

UUMILC 2017
9TH UUM INTERNATIONAL LEGAL CONFERENCE

PLEA BARGAINING PROCESS IN MALAYSIA

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Abstract

Plea bargaining is a process where the defence counsel, representing the offender, work out with the prosecutor for a mutually satisfactory disposition of a criminal case, subjected to the court's approval. It involves the offender who pleads guilty to a single offence of a lesser degree, or some of the multi-count offences, in return for a lighter sentence to avoid a possibility of a severer charge. Despite being codified in 2010, this process had taken place since the early introduction of the civil court system, yet without proper guidelines and procedures. The introduction of it goes in line with its primary objective as to reduce the backlog cases in court and to expedite the disposal of criminal cases. It emphasises on the active participation of the judges in this process to ensure that the offender enters into the process voluntarily. The problem regarding this process is there are no standard guidelines in deciding the terms of such process. The process continues to rely on the traditional practice where the prosecutors will usually determine the terms. The issue arises when there are two different cases with similar facts, but the terms are different regarding the agreed sentence. This paper focuses on the scope of prosecutor's powers and the guidelines to exercise such power in determining the terms by comparing with other countries with similar process. Its finding will emphasises on the needs for introducing clear guidelines on the prosecutor's powers and guidelines for parties in deciding the terms in plea bargaining.

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Keywords: Plea bargaining, prosecutor, offender, court, sentence.



1. Introduction

Plea bargaining is an informal process that operates largely outside the formal legal system (Alkon, 2015) before it has been codified in Malaysia in the year of 2010. During the post World War II, the plea bargaining often being said as a corruption of the courts where it rewards those who appear guilty rather than those who claimed innocent (Vogel, 2012). It has been said in plea bargaining, offender agrees to waive their legal right to a trial for leniency from prosecutors or the courts (Lippke, 2013). The institutional perspective says that different courts that have different norms about the outcome at trial will also have different outcomes for pleas (Bushway & Redlich, 2012). In other country such as the United States, plea bargaining process is unrestrained because the prosecutors and to certain extent, judges have wide discretionary powers to offer reduced punishment to individuals who have been formally accused of crimes (Lippke, 2012).

1.1.Types of Plea Bargaining

There are three types of plea bargaining which are parties will normally negotiate namely charge bargaining, count bargaining and sentence bargaining (Srimurugan, 2010). Charge bargaining occurs when the accused and the public prosecutor enter into an agreement to plead guilty to a lesser offence than the original offence he was charged with. For instance, the accused was charged with an offence for causing grievous hurt under Section 325 of the Penal Code, but he agreed to plead guilty to a lesser offence on causing hurt under Section 323 of the same Code which carries a lighter sentence as compared to the previous section.

The second type of plea bargain is the count bargaining. This type of plea bargaining can be seen in a situation when the accused was charged with more than one offence. For instance, the accused had committed three offences which are robbery, grievous hurt and rape. Upon agreement between the parties, the accused will plead guilty only to a single offence, usually that of a lesser degree in exchange of the other two offences being discharged.

On the other hand, sentence bargaining is when the accused agreed to plead guilty on the offence that he was charged for with a reduced sentence which had been agreed by both parties, namely the prosecution and the accused. Despite the three types of plea bargaining mentioned, it has been agreed by some authors that the common types of plea bargaining are charge bargaining and sentence bargaining (Wan, 2007; Akram, 2005).

1.2.Procedure in Plea Bargaining

The procedure in plea bargaining is stated under Section 172C of Criminal Procedure Code. The application shall be made in Form 28A of Second Schedule of the Code, and the court will issue a written notice to the Public Prosecutor. The form shall contain a brief description of the offence which the accused was charged for and the type of plea bargain that the accused intends to plead for either on the sentences or on the charge itself. The form needs to be signed by the Public Prosecutor, the accused and his defence counsel. The court will then examine the accused to determine whether the application is made voluntarily. If the court satisfied with the application, the prosecution and the accused will put the agreed terms into writing. However, if it was not made voluntarily, the application will be dismissed, and

the accused will be tried before another judge. Plea bargaining will be offered within thirty days after a person has been charged and the case would go to a full trial after ninety days if no agreement has been reached. If the accused is already charged with a minimum sentence for the offence, a lesser term will not be available for the accused (Kelly, 2010).

1.3. Application of plea bargaining in India and the United Kingdom

1.3.1. India

In India, the concept of plea bargaining is only applicable to certain offences especially minor offences. The application of plea bargaining is also limited to certain category of criminal law such as offences affecting socio-economy and offences committed against women and children below the age of fourteen. The concept of plea bargaining is not recognised in India as part of the legal system considers it as illegal and unconstitutional (Kumar, 2013). The Supreme Court in the case of Madal Lal Ram Chandra Daga v. State of Maharashtra held that it is wrong to enter into a plea bargain as the case should be tried at the Supreme Court, the highest level under the Indian court system. It will be against the public policy if the accused plead guilty for the sake of getting a lighter sentence as being held in the case of Murlidhar Meghraj Loyat v. State of Maharashtra and Kesambhai v. the State of Gujrat. It also violates Article 21 of the Indian Constitution which guarantees one's personal liberty and no one should be deprived of it but subjected to procedures according to the law. However, Section 256B of the Indian Criminal Procedure Code 1973 which requires that the application must be made to the court voluntarily. The court, upon ensuring such application has indeed been made voluntarily, may award compensation based on what the parties had agreed on and there should be no appeal from the judgment. The main features of plea bargaining in India are that the parties will be given time to reach an agreement which includes an agreement to pay compensation to the victim. The court would also dispose the case by sentencing the accused to one-fourth of the punishment provided, but if there is a minimum sentence, the court will sentence the accused to half of the minimum sentence (Srimurugan, 2010).

