

FOIBLES IN COURT APPEARANCE & PROCEDURES

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Kuala Lumpur

Good afternoon.

We all know it is never a breeze appearing in court and having to deal with court procedures.

Of course the bulk of the weaknesses have everything to do with the court system, how the courts are structured. You have to deal not only with the Magistrate or Judge but with the officials in the Registry, the interpreters, the court clerks and the registrars. I agree that the Rules of the High Court and the Subordinate Court Rules are meant to help smooth procedures – that is the avowed intention – but with the unwitting help of Judges and mostly with the inventive help of lawyers, the Rules, many say, have clogged the wheels of justice. Many ask for the revamp of the Rules pointing to England and Singapore.

This talk is not about the rules. Let us leave those to another day. Let us deal with our appearances and the handling of procedures in court. Let us deal with our foibles as human beings in relation to that aspect. Whether a person is a Judge or Magistrate, a DPP or an advocate for the plaintiff or for the defendant the person is a human being, a person with ordinary human needs, a person with ordinary failings. But in the court system the person who is a Magistrate or a Judge, a DPP or advocate for the plaintiff or

defendant takes a persona of a different dimension because of the office or the role he takes in court.

Most weaknesses have everything to do with not knowing the role the person takes in court and understanding the transformed persona that he is.

I think I should touch on the role of the decision maker and the weaknesses of lawyers not understanding fully that person's transformed persona. Perhaps I could share my experience with you about counsel appearing before Judges – normally a case of neither counsel nor Judge knowing or understanding each other. I had been on the floor before as advocate or as DPP before taking judicial office. So I think I know a little bit of what the weaknesses are. One unchanging fact is that the Judge sits literally on a higher plane and you as counsel will always be talked down to. I would like to suggest that although the Judge has the upper hand counsel can mitigate his difficulties if you allow the Judge to learn to trust you as the counsel and you in turn understand him as a Judge.

But more importantly, it is your duty to make sure he understands you. You might have heard this question before,

“How many judges does it take to change a light bulb?”

The answer,

“Just one, but two lawyers have to explain how to do it.”

That's it; you have to do the explaining, so it pays to know your Judge. In giving you some of my thoughts today I intend to deal with the following –

1. A little introduction to the American and Scandinavian thinkers who are called the Realists.
2. What they say is that lawyers need to realize about judicial decisions – go back to the Judge and take into account ascertainable factors.
3. Self evident matters on personal characteristics of Judges in our courts.
4. Self evident matters on what all Judges expect of lawyers.
5. Misleading a Judge.
6. Appeal Courts.

1. **The Realists**

Many of us, if not all, studied legal philosophy or jurisprudence in university. It is one of the most important courses in a law course and I hope it is compulsory in all law schools.

One of my earlier introductions as to how a Judge behaves in court was succinctly defined by our Professor of Jurisprudence, Prof L.C. Green – the fact that whether the Judge gets up from the right side of the bed decides the course of trial for the day and woe betide any lawyer who appears before the Judge who gets up on the wrong side and crosses him. Of course that was an exaggeration but he introduced us to the

inchoate thinking of several American and Scandinavian thinkers, Judge Jerome Frank, Justice Holmes, Karl Llewellyn, Roscoe Pound, Kelsen and a whole host of other thinkers commonly called the Realists. Though their thinking is deep the picture is hardly holistic. But there are some thought provoking insights.

2. **Ascertainable Factors Relating to Judges**

Basically this is what they say.

There are the rules which govern a fact situation. A Judge may have a hunch of these rules which are really word-formulae and these word-formulae determine the way in which he manipulates them and guides the logic of justifying his conclusion of the rules on the fact situation before him especially where the rules come up for the first time for application. The Judge decides and pronounces a decision but he is a person with human responses and we need to be aware of those responses to decide how likely he is to come up with such and such a decision.

The realists' approach is highly empirical. They say that the decision of Judges is the product of ascertainable factors. Included amongst these are their personalities, their social environment, the economic conditions in which they have been brought up, business interests, trends and movements of thought, emotions, psychology and so forth. I think that in the context of Malaysia one has also to factor in the university the Judges had attended and in some sense their cultural and religious background.

I must stress that most of the observations I will be making are descriptive of experience and are not borne out by a statistical study and they, I must say, are observations that some of my former colleagues on the bench had also made and probably subscribe to even now.

I would suggest as I did whenever I had a trial to attend to as a private lawyer, a federal counsel or D.P.P that you sit in the court of the Judge you will appear before for one or two days and observe him in action and ask around about how he acts in court and avoid pitfalls others face in his court.

