

PRE TRIAL PREPARATION:

***PRE-TRIAL CONFERENCE
CASE MANAGEMENT
PLEA BARGAINING
OTHER PROVISIONS***

**HANIM MOHD RASHID
HAMDAN HAMZAH
Appellate & Trial Division**

Purpose of amendments:

Expeditious and fair trial

- Abolition of Jury System and Preliminary Inquiries Criminal Procedure Code (Amendment) Act 1995
- Introduction of limited discovery procedure Criminal Procedure Code (Amendment) Act 2006
- Recording of evidence electronically - Criminal Procedure Code (Amendment) Act 2009
- CPC (Amendment) Act 2010 – Act A1378
- CPC amendments in 2012 – Act A1422 & A1423

OVERVIEW

Amendments in 2010 & 2012 involve several provisions:

- Pre-trial conference (s. 172A)
- Case management (s. 172B)
- Plea Bargaining (s. 172C)
- Disposal of case in plea bargaining (s. 172D)
- Victim's or family impact statement (proviso to s.173(m)(ii) & s. 183A)

OVERVIEW

- Reinstatement of trial after discharge (s. 254A)
- Alibi (s. 402A)
- Proof by written statement (s. 402B)
- Proof by formal admission (s. 402C)
- Disposal of seized articles (s. 407A)
- Order for payment of costs of prosecution (s.426)
- Amendments to s. 51A, 283 and 396

PRE-AMENDMENT

- No pre-trial process, case management or plea bargaining (formal)
- Requirement of notice of alibi is different
- No need for a victim or family impact statement
- No procedure for the proof of written statements or formal admission
- No reinstatement of case after DNAA

PRE-TRIAL CONFERENCE



PRE TRIAL PROCESS

Pre-amendment:

- Section 51A – Limited disclosure
- Informal communication between prosecutor and counsel
- Representation(s) made by counsel
- No formal procedure
- Cautious approach

PRE-TRIAL CONFERENCE

- Section 172A CPC
- Only applicable where there is **counsel** and when accused claims to be tried
- To commence – within **30 days** or within **any reasonable time** before the commencement of case management
- Can be conducted at **any venue** as per agreed by both parties
- Can also be conducted by **any means** as per agreed by both parties

PRE-TRIAL CONFERENCE

- The accused person may attend if he wishes to do so
- IO has to be present during PTC

PRE-TRIAL CONFERENCE

- **What to discuss? – s. 172A(4):**
 - Identifying of factual and legal issues
 - Narrowing issues of contention
 - Clarifying each party's position
 - Ensuring compliance with section 51A
 - Discussing the nature of the case including any defence of alibi
 - Discussing any plea bargaining and reaching any possible agreement; and
 - Any other matters that may lead to the expeditious disposal of the case

PRE-TRIAL CONFERENCE

- Examples of Factual Issues
 - date/time of incident
 - identity of accused person
 - identity of victim
 - how the offence occurred
 - the conduct/role of accused person
 - corroborative evidence
 - expert evidence

PRE-TRIAL CONFERENCE

- Examples of Legal Issues
 - evidence to be adduced via s.8, s.15, s.17(2), s.24, s.27, s.30, s.32, s.33, s.73AA, s.90A EA and others
 - hearsay evidence
 - documentary evidence
 - admissibility of statement made under s.112, s.113 and s.396 CPC
 - evidence procured under Child Evidence Act 2007

PRE-TRIAL CONFERENCE

- **Action to be taken – s. 172A(5):**
 - Matters agreed upon to be reduced into writing signed by the accused, defence counsel and DPP (formulation of ‘pre-trial agreement’)

PRE-TRIAL CONFERENCE

- To prepare the bundle of agreed/non-agreed documents
- To identify agreed witnesses (photographer, storekeeper, arresting officer, etc)
- To prepare the witness statements for the said agreed witnesses – s. 402B CPC
- To ensure that the agreed facts has no conditions attached to it, not amendable and final.

