MOHAMAD ZULHISHAM BIN ZULKAFLI & ORS v PUBLIC PROSECUTOR AND OTHER APPEALS

CaseAnalysis
[2026] MLJU 868

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Malayan Law Journal Unreported

HIGH COURT (JOHOR BAHRU)

ATAN MUSTAFFA YUSSOF AHMAD J

CRIMINAL APPEAL NOS JA-42R(A)-1-02 OF 2025, JA-42R(A)-2-02 OF 2025, JA-42R(A)-3-02 OF 2025, JA-42R(A)-4-02 OF 2025, JA-42R(A)-5-02 OF 2025, JA-42R(A)-6-03 OF 2025 AND JA-42R(A)-7-03 OF 2025

16 March 2026

Mohd Hamizi bin Mohd Yusof (Raziyan Rahim & Assoc) for the first appellant.
Mohd Hazza bin Mohd Khalid (Hazza Khalid Suraya & Partners) for the second appellant.
Luqman bin Mazlan (Luqman Iswatt & Partners) for the third appellant.
Chan Lee Lee (Deputy Public Prosecutor, Pejabat Penasihat Undang-Undang Negeri Johor) for the prosecution.

Atan Mustaffa Yussof Ahmad J:

GROUNDS OF JUDGMENT

INTRODUCTION

[1] These are appeals by four police personnel against their convictions and sentences imposed by the Sessions Court (Criminal 1), Johor Bahru, presided over by Datuk Ahmad Kamal Arifin bin Ismail ("***the learned Sessions Court Judge***" or "***SCJ***"). The trial below concerned three charges arising from allegations that the appellants, in furtherance of common intention, corruptly solicited and obtained gratification from a complainant whose drugs had been found during an unrecorded police search at Kangkar Pulai on the night of 10.4.2018, and that the Second Appellant thereafter attempted to obtain a further sum in the early hours of 12.4.2018.

[2] On 13.2.2025, the learned Sessions Court Judge convicted all four appellants on the First Charge (soliciting RM7,000.00) and on the Second Charge (obtaining RM1,600.00), both read with section 34 of the Penal Code. The Second Appellant was additionally convicted on a Third Charge of attempting to obtain RM1,400.00 by himself. All four were sentenced to four years' imprisonment on each conviction, the sentences to run concurrently. For the First Charge, a fine of RM40,000.00 (in default 12 months' imprisonment) was imposed on each. For the Second and Third Charges respectively, fines of RM10,000.00 (in default 3 months' imprisonment) were imposed. Being dissatisfied, all four filed appeals to this Court. The appeals were heard together on 6.8.2025.

[3] After hearing arguments from all parties, I pronounced my decisions on 8.1.2026. The appeals of the First, Second and Fourth Appellants are dismissed; their convictions and sentences are maintained. The appeals of the

Third Appellant are allowed; his convictions on both the First and Second charges are set aside and he is acquitted and discharged of both. These are the full grounds of my decision.

THE CHARGES

[4] The charges as amended and tried are reproduced in full below.

[5] The First Charge (Criminal Case No. JA-61R-19-07/2020) (all four accused) relating to the offence of corruptly soliciting a gratification reads:

> *"Bahawa kamu pada 10 April 2018 jam lebih kurang 11.00 malam, di dalam kereta bernombor pendaftaran SLB 4579 T semasa dalam perjalanan dari Balai Polis Kangkar Pulai ke Balai Polis Gelang Patah, di dalam Daerah Johor Bahru, di dalam Negeri Johor bagi mencapai niat bersama kamu telah secara rasuah meminta suatu suapan iaitu wang tunai berjumlah RM7,000.00 daripada Usamah bin Ab Rahim (No. KP: 800313-04-5003) sebagai suatu dorongan untuk kamu sebagai pegawai badan awam iaitu Pegawai Rendah Polis di Ibu Pejabat Polis Daerah Iskandar Puteri untuk tidak melakukan suatu perkara yang dengannya badan awam kamu terlibat iaitu melepaskan Usamah bin Ab Rahim (No. KP: 800313-04-5003) dan Buyamin bin Mohd Yusoff (No. KP: 780704-01-6343) yang telah ditahan atas kesalahan memiliki dadah, dan dengan itu kamu telah melakukan suatu kesalahan di bawah* Seksyen 16(a)(B) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dibaca bersama Seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah Seksyen 24(1) *Akta yang sama."*

[6] The Second Charge (Criminal Case No. JA-61R-20- 07/2020) (all four accused) relating to the offence of corruptly obtaining a gratification reads:

> *"Bahawa kamu pada 11 April 2018 jam lebih kurang 4.00 pagi, di hadapan rumah bernombor 14D Kampung Baru Kangkar Pulai, di dalam Daerah Johor Bahru, di dalam Negeri Johor, sebagai seorang ejen Kerajaan Malaysia iaitu Pegawai Rendah Polis di Ibu Pejabat Polis Daerah Iskandar Puteri, bagi mencapai niat bersama kamu telah secara rasuah memperoleh untuk diri kamu suatu suapan iaitu wang tunai berjumlah RM1,600.00 daripada Usamah bin Ab Rahim (No. KP: 800313-04-5003) sebagai dorongan bagi tidak melakukan suatu perbuatan berhubungan dengan hal ehwal prinsipal kamu, iaitu, melepaskan Usamah bin Ab Rahim (No. KP: 800313-04-5003) dan Buyamin bin Mohd Yusoff (No. KP: 780704-01-6343) yang telah ditahan atas kesalahan memiliki dadah, dan dengan itu kamu telah melakukan suatu kesalahan di bawah* Seksyen 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dibaca bersama Seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah Seksyen 24(1) *Akta yang sama."*

[7] The Third Charge (Crimonal Case No. JA-61R-21-07/2020) (Second Appellant only) relating to the offence of corruptly attempting to obtain a gratification reads:

> *"Bahawa kamu pada 12 April 2018 jam lebih kurang 12.15 pagi, di hadapan Restoran Nasi Kandar Seri Mutiara, No. 2, Jalan Meranti 2, Taman Sri Pulai, di dalam Daerah Johor Bahru, di dalam Negeri Johor, sebagai seorang ejen Kerajaan Malaysia iaitu Pegawai Rendah Polis di Ibu Pejabat Polis Daerah Iskandar Puteri, telah secara rasuah cuba memperoleh untuk diri kamu suatu suapan iaitu wang tunai berjumlah RM1,400.00 daripada Usamah bin Ab Rahim (No. KP: 800313-04-5003) sebagai dorongan bagi tidak melakukan suatu perbuatan berhubungan dengan hal ehwal prinsipal kamu, iaitu, melepaskan Usamah bin Ab Rahim (No. KP: 800313-04-5003) dan Buyamin bin Mohd Yusoff (No. KP: 780704-01-6343) yang telah ditahan atas kesalahan memiliki dadah, dan dengan itu kamu telah melakukan suatu kesalahan di bawah* Seksyen 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan boleh dihukum di bawah Seksyen 24(1) *Akta yang sama."*

THE FACTS

Background

[8] All four accused were police personnel attached to the Royal Malaysia Police ("***PDRM***"). The First, Third and Fourth Appellants were stationed at the Kangkar Pulai Police Station. The Second Appellant was based at the Nusa Bestari Police Station. Both stations were administered under the Iskandar Puteri District Police Headquarters (IPD Iskandar Puteri). Their status as police officers and the emoluments they received were proved through certificates under Section 55 Malaysian Anti- Corruption Commission Act 2009 (**"*MACC Act 2009*"**) admitted in evidence: P1(1-3) for the First Appellant, P4(1-3) for the Second Appellant, P10(1-4) for the Third Appellant, and P7(1-4) for the Fourth Appellant.

The Prosecution's Case

[9] On 10.4.2018 at about 10 pm, PW4 (Usamah bin Ab Rahim), a crane operator, visited the house of PW7 (Buyamin bin Mohd Yusoff) which was located behind the Petronas fuel station at Kangkar Pulai. He went there to repair his motorcycle. On arriving, PW4 encountered three Malay males who turned out to be the First, Third and Fourth Appellants. The First Appellant rushed out, grabbed PW4 and identified himself and the others as police. The First Appellant then pulled PW4 into the house. Inside the house, PW4 saw PW7, PW7's wife, and their three children, as well as the Second Appellant who was already present.

[10] The Fourth Appellant conducted a body search of PW4 whilst the First Appellant checked PW4's bag. Inside the bag, the First Appellant found drugs (described as *batu* or *syabu*) in a transparent plastic container within a tin. The First Appellant exclaimed "*haa ni apa ni*" and called the Second Appellant to see the discovery. The Second Appellant then questioned PW4 and PW7 at length about the drugs. The Second Appellant threatened to take PW4, PW7 and the family members to the police station. The First Appellant said he also intended to bring them there. When PW7 asked to settle the matter, the First Appellant replied "nak kira macam mana?" and added that PW7 had to think for himself how much to pay.

[11] PW4 and PW7 were then taken in a Honda Odyssey (registration SLB 4579T) to the compound of the Kangkar Pulai Police Station, then back to PW7's house, and then back once more to the Kangkar Pulai Police Station. The First Appellant arrived separately by motorcycle and joined them at the station. All four appellants together with PW4 and PW7 then proceeded towards the Gelang Patah Police Station. It was on this journey, in furtherance of the First Charge, that the First Appellant asked whether anyone could "bail" (*jamin*) PW4 and PW7 out. The First Appellant indicated the rate was between RM2,500.00 and RM3,000.00 per person. After PW4 observed it would therefore be RM6,000.00 for two, the First Appellant said "*cari la RM7,000.00. Nanti RM1,000.00 untuk saya*". PW4 understood clearly that the payment was to prevent the police from taking action against him on the drugs that had been found.

[12] After arriving in front of the quarters at the Gelang Patah Police Station, the First Appellant took PW4's telephone and made several calls to identify people who could provide money. The Second Appellant took the telephone and spoke to a clerk at PW4's workplace. The Second Appellant later said to PW4: "*dengan barang kau macam tu, dua ratus je dia nak bagi untuk jamin kau*." The Second Appellant again asked who else could provide money, and threatened that PW4 and PW7 would be put in the lock-up. At no stage were PW4 or PW7 taken inside either police station for formal processing.

[13] The vehicle then proceeded to PW4's mother's house at Kampung Melayu Kangkar Pulai, arriving at about 3.00 am on 11.4.2018. The Fourth Appellant had suggested that PW4 tell his mother the money was needed because of an accident. PW4 went in and obtained money from his mother, who told him it was RM1,200.00. He re-entered the car and all of them returned to PW7's house at Kangkar Pulai, which is this is the scene of the Second Charge.

