

The Importance of Making The Accused Understand The Nature and Consequences of Pleading Guilty

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ABSTRACT

The purpose of the charge in a criminal trial proceeding is to give to the accused person sufficient information of the allegation made against him so that he may then defend the allegation to his level best. Having said that, having the charge alone is not enough; the court is required to have it explained to the accused and to make sure that the accused understands it the way it should be legally understood. Not only that, an accused must be made aware too by the court the nature and consequences of entering a plea of guilt or claiming trial. How are these explanations to be done? This paper attempts to clarify the matter in the light of the provision in the Malaysian Criminal Procedure Code (hereinafter referred to as the 'Criminal Procedure Code' or the 'CPC', the Syariah Criminal Procedure (State of Selangor) Enactment 2003 (hereinafter referred to as the 'Selangor Criminal Procedure' or the 'SCP') and decided cases.

ABSTRAK

Tujuan pertuduhan dalam prosiding jenayah adalah untuk memaklumkan kepada orang kena tuduh maklumat yang mencukupi akan tuduhan yang dibuat terhadapnya bagi membolehkannya membela dirinya sebaik yang mungkin dalam prosiding pendakwaan. Pun begitu, pertuduhan sahaja tidak mencukupi kerana hakim dan majistret juga dikehendaki menerangkan kepada orang yang kena tuduh pertuduhan itu agar dia faham dengan betulnya pertuduhan itu mengikut undang-undang. Bahkan, orang kena tuduh juga perlu difahamkan tentang sifat dan akibat memilih untuk mangaku salah ataupun minta dibicarakan. Bagaimanakah penerangan semua ini perlu dibuat? Penulisan ini bertujuan menjelaskan perkara-perkara tersebut berlandaskan peruntukan-peruntukan dalam Kanun Prosedur Jenayah Malaysia, Enakmen Tatacara Jenayah (Negeri Selangor) 2003 dan kes-kes.

INTRODUCTION

Merely reading the charge and to then ask the accused whether he understands the charge, it is submitted, could not amount to an explanation. Failure on the part of the Magistrate or the Judge to explain to the accused the charge, the nature and consequences of making a plea of guilt would correspondingly be repugnant to the procedural requirements that before accepting the accused plea of guilt, Magistrates or Judges should ascertain first whether the accused understands the nature and consequences of making a plea, and intends to admit without qualification, the offence alleged against him. However, it must be

noted that unless there is a proper explanation, how could the Magistrate or the Judge possibly holds that the accused has understood the nature and the consequences of entering a plea of guilt or the alleged offence itself? It will be outrageous, and a fabrication of the Court's record on the part of the Magistrate or Judge then to indicate in his notes of evidence or proceedings that the accused has understood the nature of the charge and the consequences of making a plea of guilt when there had been no explanation to the accused of the charge and the consequences of making a plea of guilty or claiming trial. The naked truth is that the charge shall be read and explained to the accused. Reading the charge is not ipso facto an explanation, as reading and explaining are separate issue. A 'yes' answer by the accused to a question by a Magistrate or Judge whether the accused understands the charge immediately after the same has been read to him could not amount to an explanation, rather a question. Though, putting a question to the accused could be part of explanation, or part of the process of ascertaining whether he understands the nature and consequences of his plea, there must still be an explanation of the essential ingredients of the charge itself.

EXPLANATION OF THE CHARGE

Section 173 (a)¹ requires that the charge shall not only be read but the same shall be explained, and only then shall he be asked whether he is guilty of the offence charged or claims to be tried. The question that arises then is how do Magistrates or Judges go about explaining the charge to the accused? The Magistrate and Judge have to inevitably equip themselves with the substantive law regarding the offence in the charge, otherwise, they could not possibly explain the same to the accused. It is off course ludicrous for the Magistrates and Judges to know all the laws there are in place in the society. Here, using wits is important, for Magistrates and Judges could require that Prosecution Officers provide them in advance the copy of the Statute and section of the offence in question with an explanation of the offence. Only then that Magistrates and Judges are in a position to explain the charge to the accused. After all, are not the Prosecution to know what they are charging? If they don't, who else could? It would also be prudent of the Prosecution to furnish the Magistrate and the Judge in advance the brief facts of the case, the opening speech, and the constituents of the charge that make up the offence. All these would invaluablely aid Magistrates and Judges when it comes to explaining (not reading) the charge to the accused, and the nature and consequences of his plea. After all, there are

