

Criminal Litigation Practice

Taking Instructions and Preliminary Advice

A client will come to see you in 2 situations:

- (i) Before he is charged, i.e. while Police investigations are on-going; or
- (ii) After he is charged

Before Client is Charged

Taking Client's instructions in relation to the allegation(s) or complaint(s)

- Thorough understanding of the allegation(s) or complaint(s)
- Identify the facts in issue as Client unfolds the story
- Details of Client's denial or explanation on the events leading to the allegation(s) or complaint(s)
- Details as to any connections Client has had with the complainant, witnesses for the Prosecution, and the co-accused persons
- Particular attention ought to be paid to the defence of alibi, if available – sufficient notice is required to be given to the Prosecution

s 278 of the Criminal Procedure Code 2010

(while police investigations are on-going)

Principle in Browne v. Dunn

- The significant aspect of instructions is that it will form the basis on which you will put forward your client's case in relation to the Prosecution's case.

House of Lords, *Browne v. Dunn* [1893] 6 R 67

Before Client is Charged

Advising Client

- Advise him on importance of the Statement(s) recorded, s 23 CPC 2010 and Defence of alibi, if applicable
- Do not advise Client to collude or destroy evidence
- Do not advise him to conceal evidence or do anything to conceal information or screen him or any person from legal punishment
- A legal practitioner must not “concoct any evidence or contrive any fact, whether or not that evidence or fact will assist in advancing the client’s case”

Rule 9(2)(g)-(h), Legal Profession (Professional Conduct) Rules 2015

s 200, 201, 204A & 213 Penal Code

(while police investigations are on-going)

Before Client is Charged

Advising Client

- If Client will be charged in Court in the coming days, advise him to arrange for a bailor. If on Agency bail, bailor is to be present in Court at Mention of case
- Sufficient security to be able to post Client's bail
- Bailor must bring Passport to Court, if not surrendered to the Investigation Agency earlier
- Bailor must be:
 - a) Singapore citizen or PR
 - b) Above 21 years old
 - c) Not a bankrupt
 - d) Not involved in the case

(while police investigations are on-going)

After Client is Charged

- Examine the charges and advise Client
- Take further and detailed instructions on the charge(s)
- Decide whether to make representations to the AGC on the charge(s)
- Client to decide whether to plead guilty or claim trial to the charge(s)
- Seek clarification with Client on any areas of doubt on Client's involvement in the charge(s) before trial and before making any representations to AGC
- Explain to your Client 2 types of Statements that investigating agencies (Police, CPIB, CNB, Customs, etc) would have recorded:
 - (i) 'cautioned statement' s 23 CPC 2010
 - (ii) 'long statement' s 22 CPC 2010

(when Client is out on Police/Court Bail)

- Written representations to AGC to review the charge(s):
 - (i) reduce charge(s)
 - (ii) proceed with lesser number of charge
 - (iii) withdrawal of charge(s)
- To take instructions and advise Client on merits of Prosecution's case
- To plead guilty to charge(s) or claim trial
- If plead guilty, to receive instructions and obtain details and background of Client
- Always obtain documentary evidence in support
- Obtain Client's approval of the draft representations before submitting to AGC
- False representations may render Client liable to prosecution for an offence under Section 182 Penal Code

Client's Background

family background

marital status

academic records

employment history

awards or testimonials

medical history

criminal antecedents

Sample Schedule of Legal Costs

1. Retainer/Deposit (if not refundable, to state)
2. Disbursements
 - a) Payment for Police Reports, Medical Reports, etc
 - b) Transport costs
 - c) Stationery, postage, etc
3. Attendance in court
 - a) For Mention including bail application, if any
 - b) PTC, CCMS, CCDC
 - c) Hearing (for trial or to plead guilty)

Sample Schedule of Legal Costs

4. Preparation Fee for Hearing/Trial (bill by hour or agreed sum?)
- 5 . Refresher Fee (in the event case is part-heard)
- 6 . GST
- 7 . Additional cost(s) not anticipated at time of brief, in the event case proceeds further and new matters/issues surfaced

Legal Profession (Professional Conduct) Rules 2015

Rule 14(3)(b) – Defending accused regardless of personal opinion

A legal practitioner who represents an accused person must not express the legal practitioner's personal opinion as to whether the accused person is guilty, or allow the legal practitioner's personal opinion as to whether the accused person is guilty to affect the legal practitioner's professional assessment of the facts or the law, the legal practitioner's conduct of the criminal proceedings, or the legal practitioner's duty to the accused person or the court

Legal Profession (Professional Conduct) Rules 2015

Rule 14(4) – Confession by client

A legal practitioner who represents the prosecution must, within a reasonable time after the conviction but before the sentencing of an accused person, inform the court of –

- (a) any previous conviction or antecedent of the accused person that the prosecution knows of;
- (b) any relevant factors, and any known precedents, relating to the sentence; and
- (c) if the accused person is unrepresented, any known mitigating circumstances

Legal Profession (Professional Conduct) Rules 2015

Rule 14(5)(a)(i) – Advising client to plead

A legal practitioner must advise an accused person he or she represents on whether to plead guilty, or to claim trial, to a charge

Legal Profession (Professional Conduct) Rules 2015

Rule 14(3)(c)-(d) – Absence from criminal trial

A legal practitioner who represents an accused person must not be absent from a trial or hearing without reasonable grounds; if absent from a trial or hearing, must:

- (i) communicate the grounds for the legal practitioner's absence to the accused person before the trial or hearing; and
- (ii) make reasonable efforts to arrange for another legal practitioner to take over the conduct of the trial or hearing

Rule 14

Legal Profession (Professional Conduct) Rules 2015

Rule 14(6) – Continuing to act if accused absconds

If an accused person absconds, the legal practitioner representing the accused person may –

- (a) apply to be discharged from acting in the matter; or
- (b) conduct the defence on the basis of instructions received as if the accused person was present but elected to remain silent

Legal Profession (Professional Conduct) Rules 2015

Rule 14(8) – Disclosure of previous convictions

If an accused person has any previous conviction or antecedent, the legal practitioner representing the accused person is not required to disclose such antecedent, but must not adduce any evidence or make any submission which is inconsistent with the previous conviction or antecedent of the accused person

Legal Profession (Professional Conduct) Rules 2015

Rule 14(5)(a)(ii) – Evidence from accused

A legal practitioner must advise an accused person he or she represents on whether to give evidence or to remain silent in the accused person's defence

Legal Profession (Professional Conduct) Rules 2015

Rule 14(7) – Mitigation plea

If an accused person has pleaded guilty or has been convicted after trial, the legal practitioner representing the accused person, when presenting a plea in mitigation, must not make any allegation which is scandalous or is intended or calculated to vilify, insult or annoy any person

Legal Profession (Professional Conduct) Rules 2015

Rule 14(3)(e) – After conviction and sentence

A legal practitioner who represents an accused person must continue to reasonably assist the accused person after the accused person is convicted and sentenced

Rule 14(3)(a) – Bail

A legal practitioner who represents an accused person must not provide any surety or bail for the accused person

Making Representations

- *Knight Glenn Jeyasingam v PP [1999] 1 SLR(R) 1165*
whether representations made can be used against accused even though labelled "without prejudice"
 - plea negotiations are separate from the trial, encompass all representations to AGC with a view to PG
 - without prejudice privilege attach to representations and render them privileged and confidential
 - can only be lifted after determination of criminal culpability or after negotiated plea was made
 - this privilege maintains public confidence in criminal justice
- *Ng Chye Huay and anor v PP [2006] 1 SLR(R) 157*

regarding whether letters to the police were "privileged letters of representation".

