



PRE-TRIAL

- SECTION 172A, 172B CPC
- SECTION 399 , 51A CPC
- SECTION 402B

SECTION 172A CPC

- Pre-Trial Conference
- Accused claim trial
- PTC through counsel **within 30 days** from the date he was charged **or any reasonable time before the CM**
- maybe conducted (by any means and any place) as maybe agreed by the counsel and DPP.

Counsel and DPP shall:

- a) identifying the factual and legal issues;
- (b) narrowing the issues of contention;
- (c) clarifying each party's position;
- (d) ensuring the compliance with section 51A;

- (e) discussing the nature of the case for the prosecution and defence, including any alibi defence that the accused may rely on; _____
- (f) discussing any plea bargaining, and reaching any possible agreement thereto; and
- (g) any other matters as may be agreed upon by the advocate representing the accused and the prosecution that may lead to the expeditious disposal of the case.

–shall be reduced in writing and be signed by the **accused, counsel and dpp.**

SECTION 172B CPC

– CASE MANAGEMENT

- (1) shall be commenced within **sixty days** from the date of the accused being charged and claims to be tried.

– (2) If there is a PTC:

- take into consideration all matters that have been considered and agreed to by the accused and his advocate and the prosecution during the pre-trial conference
- Plea-bargaining (if any) according to the provisions of section 172C

- If there is no PTC:
 - discuss with the accused and the prosecution any matter which would have been considered under section 172A
 - assist an accused who is unrepresented to appoint an advocate to represent the accused
- Determine the duration of the trial and fix the hearing date.
- Upon consent by the accused and counsel, admit any exhibits.
- give directions on any other matter as will promote a fair and expeditious trial

- (3) a subsequent case management, if necessary, may be held not less than two weeks before the commencement of the trial.
- (4) the trial shall commence not later than ninety days from the date of the accused being charged.

– (5) a failure for the case management or the trial to commence according to the time period shall not—

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

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

– (6) all matters that have been reduced into writing and duly signed by the accused, his advocate and the prosecution under subsection 172a(5) shall be admissible in evidence at the trial of the accused.

SECTION 399 CPC

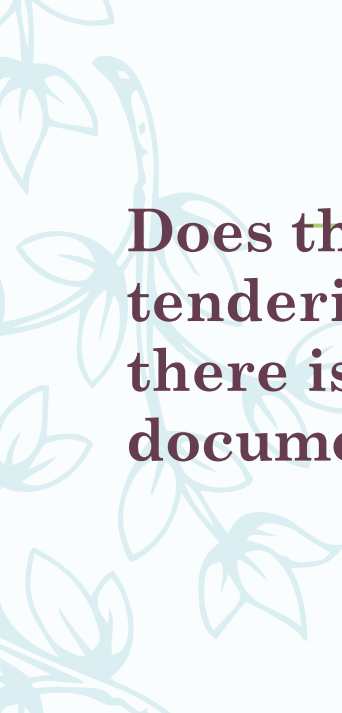
- Reports of certain persons
- Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report **he shall deliver a copy of it to the accused not less than ten clear days before the commencement of the trial.**
- **Failure to serve the doc?**

SECTION 51A CPC

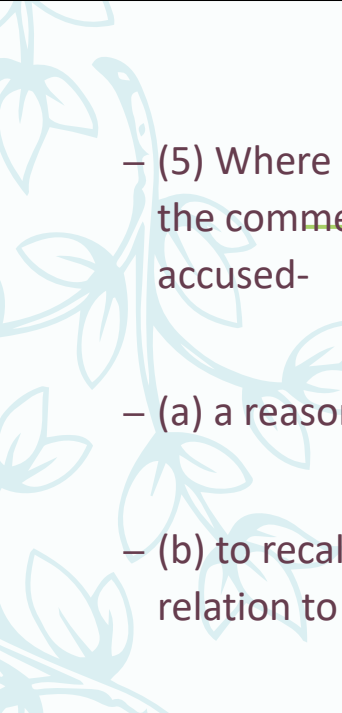
- (1) The prosecution shall before the commencement of the trial deliver to the accused the following documents:
- (a) a **copy of the information made under section 107** relating to the commission of the offence to which the accused is charged, if any;
- (b) a copy of **any document which would be tendered as part of the evidence for the prosecution**; and
- (c) a **written statement of facts favourable to the defence** of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.

