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LESSONS FROM RECENT CASES ON THE RETRACTION OF GUILTY PLEAS

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I. Introduction

1 A plea of guilty results in an accused person being convicted and sentenced without the evidence being tested via trial. It is therefore of utmost importance to ensure that a guilty plea is voluntarily entered into by an accused person without qualification, and with full understanding of its nature and implications. This fundamental principle is reflected in ss 227 and 228 of the Criminal Procedure Code[1] ("CPC").

2 The court would consider all the circumstances surrounding a guilty plea in determining whether an accused person actually intended to do so. It is good practice to properly document and record interactions with clients in this regard. Practitioners should also be careful in ensuring that there is basis to the advice given, and that it is made clear that the decision is one that only the accused can make, lest there be a finding that they had pressured their client to plead guilty.

II. State of the law

3 It is well established that a court is not obliged to accept an accused person's guilty plea. There are three safeguards before a court may accept a guilty plea as stated in *Ganesun s/o Kannan v Public Prosecutor*,[2] which have since been enshrined in s 227(2) of the CPC:

* While the author is with the Attorney-General's Chambers, the views expressed in this article are her own.
1 Cap 68, 2012 Rev Ed.
2 [1996] 3 SLR(R) 125 at [15]–[16].

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(a) the accused himself intends to plead guilty;

(b) the accused understands the true nature and consequences of his guilty plea; and

(c) the accused intends to admit to the offence without qualification.

4 However, there are circumstances where there was a mistake or misunderstanding,[3] or where the accused did not make a "voluntary and deliberate choice"[4] to plead guilty even if the safeguards were complied with. The court would not hesitate to reverse the guilty plea recorded against an accused person in these scenarios. This can be seen in two recent cases decided by the High Court.

A. Mistake/misunderstanding: Md Rafiqul Islam Abdul Aziz v Public Prosecutor

5 In *Md Rafiqul Islam Abdul Aziz v Public Prosecutor*[5] ("*Md Rafiqul*"), the applicant was charged with making a fraudulent compensation claim under the Work Injury Compensation Act[6] ("WICA"), and making false statements to investigating officers from the Ministry of Manpower ("MOM"). In his WICA claim, he indicated that he suffered a workplace accident on 30 May 2013. He visited Tan Tock Seng Hospital on 31 May 2013 and reported that he had sprained his left knee four days prior to the medical examination. He therefore conceded that no accident may have taken place on 30 May 2013, but maintained that there was an accident which took place several days prior.

6 Amendments were made to the charges on the first day of trial. The applicant was informed by his counsel that MOM was accusing him of attempting to cheat his employer, because he did not have an accident on 30 May 2013, and he did not suffer a work injury. His counsel also advised that if the applicant had given the wrong date of the incident, it may be difficult to contest the amended charges, and that he should consider pleading guilty. The applicant had the impression that

3 *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 at [13].
4 *Yunani bin Abdul Hamid v Public Prosecutor* [2008] 3 SLR(R) 383 at [53].
5 [2017] 3 SLR 619.
6 Cap 354, 2009 Rev Ed.

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MOM was accusing him of giving the wrong date for the accident and therefore decided to plead guilty.

7 Chao Hick Tin JA found that it was not inconceivable that the sequence of events on the first day of trial may have confused the applicant, notwithstanding the fact that he was represented, and it was plausible that he, being a young Bangladeshi foreign worker, could have thought that he was being charged with giving the wrong date of the incident to MOM.[7] Chao JA also pointed out that the applicant had alluded to facts in his mitigation plea which indicated that an accident did happen, though not on the day he had stated in his WICA claim, which went to the gravamen of the charges against the applicant.[8] Chao JA therefore set aside the conviction and sentence imposed on the applicant.