They will only be if

- a) letter refers specifically to the investigation or charge against accused
- b) letter written with the object or reducing charge or halting investigations
- c) letter contains statement that the author understood the consequences of making a false statement under PC s 182

To Note

- Keep attendance notes of your interview(s) with clients
- Do not concoct or adduce evidence for clients
- Do not make representations or give advice to clients on matters you know not to be true
- Do not make promises or give assurances which you know you cannot keep

Always Remember

- When taking instructions always pay close attention to possible Defence(s) available to Client based on facts or instructions received
 - E.g. Alibi Defence or General Exceptions to Penal Code
 - See s 278 CPC 2012, s 107 & 108 Evidence Act
 - Remember s 182 Penal Code

CPC s 278: Must give notice before making alibi defence

EA s 107, s 108:

- BoP on Def to prove exceptions or provisos in PC
- BoP on Def to prove facts especially in their knowledge (that only they know)

PC s 182: Offence to knowingly give false information to a public servant, intending for him to use their power to cause injury to another person

- Counsel must have competent understanding of procedural aspects of trial, evidence law, legal ingredients of offence(s)
- 3 broad areas to obtain client's instructions
 - Client's background
 - Instructions in relation to the charge(s)
 - Statement(s) given to investigation agencies
- If case is under the CCDC regime, must advise Client that his Defence must not be inconsistent with information he gave the Investigation Officer and recorded in Statement(s)
- If interviewing witnesses for Defence, Client should not be present

- Clients come to see you for a service – will seize upon any assurances they receive from you
- There must always be communication with the Client
 - Communications should be documented
- It is preferred to take instructions in person. Do not take instructions or receive information from third persons on behalf of Client. If received information from third party, to inform Client in writing and confirm the contents
- Number of interview is not conclusive – instead counsel must spend quality time with Client

Pleading Guilty

- Counsel should advise client generally about his plea
 - If necessary, express advice in strong terms, if evidence is overwhelming
 - But must make it clear to Client that they have complete freedom of choice and responsibility for the plea
 - Plea of guilty comes from lips of the Accused but his mind must be in agreement with his plea
 - If plea is extracted by pressure – it may be found to be a nullity

To sum up

- Listen to your client first, then ask questions
- Identify clearly your objectives in relation to the work to be done
- Explain the issues involved and options available to the client
- Keep the client informed of the progress of the case
- Personal Conduct – Conduct Beyond Reproach
 - When taking instructions from your client, conduct yourself with honour, integrity and dignity at all times

Summary

Taking Instructions

Take instructions from Client in person

Do not give advice or receive instructions over the phone; or via fax or email unless of course, these are the mode of communication with the Client, and if need be should always be a follow-up from previous meetings

The Interview

- Appearance/Presentation
- 1st Interview. Overview of the case and the fees
- 2nd Interview and more, if necessary

You should have details of the following:

1. Personal particulars
2. Academic Background
3. Employment Background
4. Family Background
5. Previous Antecedents, if any
6. Medical background, including Medical Reports
7. The Charge(s)
8. Statement(s) to Police
9. Alibi Notice, if any
10. Instructions whether to PG, CT or write to AGC to review case or charge(s)
11. Exhibits for Defence
12. Instructions to call for expert evidence for the Defence, if necessary

Make a checklist of information needed

- Information on the case you need
- Details of witnesses, if any
- Documents to be produced
- Medical Reports

Bailable and non-bailable offences

Bailable offences

- Offences specified as such in the 5th column of the First Schedule
- Bail must be offered as of right; *generally*, no discretion to refuse bail (“*must be released*” in s 92(1) CPC)
- For offences punishable with imprisonment, Court can order non-release on police bail, or refuse to grant court bail, if it believes on prescribed grounds that the person will not attend (s 92(3) CPC)
 - See r 5 of the CPR for the prescribed grounds of belief, which are really a mix of *facts* (e.g. the accused is not a citizen or permanent resident, is not domiciled in Singapore) and *factors* (e.g. the nature and seriousness of the offence, the likely sentence on conviction)

Non-bailable offences

- Generally discretionary as to whether bail is offered (“*may be released*” in s 93(1) CPC)
- Various factors taken into account, e.g. nature of the offence; penalty provided; likelihood of absconding; possibility of evidence being tampered with
- Must release if there are “no reasonable grounds for believing the accused has committed a non-bailable offence” (subject to exceptions to bail in s 95 CPC), or if there are grounds for further investigating whether some other bailable offence has been committed (s 93(2), (3A) CPC), but court can order no release on police bail or refuse to grant court bail if the bailable offence is punishable with imprisonment and it believes on prescribed grounds that the person will not attend (s 93(3B) CPC, r 5 CPR 2018)

Non-bailable offences

- Onus on person seeking bail to persuade the court to exercise discretion favourably (see *Selvamsylvester*)
- Read *Yang Yin* for an appreciation of how the court exercises discretion
- Despite bail being granted for non-bailable offences, court can cause released person to be arrested (s 93(5) CPC)

Exceptions to bail

Exceptions to bail

- Notwithstanding discretion to grant bail for non-bailable offences, bail shall not be granted in certain specific situations prescribed under s 95(1) CPC including:
 - Accused is charged for an offence punishable with death or life imprisonment (s 95(1)(a) CPC)
 - Court believes, on prescribed grounds, that accused will not attend (s 95(1)(b) CPC, r 5 CPR 2018)
- There are, in turn, certain carve outs from the above rule (found in s 95(2) CPC) that allow the court to still release a person on bail (e.g. accused is a juvenile or a sick or infirm person).

Conditions and quantum of Bail

Conditions

- Specified statutory conditions for release on bail/personal bond (s 94(1), 99(2), (4) CPC)
 - E.g. attendance as required, surrender of travel documents, attendance for investigations or in court, non-commission of offence; non-interference with witnesses, No leaving Singapore without permission of police/court
- Power to impose other necessary conditions, including electronic tagging (s 94(2), (3) CPC)

Breach of conditions

- Accused person is liable to be arrested without warrant in certain scenarios (s 103(1), (3) CPC):
 - E.g. actual or likely non-attendance, actual or likely breach of bail/personal bond conditions
- Following arrest, court can decide to remand or grant bail again subject to conditions.
- Offence to abscond while on bail / personal bond (s 103(5) CPC)

Quantum of bail

- A number of factors determine the quantum of bail – fundamentally, it's the bailor's money at stake if an accused absconds.
- The quantum of bail is not meant to deter an accused person from flight. Primarily has to be sufficient to ensure the bailor does not shirk from his or her duties (*Ewe Pang Kooi*; s 96 CPC)

amount is meant to come from the bailor, not the accused

Criminal Litigation Practice

Pre-Trial Matters Training Unit 7

DISCLOSURE

- What needs to be disclosed
- When does it need to be disclosed
- Who needs to disclose

DISCLOSURE

STATUTORY REQUIREMENTS – CCDC

- Sections 157-171 and 227(5) of the CPC
- Section 159 of the CPC: when CCDC procedures apply
 - Offences in the Second Schedule and to be tried in a District Court
 - Option to opt in for CCDC (for offences which do not fall within definition above) / opt out (for offences which do fall within)

DISCLOSURE

CRIMINAL CASE DISCLOSURE CONFERENCE

- Case for the Prosecution (“CFP”) (s 162 of the CPC)
- Case for the Defence (“CFD”) (s 165 of the CPC)
- Prosecution’s Supplementary Bundle (“PSB”) (s 166 of the CPC)
 - If the CFD is not served, the Prosecution need not serve the PSB (s 166(3) of the CPC)
- Defence’s bundle of exhibits (s 166(4) of the CPC)

