The Importance of the Prosecution to Plead the *Actus Reus* within Fraud and Abuse of Power Charges in Malaysia

Steven Perian KC[*]

Introduction

[1] In Malaysia, the prosecution's responsibility in drafting charges for fraud and abuse of power is paramount, particularly regarding the necessity to plead the *actus reus* (the physical act) of the offence.

[2] Sections 152 to 155 and s 173(f) and (g) of the Criminal Procedure Code ("CPC"), alongside s 23 of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act"), emphasise the importance of detailing the manner in which the fraud or abuse of power was committed within the charges themselves. The omission of such details cannot be remedied by s 156 or s 422 of the CPC.

[3] This article explores these legal provisions and the landmark case of *Ravindran Ramasamy v PP*[1] to illustrate why *actus reus* is an essential ingredient, not a mere particular, in fraud or abuse of power charges.

The legislative analysis

Sections 152 to 155 and s 173(f) and (g) of the CPC

[4] *Section 152 of the CPC*: This section mandates that every charge must state the offence with sufficient details to give the accused clear notice of the matter they have to answer. It highlights that the charge must specify the nature and the manner in which the offence was committed.

> Every charge shall state the offence with which the accused is charged. The law and section of the law under which the offence is punishable shall be mentioned in the charge, and the charge shall contain such particulars as to the time and place of the alleged offence, and as to the person (if any) against whom, or the thing (if any) in respect of which, it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.
>
> (Summary of s 152 of the CPC.)

---

[*] Fellow of the Chartered Institute of Arbitrators (UK), Member of the Civil Mediation Council (UK), Barrister at 2 King's Bench Walk (UK), Partner at Rosli Dahlan Saravana Partnership (Malaysia), Arbitrator and Mediator with the Asian International Arbitration Centre, and accredited Mediator with the Malaysian International Mediation Centre.

[1] [2015] 3 CLJ 421.

[5] *Section 153 of the CPC*: This provision requires that when the law defining the offence specifies particular details or circumstances, these must be explicitly stated in the charge. If the particulars provided under s 152 are insufficient to give the accused clear notice of the charges, the charge must additionally include comprehensive details of how the alleged offence was committed, ensuring the accused is fully informed and able to mount an effective defence.

> 153. (1) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

[6] *Section 154 of the CPC*: If the details in ss 152 and 153 are insufficient to notify the accused of the charge, the charge must include additional details about how the offence was committed to provide adequate notice.

> When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[7] *Section 155 of the CPC*: This section emphasises that the language used in the charge should be as clear as possible to avoid ambiguity and confusion.

> In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which that offence is punishable.

The role of s 173(f) and (g) of the CPC

[8] Section 173(f) and (g) of the CPC outline the procedures for magistrates in summary trials. These subsections detail the steps a court should take once the prosecution has presented its case and the mechanisms available for acquitting or discharging the accused.

[9] *Section 173(f)*:

> (i) When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused.
>
> (ii) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
>
> (Summary of s 173(f).)

[10] *Section 173(g)*:

> Nothing in paragraph (f) shall be deemed to prevent the Court from discharging the accused at any previous stage of the case if for reasons to be recorded by the Court it considers the charge to be groundless.

[11] Accordingly, s 173(f) and (g) ensures that the court thoroughly examines whether the prosecution has established a prima facie case before requiring the accused to enter a defence. However, they are insufficient to remedy defective charges, particularly those that fail to plead the *actus reus* in fraud or abuse of power charges. Here are the reasons:

(1) *Fundamental elements vs procedural safeguards*

- Section 173(f) deals with evaluating whether a prima facie case exists based on the evidence presented. It does not address the adequacy of the charge itself. The primary concern here is whether the prosecution has established sufficient evidence, not whether the charge is properly framed.
- Section 173(g) allows for the discharge of the accused if the charge is deemed groundless, but it presumes that the charge, although potentially weak, is fundamentally sound in its formulation. It does not provide a mechanism for rectifying a charge that lacks essential elements like the *actus reus*.

