

## **SEXUAL HARASSMENT AT THE WORKPLACE AND THE ISSUE OF CORROBORATION EVIDENCE**

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### **Abstract**

Sexual harassment at the workplace is a hazard which existed in a workplace and which can happen not only in Malaysia, but in all countries in all over the world. The effect of it is very serious as it reduces the quality of working life, jeopardizes the well-being of both hard working men and women who try to make a honest living, and as well as imposes financial burden on firms and organizations where the offence took place. For these reasons, sexual harassment at the workplace has been seen by many as a nuisance which need to be stop immediately. In some jurisdiction, the matter has been regarded as a civil issue and in some jurisdiction the matter has been regarded as a crime. As such, there are various laws currently being used to address the issue of sexual harassment at the workplace like specific sexual harassment law, equality and sex discrimination law, human rights law, labour law, tort law, and criminal law. Some countries like Malaysia has taken initiative by creating a special code of practice as well as strengthening their administrative law to deal with the issue effectively and efficiently at both public and private sectors. However by taking into consideration the nature of sexual harassment which is complex and sensitive in nature, it will be very difficult especially for the effecting parties to prove their allegation. There are only few cases up to today in Malaysia where the issue concerning sexual harassment at the workplace able to be prove and succeed in the court of law. Many pointing finger at the well-established requirement for having corroboration evidence rule as a reason for their failure to succeed in their legal claim. Due to this reason, there are few experts in the field as well non-governmental organizations (NGOs) in country calling for some relaxation over the corroboration evidence rule on the issue and even proposing for its immediate abolishment. As such, it is the aim of the research to examine the issue concerning sexual harassment at the workplace in the country as well as the requirement of having corroboration evidence in substantiating the allegation as provided under the Malaysian Evidence Act 1950 (Act 56) and decided cases. It should be stress that the main objective of this research is to identify and highlights the application of the corroboration rule in several decided cases in the country and the importance of having corroboration evidence in order for the effected party to build up their case for their allegation.

**Keywords:** Sexual, Harassment, Corroboration, Evidence

## 1. INTRODUCTION

It is very difficult for us to locate the true meaning of the word sexual harassment at the workplace. Up to today, there is single acceptable universal agreement on the definition of sexual harassment at the workplace. However, based on many discussions as well as reference which being made to rules and regulations from many jurisdictions including in Malaysia pertaining to the matter, sexual harassment at the workplace can be understood and define as any sexual in nature statement or act which is unwanted or unwelcome committed by the perpetrator towards the victim and which occur in a workplace. (Ahmad Shamsul Abd. Aziz, p. 19 & Catherine A. MacKinnon, pp. 25 - 47). To establish sexual harassment at the workplace in terms of specific acts or behavior is highly difficult because the acts of sexual harassment at the workplace are hard to be measure (Ashgar Ali Ali Mohamed, p. 1). Therefore, there is a need to look at the context, the surrounding circumstances which include the victims' upbringing, culture as well as religious sensitivities before any final decision is to be given on the allegation which been put forward. Every nation have their own way and interpretation on establishing the allegation of sexual harassment at the workplace. What is really required here is that the act or conduct of the perpetrator must be offensive which would effect the state and mind of the victim, it must relate to sexual matter and it must happen within the workplace. The following are some cases in which the courts have held the conduct to amount to sexual harassment in the workplace: Physically molesting staff by touching parts of their bodies, peeping into toilet, making suggestive comments as a reward for arranging transfer, promotion with increase in salary, suggestion of a lewd and sexual nature, soliciting clients for sexual favours, and others. With the coming of new communications technologies, sexual harassment at the workplace may also take place through phone, Short Message Service (SMS), Multimedia Messaging Service (MMS), Internet Electronic Mail (E-Mail), Facebook, Twitter, WhatsApp, Instagram or other medium. (Tengku Dato' Omar Tengku Bot & Maimunah Aminuddin, pp. 35 - 47)

In Malaysia, any detail reference towards the definition of sexual harassment at the workplace can be refer to the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (hereinafter referred to as "the Code"). The state - drafted Code was introduced by the Malaysian Ministry of Human Resources in August 17, 1999. (New Straits Times (Malaysia), 18 August, 1999). The aim of the Code is to ensure that sexual harassment at the workplace does not occur and, if it does occur, adequate procedures are available to deal with the problem and prevent its recurrent. The introduction of the Code has shown the seriousness on the part of the government in dealing with the issue of sexual harassment at the workplace in the country.

