IN THE

SUPREME COURT

OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,

Plaintiff-Appellee,

v.

JONG HUN LEE,

Defendant-Appellant.

Supreme Court Appeal No. 03-009-GA

Superior Court Case No. 02-0217T

FOR PUBLICATION

OPINION

Cite as: ***Commonwealth v. Jong Hun Lee,*** **2005 MP 19**

Argued and submitted on February 6, 2004
Tinian, Northern Mariana Islands
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BEFORE: MIGUEL S. DEMAPAN, *Chief Justice*; ALEXANDRO C. CASTRO; *Associate Justice*; JOHN A. MANGLONA, *Associate Justice*

DEMAPAN, Chief Justice**:**

¶1 Jong Hun Lee ("Lee") appeals his bribery conviction and the trial court's sentence determination. We AFFIRM the judgment of conviction, but VACATE Lee's sentence and REMAND for re-sentencing.

I.

¶2 On November 9, 2002, after a bench trial, the trial court found Lee guilty of the charge of Bribery in violation of 6 CMC § 3201. Excerpts of Record ("E.R.") at 157-58. Lee was sentenced to two years imprisonment, all suspended except six months. E.R. at 4-5. In addition, he was ordered to pay the statutory fine of $600, an assessment fee of $100 and a probation fee of $100.

¶3 Lee is a businessman of Korean descent and nationality who operates at least two businesses on Tinian. After he terminated the employment of Evangeline Dionio ("Dionio"), a non-resident worker, Dionio filed a complaint with the Department of Labor and Immigration ("DOLI") on Tinian, which conducted an investigation. The labor investigator assigned to the matter was Esteven King, Jr ("King"). King and Lee had no family or personal relationship.

¶4 On June 11, 2002, King and Jasper Borja ("Borja"), another DOLI investigator, met with Lee officially to discuss the Dionio complaint. At that time, Lee told King and Borja that he would like to pay the government or donate money to a public school rather than pay Dionio.

¶5 On June 14, 2002, King had a chance encounter with Lee at the parking lot in front of the building which contained Lee's poker business and King's employer, DOLI. At that time, Lee slipped an envelope containing $200 cash to King while shaking King's hand and proclaiming: "[t]his is friendship only between you and me, nothing department, no businessman." E.R. at 57.

Lee did not specifically request that King take any action at that time; however, Lee was aware from many past labor claims brought against him of "how labor claims proceed, how they are resolved and the power of an investigator to decide the [calculated] or to calculate the amount of back wages due." E.R. at 157, ln. 16-17. In addition, Lee believed that King "would have a great amount of influence on the outcome of the case." E.R. at 100.

¶6 Later that day, after King had received the envelope, he told fellow DOLI investigator Anthony M. Barcinas ("Barcinas") about the incident and asked what he should do. Barcinas suggested King return the money to Lee and both officers went looking for Lee. Unable to find him, King reported the matter immediately to Janet King, the Resident Director of the Department of Labor and Immigration. Janet King told King to record what happened, which he did, later in the day. E.R. at 165.

II.

¶7 This Court has jurisdiction over this appeal from a final order of the Commonwealth Superior Court pursuant to Article IV, Section 3 of the Commonwealth Constitution and Title 1, Section 3102(a) and Section 3108 of the Commonwealth Code.

III.

¶8 The following issues are presented for our review:

1. Whether the conviction is supported by sufficient evidence. In a criminal case, we examine the evidence presented at trial, drawing all reasonable inferences in favor of the Commonwealth, and then examine whether the trier of fact could find that every element of the crime charged was proved beyond a reasonable doubt. *Commonwealth v. Yi Xiou Zhen*, 2002 MP 4 ¶ 12, 6 N.M.I. 361, 365. Appellant must show that, "viewing the evidence in the light most favorable to the government, no reasonable trier of fact could have convicted h[im]." *Id.* at

¶33, 6 N.M.I. at 369. A litigant claiming insufficiency of the evidence "faces a nearly insurmountable hurdle." *Id., citing United States v. Teague*, 956 F.2d 1427, 1433 (7th Cir. 1992).

¶9 2. Whether Lee's conviction violated due process under Fourteenth Amendment to the United States Constitution. The constitutional right to due process is reviewed *de novo*. *Commonwealth v. Campbell*, 4 N.M.I. 11, 15 (1993).

¶10 3. Whether Lee was entitled to a jury trial under the equal protection clause of the Fourteenth Amendment to the United States Constitution. The constitutional right to equal protection is reviewed *de novo*. *Yi Xiou Zhen*, 2002 MP 4 ¶ 10, 6 N.M.I. at 364.