B. Involuntary plea of guilt: Chng Leng Khim v Public Prosecutor

8 In *Chng Leng Khim v Public Prosecutor*[9] ("*Chng Leng Khim*"), the appellant faced seven charges in connection with the ill-treatment of three dogs. On the first day of trial, her counsel, who was just engaged, requested a copy of the appellant's statements and exhibits. After taking instructions, counsel for the appellant informed that the appellant wished to plead guilty. The case was therefore adjourned on the request of counsel till the next week.

9 While the statement of facts was made available the same evening by the Prosecution, the appellant and her counsel only had sight of the document on the day of the plead guilty mention. The appellant indicated that she did not wish to plead guilty after seeing the statement of facts. However, she then changed her mind upon being advised that the trial would proceed on all the charges, counsel would have to discharge himself as she had not given any instructions on the defence, and the appellant could be remanded at the Institute of Mental Health ("IMH") by operation of s 247 of the CPC if she could not give evidence.

7 *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [42].
8 *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [43].
9 [2016] 5 SLR 1219.

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10 Sundaresh Menon CJ found that there was no reason to think that s 247 of the CPC was likely to be invoked in this case, and the suggestion that the appellant could be remanded at IMH if she did not plead guilty would have been an alarming one to her.[10] Menon CJ highlighted that whether an offender had entered a plea of guilt under "such pressure that it was not a truly voluntary decision"[11] was a fact-sensitive inquiry, and it may be relevant to consider whether such a decision was contrary to a sustained intention to contest the charges.[12] Menon CJ further stated that on the evidence before him, there was nothing to suggest that the appellant was unable to proceed with the trial due to mental unsoundness, rather than that she was not ready to do so because she was unprepared.[13] He therefore found that this "unfairly deprive[d] the Appellant of her freedom to choose between pleading guilty and pleading not guilty",[14] especially against the backdrop of the appellant having repeatedly expressed sustained misgivings about pleading guilty.[15] Menon CJ did not hesitate in making such a finding, despite stating that there was no reason to doubt that counsel for the appellant believed that the appellant was also concerned about her medical fitness to plead, as the central issue was not fault, but whether the appellant pleaded guilty under pressure.[16]

C. Proper application of section 228(4) of Criminal Procedure Code

11 Another issue relating to the retraction of guilty pleas is the proper interpretation of s 228(4) of the CPC, which reads as follows:

> 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.

12 Section 228(4) of the CPC does *not* stand for the proposition that the court has to reject the guilty plea once

10 *Chng Leng Khim v Public Prosecutor* [2016] 5 SLR 1219 at [18].
11 *Chng Leng Khim v Public Prosecutor* [2016] 5 SLR 1219 at [12].
12 *Chng Leng Khim v Public Prosecutor* [2016] 5 SLR 1219 at [12].
13 *Chng Leng Khim v Public Prosecutor* [2016] 5 SLR 1219 at [18].
14 *Chng Leng Khim v Public Prosecutor* [2016] 5 SLR 1219 at [18].
15 *Chng Leng Khim v Public Prosecutor* [2016] 5 SLR 1219 at [20].
16 *Chng Leng Khim v Public Prosecutor* [2016] 5 SLR 1219 at [21].

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there is any ostensible defence raised in the mitigation plea. Rather, s 228(4) of the CPC codifies the approach from cases decided prior to its enactment.[17] Chao JA explained this succinctly in *Md Rafiqul*:[18]

