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# CORROBORATION: RULES AND DISCRETION IN THE SEARCH FOR TRUTH

It is easy to think of the corroboration rules as a thing of the past – something which in a few years will no longer plague the law of evidence. Yet we must not forget the apparently intractable problem which they were designed to deal with – that of oath against oath, one person's word against another. Both historically and presently, the law has had to struggle with a choice between a regime of rules or a system of discretion; and the result is a fascinating compound of rule and discretion.

## I. Corroboration in Context

ONE of the most uncomfortable situations any judge or court will encounter is where it is one person's word against another. It would, of course, be immensely helpful if there were other evidence, supporting or contradicting either account. If there is nothing obvious to tip the balance, however, the judge is in a dilemma. In criminal proceedings, where the requirement is proof beyond reasonable doubt, it is difficult to see how the court can ever be certain enough to prefer the word of the accuser over the word of the accused. True, the accused's story could be so improbable as to defy belief, but such cases will be rare. Then there is the oft-mentioned demeanour of the accused and accuser when they give evidence in court. Judging truth and falsity, not on the substance of the testimony, but on the court-room behaviour of witnesses is highly risky. The science of non-verbal cues is uncertain at best. A lying witness may refuse to look the cross-examining lawyer or the judge in the eye, but so will a truthful but introverted witness, over-awed by the proceedings. Conversely, a confident and coherent witness may be speaking out of a firm conviction of the truth of what he or she is saying, or from a cool and calculated decision to lie. One might be tempted to conclude that the bare testimony of an accuser should never be enough to convict – there is at least reasonable doubt the accused might be telling the truth. This leads naturally to the rule that there must be corroboration before conviction. On the other hand, if we take into account the consequences of such a rule, we may think twice. Many crimes will occur in situations where there is little else to incriminate the culprit but the testimony of the victim. Perpetrators of crime will normally not be so stupid as to conduct their affairs so as to leave behind traces of their wrong-doing. The cost

of a mandatory corroboration rule will be high – many offenders will conceivably escape conviction because corroboration of their guilt cannot be found. More specifically, in sexual assault cases, there is the common-sense presumption that a woman is unlikely to choose to pursue such a complaint and subject herself to hostile cross-examination if it were not true. These considerations speak against any rule which might stand in the way of the court convicting on the testimony of the accuser alone. The preferred regime will be one of discretion– the court can convict if it is sufficiently convinced. A tension is set up between the factors which pull in favour of a regime of corroboration rules, and those which pull towards a discretionary system.

## II. Corroboration: Rule vs Discretion

There are legal systems, ancient[1] and modern,[2] wherein corroboration is compulsory. There is also an isolated example of our law requiring corroboration before conviction.[3] Yet the common law, which Singapore has inherited,[4] is a spectacular example of an attempt to find a compromise between setting up a rule and leaving it to discretion. In general, a system of discretion is in place. Section 136 of the Evidence Act (Cap 97, 1997 Rev Ed) is a manifestation of this:

> No particular number of witnesses shall in any case be required for proof of any fact.

Corroboration by other witnesses are not to be required; neither is corroboration by any other kind of evidence. An exception is made for three classes of witnesses: accomplices, victims of sexual offences and young children. For them, a complex amalgam of rule and discretion, known as the corroboration rules, govern. I quote from an old accomplice decision, which I shall take as a general statement of the position for all three corroboration categories:[5]

1 *Eg,* the laws of Moses in Deuteronomy 17:6, 19:15.

2 *Eg,* Scots law; see The United Kingdom Law Commission, *Corroboration of Evidence in Criminal Trials,* (1990), Working Paper 115, pp 124-5.

3 S 6 Sedition Act (Cap 290, 1985 Rev Ed).

4 See Pinsler, *Evidence, Advocacy and the Litigation Process* (1992), p 204. This is subject to what I shall say about the varying degrees of conviction with which our courts have held concerning the common law.

5 *Tay Choon Nam* [1949] MLJ 157.

i. The uncorroborated evidence of an accomplice is admissible and a conviction founded on such evidence is not illegal.

ii. But it is a rule of practice equivalent to a rule of law that the presiding judge must warn the jury of the danger of convicting on such evidence.

iii. It is also his duty to tell them that nevertheless they can legally convict on such evidence.

iv. When it appears that the judge has not given the required warning, the Court of Appeal will quash the conviction.

v. ....

vi. The corroboration must be evidence which implicates the accused. Evidence tending merely to show that a crime has been committed is insufficient.

These then are the rule-like elements: the judge must decide whether or not the testimony is corroborated; if he decides that it is uncorroborated, he must warn himself that it would be dangerous to convict on it. If he makes a mistake, the conviction will be quashed. Such mistakes usually come in two forms: the judge wrongly decides that there is corroboration where there actually is none, or the judge on the record fails to show that he has warned himself of the danger of convicting on uncorroborated testimony. Secondary rules support this regime: rules on whether or not a particular witness falls within the three categories, and rules on what can or cannot constitute corroboration. Yet, when it comes to the crunch, even for witnesses clearly within the categories, the judge may, in his discretion, still convict on uncorroborated testimony. Thus, to sum up, though a completely discretionary system exists for all other kinds of witnesses, for witnesses belonging to the three chosen categories, a mandatory *warning* rule applies – yet it is only a mandatory warning and the judge is free to convict in his discretion.

One can immediately discern the instability inherent in this compound of rule and discretion. If the judge must warn himself that it is dangerous to convict without corroboration (the rule element), then it does not gel with the power of the court to convict nevertheless (the discretion element). Surely the law cannot allow the court do something so dangerous. Seeing it another way, if the uncorroborated testimony of the accuser is so convincing and the story of the accused is so unconvincing that the court is prepared to convict on it, then it should not be compulsory for the court to warn itself that this is a dangerous course to take. Faced with uncorroborated testimony, the court will be forced to choose which to emphasise; the rule element (which would lead to an acquittal), or the discretion element (which

would lead to a conviction). The fault-line runs deeper – if there is an ultimate discretion to convict without corroboration, then it does not seem very important that the preceding rules be enforced with any vigour. This is at the heart of the startling inability of the common law to decide whether the corroboration rule is "a rule of practice" or "a rule of law". When the court decides to enforce the rule-like portion of it, then it behaves like a rule of law. When the court decides to treat it liberally, then it is merely a rule of practice.

## III. Rule and Discretion-Based Approaches: History

A sampling of some older cases does seem to bear out the dramatic contest between the rule and discretion elements in the common law-inspired corroboration regime. First, some examples of a strict, rule-emphasis approach. *Chiu Nang Hong*[6] is a famous Privy Council decision (on appeal from Malaysia). It was a classic fact situation of "oath against oath" in a rape trial. The complainant alleged that the accused forced himself upon her, and the accused's defence was that the complainant had consented to the entire affair. There was little else to support one story or the other.[7] The Privy Council quashed the conviction in these words:[8]

> [C]ounsel for the appellant [accused] dwelt [at the trial] on the desirability in these circumstances of corroboration, and the *learned [trial] judge's note of the evidence shows that counsel did so repeatedly.* In these circumstances the judge would clearly have the matter well in mind: and his judgment shows that *he examined all the surrounding circumstances with great care.* Having done so, he announced ... "I could not but come to the conclusion that she [the complainant] was speaking the truth, and that in all material circumstances her evidence *was corroborated* by the facts" ...
>
> [T]he circumstances *did not afford corroboration* of the complainant's allegation of no consent ...

6 [1965] MLJ 40.

7 Although there was conceivably evidence which told against the complainant – that of two empty (consumed) bottles of Green Spot ("still" orange drink popular in the 1960s) outside the room where the alleged rape took place, which contradicted the complainant's account that she was forced into the room and raped. The Privy Council, however, did not seem to make much of this.

8 *Supra,* note 6, p 43 (italics added).

> [Even if] the learned Judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so ... [their Lordships] do not think that the conviction could have been left to stand ... [A] judge, sitting alone, *should make it clear that he has the risk in question in mind* ... No particular form of words is necessary ... [W]hat is necessary is that the judge's mind on the matter is clearly revealed.

