

THE AMENDED ROLE OF THE PUBLIC PROSECUTOR TO RESOLVE WITH AN ACCUSED PERSON IN EXPEDITING THE DISPOSAL OF CASE

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Abstract

The Public Prosecutor makes the final decision whether an offender should be charged with an offence. Article 145(3) of the Malaysian Federal Constitution states clearly stipulates that the Attorney General has the power to institute, conduct or discontinue any proceedings for an offence in any court other than the Syariah Court, Native Court and the Court-Martial. Section 376(1) and (2) of the Malaysian Criminal Procedure Code (hereinafter referred to as the 'CPC') clarify by stating that the Attorney General, who will be the Public Prosecutor, will have the control and direction of all criminal prosecutions and proceedings under the Code. It is plain and clear from decided cases that the Public Prosecutor determines if any person is to be prosecuted of any offence. It is only right to charge a suspect when the evidence from the police investigation discloses a prima facie case. At the close of the defence which may also be said to be the conclusion of the trial, the prosecution bears legal burden to prove beyond all reasonable doubt that the accused did the offence, or the charge is not proven. This criminal standard of proof required of the prosecution to prove their case beyond all reasonable doubt against the accused is not without hurdles, and can be very time consuming. Accordingly, it makes sense for the prosecution to secure a conviction on a reduced charge by mediating with the accused to plead guilty on a lesser offence, and upon the accused doing so, to withdraw the charge against the accused for the serious offence (felony). In 2010, an amendment was made to the CPC vide the Criminal Procedure Code (Amendment) Act 2010 with its objects among others to address problems of backlog of cases in the criminal courts and towards encouraging the expeditious disposal of criminal cases. The amendment provides that the Public prosecutor need to indulge in pretrial conference, case management and plea bargaining with the accused. This paper thus looks at these amendments and how they have affected the Public Prosecutor from a reactive to proactive role in resolving with an accused person to expedite the disposal of case in accordance with both human rights and humanitarian laws.

PROSECUTORIAL DISCRETION OF THE PUBLIC PROSECUTOR

In *Repco Holdings Bhd v PP*¹, Gopal Sri Ram JCA sitting as High Court Judge held that section 126(2) of the Securities Commission Act 1993 (Act 498) providing that any prosecution under the Act may be conducted by the Registrar or by any person he authorised in writing or by any officer authorised in writing by the Chairman of the Commission as *ultra vires* article 145(3) of the Federal Constitution. Section 376(1) and (2) of the CPC clarify by stating that the Attorney General, who will be the Public Prosecutor, will have the control and direction of all criminal prosecutions and proceedings under the Code.

In *Long Bin Samat v PP*², the accused was charged with the offence of causing simple hurt when there is evidence of causing grievous hurt. Again Suffian LP reiterated the position that article 145(3) of the Federal Constitution gave the Public Prosecutor wide discretion over the control and direction of all criminal proceedings, and can in particular decide to prefer a charge for a less serious offence when there is evidence of a more serious offence.

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¹ [1997] 3 MLJ 681.

² [1974] 2 MLJ 152, FC.

