الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
يونيرسيتي إسلام انتارابغسا ملايسيا

EXCEPTIONS TO THE RULE AGAINST HEARSAY UNDER THE EVIDENCE ACT 1950: A COMPARATIVE ANALYSIS

BY

FATIMAH BT ABDUL WAHAB

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ABSTRACT

This dissertation attempts to examine the concept of the hearsay rule and its legal aspects according to the Evidence Act 1950, Common Law and Islamic Law. It also aims at making comparison among the three categories of laws. The central discussion is on the exceptions to the rule against hearsay particularly under section 32 of the Evidence Act 1950. The dissertation is based on library research which concentrates on decided cases, statutory provisions with special reference to the Evidence Act 1950 and also opinions of the Islamic scholars.

The dissertation consists of four chapters. Chapter One discusses on the nature of hearsay evidence, rationales for its exclusion, position of hearsay in Malaysia and also analysis of leading cases relevant to it. Chapter Two focuses on the exceptions to the rule against hearsay under section 32 of the Evidence Act. Chapter Three concentrates on the Islamic position regarding hearsay. Chapter Four is the concluding chapter that offers concluding remarks by giving some suggestions to improve hearsay evidence in Malaysia. It also makes some comparisons as to the application of hearsay under section 32 of the Evidence Act with the Common Law and the Islamic Law.

Based on this research it is apparent that hearsay evidence is accepted under the Evidence Act 1950 and common law under several circumstances. This is to ensure that such evidence should not be omitted in cases where no better evidence can be found. Concerning the Islamic perspective on hearsay, the writer is of the view that critical analysis on the concept of hearsay evidence in civil law and common law shows that hearsay evidence does not exist in Islam.

ملخص البحث

إنّ هذه الدراسة محاولة لتسليط الضوء على مفهوم البيِّنة السماعيَّة وأحكامها وفقاً لقانون البيِّنة سنة ١٩٥٠م، والقانون الوضعيِّ، والأحكام الشرعيَّة. وتهدف الدراسة إلى إبراز المقارنة بين هذه المجموعات الثلاث من القوانين. ويدور محور هذا البحث حول قاعدة الاستثناء في البيِّنة السماعيَّة كما هو في مادة رقم ٣٢ لقانون البيِّنة سنة ١٩٥٠م على وجه الخصوص. ولقد اعتمدت الدراسة على البحث المكتبيِّ، وذلك في البحث عن القضايا المقررة، وبنود اللوائح القانونيَّة خاصَّةً فيما يتعلق بقانون البيِّنة سنة ١٩٥٠م، فضلاً عن آراء العلماء فيها.

وهذه الدراسة تحتوي على أربعة فصول، فالفصل الأول يتناول مفهوم البيِّنة السماعيَّة وطبيعتها، وأسباب استثنائها، ومكانتها في ماليزيا، فضلاً عن تحليل القضايا المهمة المتعلقة بها. وأما الفصل الثاني، فإنَّه يركز على قاعدة الاستثناء في البيِّنة السماعيَّة كما هو مذكور في مادة رقم ٣٢ لقانون البيِّنة سنة ١٩٥٠م. وخصَّص الفصل الثالث ببيان وجهات النظر الإسلاميَّة في حكم البيِّنة السماعيَّة. وأما الفصل الرابع، فهو عبارة عن خاتمة البحث، ويعنى بعرض النتائج والملاحظات وذلك بتقديم اقتراحات في شأن تحسين تطبيق البيِّنة السماعيَّة في ماليزيا، وإلقاء الضوء على المقارنة بين تطبيق البيِّنة السماعيَّة التي خصِّصت في مادة رقم ٣٢ لقانون البيِّنة سنة ١٩٥٠م والقانون الوضعيِّ والأحكام الشرعيَّة.