DISCLOSURE

CCDC – TIMELINES

Court Event	Timeline	CPC
PTC / Mention	<ul style="list-style-type: none"> • 1st CCDC to be fixed <u>not earlier than 8 weeks</u> from the PTC / Mention 	<ul style="list-style-type: none"> • S 161(1)
1 st CCDC	<ul style="list-style-type: none"> • Prosecution to file and serve CFP <u>not later than 2 weeks</u> from 1st CCDC • 2nd CCDC to be fixed <u>not earlier than 7 days</u> from filing of CFP 	<ul style="list-style-type: none"> • S 161(2) • S 161(4)
2 nd CCDC	<ul style="list-style-type: none"> • Defence to file and serve CFD <u>not later than 2 weeks</u> from 2nd CCDC • Prosecution to serve PSB <u>within 2 weeks</u> from service of CFD • Defence to serve DSB <u>within 2 weeks</u> from service of CFD • 3rd CCDC may be fixed <u>at any time</u> after CFD is filed and PSB is served 	<ul style="list-style-type: none"> • S 163(1) • S 166(1) • S 166(4) • S 163(2)
3 rd CCDC	<ul style="list-style-type: none"> • Trial dates to be fixed 	<ul style="list-style-type: none"> • S 167

DISCLOSURE

CCDC – CONSEQUENCES OF BREACH

- The court may draw such inference as it thinks fit where there is non-disclosure, or where the case put forward at trial is inconsistent with the CFP or CFD, or from either the prosecution's or defence's failure to serve any exhibit (s 169(1) of the CPC).
- Failure to serve CFP or exhibits may result in a DNATA (s 169(2) of the CPC).

discharge not amounting to acquittal

DISCLOSURE

CCDC – Audiovisual Recordings

- Statements recorded in audiovisual recordings
 - The only offence for which this is required is s 375(1)(a) of Penal Code (Third Schedule of the CPC).^{rape}
- Impact on the CCDC procedure: the Prosecution is not required to produce the audiovisual recording.
 - The Defence is entitled to view the recording. If a transcript is made, the accused is entitled to it as soon as practicable (s 23(6) of the CPC).
 - The CFP/PSB will include the transcript (s 166(1)(aa) of the CPC), and viewing of the recording will be arranged in accordance with the CPC.

DISCLOSURE

CCDC – Personal Attendance of Accused

- Dispensation with personal attendance at the CCDC
 - The defence may indicate that the accused wishes to plead guilty, rather than the accused himself indicating (s 167 of the CPC).
 - Documents can be served on counsel and do not need to be served on the accused personally.

DISCLOSURE

CCDC – Admissibility of CFD and CFP at trial

- The CFD is admissible for use in cross-examination or to impeach the accused's credit (s 258A).
- The court has discretion to refuse to consider the CFD if the prejudicial effect outweighs the probative value.
- Certain documents in the CFP may also be admitted as if they are part of the prosecution's opening statement (s 258B).

DISCLOSURE

CCDC – Defence Bundle

- Within two weeks of serving the CFD, the Defence is now required to serve on the prosecution a copy of the documentary exhibits listed in the CFD (s 166(4)).
- The obligation to serve the PSB and defence bundles are independent of each other.

DISCLOSURE

COMMON LAW REQUIREMENTS

- Laid down pursuant to s 6 of the CPC.
- Disclosure obligations pursuant to the duty the Prosecution owes “to the court and to the wider public to ensure that only the guilty are convicted, and that all relevant material is placed before the court to assist it in its determination of the truth”: *Muhammad bin Kadar and another v PP* [2011] 3 SLR 1205 (“*Kadar I*”) at [200].
- The Prosecution has an “overarching duty of fairness” and “acts at all times in the public interest”: *Muhammad Nabill bin Mohd Fuad v PP* [2020] 1 SLR 984 (“*Nabill*”) at [4] and [37].

DISCLOSURE

COMMON LAW REQUIREMENTS

- The *Kadar* disclosure obligation:
 - *Kadar I* at [113]-[114] and [117]
 - *Muhammad bin Kadar and another v PP and another matter* [2011] 4 SLR 791 (“*Kadar II*”)
- The *Nabill* disclosure obligation applies to statements of material witnesses and goes beyond *Kadar*:
 - *Nabill* at [39]-[56]

Kadar disclosure:

The Prosecution's obligation is to disclose to the Defence any **unused material which tends to undermine the Prosecution's case or strengthen the Defence's case** where the said material:

- a) is likely to be admissible and might reasonably be regarded as *prima facie* credible and relevant to the guilt or innocence of the accused; and
- b) is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as *prima facie* credible and relevant to the guilt or innocence of the accused. This is an “exceptional category”: *Kadar I* at [117].

Kadar I at [113]

***Nabill* disclosure:**

- a) ... where the additional disclosure obligations are concerned, it does not matter whether the statement in question is (i) favourable (and so triggers the *Kadar* obligations); (ii) neutral; or (iii) adverse to the accused person. ...
- b) ... the additional disclosure obligations do not require the Prosecution to carry out a prior assessment of whether a material witness's statement is *prima facie* credible and relevant to the guilt or innocence of the accused person. ...

Nabill at [41]

KADAR DISCLOSURE – WHAT

- The obligation “certainly does not cover all unused material or even all evidence inconsistent with the Prosecution’s case”: *Kadar I* at [113].
- Not obliged to disclose unused material which is neutral or adverse to the accused: *Kadar I* at [113].
- No duty to search for additional material – the duty applies only to material within the Prosecution’s knowledge: *Kadar II* at [14].
- The obligation does not affect the operation of any ground for non-disclosure recognised by any law: *Kadar II* at [18].

KADAR DISCLOSURE – WHAT

- If a prosecution witness has provided a statement that is inconsistent with his testimony at the trial, there is no reason why that statement ought not to be disclosed to the Defence as part of the Prosecution's *Kadar* obligations. The Defence ought to have that statement for the purposes of cross-examination and impeachment of the witness's credit if appropriate: *Nabill* at [54].

KADAR DISCLOSURE – WHEN

- Pre-trial disclosure follows the statutory scheme: *Kadar I* at [113].
- Where the statutory regime does not apply, before the trial: *Kadar I* at [113].
- Once the trial or appeal begins: *Winston Lee Siew Boon v PP* [2015] 4 SLR 1184 at [184].
- The disclosure obligation is a continuing one and ends only when the case is completely disposed of, including any appeal: *Kadar I* at [113].
- Late disclosure may result in an adjournment to give the defence time to consider the material: *Kadar I* at [121].

KADAR DISCLOSURE

PRESUMPTION OF REGULARITY

- The presumption of regularity applies to the actual conduct of the case in court by prosecutors: *Lee Siew Boon Winston v PP* [2015] SGCA 67 (“*Winston Lee (CA)*”) at [8].
- The presumption will only be displaced if the Defence shows reasonable grounds to believe that the Prosecution has in its possession material which should be disclosed: *Winston Lee (CA)* at [10]-[12].

NABILL DISCLOSURE – WHAT

- Applies to statements by a material witness, i.e. a witness “who can be expected to confirm or, conversely, contradict an accused person’s defence in material respects”: *Nabill* at [4].
- An accused person ought to have access to all relevant information in order to make an *informed choice* in deciding whether or not to call a material witness: *Nabill* at [45].
- No decision taken yet on whether the Prosecution is required to disclose the statement of a material witness who is a prosecution witness: *Nabill* at [50].
- Like *Kadar*, the obligation does not affect the operation of any ground for non-disclosure recognised by law: *Nabill* at [42].

NABILL DISCLOSURE – WHEN

- Same timelines as for *Kadar*.
- The Prosecution ought to satisfy its additional disclosure obligations when it files and serves the case for the Prosecution on the accused person (if the statutory disclosure procedure applies), or at the latest, before the trial begins (if the statutory disclosure procedure does not apply): *Nabill* at [50].
- The Court rejected the Prosecution's argument that the statements be disclosed only after the accused person has testified. Instead, it should be disclosed before the trial and before the accused person has given evidence: *Nabill* at [51]-[53].
- Like *Kadar*, the disclosure obligation is a continuing one and ends only when the case is completely disposed of, including any appeal: *Nabill* at [50].