¹ See section 96 (a) of the Syariah Criminal Procedure (State of Selangor) (hereinafter referred to as the SCP) which replicates section 173(a) of the Criminal Procedure Code (hereinafter referred to as the CPC).

loads and loads of offences in so many hundred of Statutes, and it would be quite impossible for the Magistrates and Judges to know them without some research. The explanation of the charge to the accused is, therefore, a responsibility to reckon with.

Common sense would tell that the charge should be explained to the accused in the language understood by the accused, and if necessary, providing to the accused a competent interpreter for him. In *Huang Chin Shiu v. R.*² Spenser Wilkinson J. held that an accused is entitled to the use of a language he desires (that he is fully conversant with), and is not obliged to even use his native language. In this case, the interpreter is a *Hokkien* and the accused a *Kheng Chew*. It was further held that the court is duty bound to find a competent interpreter for the language required. Moreover, section 173 (b)³ of the CPC demands that the accused must understand the nature of the charge and the consequences of his plea as a condition precedent to accepting his plea of guilt, and this can only be achieved if the charge and the consequences of pleading guilty or claiming trial has first been explained to the accused in the language that he is entirely conversant with. The reading of the charge is easy, but the explanation part is not that easy as one might think. How could the Magistrate or the Judge possibly ascertain that the accused has understood the nature of the charge and consequences of his plea without first informing the accused the essential ingredients of the offence?

CONSTITUENTS OR INGREDIENTS OF THE OFFENCE

Explaining the charge would suggest that the accused has to fully appreciate the essential ingredients that make up the offence too. In *Cheng Ah Sang v. PP*,⁴ it was held that before the Court records a plea of guilty by the accused, it should satisfy itself by questioning the accused that he does really understand the charge and admit to each ingredient that goes to make it up. In *Koh Mui Keow v. Regina*,⁵ the accused was charged under section 10(1)(a) of the Dangerous Drugs Act 1952, with being the occupier of the premises permitting it to be used for smoking prepared opium. On appeal, the accused complained that the charge was neither read nor explained to the accused. Brown J. held that the charge contained one or more ingredients or questions, and the Magistrate should have explained that to an unrepresented accused. It was further held that the accused's reply should be recorded too. Here, the Court was not satisfied

² [1952] MLJ 7.

³ See section 96(b) of the Syariah Criminal Procedure (State of Selangor) which replicates section 173(a) of the Criminal Procedure Code.

⁴ [1948] MLJ 82.

⁵ [1952] MLJ 214.

that the accused had understood and admitted to each and every allegation in the charge, and ordered a retrial. In *Munandu v. PP*,⁶ the facts were that the accused had pleaded guilty to a charge of theft of a lady bicycle. Before the sentence was passed, he mitigated and explained that he was drunk at the time, and took the bicycle by mistake. He parked his own lady bicycle alongside other bicycles, and after he had his drink, he took a lady bicycle which he thought is his, and left. He pleaded guilty as he was told that the case is minor and would not affect his job but rather only a reprimand from the court. The learned Magistrate fined him \$300 and in default, three months imprisonment. He lost his job and pension as a result of that. On revision, it was held that the accused did not fully understand the charge or know that he had not taken the bicycle dishonestly, and therefore, did not commit theft. Put it bluntly, the Magistrate had not properly explained to the accused the nature of the charge and the consequences of making a plea of guilt.

