JUDGMENT Express

PP

v.

DATO' SRI MOHD NAJIB HJ ABD RAZAK

High Court Malaya, Kuala Lumpur
Mohd Nazlan Mohd Ghazali J
[Criminal Trial Nos: WA-45-2&3-07-2018 & WA-45-5-08-2018]
21 August 2020

Criminal Law: *Malaysian Anti-Corruption Commission Act 2009 — Section 23 — Offence of using office or position for gratification — Accused charged with using his position to receive gratification of RM42 million — Whether accused an officer of a public body — Whether accused held an interest beyond that of public office under s 23(2) of Act — Whether exception in s 23(4) of Act applicable in this case — Whether accused raise a reasonable doubt in prosecution case under s 23(1) of Act — Whether accused rebutted statutory presumption under s 23(2) of Act*

Criminal Law: *Penal Code — Section 409 — Criminal breach of trust by public servant — Accused charged with criminal breach of trust relating to property belonging to a company — Whether accused a director or shadow director pursuant to s 402A of Penal Code — Whether concept of shadow director applied to Penal Code — Whether accused entrusted with dominion over property and funds of company — Whether breach by accused of statutory duty of director to act honestly was a basis for violation of a direction of law in said charges — Whether utilisation of said property necessary to prove misappropriation — Whether misappropriation and conversion of entrusted property by accused established — Whether evidence on knowledge and dishonest intention of accused proven*

Criminal Law: *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 — Section 4 — Offence of money laundering — Accused charged with receiving RM42 million from proceeds of unlawful activity into his personal accounts — Whether element of receipt by accused of said sum proved – Whether prosecution or conviction of predicate offences unnecessary pursuant to s 4(4) of Act — Whether accused must have known or had reasonable suspicion that said sum was proceeds of unlawful activity — Whether accused failed to make reasonable enquires to ascertain whether said sum was proceeds from unlawful activity — Whether doctrine of willful blindness applied in this case to impute knowledge of said proceeds on accused*

Criminal Procedure: *Conviction — Sentencing — Application of sentence for charge of abuse of position under s 23 Malaysian Anti-Corruption Commission Act 2009 — Whether quantum formula in s 24 of Act meant that passing of a jail sentence must be accompanied by an imposition of a fine*

Criminal Procedure: *Sentencing — Stay of imprisonment — Accused applied for stay of imprisonment pending appeal — Whether accused successfully established presence of special circumstances to allow stay*

Criminal Procedure: *Sentencing — Stay of execution of sentence of fine — Whether any extenuating and special circumstances justifying a stay of execution of sentence of fine in this case*

Evidence: *Admissibility — Non-obstante clauses — Application of s 71 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 and s 41A Malaysian Anti-Corruption Commission Act 2009 — Whether said sections were special provisions that excluded operation of a general provision of law pertaining to the admissibility of evidence under Evidence Act 1950 — Whether all evidence gathered under non obstante clauses admissible*

This case concerned seven criminal charges preferred by the prosecution against the accused, three concerning the offence of criminal breach of trust ('CBT') under s 409 the Penal Code, a single charge of abuse of position for gratification under s 23 of the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act'), and three charges under s 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFPUAA'). On the first charge under s 23 of the MACC Act, the prosecution submitted, that the accused, as a public officer, namely as the Prime Minister and Finance Minister had used his office for gratification of RM42 million by involving himself in the decision of the Government of Malaysia at two Cabinet meetings on 17 August 2011 and 8 February 2012 to provide SRC International Sdn Bhd ('SRC') with government guarantees to secure the financing of RM4 billion extended by Kumpulan Wang Persaraan (Diperbadankan) ('KWAP') to SRC. On the three CBT charges, the prosecution submitted, that the accused as agent of SRC, namely as the Prime Minister, Finance Minister and advisor emeritus of SRC was entrusted with dominion over properties belonging to SRC, and that in that capacity had committed CBT of a total of RM42 million thereof, in violation of s 409 of the Penal Code. In respect of the three money laundering charges under s 4(1)(b) of the AMLATFPUAA, the prosecution alleged that the accused had committed money laundering by receiving a total of RM42 million, which was the proceeds of unlawful activity, into his personal bank accounts. In his defence, the accused claimed that he had not abused his position; that he had no knowledge of the RM42 million transferred into his personal accounts; and that he was under the assumption that the said funds in the account were given as donations to him by King Abdullah of the Kingdom of Saudi Arabia.

Held (finding the accused guilty of all seven charges):

(1) On the evidence adduced, the prosecution had proven the first element of the charge under s 23 of the MACC Act against the accused, in that the accused was at the material time an officer of a public body within the meaning ascribed to it under s 3 of the MACC Act, by virtue of the fact that he was not

only a member of the administration, but also a Member of Parliament, as well as a person receiving remuneration from public funds. (para 103)

(2) In this case, the accused did not declare his interest when the Cabinet considered the government guarantee proposals concerning the financing by KWAP to SRC at its meetings. Neither did he leave the meeting when the Cabinet deliberated on the matter. He chaired both meetings. All others, being Ministers, were subordinate to the accused. In addition, the accused personally introduced and tabled the proposal on the second government guarantee at the Cabinet meeting on 8 February 2012. These were plainly recorded in the respective minutes of the meetings, and duly confirmed in the subsequent minutes of meetings. Here, the accused was clearly so firmly in a position of conflict of interest and deliberately failed to divorce himself from that invidious situation. His attendance alone, not to mention his failure to leave the deliberation on the government guarantees was sufficient under the law to having used his public position for gratification under s 23 of the MACC Act. (paras 129-130)

(3) The evidence of involvement of or the series of actions taken by the accused in respect of SRC; its set up, financing, guarantee arrangement and ownership structure before and after the participation of the accused at the two Cabinet meetings which approved the government guarantees fell within the scope of a number of the illustrations set out in s 8 of the Evidence Act 1950, and thus demonstrated that the accused held an interest beyond that of public office, and of a kind which was caught under s 23(2) of the MACC Act. (para 144)

