

THE IMPOSITION OF FINES BY THE LAW ENFORCEMENT AGENCIES IN MALAYSIA: A VIOLATION OF THE RULE OF LAW

IBRAHIM DANJUMA

PhD Student, Faculty of Law, University
Kebangsaan Malaysia and a Lecturer,
Faculty of Law, Bauchi State University Gadau, Nigeria
Email: idanjuma27@gmail.com

ROHAIDA NORDIN

Faculty of Law, University Kebangsaan Malaysia.
Email: rohaidanordin@ukm.edu.my

ABSTRACT

The right to a fair hearing and the presumption of innocence are essential elements of the rule of law and shields for the proper adjudication of criminal cases. They are ultimate and collectively recognized human rights, cherished under various international, regional and domestic laws. Malaysia has not expressly incorporated the right to fair hearing and the right to presumption of innocence under the Federal Constitution, but courts in their judicial activism express that “law” as contained in Articles 5 and 8(1) of the Federal Constitution do not only include substantive law but also procedures established by law. Therefore, the combined effect of Articles 5 and 8(1) of the Malaysian Federal Constitution construed to incorporate and ensure procedural fairness wherever a person’s rights or livelihood are adversely affected by a decision maker. However, the law enforcement agencies in Malaysia impose fines on law offenders as part of their roles toward maintaining law and order, preventing crime and protecting the lives and properties. The methodology employed in this study is evaluative and exploratory doctrinal legal research. Using an evaluative and exploratory legal research as the methodology, this article discusses the laws regulating the imposition of fines in Malaysia and instances where law enforcement agencies impose fines on the offenders. Secondly, it examines the scope and the application of right to fair hearing and the presumption of innocence under international law as compared to the Malaysian laws. Lastly, this article identifies how far does the imposition of a fine by the law enforcement agencies in Malaysia tantamount to a potential threat to human rights.

Key words: Fines, Law Enforcement Agencies, Violation, Human Rights, Malaysia.

Introduction

The right to a fair hearing and the presumption of innocence are essential elements of the rule of law and shields for the proper adjudication of criminal cases. They are ultimate and collectively recognized human rights, cherished under various international law instruments such as the United Nations Universal Declaration on Human Rights (UDHR), the United Nations International Covenant on Civil and Political Rights (ICCPR) and other regionals instruments.

Malaysia as a sovereign country, and a party to a number of vital international humanitarian law treaties, including the 1949 Geneva Conventions and the Additional Protocols of 1977. It has ratified only three of the key international human rights law instruments, and they are; Convention on the Elimination of All Forms of Discrimination against Women of 1979, the Convention on the Rights of the Child 1989 and few years back ratified the Convention on the Rights of Persons with Disabilities of 2006.¹ Malaysia is party to the most important conventions on terrorism, but it has assented neither to the main treaties dealing with refugees nor to the Rome Statute of the International Criminal Court.²

Malaysia has not expressly incorporated the right to fair hearing and the right to presumption of innocence under the Federal Constitution, but courts in their judicial activism express that “law” as contained in Articles 5 and 8(1) of the Federal Constitution do not only include substantive law but also procedures established by law.³ Therefore, the combined effect of Articles 5 and 8(1) of the Malaysian Federal Constitution construed to incorporate and ensure procedural fairness wherever a person’s rights or livelihood are adversely affected by the decision maker law.⁴

The law enforcement agencies in Malaysia play a vital role toward maintaining law and order, apprehending offenders of the law to face justice, preventing crime and protecting the lives and properties. It has been the practice that the law enforcement agencies in Malaysia like Police, Immigration and custom officers use to fine traffic offenders, non-citizens for overstaying or delay in submitting their visa application, travellers for not declaring to the custom what was in his/her possession. These people

¹ www.geneva-academy accessed on 10th November, 2015.

² Ibid.

