

OPENING THE DOOR TO FICKLE-MINDED GUILTY PLEAS?

Public Prosecutor v Dinesh s/o Rajantheran

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Unlike applications to retract guilty pleas, accused persons are not required to provide valid and sufficient reasons when qualifying their guilty pleas in mitigation. In *Criminal Reference No. 5 of 2018*, the Court of Appeal held that section 228(4) of the *Criminal Procedure Code* allows accused persons to qualify their guilty pleas in mitigation to the extent that it amounts to a retraction of their guilty pleas unless there is an abuse of the court's process. This comment considers the desirability of the current law and suggests that the law applying to such withdrawals of guilty pleas should be amended.

I. INTRODUCTION

Considering that Singapore's rate of guilty pleas hovers above 90%,¹ the guilty plea process plays a crucial role in the administration of criminal justice. A successful criminal justice system prizes the twin ends of punishing the guilty and ensuring the acquittal of the innocent.² Conversely, wrongful conviction evokes public outrage and loss of confidence.³ The decision to plead guilty is an extremely difficult one for defendants and involves the assessment of the strength of the prosecution's case, the possibility of leniency and other tactical considerations.⁴ Recognising that, the Singapore courts emphasise the need to cautiously ensure that the accused intends to

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¹ Chan Sek Keong, "Rethinking the Criminal Justice System of Singapore for the 21st Century" in Singapore Academy of Law, *The Singapore Conference: Leading the Law and Lawyers into the New Millennium @ 2020* (Singapore: Butterworths, 2000) at 51.

² Hri Kumar Nair, *Opening Address by Deputy Attorney-General, Hri Kumar Nair S.C.: Towards a More Efficient and Just Criminal Process*, online: Attorney-General's Chambers <https://www.agc.gov.sg/docs/default-source/newsroom-documents/speeches/clc-2019_7-mar-2019_opening-address-by-dag-hri.pdf> at para 1.

³ Chen Siyuan & Eunice Chua, "Wrongful Convictions in Singapore: A General Survey of Risk Factors" (2010) 28 Sing L Rev 98 at 98.

⁴ Thomas P Reilly, "Now I'm Guilty, Now I'm Not: The Automatic Right to Pre-Sentence Guilty Plea Withdrawals in Pennsylvania since *Commonwealth v. Forbes*" (2014) 59:2 Vill L Rev 305 at 308 [Reilly].

unequivocally admit to the charge without any qualification before accepting guilty pleas.⁵ The guilty plea provides the legal basis for the court to convict the accused without a full trial.⁶ Following conviction, the court usually imposes a sentence after hearing the accused's submissions in mitigation.⁷

In certain circumstances, convicted accused persons may attempt to withdraw their guilty plea and proceed to trial. This could be due to a variety of reasons from a simple change of mind to allegations that their plea was involuntary or a mistake.⁸ If the withdrawal occurs after sentence has been passed, a criminal revision to reverse the process will only be allowed in exceptional situations.⁹ A more difficult situation is where the withdrawal occurs after conviction but before sentencing. In *Public Prosecutor v Dinesh s/o Rajantheran*,¹⁰ the Singapore Court of Appeal ("SGCA") clarified the law regarding section 228(4) of the *CPC* which was introduced in 2010.¹¹ The SGCA held that under the provision, it must reject the plea of an accused person if the guilty plea is qualified during mitigation by assertions that materially affect the *actus reus* or *mens rea* of the offence even without valid and sufficient reasons.¹²

This comment considers the implications of *Dinesh (CA)* and suggests that the law applying to withdrawal of guilty pleas should be amended. It first sets out the facts of *Dinesh (CA)* and explains the law on the withdrawal of guilty pleas post-*Dinesh (CA)*. Next, it examines the SGCA's interpretation of section 228(4) of the *CPC* in *Dinesh (CA)*. It then argues that the state of the law is imperfect because it opens the door to fickle-minded guilty pleas. It proceeds to consider the normative balancing of values relevant to the guilty plea withdrawal process and opines that the appropriate balance should require valid and sufficient reasons even in qualification of plea cases. Finally, it proposes some suggestions on how legislative amendment should be instituted to reform the current position.

II. FACTS AND THE DECISION

In *Dinesh (CA)*, the accused pleaded guilty to 20 charges under the *Employment of Foreign Manpower Act* pursuant to a plea offer by the prosecution on the second day of trial.¹³ He admitted to the statement of facts without qualification after some clarifications were made and was accordingly convicted.¹⁴ The accused's counsel then sought an adjournment to make mitigation submissions on another date.¹⁵ Following the conviction, the prosecution allowed several foreign witnesses who were to testify at the trial to return to Myanmar.¹⁶

⁵ *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at para 25 (HC) [*Rafiqul*].