According to the Code, sexual harassment at the workplace has been define as any unwanted conduct of a sexual nature having the effect of verbal (Paragraph 8 (i) of the Code give the examples of offensive or suggestive remarks, comments, jokes, jesting, kidding, sounds, and questioning); non-verbal (Paragraph 8 (ii) of the Code give the examples of leering or ogling with suggestive overtones, licking lips or holding or eating food provocatively, hand signal or sign language denoting sexual activity, and persistent flirting); visual (Paragraph 8 (iii) of the Code give the examples of showing pornographic materials, drawing sex – based sketches or writing se based letters, and sexual exposure); psychological (Paragraph 8 (iii) of the Code give the examples of repeated unwanted social invitations, relentless proposals for dates or physical intimacy); and physical harassment (Paragraph 8 (iii) of the Code give the examples of inappropriate touching, patting, pinching, stroking, brushing up against the body, hugging, kissing, fondling, and sexual assault) that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her or his employment (See paragraph 4 (i) of the Code) or as an offence or humiliation, or a threat to her or his wellbeing, but has no direct link to her or his employment (See paragraph 4 (ii) of the Code).

From this definition, it is clear that the Code prohibits both *quid pro quo* and hostile working environment harassment which is unwanted and unwelcome to the recipient in the workplace. The unwanted nature of sexual harassment at the workplace distinguishes it from behaviour that is welcome and mutual. Sexual attention becomes sexual harassment if the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment and/or the recipient has made it clear that the behaviour is considered offensive and/or the perpetrator should have known that the behaviour is regarded as unacceptable. The Code has also included an extensive definition of the work workplace. Paragraph 6 of the Code states that sexual harassment in the workplace includes any employment-related sexual harassment occurring outside the workplace as a result of employment responsibilities or employment relationship. Situations under which such employment-related sexual harassment may take place includes, but is not

limited to: (i) at work-related social functions; (ii) in the course of work assignments outside the workplace; (iii) at work-related conferences or training sessions; (iv) during work-related travel; (v) over the phone; and (vi) through electronic media.

It must be highlighted clearly here that currently in Malaysia there is still no specific legislation the address the issue pertaining to sexual harassment at the workplace. (Cecilia Ng, Zanariah Mohd Nor, & Maria Chin Abdullah, p. 42). In absence of specific legislation on the matter, the issue relating to sexual harassment at the workplace can be consider under various types of legislations which include the criminal legislation like the Malaysian Penal Code (Act 574). The country labour laws like the Employment Act 1955 (Act 265), Industrial Relations Act 1967 (Act 177) and Occupational Safety & Health Act 1994 (Act 514). As well administrative laws like the Code of Conduct of the Public Officers (Conduct and Discipline) Regulations 1993 and the government Circular Guidelines for Handling Sexual Harassment in the Workplace among the public services department, No. 22 (2005). (News Sunday Times (Malaysia), 20 November, 2005). (Siti Zaharah Jamaluddin, 2000, pp. 153 – 177, Sharifah Suhanah Syed Ahmad, 2012, pp. 179 – 196, & Ashgar Ali Ali Mohamed, 2014, pp. 35 – 74). Since the main object of this paper is to examine the issue concerning corroboration evidence in establishing the allegation of sexual harassment at the workplace, the focus will be given more on the issue pertaining to corroboration evidence and not on the mentioned legislation addressing the issue.

## **2. PROVING THE ALLEGATION OF SEXUAL HARASSMENT AT THE WORKPLACE**

The law pertaining to evidence in Malaysia is regulated by the Malaysian Evidence Act of 1950 (Act 56). The Evidence Act 1950 is the main source of the law of evidence in Malaysia. The Act is modeled and based on the Indian Evidence Act of 1872 drafted by Sir James Stephen. The Evidence Act 1950 is modeled on the Indian Evidence Act which is a codified form of English Law (Augustine Paul, pp. 3 - 4). Per Thomson CJ (as he then was) in *Looi Wooi Saik v PP* [1962] MLJ 337, 339 (CA). stated: "In this country the question is governed by the terms of the Evidence Ordinance which is the same as the Indian Evidence Act...It is generally accepted that the Indian Act was drafted by Sir James Stephen in 1872 with the intention of stating in a codified form of English law relating to evidence as it stood at that date". The Indian Evidence Act which also is based on the English law of evidence in the late 19<sup>TH</sup> century with certain modifications, which were made to suit the local circumstances in India. As result of several amendments, the local Malaysian Evidence Act has certain provisions which are not found in the Indian Evidence Act 1872.