(4) The series of conduct and involvement, among others, on the part of the accused *vis-à-vis* SRC, when viewed in its totality and taken together and cumulatively, disclosed evidence which could not be construed as purely being a lawful exercise of the accused's official duty as either the Prime Minister, Finance Minister or advisor emeritus in SRC. In this instance, such conduct and involvement transpired beyond the ordinary and was outside the usual conduct or involvement expected of a Prime Minister and Finance Minister, similarly circumstanced. The evidence manifest that KWAP approved the financing the way it did, and the Ministry of Finance ('MOF') facilitated the granting of the government guarantee which was approved by the Cabinet only because of one reason and no other, ie that the accused had used his position as the Prime Minister and the Minister of Finance to ensure the same, by the series of actions and conduct. Such conduct and involvement exhibited by the accused served only to demonstrate the existence of private and personal interest on the part of the accused in SRC, which interest, was in the nature that was envisaged under the law to fall within the ambit of s 23 of the MACC Act. (paras 263-264)

(5) The accused's controlling interest in his and SRC's unrelenting pursuit for financing and funds be made available to SRC on urgent basis, and curiously

despite the absence of a well-verified and proper documentation support, let alone compelling strategic and investment opportunities, could not by any stretch of imagination possibly have been reconciled with what was expected of him as a member of the administration, which at a Cabinet meeting would have been to ensure the exercise of an independent assessment and judgment on the justifications for the request for the issuance of the government guarantees to secure the financing to SRC by KWAP. For the avoidance of doubt, it was not the overarching control which the accused wielded over SRC that per se translated into the interest under s 23 of the MACC Act. That was only the enabler, albeit a potent sine qua non. It was the private designs he had in respect of SRC, which was to use SRC for his personal advantage, as demonstrated in the series of actions and decisions taken by him, made possible by his strong position of control, that rendered his relationship with SRC into an interested one, in the nature that was caught under s 23 of the MACC Act. (paras 275-276)

(6) In the instant case, the accused knew about his controlling interests in and private designs on SRC. He did not prevent the conflict of interest at the two Cabinet meetings on the matter of the two government guarantees given to KWAP to secure the repayment of the total financing of the RM4 Billion loan from KWAP to SRC. His failure to declare his interest gave rise to the inference on his criminal intention to commit the offence under s 23(1) of the MACC Act. (*Datuk Sahar Arpan v. PP (refd)*). (para 282)

(7) Considering government bureaucracy, it was extremely unlikely if not impossible for the financing by KWAP, the rushed preparation of the government guarantees for the Cabinet meetings, the approval of the guarantees by Cabinet, the decision to reverse the approval of KWAP on the second financing which had initially imposed the condition for the financing be released to SRC progressively as opposed to by way of one bullet drawdown, the early drawdown of the second financing by KWAP to SRC before KWAP received the written government guarantee, among other things, would have been effected and pursued in the fashion that transpired if not for the conduct and involvement of the accused who was the Prime Minister and Finance Minister at the material time. As such, the argument that the accused was merely expressing his requests and agreements which did not amount to an instruction or directive could not be sustained. Hence, the presumption under s 23(2) of the MACC Act applied to the effect that the accused was thus presumed to have used his office or position for gratification. (paras 313-315)

(8) Section 23(4) of the MACC Act could not apply in this case because it had not been shown that the actions taken by the accused which led to the decision by the Government of Malaysia to grant the two government guarantees in favour of the financing to SRC was done in the interest or the advantage of the Government of Malaysia. (para 323)

(9) The obvious lapse in time from the Cabinet meetings in 2011 and 2012 which approved the issuance of the government guarantees to secure the repayment of the financing of the total sum of RM4 billion by SRC to KWAP until the receipt of the RM42 million in late 2014 and early 2015 was inconsequential because the law would consider that as a single transaction. To hold otherwise would violate the legal position and constituted a departure from basic logic and common sense. This was because potential violators could flagrantly abuse their office and conveniently delay the receipt of the gratification to a later juncture in order to escape criminal liability altogether. (paras 362-363)

(10) With regard to the defence's submission that the charge under s 23 of the MACC Act was defective as it did not specify the interest that the accused had, the offence of using office or position for gratification under s 23(1) of the MACC Act, did not make any mention of the word "interest". It was plainly not an element of the said offence. But it was pertinent in the event the prosecution intended to rely on the legal presumption provided in s 23(2) of the MACC Act. Here, the prosecution had adduced the requisite evidence to demonstrate the interest in question with a view to invoking the presumption under s 23(2) of the MACC Act. (paras 368-376)

(11) Upon a maximum evaluation of all the evidence adduced, the elements of the offence of using position for gratification under s 23(1) of the MACC Act had all been proven by the prosecution, by way of the application of the presumption under s 23(2) of the MACC Act such that a *prima facie* case in respect of the charge against the accused had been established. (para 389)

(12) On an ordinary and literal interpretation of s 402A of the Penal Code, it was plain that any of the capacities specified therein was, without more, an agent. There was no necessity to fulfil other requirements which were not there in the first place. Hence, the court must apply the definition of "agent" in its clear, ordinary and unambiguous language as widely expressed in s 402A of the Penal Code without any necessity to read into this statutory provision other principles such as the law on agent-principal relationship. It would be wholly unwarranted. (paras 417-418)

(13) The nexus between the shareholder resolutions and other directions of the accused and the directors of SRC was unmistakable, as was the directors being accustomed to act in accordance therewith where the accused himself instructed on how the funds of SRC were to be utilised. Accordingly, the evidence on the conduct of the accused *vis-à-vis* the directors of SRC thus clearly rendered the finding that he was at the material time a director pursuant to s 402A of the Penal Code and a shadow director of SRC, irresistible. As such, it followed that the accused had acted in his capacity as an agent within the meaning of s 409 of the Penal Code. (*Datuk Sahar Arpan v. PP (refd)*). (paras 483, 486, 487 & 529)

