IN THE SESSION COURT AT KUALA LUMPUR

IN THE STATE OF WILAYAH PERSEKUTUAN, MALAYSIA

ARREST CASE NO.: 62SC-42-07/2015

BETWEEN

PUBLIC PROSECUTOR

AND

ALAN RAJENDRAM A/L JEYA RAJENDRAM

JUDGMENT OF THE COURT

BACKGROUND OF THE CASE

[1] This is an appeal filed by the Public Prosecutor against the order of acquittal that the Court announced for an offence under section 369(b)(B) of the Capital Markets and Services Act 2007 [*Act 671*] and punishable under the same section.

THE CHARGE

[2] The accused was charged for furnishing false statements to Bursa Malaysia Securities Berhad under section 369(b)(B) of the Capital Markets and Services Act 2007 [*Act 671*].

[3] The charge against the Accused reads as follows:

> "That you, on 29 December 2009, at Bursa Malaysia Securities Berhad (Company No: 635990-W), Bukit Kewangan, 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, knowingly authorized the furnishing of a false statement to Bursa Malaysia Securities Berhad in relation to the affairs of a listed corporation, namely Linear Corporation Berhad's General Announcement dated 29 December 2009, Reference No CS-091217-52296, entitled "Acceptance of Letter of Award for Construction, Completion and Commissioning of a 350,000RT District Cooling Plant in Manjung in the State of Perak for the King Dome Project (the "Project") (the "Letter of Award") by LCI Global Sdn Bhd (formerly known as Linear Cooling Industries Sdn Bhd) – a wholly owned subsidiary of the Company", and you have thereby committed an offence under Section 369(b)(B) of the Capital Markets and Services Act 2007 [*Act 671*] and punishable under the same section."

BACKGROUND FACTS

[4] The Prosecution called a total of 13 witnesses. The undisputed oral and documentary evidence disclosed the following background facts.

[5] Linear Corporation Berhad ("LCB") was a public listed company involved in the business of providing heating, ventilation as well as industrial and commercial air conditioning solutions. LCI Global Sdn Bhd was a wholly-owned subsidiary of LCB at the time. The accused was an Executive Director of LCB at the material time. He was one of the majority shareholders of the company and was very much involved in the decision making process of LCB.

[6] Global Investment Group Inc. (GIG) was an offshore company incorporated on 4.8.2009 (P34C) by Farisan Mokhtar (PW11), Nasrudin bin Baba (PW12) and one Nurfitri bin Mansor. Its Share Register (P34E) and Registry of Directors (P34D) were filed on 19.8.2009. Between the period of 4.8.2009 to 4.8.2010, GIG was a registered company in Seychelles. According to P34E, GIG's authorized and paid-up capital was USD100 million (PW6) though PW6 was unable to confirm whether this was the actual paid-up amount.

[7] The Project was essentially the construction of an indoor theme park with a rotating ski slope housed under a giant dome. This would have been the world's largest dome and the first of its kind in Malaysia. It was an idea that was carried forward by GIG from another company known as Nashtan

GT LLC (Nashtan) which PW11 and PW12 were involved in. It was pertinent to note that The Project did not materialize during Nashtan's time due to lack of funding and remained at a conceptual stage even in 2009.

[8] The Project was brought to the attention of the accused in one casual meeting with PW11 and PW12 in late October 2009. The accused who saw the window of opportunity for LCB seeks for the district cooling share of The Project and was willing to draft the letter of award (LOA) to GIG. GIG who saw this as a way forward has no hesitation and agrees with the request. The accused then requested GIG to officially state their intention in wanting LCB to come on board for The Project. GIG then issued a letter dated 26.10.2009 (P48) requesting LCB to revert with a quotation and costing for the district cooling system for The Project. LCB responded with a quotation on 3.11.2009 (P49) with RM1.663 billion as estimated cost of The Project. This was later used as the basis to calculate cost of the Project. A letter of offer was drafted and emailed to GIG and PW11 printed it out on GIG's letterhead, dated and signed it and issued to LCB as Letter of Award P38(a).

[9] On 11.11.2009 the accused informed the Board of Directors of LCB (BOD) of The Project. The accused merely informed the BOD about the award of The Project without providing any documentation or details of The

Project to the BOD. The BOD kept an open mind as The Project was brought in by the accused, the majority shareholder of the company. However, no approval was given by the BOD for LCB to accept The Project.

[10] The accused again mentioned to the BOD about The Project on 30.11.2009. Still without providing any documentation, the accused explained to the BOD the cost project, the area covered for The Project and that The Project was pending approval from the relevant authorities. The BOD then entrusted the accused to conduct a full due diligence on GIG to ensure GIG is a financially strong entity and able to fulfill the performance of the consideration in the LOA which was not before the BOD. On the basis of the accused confirmation to this effect, the BOD agreed to accept the LOA from GIG (P3(a)).

[11] On 16.12.2009 the accused forwarded the LOA to PW2, Linear's Company Secretary, instructing her to prepare a draft announcement based on the LOA. On the same day, the accused sent the LOA to the BOD of Linear seeking their comments. It was put forward by the accused that the LOA would be deemed as accepted if the BOD did not revert with their comments by 18.12.2009. This was met with grave concerned by two (2) members of the BOD.

[12] On 17.12.2009, PW5 responded to the accused's email and raised a number of questions pertaining to the veracity of The Project and documents pertaining to The Project. The accused reacted on 21.12.2009 by proposing that the announcement pertaining to the LOA should be dated on 28.12.2009. And on 22.12.2009, in respond to PW5's concerns, the accused stipulates that presentation was by project owner, that GIC group will be funding the project, that Linear's portion of The Project finalized subject to masterplan and that implementation schedule will be given before signing of contract. Being not satisfied with the reply, PW5 resigned on 23.12.2009.

[13] Following the accused's instructions to PW2, some series of correspondence took place to revise the draft announcement. On 29.12.2009, PW2 received the signed draft announcement (P22) together with signed copy of the LOA (P22(a)). The draft announcement was signed by the accused and the LOA was signed by the accused on behalf of Linear and PW11 on behalf of GIG. As the draft announcement has been approved for release, PW2 proceeded to make the announcement to Bursa Malaysia on 29.12.2009 (P1).

