Paper No. CB(2) 1689/99-00(01)

Bills Committee on Evidence (Amendment) Bill 1999

Written Submission on behalf of The Hong Kong Bar Association

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A. The Law

There are two categories of offences requiring corroboration. The first comprises offences which are required to be corroborated as a matter of law. A judge, magistrate or jury cannot convict anyone of such an offence without corroborative evidence. In the second, corroboration is required as a matter of practice. In this category a judge, magistrate or jury may still convict a defendant of an offence even though there is no corroborative evidence, provided the jury is warned, or the judge or magistrate warns him/herself, of the danger of convicting on uncorroborated evidence.

It is to be noted that the position in Hong Kong differs from the position in England. However, Hong Kong does not, and should not, always follow the English legislation and tradition in circumstances where different political, social and legal considerations may apply. For example, Hong Kong has never seen fit to introduce wholesale into law an equivalent of the Police and Criminal Evidence Act 1984 (commonly known as P.A.C.E.) dealing with police interviews and interrogations of persons in custody. Indeed, not all members of the Commonwealth have unanimously

followed English law in relation to corroboration; e.g. Australia. The common law, whilst adopted among many varied countries and cultures, has been adapted to local conditions with differing emphases and distinct applications.

In England the mandatory warning in relation to corroboration has been abolished by Section 32 of the Criminal Justice and Public Order Act, 1994 and been replaced by a judge's discretionary warning; see R v Makanjuola (1995) 2 Cr. App. R. 469. By contrast, in Hong Kong there are certain sexual offences that require corroboration as a matter of law under the Crimes Ordinance, Cap.200 whilst the corroboration warning as a matter of practice remains for others. Those offences in which corroboration as a matter of law is required may be listed as follows :

(i) Section 119 : Procurement by threats.
Section 120 : Procurement by false pretences.
Section 121 : Administering drugs to obtain or facilitate an unlawful sexual act.

(ii) Section 130 : Control over persons for purpose of unlawful sexual intercourse or prostitution.
Section 131 : Causing prostitution.
Section 132 : Procurement of girl under 21.

(iii) Section 133 : Procurement of a defective.

Other than the above, almost all other offences involving a sexual element require corroboration as a matter of practice, the most common examples being rape, indecent assault, and buggery.

B. The Administration's case

The reasoning behind the proposals to abolish corroboration on behalf of the Administration can be summarized as follows :

(a) Compliance with the recommendations of the United Nations Committee on the Elimination of Discrimination against Women;

(b) The inflexibility of the corroboration warning;

(c) The complexity of the corroboration rules;

(d) Anomalies/injustice of the corroboration warning and the rules of corroboration; and

(e) Failure of the corroboration warning to protect the accused.

C. The Bar Association's position

The Bar considers the possibility or risk of conviction of an innocent person charged with a sexual offence as utterly abhorrent particularly in a jurisdiction such as Hong Kong, where not only are sentences significantly higher than in other jurisdictions including England but also the public perception and condemnation of such offences is significantly different. In reality sexual offences have certain characteristics which mark them apart from other criminal offences and call for not only different but particularly careful treatment by judges and juries alike. The more salient characteristics are as follows :

(a) In a predominant number of sexual cases, particularly rape or indecent assault, the incidents involve solely the word of the alleged victim against the word of the accused. There are seldom by-standers or eye-witnesses to such offences.

(b) There is an inevitable and understandable tendency for prejudice to be generated against an accused, particularly where the alleged victim is of a young age or is otherwise apparently vulnerable or is distressed or embarrassed in giving evidence, and by virtue of his/her position or demeanor incites or invites the sympathy and protective feelings of the court.

(c) The experience of the courts have shown that complaints of sexual misconduct are not infrequently fabricated. There may be a number of reasons for such complaints : they may result from psychological or physiological problems, sexual neuroses, fantasy, jealousy, revenge, spite, embarrassment in front of a spouse or partner, or a simple refusal to admit consent to an act which is later regretted. No less a jurist than Salmon L. J. (as he then was) referred to this problem and the need for corroboration in the case of Henry and Manning (1969) 53 Cr. App. R. 150 at p.153.

> "……there is no magic formula or mumbo jumbo required in a direction relating to corroboration. What the Judge has to do is to use clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all."

(The offence with which the Court of Appeal was there concerned was rape).

(d) It is also the particular experience of criminal trial lawyers that juries in the High Court tend to convict defendants in rape trials in a disproportionately high number of cases, notwithstanding the warning as to corroboration. Although it would not be proper to single out for mention any particular case, a number of judges have privately expressed their surprise at the verdict of a particular jury in a rape case. It is not appropriate to further relax such safeguards as still exist in relation to such serious offences.