(14) Section 402A of the Penal Code included two principal scenarios, that either the person in question who either acts or issues directions or instructions in a manner in which directors of a company were accustomed to issue or act. A de facto director may do both, but in this case, the involvement of the accused which qualified him being a director under s 402A of the Penal Code, came about predominantly from his issuance of the shareholder resolutions. Furthermore, to say that the concept of shadow director did not apply to the Penal Code would not be accurate since the offences created by the Companies Act 1965, inclusive of the serious ones against the directors of a company did not exclude those acting in the role as shadow directors. Hence, there was no legal impediment to s 402A of the Penal Code being read widely to include shadow directors. (paras 557, 560 & 561)

(15) It was settled law that a director was not only a fiduciary but also acted as a trustee for all the assets and properties of a company. Although the principle was often applied to duly appointed directors of a company or the de jure directors, the same ought to be applicable to those the law considered as shadow directors or directors under s 402A of the Penal Code. The rationale here was that the ones in control, namely the directors in the usual case should be accountable to the company for the assets and properties which come under the controlling supervision of the same. Similarly, those whom the law construes as having control over the other directors and the assets of the company, such as a shadow director or the director under s 402A of the Penal Code, should all the more be made to be no less responsible than the ordinary directors. (paras 563-564)

(16) Given that the accused's overarching control of SRC arose from his official and public office representative capacity, the same must be exercised not only in the interest of and for the benefit of SRC as the true legal owner of the assets and properties of the company, but also for the purpose of safeguarding the interests of the government, taking into account his role as the Prime Minister as named in the articles, as well as the Finance Minister, being the shareholder (through MOF Inc) of SRC. The evidence also more than amply demonstrated that the accused was plainly in the position of one entrusted with the dominion over the property and inclusive of the funds of SRC, such as the RM42 million which was the subject of the three CBT charges against the accused. Thus, there was no doubt that the element of the accused having been entrusted with the properties and funds of SRC or with dominion over such properties and funds had been successfully proven by the prosecution. (paras 632-634)

(17) The defence's argument that it was the board of directors of SRC who had been entrusted with exclusive control over SRC's properties, to the exclusion of the accused was flawed. Here, s 405 of the Penal Code itself provided that entrustment could be made jointly and need not be exclusive. It did not therefore matter that despite the accused's control over SRC, at the same time, the directors of SRC still retained their usual control in exercise of their

statutory and fiduciary duties. Secondly, entrustment could also be made of property entrusted by the owner to the accused indirectly. Thirdly, under s 405 of the Penal Code, there was clearly a distinction between entrustment with property and entrustment with dominion over property. When applied to the instant case, the accused had the overarching control of the company through its power of hire and fire over the directors (as the Prime Minister), its directions to the directors through the various shareholder minutes (as the Finance Minister), and its advice on strategic and important matters which must be sought by the directors (as the advisor emeritus). In the result, the accused was entrusted with dominion over the property of the company through the directors of the company. (*PP v. Cho Sing Koo & Anor (refd)*; and *Aisyah Mohd Rose & Anor v. PP (refd)*). (paras 636-640)

(18) An accused could not conveniently plead ignorance of the transactions that had taken place in his accounts if effected by his own appointed nominee or mandate holder in order to avoid criminal liability. A customer of a financial institution must under the law have knowledge of the banking activities carried out in his account. The responsibility for the activities in the personal accounts of the holder is firmly with the holder. In the instant case, the accused, was accountable for the activities and transactions carried out in his personal accounts, even if they were performed by one Nik Faisal Ariff Kamil ('Nik Faisal'), more so since he was the accused's own duly appointed mandate holder for the three personal accounts of the accused.(*Yap Khay Cheong Sdn Bhd v. Susan George TM George (refd)*). (paras 726-728)

(19) Based on the evidence adduced, the knowledge of the accused in the transfers of the funds of RM42 million into his personal accounts, further supported the finding that the misappropriation was orchestrated by the accused who had been entrusted with dominion over the assets and properties of SRC, which indisputably included its funds of exactly some RM42 million which had instead ended up in his own two personal accounts. The physical element of misappropriation of entrusted property by the accused in respect of the offence of CBT under the three CBT charges against the accused had thus been established. (para 736)

(20) Section 405 of the Penal Code referred to 'conversion to his own use' which should be interpreted ordinarily and literally to encompass situations which included where the entrusted property was dealt with by an accused by giving the same to another party for the latter's use. In other words, in that situation, the accused had already committed conversion of the entrusted property for the accused's own use. Similarly, in this case, by transferring the SRC's RM32 million, over which the accused was entrusted with dominion, to other entities, the accused had plainly converted the RM32 million to his own use. No other interpretation could be ascribed to this transfer by the accused regardless of the motive or reason for the transfer. (paras 758-759)

(21) All the cheques issued from the personal accounts of the accused containing the 42 Million were personally written by the accused himself. This was confirmed by some of the recipients themselves who saw the accused signing the cheques. The defence for the accused too, in cross-examination did not suggest that he did not. In any event, the mandate granted to Nik Faisal did not extend to him issuing cheques or transferring funds out of any of the three personal accounts of the accused. As such, the element of conversion of the SRC's RM42 million over which the accused was entrusted with dominion, to the accused's own use, subject to the three CBT charges within the meaning ascribed to it under s 405 of the Penal Code, was established in view of the extensive and overwhelming evidence of the utilisation of the same by the accused. Further, based on the totality of evidence at the end of the prosecution stage, the ingredient of misappropriation had been established. (paras 791 & 794)

(22) The relevant words in s 405 of the Penal Code state the violation in respect of 'direction of law prescribing the mode in which such trust is to be discharged'. There must be some specific legal obligations governing the use of the entrusted property. The pertinent direction in law must prescribe the manner in which the trust was to be discharged. In this instance, the reliance on the alleged breach on the part of the accused of the statutory duty of company directors to act honestly as a basis for violation of a direction of law in the three CBT charges against him was unsustainable because s 132 of the Companies Act 1965 on the duty to act honestly did not at the same time specify the manner in which the trust was to be discharged. (paras 828, 829 & 832)

