

1 MALAYSIA
2 WILAYAH PERSEKUTUAN KUALA LUMPUR
3 DALAM MAHKAMAH SESYEN DI KUALA LUMPUR
4

5 KES TANGKAP NO: J3-62-125-2002
6
7

8
9 KHALID BIN YUSOFF

10
11 LAWAN

12
13 PENDAKWA RAYA
14
15

16
17
18 **ALASAN PENGHAKIMAN**
19

20 This case revolves around events concerning the Legal Profession Qualifying
21 Board ("QB"). The QB was established under the Legal Profession Act 1976
22 ("LPA"). The functions of the QB are set out in section 5 of the LPA. One of the
23 primary functions is to provide courses of instruction for, and for the
24 examination of, persons whose qualifications are not sufficient to make them
25 qualified persons for the purposes of the LPA except after undergoing the
26 courses and passing the examination.

27
28 In performing this function, the QB appointed the accused as Director of the
29 Certificate of Legal Practice ("CLP") Course and Examinations on 14 October
30 1993. By his agreement of service (D11), his duty was to organise and run the
31 CLP examinations in accordance with the regulations as prescribed by the QB.
32 He was also responsible for the day-to-day operations of the CLP Examination
33 Office as well as maintain its finances and its records.

34
35 However, in 2002, the accused was arrested and charged in Court. He
36 subsequently claimed trial to the following two charges:

1

2 **“Pertuduhan Pertama**

3 Bahawa kamu diantara bulan Ogos 2001 dan 13hb September 2001 di
4 pejabat Lembaga Kelayakan Profesion Undang-Undang Malaysia,
5 Tingkat 27, Menara Tun Razak, Jalan Raja Laut, di dalam Wilayah
6 Persekutuan Kuala Lumpur telah memalsukan suatu dokumen iaitu
7 ‘master list’ keputusan peperiksaan Sijil Amalan Guaman Julai 2001
8 dengan niat ianya digunakan untuk tujuan menipu dan dengan itu
9 telah melakukan satu kesalahan yang boleh dihukum di bawah
10 Seksyen 468 Kanun Keseksaan.

11

12 **Pertuduhan Kedua**

13 Bahawa kamu pada 13.9.2001 di pejabat Lembaga Kelayakan
14 Profesion Undang-Undang Malaysia, Tingkat 27, Menara Tun Razak,
15 Jalan Raja Laut, di dalam Wilayah Persekutuan Kuala Lumpur telah
16 menipu Lembaga Kelayakan Profesion Undang-Undang Malaysia
17 dengan memperdayakan mereka untuk mempercayai bahawa ‘master
18 list’ keputusan peperiksaan Sijil Amalan Guaman Julai 2001 adalah
19 keputusan yang benar yang diberi oleh pemeriksa-pemeriksa
20 peperiksaan tersebut dan dengan demikian telah dengan sengaja
21 mendorong mereka untuk meluluskan ‘master list’ tersebut yang mana
22 mereka tidak akan melakukannya sekiranya tidak diperdayakan
23 sedemikian, dan dengan itu telah melakukan satu kesalahan yang
24 boleh dihukum di bawah Seksyen 417 Kanun Keseksaan.”

25

26 **BACKGROUND**

27 As there was a delay in the disposal of this case, it may perhaps be helpful to
28 set out the history of the pertinent events that took place from the time the
29 accused was charged until the final verdict was declared.

30

31 The accused was first charged in court on 6 June 2002. The case was fixed for
32 trial from 22-25 October 2002. However, on 22 October 2002, learned counsel
33 for the accused applied for an adjournment on the ground that a representation

1 was made to the Attorney General. This was granted. Subsequently, before the
2 trial could commence, the accused filed two separate applications sometime in
3 October 2003. The first application was for an order that the accused be
4 supplied with the minutes of the QB meetings from 1994 until 2003. The second
5 application was for an order that the accused be supplied with the statement
6 given to the police by the late Tan Sri Mohtar Abdullah who was a former
7 Attorney General and by virtue of that post, also Chairman of the QB. These
8 applications were dismissed by my predecessor. In the meantime, I was
9 instructed by the then Chief Judge, High Court of Malaya to take over conduct
10 of this case as my predecessor was transferred to the Attorney-General's
11 Chambers. After a delay due to an appeal by the accused to the High Court
12 and Court of Appeal on both applications, the trial finally commenced on 25
13 September 2005. A total of 20 witnesses testified at the trial for the prosecution.
14 Submissions from both the prosecution and the defence were heard. On 27 Jun
15 2006, the Court decided that a prima facie case had been made out on both the
16 charges against the accused. Accordingly, the accused was ordered to enter
17 his defence on the said charges. As the defence had asked for time, the dates
18 for hearing of the defence case was set for 14, 17, 18, 22, 23 August 2006, 27,
19 29 September 2006 and 2, 3, 16-19 October 2006.

20

21 Before the defence was heard, the accused filed two applications. The first
22 application was for the production of the police statements taken from
23 witnesses being offered to the defence. I had allowed the application. There
24 appears to be no quarrel with the order as no appeal or application of revision
25 has been brought to the attention of the Court.

