

**To plead or not to plead? Qualifying a guilty plea during mitigation:
Public Prosecutor v Dinesh s/o Rajantheran [2019] SGCA 27**

I. Executive Summary

In *Public Prosecutor v Dinesh s/o Rajantheran* [2019] SGCA 27, the Court of Appeal (“CA”) answered two questions by the Prosecution, regarding the proper interpretation of section 228(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (“CPC”). Under section 228(4), the court “must reject” a party’s guilty plea if it is satisfied that any matter raised in mitigation¹ “materially affects any legal condition” which constitutes the underlying offence.

Here, the respondent Dinesh s/o Rajantheran (“**Dinesh**”) had initially pleaded guilty to an offence, but then made statements during mitigation which qualified his guilty plea to such an extent that it amounted to a retraction of his guilty plea. While the District Judge refused to reject Dinesh’s guilty plea on the basis of his mitigation plea, the High Court (“**HC**”) set aside his conviction and remitted the matter for trial. The Prosecution then filed a criminal reference (a process whereby parties may refer any question of law of public interest to the CA for guidance) to the CA, referring two questions involving section 228(4).

The Prosecution used the criminal reference to argue, in essence, that section 228(4) did not apply to an accused person who, having pleaded guilty to an offence, then wished to change his mind; he should instead apply to the court for permission to retract his guilty plea and set aside his conviction. If the court declined to permit the application, then the accused person would not be allowed to advance anything in his mitigation plea that would be inconsistent with his guilty plea. Otherwise, an accused person would be able, in effect, to circumvent the need to make an application to retract his guilty plea by simply asserting facts in mitigation which were inconsistent with his earlier plea of guilt. Further, the Prosecution argued that the accused person should also have to provide valid and sufficient reasons for retracting his guilty plea.

The CA re-framed the Prosecution’s questions (in consultation with the parties) as follows:

- (a) Does section 228(4) apply where the accused person seeks to qualify his plea of guilt at the mitigation stage of sentencing, to such an extent that it amounts to a retraction of his guilty plea?
- (b) Must such an accused person first satisfy the court that he has valid and sufficient grounds for doing so, before the court may reject his plea of guilt?

The CA then concluded that:

- (a) Yes it does, save where the court is satisfied that the accused person’s conduct amounts to an abuse of process of the court.
- (b) No, because it is sufficient that the mitigation plea materially affects a legal condition of the offence.

II. Material Facts

In the State Court, Dinesh had faced 63 charges under section 22A(1)(a) of the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed). He had been accused of receiving \$2,000 from foreign employees, as a condition for their employment by two marine companies where he was a senior executive. Dinesh initially claimed trial, but later accepted a plea offer² from the Prosecution where he pleaded guilty to 20 charges. He admitted to the statement of facts³ without qualification,

¹ A mitigation plea occurs after an accused person has pleaded guilty to an offence but prior to sentencing. The accused person puts forth any mitigating factors or circumstances that he thinks would persuade the court to award a lower punishment.

² A plea offer is a deal where the accused person party agrees to plead guilty, in return for concessions from the Prosecution (usually a recommendation of a lighter sentence or a reduction in the number of charges).

³ A statement of facts sets forth the elements of the offence committed and the material facts of the case.

and was accordingly convicted on his plea.

Prior to the sentencing hearing before the District Judge, Dinesh submitted an *application to retract* his guilty plea. The application disputed six material allegations that had been made against him. Dinesh further submitted that these assertions materially affected the legal condition of the alleged offences, and thus the court was obliged to reject his guilty plea under section 228(4). This statement was included even though Dinesh did not appear to be making any mitigation submissions.⁴ When the judge asked Dinesh's lawyer whether he was applying to retract the plea or putting forth matters in mitigation that would qualify his guilty plea, the lawyer stated that it was the latter. Dinesh then tendered a *mitigation plea* that again disputed the six material allegations made against him; his mitigation plea essentially restated his earlier submissions under the plea retraction.

The District Judge refused to reject Dinesh's guilty plea, noting that the procedural safeguards⁵ relating to his guilty plea had been observed. He further stated that the mitigation plea was not made in good faith, but was meant to compel the court to reject Dinesh's guilty plea under section 228(4). As such, it was an abuse of process, and a backdoor way to turn back the clock on his guilty plea. The District Judge then sentenced Dinesh in accordance with the guilty plea.

Dissatisfied with the ruling, Dinesh filed a petition for criminal revision⁶ with the HC. The HC held that since Dinesh's mitigation submissions did qualify his plea of guilty, the District Judge should have rejected his guilty plea; accordingly the HC set aside Dinesh's conviction and remitted the matter back to the State Courts for trial. The Prosecution then filed the present criminal reference to the CA.