The accused should be informed of the constituents of the charge was also emphasised in the case of *PP v. Margarita B Cruz*.⁷ The facts of this case were that the respondent pleaded guilty to a charge of possessing without lawful authority, two Philippine passports belonging to two other persons, a purported offence under section 12(1)(g) of the Passport Act 1966 (Act 150). She admitted to the facts relating to the charge, and thereafter, explained that she was holding them at the request of her friends who had gone to Ipoh. It was held that Magistrates and Presidents should scrutinise the charge, to read the provision of the statute under which the charge is framed, *to understand the constituent ingredients of the charge (author's emphasis)*, to know the nature of the punishment and appreciate the gravity of the charge. If the charge is defective or badly framed, the Magistrate should point out the defects and requests the Prosecuting Officer to amend the charge, as the accused should truly understand the nature of the charge he is asked to plead. It was obvious that the accused could not be said not to have lawful authority since she held the passports at the request of her colleagues. The High Court also held that when the Prosecuting officer gives the facts relating to the charge implicating the accused, where the accused had pleaded guilty, the Magistrate should be vigilant to see that the facts make out the ingredients relating to the charge; and where the accused states facts which show that one or more of the essential ingredients have not been made out, then notwithstanding the plea of guilty, the Magistrate should have rejected her plea of guilty. Thus, the importance to explain to the accused the charge immediately after the same has been read is before anything else, paramount and crucial so as not to vitiate the acceptance of the plea of guilt by the Court. In *Heng Kim Khoon v. PP*,⁸ Sharma J took 'pain' to explain why the

⁶ [1984] 2 MLJ 82.

⁷ [1988] 1 MLJ 539.

⁸ [1972] 1 MLJ.

court is not bound to accept a plea of guilty in all cases. He said that the court must fully consider whether the accused has fully understood the nature of the charge to which he pleads guilty. The accused is not to be taken at his word when he pleads guilty unless the plea is expressed in unmistakable terms *with full appreciation of the essential ingredients of the offence (author's emphasis)*. This is even more so, if the offence charge is complicated or serious. The Judge pointed out that the acceptance of the accused's plea of guilt is a solemn and serious act and Magistrates should devote some time and active thought before they decide to accept a plea of guilty, hence to sentence according to law.

There is a case heard before Prophet Mohammed (s.a.w) which was narrated by Yazid b. Nu 'aim b. Huzzal on his father's authority who said:

Maiz bin Malik was an orphan under the protection of my father. He had sexual intercourse with a slave girl belonging to a clan. My father said to him "Go to the Messenger of Allah (s.a.w) and inform him what you have done for he may perhaps ask Allah for forgiveness for you." His purpose in that was simply a hope that it might be a way of escape for him. So he went to him and said Messenger of Allah! I have committed fornication, so inflict on me the punishment ordained by Allah. He again turned away from him so he came back and said Messenger of Allah! I have committed fornication, so inflict on me the punishment ordained by Allah. When he uttered it four times, the Messenger of Allah (s.a.w) said, "You have said four times. With whom did you commit it? He replied with so and so. He asked, "Did you lie with her? He replied, "Yes". He asked, "Had your skin been in contact with hers? He replied, "Yes". He asked, "Did you have intercourse with her?" He said, "Yes". So he (the Prophet) gave orders that he should be stoned to death. He was then taken out to Harrah and while he was being stoned he felt the effect of the stones and he could not bear it and fled. But 'Abd Allah b Unais encountered him when those who had been stoning him could not catch upon him, threw the bone of a camel's foreleg at him, which hit him and killed him. They went to the Prophet (s.a.w) and reported it to him. He said, "Why did you not leave him. Perhaps he might have repented and been forgiven by Allah".⁹

INTENDS TO ADMIT WITHOUT QUALIFICATION

The danger in failing to explain the charge to the accused often results in the accused making a qualified plea, which is in itself a prohibitive ground against the very acceptance of the plea. A plea should be without qualification.¹⁰ In *PP v. Cheah Chooi Chuan*,¹¹ the accused pleaded guilty after his identifier had accepted the challenge of the accused to cut off a cockerel's head as proof that

⁹ Sunan Abu Dawud, Kitab al-Hudud, Hadith 4405, Vol. LII, p 1232 cited by Ahmad Ibrahim, in 'The role of the Judiciary in the administration of the Islamic Law.' [1986] April *Syariah Law Journal* 1-14 at pg. 5.