³ *Raja Abdul Malek Muzaffar v. Setiausaha Suruhanjaya Pasukan Polis & Ors* (1995) 1 MLJ 308

⁴ *R Rama Chandran v. The Industrial Court of Malaysia & Anor.* [1997] 1 MLJ 145

that are being fined by the law enforcement agencies were not given a fair hearing so as to express or to state their reason(s) for committing such an act or to raise any defence that will exonerate or mitigate the punishment. More so, their right of presumption of innocence until proved guilty before a court of law or tribunal has been curtailed.

For instance, a situation may arise whereby a motorist may be sick or forced by nature to park in order to seek medical attention in a place where parking is not allowed, or a car may be stolen by thieves and along the line, something may happen or they may decide to leave the car in a place where it is not allow to park. Also, motorists are obliged to on double signal in a place where it is not allowed to park, but perhaps the traffic indicator after it has been on may developed a mechanical problem. Likewise, a motorist while driving in a place where he is not supposed to drive beyond a certain limit, still the speed meter may co-incident developed a mechanical problem or chased by armed robbers. All these situations required explanation and may serve as a defence to the offender under the law.

Meanwhile, on the part of the immigration, international student may submit his passport to visa unit in his/her university, but unfortunately for one reason or the other and the reason best known to the visa unit, they may not submit the passport on time. At times, until after the expiration of the visa pass or when the visa is about to expire, the immigration may fine the student for late submission or overstay while the fault was not from the student.

In another case, a custom officer may fine a traveller for not disclosing to them what was in his possession at the arrival point into Malaysia, especially where the item is contraband to import or bring it into the country without paying custom tax.

This study firstly, discusses concisely about the laws regulating the imposition of fines in Malaysia. Secondly, examines the instances where law enforcement agencies enforce fines on the offenders, and thirdly, the scope and the application of right to a fair hearing and the presumption of innocence under international law as compared to Malaysia. Lastly, to identify how far does the imposition of a fine by the law enforcement agencies could be a potential for a human rights violation?

Laws And The Agencies Involved In Imposing Fines In Malaysia

Section 57 of the Immigration Act of Malaysia provides that any person guilty of an offence under the Act which there is no specific penalty to that effect, on conviction, be liable to a fine not beyond ten thousand ringgit or imprisonment to a term not above five years or to both.⁵ The Act further provides in section 58 that session courts and first class magistrate court should have the jurisdiction to try the offences and no charge should be filed in court without the consent of the public prosecutor. Additionally, under section 54 of the Act, the Minister is empowered to make regulations on many issues which among others include; prescribing a procedure to be followed by the authorities in performing their functions, prescribing fees and other charges, offences, offences to be compounded, amount to collect, the person to compound the offences and others. An Immigration officer or any person prescribed by the regulations with the consent of the public prosecutor under section 58A of the Act may compound any compoundable offence prescribed in the regulations by accepting certain amount of money as directed from any person who reasonably suspected of having committed an offence under the Act.

The Customs Act of Malaysia of 1967 regards any incorrect or untrue declarations, refusal to make a declaration and falsifying any documents as an offence, which shall on conviction be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment not exceeding 5 years or both.⁶ It is also an offence where a person omitted or neglected to comply with, and every act done or attempted to be done contrary to the provisions of Customs Act, or any breach of the conditions and boundaries subject to, shall be an offence and in respect of any such offence for which no penalty is expressly provided, the offender shall be liable to a fine of not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding five years or to both.⁷ The first class Magistrate Courts shall have jurisdiction to try any offence under the Act and to award the full punishment for any such offences.⁸ Similarly to the Immigration Act, Customs Act also empowered Customs officers to compound offences by accepting certain amount of money from a person who is alleged to have violated any provisions of the Act.⁹

It is an offence under the Land Public Transport Act of Malaysia to unlawfully bring dangerous or offensive goods or luggage into a vehicle or a railway train.¹⁰ More so, it is an offence to enter or leave a railway coach or public service vehicle or tourism vehicle while in motion, travelling irregularly or get into any part of the coach or vehicle not intended to, for the use of the passengers, commit an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit for each offence.¹¹ The Police Officer and Road Transport Officer are empowered by the Land Public Transport Act to investigate and shall have the power to acquire information from a person acquainted with the facts.¹² The Minister has the power to prescribe any offence under the Act to

⁵ Immigration Act of Malaysia 1956/63, Act no. 155

⁶ Section 133(1) a-g of the Customs Act of Malaysia of 1967, Act no.235. See also Sections 135, 136 and 137 of the said Customs Act no. 235 prescribing penalties related to smuggling, assaulting or obstructing Custom officer from exercising his duties and offering of bribe to custom officer.