NABILL –

clarification in *Roshdi bin Abdullah Altway* [2022] 1 SLR 535

- Prosecution's additional disclosure obligations are triggered *if and when* (a) the accused raises a defence *and* (b) the Prosecution has a statement of a witness who may be expected to materially confirm or contradict that defence: *Roshdi* at [155].
- Process for identifying material witness: *Roshdi* at [156] – [161]
- No legal duty on the Prosecution and law enforcement agencies to conduct further investigations by recording statements from a new “material witness”: *Roshdi* at [166]. However, the Prosecution takes the risk that it will be found to have failed to discharge its evidential burden in respect of the facts that have properly come into issue: *Roshdi* at [167].
- Consequences of a breach of the additional disclosure obligations will depend on the facts: *Roshdi* at [168]-[169].

CONSEQUENCES OF NON-DISCLOSURE

- A *Kadar* breach on its own will not automatically cause a conviction to be overturned: *Lim Hong Liang v PP* [2021] 5 SLR 626 (“*Lim Hong Liang*”) at [21].
- However, the conviction may be overturned if non-disclosure results in a material irregularity that occasions a failure of justice: *Kadar I* at [120], *Nabill* at [48], and *Lim Hong Liang* at [21].
 - The conviction is unsafe where – provided that the non-disclosed evidence is clearly admissible – the non-disclosed evidence strongly points towards an acquittal, with a causal link between the *Kadar* breach and a wrongful conviction: *Lim Hong Liang* at [28] and [30].
- Otherwise, there may be a retrial, if s 390(1)(b)(i) of the CPC is satisfied, in light of the established principles governing retrials: *Lim Hong Liang* at [23].
- Acquittals and retrials are not the only two binary options, there may be other outcomes: *Lim Hong Liang* at [24].

CONSEQUENCES OF NON-DISCLOSURE

- In deciding on the consequences of a *Kadar* breach the court should balance:
 - the effect of the breach on the evidence against the accused;
 - how the breach prejudiced the accused;
 - E.g. if the undisclosed material would have opened up a new line of questioning against a Prosecution witness who can no longer be called for retrial, there may be substantial and irremediable prejudice warranting an acquittal: *Lim Hong Liang* at [32]
 - whether steps can be, or have been, taken to remedy the prejudice caused;
 - the causes of the breach, including the conduct of the Prosecution;
 - Prosecutorial non-disclosure alone, without casting doubt on the integrity of the prosecution process, may not warrant an acquittal: *Lim Hong Liang* at [36]
 - the broader objectives of the administration of justice, including certainty and fairness (not only to the accused, but also to the victims especially when the charge is serious).
Lim Hong Liang at [22]

CONSEQUENCES OF NON-DISCLOSURE

- Having balanced the factors at the first stage of inquiry, if the court finds a retrial appropriate, the second stage of inquiry is to assess whether it can order a retrial.

UPSHOT OF KADAR AND NABILL

- For the Prosecution: When in doubt, disclose: *Nabill* at [48].
- For the Courts: Keep in mind that for the judicial system to operate effectively, those who commit crimes must face the consequences. Rendering acquittals too readily because of a *Kadar* breach will ill serve the needs of society, particularly the victims, especially when the crime committed is serious: *Lim Hong Liang* at [36].

Criminal Litigation Practice

Pleading Guilty

Areas of Focus

- (1) Statement of Facts
- (2) Validity of Plea
- (3) Newton Hearing
- (4) Charges Taken Into Consideration
- (5) Antecedents
- (6) Address on sentence/ Mitigation
- (7) Pronouncement of Sentence & Consequential Orders
- (8) Retraction of Guilty Plea

Key Pointers (for Context)

- The accused can elect to plead guilty at any time after being charged (including midway through the pre-trial discovery [CCDC process] or midway through trial).
- This training unit focuses on how a valid guilty plea is recorded and what happens when a guilty plea is “problematic”.
- In particular, be mindful of:
 - What happens when the accused challenges an element of the charge(s) against him/her? What happens when an accused person changes his/her mind midway through pleading guilty?
 - What happens when either the Prosecution or accused challenges a fact that is material to sentencing?

Procedure At Plead Guilty Hearings

Procedure At Plead Guilty Hearings

Section 227(1) of the CPC: If the accused pleads guilty to the charge after it has been read and explained to him, whether as originally framed or as amended, his plea must be recorded and he may be convicted on it.

Procedure At Plead Guilty Hearings

Section 227(2) of the CPC:

Before the court records a plea of guilty, it must-

- (a) If the accused is not represented by an advocate, be satisfied that the accused-
 - (i) Understands the **nature and consequences of his plea and the punishment** prescribed for the offence; and
 - (ii) Intends to admit to the offence without qualification; or
- (b) If the accused is represented by an advocate, record the advocate's confirmation that the accused-
 - (i) Understands the **nature and consequences of his plea**; and
 - (ii) Intends to admit to the offence without qualification.

Procedure for recording guilty plea

- Charges which the Prosecution intends to proceed with are read to the accused first. The remaining charges are stood down temporarily.
- The court will confirm that the accused wishes to plead guilty and understands the implications pursuant to sections 227(1) – (2) of the CPC.
- The Prosecution will read out the Statement of Facts (“**SOF**”).
- The accused is asked to confirm if he admits to the SOF without qualification.
- The court will convict the accused based on the facts in the SOF.
- The accused’s consent is obtained for any remaining charge(s) to be taken into consideration (“**TIC**”) for the purpose of sentencing (s 148 of the CPC).

1. Statement of Facts (“SOF”)

SOF – Essential Ingredients

- The accused need not admit to every single fact in the SOF, as long as what he **does admit to contains all the essential ingredients of the offence** and what he disputes is **irrelevant or immaterial** to the ingredients of the offence.
- Occasionally, there are peripheral facts which the accused cannot recall or confirm. It is acceptable for the accused not to admit to such peripheral facts as long as he does not qualify the plea.
- In practice, parties would have made reasonable attempts to iron out the facts between them before the guilty plea hearing.

SOF – Legal Duty on the Court

Biplob Hossain Younus Akan & Ors v PP and another matter [2011] 3 SLR 217 at [6]:

- There is no statutory prescription for an SOF to be provided to the court – you will not find any references to an “SOF” in the CPC.
- However, it is now well established that there is a *legal duty* for parties to agree on an SOF and for the court to scrutinise the SOF to ensure that all the elements of the charge have been made out.

SOF – Legal Duty on the Court

Biplob Hossain Younus Akan & Ors v PP and another matter [2011] 3 SLR 217 at [8] expounds on how the Court should scrutinise the SOF:

1. To evaluate the SOF with fresh lenses and be satisfied that SOF sufficiently discloses the elements of the charge(s)
2. To take the contents of the SOF at face value; the Court should be very slow in drawing any inferences to supply deficiencies in the SOF
3. To be alert to the situation where there is reason to doubt what is stated in the SOF e.g. where there are internal inconsistencies in the SOF
4. If there is doubt as to the sufficiency of the SOF, the court should decline to record the plea of guilt
5. To satisfy itself that an accused person, especially one who is unrepresented, understands the ingredients of the offence

2. Validity of Plea

Validity of Plea

Recap: Section 227(2) of the CPC:

Before the court records a plea of guilty, it must-

- (a) If the accused is not represented by an advocate, be satisfied that the accused-
 - (i) Understands the **nature and consequences of his plea and the punishment** prescribed for the offence; and
 - (ii) Intends to admit to the offence without qualification; or
- (b) If the accused is represented by an advocate, record the advocate's confirmation that the accused-
 - (i) Understands the **nature and consequences of his plea**; and
 - (ii) Intends to admit to the offence without qualification.