In *Dato Seri Anwar bin Ibrahim v Public Prosecutor*,³ the accused was convicted on 4 amended charges of corrupt practise under section 2(1) of the Emergency (Essential Powers) Ordinance.⁴ He was sentenced to 6 years imprisonment on each of the charge to run concurrently from the date of conviction. One of the grounds of appeal was that the charge under the 1970 Ordinance was an abuse of the process considering that the Federal Government had expressed a clear intention to have it annulled because the Anti Corruption Act 1997⁵ is already in place making the 1970 Ordinance redundant when it was consolidated into the 1997 Act together with Prevention of Corruption Act 1961⁶ and Anti Corruption Agency Act 1982⁷. Unlike the two corruption Acts of 1961 and 1982 that were automatically repealed, the 1970 Ordinance requires a resolution to be passed by both Houses of Parliament to annul it. The Lower House (House of Commons) had passed a resolution to that effect, but it had yet to be laid before the Upper House (Senate). Hence, it was argued by the accused's counsel that there was legitimate expectation by the public that the 1970 Ordinance is a spent force. It was held by the Court of Appeal that the question of oppression or vexatiousness on the part of the Attorney General to prosecute the accused under the 1970 Ordinance did not arise. The Court of Appeal also held that the Federal Constitution gives the Attorney General (Public Prosecutor: section 376(1) of the CPC) the power exercisable at his discretion 'to institute, conduct or discontinue any proceedings for an offence in any court other than a syariah court, a native court or a court martial.' In this case, the Court of Appeal noted that prosecution was instituted after a full police investigation, and it cannot be said that the Attorney General could have acted in bad faith. This discretion vested in the AG is unfettered and cannot be challenged and substituted by that of the Court's. The case went up for appeal before the Federal Court which upheld the entrenched view that it is a matter entirely within the discretion of the attorney-general under art 145(3) of the Constitution to prefer any charges for offences under any law he deems fit depending on the facts of the case and taking into account the public interest element into consideration. The Federal Court said that it is not the business of the court to speculate whether a resolution would be passed in the Dewan Negara (Senate) as a matter of course. With the Ordinance continuing in force, the question of vexatiousness or oppression on the part of the Attorney General does not arise nor would the same be invidious or oppressive to the accused to be prosecuted under a law that is still valid. The Federal Court, however, accepted that it should not be impotent when it comes to abuse of its process and would intervene.⁸ It must be noted that the House of Representative had already passed a resolution to annul it. In other words, the annulling process was already half way in process and for the Public Prosecutor to charge him under the law against the wish of those who had the peoples' mandate would not, it is submitted, be acting sagaciously and in public interest. Be that as it may, the discretion is still his and why should he substitute his sagacity with that of others?

In *PP v Toha & 3 Ors*,⁹ four accused were arrested on 24th April 2004 were charged with trafficking in dangerous drugs under section 39B(1)(a) of the Dangerous Drugs Act 1952¹⁰ on 7th May 2004 which carries the mandatory death penalty. The accused were finally produced before the judge of the High Court on 6th January 2006 and they were all unrepresented. They were, however, charged not with trafficking under section 39B(1) but for a lesser charge under section 39A(2) for possession of larger quantity of dangerous drugs. The charge was read to all of them and they claimed trial. A short mentioned date to 13th January 2006 was granted on the request of the learned Deputy Public Prosecutor who wanted to get further instructions, and to explore the possibility for any of the accused offering to plead guilty and the charge against the remaining accused withdrawn. On 13th January 2006, all the accused appeared and were represented by one counsel. The four accused were granted adjournment to 17th January 2006 to discuss with counsel their plea to the charge. On 17th January, the accused appeared with the same counsel and all the accused claimed trial except one (M Ali Bin Osman) who pleaded guilty to the charge and he understood the nature and consequences of his plea. The learned Deputy Public Prosecutor then informed the Court that he would withdraw the charge against the accused who claimed trial only after the 3rd accused who pleaded guilty to the charge was convicted and

³ [2000] 2 MLJ 487, CA. See also the Supreme Court case of *Karpal Singh & Anor v PP* [1991] 2 MLJ 544 which held that the Attorney General discretion is unfettered and cannot be challenged and substituted by that of the courts.

⁴ No 22 of 1970.

⁵ Act 575.

⁶ Act 57.

⁷ Act 271 (repealed by Act 575).

⁸ *Dato Seri Anwar Bin Ibrahim v PP* [2002] 3 MLJ 193, FC.

⁹ [2006] 2 CLJ 800.

¹⁰ Act 234.

sentenced. The Court fixed the case for disposal to 19th January 2006 to hear the facts and sentence against the 3rd accused. On that day, the 3rd accused still maintained his plea of guilty despite knowing the nature and consequences of his plea, and even after the Court explained to him that the maximum sentence may be imposed notwithstanding his plea should he be convicted after the facts were tendered and admitted by him unequivocally. The 3rd accused admitted the facts and the exhibits tendered by the Deputy Public Prosecutor. He was found guilty and convicted for the offence charge on his own plea of guilty. The sentence was 18 years imprisonment from the date of arrest and 10 strokes of the whip. The learned Deputy Public Prosecutor then applied to withdraw the charge against the three remaining accused who claimed trial. The judge accordingly acquitted them.