(23) The manner in which the RM42 million was arranged to be transferred to the personal accounts of the accused which was through the use of two intermediary companies, Gandingan Mentari Sdn Bhd ('GMSB') and Ihsan Perdana Sdn Bhd ('IPSB') was a valid basis for an inference of dishonesty to be raised. This was because there was no reason or requirement why the funds should be made to flow through the accounts of GMSB and IPSB from being deposited into the accounts of the accused other than to make the source of the funds less apparent or to avoid detection altogether. There was no suggestion during cross-examination of the relevant witnesses by the defence that the use of intermediaries was to comply with any legal requirements or in any fashion commercially beneficial. (para 875)

(24) On the evidence, there were no queries, no complaints, no threat of legal action, and no police report against the bank, upon the accused being appraised of the transfers of monies into his personal bank accounts. The absence of such conduct was entirely unbecoming of any reasonable person when informed of any unlawful deposits of funds into his private account without his consent. Here, the evidence on the absence of action on the part of the accused when informed about the transfers was one which was not contemporaneous with but subsequent to the period stated in the charges. It was evidence of subsequent conduct. (paras 932-936)

(25) In light of the weight of evidence and in the further absence of any meaningful and credible explanation for the transfers or the source of the funds, the drawing of the irresistible inference that the accused knew about or consented to the transfers such that the accused therefore had misappropriated and converted the SRC's RM42 million with dishonest intention was the only conclusion that the court could justifiably arrive at. Accordingly, the prosecution had established all the ingredients of the offence of CBT as framed in the three charges against the accused. (paras 955-956)

(26) Given the overwhelming and incontrovertible evidence pertaining to the flow of funds, the evidence had more than amply established that the accused had received in his personal bank accounts funds which belonged to SRC, on the dates mentioned and in the manner described in the three money laundering charges. Hence, it was plain that the first element of the receipt by the accused of the sum totalling RM42 million which originated from SRC had been established. (paras 979-980)

(27) It was clear that s 4(1) of the AMLATFPUAA concerned proceeds of unlawful activity, which was defined as the predicate offence, in this case the s 23 of the MACC Act and s 409 of the Penal Code offences. It followed that the prosecution must prove that the element of an unlawful activity was satisfied. However, a prosecution, let alone a conviction of those predicate offences was not necessary, as clearly set out in s 4(4) of AMLATFPUAA. Nevertheless, the prosecution was not relieved of its duty to still prove that the predicate offences had been committed. Further, pursuant to s 4(1)(b) of the AMLATFPUAA, an unlawful activity need not necessarily be only the predicate offence itself, but could also be an activity which resulted in the predicate offence. As such, even though the unlawful activity must be established, it did not mean that the predicate offence itself must be proved to have been committed. It sufficed that an activity that led to the commission of the offence be established. In this case, the charges for those predicate offences of abuse of position for gratification and CBT had already been *prima facie* proven at the end of the prosecution case. (paras 987 & 1008)

(28) The culpability of an accused person under s 4(1) of the AMLATFPUAA was premised on being knowingly concerned with the illegal proceeds from the unlawful activity. This knowledge, as formulated in s 4(2) of the AMLATFPUAA was the mental or fault element of a money laundering offence. In other words, this element of the offence of money laundering would be satisfied if it was proved that the accused either knew, or had reason to believe or had reasonable suspicion that the monies which were transferred into his personal accounts as per the three charges were the proceeds of an unlawful activity, or that the accused without reasonable excuse failed to take reasonable steps to ascertain whether or not the monies were the proceeds of an unlawful activity. Section 4(2) of the AMLATFPUAA stated that the mental element was to be inferred from the objective factual circumstances. Here, evidence of knowledge and dishonest intention of the accused had already

been inferred in respect of the CBT charges. Much of the same evidence supported the inference to be made under s 4(2) of the AMLATFPUAA for the three money laundering offences. In the circumstances, the evidence pointed to the inevitable inference that the accused must have known or had reasonable suspicion that the RM42 million was proceeds of unlawful activity, in pursuance of s 4(2)(a) of AMLATFPUAA. Further, it could be also reasonably inferred from the facts that the accused had failed to make reasonable enquiries to ascertain whether the RM42 million was proceeds from unlawful activity, within the meaning under s 4(2)(b) of the AMLATFPUAA. (paras 1030, 1031, 1054, 1058, 1062 & 1063)

(29) While there was much public controversy on the matter in this case, the accused chose not to lodge any report with the bank or the authorities, when that would have been the very first and obvious thing reasonably expected by all and sundry to have been undertaken by any incumbent of not just an important public office, but the highest executive and elected position in the nation, as the Prime Minister and the Minister of Finance. The doctrine of willful blindness, as explained in *Azmi Osman v. PP & Another Appeal*, readily applied in the instant case, imputing knowledge on the accused who so manifestly had his suspicion aroused to the point that despite the glaring need to inquire further, he deliberately chose not to make those inquiries. Accordingly, the element of knowledge was made out against the accused. (paras 1066-1068)

(30) The intention of the *non-obstante* clauses in s 71 of AMLATFPUAA and s 41A of the MACC Act was plain and unambiguous. It was intended to exclude the application of certain provisions of the Evidence Act 1950 in relation to admissibility in that these requirements should not be applicable to documents seized in the course of investigation, thus enabling these documents to be admitted as evidence. Hence, the provisions governing admissibility of oral and documentary evidence as contained in the Evidence Act 1950 were superseded, overridden and altogether dis-applied when either of s 71 of AMLATFPUAA or s 41A of the MACC Act was relied on. As such, whatever irregularities in the compliance with the provisions of the Evidence Act 1950 as highlighted by the defence, which in the absence of s 71 of the AMLATFPUAA and s 41A of the MACC Act would bar the admission of those documents as evidence, would however no longer prevent this court from receiving the said documents as evidence. This was further supported by the fact that, s 71 of AMLATFPUAA and s 41A of the MACC Act were special provisions that excluded the operation of a general provision of the law under the Evidence Act 1950. (paras 1142, 1143 & 1153)

(31) Section 68(2) of AMLATFPUAA, deemed all evidence gathered by an enforcement agency relating to a serious offence (which included the MACC Act and the Penal Code offences which were the premise of the charges in this trial) as evidence gathered in pursuance of AMLATFPUAA. The enforcement agency in this investigation, ie the MACC as represented by Investigating officer, PW57, and all evidence gathered under the *non obstante* clauses which

include in s 71 of AMLATFPUAA and s 41A MACC were therefore admissible in evidence. (para 1162)