Validity of Plea

- **Nature of the plea** - the accused must know exactly what offence(s) he is pleading guilty to
- **Consequences of the plea** -
 - The accused has to be aware of the punishments prescribed by the law so that he is similarly aware of the possible sentence he would receive upon conviction
 - Must be aware that if the accused pleads guilty, he **may appeal against the sentence handed down on him but may not appeal against his conviction**

Validity of Plea

Md Rafiqul Islam Abdul Aziz v PP [2017] 3 SLR 619 at [36] provides a non-exhaustive list of the circumstances where the court should not accept an accused's guilty plea:

- a. Where the court is not satisfied that the accused understands the nature and consequences of his plea;
- b. Where the court is not satisfied that the accused intends to admit to the offence without qualification;
- c. Where the court is satisfied that the accused has qualified his plea in mitigation;
- d. Where the accused pleaded guilty on a mistake or misunderstanding; or
- e. Where the accused did not plead guilty voluntarily.

Validity of Plea

Simple example of qualifying the plea:

- Assume the accused is charged with one count of theft in dwelling under section 380 of the Penal Code for stealing alcohol from a supermarket.
- Dishonesty is the *mens rea* or fault element of theft-related offences (see sections 24 and 378 of the Penal Code).
- If the accused tells the court that he simply forgot to pay for the item, he is denying that he possessed the *mens rea* or fault element for the charge – this qualifies his plea of guilt.
- In practice, the qualification of plea usually arises (1) where the written mitigation plea expressly undermines a material element of the charge or (2) where the accused orally challenges the SOF after it is read out.
- If accused maintains the qualification, the matter must go for trial.

3. Newton Hearing

When is a Newton Hearing Required

- **Candidates must be mindful that the matter will not proceed to this stage if the plea is qualified in any way. A Newton Hearing relates to sentencing and is predicated on a valid guilty plea.
- A Newton Hearing is conducted when a fact is contested and the contested fact is material to sentencing. Such a hearing is the (very rare) exception rather than the norm. (*Ng Chun Hian v PP [2014] 2 SLR 783* at [24])
- Court has the discretion to decline to hear evidence on a disputed fact if the Court is satisfied that the case advanced by the accused is “*absurd or obviously untenable*” (*Ng Chun Hian v PP [2014] 2 SLR 783* at [24])

Newton Hearing – Who has to prove?

See *PP v Chan Yoke Ling Catherine* [2004] SGDC 108

- General rule: the party who asserts a fact that is contested has the burden of proving that that fact
- The burden is on the Prosecution to prove a contested fact if:
 - (a) The fact is “*very fundamental*” to the Prosecution’s case; and
 - (b) The Prosecution would nevertheless have had to prove the fact in the event of a trial [47 – 48]
- The burden shifts to the Defence to prove a contested fact if:
 - (a) The disputed fact relate to extraneous matters which the Prosecution would not have proven as part of its case had there been a trial;
 - (b) The disputed fact is within the knowledge of the accused; or
 - (c) Where it is provided by law that the proof of certain facts lie on the accused [52]

Newton Hearing – Standard of Proof

- The general rule is that the Prosecution has to prove a contested fact beyond a reasonable doubt; the Defence has to prove a contested fact on a balance of probabilities (see *PP v Chan Yoke Ling Catherine [2004] SGDC 108* at [50] – [52])
- If held, the proceedings at the hearing are akin to that of a trial process and the court will record evidence from witnesses

When is a Newton Hearing Required

Simple example:

- Assume that the accused is charged with one count of theft in dwelling under section 380 of the Penal Code for stealing alcohol from a supermarket. The accused has a very long history of property offences and faces a significant imprisonment term for this offence.
- Instead of qualifying the plea, the accused asserts in mitigation that his sentence should be lower as he was suffering from depression that significantly lowered his self control when he committed the offence. He relies on a report from a private psychiatrist.
- The Prosecution tenders a report from IMH, stating that the accused was not suffering from any mental disorders at the time of the offence.
- In this scenario, the court will likely have to convene a Newton Hearing as the disputed fact is material to sentencing. Note that the accused is not contesting *mens rea* or *actus reus*.

4. Charges Taken Into Consideration (TIC)

Charges Taken Into Consideration

Section 148(1) of the CPC:

If the accused is found guilty of an offence in any criminal proceedings began by or on behalf of the Public Prosecutor, the court in determining and passing sentence may, ***with the consent of the prosecution and the accused***, take into consideration any other outstanding offences that the accused admits to have committed.

Procedure for charge(s) to be TIC-ed

1. The Court convicts the accused after the accused confirms that the accused accepts the SOF without qualification;
2. The Prosecution then applies for the remaining charge(s) to be TIC-ed; and
3. The accused must admit and consent to remaining charge(s) to be TIC-ed

Effect on charges TIC

PP v Mok Ping Wuen Maurice [1998] 2 SLR (R) 439 at [19]:

*“...The effect of taking into consideration outstanding offences is to **enhance the sentence** that would otherwise be awarded. The accused merely admits to these offences and must not be convicted of them. However, in doing so, the accused also saves the court time and trouble in determining his complicity in these offences. Ultimately, it is **the court’s discretion whether to consider the offence or not.**”* [Emphasis Added]

*Note that court is more likely to increase the sentence(s) for the proceeded charge(s) if TIC charge(s) is similar in nature.

5. Offender's Antecedents

Offender's Antecedents

Section 2(1) of the CPC

Definition of “*Criminal Record*” means the record of any –

- (a) Conviction in any court, or subordinate military court established under section 80 of the Singapore Armed Forces Act;
- (b) Order made under section 34(2) of the Misuse of Drugs Act;
- (c) Supervision order made under section 16 of the Intoxicating Substances Act;
- (d) Order made under section 30 of the Criminal Law (Temporary Provisions) Act; and
- (e) Order as may be prescribed by the minister charged with the responsibility for home affairs to be a criminal record for the purposes of this Code

Offender's Antecedents

Section 228(2) of the CPC

The address on sentence may include-

- (a) The criminal records of the accused;
- (b) Any victim impact statement; and
- (c) Any relevant factors which may affect the sentence.

PP v Koh Thiam Huat [2017] 4 SLR 1099

(see [51] – [60])

- The accused pleaded guilty and was convicted of one charge dangerous driving under Section 64(1) of the Road Traffic Act (Chapter 276).
- The accused's driving record comprised offences that were compounded from 1999 to 2014. In particular, the compounded traffic offences that were relevant were the speeding offences and the offence of failing to confirm to a red light signal.
- The High Court held that compounded offences can be taken into account for sentencing purposes.

PP v Koh Thiam Huat [2017] 4 SLR 1099

“59 Moreover, allowing a court to take into account a compounded offence under the RTA (or its subsidiary legislation) allows for a more holistic approach in sentencing. It cannot be gainsaid that a court should have regard to all relevant factors in sentencing. This is, in fact, hinted at by s 228(2)(c) of the CPC, which provides that the Prosecution’s address on sentence may include “any relevant factors which may affect the sentence” [emphasis added] (although this provision appears to apply only to plead guilty proceedings, s 230(1)(x) of the CPC makes it applicable to trial proceedings as well). It follows that the court must be allowed to take these same factors into account.

60 Furthermore, the offence of dangerous driving is one that calls for both specific and general deterrence (*D’Rozario Pancratius Joseph v PP [2015] SGHC 46* at [27]). Allowing a court to take into account a compounded offence under the RTA (or its subsidiary legislation) gives better effect to this need. Indeed, whether a traffic offence is compounded may ultimately depend on the prevailing prosecutorial policy of the day. But the need to deter bad driving remains regardless and is better given effect to when a court is allowed to take into account compounded offences under the RTA (or its subsidiary legislation).”

6A. Prosecution's Address on Sentence

Prosecution's Address on Sentence

Section 228 of the CPC

- (1) On the conviction of the accused, the prosecution may where it thinks fit address the court on sentence.
- (2) The address on sentence may include-
 - (a) The criminal records of the accused;
 - (b) Any victim impact statement; and
 - (c) Any relevant factors which may affect the sentence.

PP v Tan Fook Sum [1991] 1 SLR(R) 1022 at [34]

- A sentence is awarded entirely within the discretion of the court and a trial judge cannot justify a sentence that is manifestly inadequate by pointing to the omission of the Prosecution to press for a harsher sentence.

