An Analytical Study of Pre-Trial Processes in Speedy Disposal of Cases in the Criminal Justice System of Malaysia

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Abstract: This paper is an attempt to analyse the role of pre-trial processes in the criminal justice system in Malaysia as far as the speedy justice is concerned. Before 2010, Malaysia faced a huge backlog of criminal cases in the court; however, it made amendments in the code of criminal procedure and introduced the pre-trial processes in the criminal justice system of Malaysia to resolve the huge backlog and to promote the speedy trial. The researcher in this research has determined and explored that how pre-trial processes work in the way of disposal of criminal justice, and how it has reduced the huge backlog of criminal cases from the courts. The researcher has explained many case laws, provisions of criminal procedure code and described the opinions of judges and legal entities in Malaysia.

Keywords: Pre-trial processes, criminal justice, speedy disposal of cases, delay, Malaysia.

1. INTRODUCTION

Malaysia holds the Common Law tradition. Therefore, Malaysian criminal trial as provided by Criminal Procedure Code (CPC) is adversarial in its nature as in England. The police investigate the offences and crimes, and all the witnesses are bound to tell the truth to the court for the purpose of adjudication. The suspect can remain silent during interrogation. And the evidence must be obtained voluntarily without oppression from suspect. When investigation is completed, then the complete report is submitted to the Public Prosecutor who will determine, whether the suspect should be prosecuted or not. If the suspect is prosecuted, judge then hear the case in an open court, writes down all the evidences and makes the decision in the presence of the accused and also gives the complete explanation of the decision to the accused. If the accused requires the copy of the judgment, that will be given to him without any delay.

Because of the huge backlog of cases, delay in courts and for promoting the speedy trial, Malaysia has introduced the Pre-trial processes into the Criminal Procedure Code (Amendment) Act 2010. Chapter XVIIIA of CPC includes these pretrial processes. The 2010 Amendments symbolize Parliament's essence of determining the backlog of cases and promoting speedy trials in line with the Malaysian Government Transformation Programme (Rahim, 2016). Moreover, the 2010 Amendments were also encouraged by the then Chief Justice Tun Zaki Azmi's initiative to provide justice more expeditiously (Zakaria, 2016). It is internationally recognized that access to speedy justice or speedy trial is a fundamental right of an accused (United States, 1977). Prior to 2010 Amendments, there was a huge the backlog of criminal cases in Malaysia. Once, The Chief Justice Muhammad Raus Sharif said that "before the 2010 Amendments, a murder case took about 10 to 15 years to reach the Federal court" (Majid, 2017). After 2010 Amendments, criminal trials were revealed to be conducted more expediently than past. For example, the 2010 Amendments have reduced the backlog of criminal cases across Malaysian Courts to almost 100%, that is, from 3414 cases to two cases.

This research has explained the main features of pretrial processes like pre-trial conference, case management and plea bargaining as far as the delay in criminal cases is concerned. Either these amendments have brought benefits for the improvements of speedy disposal of criminal cases in Malaysia or not. As mentioned above, pretrial process includes pretrial conference, case management and plea bargaining; however, it is very pertinent to analyze one by one here.

2. RESEARCH METHODOLOGY

The researcher has adopted the doctrinal research methodology in the form of analytical approach. Analytical approach is a careful examination, evaluation, identification and interpretation of data already existing in documents and articles. The researcher has adopted the analytical mode, whereby the researcher has analyzed the relevant legal provisions of pretrial processes introduced in the code of criminal procedure in Malaysia. It is necessary to conduct the doctrinal research to understand the provisions of law. The researcher has explained many

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case laws, provisions of criminal procedure code and described the opinions of judges and legal entities in Malaysia as far as the pre-trial processes in Malaysia is concerned.

Doctrinal research is theoretical, pure legal and traditional research where most of the materials needed are available in the libraries, records and other databases. The key aim of the doctrinal research is to analyze, explain and examine the rules, doctrines, facts and principles, provisions of law and theories. Doctrinal research is also concerned with the formulation of legal doctrines through the analysis of legal rules that can be found in statutes.

3. PRETRIAL PROCESSES IN MALAYSIA

3.1. Pre-Trial Conference

Before 2010, Malaysia faced a serious nature of delay in disposal of criminal cases. Then Malaysia introduced the pretrial processes to deal with high backlog of criminal cases. Pre-trial conferences are now officially documented under S.172A of the CPC following the 2010 Amendments. Section 172A of the criminal procedure code states as:

(1) An accused who is charged with an offence and claims to be tried shall, by an advocate representing him, participate in a pre-trial conference with the prosecution before the commencement of the case management.