(32) The fact that s 41A MACC became effective from 1 October 2018 did not mean that documents which were created prior to that date (such as from 2011 until 2015, relevant to the charges in this case) did not come within the scope of the said section. Those documents would still be admissible provided that the proceedings in which they are proposed to be admitted as evidence take place after the insertion of the said section came into effect. In any event, s 41A of the MACC Act applied retrospectively, and as s 41A of the MACC Act only dealt with the admissibility of evidence, it was procedural in nature and did not violate art 7 of the Federal Constitution. (*Lim Sing Hiaw v. PP (refd)*). (paras 1165, 1166, 1171 & 1172)

(33) Upon a maximum evaluation of all the evidence adduced at the end of the prosecution stage, the prosecution had successfully adduced credible evidence proving each and every essential ingredient of the offences of abuse of position for gratification, CBT and money laundering as framed in the seven charges. Consequently, a prima facie case had been made out against the accused in respect of all the seven charges within the meaning of s 180 of the CPC. (paras 1227-1229)

(34) The accused in his defence was not able to challenge the finding at the end of the prosecution case that the actions by the accused was not for the advancement of national interest, warranting the invocation of s 23(4) of the MACC Act. (para 1501)

(35) Under the presumption in s 23(2) of the MACC Act, an accused was presumed to be using his office for gratification, effectively the whole of the offence under s 23(1) of the MACC Act, if the accused was proved to have taken any action in respect of a matter in which he has an interest. In other words, an accused was presumed to commit the whole of the offence under s 23(1), if he can be proved to have engaged in a conduct as envisaged under s 23(2) of the MACC Act. Considering the entirety of the evidence in this case the defence had failed to raise a reasonable doubt in the prosecution case under s 23(1) of the MACC Act, nor did the defence rebut the statutory presumption under s 23(2) of the MACC Act on a balance of probabilities. (paras 1534-1536)

(36) Given the accused's controlling position, the approval of the government guarantees which enabled the approval of the financing of the RM4 billion meant that the accused had at his disposal by virtue of the exercise of his controlling authority, funds of SRC which could at any time after the formalisation of the approval by the Cabinet, be channelled into his personal accounts if and when necessary. Thus, it was incorrect for the defence to argue that it seemed odd that the accused only obtained gratification more than three years after the corrupt act, or that in this case there was delayed gratification. It was the immediate entitlement to the gratification that matters under s 23 of the

MACC Act. Furthermore, the gratification was equally immediate and instant in this case. Here, the approvals meant that SRC, the company the accused had an interest in had secured an immediate benefit. (paras 1576, 1577 & 1579)

(37) In so far as the evidence of the transactions from SRC and GMSB being effected by way of soft copy instruction letters, whilst the defence may attribute this to the instructions of one Low Taek Jho ('Jho Low'), it was still very much consistent with the totality of evidence that established that the transactions executed by Jho Low had been done also with the view to performing his role in managing the personal accounts of the accused, in the specific aspect of ensuring availability of funds in these accounts. The evidence was plain that the purpose of the transfers of the RM32 million by the accused was to repay the advance of the same sum earlier made by Permai Binaraya Sdn Bhd ('PBSB') and Putra Perdana Construction Sdn Bhd ('PPC') in July and September 2014 which had been utilised by the accused. As such, it was entirely untrue that the accused had no dealings with PBSB and PPC or that the central role of Jho Low in the transactions involving SRC meant the accused was neither involved in nor in the know about the RM42 million transactions. (paras 1692 & 1697)

(38) Given the court's finding on the accused's overarching control in SRC and as a shadow director and director (under s 402A of the Penal Code) and Nik Faisal's role and his mandate as an authorised signatory of SRC (as well as the mandate holder for the personal accounts of the accused), it was reasonable to infer that it was not improbable that Jho Low could have been involved in the orchestration of the inward and outward transactions of SRC funds (including the RM42 million specified in the charges). Nevertheless, this did not in any manner detract from the finding of the complicity of the accused and Nik Faisal in the transfers of the RM42 million from SRC to the personal accounts of the accused. In the circumstances, the defence had not succeeded in raising any reasonable doubt on the prosecution case that the accused caused the misappropriation of the RM42 million from SRC into the personal accounts of the accused. Further, the weight of evidence on the knowledge and dishonest intention on the part of the accused in respect of the misappropriation found at the end of the prosecution case remained unrebutted. (paras 1725-1726)

(39) The accused could not deny knowledge of the contents of the bank statements of his personal accounts when he himself authorised Nik Faisal to deal with the same. Matters dealt with by the appointed agent did not absolve the principal of liability. Furthermore, Nik Faisal under his mandate could only conduct inter-account transactions. It did not extend to dealing with transactions involving the transfer of funds from outside sources to said accounts of the accused, which could only be undertaken by the accused for which purpose knowledge of his bank accounts balances would have been essential. In any event, an account holder was accountable for the transactions

effected by a person appointed by the former for the purpose. (*Yap Khay Cheong Sdn Bhd v. Susan George TM George* (refd)). (para 1822)

(40) The accused could not possibly contend that he did not have knowledge of the SRC fund of RM32 million that entered his two accounts since he readily instructed for the payment of that same amount back to the Putrajaya Perdana Berhad ('PPB') on 24 December 2014, two days before funds of the same amount found its way into his accounts, from SRC. Further, the audited financial statements of PPB ('D661') was a form of written evidence reduced in a document, attracting the application of s 94 of the Evidence Act 1950. Therefore, any attempt by the defence to give other evidence to contradict the relevant portion in D661 was not admissible. (paras 1855-1857)

(41) The fact of the overdrawn positions in the accused personal accounts did not mean the accused had no knowledge of the account balances. The overdrawn positions did not actually matter because the accused was assured by the role he had assigned to his principal private secretary, Datuk Azlin Alias ('Datuk Azlin'), Jho Low, and Nik Faisal that his personal cheques would not be dishonoured. On the evidence, as long as the accused was assured that the cheques would never get dishonoured, the many and various overdrawn positions became secondary. (para 1868)

