICSB perlu ambil kira elemen lain seperti 'goodwill' untuk timbang harga RM160 juta yang ditawarkan oleh GAPSB, yang dicadangkan oleh tertuduh untuk diterima. Lembaga Pengarah bersetuju dengan harga ini.

[258] Memang kertas cadangan (P69) itu pun yang disediakan pihak pengurusan yang diketuai SP15 mencadangkan pembelian MPHS (pada harga RM153 juta). **SP15 sendiri memberi keterangan dalam penyataan bertulis beliau bahawa dalam pembentangan kertas cadangan di mesyuarat Lembaga Pengarah FICSB tersebut, pihak pengurusan telah membuat semakan semula dan atas asas potensi pelancongan di sekitar lokasi MPHS, 'sekiranya pengambilalihan ini berlaku, MPHS akan memperolehi keuntungan'.**

[259] Keempat, langsung tiada keterangan daripada Ahli Lembaga Pengarah FICSB yang mana-mana daripada mereka diarah atau dipengaruhi untuk

meluluskan pembelian atau penubuhan anak syarikat. Sebenarnya tiada seorang pengarah FICSB lain pun yang dipanggil oleh pendakwaan selain daripada SP15 sendiri yang juga merupakan CEO syarikat untuk mengetahui perkara sebenar yang berlaku semasa mesyuarat yang meluluskan pembelian MPHS pada harga RM160 juta tersebut, dan sekiranya mereka diarah tertuduh untuk bersetuju meluluskan pembelian MPHS dengan harga RM160 juta. Tiga lagi pengarah FICSB yang hadir di mesyuarat itu, iaitu Datuk Dr Omar bin Salim, Datuk Ehsanuddin dan Datuk Faizoull bin Ahmad langsung tidak dipanggil pihak pendakwaan. Ini sudah tentunya kurang membantu kes pendakwaan kerana SP15 juga berkata beliau telah memaklumkan ketiga pengarah ini mengenai cadangan meminta diskaun sebanyak RM10 juta daripada GAPSB yang dikatakan telah awalnya dipersetujui oleh tertuduh.

[260] Kelimanya, berkenaan isu pengaruh atau arahan oleh tertuduh ke atas Lembaga Pengarah ini, terdapat satu keterangan yang dibangkitkan oleh pendakwaan dalam hujahan mereka ialah yang diberi oleh Ruzeti Emar bt Mohd Rosli (SP14), setiausaha syarikat dari luar (external) FICSB yang terlibat dalam proses merekodkan minit mesyuarat tersebut yang mana beliau mengesahkan bahawa selepas pembentangan perkara 5 Minit Mesyuarat Lembaga FICSB Kali Ke-10 oleh CEO (SP15), tertuduh telah meminta semua Ahli Lembaga Pengarah FICSB bersetuju dengan apa yang SP14 katakan mengenai MPHS dalam pernyataan bertulis beliau 'Tan Sri Isa Samad bertanya kepada semua ahli-ahli Lembaga Pengarah yang hadir 'Kita bersetuju ye? Setuju ye' dan semua ALP yang lain tidak menyatakan mereka tidak bersetuju, maka dianggap sebagai persetujuan sebulat suara oleh ALP FICSB'.

[261] Mahkamah dapati ini nampaknya selari dengan keterangan SP15 di mana dalam penyataan bertulis ada menyebut tertuduh di akhir pembentangan kertas oleh SP15 di mesyuarat tersebut telah berkata bahawa FICSB perlu ambil kira elemen goodwill MPHS dan mencadangkan FICSB membeli MPHS dengan harga RM160 juta, yang dipersetujui oleh Lembaga Pengarah. Tetapi seperti yang diterangkan mahkamah sebelum ini, syor yang dibuat tertuduh sebagai Pengerusi ini tidak boleh dikatakan sebagai arahan atau pengaruh kepada Ahli Lembaga Pengarah membuat keputusan meluluskan pembelian

MPHS dengan harga RM160 juta. Secara objektifnya kenyataan tersebut adalah bersifat neutral dalam sesuatu perbincangan dan tidak mempamirkan unsur arahan, dan Ahli Lembaga Pengarah FICSB juga tidak dipanggil untuk memberi keterangan sama ada mereka diarah atau dipengaruhi tertuduh untuk meluluskan pembelian MPHS tersebut.

... ...