(2) A pre-trial conference shall commence within thirty days from the date the accused was charged in court or any reasonable time before the commencement of the case management.

(3) A pre-trial conference may be conducted by any means and at any venue as may be agreed upon by the advocate representing the accused and the prosecution.

(4) During the pre-trial conference, an advocate representing an accused may discuss with the prosecution the following matters relating to the case:

(a) identifying the factual and legal issues;

(b) narrowing the issues of contention;

(c) clarifying each party's position;

(d) ensuring the compliance with section 51a;

(e) discussing the nature of the case for the prosecution and defence, including any alibi defence that the accused may rely on;

(f) discussing any plea bargaining, and reaching any possible agreement thereto; and

(g) any other matters as may be agreed upon by the advocate representing the accused and the prosecution that may lead to the expeditious disposal of the case.

(5) All matters agreed upon in the pre-trial conference by the advocate and the prosecution shall be reduced into writing and signed by the accused, the advocate and the prosecution.

Section 172A states that any person accused charged with an offence has the right to participate in pretrial conferences before the stage of case management, and within 30 days from the date of charge, and will be held by any means and at any venue agreed upon by the parties. S.172A was enacted to speed up the disposal of criminal cases (*Dike v PP,* 2015). This section or provisions of pre-trial conferences reproduce this essence. Under S.172A (2), pre-trial conference shall commence within thirty days or any reasonable period before case management from the date the accused was charged. This section practically protects prosecution from all those issues which may arise from any stage of the criminal cases. Furthermore, S.172A (4) of CPC accepts all relevant matters which may be brought into discussion by the prosecution and defense, for the purpose to speed up the trials.

S.172A (5) of the CPC creates obligation that all matters, to which parties are agreed, in pre-trial conferences, must be reduced into writing and signed by parties such as the accused, the advocate, and the prosecution. Then section 172B (6) specifies that this signed agreement is admissible in evidence *(PP v Robert Yee,* 2015) and further, the accused must approve the agreement which has been made in pre-trial conferences. The significance of this requisite was highlighted by the Court of Appeal in *Naveen Raj Naidu v PP 2015:*

> "a derogation of S.172A (5) cannot be cured under S.422 of the CPC. Couching S.172A (5) in mandatory terms disallows the prosecution and the accused's advocate from compromising on matters to which the accused disagreed."

Additionally, the *Kingsley* case (2015) mentions that S.402B of the criminal procedure code. Which is about admission of written statements, must be read along with section 172A and section 172B, which encourages the necessity for the accused's approval of all matters which are agreed upon in pre-trial conferences. The need for the signature of person accused is further emphasized in numerous Court of Appeal decisions *(Ibeneme v PP,* 2017). Section 172A provides the guidelines for the parties concerned to arrange the venue where pretrial trial conferences will be held to speed up trials for the benefit of the person accused.

3.2. Case Management

Before 2010 amendments, case management was not the part of the criminal trials in Malaysia. Due to delays in the courts, people always think that the courts proceedings are inefficient and expensive. In this way, access to justice through courts was much difficult. Delay in criminal trials violates the constitutional rights of the accused person. Once the justice Edgar joseph pointed out in *Choo Chuan Wang (1992)* that delay in criminal cases can violate article 5 of the Federal constitution because it divests the person accused from his liberty. For those persons who are convicted, delays in criminal trials also suspend timely access to suitable rehabilitation programs (Wesley, 2013).

So Malaysia introduced the case management system in criminal trials. It is manifest that case management is a procedure where advocates from both defence and prosecution, and the judge come together and discuss, how the case is to be handled (United States, 2013). The Malaysian Bar claims that active case management accomplishes the main purposes of fair and effective disposal of legal proceedings. It also makes sure that case management avoids unnecessary delays from the courts and saves the time as well (Malaysia Bar, 2016). The object of case management is to inform the court about any new agreed or disagreed issues of the offence. Section 172 b of criminal procedure code states that:

(1) A Magistrate, Sessions Court Judge or Judge of the High Court, as the case may be, shall commence a case management process within sixty days from the date of the accused being charged and claims to be tried.