CASE MANAGEMENT



CASE MANAGEMENT

- Section 172B
- Initiated by the Court (involves the Court, defence counsel and prosecutor)
- Within 60 days of accused being charged and claims to be tried
- Subsequent case management not less than 2 weeks before trial [s. 172B(3)]
- Venue – court

CASE MANAGEMENT

- **What to consider? S. 172B(2)**
 - All matters agreed upon by the accused, defence counsel and DPP during PTC
 - In relation to plea bargaining agreed upon by parties – to decide on voluntariness of the accused in plea bargaining according to s. 172C

CASE MANAGEMENT

- Where no PTC was held (unrepresented accused) – to discuss with the accused and DPP on any matter which would have been considered under s. 172A
- Assist accused to appoint counsel (if unrepresented)
- Determination of the duration of trial

CASE MANAGEMENT

- Fix hearing date – but subject to subs. 172B(4) ie, trial to commence within 90 days of charging
- Admit any exhibits, as per agreed by parties
- Give directions on any other matter as will promote a fair and expeditious trial

CASE MANAGEMENT

- Failure to commence case management according to time period specified **shall not**:
 - render charge defective or invalid
 - be considered as a ground for appeal, review or revision
- Notwithstanding the Evidence Act 1950 -all matters reduced into writing and duly signed by accused, advocate and PP shall be admissible in evidence

PLEA BARGAINING



PLEA BARGAINING

Pre-amendment:

- Courts do not entertain plea-bargaining between the parties

PP v. Hsila Sulai (M) (2008) 10 CLJ 597

- The courts are judicially prohibited to participate in plea bargaining. They are not bound by the private bargaining between the prosecution and the defence

New Tuck Shen v. PP (1982) CLJ 38

PLEA BARGAINING

- Section 172C
- Applies to all offences where accused claims to be tried
- Can only be conducted by a DPP
- Plea bargaining in respect of:
 - Charge; or
 - Sentence

PLEA BARGAINING

- **Application:**
 - Under Form 28A of the Second Schedule
 - To the Court where the offence is to be tried

PLEA BARGAINING

- **Form 28A Second Schedule – shall contain:**
 - Brief description of the offence
 - Declaration by accused stating that application is voluntarily made
 - Whether application is in respect of the sentence or the charge

PLEA BARGAINING

- Upon receiving application – Court will issue a notice to accused and DPP to appear before the Court on a date fixed for hearing

HEARING OF PLEA BARGAINING APPLICATION

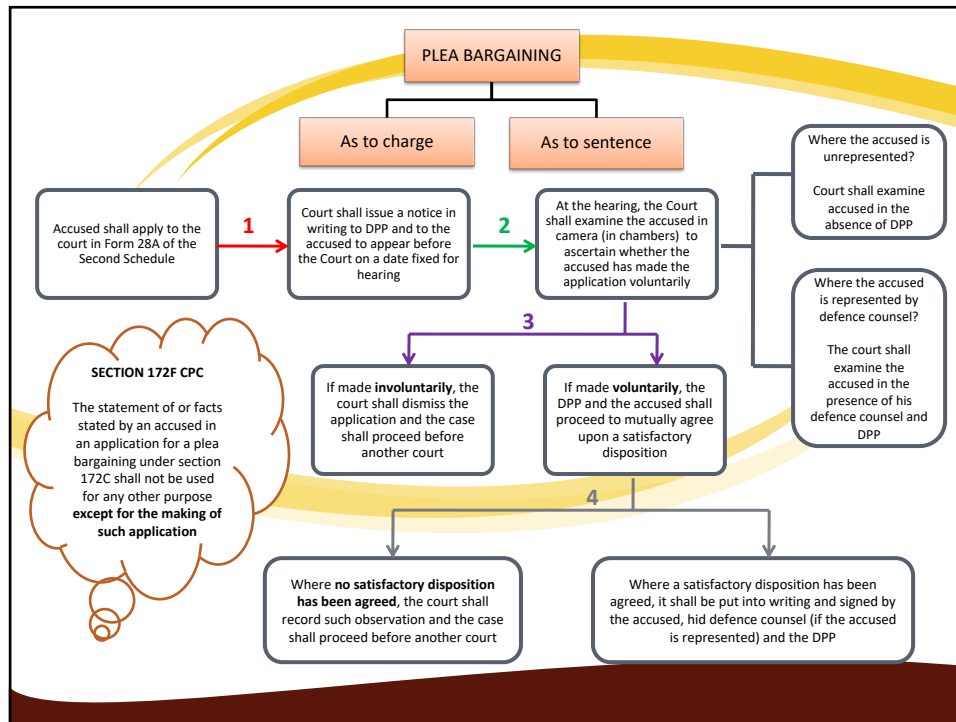
- Court shall first examine the accused '*in camera*' to ascertain the voluntariness of the application:
 - If accused unrepresented, without the DPP
 - If represented, in the presence of his advocate and DPP