(2) *Actus reus as an essential component*

- The *actus reus* is a core element of the offence and must be explicitly stated in the charge. This is different from the evidentiary burden considered under s 173(f).
- A charge without the *actus reus* fails to inform the accused of the specific nature of the allegations, making it impossible to mount a defence.
- Section 173(f) and (g) presuppose that the charges have been correctly framed in accordance with ss 152 to 155 of the CPC. These procedural steps are meant to protect the accused from wrongful conviction based on insufficient evidence, not to correct substantive defects in the charge itself.

(3) *Miscarriage of justice*

- As highlighted in the case of *Ravindran Ramasamy v PP*,[2] a defective charge that does not specify the *actus reus* can lead to a miscarriage of justice. The accused is deprived of the ability to understand the exact nature of the accusations and to prepare an adequate defence.

[2] See n 1 above.

- Sections 173(f) and (g) do not offer a remedy for such fundamental flaws. They focus on the sufficiency of the prosecution's case based on the evidence presented rather than the legal adequacy of the charge.

(4) *Application to fraud and abuse of power charges*

- In fraud and abuse of power cases, the *actus reus* is particularly crucial as it details the fraudulent act or the misuse of authority that constitutes the offence. Without this detail, the charge is inherently defective and cannot be salvaged by the procedural safeguards of s 173.

- For instance, under s 23 of the MACC Act, the misuse of power for gratification must be clearly outlined in the charge. Failing to include this *actus reus* renders the charge ineffective, and s 173(f) and (g) do not provide the necessary correction.

Section 23 of the MACC Act

[12] Section 23 of the MACC Act specifically addresses the offence of using one's office or position for gratification. It requires the prosecution to prove that the accused used their position with intent to obtain gratification, directly or indirectly. This section implicitly demands the *actus reus* be detailed, illustrating how the power was abused or fraud committed:

> Any officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.

[13] *Deeming provision*: Section 23(2) includes a deeming provision stating that "*an officer shall be presumed to use his office or position for gratification unless proven otherwise*", thereby necessitating clear articulation of the *actus reus* to support the presumption.

***Ravindran Ramasamy v PP* per Jeffrey Tan FCJ**

[14] The case of *Ravindran Ramasamy v PP*, although not directly concerning fraud or misuse of power charges, elucidates legal principles of universal applicability regarding the prosecution's duty in meticulously drafting charges against a defendant, as underscored by the Federal Court's judgment.

> *Relevant facts*
>
> On January 14, 2008, Ravindran Ramasamy and his accomplice attempted to rob a jewellery store. During the robbery, Ravindran smashed glass display cases with a hammer while his accomplice discharged a firearm. Ravindran was later apprehended with stolen jewellery, while his accomplice escaped.

Ravindran was charged under s 3A of the Firearms (Increased Penalties) Act 1971 ("FIPA"), which pertains to discharging a firearm with intent to cause death or hurt during a robbery.

He was convicted by the High Court, and his conviction was upheld by the Court of Appeal.

Ravindran appealed to the Federal Court, arguing that the charge was defective due to duplicity, combining elements of being both a principal offender and an accomplice.

The issue

The primary issue was whether the charges against Ravindran were defective for failing to provide sufficient particulars of the acts constituting the offences, thus not giving him adequate notice to prepare his defence.

Federal Court's decision

- The Federal Court found that the charge was ambiguous and flawed because it did not clearly specify whether Ravindran was being charged as a principal offender or an accomplice.
- The court emphasised that under FIPA, an individual cannot be charged as both a principal offender (who discharges the firearm) and an accomplice (who is present and knows about the firearm) in the same charge.
- The Federal Court allowed Ravindran's appeal, setting aside his conviction and sentence due to the defective charge.

Key points from the judgment

(1) *Duplicity of charges*

The charges read that the offence was committed under s 3A of the FIPA but the particulars of the offence pointed to offences under both ss 3 and 3A. This created ambiguity and did not give fair notice to the appellant of the exact section of the law he was alleged to have violated.