[265] Walau bagaimanapun, perkara pokoknya ialah, **seperti yang telah diterangkan sebelum ini tiada keterangan sokongan yang boleh dipercayai kepada hujahan pihak pendakwaan bahawa tertuduh telah meluluskan atau mengarah dan mempengaruhi keputusan yang meluluskan pembelian MPHS itu.**

[36] The prosecution's case is that the appellant had instructed SP21 to demand the gratification from SP16 and upon receiving them SP21 had given them to the appellant. SP16 had stated that the appellant had never requested any gratification from him directly. In fact, in the ~~one~~ two occasions that SP16 met the appellant, he had never asked for any gratification for bringing the proposed offer of sale of MPHS to the board of FICSB, and in fact had told him that whilst he can help to bring the matter to the board, it is still up to the board to approve the purchase.

[37] Further, there is no credible evidence showing the appellant instructing SP21 to make any monetary demand from SP16 as gratification for the assistance that the appellant was to render to obtain FICSB's approval for the purchase of MPHS. Now, the decision ~~the decision~~ to buy MPHS at the price of RM160 million was made in the 10th FICSB Board of Directors meeting on 29 April 2014. However, according to SP21 the demand for gratification by the appellant came sometime after that. If that was so than it cannot be said that the gratification was for the assistance rendered to obtain the approval of FICSB, as that event has

already happened and the appellant's assistance would not be required any further. In this regard, the learned trial judge made the following findings:

> [454] Permintaan untuk mendapatkan suapan dibuat oleh tertuduh melalui SP21 kepada SP16 berlaku selepas FICSB membuat keputusan membeli MPHS pada harga RM160 juta dalam mesyuarat Lembaga Pengarah FICSB Kali Ke-10 pada 29 April 2014. Secara spesifik juga boleh dirumuskan permintaan tersebut berlaku selepas SP16 dan Ibrahim bin Baki bertemu dengan tertuduh pada kali kedua di pejabat Pengerusi FELDA bagi menzahirkan ucapan terima kasih GAPSB kepada tertuduh atas keputusan FICSB membeli MPHS pada harga RM160 juta. Menurut keterangan SP21 perkara permintaan suapan ini ditimbulkan oleh tertuduh ketika beliau menceritakan kepada SP21 mengenai pembelian MPHS oleh FICSB dan hasrat SP16 untuk membantu parti politik PBB di Sarawak.
>
> [455] Walaupun tidak disuarakan dengan spesifik oleh tertuduh, permintaan suapan ini adalah dizahirkan secara tidak langsung kerana dalam konteks perbualan (mengambil kira perkembangan dalam cadangan pembelian MPHS tersebut yang baru diluluskan Lembaga Pengarah FICSB) antara tertuduh dan SP21 mengenai subjek MPHS dan SP16, SP21 memberi keterangan yang tertuduh berkata lebih kurang 'Kalau dia orang bagi apa-apa nanti kau ambil lah'. Pada pemahaman SP21 ungkapan tersebut bermaksud apa-apa jua yang diberikan oleh SP16 atau Ibrahim Baki kepada SP21, maka SP21 perlu menerimanya bagi pihak tertuduh.

[38] The words "Kalau dia orang bagi apa-apa nanti kau ambil lah", even if said by the appellant cannot be construed as an instruction or direction by the appellant to SP21 to take any money offered by SP16 for and on behalf of the appellant. SP21 further said that he would pass on the "salam" from the appellant to SP16 following which payments would be made by SP16, which he then gave to the appellant. Apparently the salam greeting was the trigger for SP21 to ask for payment from SP16.

However, there is no credible evidence showing that there was such an understanding between the appellant and SP21 to use this code word, and during cross-examination S21 gave contradictory evidence in this regard.

[39] It can clearly be seen from SP21's Cross-Examination that SP21 has given contradictory evidence, where:-

(a) SP21 states that the appellant gives salam greetings before every transaction;

(b) SP21 then agreed that the appellant did not give the salam greeting as a signal before every transaction;

(c) SP21 then stated that though the conveying of the salam greetings was a pattern, it was not included in his Witness Statement; and

(d) SP21 admitted that he only used the salam greetings that had been given in the past and that the Appellant ~~giving~~ salam before each transaction.

[39] We note that the existence of these material contradictions in the answers given by SP21 regarding this crucial issue of the conveying of the salam greeting from the appellant as the trigger signal for SP21 to demand for payment to made by SP16 were not properly evaluated by the learned trial judge. The learned trial judge should have evaluated SP21's answers during cross-examination on this very important because it will greatly assist the LHCJ ~~to examine~~ the credibility, consistency and accuracy of SP21's testimony. This is particularly so when SP21 said that the total amount agreed to be paid by SP16 was RM3 million, but when the amounts stated in the 9 charges are tallied they total more than RM3

million, and no plausible explanation was given by SP21 for this contradiction.