Here was the Privy Council intent on enforcing the rule portion of the corroboration regime with a high degree of strictness. From a discretion-based perspective, we should not expect the trial judge to do any more: he had faithfully recorded defence counsel's repeated reminders of the desirability of corroboration, he had examined all the surrounding circumstances with great care. Yet he was apparently convinced of the truth of the complainant's account, and he convicted the accused, as he was perfectly entitled to do. His only mistake was to say that there was "corroboration" (when there was none). The rule portion of the corroboration regime required that the judge correctly identify whether or not there was corroboration. It did not matter that the judge, at the end of the day, had considered the probative value of all the evidence (faultlessly) and had come to the conclusion that the complainant was truthful. The rule was breached and the conviction could not stand. From a discretion-based perspective, this was an acquittal on a mere technicality.

*Ng Kwee Piow*[9] was a decision of the Singapore Court of Appeal. The charge was abetment of rape, and the court had to figure out what to do with the uncorroborated testimony of the complainant, a 17 year old (or 18 at the time of trial) who was of insufficient intelligence to be sworn or affirmed. The jury convicted, but the Court of Appeal reversed:[10]

> The learned [trial] Judge then proceeds to deal with the question of corroboration of the complainant's evidence [saying], "...the reason for that warning [of the danger of convicting on uncorroborated testimony of the complainant]...is...fairly obvious, that comparatively young people are prone to imagine, to invent, to exaggerate – hence the reason for the warning that you must examine the evidence with the utmost care. *On the other hand ... young minds are often far more receptive to incidents and circumstances, their observation possibly more acute, their memories more retentive, than possibly yours or mine, who are getting on somewhat in years.* You must, therefore, consider the evidence of the young girl with the greatest care and caution before you act upon it ..."

[9] [1960] MLJ 279.
[10] *Ibid,* pp 280-1 (italics added).

> [T]he reference to the acuteness of observation and the retentiveness of memory of the young was perhaps somewhat unfortunate ... [W]e feel that it was unfortunate that the learned trial judge qualified, or put a gloss upon, his very necessary *warning that in practice corroboration in such a case is always looked for.* The necessity for *this rule of prudence, which in practice should almost have the force of a rule of law* in sexual cases, hardly needs restatement ... It should surely be accepted now in criminal courts that the rule of prudence ... should only be *departed from in the most exceptional cases* ... [The present case is] eminently one in which the jury should have been warned in the clearest terms, without qualification or gloss of any kind ...

The trial judge said too much. Not that the extra bit which he said was untrue. There is no reason to think that the remark about the possible superiority of "young minds" is any less true than the warning that "young minds" are prone to invention and exaggeration. Yet the rule was breached because the "qualification" was not in the script, as it were, and the conviction had to go. The strictness with which the rule portion of the corroboration regime is viewed is demonstrated in the comment that the warning was necessary, and that it "should almost have the force of a rule of law". Moreover, "the rule" should only be "departed from in the most exceptional cases". The judgment is not entirely clear about what "the rule" means. It could simply mean that the warning may be dispensed with only "in the most exceptional cases"; or it could also mean that corroboration itself is unnecessary only "in the most exceptional cases". If indeed the second meaning is what was intended, *ie*, that conviction on uncorroborated testimony is "most exceptional", we can see clearly the logic of the rule portion shining through. Not only is it dangerous to convict without corroboration, but the trial court *cannot* convict, save in the most exceptional of circumstances – the discretion element is reduced to vanishing point.

If all our corroboration cases had been like these two, the picture would have been simple and we would have probably evolved, in time, a mandatory corroboration rule wherein the uncorroborated testimony of a witness in one of the three categories simply cannot be the basis of a conviction. But that was not to be – for there are as many cases which show a distinct distaste for the rule-like element of the corroboration regime. First is *Fuan*

[11] [1940] MLJ 250.

[12] The Privy Council, rather unsatisfactorily, side-stepped a submission that local law differed from the common law of England, see *supra,* note 6, pp 43-4.

*Ah Pock,*[11] a pre-War decision, which is almost a direct contradiction of *Chiu Nang Hong*.[12] The accused was convicted on a theft charge on the uncorroborated evidence of a child of 10. There was nothing in the record to show that the issue of corroboration was specifically addressed by the Magistrate. On appeal it was held:[13]

> It is ... an established rule of practice that in trials *before a jury* ... the danger of accepting such evidence must be clearly put by the trial judge ...
>
> In a trial *before a Magistrate* it often happens that there is nothing in the record to show that in considering the evidence the Magistrate has directed himself to the rules of evidence with which he can be presumed to be familiar with ... I think that any indication on the record that the point had been raised should be sufficient. [On the record, counsel for the accused had cited to the Magistrate a case concerning corroboration of child evidence]. I feel no doubt that the point was present in the learned Magistrate's mind, even though it was not specifically referred to in his grounds of judgment.

The attempt to draw a distinction between bench and jury trials does not succeed. *Chiu Nang Hong* was, of course, a bench trial. The approach was a common-sense one: was the Magistrate aware that he was dealing with uncorroborated testimony of a child? It does seem highly unlikely that he was not so aware – quite apart from the corroboration decision cited to him, the child witness must have testified before his very eyes. To require him to spell it out would have been fastidious in the extreme. Yet this was the very approach rejected in *Chiu Nang Hong* which, as we have seen, insisted on the trial judge spelling out expressly that he was aware of the danger.

Rather more extreme is the Malaysian case of *Tham Kai Yau,*[14] where a murder prosecution hinged on the uncorroborated testimony of a child of 13 (14 at the trial). The court pronounced:[15]

> In cases involving child evidence of tender years, we are of the opinion that it would *not be necessary to give a formal warning* that it was

[13] *Supra,* note 11, p 251 (italics added).

[14] [1977] 1 MLJ 174. Although Malaysia (and before that Malaya) was technically a different jurisdiction, earlier cases on both sides of the border did not think that the law was or should have been different.

[15] *Ibid,* pp 175-6. (italics added)

> dangerous to convict on the uncorroborated evidence of a child of tender years. It is sufficient if the judge adopts the prudent course of advising the jury to pay particular attention to or scrutinise with special care, the evidence of young children and explains the tendencies of children to invent and distort ...The absence of such a [formal] warning was not fatal.

The words do seem to repudiate the corroboration rules altogether. Failure to obey the corroboration rules do not affect the conviction, so long as the jury was fairly directed on the testimony of the child. It is not entirely clear whether the "prudent course" has taken the place of the "formal warning", changing only the content of the rule and not challenging its existence – this is a problem which shall be taken up later. What is clear is that if the appeal court refuses to police the rules governing the "formal warning", the warning itself becomes discretionary.

A final example illustrates a subtler form of rule aversion. *Din*[16] was a rape trial in which the trial judge found as a fact that the complainant was indeed raped. The accused gave a statement from the dock claiming that the complainant had mistakenly identified him, and that he was asleep at home with his wife. One might have thought that perhaps there was corroboration of his guilt in that he failed to produce his wife as a witness. One might also have thought that the accused's refusal to testify told against him. But what interests us is the manner in which the court carved out an exception to the corroboration rules:[17]

> Coming to the identification of the appellant the Judge fully recognised that there was no support whatsoever for the evidence of the prosecutrix that it was the appellant who attacked her. After a comprehensive appraisement of her evidence, however, he came to the conclusion that it was true ...
>
> Here, however, the necessity for corroboration, generally speaking, *is not so imperative with regard to the identity* of her assailant as to the fact of the offence itself ...[B]ut although it might be dangerous to find the factum of rape on the uncorroborated evidence of the prosecutrix *once that factum is established there seems to be nothing left to support the view that identification of the assailant calls for corroboration* any more than it would in relation to any other type

[16] [1964] MLJ 300 (italics added).
[17] *Ibid,* p 301 (italics added).

of offence.

The English common law did indeed reach this position many years later[18] But the upshot is that the corroboration rules apply only to the testimony of sexual offence victims with respect to the *factum* of the sexual offence, and not the identity of the accused. Whatever happened to the rule that corroborative evidence must, not only support the fact that the crime was committed, but also show that it was the accused who did it?

This short, and admittedly selective, history of the corroboration regime in this part of the world is sufficient to indicate that two schools of thought emerged and existed side by side.[19] There was the strict rule-centered tradition which sought to enforce the letter of the law and to reduce to insignificance the discretion to convict on uncorroborated testimony. There was also the liberal discretion-centered lobby which either refused to enforce breaches of the rules or to deny their existence altogether. This counter-movement also carved out exceptions to the rules, and re-emphasised the discretion to convict on uncorroborated testimony. It could have been that the courts switched from one mode to the other, depending on where the relative sympathies lay – indeed some of these decisions can be interpreted in this fashion. But one could never tell for sure which approach a particular court would take, and I would speculate that the inability to stick to a particular approach was, at least partially, a manifestation of the tension between a preference for rules and preference for discretion in the face of uncorroborated testimony.