إنَّه يتبين من خلال هذه الدراسة أنّ البيِّنة السماعيَّة قد قُبلت في قانون البيِّنة سنة ١٩٥٠م والقانون الوضعيِّ، وذلك في تضمين عدم إهمال البيِّنة السماعيَّة عند فقد البينات الأخرى الأفضل. وأما بالنسبة لموقف الإسلام تجاه البيِّنة السماعيَّة، فإنّ الباحثة ترى أنّ الدراسة التحليليَّة النقديَّة حول هذا المفهوم في القانون المدنيّ والقانون الوضعيِّ تقود إلى القول بأنّ البيِّنة السماعيَّة لم تعرف في الإسلام.

APPROVAL PAGE

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

Prof. Dr. Hj. Mohd. Akram bin Hj. Shair Mohamed
Supervisor
Date: 10/1/2001

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

Asst. Prof. Dr. Zulfakar Ramlee
Examiner
Date: 10/1/2001

This dissertation was submitted to the Kulliyyah of Laws and is accepted as partial fulfillment of the requirements for the degree of Master of Comparative Laws.

Assoc. Prof. Dr. Nik Ahmad Kamal Nik Mahmod
Dean Kulliyyah of Laws
Date: 10/1/2001

DECLARATION

I hereby declare that this thesis is the result of my investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

FATIMAH BT ABDUL WAHAB

Name: .....

Signature: ..... Date: 9/1/2001

"In the memory of my beloved father Abdul Wahab bin Ahmad whose support and guidance have been a great inspiration to my success."

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LIST OF ABBREVIATIONS

AC	Appeal Cases
AIR	All Indian Reporter
All.	All Indian Reporter, Allahabad Series
All ER	All England Reports
AMR	All Malaysia Reports
Anor	Another
Cal.	All Indian Reporter, Calcutta Series
Camp.	Camp's Reports
Ch.	Chancery Division
Cl. & F.	Clark and Finnelly House of Lords Reports
CLJ	Current Law Journal
Cox CC	Cox's Criminal Law Cases
CPC	Criminal Procedure Code
ER	English Reports
FT Act	Syariah Court Evidence (Federal Territories) Act 1997
Holt KB	Holt's King's Bench Reports
i.e.	that is
ILR	Indian Law Reports
KB	King's Bench Law Reports
Leach	Leach's Cases in Crown Law
MC	Malayan Cases
MLJ	Malayan Law Journal
Nag.	All Indian Reporter, Nagpur Series

Ors	Others
para	paragraph
PC	Privy Council
PD	Law Reports, Probate, Divorce and Admiralty Division
QB	Queen's Bench Law Reports
QBD	Queen's Bench Division
RHC	Rules of The High Court
SAC	Senior Assistant Commissioner of Police
SC	Supreme Court
Sdn. Bhd.	Sendirian Berhad
SSCR	Sarawak Supreme Court Reports
the Act	Evidence Act 1950

CHAPTER ONE

HEARSAY EVIDENCE

1.1 What is hearsay?

It is a fundamental principle of evidence that anything to be proved by oral testimony may be proved only by witnesses through personal observation of their own senses and not from what they have been told. The evidence must therefore be direct in this sense.

In Malaysia, section 60 of the Evidence Act 1950 (Act 56, hereinafter referred to as 'the Act') lays down that oral evidence must be direct. Oral evidence will only be admissible if the witness has perceived it by one or more of his five senses. Thus, oral evidence must not depend on hearsay since the maker of the statement himself should give evidence in court as a witness.

However, what really amounts to hearsay is ambiguous and is capable of various meanings. According to Stephen, "...the term 'hearsay' connotes different meanings. Sometimes, it means anything which someone is heard to have said, sometimes it means anything which someone informs regarding information which have been conveyed by someone else and sometimes this term is used similarly with the term irrelevant".[1]

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[1] Cited in Mohd. Akram bin Hj. Shair Mohamed, "Penerimaan Keterangan Dengar Cakap Dalam Undang-Undang Keterangan", Dewan Bahasa dan Pustaka, Kuala Lumpur, 1997, Al-Ahkam Vol. 5, p.115.