(2) *Essential ingredients of offence*

The court emphasised that the essential ingredients of an offence must be clearly stated in the charge. The presence of the appellant at the scene, as required under s 3A, was not stated, which could mislead the accused about the nature of the case he had to answer.

(3) *Failure of justice*

The omission of key details in the charge could mislead the accused and lead to a failure of justice. The appellant was potentially misled to believe that the case to answer was not under s 3A but s 3, which requires different elements to be proven.

(4) *Defective charge explanation*

The court elaborated that a defective charge is one that fails to include necessary elements that constitute the offence, such as the *actus reus* and *mens rea*. A defective charge does not provide the accused with adequate information to prepare a defence, thereby compromising the fairness of the trial process. In the context of Ravindran, the defective charges failed to specify in which context he was involved in the alleged offence thereby, rendering the charges insufficient and legally flawed.

(5) *Defective charge and ss 156 and 422 of the CPC*

Sections 156 and 422 of the CPC cannot save a defective charge where the accused was misled and a failure of justice has occurred. The distinction between an error in stating the particulars and an error in stating the ingredients of an offence is crucial. Here, the error was in stating the ingredients, which is more serious and cannot be cured by ss 156 or 422 of the CPC.

Key paragraphs from Ravindran Ramasamy v PP

[30] In *PP v Mahfar Sairan*,[3] Kang Hwee Gee J (as he then was), drew attention to the vast difference between the ingredients of an offence as opposed to the particulars of the act, and the need to distinguish between the ingredients of an offence and its mere particulars:

> Steven A Hirsch, in an article entitled "*Yap Sing Hock v. PP*: Time for a Quick and Decent Burial" [1993] 3 MLJ Lexis, draws a distinction between the elements (or what is more commonly described in courts as ingredients, and mere particulars and pointed out that a charge is bad only where the element specified therein had prejudiced the accused under the fair notice rule. He wrote at p lxxvii of his article which he fortified by reference to numerous case decisions, which I have no reason to doubt as correctly representing the law:
>
> > "The court failed to appreciate that every criminal charge contain two distinct types of averment: (i) a recitation of or reference to the elements (or 'ingredients') of the underlying statutory offence; and (ii) particulars which are not themselves elements of the underlying offence but which 'flesh out' the details of the allege crime. The first

[3] [2000] 4 AMR 4913; [2000] 4 MLJ 791; [2000] 7 CLJ 600, HC.

> sort of averment, as the court correctly pointed out, is subject to the rule of strict construction in favour of liberty."

[31] The other case where the court drew the distinction between particulars and ingredients was *Shawal Hj Mohd Yassin v PP*,[4] where it was held by Azahar Mohamed JC (as he then was), that ss 156 and 422 of the CPC only cure technical errors. Azahar Mohamed JC also enunciated on "miscarriage of justice" and "prejudice" in the context of ss 156 and 422 of the CPC, which enunciation we approve and now reproduce below *in extenso*:

> In my view s. 156 has application only in a situation where there is an error either in stating the offence or the particulars required to be stated in the charge or there is an omission to state the offence or those particulars. In other words that section provides for a cure should there be any non-compliance with the technical provisions of the law. I do not think that provision can be invoked in the case at hand in a situation where the charge was defective as disclosing no offence under the section of the Act. I do not consider that this is an irregularity curable under s. 156. In the same way, the application of s. 422 is constrained to remedy no more than technical defects in the charge. To me where a trial in the court below is conducted on the basis of a charge which is defective as not disclosing an offence under the relevant section, it is an illegality which cannot be cured by s. 422. I should point out that the case of *Msimanga Lesaly v. PP* [2005] 4 MLJ 314 relied on by the learned deputy is distinguishable on its facts ... In stark contrast to that case, in the case before me it was not a minor defect; the charge was defective as disclosing no offence in law.
>
> The defect in the charge was a matter of substance and not merely of form. This was not a mere technical non-compliance of any provision of the law which can be condoned as an irregularity. I do not think it can be cured without causing injustice to the appellant. In my view, this was not a defect, disregarding it would not occasion a miscarriage of justice. To me the charge as framed did not disclose any offence and therefore I have no doubt that the defect of this kind was an illegality. I think the appellant was left in doubt as to the offence of which he had been convicted and sentenced. It is a fundamental principle of criminal law in our country that an accused person should know accurately of what offence he has been convicted and sentenced. In my judgment the error in the charge did cause prejudice and injustice to the appellant. In the end, I have no hesitation in saying that the charge framed against the appellant was bad in law. When looked in this way, one can see that there has been a substantial miscarriage of justice. As a consequence, the conviction in this case was a nullity.