(2) At the case management, the Magistrate, Sessions Court Judge or Judge shall—

(i) take into consideration all matters that have been considered and agreed to by the accused and his advocate and the prosecution during the pre-trial conference; and where a plea bargaining has been agreed between the accused and his advocate and the prosecution during the pre-trial conference, the Magistrate or the Sessions Court Judge or the Judge trying the case shall decide on the voluntariness of the accused in the plea bargaining according to the provisions of section 172c;

(ii) where no pre-trial conference has been held on the ground that the accused is unrepresented, discuss with the accused and the prosecution any matter which would have been considered under section 172a; (iii) assist an accused who is unrepresented to appoint an advocate to represent the accused;(iv) determine the duration of the trial; (v) subject to subsection (3), fix a date for the commencement of the trial;

(vi) subject to the consent of the accused and his advocate, and the prosecution, admit any exhibits; and

(vii) give directions on any other matter as will promote a fair and expeditious trial.

(3) A subsequent case management, if necessary, may be held not less than two weeks before the commencement of the trial.

(4) The trial shall commence not later than ninety days from the date of the accused being charged.

(5) Notwithstanding subsections (1) and (4), a failure for the case management or the trial to commence according to the time period specified in the subsections shall not—

(a) render the charge or prosecution against the accused as defective or invalid; or

(b) be considered as a ground for appeal, review or revision.

(6) Notwithstanding the provisions of the Evidence Act 1950, all matters that have been reduced into writing and duly signed by the accused, his advocate and the prosecution under subsection

> 172a (5) shall be admissible in evidence at the trial of the accused.

Under S.172B (1), case management shall commence within thirty days from the date of charge; while on the other hand, (4) specifies that trial must initiate within ninety days from the date of charge. Judges in the courts have a power to give directions to uphold a fair and expeditious trial under S.172B(2)(vii). Hence, courts are now doing their jobs more efficiently. Because trial has to commence within 90 days, so the accused's constitutional right to a speedy trial is much saved and protected or preserved (Steinberg, 1975). Speedy trial helps the person accused to save his liberty and have access to get rehabilitation if he found guilty.

Section 172B(2)(i) of the CPC states that if the person accused plea bargains, then judges must determine the voluntariness for him. Judges may also protect the person accused from an unwanted plea bargain if he is coerced. Section 172B(2)(ii) points out that judges must bring all those matters into discussion which may arise in a pre-trial conference with an unrepresented accused. Furthermore, under S.172B(2)(iii) states that judges must help the unrepresented accused to appoint an advocate for him. Since S.172B(2)(v) requires judges to fix the date for the commencement of the trial. For the purpose of promoting a fair and expeditious trial, judges shall save and protect the person accused from procedural abuses. The researcher admits that speedy trials let the prosecution to move on and put their attention on more complex cases. In Malaysia, Case management has tremendously upgraded the criminal justice system with fare and speedy trials, and has given more protections to the person accused.

3.3. Plea Bargaining

Malaysia has also introduced the process of Plea bargaining as far as delay in criminal trial is concern. Plea bargaining is a process where the person accused pleas for the purpose of lessening charge or sentence for a crime or offence committed. This research observes how plea bargaining is conducted under the Criminal Procedure Code of Malaysia. The Criminal Procedure Code of Malaysia has been amended to let a third party to enable the process of plea bargaining. Black's Law Dictionary defines plea bargaining as:

> "The process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to Court approval." It usually involves the defendant pleading guilty to a lesser offence or to only one or some of the counts of a multicounty indictment in return for a lighter sentence than that possible for the graver charge" (Garner, 2004).

For the purpose of dealing with delay in criminal cases, Malaysia introduced the plea bargaining in the criminal justice system and now is the part of the criminal procedure code. Section 172c states that:

172c.

(1) An accused charged with an offence and claims to be tried may make an application for plea bargaining in the Court in which the offence is to be tried.

(2) The application under subsection (1) shall be in Form 28a of the Second Schedule and shall contain—*(a)* a brief description of the offence that the accused is charged with; 110 *Laws of Malaysia* **Act 593***(b)* a declaration by the accused stating that the application is voluntarily made by him after understanding the nature and extent of the punishment provided under the law for the offence that the accused is charged with; and *(c)* information as to whether the plea bargaining applied for is in respect of the sentence or the charge for the offence that the accused is charged with.