[14] PW1 confirmed that the announcement dated 29.12.2009 entitled Linear Corporation Berhad – Acceptance of LOA for construction, completion

and commissioning of a 350,000 RT district cooling plant in Manjung in the state of Perak for the King Dome project by LCI Global Sdn Bhd, a wholly owned subsidiary of the company, was announced on 29.12.2009.

[15] In 2016, the accused was charged with the present offence.

CASE FOR THE PROSECUTION

Submission of false statement to Bursa

[16] The case for the Prosecution in respect of this charge was that the statement in relation to the affairs of Linear Corporation Berhad furnished and announced to Bursa was false. It was alleged that the accused had knowingly authorized the furnishing of the statement to Bursa. It was further alleged that the accused knew that the statement contained in the announcement was false.

FINDING BY THE COURT

[17] At the end of the Prosecution case, the Court must consider whether the Prosecution has made out a prima facie case against the accused as required under section 173 (f)(i) of the Criminal Procedure Code. The Court is fully mindful that in order to do so, the Prosecution evidence must be subjected to maximum evaluation as set out by Court of Appeal in the case

of **Looi Kow Chai & Anor v PP [2003] 2 MLJ 65** which was affirmed and adopted by the Federal Court in the case of **Balachandran v PP [2005] 2 MLJ 301, [2005] 1 CLJ 85** applied by **Loo Ting Meng v PP [2014] 6 MLJ 208 (Federal Court), Munuswamy Sundar Raj v PP [2015] 6 MLJ 214 (Federal Court)** and **Abdul Rahim a/l Abdul Razak v PP [2015] 2 MLJ 835 (Court of Appeal).**

[18] The Court is equally mindful of the Federal Court decision in the case of **PP v Mohd Radzi Abu Bakar [2006] 1 CLJ 457** at page 467 where the court propounded a step-by-step guidance in relation to the procedure after the conclusion of the Prosecution case as follows:

> *'[15] For the guidance of the courts below, we summarize as follows the steps that should be taken by a trial court at the close of the Prosecution's case :-*
>
> *(i) the close of the Prosecution's case, subject the evidence led by the Prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the Prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more*

inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is "Yes", then a prima facie case has been made out and the defence should be called. If the answer is "No" then, a prima facie case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in Mat v Public Prosecutor [1963] MLJ 263.'

[19] I have perused the evidence produced by the Prosecution and I found that in determining whether to accept or reject their evidence, the principle is very clear and that the prime consideration is to determine whether what was said by the witnesses was inherently probable or not. This was laid down in

the Federal Court case of **Muniandy & Ors v. Public Prosecutor [1966] 1 MLJ 257** which said:

> *'In our view, being unshaken in cross- examination is not per se an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration.'*

[20] The factual test was adopted and applied in the Federal Court case of **Public Prosecutor v. Lim Kiang Chai [2016] 2 MLJ 153** which said to the following effect:

> *'[79] It has been said that being shaken or unshaken in cross examination is not per se an all sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration: see Muniandy & Ors v. Public Prosecutor; Public Prosecutor v. Dato Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 at page 79. The learned trial judge had carefully evaluated PW26's evidence and concluded that PW26 was a truthful witness.'*

[21] On the same issue, I also applied the test in **Public Prosecutor v. Dato Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1** where Augustine Paul J (as he then was) said at page 79:

> *'The Privy Council has stated that the real tests for either for accepting, or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits with the rest of the evidence and the circumstances of the case (see Bhojraj v. Sitaram AIR 1936 PC 60).'*

[22] The accused was charged under Section 369 of the Capital Markets and Services Act 2007 (CMSA). Section 369 provides:

> *'A person who-*
>
> *(a) With intent to deceive, makes, furnishes or lodges; or*
>
> *(b) Knowingly causes, authorizes or permits the making, furnishing or lodging of, any statement, information or document that is false or misleading, to the Commission, a stock exchange, a derivatives exchange or an approved clearing house relating to-*

(A) dealings in securities or derivatives;

(B) the affairs of a listed corporation;

(C) any matter or thing required by the Commission for the due administration of this Act;

(D) any requirement imposed by the Commission under any guideline, practice note, written notice or term and condition; or

(E) *any requirement under the rules of a stock exchange, derivatives exchange, or approved clearing house, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding ten years and shall also be liable to a fine not exceeding three million ringgit.'*

Section 369 prohibits a person who knowingly authorizes or permits the making or furnishing of any false or misleading statement to amongst others, the Securities Commission or the stock exchange in relation to the affairs of a listed corporation.

[23] The Court is satisfied under Section 369 CMSA, the Prosecution is required to proof the following ingredients:

a) The statement in relation to the affairs of Linear Corporation Berhad was furnished to Bursa;

b) The accused had knowingly authorized the furnishing of the statement to the stock exchange; and

c) The accused knew that the statement contained in the announcement on 29.12. 2009 was false.

THE STATEMENT IN RELATION TO THE AFFAIRS OF LINEAR CORPORATION BERHAD WAS FURNISHED TO BURSA

[24] Allied Secretarial Services Sdn Bhd was Linear's Company Secretary. PW2 who testified on behalf of Allied Secretarial Services Sdn Bhd stated (at pages 51 to 54 NOTES OF PROCEEDING (NOP)) that on 29.12.2009 she received a signed draft announcement in relation to LOA with respect to the King Dome project signed by the accused (P22) and LOA dated 24.12.2009 signed by the accused on behalf of Linear and PW11 on behalf of GIG on 29.12.2009. As the draft announcement was ready, PW2 proceeded to make the announcement (P1) to Bursa on 29.12.2009.

[25] PW1 testified (at page 8 NOP) that the announcement dated 29.12.2009 (P1) entitled Linear Corporation Berhad – Acceptance of

LOA for construction, completion and commissioning of a 350,000 RT District cooling plant in Manjung in the state of Perak for the King Dome project by LCI Global Sdn Bhd, a wholly owned subsidiary of the company was announced on 29.12.2009. PW1 confirmed that P1 was in relation to Linear Corporation Berhad and contained information in relation to the affairs of Linear Corporation Berhad. This piece of evidence was never denied by the accused who in fact through his counsel's submission admitted that P1 was in relation to the affairs of Linear which was a public listed corporation on the date of release of the announcement. It was also admitted that LCI Global was a wholly owned subsidiary of Linear on the said date. It was also not denied that the announcement was furnished by Linear to Bursa on the said date. Based on the evidence adduced, The Court is satisfied and found that indeed the statement in relation to affairs of Linear was furnished to Bursa in the said announcement on 29.12.2009.

