

PLEA NEGOTIATIONS AND AGREEMENTS

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Preliminary

- There was no formal or established custom of plea negotiations prior to the passage of the Criminal Justice (Plea Negotiations and Agreements) Act.
- What used to happen?
 - The Attorney of an accused upon receiving instructions that his client wishes to give a plea of guilty to an offence would:-
 - Ask a conservative Judge or Magistrate to accept a plea with the hope of obtaining the most lenient sentence for his client in open court.

- Ask the Prosecution to reduce some of the charges in exchange for a plea of guilt on the others offences or lesser offences
 - Approach the Magistrate or Judge in their chambers ,with the prosecution, to appeal for a lenient sentence prior to proceeding with a plea in open court
- The Prosecution would ask the Defence Attorney if he can ask his client to plead to the offence, or some of them or to a lesser offence

Previous Cases

- ***Ovando Anderson v The Queen*** SCCA 133 of 2004 decided on the Nov 8, 2006
- ***Whitfield Williams v Regina*** SCCA No 174 of 2005 decided on October 31 2008
- ***Neville Lewis v Regina***
- ***Davis v Director of Public Prosecutions***
[1954] 1 All ER 507

- There was no provision for a written agreement between the prosecution and the Defence for accepting a plea of one co-accused in exchange for giving accomplice evidence.
- The prosecution often times used the option of offering a nolle prosequi to one of the accused with a gentleman's agreement for accomplice evidence in return

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- The Act now allows for a formal contact between the parties.
- The Act was passed on the 29th day of December 2005
- Like most of our recent legislation the accompanying regulations were not published until years later on the 1st July 2010

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- The Act give powers to the DPP at any time before judgment to enter into plea negotiations with an accused to dispose of the charge
- The Act does not preclude an accused from pleading guilty without entering into a plea agreement
- Act was amended in 2010 to allow minimum sentences to be disregarded

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- The DPP may
 - withdraw or discontinue the proceedings
 - accept a plea to a lesser offence than charged.

If the accused is unrepresented the DPP must inform him of his right to be represented by an attorney-at-law or legal aid

All negotiations with the DPP must be with the attorney-at-law of the accused

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- The Agreement requires the accused to plea guilty to an offence disclosed on the facts and fulfil other obligation as specified in the agreement
- Once the Accused agrees then the DPP is required to take the course of action consistent with their agreement.

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- Each plea agreement must:-
 - Be in writing
 - contained all the relevant the information in the schedule to the Act
 - signed by the DPP and
 - signed the Accused *and* his Attorney-at-law

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- The Victim is to be informed of the plea agreement before it is concluded
- Otherwise the victim is entitled to be present at the Court when it is considered and be advised by the DPP of the reason for the agreement
- Where the victim is a child then the parent or guardian or Children's Advocate if unable to locate child
- If the victim is deceased then the family of the victim

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- The DPP must inform the Judge of the existence of the plea agreement in Open Court, or if good cause shown, in Chambers
- The Accused and Attorney-at-law should be present in Chambers
- Judge or Magistrate may question the Accused of his knowledge of the agreement

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- The Judge or Magistrate are not bound to accept the plea agreement and they shall examine :-
 - for improper inducement,
 - that the accused understanding nature substance and consequence of the agreement
 - The factual basis on which agreement was made and
 - that the agreement is not contrary to the interest of justice

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- Where the Judge determines that a person has an interest in the outcome of a case they shall;-
 - Warn himself and the jury (if applicable) if uncorroborated evidence is utilised
 - Identify some other independent evidence that is capable of confirming the fact the accused committed the crime

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- The Court shall, if it decides that the facts disclosed fails to show the offence, or if the accused fails to confirm the plea agreement:-
 - Refuse to accept the plea agreement
 - Inform the DPP of their reason for refusalThis will not bar future plea agreements for the same matter.

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- Once the plea agreement is accepted the Accused shall be requested to plea to the charge in open court
- Written representation of the victim and the fact that the plea agreement has been accepted shall be entered upon the record.