¹⁰ Criminal Procedure Code, section 173 (b).

¹¹ [1972] 1 MLJ 215.

her identification of the accused was correct. Chang Min Tat J. in revision observed that the accused made the plea with the mental reservation that the complainant's subsequent cutting of the cockerel's head indicated her acceptance to perjure her soul or to suffer whatever torments in the next world, and for his part he would be prepared to go to jail. The judge then held that it is a cardinal principle that any plea of guilty must be completely unreserved, unqualified and unequivocal. In *Re Mohamed Miskin Son of Kader Bach*,¹² the accused pleaded guilty to a charge under section 413A of the Penal Code of causing mischief for cutting a cable belonging to the Posts and Telegraph Department. The facts are that the accused had anchored his boat near the underwater cable in question, and during the night when the accused and his crew were sleeping, the anchor dragged and cut the said cable. Posyer CJ. held that when he pleaded guilty to the charge, his statement was in effect an admission that he was responsible for the cutting of the cable, but there was nothing in the statement to indicate that he intended to cut the cable or knew he was likely to do so. It was pointed out by the judge that to establish a charge of mischief, it must be proved that the accused intended to cause wrongful loss or damage, or that he committed an act with the knowledge that he was likely to cause loss or damage. Thus, it can be seen that in the above case, the trial court had not explained to the accused the essential ingredients that make up the offence before putting to the accused the choice whether he wants to claim trial or to plead guilty. In *PP v. Margarita B Cruz*,¹³ the respondent pleaded guilty to a charge of possessing two Philippine passports belonging to two other persons, a purported offence under section 12(1)(g) of the Passport Act 1966 (Act 150). She admitted to the facts relating to the charge, and thereafter explained that she was holding them at the request of her friends who had gone to Ipoh. It was held that the Magistrate should have rejected her plea of guilty, as it did not constitute an unequivocal plea of guilty. Again, here there was no proper explanation, and the Magistrate was oblivious that holding another person passport with consent is an offence not known to law and the plea of guilty by the accused should not be accepted. Had the Magistrate known of the constituents of the offence, the appropriate course to take is to simply discharge the accused on the ground that the charge is groundless,¹⁴ or the plea being a qualified one, proceed with the trial.¹⁵ In *Mahmood Ali v. PP*,¹⁶ the defence counsel put to the Prosecution witness that if he dared to swear by the *Quran*, his client, the accused would plead guilty and would be prepared to go to the prison. Hashim J. held that the plea was not

¹² [1939] MLJ 289.

¹³ [1988] 1 MLJ 539.

¹⁴ Criminal Procedure Code, section 173(b) and Syariah Criminal Procedure, section 96 (b).

¹⁵ *Ibid.*, section 173(g) and *ibid.*, section 96 (g).

¹⁶ [1964] MLJ 57.