⁶ *Koh Bak Kiang v Public Prosecutor* [2016] 2 SLR 574 at para 43 (HC) [*Koh Bak Kiang*].

⁷ *Criminal Procedure Code* (Cap 68, 2012 Rev Ed Sing), ss 227-228 [*CPC*].

⁸ Reilly, *supra* note 4 at 309.

⁹ *Public Prosecutor v Oh Hu Sung* [2003] 4 SLR (R) 541 at para 28 (HC) [*Oh Hu Sung*].

¹⁰ [2019] 1 SLR 1289 (CA) [*Dinesh (CA)*].

¹¹ *CPC*, *supra* note 7, s 228(4).

¹² *Dinesh (CA)*, *supra* note 10 at paras 28-29.

¹³ *Ibid* at para 5.

¹⁴ *Ibid*.

¹⁵ *Ibid* at para 6.

¹⁶ *Ibid* at para 7.

Subsequently, the accused changed his counsel and made an application to retract his guilty plea by denying every element of the charges he had pleaded guilty to.¹⁷ Since the accused had considered every aspect of the statement of facts carefully and had legal counsel, the trial judge took the view that no valid and sufficient reasons were offered and disallowed the application.¹⁸ The accused then submitted the exact same grounds relied on in the retraction application in his mitigation submissions and sought to rely on section 228(4) of the *CPC*.¹⁹ Viewing this as a “backdoor way [for the accused] to turn back the clock” and resile from his guilty plea, the trial judge held that it was an abuse of process and declined to reject the plea.²⁰

However, the Singapore High Court (“SGHC”)²¹ took the view that the trial judge’s refusal to reject the accused’s plea of guilt was a miscarriage of justice because of the mandatory nature of section 228(4) of the *CPC* and exercised its revisionary powers to set aside the conviction.²² The Prosecution filed *Criminal Reference No. 5 of 2018* to clarify the interpretation of section 228(4).²³ The SGCA agreed with the SGHC.²⁴ It held that the provision mandated that the court must reject the plea of an accused person if the accused made assertions during mitigation that materially affects the *actus reus* or *mens rea* of the offence.²⁵ There was no requirement for valid and sufficient reasons.²⁶ Ultimately, the accused was permitted to effectively change his mind and withdraw his guilty plea by qualifying his earlier plea in mitigation.

III. THE LAW ON WITHDRAWAL OF GUILTY PLEAS AFTER *DINESH* (CA)

At the outset, the court must cautiously observe three safeguards before accepting a guilty plea.²⁷ First, it must be the accused who wishes to plead guilty.²⁸ Secondly, the accused must understand the true nature and consequences of the plea.²⁹ Thirdly, the accused must intend to admit to the offence without any qualification.³⁰ Despite these safeguards, there are attempts by accused persons to withdraw their guilty pleas at various stages. If sentence has been passed, the court is *functus officio*.³¹ It is trite that a criminal revision would only be allowed in exceptional circumstances.³² This is because the principle of finality is generally observed unless a lack of revision would result in a miscarriage of justice.³³

¹⁷ *Public Prosecutor v Dinesh s/o Rajantheran* [2018] SGMC 32 at paras 23-25 [*Dinesh* (MC)].

¹⁸ *Ibid* at paras 28-34.

¹⁹ *Ibid* at paras 35-36.

²⁰ *Ibid* at para 38.

²¹ *Dinesh s/o Rajantheran v Public Prosecutor* [2019] 3 SLR 1261 at para 32 (HC).

²² *Ibid* at para 13.

²³ *Dinesh* (CA), *supra* note 10 at para 1.

²⁴ *Ibid* at para 72.

²⁵ *Ibid* at paras 28-29.

²⁶ *Ibid*.

²⁷ *CPC*, *supra* note 7, s 227(2); *Rafiqul*, *supra* note 5 at para 25.

²⁸ *Rafiqul*, *ibid*.

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ *Halsbury’s Laws of Singapore Volume 8(2) - Criminal Procedure* (Singapore: LexisNexis Singapore, 2018) at para 95.112.

³² *Oh Hu Sung*, *supra* note 9 at para 28.

³³ *Ibid*.

If sentence has not been passed, the position is more difficult. The *CPC*³⁴ does not explicitly set out a procedure for an accused's withdrawal of his guilty plea at this stage. However, the courts have recognised its discretion to allow an accused to withdraw his guilty plea before sentence.³⁵ Following *Dinesh* (CA), the applicable test appears different depending on how the accused attempts to frame his withdrawal of the guilty plea. First, if the accused attempts to withdraw his guilty plea by making an application to retract his guilty plea, valid and sufficient grounds are required.³⁶ Secondly, if the accused attempts to withdraw his guilty plea by making assertions in his mitigation submissions which "materially [affect]" the validity of any essential element of the offence, the court is mandated to reject the qualified plea.³⁷ A successful retraction or qualification of a guilty plea will result in a withdrawal of the guilty plea and the accused will proceed to trial.