DISCRETION TO DISCONTINUE PROSECUTION

The Public Prosecutor at any stage of the trial, before the delivery of the judgment may, if it thinks fit, inform the Court that he will not further prosecute the accused upon the charge, and thereupon, all proceedings on the charge against the accused shall be stayed, and the accused shall be discharged of and from the same. The discharge shall not amount to an acquittal unless the court so directs.¹¹ In *Poh Choo Ching v PP*,¹² charges of corruption were brought against two persons, one for giving the bribe, and the other for accepting it. The charge against the giver was withdrawn. The acceptor of the bribe was duly convicted and sentenced. At the High Court, he alleged that the withdrawal of the charge against the other person had affected the legality of the charge against him. In essence, the offence of receiving gratification involves two parties, and if there was no giver, there could be no acceptor. Wan Yahya J. referred to section 254 of the CPC, which allows a charge against any person to be withdrawn and proceedings to be discontinued. The judge observed that this power undoubtedly confers on the Public Prosecutor an unrestricted discretion in respect of which he is expected to exercise extreme fairness and sagacity. Whether he does so or not, it is not for the court to decide.

Section 171A of the CPC further stipulates that any outstanding offence may be taken into consideration with the consent of both the Public Prosecutor and the accused in determining and passing sentence upon the accused who has been found guilty. When the aforesaid consent is given and an outstanding offence is taken into consideration, the Court shall enter or cause an entry to that effect to be made on the record and upon sentence being pronounced the accused shall not, unless the conviction which has been set aside, be liable to be charged or tried in respect of any such offence so taken into consideration.

PRIMA FACIE CASE (EVIDENTIAL BURDEN)

It is trite under common law that the prosecution bear the legal burden of proving their case beyond all reasonable doubt.¹³ The accused is initially presumed innocent until the prosecution establish a *prima facie* case, and the accused is called upon to enter his defence.¹⁴ Until then, an accused shall not be called to enter upon his defence and is presumed innocent. This criminal standard of proof required of the prosecution to prove their case beyond all reasonable doubt against the accused is not without hurdles, and can be very time consuming. Accordingly, it makes sense for the prosecution to secure a conviction on a reduced charge by mediating with the accused to plead guilty on a lesser offence, and upon the accused doing so, to withdraw the charge against the accused for the serious offence (felony). The Attorney General Tan Sri Gani Patail explained how he determines whether an accused person is to be charged or not:¹⁵

We look for 90 per cent chances of conviction, not *prima facie* — then we'll go to court. When we prosecute, we depend on evidence on paper. We all know witnesses will say this and that. All witnesses have given accounts of different things. The best we can do is produce evidence of what is given to us. But witnesses may change the story. But in court, the story may change.

¹¹ CPC s 254; see also s 103 Syariah Criminal Procedure (Federal Territories) Act 1997 (Act 560).

¹² [1982] 1 MLJ 86.

¹³ See section 173 (m) & 182A of the Criminal Procedure Code, read with section 101 of the Evidence Act 1950.

¹⁴ See section 173 (f) & 173(h) (i), 180(3), 256 & 257 of the CPC.

¹⁵ Parts of Aniza Damis' interview with the Attorney General Tan Sri Gani Patail, New Sunday Times, July 25, 2004 p 4.

Or the story may have some other evidence which was not made available to us — things might come up. And for these reasons alone, the person can be acquitted. A person may be acquitted based on just one reasonable doubt. I on the other hand, have to prove to a very high degree — beyond reasonable doubt! The principle of the law is that all discretion must be exercised judiciously. There is no such thing as dropping a case. The moment there is enough evidence, I want to charge a person. Then I look at the public interest, at the national interest and at other interest. Then I exercise that discretion to charge or not. ... The decision to charge is not my alone. Every time in big cases, there is a group of us. There are at least two or three of my officers sitting with me, giving their ideas, and we go on consensus.... The only way is to have a collective decision, where everybody sits down, and discusses the matter thoroughly, openly, transparently and seriously. ... I have only said that that the moment the case is referred to me, and if there is a case, I will charge. ... If papers are sent to me, then we look at them, and if there is a case, we charge. If there is insufficient investigation, then we push it back ... for further investigation. ... On prosecution, I'm not answerable to anybody. I only answer to my conscience and the Law. I do not have the powers to investigate. I can only look at a file and decide whether to charge or not. And if I am not happy, I will then ask the police, and say that I don't have a case at the moment, if you investigate further, then I can re-look it.

