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Case Note

THE LAW ON THE RETRACTION AND QUALIFICATION OF PLEAS

Public Prosecutor v Dinesh s/o Rajantheran [2019] 1 SLR 1289 and the Way Forward

A plea of guilt carries with it serious consequences. This article considers the ability of an accused person to retract and qualify such a plea in light of the recent Court of Appeal's decision in *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 ("*Dinesh*") and suggests that the relationship between the retraction and qualification of pleas has been and remains confusing and unsatisfactory. The article offers a broad overview of the law in the area, highlighting the issues, some of the difficulties with the *Dinesh* decision and offers suggestions for the way forward.

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I. Introduction

1 In Singapore, criminal cases are predominantly resolved by way of an admission of guilt rather than through recourse to a full-blown trial.[2] Not infrequently, however, accused persons change their mind after they have been convicted, but before they have been sentenced. If accused persons could easily retract or qualify their pleas and have their case sent back to trial, this can create a strain on judicial and administrative resources as new trial dates have to be set, and witnesses recalled. As such, the law on the retraction and qualification of pleas plays a critical role in the plead guilty process and has a direct impact on the efficient and timely administration of criminal justice.

1 I am grateful to Gerome Goh and Jayakumar Suryanaraya for the discussions we had on the topic. I am also grateful to Elizabeth Lim and the anonymous referee for their comments and suggestions. All errors are mine alone.
2 See Attorney General's Chambers Singapore, *Annual Report 2018* at p 14. See also Selina Lum, "Plea Bargaining, Singapore-style" *The Straits Times* (15 March 2017).

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2 Unfortunately, the law on qualification of pleas has, at times, been unclear with High Court decisions reaching different interpretations on the application of s 228(4) of the Criminal Procedure Code[3] ("CPC"). Even more murky is the relationship between the retraction and qualification of pleas. It is therefore welcome that in *Public Prosecutor v Dinesh s/o Rajantheran*[4] ("*Dinesh*"), the Court of Appeal clarified the law on qualification of pleas and the application of s 228(4) of the CPC. However, the Court of Appeal's decision may have created further problems because it leans so far in favour of accused persons that it appears as if there is no longer any effective bar to deter accused persons from changing their pleas on a whim. Moreover, it has the practical effect of rendering the retraction of pleas redundant.

3 This article aims to review the law on the retraction and qualification of pleas in Singapore and offer suggestions as to the legal position locally. Part II[5] will first introduce the law on retraction and qualification of pleas and illustrate the difficult relationship between the two. Part III[6] considers the decision in *Dinesh* and some of the problems created by the decision. Part IV[7] proffers suggestions as to the way forward.

II. Law on retraction and qualification of pleas prior to *Dinesh*

A. Retraction

(1) Context leading to application to retract a plea

4 As a starting point, it is helpful to first sketch out the context in which issues of retraction of a plea of guilt arise.

5 The law has in place safeguards to ensure that a person is only convicted on a valid plea of guilt.[8] In particular, before a court can record a plea of guilt, it must be satisfied that the accused voluntarily wishes to plead guilty, understands the nature and consequences of his plea, and admits without qualification to the offence he has been charged with.[9] There is also an established practice whereby a court will not accept

3 Cap 68, 2012 Rev Ed.
4 [2019] 1 SLR 1289.
5 See paras 4–37 below.
6 See paras 38–52 below.
7 See paras 53–67 below.
8 See s 227(2) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).
9 See *Koh Bak Kiang v Public Prosecutor* [2016] 2 SLR 574 at [42] and *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 at [15]–[20].

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a plea of guilt unless the accused also admits without qualification to a statement of facts ("SOF") containing the legal conditions establishing the offence.[10] Once an accused pleads guilty to a charge and admits to the SOF, he will be convicted.

6 The next step in the criminal justice process is sentencing. At times, sentencing does not immediately follow the conviction of the accused because a pre-sentencing report might be called for by the courts, or time is required for counsel to prepare and submit a mitigation plea. In this intervening period, accused persons sometimes change their mind and no longer wish to plead guilty. At this point, an accused person may then submit an application to the court to retract his plea.

(2) Law on retraction of pleas

7 The law on the retraction of pleas is comparatively clear when considered alone. First, it is well settled that a court can entertain an application by an accused person to retract a plea of guilt, even though unequivocal, at any time before the case is finally disposed of by sentence.[11] The decision whether to allow the withdrawal of the plea is one that is left to the discretion of the court.[12]

8 However, underlying this discretion is the idea that a plea of guilt should not be one that is lightly made. As such, the courts have been clear that "an accused person cannot be permitted merely at whim to change his plea, except upon valid and sufficient grounds which satisfy [the court] that it is proper and in the interests of justice that he should be allowed to do so".[13] Whether there are valid and sufficient grounds will necessarily depend on the facts and circumstances of each case but an accused would need to adduce sufficient evidence to convince the court that his plea of guilt was either invalid or equivocal.[14] To establish that a plea of guilt was invalid or equivocal, the accused must essentially show that the safeguards set out above had not actually been complied with.[15] For example, a plea of guilt may be invalid where the accused can demonstrate that he was in fact labouring under a mistake or a misunderstanding as to the nature

10 *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 at [20].
11 See *Lee Weng Tuck v Public Prosecutor* [1989] 2 MLJ 143 and *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 at [14]. See also *Thong Sing Hock v Public Prosecutor* [2009] 3 SLR(R) 47 at [24].
12 *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 at [12].
13 See, for example, *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 at [12]; *Koh Thian Huat v Public Prosecutor* [2002] 2 SLR(R) 113 at [7]; and *Thong Sing Hock v Public Prosecutor* [2009] 3 SLR(R) 47 at [24].
14 *Thong Sing Hock v Public Prosecutor* [2009] 3 SLR(R) 47 at [24].
15 See para 5 above for the safeguards that must be complied with.

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of his plea or that he did not make a voluntary and deliberate choice to plead guilty.[16]

B. Qualification

(1) Context leading to a qualified plea

9 Compared to the retraction of a plea, there are two distinct situations in which issues relating to a qualified plea might arise.