26

27 The second application was for the production of documents of the Legal
28 Profession Qualifying Board ("QB"). The application was supported by an
29 affidavit of the accused. The documents sought were contained in an annexure
30 to two letters exhibited in the affidavit. The Public Prosecutor resisted the
31 application. This application was dismissed. There was an appeal but
32 subsequently, and to the credit of the prosecution, there appeared to be a
33 change of heart and the documents requested by the defence were eventually
34 supplied to the accused before he began his defence.

1

2 After the case for the defence was heard, time was given to both parties to
3 prepare submissions. The accused was eventually convicted of both the
4 charges on 24 July 2007. On 31 July 2007, after hearing a plea in mitigation
5 and submission by the learned Deputy Public Prosecutor, the accused was
6 sentenced to three months' imprisonment on each charge with the sentences
7 to run concurrently. The whole case took 72 days from the time the accused
8 was charged until he was sentenced.

9

10 **THE CASE FOR THE PROSECUTION**

11 The prosecution called 20 witnesses to prove a prima facie case on the two
12 charges that the accused faced. The evidence disclosed that on 13 September
13 2001, while acting as the Director of CLP, the accused during a QB meeting,
14 presented to the board members the results of the July 2001 CLP examination
15 in a master-list which was later marked as Exhibit P4BCDE. This master-list
16 contained the marks and results of all the candidates who sat for all the papers
17 in the main CLP examination in July 2001. The purpose of the presentation
18 was to seek the approval of the QB. The results were duly approved and made
19 known to the students.

20

21 Later in November 2001, it came to the knowledge of the QB that there may
22 have been a leakage of the questions for the Evidence paper in the
23 Supplementary Examination held in October 2001. Whilst the QB was looking
24 into this, it was further brought to the knowledge of the QB that there may have
25 been a leak of all the papers in the main July 2001 Examination. The QB
26 decided to conduct an internal inquiry to determine this by going through all the
27 examination answer scripts. Whilst doing so, it was discovered that there were
28 a substantial number of discrepancies between the marks awarded and
29 recorded by the markers on each paper on the answer scripts and the marks
30 tabulated in P4BCDE which were tabled and approved at the QB meeting on
31 13 September 2001.

32

1 It was disclosed by a typist at the CLP office (SP12) that she was the one who
2 keyed-in the marks given by the markers into the computer for the July 2001
3 Examination. She would print out a master-list which she gave to the accused
4 at a review meeting. This master-list would be returned to her by the accused
5 with upgrading of marks and she would be directed to produce a new master-
6 list. This process would go on with further alterations made until finally the
7 master-list P4BCDE was produced which was eventually presented to the QB.

8
9 According to QB members SP2 and SP7, the accused when confronted with
10 the discrepancies gave two reasons, that is, to maintain the pass percentage at
11 30% and to help the bumiputra students. The QB was not satisfied with the
12 explanation given by the accused and directed the Secretary of the QB (SP14)
13 to lodge a police report (P8). SP2 and SP7 told the court that they would not
14 have approved the results if they had known of the upgrading of marks without
15 any explanation. As it turned out, the QB had to recalculate the marks and
16 restored the original marks given by the markers save for upgrading for
17 marginal failures.

18
19 In order for the court to be satisfied that a prima facie case has been made out,
20 the court must undertake a maximum evaluation of the prosecution evidence.
21 This would involve a careful scrutiny of the credibility of each prosecution
22 witness and all reasonable inferences that may be drawn from the evidence to
23 determine whether the elements of the offence have been established. (*PP v*
24 *Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 399)

25
26 The test at the close of the prosecution case is:

27 “Is the evidence sufficient to convict the accused if he elects to remain silent
28 when defence is called?” If the answer is “yes”, then a prima case has been
29 made out and defence must be called. If the answer is “no”, as for example
30 when there is a reasonable doubt in the case for the prosecution, the accused
31 must be acquitted. (*PP v Mohd Radzi bin Abu Bakar, supra*)

1 Before I go into the elements of the offence, there were four issues raised in
2 the course of the prosecution case that called for consideration and decision.
3 They were as follows:

4
5 Admissibility of ID2

6 ID2 was a file containing a cyclostyled document entitled “Scheme of Marks
7 and Grades for the Examination”. The Defence submitted that the document is
8 inadmissible. The contention was that it was not an original document and that
9 it was only discovered by the QB on 28 November 2001.

10
11 After due consideration, I agreed that the original would be the stencil block
12 much like a photograph negative. It would be fair to say that it would no longer
13 be in existence by now. In any event, SP1 had testified and confirmed ID2’s
14 existence and contents and I had no reason to doubt his testimony. More
15 importantly, SP14 told the court that it was the accused who showed him ID2
16 during the time when the accused was asked to explain the discrepancies. I
17 therefore ruled that ID2 was admissible and was accordingly marked as Exhibit
18 P2.

19
20 Exhibit P4BCDE

21 Objection was also taken as to Exhibit P4BCDE as it was contended that the
22 maker was unknown. In this regard, it is clear from the evidence that it was
23 SP12 who prepared Exhibit P4BCDE as it was reproduced from Exhibits P13A
24 and B which were diskettes used by her. SP2 had also identified Exhibit
25 P4BCDE as the document presented to the Board. As such, the objection as to
26 its use and admissibility was clearly without merit.