It is plain and clear from decided cases that the Public Prosecutor determines if any person is to be prosecuted of any offence which he is alleged to have committed. It is only right to charge a suspect when the evidence from the police investigation discloses a *prima facie* case. The Human Rights Commission of Malaysia recommends that prosecution should only proceed when a case is well founded upon evidence reasonably believed to be reliable and admissible.¹⁶ To start with, there must first be a *prima facie* case against the accused if the case against him is to succeed at the prosecution stage. At the close of the defence which may also be said to be the conclusion of the trial, the prosecution must prove beyond all reasonable doubt that the accused did the offence, or the charge is not proven.¹⁷ Thus, whether, an accused should be charged depends on whether there is a *prima facie* case which means upon well founded evidence believed to be reliable and admissible. On this Lord Devlin in the Privy Council case of *Shaaban & Ors v Chong Fook Kam & Anor* said:¹⁸

Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes to the next stage ...

What is a *prima facie* case is now settled under the new amendment made to section 173(h)(iii) and 180(4) of the CPC vide the Criminal Procedure Code (Amendment) Act 2006¹⁹ which reads a '*prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.' What this means could be illustrated with decided cases decided as early as 1930s before the 'upheaval' as to what is *prima facie* case, and the 'ridiculous idea' between what is minimal or maximum evaluation. In *Yeo Tse Soon*, Mc Mullin Commissioner, delivering the judgment of the Court of Appeal said that to make out a case is not the same thing as to prove it beyond all reasonable doubt.²⁰ In *PP v Saimin & Ors*, Sharma J. said that evidence discloses a *prima facie* case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused.²¹

In *PP v Goo Kian*, the Public Prosecutor had appealed against the acquittal of the respondent on a charge of theft. Raja Musa J said that at the close of the case for the prosecution, the evidence disclosed that the respondent took away the complainant's bicycle which undoubtedly was in the complainant's possession, out of his possession by riding it away to Seremban, without the

¹⁶ Read Human Rights Commission of Malaysia Report: *Forum On The Right To An Expeditious And Fair Trial* 708 April 2005 p 20 -21.

¹⁷ See both s 173(m) and 182A of the CPC.

¹⁸ [1969] 2 MLJ 219 at 221, PC.

¹⁹ Act 1274.

²⁰ [1995] 3 MLJ 255

²¹ [1971] 2 MLJ 17

complainant's consent, hence had *prima facie* caused wrongful loss to the complainant in that he was deprived without his consent of the use of his own bicycle causing wrongful loss to him.²²

In *PP v Mahmud*, the accused had driven his car without due care and attention which was an offence under section 366(1) of the Driving Ordinance to which he pleaded guilty. However, having heard the facts as narrated by the Public Prosecutor, the Magistrate held that the facts disclosed no offence and acquitted the accused. On appeal, Ong Hock Sim FJ. set aside the order of acquittal, and held that the fact of knocking into the telephone post unexplained by mechanical defect or other reasonable cause is *prima facie* evidence that the respondent had failed to exercise the due care and attention.²³

Obviously, a *prima facie* case is not adducing evidence beyond all reasonable doubt nor could it be a maximum evaluation because the accused has yet to adduce his part of the evidence.²⁴ Likewise, it could also not be minimal as the prosecution needs to adduce sufficient evidence to succeed in their submission that there is a case to answer. *Prima facie* case simply means that the accused has a case to answer upon the evidence adduced by the prosecution that is, there is evidence not inherently incredible that goes towards establishing the elements or ingredients of the offence.