On the other hand, according to Cross a hearsay statement is "...an assertion other than one made by a person while giving oral evidence in the proceedings...".[2]

Hearsay evidence is further defined by Phipson as "Former statements of any person whether or not he is a witness in the proceeding, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them".[3]

Similarly, in the Halsbury's Laws of England hearsay is defined as "...evidence given by a testifying witness of a statement made on some other occasion, when it is intended as evidence of the truth of what was asserted...".[4]

It is submitted that the definition of hearsay forwarded by Lord Wilberforce in the case of *Leith McDonald Ratten* v *The Queen*[5] is the most acceptable compared to the forgoing definitions. In this case, the accused was charged with the murder of his wife. The disputed evidence was that of a telephone operator testifying that she had received a call from a female deceased in a distressed voice asking for the police when she said "Get me the police, please". Lord Wilberforce observed that the evidence of the call having been made was not hearsay:

> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of

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2 Sir Rupert Cross and Colin Tapper, *Cross On Evidence*, Butterworths, London, 1990, p.44.

3 M.N. Howard, *Phipson On Evidence*, Sweet & Maxwell, London, 2000, p.629.

4 Lord Hailsham of St. Marylebone, *Halsbury's Laws of England*, Butterworth, London, 1976, Vol. 17, p.39.

5 [1972] AC 378.

> hearsay only arises when the words spoken are relied on "testimonially", i.e., as establishing some fact narrated by the words.[6]

It is to be noted that the Judicial Committee also dealt with the issue on the assumption that the words uttered by the deceased involved an assertion of the truth of some fact stated, i.e., that she was being attacked by the accused. This raised the issue of the proper criteria of the *res gestae* exception to the hearsay rule. Lord Wilberforce commented:

> ...the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction.... As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to enable to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event....[7]

From the above definitions of different writers, hearsay evidence can be generally defined as out-of-court statements, which are not based on one's personal observation and are tendered to prove the truth of facts contained in them. As a general rule, hearsay evidence is inadmissible under common law as well as Malaysian law. However, there are a number of exceptions, which will be discussed later that make hearsay evidence acceptable in the proceedings.

Evidence can be divided into two types: original and non-original or hearsay evidence. It is vital but not always easy to distinguish original evidence from hearsay evidence. Original evidence refers to out-of-court statements that are adduced for any relevant

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6 *Ibid.*, p.387.
7 [1972] AC 389.

purpose without reference to the truth of the facts contained in them. Examples of original evidence may be classified according to whether such statement is in itself a fact in issue or relevant to the fact in issue.[8] Original evidence may also be defined as anyone who has seen or heard anything reported based on something, which is within his knowledge or as a result of his personal observation. Non-original, on the other hand, includes evidence, which means anything said by a witness in court that is based on something heard through the medium of third party who is not called as witness. Statement of that witness is inadmissible for the purpose of proving the truth of the facts contained in them.[9]

The example of hearsay evidence can be illustrated as follows. When witness A says that B (who does not give evidence in court) told him of an occurrence of an event X, A's assertion of that event being not based on his personal observation rendered him to be disqualified to adduce that evidence in court. B's out-of-court statements cannot be accepted because it is not subjected to cross-examination and other tests. However, A is competent to tender that evidence and it may be accepted if there is any relevancy in the case if the object of adducing it is only to prove B's assertion and not to prove the event.[10]

It should be noted that if the statement is tendered for any relevant purpose other than that of proving the truth of its contents it is not hearsay and is 'original' and accordingly if relevant admissible. The rule to determine whether an out-of-court

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8 Adrian Keane, *The Modern Law of Evidence*, Butterworths, London, 1996, p.225.

9 Mohd. Akram bin Hj. Shair Mohamed, "Penerimaan Keterangan Dengar Cakap Dalam Undang-Undang Keterangan", pp.115-116.

10 *Ibid.*, p.116.

statement is hearsay or not is best explained in the leading case of *Subramaniam* v *Public Prosecutor*.[11] In this case, Mr. L. M. D. de Silva in the Privy Council observed:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.[12]

Hence, to understand the rule of hearsay, it is vital to note that if an out-of-court statement is adduced to prove the truth of its contents it is hearsay. However, if it is adduced to show the fact that the statement was made such as merely to show the state of mind of the maker of the statement it is not hearsay and is admissible.