27
28 Exhibit P6ABCDE

29 Exhibit P6ABCDE was a computer print-out of a master-list. An objection was
30 taken by the defence that the print-out was not admissible as no certificate
31 under section 90A(2) Evidence Act was produced. It was further contended that
32 it could not be an accurate master-list.

33

1 It was in evidence that the marks in ID6 were compiled by the QB (including by
2 SP2) from the answer scripts. Section 90A(2) Evidence Act is therefore
3 inapplicable. Apart from the “apparent markdowns” which were later shown to
4 be results taken from the October 2001 exam, the rest of the results are
5 accurate. Two of the candidates, SP16 and SP17, were called and identified
6 their answer scripts which showed that the higher mark obtained in the October
7 Examination was taken into account in order to be fair to the candidates. To be
8 fair, I considered that there was in fact no markdown by the accused as any
9 “markdown” was actually the marks taken from the October Examination. If this
10 was taken into account, the accuracy of the marks was therefore not in doubt.
11 Accordingly ID6 and ID6ABCD were admitted into evidence as P6 and
12 P6ABCD.

13

14 Exhibit P7

15 Exhibit P7 was alleged to be the minutes taken for a period of 9 November
16 2001 until 5 December 2001. The defence contended that Exhibit P7 should be
17 rejected as the maker of the entire document was unknown and it was not
18 signed by the Chairman.

19

20 In this regard, SP8, who was the executive secretary and who always took
21 down the minutes, told the court that he attended the meeting until 10
22 November 2001 and recorded the minutes. However, he did not attend the rest
23 of the meetings, and he prepared the minutes based on the notes given by
24 SP14 who however was unsure of the same.

25

26 In my view, P7 can be accepted as evidence as the maker had been called.
27 However, I agreed that what was recorded by SP8 when he was not present at
28 the meetings should not carry any weight and be disregarded as what
29 transpired was only told to him by someone else. Curiously, this person could
30 not be ascertained with precision.

31

32 I now come to the charges.

33

34

1 **First Charge**

2 To prove the 1st charge under section 468 Penal Code, the prosecution must
3 prove the following elements:

- 4
- 5 (i) the document in question was a forgery;
 - 6 (ii) the accused forged it; and
 - 7 (iii) that in forging the document, the accused intended that it be
8 used for the purpose of cheating.
- 9

10 Forgery is defined in section 463 Penal Code and involves the making of a
11 false document with intent to cause damage or injury to the public or to any
12 person. It reads:

13

14 “Whoever makes any false document or part of a document with
15 intent to cause damage or injury to the public or to any person,
16 or to support any claim or title, or to cause any person to part
17 with property, or to enter into any express, or implied contract,
18 or with intent to commit fraud or that fraud may be committed,
19 commits forgery.”

20

21 Section 464 Penal Code provides the circumstances in which a false document
22 may be made. The prosecution is here relying on limb (b). Omitting irrelevant
23 parts, it reads as follows:

24

25 “A person is said to make a false document –
26 (b) who without lawful authority, dishonestly or fraudulently, by
27 cancellation or otherwise, alters a document in any material part
28 thereof, after it has been made or executed either by himself or
29 by any other person, whether such person be living or dead at
30 the time of such alteration.”

31

32 Cheating is defined in section 415 Penal Code. For the purpose of the present
33 case, the relevant definition is in section 415(b) and after omitting the irrelevant
34 parts, reads as follows:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33

“Whoever, by deceiving any person, whether or not such deception was the sole or main inducement, intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation or property is said to “cheat”

Explanation 1 – A dishonest concealment of facts is a deception within the meaning of this section”

In essence, the first charge involves forging for the purpose of cheating. Therefore, for the purpose of forging under section 468 Penal Code (1st charge), the prosecution must prove 3 main points which are:

- (1) that P4BCDE (master-list) was a false document within the meaning of the second limb of section 464 Penal Code;
- (2) that the making of the false document comes within one of the intents under section 463 Penal Code; and
- (3) that P4BCDE was intended to be used for the purpose of cheating.

Was P4BCDE a false document with the meaning of the second limb of section 464 Penal Code?

In this regard, the prosecution must prove that:

- (1) Accused altered a document in material parts after it has been made by himself or other person;
- (2) Accused did so without lawful authority; and
- (3) Accused did so dishonestly or fraudulently.

1 On the first point, there is credible evidence that it was SP12 who prepared the
2 master-list which were the actual marks obtained as written on the answer
3 scripts by the markers. This master-list was then altered on the instructions of
4 the accused with the final result being P4BCDE.

5
6 On the second point, did the accused have lawful authority to alter the
7 document? There were no gazetted rules in the conduct of the examination.
8 The defence contended the accused was given full authority and mandate to
9 run the CLP exam. Further, he took instructions from the Chairman of the QB,
10 the late Tan Sri Mohtar bin Abdullah.

11
12 There is, however, credible evidence that the accused was aware of P2 as
13 SP14 claimed that it was the accused who gave it to him to explain the
14 discrepancies. The marks that could be upgraded were no more than five
15 and only up to two subjects. P4BCDE, however, contained substantial
16 upgrading for quite a substantial number of students.