[14] At the compound of PW7's house, the First Appellant demanded the money. PW4 handed over what he had. After counting it, the First Appellant declared the amount to be RM1,500.00. The Second Appellant complained, saying "*aishh, kata RM7,000.00, ni RM1,500.00 sahaja*" and "*mana cukup RM1,500.00*". PW4 then asked about the RM100.00 that had been seized during his body search earlier. The Fourth Appellant took out the RM100.00 (which had been kept together with the drugs in the tin box) and handed it to the First Appellant. The First Appellant placed the total of RM1,600.00 into his sling bag. PW4 was certain that PW7 and the Third Appellant saw him hand over the money to the First Appellant. PW4 and PW7 were then released. Before leaving, the appellants warned PW4 and PW7 not to make trouble for them.

[15] After his release, PW4 went to work as usual at about 7.15 am on 11.4.2018. He consulted a friend named Lolok who advised him to report the matter to the MACC. That afternoon, before making the report, the First Appellant called PW4 on his telephone number 019-7111329 and asked whether he had enough money; he demanded the balance by 5 pm. PW4 lodged his MACC report (P22) at approximately 5.10 pm on 11.4.2018 as recorded by PW17. After PW4 returned to the MACC office, another call from the First Accused to PW4 was recorded. He was heard saying: "*macam mana duit tak cukup lagi ni, macam mana la aku nak jawab dengan pegawai atas*." Shortly thereafter, the Second Appellant called PW4 on his number 017- 7950600 and similarly asked for more money. This conversation was likewise recorded by the MACC.

[16] A MACC operation was set up to trap the Second Appellant. PW4 managed to obtain RM1,400.00. The designated meeting point was the restaurant referred to in the Third Charge at Taman Sri Pulai. On 12.4.2018 at about 12.15 am, the Second Appellant arrived alone at the restaurant in the same Honda Odyssey. He instructed

PW4 to get into the car. PW4 told him the money had been left with a friend at the restaurant. The Second Appellant was dissatisfied with this arrangement and did not agree to stop to collect it. Instead, he drove to the Kangkar Pulai Police Station with PW4. There, the Second Appellant spoke by telephone with the supposed friend, who was in fact an undercover MACC officer, and asked him to come to the station. While the Second Appellant and PW4 waited, a MACC team arrived and arrested him. The other three appellants were subsequently also arrested.

The Defence Cases

[17] All four appellants elected to give sworn testimony. The broad thrust of all four defences was that on the night of 10.4.2018, the First Appellant had received intelligence about a suspect named "Ahpet" who was involved in motorcycle thefts. After completing their respective shifts, the First, Third, and Fourth Appellants met at the First Appellant's home, and together with the Second Accused, they went to PW7's house for purposes of intelligence-gathering and a search, and found only a small quantity of suspected drugs on PW4. They denied that any bribe was solicited or received.

[18] The First Appellant (DW1) maintained that the visit to PW7's house was to investigate motorcycle theft. He denied soliciting RM7,000.00, claiming that any reference to money was about bail, not a bribe. He accepted that he wrote in his pocket book (ID21) certain particulars about PW4 as part of recording intelligence about motorcycle theft. He maintained that the money was never received by him.

[19] The Second Appellant (DW2) contended that he had been at the Bazar Karat in Johor Bahru on the evening of 10.4.2018 with his then-wife (DW5, Amalina binti Md Ali Asad) from about 7.30 pm to 9 pm; she corroborated this. He claimed to have driven to PW7's house that night at the First Appellant's invitation for intelligence purposes. He denied asking PW4 for money. He contended that when the RM7,000.00 was allegedly asked, he was the driver in the front of the car and could not hear conversations occurring in the rear seats. For the Third Charge, he claimed he went to the restaurant only because the First Appellant had instructed him to fetch PW4 for further questioning.

[20] The Third Appellant (DW3) denied any solicitation or receipt of gratification. He said that he had been at the First Appellant's house together with the Second and Fourth Appellants when the First Appellant returned from completing his sentry duty at the Kangkar Pulai Police Station at 11 pm on 10.4.2018. He accompanied them to PW7's house on what he understood to be an investigative task. He claimed not to have heard any discussion about money during the car journey because the atmosphere in the vehicle was noisy. He further contended that he had departed from the scene at approximately 2.30 to 3.00 am on 11.4.2018 to commence his next duty as sentry at the Kangkar Pulai Police Station, a fact he relied upon through a station diary entry (ID14, entry no. 2199 for 11.4.2018 at 0300hrs by "Koperal Azim 160546"), and that he was therefore not present when the RM1,600.00 was obtained at PW7's house at around 4.00 am.

[21] The Fourth Appellant (DW4) denied both the First and Second Charges. In respect of the Second Charge, he claimed he had left the group at about 3.00 am on 11.4.2018 to return home as his wife had telephoned him to say their young child was unwell. His wife (DW9) testified that he returned home between 3.00 am and 3.15 am.

The Findings of the Learned Sessions Court Judge

[22] At the close of the prosecution's case, the learned SCJ subjected the totality of the evidence to a maximum evaluation. As guided by the decision in *PP v Lee Hock Lai* [2004] 1 CLJ 57, this requires a proper and complete evaluation of all the evidence adduced, not a perfunctory or cursory appraisal, so as to determine whether each ingredient of each charge has been proved by credible evidence which, if unrebutted, would warrant a conviction. The corollary of this test, as affirmed by the Federal Court in *Balachandran v PP* [2005] 1 CLJ 85 and *PP v Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457, is that if the prosecution's evidence is sufficient to convict the accused were he to elect to remain silent, a prima facie case has been made out. Applying this standard, the learned SCJ found that the prosecution had adduced credible evidence establishing each ingredient of the First and Second Charges against all four appellants, and the Third Charge against the Second Appellant. He was accordingly satisfied to invoke the statutory presumption under section 50(1) of the MACC Act 2009, which provides:

> *"Where in any proceedings against any person for an offence 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 offence, unless the contrary is proved."*

[23] He informed the parties of the application of this presumption during the decision delivered at the close of the prosecution's case. A prima facie case was found to have been made out against the respective accused on the charges preferred against them, and they were called upon to enter their defences.

[24] At the close of the defence, the learned SCJ made a comprehensive assessment of the credibility and reliability of all witnesses. He found PW4 to be a credible and trustworthy witness with no reason whatsoever to fabricate his evidence against the accused. He rejected the contention advanced on behalf of the accused that PW4 and PW7 were unreliable by reason of their history of drug use, finding that contention to be speculative and wholly unsupported by any evidence. He likewise rejected the suggestion that both witnesses had concocted their accounts out of a desire for revenge, characterising that contention as inherently improbable and devoid of merit. He accepted PW4's account in its entirety and found, as a matter of fact, that the sum of RM7,000.00 had been corruptly solicited and that the sum of RM1,600.00 had been corruptly obtained as a bribe, and not as payment of bail as contended by the defence. On the question of common intention, the learned SCJ found that the offences were committed in furtherance of the common intention of all four accused within the meaning of section 34 of the Penal Code, which provides:

> *"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."*

[25] For the First Charge, he drew the inference of common intention from the fact that all four accused were in the car together with PW4 when the bribe of RM7,000.00 was corruptly solicited by the First Accused, finding that it was not incumbent on the prosecution to prove that each accused had individually made the same demand. For the Second Charge, he found that all four accused were present at PW7's house when the RM1,600.00 was corruptly obtained, and that all of them were participants in facilitating that criminal act. In particular, the learned SCJ found that the Fourth Accused was present on both occasions. As to the solicitation, he referred to paragraph 13 of PW4's written statement (WSSP4), in which the Fourth Accused had suggested that PW4 lie to his mother about an accident in order to obtain the bribe money. As to the obtaining, he referred to paragraph 16 of WSSP4, in which the Fourth Accused took out the RM100.00 that had been seized from PW4 and handed it to the First Accused so that a total of RM1,600.00 was obtained. The learned SCJ further observed that the Fourth Accused had not challenged PW4 in cross-examination on his presence at either occasion, and that PW7 had likewise not been challenged on this point. He accordingly found the defences of all four accused to be bare denials, afterthoughts, and recent inventions, which did not answer the real questions in controversy and were merely calculated to deflect from the prosecution's evidence.

[26] Having rejected the defences of all four accused, the learned SCJ turned to whether any of them had succeeded in rebutting the presumption under section 50(1) of the MACC Act 2009 on the balance of probabilities. He correctly observed that this burden was a heavier one than the mere casting of a reasonable doubt in the prosecution's case, and that it could not be discharged by bare denials, conjectures, afterthoughts, or recent inventions. He applied the principle stated by the Federal Court in *Mohd Khir Toyo v PP* [2015] 8 CLJ 796, that a presumption standing "unless the contrary is proved" must be rebutted by proof and not merely by a plausible explanation. He found that none of what any of the four accused alleged in their testimonies and written submissions constituted affirmative admissible evidence of the facts said to constitute their respective defences, and that accordingly none of them had discharged the burden imposed by section 50(1).

[27] At the conclusion of the trial, the learned SCJ found that each of the four accused had not only failed to raise a reasonable doubt in the prosecution's case but had equally failed to rebut the statutory presumption on the balance of probabilities. He was satisfied that the prosecution had proved its case beyond a reasonable doubt against the respective accused on the charges preferred against them and convicted them accordingly.

THE APPELLATE STANDARD

[28] These are first-instance appeals heard by way of rehearing under section 316 of the Criminal Procedure Code. The standard applicable is well-settled. On questions of fact and the credibility of witnesses, this Court accords significant deference to the findings of the trial judge who had the advantage of seeing and hearing the witnesses: *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] CLJ Rep 101. An appellate court will not interfere with findings of fact unless there is a demonstrable error, such as a failure to address a material contradiction, an unjustifiable rejection of evidence, or a misdirection that goes to the root of the conviction. On questions of law, correctness review applies.

ISSUES FOR DETERMINATION

[29] Having studied the grounds of appeal and the submissions of all parties, I distil the following issues for determination:

a) Issue 1: Whether the prosecution proved each element of the offences against all four appellants.

b) Issue 2: Whether the learned SCJ correctly applied the doctrine of common intention under section 34 of the Penal Code in convicting all four appellants on the First and Second Charges.

c) Issue 3: Whether, in the specific case of the Third Appellant, there was sufficient evidence of his participation to found a conviction based on common intention.

d) Issue 4: Whether the learned SCJ correctly applied the statutory presumption under section 50(1) of the MACC Act 2009 and correctly evaluated the defences.

e) Issue 5 (Second Appellant only): Whether the elements of the Third Charge (attempt to obtain) were made out.

f) Issue 6: Whether the sentences imposed were manifestly excessive.