THE ACCUSED HAD KNOWINGLY AUTHORIZED THE FURNISHING OF THE STATEMENT TO THE STOCK EXCHANGE

[26] Evidence from the BOD of Linear suggested that the accused was given permission, pertaining to the King Dome project, to conduct a full

due diligence on GIG to ensure the company is a financially strong entity with means to undertake a project of this magnitude and the ability to fulfil the performance of the consideration in the LOA. But the accused took many steps ahead by playing an active role in the preparation of the announcement and dictating the timelines throughout the preparation of the draft announcement. The accused had knowingly authorized the furnishing of the statement to Bursa on 29.12.2009 when he instructed PW2 to draft the announcement and later approved it to be furnished to Bursa. The accused had emailed PW2 on 16.12.2009 (P5), attached the draft LOA from GIG, instructed PW2 to draft the announcement and forward the announcement to him once drafted. Referring to P5, PW2 stated at page 26 to 27 NOP:

'Q : *Can you confirm that this is this was an email in relation to your communication with Linear.*

A : *Yes, it's an email from Mr. Alan Rajendram.*

Q : *Can you confirm that you received this email?*

A : *Yes.*

.....

.....

Q : Can you tell us what is the date of this email you received?

A : The date is 16 December 2009.

Q : Other than you who received this email?

A : According to this email, it was carbon copied to Mervin Nevis.

Q : Can you read out the content of this email that you received.

A : Enclosed herewith a draft Letter of award from Global Investment Group Inc (GIG) for your attention. Please draft the announcement and forward a copy to Mervin and myself for approval by Friday 18 December 2009. Thank you.'

[27] PW2 send the draft announcement to the accused and the accused together with Mervin continued to correspond with PW2 via email (P7, P9, P11 and P13). According to PW2, the accused not only dictating the date but also the exact details of the content of the announcement. PW2 then proceeded to send through email (P15) the finalized announcement draft to all the Directors of Linear on 22.12.2009, seeking their approval by 24.12.2009 but none responded. According to PW2, one of the Directors has to sign the draft announcement before she can make the announcement.

Subsequently, PW2 received the approval from the BOD on 29.12.2009 and the approval given in relation to the draft announcement was given by the accused (P22(a)). PW2 then proceeded to release the announcement after she saw the signed approval.

[28] The accused had also emailed the BOD of Linear on 16.12.2009 (P33) at 5.39 pm appending the LOA for their attention. The accused seeks comments from other Directors and informed them that if no comment received by 18.12.2009, the LOA would be deemed to be accepted. On 14.12.2009 at 7.57 am, in an email in reply to PW5's concerns, the accused stated that he is prepared to answer any of the authorities and he had obtained the consent of GIC that they are also willing to disclose all to the relevant authorities should the need arises.

[29] Hence, it was the Prosecution case that since the accused was actively involved in the preparation of the announcement and dictated the timeline throughout the preparation of the draft announcement, the accused had knowingly authorized the furnishing of the statement to Bursa.

[30] Analyzing further on the evidence adduced the Court discover this though. It was evidenced during the trial that after sending the draft announcement to the accused, the accused together with Mervin continued

to correspond with PW2 via series of emails (P5, P7, P9, P11, P13, P15, P17, P19 and P21). However, when P7, P9, P11, P15, P17 and P19 were produced and tendered in Court, it was discovered that it was incomplete. It was evidenced that P7 was tendered without the draft announcement which was missing, P9 was tendered without page 2 which was missing, P11 was tendered without pages 2 and 3 which were missing, P15 was tendered with all the attachments missing namely LCB-Let of Award and LCB-PN1(Dec09), P17 was tendered without pages 2, 3 and 4 which were missing and P19 was tendered with all attachments missing namely LCB-Let of Award (3), LCB-Chan (Audit), LCB-Chan (BOD). During cross-examination, PW2 admitted that she did not know where the missing pages and attachments in those emails were. To get PW13, the investigating officer, to testify on the missing pages proof futile. Pw13 admitted that he had made an effort to locate the missing pages and attachments but he could not recall whether he had obtained all of these documents. During cross-examination, PW13 stated at page 614 NOP:

'Q : *When preparing documents for this case, did you make any effort to find where the missing pages are?*

A : *The pages are with SC,*

Q : *You believe the pages are with SC but you don't know why it is not attached here?*

A : *As of now I cannot confirm of that. But as of now we don't know.*

J : *Did you make an effort?*

Q : *Yeah, did you make an effort to locate the missing pages and documents, that's all?*

A : *Yes.*

Q : *Were you able to obtain them?*

A : *Can't recall.*'

[31] Question arises, are these missing documents and failure to locate them crucial to the Prosecution case. Prosecution may argue that it is not because issue at hand is the accused knowingly authorizing the furnishing of document to Bursa and documents were part of correspondence that leads to the accused giving final instruction to PW2 to furnish the announcement.

[32] The Court has to differ. These documents and attachment are part of the correspondence that implicate motive and intention of the accused. It is important because without it the documents are incomplete and negated the

purpose of sending it in the first place. **Section 6 of the Evidence Act 1950 [Act 56]** provides as follows:

'***Relevancy of facts forming part of same transaction***

6. *Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different time at places.*'

The Court looks at illustration (c) of Section 6 which provides as follows:

'***6.*** .....

Illustrations

(a).....

(b).....

(c)*A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose and forming part of the correspondence in which it is contained are relevant facts though they do not contain the libel itself.*'

[33] The Court is satisfied and found that these are relevant facts which were overlooked by the Prosecution as the failure to produce these relevant facts are crucial to the Prosecution case. The Court found that an inference can be established for the accused against the Prosecution.