(42) On the defence's submission that the transfer of RM32 million from SRC into the accused personal account benefitted not the accused but Jho Low was not valid. While, the transactions might have been orchestrated by Jho Low to allow PPB to achieve a closure on the treatment of that sum of money which was debited out of its subsidiaries' accounts, it did not change the finding that that the return of the RM32 million by the accused to PBSB and PPC on 29 December 2014 was not a reversal transaction. Instead it was a repayment exercise, made possible by the transfer from SRC of exactly RM27 million and RM5 million into the personal accounts of the accused, as specified in the CBT and money laundering charges. (paras 1874-1876)

(43) On the evidence adduced, Jho Low, together with Nik Faisal and Datuk Azlin were tasked to ensure sufficient funds in the personal accounts of the accused, and that Jho Low was in contact with the accused, and according to the accused, with Datuk Azlin as well, all with a view to ensuring all cheques written by the accused would not bounce. This had been firmly established. The circumstances therefore showed that Jho Low did what he was assigned to do, and contrary to the argument of the defence, did not always act reactively in response to the issuance of cheques by the accused, thus discrediting the contention that there was no contact between Jho Low and the accused on the latter's accounts or his plans on writing cheques or that the accused did not know the balance in his accounts. (paras 2024-2026)

(44) At the material time, the accused was the Prime Minister of the country. That was, so to speak, his line of business. The lack of any efforts on the part of the accused to seek official confirmation of the impending donation from

King Abdullah was certainly unexpected of a Prime Minister under such circumstances. This was the only reasonable inference to be drawn from this particular concrete situation as disclosed in the evidence which affected the accused whose knowledge was presently in issue. And there was absolutely nothing in evidence to indicate that there were impediments to the accused acquiring the relevant knowledge. Given the testimony that the information of the alleged donations from King Abdullah sans any details was notified not by any official channels but Jho Low, and considering the very nature of financial assistance from a foreign country, evidence of the accused's non-action to verify the information on the imminent donations showed that the accused did not have the knowledge that he would be receiving donation monies from King Abdullah. (paras 2069, 2070 & 2072)

(45) If for a genuine error of judgment, the accused had failed to verify the accuracy of the intention of King Abdullah to grant personal donation as intimated to the accused by Jho Low, his continued failure to confirm the true source of the remittances when he started receiving these huge sums of monies in his personal accounts throughout the years 2011 to 2014 further fortified the position that he never truly held that belief. Given the evidence and circumstances relating to the four Arab donation letters, this must irresistibly mean that the defence that the accused believed the remittances originated from King Abdullah was at best an elaborate but weak fabrication. This defence on the knowledge which was premised on the belief of the accused on the alleged donation monies from King Abdullah simply could not hold water. (paras 2168 & 2195)

(46) It was too preposterous for the accused, then the Prime Minister and Finance Minister of the country to claim having no knowledge of the funds of RM87 million in excess of the alleged donation by King Abdullah of RM49 million in his accounts yet he had no qualms of spending on the said sum during the same period. The only irrestible inference was that the accused had knowledge of this RM87 million which included the RM42 million from SRC, being the subject matter of the charges against him. (para 2382)

(47) It was too far-fetched and self-serving for the accused to claim that he was deceived and defrauded by Jho Low, or that the accused was a victim of a scam orchestrated by Jho Low. The evidence plainly showed that Jho Low had performed the task required of him by the accused with unmatched distinction, by channelling the large sums of funds into the personal accounts of the accused, and the accused had benefitted by the ability of making payments in the amount of almost RM1 billion during the period. The accused, despite claims of being scammed, agreed that he did not lose any money. Instead he benefitted immensely by the remittances of huge sums of monies into his accounts. The irresistible inference was that Jho Low was closely assisting the accused to secure funding for the latter, and the accused must have known about the sources of the funds, including SRC in respect

of the transfers made into his personal accounts as specified in the charges against him. (paras 2397-2398)

(48) In the instant case, on the accused's assertion that he had no knowledge of the RM42 million which arrived into his personal accounts from SRC, applying the subjective test, the conduct and actions of the accused at the material time strongly suggested the contrary. There were also no complaints lodged by the accused with the bank or any other party at the material time on any of the transactions in his bank accounts. In other words, the accused did not meet the first test as to whether he honestly actually did not know of the transactions concerning the RM42 million from SRC. Nevertheless, even if it were true that he did not, on the application of the objective test, the credit of RM42 million which arrived after a considerable part of the alleged donations from King Abdullah had been used up and the continued availability of funds in the accused's accounts must have raised suspicion especially to the Prime Minister and Finance Minister of the country at that time. In conclusion, the accused's belief that the funds in his accounts in 2014 and 2015 were from donation made at the behest of King Abdullah, plainly could not be a reasonable inference which could be drawn from the evidence as a whole. (paras 2435, 2436 & 2440)

(49) The CBT relying on the mode of misappropriation did not have to be proven by the utilisation itself. In fact, utilisation was unnecessary to prove misappropriation or the *actus reus* of the offence. The fact that the accused as a director of the company (within the meaning of s 402A of the Penal Code) had intended a wrongful gain to himself and thereby caused a wrongful loss to SRC fulfilled the element of dishonesty and completed both the *actus reus* and the *mens rea* of committing the offence of CBT under s 409 of the Penal Code as framed in the three charges. Here, the defence had not negated the version on the manner the misappropriation in relation to the transfers of the RM42 million from SRC to the personal accounts of the accused. (paras 2610 & 2613)

(50) On the totality of the evidence, it had been established beyond reasonable doubt that the accused was a director of the company (as defined under s 402A of the Penal Code) and entrusted with the dominion over the property of the company, in respect of which funds belonging to SRC of the sum of RM42 million was misappropriated and converted for his own use, with dishonest intention, which was to cause wrongful gain to himself and wrongful loss to SRC, as defined under ss 23 and 24 of the Penal Code. The defence had failed to cast any reasonable doubt on the prosecution case. (para 2662)