LEGAL ANALYSIS

Elements of the Offences — General

[30] Section 16(a)(B) of the MACC Act 2009 makes it an offence for any person, by himself or in conjunction with any other person, to corruptly solicit or agree to receive, for himself or for any other person, any gratification as an inducement to or a reward for an officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned. Section 16 reads:

"16. Any person who by himself, or by or in conjunction with any other person —

(a) *corruptly solicits or receives or agrees to receive for himself or for any other person; or*

(b) *corruptly gives, promises or offers to any person whether for the benefit of that person or of another person,*

any gratification as an inducement to or a reward for, or otherwise on account of —

(A) *any person doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place; or*

(B) *any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned,*

commits an offence."

[31] Section 17(a) of the MACC Act 2009 makes it an offence for an agent to corruptly accept, obtain, or attempt to obtain, from any person, for himself or any other person, any gratification as an inducement or reward for doing or forbearing to do any act in relation to his principal's affairs. It reads:

"Any person commits an offence if —

(a) being an agent, he corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or a reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;"

[32] For the First Charge, the prosecution was required to prove:

a) that the accused corruptly solicited RM7,000.00;

b) that it was solicited as an inducement for the release of PW4 and PW7;

c) that the accused were officers of a public body who forbore to do something in respect of an actual matter concerning the public body; and

d) that the offence was committed in furtherance of the common intention of all four accused.

[33] For the Second Charge:

a) that the accused were agents;

b) that they corruptly obtained RM1,600.00;

c) that it was obtained as an inducement for forbearing to do an act in relation to their principal's affairs; and

d) that it was in furtherance of common intention.

[34] The learned SCJ addressed each element in his judgment, at paragraphs [37] to [110].
Element (i): Gratification corruptly solicited / obtained

[35] The primary witness for the prosecution on all three charges was PW4 (Usamah bin Ab Rahim). The learned SCJ, having had the advantage of seeing and hearing PW4 testify, conducted a maximum evaluation of his evidence at the close of the prosecution's case and concluded, at paragraph [44] of the Sessions Court judgment, that PW4 "had no reason to lie." He further found that PW4 "was a witness who was telling the truth as to what had happened to him" and that "His entire evidence was credible and cogent." The learned SCJ accepted the veracity and reliability of PW4's evidence in its entirety. I find no basis to disturb this assessment. PW4 was himself found in possession of drugs and therefore exposed to criminal liability; he had no apparent motive to fabricate allegations against the appellants, and the evidence he gave was consistent with the probabilities of the situation in which he found himself.

[36] The appellants mounted a broad attack on PW4's credibility on appeal, asserting variously that his evidence was uncorroborated, that he was a drug user, and that his written statement (WSSP4) had not been prepared by him personally. The learned SCJ addressed and rejected each of these contentions. On the question of credibility, the Court of Appeal in *Public Prosecutor v Mohd Bandar Shah bin Nordin & Anor* [2008] 4 MLJ 556 stated that "where the evidence of a witness accords with the probabilities of a case, it would be a serious misdirection on the part of the trial court to give it little or no weight on grounds of credibility." PW4's account accorded entirely with the probabilities of the case. I accept the learned SCJ's credibility findings and proceed to examine the substantive evidence on each charge.

[37] On the First Charge, the solicitation of RM7,000.00 was established by PW4's account of events in the motor vehicle bearing registration number SLB 4579 T on the night of 10.4.2018. PW4 testified, as recorded at paragraphs 8 and 9 of his written statement WSSP4, that while he was being transported from the Kangkar Pulai Police Station to the Gelang Patah Police Station, the First Appellant, who was seated in the same vehicle as all four accused, directed him: "*cari la RM7,000.00. Nanti RM1,000.00 untuk saya*." The solicitation was express and unambiguous. The learned SCJ, at paragraph [65] of his judgment, found that the first accused had made "a wrongful design to acquire a pecuniary gain" and that the solicitation was "not just for the first accused but for the rest of the accused as well," given the First Appellant's own statement to PW4 that RM1,000.00 of the RM7,000.00 was for himself personally.

[38] The legal significance of the word "inducement" in section 16(a)(B) of the MACC Act 2009 was fully analysed by the learned SCJ at paragraph [67], where he applied *PP v Datuk Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, in which the court explained:

> *"The word 'inducement' evidently refers to a future act. What is forbidden, generally speaking, is soliciting a gratification as an inducement to do any matter or transaction … The gravamen of the offence is soliciting a gratification as an inducement to do any official act or conduct. This need not be proved by explicit evidence but may be inferred from surrounding circumstances. Just as 'corruptly solicit' may be inferred from all the surrounding circumstances, … so can 'inducement' be inferred from acts or conduct from the relevant circumstances."*

[39] Applying that principle, the learned SCJ correctly found that the money was demanded so that the appellants would refrain from taking further action against PW4 and PW7 for possession of drugs. The purpose of the solicitation was plain from the circumstances: PW4 and PW7 had been detained, drugs had been found on PW4, and the appellants were the police officers responsible for them.

[40] The appellants contended, in both the Sessions Court and on appeal, that any reference to the sum of RM7,000.00 was for bail rather than a bribe. This contention was rejected by the learned SCJ at paragraph [45], and I agree with his reasoning. PW4 unequivocally denied that the money was requested for bail purposes. When

this suggestion was put to PW4 during cross-examination, "*Setuju dengan saya tujuan RM7,000.00 tersebut adalah bagi memudahkan urusan jaminan di balai kelak dan bukan untuk tujuan rasuah atau peras ugut?*", he replied: "*Tidak setuju*."

[41] The learned SCJ observed at paragraph [45] that the context rendered the bail explanation "improbable and illogical": neither PW4 nor PW7 was ever brought inside either police station for formal processing or investigation, and the First Appellant had explicitly stated that RM1,000.00 from the RM7,000.00 was for himself personally, a statement wholly inconsistent with the collection of bail monies, which are not retained by arresting officers. Moreover, as the learned SCJ found at paragraph [46], even the line of questioning adopted by counsel for the First and Fourth Appellants during the cross-examination of PW4 proceeded on the basis that RM7,000.00 had in fact been requested, the contest being only as to the purpose. I accept the learned SCJ's rejection of the bail defence as correct. The solicitation of RM7,000.00 on the night of 10.4.2018 was a corrupt solicitation within the meaning of section 16(a)(B) of the MACC Act 2009.

[42] On the Second Charge, the obtaining of the gratification amounting to RM1,600.00 was established by the sequence of events at the compound of PW7's house at approximately 4.00 am on 11.4.2018, as detailed at paragraph [21] of the Sessions Court judgment and paragraphs 16 of WSSP4. Before arriving at that location, the Fourth Appellant had suggested at paragraph 13 of WSSP4 that PW4 deceive his mother by telling her the money was needed because of a road accident, thus facilitating PW4's acquisition of funds from his mother. Upon the group's arrival at PW7's house, the First Appellant demanded the money. PW4 handed over the sum his mother had given him. The First Appellant counted it and declared the amount to be RM1,500.00, while PW4, who had been told by his mother that it was RM1,200.00 and had not counted it himself, was found by the learned SCJ to be the victim of his mother's likely miscalculation due to her poor eyesight.

[43] The Second Appellant, who was also present, expressed dissatisfaction, saying "*aishh, kata RM7,000.00, ni RM1,500.00 sahaja*" and "*mana cukup RM1,500.00*". PW4 then asked about the RM100.00 that had been seized from him during his body search earlier that night. The Fourth Appellant took out the RM100.00 which had been kept together with the drugs in a tin box, and handed it to the First Appellant. The First Appellant placed the total sum of RM1,600.00 in his sling bag. The learned SCJ found, at paragraphs [100]–[101], that the offence of corruptly obtaining the RM1,600.00 was proved, and I find no error in that conclusion.

[44] The appellants raised several challenges to the evidence on the obtaining. First, it was argued on behalf of the First and Fourth Appellants that PW4's mother was a material witness who ought to have been called to testify, and that her absence created a lacuna in the prosecution's case. The learned SCJ rejected this argument at paragraph [102], finding that PW4 had given a cogent explanation of the events and that there was no requirement to call his mother to testify to the same matters. This court agrees. As stated by the Privy Council in *Adel Muhammed El Dabbah v Attorney General for Palestine* [1944] AC 156, "The prosecutor has a discretion as to what witnesses to be called for the prosecution, and the Court will not interfere with the exercise of that discretion, unless it can be shown that the prosecutor has been influenced by some oblique motive." No such motive was established. PW4's mother was offered to the defence at the close of the prosecution's case; the defence declined to call her.

[45] Second, the First and Fourth Appellants submitted that there was no corroborating evidence, such as any recording or physical proof, to support PW4's account of the payment. This submission must be assessed against the principle, set out at section 134 of the Evidence Act 1950, that evidence is to be weighed and not counted. As the learned SCJ observed at paragraph [101], the real question was why PW4 would lie about the amount of money given by his mother or about what the First Appellant found after counting it. No satisfactory answer was offered. The amount of RM1,600.00 was never seriously challenged at trial as being incorrect. I am satisfied that the learned SCJ correctly found this element proved beyond reasonable doubt on the Second Charge.

Element (ii): Accused as officers of a public body

[46] The status of all four accused as police officers attached to IPD Iskandar Puteri was established conclusively by the section 55 certificates P1, P4, P7 and P10. Section 55 of the MACC Act 2009, under the heading Certificate of position or office held, provides:

> *"(1) A certificate issued by a principal or an officer on behalf of his principal shall be admissible in evidence in any proceedings against any person for any offence under this Act as prima facie proof that the person named in such certificate—*
>
> (a) *held the position, office or capacity as specified in such certificate and for such period as so specified; and*

(b) *received the emoluments as specified in such certificate.*

(2) A certificate issued under subsection (1) shall be prima facie proof that it was issued by the person purporting to issue it as principal or on behalf of the principal without proof of the authority of such person to issue it."

[47] Policemen of PDRM are officers of a public body under section 3 of the MACC Act 2009. The drugs found on PW4 were found at Kangkar Pulai, which fell under the jurisdiction of IPD Iskandar Puteri. No challenge was mounted on this element.