Generally, the Malaysian Evidence Act 1950 (Act 56) is divided into the following sub-headings namely, Burden and Standard of Proof, Circumstantial Evidence, Prima Facie, General Relevancy, Specific Relevancy – Hearsay, Specific Relevancy - Similar Fact Evidence, Specific Relevancy - Character Evidence, Specific Relevancy - Opinion Evidence, Documentary Evidence, Presumptions, Witnesses - Competency, Compellability and Privileged, Witnesses – Corroboration, Witnesses – Examination, and Judicial Notice.

It is important for us to note that the law of evidence in the country applies to both civil and criminal cases and regulates the proving facts in judicial proceedings. (See the case of *Re Loh Kah Kheng* (1990) 2 MLJ 126). Section 2 of the Evidence Act 1950 (Act 56) also provides on the extent of applicability of the Act. The wording of the Section 2 of the Evidence Act 1950 clearly states: "This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator".

When its come to the issue of sexual harassment at the workplace, regardless where the case been push forward either under the criminal law, labour law or administrative law, there is always difficulties especially on the part of the victim to establish their cases. This happen because the fact that many of the offence involving sexual harassment at the workplace occur in private places without the present of any witnesses, CCTV or other form of evidence. If the victim lodge a police report, the case will be investigated under the country Penal Code. If the authorities find there is potential case to be brought, the matter will be tried in the ordinary open court which will be subjected to the Evidence Act 1950 (Act 56). Thus requesting the victim to prove their cases on the quantum of beyond reasonable of doubt which require high standard of prove.

Similarly if the matter been push forward either under labour law or administrative law, though Evidence Act 1950 is not mandatory to be follow here and though the quantum of proof is lower as compare to criminal

cases namely on the quantum of balance of probabilities, convincing evidence must be put forward to establish the case accordingly.

### 3. THE REQUIREMENT OF CORROBORATION EVIDENCE FOR SEXUAL OFFENCES CASES

The concept of sexual harassment has both colloquial and legal meanings. Many more people have been reported to have experienced sexual harassment at the workplace than have a solid legal case against the perpetrator. Due to the sensitive nature of the offence, allegation of sexual harassment at the workplace, if established, can cause enormous embarrassment and damage on the social status and reputation of both the victim as well as the perpetrator. Therefore, there must be sufficient evidence to support the allegation on the matter. In this regard, under rules of evidence, corroboration plays a vital role to ensure that any allegation made towards the accused on the issue is sufficiently and satisfactorily been prove.

Corroboration means to strengthen or support the existing credible evidence with other evidence in order to make the existing credible evidence more reliable, certain and convincing. (Abu Bakar Munir, pp. 1- 5). It must be noted that the question of corroboration does not arise unless the evidence of the witness requiring corroboration is itself credible. In this regard Lord Hailsham has expressed a similar opinion in the English House of Lord's case of *DPP v Kilbourne* [1973] 1 All ER 440 when he said that "Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanity the question of his needing, or being capable of giving, corroboration does not arise".

Thus the essence of corroborative evidence is where one creditworthy witness confirms what another creditworthy witness. In a case involving sexual offences including sexual harassment in the workplace, a conviction based on uncorroborated evidence is not illegal. But the rule of practice regulates the manner in which uncorroborated evidence is to be treated, that is to say, the judge must warn himself of the dangers of convicting a person on such evidence. In saying that the warning must at least appear in the judgment or grounds of decision of the trial court though no particular form of words need be used. Thomson LP in speaking for the Federal Court in *Din v PP* [1964] MLJ 300 that the need for corroboration in such cases springs not from the nature of the witness but from the nature of the offence and added if, however, she complains of having been raped then both prudence and practice demand that her evidence should be corroborated. However his Lordship went on to say that though it might be dangerous to find the factum of rape on the uncorroborated evidence of the prosecutrix, once that factum of rape is established there seems to be nothing left to support the view that her identification of the assailant calls for corroboration any more than it would in relation to any other type of offence.

