CORRUPTION: A PROSECUTOR'S PERSPECTIVE

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I. INTRODUCTION

The flagship Corruption Perception Index by Transparency International scored Brunei Darussalam at 60 of 100 – ranking Brunei Darussalam 35th out of 180 countries and 2nd in the South East Asian region in 2020. Despite its relatively small size and population, Brunei Darussalam is not shielded from the negative effects brought by corruption.

Brunei Darussalam has always taken a zero-tolerance approach towards corruption. Demonstrating the need to eradicate all types of corruption, His Majesty Sultan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah bin Al-Marhum Sultan Haji Omar 'Ali Saifuddien Sa'adul Khairi Waddien, Sultan and Yang Di-Pertuan of Brunei Darussalam, in a number of *Titahs* addressed to the nation highlighted the devastating impacts of corruption to developments in both the public and private sectors. He stresses that corruption can weaken the administration and bring about a country's downfall.

Accordingly, the Prevention of Corruption Act, Chapter 131, provides for crushing penalties to ensure that corruption is a crime that does not pay in Brunei Darussalam.

II. CHALLENGES AND EFFECTIVE MEASURES

While fraud takes minutes, investigation takes months, and prosecutions take even longer. Corruption cases are hard cases to make. They can be nuanced and difficult to pinpoint.

To set things in motion before a corruption offence is brought to court, section 31 of the Prevention of Corruption Act, Chapter 131, requires the consent of the Public Prosecutor. This requirement is to ensure that proposed prosecution is first scrutinized and that judgment is made about its appropriateness before proceedings are brought.

The Attorney-General's Chambers of Brunei Darussalam have identified the following challenges in prosecuting corruption cases:

A. Prosecutorial Discretion

Article 81(3) of the Brunei Constitution provides that the Public Prosecutor has power exercisable in his discretion to institute, conduct or discontinue any proceedings for any offence. In short, prosecutorial discretion is the power to decide whether or not to charge a person for a crime, and which charges to bring. It is exercised wisely, not abusively, without fear or favour, ill will or affection.

The outcome following the considerations expounded below have enormous impact on individuals and communities and one that is not, rightly so, taken lightly. It is seldom a straightforward exercise and is one that requires the balancing of competing interests.

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The underpinning thread at the heart of the decision-making process is fairness – fairness not just to victims, but it also extends to witnesses and suspects. Independent from investigators, prosecutors ensure that the decision whether to bring the matter to court is made impartially. It would not be fair to expect anyone so intertwined and so close to the investigation of a serious case to make the vital decision to charge a person or, just as importantly, not to charge that person.

With this in mind, prosecutors apply a consistent test across all referred cases before proceedings are initiated. Every decision is based on a two-stage test:

1. Is there enough evidence to prosecute the person for the crime, and

2. Is it in the public interest to charge the person?

Evaluation on whether to pursue prosecution would likely include, but not be limited to, the following questions: What is the level of evidence against the subject? Can the evidence gathered be effectively tendered in court? What is the likelihood that further investigation will uncover additional evidence? Can the information obtained from a particular subject be corroborated? What is the credibility of the suspect? What is the credibility of the witnesses when he or she testifies? What will serve the public in the long run? Do we take a top-down approach in bringing these cases to court or work our way up the hierarchy? Can the matter be dealt with in a better way without going to court? Is the case so serious that prosecutors need to decide straight away whether to charge or not? What will be the bail considerations?

The trouble in arriving at a just decision is heightened in corruption offences due to its covert nature, where in most cases, independent supporting evidence are absent. In those instances, the strenuous exercise on who, what and when to prosecute hinges on the statements made by the receiver and/or giver only. Where there exists independent evidence to support the charge, both the receiver and the giver are prosecuted.

The cases below illustrate that the decision depends on the circumstances particular to each case:

In the case of the former head of the Serious Investigations Unit at the Royal Brunei Police Force involving a complex web of abuse of power and secret dealings with cross-border organized crime syndicates, the then Supt Hj Khairul Rijal was charged for accepting a Toyota Hilux from a Malaysian national in exchange for facilitating his re-entry into Brunei Darussalam after being expelled. The Malaysian national was also charged for giving the gratification. Following a joint trial, both of them were found guilty.

Similarly, in a case involving the then Minister of Development, a man in high and powerful public office, charges were brought against him together with the giver, the managing director of TED Sdn Bhd. The case involves three construction contracts and five variation orders in respect of one of them being awarded to TED Sdn Bhd. The decision was made to try the case together and the prosecution secured a conviction.

On the contrary, collectively known as the Brunei Shell Petroleum (BSP) corruption cases, it was decided that the defendants were to be charged separately. The former BSP employees received bribes as gratification for creating purchasing work orders in their respective roles within BSP which allowed Musfada Enterprise to sell supplies to BSP, with many of the orders

not delivered at all, causing losses for BSP. The prosecution went for the managing director of Musfada Enterprise first before going after the BSP employees.