[48] The status of all four accused as police officers attached to IPD Iskandar Puteri was established conclusively by the section 55 certificates P1, P4, P7 and P10. Policemen of PDRM are officers of a public body under section 3 of the MACC Act 2009. The drugs found on PW4 were found at Kangkar Pulai, which fell under the jurisdiction of IPD Iskandar Puteri. No challenge was mounted on this element.

Element (iii): Inducement for forbearing in the principal's affairs

[49] The statutory requirement under section 16(a)(B) of the MACC Act 2009 is that the gratification be solicited as an inducement for an officer of a public body to do or to forbear from doing anything in respect of a matter in which the public body is concerned; and under section 17(a), that the gratification be obtained as an inducement for an agent to forbear from doing an act in relation to his principal's affairs. The learned SCJ addressed these requirements at paragraphs [66]–[75] and [104]–[108] of the Sessions Court judgment. At paragraph [67], the learned SCJ adopted the explanation of the term "inducement" as articulated in *PP v Datuk Harun bin Haji Idris (No 2)* [supra], where the court explained that inducement refers to a gratification solicited with a view to a future act. In essence, the offence concerns the solicitation of gratification intended to influence the performance of an official act or conduct. Such intention need not be proved by explicit evidence and may be inferred from the surrounding circumstances.

[50] On the facts, the purpose of the bribe was never in doubt. When PW4 was being driven from the Kangkar Pulai Police Station towards the Gelang Patah Police Station on the night of 10.4.2018, the First Appellant said: "*cari la RM7,000.00. Nanti RM1,000.00 untuk saya*". PW4 understood plainly that the payment of that sum would result in the police taking no action against him for the drugs found in his bag. The inducement for the solicited gratification, namely the forbearance from official enforcement action, was therefore established from the very words and conduct of the First Appellant, without the need to look beyond the surrounding circumstances. The defence of the appellants was that any reference to money was for the purposes of bail and not a corrupt payment. The learned SCJ rejected this entirely at paragraph [68], reasoning that it was neither probable nor logical that the RM7,000.00 was for bail, noting: "it was not uncommon in corruption cases to label such gratification as bail or a loan or any other deceptive description." This finding was amply supported by PW4's own unequivocal rejection, during cross- examination, of the suggestion that the RM7,000.00 was for bail purposes.

[51] As for the element of forbearance, the learned SCJ found at paragraph [106] that "to forbear means to refrain from doing something or from enforcing what was supposed to be done." The evidence irrefutably demonstrated that forbearance in fact followed the payment of the gratification. PW4 and PW7 were transported to the compound of the Kangkar Pulai Police Station and then to the vicinity of the Gelang Patah Police Station, yet at no stage were they taken inside either police station for formal processing. The evidence of PW2 and PW3, the supervisors of the appellants, established the applicable rules and regulations: all arrested persons were required to be brought to the police station and a police report was to be lodged, and only a senior police officer of the rank of Inspector and above was authorised to enter a dwelling for purposes of investigation and arrest. None of the appellants was a senior police officer.

[52] No police report was ever lodged by any of them following the discovery of drugs in PW4's bag; this omission was, in the words of the learned SCJ at paragraph [106], "clearly adverse against them." Ultimately, PW4 and PW7 were released without formal arrest and without any investigation being commenced by any investigating officer. The forbearance from official enforcement duty was accordingly proved beyond reasonable doubt. The Third Appellant's attempt, through his witness DW6, a retired senior police officer and former Head of the Narcotics Crimes Investigation Division at IPD Iskandar Puteri, to suggest that an arrest could legitimately be discontinued in exchange for information concerning a more serious offence, availed him nothing. DW6 testified unequivocally: "*Tidak ada, semua tangkapan mesti dibuat laporan polis dan diserahkan kepada pegawai penyiasat bahagian-bahagian yang tertentu mengikut kesalahan*" and "*Kalau tangkapan telah dibuat walaupun orang itu nak bagi maklumat, kita tidak ada prosedur untuk tawar menawar*." The learned SCJ observed at paragraph [172] that DW6's evidence, far from assisting the Third Appellant, was adverse to his defence and repudiated any suggestion that there existed a permissible procedure for bargaining with information about more serious offences.

[53] The learned SCJ further found that the forbearance constituted an act "in relation to their principal's affairs" within the meaning of section 17(a) of the MACC Act 2009. The principal of each appellant was PDRM, which was a public body. The appellants were attached to IPD Iskandar Puteri and the drugs were found at Kangkar Pulai, which fell within the jurisdiction of that headquarters. The enforcement of drug laws was plainly part of the PDRM's affairs. Drawing on the definition of "principal" in section 3 of the Act, which provides that "principal" includes, "in the case of any person serving in or under a public body, the public body," the learned SCJ held at paragraph that all the appellants had corruptly obtained a bribe to forbear from doing an act in relation to their principal's affairs, namely the PDRM's obligation to enforce the law against PW4 for drug possession. The learned SCJ further noted, in support, *Jeffry Abdullah lwn Pendakwa Raya* [2019] 1 LNS 1231 at paragraphs 21–28 (Court of Appeal).

[54] The appellants had no answer to this element. None challenged their status as officers of the PDRM; none disputed that the PDRM was a public body or that drug enforcement fell within its remit. Their defences rested entirely on the contention that the money was for bail and that they had attended PW7's house for purposes of intelligence-gathering on motorcycle theft, both of which were rejected for the reasons canvassed above. I find no error, whether of fact or of law, in the learned SCJ's analysis and conclusion on this element. The prosecution proved, beyond reasonable doubt, that the gratification of RM7,000.00 was solicited and that the sum of RM1,600.00 was obtained as an inducement for the appellants to forbear from performing their lawful duties as officers of the PDRM in relation to the drugs found on PW4.

Common Intention — Principles (Issue 2)

[55] Section 34 of the Penal Code provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. As the learned SCJ correctly stated at paragraph [76], section 34 is a rule of evidence and does not create a substantive offence. Common intention may be inferred from the facts and the surrounding circumstances, together with the conduct of the accused: *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [supra].

[56] The prosecution is not required to prove that each accused must have done exactly and equally what the others did. What must be shown is that the criminal act was done by one of the accused persons in furtherance of the common intention of all: *Mahbub Shah v Emperor* 1945 AIR OC 118. As the Federal Court held in *Farose Tamure Mohamad Khan v Public Prosecutor & Other Appeals* [2016] 9 CLJ 769:

> *"[65] … it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. As long as there is a common intention to commit a criminal act, which resulted in the commission of a crime actually committed,* s. 34 *can operate against all persons involved in the commission of the actual crime."*

[57] Participation is an essential element. As stated in *Shamsudin Abas & Anor v Public Prosecutor* [2020] 1 LNS 1004, citing *Om Prakash v State AIR* [1956] All 241, "presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation." Every person charged with the aid of section 34 "must in some form or the other participate in the offence in order to make him liable thereunder. He must have done something, however slight, or conducted himself in some manner, however nebulous whether by doing an act or by omitting to do an act so as to indicate that he was a participant in the offence and guilty associate in it."

[58] Against this backdrop, I turn to examine whether section 34 was correctly applied to each appellant.

The First Appellant (OKT1 - Mohamad Zulhisham bin Zulkafli) - Issues 2, 4

[59] The role of the First Appellant in the commission of both the First and Second Charges was not peripheral. He was the active instigator and primary actor throughout. It was he who rushed out and seized PW4 on arrival at PW7's house on the night of 10.4.2018. It was he who found the drugs in PW4's bag. When PW7 asked to settle the matter, it was he who replied "*nak kira macam mana*?" It was he who, in the car during the journey from PW7's house, first proposed the figure of RM7,000.00, saying "*cari la RM7,000.00. Nanti RM1,000.00 untuk saya*." In doing so, he made plain that the solicitation was not merely for himself but on behalf of all present. That evidence was given by PW4 and corroborated by PW7, who confirmed in paragraph 11 of his written statement (WSSP7) that the policeman asked for RM7,000.00 and that RM1,000.00 was for that policeman.

[60] The learned SCJ at paragraph [65] of the Sessions Court judgment found that the solicitation by the First Appellant "was not just for the first accused but for the rest of the accused as well" and that "there was no doubt in my mind that the first accused knew what he was doing was wrong and it was moved by an evil intention to obtain the bribe." After PW4's release, it was the First Appellant who called PW4 the following day and demanded the

balance of the money, saying "*macam mana duit tak cukup lagi ni, macam mana la aku nak jawab dengan pegawai atas*." It was also he who, at PW7's house in the early hours of 11.4.2018, demanded and received the RM1,600.00 from PW4, which he ultimately retained in his sling bag. The entirety of the operative conduct on both charges was anchored in the First Appellant's own acts.

[61] The prosecution's case against the First Appellant was further corroborated through the telephone recording transcribed as exhibit P23. The telephone conversation between PW4 and the First Appellant was recorded on 11.4.2018 at about 8 pm at the Johor MACC's office and transcribed by MACC officer PW6 onto a cassette tape, P24. The learned SCJ at paragraph [51] of the Sessions Court judgment found that the recording was properly played and heard in court, that the First Appellant did not challenge its authenticity, and that he "did not even allege the transcript was not the conversation recorded between him and PW4."

[62] It was argued by the First and Fourth Appellants that P23 was inadmissible as evidence due to the prosecution's failure to obtain authorisation under section 43(3) of the MACC Act 2009, which provides:

> *"An authorization by the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor under subsection (1) may be given orally or in writing; but if an oral authorization is given, the Public Prosecutor or the officer of the Commission of the rank of the Commissioner or above as authorized by the Public Prosecutor shall, as soon as practicable, reduce the authorization into writing."*

[63] The learned SCJ rejected this argument. At paragraphs [56]–[58] of the Sessions Court judgment, the learned SCJ held, applying the decision of the Court of Appeal in *Azahar bin Haji Abdul Aziz v Public Prosecutor* [2019] 1 LNS 2032, that the recording was not an intercepted communication within the meaning of section 43(1) of the Act; it was a recording made with the full knowledge, consent and cooperation of PW4, as stated in paragraph 21 of WSSP4. Since the First Appellant was the only participant who did not know of the recording, the transaction did not fall within the prohibition against interception.

[64] The learned SCJ was correct to admit P23. At paragraph [52], he correctly observed that, though the amount of RM7,000.00 was not expressly mentioned in the transcript, the conversation had to be assessed in its proper context, namely, that it took place after the First Appellant had already demanded the bribe and was directed at pressing PW4 for the balance outstanding. The implicit meaning was apparent. I affirm the learned SCJ's finding in this regard.