[4] [2006] 4 MLJ 334; [2006] 6 CLJ 392, HC.

[15] The overarching legal principle derived from paragraphs [30] and [31] of the judgment can be succinctly summarised as follows:

> The *actus reus* and *mens rea* are fundamental ingredients of any offence. Failure to specify these elements in the charge cannot be dismissed as mere particulars. Such an omission strikes at the very root of the legal sufficiency of the charge and cannot be cured under sections 156 or 422 of the CPC.

The legislative role of ss 156 and 422 of the CPC

[16] *Section 156 of the CPC*: This section addresses errors in the charge that do not prejudice the accused's defence or result in a miscarriage of justice. It provides that such errors can be corrected at any stage of the trial.

> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission.

[17] *Section 422 of the CPC*: This section protects convictions from being invalidated due to errors or omissions in the charge, provided these do not affect the substantial rights of the accused.

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code unless such error, omission or irregularity has in fact occasioned a failure of justice.

[18] However, these sections cannot cure the failure to state the *actus reus* because it constitutes a fundamental element of the offence rather than a procedural or technical error. The *actus reus* delineates the specific actions that constitute the criminal conduct, providing the accused with clear information on the allegations they need to defend against.

The necessity of pleading actus reus in fraud and abuse of power charges

[19] In criminal prosecutions, the burden rests on the prosecution to establish the elements of the offence *beyond reasonable doubt*. This includes both the *actus reus* (the physical act) and the *mens rea* (the mental element). In cases involving fraud and abuse of power, this foundational requirement becomes even more critical, given the complexity and often subjective nature of such allegations. Without clearly pleading the *actus reus*, a defendant cannot reasonably be expected to understand the nature of the case he must meet. It is therefore essential that the charges explicitly plead the *actus reus*, for the following reasons:

(1) *Clarity and fair notice*

Pleading the *actus reus* ensures that the defendant is fully informed of the charges, allowing him and his legal team to prepare an adequate defence. This aligns with the principles of natural justice and fair trial rights.

(2) *Legal sufficiency*

For a charge to be legally sufficient, it must encapsulate all elements of the offence, including the *actus reus*. Omitting this crucial element can lead to the charge being struck out as defective.

(3) *Judicial precedent*

As established in *Ravindran Ramasamy v PP*, failure to detail the *actus reus* can result in a miscarriage of justice, as the accused is not given a fair opportunity to understand and challenge the prosecution's case.

(4) *Distinct from particulars*

While particulars provide additional context, the *actus reus* is an essential component of the offence. Without it, the charge lacks substance, and s 156 or s 422 cannot rectify such a fundamental omission.

Conclusion

[20] The prosecution in Malaysia must meticulously draft charges for fraud and abuse of power cases, ensuring that the *actus reus* is explicitly stated. This requirement is grounded in statutory provisions and reinforced by judicial precedent, emphasising that the *actus reus* is not a mere particular but an indispensable element of the offence. The case of *Ravindran Ramasamy v PP* serves as a crucial reminder of the necessity to provide clear and comprehensive charges to uphold the principles of justice and fairness in the criminal justice system.