⁷ Section 138 of the Customs Act of Malaysia of 1967, Act no.235.

⁸ Section 118 of the Customs Act of Malaysia of 1967, Act no.235

⁹ Section 131 of the Customs Act of Malaysia of 1967, Act no.235

¹⁰ Section 198 of the Land Public Transport Act of Malaysia 2010, Act no 715

¹¹ Section 199 of the Land Public Transport Act of Malaysia 2010, Act no 715

¹² Sections 231 & 232 of the Land Public Transport Act of Malaysia 2010, Act no 715

be compounded, make regulations on issuance of license and other issues and the public prosecutor has to be informed before commencing any proceedings under the Act.¹³

A Police officer and Traffic Warden are allowed by the law to arrest without warrant any person who committed an offence against the Road Transport Act and they are also empowered together with Road Transport Officer to conduct an investigation and to request for an information from the person who is acquainted with the facts and circumstances of the case under investigation.¹⁴ The first class Magistrate Courts shall have jurisdiction to try any offence under this Act and to award the full punishment for any such offence.¹⁵ Any person who without lawful excuse or proof which shall on him, refuses or neglects to do anything he is by the Act required him to do, fails to comply with the notice served on him or fails to comply with the any provisions of the Act shall be guilty of an offence.¹⁶ Police officer, Director General of Road Transport Officer and others may in their discretions compound any offence against the Act by collecting from the offender certain amount of money as fine.¹⁷

From the laws highlighted above, it is evidently clear that Ministers are empowered to make regulations guiding or regulating a procedure to obtain something and to compound some certain offences by collecting a certain amount of money as a fine from the offender(s). Based on powers of the Ministers to compound offences, it is now the practice of Police Officers, Immigration Officers, Customs Officers and Road Transport Officers to collect fines from the offenders in respect of compoundable offences instead of filing a criminal charge against the offenders before the court of law.

Right To Fair Hearing And Presumption Of Innocence Under International Law

The right to a fair hearing and presumption of innocence lies at the heart of every democratic society which prides itself on fairness, justice and rule of law.¹⁸ Based on the above premise, there is an expectation that the principle of natural justice will be applied to issues involving the liberty, goods or welfare of a person, especially when they are at stake and the fairness and legality of the judicial process will be measured against those principles.¹⁹

The Magna Carta of 1215 is assumed to be the origin or basis of a variety of rights and privileges enjoyed by everyone, and clause 29 of the Magna Carta brought about the foundation of crucial elements of a fair trial.²⁰ Clause 29 provides:

“No freeman shall be taken, or imprisoned, or be disseised of his freehold, or Liberties, or free customs, or be outlawed, or exile, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.”

Subsequently, the English Bills of Rights of 1689 contained some provisions that had a direct bearing on how the law affected individuals.²¹ The said Bills of Rights echoed that Crown should not arbitrarily suspend or dispense any law or impose unreasonable penalties or impositions unless due process of law making had been observed.²² The Bills provide:

“That the pretended power of suspending the laws or the execution of laws by legal authority [and as it hath been assumed and exercised of late] without the consent of Parliament is illegal...that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted...that jurors which pass upon men in trials for high treason ought to be freeholders [and] that all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.”