10 First, at the time when an accused pleads guilty, or at any time after he has pleaded guilty but before he is convicted, he might raise matters disputing one or more of the legal conditions required to make out the offence. In such a situation, it is not controversial that the plea is a qualified one and the accused is in fact pleading "not guilty". It is clear that a court would not record such a qualified plea since the safeguard required under s 227(2) of the CPC – that the accused intends to admit to the offence without qualification – would not be satisfied.[17] This makes eminent sense since an accused person who insists on raising matters that demonstrate his innocence should not be convicted without the benefit of a full trial to determine the veracity of the matters raised.

11 In the second situation, an accused person pleads guilty, admits to the SOF without qualification and is convicted. However, *post*-conviction, the accused might then raise in his mitigation plea matters that dispute the legal conditions required to make out the offence. Whether the raising of such matters in the mitigation plea *ipso facto* qualifies the earlier plea of guilt and necessarily requires its rejection will be considered below.

12 There is little controversy or difficulty regarding qualification of pleas *pre*-conviction and this paper does not consider it further. Any reference to the qualification of pleas in the subsequent discussion considers qualification in the second situation raised above (that is, a qualified plea arising post-conviction).

(2) Law on qualification of pleas

13 A good starting point to understand the qualification of pleas is probably the oft-cited decision of *Balasubramanian Palaniappa*

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16 See *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 at [13]; *Yunani bin Abdul Hamid v Public Prosecutor* [2008] 3 SLR(R) 383 at [53]; and *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [26].

17 See ss 227(2)(*a*)(ii) and 227(2)(*b*)(ii) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

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Vaiyapuri v Public Prosecutor[18] ("*Balasubramanian*"), where Yong Pung How CJ held that:[19]

> The law in Singapore is that, if the mitigation plea qualified the earlier plea of guilt by indicating the lack of *mens rea* or *actus reus*, the accused would not be deemed to have admitted to the offence without qualification and the plea would be rejected by the court: *Ulaganathan Thamilarasan v Public Prosecutor*.

14 *Balasubramanian* suggests that if matters raised in the mitigation plea indicate the lack of one or more of the legal conditions required to make out the offence, the mitigation plea would qualify the earlier plea of guilt and such a qualified plea would be rejected by the courts.[20] More recent decisions such as *Koh Bak Kiang v Public Prosecutor*[21] ("*Koh Bak Kiang*") similarly support the position set out in *Balasubramanian*.

15 In *Koh Bak Kiang*, the accused pleaded guilty to two charges of trafficking in diamorphine. However, in mitigation, despite stressing that he was *not* qualifying his plea, the accused averred that he did not know he was in possession of diamorphine but believed that he had delivered some less dangerous drugs such as ice, ketamine or ecstasy. In finding that the plea of guilt ought to have been rejected, Sundaresh Menon CJ explained that a plea of guilt carried grave implications and as such, the judge recording the plea had a strict duty to ensure that the accused understood the nature and consequences of his plea and intended to admit without qualification the offence alleged against him.[22] On the facts, Menon CJ held that notwithstanding the accused's assertion to the contrary, he *had in fact* qualified his plea of guilt by raising matters in mitigation indicating the lack of *mens rea* for the charges of trafficking in diamorphine.[23] Consequently, Menon CJ set aside the accused's plea of guilt.[24]

16 More importantly, the law on qualification of pleas must also be seen in light of s 228(4) of the CPC which provides as follows:

18 [2002] 1 SLR(R) 138.
19 *Balasubramanian Palaniappa Vaiyapuri v Public Prosecutor* [2002] 1 SLR(R) 138 at [29].
20 See also *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [27]–[30] and *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [38]–[40].
21 [2016] 2 SLR 574.
22 *Koh Bak Kiang v Public Prosecutor* [2016] 2 SLR 574 at [41]–[42].
23 *Koh Bak Kiang v Public Prosecutor* [2016] 2 SLR 574 at [40].
24 *Koh Bak Kiang v Public Prosecutor* [2016] 2 SLR 574 at [45]. The accused was eventually convicted on the amended charge of attempted trafficking in a Class A controlled drug other than diamorphine.

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> Where the court is satisfied that any matter raised in the plea in mitigation materially affects any legal condition required by law to constitute the offence charged, the court must reject the plea of guilty.

17 Section 228(4) was first introduced as part of the re-enacted CPC in 2010.[25] There is no analogue of the provision in previous iterations of the CPC. There is also no mention of the provision in the parliamentary debates.[26] One might therefore surmise that s 228(4) was not intended to introduce drastic changes to the law but was merely an attempt by the draftsmen to codify what was assumed to be an established common law rule on the qualification of pleas.[27]

18 However, prior to *Dinesh*, there was some uncertainty as to the applicability and effect of s 228(4). In *Md Rafiqul Islam Abdul Aziz v Public Prosecutor*[28] ("*Rafiqul*"), Chao Hick Tin JA took the position that s 228(4) codified the common law approach set out in *Balasubramanian* and *Koh Bak Kiang*. Chao JA considered that under s 228(4), once an accused raises a point during the plea in mitigation that may materially affect any legal condition required by law to constitute the offence charged, the court was *mandated by law* to reject the plea and allow the accused to claim trial.[29]

19 In *Rafiqul*, a foreign worker had injured his knee and sought compensation under the Work Injury Compensation Act[30] ("WICA"). Prosecutors of the Ministry of Manpower ("MOM") subsequently charged him with making a fraudulent claim in order to cheat his employer, believing that he had concocted the accident entirely. The accused's lawyer informed him that, if the accused had given the wrong date of the accident in the WICA claim, it might be difficult to contest the charge. On hearing this, the accused formed the impression that he was accused by MOM of giving the wrong date for the accident and decided that this was an accusation he could consider accepting. On this basis, the accused pleaded guilty and accepted the SOF, which had no mention of any worksite accident or injury, without qualification. Accordingly, the accused was convicted, and sentencing was adjourned to the next day.

25 *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [31].
26 See *Parliamentary Debates, Official Report* (18 May 2010) vol 87 at cols 407–428 (K Shanmugam, Minister for Law and Second Minister for Home Affairs). No mention of s 228(4) was made by K Shanmugam when he introduced the new provisions of the Criminal Procedure Code 2010 (Act 15 of 2010).
27 This was the view taken by the courts in *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [31], and *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [38]–[40].
28 [2017] 3 SLR 619.
29 *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [32].
30 Cap 354, 2009 Rev Ed.