## IV. The Case Against Rules

There is no denying that the tide has turned decidedly against corroboration rules all over the common law world. In 1972, the United Kingdom Criminal Law Revision Committee recommended the abolition of the accomplice

[18] *Chance* [1988] QB 932.

[19] It may be argued that the position was similar for the common law. See Mirfield, "An Alternative Future for Corroboration Warnings" (1991) 107 LQR 450.

[20] *11th Report, Evidence* (General), pp 106-24. The Report proposed a two-tier structure for sexual offences: mandatory corroboration for complainants under 14, and mandatory warning for others. The 11th Report was never acted on.

[21] *Criminal Law: Corroboration of Evidence in Criminal Trials* (1991), Law Com No 202. Significantly, the Law Commission did not repeat the 11th Report, *ibid,* recommendation on sexual offences.

[22] S 32(1) Criminal Justice and Public Order Act 1994. See Mirfield, "'Corroboration' After the 1994 Act" [1995] Crim LR 448; Birch, "Corroboration: Goodbye to All That" [1995] Crim LR 524.

and child rule.[20] By 1994, following the report of the Law Commission,[21] all rules of corroboration were abolished.[22] New Zealand did away with all corroboration rules in 1985.[23] Singapore abolished the accomplice rule in 1976.[24] Hong Kong has abolished the accomplice and child rule and appears to be proceeding with legislation to abolish the sexual offence rule.[25]

There is enough literature bemoaning the shortcomings of the common law corroboration rules.[26] I shall attempt no more than a brief summary of the major problems posed by the traditional corroboration regime. The United Kingdom Law Commission said:[27]

> The *inflexibility* of the rules springs from the fact that in every case that falls within the rules, whatever the trial judge's assessment of the reliability of the evidence ..., he is obliged to give a standardised warning that it is dangerous to convict in the absence of corroboration.

As with all rules, those which traditionally governed corroboration suffer from the twin problems of under- and over-inclusion. The corroboration rules do not cover all witnesses, but only those who fall within the three classic corroboration categories: accomplices, sexual offence victims and children. It is clear that witnesses of potentially doubtful credibility may fall outside these categories: witnesses with a grudge against the accused, or witnesses who stand to gain something by incriminating the accused. The rules should include them, but they do not. Conversely, there are witnesses who are within the classic corroboration categories, but whose credibility is not any more in question than any other witness: accomplices who no longer have any ostensible reason to incriminate the accused falsely, sexual assault victims who can by no stretch of imagination be presumed to be inclined towards sexual fantasy, children who are sufficiently coherent and mature. The judges look silly directing the jury or themselves that it is dangerous to convict on the uncorroborated testimony of potentially reliable witnesses who happen to fall within the classic corroboration categories. The other element of inflexibility is the "standardised warning". Credibility may be doubted to varying degrees but the corroboration rules force the

[23] See the helpful summary in the UK Law Commission Working Paper (*supra,* note 2), appendix B. The position in Canada and Australia is a little more complicated – something less than total abolition still exists. The other trend is legislative *prohibition* on certain sexual offence and child warnings, no doubt fuelled by the women and child rights movement.

[24] Evidence (Amendment) Act 11 of 1976.

[25] Hong Kong Government Press Release, 20 March 1999, http:/www.info.gov.hk/gia/general/199903/20/0320114.htm.

[26] *Eg,* Dennis, "Corroboration Requirements Reconsidered" [1994] Crim LR 316; Zuckerman, *The Principles of Criminal Evidence* (1989), Chapter 10.

[27] *Supra,* note 21, p 4 (italics added).

judge to give the same corroboration warning.

The other set of problems is described by the United Kingdom Law Commission as follows:[28]

> The *complexity* of the corroboration rules is notorious, as are the very great difficulties that that complexity causes ... for the judges who have to expound the rules ... and to understand and try to apply them.

All rules have to deal with problems of definition, but the corroboration rules appear to have had more than its fair share. First, and rather less serious, are problems associated with the definition of traditional corroboration categories. For example, the accomplice rule ran into difficulties with accomplices who gave evidence, not as a prosecution witness, but as a co-accused.[29] Complicity is, of course, a matter of degree, and complex rules had to be developed to specify the extent to which participation becomes complicity for the purpose of the rule.[30] We have encountered the peculiar exception to the sexual offence rule where only identity is in issue.[31] More intractable is the problem demonstrated by the luxuriant case-law surrounding the definition of corroboration itself. The word itself could mean anything from any evidence somehow supportive of any part of the witness' testimony to evidence strongly incriminating the accused of the crime charged.[32] Battles have been waged over the issue of whether corroboration had to come from an independent source, and whether corroboration had to be evidence with a decent probative value.[33] Rules begat rules.

The other source of complexity (perhaps more aptly described as confusion) is that which has already been discussed – the inherent contradiction between the mandatory warning that it is dangerous to convict on

[28] *Ibid* (italics added).

[29] *Tan Cheng Seng* [1948] 1 MLJ 148, following English authority. The reason for not treating co-accused persons as accomplices stems from desire not to prejudice the co-accused in his defence, not from any increased credibility on the part of the co-accused.

[30] See C*hai Chien Wei Kelvi*n [1999] 1 SLR 25, adopting the classic common law definition in *Davies* [1954] AC 378.

[31] *Supra*, note 16.

[32] *The Oxford English Dictionary* (1989 Ed) uses words like "confirm" and "strengthen" to describe corroboration.

[33] See the discussion below on s159 Evidence Act. The injunction not to consider the probative value of evidence for the purpose of qualifying as corroboration (*Wong Muk-Ping* [1987] 2 All ER 488) does seem to contradict the idea that corroboration must be independent (*Baskerville* [1916] 2 KB 658) – why else must corroboration be independent, if not to vouch for its probative value?

uncorroborated testimony, and the discretionary power to do so notwithstanding. This became an invitation for courts to choose between heeding and not heeding the warning, without clear guidelines as to how the choice is to be made.

Quite apart from these internal and rather technical problems, larger forces were, and still are, at work, pushing forward the abolitionist agenda. Life after the demise of corroboration rules is described by the Law Commission:[34]

> The general rule that the *defence must be [considered] fairly and adequately* will remain [after the abolition of corroboration rules], as will the general control of the Court of Appeal. Witnesses now within the corroboration rules would be treated, as other witnesses already are, *on their merits.*

No less than three broader movements may be identified. First is, what I shall call, the "free proof" philosophy. This is normally traced to the work of Jeremy Bentham in the context of the rules of admissibility.[35] Bentham argued that all relevant evidence should be admissible, and the trier-of-fact left to assess probative value. Rules of admissibility which shut out relevant evidence from the court should be viewed with grave suspicion.[36] This has been, and continues to be, a great influence in modern developments in the law of evidence.[37] In the context of the corroboration rules, the "free proof" advocate would contend that the court should be left to assess the probative value of uncorroborated evidence, unencumbered by rules.[38] The "free proof" movement is a champion of a discretion-centered approach to witnesses of potentially doubtful credibility. Such is the ascendancy of the "free proof" movement that we have to be careful not to dismiss out of hand the case for rules. Rules are by nature, to some extent, over- and under-inclusive. For example, speed limits on the expressway will catch careful drivers who exceed the limit, and will also fail to

[34] *Supra,* note 21, p 10 (italics added).

[35] *Rationale of Judicial Evidence* (1827).

[36] Rules of admissibility can, of course, be justified where the "disutility" (of admitting the evidence) outweighs the "utility". See Zuckerman, *supra,* note 26, pp 49-50.

[37] The most famous "free proof" crusade fought by Bentham is, of course, the fight against the privilege against self-incrimination, which is also in decline in the common law world.

