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## **Development in Child Evidence in Malaysia**

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## DEVELOPMENT OF CHILD EVIDENCE IN MALAYSIA: CHILD ABUSE CASES

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A child witness can either be the victim or a bystander of an offence. In Malaysia, a child witness is presumed not to be a good or reliable witness. In 1960, Thompson CJ made the following statement in *Chao Chong & Ors v PP*<sup>1</sup>:

*'One reason why children's evidence is regarded with suspicion is that there is always the danger that a child may not fully understand the effect of taking an oath. In this country where evidence is taken on affirmation that consideration loses much of its force. Another reason, however, which in this country possesses undiminished force is that it is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the result of observation and the result of imagination.'*

In 1971, section 133A was introduced in the Evidence Act 1950<sup>2</sup>. Section 133A gave way for a child of tender years to give evidence. Section 133A provides that a child of tender years<sup>3</sup> can give unsworn evidence provided that they have enough intelligence for the reception of evidence and understands the duty of speaking the truth. But their evidence is not enough to convict the accused unless they are corroborated by material evidence implicating the accused person.<sup>4</sup>

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<sup>1</sup> [1960] 1 MLJ 238.

<sup>2</sup> PU(A)261/71.

<sup>3</sup> No definition is given in the Evidence Act 1950 of a child of tender years. It is left to the court to use its discretion. The child could be as old as 15 years old or as young as 8. *Arumugam v PP* [1995] 1 CLJ 58, *PP v Mohammad Terang bin Amit* [1991] 3 MLJ 582.

<sup>4</sup> Corroboration means other evidence except those made under 133A, *PP v Mohammad Terang*.



The law relating to child evidence in Malaysia is governed by both the above. If a child gives sworn evidence, there is a need for the judge to give exhaustive warning on the danger of convicting on such uncorroborated evidence. Corroborative evidence generally is evidence which can reasonably confirm the truthfulness of a child's testimony.<sup>5</sup> This governs the common law rule that has since been abolished in England.

Section 133A on the other hand is the same as section 38 of the English Children and Young Persons Act 1933 which has completely been abolished. The abolishment of the corroboration rule in England came in at the height of concerns over child abuse cases<sup>6</sup> and child welfare throughout the 1980's.<sup>7</sup> In 1988, the Criminal Justice Act 1988 of England created a new way of giving evidence via live link for witnesses under the age of 14 years. The provision was created mainly for the purpose of the welfare of the child witness who goes through the stressful and bad experience of giving evidence in court especially in child abuse cases. And in 1999 in England, more and better development was made in the Youth and Criminal Evidence Act 1999.

In Malaysia child abuse was never a social problem until 1991 when the Child Protection Act 1991 was introduced.

### **(i) DEVELOPMENT OF CHILD ABUSE LAW IN MALAYSIA**

The law against cruelty to children in Malaysia was provided for, and a registry record of child abuse and neglect was introduced as far back as 1947. But, all these measures however, did not indicate that child abuse was a social problem that deserved to be addressed by the government. For instance, legislation was not available until recently to protect or support victims of abuse. Fortunately this did not continue.

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<sup>5</sup> Corroboration means independent evidence that implicates the accused by connecting him to the crime. *Chao Chong & Ors v PP*.

<sup>6</sup> Child abuse in this article is used loosely to mean physical sexual, and any kind of abuse on a child.

<sup>7</sup> Child's rights was enhanced by the decision by the decision in Gillick's case [1986] 1 A.C. 112 where the court decided that the child have the right to make her own decision for her own future, and the Cleveland incident where the committee in the Cleveland report recommended to the professionals to listen to children in child abuse cases. Corroboration for unsworn child was abolished by the Criminal Justice Act 1988.



In the 1980's there was growing public concern over child abuse, neglect of children, child labour and other related matters concerning children which was brought to the attention of the public through mass media, seminars and round table discussion. These activities sought to generate consciousness in order to address the growing problems of child abuse. Association such as Suspected Child Abuse and Neglect (SCAN) was set up to support and educate the public of the prevailing problem of child abuse.

Public outcry over child abuse escalated and reached the pinnacle when the death of baby Bala Balasundran was highlighted in the media in 1990. Baby Bala was found dumped in a hospital toilet and died on 15 May 1990 from serious injuries.<sup>8</sup> This was a classic case of child abuse resulting from lack of concern for life. The seriousness of Baby Bala's case caught the government's attention, and in 1991, the Child Protection Act 1991 was passed to ensure the care and protection of children. The Act defined various forms of abuse which included amongst other things, a child who had been or was at substantial risk of being physically or emotionally injured or sexually abused by the guardian.