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20 In the interim period, the accused informed his lawyer that he wanted to include the fact that there was in fact an accident, and he suffered a work injury, but that the date might be a few days earlier than what was stated in the WICA claim in his mitigation plea. As such, at the sentencing hearing, his lawyer indicated that the accused wanted to retract his plea as he might have to qualify it. The District Judge considered that the retraction and story of an earlier accident was an afterthought and rejected the qualification and retraction of the plea. On an application for criminal revision in the High Court, Chao JA held that by maintaining in mitigation that the work accident did in fact occur, the accused was disputing one of the legal conditions (the *mens rea*) required to establish the offence charged, that is, that he did not actually have the intention to defraud his employer.[31] Therefore, s 228(4) of the CPC applied squarely to the facts of the case and the District Judge was *obliged* under law to reject the accused's plea of guilt.[32]

21 On the other hand, in *Public Prosecutor v Mangalagiri Dhruva Kumar*[33] ("*Mangalagiri*"), Foo Chee Hock JC adopted a different approach to the application and effect of s 228(4) of the CPC. Foo JC considered that:[34]

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

It is clear from this quote that Foo JC believed that: (a) the qualification of a plea at mitigation and the applicability of s 228(4) was an issue that must be considered in tandem with the law on retraction; and (b) the test for retraction had to be satisfied before s 228(4) could apply.

22 In *Mangalagiri*, the accused had initially pleaded guilty to a charge of trafficking in heroin and admitted to the SOF without qualification. He was convicted, and proceedings adjourned for sentencing. In the interim period, the accused sought to retract his plea. He claimed that he was very emotional at the time he pleaded guilty, and that he did not actually give anyone drugs. Foo JC found that the accused's plea of guilt was voluntarily made, with full presence of mind as to the nature of his plea, the offence and the facts he was admitting to and the new allegations were nothing but an afterthought.[35] As such, Foo JC held there were no valid

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31 *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [37].
32 *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [37].
33 [2018] SGHC 62.
34 *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at [23].
35 *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at [11].

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grounds for retraction, and the accused was accordingly not entitled to rely on s 228(4) of the CPC.

23 The tension between *Rafiqul* and *Mangalagiri* teases the complex relationship between the qualification and retraction of pleas and it is this issue which will be considered next.

C. Relationship between the retraction and qualification of pleas

24 It should already be evident from the foregoing discussion that the retraction and qualification of pleas are highly inter-related. Both retraction and qualification take place post-conviction, but pre-sentence. More importantly, both retraction and qualification have the *same effect* of allowing an accused person to change his plea and claim trial. One would therefore think that in any case involving either retraction or qualification, both concepts would be discussed by the courts. Yet strangely enough, many cases, especially the older cases, do not consider the interplay between the retraction and qualification of a plea. The consequence appears to be that the two doctrines have developed independently of each other with the result that they have become somewhat inconsistent.

25 Two cases will first be considered to illustrate this point.

26 In *Ganesun s/o Kannan v Public Prosecutor*[36] ("*Ganesun*") and *Koh Thian Huat v Public Prosecutor*[37] ("*Koh Thian Huat*"), the accused persons initially pleaded guilty and were convicted. However, they later raised matters disavowing some of the legal conditions required to make out the offence in their application to *retract* their pleas of guilt. The courts in both cases *refused* to allow the pleas to be retracted on the basis that the safeguards for ensuring a valid plea had been complied with, and there was no evidence of a mistake or misunderstanding or that the

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36 [1996] 3 SLR(R) 125. The accused operated a hawker stall and was charged with employing a foreigner who had overstayed his visit pass. The accused initially pleaded guilty, admitted to the statement of facts without qualification and was convicted. But during the sentencing hearing, the accused applied to retract his plea on the ground that he was merely an employee and had no ability to employ the foreigner. The accused explained that he had only pleaded guilty because he was not confident that the documents he needed for his defence would arrive in time for trial.

37 [2002] 2 SLR(R) 113. The accused was charged with stealing necklaces from a store and he pleaded guilty. During the sentencing hearing, he applied to retract his plea explaining that he had no intention to steal the necklaces and had merely forgotten to pay for the goods. When questioned by the court as to why he had not raised this earlier, the accused claimed that he had been prevented by the court interpreter from doing so.

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accused had not voluntarily pleaded guilty.[38] There were thus no valid grounds for retraction.

27 However, in both *Ganesun* and *Koh Thian Huat*, there was *no* discussion as to whether the matters raised in their application to retract their plea could have *qualified* their earlier guilty plea, thus requiring the court to send the case back to trial. Two things may be said. First, it is true that in *Ganesun* and *Koh Thian Huat*, the matters disavowing the legal conditions required to make out the offence were raised in a retraction application rather than asserted *in the course of mitigation*. Therefore, one might say that the two cases do not conflict with *Balasubramanian*, *Koh Bak Kiang* or Chao JA's interpretation of s 228(4) in *Rafiqul*.[39] However, it is submitted that this is an unconvincing manner of distinguishing *Ganesun* and *Koh Thian Huat* from *Balasubramanian*, *Koh Bak Kiang* and *Rafiqul*. After all, both the mitigation plea and the retraction application take place at the same stage of proceedings – that is, post-conviction, but pre-sentencing. There is no principled reason why something said in mitigation may qualify the earlier plea while something said in an application to retract the plea may not.

28 Second, if that fact is put aside, based on *Balasubramanian*, *Koh Bak Kiang* and *Rafiqul*, the disavowal of the legal elements required to establish the offence by the accused persons in *Ganesun* and *Koh Thian Huat* ought to have qualified their earlier plea and resulted in the court rejecting the pleas of guilt. Yet, this was not done. It is difficult to believe that this was merely an oversight on the part of the court considering that *Ganesun, Koh Thian Huat* and *Balasubramanian* were heard by the same judge – Yong CJ. The conclusion then is that there appears to be some sort of inconsistency between *Balasubramanian, Koh Bak Kiang* and the approach taken by Chao JA in *Rafiqul* on the one hand, and *Ganesun* and *Koh Thian Huat* on the other.