¶11 4. Whether Lee's sentence was based on, or appeared to be based on, impermissible criteria of race and nationality. A court has abused its discretion if it based a ruling on a "an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Lucky Dev. Co., Ltd. V. Tokai, U.S.A., Inc.*, 3 N.M.I. 79, 84 (1992).

IV.

A. Sufficiency of the Evidence

¶12 Lee argues that the prosecution failed to prove all elements of the bribery charge beyond a reasonable doubt. Section 3201 of Title 6 of the Commonwealth Code provides:

> Every person who shall unlawfully and voluntarily give or receive anything of value in wrongful and corrupt payment for an official act done or not done, to be done or not to be done, shall be guilty of bribery, and upon conviction thereof may be imprisoned for a period of not more than five years, and shall be fined three times the value of the payment received; or, if the value of the payment cannot be determined in dollars, shall be imprisoned for a period of not more than five years, and fined not more than $1,000.

6 CMC § 3201. A basic rule of statutory construction is that words should be given their plain meaning. *Commonwealth v. Itibus*, 1997 MP 10 ¶ 6, 5 N.M.I. 78, 79; *Commonwealth v. Nethon*,

1 N.M.I. 458, 461 (1990). Courts applying criminal laws must strictly construe the plain language of a statute. *Nethon,* 1 N.M.I. at 461; *United States v. Coyne*, 4 F.3d 100, 108 (2nd Cir. 1993). However, when statutory language is taken directly from common law and uses common law terms of art, which are not otherwise defined, then we presume that the legislature knows and has adopted "the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Morissette v. United States*, 342 U.S. 246, 263, 72 S. Ct. 240, 250, 96 L. Ed. 288, 290 (1952). Therefore, we will turn to the common law for guidance when the statutory text contains a term, otherwise undefined, which has an established meaning at common law. *See Neder v. United States*, 527 U.S. 1, 21-22, 199 S. Ct. 1827, 1840, 144 L. Ed. 2d 35, 44 (1999).

¶13 "Common law bribery has been defined as 'the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done . . . .'" *United States v. Zacher*, 586 F.2d 912, 914 (2nd Cir. 1978) (*quoting* 12 AM. JUR. 2D BRIBERY §2). Our bribery statute clearly mirrors this common law definition. In addition, our bribery statute does not provide a definition for the key term "corrupt." As such, it is instructive to turn to common law definitions of bribery and specifically of the term "corrupt" as an aid to interpreting our statute.

¶14 The actual meaning of the word "corrupt" at common law is elusive. Generally, "[c]onduct is corrupt if it's an improper way for a public official to benefit from his job." *United States v. Dorri*, 15 F.3d 888, 894 (9th Cir. 1994) (Kozinski, J., dissenting) (majority in full agreement with "the dissent's very eloquent explanation of the [common] law of bribery"). The term corrupt likewise refers to a "wrongful desire for pecuniary gain or other advantage." BLACK'S LAW DICTIONARY 348 (7th ed. 1999). However it is defined, the term "corrupt" implicates a defendant's intent or *mens rea*. *See Roma Constr. Co. v. aRusso,* 96 F.3d 566, 573-

74 (1st Cir. 1996) ("The *mens rea* implicated by 'corruptly' concerns the intention to obtain ill-gotten gain.").

¶15 Two branches of the common law requirement of "corrupt payment" have developed in American statutory law. In some statutes, an essential element of the offense of bribery is a corrupt understanding or agreement: a *quid pro quo*. 12 AM. JUR. 2D *Bribery* § 9 (1997). *See United States v. Kotvas*, 941 F.2d 1141, 1145 (11th Cir. 1991). Those statutes require proof that a mutual or reciprocal agreement existed in the minds of both parties to the bribe. In other statutes, all that is required is a subjective intent on the part of the person offering the bribe. *See Illinois v. Lyons*, 122 N.E.2d 809, 811 (Ill. 1954); 12 AM. JUR. 2D *Bribery* § 9 (1997). When all that is required is a subjective intent, the offense of bribery may be committed even if the public official rejected the bribe or made no reciprocal promise as to any future action. 11 C.J.S. *Bribery* § 2 (1938). *See, United States v. Frega*, 179 F.3d 793, 807 (9th Cir. 1999).