In 1995, Malaysia ratified the United Nations Convention on the Rights of the Child (CRC). A great deal of time was spent in dialogue on how to implement this treaty in order to protect the position of children. In line with the ratification of the CRC, the Child Act 2001 (2001 Act)<sup>9</sup> was introduced. The 2001 Act gave child abuse a wide ambit under the category of a child in need of care and attention<sup>10</sup>. The 2001 Act provides that once there is reasonable ground to show that a child is abused, the child will be placed in a place of safety.<sup>11</sup> And in August 2002, incest<sup>12</sup> became an offence under section 376A Penal Code (Act 574). Like child abuse, incest was never identified as a

<sup>8</sup> Fatimah Abu Bakar, Role of the Media in Child Protection. Proceedings of the 5<sup>th</sup> National Conference on Child Abuse and Neglect Malaysian Association for the Protection of Children and Malaysian Council for child Welfare.

<sup>9</sup> The Act encompasses three governing pieces of legislation, the Child Protection Act 1991, Women and Girls Protection Act 1973 and the Juvenile Courts Act 1947. With the passing of the 2001 Act the 3 legislations were repealed.

<sup>10</sup> Section 17 Child Act 2001.

<sup>11</sup> Usually children's home run by the Social Welfare Services.

<sup>12</sup> Incest under section 376A, is committed where there is sexual intercourse, for example, between a father and daughter, a mother and son or between a brother and a sister.



social problem in Malaysia historically. The reason behind the introduction was the rampant increase of the number of incest cases reported yearly<sup>13</sup>. Like victims of abuse in the 2001 Act, victim of incest will also be treated the same as any other abused child and be placed in a place of safety.

In January 2003, the Child Protection Unit cum Victim Care Centre run by the Royal Malaysian Police came into operation. Specially trained officers are responsible for the taking and recording victim's statements. These officers are trained in techniques of effective interviews of child victims. Interviews are conducted by police officers from the unit. The use of video techniques is held to reduce the number of interview, which the child undergoes. The Unit was introduced with the purpose of introducing video evidence in court proceedings. Unfortunately special provision for the admissibility of these video have yet to be included in the Evidence Act 1950 and remains inadmissible.

In July 2003, the child victim support service run by the Social Welfare Department came into operation at the Kuala Lumpur court. The service was set up to look into the welfare of child witnesses. Its objective is to reduce the stress and trauma a child goes through when giving evidence. Child support aims to prepare the child before he/she goes to court to testify. It explains to the child the procedure he will have to go through, for example, examination in chief, cross examination, and it lends emotional support to the child and acts as the child's companion through out the proceedings.

Although steps has been taken to protect child victims, but none of those measures discussed address measures for protection of children during trial.

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<sup>13</sup> The Royal Malaysia police recorded 322 cases of incest between 1998 and 1999, and 459 cases between the year 2000 and 2001. Between 1997 and 2000, there was 480 cases of incest involving victims under the age of 19 years.



## (ii) EVIDENCE BY CHILDREN

Stress, trauma and emotional breakdown of child witnesses in sexual abuse have been discussed as far back as 1925, when the Departmental Committee on Sexual Offences Against Young Persons in England<sup>14</sup> reported;

*'We have had many cases brought to our notice in which a child or young person has been overcome with distress or fright in giving evidence at the trial and has broken down or even fainted. The result of this distress has sometimes been that no evidence could be obtained and the case has consequently been lost or has had to be withdrawn.'*<sup>15</sup>

The adversarial system of which insist on live evidence at a trial, examination in chief and cross examination is often stressful for children. Giving evidence against one's own relative or someone you trust or just someone close or known to you in a rape or incest case is distressing indeed. Having to relate experience in a rape to strangers is embarrassing, as well as confusing.

Such strain and difficulty is illustrated in the case of *Yusaini Mat Adam v PP*.<sup>16</sup> The accused in this case was charged with the rape of his step daughter aged 10 years, 8 months. She was 11 years old when she gave evidence. Vohrah J stated some observation made by the trial judge regarding the witness;

*'∴ the girl sometimes cried when she was to relate what had happened, sometimes she turned pale and sometimes she refused to speak and that the court had to adjourn the proceedings several times in order to clear her mind before she testified. The judge also*

<sup>14</sup> Cmnd. 2561, 1925. The Committee was asked to look into the welfare of victim in sexual offence as witnesses in court, and recommend if any changes should be made.