6B. Mitigation Plea

Mitigation Plea

Section 228(3) of the CPC:

(after hearing the Prosecution's Address on Sentence)

The court **must** then hear any plea in mitigation of sentence by the accused and the prosecution has a right of reply.

Mitigation Plea

Section 228(4) of the CPC:

The plea in mitigation **must not qualify the plea**. If the plea in mitigation qualifies the plea, the court **must** reject the plea of guilty.

note slide 115 - Court can refuse to do this if it amounts to an abuse of process

Mitigation Plea

Rule 14(7), Legal Profession (Professional Conduct) Rules 2015:

If an accused person has pleaded guilty or has been convicted after trial, the legal practitioner representing the accused person, when presenting a plea in mitigation, **must not make any allegation which is scandalous or is intended or calculated to vilify, insult or annoy any person.**

E.g. Unacceptable to engage in victim blaming in matters involving sexual offences (see *GCM v PP* [2021] 4 SLR 1086, for reference only – not in course outline)

7. Pronouncement of Sentence & Consequential Orders

Deferment of sentence

Section 318 of the CPC:

Subject to this Code and any other written law, a sentence of imprisonment shall take effect from the date it was passed, unless the court passing the sentence or, when there has been an appeal, the appellate court, otherwise directs.

Loh Kok Siew v PP [2002] 2 SLR(R) 186 at [7]-[12]

If accused asks to defer sentence, the Court's paramount consideration would be the accused's reasons for the postponement of sentence. The Court will consider factors including:

- The adjournment(s) that have previously been granted to the accused;
- Gravity of the offence;
- The accused's criminal record and the possibility of reoffending while at liberty;
- Whether bail imposed will ensure the attendance of the accused in court.

Loh Kok Siew v PP [2002] 2 SLR(R) 186 at [10]

- Burden lies on the accused to satisfy the Court that the circumstances necessitate the Court's exercise of its discretion to grant a deferment of the sentence.
- Court will have to weigh the reasonableness of the request against the justice of the case i.e. "*the discretion to postpone should be exercised judiciously and only where good reasons exist*".

Fines – amount to be imposed

Section 319(1)(a) of the CPC:

- If maximum amount not stated in the law, the fine to which the offender is liable shall be unlimited but must not be excessive.

BUT Section 303 of the CPC:

- High Court – no upper limit
- District Court – fine not exceeding S\$30,000
- Magistrate Court – fine not exceeding S\$10,000

Payment of Fines

Section 319(1)(b) of the CPC:

- The Court may allow an extension of time for the payment of the fine;
- The Court may allow the fine to be paid by instalments;
- The Court may direct that the offender must serve a term of imprisonment if the offender defaults on the payment of the fine. This term of imprisonment must run consecutively with any other imprisonment term that the offender may have been sentenced to.

Withdrawal of remaining charges on conviction on one of several charges

Section 147 of the CPC:

- (1) When 2 or more charges are made against the same person and he has been convicted on one or more of them, the prosecution may, with the consent of the court, withdraw the remaining charge or any of the remaining charges.

- (2) Such withdrawal shall have the effect of an acquittal on the remaining charge or charges withdrawn unless the conviction is set aside.

- (3) Where a conviction is set aside under subsection (2), and subject to any order of the court setting aside the conviction, the court may proceed with the trial of the charge or charges previously withdrawn.

Disposal of property by court

Section 364 of the CPC

Pursuant to s 364(1), during or at the conclusion of an inquiry or trial, the court may make an order as it thinks fit for the disposal of any property produced before it.

Disposal of property by court

Pursuant to s 364(2), during or at the conclusion of any criminal proceeding, a court may make an order as it thinks fit for the disposal of any property –

- (a) in respect of which an offence is or was alleged to have been committed or which has been used or is intended to have been used for the commission of any offence or which constitutes evidence of an offence; and
- (b) which is produced before the court or is in the court's custody or the custody of a police officer or any other person who has seized the property pursuant to any law.

Disposal of property by court

- Court can make the following disposal orders:
 - 1) Forfeiture;
 - 2) Confiscation;
 - 2) Destruction; or
 - 3) Delivery to any person.
- Disposal inquiry will be conducted if there are any competing claims.

8. Retraction of Guilty Plea

Retraction of Guilty Plea

Md Rafiqul Islam Abdul Aziz v PP [2017] 3 SLR 619 at [23]-[36]

- Court's powers of revision are to be exercised sparingly and would only be invoked to remedy a serious injustice.
- Before a court accepts a guilty plea, the court:
 - Should be satisfied that it is the accused himself who wishes to plead guilty;
 - Must ensure that the accused understands the true nature and consequences of his plea; and
 - Must establish that the accused intends to admit without qualification to the offence alleged against him.

Md Rafiqul Islam Abdul Aziz v PP [2017] 3 SLR 619

at [26]

- An accused person would be permitted to retract his guilty plea if he is able to show “*valid and sufficient grounds which satisfy [the court] that it is proper and in the interests of justice that he should be allowed to do so.*”
- “*valid and sufficient grounds*” depend on all facts of the case, for example:
 - Situation where there was a mistake or misunderstanding; or
 - Where the accused did not make a “*voluntary and deliberate choice*” to plead guilty

Md Rafiqul Islam Abdul Aziz v PP [2017] 3 SLR 619

at [34]

“...The combined purport of ss 227(2) and 228(4) of the CPC is that at all stages of the plead guilty procedure – both when the plea is being taken and during mitigation – the court must be cautious to ensure that the accused intends to unequivocally admit to the offence alleged against him without qualification before convicting and sentencing the accused on the charge”.

*See also PP v Dinesh s/o Rajantheran [2019] 1 SLR 1289, especially at [28]-[30], [67]

very little room for any exercise of judicial discretion under s 228(4) - if a matter raised in the plea in mitigation affected an element of the offence, it would be triggered.

Subjective intention of the accused person or the court's opinion as to his factual guilt is irrelevant

BUT the court will not set aside a PG under this provision if the accused person's conduct was an abuse of process

(2) Sentencing Philosophy & Principles

WHY PUNISH?

Each time a judge decides to punish an offender, he must remember to ask himself the additional question: Why punish? This will remind him that the punishment imposed should achieve a societal purpose and cannot be an end in itself.

Former Chief Justice Chan Sek Keong (2006)

Sentencing Overview

- Sentencing only takes place if there is a conviction (including a successful appeal against acquittal by the Prosecution)
- Not much controversy when it comes to conventional sentences of fines and imprisonment for individual charges – courts will usually have regard to (1) the prescribed punishment for the offence and (2) any sentencing guideline judgments / sentencing norms
 - Court of Appeal and High Court have been very active in promulgating sentencing guideline judgments in recent times
 - Optional: For a good overview (and example) of such guideline judgments – see *Ng Kean Meng Terence v PP [2017] 2 SLR 449*

Sentencing Overview

- ***Three main areas of interest which are highly topical:
 - Consecutive and concurrent sentencing when the court imposes imprisonment terms for multiple charges
 - Sentencing of youthful offenders
 - Community based sentences (see sections 335 to 354 of the CPC)

We will flesh out these areas of interest at the relevant junctures below.

Sentencing Philosophy

- Key sentencing principles and sentencing pillars:
 - **Retribution:** punishment must reflect gravity of offence
 - **Deterrence:** deter likeminded offenders (general deterrence) and/or deter a particular offender from reoffending (specific deterrence)
 - **Prevention:** take offender out of circulation to protect public (e.g. preventive detention)
 - **Rehabilitation:** targeted at reform - underpins the sentencing of youthful offenders and adult offenders who may qualify for community sentences

*Sentencing often entails identifying the most relevant principle and proceeding from there. There can certainly be competing considerations (e.g. deterrence v rehabilitation when it comes to youthful offenders).