3. Self Evident Matters on Personal Characteristic of Judges

The self evident matters will relate to the nature of the human being that is before you sitting as Judge – bearing in mind the earlier factors I mentioned to you - either a quiet and patient man, or a quick tempered impatient man, a talkative man, a man who manages to steal the limelight a lot of times, a very cautious man who need re-assurances of the principles argued before him and is painstaking in digesting them, a man who is bored and shows it and of course you get the quick one who purports to know all the law that was and what it must be. I think it is the same everywhere in the common law world – idiosyncrasies abound. Many will exhibit combined characteristics. I would hasten to add that I am not suggesting that all the Judges will knowingly make incorrect and unjust decisions - they are there to dispense justice and they all know their decisions are appealable. But having said that you must be aware that findings of

fact are rarely reversed so it pays that your or your client's behavior or lack of a attention has not adversely influenced the Judge to come to such a finding of fact. Of course we can get the dishonest Judge everywhere though I would imagine and we certainly hope such a person is a rare creature in our judicial system.

You would to have to adjust to the temperament of the Judge. I am not in any way suggesting that you be manipulative. More important is to contain your exasperation and anger. Be courteous but firm!

If he is a quiet and patient man don't take advantage of him. He will probably be courteous but at the same time he maybe giving you a lot of leeway to make a fool of yourself. The more you talk the more loopholes you make and the more questions you leave open and unanswered. Be to the point and don't brow beat him – there is a limit to his patience.

If he is quick tempered and impatient – humour him courteously but firmly. Leave the point he does not want you to address him on but come back to it later when a situation in an argument or a provocative aside that you make causes him to backtrack. There was one famous Judge who was quick tempered and impatient much to the bane of all lawyers who appeared before him but most of the lawyers managed to get their main argument through despite an initial stonewall put up by the Judge. But you know he never threatened contempt proceedings. He would raise his voice, he would ridicule

your first argument, he would interrupt you many a time and if he had probably given you a rough time he would invite you for a drink in chambers.

If you have a talkative Judge let him talk – he is probably on track and he is merely drawing from his vast previous experience as counsel or Judge. If he is not on track as shown by what he says you'll be in a position actually to make preparation to meet the points he is troubled about and persuade him to change his views or at least know you don't have a chance in actual fact and rightly so. The trouble is too much talk might make your mind wander and make it dull. Better that than making the Judge your enemy for that day.

On the other hand you might have grave difficulty in dealing with a person who is almost always in the limelight. These are rare Judges just like the quick ones who pontificate and purport to know all the law that was and what it must be. One story that was going round is about a judge notorious for his bad temper and tantrums. One palliative adopted by one lawyer fighting his client's case was to bill his client an extra fee for "pain and suffering". You might well have to resort to that and ask for a yet extra fee to buy a blanket and a pillow in case you have to spend time out of the office and court in his Majesty's Hotel! It is unlikely in our present climate you would ask for the extra extra fee.

You know, in England, I think it was Lord Denning who made the comment that some Judges usually suffered from "judgeditis" for a while after appointment. Over here we

have the same problem but unfortunately, for some, instead of the disease clearing up it persists for a while. Judgeditis is a disease suffered by a Judge of overwhelming confidence trusted up by a high sense of superiority and imbued with demi-god qualities. One might say, such a Judge's word is law written in stone and is never to be challenged and his power to punish for breach of his word or for insult to his persona is awesome. No doubt it is punishable with an earthly fine or imprisonment or with a volley of scintillatingly brilliant language and a masterful exposition of the law. And even a brave heart would wish the floor to open up and let him drop to the floor below.

You don't have to take insults from either Judge. I think you have to stand firm in whatever argument you believe in and can support. Don't be intimidated. You give in, you are taken advantage of. If a Judge is raving and ranting at you, tell him in the coolest voice – do not raise your voice - that you don't understand why he is shouting at you – he will deny he is shouting at you but you will notice his voice will have dropped an octave or two. Calmly tell him in the politest of terms that you would wish to put across a point which up to now you have not be able to do. Appeal to his fairness as a Judge. I have seen and heard about experienced and senior lawyers reacting coolly and they get heard or at least the Judge backs down from his heckling. It is unlikely in the present day climate you would be cited for contempt. This bring me to the next point – it is always good to give a written submission - not too brief and not too long – containing all your salient points and the case law which you should submit to the difficult Judge as part of your submissions. This is also useful for the Judge who appears bored or distracted and

does not appear to be taking down notes. And it is equally useful, especially useful, for the quiet and cautious Judge.

After all said and done, your Judge will have to make up his mind. Unless he is really perverse he would have to read the notes of proceedings normally in his indecipherable writing (even to himself) if he has taken down any notes. He would need to refresh his mind or take up an argument which he has missed writing down. Don't forget he is not going to give his decision the same day or the next day unless it is on a simple matter. In the meantime he is going to hear cases and he needs his notes and your notes on the case to refresh his crowded memory. And if you should lose the case and the Judge had not considered the related point and you have put up a written submission case that written submission forms part of the appeal record and can be potent for you. Keep your written submission short and simple. Right at the beginning tell the Judge what you intend to discuss in your submission itemizing them with sensible captions and then proceeding to elaborate your submission under each caption. Avoid clutter.