[34] The Court also found that Melvin's involvement during the correspondence of the series of email was pivotal. In P5, a draft LOA for PW2 to draft the announcement was forwarded to Melvin by the accused. In P7, PW2 attached a draft announcement for the comments of Mervin and the accused. In P9, Mervin commented on the draft announcement sent by PW2 and instructed PW2 to make the necessary changes. In P11, the accused referred to Mervin email dated 17.12.2009 and proposed announcement to be dated 28.12.2009. Mervin then stated to PW2 further points for inclusion in the announcement. In P13, PW2 sent another draft announcement to Mervin and the accused for comments. In P17, PW5 emailed Mervin and Allied stating his wish to be excluded from the announcement. Finally, in P19, Mervin instructed Allied to release an announcement in relation to PW5's resignation.

[35] The Court also found that correspondences regarding the draft announcement was not only between the accused, Mervin and PW2. It was

also extended to the BOD of Linear in 4 occasion namely P11 which was carbon copied (CC) to 5 Board Members, P15 sent to 6 Board Members and P17 to 7 Board Members at 12.57 pm and 2.56 pm. Needless to say limitation of correspondences took place as it was always informed to the BOD.

[36] It was contended that the accused had overridden the decision made by the BOD of Linear and authorized himself to sign the LOA on behalf of the company. The Court found that this goes without basis as evidence from PW9 (pages 275 to 276 NOP) confirmed that the accused is well authorized to do so by his position as Executive Director in charge of management.

[37] It was further adduced by PW13 during cross-examination the following evidence at page 630 NOP:

> *'Q : Yeah, you are the right person. You are the IO. My question is, are there other emails and documents seized that have not been provided to the defence?*
>
> *A : Yes.'*

Now, this is something that the law requires the Prosecution to do prior to commencing a case in Court against the accused. Section 51A of the Criminal Procedure Code [Act 593] provides as follows:

'Delivery of certain documents

51A. (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;

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

Suffice for the Court to mention here that it is a requirement for the Prosecution to deliver documents to the accused if they intend to tender the document in Court as part of the Prosecution evidence. Failure to do so will not make the document inadmissible but will definitely prejudice the accused in preparing their defence. The Court will have the authority not to accept any document delivered after the commencement of the trial if delivery was so done deliberately and in bad faith.

[38] The accused was said to knowingly authorize the furnishing of the statement to Bursa. But as the evidence adduced curtailed to the existence of inference against the Prosecution, the Court is satisfied and found that the inference impeded these elements from the accused.

THE ACCUSED KNEW THAT THE STATEMENT CONTAINED IN THE ANNOUNCEMENT ON 29.12.2009 WAS FALSE

[39] It is trite that actual knowledge is often inferred and is rarely subject to direct proof – refer to **Professor Molly Cheang in Criminal Law of Malaysia and Singapore, Principles of Liability**. Federal Court in the case

of **Fakhrurrazi Hasan v Public Prosecutor [2018] supp MLJ 1** at page 9 stated:

> *'[11] Thus the law is clear and well-settled. Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the Prosecution to prove facts from which it could be properly inferred that the accused had the necessary knowledge (see Parlan bin Dadeh v Public Prosecutor [2008] 6 MLJ 19 at p 39; [2009] 1 CLJ 717 at p 741, per Augustine Paul FCJ). In Emmanuel Yaw Teiku v Public Prosecutor [2006] 5 MLJ 209 at p 215–216; [2006] 3 CLJ 597 Richard Malanjum FCJ (now CJ (Sabah and Sarawak)) said at pp 605–606:*
>
> > *It should be borne in mind that proof of intention or knowledge is generally inferred from proved facts and circumstances. It is difficult to do so by other means unless there is a clear admission by the person himself This difficulty had been acknowledged in the case of Chan Pean Leon v Public Prosecutor [1956] 1 MLJ 237; [1956] 1 LNS 17 when Thomson J said this (at p 239):*

Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

(See also Wong Nam Loi v Public Prosecutor [1997] 3 MLJ 795; [1998] 1 CLJ 37). (Emphasis added).'

[40] Prosecution avers that the accused knew what was announced to the public on 29.12.2009 was false. It was evidence from PW6 that GIG was a company incorporated in the Seychelles. It was also evidence that the company was set up by PW12 who later roped in 2 others namely PW11 and Nur Fitri bin Mansur. According to PW11, it was PW12's idea to incorporate an offshore company for the purposes of tax advantage. GIG did not have a formal office but shared an office with Nur Fitri in Kampung Baru. Although the company had an authorized capital of USD100,000,000, PW11 and PW12 stated that there was no paid up capital and they never pay for the shares they held in the company.

[41] PW11 and PW12 testified dah GIG had only one account with OCBC Bank Singapore which had a zero balance throughout their tenure and was

subsequently closed. PW12 also testified that GIG never had any formal credit facilities arrangements with any other financial institutions during his time in GIG. At page 348 NOP, PW11 stated:

'Q : *If you go back to the first page of P38(a) it says here that we are pleased to award you the abovementioned project for 1.662 Billion 9 hundred 34 thousand and 5 hundred Ringgit. Being a Director or CEO of GIG at this point of time. Was GIG financially capable of awarding such an amount?*

A : *Not at that point of the letter.*

Q : *Even before that?*

A : *Even before that.*

Q : *And in your short stint in GIG, could you recall ever make a formal loan application or financial assistance of such an an amount.*

A : *Not a formal application of loan or funding. It's more of a non-traditional source of which Haji Nash contacted his contacts from his banking days and I would*

presumed it will be through what we call now a private equity participation.

Q : *My question is. Never mind. So formal application, was there any?*

A : *No. There's no formal application.*

Q : *Have you ever signed any documents pertaining to an application for any loan?*

A : *No, not that I know of.*

Q : *And you are a director of this company, you should be signing if there any application?*

A : *There's 2 other directors Encik Nurfitri and Haji Nash they are capable of signing as well.*'

At page 353 NOP, PW11 stated:

'Q : *I'm referring to the announcement where it has mentioned of the value, contract sum on 29 December right on this day when it is announced, was GIG financial capable of awarding such a project at 1.6 Billion?*

A : *No.*'

At pages 424 to 425 and 407 NOP PW12 stated:

'Q : *Now at this point of time, when this was presented, was GIG financially capable by itself to carry out this project?*

A : *We tried to rope in certain professionals or big body to join with us.*

Q : *We tried?*

A : *To rope in the big people or the professional to join in with us.*

Q : *So my question is was GIG financially capable to carry out this project?*

A : *Not at that moment.*

Q : *Did GIG secure any funding for this?*

A : *No.*

Q : *You couldn't get?*

A : *No, we have not put up real papers yet, these are old papers, we have not determined the places, we have not come to the right say location where should we only we can put up the places.*

Q : *So there was no funding this stage at this stage?*

A : *No funding at this stage at this moment. Only we have formal talking with the bank. Yes.*

Q : *Now, did GIG even have any formal credit facilities arrangements with any other financial institutions during your time? Did you have any formal credit facility arrangements with other financial institutions?*

A : *We just go and met them only, no credit line, no nothing.*

Q : *Oh, so you just met them.*

A : *Met them, asking them can you fund this project, can you do this, can you do that, that's only thing.*

Q : *No formal arrangements?*

A : *No formal arrangements.*

Q : *Now when you met them, can you further explain, just to discuss to fund the, when you met the-*

A : *We were just discussing to use this dome project, so we'd like to ask them to have a loan from this bank.*

Q : *And after asking with them, what happened with the discussion with this bank.*

A : We never follow up.