17
18 A QB member, SP2, told the court that it was only the QB which had the
19 absolute authority in deciding who among the candidates was a qualified
20 person to practice. There could not have been any delegation to the accused.
21 The duty of the accused was to assist the QB. SP2 also claimed that there
22 was no such policy of maintaining a pass rate quota. SP2 told the court that
23 the late Tan Sri Mohtar bin Abdullah had confirmed to him that there was no such
24 direction.

25
26 This was consistent with the statement of the late Tan Sri Mohtar bin Abdullah. In
27 his statement, Tan Sri Mohtar bin Abdullah disclosed that:

28
29 “Lembaga tidak pernah menetapkan sebarang kuota sama ada
30 berkaitan dengan peratusan kelulusan atau perkara-perkara lain
31 dalam peperiksaan CLP, termasuk soal kuota Bumiputra atau
32 kuota kelas-kelas kelulusan atau apa-apa saja kuota.”

1 The late Tan Sri also added that he was never informed by the accused nor
2 discussed with him any of the alleged criteria that were used to upgrade the
3 marks. There is therefore credible evidence that the accused had no lawful
4 authority to upgrade the marks as he did.

5
6 On the third point, did the accused act dishonestly or fraudulently? There is a
7 difference between the expressions "dishonestly" and "fraudulently" (*Mohd*
8 *Jalani Saliman & Anor v PP* (1998) 1 CLJ 123 at page 141). In order to do
9 something dishonestly, there must be the intention of causing wrongful gain to
10 one person or wrongful loss to another person (section 24 Penal Code). A
11 person is said to do a thing fraudulently if he does that thing with intent to
12 defraud, but not otherwise (section 25 Penal Code). There is no requirement
13 of proof of wrongful gain or wrongful loss.

14
15 The prosecution here is relying on the element of "fraudulently" or "intent to
16 defraud". This involves two elements, namely, deceit and injury to the person
17 deceived. The injury can include any harm to any person in body, mind,
18 reputation or others (*Ratanlal & Dhirajlal's, Law of Crimes*, 24th Edition, page
19 84 and 2232).

20
21 In the present case, there is credible evidence of deception in that even when
22 the occasion arose, the accused failed to explain to the QB the details of the
23 upgrading of marks. According to the minutes of the QB meeting (P3) which
24 was confirmed by SP2 and SP8, SP2 raised the issue of the pass mark of 40.
25 SP2 enquired if more details could be given so that the QB could make a fair
26 and equitable assessment of the results. Substantial upgrading in a
27 substantial number of cases had been carried out by the accused as the pass
28 rate had been very low. This failure to inform the QB when a specific question
29 was raised as to the assessment of the results was evidence of deceit.

30
31 This deception by the accused led to an advantage for him. The QB was
32 deprived of the knowledge that there was a poor pass percentage of less than
33 12 percent for which the accused would have to explain. However, the
34 significant advantage the accused derived from this deception and the power

1 that he claimed for himself of upgrading the marks as he did was that he
2 became the sole authority of determining who was a “qualified person” under
3 the LPA. In effect, the accused had brushed aside and usurped the powers of
4 the QB.

5

6 It was fairly obvious as well that with this deception, injury or harm would be
7 caused to the QB in that the value of its examination would have depreciated
8 in the eyes of the public. The QB’s reputation would be severely dented.
9 Harm would also be caused to the public if unqualified persons were allowed
10 to practice law.

11

12 In the premises, there was indeed credible evidence that P4BCDE (master-
13 list) was a false document within the meaning of the second limb of section
14 464 Penal Code.

15

16 The second element is determining whether the making of the false document
17 comes within one of the intents specified in section 463 Penal Code. As I had
18 indicated, there was credible evidence pointing to an intention to commit
19 fraud.

20

21 The third element involves a consideration of whether P4BCDE was intended
22 to be used for the purpose of cheating. Here the prosecution needs to
23 establish:

24

- 25 (1) deception of any person, and
- 26 (2) intentionally inducing that person to do or omit to do
27 anything which he would not do or omit to do if he were not
28 so deceived and which act or omission is likely to cause
29 damage or harm to that person in body, mind, reputation or
30 property.

31

32 In this case, there must be deception and intentional inducement. The
33 element of deception must connote a dishonest intention as illustrated by
34 Illustration 1 which states:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34

“A dishonest concealment of facts is a deception within the meaning of this section”

In this regard, substantial changes were made to the original marks given to the candidates. There was substantial upgrading of marks in a substantial number of cases. The accused had no authority to do this. This was not conveyed to the QB at the meeting when the master-list was presented. When SP2 raised the issue of marks, the accused did not disclose the substantial changes that were made. SP2 and SP7, who were QB members present at that meeting, indicated that the QB would not have approved the results if they had known of the changes without explanation. After discovering the changes, the QB decided that a police report had to be lodged. In the end, the QB restored the original results but for some adjustment of marks in the case of marginal failures. To my mind, this was credible evidence of a dishonest concealment of facts.

There was also evidence of intentional inducement as the accused kept silent on the changes that had been made and the QB approved the results on the understanding that everything was in order. The QB was misled into believing that the results presented to them were the actual results when in truth they were not. If the accused had no such intention, he would have explained the upgrading of marks when the issue was raised by SP2. Even if SP2 had not raised this, the accused ought to have brought to the knowledge of the QB the low percentage of passes. This issue had even been raised in Parliament.