III. Issues on appeal

The Prosecution referred the following questions to the CA:

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

The CA answered the questions referred in the following manner:

- (a) First, it looked at the literal and logical interpretation of section 228(4). The CA decided that section 228(4) was unambiguous and left little room for judicial discretion;
- (b) Second, it disagreed with the Prosecution's interpretation of section 228(4);
- (c) Third, it held that the correct philosophical approach in dealing with a mitigation plea was to view it against the background of the plead guilty procedure as a single process, spanning from the initial plea of guilt to the final sentencing; and
- (d) Finally, it rejected the Prosecution's arguments, based on prior cases, that an accused person could not qualify his guilty plea in the course of mitigation without showing valid and sufficient reasons.

A. Literal and logical interpretation of section 228(4)

The CA agreed with the HC that the literal wording of section 228(4) was unambiguous, leaving little room for any exercise of discretion. Once the provision was properly invoked, the court *must* reject the guilty plea. The court could only consider whether what was stated in the accused person's

⁴ Since he was not technically making a mitigation submission, his application to retract his guilty plea would not trigger review under section 228(4).

⁵ They were: Dinesh had pleaded guilty in his own voice and words; he had understood the nature and consequence of a plea of guilty; and he had pleaded guilty with the intention of admitting to the charges without qualification.

⁶ In essence, parties in criminal cases may file a petition to the HC to review their cases if they feel that the matter has not been dealt with appropriately in the lower courts.

mitigation plea in fact materially affected any legal condition which constituted the underlying offence, i.e. materially affected the validity of any essential element or ingredient of the offence. Once this was established, the court *must* then reject the guilty plea, and by extension terminate the mitigation stage of proceedings.

B. Prosecution’s interpretation was incorrect

The Prosecution argued that section 228(4) should only apply when the accused person made a *genuine* plea in mitigation, i.e. that the accused person raised certain facts merely to seek leniency in sentencing, and these facts happen *incidentally* to cast doubt on the validity of the guilty plea. Conversely, it was not a genuine plea in mitigation if he changed his mind about pleading guilty and sought to retract his guilty plea during the mitigation stage. The Prosecution further argued that an accused person seeking to retract his guilty plea had to establish valid and sufficient grounds for doing so, so as to guard against abuse of process and facilitate the efficient administration of justice. Thus, the court should not be satisfied that a “legal condition required by law to constitute the charge” was materially affected by the mitigation plea, unless the accused person *first* provided *valid and sufficient reasons* to explain why his earlier plea should be set aside.

However, the CA noted that this interpretation would introduce requirements which were not actually found in the words of section 228(4), and would also undermine the mandatory nature of the provision. It would not cohere with the clear words and ordinary meaning of the provision to find that the court could consider circumstances *external* to the mitigation plea, such as the accused person’s *reasons* for advancing a mitigation plea that was inconsistent with the elements of the offence to which he had earlier pleaded guilty. Moreover, section 228(4) already allowed the court to examine whether the points raised in mitigation had any substance; this ensured that not every ostensible defence raised in mitigation would prevent the court from convicting the accused person on the charge to which he had pleaded guilty.

Finally, the CA found that the Prosecution’s interpretation would render section 228(4) completely ineffectual. Under such interpretation, whenever the accused person raised a point in his mitigation plea that had the effect of qualifying his guilty plea, he would first have to obtain the court’s permission to retract his earlier guilty plea. However, once such permission was obtained, the matter would proceed to trial and section 228(4) would no longer apply, thus rendering it ineffectual. On the other hand, if such permission was denied, the court would presumably have to ignore the point made in the accused person’s mitigation plea or prohibit him from making it – which would be flatly contrary to the terms of section 228(4), and render it ineffectual as well. Thus, on either basis, section 228(4) would have no real function at all.

C. The correct approach to section 228(4)

The CA held that the correct approach would be to view the whole “plead guilty procedure” as a continuum: it began with the taking of the accused person’s plea to the charge and his admission of the statement of facts, continued through the conviction and the mitigation submissions, and ended with the pronouncement of the appropriate sentence. It was the continuing duty of the court to ensure that the accused person maintained the intention to plead guilty throughout the entire process. When the mitigation and sentencing process was regarded as part and parcel of the plead guilty procedure, it was clear that section 228(4) acted as a safeguard, which had to be complied with, before a guilty plea could be safely accepted as the legal basis for conviction.

The CA stressed that the courts must be cautious to ensure that the accused person intends to unequivocally admit to the offence alleged against him without qualification, before convicting and sentencing him. This was also in line with established caselaw, which states that if a mitigation plea qualified an earlier plea of guilt (by indicating that certain elements of the offence were not satisfied), the accused person would be deemed not to have admitted to the offence without qualification, and

the plea would be rejected by the court.

D. Qualifying a guilty plea during mitigation

The Prosecution used a number of cases to support its argument that an accused person did not have a right to change his mind about a guilty plea at any stage after a conviction, unless he could prove that the earlier guilty plea was invalid. It reasoned that since an accused person could not retract his plea except by showing valid and sufficient grounds for doing so, he must therefore be prohibited from achieving the same outcome indirectly, i.e. by qualifying his guilty plea during mitigation.