> 32 It is evident from the foregoing that s 228(4) of the CPC is applicable where the accused has pleaded guilty and been convicted, but has yet to be sentenced. In such a situation, the section states that where an accused raises a point during the *plea in mitigation* that may 'materially affect any legal condition required by law to constitute the offence charged', the court is *mandated by law* to reject the guilty plea and allow the accused to claim trial.
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> 33 This reflects the law's recognition that where an accused has qualified his plea during mitigation, this casts doubt on the safety of the accused's conviction based on his plea of guilt. Putting it another way, it may be said that the guilty plea in such a circumstance cannot be regarded as an unequivocal one. As was stated by See Kee Oon JC in the case of *Tan Kian Tiong v PP* [2014] 4 SLR 131 (at [12]), the paramount duty of the court is to ensure that the accused 'knowingly and unreservedly intends to plead guilty to the charge and admit the truth of the allegations', and to that end 'the court must carefully consider the circumstances surrounding his plea *and, if relevant, also properly consider the mitigation plea to see whether this qualifies his plea of guilt*' [emphasis added].
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> 34 In this connection, ***the requirement in s 228(4) of the CPC, that the matter raised in the plea in mitigation should 'materially affect any legal condition required by law to constitute the offence charged' before the court is mandated to reject the plea of guilty, allows the court in such an event to examine whether the point raised in mitigation has any substance. As in*** Toh Lam Seng ***([28]*** supra***), this ensures that not every ostensible defence raised in mitigation would prevent the court from convicting the accused on the charge to which he has pleaded guilty***. 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.
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> 35 Thus, the legal position prior to, and after, the enactment of s 228(4) of the CPC remains broadly similar (in

17 *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [27]–[31].
18 *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [32]–[35].

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> that a plea of guilt must be unequivocal), and s 228(4) codifies the position by making it compulsory for the court to reject a guilty plea if it is satisfied that 'any matter raised in the plea in mitigation materially affects any legal condition required by law to constitute the offence charged'.
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> [emphasis in original in italics; emphasis added in bold italics]

13 As such, where a defence is raised in mitigation, the court would examine whether this claim has any substance, with the aim of determining whether the earlier guilty plea was in fact an unequivocal one. It is only when the inquiry reveals that the accused did not "knowingly and unreservedly [intend] to plead guilty to the charge and admit the truth of the allegations"[19] that the court is required to reject the earlier plea of guilt.

14 This is best demonstrated in the recent case of *Public Prosecutor v Mangalagiri Dhruva Kumar*[20] ("*Mangalagiri*"). The accused claimed trial to a capital charge of drug trafficking. Counsel for the accused indicated on the third day of trial that the accused wished to plead guilty to a non-capital charge. The plea of guilt was taken, with the accused admitting to the statement of facts without qualification on the same day.

15 At the adjourned sentencing hearing, which was more than six weeks later, the accused indicated that he wished to retract his earlier guilty plea. He filed an affidavit, claiming that he did not want to plead guilty when advised after the first day of trial that the evidence against him was strong, and he was therefore given a piece of paper by counsel to write what he intended to do. He asserted that he eventually decided the next day to plead guilty as he felt very emotional and depressed that no one was helping him or believed him, and he missed his son who was having his birthday. The accused also claimed that he had told counsel four weeks before the sentencing hearing that he wished to retract his guilty plea.

16 Counsel for the accused filed an affidavit in response, stating that it was the accused who immediately agreed to plead guilty, upon being told that the Prosecution would consider proceeding on a non-capital charge upon condition of

19 *Tan Kian Tiong v Public Prosecutor* [2014] 4 SLR 131 at [12].
20 [2018] SGHC 62.

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guilty plea. Counsel advised the accused not to make a rash decision and gave a piece of paper to the accused to confirm his instructions. Counsel further advised him to keep the paper after writing and signing on it, and to take some time to think about it. The signed and dated paper was then handed to counsel the following day.

17 Foo Chee Hock JC found that the guilty plea was validly made.[21] The accused actually intended to plead guilty after the first day of trial, in the light of the signed and dated paper he had written.[22] His assertion that he wanted to retract his plea four weeks before the sentencing hearing was not supported by counsel having done the work to file detailed mitigation and submissions on sentence thereafter.[23] The accused's allegations of being depressed and emotional were self-induced, which is not a valid ground for retraction under the law – the accused's affidavits showed that he had made a calculated and considered decision to plead guilty after duly considering the advice from counsel, albeit reluctantly.[24] Foo JC therefore rejected the accused's application to retract his guilty plea.