(3) Upon receiving an application made under subsection (1), the Court shall issue a notice in writing to the Public Prosecutor and to the accused to appear before the Court on a date fixed for the hearing of the application.

(4) When the Public Prosecutor and the accused appear on the date fixed for the hearing of the application under subsection (3), the Court shall examine the accused *in camera—(a)* where the accused is unrepresented, in the absence of the Public Prosecutor; or *(b)* where the accused is represented by an advocate, in the presence of his advocate and the Public Prosecutor, as to whether the accused has made the application voluntarily.

(5) Upon the Court being satisfied that the accused has made the application voluntarily, the Public

Prosecutor and the accused shall proceed to mutually agree upon a satisfactory disposition of the case.

(6) if the Court is of the opinion that the application is made involuntarily by the accused, the Court shall dismiss the application and the case shall proceed before another Court in accordance with the provisions of the Code.

(7) Where a satisfactory disposition of the case has been agreed upon by the accused and the Public Prosecutor, the satisfactory disposition shall be put into writing and signed by the accused, his advocate if the accused is represented, and the Public Prosecutor, and the Court shall give effect to the satisfactory disposition as agreed upon by the accused and the Public Prosecutor.

(8) In the event that no satisfactory disposition has been agreed upon by the accused and the Public Prosecutor under this section, the Court shall record such observation and the case shall proceed before another Court in accordance with the provisions of the Code.

(9) In working out a satisfactory disposition of the case under subsection (5), it is the duty of the Court to ensure that the plea bargaining process is completed voluntarily by the parties participating in the plea bargaining process.

Section172C(2)(b) of criminal procedure code states that courts make sure that plea bargaining must be made voluntarily only when the accused realizes the nature and amount of the sentence or punishment provided by law. An application of plea bargaining must contain a summary of the offence and also a statement that the accused has already understood the nature and extent of punishment provided by law for the wrongdoing. S.172C(3) states that having received an application, the court must initiate the hearings to determine whether the application was made voluntarily. Under S.172 C (5), the case shall be decided only when the court is satisfied that the application is made voluntarily. If application is not made voluntarily, then the court must dismiss the application of plea bargaining and the case shall proceed before another Court in accordance with the provisions of the Code.

Under new amendments, courts no longer rely on *New Tuck Shen (1982).* The Court of Appeal case of *PP v Manimaran Manickam (2011)* stipulates new principles in plea bargaining and that are following:

1. Request for plea bargaining must come from the accused person;

2. If the application is made by a counsel representing an accused, the council must obtain a written authority signed by the accused affirming that the accused wishes to plea bargain on the sentence;

3. The prosecution must promptly react to the request, and the plea bargaining agreement must state the minimum and maximum sentence acceptable to them;

4. The plea bargaining agreement must be placed before the court so that the court will impose a sentence within the acceptable range;

5. If the court disagrees with the sentence proposed, it must so inform the parties, and the parties may decide on the next move; and

6. The process must be done transparently and be recorded, and the notes will form a part of the notes of proceedings.

Prior to 2010, Malaysia had an actual concern with the backlog of criminal cases in courts. For the purpose of avoiding inordinate delay, the procedure of plea bargaining is manifest in the case of *PP v Ravindran & Ors* (1993), where the Court minimized the punishment for accused to avoid a long protracted trial with seventy-five witnesses. The 2010 Amendments gives the big emphasis on the voluntariness of accused in plea bargaining. The application for plea bargaining under Form 28A of the Second Schedule of the CPC, contains certain items:

1. A brief description of the offence;

2. A declaration by the accused himself that the plea is voluntary after understanding the nature and extent of the punishment provided under the law; and

3. The type of plea.

When the court receives the application, it will call for a hearing between the prosecution and the person accused. The court will examine the accused whether the application of plea bargaining is made voluntarily. If the Court has sufficient ground that the application is not made voluntary, the application must be discharged, and moreover, the case shall go for trial in

another court having jurisdiction. However, when the court satisfied that the application is made voluntarily, then the accused will get the reduced punishment quickly or expeditiously without waiting for a long-lasting trial to conclusion. Scholars acknowledge that the reduced punishment may help the person convicted in rehabilitation (McDowell, 2012) which eventually benefits that person to be an operative member of the society (Gilligan, 2012). The advantage of a lesser punishment goes in the favour of younger or first-time offender because he will devote less time in prison. The 2010 Amendments in Malaysia has resolved a lot of issues and problems especially concerned with the backlog of cases in courts and the certainty of sentencing. These improvements may speed up the criminal trials because they let the accused, victims and the prosecution to move on to other matters.