- (2) Notwithstanding paragraph (c), the prosecution may not supply any fact **favourable** to the accused if its supply would be contrary to public interest.
- (3) A document shall not be inadmissible in evidence merely because of non-compliance with subsection (1).

- Who decides?
- (c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution



**Does the PP barred from
tendering those documents if
there is a failure to supply the
documents to the defence?**

- 
- (5) Where a document is delivered to the accused after the commencement of the trial, the Court shall allow the accused-
 - (a) a reasonable time to examine the document; and
 - (b) to recall or re-summon and examine any witness in relation to the document.

SEE KEK CHUAN v. PP [2013] 6 CLJ 98

Abdul Malik Ishak JCA

“If documents are not supplied to the defence in accordance with s. 51A of the CPC, the prosecution is not barred from tendering those documents and the defence may be given time to study those documents (PP v. Mohd Fazil Awaludin [2009] 2 CLJ 862; [2009] 1 LNS 6 and Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265; [2010] 2 MLJ 312, FC). It is germane to mention that in the event the prosecution fails to comply with the provisions of s. 51A of the CPC, the prosecution's case would be jeopardised if the trial court refuses to condone the non-compliance by the prosecution of s. 51A of the CPC. And s. 422 of the CPC may not assist the prosecution if the non-compliance to s. 51A of the CPC is material (Narain and others v. State of Punjab [1959] AIR SC 484)”

Can the charge being struck out solely based on the documents supplied under s.51A CPC?

AHMAD ZUBAIR HJ MURSHID v. PP [2014] 1 CLJ 697

Azhar Mohamed JCA:

- [10] In our view, based purely on the documents that have been supplied by the prosecution to the appellant pursuant to s. 51A of the CPC, **it is premature at this early stage of the proceedings for the court to decide on the three issues raised by learned counsel. Documentary evidence must be viewed in the light of the case as a whole and it would be wrong for the court to consider these documents in isolation.** The prosecution is entitled to produce these documents during the trial through its relevant witnesses in order to unravel the case for the prosecution in its proper context. The prosecution is entitled to explain through its relevant witnesses, within the limits of the relevant provisions of the Evidence Act 1950, how these documents came into existence and how these documents fit into the prosecution's case. When the case for the prosecution is concluded, after the prosecution has examined its witnesses, who may in turn be cross-examined and if necessary re-examined, only then the court shall consider based on the entire evidence whether the prosecution has made out a prima facie case against the appellant

SECTION 402B

- WITNESS STATEMENT

- Must be :
 - **Signed** by the maker/witness
 - Contained a **declaration** by that person to the effect that it is true to the best of his knowledge and belief
 - **Served to other party** not later than fourteen days before the commencement of the trial unless the parties otherwise agree.
 - **Read aloud** in open court unless the court directs otherwise



ISSUES INVOLVING WITNESS STATEMENT

1. No declaration
2. Not read aloud in open court
3. No consent from the accused –
s.172A (latest)



NO DECLARATION

–section 6 and 7 of the
Oath and Affirmation Act
1949

– Persons by whom oaths are to be taken

6. (1) Subject to section 7, oaths shall be taken by the following persons:

- (a) witnesses, that is to say, all persons who may be lawfully examined, or give or be required to give evidence, by or before any court or person having, as mentioned in section 4, authority to examine such person or to receive evidence;
- (b) (b) interpreters of questions put to and of evidence given by witnesses;
- (c) translators; and
- (d) jurors.

(2) Nothing herein contained shall render it necessary to administer to the official interpreter of any court, or to a certified interpreter in the employment of the Government of Malaysia or of any State Government when he is engaged in the performance of his duties, after such official or certified interpreter has entered on the duties of his office, an oath that he will faithfully discharge those duties. Where oath required affirmation may be made

7. Where any person is required by this Act or any other written law to take an oath the requirement shall be deemed to be complied with if an affirmation is made.

- The witness come to court and take an oath which is accordance to section 13 of the Oath and Affirmation Act 1949

“13. Every person giving evidence on any subject before any court or person authorized by this Act to administer oaths and affirmations shall be bound to state the truth on such subject. Summary punishment for perjury in open court”

- The absence of the declaration is curable when the witness present in the court and give evidence

THE WS WAS NOT READ ALOUD

- FAUZI NAIM BIN MUHAMAD ZAKI v PP (CRIMINAL APPEAL NO: 05-253-11/2015 (K) – 29/8/2016 FC

- Federal Court held that the non-compliance with the provisions of subsection 402B(6) of the CPC did not render the whole proceeding a nullity. The conditions to be complied with under the said subsection are only directory and not mandatory.