29 It is in light of this apparent inconsistency that Foo JC suggested in *Mangalagiri* that before a plea could be qualified in mitigation and s 228(4) of the CPC could apply, valid or sufficient reasons for retraction must first be shown.[40] *Prima facie*, this proposition is an attractive one because it would explain why Yong CJ did not see the need to consider the issue of qualification in *Ganesun* and *Koh Thian Huat*.[41]

38 *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 at [15]–[22]; *Koh Thian Huat v Public Prosecutor* [2002] 2 SLR(R) 113 at [24]–[30].

39 See *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [57].

40 *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at [23].

41 Since Yong Pung How CJ found that there were no valid reasons for retraction in *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 and *Koh Thian Huat v Public Prosecutor* [2002] 2 SLR(R) 113, the issue of qualification and s 228(4) of

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30 Equally perceptive in the *Mangalagiri* decision is the comment by Foo JC of the link between the qualification and retraction. As Foo JC noted:[42]

> In the ordinary course, the circumstances of the qualification would have made it obvious, or upon closer elucidation the court would have discerned, that an accused was manifestly labouring under a mistake or misunderstanding (of the nature of the plea).

This explanation is insightful because it elucidates that where a mitigation plea raises matters affecting the legal conditions required to establish the offence, it *often* (but not always) goes hand-in-hand with showing there are also valid reasons for retraction. It also explains why the courts reject the pleas in most qualification cases: it may not simply be because every assertion in mitigation that qualifies the guilty plea ends up being accepted by the court with the consequence that the guilty plea is rejected, but in most situations, the circumstances of the mitigation might *also* show that there are valid reasons for retraction, and it is because of the *latter* that the courts reject the plea.[43] Illustrative of this explanation is the case of *Ulaganathan Thamilarasan v Public Prosecutor*[44] ("*Ulaganathan*").

31 In *Ulaganathan*, the accused was a foreign worker charged with outrage of modesty. He pleaded guilty and admitted to the SOF. But in mitigation, he said that it was very crowded, he was pushed and as a result unintentionally touched the victim. When questioned by the District Judge as to why he had admitted to the SOF, the accused replied that "I came [to Singapore] to work. If I did not admit, I would not have any way of proving I did not do it. Did not want to go through the trouble."

32 It is clear that *Ulaganathan* bears some similarity to *Ganesun* and *Koh Thian Huat*; the case involved an accused person raising matters post-conviction pre-sentence, indicating the lack of *mens rea*. However, in this case, Yong CJ held that the plea should have been rejected. The key difference warranting the different result, it is submitted, is not because the matters were raised in a mitigation plea rather than in a retraction application. Instead, as Yong CJ noted, notwithstanding the accused's original plea of guilt, the circumstances of his mitigation cast doubt as

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the Criminal Procedure Code (Cap 68, 2012 Rev Ed) would not be attracted under Foo Chee Hock JC's proposition in *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62.

42 *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at [21].

43 *Cf Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [61]. Foo Chee Hock JC's explanation here provides a good counter-explanation as to why there are few reported judgments where an accused person puts forth assertions in mitigation that qualify his guilty plea.

44 [1996] 2 SLR(R) 112.

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to whether he actually understood the nature of his plea.[45] This is to be contrasted to the situation in *Ganesun* and *Koh Thian Huat* where there was nothing to suggest that the accused persons failed to understand the nature of their plea at the time they pleaded guilty.[46]

33 As such, *Ulaganathan* was *not* simply a case where because of an assertion of a lack of *mens rea* in mitigation, the plea of guilt was qualified thereby requiring the court to reject the plea. Rather, the case is consistent with the proposition in *Mangalagiri*. The circumstances of the mitigation, and possibly the fact that the accused was an unrepresented foreign worker, cast doubt as to whether the accused actually understood what he was pleading to when he pleaded guilty.[47] In turn, this would have allowed the court to discern that the accused "was manifestly labouring under a mistake or misunderstanding" as to the nature of his plea.[48] On that basis, there would have been valid grounds for both retraction *and* qualification.[49]

34 Similarly, both *Rafiqul* and *Koh Bak Kiang* can also be seen as consistent with the proposition in *Mangalagiri*. Importantly, in *Rafiqul*, despite holding that the court was mandated by law to reject the accused's plea once the accused had raised a matter in mitigation asserting the lack of *mens rea*, Chao JA went on to observe that it was plausible that the accused, as a young Bangladeshi foreign worker unfamiliar with the Singapore legal system, could have mistakenly believed that he was being charged for providing the wrong date of the accident to MOM.[50] It is clear from this that Chao JA had also gone on to find, albeit impliedly, that the conditions for retraction would have been satisfied too since the accused was under a misapprehension as to what he was pleading to.

35 Similarly, in *Koh Bak Kiang*, the circumstances of the mitigation *viz* the fact that the accused raised in mitigation matters indicating that he did not have the requisite *mens rea* for the offence he was pleading guilty to, yet at the same time insisting that he was not qualifying his plea, would have allowed the court to infer that in truth, the accused

45 *Ulaganathan Thamilarasan v Public Prosecutor* [1996] 2 SLR(R) 112 at [27].
46 Notably, in *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 at [21] and [22], the accused was represented at the time he pleaded guilty. In *Koh Thian Huat v Public Prosecutor* [2002] 2 SLR(R) 113 at [26], even though the accused was unrepresented, the court had pointed out that the accused had numerous convictions and was no stranger to court proceedings.
47 *Ulaganathan Thamilarasan v Public Prosecutor* [1996] 2 SLR(R) at [27].
48 *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 at [21].
49 *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 at [13]; *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [26].
50 *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [42].

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did not understand the nature of his plea and the offence to which he was pleading guilty to. This would also have provided a valid ground for retraction.

36 The above discussion shows that, unlike the approach considered in *Rafiqul* – which would be unable to explain cases such as *Ganesun* and *Koh Thian Huat* – Foo JC's proposition in *Mangalagiri* – that valid or sufficient reasons for retraction must first be shown before s 228(4) could apply – potentially offered a neater way for the cases on retraction and qualification to be reconciled. However, *Mangalagiri* was only a decision of the High Court. It could not therefore overrule *Rafiqul*'s approach to s 228(4) of the CPC.