4. OUTCOMES AND RESULTS OF PRETRIAL PROCESSES IN MALAYSIA

Prior to the amendments, Malaysia justice system used to face a strict nature of backlog of cases whereby the person accused had suffered for many years to be trialed in the court (Human Rights Report Malaysia, 2010). Sometimes, an accused was to be confined into the prison for a long time without his trial and consequently it became more suffering when it resulted into his acquittal (Annual Report Malaysian Prisons 2018). Pretrial process is the process where for the purpose of speedy trial, the person accused pleads his guilt and ready to cooperate with the prosecution upon stipulated terms and conditions. Likewise, it is considered as the best solution to the expeditious disposition of huge backlog of cases in the courts. The benefits of the pretrial processes are highly praised as speedy and effective justice because Chief Justice Tun Arifin Zakaria has once depicted that backlog of criminal cases before 2009 across the Malaysian courts have been completely disposed (Tariq, 2014). In the same way, ex-chief justice of the High Court of Malaya also explained:

> "The plea bargaining process was introduced to speed up the disposal of criminal cases. Both the accused and the prosecution could resolve their case the best way possible without the need to having a lengthy trial. Thus, it saves everyone's time and costs. On the same note, criminal trial could be expedited with the introduction of pre-trial conference and case management. Through these procedures, commonly used in civil proceedings, the factual and legal issues could be agreed upon by the parties before the commencing of the trial"(Makinudin, 2015).

2010 amendments have brought the significant impact in the criminal justice system in Malaysia as far as the speedy justice is concerned. One of the purposes to incorporate the process of plea bargaining into CPC is to decide the large number of cases as soon as possible within a very short time. All the backlog of criminal cases in the court prior to 2009 was disposed completely in 2014. Plea bargaining has a huge impact on the Malaysian criminal justice system. In the same way, it has benefited to the prosecution and the accused person as far as the length of trial and the amount of punishment is concerned. When an accused pleads his guilty, it saves the time of the courts especially in all those cases which are very complicated, and in the same way, it results into the balancing social welfare and individual rights. The cost and the length of the time have also been protected by pleading guilty (Afzan, 2006).

Likewise, 2010 amendments have also benefited the system of prosecution and defense because it's easier for the prosecution to prepare the case where the accused reveals the complete information of the offence and admits other crimes and offences if any (Jefferson, 2006). Furthermore, judges may impose any punishment adequate to the offence rather than on the recommendations of both the parties (Akram, 2005). Both the accused and victim has got benefited from the system of plea bargaining where the accused gets his punishment for his wrongdoing and the victim gets his relief immediately without facing any trial and cross-examination in the court (Alagan, 2010).

Definitely, the 2010 amendments have improved the criminal justice system in Malaysia and also have reduced the risks of injustice in society. Moreover, it also has settled the backlog of cases in Malaysia.

5. CONCLUSION

As far as the delay in criminal trial is concerned, the researcher has identified that Malaysia introduced the Pre-trial processes into the Criminal Procedure Code (Amendment) Act 2010. Chapter XVIIIA of CPC includes these pretrial processes. The 2010 Amendments symbolize Parliament's essence of determining the backlog of cases and promoting

speedy trials in line with the Malaysian Government Transformation Programme. These pretrial processes have included the pretrial conferences, case management and plea bargaining.

This research has identified that pretrial processes, while playing a vital role, have managed all kinds of delay in criminal trial in Malaysia since 2010 to 2019 and improved the whole criminal justice system as required. Many researches have been conducted to see that how criminal trial are being conducted within a reasonable time and what kinds of benefits go in the favour of victims, accused and administration of justice in Malaysia.

The researcher has examined the rule of pretrial processes in the criminal justice system in Malaysia, and found that now the system is functioning sound as justice requires because of the improvements in the system with the passage of time for speedy disposal of criminal cases. The Malaysian criminal justice system now is one of the best examples in the world for developing countries like India and Pakistan, the criminal justice systems of which is confronted with a huge pendency of cases; and suffered from the issue of delay in speedy disposal of criminal cases. Thus India and Pakistan must adopt these pretrial processes in their adversarial system to cope with the issue of delay in the disposal of criminal cases.

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