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- Where the Judge accepts the plea agreement the sentence imposed shall be :-
 - A maximum of $2/3$ of the maximum penalty of the sentence imposed for the offence
 - If the sentence punishable by life imprisonment then the maximum that can be imposed is 15 years in relation to the offence.
 - They can ignore any minimum sentence require by any Act

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- An accused shall be entitled to withdraw from a plea agreement before sentence or appeal conviction if:-
 - It was entered with improper inducement
 - The Court determines the DPP breached the agreement
 - Misrepresentation or misapprehension occurred as to the consequence or substance of plea agreement

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- The DPP shall be entitled to withdraw from the plea agreement before sentence if :-
 - They were misled by the accused or his attorney in some material aspect
 - They were induced to conclude the plea agreement by conduct amounting to obstruction of justice

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- Once an accused enters plea negotiations or a plea agreement it is not admissible in Court
 - Any evidence of a plea of guilty that he later withdraws or any statement he makes in course of proceedings
 - Any statement made in negotiations with DPP which does not result in plea of guilty

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- A Judge may seal the records of a plea negotiations in their own discretion or on application if they are satisfied it is best in the interest of justice
- Once this is done the every official or employee in administration of Act shall keep all information relating to and the plea agreement confidential.

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- Breach of obligation for secrecy is an offence on summary conviction in the Resident Magistrate's Court with penalty of One Million Dollars or Twelve months imprisonment or both.

Criminal Justice (Plea Negotiations and Agreement) Act 2005

- Any Accused who needs an Attorney to entered into plea negotiations is entitled to Legal Aid and the Legal Aid Act was amended to include this provision.
- The Schedule to the Act deals with the contents of the plea agreement.

Criminal Justice (Plea Negotiations and Agreement) Regulation 2010

- Although the Act was passed since 2005 the Regulations was not passed until 1st day of July 2010.
- It contains the form of plea agreement
- The form for Notice of Breach of Plea agreements
- Notice of Application for Withdrawal from plea
- Order accepting Plea

The Difficulty

- Act does not contemplate plea bargaining in its true sense when an accused wishes to shorten proceeding by :-
 - Pleading guilty and be rewarded with a lesser sentence or
 - Pleading guilty to a lesser offence than originally charged in a effort to get a lighter sentence

Comparison

- Advantage of Plea bargaining :-
 - Disposes of matter quickly
 - Keeps the wheel of Justice turning faster
 - Reduces the costs of litigation
 - Reduces sentences for an accused
 - Avoids long periods of detention pending trial
 - Allows more time to deal with more serious case with masterminds of crime

Practical Situations

- R v Jane Doe & Another – First case using the Act by the DPP and the Defence that went awry
- R v Lydford Allen – this accused refused to do a deal with the prosecution to give evidence against his co-accused who he had implicated in the murder of financial analyst Jamie Lue in his caution statement.

What needs to Happen

- The Act needs to be expanded to allow all cases of plea bargaining to fall under its umbrella
- The Act needs to allow the Accused and the DPP to also negotiate the sentence and/or recommendations on sentencing to the court

What needs to Happen

- Clerk of Courts must be sensitized to use the Act
- All Crown Counsel and Clerk of Court should be able to make informed decisions and negotiate details with the Defence.
- When the Accused gives accomplice evidence the details of his negotiations should be made available to his co-accused

What needs to Happen

- The DPP should negotiate a plea in all cases and not restrict them to cases where the Accused is offering something in return for his plea.
- The parties should always negotiate a plea at criminal case management.
- At criminal case management an accused should be informed the lesser sentence if he offer a plea before trial.

Conclusion

- The Act is a good start and we should applaud the authorities for its implementation.
- We, as practitioners, need to utilize it more often and encourage our clients to make use of it.
- More Publication of the existence of the Act needs to be done

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- This papers was commenced before that workshop and reflects my own views.