37 Against this context, *Dinesh* came along soon after.

III. *Dinesh* and its implications

A. Decision in Dinesh

38 In *Dinesh*, the accused faced charges under the Employment of Foreign Manpower Act.[51] On the second day of trial, the accused decided to plead guilty. He admitted to the SOF without qualification after a few clarifications were made and was convicted by the District Judge. The case was adjourned at the request of accused's counsel for mitigation submissions to be prepared. Following the accused's conviction, and in the interim period, the Prosecution allowed several foreign workers who had been scheduled to testify at the trial to return to Myanmar.

39 However, the accused later changed his mind and sought to retract his plea. The accused's reason for retracting his plea was a bare denial of the SOF and of each and every element of the offence against him. The District Judge refused to allow the accused to retract his plea. The accused then filed a mitigation plea that reproduced the exact same denials in the earlier retraction application and argued that s 228(4) of the CPC mandated that the court reject his plea. The District Judge took the view that the mitigation plea was not done in good faith and was an abuse of process.[52] As such, the District Judge refused to reject the plea and proceeded to sentence the accused.

40 If *Mangalagiri* were applied, it is clear that the District Judge's decision would have been right. Here, there was nothing to indicate

51 Cap 91A, 2009 Rev Ed, s 22A(1)(*a*).
52 *Dinesh s/o Rajantheran v Public Prosecutor* [2018] SGMC 32 at [38].

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that the accused was "labouring under a mistake or misunderstanding" or that his plea was anything but voluntary. Not only was the accused represented, but he had the presence of mind to make clarifications to the SOF before he was willing to admit to it.[53] The District Judge would thus have been right to reject the application by the accused to retract his plea of guilt. Since there were no valid reasons for retraction, following *Mangalagiri*, s 228(4) would not have applied and the court did not need to reject the plea.

41 Dissatisfied with the trial judge's decision, the accused filed a petition for criminal revision to the High Court. Curiously, in his grounds of decision, Chua Lee Ming J did not address *Mangalagiri*.[54] Instead, Chua J applied *Rafiqul* and found in favour of the accused person, allowing the case to be sent back to trial.

42 Subsequently, the Prosecution filed a criminal reference to the Court of Appeal with the following question: "[M]ust an accused person seeking to retract his plea of guilty at the mitigation stage of sentencing satisfy a court that he has valid and sufficient grounds for his retraction before the court can reject his plea of guilty?"[55] Effectively, the Prosecution was asking the Court of Appeal to decide whether the approach adopted in *Mangalagiri* in relation to the application of s 228(4) of the CPC was correct.

43 However, the Court of Appeal declined to follow *Mangalagiri*.[56] Instead, it held that:

> (a) Under s 228(4), the court's only role is to assess whether the averments in the mitigation submissions have the effect of materially affecting the validity of any essential element or ingredient of the offence.[57]
>
> (b) If the court finds that the mitigation submissions materially affect any legal condition of the offence, then the court *must* reject the plea of guilt, *save where there is an abuse of process*.[58]

53 *Dinesh s/o Rajantheran v Public Prosecutor* [2018] SGMC 32 at [32].

54 Although *Public Prosecutor v Mangalagiri Dhruva Kumar* [2018] SGHC 62 ("*Mangalagiri*") was not discussed in Chua Lee Ming J's grounds of decision (as reported in *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 3 SLR 1261), the author was informed that *Mangalagiri* was in fact raised by the parties to Chua J.

55 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [19].

56 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [30].

57 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [28].

58 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [28] and [67].

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(c) There is no further requirement for the accused to show valid reasons for retraction before the court is obliged to reject the plea.[59]

44 The Court of Appeal gave three main reasons for its decision.

45 First, the court reasoned that Foo JC's approach in *Mangalagiri* was inconsistent with the clear wording in s 228(4).[60] In particular, the court considered that it did not cohere with the clear words and ordinary meaning of s 228(4) for the court to have regard to circumstances *external* to the mitigation plea when determining whether the provision applied.[61] That is to say, the court can only look at the substance of what was raised in mitigation and see if what was said disputes any legal element of the offence.[62]

46 Second, the court also justified the above approach on the basis that:[63]

> … the whole plead guilty procedure should be seen as a continuum that begins with the taking of the accused person's plea to the charge and … culminates in the pronouncement of the appropriate sentence. It is the continuing duty of the court to be vigilant and to ensure that the accused person maintains the intention to plead guilty throughout this process.

47 Third, the court considered that s 228(4) and the approach above did not undermine existing case law.[64]

B. Problems with the decision

48 While the decision in *Dinesh* definitively resolved the issue as to the interpretation and applicability of s 228(4) by endorsing *Rafiqul* over *Mangalagiri*, the Court of Appeal's decision has created its own problems.

49 First, it is rather surprising that the Court of Appeal held that courts have a *continuing duty* to ensure that the accused person *maintains*

59 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [72].
60 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [30].
61 See *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [30] and [34] where the Court of Appeal noted that issues such as why the accused person advanced a mitigation plea inconsistent with the elements of the offence to which he had earlier pleaded guilty to ought *not* to be considered in determining whether s 228(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) applied.
62 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [34].
63 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [36].
64 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [38]–[40] and [54]–[59].

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the intention to plead, from the time he pleads guilty to the charge up till the pronouncement of the sentence. The need to ensure that an accused maintains the intention to plead almost appears to suggest that an accused person is allowed to change his intention to plead guilty at any time, for any reason, as long as it is before sentence. It is not clear if that was the intention of the Court of Appeal, but if it were, then it must be said that not only is this a stark departure from a clear line of previous authority suggesting that "an accused person cannot be permitted merely at whim to change his plea, except upon valid and sufficient grounds", but the position is one that is also inconsistent with the judicial and legislative policy in many other common law jurisdictions.[65] But even if it were not the Court of Appeal's intention, the practical effect of s 228(4) seems to give rise to the same result.

50 Under the Court of Appeal's interpretation of s 228(4), all an accused person needs to do is to assert matters in mitigation disputing some element of the offence he is charged with. If this is done, the court must reject the plea regardless of the reasons the accused person may have had in deciding to advance such a mitigation plea.[66] It is clear from the foregoing that there is no bar, save for the nebulous abuse of process exception considered below, to deter an accused person from changing their pleas on a whim.