1.3.2. United Kingdom

In United Kingdom (UK), Section 48 of the Criminal Justice System and Public Order Act 1994 acknowledges the reduction of sentence when the accused plead guilty. The plea bargaining concept imposes a duty on the defence counsel to advise the best possible outcome for the accused (Akram, 2005). It is the right of the accused to plea bargaining and he should not be forced to plead guilty. The involved parties, namely the accused, the counsel and judges need to have a mutual agreement in the plea bargaining. Upon pleading guilty, the sentence would be reduced up to one-third of the original amount allocated but such practice is subjected to case by case basis.

2. Problem Statement

Application of Plea Bargaining in Malaysia

- Discretionary powers of Public Prosecutor
- Guidelines in deciding its terms
- Inconsistencies in its application

2.1. Discretionary powers of Public Prosecutor

When the accused agreed to plead guilty under plea bargaining, the case will be disposed without a trial provided both parties shall reach a mutual agreement on its terms as discussed in the case of Public Prosecutor v. Azizul Aisha. It depends on the prosecution as to decide whether or not to apply the plea bargain to each case. The court only needs to ensure that the terms in plea bargaining were entered into voluntarily by the parties. Once the court has passed its sentence based on the plea bargain terms, the parties cannot appeal the decision except on the technical ground.

2.2. Guidelines in deciding its terms

The provisions regarding plea bargain only set out the procedures on how plea bargaining should be done, but there are no guidelines for the parties in determining on its terms. Hence, it will lead to inconsistency especially when there are similar facts in cases, and different courts passed different sentence.

2.3. Inconsistencies in plea bargaining application

The inconsistencies in plea bargaining application can be seen in several cases with similar facts, but with the different outcome as the parties agreed on different terms. Such inconsistency can be seen in the case involving the possession of drugs, namely Public Prosecutor v. Manimaram a/l Manickam where the Court referred to the case of Subramaniam Arumugam v. Public Prosecutor which share similar facts, but the court passed lesser sentence to a heavier weight of drugs as what has been agreed during the plea bargaining process. This situation may lead to unfairness towards the accused person as it seems to suggest that it is up to the prosecution “discretion” in determining the terms in the plea bargaining process especially the terms relating to sentencing and count of charge.

3. Research Questions

3.1. Guidelines and Significance of Plea Bargaining

1. What are the guidelines for parties in plea bargaining procedures in deciding its terms?
2. What is the significance of the application of plea bargaining process in Malaysia?

3.2. What are the guidelines for parties in plea bargaining procedures in deciding its terms

There are no guidelines in determining the terms in a plea bargaining process as the Criminal Procedure Code only provides on how the application of plea bargaining should be made. The provisions did not provide the guidelines on how to determine the terms in plea bargaining itself. The paper aims to see what are the standard guidelines applied by the parties in a criminal case.

3.3. How does plea bargaining being applied in other selected countries?

The concept of plea bargaining being applied in other countries to assist the court in the disposal of the cases. For instance, it is applied widely in India and the United Kingdom. This paper will examine on how plea bargaining being applied in those selected countries.

4. Purpose of the Study

Application of plea bargaining and improving the application of plea bargaining

4.1. Application of Plea Bargaining

The paper aims to examine ways to improve the application of plea bargaining by referring to the law regarding plea bargaining application in India and the United Kingdom.

5. Research Methods

This research paper adopts a qualitative approach which does not deal with numerical data in its research but more on data collection. The paper also adopts a doctrinal research in which legal analysis will be carried out based on judicial reasoning. The primary sources of data will be collected through reported cases and legislations. The cases referred will be the decided cases in Malaysia reported in the Current Law Journal (CLJ) and the Malayan Law Journal (MLJ). The analysis also would include the legislations in the Criminal Procedure Code (Amendment) Act 2010 which relate to the procedures in plea bargaining application in Malaysia. The secondary data are gathered through journals, articles and law reference books, relevant to the issues.

6. Findings

The provisions regarding plea bargaining practice in Malaysia are clear especially in its procedures. However, on the guidelines for determining the terms on the agreement between the parties are not clear. The guideline to determine the terms on sentence to be passed by the court is nowhere stated in the Criminal Procedure Code. In contrast, in India, one of the main features of the plea bargaining practice is that the sentence passed by the court in plea bargaining case should be one-fourth of the punishment provided and if there is a minimum sentence, the court will pass up to half of the minimum sentence. The category of cases which apply to the plea bargaining application is only limited to cases which do not affect the socio-economy of the victim, and it is not offences against women or children below fourteen years old. The plea bargaining also does not available to the accused who is charged with offences which are punishable by death or life imprisonment or more than seven years imprisonment. In addition to that, the court may award compensation as being agreed by the parties to the victim upon the accused plead guilty. Meanwhile, in the United Kingdom, there is a provision in reducing a sentence upon accused plead for guilty. The ratio in reducing the sentence is up to one-third of the prescribed sentence by the law.

7. Conclusion

The plea bargaining practice can be seen as a tool to assist the court in reducing backlog cases and to speed up the disposal of cases. However, there should be clearer guidelines on deciding the terms in the plea bargaining in order to avoid a miscarriage of justice when the accused pleads guilty just for the sake of getting a lighter sentence. The law also should provide on specific category of cases which the accused can apply for a plea bargain, and it could also include the right of the victims to be awarded compensation especially when the victims suffered monetary losses.

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