valid as it went beyond legitimate procedural practice. In *Yeo Sim Huat v. PP*,¹⁷ the accused had landed his vessel containing 20 imported pigs at a non-designated landing place, an offence under section 22(1) and (2) of the Customs Ordinance (no.12 of 1952), and punishable under section 134 thereof. The accused had to unload the animals to save them as the boat engine broke down. Ismail Khan J. held that the plea was a qualified plea and should not have been accepted. In *PP v. Yusof*,¹⁸ the accused was charged with possession of a *keris* (a Malay dagger), which is an offence under section 6 of the Corrosive and Explosive Substances and Offensive Weapons Ordinance 1958. The accused, however, explained that he was taking it home after a friend who borrowed it from him had returned it to him. Hashim J. held that the plea was a qualified plea and the Magistrate should not have accepted it. Moreover, the Court pointed out that a *keris* forms part of the Malay wedding ceremony, and it is lawful for the lender of a *keris* for such a ceremony to carry it home when it is returned to him. Properly construed, it is submitted that in the abovementioned cases, the accused were actually making a plea to an offence not known to the law rather than making a qualified plea. Therefore, a plea to an offence unknown to the law is not a plea at all. In *PP v. Lim Yoo Hock*,¹⁹ the accused was charged with the offence of being in possession of certain uncensored video tapes in contravention of section 12(1) of the Film Censorship Act 1952 (Act 35), which did not make 'possession' of tapes *per se* an offence. The accused pleaded guilty but in mitigation said that the tapes were not meant for hire as they were put in the cabinet lockers. Edgar Joseph Junior J. in quashing the conviction held that when the accused offered an explanation in mitigation that would tantamount to making a qualified plea and the Magistrate should have rejected it by entering a plea of not guilty instead. It was also held that the charge was defective, as possession of the offending tapes *per se* did not constitute an offence within the meaning of section 15(1) of the Films (Censorship) Act 1952 (Act 35). A plea of guilty to an offence not known to the law is not a plea at all and should be rejected.

The failure to explain to the accused the essential ingredient of the charge often than not resulted in the accused making a qualified plea. In *Margarita De Cruz*, *Mohamed Miskin*, and *Yeo Sim Huat*, for examples, the accused would not have pleaded guilty to the offence had the Magistrates explained to them the nature of the offence so that they fully appreciate the essential ingredients of the offence to which they would subsequently be asked to plead. The convictions should be quashed not so much because their pleas were qualified, rather because the accused did not understand the nature of the offence as there was no proper explanation of the charge or the constituents of the offence to the

¹⁷ [1961] MLJ 328.

¹⁸ [1964] MLJ 264.

¹⁹ [1984] 1 MLJ 309.

accused. It would, therefore, be ludicrous for the Magistrate to then conclude that the accused had understood the nature and consequences of the plea without first providing the accused with the explanation of the charge. Such an omission would occasion a failure of justice to the accused, an irregularity that cannot be cured.²⁰

KNOWING THE CONSEQUENCES OF THE PLEA

The Court has discretion whether to accept or to reject a plea of guilty. Section 173 (b) of the CPC provides that if the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he *may be convicted* on it, and the Court shall pass sentence according to law, provided that before a plea of guilty is recorded, the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him. It is obvious that there is a difference in recording a plea of guilty and the acceptance of it. This can be seen by the use of the word 'may be convicted' in section 173 (b) of the CPC and fortified by the proviso that the accused must also understand the nature and consequences of his plea, and intends to admit without qualification, the offence alleged against him. The words 'shall ascertain that the accused understands the nature and consequences of his plea' in the section certainly place a heavy responsibility on Magistrates and Judges that a plea of guilty cannot be simply taken at its face value. There must be some form of exercise to back up for the acceptance of the plea of guilty. This is corroborated by section 173 (a) in that the charge shall be read and explained to the accused, and also under section 258²¹ of the CPC that where the accused cannot be made to understand the charge, his plea should be recorded but not accepted, and to proceed with the trial. In *Low Hiong Boon (F) v. PP*,²² the accused, a nurse was charged with causing the death of a 10-month old baby by a negligent act not amounting to culpable homicide, by allowing the mother who unwittingly administered an overdose of *oleum chinnapodium* to her baby. She pleaded guilty. Spenser Wilkinson J. held that in view of the difficulties of the law relating to criminal negligence and the intricacy of the facts of the case, the plea of guilty should not have been accepted. In *Lee Weng Tuck & Anor v. PP*,²³ the Supreme Court stated that when the accused pleads guilty, there must be some indication in the record to show that he actually knows not only the plea of

²⁰ Criminal Procedure Code, section 422 and Syariah Criminal Procedure, section 207.