51 This is unsatisfactory for four reasons.

65 For Singapore cases, see, *eg*, *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 at [12]; *Koh Thian Huat v Public Prosecutor* [2002] 2 SLR(R) 113 at [7]; and *Thong Sing Hock v Public Prosecutor* [2009] 3 SLR(R) 47 at [24]. For Hong Kong judicial policy, see *Chan Chi Ho Lincoln v HKSAR* [2019] 1 HKC 275 at [41] where the Hong Kong Court of Final Appeal considered that certainty and finality dictated against allowing a reversal of an unequivocal plea without good reason. For UK legislative policy, see rr 24.10 and 25.5 of the UK Criminal Procedure Rules 2015 (SI 2015 No 1490) which provide that an accused must show why it would be unjust for a guilty plea to remain unchanged. For UK judicial policy, see *S v Manchester City Recorder* [1971] AC 481 at 507 where Lord Upjohn noted that even though the UK courts had an unfettered discretion to allow pleas to be withdrawn, the discretion should only be exercised in *clear cases and very sparingly*. For US legislative policy, see r 11(d) of the Federal Rules of Criminal Procedure which provides that after the court accepts a plea but before it imposes a sentence, an accused must show a fair and just reason for the withdrawal of the plea. For US judicial policy, see *US v Wilson* 828 F Supp 2d 679 at 683 (SDNY, 2011) where the court considered that there is "a strong interest in the finality of guilty pleas", and allowing withdrawals "undermines confidence in the integrity of … judicial procedures, … increases the volume of judicial work, and delays … the … administration of justice". For New Zealand judicial policy, see *R v Ripia* [1985] 1 NZLR 122 at 128 where the Wellington Court of Appeal held that a change of mind alone is not enough to support an application to change a plea of guilt.

66 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [30].

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(a) This allows an accused person to retract his plea for purely tactical reasons. For example, an accused person may claim trial, plead guilty, then retract his plea to force a change of judge, or to prolong and delay proceedings, or in the hope that witnesses might become unavailable to testify on the new trial dates.[67] *Dinesh* itself illustrates such concerns: after the accused pleaded guilty, the Prosecution released a number of witnesses who then returned to Myanmar.[68] It may not be easy or even possible for the Prosecution to secure the attendance of these foreign witnesses at a new trial.

(b) As indicated in the introduction of this article, allowing an accused person to freely withdraw his plea can impose a strain on judicial and administrative resources as new trial dates have to be set, and witnesses recalled.[69] Where foreign witnesses are involved, even if they are willing to come to Singapore to testify, flying them in repeatedly can create a drain on public resources.[70]

(c) The decision to plead and the conviction of an accused ought to have some significance.[71] The law recognises that a plea of guilt carries with it grave consequences and for that reason, a plea and the conviction is only recorded after due compliance with legal safeguards.[72] Allowing accused persons to change their pleas and reverse their convictions on a whim can undermine confidence in the integrity of these judicial procedures and safeguards.[73] It also gives the impression that one need not take the plea of guilt seriously.

(d) The court left the question of abuse of process hanging and offered no specific guidance as to what might indicate an

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67 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [21] and [68].

68 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [68].

69 See *US v Wilson* 828 F Supp 2d 679 at 683 (SDNY, 2011).

70 See regs 5–7 of the Criminal Procedure Code (Witnesses' Allowances) Regulations 2010 (S 805/2010). But see also *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [69]–[70] where the Court of Appeal offered a number of practical steps that may be taken to mitigate these operational issues.

71 In *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289, the Prosecution similarly argued that there must be a degree of sanctity of the conviction which is obtained upon the accused person's plea of guilt so that the conviction should not be disturbed unless there was a flaw in the procedure. See also *Chan Chi Ho Lincoln v HKSAR* [2019] 1 HKC 275 at [41] where the Hong Kong Court of Final Appeal noted that a plea of guilt is a serious plea and must not be lightly made.

72 An accused person waives his right to be convicted after a full trial and is precluded from appealing against his conviction when he pleads guilty. See ss 227 and 375 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), and *Koh Bak Kiang v Public Prosecutor* [2016] 2 SLR 574 at [41].

73 *US v Wilson* 828 F Supp 2d 679 at 683 (SDNY, 2011).

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abuse of process in the context of s 228(4).[74] In *Dinesh*, the District Judge had in fact considered that the mitigation plea was an abuse of process because it was done with a view of compelling the court to reject the guilty plea. While the issue of an abuse of process was not referred to the Court of Appeal in the criminal reference, one would have expected the court to not stand by if there were an abuse of process, and if there were no abuse on the facts, then to indicate what conduct might amount to an abuse. This uncertainty is greatly unsatisfactory because the abuse of process exception is the only control mechanism to the otherwise mandatory application of s 228(4).

52 Finally, it should also be said that the Court of Appeal's claim that s 228(4) does not undermine existing case law is an unconvincing one.[75] As already discussed above,[76] the approach in *Rafiqul* (and now in *Dinesh*) is inconsistent with and fails to explain cases such as *Ganesun* and *Koh Thian Huat*. It is true that *Ganesun* and *Koh Thian Huat* are pre-s 228(4) cases and may be distinguished on that basis.[77] But if that is the only convincing basis on which these retraction cases can be explained away – that is, that they have been effectively made redundant by virtue of a legislative amendment – then it is clear that s 228(4) does in fact undermine existing case law.[78] For the Court of Appeal to suggest otherwise creates an impossible task for the lower courts and counsel to conceive of any relevance for the retraction of pleas under the current approach; it is inconceivable that any accused person would

74 See *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [67].

75 See *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [54]–[59] for the Court of Appeal's attempt at distinguishing and explaining *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 and *Koh Thian Huat v Public Prosecutor* [2002] 2 SLR(R) 113.

76 See paras 4–37 above.

77 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [59].