Retraction of guilty plea cases are characterised as those in which the accused applies to withdraw his earlier guilty plea at any time before sentencing.³⁸ The court's discretion to allow this should be exercised judicially.³⁹ An accused person is not permitted to withdraw his plea at whim unless there are valid and sufficient reasons which satisfy the interests of justice.⁴⁰ What would be considered valid and sufficient will be determined on the facts and circumstances of each case with sufficient evidence adduced.⁴¹ Valid reasons may include situations where the accused was mistaken, misunderstood or was not making a "voluntary and deliberate" plea of guilt.⁴² This requirement is to prevent accused persons from making purely tactical decisions to "game the criminal process" and resile from a validly taken plea.⁴³

Qualification of guilty plea cases are characterised as those in which the accused makes assertions in his mitigation submissions showing a lack of *mens rea* or *actus reus* which materially affects the validity of his earlier guilty plea.⁴⁴ This must be distinguished from the use of "qualification" in the aforementioned third safeguard before the court accepts the guilty plea,⁴⁵ where it is unobjectionable that a qualified plea cannot be accepted.⁴⁶ Where the qualification occurs in mitigation submissions instead, this engages section 228(4) of the *CPC*. It provides that "where the court is satisfied that any matter raised in the plea in mitigation materially affects any legal condition required by law to constitute the offence charged, the court must reject the

³⁴ *CPC*, *supra* note 7, ss 227-228.

³⁵ *Public Prosecutor v Sam Kim Kai* [1960] MLJ 265 at 267 [*Sam Kim Kai*].

³⁶ *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR (R) 125 at para 12 (HC) [*Ganesun*].

³⁷ *Dinesh* (CA), *supra* note 10 at para 28.

³⁸ *R v McNally* [1954] 1 WLR 933 (Court of Criminal Appeal); *Abdul Mormin v Public Prosecutor* [1939] MLJ 323 (App Crim Juris Perak); *Lee Weng Tuck v Public Prosecutor* [1989] 2 MLJ 143 (Supreme Court of Kuala Lumpur); *Ganesun*, *supra* note 36; *Koh Thian Huat v Public Prosecutor* [2002] 2 SLR (R) 113 (HC); *Sukla Lalatendu v Public Prosecutor* [2018] 5 SLR 1183 (HC).

³⁹ *Sam Kim Kai*, *supra* note 35 at 267.

⁴⁰ *Ganesun*, *supra* note 36 at para 12.

⁴¹ *Thong Sing Hock v Public Prosecutor* [2009] 3 SLR (R) 47 at para 24 (HC).

⁴² *Rafiqul*, *supra* note 5 at para 26.

⁴³ *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at para 22 [*Mangalagiri*].

⁴⁴ *Balasubramanian Palaniappa Vaiyapuri v Public Prosecutor* [2002] 1 SLR (R) 138 at para 29.

⁴⁵ *Ganesun*, *supra* note 36 at para 16.

⁴⁶ *Rafiqul*, *supra* note 5 at para 25.

plea of guilty”.⁴⁷ The interpretation of this provision was precisely the controversy in *Dinesh (CA)*.⁴⁸

IV. STATUTORY INTERPRETATION OF SECTION 228(4) OF THE *CPC*

Before *Dinesh (CA)*, there had been some uncertainty over the interpretation of section 228(4) of the *CPC*. In *Rafiqul*, the SGHC held that it was compulsory for the court to reject a guilty plea if it was satisfied that the accused’s assertions “materially [affect]” any element of the offence.⁴⁹ The SGHC implicitly accepted that this would apply without valid or sufficient reasons.⁵⁰ However, the court may still examine the substance of the assertion made in mitigation such that not just any ostensible defence raised would prevent conviction.⁵¹

In *Mangalagiri*, the SGHC took a radically different view by deciding that valid and sufficient reasons were needed to materially affect the legal conditions of the offence under section 228(4) of the *CPC*.⁵² This requirement would ordinarily be satisfied where, despite the accused’s insistence on pleading guilty, the court could not accept the guilty plea because the plea was qualified due to mistake, misunderstanding or undue pressure.⁵³ However, if there were no valid or sufficient reasons, the legal conditions constituting the offence would be unaffected despite the accused’s *ex post facto* assertions otherwise.⁵⁴

In *Dinesh (CA)*, the SGCA considered this particular controversy and expressly disagreed with *Mangalagiri*.⁵⁵ It held that the literal wording of section 228(4) of the *CPC* only permitted the court to consider whether the accused’s assertions in mitigation have the effect of materially affecting the validity of any element of the offence.⁵⁶ This inquiry objectively compares the charges and statement of facts that the accused accepted and the accused’s subsequent assertions in mitigation.⁵⁷ Following *Rafiqul*, this included whether, as a matter of substance, the assertions amounted to a defence that would qualify the guilty plea.⁵⁸ However, the court cannot consider circumstances external to the mitigation plea such as the accused’s subjective reasons for making the mitigation plea or the court’s opinion as to the accused’s factual guilt.⁵⁹ There would be no need for valid and sufficient reasons.⁶⁰ This is subject only to the court’s inherent jurisdiction to consider if the accused’s conduct amounted to an abuse of process.⁶¹ As such, the current state of the law is that

⁴⁷ *CPC*, *supra* note 7, s 228(4).