18 Foo JC further observed that s 228(4) of the CPC was generally invoked in situations where despite an accused's insistence on pleading guilty, the court could not accept it as it was not a knowing plea of guilt at first instance.[25] On the other hand, there would be situations where an application is made to retract a guilty plea after what appears to be a considered and voluntary plea.[26] The court was duty bound to inquire into the reasons for the change of mind, and a purely tactical decision to do so may be an attempt to "game the criminal process".[27] Foo JC summarised the position at [23] of *Mangalagiri* as such:

> If there were indeed no *valid or sufficient* reasons for retraction, then the legal conditions to constitute the offence were unaffected, let alone 'materially affect[ed]' under s 228(4) of the CPC. This would be the case despite the

21 *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at [11].
22 *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at [13].
23 *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at [15]–[16].
24 *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at [17], [29] and [30].
25 *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at [21].
26 *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at [22].
27 *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at [22].

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> accused's *ex post facto* assertions that he did not admit to the reduced charge and the SOF. [emphasis in original]

19 As such, s 228(4) of the CPC does not in any way change the law in relation to retraction of guilty pleas. The court will still inquire into the circumstances surrounding the guilty plea and the reasons for the accused qualifying his guilty plea during mitigation. It is only when there is doubt about the unequivocal nature of the initial guilty plea that an accused person would be permitted to rescind his earlier position.

III. Observations for the practitioner

20 There are two observations to be made on the impact of the abovementioned cases on the criminal practitioner.

21 First, the courts have shown their willingness to inquire into the events not only at the plead guilty mention, but events surrounding it, which would not be reflected in the notes of evidence. The court may require parties and counsel to file statutory declarations or affidavits to ascertain what transpired, as was done in all three abovementioned cases. This is especially where allegations are made against counsel: while "it is undesirable to allow defence counsel to be made convenient scapegoats, on the backs of whom 'backdoor appeals' are carried through",[28] genuine grievances must never be buried or tolerated, and the court should take cognisance of the complaints and direct further investigations to determine the veracity of the complaints so long as they are not inherently unbelievable or unsupportable on the facts.[29]

22 It would therefore be in the interest of practitioners to keep detailed records of the instructions from their clients in relation to entering a guilty plea. It would be even more preferable for these instructions to be in writing, as was done by counsel in *Mangalagiri*, in the context of a charge carrying a potentially lengthy sentence. There should also be a cooling-off period where appropriate after such instructions are taken – counsel in *Mangalagiri* had ensured that the accused took more time to think about his decision even after putting it down in writing, whilst the allegations in *Md Rafiqul* and *Chng Leng*

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28 *Thong Sing Hock v Public Prosecutor* [2009] 3 SLR(R) 47 at [29].
29 *Thong Sing Hock v Public Prosecutor* [2009] 3 SLR(R) 47 at [28].

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Khim arose in part due to the events which took place on the day the accused pleaded guilty. This will serve to guard against unfounded assertions later in time, and to assist the court in reconstructing the events surrounding a guilty plea where necessary.

23 Second, it would serve practitioners well to be very careful in ensuring that there is basis for the advice they give their clients in relation to the clients' prospects at trial and the feasibility of a guilty plea. There is no reason to shrink away from giving robust advice, which would include assessments that the evidence is strong and the client should plead guilty, that a plea of guilt would be a valid mitigating factor, and that his defence is unlikely to succeed.[30] However, the giving of advice without factual support may result in a finding that the accused was pressured to plead guilty, even in the absence of fault or intent on the part of counsel to act improperly, as happened in *Chng Leng Khim*. Ultimately, it should be made clear that the decision to plead guilty is one which only the accused can make.

IV. Conclusion

24 In conclusion, the courts have taken a fact-sensitive approach in determining whether an accused person truly intended to plead guilty. Practitioners, as the link between accused persons and the court, play a critical role in ensuring that accused persons fully intend to plead guilty and recognise the consequences of doing so. This will foster greater certainty, which benefits all parties within the criminal justice system.

30 *Lee Eng Hock v Public Prosecutor* [2002] 1 SLR(R) 364 at [10].

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