[38] Corroboration rules could be justified in Benthamite philosophy by arguing that the trier of fact cannot be trusted to assign the appropriate probative value to the testimony of suspect witnesses – but that would be an unattractive argument to make for the integrity of the existing system of justice is premised on the ability of the trier of fact to assess the credibility of witnesses.

detect careless drivers who do not exceed the limit – but few challenge the desirability of a rule governing speed limits. Why, because it is believed that a large enough proportion of those caught by the limit are a danger to other road users. The cost of over- and under- inclusion must be balanced off against the times when the rule does hit its mark. The analogy with corroboration rules is clear. The cost of over- and under-inclusion (and of administering the rule) may well worth it, considering that the rule probably functions as it should much of the time (*ie,* prevents the conviction of the innocent in the face of uncorroborated testimony). A system of discretion is not *necessarily* any better – discretion does not guarantee more accurate results. Much depends on imponderables like how the discretion is likely to be exercised. In the context of oath against oath, it is not at all easy to see any principled basis on which the discretion (to convict or acquit) will or should be exercised.[39] It is simply not clear that a system of discretion will result in more hits than misses than a regime of rules.

The second movement which informs the debate is what I shall call the "law and order" philosophy.[40] This is best appreciated from the point of view of the prosecution. Corroboration rules are a hindrance to conviction, and therefore an obstacle to law enforcement. Confidence in the ability of the criminal justice system to deal with crime is dented by allowing accused persons to escape on the technicalities of corroboration rules. Moreover, the realities of crime detection are such that the testimony of the accomplice or victim is often the only incriminating evidence available. There can be little doubt that in Singapore, at least, the "law and order" philosophy is predominant. Yet trials must be fair, and we cannot ignore "due process" ideals. The "law and order" approach works wonderfully if the accused person is indeed guilty. But we cannot forget that the purpose of the trial is to determine guilt, not simply to rubber-stamp what the prosecution has already decided (by preferring charges). An attempt to make it easier for the prosecution to succeed when the accused is guilty is likely to make it easier for the conviction of the innocent as well. When it comes to the crunch, there is the oft-unspoken sacrifice that the "law and order" advocate is willing to make – the mistaken conviction of an innocent person is the price that has to be paid (albeit regrettably) for the rightful conviction of

[39] A possible consequence is the development of "guidelines" for the exercise of discretion which, in time, might crystallise into rules – that seems to be how corroboration rules came about in the first place.

[40] Attorney-General Chan, "The Criminal Process – The Singapore Model" (1996) 17 Sing LR 431. The idea is that traditional common law efforts designed to protect the innocent operate unfairly against the prosecution, victims and society seeking to bring offenders to justice.

guilty persons (who might otherwise have escaped). The "due process" school of thought sees this kind of bargain as being morally wrong and impermissible. I am not sure that this tension can ever be satisfactorily resolved philosophically, but the strength of the abolitionist movement in the law of corroboration testifies to the contemporary appeal of the "law and order" way of thinking.[41]

The third force is that of anti-discrimination in general, and the rise of women and child rights movements in particular. This is most clearly seen in the context of sexual offences against women. Feminist jurisprudence urges legal systems to recognise the historical and systematic oppression of women, especially through forced sexual relations.[42] From this perspective, corroboration rules which target only sexual offence complainants (and no others) become an instrument of oppression. As it is, present day norms and expectations of sexual equality make expressions of the traditional rationale of the sexual offence rule sound archaic, false and indeed downright offensive. One cannot imagine a judge today using these words, which were said not that long ago:[43]

> [T]he temptations of a woman to exaggerate an act of sexual connection are well known and manifold.

Similarly, this description of child evidence is unlikely to be repeated today:[44]

> ...the notorious unreliability of children as witnesses and in particular their known aptitude to confuse fact with fantasy...

Not only is scientific evidence on this score lacking, but the kind of sexual assault cases which are most repulsive are those committed by adults (who are supposed to be care-givers) on defenceless children under their charge. Here, the corroboration rules are seen as making it twice as difficult to obtain a conviction – the rules require a double warning that the witness is both a child and a sexual assault victim. The corroboration rules are seen as part of the structural oppression of children.

The force of the anti-discrimination argument for abolition is strong,

[41] A similar debate is played out in the disagreement over the proper burden of proof on the prosecution at the end of the prosecution's case: see Hor, "The Persistent Problem of the Prosecutor's *Prima Facie* Burden" (1997) 9 SAcLJ 388.

[42] *Eg,* Schulhofer, *Unwanted Sex* (1998).

[43] *Din*, *supra,* note 16, p 301.

[44] *Ibid.*

perhaps the strongest of the three. If we do not have corroboration rules for any other offence, why do they exist only for sexual offences? If we do not have corroboration rules for adults with subnormal or abnormal mental processes, or adults with every reason to fabricate testimony, then why do they exist for children? The right to equality is an important one, but so is the right to a fair trial. Working out a compromise between equality and other fundamental values is one of the most difficult tasks of modern constitutional law. What do we do with speech which is likely to reinforce historical stereotypes of women, or with a religious belief in the inferiority of women? The answer is not cut and dried. It is in a situation where we feel the greatest desire to do away with the corroboration rules (for example, where a child complainant alleges rape) that the need to protect the innocent from wrongful conviction is strongest, both because of the potential prejudice which is likely to be directed against any accused person, and because of the stigma and very severe penalties in store for the convicted. Singling out sexual offences and children is probably unjustifiably discriminatory, but equality can be attained not only by abolishing the rule, but by the opposite strategy of extending the rule across the board to all situations in which the prosecution relies only on the uncorroborated testimony of a witness, whether or not a child, and whether or not a sexual offence. The extension of existing corroboration categories, or the creation of new categories has been largely frowned upon.[45] Yet it is not unknown. In a rare but significant decision, the Australian High Court in *McKinney and Judge* created a new corroboration category – the disputed custodial confession:[46]

> [T]he jury should be informed that it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence available to support a challenge to such police evidence of confessional statement than it is for such police evidence to be fabricated, and, accordingly, *it is necessary that they be instructed* ... that they should give careful consideration as to the *dangers involved in convicting* ... in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is a [custodial confession], the making of which is not reliably corroborated.

[45] *Eg, Spencer* [1986] 2 All ER 928.
[46] (1991) 171 CLR 468, 476 (italics added).
[47] "Direction in the Law of Corroboration" (1993) 14 Sing LR 96, 131.

In Singapore, Tan Yock Lin makes a plea to the same effect:[47]

> A retracted confession poses all the concerns which engage the necessity of corroboration. It is often oath against oath. While the confessee alleges that the confession was voluntarily made, the confessor alleges it was extracted by force, inducement or promise.

Although there is local authority in support of *McKinney and Judge,* the position now is quite clearly the opposite.[48] Convictions on uncorroborated (and disputed) confessions are by no means rare. The truth is that there are very few weapons in the judicial arsenal when the court disapproves of improper police conduct. Custodial confessions could have been ruled inadmissible, but that might have been too strong a response.[49] Creating a corroboration rule does seem like a plausible compromise. One simply has to live with the "inflexibility" and "complexity" of yet another corroboration category, but it is the price that has to be paid. Whether this decision is just a flash in the pan, or is destined to be the seed of a new corroboration harvest remains to be seen – but it is a testament to the alternative way of meeting the equality argument.

## V. The Accomplice Rule in Singapore

The accomplice category is the only one to have attracted legislative attention. Inspired by the recommendations of the 11th Report of the United Kingdom Criminal Law Revision Committee, the accomplice rule was "abrogated" in 1976:[50]

> Any rule of law or practice whereby at a trial it is *obligatory* for the court to warn itself about convicting the accused on the uncorroborated testimony of the accomplice is hereby abrogated.

One would have thought that the disappearance of the "rule" places the accomplice witness back into the normal discretionary regime. The accomplice, like any other witness, is now subject to a discretionary presumption (depending on the circumstances) described by illustration (b) to section 116:[51]

> The court may presume that an accomplice is unworthy of credit and

[48] *Ibid,* p 132.
[49] The original (s 26 of the) Evidence Act made all custodial confessions inadmissible.
[50] S 135 Evidence Act (italics added).
[51] Evidence Act.

his evidence needs to be treated with caution.