¶16 Examining our statute, on its face, it is clear that the offense of bribery is separated into giving "or" receiving. Corrupt payment-- the motive for a public official to illegally benefit from his job or the motive for a citizen to gain an unfair governmental advantage-- is required by our statute for either the giving or the receiving of a bribe. There is nothing in the wording of our statute which makes the giving and receiving mutually dependent. They are separated by the word "or." A plain reading then suggests that giving or receiving are each separate crimes. Accordingly, here it was proper for the trial court to examine Lee's intent or *mens rea* in passing $200 to King separately from King's intent or *mens rea* in receiving the $200 to determine whether Lee was guilty of bribery.

¶17 The essential elements of bribery under 6 CMC § 3201 that were needed to convict Lee were: (1) whether he knew that King was a public officer; (2) whether he unlawfully and

voluntarily gave something of value to King; (3) whether his intent or *mens rea* in doing so was wrongful and corrupt; and (4) whether he did so to obtain an official act by King. There is no argument that Lee knew King was a DOLI employee and public officer. There is also no argument that Lee gave King $200 voluntarily.

¶18 As for Lee's intent, the trial court found that Lee intended to make the payment to influence King to commit an official act: to favor Lee in the labor case brought by Dionio. Lee knew that King had a certain amount of control over the outcome of the labor case. In order to make a finding of bribery, it is not necessary to have proof of an explicit promise to perform certain acts. *Coyne,* 4 F.3d 100 at 111. The court can make an inference regarding the purpose of the payment by an examination of the relevant facts: Lee had no personal relationship with King; King was investigating a labor complaint against Lee; Lee believed King could perform official acts making the outcome of the case more favorable to Lee; and Lee gave King $200. On these facts, we find that a reasonable trier of fact could have found that Lee had the requisite intent to bribe King. We also find, considering that King was a labor investigator on a pending case involving Lee, it was reasonable for the trial court to infer from the facts that Lee intended to obtain an official act from King: preferential treatment in the Dionio labor case.

¶19 Lee argues that a finding of bribery cannot be based on a defendant's attempt to "influence" official proceedings without proving a specific official act was promised. While Lee is correct that the actual word "influence" is not part of our statute, the idea of "influence" is inherent in the common law definition of bribery which encompasses "pecuniary gain or other advantage." Accordingly, we find that the conviction of bribery is supported by sufficient evidence.

B. Due Process

¶20 The claim of insufficiency of the evidence raises a federal due process question. *See Barnes v. United States*, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). The evidence necessary to invoke an inference must be sufficient to find an inferred fact beyond a reasonable doubt. *Id.*, 837 U.S. at 843, 93 S. Ct. at 2361-62, 37 L. Ed. 2d at 387. Because we have already found, *supra*, that the conviction of bribery was supported by sufficient evidence, due process has been satisfied.

C. Entitlement to Jury Trial Under Equal Protection

¶21 Lee argues that 6 CMC § 3201 creates an arbitrary classification under the equal protection clause of the Fourteenth Amendment because the right to a jury depends solely on the amount of the bribe offered. Pursuant to 7 CMC §3101(a), a defendant is entitled to a jury trial when the punishment includes a term of more than five years imprisonment and/or a criminal fine greater than $2,000. The CNMI Legislature has discretion to decide whether a trial under local law will be held before a jury, *Commonwealth v. Atalig*, 723 F.2d 682, 685-86 (9th Cir. 1984), *cert denied*, 467 U.S. 1244, 104 S. Ct. 3518, 82 L. Ed. 2d 826 (1984); *Commonwealth v. Peters*, 1 N.M.I. 466, 471-74 (1991), and 7 CMC § 3101(a) has been upheld as a constitutional legislative enactment. *Commonwealth v. Yi Xiou Zhen*, 2002 MP 4, 6 N.M.I. 361.

¶22 Because 6 CMC § 3201 conditions the amount of the criminal fine on the size of the bribe ("three times the value of the payment received," *supra* ¶12), some defendants accused of bribery would be entitled to a jury trial pursuant to 7 CMC § 3101(a) while others would not. The deciding factor is the monetary amount of the bribe alleged, because the potential maximum period of incarceration pursuant to 6 CMC § 3201 ("not more than five years," *supra* ¶12) does not entitle a defendant to a jury trial.

¶23 Under an equal protection analysis, the issue is whether the defendant was treated differently than others similarly situated. *See City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 315 (1985). Here, Lee was not treated differently from others similarly situated because other people charged with the same crime in the same monetary amount would have also received a bench trial. The fact that the length of incarceration stays constant no matter how small or large of a bribe was tendered is not relevant because the Legislature has decided not to provide jury trials for any felony with a maximum penalty of less than five years of incarceration. As such, 6 CMC § 3201 does not violate the equal protection clause.