²¹ There is no equivalent of section 258 of the Criminal Procedure Code in the Syariah Criminal Procedure.

²² [1949] MLJ 98.

²³ *Lee Weng Tuck & Anor v. PP* [1989] 2 MLJ 143.

guilty to the charge but also the consequences of his plea, including that there will be no trial and that the maximum sentence may be imposed on him. The judge cannot merely and formally record that the accused understands the nature and consequences of his plea of guilty without some indication on record to show that the accused actually knows that there is a possibility that he may be given the death sentence. In *PP v. Tengku Hitam*,²⁴ the Court must record the proceedings as it is implicitly necessary under section 173 (a) and (b) of the CPC so that the High Court may ascertain that the mandatory requirements are observed. In *Chua Ah Gan v. Public Prosecutor*,²⁵ it was held that if the plea is one of guilty, the Magistrate should make it clear on the record that the accused understands the nature and consequences of his plea. In *PP v. Abdul Aziz*,²⁶ the accused was charged for failing to attend a civic duty (*Rukun Tetangga*), an offence under 31(1)(e) and punishable under section 44 of the Emergency (Essential Powers) Ordinance 1969 (PU (A) 307A/1969). He pleaded guilty to all the charges and was sentenced. There was, however, nothing on the record except the words ‘facts as per charged’ and ‘plea in mitigation’. It was held that the learned Magistrate had failed to record the facts of the case, which he should have done on a plea of guilty. This was necessary in order to ascertain whether the accused, especially if unrepresented, had understood the charge or charges against him and that he really intended to plead guilty.

The trial Magistrate or Judge should also inform the accused that in criminal case, the Prosecution bears the legal burden to prove its case against the accused beyond all reasonable doubt.²⁷ It is for the prosecution to prove its case against the accused, if it can to the above said standard of proof. It is not the duty of the accused to establish his innocence, as the accused is presumed innocence until proven guilty.²⁸ Further, the accused should also be informed that should he pleads guilty, he may be convicted on it, and the court shall pass sentence according to law. ‘Sentence according to law’ has been clarified by Justice Mohamed Azmi in *PP v. Jaffa Bin Daud*²⁹ to mean that the sentence must be within the ambit of the punishable section, and is in accordance with established judicial principles. An accused person who had pleaded guilty and been convicted on that plea shall not be entitled to appeal against the conviction except on the legality and extent of the sentencing.³⁰ A plea of guilt, though, it is a mitigating factor of about a third or a quarter of the maximum punishment

²⁴ [1962] MLJ 414.

²⁵ [1958] MLJ liv.

²⁶ [1978] 2 MLJ 155.

²⁷ Criminal Procedure Code, section 173(m).

²⁸ See *Mohammad Radhi bin Yaacob v. PP* [1991] 3 MLJ 171 (SC).

²⁹ [1981] 1 MLJ 315.

³⁰ Criminal Procedure Code section 305 and Syariah Criminal Procedure, section 136.

that may be imposed,³¹ the uppermost consideration in sentencing is public interest.³² An accused pleading guilty may still be imposed with severe penalties very close to the maximum, if public interest demands that it should be so. It should be also emphasised to the accused that a refusal to make a plea or to claim trial is not an aggravating factor in sentencing. Should not the accused know of these consequences?