⁴⁸ *Dinesh (CA)*, *supra* note 10 at para 1.

⁴⁹ *Rafiqul*, *supra* note 5 at para 35.

⁵⁰ *Ibid* at paras 21, 26-27.

⁵¹ *Ibid* at para 34.

⁵² *Mangalagiri*, *supra* note 43 at para 23.

⁵³ *Ibid* at para 21.

⁵⁴ *Ibid* at para 23.

⁵⁵ *Dinesh (CA)*, *supra* note 10 at paras 29-30.

⁵⁶ *Ibid* at para 28.

⁵⁷ *Ibid* at para 34.

⁵⁸ *Ibid* at paras 31-33.

⁵⁹ *Ibid* at paras at 30, 34.

⁶⁰ *Ibid* at para 72.

⁶¹ *Ibid* at para 67.

the applicable test is different depending on how the accused frames his withdrawal of guilty plea *ie* as a retraction or qualification.

In approaching statutory interpretation, the SGCA had to grapple with the provision's literal wording and the possibility of judicial discretion. The dominant reason for its decision was its observation that the phrase "the court must" in the literal words of section 228(4) of the *CPC* left very little room for any exercise of judicial discretion.⁶² The provision's literal wording did not permit the introduction of requirements not found in the words of the provision. Such extraneous requirements would wholly undermine the mandatory nature of section 228(4).⁶³ It is easy to empathise with the SGCA's decision because the literal wording does indeed favour this result. The alternative interpretation given by *Mangalagiri* was that valid and sufficient reasons can inform the court's satisfaction as to whether the legal elements of an offence were materially affected.⁶⁴ While this may arguably accord better with the provision's purpose to prevent wrongful convictions if the accused who had pleaded guilty is actually not guilty,⁶⁵ the SGCA is correct in finding that the literal wording does not suggest that the provision was designed to frustrate the subjective wishes of the accused.⁶⁶ As such, the SGCA's hesitance to introduce any additional requirements into section 228(4) of the *CPC* is understandable.

V. THE IMPERFECT STATE OF THE LAW

In evaluating the current state of the law, it is pragmatic to consider the law from the perspective of the accused. An accused would likely act in the most strategically favourable way. Knowing that he could always change his mind later and withdraw his guilty plea by asserting a bare denial of the *actus reus* or *mens rea* in the mitigation plea, there is no longer any reason why an accused would make an application to retract his plea and subject himself to the valid and sufficient reasons test. Currently, there are also no consequences to an accused person choosing to change his mind and withdraw his guilty plea. The accused may also perceive strategic advantages such as delaying proceedings so that prosecution witnesses can be sent back to other countries or to seek a change of judge.⁶⁷ An early plea of guilt would be a mitigating factor⁶⁸ should the accused eventually decide not to change his plea. If an accused person is unsure, there is no downside in pleading guilty first. This comment argues that the current law opens the door to fickle-minded guilty pleas and is imperfect.

First, there is no principled justification for maintaining two different tests for the same situation where an accused intends to withdraw his guilty plea. In considering the precedents regarding retraction of guilty pleas, the SGCA emphasised that those cases involved challenging the validity of the plead guilty procedure.⁶⁹ Since the

⁶² *Dinesh* (MC), *supra* note 17 at para 28.

⁶³ *Dinesh* (CA), *supra* note 10 at para 29.

⁶⁴ *Mangalagiri*, *supra* note 43 at para 23; *ibid* at para 22.

⁶⁵ *Public Prosecutor v BAB* [2016] 3 SLR 316 at para 3 (HC).

⁶⁶ *Dinesh* (CA), *supra* note 10 at para 22.

⁶⁷ *Ibid* at para 68.

⁶⁸ *Ng Kean Meng Terence v Public Prosecutor* [2017] 2 SLR 449 at paras 66-67 (CA).