D. Reply to the Administration's case

(i) Compliance with UN Committee

(a) The rationale for the corroboration rules and the corroboration warning have nothing whatever to do with the sex of the complainant. Whilst the victims of a rape offence are almost always female, the victims of buggery offences are invariably male. Corroboration attaches to the offence not the victim.

(b) There is no discrimination in the prosecution of criminal offences in relation to sexual cases. All that is required is a complaint by the victim. The prosecution does not need corroborative evidence

in order to prosecute (except for those limited offences under the Crimes Ordinance).

(ii) <u>Inflexibility</u>

(a) This argument is with respect an insult to both judges and juries. As will be clear from the opening words of Salmon L.J. above, "There is no magic formula or mumbo jumbo required in a direction relating to corroboration."

(b) The corroboration warning is a general warning as to the risk involved in sexual cases. It does not involve a criticism of the complainant or victim. In Hong Kong the educational standard of members of the jury is very high indeed unlike that which pertains in either England or the United States. By virtue of Section 4 of the Jury Ordinance Cap.3 anyone "who has a knowledge of the English language sufficient to enable him to understand the evidence of witnesses, the address of counsel and the judge's summing up" may sit on the jury. In practice our juries are both educated and bilingual. It cannot be contended that a jury would readily interpret a general corroboration warning as a criticism or undermining of the evidence of a victim.

(iii) Complexity

(a) Many offences involve very complicated facts and many trials require complicated directions to a jury or self-directions by a judge or magistrate.

(b) The warning as to corroboration is not complex and all the judge "has to do is to use clear and simple language." As to the corroboration rules, what is capable of being corroborative is a matter for the judge and not the jury. Whether or not it does in fact corroborate is a matter for the jury. There is an important distinction between the role of the judge in directing the law and the role of the jury in applying the law to its assessment of fact.

(c) The present corroboration rules have derived from over a century of case law. If they are considered to be complex, there may be a case for simplification of the rules but not for outright abolition. The underlying rationale for the rules and the warning have not suddenly disappeared or evaporated overnight.

(iv) Anomalies/injustice

It is not correct to say that a failure to give a corroboration warning automatically leads to either an acquittal or a conviction being overturned, this depends on the evidential circumstances in each case (N.B. the Appeal Court can always apply the proviso - i.e. the conviction stands even if there is a misdirection in law.) Of course in relation to anyone of the specified offences under the Crimes Ordinance, which require corroboration as a matter of law, an appeal will be allowed or an acquittal must follow if there is in fact no corroboration. However, corroboration in those circumstances is simply an added ingredient of the offence.

(v) **<u>Failure to protect the accused</u>**

This argument is with respect non-sensical. Is the Administration seriously suggesting that it is motivated, in abolishing the rules of corroboration and the corroboration warning, out of a desire to protect the rights and interests of the accused? If it is, there is no evidence of any complaint in this regard from any accused. It seems extraordinary that, despite over a century of judicial warning designed to protect the accused, the Administration should be suggesting that such warnings are in fact counter-productive!

E. Conclusion

(i) The Seven Offences under the Crimes Ordinance

The seven offences contained in the Crimes Ordinance were obviously isolated for special treatment by the Administration for valid reasons at the time when the legislation was passed. If the Administration can demonstrate that these special reasons no longer exist, the Bar will be content that these statutory offences be put in the same category as other sexual offences.

(ii) The Bar Association's Submission in 1996

In 1996, the Bar Association did not support the outright abolition of the mandatory warning regarding corroboration for sexual offences. The Bar's proposal at the time was to replace the existing mandatory warning with a new mandatory warning following the Australian formula (as recommended by the Law Reform Commission of Australia). However, it became apparent that the Administration's position was against any type of mandatory warning and in these circumstances, the Bar's submission is that the existing warning should remain.

(iii) Urgency for Reform

No reference has been made to the Law Reform Commission of Hong Kong who (and this is common ground) is in the best position to examine the

need for reform of the existing rules. The Administration's explanation was that the matter had been examined by the Law Reform Commission in the United Kingdom. This explanation is wholly untenable as :-

(a) Even before 1997, Hong Kong had always had its own law reform integrity.

(b) The situation in Hong Kong differs vastly from the United Kingdom: e.g. there is no right to jury trial by the accused person in Hong Kong unlike the position in England; e.g. magisterial appeals in England are heard by way of rehearing, which is not the case in Hong Kong.

Furthermore, the Administration has not in any way suggested that there is an urgency for reform (if reform is indeed required). The Bar's recommendation is therefore that this matter should be rejected or at the very least referred to the Law Reform Commission of Hong Kong.

6th April 2000