The very basis of the corroboration is to induce belief in evidence that might otherwise be regarded as untrustworthy. In *Sitt Tatt Bhd v Flora Gnanapragasam* [2002] 1 ILR 98; [2005] 7 CLJ 522, the claimant, considered herself constructively dismissed when her complaint to the higher management of the company of several incidents of sexual harassment and annoyance, went unheeded. The Industrial Court held among others, that the burden imposed on the claimant to prove the allegation is not as heavy and onerous as that required in a criminal trial on sexual offences such as rape or attempted rape or other forms of sexual assault that require independent corroboration. If the evidence of the complainant had been riddled with inconsistencies and contradictions, it would not be prudent to rely solely on her evidence unless it is corroborated. In *S. Sivalingam v Northern Telekom Industries Sdn. Bhd. Penang* [1980] 1 ILR 96, the claimant was alleged to have molested an amah in the lady's toilet on a number of occasions. The amah did not make a report earlier for fear of being dismissed by the claimant as he claimed to be her boss. During the inquiry in the office, the claimant stated that he denied having molested the amah. He stated that he was given a resignation letter to sign and when he did not sign it, he was given a termination letter. The Industrial Court held that the dismissal of the claimant was unfair and without just cause and the court awards compensation in lieu of re-instatement to the claimant. Amongst the reason behind such decision was that involving the issue of corroboration. The Industrial Court stated that the nature of the allegation required corroborative evidence. It was an allegation easy to make but difficult to rebut and cast a stigma on the person accused. It is therefore a matter of prudence that the Court should require corroborative evidence. In the absence of such, the court rules that the allegation against the claimant has not been proved. In *Varitonix*

(M) *Sdn. Bhd. v R. Thandavanaiker P Raman* [2004] 3 ILR 426 the claimant, a security assistant for the company, was found guilty of sexually harassing a male employee, a storehand on several occasions pursuant to a domestic inquiry. The claimant argued that the domestic inquiry was bias, and that there was a breach of natural justice and lack of evidence regarding the incidents where he had allegedly touched the male employee genitals and rubbed his chest. In dismissing the claim, because of strong evidence against the claimant, the industrial court stated that since the misconduct complained of is sexual in nature the court should look for corroborating evidence of the complainant testimony. To rely on the uncorroborated evidence of the complainant alone would be dangerous and the court should warn itself accordingly. In *Fuchs Petrolube (Malaysia) Sdn. Bhd. v Chan Puck Lin @ Chan Pak Nean* [2003] 3 ILR 845 it was stated by the Industrial Court that an allegation of sexual harassment must be adequately corroborated. To rely on uncorroborated evidence of a complaint will be dangerous.

In general, the Evidence Act 1950 (Act 56) does not apply to the proceeding before the Industrial Court in the country. However, certain fundamental principles of the law of evidence may apply to the facts of the case such as rejecting hearsay evidence, the requirement for supporting or corroborative evidence or calling the makers of documents to tender such documents which are in his possess, among others, are necessary to be followed in order to enable any court to arrive at a just and fair decision. The matter can be clearly seen in one of the highly celebrated case in the country namely the case of *Jennico Associates Sdn Bhd v Lilian Therera De Costa & Anor* [1998] 3 CLJ 583 the High Court had quashed the Industrial Court's finding of constructive dismissal of a claimant who had alleged sexual harassment in the workplace. Azmel Maamor J stated: "As quite rightly pointed out by the Industrial Court in its award that an allegation of sexual harassment must be adequately corroborated. To rely on the uncorroborated evidence of the complainant alone would be very dangerous to the extent that it would not be prudent to convict merely on an uncorroborated evidence of the complainant. Therefore the evidence of a complainant in a sexual case is quite similar to that of an accomplice. While it would not be unlawful to convict merely on the evidence it is imperative for the court to warn itself of the dangers of convicting an accused person merely on the uncorroborated evidence of an accomplice".

In *Jennico Case* the High Court noted the evidence of a complaint in a sexual case is quite similar to that of an accomplice. It was further stated that if the court were to convict on the uncorroborated evidence of an accomplice, it must give reasonable grounds as to why it was safe in such circumstances to do so. The same principle should apply in the case of the uncorroborated evidence of a complaint in a sexual offence. In this case, the Industrial Court found in favour of the claimant and held that the credibility of the allegations had not been lessened by the fact that she did not go into theatrics, or lodge a police report or tell her husband or colleagues of the sexual harassment. Unfortunately, what many deemed as a landmark victory in the battle against sexual harassment in the country was later quashed by the High Court in a judicial review application on the ground that the claimant's evidence of the allegations were not adequately corroborated. This was because the credibility of the testimony of the claimant had been proven to be seriously unreliable due to the presence of numerous inconsistencies and contradictions in her evidence.