CRIMINAL PROCEDURE (AMENDMENT) ACT 2010

Pre-trial Conference

Section 172A provides –

(1) An accused who is charged with an offence shall, by an advocate representing him, participate in a pre-trial conference with the Public Prosecutor before the commencement of the case management.

(2) A pre-trial conference shall commence within thirty days from the date the accused was charged in court or any reasonable time before the commencement of the case management.

(3) A pre-trial conference may be conducted by any means and at any venue as may be agreed upon by the advocate representing the accused and the Public Prosecutor.

(4) During the pre-trial conference, an advocate representing an accused may discuss with the Public Prosecutor the following matters relating to the case:

- (a) identifying the factual and legal issues;
- (b) narrowing the issues of contention;
- (c) clarifying each party's position;
- (d) ensuring the compliance with section 51A²⁵;
- (e) discussing the nature of the case for the prosecution and defence, including any alibi defence that the accused may rely on;
- (f) discussing any plea bargaining, and reaching any possible agreement thereto; and
- (g) any other matters as may be agreed upon by the advocate representing the accused and the Public Prosecutor that may lead to the expeditious disposal of the case.

(5) All matters agreed upon in the pre-trial conference by the advocate and the prosecutor shall be reduced into writing and signed by the accused, the advocate and the Public Prosecutor.

²² [1939] MLJ 291

²³ [1974] 1 MLJ 85 (FC)

²⁴ CPC s 173(h) (i), (iii), 180(3) and 257.

²⁵ Section 51A of the CPC requires the Public Prosecutor to furnish to the accused documents that favour the accused such as the charge, cautioned statements provided it would not be in the public interest to do so.

Case Management

Section 172A provides -

- (1) The Court shall commence a case management process within sixty days from the date of the accused being charged.
- (2) At the case management, the Court shall—
 - (a) take into consideration all matters that have been considered and agreed to by the accused and his advocate and the Public Prosecutor during the pre-trial conference;
 - (b) where no pre-trial conference has been held on the ground that the accused is unrepresented, discuss with the accused and the Public Prosecutor any matter which would have been considered under section 172A;
 - (c) assist an accused who is unrepresented to appoint an advocate to represent the accused;
 - (d) determine the duration of the trial;
 - (e) subject to subsection (3), fix a date for the commencement of the trial; and
 - (f) give directions on any other matter as will promote a fair and expeditious trial.
- (2) A subsequent case management, if necessary, may be held not less than two weeks before the commencement of the trial.
- (3) The trial shall commence not later than ninety days from the date of the accused being charged.
- (4) Notwithstanding the provisions of the Evidence Act 1950, all matters that have been reduced into writing and duly signed by the accused, his advocate and the Public Prosecutor under subsection 172A(5) shall be admissible in evidence at the trial of the accused.

Plea Bargaining

Section 172C provides –

- (1) An accused charged with an offence may make an application for plea bargaining in the Court in which the offence is to be tried.
- (2) The application under subsection (1) shall be in Form 28a of the Second Schedule and shall contain—
 - (a) a brief description of the offence that the accused is charged with;
 - (b) a declaration by the accused stating that the application is voluntarily made by him after understanding the nature and extent of the punishment provided under the law for the offence that the accused is charged with; and
 - (c) information as to whether the plea bargaining applied for is in respect of the sentence or the charge for the offence that the accused is charged with.
- (3) Upon receiving an application made under subsection (1), the Court shall issue a notice in writing to the Public Prosecutor and to the accused to appear before the Court on a date fixed for the hearing of the application.
- (4) When the Public Prosecutor and the accused appear on the date fixed for the hearing of the application under subsection (3), the Court shall examine the accused *in camera*—
 - (a) where the accused is unrepresented, in the absence of the Public Prosecutor; or
 - (b) where the accused is represented by an advocate, in the presence of his advocate and the Public Prosecutor, as to whether the accused has made the application voluntarily.

(5) Upon the Court being satisfied that the accused has made the application voluntarily, the Public Prosecutor and the accused shall proceed to mutually agree upon a satisfactory disposition of the case.

(6) If the Court is of the opinion that the application is made involuntarily by the accused, the Court shall dismiss the application and the case shall proceed before another Court in accordance with the provisions of the Code.