Q : So my question is was GIG financially capable to carry out this project?

A : Not at that moment.

Q : Did GIG secure any funding for this?

A : No.

Q : You couldn't get?

A : No, we have not put up real papers yet, these are old papers, we have not determined the places, we have not come to the right say location where should we only we can put up the places.'

[42] It was further evidenced that though 'multi consortium of experts' were stated in the company profile, according to PW11, most of these experts were friends of PW12. There were no formal engagement with any of them but merely a loose relationship base on PW12's knowledge and friendship. It was also evidence from PW6 that GIG registration was not renewed in the following year and therefore ceased to be a registered company in Seychelles after one year.

[43] The accused was tasked to conduct a full due diligence by the BOD of Linear on 30 November 2009. But evidence evolved to the contrary. No due diligence was conducted as affirmed by PW11 and PW12. PW5 resigned himself when his concerned was not attended to.

[44] From the evidence adduced, GIG was only an offshore company which do not have the financial capacity to award the King Dome project to Linear neither did GIG manage to secure any funding for the project. All the facts were readily available and should be known to the accused but for the due diligence. This would be the irresistible inference against the accused but for the full due diligence. Be that as it may, the irresistible inference do not fall short as PW11 and PW12's evidences at pages 354 to 355 and pages 454 to 455 indicated that the accused was aware that GIG was not financially capable. PW11 at pages 354 to 355 NOP stated:

'Q : *In relation to, you just said that GIG was not financially capable at this point of time. Did Alan make any due diligence? Requesting or trying to clarify the capability of GIG to award a project of such an amount.*

A : *Not that I know of.*

Q : *Did he did that with you?*

A : *Say again.*

Q : *Did he make clarification by asking you?*

A : *No.*

Q : *Was there any request of financial statement of your company?*

A : *No.*

Q : *And was he aware whether, other than the 3 of you, sorry, other than yourself, Mr. Nash, Nurfitri, was there anyone else who was supporting the company financially?*

A : *No.*

Q : *Mr. Alan aware of that?*

A : *He is aware that the, we are still pursuing for funder for the project.*

J : *He's aware of it?*

A : *He's aware we are pursuing funder for the project.'*

At pages 454 to 455 NOP PW12 stated:

'Q : *Ok I'll rephrase if he wants – ok fine – now, did you have the discussion between you and Alan with regards to the capabilities of GIG on this King Dome project – GIG's financial capabilities or backings with regards to the King Dome project.*

A : *If the thing materialize, then we will finding for this Project.*

Q : *No no no, did you and Alan discuss about GIG's financial capabilities or backings to finance this King Dome Project?*

A : *No.'*

[45] It was further evidenced that the discussions the accused had with the Directors of GIG were casual and the King Dome project was only at a conceptual stage. PW11 testified (pages 328 and 329 NOP) that he, PW12 and the accused were acquainted at the material time and had been meeting now and then for social gathering. During one of those gathering somewhere around October 2009 at Hilton, KL Sentral, the idea of King Dome project

was brought up. PW12 testified (page 428 NOP) that it was the accused who had mooted the idea to use Linear for the cooling system for the project.

[46] After the meeting at Hilton KL Sentral, PW11 stated that the accused had requested for GIG to officially state their intention in wanting Linear to come on board for this project. PW12 affirmed that it was the accused who had requested that a letter be issued out by GIG. PW11 had prepared the said letter dated 26.10.2009 (P48) asking Linear to revert with a quotation and costing for the district cooling system for the King Dome project. PW11 stated (page 350 NOP) that when P48 was issued out, the project was still at a conceptual stage. PW12 affirmed (page 432 NOP) that the project was at a very early stage, early bird and nothing concrete. They had only casual meetings which was not at a serious stage. The accused was all the time aware about the status of the project which was at the early bird stage.

[47] It was further evidenced that after P48 was issued, Linear responded with a quotation on 3.11.2009 (P49) stating the estimated cost of the project as RM1.446 billion. This figure will be used as a base in the calculation of the cost in the LOA. PW11 (at pages 339 to 341 NOP) stated that PW12 informed him that the accused will prepare a draft LOA and will email it to them. They are supposed to print it on GIG letter head and issue it to Linear.

PW11 admitted that two days before 24.12.2009, he received the draft letter from the accused through email and he printed out the draft LOA.

[48] The LOA purportedly issued to Linear contained the following statements:

a) That the project awarded to Linear was for the design, construction, completion and commissioning of a 350,000RT District Cooling Plant for the King Dome project with a contract sum of RM1,662,934,500;

b) That the commencement of work is 24 months from the date of approval of the Development Plan by Manjung District Council;

c) That the duration of the project will be 24 months from the date of the commencement of work; and

d) That a formal contract shall be entered within 180 days from the date of the Letter of Award.

To this LOA PW12 testified (pages 446 and 447 NOP) that there was no discussion with the accused on the cost of the 350,000RT District Cooling Plant in Manjung, PW12 is not aware of the value which was arrived upon and neither PW12 or GIG agreed for the contract sum to be awarded to Linear. Meanwhile, PW11 testified (page 355 NOP) that the accused did not

make any request of any financial statement of GIG's and the accused was aware that the company was still at the stage where it was pursuing funding. It was evidenced that the budgetary cost was prepared by PW7 based on P35 and it was prepared purely on drawings only with no engineering design taken into consideration. Taking into account the magnitude of the project and GIG's non-existent financial capabilities, it is illogical for GIG to award such a project to Linear. It just goes to show that the accused knew the amount in P38(a) and the announcement dated 29.12.2009 was false.