HEARING OF PLEA BARGAINING APPLICATION

- If made voluntarily – DPP and accused shall work out a satisfactory disposition
 - Satisfactory disposition agreed – put into writing and signed by accused, his advocate (if accused represented) and DPP
 - To be recorded as particulars in the records of proceedings [s.176(2)(na)]
 - No satisfactory disposition agreed upon – Court shall record observation and case proceed before another court

HEARING OF PLEA BARGAINING APPLICATION

- If made involuntarily – the Court shall dismiss the application and the case shall proceed before another court
- The statement of or facts stated by accused for plea bargaining, cannot be used for any other purpose (s. 172F)
- Duty of Court is to ensure the plea bargaining process is completed voluntarily by the parties



Section 172D

- S. 172D (1) - disposal of case in the following manner:
 - a) If disposition in respect of charge:
 - Make order under s. 426 (order for costs of prosecution/compensation); and
 - Sentence the accused accordingly

Section 172D

- b) If disposition in respect of sentence:
 - Make order under s. 426 (order for costs of prosecution/compensation); and
 - Deal with accused under s. 293 or 294; or
 - Sentence the accused to not more than half of the maximum punishment of imprisonment under the law
 - If there is a minimum term, not less than the minimum term [s. 172D(2)]

Section 172D

○ **Not applicable to :**

❖ **Serious offence** – accused has a previous conviction for a related or same offence;

S. 172D(5) – **serious offence** : offence where maximum imprisonment term is not less than 10 years, and includes any attempt or abetment

Section 172D

○ **Not applicable to (cont.):**

❖ Offence charged falls within the following:

- i. is punishable by fine only;
- ii. is punishable by imprisonment for natural life;
- iii. any sexual offence;
- iv. offence committed against a child below 12 years old
- v. any other offence as may be specified by the PP

Section 172E

- Finality of the judgment
 - Once accused pleaded guilty and Court convict under 172D – no appeal except to the extent and legality of sentence

Section 172G

- Inserted through the CPC (Amendment) Act 2012
- Accused who pleads guilty-
 - Any accused who pleads guilty at **any time before trial**, Court shall sentence accused according to subpara. 172D(1)(c)(ii) ie, half of the maximum punishment of imprisonment provided under the law for the offence

VICTIM IMPACT STATEMENT S. 173



Victim's or family impact statement

Pre-amendment:

- The victim or his family were not given the opportunity to participate in the sentencing process
- The court was informed on the condition of the victim through the prosecutor
- In contrast it was normal for the accused to address the court personally during mitigation