(7) Where a satisfactory disposition of the case has been agreed upon by the accused and the Public Prosecutor, the satisfactory disposition shall be put into writing and signed by the accused, his advocate if the accused is represented, and the Public Prosecutor, and the Court shall give effect to the satisfactory disposition as agreed upon by the accused and the Public Prosecutor.

(8) In the event that no satisfactory disposition has been agreed upon by the accused and the Public Prosecutor under this section, the Court shall record such observation and the case shall proceed before another Court in accordance with the provisions of the Code.

(9) In working out a satisfactory disposition of the case under subsection (5), it is the duty of the Court to ensure that the plea bargaining process is completed voluntarily by the parties participating in the plea bargaining process.²⁶

Disposal of the Case

Section 172D provides –

(1) Where a satisfactory disposition of the case has been agreed upon by the accused and the Public Prosecutor under section 172c, the Court shall, in accordance with law, dispose of the case in the following manner:

- (a) make any order under section 426²⁷; and
- (b) where the satisfactory disposition is in relation to a plea bargaining of the charge, find the accused guilty on the charge agreed upon in the satisfactory disposition and sentence the accused accordingly;²⁸ or
- (c) where the satisfactory disposition is in relation to a plea bargaining of the sentence, find the accused guilty on the charge and—
 - (i) deal with the accused under section 293²⁹ or 294³⁰; or
 - (ii) subject to subsection (2), sentence the accused to not more than half of the maximum punishment under the law for the offence for which the accused has been convicted.

(2) Where there is a minimum term of imprisonment provided under the law for the offence, no accused shall be sentenced to a lesser term of imprisonment than that of the minimum term.

(3) Notwithstanding section 283, where any fine has been imposed under this section and there is a default of payment of the fine, the Court shall direct that the offender shall be imposed a sentence of imprisonment for a term of not less than six months.

²⁶ Section 305 of the CPC provides that an accused who has pleaded guilty and convicted, there shall be no appeal except to the extent and legality of the sentence. The new inserted section 172E too provides that when an accused has pleaded guilty and has been convicted by the Court under section 172D, there shall be no appeal except to the extent and legality of the sentence.

²⁷ Order for payment of costs of prosecution and compensation to person aggrieved.

²⁸ Under the newly inserted section 183A of the CPC, the court is required to consider the victim's impact statement

²⁹ Apply to a youthful offender where the court may impose either caution or probation for good behavior with or without bond, and which may include whipping with a light rattan or cane not exceeding ten in the court's premise. The court too may impose fine on the youth's parent or guardian if after a summary inquiry, the court is satisfied that the youth delinquency was the result of the parent or the guardian's neglect or was contributory to it.

³⁰ Providing for bond with or without sureties for good behavior to a first offender after having regard to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct. The court too may impose on the accused payment for the costs of the prosecution.

CONCLUSION

The new provisions under section 172A, 172B, 172C & 172D that respectively provide for pre-trial conference, case management and plea bargaining have somehow amended the role of the Public Prosecutor from being reactive to pro active in the manner how he is to prosecute an accused person. The 2010 amendments require the Public Prosecutor to indulge with an accused person to expedite the disposal of case through among others, pretrial conference, case management and plea bargaining. The pre-trial conference which must be done within 30 days from the time the accused has been charged provides a forum to narrow down fact in issues and to agree on how the case is to be fought between them thus cutting down the time required dramatically for the disposal of the case. Through case management which must be done within sixty days by the parties after the accused has been charged, the court is able to monitor and guide both the prosecution and the defence. In other words, matters to be resolved at the pre trial conference should be done not later than 30 days from the time the accused has been charged but shall not be later than 60 days to allow for case management to take place. The case management to be done by the court should then take no more than 30 days. All in, the trial shall commence not later than ninety days from the date of the accused being charged whether or not both the prosecution and the accused have agreed to any plea bargaining. The amendments imposing on both the prosecution and the defence a pro active role in the management and the expeditions disposal of the case is highly commendable and in accordance with both human rights and humanitarian laws.