⁶⁹ *Dinesh* (CA), *supra* note 10 at para 52.

relevant cases involved serious allegations casting doubt on the legality and propriety of legal officers, counsel or other procedures, the court will take steps to ascertain the truth of the matter.⁷⁰ The onus is on the accused to adduce sufficient evidence to convince the court that his guilty plea was invalid in accordance with the fundamental rule of evidence that he who asserts a fact must prove it.⁷¹

While that is certainly understandable, the SGCA did not address cases where the accused's application to retract does not challenge the validity of the plead guilty procedure. What if the accused's reason was simply that he had decided to change his mind? The SGHC has previously stated that an accused cannot be permitted at whim to simply change his plea.⁷² Thus, the accused's application to retract his guilty plea is likely to be rejected for a lack of valid or sufficient reasons. However, the accused could simply change his mind by invoking section 228(4) of the *CPC* as a backdoor to achieving his desired result.

In fact, this was precisely what happened on the facts of *Dinesh (CA)*. There, the accused's application to retract his guilty plea by denying all the elements of the offence was rejected.⁷³ The accused then submitted the exact same grounds relied on in the retraction application in his mitigation and sought to invoke section 228(4) of the *CPC*.⁷⁴ Effectively, section 228(4)⁷⁵ allowed the accused's withdrawal of his guilty plea without any reasons. Respectfully, it is suggested that this result does not cohere with the principle that accused persons should not be allowed to change their minds at whim after a valid plea has been taken.

Secondly, there is a lacuna as to what constitutes an abuse of process such that the court is not mandated to reject the plea. Preliminarily, it has to be assumed that the SGCA's caution that the subjective intention of the accused should not enter the court's consideration at all⁷⁶ does not apply when the court is ascertaining whether the accused's conduct is an abuse of process. This is because the abuse of process inquiry necessarily considers the *bona fides* of the accused.⁷⁷ From the facts of *Dinesh (CA)*, it seems that the SGCA did not consider such a blatant change of mind an abuse of process. Unfortunately, the SGCA did not go further to explain why this was so.

Instinctively, one could easily concur with the trial judge that this would be a classic example of an abuse of process. An abuse of process includes proceedings which are fictitious, manifestly groundless, or dishonestly used for improper or collateral purposes.⁷⁸ The categories of conduct are not closed and depends on the facts of each case.⁷⁹ For instance, bringing a winding-up petition for the collateral purpose of seeking to enforce payment of a *bona fide* disputed debt is an abusive use

⁷⁰ *Ibid* at paras 52-53.

⁷¹ *Ibid* at para 54.

⁷² *Ganesun*, *supra* note 36 at para 12.

⁷³ *Dinesh (MC)*, *supra* note 17 at paras 23-25, 28-38.

⁷⁴ *Ibid* at paras 35-36.

⁷⁵ *Dinesh (CA)*, *supra* note 10 at para 72.

⁷⁶ *Ibid* at para 34.

⁷⁷ *Goh Koon Suan v Heng Gek Kiau* [1990] 2 SLR (R) 705 at para 15 (HC).

⁷⁸ *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR (R) 582 at para 34 (HC); *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR (R) 649 at para 22 (CA) [*Gabriel Peter*].

⁷⁹ *Gabriel Peter*, *ibid*.

of the court's process.⁸⁰ Similarly, bringing a mitigation plea as a backdoor means to retract a guilty plea without any reasons could arguably be considered an abuse of process. The purpose of a mitigation plea is to provide the opportunity for an accused to present personal circumstances that reduce the gravity of his offence and assist the court with sentencing.⁸¹ When an accused uses the mitigation process for the collateral purpose of withdrawing his guilty plea, he is abusing the court's process. The law currently provides limited guidance on what constitutes situations of an abuse of process in the context of section 228(4) of the *CPC*. Thus, the courts are likely to take a light-touch approach and err on the side of caution. This opens the door to fickle-minded guilty pleas.

VI. THE COMPETING NORMATIVE TENSIONS AND PHILOSOPHIES

The SGCA in *Dinesh* (CA) had to grapple with several normative tensions and philosophical concerns relevant to the guilty plea withdrawal process and determine where the balance should lie. This comment suggests that a balancing of these tensions and philosophies should ultimately incline towards the need for valid and sufficient reasons even in qualification of guilty plea cases.

First, the SGCA considered the appropriate philosophical approach towards the entire plead guilty phase of the proceedings. It stated that the whole plead guilty procedure is to be seen as a continuum beginning from the taking of the accused's plea and his admission to the statement of facts and continues through to conviction, mitigation submissions and the pronouncement of the sentence.⁸² The court's duty up till the point the court is *functus officio* is to "ensure that the accused person maintains the intention to plead guilty throughout [the] process".⁸³ Certainly, this is justifiable because of the underlying policy to avoid convicting the innocent.⁸⁴

However, instead of a continuum, the current state of the law better fits a polarity with the line dividing the two poles drawn at the point of sentencing. Before sentencing, section 228(4) of the *CPC* allows the accused to simply change his mind and withdraw his guilty plea by making assertions in mitigation that materially affect the legal condition of the offence. After sentencing, the principle of finality operates such that the plea can only be withdrawn in exceptional circumstances.