[65] The defence of the First Appellant, that the visit to PW7's house was for legitimate intelligence purposes concerning stolen motorcycles and that any mention of money related merely to bail, was comprehensively rejected by the learned SCJ. In paragraphs 2 and 3 of his written statement (WSSD1), the First Appellant alleged that on the night of 10.4.2018 he had obtained intelligence about a suspect involved in motorcycle theft and that the appellants visited PW7's house to gather intelligence and conduct a raid. The learned SCJ at paragraph [134] of the Sessions Court judgment held that this contention was "an afterthought and a recent invention," relying on *Megat Halim Megat Omar v PP* [2009] 1 CLJ 154 and *DA Duncan v Public Prosecutor* [1980] 1 LNS 12. The basis for this finding was that the contention had never been put to the supervisory prosecution witnesses PW2 and PW3, who as superior officers of the First Appellant were the very witnesses who could have shed light on whether there was an actual and proper investigation into motorcycle theft. The failure to challenge them on this point permitted their testimony to stand unchallenged.

[66] The learned SCJ was further entitled to note, at paragraph [136], that no police report was made by any of the accused if there had been a genuine investigation, no senior officer was present, and no credible basis was advanced for departing from the standard requirements of the police force. The First Appellant also alleged in paragraphs 4 and 5 of WSSD1 that PW4 had admitted keeping drugs at his mother's house and that the visit there was for investigative purposes. The learned SCJ at paragraph [137] rejected this as equally an afterthought, since it was also never put to PW4, who had testified that he was brought to his mother's house to borrow money to pay the bribe. These findings are unassailable on the evidence, and I affirm them.

[67] The pocket book (ID21), which was a copy of the First Appellant's police pocket book, formed a separate ground of contention. During the defence case, the First Appellant acknowledged that on the last page of ID21 he had written PW4's name, identity card number, address, motorcycle number plate, date and telephone numbers. He maintained these particulars were recorded to locate a stolen motorcycle. The copy had been delivered to the First Appellant prior to trial pursuant to section 51A of the Criminal Procedure Code, which provides:

> *"(1) The prosecution shall before the commencement of the trial deliver to the accused the following documents:*

(a) *a copy of the information made under* section 107 *relating to the commission of the offence to which the accused is charged, if any;*

(b) *a copy of any document which would be tendered as part of the evidence for the prosecution; and*

(c) *a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.*

(2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.

(3) A document shall not be inadmissible in evidence merely because of non-compliance with subsection (1).

(4) The Court may exclude any document delivered after the commencement of the trial if it is shown that such delivery was so done deliberately and in bad faith.

(5) Where a document is delivered to the accused after the commencement of the trial, the Court shall allow the accused—

(a) *a reasonable time to examine the document; and*

(b) *to recall or re-summon and examine any witness in relation to the document."*

[68] The copy having been furnished under section 51A(1)(b) of the Criminal Procedure Code, which requires the prosecution to deliver to the accused, before the commencement of the trial, "a copy of any document which would be tendered as part of the evidence for the prosecution", the prosecuting officers chose not to tender the original pocket book as evidence during the trial, despite having initially indicated that it would form part of the prosecution's evidence. Counsel for the First Appellant applied to the court under section 51A for an order compelling the prosecution to produce the original pocket book. The learned SCJ at paragraph [140] disallowed the application, finding no basis in that provision for such an order. Section 51A confers no power on the court to compel the prosecution to tender a document it has elected not to adduce; it is a provision regulating pre-trial disclosure to the accused, not a mechanism for compelling the production of evidence.

[69] A further application was made under nsection 51 of the Criminal Procedure Code. The learned SCJ at paragraph [141] rejected this as well, holding that since the application was made after the commencement of trial, the rule of relevancy had to be strictly applied and the issue of relevancy had not been submitted or argued by the First Appellant. In any event, the learned SCJ at paragraph [142] proceeded to consider the writings in the pocket book for their potential exculpatory effect and found them to have none. He held:

"Even if ID21 was admitted as evidence and marked as P21, I did not think that the writings in the pocketbook alone could exonerate the first accused from all the ingredients of the offences that were proved by the prosecution. In my view, the writings failed to cast a reasonable doubt to support his afterthought defence that he was gathering intelligence for the theft of motorcycles…."

[70] Taken together with the overwhelming evidence of active solicitation and receipt of gratification, the pocket book entries were at most a neutral document incapable of displacing the prosecution's case. I agree entirely with this analysis.

[71] The First Appellant further argued that the prosecution had not discharged the burden of proving that PW4 and PW7 were "detained" in respect of a drug offence at the material time. This submission is unmeritorious. The word "detained" in the context of the charge is not a technical legal term requiring formal arrest under a specific provision; it refers to the factual restraint exercised over PW4 and PW7 by the appellants throughout the night. That restraint is established beyond doubt on the evidence: their hands were tied, they were driven from location to location across several hours, and they were subjected to repeated threats of formal arrest at a police station. The factual circumstances constituted a plain deprivation of liberty. The submission that the charge required proof of a formal arrest for drug possession is without basis in the language of the charge or in the authorities, and the learned SCJ was correct to reject it.

[72] The learned SCJ correctly applied the presumption under section 50(1) of the MACC Act 2009. The foundational facts triggering the presumption were established: the gratification of RM7,000.00 was solicited on the night of 10.4.2018; it was agreed to be received; and the sum of RM1,600.00 was subsequently obtained in the early hours of 11.4.2018. The presumption accordingly arose that the gratification was corruptly solicited and

obtained as an inducement. The First Appellant's bare denial and afterthought defence did not constitute affirmative admissible evidence capable of rebutting the presumption on the balance of probabilities.

[73] In *Mohd Khir Toyo v PP* [supra], the Federal Court observed:

> *"[105] A presumption stands 'unless the contrary is proved'. 'The words "unless the contrary is proved" mean that the presumption raised ... has to be rebutted by proof and not by mere explanation which may be merely plausible ..."*

[74] The distinction between the duty to cast a reasonable doubt in the prosecution's case and the heavier duty to prove a defence on the balance of probabilities was stated with precision by the learned SCJ at paragraph [192], citing the Court of Appeal in *Abdul Aziz Miew Yiong v PP* [2014] 1 LNS 1875, where Abdul Rahman Sebli JCA (as he then was) opined:

> *"In law there is a distinction between the duty to merely cast a reasonable doubt in the prosecution case and the duty to prove a defence on the balance of probabilities. In the former case all that the accused needs to do to entitle him to an acquittal is to cast a reasonable doubt in the trial judge's mind as to his guilt ... He has no duty to prove or disprove anything whereas in the latter case affirmative admissible evidence of the facts constituting the defence must be established, failing which he will be convicted of the offence charged."*

[75] The First Appellant adduced none. His testimony consisted of bare denials, conjectures, and a recent invention. His case was further characterised by his concession under cross-examination that he had made no record in the pocket book of any search for drugs or of any formal action taken. The learned SCJ at paragraph [193] found that nothing adduced by the defence could be accepted as proof of affirmative admissible evidence, and that the First Appellant had failed to rebut the presumption on the balance of probabilities. I am satisfied that the learned SCJ correctly directed his mind to the applicable standard and applied it with precision.

[76] The appeals of the First Appellant are accordingly dismissed. His convictions on the First Charge under section 16(a)(B) of the MACC Act 2009 read with section 34 of the Penal Code, and on the Second Charge under section 17(a) of the MACC Act 2009 read with section 34 of the Penal Code, are affirmed. The sentences imposed by the Sessions Court on 13.2.2025 are also affirmed.

The Second Appellant (OKT2 - Mohd Shahir bin Ahmad Dewi) - Issues 2, 4, 5

[77] The Second Appellant's appeal raises the following specific contentions: (a) that, as the driver of the Honda Odyssey (registration SLB 4579T), he was unable to hear the solicitation that took place in the rear of the vehicle; (b) that there was no evidence he had agreed to receive the RM7,000.00; (c) that the evidence of DW5 placed him at the Bazar Karat in Johor Bahru at the relevant time on the evening of 10.4.2018, thereby raising a reasonable doubt as to his participation in the events of that night; and (d) that the elements of the Third Charge, involving an attempt to obtain RM1,400.00, were not proved. These contentions have been carefully examined against the totality of the evidence and are, for the reasons that follow, rejected.

[78] On the First and Second Charges, the prosecution's case against the Second Appellant rested not merely upon the doctrine of common intention under section 34 of the Penal Code, but upon his own specific acts of participation which established individual liability. The sequence of his conduct across the night of 10.4.2018 and into the early hours of 11.4.2018 discloses sustained and active involvement at each material stage of the corrupt scheme. Upon arriving at PW7's house, it was the Second Appellant who, after being called by the First Appellant to observe the discovery of drugs, questioned PW4 and PW7 at length and threatened to take PW4, PW7, and the family members to the police station.

[79] During the subsequent drive towards the Gelang Patah Police Station, it was the Second Appellant who took PW4's telephone from him. The Second Appellant then took the telephone and spoke directly to a clerk at PW4's workplace, identified in PW4's evidence as "Li", and thereafter told PW4: "*dengan barang kau macam tu, dua ratus je dia nak bagi untuk jamin kau*." He further pressed PW4 as to who else could provide money, and reinforced the threat of detention: PW4 and PW7 would be placed in the lock-up if the sum demanded was not forthcoming. These were not the acts of a bystander or a driver oblivious to the proceedings around him; they were the acts of a participant who had insinuated himself into the solicitation.

[80] The Second Appellant's active involvement continued when the vehicle proceeded to PW4's mother's house at Kampung Melayu Kangkar Pulai, arriving at approximately 3.00 am on 11.4.2018. When PW4 suggested to the appellants that his mother could only manage RM1,000.00, it was the First Appellant who responded immediately

with "*seribu je*", and who then sought to press the point further by adding: "*aku nak tolong korang ni, tapi korang ni macam tak nak tolong diri sendiri, macam mana aku nak jawab dengan pegawai aku, kurang-kurang separuh*."

[81] This remark by the First Appellant, in its candour, is of particular significance. He invoked his accountability to a superior officer as justification for the minimum acceptable sum, acknowledging not only his personal stake in the transaction but also a pre-existing understanding of what was to be collected and to whom it was to be accounted, an understanding the Second Accused clearly shared. At PW7's house, when the bribe was ultimately received, the Second Appellant expressed his dissatisfaction openly upon being told the collected amount was RM1,500.00: "*aishh, kata RM7,000.00, ni RM1,500.00 sahaja*" and "*mana cukup RM1,500.00*."