In criminal trials, common law has developed a principle on the presumption of innocence upon which any person who is alleged to have committed an offence is innocent until properly proved guilty and the burden is on the prosecution to prove his guilty beyond reasonable doubt.²³

The principles of *Audi Alteram Partem* and *Nemo Judex in Causa Sua* were developed in the nineteen century²⁴ as a guide to trials. The concern of this study is on the first principle that is *Audi Alteram Partem*, meaning “to hear the other side”. The principle is saying further that no one should be convicted or found liable without giving an opportunity of being heard.²⁵ Today, these are

¹³ See Sections 252 & 241 of the Land Public Transport Act of Malaysia 2010, Act no 715

¹⁴ See Sections 112-114 of the Road Transport Act of Malaysia of 1987, Act no. 333.

¹⁵ Section 116A of the Road Transport Act of Malaysia of 1987, Act no. 333.

¹⁶ Section 119 (a-c) of the Road Transport Act of Malaysia of 1987, Act no. 333

¹⁷ Section 120 of the Road Transport Act of Malaysia of 1987, Act no. 333

¹⁸ S. Foster, “*Human Rights and Civil Liberties*”, Second Edition, published by Pearson Education Limited, 2008, pg 245.

¹⁹ *Ibid* at 246

²⁰ Peter Halstead, “*Unlocking Human Rights*” Edited by J. Martin & C. Turner, Published in 2009 by Hodder Education, London, pg.194

²¹ *Ibid* at 195

²² *Ibid*.

²³ *Ibid* at 196

²⁴ *Ibid* 200.

²⁵ *Ibid*.

regarded as rules of procedural fairness which comprises an important component of judicial review and which is another aspect of the individual's right to obtain justice by means of a court hearing when he wishes to challenge a decision of a public body.²⁶

One of the arguments to be considered on the issue of natural justice, is whether the fundamental rights of a person will be affected by a decision of the executive or administrative bodies. It was held in the case of *R. v. Army Board of the Defence Council*,²⁷ where such rights are affected or involved, the common law will be demanding in terms of procedural protection.

The principle underpinning the basis of trial is the right to a fair and public trial, which can be found in a number of international and regional human rights instruments, including Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 35 of the Statute of the International Court of Justice.²⁸ The rule of a fair hearing is not a technical doctrine, but it is one of substance and the question is not whether an injustice has been done because of lack of hearing, but, whether a party is entitled to be heard and given an opportunity of hearing.²⁹ Once an appellate court comes to the conclusion that the party was entitled to be heard before a decision was reached but was not given the opportunity for a hearing, the judgment entered is bound to be set aside.³⁰

Article 6 of the European Convention on Human Rights provides as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law.

In general, the scope of the application of Article 6 of the ECHR applies to all proceedings where it involves civil rights and obligations that are subject to determination or where the applicant is facing criminal charges.³¹ The phrase "civil rights" as contained in Article 6 of ECHR has a conventional meaning and it is related to cover the rights under private law as used in civil law systems.³² The courts now have taken a knee position on the scope of matters that are within the context of civil rights to include; monetary claim against public authorities,³³ land matters,³⁴ and disciplinary proceedings³⁵

It has been decided that public law rights are involved only when they are personal and economic in nature and not on issues that are solely discretionary in nature.³⁶ It is equally important to note that, Article 6 provides a need for any decision making body to be overseen by an impartial and independent body or tribunal established by law.³⁷ When it appears before the court that even if there is little evidence that individual's right or interest has been damaged, the court may rule in favour of the applicant and declared that Article 6 of the ECHR has been infringed.³⁸

In the case of *the Lord Advocate, Petitioner 2007 SLT 849* in Scotland, the court held that the fatal accident inquiries were statutory proceedings *sui generis* and it shall not be treated as civil proceedings, administrative or ordinary actions in relation to awards of expenses. This means that such a case does not have a protection under Article 6 ECHR, being neither a process for determination of civil rights and obligations nor of punishment in respect of a criminal charge. The decision demonstrates the necessity of having a hearing which has a bearing on the way that penalties or punishments may be imposed on individuals if the shield of Art.6 is to be safeguarded.

In determining whether the charge was criminal in nature and falls within the ambit of Article 6 of the ECHR, it was held in the case of *Engel v. Netherlands*³⁹ that three (3) things must be satisfied. The first one is, the offence alleged to have committed must be regarded as an offence under the domestic law. Secondly, the nature of the offence and thirdly the severity of the punishment. In

²⁶ Ibid.

