

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 255

Criminal Revision No 8 of 2018

Between

Dinesh s/o Rajantheran

... Applicant

And

Public Prosecutor

... Respondent

GROUND OF DECISION

[Criminal procedure and sentencing] — [Revision of proceedings]

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Dinesh s/o Rajantheran

v

Public Prosecutor

[2018] SGHC 255

High Court — Criminal Revision No 8 of 2018

Chua Lee Ming J

1 October 2018

23 November 2018

Chua Lee Ming J:

1 A plea of guilty carries with it grave implications. By it, the accused person waives his right to be convicted only after a full trial. The prosecution need not adduce evidence to prove the accused person's guilt. The accused is also precluded from appealing against his conviction even if he subsequently comes to regret the plea, so long as the plea is not set aside. See *Koh Bak Kiang v Public Prosecutor* [2016] 2 SLR 574 ("*Koh Bak Kiang*") at [41].

2 It is in this light that the law has put in place safeguards to protect against any miscarriage of justice when an accused person is convicted and sentenced on his plea of guilty. As pointed out in *Koh Bak Kiang* (at [42]), one safeguard is the strict duty imposed on the judge recording the plea to ensure that "the accused understands the nature and consequences of his plea and intends to admit without qualification the offence alleged against him". This duty is now found in s 227(2) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("the

CPC”). Another is s 228(4) of the CPC, which states that where the court is “satisfied that any matter raised in the plea in mitigation materially affects any legal condition required by law to constitute the offence charged, the court must reject the plea of guilty”.

3 This issue in this application for criminal revision concerns the scope of s 228(4), specifically, whether it applies where an accused person retracts his plea of guilty and disputes all the elements of the offence, in his mitigation plea. I decided that in such a case, the court is bound under s 228(4) to reject the plea of guilty. I therefore set aside the applicant’s conviction and sent the case back to the State Courts for trial.

4 The prosecution has filed Criminal Reference No 5 of 2018 to refer the following questions of law of public interest for the decision of the Court of Appeal:

(a) Does s 228(4) of the CPC apply to a case where an accused person seeks to retract his plea of guilty at the mitigation stage of sentencing?

(b) Must an accused person seeking to retract his plea of guilty at the mitigation stage of sentencing satisfy a court that he has valid and sufficient grounds for his retraction before the court can reject his plea of guilty?

Facts

5 The facts can be briefly stated. The applicant was charged with 63 offences under s 22A(1)(a) of the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed). Each charge alleged that the applicant had received directly

from a foreign employee a sum of \$2,000 as a condition for employment by one of two companies that the applicant represented.

6 The trial proceeded on all 63 charges on 26 April 2018. On the next day, the applicant pleaded guilty to 20 charges and admitted to the amended statement of facts without qualification. He also consented to the remaining 43 charges being taken into consideration for the purposes of sentencing. He was convicted accordingly by the trial judge on that day. The applicant's then counsel, Mr Kalidass, requested an adjournment for the mitigation plea and his submissions on sentence, and the case was adjourned to 23 May 2018.

7 Subsequently, the applicant appointed Mr Peter Fernando to represent him in place of Mr Kalidass. By way of letter dated 10 May 2018, Mr Fernando informed the trial judge that he had been instructed to apply for a retraction of the applicant's plea of guilt and that he was prepared to continue with the trial on 23 to 25 May 2018.¹

8 As directed by the trial judge, Mr Fernando tendered written submissions on the application to retract the plea of guilty² as did the prosecution. When hearing resumed on 23 May 2018, the trial judge stated that having read the submissions, he was not going to allow the application for the plea to be retracted. The trial judge further stated that if the applicant intended to qualify his mitigation plea, then he would have no choice but to reject the plea.³ After some exchanges between the trial judge, Mr Fernando and the prosecution, the case was adjourned for Mr Fernando to prepare a written mitigation plea.

9 Mr Fernando filed a mitigation plea⁴ on behalf of the applicant and the hearing resumed the next day, 24 May 2018. The mitigation plea reproduced

the same grounds relied upon in the earlier application to retract the plea of guilty. The applicant disputed the material allegations against him in the charges and the statement of facts, including the allegations that he received of \$2,000 from each of the employees named in the charges as a condition for their employment.