This polar approach ignores any significance that should be accorded to the court's conviction of the accused after accepting the guilty plea. It must be noted that the court's prior acceptance of the guilty plea already indicates that the three safeguards have been complied with.⁸⁵ Arguably, this polarity undermines the gravity and severity of making a guilty plea before a court of law.⁸⁶ While it is true that section 228(4) of the *CPC* does not support any "supposed sanctity" of the prior conviction,⁸⁷ this

⁸⁰ *Re Mechanised Construction Pte Ltd* [1989] 1 SLR (R) 500 at para 11 (HC).

⁸¹ *Public Prosecutor v Ong Ker Seng* [2001] 3 SLR (R) 134 at para 29 (HC).

⁸² *Dinesh* (CA), *supra* note 10 at para 36.

⁸³ *Ibid.*

⁸⁴ Chin Tet Yung, "Criminal Procedure Code 2010: Confessions and Statements by Accused Persons Revisited" (2012) 24:1 Sing Ac LJ 60 at para 8.

⁸⁵ *CPC*, *supra* note 7, s 227(2); *Rafiqul*, *supra* note 5 at para 25.

⁸⁶ Reilly, *supra* note 4 at 310-311; *United States v Buckles* 843 F (2d) 469 at 472-473 (11th Cir 1988).

⁸⁷ *Dinesh* (CA), *supra* note 10 at para 35.

position is not ideal. After the court has deemed that the guilty plea was validly made, how can it simply allow that decision to be changed by the accused at whim?

This very point was made by the Hong Kong Court of Final Appeal recently.⁸⁸ The court noted that whether a plea is valid is to be determined at the time it is made.⁸⁹ In principle, after the court convicts the defendant of the offence charged, anything the defendant says to the court during mitigation does not turn the valid guilty plea into an invalid one.⁹⁰ The court, however, retains the discretion to allow a change of plea if something emerges after conviction that if true would show that the accused is innocent.⁹¹ This supports the argument that the court's acceptance of the valid plea should count for *something*. Since the plea of guilt should be regarded by all accused persons as a serious plea that is not to be made lightly, the policies of certainty and finality dictate against allowing withdrawals without valid reasons.⁹² If the process was truly a continuum instead, it should logically be increasingly harder for an accused to withdraw his guilty plea throughout the various stages. After the accused has been convicted pursuant to a guilty plea, valid and sufficient reasons should be required to withdraw the guilty plea. After sentence, the threshold to withdraw his guilty plea should be even higher since the court has become *functus officio*. This would be a neater reflection of the court's approach to the plead guilty procedure as a continuum.

Secondly, the SGCA had to grapple with the tension between the accused's right to go to trial and the state's countervailing interest to effectively administer criminal justice.⁹³ Certainly, a guilty plea does have grave implications since the accused's right to go to a full trial is waived and the accused is precluded from appealing against conviction so long as the plea is valid.⁹⁴ Since the result of a successful qualification of the guilty plea is only that the accused person will proceed to trial, it is understandable that the law inclines towards accused persons.

However, there are also countervailing considerations regarding the effective administration of criminal justice. Currently, section 228(4) of the *CPC* potentially opens the door to gamesmanship where accused persons can manipulate the system.⁹⁵ While this could be alleviated by the SGCA's recommendation to adjourn plead guilty hearings such that they can take place at the same time as sentencing hearings,⁹⁶ it is unclear whether this can *always* be done in practice. Even if such adjournments were to take place,⁹⁷ it is still likely to result in a greater expenditure of the court and prosecution's resources if accused persons routinely delay their plead guilty procedure.⁹⁸ Further, other interests like allowing the victim to move

⁸⁸ *Chan Chi Ho Lincoln v HKSAR* [2019] 1 HKC 275 at para 25 (CFA) [*Chan Chi Ho Lincoln*].

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid* at para 26.

⁹² *Ibid* at para 41.

⁹³ Reilly, *supra* note 4 at 309.

⁹⁴ *Koh Bak Kiang*, *supra* note 6 at 41.

⁹⁵ *Commonwealth v Miller* 639 A (2d) 815 at 819 (Pa Super Ct 1994); *Commonwealth v Iseley* 615 A (2d) 408 at 414 (Pa Super Ct 1992); *Mangalagiri*, *supra* note 43 at para 22.

⁹⁶ *Dinesh (CA)*, *supra* note 10 at para 70.