²⁷ *R. v. Army Board of the Defence Council, ex p Anderson* [1991] 3 ALL ER 375

²⁸ An International Bar Association Human Rights Institute Report on Malaysia (2010): the delicate balance between security and due process, A report on the observation of the habeas corpus application of Raja Petra Kamarudin.

²⁹ E.E Sunday (2011), the rule of fair hearing is not a technical doctrine. *Sacha Journal of Human Rights Volume 1* Number 1 (2011); pp. 68- 89.

³⁰ Ibid.

³¹ S. Foster, "Human Rights and Civil Liberties" at pg. 247.

³² P. Leyland & G. Anthony, *Text Book on Administrative Law*, 6th Edition, published by Oxford University Press, 2009, pg. 353.

³³ *Editions Periscope v. France* (1992) 14 EHRR 597

³⁴ *Skarby v. Sweden* (1990) 13 EHRR 90

³⁵ *Le Compte, Van Leuven and De Meyere v. Belgium* (1982) 4 EHRR

³⁶ *Runer Begum v. Tower Hamlets London Borough Council* [2003] 2 AC 430, at 465.

³⁷ P. Leyland & G. Anthony, *Administrative Law* at 378.

³⁸ See *Kingsley v. United Kingdom* (2001) 31 EHRR 13.

³⁹ (1976) 1 EHRR 647.

most cases, the courts are more concerned on the charges and the penalty whether has the elements of a criminal offence.⁴⁰ It was held in the case of *Ozturk v. Turkey*⁴¹ that classifying motor offences as regulatory did not preclude the applicant's right to rely on Article 6 and to be protected from arbitrary fines.

The presumption of innocence is universal, irrespective of the offence charged and the country in which it was allegedly committed. The accused is innocent until proven guilty. Not only does the accused have a right to be treated as being innocent until found guilty, they also have a right to be dealt with fairly and expeditiously throughout the process.⁴² Therefore, it is duty upon the prosecution to notify the accused of the case against him, so that he will get prepare to his available defences and to present his witnesses.⁴³

An Overview Of The Right To Fair Hearing And Presumption Of Innocence Under Malaysian Federal Constitution

As rightly observed in the introductory part of this paper, there are no specific provisions on the right to a fair hearing and the presumption of innocence under the Malaysian Federal Constitution. Despite the above hitches, that does not stop the courts from accommodating the right to fair hearing, presumption of innocence and procedural fairness to be the products of the combined effect of Articles 5 and 8 of the Malaysian Federal Constitution.⁴⁴ It is apparently clear that, decided cases in Malaysia show that the courts are brave, innovative and energetic in interpreting the law liberally and broadly where it involves the fundamental rights of the applicant.⁴⁵

Justice Raja Azlan Shah held in the case of *Lob Kooi Choon*⁴⁶ that the Malaysian Constitution contained three basic concepts and they are rule of law, separation of powers and federalism. The concept of rule of law is the sources of many rights to the accused person standing trial and it has been embodied in part II of the Malaysian Federal Constitution, which not only set out the fundamental liberties but also to protect individual rights by ensuring that the power of the State and its enforcement agencies is not exercise unsteadily and indiscriminately.⁴⁷

Adherence to the principle of rule of law necessitate compliance with the principle of natural justice, including but not limited to right to be heard, the rule against biasness and also right to presumption of innocence.⁴⁸ These rights are guaranteed and protected under Article 5(1) of Malaysian Federal Constitution which provides that no person shall be deprived of his right to life or personal liberty except in accordance with the law and Article 8(1) of the Federal Constitution of Malaysia equally provides that all persons are equal before the law and entitled to equal protection of the law.⁴⁹

At this juncture, it is of great important to share the recent decision of the case of *Fauzilah Saleh*,⁵⁰ on fair hearing in Malaysia. The brief fact of the case was that, the Plaintiff was awarded Master's degree by the Defendant, later she was invited by a committee of inquiry as a witness to give evidence and not to answer accusations against her and based on recommendation of the committee, the Defendant revoked her degree. It was held that the Plaintiff was never afforded with the right to be heard and it has been well established and rooted in the Malaysian public law that before depriving a person rights, he is entitled to be heard, which must be fair or otherwise the decision will be set aside.⁵¹

To What Extent Does The Fine Imposed By The Law Enforcement Agencies In Malaysia Amounts To Violation Of The Rule Of Law?