10 The trial judge was of the view that the mitigation plea “was not done in good faith and was done with a view to compelling the Court to reject the plea of guilty pursuant to section 228(4) CPC”.⁵ The trial judge described the applicant’s mitigation plea as “a backdoor way to turn back the clock and resile from his plea of guilty” and “an abuse of process”. The trial judge then refused to reject the applicant’s plea of guilty and proceeded to sentence the applicant.

The scope of s 228(4) of the CPC

11 It is well established that the Court’s power of criminal revision to set aside convictions may be exercised only sparingly and only if there is serious injustice or a miscarriage of justice: *Chng Leng Khim v PP and another matter* [2016] 5 SLR 1219 at [8].

12 Section 228(4) of the CPC states as follows:

(4) Where the court is satisfied that any matter raised in the plea in mitigation materially affects any legal condition required by law to constitute the offence charged, the court must reject the plea of guilty.

13 It seems to me that where the court below refused to reject a plea of guilty despite the fact that the mitigation plea materially affected one or more legal conditions required by law to constitute the offence (*ie*, the mitigation plea qualified the plea of guilty), that would be a miscarriage of justice and the High Court ought to exercise its revisionary powers to set aside the conviction.

14 Before me, the prosecution did not argue otherwise. However, the prosecution submitted that

- (a) s 228(4) of the CPC does not apply where an accused person's mitigation plea amounts to a retraction of his plea of guilty; and
- (b) an accused person seeking to retract his plea of guilty at the mitigation stage must show valid and sufficient grounds for his retraction.

15 The language in s 228(4) appears unambiguous. The controversy in this case arose because of a line of cases that have held that an accused person cannot retract his plea of guilty except on valid and sufficient grounds which satisfy the court that it is proper and in the interest of justice that he should be allowed to do so. It was based on this line of cases that the prosecution submitted that the applicant had to show valid and sufficient grounds to support the retraction of his plea of guilty.

16 A reading of the cases suggests, unsurprisingly, that valid and sufficient grounds exist if the plea of guilty is not valid. The cases recognise that under common law, for a plea of guilty to be valid, three safeguards must be observed. First, the court must ensure that it is the accused himself who wishes to plead guilty ("the first safeguard"). Second, the court must ascertain whether the accused understands the nature and consequences of his plea ("the second

safeguard”). Third, the court must establish that the accused intends to admit without qualification the offence alleged against him (“the third safeguard”). See *Ganesun s/o Kannan v PP* [1996] 3 SLR(R) 125 (“*Ganesun*”) at [15]–[16]. *Ganesun* noted that the second and third safeguards were embodied in ss 180(a) and 180(b) of the 1985 Revised Edition of the Criminal Procedure Code (“CPC 1985”), which applied to summary trials by the Magistrate’s Court or District Court. See, also, *Toh Lam Seng v PP* [2003] 2 SLR(R) 346 (“*Toh Lam Seng*”) at [5]–[6]. Sections 180(a) and 180(b) of the CPC 1985 are largely similar to what is now ss 227(1) and 227(2) of the CPC. The second and third safeguards referred to above therefore appear in both editions of the CPC.

17 *Ganesun* appears to have been accepted as authority for the proposition that retraction of a plea of guilty will not be permitted if the three safeguards have been observed. Presumably, the basis for this is that the plea of guilty would be valid if the three safeguards have been observed. *Ganesun* also referred (at [22]) to there being “no question of a mistake or misunderstanding”. It seems to me that this was just a reference to the fact that the accused in that case understood the nature of the offence that he had pleaded guilty to and consequences of his plea, and that he understood the material facts that he had admitted to without qualification.

18 The prosecution submitted that the applicant’s mitigation plea was tantamount to a retraction of his plea of guilty, and as such s 228(4) of the CPC was not applicable. The prosecution referred me to *Ganesun* and submitted that the applicant’s retraction of his plea of guilty should not be permitted because the three safeguards referred to in *Ganesun* have been observed and therefore his plea of guilty was valid.