⁹⁷ *Ibid.*

⁹⁸ *Chan Chi Ho Lincoln*, *supra* note 88 at para 42.

on from traumatic incidents as quickly as possible and the interests of finality and certainty in accepting a guilty plea also point toward the need to have some control over withdrawals of guilty pleas.⁹⁹

VII. PROPOSED LEGISLATIVE AMENDMENT

To strike a better normative balance within the criminal justice system, this comment proposes that section 228(4) of the *CPC* should be legislatively amended. In ascertaining the ideal framework to deal with withdrawal of guilty pleas between conviction and sentencing, this comment seeks to draw common threads from the positions of other common law jurisdictions such as Hong Kong (“HK”), the United Kingdom (“UK”) and the United States of America (“US”). These jurisdictions do not have a statutory equivalent that is *in pari materia* with section 228(4) of the *CPC*. However, their case law¹⁰⁰ shares Singapore’s normative starting point that an accused person should not be allowed to change his guilty plea at whim¹⁰¹ and therefore has instructive value.

In HK, an accused person is not allowed to withdraw his guilty plea unless leave of the court is obtained.¹⁰² A crucial distinction is drawn between an equivocal guilty plea and an unequivocal guilty plea.¹⁰³ An equivocal plea is one which is accompanied or immediately followed up with a qualification while an unequivocal plea is one without any such qualification.¹⁰⁴ For equivocal pleas, the court has no choice but to reject the equivocal plea.¹⁰⁵ However, whether a plea is equivocal is determined “at the time it is made” and not after conviction during mitigation.¹⁰⁶ If the guilty plea was unequivocal at the time it was made, this is a historic fact and events that happen subsequently at any stage of the proceedings before sentencing cannot transform that unequivocal plea into an equivocal one.¹⁰⁷

For unequivocal pleas, the court has the discretion to allow an accused to withdraw his plea before sentence is passed.¹⁰⁸ Here, the court has a duty to make sufficient inquiries to ascertain the basis of the accused’s wish to withdraw his plea and decide if that basis is sound.¹⁰⁹ However, this discretion should not be exercised lightly to prevent such applications from being misused as a delaying tactic.¹¹⁰ In the context of mitigation submissions which cast doubt on the guilty plea, the court acknowledged that the interests of justice would normally weigh heavily in favour of allowing the

⁹⁹ *State v Slater* [2009] 966 A (2d) 461 at 467 (NJ Sup Ct).

¹⁰⁰ *HKSAR v Shum Wan Foon* [2014] 4 HKC 87 at para 18 (CFA) [*Shum Wan Foon*]; *Revitt v Director of Public Prosecutions* [2006] 1 WLR 3172 at para 17 (HC Admin) [*Revitt*]; *United States v Benton* 639 F (3d) 723 at para 3 (6th Cir 2011) [*Benton*].

¹⁰¹ *Ganesun*, *supra* note 36 at para 12.

¹⁰² *Magistrates Ordinance 2018* (Cap 227) (HK), s 81B(3).

¹⁰³ *Chan Chi Ho Lincoln*, *supra* note 88 at para 22.

¹⁰⁴ *Ibid* at para 39.

¹⁰⁵ *Ibid* at para 23.

¹⁰⁶ *Ibid* at para 25.

¹⁰⁷ *Ibid* at paras 32-33.

¹⁰⁸ *Shum Wan Foon*, *supra* note 100 at para 12.

¹⁰⁹ *Ibid* at 13.

¹¹⁰ *Ibid* at 18.

withdrawal.¹¹¹ However, where the court has real doubts and finds that the subsequent assertions are only a recent fabrication, a deeper inquiry should be held to decide how its discretion should be exercised.¹¹²

Similarly, in the UK, an accused may make an application to withdraw a guilty plea by explaining why it would be “unjust for the guilty plea to remain unchanged” and proffering any necessary evidence.¹¹³ The court may then exercise the discretionary power to allow the accused to withdraw a guilty plea.¹¹⁴ Even after an unequivocal guilty plea has been made, it is generally appropriate to permit the accused to withdraw his plea if it becomes apparent that the accused did not appreciate the elements of the offence he was pleading guilty to.¹¹⁵ However, these situations are rare since it is unlikely to arise where the accused was represented or when the court had made clear the nature of the offence to the accused before accepting the plea of guilt.¹¹⁶

In the US, an accused may withdraw a guilty plea after conviction and before sentence if a fair and just reason may be shown.¹¹⁷ The courts have developed several factors in deciding whether any fair and just reason exists.¹¹⁸ The majority of the states in the US place the burden on the accused to provide a plausible explanation of innocence rather than making bare assertions of innocence.¹¹⁹ The factors considered include the time elapsed between plea and withdrawal application, the presence of a valid reason for failing to withdraw the plea earlier, the assertion of innocence, the circumstances underlying the entry of the guilty plea, the nature and background of the defendant, the degree of experience the defendant had with criminal justice system and the potential prejudice to the prosecution.¹²⁰ These were conceived to prevent defendants from making tactical decisions to withdraw their guilty plea just because they believe that they made a bad choice.¹²¹

Three conclusions can be drawn about Singapore’s current position from the above review of foreign jurisdictions. First, Singapore’s mandatory position is the only one at odds with the common premise that the accused person should not be allowed to withdraw his guilty plea at whim after conviction. Secondly, the distinction between the retraction and qualification of the plea is unnecessarily confusing and detracts from the central inquiry of when an accused person should be permitted to withdraw a validly taken plea after conviction. Thirdly, Singapore’s position does not optimally consider the relevant circumstances that would allow the court to better strike a balance between preventing wrongful convictions and ensuring the effective administration of criminal justice. The status quo should be reformed by way of legislative amendment.