It would appear that the legislature has stepped into the "rule vs discretion" debate here and decided on discretion. Some earlier cases seem to have so interpreted the amendment – accomplices are now to be treated like any other witness.[52] More recent cases however adopt a discernibly more guarded attitude towards the complete abandonment of the accomplice rule. Words like these, found in *Tan Khee Koon,* express a distinct unease with leaving accomplices to the normal discretionary regime:[53]

> While section 116 is couched in terms of a discretion, there is no doubt that in most instances*, the courts will still treat accomplice evidence with more caution than normal* ... The accomplice is an interested party, who would have reasons of his own to exaggerate the culpability of ... the accused, while reducing the magnitude ... of his own involvement ... The present law then is that no [corroboration] warning ... is required. Nonetheless, the accomplice's evidence *still needs to be treated with caution.*

In a similar vein is the more recent decision in *Tan Hung Yeoh:*[54]

> The corroboration warning against an accomplice's evidence is no longer mandatory ... All that the court is *required to do* is to treat the evidence of an accomplice with caution ... The trial judge had cautioned himself that [the prosecution witness] was an accomplice and had perused [his] evidence very carefully before relying on it ... [T]here was nothing in law which would have prevented the trial judge from relying on [his] testimony, whether or not [it] was corroborated.

These sentiments indicate the resurgence of a rule-based regime. Accomplices still stand apart from other witnesses in that the trial judge is "required" to treat them with "more caution than normal". The content of the rule is different – the requirement is to treat accomplice evidence with caution, no longer is the court obliged to administer the particular warning of the danger of convicting on uncorroborated testimony. A mandatory "caution" rule seems to have replaced the mandatory corroboration warning (of the common law). It remains to be seen whether, and to what extent, appellate tribunals will enforce the rule by overturning convictions on the

[52] *Eg, Kong Weng Chong* [1994] 1 SLR 34.
[53] [1995] 3 SLR 724, 731 (italics added).
[54] [1999] 3 SLR 93, 109 (italics added).

ground that trial judges have failed to direct themselves that they have to be cautious with accomplice evidence. This and some of the perceived "shortcomings" of a rule-based regime will be re-introduced: for example, is the accomplice turned co-accused covered? One cannot ignore the clear judicial feeling that something more than the normal discretionary system is needed – but what exactly is the content of the new rule-based regime is not entirely clear. The rule-discretion tension persists, notwithstanding legislative intervention.

A piece of unfinished business is the meaning of section 25 of the Prevention of Corruption Act (PCA), enacted before the 1976 amendment:[55]

> Notwithstanding any rule of law or written law to the contrary, no witness shall [in proceedings under the Act] be presumed to be unworthy of credit *by reason only of any payment or delivery* by him or on his behalf of any gratification to an agent or member of a public body.

This provision was clearly meant to be an exception to the accomplice rule. If the section was to have had any meaning at all, it must have been that it exempted some witnesses who would otherwise have fallen within the accomplice rule. The courts were not willing to exempt all accomplices who paid or delivered gratification, so they came up with a distinction between "active" accomplices ("mere payors" who go no further than to pay or deliver), and "passive" accomplices (those who go beyond that by, for example, persuading the public officer to accept it). Only passive accomplices, otherwise subject to the accomplice rule, are to be treated like ordinary witnesses. Exactly how the active-passive distinction was to be drawn, and why it should be drawn has never been clear.

The abolition of the accomplice rule itself provided a golden opportunity to do away with the troublesome section altogether – the disappearance of the accomplice rule must mean that the section, which only functions to create an exception to the rule, no longer has any purpose. Indeed it must have been a legislative oversight that the section remained untouched. If the 1976 amendment had been interpreted to mean the total abolition of the accomplice rule, then section 25 of the PCA can no longer mean anything – all accomplices, active or passive, are to be treated like any other witness under the normal discretionary system. But, as we have seen, our recent cases appear to have resurrected a mandatory caution rule in

[55] Cap 241, enacted in 1960 (italic added). See also s 12 Kidnapping Act (Cap 151, 1999 Rev Ed) which, unfortunately, has never been the subject of judicial comment.

its place. The court in *Tan Khee Koon* had to work out the meaning of the section in the face of this development. It upheld the active-passive distinction, held that active accomplices are subject to the new mandatory caution rule, and then said:[56]

> What is less clear is whether there has to be any additional caution in respect of the evidence of the *mere payor*. [Rejecting earlier dicta to the contrary] it is *not necessary then to apply any greater caution* to the evidence of section 25 witnesses beyond that practised normally.

New life was breathed into section 25. In the past it operated as an exception to the traditional accomplice (corroboration warning) rule, now it serves to exempt mere payors from the new accomplice (mandatory caution) rule. This raises the same old problems that plagued section 25: why and how should the passive-active distinction be drawn?[57]

The more recent decision of *Kwang Boon Kong Peter*[58] has generated even more questions. Section 25 (explicitly) applies only where the recipient of gratification is an "agent or member of a public body" – what of recipients who are officials of a private corporation? One might have thought that without the operation of section 25, the general regime for accomplices (mandatory caution rule) applies, whether or not they were active or passive. Not so, held the court; the active-passive distinction applies even without section 25.[59] The implications are far-reaching. If there is a new principle that the (renovated) accomplice rule applies only to active accomplices *independent of section 25,* then there is no reason to restrict that principle to proceedings under the Prevention of Corruption Act – it should apply across the board all criminal prosecutions. This in turn will raise the issue of how the active-passive distinction is to be applied in the context of non-corruption offences.

In any discussion of corroboration, it is easy to lose sight of the particular problem we are trying to deal with – that of oath against oath. Directions

56 *Supra,* note 53, p 735 (italics added).

57 In *Tan Khee Koon,* the court simply said that "what conduct crosses the line is a question of fact" and that "it would be futile to attempt to set rigid guidelines". Why then did the court not set *flexible* guidelines? How are trial judges to know what to do?

58 [1998] 2 SLR 592.

59 *Ibid,* p 612. The court held that "[a]lthough *Tan Khee Koon* dealt with gratification to a public servant ... the principles and rationale stated there are equally relevant to gratification paid to any individual".

60 *Abdul Rashid* [1994] 1 SLR 119, p 131-2 (italics added).

like the following are given, and approved on appeal, routinely:[60]

> I *considered carefully* the significance of the evidence of the first accused who unequivocally implicated the second accused whilst confessing that he transported the [illicit drug] into Singapore. I *scrutinized* the evidence of the first accused with much care ... Moreover, I *reminded myself of the pitfalls in relying exclusively on the evidence of the first accused* ... However, having first weighed in my mind the *circumstantial aspects* of this case and having the *advantage of observing and hearing* both accused persons in their defence, I was satisfied that the [testimony of the first accused] was the true version ... The first accused was *emphatic* in ... implicating the second accused who was *his neighbour. No motive* had been attributed to the first accused as to why he should in fact implicate the second accused [falsely]. Another telling feature was that he [the first accused] totally *absolved the third accused.*

Although the accomplice turned co-accused has never been the subject of the traditional corroboration rules,[61] the problems are similar, and perhaps even more acute.[62] How did the judge decide to prefer the testimony of the first accused over the second? First, he tells us something about the process – he "considered carefully" the evidence and he "scrutinized" the testimony "with much care". The judge even administered to himself something close to the traditional warning of the danger of convicting on uncorroborated testimony – he "reminded himself of the pitfalls of relying exclusively on the evidence of the first accused". Then the judge tells us why he preferred the first accused. First, he relied on "the circumstantial aspects", but these presumably did not amount to circumstantial evidence of the guilt of the second accused – otherwise there would not have been any need to rely "exclusively" on the testimony of the first accused. Then that familiar refrain, "the advantage of hearing and observing" the witnesses first hand, was used. I do not need to stress the unsatisfactory nature of making too much of witness demeanour. The rest of the reasons do sound as if a bit of straw-grasping is going on: one is not likely to emphatically implicate one's neighbour falsely; when a witness implicates one co-accused and absolves another, then he is likely to be telling the truth. The expectation that it is the (second) accused who must show that the witness had a motive to lie does seem to involve an illegitimate shifting of the burden of proof.

61 *Supra,* note 29.

62 Whereas the accomplice who is not a co-accused labours under the prospect of a prosecution, the accomplice who is a co-accused is under an immediate threat of punishment.