There is also evidence of damage and harm as I had alluded to earlier in that “unqualified persons” would be unleashed onto the unsuspecting public. The QB’s reputation and integrity would have been compromised and damaged.

Second Charge

As for the second charge, the considerations that apply are the same as I have set out in the foregoing.

1 At the end of the case for the prosecution, I have asked myself, after
2 evaluation of the credibility and reliability of all the evidence, have the
3 elements of the offence been established on both the charges. I have asked
4 myself, if the accused elects to remain silent, is the evidence sufficient to
5 convict him on both the charges. The answer to both these questions was in
6 the affirmative. I therefore ordered the accused to enter his defence on both
7 the charges.

9 **THE CASE FOR THE DEFENCE**

10 The accused gave evidence himself and called two other witnesses. At the
11 end of the defence case, extensive submissions were made on behalf of the
12 prosecution and on behalf of the accused. Before I proceed to examine the
13 defence case and the evidence adduced, it may be appropriate at the outset
14 to outline the duty of the court at the end of the defence case.

15
16 The duty of the court at the end of the trial is set out in section 173(m)
17 Criminal Procedure Code (CPC"). The duty of the court is to consider all the
18 evidence adduced before it and decide whether the prosecution has proved
19 its case beyond reasonable doubt (*Jaafar bin Ali v PP* [1998] 4 MLJ 406).

20
21 In considering all the evidence adduced, it is important to bear in mind that
22 the onus of proof of guilt always rests with the prosecution and never shifts to
23 the accused (*Wong Sieng Ping v PP* [1967] 1 MLJ 56). All the accused had
24 to do is to raise a reasonable doubt on the case for the prosecution. He need
25 not prove his innocence nor convince me of the truth of his story. All that he
26 has to do is to show that his defence might reasonably be true or probable so
27 as to raise a reasonable doubt on the prosecution's case (*Mohamad Radhi b*
28 *Yaakob v PP* [1991] 3 MLJ 169). In order to arrive at a fair conclusion, it is
29 imperative to scrutinise the evidence carefully. My analysis was as follows.

30
31 In his evidence, the accused did not dispute that he had tabled the results P4
32 before the QB. He also did not dispute the fact that alterations were made to
33 the actual results and that these alterations were not disclosed to the QB at

1 the QB meeting on 13 September 2001. The accused, however, gave
2 detailed explanations as to his actions.

3

4 In a nutshell, the defence of the accused was as follows:

5

6 (i) the alterations were not done by him alone but by a
7 consensus in a review committee or Board of Examiners
8 together with two others namely SP4 and SP15.

9 (ii) the alternations were carried out in accordance with a
10 mandate given by the then Chairman of the QB, the late Tan
11 Sri Mohtar Abdullah and that these alterations were in any
12 event a normal practice and were therefore legal, valid and
13 justified.

14 (iii) he had no knowledge of the existence of the guidelines P2
15 as used by SP1.

16 (iv) he had acted without any criminal intent as there was no
17 obligation to inform the QB of the moderation process and
18 as there were no guidelines, he exercised his own
19 professional judgement and acted in good faith without any
20 intention to deceive anybody.

21

22 On the question of the existence of the review committee, the accused
23 contended that the marks were finalised or moderated or adjusted by the
24 review committee and not him alone.

25

26 On this issue, I have no doubt that on 11 September 2001, there was such a
27 review committee headed by the accused to finalize the marks. I say this
28 because the accused's predecessor, SP1, also had a review committee
29 although SP1 did say that the power to raise marks was limited to the
30 guidelines set out in Exhibit P2 which was approved by the QB. I will come to
31 P2 later.

32

33 To my mind, however, the existence of the review committee by itself does
34 not absolve the accused. This is because unlike the QB members, the

1 members of the review committee were not appointed independently. They
2 were selected and appointed by the accused. Unlike the accused, they were
3 not privy to the deliberations of the QB Board at their meetings. They could
4 therefore be said to be outsiders.

5
6 Although SP4 and SP15 were not completely candid about their roles in the
7 review committee, their evidence that they did what they did on the
8 assumption that the accused had the power and authority to upgrade the
9 marks is quite persuasive. To my mind, the accused had the overall
10 responsibility and the major role in this review process. He was the one with
11 the power and influence. He cannot hide behind this review committee or shift
12 blame on the other members of the review committee. His contention that he
13 did not act alone must be considered in this light.

14
15 I think what is more crucial is to determine whether the review process
16 involving the upgrading of marks was authorised by the QB or an accepted
17 practice as the defence contended. The accused explained in great detail and
18 at some length on the criteria used to upgrade the marks. He adverted to
19 quite a number of the results to explain why the marks were upgraded and
20 the criteria that was applied. He claimed that this process was called
21 moderation and was an accepted practice. It was argued with much force in
22 the submissions at the end of the trial that this moderation process was legal
23 and part of the accused's professional duty as set out in his contract of
24 employment.