It is a universal standard in every democratic state that, where a person is alleged to have committed a criminal offence, before his conviction or found liable, he has to be given an opportunity to be heard. The essence of this is to provide an avenue to the alleged offender to express whether he has a defence in the eyes of the law that will exonerate him from the punishment completely or to mitigate the punishment. There is presumption that the alleged offender is innocent until proven guilty by the prosecution.

It is a non-contested fact that in Malaysia, the combined effect of Articles 5 and 8(1) of the Malaysian Federal Constitution construed to incorporate the right to fair hearing and presumption of innocence and ensure procedural fairness wherever a person's rights or livelihood is undesirably affected by a decision maker.

⁴⁰ S. Foster, Human Rights, pg. 248.

⁴¹ (1984) 6 EHRR 409

⁴² A Global Campaigns by Open Society Foundation, Improving Pre-trial Justice (2012): The Roles of Lawyers and Paralegals.

⁴³ Shajeda Akther and Rohaida Nordin (2015), An Analysis of Fair Trial Guarantees at Trial Stage under the ECHR, [2015] LR 211-234.

⁴⁴ S. Thambapillay (2007), "Recent Developments in Judicial Review of Administrative Action in Malaysia: A shift from Grounds based on Common Law Principles to the Federal Constitution", Persidangan Undang-Undang Tuanku Ja'afar 2007, at pg 276

⁴⁵ Ibid at 275.

⁴⁶ *Lob Kooi Choon v. Government of Malaysia* (1977) 2 MLJ 187

⁴⁷ Amer Hamzah Arshad, Rights of Accused Persons; Are Safeguards Being Reduced? The Malaysian Bar, Published in Infoline January/February, 2004, pg 1. Can be access online via <http://www.malaysianbar.org.my>

⁴⁸ Ibid.

⁴⁹ Ibid

⁵⁰ *Fauzilah Saleh v. University Malaysia Terrenggan* [2012] 4 CLJ 601

⁵¹ Ibid.

As realised in this article,⁵² law enforcement agencies in Malaysia are allowed by law to impose fines on the offenders for violating the law. The question to be addressed in the following paragraphs is whether the imposition of such fines by the law enforcement agencies amounted to a violation of the rule of law?

It is a settled law that, where a person alleged that his right to fair hearing and presumption of innocence has been violated, it is duty bound on the adjudicating body to determine whether what transpired between the applicant and the respondent involves civil rights and obligations that are subject to determination or where the applicant is facing criminal charges.⁵³ This article is concerned on the second part of the issues to be determined by the court that is whether the person is facing criminal charges. This is because fines were imposed in Malaysia on those that were alleged to have violated the law.

In determining whether the charge or offence was criminal in nature and entitles the applicant right to a fair hearing, then three (3) must be satisfied. The first one is whether the offence alleged to have been committed is regarded as an offence under the domestic law. Secondly, the nature of the offence and thirdly the severity of the punishment.⁵⁴ In most cases, the courts are more concerned on the charges and the penalty whether has the elements of a criminal offence.⁵⁵ It was held in the case of *Ozturk v. Turkey*⁵⁶ that classifying motor offences as regulatory did not preclude the applicant's right to rely on Article 6 and to be protected from arbitrary fines.