Victim's Impact Statement

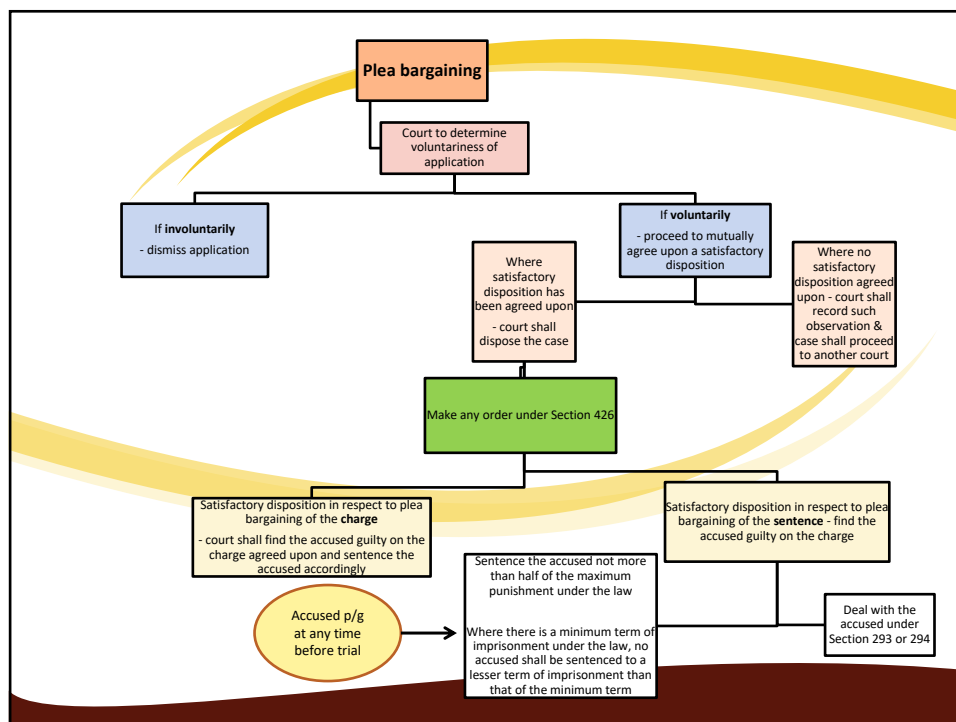
- In summary trials (subordinate courts) – s. 173(m)(ii)
- Trials before High Court – new s. 183A

Victim's Impact Statement

- Under the new amendments, upon request of victim or victim's family, the Court **shall** consider the victim's or a member of his family's impact statement prior to passing of sentence.
- If victim or victim's family not able to attend proceedings, Court **may at its discretion**, admit a written statement of the victim or victim's family

Victim's Impact Statement

- Should contain:
 - a) Trauma or harm suffered by victim
 - b) Economic loss or damages suffered by the victim
 - c) Victim's reaction or objection to any proposed sentence
 - d) The outcome the victim would like
 - e) Highlight the effect of the crime towards the victim's hopes
 - f) Overall effect of the incident



PROOF BY WRITTEN STATEMENT



Section 402B

- **Pre amendment :**
 - Evidence to be given in Court orally
 - No statements of agreed and admitted facts by the parties

Section 402B

- Purpose – expeditious trial
- Post amendment :
 - Written statement can be admissible during trial with consent of parties
 - Statement is in lieu of examination in chief

Section 402B

- Statements admissible if:
 - Signed by the maker;
 - Statement contains declaration that it is true to the best of his knowledge and belief; and

Section 402B

- Statement is served on the parties not later than 14 days before the commencement of the trial **unless** parties agrees otherwise
 - deliver to the person himself or his advocate; or
 - For corporation :
 - deliver to the secretary or other like officer at its registered or principal office; or
 - By registered post to the above persons

Section 402B

- Statement shall be read aloud in Court, unless Court directs otherwise
- Any object or document referred to in the statement is treated as an exhibit tendered in the course of the trial
- Party who was served with the statement, may call for giving of additional evidence not contained in the statement – maker shall attend court to be examined [s. 402B(5)]

PROOF BY FORMAL ADMISSION



Section 402C

- Both parties can agree upon certain facts to be adduced at the trial – shall be conclusive evidence
- When? – before or during the proceedings and shall be in writing and signed by both parties [s. 402C(2)(a)]
- If made outside Court – shall be in writing
- Oral admission?