One searches in vain for a satisfactory reason for the trial judge choosing the testimony of one accused over the other. A rule requiring corroboration would have resulted in an acquittal. This would have provided maximum protection for the innocent, but it will also be very costly in the sense that much more time and expense will have to be put into investigation, and in that there would be the increased possibility of a substantial number of guilty persons escaping. A completely discretionary system might tax the concept of proof beyond reasonable doubt a little too much – as we have seen, trial judges might be tempted to employ less than satisfactory deductions and assumptions. The prospect of the conviction of an innocent accused increases. How do hybrid rule and discretion models like the traditional corroboration rules (and the emerging caution rule) fare? They seem to highly dependent on whether the trial judge chooses to emphasise the rule element (and acquit), or the discretion element (and convict), as appears to have happened in this case. At the heart of it, the law is simply unable to commit itself to a consistent solution.

## VI. The Sexual Offence Rule in Singapore

Uninterrupted by legislation, the sexual offence rule continued to evolve through judicial decisions. In stark contrast to the reluctance of the accomplice cases to abandon a rule-based regime (in the face of legislation to the contrary), recent sexual offence cases show a distinct distaste for rules, and a clear preference for discretion. Perhaps the strongest expression of this is to be found in *Tang Kin Seng:*[63]

> [I]t is hard to see why the same considerations [which make the uncorroborated testimony of sexual offence complainants potentially unreliable] do not apply in cases involving other offences. A false accusation concerning other offences can just as easily arise from sexual neurosis, jealousy, fantasy or spite. The danger is no less hidden. It may be the case that such motives to falsely implicate may have a particular bearing upon sexual cases, but, surely, *this should only mean that the evidence must be sifted with care, which should, in any event, be done in all cases.*
>
> [The abolition of the sexual offence rule in some other jurisdictions

[63] [1997] 1 SLR 46, 56-8 (italics added).

is discussed with apparent approval]

> In Singapore ... there is *no legal requirement that a judge must warn himself* expressly of the danger of convicting on the uncorroborated evidence of a complainant in a case involving sexual offences. There is, however, authority to the effect that it is *dangerous to convict on the words of the complainant alone unless her evidence is unusually compelling*. There is therefore *no reason for the courts to be bogged down by legal technicalities as to whether or not there is corroboration* and what is or is not, legally speaking, corroboration ... [T]he right approach is to analyse the evidence ... in the light of all the circumstances of each case ... as well as the accumulated knowledge of human behaviour and common sense.

In a similar vein is the more recent decision of *Soh Yang Tick*:[64]

> Although *we do not have legislation*, unlike the position in England expressly abolishing the need for corroboration warnings ... nevertheless we *should not be over concerned* about the technicalities of the concept of corroboration. Rather, it is important to realise that, especially in cases of sexual offences, *one should not convict* an accused on the word of the victim or complainant alone *unless the evidence is unusually convincing*.

There is language here to the effect that there is not (and, indeed, has never been) a sexual offence rule in Singapore. Historically, this cannot be right.[65] If anything these recent decisions seem to be a judicial abolition of the sexual offence rule. The treatment which sexual offence victims deserve is no different from the treatment of any other witness – the "care" with which such witnesses should be dealt with "should, in any event, be done in all cases". There is "no legal requirement" that the corroboration warning be given. The "right approach" is to ignore the whole idea of corroboration and to "analyse the evidence" properly.

Yet the picture is not as clear as we would prefer it to be. The first judgement refers, without disapproval, to the "authority to the effect that it is dangerous to convict on the words of the complainant alone unless her evidence is unusually compelling". The second emphasises that "it is important to realise" that the trial court "should not convict" on the bare word of the complainant "unless the evidence is unusually convincing".

[64] [1998] 2 SLR 42, 52 (italics added.)
[65] *Eg,* see *supra,* note 12.

These words hark back to the days of the corroboration rule. The implication is that appellate courts will scrutinise the trial court's grounds of decision to see if the trial judge was indeed aware of the danger of convicting on the bare word of the complainant. It is not a full blown corroboration warning, but one which is akin to the mandatory caution rule which seems to apply to accomplices post-abolition. There are additional problems. The two judgments differ as to whether it is *merely dangerous* to convict on the bare words of the complainant (but the trial judge may nevertheless do so) or whether the trial judge *should not* (presumably, meaning "cannot") so convict. Then there is the enigmatic "unusually compelling (or convin-cing)" exception. The case of *Teo Keng Pong* sought to clarify its meaning:[66]

> [T]here is nothing magical about the words ... They are but another way of saying that the witness's testimony was *so convincing that the prosecution's case was proven beyond reasonable doubt,* solely on basis of that evidence.

The terminology is misleading – when we say that a certain piece of testimony is "compelling" or "convincing", we must mean, in a criminal trial, compelling or convincing beyond reasonable doubt. To then describe testimony as *unusually* compelling or convincing is to mislead the reader into thinking that something more than the normal criminal standard of proof is required. If the testimony is in and of itself proof beyond reasonable doubt, then it is again misleading to say what is implied by the first part of the pronouncement – that it is no longer dangerous to convict (*ie,* the court may or may not convict); for not only is it no longer dangerous to convict, the court *must* convict. Fortunately, the "unusually compelling (or convincing)" concept does not plague the post-abolition accomplice caution rule. The position (for accomplices) is simply that the trial judge must demonstrate an awareness that he or she must be cautious when faced with bare testimony, and that he or she has scrutinised the testimony to determine if it is reliable beyond reasonable doubt. If so satisfied, a conviction must be recorded. If not, there must be an acquittal. The new sexual offence rule would do well to learn from this.

This raises the now familiar issue of how unsupported complainant testimony faced with unsupported counter-testimony of the accused can ever be proof beyond reasonable doubt. We are left with nothing but the rather unsatisfactory "tie-breakers" like the ones used in *Abdul Rashid.*[67] For

[66] [1996] 3 SLR 329, 340 (italics added). The phrase seems to have originated in the colonial decision of *Mardai* [1950] MLJ 33.

[67] *Supra*, note 60.

example, it will be remembered that in *Abdul Rashid,* the Court of Appeal approved the direction of the trial judge which employed as one of the "tie-breakers" the fact that the accused was unable to attribute to his accuser any motive to lie.[68] In *Khoo Kwoon Hain,* however, the trial judge was taken to task for doing just that:[69]

> The [trial] judge relied on the fact that the [accused] was unable to venture a reason why the complainant would lie. [This] is *neither here nor there.* The burden of proving lack of motive to falsely implicate the [accused] is on the prosecution. It is not for the defendant to prove that the complainant had some reason to falsely accuse him.

This starkly different treatment of the same alleged tie-breaker can only be explained by the fact that the appellate court in *Abdul Rashid* approved of the conviction, but the appellate court in *Khoo Kwoon Hain* did not. The alleged tie-breaker is not the decisive factor at all but appears to be an excuse for a decision made according to some other criteria independent of it.

Meanwhile, other more or less contemporaneous judgments seem blissfully unaware that all this is going on. *Tang Kin Seng* is quite correct in saying that, with the corroboration rules gone, it would be senseless to be "bogged down by legal technicalities as to whether or not there is corroboration and what is or is not, legally speaking, corroboration".[70] But there is a cluster of decisions which *do* treat the question of what is or is not corroboration quite seriously indeed. In *Tan Pin Seng*,[71] the court adopted the rather elaborate rules of the common law dealing with the lies of the accused as corroboration. The court in *Khoo Kwoon Hain* was rather exercised as to whether prior consistent statements of the complainant can corroborate.[72] In *Teo Keng Pong,* there was a discussion of whether a parent can corroborate the testimony of a child complainant of a sexual offence.[73]

68 *Ibid.*
69 [1995] 2 SLR 765, 781 (italics added.)
70 *Supra*, note 63, p 58.
71 [1998] 1 SLR 418, 428.
72 *Supra,* note 69, pp 776-7.
73 *Supra*, note 66, pp 339-40.
74 [1997] 3 SLR 278, pp 296-301. There is no point in analysing the judgment in detail. The upshot can be stated quite simply – a conviction is justified in two situations: where the testimony of the suspect witness alone is proof beyond reasonable doubt; and where the testimony plus supporting (or corroborative) evidence amounts to proof beyond reasonable doubt. The only really objectionable holding (as far as corroboration was concerned) was that similar fact evidence, although inadmissible, may still corroborate: see Hor, "Similar Fact Evidence in Singapore: Probative Value, Prejudice and Politics" [1999] SJLS 48, pp 75-6.