[82] Each of these statements, considered individually or collectively, constitutes positive evidence of the Second Appellant's corrupt solicitation and obtaining, sufficient to establish his liability under sections 16(a)(B) and 17(a) of the MACC Act 2009 by his own acts, wholly apart from the operation of section 34.

[83] The argument that the Second Appellant, seated in the driver's position at the front of the vehicle, could not hear the solicitation of RM7,000.00 which took place in the rear is not borne out by the evidence and was rightly rejected by the learned SCJ. PW4 confirmed under cross-examination that the Second Appellant was driving when the First Appellant uttered the words concerning RM7,000.00, and conceded that, from his own vantage point in the rear of the vehicle, he could not personally confirm that the Second Appellant heard those specific words. Counsel for the Second Appellant further put to PW7 in cross-examination that the car radio had been switched on and that both windows on the driver's and front passenger's sides were open, to which PW7 responded affirmatively, stating that the radio was on, albeit at low volume ("*ada tapi slow*"), and that both front windows were open.

[84] Counsel then pressed the point that the interior of the vehicle was consequently rather noisy ("*agak bising*") and that the driver must therefore have been unable to hear the rear conversation. PW7's response was unequivocal: "*Tidak setuju*." Thus, even on PW7's own account of the physical conditions inside the vehicle, the suggestion that the Second Appellant was insulated from the conversations in the rear was expressly rejected by that witness. In any event, this argument must be assessed in its proper evidentiary context: the overwhelming body of evidence, as set out above, demonstrates that the Second Appellant was an active and knowing participant in the corrupt scheme from the outset, well before the moment of the RM7,000.00 solicitation in the car. Mere physical separation from a single moment in a continuous course of conduct does not negate participation in that conduct. As the Federal Court observed in *Krishna Rao a/l Gurumurthi v Public Prosecutor & Another Appeal* [2009] 3 MLJ 643, a case decided by the Federal Court on the application of section 34 of the Penal Code:

> *"the section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act."*

[85] The Second Appellant called his then-wife, DW5 (Amalina binti Mohd Ali Asad), to testify on his behalf. The purpose of this evidence was, as the learned SCJ correctly noted at paragraph [167] of the Sessions Court judgment, to support the contention that the Second Appellant had been innocuously occupied at the Bazar Karat in Johor Bahru on the evening of 10.4.2018 before being summoned by the First Appellant for what he claimed was a legitimate intelligence-gathering exercise. DW5 testified that on that evening she and the Second Appellant were at the bazaar from approximately 7.30 pm to 9.00 pm, and that during this time the Second Appellant received a telephone call from a friend, told her that his friend needed assistance, and thereafter drove her home before going out.

[86] The learned SCJ addressed this evidence at paragraphs [165]–[168] of the judgment. Having considered it carefully, the learned SCJ found that DW5's testimony did not contradict the prosecution's case in any material way: it did no more than establish that the Second Appellant was at the Bazar Karat that evening and subsequently left at a friend's request. It said nothing whatsoever about what the Second Appellant did after leaving DW5, and threw no light on whether he was or was not involved in the corrupt conduct that followed. The further consideration that DW5 had been divorced from the Second Appellant in 2022, some four years after the events of 10.4.2018 to which she deposed, was a matter the learned SCJ was entitled to take into account in assessing the weight to be accorded to her evidence. I am satisfied that the learned SCJ's evaluation of DW5's testimony was correct, and that DW5's evidence did not raise a reasonable doubt as to the Second Appellant's guilt.

[87] The Third Charge concerns events on 12.4.2018. After his release together with PW7 in the early hours of 11.4.2018, PW4 consulted a friend and subsequently lodged a report with the MACC at approximately 5.10 pm on 11.4.2018. Earlier that same afternoon, the First Appellant had already called PW4 demanding the balance of the

sum outstanding. Shortly thereafter, the Second Appellant separately telephoned PW4 on the number 017-7950600, a call which was recorded by the MACC, and likewise asked for more money.

[88] A MACC operation was duly set up. PW4 obtained the sum of RM1,400.00 as trap money. The designated meeting point was a mamak restaurant at Taman Sri Pulai. On 12.4.2018 at approximately 12.15 am, the Second Appellant arrived alone at the restaurant driving the same Honda Odyssey as before. He did not enter the restaurant. Instead, he directed PW4 to get into the vehicle; PW4 complied. Once inside the car, the Second Appellant immediately asked where the money was. PW4 replied that he had left it with a friend at the restaurant. The Second Appellant was dissatisfied with this and made plain that he did not know PW4's friend, meaning he was not prepared to stop at the restaurant and collect the sum from an unknown person.

[89] He drove instead to the Kangkar Pulai Police Station. There, after PW4 telephoned the supposed friend (who was in fact an undercover MACC officer), the Second Appellant himself spoke by telephone to that officer and asked him to come to the station. While the two were waiting, a MACC team arrived and the Second Appellant was arrested. The other three appellants were subsequently arrested as well.

[90] On the legal analysis of the Third Charge, the learned SCJ correctly identified the controlling authorities at paragraphs [113]–[116] of the Sessions Court judgment. In *Thiangiah & Anor v PP* [1977] 1 MLJ 79, the High Court articulated the four stages of a criminal act, namely intention, preparation, attempt, and commission, and adopted the definition of Sir James Fitzjames Stephen, the "Great Reformer" of the Indian penal Code:

> *"An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted."*

[91] The further test for distinguishing preparation from attempt was stated in *Mohd Ali Jaafar v PP* [1998] 4 CLJ Supp 208, where the High Court cited the Law of Crimes by Ratanlal (24th edn, p. 2523) as follows:

> *"But where the thing done is such as, if not prevented by an extraneous cause, would fructify into a commission of the offence, it would amount to an attempt to commit an offence."*

[92] Applying this to the facts, the learned SCJ found, and I concur, that by the time of his arrest the Second Appellant had gone far beyond preparation. He had agreed on the sum of RM1,400.00 with PW4; driven alone to the designated rendezvous at midnight; instructed PW4 into the vehicle; inquired of the whereabouts of the money; driven with PW4 to the Kangkar Pulai Police Station; and then personally contacted the supposed money-keeper by telephone requesting him to come and deliver the sum. The sole reason the gratification was not physically received was the extraneous interruption of the MACC operation, which had ensured that the trap money remained with an undercover officer at the restaurant. As the learned SCJ correctly concluded at paragraph [116], "It had certainly gone beyond the stage of preparation. By his conduct in such a situation, the second accused had done what was required in his attempt to obtain the bribe if not for the intervening interruption by the MACC." The Second Appellant's claim that he attended the restaurant at the First Appellant's behest for an entirely legitimate purpose was never put to PW4 in cross-examination and was accordingly rejected as an afterthought and recent invention: *AEG Carapiet v AYD Derderian AIR* 1961 Cal. 359, a principle applied by the learned SCJ at paragraph [135] of the Sessions Court judgment in assessing the defences generally.

[93] The Second Appellant's appeals are accordingly dismissed. His convictions on all three charges, namely the First Charge under section 16(a)(B) of the MACC Act 2009 read with section 34 of the Penal Code, the Second Charge under section 17(a) of the MACC Act 2009 read with section 34 of the Penal Code, and the Third Charge under section 17(a) of the MACC Act 2009, are affirmed.

The Fourth Appellant (OKT4 - Mohamed Syukur bin Ghulam Mohamed) - Issues 2, 4

[94] The Fourth Appellant raises two principal contentions on appeal. First, he submits that the learned SCJ failed to properly evaluate his alibi defence, namely that he had returned home between 3.00 am and 3.15 am on 11.04.2018, before the RM1,600.00 was allegedly obtained at about 4.00 am. Second, he contends that he was not present when the RM7,000.00 was solicited on the journey to the Gelang Patah Police Station, and that his presence at PW7's house earlier in the night does not, without more, establish the common intention required under section 34 of the Penal Code. It is further submitted on his behalf that the learned SCJ erred in failing to inform him of the requirements for a formal alibi notice under section 402A of the Criminal Procedure Code before rejecting his alibi, and that any absence of such a notice should not have been held against him. These contentions have been carefully considered and, for the reasons that follow, they are rejected.

[95] On the First Charge, the prosecution's case against the Fourth Appellant was cogent and direct. PW4 testified in his written statement (WSSP4) that all four accused, including the Fourth Appellant, were present in the Honda Odyssey during the journey from the Kangkar Pulai Police Station towards the Gelang Patah Police Station, during which the First Appellant solicited a bribe of RM7,000.00. This is established by paragraphs 8 and 9 of WSSP4. The Sessions Court's narrative at paragraph [18] of the judgment records that it was on this journey that the First Appellant said "*cari la RM7,000.00*", adding "*nanti RM1,000.00 untuk saya*." PW4 understood that payment was to prevent police action on the drugs found on him. The Fourth Appellant was present in that vehicle throughout. He was not a peripheral figure who had wandered into the scene; from the outset, as confirmed in paragraph 8 of WSSP4, he had been the officer who conducted a body search of PW4 at PW7's house. The Fourth Appellant's participation in the unfolding events was continuous and not a matter of happenstance.

[96] Beyond mere presence in the vehicle, the evidence established that the Fourth Appellant played an active role in facilitating the extraction of money from PW4. The Sessions Court found at paragraph [161] that, in paragraph 13 of WSSP4, "it was the fourth accused who suggested that PW4 lied to his mother about an accident to obtain the bribe." This is corroborated by the narrative at paragraph [20] of the Sessions Court judgment, which records that the Fourth Appellant suggested PW4 inform his mother that the money was needed because of an accident involving PW4. This suggestion, calculated to provide PW4 with a pretext to extract money from his mother under false pretences, was not the conduct of a passive observer. It was an act of deliberate facilitation of the corrupt scheme. The Fourth Appellant advanced no challenge to this evidence when PW4 testified. He did not put to PW4 that he had not been present during the solicitation, nor that he had made no such suggestion. The learned SCJ found, at paragraph [161], that this failure was fatal to his later denial. This approach is consistent with the principle stated by the Federal Court in *Wong Swee Chin v Public Prosecutor* [1980] 1 LNS 138, where Raja Azlan Shah CJ (as His Royal Highness then was) stated: "there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony." The Fourth Appellant's silence at the material juncture rendered his subsequent denial untenable.