(51) Any assertion that the circumstances prevailing provided no cause for suspicion to arise and the accused reasonably did not have cause to enquire into any particular transaction during the material period was absolutely perverse given the wealth of evidence to the contrary. Further, the defence of the accused that he had no knowledge on the account balances and the source of funds because he tasked the management of his personal accounts,

particularly on ensuring sufficiency of funds in the same to Jho Low, Datuk Azlin and Nik Faisal to be similarly contrived and did not raise any reasonable doubt on the case of the prosecution that the accused instead had knowledge of the same. (paras 2689-2690)

(52) It was trite that the court could find actual knowledge from proven facts or draw inferences that an accused had the necessary knowledge. In this case, notwithstanding the finding on the accused being wilfully blind to the receipt of the proceeds of unlawful activities in his personal accounts as charged in the money laundering offences, the facts and evidence of this case as relevant to the dishonest intention and knowledge for the CBT charges also warrant the inference that the accused knew that the RM42 million that flowed into his accounts were from SRC under s 4(2)(a) of the AMLATFPUAA. Further, the defence did not manage to cast any reasonable doubt on the prosecution case that the accused had knowledge of the RM42 million having originated from SRC. In addition, the defence had failed to cast any reasonable doubt on the case against the accused under s 4(1) of AMLATFPUAA as framed in the three money laundering charges. (paras 2710, 2714 & 2719)

(53) In the instant case, the accused had denied all suggestions and in particular his knowledge of the transfer of RM42 million from SRC to his private accounts. However, the accused plainly admitted that Jho Low, Nik Faisal and Datuk Azlin were tasked to transfer funds into his accounts to ensure that cheques issued out of those accounts by the accused would not be dishonoured. The suggestions by the prosecution were meant to test the credibility and veracity of the accused's evidence, and did not run afoul with the provisions of the Evidence Act 1950. It was nothing more than a suggestion unless accepted by the accused. It was therefore untrue for the defence to contend that the prosecution had diverted from what it alleged to be the *prima facie* case by introducing new versions that were inconsistent with such *prima facie* case. (para 2815)

(54) Upon considering all the evidence pursuant to s 182A of the Criminal Procedure Code, the prosecution had successfully proven its case beyond reasonable doubt against the accused in respect of the charge for use of position for gratification under s 23 of the MACC Act, the three CBT charges under s 409 of the Penal Code and the three money laundering charges under s 4(1) of the AMLATFPUAA. (para 2827)

(55) For the conviction for the charge of abuse of position under s 23 of the MACC Act, firstly, s 24 of the MACC Act was to be construed as being directory because of the expression 'shall be liable" which preceded the penalties of both jail term and fine. The court may strictly exercise its discretion to decide whether or not to impose the penalties stated therein. Secondly, if the court decided to impose any of the penalties, the terms and quantum as specified in s 24 of the Penal Code must be followed. Thirdly, as made clear in *PP v. Mohd Salim Hamiddulrahman*, because of the conjunction 'and' connecting the

two penalties, and since they were preceded by a single expression 'shall be liable', if the court decided to pass a jail sentence, it must also impose a fine, in accordance with the quantum formula in the provision. (para 2936)

(56) On the facts and circumstances of the case, in attempting to strike a balanced determination of the most proportionate, fair and appropriate punishment for the accused for his conviction for the seven charges, the accused was sentenced as follows: (i) for the single charge under s 23 of the MACC Act for abuse of position for gratification, imprisonment for 12 years and a fine of RM210 million (in default five years' jail); (ii) for each of the three charges under s 409 of the Penal Code for criminal breach of trust, imprisonment for 10 years; and (iii) for each of the three money laundering charges under s 4 of the AMLATFPUAA, imprisonment for 10 years. (para 2941)

(57) On the application for a stay of imprisonment, the accused successfully established the presence of special circumstances, for the following reasons. First, there were novel points of law involved. Secondly, the accused was also a first offender and had no previous convictions. Further, it appeared unlikely that the accused would become involved again in another offence whilst at liberty as he was also presently answering criminal charges in other High Courts. (para 2946)

(58) A Court should not impose a fine which it knew or ought to have known that the accused was not in a financial position to pay. In the instant case, by imposing the sentence of imprisonment under s 24 of the MACC Act, the court was bound by the penal provision of s 24 of the MACC Act to also pass a sentence of fine, and in accordance with the formula specified therein of which in this case, an extremely large sum of RM210 million was the minimum. At the same time as submitted by the defence, another High Court (Civil Division) had also ordered the accused to pay RM1.69 billion in additional taxes and penalties. This constituted extenuating and special circumstances justifying a stay of execution of the sentence of fine in this case. (paras 2955-2957)

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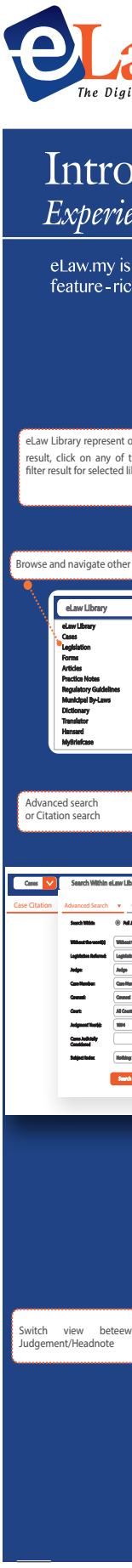