25
26 From the evidence adduced, it does appear that this moderation process is
27 an accepted practice. This was confirmed by a number of prosecution
28 witnesses. In fact, SP1 carried out his own review process guided by P2 in
29 which the maximum number of marks that can be raised is five and in not
30 more than two subjects. SP1 told the court that the moderation process is
31 practised by some examining bodies where the marks are too high or too low.
32 Scripts can be reviewed to see if the marking system is fair. And the marks
33 can be raised or reduced across the board. However, he explained that this

1 process is carried out not strictly to pass people but to ensure that justice is
2 done.

3

4 A QB member, SP6, who was a former Dean of the Law Faculty at Universiti
5 Kebangsaan Malaysia, also testified that the review process was to ensure
6 that the result was fair to the candidate. It was not for the purpose of passing
7 them.

8

9 SP2, another QB member, explained that only those who qualified will be
10 admitted to the bar to practice. The purpose was to protect the public and not
11 to hand out rice bowls was how he put it.

12

13 If we now examine what the accused did in his version of the moderation
14 process, it is fairly clear in my view, that the review process had altogether
15 different objectives and was vastly different.

16

17 The function of his review committee, as the accused declared on many
18 occasions, was to reflect an acceptable pass rate of about 30-35%. The
19 evidence showed that the pass percentage for the CLP July 2001 exam was
20 very low at about 12%. After the review process, the pass percentage rose to
21 25%. Although the accused claimed that he applied several criteria to
22 upgrade the marks, my impression was that the application of these criteria
23 was just a means to an end. The main objective was to pass students. The
24 only justifiable criterion was in the case of marginal failures which accords
25 with the normal understanding of moderation.

26

27 If the markers were too strict, then as suggested by SP1, the scripts should
28 be remarked or the marks that were to be upgraded should be applied across
29 the board and not selectively as the accused had done. I have analysed the
30 results and there appears to be no pattern to the upgrading. The accused
31 was solely motivated to increase the pass percentage. This sort of
32 upgrading, as the evidence disclosed, was never referred to much less
33 authorised by the QB.

34

1 In carrying out this moderation, the accused claimed that he had received a
2 mandate from the late Tan Sri Mohtar Abdullah to maintain an acceptable
3 passing rate of 30 %. Much was made by the defence of the statement to the
4 police by the late Tan Sri, that is, Exhibit P18. It was submitted, with
5 extensive reference to passages from P18, that this was a wholly exculpatory
6 statement. It was submitted that by virtue of P18 alone, the accused should
7 be acquitted.

8

9 However, a careful perusal of P18 reveals quite the opposite. To be fair, Tan
10 Sri Mohtar does say in his statement that moderation or adjustment of marks
11 is permitted as long as it is done professionally. There can, of course, be no
12 quarrel about this and I have alluded to this moderation earlier. However,
13 nowhere in P18 does the late Tan Sri say that marks can be upgraded for the
14 purpose of maintaining an acceptable pass percentage of 30 %. Additionally,
15 the late Tan Sri stated that he was never informed by the accused nor
16 discussed with him any criteria employed to upgrade the marks. The late Tan
17 Sri also said that any matters outside the professional duties of the accused,
18 including the bumiputra issue, should be referred to the QB. And finally, and
19 most importantly, the late Tan Sri emphatically declared at the end of his
20 statement P18 that there was no quota whatsoever set by the QB which
21 included the percentage of passes or any other quota. In the final analysis, I
22 would say that P18 was far from exculpatory.

23

24 In the premises, I therefore held that there was no authority given either by
25 the QB or the late Tan Sri as Chairman of the QB to maintain the pass
26 percentage. This is also consistent with the late Tan Sri's position that policy
27 matters are left to the QB. The question of maintaining the pass percentage
28 at 30 % was an important issue and a policy matter. It should rightly be
29 referred to the QB. The accused had therefore no lawful authority to upgrade
30 the marks as he did.

31

32 In coming to this view, I had discounted any knowledge on the part of the
33 accused of the guidelines in P2. SP1 could not recollect if he had informed
34 the accused about P2. There was, however, strong suspicion that the

1 accused must have known about P2 since it was lying in the office safe all
2 these years. It was also strange that for so many years, Felix Lee did not
3 think it fit to tell the accused about P2. Nevertheless, the evidence of
4 knowledge of P2 on the part of the accused is merely circumstantial and such
5 knowledge is not the only inference that can be made. It is quite possible that
6 the guidelines P2 was not brought to the knowledge of the accused until the
7 day SP14 asked for certain information. The accused should therefore be
8 given the benefit of any favourable inference to him.

9

10 I now come to the final and important question of the criminal intent on the
11 part of the accused. The accused says he acted in good faith with no
12 intention to cheat or defraud anyone. If that is indeed the case, then the
13 accused is entitled to an acquittal.

14

15 In this regard, the accused told the court that he was not given any guidelines
16 in conducting the review. The QB also never asked about the moderation
17 and it was accepted that he was not obliged to inform the QB of any
18 moderation of adjustment of marks. He therefore exercised his discretion
19 based on his experience and on what was the practice.

20

21 After careful consideration, I find the explanation by the accused quite bizarre
22 and mind-boggling. If there were no guidelines, surely the proper thing to do
23 would be to go back to the QB in the way that SP1 did to have P2 approved.
24 The accused could not have possibly thought that he had a blank cheque to
25 do as he liked without referring to the QB. He was after all an employee of
26 the QB and therefore answerable to it.