In Malaysia context, fines were imposed on the law offenders by the law enforcement agencies as permitted by the laws and regulations. From the available facts above, it can be argued that the fines impose by the law enforcement agencies on offenders in Malaysia are in respect of criminal offences. This is because it is the law that categorises such an act to be an offence and provide punishment that should be inflicted on the offenders. More so, certain offences attracts fine of twenty thousand ringgit or 5 years imprisonment or both.⁵⁷

Therefore, it can be laudably stated that those that are being fine by the law enforcement agencies in Malaysia for violating a law are entitled to a fair hearing, because the offence alleged to have committed is criminal in nature. And it is the position of the law that any person who is alleged to have committed an offence is entitled to a fair hearing and presume to be innocent until proven guilty.

Another issue to consider is that, the essence of a fair hearing is to allow the offender to ventilate any available defence that is acceptable in the eye of the law that will either exonerate him or mitigate the punishment. In line with that, Malaysian criminal law provides a number of defences to the accused person that will either exonerate him or mitigate the punishment. The available defences for an accused person standing trial include; Defence of Mistake of fact as provided under Section 79 of the Malaysian Penal Code that "nothing is an offence which is done by any person who is justified by law, or who by a reason of mistake of fact and not by a reason of mistake of law in good faith believes himself to be justified by law, in doing it". The motive behind recognising a mistake of fact as a defence is that, if a person as a result of mistake of fact in good faith, believe himself to be bound or justified in doing an act, is not criminally responsible.⁵⁸

Also, it is a defence to an accused person if he can shows that the alleged offence occurred as a result of accident or misfortune, without any criminal knowledge or intention, in doing a lawful act in a lawful manner, by lawful means and by proper caution and care.⁵⁹ This defence was applied in the case of *Ratnam*⁶⁰ where the Court of Criminal Appeal set aside the judgment of the lower court on the ground it convicted the Appellant on the evidence that is solely a defence of accident to the Appellant which the lower court supposed to have acquit him.⁶¹

Under the defence of accident or misfortune stated above, a situation may arise whereby a car may be stolen by thieves and along the line, something may happen or they may decide to leave the car in a place where it is not allowed to park. Then, the law enforcement agencies may fine the owner of the car for illegal parking. While he was not the person that actually committed the offence of illegal parking, even if there is a remedy, he has already been fined. Also, motorists are obliged to on double signal in a place where it is not allowed to park as a sign that they will not stay long. But the traffic indicator after it has been on by the car owner or driver and left to a shop or nearby, it may developed a mechanical problem, which the police or other law enforcement agencies may not realise that and they may clip the fine paper to his car without knowing that he complied with the law. After they might have left, the motorist may get to know that he was fined by law enforcement agencies and there will be no room to explain to them. But if the law enforcement agency draw his attention by calling him that you illegally parked at a place where you are not supposed and you did not comply by switching a double signal. Definitely he will explain to them and to even show them that the traffic light was already on.

Another scenario which may serve as a defence of accident to a motorist is that, while driving in a place where a motorist is not supposed to drive beyond a certain limit, still the speed meter may co-incident developed a mechanical problem to display to him

⁵² Under the heading of Laws and Enforcement Agencies involved in imposing fines in Malaysia.

⁵³ S. Foster, "Human Rights and Civil Liberties" at pg. 247.

⁵⁴ See *Engel v. Netherlands* (1976 1 EHRR 647).

⁵⁵ S. Foster, Human Rights, pg. 248.

⁵⁶ (1984) 6 EHRR 409

⁵⁷ See the discussion under the heading of Laws and Agencies involved in imposing Fines in Malaysia in this Article.

⁵⁸ Stanley Yeo, "Criminal Defences in Malaysian and Singapore" Published Lexis Nexis Malaysia, 2005, pg. 16.

⁵⁹ Section 80 of Malaysian Penal Code of 2006, Act 574.

⁶⁰ *Ratnam v. R* [1937] MLJ 222.

⁶¹ This decision was also applied in the case of *Kong Poh Ing v. PP* [1977] 2 MLJ 199.

certain speed as if he is driving within the average speed permitted or allowed by law without knowing that he has exceeded the speed limit, which he may release letter after he was snapped by a camera for violating speed limit while no room for explanation.