Section 402C

- Admission in writing:
 - a) by an individual – signed by the maker
 - b) by a body corporate – signed by a director or manager, or the secretary or clerk, or some other similar officer
- Admission made on behalf of accused (individual) – to be made by his advocate

Section 402C

- Admission made at any stage of trial - if by accused (individual) , shall be approved by his advocate before or during the proceedings
- Effect of the admission to subsequent proceedings – admissible as admission [s. 402C(3)]
- Such admission may be withdrawn, with the leave of the Court [s. 402C(4)]

REINSTATEMENT OF TRIAL AFTER DISCHARGE



Section 254A

- **Pre amendment:**
 - When case was DNAA and accused recharged, the trial would have to begin afresh
- **Post amendment:**
 - When case was DNAA and accused recharged, the trial will continue as if he had never been discharged, **subjected that witnesses have been called to give evidence at the trial before DNAA was given**

DEFENCE OF ALIBI



Section 402A

- **Pre amendment:**
 - Defence must give 10 days notice prior to the trial
 - Defence not admissible unless notice is complied with
- PP v. Chee Chi Tiam [1982] 1 MLJ 88

Section 402A

- **Post amendment:**
 - Court shall inform accused of right to alibi defence when he's charged
 - Notice of alibi to be forward at case management stage
 - If not, can put forward during the trial subjected to:
 - Written notice was given to the DPP; and
 - DPP given reasonable time to investigate the alibi before such evidence can be adduced

Section 402A

- Notice shall contain:
 - Particulars of the place where the accused claim to have been at the time of the offence
 - Names and addresses of witnesses he intends to call to establish his defence

DISPOSAL OF SEIZED ARTICLES



PRE-AMENDMENT

Disposal of seized articles:

- Exhibits in connection with the offence generally had to be produced in court
- There was no provision for pre trial disposal of exhibits
- Chain of evidence had to be intact

Section 407A (post amendment)

- DPP may apply for disposal of specified seized articles at any time
- Court may order disposal subject to:
 - a) Inventory made and certified by Magistrate
 - b) Photographs taken and certified by Magistrate
 - c) Where possible, representative samples taken in presence of Magistrate and certified by him
 - d) Videos, compact discs have to be viewed by Magistrate and certified as to contents

Section 407A (post amendment)

- Where Court order for the disposal of articles, Court may allow the accused to take photographs of the articles.

Section 407A(2)

- Seized articles that may be disposed of:
 - a) Dangerous drugs seized under DDA 1952
 - b) Clandestine drug laboratories or premises
 - c) Valuable goods
 - d) Cash money
 - e) Noxious, deleterious, corrosive, explosive, dangerous toxic, flammable, oxidising, irritant, harmful, poisonous, psychotropic and decay substances

Section 407A(2)

- f) Video compact discs, optic discs, films and other similar devices
- g) Publication, books and other documents
- h) Vehicles, ships and other forms of conveyance
- i) Equipment and machineries
- j) Timber and timber products

Section 407A(2)

- k) Rice, food and other perishable items; and
- l) Other articles as may be determined by the DPP that may be vulnerable to theft, substitution, constraints or proper storage space, high maintenance costs or any other consideration deems relevant

ORDER FOR PAYMENT OF COSTS OF PROSECUTION AND COMPENSATION



PRE-AMENDMENT

Order for payment of costs for prosecution and compensation:

- Court can order either or both:
 - a) payment by the accused of the prosecution cost
 - b) compensation to any person or his representative regarding injury to person, character or property

Section 426 (post amendment)

- Once accused convicted:
 - a) Court **may** make order for accused to pay cost of prosecution or any part thereof [s. 426(1)(a)]
 - b) Upon application by the PP, Court **shall** order for accused to pay cost of prosecution where:
 - i. involves evidence obtained pursuant to MACMA 2002; or
 - ii. Accused has obtained pecuniary gain
(sum to be fixed by Court as may be agreed by the PP)