4. Self Evident Matters on What all Judges Expect of Lawyers

Other self evident matters relate to attendance in court, how you dress, how you address the Judge, how you keep pace with the Judge. No Judge likes to be left waiting for a lawyer more so if the lawyer is a junior one. Be punctual, get a place at your table – pass your name to the court interpreter so that he or she can give the correct spelling of your name to the Judge – Indian names are always very difficult to spell and

don't irritate the Judge by his having to call out to you to spell your name. The next thing that the Judge notes about you – if you are in open court – will be your appearance. Honestly, a man with an unshaven face or uncombed hair or an untidy woman would not strike the Judge that the lawyer before him has a tidy mind. While a robe frayed at the edges will show a man of seniority and probably learning, wearing a dirty wing collar and crumpled and yellowed wings (bibs) hardly shows a tidy mind.

Please remember all judges without fail are particular about how you dress. If you appear in chambers again arrive early and be neat in appearance. Don't use heavy perfume, make sure your coat, blouse or shirt or your person does not exude body odour. In the confining area of an air-conditioned room not only the Judge but your opponent will have to tolerate the oppressive atmosphere which you might not be aware of and you would not want the Judge to miss a point or two with his thinking how best he can end the proceedings quickly!

Now while the Judge is talking do not interrupt - let him finish and then begin with what you have to say. If the Judge is a talkative one and he puts up a point with which you agree nod your agreement and gently interpose, "If I may continue on (this point) (the next point)"

Unfortunately our court system still compels the Judge to take down notes of the proceedings. For young lawyers please let the Judge finish what he is taking down before your next question to your witness or your next point of submission. Watch his

head – when he has finished he would lift it – give a little pause and let him get his equilibrium – and then continue.

5. **Misleading a Judge**

You will be surprised how often this happens – on the sworn facts in the affidavits, in the adduced evidence of witnesses, in submissions. Once found out you are doomed if you appear before the same Judge again and before you know you would be quite well known to other Judges especially those on the same floor as the affected Judge or to Judges who are his close friends.

Now, you cite case law on a matter that has a rival decision which you fail to disclose or which you know has been overruled and you learned opponent is not aware of it. If the Judge is diligent who does further research and he discovers what you have done woe betide you. It is likely you won't be trusted in future appearances. Some senior lawyers have done that and many Judges are really wary of them.

Then you have the case of the quoting and the reading of a passage of a Judge from a case- I am not exaggerating – this has happened often – relating to the arguments which lead to a principle which you espouse and then stopping short of the opposite view which the Judge in the case cited in fact takes. Unfortunately a busy Judge does not normally go further than the quote especially when the quote is highlighted. But you know some Judges do read further and when the lawyer is found out of course the

lawyer will make clucking sounds of apology for having misread the passage. You will be surprised how many lawyers have tried that trick, some of them senior and previously respected. I remember when I was in the Court of Appeal of being warned of certain senior lawyers and you know the Judges became unduly wary of the lawyer when he or someone from firm appears for a case although no deception was practiced for that particular case and that is a terrible disadvantage to the client whose case is on appeal.

6. Appeal Courts

You could have an appeal from the Subordinate Court to the High Court or you could have a case before the Court of Appeal or the Federal Court.

You should know that in your appeal your case is not the only appeal case before the court. You should know your Judge will have to read several appeal files for that day. It is no easy task being a Judge. The amount of work is tremendous. Most Judges bring home files. Most write their judgments at home. There are no real weekends for him to enjoy. So make things easy for him. Include an English translation of at least the memorandum or petition of appeal. In the Court of Appeal and Federal Court try to get translations of as many relevant documents especially the affidavits and pleadings and do get the judgement, if in Malay, translated into English. I can tell you that most of the judges especially those in their 50s read and think in English. Help yourself by helping the Judge understand the case before him. Don't let the Judge pick up on something which he has misunderstood and making it the main stay of his judgement. Always give

a brief written submission in clear narrative form – Denning like – in English and avoid clutter. Your affidavits should also avoid clutter.

If you find in the Court of Appeal or Federal Court a difficult Judge in the panel especially if he is the presiding Judge catch the eye of another Judge who by his body language shows that he disagree with that Judge and try to focus on getting his full attention and his verbal intervention on your side. You may swing the reluctant judge to your point of view.

All the while I have been talking about knowing the weaknesses of a system that you should know. Knowing these weaknesses will allow you to plan how to appear and take advantage of procedures properly.

Remember Judges are human beings with human frailties and they do strive to be just though one or two may some suffer from judgeditis and overreach themselves. So approach all Judges with an understanding of the factors that make them what they are and try to do the best for your client. Most of the times provided your behave you should have no problem.

Enough is enough. And I must come to a end. Hope I have not bored you.

K.C. Vohrah

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