Moreover, with the exception of murder and other offences punishable with death penalty, nothing is an offence which is done by a person who is compelled to do it by threat or duress.⁶² This defence of duress which exonerate an accused person from criminal liability is available to an accused person or offender that was chased by the armed robbers or other criminals that forced him to drive his car beyond speed limit as permitted by law in a place where he is not supposed to do so.

The defence of necessity may avail a motorist offender where he is sick or forced by nature to park in order to seek medical attention in places where parking is not allowed. This is because the Penal Code of Malaysia makes categorically clear that “nothing is an offence merely by reason of its being done with knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property”.⁶³ There is tendency that if he did not park immediately, it may result in causing accident which may consume lives and properties.

The above are some of the defences open to an accused person in a criminal trial which will avail him if he is being heard by the court or tribunal. Therefore, right to fair hearing enables the accused or offender to state his own part of the story in order to determine whether the act he committed has any justification or reason to protect him from being punished.

It is observed that the fine is just like a verdict of the court and not a charge that may warrant admission or denial on the part of the offender. This is because if it is really a charge, there will be a judgment after admission of guilt. But once the offender accepted to pay the fine or paid it, there is no judgment or court’s verdict. Where the offender for instance after being chased by criminals and he exceeded the speed limit or he parked at place that where he is not supposed to answer the call of nature or by necessity, at the trial he cannot provide these evidences so easily as his defences. It is of paramount importance to give him fair hearing at the place where the offence was alleged to have been committed before founding him liable or fine him, in order to justify his act or to provide a defence to the alleged act.

One may argue that the current system of imposing fines on the offenders by the law enforcement agencies forced the offenders with no option rather than to pay the fine. This is because, considering the time to spend at the trial, money to spend in engaging the services of a lawyer and going to court and other issues that may inconvenience the offender. The offender is left with no option than to pay the fine. Thus, something need to be done in order to bring the court closer to the offenders and to determine the case within short possible time.

Conclusion

From the discussion above, it is clearly understood that the law enforcement agencies are empowered by law in Malaysia to impose or collect fines from law offenders. While imposing the fines, the offenders in most cases were not given the right or an opportunity to state their own story as to whether they have justification for committing that act or offence. And to also determine whether they have defence recognised by law that will avail them in mitigating or exonerating them from being punished. Therefore, this act of condemnation or founding liable and imposing fines on the law offenders by the law enforcement agencies in Malaysia is a serious attack on the principle of rule of law that entitles an offender the right to heard and to presume innocent until proved otherwise.

Having determined that, it is recommended that there is need for a mobile court or tribunal that will go along with the law enforcement agencies in order to comply with the rule of law and procedural fairness guaranteed by the law to all the offenders. One of the importance of this mobile court as rightly pointed out by the Chief Justice of India, Mr. Justice Balakrishnan (as then was) during inauguration of mobile court in India in 2007 said, “A judicial system for the masses is a must for the maintenance of rule of law and for safeguarding the democracy, and people generally go to courts to get justice but today with mobile courts, the courts will come to the people”.⁶⁴ The mobile court will serve as an avenue for the offender to bring to its notice of any available defence and to be tried within short possible time.

Before the trial of the offender at the mobile court or tribunal, the law enforcement agencies can ask the offender whether he will bargain with them in order to compound the offence by collecting certain amount as fine or he will prefer his trial before the mobile court or tribunal. If the offender chooses to bargain, then he has waived his right to a fair hearing and presumption of innocent. But where he insisted that he has a justification or defence regarding the alleged offence, then the matter shall proceed to hearing before the mobile court or any tribunal established by law to try such offender.

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⁶² See Section 94 of the Malaysian Penal Code of 2006, Act 574.

⁶³ See Section 81 of the Malaysian Penal Code of 2006, Act 574

⁶⁴ The India’s First Mobile Court Mobile Inaugurated Today, published online on 5th August, 2007 by The Hindu available at <http://www.thehindu.com/todays-paper/indias-first-mobile-court-inaugurated/article1886224.ece> accessed on 12th November, 2015.

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