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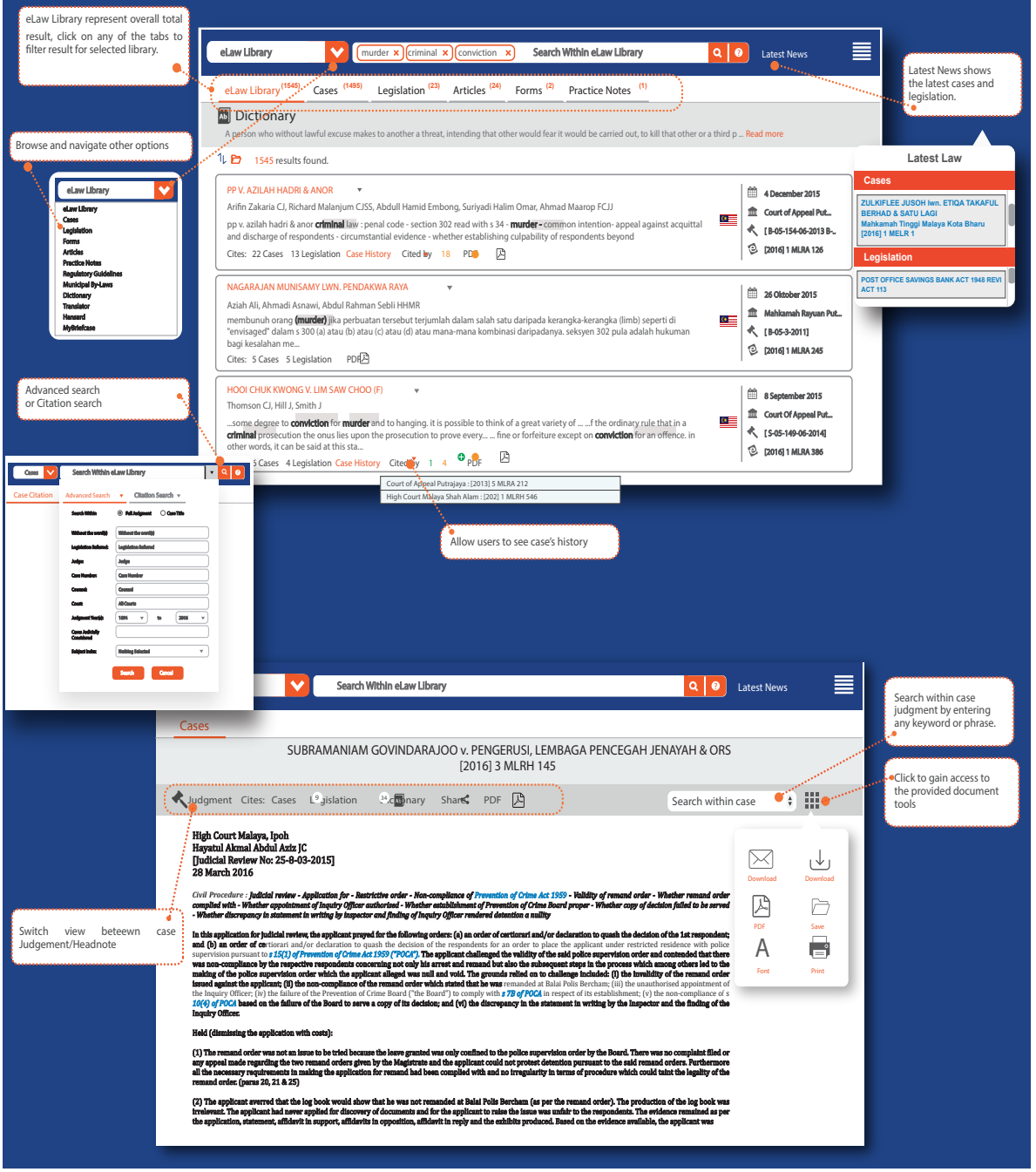

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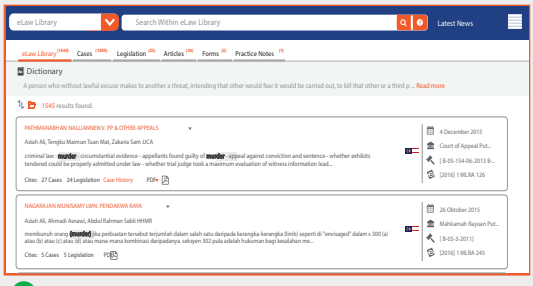

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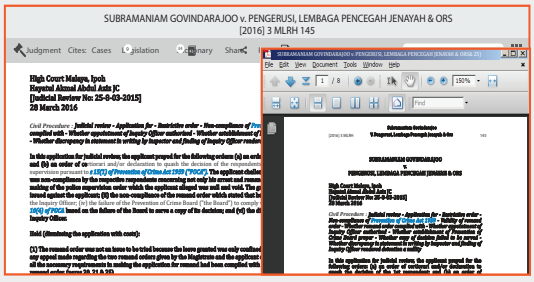

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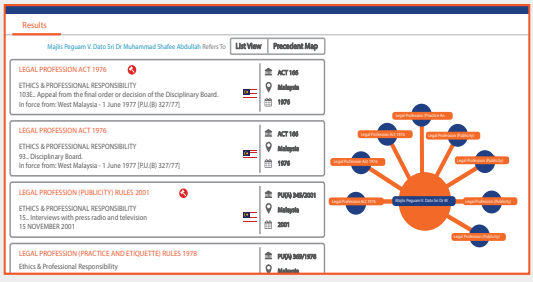

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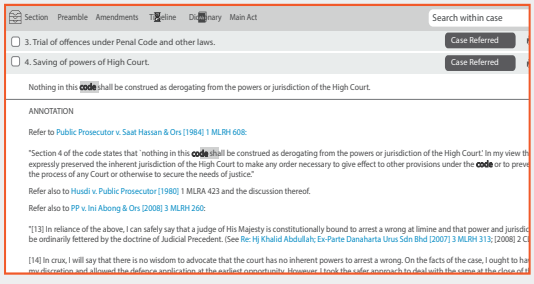

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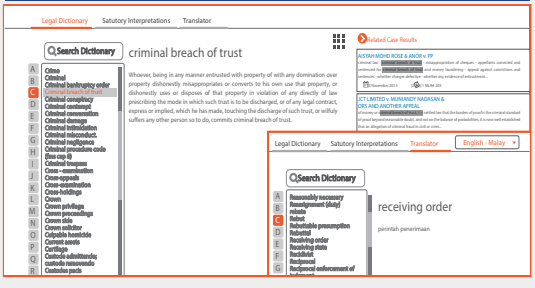

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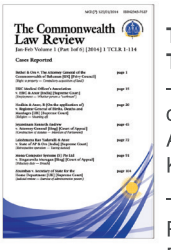

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