19 I disagreed with the prosecution's submissions. First, the prosecution's submissions drew a distinction between a mitigation plea that is tantamount to a retraction of a plea of guilty and one that is not. It seems to me that the distinction cannot be supported in principle. After all, a mitigation plea that qualifies a plea of guilty results in a qualified plea which is in fact a plea of not guilty: see *Koh Bak Kiang* at [41]. When an accused person qualifies his plea, he is in fact saying he is not guilty. That must mean that he is also saying that he has changed his mind about his previous plea of guilty, *ie*, that he is retracting his previous plea. It makes no difference whether, in qualifying his plea, the accused disputes one element of the offence or all of the elements of the offence, or whether he denies *mens rea* or *actus reus* or both.

20 Second, nothing in the language of s 228(4) suggests, much less supports, the prosecution's submissions.

21 Third, if the mitigation plea disputes one or more (but not all) of the elements of the offence, s 228(4) mandates the court to reject the plea of guilty. The prosecution did not dispute this. Yet, the prosecution's submissions mean that s 228(4) cannot apply if the mitigation plea disputes *all* of the elements of the offence (which is what the applicant did in the present case) because that would be tantamount to a retraction of his plea of guilty. This cannot be correct. The more elements of the offence that the accused disputes, surely the greater the need for the court to reject the plea of guilty under s 228(4).

22 Fourth, even if one accepted the prosecution's distinction between a mitigation plea that is tantamount to a retraction and one that is not, the prosecution's case seemed to assume that the observance of the three safeguards test would treat the two differently. I do not think this is correct. Section 228(4) of the CPC was enacted in 2010. It specifically deals with the situation where

the mitigation plea qualifies the plea of guilty. It would appear that prior to 2010, a qualified plea of guilty was dealt with within the third safeguard: *Toh Lam Seng* at [6]–[7]. This can also be seen in *Balasubramanian Palaniappa Vaiyapuri v PP* [2002] 1 SLR(R) 138 where the Court cited *Ulaganathan Thamilarasan v PP* [1996] 2 SLR(R) 112 and said (at [29]) that

... The law in Singapore is that, if the mitigation plea qualified the earlier plea of guilt by indicating the lack of *mens rea* or *actus reus*, the accused would not be deemed to have admitted to the offence without qualification and the plea would be rejected by the court...

23 In other words, even before s 228(4) was enacted, a qualified plea would have meant that the third safeguard had not been observed and would have been sufficient to satisfy the “valid and sufficient grounds” requirement for retraction of a plea of guilty. It appears that s 228(4) codified the then-existing position applicable to retraction of a plea of guilty where the mitigation plea qualified the plea of guilty. This seems to have been recognised in *Md Rafiqul Islam Abdul Aziz v PP* [2017] 3 SLR 619 (“*Rafiqul*”) (at [35]) although there, the Court put it in more general terms. In the circumstances, there is no reason why s 228(4) should not apply to cases involving a retraction of a plea of guilty.

24 There is one difference between the common law position and s 228(4). It appears that under common law principles, the court has the discretion to refuse to allow retraction of a plea of guilty even where the retraction is made as early as before the reading of the statement of facts: *Thong Sing Hock v PP* [2009] 3 SLR(R) 47 at [24]. Although the High Court in that case went on to opine that retraction of a plea of guilty before the reading of the statement of facts should generally be allowed as of course but once an accused admits to the statement of facts, permitting the retraction of the plea is discretionary and only

for valid reasons, the fact remains that permitting the retraction is discretionary under common law.

25 Section 228(4), on the other hand, makes it compulsory for the court to reject a qualified plea of guilty but (as also recognised in *Rafiqul* at [32]), it only applies where the accused has not been sentenced. Section 228(4) thus draws a distinction between a retraction of a plea of guilty *before* the case is concluded and one after the court has become *functus officio*. The fact that s 228(4) favours the accused who retracts his plea of guilty before his case concludes is understandable. As *Koh Bak Kiang* pointed out, a plea of guilty carries with it grave implications (see [1] above). Section 228(4) provides a crucial safeguard by mandating the court to reject a plea of guilty if it is qualified by the accused during the mitigation plea.