[49] It was put forward by the Prosecution that the statement stating that the King Dome project was to be built in Manjung Perak was false. To this, the Prosecution led evidence of PW3 who testified that as at 19 September 2011, there were never any project related to the King Dome in the District of Manjung Perak. PW3 confirmed (pages 74 and 75 NOP) that not only that there was no approval, an application was never even made for such a project. This affirmed the testimony of PW11 (pages 345 and 346 NOP) and PW12 (pages 448 to 449 NOP). Thus, it was inevitable conclusion that the part in relation to the location of the project was false and the accused knew this for a fact.

[50] It was further evidenced that the commencement, duration and entering of a formal contract with GIG as stipulated in the LOA was also false. PW11 testified (pages 344 to 345 and page 354 NOP) that no discussion whatsoever took place with the accused on this issue. PW12 also testified alike (pages 447 to 448 NOP). Now this goes to show that the information pertaining to the commencement, duration and entering of a formal contract with GIG as stipulated in the LOA was false.

[51] In his testimony, PW12 disclosed the accused true intention with respect to the King Dome project. It was for 'wayang' purposes (pages 499, 548 and 553 to 555 NOP). PW12 stood firm with this testimony eventually after being shown his section 134 of the SCA 1993 statement. PW12 was also subjected to Section 154 of the Evidence Act application but was later withdrawn. Thus, it was the contention of the Prosecution that PW12's evidence proves the intention of the accused in creating a false impression of the King Dome project even though he knew what was contained in the announcement was false.

[52] The Prosecution contended that the accused not only failed to conduct the full due diligence that was required but further mislead the BOD of Linear and then went on to authorize the furnishing of a false statement to

Bursa. The act of the accused in reneging on his duties, according to the Prosecution, support the fact that it was because the accused knew the announcement on 29.12.2009 contained false statements.

[53] To show that the accused had knowledge about the falsity of the content of the announcement, the Prosecution relied profoundly on the evidence of PW11 and PW12. Subjecting the evidence of PW11 and PW12 to a maximum evaluation, some incongruities ensued which requires some observation. The first is pertaining to P48. PW11 testified that the accused made the request through PW12 for the said letter P48 (pages 349 to 350 NOP) and in his statement to Securities Commission (SC), PW11 did say that PW12 asked him to get the letter out (pages 361 to 362 NOP). But this was denied by PW12 when he testified that P48 is the work of PW11 and he doesn't know about the letter (page 428 NOP). On whether there was any discussion with the accused with regard to the quotation and costing PW12 testified that he thinks PW11 did, not him as he doesn't know. It is observed that PW12 denied any knowledge on how P48 came about when in fact, according to PW11, PW12 is the one who asked him to issue the letter.

[54] The second is pertaining to P49(a-f). PW11 testified that after receiving P48, Linear replied to GIG via email attaching a budgetary cost and

other attachments (P49(a-f)). PW11 shared the email and attachments with PW12 on the same day he received it. PW12 have no issue with it and wanted to go ahead with it (pages 335 to 336 NOP). However, when P49(a-f) were shown to him in Court, PW12 stated that he had not seen the email and the documents attached (pages 433 to 435 NOP). It is observed that PW12 denied knowledge of P49(a-f) when in fact it was shared with him by PW11 and despite the fact that PW12 also had access to the email and would open the email with PW11 (page 434 NOP).

[55] The third is pertaining to P38(a). Both PW11 and PW12 stated that the draft letter of award was emailed to GIG by the accused. However, no proof of such email was produced for the benefit of the Court to evaluate. The email contains the LOA which was rejected by PW12. PW11 then prepared a Pre LOA of which the accused dislike it and asked for the original letter of award to be used. But when P38(a) was referred to PW12, he said that he had not seen the document before (page 524 NOP). PW11 also testified that he got the go ahead from PW12 to issue P38(a) and he signed it (pages 350 to 351 NOP). However, PW12 testified that PW11 as CEO of GIG issued P38(a) without his consent (page 524 NOP).

[56] The fourth is pertaining to whether the accused was informed about the LOA. PW11 testified that after receiving the LOA via email, PW12 asked them to proceed with it. PW11 said that they informed the accused they will proceed with it. According to PW11, the project will be awarded to Linear as far as cooling district is concerned and believed that PW12 communicated to the accused on this page 339 NOP). But PW12 denied informing the accused the same (page 20 NOP).

[57] The fifth is pertaining to pre-letter of award. In his testimony in Court, PW11 did not mention anything about the pre-LOA and/or pre-award. He did not mention about ever showing the said pre-LOA / pre-award to the accused. However, PW12 stated that he asked PW11 to amend the whole letter and put the term pre award. PW12 also mentioned that PW11 showed the pre award letter to the accused (page 17 NOP). PW12 confirmed that at the time, the accused, PW11 and he were present (page 25 NOP).

[58] The sixth is pertaining to the word "wayang". PW11 did not and never mention anything about "wayang". But PW12 in his testimony stated that when the word "wayang" was used PW11 was present (page 484 NOP).

[59] The seventh is pertaining to the act of pestering and harassing. PW11 when giving evidence did not mentioned that the accused and/or Mervin had

been pestering and harassing him for the LOA. But PW12 in his testimony stated that the accused was pestering and harassing PW11 for the letter (pages 24 to 25 NOP). PW12 also said the accused and Mervin had pestered him to issue the LOA (page 17 NOP)

[60] The eighth is pertaining to the contract sum. PW11 testified that whatever has been drafted by the accused and sent through email is something which has been agreed upon between the accused and PW12 (pages 342 to 343 NOP). To this, PW12 said that he could not remember whether there was any agreement with the accused on the contract sum (page 447 NOP). But after being showed his statement to SC dated 3.4.2014, PW12 agrees that there was no agreement. It is observed that PW12 needs some sort of coaching when giving evidence in Court.

[61] After perusing the evidence as a whole, I found that there are 2 versions of the Prosecution evidence. The first version of evidence was the one narrated by PW11 who relied solely on PW12, the person who make the decision. The second version of evidence was the one narrated by PW12 who had a very poor memory and has to be 'coach' by the Prosecution through his statements.