27

28 The accused also knew that even matters such as marking the answer scripts
29 in pencil were referred to the QB. Matters such as the panel of examiners
30 were also brought to the attention of the QB for approval. So what made the
31 accused think that an important matter as maintaining the pass rate at 30 %
32 could be left entirely to him?

33

1 The accused, it must be remembered, is no simpleton. He is a highly
2 experienced academician with a Masters Degree in Law. He was also a
3 former Dean of the Law School at Universiti Teknologi Mara. I can only think
4 that he did not tell the QB intentionally with the result that he became the sole
5 decider of who should be qualified to be admitted to practice, thus usurping
6 the QB and converting it to a mere stamping office. In effect, the employee
7 became the master.

8

9 I think what is most damning is what transpired at the QB meeting on 13
10 September 2001. SP2 had asked a specific question on the value of the
11 marks that were presented to the QB. The accused remained silent except to
12 say that such information would be provided in the future. When asked why
13 at this stage he did not inform the QB of the review process he had employed,
14 the accused responded by saying that this was asked long after the results
15 were approved and it did not occur to him to tell the QB. In my view, this
16 response defies belief and is inconsistent with someone who had nothing to
17 hide. Only two days earlier, the accused and his review committee had spent
18 hours until late into the night upgrading the marks. The pass percentage was
19 a low 12% and eventually upgraded by a large extent to more than double the
20 percentage to 25%. And yet the accused says that it never occurred for him to
21 say anything even when the issue of marks was raised by SP2. The
22 accused's explanation that if they had asked him how he had reviewed the
23 results, he would have told them is an absurd explanation as to why he never
24 said anything to the QB. I think any person who had nothing to hide would
25 have told the QB of the low pass rate and the methods he employed to raise
26 the pass rate for the QB's approval even if SP2 had not raised this.

27

28 There is no doubt in my mind that the accused acted on his own and
29 intentionally kept the QB Board in the dark about the upgrading. He knew he
30 was not given a carte blanche to do as he liked. He knew that maintaining
31 the pass percentage was a policy matter that could only be determined by the
32 QB.

33

1 He also knew very well that on 13 September 2001, there was almost
2 completely a new QB. Tan Sri Mohtar was no longer the Chairman. There
3 was even more reason for the accused to disclose the upgrading. But he
4 kept silent. How was he going to explain to the QB that a mark of 15 was
5 upgraded to 40? I think there lies the dishonestly, his intention to deceive and
6 to conceal the upgrading.

7

8 Although it could be surmised from the evidence that the accused went on a
9 frolic of his own, why he acted in this fashion is unclear. There was no
10 evidence of any monetary gain. Perhaps he was embarrassed by the low
11 pass rate. Or perhaps he wanted to deflect criticism of the low percentage of
12 passes, a matter that was raised even in Parliament.

13

14 However, on this issue of dishonest intention, I am guided by the Privy
15 Council decision in *HJEG Caspersz v The King* AIR 1949 PC 22, which was
16 followed by the High Court in *PP v Datuk Haji Harun bin Haji Idris & Ors*
17 [1997] 1 MLJ 180. In that case, the Privy Council rejected the argument that
18 deception honestly employed to achieve lawful and desirable ends negated
19 dishonest intention. The Privy Council took the view that this could only be
20 taken into account in mitigation.

21

22 After a careful evaluation of all the evidence in this case, I have asked myself
23 if the defence has raised any reasonable doubt in the case for the prosecution
24 and the answer has to be in the negative. I was satisfied that the prosecution
25 had succeeded in proving both the charges against the accused beyond all
26 reasonable doubt. Accordingly, I found the accused guilty of both charges
27 and he was accordingly convicted of the same.

28

29 **SENTENCE**

30 (Addressing the accused):

31 Having convicted you of the offences with which you are charged, I have to now
32 decide what is the appropriate punishment that has to be meted out.

33

1 I am compelled to say that I find this a most unpleasant task as I know, from the
2 evidence, that you have been involved in the teaching of the law for a long time.
3 You have even been dean of the law school at Universiti Teknologi Mara. To
4 me, the teaching profession is the noblest of all professions. Whatever I have
5 gained as a person, lawyer and judge have been due to a large measure to my
6 teachers, persons like you. I therefore find this task particularly distressing.

7
8 But this task I have to undertake as it is a part of my duty as a servant of the
9 law and the administration of justice. My duty as I see it is to mete out the
10 appropriate punishment commensurate with the crime and the circumstances
11 surrounding it after considering all the aggravating and mitigating factors.

12
13 Your counsel has made, on your behalf, a passionate and admirable plea in
14 mitigation. I have taken some time to consider all that learned counsel has said.
15 I have also considered the submissions by the learned Deputy Public
16 Prosecutor.

17
18 In particular, I have noted the problems that have befallen you since the day
19 you were charged with the offences in this case. You have lost your job and
20 have now encountered financial difficulties. Whilst I sympathise with you, I
21 should add, that most of these difficulties are a natural consequence of your
22 actions and apply to most convicted offenders.