The proposed legislative amendment should make clear that the courts have the discretion to decide whether to reject a guilty plea at the mitigation stage. In order

¹¹¹ *Ibid* at 45.

¹¹² *Ibid*.

¹¹³ *The Criminal Procedure Rules 2015* (UK), part 25, r 25.5.

¹¹⁴ *S (An Infant) v Recorder of Manchester* [1971] AC 481 at 507 (HL).

¹¹⁵ *Revitt*, *supra* note 100 at para 17.

¹¹⁶ *Ibid*.

¹¹⁷ *Federal Rules of Criminal Procedure 2016* (US), r 11(d).

¹¹⁸ *United States v Garavaglia* 5 F Supp (2d) 511 at 514 (E D Mich Dist Ct 1998) [*Garavaglia*].

¹¹⁹ *Reilly*, *supra* note 4 at 311-312.

¹²⁰ *Garavaglia*, *supra* note 118 at 514.

¹²¹ *Benton*, *supra* note 100 at para 3.

to uphold the integrity of the plead guilty process, the court should be permitted to filter out cases where the accused is simply changing his mind at whim. As such, the accused should be encouraged to provide evidence to back up their reasons. The amendment should explicitly set out the relevant non-exhaustive factors that should be considered in ascertaining if the application should be granted. Some guidance may be taken from the factors used by the courts in the US.¹²² This approach will adequately protect accused persons from being wrongly convicted but preserve the integrity of the criminal justice system by preventing abuse.

However, in the absence of legislative reform, the Singapore courts should further develop the abuse of process test to suit the purposes of the plead guilty procedure. If abuse of process is to be the main control mechanism against abuse by accused persons in Singapore,¹²³ it may be instructive to import the factors used by the US courts. In fact, some of these factors have been used by the Singapore courts in finding an abuse of process in other contexts. In *Lai Shit Har v Lau Yu Man*, the SGCA considered the substantial delay between the ground relied on for winding up and the initiation of the proceedings, the reasons for not bringing the proceedings earlier and the surrounding circumstances that indicated collateral reasons to smother another suit.¹²⁴

Further, the criminal justice system can do more to ensure more informed pleas and reduce the incidences of withdrawals of guilty pleas. In terms of case management, more time should be given for accused persons to consider the statement of facts and the decision to plead guilty. Relatedly, as encouraged by the Attorney-General's Chamber's *Code of Practice*, there should be disclosure of the statement of facts and the mitigation plea between the prosecution and defence counsels before the taking of the plea.¹²⁵ If this is done at least two days before the proceedings, accused persons should have sufficient opportunity to make considered pleas. Judges can also impress on accused persons the consequences of the plea and that reasons must be given to retract the plea if there is a subsequent change of mind.

VIII. CONCLUSION

In a nutshell, this comment argues that the state of the law pertaining to the withdrawal of guilty pleas following *Dinesh* (CA) opens the door to fickle-minded guilty pleas. The applicable test for a withdrawal of a guilty plea should not depend on whether the accused frames his withdrawal as a retraction or a qualification during mitigation submissions. Further, the abuse of process test requires more substantive guidance so as to effectively act as a practical safeguard against any misuse of the proceedings. Considering the philosophical underpinnings of the plead guilty procedure and the efficient administration of criminal justice, this comment concludes

¹²² *Garavaglia*, *supra* note 118 at 514.

¹²³ *Dinesh* (CA), *supra* note 10 at para 67.

¹²⁴ *Lai Shit Har v Lau Yu Man* [2008] 4 SLR (R) 348 at paras 24-29 (CA).

¹²⁵ Attorney-General's Chambers, *The Code of Practice for the Conduct of Criminal Proceedings by the Prosecution and the Defence*, online: Attorney-General's Chambers <<https://www.agc.gov.sg/newsroom/newsitem2temp/the-code-of-practice-for-the-conduct-of-criminal-proceedings-by-the-prosecution-and-the-defence>>.

that the current state of the law is imperfect. As such, it proposes that legislative reform of section 228(4) of the *CPC* should be undertaken such that accused persons are required to show valid and sufficient reasons before being allowed to withdraw their validly taken guilty pleas.