Consecutive and concurrent sentencing

- Key reference point is section 307(1) of the CPC – if accused is convicted and sentenced to imprisonment for at least 3 distinct offences, at least 2 imprisonment terms must run consecutively.
- For avoidance of doubt, fines cannot run “concurrently” when they are imposed – they aggregate and stack up.
- Two other key considerations:
 - There is a general rule that custodial sentences for unrelated offences (distinct offences committed on separate occasions) must run consecutively (IMPT: see *PP v Raveen Balakrishnan* [2018] 5 SLR 799)
 - The one-transaction rule serves as a “filter” for the court to ensure that sentences run concurrently when consecutive sentences are not appropriate (IMPT: see *Mohamed Shouffee bin Adam v PP* [2014] 2 SLR 998)
 - No presumption that 2 most severe sentences should run consecutively
 - Rule is flexible - just a general rule. Same transaction offences may run consecutively if enhanced culpability from multiplicity of offences in that transaction.
 - Must state reasons if departing.

Consecutive and concurrent sentencing

- The general rule in *Raveen Balakrishnan* ensures that the deterrent effect of sentencing is not lost and avoids the appearance that one can get a bulk discount for multiple offending acts.
- One-transaction rule provides that offences which are part of the same transaction should be the subject of concurrent sentences:
 - Factors such as proximity of time, proximity of purpose and proximity of location serve as a “first level” filter – offences are quite plainly unrelated if these are not satisfied.
 - Be mindful that the “real basis” of the one-transaction rule is whether the offending acts offend the same legal interest (IMPT: see *Shouffee* at [31]).
 - In the final equation, common sense is still an important determinant in whether sentences should run concurrently or consecutively.

*Sentences are ultimately subject to the need for punishment to be proportionate and not crushing
(Illustration: accused person who is convicted of eight counts of snatch theft under section 356 of the Penal Code (minimum sentence of one year's imprisonment per charge) - 8 consecutive sentences???
- Totality principle comes in as a moderating mechanism to ensure that punishment is not crushing.

Totality Principle

- The total sentence imposed should not be a ‘crushing sentence not in keeping with the offender’s records and prospects’
- Subject to Section 307(1), CPC

At least 2 consecutive sentences, if convicted of 3 or more

Totality Principle

“The “totality principle” is an expansion of the “one-transaction principle”. Under this principle, the sentencing court would take into account all sorts of overlapping factors that might, in some cases, render the overall punishment harsher than the offender deserves. These principles are applied as part of the court’s sentencing discretion, and are important considerations although they are not mandatory rules.”

PP vs McCrea Michael
[2006] 3 SLR(R) 677

Totality Principle

- Must not be used to minimize punishment when the facts merits sufficiently severe punishments being meted out: "...the totality principle cannot be unthinkingly invoked to minimise punishment for those who maliciously pursue a deliberate course of criminal behaviour"

- *ADF v PP & Anor*

[2010] 1 SLR 874, per VK Rajah JA (as he then was)

Maximum Sentence

- May be imposed even in PG cases
- Court has to identify a range of conduct characteristic of the most serious instances of the offence in question
- Consider the nature of the offence:
 - Aggravating features
 - Personal circumstances of the offender, e.g. previous similar convictions?

Maximum Sentence

“If a particular criminal provision prescribes a maximum sentence that seems unduly light or lenient in relation to the potential seriousness of offences that fall under it, meting out a near-maximum sentence is not warranted unless it is demonstrated by the prosecution that that particular offence figures among the worst type of cases *falling within that prohibition*.... there must be a sense that the sentence is proportionate not only to the culpability of the offender but also in the context of the legislative scheme.”

Comparison is with other offenders within that prohibition

Angliss Singapore Pte Ltd vs PP

[2006] 4 SLR(R) 653

(3) SENTENCING OPTIONS

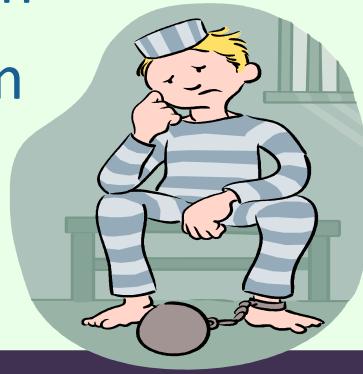
Types of Sentences

General Sentencing Options

- Imprisonment
- Caning
- Fines
- Probation

Specific Sentencing Options

- Community Sentences
- Reformative Training
- Corrective Training
- Preventive Detention
- Disqualification from Driving



Date of commencement of sentence, deferment of sentence

- Court's power to backdate sentence of imprisonment is a discretionary one (see section 318 CPC for context).
- By backdating an imprisonment sentence, the court will be able to achieve a discount in the sentence.
- By refusing to backdate it, the court can in effect achieve an enhanced sentence.
- Where the court does decide to backdate an imprisonment sentence, the prevailing practice is to equate this with date of arrest if the accused was remanded (i.e. was not bailed out) since then.

THE TRIAL

Ong Luan Tze
Criminal Justice Division
State Courts, Singapore

II. TRIAL – CASE FOR THE PROSECUTION

Case for the Prosecution

- Procedure at trial (S.230(1) CPC).
- Proceeded charge/s will first be read to the accused for his plea to be taken.
- Opening statement, if any, will be read.

Case for the Prosecution

- Prosecution calls its witnesses
- Examination-in-chief of the Prosecution's witness by the prosecutor
 - Exhibits should be admitted through the appropriate witness
 - Report by a qualified person (e.g. HSA report) may be used as evidence at trial without calling the qualified person (S.263 CPC)

Case for the Prosecution

- Cross examination of the Prosecution's witness by the Defence
- Re-examination of the Prosecution's witness by the prosecutor
 - Questions to be asked only to clarify the areas covered in cross examination. (S.140(3) Evidence Act)

Case for the Prosecution

- S.136 Evidence Act – No particular number of witnesses shall be required for the proof of any fact.
- After proving its case, the Prosecution can offer its remaining witnesses to the Defence.

When should an adverse inference be drawn?

- S.116, illustration (g) Evidence Act – The court may presume that evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it.

When should an adverse inference be drawn?

- Not every failure to offer or call a witness will be a basis for invoking S.116(g) EA.
- The materiality of the witness has to be considered.
- An adverse inference will not be made where the witnesses were not material or indispensable to the case, and where the case had been sufficiently proved by other independent evidence.
 - *Satli bin Masot v PP* [1999] SGCA 22

When should an adverse inference be drawn?

- On the other hand, if a witness was readily available to testify and a central figure in a party's case theory, then it would be incumbent on the said party to call him.
 - *Beh Chew Boo v PP* [2020] 2 SLR 1375

III. TEST AT THE CLOSE OF THE PROSECUTION'S CASE

Close of Prosecution's Case

“At the end of the Prosecution’s case, what had to be decided was a question of law only. As decider of law, the judge had to consider whether there was some evidence (not inherently incredible) which if he were to accept as accurate, would establish each essential element in the illegal offence.”

Haw Tua Taw v PP [1981-1982] SLR(R) 133 at [17]

Close of Prosecution's Case

- At the close of the Prosecution's case, the Defence may invite the Court to dismiss the case on the ground that there is no case to answer (S.230(f) CPC)
- Bear in mind that the threshold is a very low one at this stage (i.e. a *prima facie* case)
- Submission of no case should not be made just for the sake of it (*Ong Lee Koon v PP* [1995] 1 SLR(R) 682 at [19])

Close of Prosecution's Case

- The guiding propositions at the close of the Prosecution's case (*PP v Wong Wee Keong* [2016] 3 SLR 965 at [33]):
 - a) All evidence of primary fact should be accepted as being true, unless it is so inherently incredible that no reasonable person would be able to accept it as being true or if it has been discredited or shown to be wholly unreliable.
 - b) Inferences may be drawn, but only if they are reasonable.
 - c) The totality of evidence has to be considered

Close of Prosecution's Case

- If the court finds that there is no prima facie case against the accused, the court must order a discharge amounting to an acquittal (S.230(1)(k) CPC)
- If the court finds that there is a prima facie case against the accused, the court must call on the accused to give his defence. (S.230(1)(j) CPC)

Standard allocution under S.230(1)(m)

CPC

“I find that the prosecution had made out a case against you on the charge(s) on which you are being tried. There is some evidence, not inherently incredible, that satisfies each and every element of the charge(s). Accordingly, I call upon you to give evidence in your own defence...”