– MISS ROSSARIN NUEKAEW V PP CRIMINAL APPEAL NO.
05-286-12/2015(K) – 15/12/2016 FC

“We are of the view that from a proper reading of subsection 402B(6) of the CPC, that subsection does not require the witness statement to be read aloud in Court in every situation. The Court can direct that only a portion of the witness statement to be read or not at all.”

No consent from the accused

–Refer s.172A

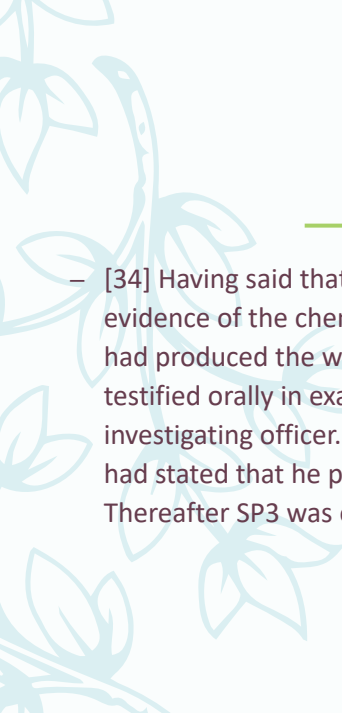
–Latest issue in COA & FC

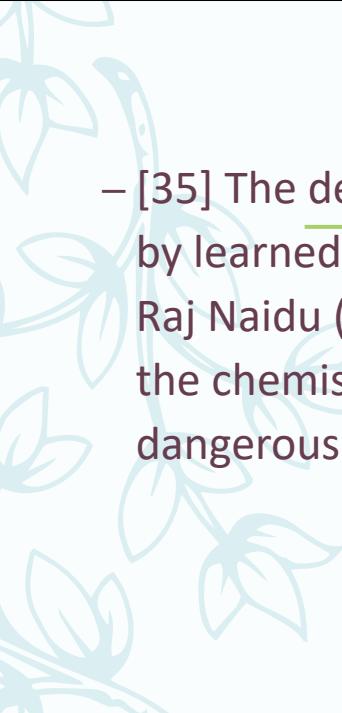
NAVEEN RAJ NAIDU GUNASEGARAN v. PP & ANOTHER APPEAL [2015] 3 CLJ 1082

- Tengku Maimun Tuan Mat JCA
- [28] In the light of all the above, notwithstanding the agreement of or waiver by defence counsel during case management, we found that the chemist's report, exh. P7 was wrongly admitted, which wrongful admission could not be cured under s. 422 of the CPC. The agreement of the prosecution and the defence counsel cannot derogate from the application of sub-s. (5) of s. 172A and sub-ss. (2)(vi) and (6) of s. 172B of the CPC and, especially in criminal matters, no default by the defence or waiver or agreement by the parties can supersede the written law (see *Fan Yew Teng v. PP* [1971] 1 LNS 29; [1971] 2 MLJ 271, see also *Kiew Foo Mui & Ors v. PP* [1996] 1 CLJ 14; [1995] 3 MLJ 505).

KINGSLEY OBI DIKE v. PP [2015] 7 CLJ 1039 - affirm by FC 23.3.2017

- Tengku Maimun Tuan Mat JCA
- [33] As with ss. 172A and 172B, s. 402B of the CPC is similarly designed to facilitate the trial of criminal cases. To save time on the taking of evidence, s. 402B stipulates that evidence may be proved by written statement. Clearly this is associated with pre-trial conference and case management. As such, we took the view that s. 402B should be read together with ss. 172A and 172B of the CPC. But even if s. 402B were to stand on its own, it similarly requires the consent of the parties to the proceedings. Parties to criminal proceedings must necessarily mean the accused person and the prosecution.

- 
-
- [34] Having said that, we however, were not able to agree with learned counsel that the evidence of the chemist, SP3 was inadmissible. Although it was stated at the outset that SP3 had produced the witness statement (Rekod Rayuan Jld 1: p. 11), we found that SP3 had also testified orally in examination in chief on the drug exhibits that he received from the investigating officer. In his oral evidence, SP3 had identified the exhibits concerned and he had stated that he prepared the chemist report, exh. P66 (Rekod Rayuan Jld 2: pp. 112-122). Thereafter SP3 was extensively cross examined on his analysis of the drugs exhibit.