In the trial involving ex-judges siphoning $15.75 million from the judgment debtors' accounts, the largest amount of money ever embezzled by a public servant in Brunei Darussalam, the decision was to engage a Queen's Counsel (QC) from the United Kingdom to lead the prosecution team to avoid any perception of bias. Similarly, the Judiciary Department also assigned the case to be heard before a visiting High Court Judge from the United Kingdom.

B. Securing Witnesses Out of Jurisdiction

Where there is a cross-border element, an additional hurdle faced by the prosecution is securing witnesses out of jurisdiction. The prosecution has identified that the witness list must remain flexible in order to control the inevitable – unplanned events and issues that arise in almost every trial.

This was certainly the case in the trial involving ex-judges explained above where the prosecution tried to secure the attendance of a witness residing in Malaysia.

During investigations, the defendants had explained that the accumulated "wealth" came from a lady residing in Malaysia, but due to the confidential agreement and nature of the job, the defendants were reluctant to discuss the matter any further. The Anti-Corruption Bureau (ACB) worked with their Malaysian counterparts, the Malaysian Anti-Corruption Commission (MACC), to secure an explanation from the lady in the form of a written statement.

In the early stages of preparing for the case, the Malaysian lady agreed to give evidence through video-link and as such, she was listed as a prosecution witness and arrangements were made for her to testify virtually. However, due to scheduling constraints, which only arose mid-trial, she eventually became unable to testify.

C. Presentation of Evidence of Corruption in Court

Due to the nature and complexity of corruption offences, prosecutors must strategize on how to effectively build a case. Equally indispensable is how evidence is eventually presented in court.

The fundamental rule of evidence states that relevant evidence is admissible, irrelevant evidence is not. The two general types of evidence are direct and circumstantial evidence. Direct evidence is considered to be the strongest method of proof, but circumstantial evidence is evidence that tends to prove a fact indirectly, or by inference from other facts. A combination of these two will be presented to persuade the court. In particular, proof of knowledge and intent are almost always proved by circumstantial evidence in corruption cases.

The logical sequence of evidence presented to the court would be, for example, the use of direct evidence to show that the suspect had received a thing of value usually through bank transfers in the form of bank slips or statements, followed by circumstantial evidence such as the sudden spike in wealth which cannot be accounted for or the substantial use of cash without legitimate source of funds. This evidence can be strengthened again through the discovery of concealed or withholding of relevant records during investigations. The aim in the sequencing of the evidence is to lead the judge, one step at a time, to the sensible conclusion that the defendant is indeed guilty beyond reasonable doubt.

In particularly convoluted corruption cases, an effective presentation can also include the introduction of aids. Examples include: a money trail analysis chart, transcript of recorded telephone conversations pre-marked and the effective use of headings in court documents.

In the context of the ex-judges' case above where there was a dizzying amount of documentary evidence that relied on involving numerous banking records, copious correspondence and complex money-trail analysis, the prosecution presented sample documentary evidence in the opening speech of the trial before meticulously going through each of them in the trial proper. In doing so, this allowed the judge to be introduced to the series of documents and their relevancy before being tendered by the witnesses.

Alongside the above, the prosecution listed 133 witnesses in their witness list to prove their case. In preparing such a list, the prosecution grouped, with the use of headings, the witnesses according to their roles and respective agencies, such as, the Judiciary witnesses, the Banking witnesses, the car dealership witnesses and the ACB witnesses. This was to ensure that the direction and presentation were made clear to the judge at the outset.

D. Case Management

It goes without saying that the criminal courts were congested even before the pandemic. With criminal trials initially put on hold as a response to containing the virus, the burden on the prosecution of live caseloads and backlogs was immense – the longer cases run, the more case tasks there are to manage.

In recognizing the issues arising when trials are adjourned indefinitely, the adoption of technology was unprecedented in pace and scale. The outbreak of the coronavirus has forced the prosecution to shift to online presence rapidly. In particular, the prosecution has leveraged technology not just to stay operational during the pandemic but also to improve swift disposal of cases.

Now, virtual courtrooms are the norm and relevant agencies are now equipped with the necessary infrastructure to ensure that cases run smoothly even when conducted remotely. In some instances, proceedings are heard almost entirely virtually. For example, in the case of the former director of state broadcaster, Radio Televisyen Brunei, who was charged for allegedly accepting a luxury car in exchange for promoting the assistant head of the news division, the court mention was conducted virtually without the defendant ever setting foot into a courtroom. In that particular case, the defendant was present at the ACB Headquarters for the mentions.

Mindful of the emerging trends showing increasingly intricate corruption cases especially in this digital age, and the challenges discussed above, it is imperative for prosecutors to be ahead of the curve. Prosecutors need to be equipped with the necessary expertise by specialist training and sharing of good practices. The adoption of best practices shared regionally and internationally remains paramount in order to advance the understanding of the crime.

III. CONCLUSION

We are all aware that the fight against corruption is not one that can be fought by one country alone; any success to be meted out will have to be the result of a unified stance at both the regional and global levels to enhance and continue efforts to stifle these criminal activities which deeply impact governments and individuals around the world.

To this end, the Attorney-General's Chambers of Brunei Darussalam is committed to continuously improving our work and adopting best practices learned through its own experiences, as well as those of other countries.