[97] On the Second Charge, the evidence was equally clear. PW4 testified in paragraph 16 of WSSP4 that the Fourth Appellant was present at the compound of PW7's house when the RM1,600.00 was obtained. More significantly, it was the Fourth Appellant himself who retrieved the RM100.00 that had been seized from PW4 during the earlier body search and handed it to the First Appellant, thereby bringing the total gratification to RM1,600.00. This is recorded both in paragraph [21] of the Sessions Court's narrative, which states that "then the fourth accused took out RM100.00 that was seized during the body search and gave it to the first accused", and in the learned SCJ's findings at paragraph [161], where he noted that "it was the fourth accused who took out the RM100.00 that was seized from PW4 and gave the money to the first accused so that the bribe obtained amounted to RM1,600.00." This single, positive act of retrieving and transferring the seized money placed the Fourth Appellant squarely within the commission of the second offence. As with the First Charge, neither PW4 nor PW7 was challenged in cross-examination on the Fourth Appellant's presence or his act of handing over the RM100.00. Their evidence on these critical matters therefore stood unchallenged.

[98] The Fourth Appellant testified through a written defence statement (WSDW4). In the first paragraph of WSDW4, he denied having solicited the RM7,000.00 or having obtained the gratification of RM1,600.00 from PW4 or PW7. In the second and third paragraphs, he stated that he had been together with the other accused at the First Appellant's house after finishing work, and that all of them subsequently went to PW7's house to conduct a raid in connection with a motorcycle theft investigation. In paragraph 11 of WSDW4, he firmly denied both charges, asserting that he had not been with PW4 and PW7 on either occasion when the bribe was solicited and obtained. The learned SCJ, having carefully noted these denials at paragraphs [158]–[160] of his judgment, then posed the dispositive question at paragraph [160]: was this argument put to PW4 and PW7 during the prosecution phase? The answer, as found at paragraphs [161] and [162], was that it was not. The bare denial in the defence statement, advanced for the first time at the defence stage, could not displace the positive prosecution evidence that had been left unchallenged.

[99] The alibi defence advanced through the evidence of DW9 was similarly unavailing. The learned SCJ found at paragraph [162] that the Fourth Appellant had failed to forward any formal defence of alibi under section 402A of the Criminal Procedure Code in support of his assertion that he was elsewhere when the bribe was solicited and obtained. The submission on appeal that the learned SCJ ought to have informed the Fourth Accused of this requirement is noted, as section 402A(1) of the Criminal Procedure Code does place a duty upon the court to inform the accused of his right to put forward a defence of alibi. However, any such omission by the court does not salvage his defence. More fundamentally, the Fourth Appellant never put to either PW4 or PW7, during cross-examination, that he had not been present at the material times. The learned SCJ recorded at paragraph [162] that

"during his cross-examination, the fourth accused never challenged or put to PW7 that he was not present when the bribe was solicited and afterwards obtained by the policemen." In the absence of any challenge to the testimony of PW4 and PW7 during the prosecution phase, the account now sought to be advanced through DW9 could not be treated as a credible answer to the prosecution case.

[100] DW9, the wife of the Fourth Appellant, testified that on 11.04.2018 the Fourth Appellant had returned home between 3.00 am and 3.15 am. The learned SCJ recorded at paragraph [184] that "that was the only important evidence in her short testimony." Having considered this evidence, the learned SCJ found at paragraphs [185]–[186] that the Fourth Appellant had never challenged PW4 on his absence at the scene of the second offence, that PW4's evidence in paragraph 16 of WSSP4 placed the Fourth Appellant at the compound of PW7's house and positively identified him as the person who handed over the RM100.00, and that the failure to challenge PW7 likewise left unchallenged his corroborating account of events. The learned SCJ found at paragraph [186] that as a result of these failures, "what DW9 testified was clearly an afterthought and a recent invention", a conclusion that is, in the view of this court, plainly correct. The further observation of the learned SCJ, that "it was not merely a technical rule of evidence but it was a rule of essential justice in an adversarial system", correctly identifies why the rule in *Wong Swee Chin* (supra) operates with full force in this case. DW9's evidence, tendered without any prior foundation having been laid during the prosecution phase, could not raise any reasonable doubt in the prosecution's case.

[101] The Fourth Appellant cannot escape the consequences of section 34 of the Penal Code. The entire sequence of events, from the initial raid on PW7's house and the Fourth Appellant's body search of PW4, to his presence in the vehicle during the solicitation, to his active suggestion that PW4 deceive his mother, and finally to his physical act of retrieving and passing the RM100.00, constitutes a course of conduct united by a common criminal purpose to extract corrupt gratification from PW4. The evidence in its totality demonstrates not merely knowledge of the scheme but positive and continuing participation in it. In *Farose Tamure Mohamad Khan*, the Federal Court, in the judgment of Mohamed Raus Sharif PCA (as his Lordship then was), stated:

> *"The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. Direct evidence as proof is difficult to procure because common intention is essentially a state of mind. Invariably inferences have to be relied upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether there is a common intention to commit the offence for which the accused could be convicted."*

[102] Applying that framework, the inference of common intention drawn by the learned SCJ against the Fourth Appellant was entirely warranted by the evidence. The appeals of the Fourth Appellant are accordingly dismissed. His convictions on the First Charge (JA-61R-19-07/2020) and the Second Charge (JA-61R-20-07/2020) are affirmed.

The Third Appellant (OKT3 - Muhammad Azim bin Muhamad Adnan) - Issue 3

Overview

[103] The Third Appellant's case warrants separate and careful analysis. His convictions rest exclusively on the doctrine of common intention under section 34 of the Penal Code. Unlike the First and Second Appellants, whose words and active demands are captured in PW4's evidence, or the Fourth Appellant, who made a concrete physical act contributing to the gratification, the Third Appellant made no verbal demand, uttered no threat, and performed no act of participation that can be positively identified from the evidence. The charges against him are not founded on any allegation that he personally solicited or received any gratification. His liability, as framed by the prosecution and accepted by the Sessions Court, was to be derived entirely from his shared criminal purpose with his co-accused. The question before this Court is whether that inference was warranted on the state of the evidence.

Evidence of the Investigating Officer

[104] The investigating officer (SP18) agreed under cross- examination that there was no evidence that the Third Appellant had personally solicited or received the RM7,000.00 or RM1,600.00. This concession was significant:

> *"S: Setuju juga dengan saya sepanjang tempoh aduan diterima daripada SP4 sehinggalah Muhammad Azim ditangkap tiada apa permintaan dan penerimaan wang rasuah daripada SP4 dan Muhammad Azim?*
>
> *J: Setuju."*

[105] And further:

"S: Seterusnya saya ingin cadangkan pada puan dan setuju tidak dengan saya bahawa tiada apa-apa bukti yang dapat membuktikan OKT 3 iaitu Muhammad Azim bin Muhamad Adnan telah meminta atau menerima jumlah wang RM7,000.00 dan RM1,600.00?

J: Setuju."

[106] And:

"S: Berdasarkan siasatan puan daripada dokumen ini P52 kepada telefon milik Buyamin, melalui siasatan puan dokumen ini juga tiada apa-apa bukti yang dapat puan buktikan berkenaan OKT bernama Muhammad Azim bin Muhamad Adnan ada membuat talian telefon telefon terhadap Buyamin bagi tujuan meminta wang suapan berjumlah RM7,000.00 ataupun mengesahkan beliau memperoleh RM1,600.00 dari Buyamin setuju?

J: Setuju."

[107] These concessions are of significance. They establish that the investigation itself yielded no direct evidence of personal participation by the Third Appellant, neither by act, nor by telephone communication, nor by the receipt of any part of the gratification.

Evidence of the Principal Witness - First Charge

[108] On the First Charge, PW4 conceded during cross- examination that, throughout the events of 10.4.2018 up to and including the period before 3.00 am on 11.4.2018, the Third Appellant (identified as "Azim") never mentioned money to him or to Buyamin:

"S: Setuju dengan saya sepanjang-panjang kejadian 10/04/2018 sehinggalah sebelum 3 pagi 11/04/2018 polis bernama Azim ini tidak pernah menyebut berkenaan dengan duit kepada awak atau Buyamin?

J: Setuju.

S: Setuju dengan saya sepanjang-panjang kejadian tersebut polis bernama Azim ini tidak pernah meminta duit daripada awak ataupun Buyamin?

J: Ya, setuju."

[109] That concession is not a minor or peripheral one. PW4 was the principal witness and the person directly targeted by the corrupt solicitation. His confirmation that, at no point throughout the entire episode on 10.4.2018 and into the early hours of 11.4.2018, did the Third Appellant ever mention or ask for money, constitutes a direct negation of the Third Appellant's personal participation in the solicitation.

[110] PW4 also confirmed that the Third Appellant made no seizure from him or Buyamin. And that after 3.00 am on 11.4.2018, PW4 had no further contact or communication whatsoever with the Third Appellant. The sum of PW4's concessions therefore establishes that, as far as the principal prosecution witness could attest, the Third Appellant was physically present but entirely silent and inactive in relation to the corrupt transaction throughout the material period.

The Findings of the Learned Sessions Court Judge

[111] The learned SCJ, at paragraphs [93]–[94] of his judgment, based his finding of common intention against the Third Appellant principally on the inference that "all the accused were in the car together to corruptly solicit the bribe from PW4." At paragraph [109], he further found that "all of them were participants in facilitating the crime of corruptly obtaining the RM1,600.00. All four accused were present at PW7's house when the bribe was corruptly obtained by them through the first accused." At paragraph [82], the learned SCJ also found that, regardless of whether the other three accused actually heard the conversation in the car, that was not the sole criterion by which to assess their liability under the principles of common intention.

Parties' Respective Submissions

[112] The prosecution, in upholding the convictions on appeal, relied principally on the collective nature of the

episode and on the principles in *Farose Tamure Mohamad Khan*. The prosecution maintained that all four accused went together to PW7's house, were together in the car when the solicitation was made, and were together at PW7's house when the RM1,600.00 was obtained, as proved by paragraphs 15 and 16 of WSSP4; that it was not incumbent on the prosecution to prove that each accused did exactly and equally what the others did; and that the totality of the circumstances supported the inference of common intention. The prosecution further relied on the finding of the learned SCJ that the Third Appellant never seriously challenged PW4 during cross-examination on the fact of his presence at the relevant locations.