In *Re Soo Leot*[13] the statement by Wong Hwa repeated by the witness Soo Leot in court was not hearsay as it was relevant under section 14 to show the witness' state of mind.[14] The statement was relevant and admissible as it was not tendered to prove the truth of it. For this reason, Soo Leot was entitled to rely on the statement as original evidence.

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11 (1956) 22 MLJ 220.

12 *Ibid.*, p.222.

13 (1956) 22 MLJ 54.

14 In this case, Wong Hwa (who was not called as a witness) had told Soo Leot that he brought the three bicycles. This statement was relevant under section 14 of the Evidence Ordinance 1950 to show that the accused (Soo Leot) who was charged with offences under section 414 and 471 of the Penal Code did not have reason to believe that the bicycles were stolen property.

In the leading case of *Chandrasekaran & Ors.* v *Public Prosecutor*,[15] the principle formulated in *Subramaniam* v *Public Prosecutor*[16] was followed.[17] In this case, the repetition of out-of-court statements made by Leong Chey Kee to a witness in court (PW55) was not hearsay. It was merely explaining the relevant conduct (under section 8 of the Evidence Ordinance) of PW55 and not to prove the truth of the statements. Raja Azlan Shah J. observed at page 155-156:

> Leong is untraced. He was not a witness in the case. Whatever statements he had made to PW55 were admitted not for the purpose of establishing the truth of facts the alleged but to show the state of mind and conduct of Leong and PW55 and to draw inferences therefrom. (See further, *Mawaz Khan* v *Reg* [1967] 1 All ER 80). The statements admitted established that there was a plot to open a bank account of a fictitious firm dealing in insecticide with the Oversea-Chinese Banking Corporation, Sungei Besi Branch, Kuala Lumpur and their knowledge of it.

The above three leading local decisions, (*Subramaniam, Re Soo Leot* and *Chandrasekaran*) clearly indicate that if the repetition of an out-of-court statement made to a witness in court is tendered only to show the fact that the statement was made it is not hearsay. Indeed, it is direct evidence under section 60 of the Act. Therefore, the statement if relevant may be admissible.[18]

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15 [1971] 1 MLJ 153.

16 Above note 11.

17 The principle excludes the hearsay rule where the purpose of adducing the evidence is not to show the truth of what was said but the fact that it was made.

18 Mohd Akram bin Hj. Shair Mohamed, "The Rule Against Hearsay And The Evidence Act 1950", Current Law Journal, Kuala Lumpur, 1990, Vol. 2, p.v.

1.2 Rationales for the exclusion of hearsay evidence

The so-called rule against hearsay excludes an out-of-court statement where such statement is adduced to affirm the truth of its contents and where the makers are not the direct witnesses. A number of justifications for the rule against hearsay have indeed been forwarded by Lord Normand in the case of *Teper* v *Reginam*[19] where he observed that:

> The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.[20]

It is submitted that a witness who testifies as to what somebody told him can be regarded as a mere conduit pipe since no amount of cross-examination can test the accuracy of what he was told. Thus, to admit a witness's assertion of what he was told as evidence of the fact stated is to deny to the person against whom such evidence is tendered the right of cross-examination, which is given to him by the law.[21]

Hence, hearsay evidence may be said as merely second hand or inferior evidence. Although such evidence was the best obtainable, its exclusion has been based on its relative untrustworthiness for judicial purposes due to several reasons:

1- the irresponsibility of the original declarant, whose statements were neither given on oath nor subject to cross-examination.

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19 [1952] 2 All ER 447.

20 *Ibid.*, p.449.

21 Ferguson, "Aspects Of The Hearsay Evidence Rule", Law Book Company Limited for New South Wales Bar Association, Sydney, 1964, pp.112-117.