[62] It is trite that when there are 2 versions of what could have happened, the court must always give the accused the benefit of the doubt. The court in the case of **Public Prosecutor v. Lee Eng Kooi [1993] 2 CLJ 534** at page 540 stated:

> '*If in a case the Prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.*'

The Court of Appeal in **Ali Tan bin Abdullah v. PP [2013] 2 MLJ 676** stated at page 688 that:

> *'[23] It is true that if 2 views are possible on the evidence adduced in a case, one pointing to the guilt of the accused and the other to his innocence, the view which is favorable and beneficial to the accused should be adopted (see Tan Chai Keh v. Public Prosecutor 1948-1949 Supp MLJ 105)*'

The Supreme Court in the case of **Yusoff bin Kassim v. Public Prosecutor [1992] 2 MLJ 183** at page 187 stated:

'There was thus an acute conflict of evidence upon a question of central importance in the case for the Prosecution itself, giving rise to more than a reasonable doubt as to whether the appellant carried one or two bags, the benefit of which he was plainly entitled to.'

[63] Having considered the principles of the cases and in light of evidence of PW11 and PW12, the Court found that there are sufficient evidence to justify this Court to make an inference favorable to the accused.

[64] PW12 was found to have a very bad memory and this prompted the Prosecution to apply to refresh PW12's memory. Besides memory refreshing, the Prosecution also applied to treat PW12 as a hostile witness. The Prosecution submitted that there were material contradictions (as seen in Lampiran D) between the testimony given in Court and PW12's previous statements to the Securities Commission. Scrutinizing Lampiran D, the Court allowed the application of the Prosecution under **Section 154 Evidence Act**. Section 154 reads as follows:

'154. Question by party to his own witness

The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.'

The following passage from **Woodroffe & Syed on Law of Evidence, 15th edition, page 812 (cited in Lim Teng Leng v Public Prosecutor [1998] 5 CLJ 400)** gives an excellent insight into the principle behind the practice of cross-examining one's own witness:

'A party may with the permission of the Court, put leading questions to the witness under the provisions of section 143 or cross-examine him as to the matter mentioned in section 145 and 146. The rule, which excludes leading questions, is chiefly founded on the assumption that a witness must be taken to have a bias in favour of the party by whom he is called; whenever circumstances show that this is not the case and he is either hostile to that party or unwilling to give evidence, the judge may, in his discretion, allow the rule to be relaxed. Further, by offering a witness, a party is held to recommend him as worthy of credence, and so it is not in general open to him to test his credit, or impeach his truthfulness. But there exist cases in which the rule should be relaxed at the discretion of the Court, as for instance,

where there is a surprise, the witness unexpectedly turning hostile, in which and in other cases the right of examination ex adverso is given.'

[65] The most common reason for treating a witness as hostile is if his previous statement either written or oral departs from his court testimony. Ong C.J (as he then was) in **Munniandy & Anor v Public Prosecutor [1973]** ***1 MLJ 179*** said as follows:

'As all lawyers must know, in order to treat one's own witness as hostile by cross-examining him, the only possible means is to confront the witness with his previous contradictory statement.'

The cross-examination of the hostile witness in respect of a previous statement will not have the effect of substituting the former statement for his court statement but may render negligible his Court testimony which is unfavourable to the party that called him. Horne J in P A Anselam v Public Prosecutor [1941] MLJ 157 said as follows on that issue:

'Such cross-examination is not for the purpose of substituting the unsworn statement for his testimony given in open Court on affirmation. All that such cross-examination can do is to prevent the Court giving any value to his sworn statement that the woman

always paid the rent. The Magistrate was clearly wrong in placing any reliance upon this witness. He should have been treated as negligible and the verdict found on the rest of the evidence, Rex v Harris (1927) Cr App R 144.'

In the case of **PP v Tan Chye Joo & Anor [1988] 1 LNS 174**, Wan Adnan J (as he then was) said:

'The object of the cross-examination under section 154 of the Evidence Act is only to test the veracity of the witness. The grant of the permission to cross-examine is not an adjudication by the court adverse to the veracity of the witness. Whether the testimony of the witness should be rejected in whole or in part depends on the result of the cross-examination.'

[66] When the Court allowed the Prosecution's application to cross-examine PW12 under Section 154 of The Evidence Act, PW12 became a hostile witness giving evidence. During the cross-examination process, the Prosecution purportedly produced and tender PW12's statement made to SC (P50 and P51) to show that PW12 had made a previous statement and depart from his testimony in Court. The impugned evidence that prompted the Prosecution to use Section 154 against PW12 were:

A.i) Q : Can you please inform the Court when you had dealt with Alan, what was his response, what did he say when it comes to this issuance of the LOA?

A : I can't remember that

ii) Q : What did Alan say?

A : I don't know, I didn't discuss with Alan, I only discuss with Farisan, because Farisan only do the correspondence.

iii) Q : Why is there a need to issue out this letter when you said it's premature?

A : Who issued this letter?

iv) Q : GIG

A : I don't know what transpired between Alan and Farisan

v) Q : Did you know whether Alan had commented on contents of the pre-award letter?

A : As I said just now, Farisan corresponded with Alan, Alan doesn't come to me.

vi) Q : Can you inform the Court, what did Alan respond

to the letter of award?

A : I don't know, the correspondence was between Farisan and Alan.

To these impugned question and answer in (A), the Prosecution showed PW12 page 17, line 390 – 404 in P50 as proof of previous statement.

B.i) Q : Prior to the issue of LOA being discussed, was Alan told that the King Dome project will be awarded to Linear?

A : No

ii) Q : Was that the only thing that you can recall?

A : Yes

iii) Q : Did Alan knew about the status of the project?

A : I guess so.

To these impugned question and answer in (B), the Prosecution showed PW12 page 20, para 475 in P50 as proof of previous statement.

C.i) Q : Was Alan aware that there was no formal Relations between GIG, Al Juraifaini and Sky-Trac?

A : I don't know.

To these impugned question and answer in (C), the Prosecution showed PW12 page 14, para 305 in P50 as proof of previous statement.

D.i) Q : Did you tell Alan that GIG did not have the Financial capabilities to finance the King Dome?