[113] The Third Appellant, by contrast, submitted that the prosecution had wholly failed to identify any evidence of common intention on his part. He argued that his position in the vehicle placed him out of earshot of any discussion between the First Appellant and PW4, the atmosphere in the vehicle being noisy with the windows open. He further relied on station diary entry ID14 (entry no. 2199 for 11.4.2018 at 0300hrs, recorded in the name of "Koperal Azim 160546") to support his contention that he had departed for sentry duty at the Kangkar Pulai Police Station before the RM1,600.00 was obtained at approximately 4.00 am. He submitted that his bare presence in the car and at PW7's house, unaccompanied by any statement or act furthering the criminal purpose, was insufficient to attract liability under section 34, and that the prosecution had neither proved common intention to the requisite standard nor discharged its burden by relying on presence alone.

The Applicable Legal Principle

[114] The legal principles governing participation under section 34 are well-settled. Section 34 is a rule of evidence and does not create a substantive offence: *Krishna Rao a/l Gurumurthi v Public Prosecutor & Another Appeal* [supra]. As the Sessions Court rightly stated at paragraph of the judgment below, the element of participation is essential. On the meaning of participation, the Allahabad Court of Appeal in *Om Prakash v State*, as cited in *Shamsudin Abas & Anor v Public Prosecutor*, held that:

> *"On the meaning of participation, in Om Prakash v State AIR All 241, the Allahabad Court of Appeal held that presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation. Every person charged with the aid of* s. 34 *must in some form or the other participate in the offence in order to make him liable thereunder. He must have done something, however slight, or conducted himself in some manner, however nebulous whether by doing an act or by omitting to do an act so as to indicate that he was a participant in the offence and guilty associate in it."*

[115] The critical phrase is "for the purpose of facilitating or promoting." Presence, even continuous presence at the scene of a criminal act, does not, without more, constitute participation. The presence must carry the quality of facilitation or promotion of the offence. The question to be answered, therefore, is whether the evidence established that the Third Appellant's presence in the car and subsequently at PW7's house was for the purpose of facilitating or promoting the corrupt solicitation and obtaining being carried out by the First and Second Appellants.

Application to the First Charge

[116] The prosecution's case does not identify any verbal statement, threat, demand, or overt act by the Third Appellant that would demonstrate that he was present for the purpose of facilitating the bribe. The distinction is crucial. The Fourth Appellant, though he may also have departed before the bribe was collected, had positively and actively participated by suggesting that PW4 lie to his mother and by handing over the RM100.00 seized from PW4 to the First Appellant. The Third Appellant did neither of these things. PW4 himself did not attribute to the Third Appellant any act or statement that furthered the corrupt solicitation or obtaining. The prosecution offered no evidence, whether direct or circumstantial, from which an act of participation by the Third Appellant, however slight, could be inferred.

[117] At paragraph [21] of the Sessions Court judgment, the learned SCJ recorded that PW4 "was sure that PW7 and the third accused saw that he had given it to the first accused." Merely witnessing the handing over of money, without any prior act of participation, is not in itself evidence of common intention. A person who happens to observe an event is not thereby a participant in it. The question under section 34 is not whether the Third Appellant was present and observant, but whether his presence served a facilitative or promotional purpose in respect of the criminal act being committed by his co-accused. On the evidence as it stands, no such purpose was established.

Application to the Second Charge

[118] As for the Second Charge, the Third Appellant's own evidence, supported by station diary entry ID14 (entry no. 2199 for 11.04.2018 at 0300 hrs, recorded in the name of "Koperal Azim 160546"), which recorded his commencement of sentry duty at the Kangkar Pulai Police Station, raised a credible question as to whether he was present at PW7's house at approximately 4.00 am when the RM1,600.00 was obtained. The learned SCJ found, at

paragraphs [153]–[156], that the Third Appellant's evidence was also an afterthought and a recent invention, in part because he never put to PW7 his account that PW7 had pointed out where Ahpet's house was. That finding relates to the Third Appellant's substantive defence narrative and is in that respect not without basis. But it does not resolve the discrete and prior question of whether, having regard to the complete absence of any evidenced act of participation by the Third Appellant, the prosecution proved the element of common intention against him.

The Error in the Learned SCJ's Approach

[119] A further and distinct difficulty lies in the approach taken by the learned SCJ below. The findings at paragraphs [93]– [94] and [109] were directed collectively at all four accused on the basis that all were in the car and all were present at PW7's house. That approach, without more, treats the four accused as a single undifferentiated group. Where there is evidence of individual participation by each member of the group, as there is in the cases of the First, Second, and Fourth Appellants, such a collective finding is permissible and correct. But where one accused has been shown by the prosecution's own witnesses to have made no demand, issued no threat, taken no money, and performed no act whatsoever in furtherance of the criminal enterprise, the mere invocation of group presence cannot substitute for the evidential minimum that section 34 requires. As stated in Ratanlal & Dhirajlal's Law of Crimes (28th edition), relied upon by the Third Appellant in his written submissions: "the consensus of minds of person to bring about certain result having criminal propensity and participation in criminal act in some manner is essential ingredient of common intention." Participation in some manner is not optional; it is an essential ingredient that must be individually established as against each accused person.

Conclusion on Section 34

[120] The learned SCJ's findings on common intention were sound as applied to the First, Second, and Fourth Appellants, whose respective acts of solicitation, intimidation, demand, suggestion, and physical handling of the money are individually and collectively proved on the evidence. However, with respect to the Third Appellant, the learned SCJ erred in drawing the inference of common intention from mere presence without identifying any act, however slight, that connected the Third Appellant to the criminal purpose being executed by his co-accused. The required minimum evidential foundation for section 34 was not established as against the Third Appellant. The prosecution failed to establish the element of participation, and without that element, the invocation of section 34 cannot be sustained.

[121] Applying the framework in *Mat v PP* [1963] MLJ 263 (High Court), even if this Court does not accept or believe the Third Appellant's explanation, the question remains whether that explanation nevertheless raises a reasonable doubt as to his guilt. In this instance, however, the doubt arises not from the Third Appellant's own evidence but from the prosecution's own case. Even setting aside the Third Appellant's explanation entirely and confining the analysis to the prosecution's evidence, the evidence does not cross the threshold required to implicate him under section 34. The prosecution adduced no evidence of any act of participation on the Third Appellant's part. The concessions of SP18 and PW4 establish the absence, not merely the inadequacy, of such evidence. In these circumstances, the prosecution has not proved the element of common intention beyond reasonable doubt as against the Third Appellant on either charge.

Orders - Third Appellant

[122] Accordingly, the appeals of the Third Appellant on both the First and Second Charges are allowed. His convictions on both charges are set aside. He is acquitted and discharged on the First Charge (JA-42R(A)-1-02/2025) and on the Second Charge (JA-42R(A)-3-02/2025).

SENTENCE

[123] The sentences imposed were: four years' imprisonment with a fine of RM40,000.00 (in default 12 months' imprisonment) for the First Charge; four years' imprisonment with a fine of RM10,000.00 (in default 3 months' imprisonment) for the Second Charge, to run concurrently with the first; and (for the Second Appellant alone) four years' imprisonment with a fine of RM10,000.00 (in default 3 months' imprisonment) for the Third Charge, all terms to run concurrently.

[124] The maximum sentence under section 24(1) of the MACC Act 2009 is 20 years' imprisonment and a fine of not less than five times the sum of the gratification or RM10,000.00, whichever is higher. For the First Charge, five times RM7,000.00 is RM35,000.00, and the fine of RM40,000.00 imposed exceeded that minimum, which was within the learned SCJ's discretion given that the appellants were convicted after full trial rather than having pleaded guilty. For the Second and Third Charges, the minimum fine was RM10,000.00 (five times RM1,600.00 = RM8,000.00, and five times RM1,400.00 = RM7,000.00, both below the RM10,000.00 floor).

[125] The learned SCJ invoked the one transaction rule in ordering concurrent sentences: *Bachik Abdul Rahman v*

PP [2004] 2 CLJ 572. He found, at paragraph [208], that the three offences were committed by continuity of action and for a community of purpose, noting that the solicitation was on 10.4.2018, the obtaining on 11.4.2018, and the attempted obtaining on 12.4.2018. The one transaction rule was appropriately applied.

[126] It was argued that the sentences were manifestly excessive. I do not agree. Police officers in positions of trust who abuse their authority to extort money from civilians caught with drugs are properly regarded as serious offenders. Such conduct undermines public confidence in law enforcement, corrupts the administration of justice, and exploits the vulnerability of detainees. A deterrent sentence was necessary. The concurrent term of four years' imprisonment, representing one fifth of the statutory maximum, was in my judgment proportionate, not crushing, and entirely consistent with the totality principle.

[127] There is no basis to interfere with the sentences imposed on the First, Second and Fourth Appellants.

ORDERS

[128] For the foregoing reasons, I make the following orders:

a) First Appellant Mohamad Zulhisham bin Zulkafli: Appeals in JA-42R(A)-4-02/2025 and JA-42R(A)-5-02/2025 are dismissed. The convictions on the First Charge (section 16(a)(B) MACC Act 2009 read with section 34 Penal Code) and the Second Charge (section 17(a) MACC Act 2009 read with section 34 Penal Code), and the sentences imposed by the Sessions Court on 13.2.2025, are affirmed.

b) Second Appellant Mohd Shahir bin Ahmad Dewi: Appeals in JA-42R(A)-2-02/2025, JA-42R(A)-6- 03/2025 and JA-42R(A)-7-03/2025 are dismissed. The convictions on the First Charge (section 16(a)(B) MACC Act 2009 read with section 34 Penal Code), Second Charge (section 17(a) MACC Act 2009 read with section 34 Penal Code), and Third Charge (section 17(a) MACC Act 2009), and the sentences imposed by the Sessions Court on 13.2.2025, are affirmed.

c) Third Appellant Muhammad Azim bin Muhamad Adnan: Appeals in JA-42R(A)-1-02/2025 and JA- 42R(A)-3-02/2025 are allowed. The conviction on the First Charge and the conviction on the Second Charge are set aside. The Third Appellant is acquitted and discharged of both charges.

d) Fourth Appellant Mohamed Syukur bin Gulam Mohamed: Appeals in JA-42R(A)-4-02/2025 and JA-42R(A)-5-02/2025 are dismissed. The convictions on the First Charge (section 16(a)(B) MACC Act 2009 read with section 34 Penal Code) and the Second Charge (section 17(a) MACC Act 2009 read with section 34 Penal Code), and the sentences imposed by the Sessions Court on 13.2.2025, are affirmed.