78 In *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [57]–[59], the Court of Appeal attempted to distinguish *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 ("*Ganesun*") and *Koh Thian Huat v Public Prosecutor* [2002] 2 SLR(R) 113 ("*Koh Thian Huat*") by suggesting that in those cases the matters disputing the *actus reus* and *mens rea* were not actually asserted in mitigation, and that the focus of the courts in those cases was not on those matters. However, as considered at paras 4–37 above, in particular paras 27–28, this reasoning is *unconvincing* because there is no principled reason why matters asserted in mitigation can qualify a plea whereas matters asserted in a retraction application cannot do the same. Moreover, it is unconvincing to say that the courts did not focus on those matters because the judge in *Ganesun* and *Koh Thian Huat* was Yong Pung How CJ who also heard *Balasubramanian Palaniappa Vaiyapuri v Public Prosecutor* [2002] 1 SLR(R) 138 ("*Balasubramanian*"); therefore, if the Court of Appeal's position that s 228(4) codified the law in *Balasubramanian* were followed, Yong CJ ought to have known that the raising of such matters would have qualified the plea.

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still try to retract his plea (where he would need to show the court valid and sufficient grounds) when he can achieve the same result by simply making bald assertions in mitigation.

IV. The way forward

A. Legislative amendment

53 In *Dinesh*, the Court of Appeal indicated that its decision was due in part to the clear wording of s 228(4).[79] The implication appears to be that the Court of Appeal considered itself bound and unable to reach an alternative interpretation of the provision, even if it had been minded to do so. Going forward, this suggests that any meaningful change in the law would likely have to be effected by way of a legislative amendment rather than through the courts.

54 In this regard, this article proposes that s 228(4) of the CPC be amended and that any future amendment should consider including the following two features: (a) removing the distinction between retraction and qualification of pleas; and (b) making clear that the courts have discretion whether to send a case back to trial. The reasons for these two aspects will be considered below.

(1) Removing the distinction between retraction and qualification

55 One of the problems with the current state of the law, and even before *Dinesh*, is the difficult and confusing interaction between the retraction and qualification of pleas. However, if one takes a step back, one question which has not been considered by the Singapore courts is why the law even provides for two different tests set at different standards that both allow an accused person to have his case sent back to trial. Such a position is indefensible since any accused person would just go for whatever may be the easier test.

56 This question was in fact addressed by the House of Lords in *S v Recorder of Manchester*[80] ("*Re S*") and more recently revisited by the Hong Kong Court of Final Appeal in *Chan Chi Ho Lincoln v HKSAR*[81] ("*Lincoln Chan*"). In *Lincoln Chan*, the HKCFA explained that historically, there was an *aberrant* line of English cases which held that once a person had been convicted, the court had become *functus officio*

79 *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [30].
80 [1971] AC 481.
81 [2019] 1 HKC 275.

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so far as conviction was concerned and had no power to reverse the plea and send the case back to trial.[82] This *functus* rule had the potential to result in injustice where in the post-conviction but pre-sentencing stage, it emerged (whether from the mitigation plea or otherwise) that the defendant might not be guilty or for some reason should be allowed a chance to have the proceedings sent back to trial. As a result of such possible injustice, the English courts developed a number of "artificial practices" to get around the difficulty created by the *functus* rule.[83] One of these was to label an originally unequivocal plea a qualified one by reason of what transpired at a later stage of the proceedings, in which event, the plea or the conviction would become a nullity and the conviction could then be quashed on that basis.[84]

57 It was only in *Re S* where the House of Lords finally had the opportunity to overrule the aberrant line of cases suggesting that the courts were *functus officio* after conviction. Lords MacDermott and Upjohn noted that with the decision of *Re S* making clear that courts had the discretion to allow a plea of guilty to be withdrawn before the point of sentencing, there would *no longer be any need to resort to the artifice of qualifying an earlier unequivocal plea*.[85] Similarly, the Court of Final Appeal in *Lincoln Chan* reiterated that the correct position in light of *Re S* was that:[86]

> An unequivocal guilty plea, once given, is a *historical fact*. It cannot 'become' or be 'turned into', nor can it 'take on the nature of', an equivocal plea by what happens afterwards. [emphasis added]

58 Therefore, in both Hong Kong and the UK, if an accused raises matters in mitigation materially affecting any legal condition of the offence, it will not qualify his earlier unqualified plea. Instead, whatever is said is but *a* factor that goes towards whether the court will exercise its discretion to send the case back to trial.[87]

59 Considering that the Singapore courts similarly recognise that courts are only *functus officio* after sentencing, there is no reason why the Singapore courts should adopt a different position.[88] Having only *one* composite test which the courts apply in deciding whether an accused

82 *Chan Chi Ho Lincoln v HKSAR* [2019] 1 HKC 275 at [34].
83 See *S v Recorder of Manchester* [1971] AC 481 at 494, 496 and 507.
84 *Chan Chi Ho Lincoln v HKSAR* [2019] 1 HKC 275 at [34].
85 *S v Recorder of Manchester* [1971] AC 481 at 496 and 507.
86 *Chan Chi Ho Lincoln v HKSAR* [2019] 1 HKC 275 at [33].
87 *Chan Chi Ho Lincoln v HKSAR* [2019] 1 HKC 275 at [39].
88 *Ganesun s/o Kannan v Public Prosecutor* [1996] 3 SLR(R) 125 at [14]; *Md Rafiqul Islam Abdul Aziz v Public Prosecutor* [2017] 3 SLR 619 at [38]; *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 at [36].

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person can withdraw his plea and have the case sent back to trial would provide a conceptually neater position and would avoid the unnecessary complex interplay and interaction between retraction and qualification of pleas.

(2) Judicial discretion to send a case back to trial

60 As raised above,[89] another reason that the law is unsatisfactory is because s 228(4) allows accused persons to effectively compel the courts to send their case back to trial whether on a whim or for more nefarious tactical reasons. No other common law jurisdiction adopts such a lenient approach towards accused persons who have been convicted and for good reason: considerations of finality, efficiency and the integrity of the plead guilty process ought to require that the accused person give reasons and justify why his case should be sent back to trial.[90]

61 As such, it is suggested that the better position would be for courts to be given wide-ranging discretion to decide whether the plea should be allowed to be withdrawn and the case sent back to trial. In this regard, it is important to make clear that the courts can look at the reasons why an accused person is seeking to retract his plea and, if necessary, look at whether there is evidence to support such reason given. This will allow the courts to filter out accused persons who change pleas for frivolous or tactical reasons from those who might have a genuine reason for doing so. To be clear, the threshold for allowing a withdrawal of a plea need not, and perhaps ought not to, be set too high. But it is important that courts should be allowed to dig deeper if they suspect that the attempt to retract or qualify the plea is an unmeritorious or frivolous one. This would allow the courts to strike a more calibrated balance between ensuring fairness and justice to accused persons on the one hand, and efficient case management on the other.