The case of *Lee Kwang Peng* contains a labyrinthine analysis of what can and cannot constitute corroboration.[74] These pronouncements are more than a little mystifying if the corroboration rules no longer exist for sexual offences.

To summarise, the position of sexual offence complainants is quite unclear. It may be that the corroboration rules apply with full force. This is supported by the cases which discuss with apparent seriousness the question of what is and is not corroboration, and by the absence of legislative intervention. It may also be that the sexual offence rule has been judicially abolished, throwing such witnesses back into the normal discretionary system of assessment. The third possibility is a half-way house – the corroboration rules are gone, but in its place is a mandatory caution rule akin to the post-abolition position for accomplices. The ravages of the rule-discretion battle are particularly evident here.

## VII. The Child Witness Rule in Singapore

Modern cases on the testimony of children, unfortunately, almost always occur in the context of sexual offences. Discussion of corroboration is normally subsumed under the sexual offence complainant rule. Although *Lee Kwang Peng* is not an exception, it does contain a rare, independent elaboration of the child witness rule:[75]

> [I]t is a *well-established rule of practice in our law* that where evidence is given by a child witness, that evidence is *not to be accepted at face value without some measure of corroboration* ... The rationale of the rule makes it very difficult to lay down a guideline as to the point at which a maturing individual, in his progress towards adulthood, crosses the line past which the judicial process considers his testimony credible without independent evidence in support of it ... The court's discomfort with requiring a corroboration warning in all cases ... manifested itself in *Tham Kai Yau* [which held that] a formal warning ... need not be issued ... if [the jury] were advised to pay particular attention to or to scrutinise with special care the evidence of young children ... In accordance with [this] approach ... I consider that there is *no special rule requiring a trial judge to direct himself as to the dangers of convicting without corroboration* where the only evidence is that of a child witness, although he or she *must remain sensitive*

[75] *Ibid,* pp 295-6 (italics added).

> *to the requirement of corroborative evidence* or alternatively consider that corroboration is not required because of maturity and reliability.

These passages are infected with a similar inability to describe with clarity exactly what the position is with regard to uncorroborated child testimony. One might reasonably conclude from the statement that there is "no special rule" governing child witnesses, and from the citation of *Tham Kai Yau,*[76] that child witnesses are to be treated like other witnesses under the normal discretionary system of assessment. Yet in the same breath, we are told that there is this "well-established *rule* of practice in our law" that the trial judge "*must* remain sensitive to the *requirement* of *corroborative* evidence". This is classic corroboration language expressing the position rejected in *Tham Kai Yau.* How is the trial judge to show that he or she has been "sensitive to the requirement of corroborative evidence" except by saying that he or she is aware of the danger of convicting on uncorroborated child testimony?

Notice also that there is no indication here of a shift from the traditional corroboration warning to the new caution requirement advocated by the post-abolition accomplice cases and some of the recent sexual offence decisions. We do not know why. If the court is minded to set up a caution rule for accomplices and sexual offence complainants, then, the presumption must be that child witnesses should be governed by the same rule. The court ought to have explained why it did not think that such a course was suitable for child witnesses.

## VIII. Section 159 and the Definition of Corroboration

The most vexed problem in the corroboration universe is that of section 159 of the Evidence Act:

> In order to *corroborate* the testimony of a witness, *any former statement* made by such witness ... relating to the same fact *at or about the time* when the fact took place, or *before any authority* legally competent to investigate the fact, may be proved. (italics added)

The difficulty is that it is flatly contradictory to the almost universally accepted definition of corroboration found in *Baskerville:*[77]

[76] *Supra,* note 14.
[77] [1916] 2 KB 658, 667 (italics added).

> [E]vidence in corroboration *must be independent* testimony which affects the accused by connecting or tending to connect him with the crime ... it must be evidence which implicates him, that is, which confirms in some material particulars not only that the evidence that the crime has been committed, but also that the prisoner committed it.

One way of dealing with this is to say simply that the *Baskerville* definition, arising from the common law of England, cannot over-ride the clear words of section 159. This is precisely what the court in *Teo Eng Chan* did when it held several 159 statements to be corroboration of the testimony of a sexual offence complainant:[78]

> I fully appreciate in the case of *Chiu Nang Hong,* Lord Donovan said corroboration must be independent of the witness' testimony. However ... counsel for the *Public Prosecutor was precluded from argument on the significant* differences between the law and practice in England and the law and practice in Malaysia [and therefore Singapore] ... *Our law is contained in section 159.*

However, some more recent decisions are decidedly equivocal. *Khoo Kwoon Hain* is an example:[79]

> The position in Singapore is *of course* as stated in PP v Teo Eng Chan. Hence, a previous complaint goes beyond the question of *consistency* and is *admissible evidence.* In my view, although section 159 has the effect of elevating a recent complaint to *corroboration*, the court should nevertheless bear in mind the fact that corroboration by virtue of section 159 alone *is not corroboration by independent evidence.* It would be dangerous to equate this form of corroboration with corroboration in the *normal sense* of the word.

This is a fascinating piece of confusion. If *Teo Eng Chan* is the governing authority, and section 159 not only makes a previous consistent statement "admissible evidence" but "has the effect of elevating" it to "corroboration" then what could it possibly mean to say that this is not corroboration in the "normal sense"? We do not really care what corroboration "in the normal sense" is, whatever that may mean. What we are concerned about is whether it is corroboration for the purpose of the corroboration rules. If corroboration

78 [1987] SLR 475, 483 (italics added).
79 *Supra,* note 69, pp 776-7 (italics added).

"in the normal sense" means corroboration for the purpose of the corroboration rules, then the earlier part of the pronouncement makes no sense – for it is at pains to point out that a section 159 statement is not merely admissible (*ie,* has some probative value supporting the testimony) but is *elevated* to the status of corroboration. If the "normal sense" of corroboration is merely supportive evidence, then the second part of the passage quoted does not gel – why would it be dangerous to say that a section 159 statement is supportive of the witness' testimony? All we can discern with any degree of certainty is that the court had severe misgivings about treating section 159 statements as corroboration, but did not know what to do with the apparently clear words of section 159.

The later decision of *Soh Yang Tick* exhibited the same unease, but sought to draw a distinction between qualification as corroboration and probative weight:[80]

> Although by virtue of section 159... such previous statements made [by the complainant] could *technically* be considered 'corroborative evidence', they, in my view, did not command as much weight as the trial judge appeared to give them ... For supporting evidence to carry *weight*, an essential ingredient which it must possess is that of independence.

The entire purpose of the corroboration rules is to encourage the trial court to look for the tie-breaking evidence (where it is one person's word against another). It simply does not make much sense to say that a 159 statement can be corroboration (*ie,* can be the tie-breaker) and then declare that it can never have enough weight to amount to anything. In the logic of the corroboration rules then, a witness with no 159 statement and a witness with a 159 statement stand in exactly the same position – it is dangerous to convict on the witness' testimony.

There is a tension that just cannot be resolved between the literal meaning of section 159 and the unpalatable consequences of what it says. The entire structure of corroboration rules is to protect the innocent accused from being convicted on uncorroborated testimony. It is simply ridiculous to allow the mechanism to be de-activated by a 159 statement. 159 statements given "at or about the time" the events in question took place can at least appeal to contemporaneity and the lack of opportunity to concoct,[81] but 159 statements given to a competent investigative authority cannot. In practice, most

[80] *Supra,* note 64, p 53 (italics added).

[81] Adopting a parallel reasoning from the *res gestae* cases (*eg, Ratten* [1971] 3 All ER 801) in the context of hearsay.

investigations and prosecutions are initiated by such a statement – to allow the statement to be corroboration will spell the end of the corroboration rules for all practical intents and purposes. More recent legislative initiatives do seem to realise the problem of self-corroboration and adopt the *Baskerville* requirement of independence.[82] There are really only two alternatives. Either read "corroboration" in section 159 to mean merely supportive evidence and not corroboration for the purpose of the corroboration rules;[83] or take section 159 at face value, consider it corroboration for the purpose of the corroboration rules and accept the consequences. Any other stance invites confusion.

We have conducted the preceding arguments on the assumption that the corroboration rules exist. It no longer does for accomplices, and for sexual offences and children there is now considerable doubt as to whether the corroboration rules still apply. In both the completely discretionary system and the caution rule regime, it no longer means anything for something to be labelled corroboration (or not to be labelled corroboration). *Tang Kin Seng* quite rightly observed:[84]

> It would be a mere academic exercise to attempt to reconcile what was said in some of the Singapore cases and the Malaysian ones [which adopt different views of section 159]. Deciding whether to call a previous complaint 'corroboration' or otherwise *does not add anything* to the fact finding process.