Amendment of charge

- The court may alter the charge or frame a new charge before calling on the accused to give his defence (S.230(1)(g) CPC)
- Procedure in S.128 – S.131 CPC to be followed

Amendment of charge

- The trial court is not obliged to “*search the law for offences which an accused person may have committed*”.
- However, the trial court can, and ought to exercise its discretion to amend the charge if the evidence points obviously to another offence.
 - *PP v Tan Khee Wan Iris* [1994] 3 SLR(R) 168 at [7] – [10]

IV. CASE FOR THE DEFENCE

Case for the Defence

- If the accused is giving evidence in his own defence, he must give it on oath or affirmation, and be liable to cross examination. (S.291(1) CPC)
- The accused's evidence will be heard first before the other Defence witnesses, if any, are called.

V. RECALLING WITNESSES

Recalling witnesses

- At the end of the trial, the Court retains a discretion to call for, or to allow a person to be summoned / recalled as a witness (S.283(1) CPC)
 - This discretion should be exercised sparingly and judiciously to the just decision of the case (*Sim Cheng Hui v PP* [1998] 1 SLR(R) 670 at [30])

Recalling witnesses

- If the Court thinks that the person's evidence is essential to making a just decision in the case, the Court must re-call or summon the witness (S.283(2) CPC).
- If the charge is altered or a new charge framed by the court, parties must be allowed to re-call any witness with reference to the amended charge, unless the Court thinks the application is frivolous or vexatious. (S.131 CPC)

VI. REBUTTAL WITNESSES

Rebuttal witnesses

- At the close of the Defence's case, the Prosecution has the right to call or re-call any person for the purpose of rebuttal. Any such witness shall be liable to be cross-examined by the Defence. (S.230(1)(t) CPC)

VII. CLOSING SUBMISSION & JUDGMENT

Closing Submission & Judgment

- Closing submissions will first be made by the Defence (S.230(1)(u) CPC)
- Final right of reply lies with the Prosecution (S.230(1)(v) CPC)

Closing Submission & Judgment

- The case against the accused must be proven beyond a reasonable doubt.
- This does not mean that the Prosecution has to dispel *all* conceivable doubts. Doubts which are “merely fanciful” will not be sufficient to raise a reasonable doubt in the Prosecution’s case.
 - See *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 at [61]

Closing Submission & Judgment

- A doubt is not reasonable if it is not reasoned, in the sense of being supported by reasons that are logically connected to the evidence.
- A reasonable doubt can arise from “within the case mounted by the Prosecution”, or “on the totality of the evidence” which will include the Defence’s case and any weaknesses therein
 - See PP v GCK & Anor [2020] 1 SLR 486 at [131, 134 and 135]

Closing Submission & Judgment

- The burden of proof always lies with the Prosecution.
- A tenuous and inadequate defence does not discharge the Prosecution's burden
 - See *Tan Edmund v PP* [1995] 1 SLR(R) 618 at [15]

Closing Submission & Judgment

- If the Court finds the accused not guilty, it must order a discharge amounting to an acquittal (S.230(1)(w) CPC)
- If the Court finds the accused guilty, it must record a conviction and comply with the procedure under S.228 CPC to deal with the issue of sentence. (S.230(1)(x) CPC)

Impeachment in general (2)

S 157 of Evidence Act (Cap 97) (“EA”)

The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls the witness:

- (a) *By evidence of people who testify that the witness is unworthy of credit;*
- (b) *By proof of bribery/corruption of the witness;*
- (c) *By proof of inconsistent statements made by the witness;*
- (d) *If a person is prosecuted for rape, it may be shown the prosecutrix was generally of an immoral character*

Prior inconsistent statement(1)

Public Prosecutor v Heah Lian Kin [2002] 2 SLR(R) 745

- A prior inconsistent statement is not confined to situations where the witness gives “two affirmative versions of the facts” [at [44]]
- If a witness claims that he cannot remember the events stated in his statement even after the statement was shown to him to refresh his memory, he contradicts the essence of his earlier statement which contains a detailed account of the facts (at [51])

Prior inconsistent statement(2)

Kwang Boon Keong Peter v Public Prosecutor [1998] 2 SLR(R) 211 at [21]

- Four classes of discrepancies:
 - Minor
 - Apparent
 - Serious
 - Material
- it is only the last two classes of differences which are sufficient to invoke the operation of s 147

s 147 - cross examination as to previous statements in writing

- if want to find an inconsistency/contradiction, must draw attention to the inconsistent part of the statement
- can admit proof that they made certain oral statements
- can admit documents used for witness to refresh memory

Impeachment Procedure (1)

- Procedure derived from statute, case law and practice (see ss 147, 156 and 157 of EA and *Muthusamy v Public Prosecutor* [1948] MLJ 57)

s 156 - with court's permission, can cross-ex your own witness

s 157 - impeachment

Impeachment Procedure (2)

1. Establish material parts of the witness's evidence that are inconsistent with his/her previous statements
2. Highlight the material discrepancies in the statements (usually underlined in red), and cover up the prejudicial portions
3. Apply under s 157(c) of EA to cross examine witness on the statement and tender copy of statement to court for court to determine whether material discrepancies exist

Impeachment Procedure (3)

4. Court determines if there are serious/material discrepancies. If there are no irreconcilable conflicts, impeachment process will not be allowed to proceed.
5. If court determines that there are serious/material discrepancies, impeachment process continues.
6. Witness is asked whether he made the statement voluntarily. If witness denies making the statement, the statement must be proved by calling the maker of the statement

Impeachment Procedure (4)

7. After statement is admitted, the discrepancies are pointed out to the witness, and he is given a chance to explain
8. If the witness's explanation is satisfactory, his credit is saved

Impeachment Procedure (5)

“forgetful” witness

- Where witness claims that he does not remember what happened, it may be preferable to refresh his memory under s 161 of the EA.
- Rationale: witness may have genuinely forgotten, and is not deliberately trying to be hostile
- If refreshing memory fails, proceed to impeach

Effect of successful impeachment (1)

- The court does not need to rule on whether the witness's credit is impeached: see *Loganatha Venkatesan v Public Prosecutor* at [56]
- Witness's credit is adversely affected
- Evidence of the witness must now be carefully scrutinised

Effect of successful impeachment (2)

Loganatha Venkatesan v Public Prosecutor [2000] 2 SLR(R) 904 at [56]

[I]mpeachment of the witness's credit does not automatically lead to a total rejection of his evidence. The court must carefully scrutinise the whole of the evidence to determine which aspect might be true and which aspect should be disregarded...Thus, regardless of whether his credit is impeached, the duty of the court remains, that is, to evaluate the evidence in its entirety to determine which aspect to believe.

Effect of successful impeachment (3)

- s 147 (3) EA allows the witness's prior inconsistent statement to be admitted as "*evidence of any fact stated therein*"
- *Weight given to the statement depends on "all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts."*
(see s 147(6) EA)

Effect of successful impeachment (4)

Weight given to prior statement

- little weight is given to statements that were not made contemporaneously with the occurrence or existence of the facts stated: see *Lee Yuen Hong v Public Prosecutor* [2000] 1 SLR(R) 604 at [54]-[55]

Effect of successful impeachment (5)

Other factors affecting the weight of an admitted statement Chai Chien Wei Kelvin v Public Prosecutor at [71] :

- The possibility of misrepresentation by the maker
- Explanation of the inconsistency
- Context of the whole statement
- The cogency and coherence of the facts to be relied on

END