23
24 I have, however, considered in your favour, your impressive record of service
25 as outlined in your Curriculum Vitae (Ext D36) and your contribution to the
26 Legal Profession Qualifying Board. (Ext D37). Your past character and
27 contribution to society is certainly a strong mitigating factor. I have noted in
28 your favour that with this conviction, your impressive record and your
29 reputation, which you have taken your whole life to build, will effectively be in
30 tatters and tarnished forever and remain as a tragic story in the annals of legal
31 history. A man's reputation or good name is a precious thing. It was
32 Shakespeare who characterised a man's "good name" as "the immediate jewel
33 of their soul" in Othello.

34

1 As a result of the conviction, as you yourself have stated in mitigation, you have
2 lost the right to participate fully in public life. You have been ostracised by your
3 friends and others. The loss of your job, your livelihood and the subsequent
4 humiliation already serve as substantial punishment. Compounded to this is the
5 fact that the prosecution and trial, which lasted some 72 days, would have
6 taken a heavy toll on you and your health.

7

8 As for the crime itself, I am mindful that the sentence must bear relation to the
9 particular circumstances of the offence. I agree that all cases of cheating and
10 forgery should not be lumped together and a standard sentence imposed. Each
11 case must be considered on its own merits. In this case, a strong mitigating
12 factor is the fact that you received no personal monetary benefit.

13

14 As against all these factors, I have to balance with the aggravating factors and
15 the primary consideration of public interest. A proper sentence serves the
16 public interest in two ways. It deters the criminal from committing the crime
17 again and it deters others who may be similarly inclined as the criminal to
18 commit the crime. In effect, the sentence must reflect the gravity of the crime.

19

20 In the plea of mitigation, it was suggested that you acted in good faith and
21 without mala fide. It may well be that your intention was to achieve desirable
22 ends in your mind. But the methods you employed were unlawful. You knew
23 very well that maintaining the pass percentage at 30% could not have possibly
24 been your function. It was the function of the QB. Even then, no QB, in order to
25 safeguard its credibility and reputation, would impose such a pass percentage
26 even to deflect criticism that has been heaped upon it. As was the case here,
27 the QB in 2001, had to reconsider and recalculate all the marks that were
28 upgraded by you.

29

30 The QB Board had no choice in this regard because it was the duty of the QB
31 under the Legal Profession Act 1976 (Act 166) to determine who are qualified
32 persons for the purpose of being admitted as an advocate and solicitor. If this
33 function is carried out improperly or is based on improper considerations, we
34 would have unqualified persons practising law. The danger of this is obvious. It

1 would be similar to unqualified surgeons practising surgery and unqualified
2 architects or engineers plying their trade with drastic consequences. The only
3 difference in the case of unqualified lawyers is that the consequences would
4 not be so easily apparent. But such unqualified lawyers could potentially cause
5 irreparable harm and injustice to their clients. For this reason, the duty and
6 function of the QB was not to hand out careers but to protect the public.

7

8 To my mind, any reasonable person in your shoes, with even a quarter of your
9 experience, qualifications and career that you have, would know that the
10 methods you employed in this case cannot possibly be right. How is it possible
11 for a candidate who has achieved only 15 marks out of 100 be considered to
12 have passed? So, I cannot for a moment accept any good faith or lack of
13 intention on your part.

14

15 In your mitigation plea, you have sought to blame others for your predicament,
16 from the Attorney-Generals past and present, members of the QB, officers of
17 the Attorney-General's Chambers to the staff in your former office. I think it is
18 time for you to take responsibility for your own actions. To put it in crude terms,
19 no one put a gun to your head when you were carrying out your functions. Your
20 predecessor had alerted you of the pitfalls that may befall you in the discharge
21 of your duty. I think, in the final analysis, a man with a distinguished career as
22 yours, should know, and did in fact know, that you had to act in a manner
23 beyond reproach.

24

25 After having given anxious consideration to all the factors that I have outlined,
26 both mitigating and aggravating, I have to now consider whether a custodial
27 sentence in respect of each of the charges is warranted. Learned counsel has
28 made a passionate plea for you to be bound over instead of receiving a prison
29 sentence. However, any plea for mercy or leniency must be balanced with
30 public interest which is paramount. Although there are strong mitigating
31 circumstances in your favour, I would be failing in my duty, to my conscience
32 and to the public, if any punishment less severe than a custodial sentence is
33 imposed. The punishment must be such as to record society's disapproval of

1 your conduct in this case. Anything less may amount to a farce of the law and
2 justice.

3

4 In terms of the severity of the punishment itself, I am acutely aware of the
5 principle that for men of good character, the very fact that prison gates have
6 closed is the main punishment and it does not necessarily follow that they
7 should be closed for a long time (*Sargeant v Regina* (1975) 60 Cr App 74).

8

9 After taking into account all the relevant facts and circumstances and all other
10 considerations which I have discussed earlier, I sentence you, on each of the
11 charges, to three months' imprisonment with effect from today. I also order that
12 the sentences are to run concurrently as the offences committed are not
13 separate or distinct. I should make it clear that if not for the strong mitigating
14 circumstances, a substantive term of imprisonment would have been imposed.

15

16 Bertarikh 31 July 2007

17

18

19

20

21

22

23

Signed
(HARMINDAR SINGH DHALIWAL)
Hakim Mahkamah Sesyen,
Kuala Lumpur