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89 See paras 38–56 above.

90 For Hong Kong's position, see *Chan Chi Ho Lincoln v HKSAR* [2019] 1 HKC 275 at [41]. For the UK position, see rr 24.10 and 25.5 of the UK Criminal Procedure Rules 2015 (SI 2015 No 1490) and *S v Manchester City Recorder* [1971] AC 481 at 507. For the US position, see Rule 11(d) of the Federal Rules of Criminal Procedure and *US v Wilson* 828 F Supp 2d 679 at 683 (SDNY, 2011). For New Zealand's position, see *R v Ripia* [1985] 1 NZLR 122 at 128. See also *R v Seymour (Malcolm Ernest)* [2006] EWCA Crim 3088 where Hallett LJ noted that once an unequivocal plea of guilt has been recorded and the accused convicted, it brings to an end the presumption of innocence. To the extent that this presumption justifies the lenient approach towards accused persons, this ought to end after an accused person has been convicted on the basis of a valid plea.

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B. Developing abuse of process

62 Any amendment to s 228(4) is likely to take place only in the longer term. In the interim period, the courts will only have the abuse of process exception to rely on. Given the lack of specific guidance by the Court of Appeal in *Dinesh*, this article will attempt to make some general suggestions as to how this exception may be developed.

63 As a starting point, the High Court in *Chee Siok Chin v Minister for Home Affairs*[91] considered that there is an abuse of process if the "process of the court is not being fairly or honestly used but is *employed for some ulterior or improper purpose* or in an *improper way*" [emphasis in original; other emphasis omitted].[92] It is therefore important to first consider the purpose of a mitigation plea.

64 On this point, it is well established that the purpose of the mitigation plea is to provide an opportunity for an accused to ask for leniency.[93] It is certainly not for an accused person to use as a tactical tool to drag out or delay proceedings.[94] There should be no doubt that a mitigation plea used for such tactical reasons is one that has been employed for an extraneous or improper purpose and would constitute an abuse of process. The difficulty that a court may then face is in determining when a plea has been used for such tactical purposes.

65 In this regard, it is suggested that the Singapore courts could have regard to the following factors as a starting guide: (a) the amount of time that elapsed between the plea and the application to withdraw it; (b) the presence or absence of a valid reason for the failure to move for withdrawal earlier in the proceedings; (c) whether the accused has asserted or maintained his innocence; (d) the circumstances underlying the entry of the plea of guilty; (e) the accused's nature and background; (f) the degree to which the accused has had prior experience with the

91 [2006] 1 SLR(R) 582.

92 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [34].

93 See *Public Prosecutor v Ong Ker Seng* [2001] 3 SLR(R) 134 at [29], followed in *Public Prosecutor v Sikendar Sellamarican* [2012] SGDC 29 at [11] and *Public Prosecutor v Chita Lakshmi d/o Subramaniam* [2012] SGDC 289 at [16].

94 It should be said that *even if* the purpose of the mitigation plea has now evolved in light of *Public Prosecutor v Dinesh s/o Rajantheran* [2019] 1 SLR 1289 and s 228(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) so that it provides the final opportunity for an accused person to change his mind, surely the Court of Appeal could not have intended for the mitigation plea to be used to further tactical goals aimed at defeating the due administration of justice.

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criminal justice system; and (g) potential prejudice to the prosecution if the application to withdraw is granted.[95]

66 These factors may serve the Singapore courts well since they were designed and used by the US courts for the similar purpose of sieving out accused persons using the withdrawal process for tactical reasons.[96] Moreover, there is also precedent in Singapore for the use of similar factors to determine whether there is an abuse of process, albeit in a different context. For example, in *Lai Shit Har v Lau Yu Man*,[97] a company sued a director for breach of director's duties. However, just as trial was about to begin, the director took out an application to wind up the company. The Court of Appeal found that the winding-up application was an abuse of process based on three key points.[98] First, the court noted the timing of the application – the ground for applying for a winding up had existed for four years already, but the director only brought the application right on the eve of trial. The court thus inferred from the delay that there was some collateral improper purpose in bringing the application at that point in time. Second, the court found that there were no valid reasons given for the delay. Third, the court noted the prejudice that the company would suffer if winding-up proceedings were continued.

67 As can be seen from the above example, the three points relied upon by the Court of Appeal are roughly equivalent to factors (a), (b) and (g) raised above.[99] While there is certainly no hard and fast rule as to how many of the abovementioned factors have to be engaged before a court will find that there has been an abuse of process, the factors can at least serve as a helpful guide in which the courts can navigate the question of an abuse of process in the context of a mitigation plea.

V. Conclusion

68 This article has sought to illustrate some of the difficulties with the law on retraction and qualification on pleas especially in light of s 228(4) of the CPC and *Dinesh*. While the practical import of *Dinesh* is to offer up a simplified position where accused persons effectively

95 See *US v Benton* 639 F 3d 723 at 727 (6th Cir, 2011) and *US v Garavaglia* 5 F Supp 2d 511 at 514 (ED Mich, 1998).
96 See *US v Benton* 639 F 3d 723 at 727 (6th Cir, 2011) where the court noted that "[t]he aim of the [factors] is … not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes he made a bad choice in pleading guilty".
97 [2008] 4 SLR(R) 348.
98 See *Lai Shit Har v Lau Yu Man* [2008] 4 SLR(R) 348 at [22]–[29].
99 See para 65 above.

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need only concern themselves with the qualification of pleas, this simplified position is unsatisfactory because it undermines the sanctity of a conviction based on a plea validly recorded and has the potential for abuse. It is hoped that the factors raised above can assist the courts in stemming any potential abuse, and Parliament will, in the not too distant future, step in and amend s 228(4) of the CPC.

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