<sup>15</sup> Ibid. para 66.

<sup>16</sup> [1999] 3 MLJ 582.



observed that she seem to be afraid of the deputy public prosecutor, the counsel for the defence and the accused.'

In *Sidek bin Ludan v PP*<sup>17</sup>, a child aged nine years ten months was raped by the accused, his neighbour. The child gave evidence when she was ten years six months old. The trial judge noted that the child was under great strain while giving evidence and whenever she was asked a question or asked to relate the incident between her and her neighbour, she became uneasy and fidgety. On this point the court pointed stated that the child's;

*'... 'gelisah' feeling is quite understandable . It is quite embarrassing for her to expose the sordid rape episode in court.'*<sup>18</sup>

The court observed that the child went through such strain in giving her evidence. The court then held that despite going through the strain and embarrassment, the child had tremendous courage. She was able to give clear accounts of the incident and was able to respond well to cross examination by the defence.

Observations from the cases above shows that the adversarial system puts too much strain on a child in giving live evidence. It also confirms the 1925 Committee Report on Sexual Offences Young Persons Against Young Persons. The judge in *Yusaini bin Mat Adam*<sup>19</sup> observed that;

*'Section 38 of the English Children and Young Persons Act 1933 has been repealed and replaced by some other law and perhaps it is time to study why it was repealed and whether we should do the same to our s 133A of the Evidence Act bearing in mind too, the experience of other Commonwealth countries on the matter of children's evidence in court and also that in our judicial system jury trials have been abolished. In addition, rules relating to corroboration need a re-look and the necessity for the examination procedures of child witnesses to be child-friendly need to be taken into account.'*

<sup>17</sup> [1995] 3 MLJ178.

<sup>18</sup> Ibid. p 184.

<sup>19</sup> Ibid at p 587.



The judge also observed comments made by Andrews and Hirst in their book *Criminal Evidence*;<sup>20</sup>

*'...the child's ordeal as a witness was still made far more difficult than it should have been. Children were usually propelled unprepared and unprotected into intimidating atmosphere of a formal criminal trial....'*

Strain, intimidation, and emotional stress can be eased with a change in procedure which does not at the same time compromise justice. Requirement of corroboration can be dispensed off as there has never been enough proof that children are inherently unreliable witnesses. In fact the Committee on Sexual Offences against Young Persons reported that *'features in the commission of a sexual offence are such that no child could invent them unless he or she had been offended against.'*<sup>21</sup>

In 1972, the Criminal Law Revision Committee<sup>22</sup> in England recommended that the requirement of the oath and corroboration be dispensed off. It was the committee's finding that children are often very observant and, often give very good evidence and that there is no danger in convicting on the uncorroborated evidence of children.<sup>23</sup> Malaysia should seriously consider the abolishment of the corroboration warning, after all jury trial had been abolished almost 9 years ago. Mandatory corroboration should also be removed. Mandatory corroboration has been strictly defined which makes conviction almost impossible in sexual abuse cases as these cases normally occurred in private where corroboration is almost none existence. The case of *PP v Mohammad Terang*<sup>24</sup> clearly illustrates this problem. The accused in this case was charged for the offence of outraging the modesty of three children aged 10 and 12 years old. The accused was a teacher at the school attended by the three children. The problem in this case was that the three children

<sup>20</sup> Ibid at p 587.

<sup>21</sup> Ibid. para 67.

<sup>22</sup> 11<sup>th</sup> Report. Cmnd. 49991 p 1. The committee was set up in 1964 to 'review the law of evidence in criminal cases and to consider whether any changes are desirable in the interest of a fair and efficient administration of justice.

<sup>23</sup> Ibid. para 208, clause 22(1).

<sup>24</sup> [1999] 1 MLJ 154.



gave unsworn evidence. The consequence of the corroboration rule was that they could not corroborate each other as all three witnesses gave unsworn evidence.<sup>25</sup> There was no confirmation of the evidence and the accused was acquitted on two of the charges.

### (iii) EVIDENCE THROUGH LIVE VIDEO OR LIVE LINK

One main feature of the newly passed Criminal Procedure Code (Amendment) Act 2006 is the introduction of the section 272B. The provision allows a witness with leave of court to give evidence through live link or live video link. The provision departs from the tradition rule of the adversarial system.