The court has to pass sentence according to law and not out of spite against the accused simply because he refused to plead guilty and claim trial. Moreover, it is not the Court's duty to see that there is no backlog of cases through 'entrapping' the accused into pleading guilty. What is important is the due process as prescribed by procedural laws, and that justice is seen to be done.³³ In *Lee Yu Fah & Ors v. PP*,³⁴ the Appellate Court even held that it can always, in a proper case, exercise its power of revision under section 323 of the CPC even though an accused person has been convicted by a Magistrate on his own plea of guilty. The Appellate Court is not precluded from making itself satisfied that the provisions of the CPC leading up to acceptance of the plea of guilty have been complied with. A plea of guilty can only be properly construed if the trial Magistrate has fairly and fully literally recorded the statement of the accused person in answer to the charge. In *Supramaniam v. Kanthasamy*,³⁵ the appellant pleaded guilty to a charge of voluntarily causing hurt under section 323 of the Penal Code. No statement of facts was called for or recorded. Spenser Wilkinson J. held that the courts have frequently laid down that upon a plea of guilty, the Magistrate must either take evidence or a statement of the facts and have the same recorded. It was apparent that had the facts been properly outlined, it would have been apparent that the accused would not have intended to plead guilty at all. The conviction was quashed and that a retrial was ordered to be done.

WHEN AN ACCUSED DOES NOT UNDERSTAND PROCEEDINGS

The best recourse to follow where an accused cannot be made to understand the proceedings is to record the plea of guilty but without accepting it, and simply

³¹ *Mohamad Abdullah and Swee Kang v. PP* [1988] 1 MLJ 167. See also *PP v. Ravindran & Ors* [1993] 1 MLJ 45.

³² See *R v. Kenneth John Ball* [1951 35 C App R 164; *Ang Chai Seng v. PP* [2000] 1 CLJ 213 & *PP v. Khairuddin* [1982] 1 MLJ 331.

³³ Malaysian Federal Constitution, article 5.

³⁴ [1937] MLJ 179.

³⁵ [1956] MLJ 18.

proceed with the trial of the case under section 173 (c).³⁶ Section 258³⁷ of the CPC alternatively provides that the court may proceed with the trial of the case, and should it result in a conviction, the record of the proceedings should be forwarded to the High Court for verification. The presumption is that an unrepresented accused does not know the nature and consequences of his plea even if the charge has been read and explained to him. A Magistrate or Judge should in this case proceed with the trial on the basis that the accused does not understand the proceedings.

RECORDING AND ACCEPTING A PLEA OF GUILTY

In *PP v. Leng Chow Teng*³⁸ the Federal Court said that it is mandatory that before a plea of guilty is recorded and accepted, the Court must ascertain that the accused understands the nature and consequences of his plea, and that he intends to admit without qualification the offence alleged against him. In *PP v. Leng Chow Teng*, it was held (*obiter dicta*) that any plea must in all cases be made by the accused personally, irrespective of whether he is unrepresented or represented by counsel except in situations provided under section 137 (plea by post for minor offences punishable by fine or imprisonment not exceeding three months). The requirement for the accused himself to make a plea and not merely through his counsel is implicit in section 173(a) and (b) of the CPC. The facts of the case are that the accused is charged with possession of opium and the utensils for smoking opium. He appears with his counsel and a date is fixed for hearing. The hearing is postponed to a later date but is then brought forward without notifying his counsel. He pleads guilty and is convicted for both charges. On revision, Harun J. quashed the conviction and set aside the sentence. The Public Prosecutor, thereupon, referred some questions of law to the Federal Court whether a plea of guilty by an accused is good in law but without notice to and in the absence of his counsel, after the charge has been read and explained to him, and he understood the nature and consequences of his plea. It was held that the plea of guilt is good in law, but should only be recorded and not accepted unless the Court is satisfied that the absence of counsel has been properly accounted for. The acceptance of such a plea in the absence of counsel is bad in law, as without counsel's advice, the accused could not be said to have

³⁶ See also Syariah Criminal Procedure, section 96 (c) which replicates section 173 (c) of the Criminal Procedure Code.

³⁷ There is no equivalent of section 258 of the Criminal Procedure Code in the Syariah Criminal Procedure. Persons of unsound mind are dealt with under sections 342 to 352A in Chapter xxxiii of the Criminal Procedure Code, and is not central in this discussion, but only collateral which need not be discussed.