[40] We find that the learned trial judge's finding that there was demand for payment made by the appellant through SP21 and that SP16 had made 9 payments via SP21 to the appellant is not borne out by credible evidence. The evidence shows that SP16 made 9 payments to SP 21 but apart from the oral evidence of SP21 there is no other evidence showing that the appellant had received these payments from SP21.

[41] Further, the LHCJ also made a finding that the gratification was corruptly given by SP16 because he was afraid that if payment is not made then the appellant could jeopardise the contract for sale of MPHS and the sale proceeds could be delayed or the approval to purchase MPHS could be cancelled due to the influence of the appellant as Chairman of FICSB. This can clearly be seen in paragraphs 461, 556 and 958 of the Grounds of Judgment.

> [461] menurut SP16, pihak beliau dengan Ibrahim Baki tidak ada pilihan dan akur dengan permintaan tertuduh yang dibuat sebelum ini. Mereka khuatir dengan pengaruh tertuduh sekiranya mereka tidak bersetuju dengan permintaan ini, umpamanya ada kemungkinan tertuduh boleh bertindak untuk mengakibatkan pembayaran kepada GAPSB dilengahkan atau kelulusan urusniaga pembelian MPHS dibatalkan terus kerana sebelum ini FICSB telahpun menolak cadangan pembelian MPHS.
>
> [556] dengan lain perkataan, wang suapan dalam kes ini, sepertimana yang diperincikan dalam kesemua sembilan pertuduhan adalah sebagai upah atas penglibatan tertuduh dalam kelulusan pembelian MPHS tersebut. Lebih-lebih lagi, SP16 telah memberi keterangan bahawa setelah permintaan dibuat beliau telah bersetuju untuk memberi 3 juta kerana bimbang pembelian MPHS tersebut tidak terlaksana walaupun telah diluluskan atas sebab pengaruh tertuduh sebagai Pengerusi FELDA dan FICSB. Ini juga boleh dianggap

sebagai upah untuk memastikan FICSB meneruskan pelaksanaan pembelian MPHS setelah memberi kelulusan terhadapnya.

[958] Tiada sebab lain mengapa suapan diberikan kepada beliau. Ianya telah jelas diterangkan oleh pemberi sendiri, SP16 iaitu kerana diminta tertuduh. Ini adalah selepas tertuduh bersama Ahli Lembaga Pengarah FICSB yang lain meluluskan pembelian MPHS dan disebabkan SP16 dan Ibrahim Baki tidak mahu kelulusan pembelian tersebut diganggu ataupun perlaksanaan pembelian dibatalkan atas dasar pengaruh tertuduh sebagai Pengerusi dan Pengarah FICSB sekiranya suapan upah tidak diberikan kepada Tertuduh.

[42] We agree with the learned counsel for the appellant that if the fear of the appellant's influence as Chairman of FICSB over the decision to purchase MPHS was the reason for the payments being made SP16 to SP21, and too after the board approval had been given, then the charges would be rendered defective as this is not stated in any of the 9 charges.

[43] The prosecution has presented two different narratives of their case, where in the charges and their opening statement it was stated that the gratification was a reward for helping to approve the purchase of MPHS, and then in the course of trial the narrative was changed to 'inducement' so that appellant did not interfere with the contract for the purchase of MPHS. The question then arises as to which element Section 16(a)(A) MACCA was used by the learned trial judge in deciding whether a prima facie case has been established against the appellant. Is it one of reward, or is it one of inducement.

[44] The prosecution cannot change the goal post midstream. They must keep to the particulars stated charges as they stand. The charges were amended once but the reason for the gratification stated in the original charges remained the same in the amended charges, and it was as a reward for the appellant in assisting to get the approval for the purchase

of MPHS and not the perceived fear that the appellant would throw a spanner in the works.

[45] It is trite law that the appellant must have sufficient notice of the matter with which he is charged as otherwise he will be seriously prejudiced in his defence. Further, when two conflicting versions of the prosecution's case are adduced pertaining to the exact purpose of the gratification, the arising ambiguity must be resolved in favour of the accused/appellant.

[46] Thus, we find that the learned trial judge had misdirected himself when ruling that a prima facie case has been established based on the evidence of SP16 that his apprehension and fear of the appellant's influence as Chairman in the contract completion was the reason why he gave the gratification as satisfying the element of the charges under s.16(a)(A) MACCA, when the charges themselves stipulate that the gratification was paid as reward for his assistance in obtaining the approval of FICSB for the purchase of MPHS.

[47] Thus we find that in the overall, the conviction on all nine charges are not safe. We find that there are merits in the appeal, and appellate intervention is warranted. Hence, the appeal against conviction and sentence in respect of all charges is allowed and the order of the HC is set aside. The appellant is acquitted and discharged.