Section 272B reads,

- (1) *Notwithstanding any other provisions of this code or the Evidence Act 1950, a person, other than the accused, may, with the leave of court, give evidence through video or a live video or live television link in any trial or inquiry, if it is expedient in the interest of justice to do so.*

Although the amendment does not specify the application for child witness, it is a positive move towards improving the procedure for child witnesses with the object of save guarding a child's welfare and their wellbeing throughout the trial. The court has discretion to allow a child witness to give evidence via live link. As discussed above, child witnesses are disadvantaged when giving evidence in court with the fear, anxiety, and stress due to them being examined and asked to recall their bad experiences and being challenged by the defence counsel with intimidating questions and sophisticated language structure which confuses them. What children fear most is a confrontation or facing the accused or the abuser, who in who had over powered them in many aspects of their effort to retaliate.<sup>26</sup>

<sup>25</sup> It was held that the word 'corroboration by some other material evidence' in section 133A means evidence other than evidence admitted by virtue of this section.

<sup>26</sup> Spencer J, Flin R, 'The Evidence of Children' Blackstone1990. p70-72.



Section 272B(3) provides that, the court will not give leave if in their opinion, in doing so, it would be inconsistent with the court's duty to ensure that the proceedings are conducted fairly to the parties to the proceedings. Meaning, the court has a duty to ensure that the system operate fairly to not only the child witness, but also to the prosecution and the accused. The provision is vague and court will have to have some guide lines in making its decision, this is important as it departs from the tradition of the adversarial system of face to face confrontation by the accused.

In making its' decision, the court can use as guidelines experiences from other jurisdictions. The English courts, as far back as in 1919 has departed from the tradition of confrontation. In the case of *Smellie*<sup>27</sup> decided that if a judge considers that the presences of the accused will intimidate the witness, the for the ends of justice, the judge will not hesitate in removing the accused from the presence of the witness. In *R v XYZ*,<sup>28</sup> it was held that at times, the necessity of trying to ensure that a child is able to give evidence may outweigh the prejudice towards the accused person in departing from the traditional confrontation system. This case was a case of child abuse where the judge gave permission for the child to give evidence behind a screen. This was objected by the defence counsel on the ground that the use of the screen was unfair and prejudicial which may influence the jury into believing they had already threatened and intimidated the child in some way. The court in making its decision took judicial notice that children in sexual abuse cases had been reluctant to give evidence and that in some cases they breakdown while giving evidence. The court also took into consideration the social services view that some children would be affected if they saw the alleged perpetrator. The court then went on to warn the jury not to allow the presence of the screen to influence their decision. In Malaysia, following Vohrah J's observation in *Yusaini*, that since jury trials have been abolished, there is no danger of the court misunderstanding the purpose of a screen or the live link.

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<sup>27</sup> [1919] Cr App.R 128.

<sup>28</sup> [1989] 91 Cr App. R 36,



In the United States, the right to confront by the accused is protected by the 6<sup>th</sup> Amendment to the Constitution of the United States. In *Maryland v Craig*,<sup>29</sup> the Supreme Court held that the public interest of the wellbeing of a child witness in an abuse case maybe sufficient to outweigh the accused's right to face to face confrontation. The court went on to say that the right to confront does not only mean face to face confrontation. It also means right to examine the witness, giving evidence under oath, and observation of the demeanor of the witness by the trier of fact. If all this have been fulfilled, the accused position has not been prejudiced.

Public policy in ensuring a child's physical and psychological wellbeing has been used by the courts in both jurisdictions above to depart from the tradition of confrontation. Courts in Malaysia can follow suit in realizing the importance of protecting child witnesses from the trauma of giving evidence in court.

### Conclusion

Much has been said about child protection in Malaysia which includes protecting child witnesses from the stress of giving evidence in court. Section 272B Criminal Procedure Code (Amendment) Act 2006 is no doubt a long awaited development. But more improvement is needed to protect the wellbeing of child witnesses. The corroboration rule need to be looked into to avoid the case of *Mohammad Terang* from recurring. The implementation of video evidence should be speed up since the Child Protection Unit has long been set up to accommodate the use of video technology in court. The rule of similar fact evidence should also be more accommodating in child abuse cases. After all the view of Thompson J in *Chao Chong & Ors v PP* have long been refuted by the English and United States system which have abolished the corroboration requirement.

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<sup>29</sup> 497 U.S 836.