- 
-
- [35] The decision in Naveen Raj Naidu (supra) cited by learned counsel was distinguishable. In Naveen Raj Naidu (supra), this court had ordered a retrial as the chemist was not called to give evidence on the dangerous drugs, the subject matter of the charge.

IKENNA LIVINUS IBENEME lwn. PP [2017] 1 LNS 510

- Dato' Ahmadi bin Asnawi, JCA
- [36] Maka dalam keadaan yang sedemikian, sama ada subseksyen 172A(5) dan 172B(2) (vi) telah dipatuhi atau tidak adalah tidak relevan kerana **penerimaan masuk barang-barang kes tersebut sebagai keterangan tidak dibuat melalui persetujuan** di bawah seksyen 172A(4), khususnya sub-perenggan (g) yang memerlukan persetujuan tersebut diturunkan secara bertulis dan ditandatangani oleh perayu, peguam belanya dan pihak pendakwaan di bawah seksyen 172A(5). **Maka sama ada perayu ada memberikan persetujuan bertulisnya di bawah seksyen 172A(5) atau tidak adalah juga tidak relevan.** Demikian juga sama ada perayu dan peguam belanya ada memberikan persetujuan (consent) untuk barang-barang kes tersebut diterima masuk sebagai keterangan di bawah seksyen 172B(2)(vi) adalah juga tidak relevan.

KANADASS KRISHNAN v. PP [2016] 1 LNS 48

- Dato' Zamani bin Abd Rahim JCA
- Refer Kingsley (COA) and distinguish Naveen Raj



VIGANESWARAN ARUNASALAM v. PP & OTHER APPEAL

[2016] 1 LNS 1509

– Affirmed by FC 17.5.2017

- [40] In respect of the third issue, the counsel submitted that the chemist's evidence is inadmissible. The chemist (SP2) gave evidence by way of a written statement (at pg. 108 of AR Vol. 1). The written statement appears at pg. 21 of AR Vol. 1. The court had acted pursuant to s. 402B of the Criminal Procedure Code (CPC) which provides for written statements to be admissible in evidence if the parties so agree. The decision to tender the written statement of the chemist was made during the case management pursuant to s. 172B of the CPC (see pg. 34 of AR Vol.1)

– [44] The chemist Puan Suhana bt. Ismail (SP3) had been called to testify and were cross-examined by all the counsels. We see no prejudice had been occasioned to any of the appellants.

– **[45]S. 172A and s. 172B CPC is more for the compilation of the Agreed Bundle of Documents where witnesses need not be called.**

ALMA NUDO ATENZA V PP [B-05(M)-132-04/2016)

Kamardin Hashim JCA:

[27] Section 402B reads as follows:

.....

[28] Based on the clear wording of the provisions, we agree with the learned Deputy Public Prosecutor that **there is no requirement under the provisions that consent of the parties must be reduced into writing. Neither that the consent must be given by the accused person personally.**

- [29] From the perusal of the Appeal Records we observed that **learned counsel had never objected to the use of the witness statements** and **also its marking as exhibits** throughout the trial. In fact, **learned counsel had participated** in the cross-examination of the relevant witnesses including the chemist. **We are of the view that by participating in the cross-examination and by conduct in not objecting to the use of the witness statements, amounted to consent by learned counsel to the use of the witness statements during examination-in-chief.** We also hold that **since learned counsel acted on behalf of his client, it can safely be taken that the accused person similarly consented to the use of witness statements during the trial.**

–[31] In our judgment, the requirement under section 402B of the CPC eventhough mandatory but is nevertheless procedural in nature. Therefore, we are of the view that non compliance of the provisions are curable under section 422 of the CPC

SUGGESTIONS?

- AVOID WS FOR THE MAIN WITNESSES (RAIDING OFFICER/EYE WITNESS/VICTIM/IO)
- COMPLY WITH SECTION 402B (2) CPC
- S.402B(6) – Pray for the court to put in record that the witness had read aloud the ws in open court

Thanks!



Tengku Intan Suraya Tengku Ismail

E-mail : tengku.intan@agc.gov.my

Contact No. : 019-301 9619 / 03-8872 2919