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A Fundamental Understanding of Malaysian Evidence Law

By Dr Claudia Lau and Dr Tan Swee Kiow | *9 April 2020*

Introduction

> *"A, a 47 years old businessman was charged under Section 39B(1)(a) Dangerous Drug Act 1952 for trafficking 8.7kg of methamphetamine in a coffee shop in Taman X on 1 January, 2016 at 5pm. This charge carries a mandatory death sentence. The trial judge said that the investigating officers did not find the accused's fingerprints on the iron cylinder where the drugs were stored; therefore, the prosecution has failed to prove a prima facie case against the accused. A was acquitted."*

> *"A is a 35 years old security guard. He was charged with raping B, who is a 19 years old university student at DEF Sports Centre in Taman X on 1 January, 2017 at 5.30pm. A was charged under Section 376(1) of Penal Code, if found guilty, A will be sentenced to imprisonment for up to 20 years and whipping. The trial judge said that the prosecution failed to establish a prima facie case on the accused and did not prove the case beyond reasonable doubt. A was acquitted."*

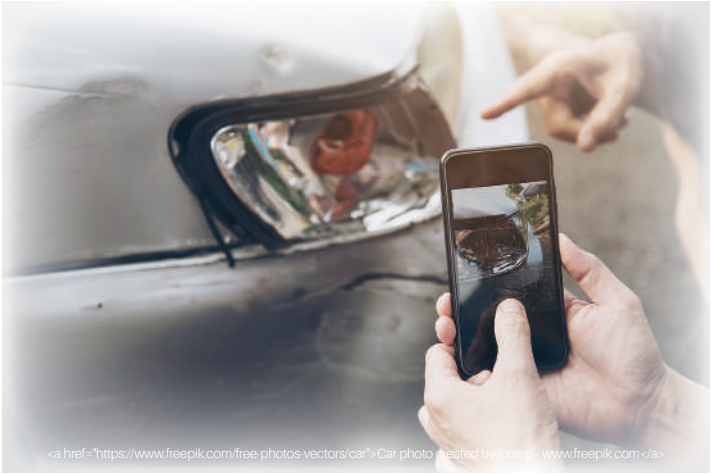
Often, we read about cases similar to the above examples where the accused persons were acquitted due to lack of evidence. We are often confused over these basic areas, such as: What actually constitutes evidence? What are the types of evidence in law? Is evidence automatically admissible in court? Therefore, the purpose of this article is to, as much as possible, in simple language, endeavour to share some salient points with reference to the Malaysian Evidence Act 1950.

Evidence

Section 3 defines evidence to include:

(a) All statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence
(b) All documents produced for the inspection of the court: such documents are called documentary evidence

In this section, the word 'include' is used, hence, evidence cannot be limited to oral evidence and documentary evidence only, and the court will permit and take into consideration some other types of evidence.



Types of Evidence

1. Direct Evidence
   Direct evidence is one which establishes the very fact in issue. Direct evidence can be understood in two different contexts (Sections 60 & 5). As in section 60, all oral evidence must be direct and evidence is said to be direct if a witness who says he saw it; he heard it; he perceived it, and he holds that opinion. Additionally, in section 5, direct evidence refers to the evidence that is directly produced to prove a fact in issue and that the evidence is directly related to the facts in issue.

2. Circumstantial Evidence
   Circumstantial evidence is the evidence of various circumstances connected to, although not directly to the fact in issue. However, the judge may refer to the existence of any fact to infer the existence of a fact in issue whereby to draw an inference or presumption of the principal fact. As per section 60, the witness must directly give all circumstantial evidence of what he perceives with his senses, and that such evidence must be relevant to the fact in issue.

3. Oral Evidence
   Oral evidence is the evidence of the fact brought to the knowledge of the court by a verbal statement of a witness made under oath. A witness giving oral evidence must be competent, i.e. he understands the question put to him and is able to provide rational answers (section 118). In addition, section 60 requires that all oral evidence must relate to what the witness knows through the use of his own senses.

4. Documentary Evidence
   The word "document" literally refers to "written papers". However, section 3 provides a wider scope to include "any matter embodied in a disc, tape, film, and soundtrack."

5. Primary Evidence
   Primary evidence is regarded as the best evidence as under every possible circumstance, it affords the greatest certainty to the facts in question. In the context of documentary evidence, section 61 states that "the contents of documents may be proved either by primary or by secondary evidence." In section 62, primary evidence refers to "the document itself produced for the inspection of the court."

6. Secondary Evidence
   In relation to documentary evidence, section 63 provides that secondary evidence includes:
   (a) Certified copies given under the provisions hereinafter contained
   (b) Copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies
   (c) Copies made from or compared with the original
   (d) Counterparts of documents as against the parties who did not execute them, and
   (e) Oral accounts of the contents of a document given by some person who has himself seen or heard it or perceived it by whatever means

7. Real Evidence
   Real evidence is any material object (known as material evidence), introduced in a trial, and intended to prove a fact in issue based on its demonstrable physical characteristics (known as physical evidence). Physical evidence is not limited to a complete or all part of any object.

8. Hearsay Evidence
   Hearsay evidence is evidence by a witness of what another person had stated (whether verbally, in writing or otherwise) on a prior occasion. As a general rule, hearsay evidence is not admissible. However, under the Evidence Act, there are various situations where hearsay evidence may be admitted (sections 6 to 9, 14, 32, 33, 73A, 90A, admission and confession).

9. Opinion Evidence
   There are 2 types of opinion evidence: expert and non-expert opinion. As a general rule, opinions of third persons are irrelevant. However, the opinion of an expert under section 60(1)(d) is regarded as direct evidence and can be accepted by the court.

10. Character Evidence
    In section 55, "character" includes both reputation and disposition." Generally, evidence of a character of a party to an action (whether civil or criminal) is not relevant and admissible. However, character evidence is relevant under sections 52 to 55.

11. Similar Fact Evidence
    Similar fact evidence is evidence that the accused person had misconducted himself previously, and the misconduct is similar to the misconduct alleged against him in the present proceeding. As a general rule, the prosecution may tender similar fact evidence if the evidence is relevant to an issue. However, the judge may exercise his discretion not to admit such evidence if he thinks it will have an adverse effect on the fair proceeding.

12. Conclusive Evidence
    This is a type of evidence where no party is permitted to contradict that piece of evidence.

Relevancy, Admissibility and Weight of Evidence

In order for the law of evidence to operate, the court must adhere to the foundation provided by the concepts of relevancy, admissibility and weight of evidence. Relevancy is the degree of connection between a fact that is given in evidence and the issue to be proved. For the court to accept a relevant fact, it has to be logical, legal and has a high degree of probative value. When the court finds a piece of evidence relevant and is useful to either prove or disprove a fact in issue, the court will admit that piece of evidence. The court's admission of evidence is by exercising its power provided under section 136. Weight of evidence refers to the strength or value of the admitted evidence. It is a question of fact based on circumstances of each case and it is to be assessed qualitatively by the court.

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