³⁸ [1985] 1 MLJ 229.

understood the nature and consequences of the plea or to have intended to admit without qualification the offences alleged against him.³⁹

In *Mahmood Ali v. PP*,⁴⁰ it was held that where there is more than one charge, each and every charge shall be read and explained (this fact must be recorded) to the accused separately, and the pleas are to be recorded separately too. Where there are more than one accused person, it is the duty of the Magistrate to explain to the accused the charge, and the plea of each accused person should be taken and recorded separately after the consequences of the plea have been explained and acknowledged by each accused.⁴¹ Hence, a joint plea of guilty is bad and irregular, as it may occasion a failure of justice to the accused. It may well be that there is no failure of justice or no injustice has been occasioned. The danger, however being that the High Court Judge may not see eye to eye with the Magistrate, or that what is not a failure of justice to one person may not necessarily be so to another. It would be safer that the plea should be done separately rather than jointly, to avoid an order for retrial by the High Court.

CONCLUSION

Failure on the part of the Court to explain to the accused the charge and the nature and consequences of making a plea of guilty means that the accused is handicapped to decide whether to plead guilty or to claim trial. He is probably making a plea of guilt under the notion that he has committed an offence, and probably also believing that he is presumed guilty and the legal burden is his to prove his innocence, not the Prosecution. The accused is also probably under the added belief that the best way out from the predicament he is currently facing is to plead guilty, thinking that he will avoid a stiffer sentence being meted to him by the Court. Given all these, failure to explain is not an omission that will not occasion a miscarriage of justice to the accused. Thus, a plea of guilty by an unrepresented accused accepted by the Court before giving him an adequate explanation of the offence, and the nature and the consequences of making the plea must inevitably vitiate the acceptance of the plea for the simple reason that it is difficult to conclude that the accused understands the allegation made against him, and appreciate the nature and consequences of the plea of guilty that he has made. It deprives the accused from making an informed choice; the omission is not an irregularity in the proceeding which can be cured, but a nullity as the above discussed cases indicate. An omission to explain to the

³⁹ See *R v. Tan Thin Chai* [1932] MLJ 74. See also Criminal Procedure Code section, 255 and Syariah Criminal Procedure, section 104.

⁴⁰ [1964] MLJ 57. See also *Subramaniam & Anor v. PP* [1976] 1 MLJ 76.

⁴¹ *Chai Chin Fatt v. PP* [1984] 2 MLJ 84. The same had earlier been decided in *Fong Siew Poh v. PP* (1933) 1 MC 15 (Gerathy J.).

accused the ingredient of the charge is also not an irregularity that can be cured by section 422 of the Criminal Procedure Code, or by section 207 of the Syariah Criminal Procedure, as the case may be, as it would highly likely occasion a miscarriage of justice to the accused. Any conviction then would be bad in law, the conviction is quashed, the sentence set aside, and a retrial is normally ordered. Reading the charge is not *ipso facto* an explanation. A 'yes' answer by the accused to a question by a Magistrate or Judge whether the accused understands the charge immediately after the same has been read to him could not amount to an explanation, rather a question. Though, putting a question to the accused could be part of explanation, or part of the process of ascertaining whether he understands the nature and consequences of his plea, there must still be an explanation of the essential ingredients of the charge itself, the nature and consequences of entering a plea of guilty, and claiming trial. Should not the Courts ensure that justice is manifestly seen to be done? Lord Hewart C.J. in *R v Sussex Justices, ex parte McCarthy* 192 said *Justice should not only be done but should manifestly and undoubtedly be seen to be done.*

In the *al-Quran*, Allah said:

Allah commands that you render back your trusts to whom they are due and when you judge between mankind that you judge with justice.⁴²

...If thou judge, judge in equity between them; for Allah loveth those who judge in equity.⁴³

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⁴² Chapter 4: Sura al-nisa [the women] in verse 58.

⁴³ Chapter 5: Sura al-maidah [the repast] in verse 42.