A : No

ii) Q : Did you discuss with Alan whether GIG did not formally obtain any fund for this project?

A : No.

To these impugned question and answer in (D), the Prosecution showed PW12 pages 13 and 14, para 279 – 285 in P50 as proof of previous statement.

E.i) Q : When you found out it was not suitable, did you tell Alan it was not suitable?

A : I think I told him.

ii) Q : Was there any applications or permits made to the authority for the use of land in Manjung for the King Dome project.

A : We must purchase first the land, we didn't do anything.

iii) Q : Did you discuss with Alan, about the non-application of the Land in Manjung?

A : We didn't discuss about this also.

To these impugned question and answer in (E), the Prosecution showed PW12 page 15 and 16, para 360 – 365 in P50 as proof of previous statement.

[67] From the evidence adduced, the Court found that PW12 testimony in Court differs from his statement made previously to SC on 3.4.2013 and thus the testimony as per A, B, C, D and E negligible to the proceeding. The Court also found that, in line with decided cases, the reference made and used by the Prosecution to counter PW12's testimony will not be used to substitute PW12 negligible testimony.

[68] The Court also take notice of the active involvement of Mervin Nevis a/l Nevis, one of the BOD of Linear, who was not call as a witness but instead made available to the accused. The evidence put forward was Mervin was not only involved in the pitching for the King Dome project but also in the drafting of the announcement till the release of the announcement (refer pages 366 to 367, 375, 493 and pages 587 to 588 NOP). It was evidenced that Mervin was also involved in matters pertaining to location of the King Dome Project (pages 377 and 616 to 617 NOP). Mervin was also in the picture when P46 was in the question (page 524 NOP). PW13 was aware of

Mervin role in this case. The Court had reservations on why Mervin was not put to the stand.

[69] The law on adverse inference is enshrined under **Section 114(g) of the Evidence Act 1950**. It provides as follows:

> '***Court may presume existence of certain fact***
>
> *114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.*
>
> *ILLUSTRATIONS*
>
> *The court may presume –*
>
> *.....*
>
> *(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;*
>
> *.....'*

[70] Supreme Court in the case of **Munusamy v. PP [1987] 1 MLJ 492** at page 494 states the application as follows:

'...it is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.'

[71] The Court is mindful of **Section 134 of the Evidence Act 1950** on number of witnesses to be called. It provides:

'Number of witnesses

134. No particular number of witnesses shall in any case be required for the proof of any fact.'

In **PP v. Dato' Seri Anwar bin Ibrahim (N0. 3) [1999] 2 MLJ 1** at page 70 the Court stated:

'It is settled law that in a criminal trial the prosecution has a discretion, provided that there is no wrong motive, as to whether or not to call any particular witness and in particular has a discretion not to call in support of its case a witness whom it does not believe to be a witness of truth (see Khoon Chye Hin v. PP [1961] MLJ 105,

Adel Muhammed el Dabbah v. Attorney- General for Palestine [1944] AC 156).'

[72] The manner how adverse inference operated was expounded in the case of **PP v. Dato' Seri Anwar bin Ibrahim (supra)** where the Court states:

'... Thus, an adverse inference for not calling a witness cannot be drawn if there is sufficient other evidence to support the prosecution case (see Namasiyiam & Ors v. PP [1987] 2 MLJ 336). No adverse inference can also be drawn when a witness has been offered for cross-examination (see Saw Thean Teik v. R [1953] MLJ 124) or has been made available to the defence and the defence did not call the witness (see PP v. Chee Kon Fatt [1991] 3 CLJ 2564). If a witness has been made available to the defence, there can be no suggestion, as stated by Lord Thankerton in the case of Adel Muhammed el Dobbah v. Attorney-General for Palestine, '...that the prosecutor has been influenced by some oblique motive' (see Samsudin v. PP [1962] MLJ 405). ***However, where the prosecution evidence falls short of proving a prima facie case, the right of not calling a witness by merely offering him to the defence will not be available***

(see Abdullah Zawawi v. PP [1985] 2 MLJ 16, PP v. Chew Yoo Choi [1990] 2 MLJ 444, Teoh Hoe Chye v. PP [1987] 1 MLJ 220).'

(Emphasis ours)

[73] In view of the evidence before this Court, the Court found that it is not enough for the Prosecution just to make available Mervin to the accused. The non-production of Mervin and/or his statement(s) to the SC had amounted to a conscious suppression of evidence and had given rise to a presumption under Section 114(g) of the Evidence Act 1950.

[74] The Court found that there was evidence to show PW5 and PW9 had never stated that the accused had misrepresented to the BOD of Linear. The Court also found that GIG had indeed awarded the King Dome project to Linear and no evidence was produced to show otherwise. And the Court found that there was evidence adduced to show BOD of Linear was satisfied with the King Dome project at all material time (page 153 to 155 NOP).

[75] The Court is satisfied and found that PW12 was indeed the money man (pages 375 and 409 NOP). The Court also found that as the nature of the financial relationships was only within the knowledge of GIG (page 370 NOP) PW12 had made representation to the accused that GIG had about 10 billion Euro in HSBC London (page 544 NOP). The Court found that this

evidence led the accused to have honest belief of the project depicted via D31 and D31(a-b). These act of the accused in delivering the project, to indemnify Linear in the event of any loss and to take over the King Dome project at cost from Linear in the event Linear decided not to proceed fits Section 8 of the Evidence Act 1950.

[75] In light of the negligible evidence of PW12, the material discrepancies between PW11 and PW12's evidence and the adverse inference against the prosecution, the Court found that it is highly improbable that the accused had knowledge of the falsity of the content of the announcement.

Prima Facie Case

[76] The Court is satisfied and found that the Prosecution has not proved the elements of the offence. Therefore it is unsafe for the Court to call the accused for his defence.

[77] After applying the test of maximum evaluation to the whole evidence presented and after asking itself should the accused choose to remain silent, would the Court convict him and answer was the Court will not, the Court found a *prima facie* case has not been established. The *prima facie* test that the Court applied are the principles decided in *Balachandran v PP* [2005] 2 MLJ 301, [2005] 1 CLJ 85 and *Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65.

[78] The Court acquitted and discharged the accused.

SHAMSUDIN BIN ABDULLAH
Judge
Session Court Civil 3
Kuala Lumpur.
Dated 25 September 2018

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