Based on above case discussion many in the country have started to see corroboration evidence as a nuisance and huge obstacle in gaining or achieving justice for the victim in sexual harassment at the workplace cases. Some even have call for the relaxation and abolishment of the rule pertaining to corroboration entirely or at least in cases involving sexual harassment at the workplace by taking into account the difficulty face by the victim to gather all the necessary evidence to substantiate their allegation. Some individual also seen the corroboration rule would not only hamper the administration of justice but will also make any effort to combat the offence futile.

It is very important to the opponent to the corroboration evidence rule to remember that the object for having the rule in the first is not to hamper the administration of justice in cases involving sexual harassment at the workplace, but to ensure every allegation are fully support by strong and concrete pieces of evidence. As mentioned earlier, sexual harassment along with other sexual offences cases would seriously jeopardize the name and reputation of all concern parties mostly the accused person. The social stigma which the accused need to bear out from the allegation is very huge and serious regardless whether he or she is guilty or not. The effect is not only been face by the accused themselves but also will effect his career and his or her entire family. It is right to say that we should give our focus and concern to the victim who has suffered a lot but in doing so it is also fair to say here that any allegation which being raised by the victim must be fully supported with strong pieces of evidence. The evidence tender must be credible and fully convincing to

substantiate any allegation made towards the accused. We cannot allow people making wild accusation without having strong evidence in hand. There is also a fear that by moving away the rule, it would generate more difficulty in the administration of justice itself.

#### **4. CONCLUSION**

The importance of corroboration evidence is already been laid down by many judges in many decided court cases. The matter should have not been disputed by anyone. It is crucial for us to note that in sexual offences cases including sexual harassment at the workplace case, allegation is easy to be made but it is extremely difficult to be established. Due to the sensitive nature of sexual harassment cases, the victim will certainly face some obstacle in locating evidence to support their case. However, by relaxing or abolishing the existing rule on this matter is not the way to solve the problem. What can be done here is to find ways to improve the working environment by eliminating any factors which could easily give rise to the issue and continue to find ways allowing the affected party find evidence when the need arises. This will require further academic and table discussion with all relevant parties which are already taken place in the country for the last many years. Many improvement has already started to be seen on this matter either within the country legislation, level of awareness, educational program, and others. All the improvement which been seen will eventually lead to two things namely, sexual harassment at the workplace will be eradicated and the perpetrator know that their action is being watched and appropriate action can and will be taken against them.

#### **REFERENCE LIST**

- Abdul Razak Ahmad. "You may lose your job for sexual harassment by flirting in office". *New Straits Times* (Malaysia), 18 August, 1999
- Abu Bakar Munir. "Corroboration and the Warning". [1993] 4 *Current Law Journal* (CLJ) (Malaysia). December.
- Ahmad Shamsul Abd. Aziz. (2005). *Undang - Undang Gangguan Seksual Di Malaysia*. Pahang: PTS Publications & Distributions Sdn. Bhd.
- Ashgar Ali Ali Mohamed. (2014). *Dismissal from Employment and the Remedies*. Second Edition. Malaysia: LexisNexis.
- Ashgar Ali Ali Mohamed. "Sexual Harassment in the Workplace: The Law and Practice in Malaysia". [2004] 1 *Malayan Law Journal* (MLJ) (Malaysia) 1.
- Augustine Paul. (2000). *Evidence Practice and Procedure*. 2<sup>nd</sup> Edition. Kuala Lumpur: Malayan Law Journal.
- Catherine A. MacKinnon. (1979). *Sexual Harassment of Working Women: A Case of Sex Discrimination*. New Haven and London: Yale University Press.
- Cecilia Ng, Zanariah Mohd Nor, & Maria Chin Abdullah. (2003). *A Pioneering Step: Sexual Harassment & The Code of Practice in Malaysia*. Selangor: Vinlin Press Sdn. Bhd.
- Hamidah Atan. "Sexual harassment: Don't even think about it". *News Sunday Times* (Malaysia), 20 November, 2005.
- Sharifah Suhanah Syed Ahmad. (2012). *Industrial Relations Law in Malaysia: Cases & Materials*. Kuala Lumpur: University of Malaya Press.
- Siti Zaharah Jamaluddin. (2000). *Pengenalan Undang – Undang Perhubungan Perusahaan di Malaysia*. Kuala Lumpur: Penerbit Universiti Malaya.
- Tengku Dato Omar Tengku Bot & Maimunah Aminuddin. (2000). *A guide to the Malaysian Code of Practice on Sexual Harassment in the Workplace*. Kuala Lumpur: Leeds Publications.