D. Sentencing Criteria

¶24 A trial court may not make sentencing determinations based on a defendant's race, alienage, nationality, ethnicity, or place of origin. *See, United States v. Borrero-Isaza*, 887 F.2d 1349 (9th Cir. 1989); *United States v. Lai-Moi Leung*, 40 F.3d 577 (2nd Cir. 1994). The appearance that a defendant's nationality or alienage played a role in the sentence imposed is likewise unacceptable. *Lai-Moi Leung*, 40 F.3d at 586-87. In *Lai-Moi Leung*, the trial judge stated:

> The purpose of my sentence here is to punish the defendant and to generally deter others, particularly others in the Asiatic community because this case received a certain amount of publicity in the Asiatic community, and I want the word to go out from this courtroom that we don't permit dealing in heroin and it is against president [sic] law, it is against the customs of the United States . . . .

Id. at 585. In remanding, the Second Circuit found that while the judge was not personally biased, "justice must satisfy the appearance of justice." *Id.* at 586 (*citing United States v. Edwardo-Franco*, 885 F.2d 1002, 1005 (2nd Cir. 1989) (*quoting Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11, 12 (1954))). Similarly, in *Borrero-Isaza*, when a judge

attempted to "send a message" to Columbia regarding drug crimes by penalizing a person with Columbian citizenship, the Ninth Circuit found that the district court improperly based its sentence on defendant's national origin. *Borrero-Isaza*, 887 F.2d at 1355. A passing reference to a defendant's nationality is not improper. *Lai-Moi Leung*, 40 F.3d at 586-87. If there is a sufficient risk, however, that a reasonable observer might infer bias from the sentencing remarks, then those remarks do not satisfy "the appearance of justice." *Id*.

¶25 In the case before us, the trial court, in its sentencing order, stated the following:

> In this case we have a 50-year-old man who is a citizen of Korea doing business in the Commonwealth of the Northern Mariana Islands (CNMI) on the island of Tinian. A Non-US citizen or national does not have an inherent right to do business here or even to be here. Their operation of a business or to stay in the CNMI is a privilege that is granted according to law and conditioned on complying with the various laws of the CNMI.
>
> While bribing a government official may not be taken too seriously and not vigorously enforced in many countries of the world, it is, indeed, taken seriously, in the CNMI, as is revealed in our law . . . .
>
> . . . .
>
> It is always difficult for this court to understand how a citizen of another country can come into a [sic] this or other jurisdictions and feel that they have the right to conduct themselves and their business in violation of the guest country laws.

The trial court specifically referred to the defendant's Korean nationality, and strongly implied that the people of Korea do not take the crime of bribery seriously. This was not merely a passing reference to Lee's nationality. A reasonable observer might infer that Korean nationals were being singled out and might believe that this sentence reflected Lee's nationality. While we do not believe that the trial judge is personally biased, we find that there is an appearance of bias inherent in this sentencing order. Accordingly, we remand this case for the sole purpose of re-sentencing.

¶26 Unless there are "unusual circumstances," re-sentencing is done by the original sentencing judge. *United States v. Alverson*, 666 F.2d 341, 349 (9th Cir. 1982). The factors we consider when deciding whether to have a different judge conduct a re-sentencing are:

> (1) the difficulties, if any, that the [ ] court would have at being objective upon remand because of prior information received; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication of effort out of proportion to any gain in preserving the appearance of justice.

Borrero-Isaza, 887 F.2d at 1357. We are confident that the appearance of justice will be satisfied by having the original trial judge re-sentence this defendant. There is no further information which might impact upon the trial judge's objectiveness. In addition, a reassignment would entail a duplication of effort far out of proportion to any gain in preserving the appearance of justice.

V.

¶27 For the foregoing reasons, we AFFIRM the trial court's conviction of Defendant Jong Hun Lee on the charge of Bribery in violation of 6 CMC § 3201, but we VACATE the sentence on the basis that the trial court judge's sentencing order reference to defendant's race and nationality has an appearance of bias. We, therefore, REMAND this matter to the trial court for the purpose of re-sentencing in accordance with this opinion.

SO ORDERED this 17th day of November 2005.

/s/
MIGUEL S. DEMAPAN
Chief Justice

/s/
ALEXANDRO C. CASTRO
Associate Justice

/s/
JOHN A. MANGLONA
Associate Justice