26 However, after the case is concluded, another principle comes into play – that of finality as reflected in s 375 of the CPC. Section 375 limits appeals where the accused has been convicted on a plea of guilty, to appeals only against the extent or legality of the sentence. It is not unjust that an accused person should be treated less favourably where he retracts his plea of guilty after the case is concluded. As the Court in *Rafiqul* observed (at [45]),

...Where an accused seeks to retract his plea of guilt by way of revision *only after* he has been sentenced and the court of first instance is *functus officio*, it should follow that a higher threshold would have to be met before the court exercises its revisionary powers, bearing particularly in mind the principle of finality. An accused ought not to be allowed to mount a “back-door appeal” against a conviction and sentence just because he is unhappy with the sentence imposed. [emphasis in original]

27 Fifth, I find support for my decision in *Rafiqul*, in which the Court considered and applied s 228(4) of the CPC. In that case, the applicant was

charged for making a fraudulent claim for compensation under the Work Injury Compensation Act (Cap 354, 2009 Rev Ed). He pleaded guilty to, and was convicted on, the charge. The mitigation plea was adjourned to the next day, at which time, the applicant sought to retract his plea on the basis that if he were going to proceed with it, he may have to qualify his plea because he did not have the requisite *mens rea*. The District Judge's attention was drawn to s 228(4) but he rejected the applicant's retraction of the guilty plea.

28 The High Court reviewed the cases and observed (at [30]) that “if and when a plea of guilt is in fact qualified in mitigation, the actual plea is that of ‘not guilty’ and the court ought not to convict the accused on the charge”. The Court also noted (at [31]) that with the enactment of s 228(4) in 2010, the previous approach to guilty pleas that have been qualified in the course of mitigation has been codified. The Court further noted (at [33]) that s 228(4) “reflects the law’s recognition that where an accused has qualified his plea during mitigation ... the guilty plea ... cannot be regarded as an unequivocal one”.

29 The High Court set aside the applicant's conviction. In the Court's judgment, s 228(4) applied “squarely to the facts” of the case (at [37]). The Court held (at [44]) that “the *retraction* should have been allowed by the [District Judge]” (emphasis added). *Rafiqul* therefore is authority for the proposition that s 228(4) applies to a retraction of a plea of guilty at the stage of the mitigation plea. The Court in *Rafiqul* clearly did not draw any distinction between a mitigation plea that amounts to a retraction and one that does not.

30 I would add one observation. As noted in *Rafiqul* (at [40]–[41]), *Koh Thian Huat v PP* [2002] 2 SLR(R) 113 and *Ganesun* involved similar facts in that the accused had pleaded guilty and wished to retract the plea before

sentencing. The Court in both cases did not allow the accused persons to retract their pleas because the relevant procedural safeguards had been complied with and each of the accused persons fully understood the nature and consequences of his plea. I respectfully agree with the view expressed in in *Rafiqul* (at [41]) that these two cases can be distinguished on the ground that they were decided prior to the enactment of s 228(4).

Conclusion

31 For the reasons set out above, I concluded that for purposes of s 228(4) of the CPC, there is no distinction between a mitigation plea that is tantamount to a retraction of a plea of guilty and one that is not. A qualified plea is in fact a plea of not guilty and therefore a mitigation plea that qualifies a plea of guilty is a retraction of the earlier plea.

32 As the applicant's mitigation plea did qualify his plea of guilty, the court below ought to have rejected his plea of guilty. Accordingly, I set aside his convictions in the court below and sent the case back to the State Courts for trial.

Chua Lee Ming
Judge

Peter Fernando (Leo Fernando) for the applicant;
Mark Jayaratnam, Kelvin Kow and Senthilkumaran Sabapathy
(Attorney-General's Chambers) for the respondent.

- ¹ Affidavit of Dinesh s/o Rajantheran (18 July 2018), at p 154.
- ² Affidavit of Dinesh s/o Rajantheran (18 July 2018), at pp 162–167.
- ³ NE (23 May 2018), at 1:25–28.
- ⁴ Affidavit of Dinesh s/o Rajantheran (18 July 2018), at pp 157–160.
- ⁵ Grounds of Decision, at para 38.