However, the CA repeated that this reasoning was incorrect as a matter of principle and statutory interpretation. Moreover, the cases cited did not support the Prosecution's interpretation of section 228(4): none of them involved situations where the accused person qualified his plea during mitigation by asserting inconsistent facts, but the court nonetheless upheld the plea and conviction. The court separated the cases into three categories.

(i) First Category

In the first category of cases, the accused persons had already pleaded guilty and had then been convicted and sentenced on the basis. At the post-sentencing stage, they then sought to retract their guilty pleas, by casting doubts on the validity of the plead guilty process or by otherwise denying their guilt. The CA observed that at the post-sentencing stage, the court will almost inevitably take a dim view of the accused person's assertions, for the more obvious inference to be drawn will be that the accused person now regretted his decision to plead guilty (after sentence had been imposed) and therefore wished to take his chances at trial. In this category, it would be rare for an accused person's conviction to be set aside at the post-sentencing stage, whether he attempted to challenge the regularity of the plead guilty procedure or asserted facts inconsistent with the elements of the offence and maintaining his innocence. The court's revisionary powers⁷ would only be exercised in cases of serious injustice, such as where the court was satisfied that the accused person did not have the genuine freedom to plead guilty.

(ii) Second Category

In the second category of cases, the accused person, after being convicted on a guilty plea but before being sentenced, made assertions attacking the integrity of the plead guilty procedure, and thus sought to retract his guilty plea. In such cases, given the seriousness of any allegations that aim to cast doubt on the legality and propriety of legal proceedings, the court will take steps to ascertain the truth of the matter, especially if allegations of impropriety are made against judicial officers or legal counsel. However, the onus would be on the accused person to adduce sufficient evidence to convince the court that his plea of guilt was invalid.

Thus, in these cases, the CA found that the accused persons there were not trying to qualify their earlier plea of guilt through their mitigation pleas, but were instead claiming that the plea-taking process had been undermined in a material way. In one case, the accused person claimed that he had pleaded guilty due to lack of time to prepare his defence; in the other case, the accused person claimed that he was prevented by the court interpreter from communicating his version of events to the court.

(iii) Third Category

The CA considered the third category of cases to be the only true cases where a guilty plea was qualified during mitigation, i.e. where an accused person put forth assertions in mitigation that qualified his guilty plea because they were inconsistent with material elements of the offence. Cases in this category (compared to the earlier two categories) were few; the CA reasoned that in the majority of such cases, a qualification in the mitigation plea would simply have led to the trial judge

⁷ In exercising its revisionary powers, the HC may examine the record of any criminal proceedings before the State Courts and amend or correct any irregularities, including amending orders made by the State Courts.

rejecting the plea and fixing the matter for trial. The CA considered this the right approach, and one that was ordinarily mandated by section 228(4).

The CA noted that only *two* of the cases cited by the Prosecution fell within this third category. In the first case, the accused person had pleaded guilty to drug trafficking, but then claimed in mitigation that he did not know that he was carrying diamorphine (a condition for a drug trafficking charge is that the accused person had knowledge of the nature of the drug). In the second case, the accused person had pleaded guilty to making a fraudulent work injury compensation, but claimed in mitigation that he had merely miswritten the date of the accident. These were clear-cut cases where the accused person made assertions during mitigation that were inconsistent with the material elements of the offence. The CA found that the courts in those cases had consistently held that if a plea of guilt was qualified in mitigation, the proper course of action would be to reject the plea, and proceed to trial on the charges faced. As such, contrary to the Prosecution's argument, the HC's interpretation of section 228(4) was indeed consistent with relevant case authorities.

IV. Conclusion

The CA held that section 228(4) reflected the established common law rule that where an accused person asserted certain facts in mitigation which qualified his guilty plea (in the sense that they undermined a legal condition which constituted a material element or ingredient of the offence), the court must set aside the earlier guilty plea. However, this was subject to the qualification that where a court was satisfied that an accused person's conduct amounted to an abuse of process, it was not compelled to reject a guilty plea, section 228(4) notwithstanding. This was because the court had the inherent jurisdiction to ensure the observance of the due process of law and prevent an abuse of the court's processes.

V. Lessons Learnt

The CA did not elaborate further on what would constitute an abuse of process, other than stating that this would be a fact-sensitive inquiry. However, it is interesting that the CA did not appear to consider Dinesh's situation an abuse of process, despite the District Judge's opinion that Dinesh's actions constituted an abuse of process and a backdoor way to turn back the clock on his guilty plea. In any event, accused persons (and their counsels) should take note of this qualification, and take care not to appear to be abusing the court's processes in such situations.

The CA's clarifications may also raise some logistical issues. For instance, the Prosecution may be hesitant to allow foreign witnesses to depart Singapore until the accused person's sentence is finally pronounced. Otherwise, it may be difficult to recall such witnesses in the event the accused person seeks to qualify his (or her) guilty plea at the mitigation stage of sentencing, such that it amounts to a retraction of his (or her) guilty plea.

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