Section 426 (post amendment)

- Once accused convicted (cont.):
 - c) Court **shall** make order for compensation to the victim, **upon application by the DPP** [s. 426(1A)]
 - Compensation could include loss of income or property

Section 426

- Court may hold inquiry to determine order for compensation - consider:
 - a) Nature of offence
 - b) Injury sustained by the victim
 - c) Expenses incurred by the victim
 - d) Damage to, or loss of, property suffered by the victim
 - e) Loss of income incurred by the victim

Section 426

- f) The ability of the convicted accused to pay
- g) Any other factors which the Courts deems relevant

SECTION 51A



SECTION 51A

- Provision on delivery of certain documents
- This provision cif on 7.9.2007
- Prior to amendments in 2012 – only 2 sections
- 2012 amendments – includes 3 more subsections (cif 1.6.2012)

Effect of non compliant to s. 51A (prior to 2012 amendment)

- ***PP v. Mohd. Fazil bin Awaludin***, ie:
 - ✓ Non-compliance did not make a trial a nullity
 - ✓ S. 51A is only procedural and not evidential, non compliance would not statutorily bar the prosecution from tendering the documents which were not delivered to the accused before trial as evidence at the trial
 - ✓ Word 'shall' means the provision is directory and not mandatory

Effect of non compliant to s. 51A (prior to 2012 amendment)

- ✓ Word 'shall' means the provision is directory and not mandatory
- ✓ Accused's right to a fair trial had not been compromised or the failure of the prosecution to comply with section 51A did not have an adverse effect on the accused in his preparation of a defence to the charge preferred against him.

CPC (Amendment) Act 2012

- Purpose:
 - to make it clear that documents to be tendered by the prosecution under subsection 51A(1) are admissible in evidence notwithstanding that the prosecution did not deliver the documents to the accused before the commencement of the trial

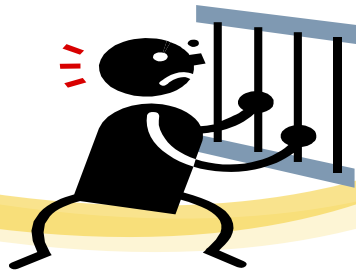
CPC (Amendment) Act 2012

- subsection (3) :
 - non-compliance to ss (1) does not make evidence inadmissible
- Subsection (4) :
 - Ct may exclude document delivered after commencement of trial if shown delivery done **deliberately and in bad faith**

CPC (Amendment) Act 2012

- subsection (5) :
 - Document delivered after commencement of trial, Ct shall allow accused:
 - Reasonable time to examine document; and
 - Recall or re-summon and examine any witness in relation to the document.

SECTION 283



CPC (Amendment) Act 2012

- Section 283 (1)(c) was substituted with a new paragraph
- to provide for a more reasonable scale of imprisonment for default of payment of fine which the Court may impose on the offender

SECTION 396



Thanks to Phil Witte (See Phil Witte 11-11-10) 10-16-2000
SO DO YOU, OH, WELL, PROMISE TO TELL
THE, OH, WHOLE TRUTH SO HELP, ER, OH,
YOURSELF?

CPC (Amendment) Act 2012

- Section 396 is substituted with a new provision
- Similar like provision to section 52, Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM)

CPC (Amendment) Act 2012

- To allow the Court on the application of the PP, to record the evidence of a person whose attendance in the Court as a witness cannot be procured without unreasonable delay or expense or who may become incapable to give evidence

CPC (Amendment) Act 2012

- The evidence of such person shall be recorded on oath by the Court and the person shall be examined in accordance with the Evidence Act 1950 during the recording of evidence

CPC (Amendment) Act 2012

- With this amendment, there is no longer a requirement to commit a person to the civil prison until the trial or to require the person to give satisfactory security that he will give evidence at the trial.

THANK YOU...