Of course, only where the corroboration rules no longer apply does the corroboration label "not add anything to the fact finding process". Simply assign a section 159 statement its appropriate weight and then move on. This is the other, more radical, way of dealing with the section 159 problem.

But what exactly is the weight of a 159 statement? Our most recent cases do not seem willing to assign it any weight at all. The reason is that consistency between the 159 statement and testimony in court is intractably equivocal. The story may be consistent because that was what really happened, or because the witness decided to concoct it and stick to that fabrication. There is usually no way of telling which it is. The cases have, somewhat surprisingly,

[82] *Eg* s 381(4) Criminal Procedure Code (Cap 68, 1985 Rev Ed); s 147(7) Evidence Act. Both provisions are modern amendments which make previously inadmissible statements admissible, but contain a saving that they are not to be used as corroboration.

[83] Winslow, "'Corroboration' Re-Examined" [1988] Malaya L Rev 152; Tan Yock Lin, *supra,* note 47.

[84] *Supra,* note 63, p 65 (italics added).

[85] *Ibid* (italics added).

found it more fruitful to analyse the *failure* of a complainant to make a 159 statement. This startling turning of the tables is described in *Tang Kin Seng:*[85]

> The evidential value of a prompt complaint often lay not in the fact that making it renders the victim's testimony more credible. [It] is that *the failure to make one renders the victim's evidence less credible.* The reason is simply common human experience. However ... there *may be very good reasons why the victim's actions depart from it ...* All this merely illustrate the fallacy of adhering to a fixed formula.

The traditional concern about section 159 was that it might be used unfairly against the accused. It now appears that section 159 may have quite the opposite effect – it may be used unfairly against the complainant. It is true that the court recognised that there may be good reasons for a delay in making a complaint – but the language indicates a presumptive preference for drawing adverse inferences against a complainant who does not make a prompt complaint. The burden is on the complainant to explain the delay.

Although all this is supposed to be "common human experience", later cases could not resist the temptation of further elaboration. *Tan Pin Seng,* a later decision, contains a much more complicated analysis:[86]

> While it is not usual human behaviour for a victim not to make a quick complaint to her family or friends, the same cannot be said of a failure to make a prompt police report. In my experience, there is a *natural reluctance on the part of victims of sexual offences to make a police report ...* The victim may keep silent for fear of being *stigmatised or disbelieved.* She may view the *police investigation and court processes* ... with trepidation, or she may be so *traumatised* ... that reporting the offence is simply a very low priority. She may even have been *threatened with retaliation* if she reported the offence. Her first recourse will *invariably* be her family and friends rather than the police. Indeed many of those who eventually do make a report do so only after they have been persuaded to do so by their family or friends.

According to this case, the presumptive adverse inference occasioned by delay in complaining operates only in the case of statements made to family and friends, but not in the case of police reports. My problem is

[86] *Supra,* note 71, p 429 (italics added).

not with the observation that a delay in making a police report may well be explained by reasons other than concoction. These are probably some of the "good reasons" (for delay) mentioned in *Tang Kin Seng*. The difficulty is with the accompanying assertion that a delay in the victim telling her family or friends is to be treated differently. There is a "natural reluctance", it is said, on the part of the victim of a sexual offence to make a complaint to the police, but none in the context of making a complaint to family and friends. The problem is that the reasons given for this "natural reluctance" applies in a similar fashion to complaints to family and friends. The fear of being stigmatised or disbelieved may well operate in the context of family and friends, just as it does for police reports. Indeed, the fear of being stigmatised and disbelieved by those whom the victim has to see and relate with everyday is likely to be much stronger. It is not at all clear that the police are more likely to stigmatise and disbelieve the complaint than the victim's family or friends. Great strides in receiving sexual offence complainants more sensitively have been made and publicised by the police.[87] Conceivably, victims of sexual offences may not live in ideal happy families and may not be enjoying trusting and affirming relationships with friends. Next, the "trepidation" about police investigation and court processes is likely to begin with a complaint to family and friends – for the court rightly observes that family and friends are likely to persuade the victim to make a police report, and the victim knows that. Similarly, a victim who is too traumatised to make a police report, may well be too traumatised to tell her family and friends as well. Finally, there is no reason to think that the perpetrators of the crime are less likely to threaten the victim with retaliation if she reported the matter to her family and friends. A threat issued to the victim not to tell anyone is unlikely to be limited only to police reports.

In summary, just as the existence of a section 159 statement is unlikely to tip the balance in an oath against oath contest, so too is the failure to make a section 159 statement likely to be of much help, whether it is in the context of family and friends or in the context of a police report. In most cases we simply cannot know whether the delay indicates concoction or whether it is behaviour in conformity with the psychology of a victim of sexual assault.

## IX. Analogous Rules

Although the corroboration regime is the most ambitious attempt of the

[87] It appears that special rape report units manned by specially trained personnel have been formed.

[88] [1998] 3 SLR 465, pp 475-6 (italics and numbering added).

law to structure the assessment of probative value, it is not the only one. The most notable example is the treatment of identification evidence. In *Heng Aik Ren Thomas,* the court declared:[88]

> [T]he principles [in *Turnbull*] are of equal importance to our criminal trial system ... [W]e have reworked the *Turnbull* guidelines [originally meant for jury trials in England] into the following three step test.
>
> 1. The first question ... is whether the case against the accused *depends wholly or substantially* on the correctness of the identification evidence ...
> 2. If so, the second question should be ...[i]s the identification evidence of good *quality,* taking into account the circumstances in which the identification by the witness was made ...
> 3. Where the quality of the identification evidence is poor, the judge should go on to ask [if] there is any other evidence which goes to *support* the correctness of the identification.
>
> – If the judge is unable to find other supporting evidence ... *he should be mindful* that a conviction which relies on such poor identification evidence *would be unsafe.*
>
> – The supporting evidence *need not be corroboration* evidence [as defined in *Baskerville*]

The complex structure of the *Turnbull* warning[89] does look a little Jurassic through modern eyes. But it was thought to be (and probably was) progressive in its time. It is clearly rule-based – "a failure to follow these guidelines is likely to result in a conviction being quashed". It adopts the strategy of the corroboration rules, forcing the trial judge to structure his assessment of the evidence by scrutinising the probative value of both the identification evidence and evidence supporting it. The innovation in *Turnbull* was to avoid the language (and technicalities) of corroboration. It uses the less fussy terminology of "supporting evidence". In the common law of England in 1977, when the corroboration rules were in full swing, *Turnbull* was a breath of fresh air. In modern Singapore, with the corroboration rules either completely replaced by discretion, or by a simple caution rule, it is anomalous that identification evidence, above all else, should continue to attract this complicated set of rules. Is it not far more elegant to say

[89] [1977] QB 224 (italics added).

that where a trial judge encounters identification evidence, he or she is to demonstrate an awareness that people do occasionally make mistakes? The reform initiative evident elsewhere seems to have stopped short of identification evidence, leaving this relic intact.

Finally, is there a residual corroboration category of witnesses with a strong motive to lie? There was indeed authority to that effect, but in *Chua Keem Leong* the court said:[90]

> A number of local cases have identified situations in which some caution or even corroboration is required where the witnesses concerned have interests of their own to serve [*eg*, mother of complainant, co-accused in murder trial].
>
> Most of these cases were *decided before the amendments* removing the need for corroboration of accomplice evidence were passed ... In the light of the *removal of the corroboration warning for accomplice evidence,* it is not necessary either for the judge to administer to himself a similar warning as regards the evidence of a person with an interest to serve, *in contrast to the present position as to the evidence of victims of sexual offences and children.* It is open for the judge to so treat the evidence of an interested person with caution, but this is *not a general rule* ... and is very much dependent on the facts of the case.

There is a clear preference here for the normal (completely discretionary) system – no "general rule" governs. Nevertheless, it does rest on two assumptions which are not clearly established. First, there is the implication that a normal discretionary system now applies to accomplices, following the abolition of the corroboration rules. As we have seen, there is considerable uncertainty here. If anything, the more recent cases show a preference for a mandatory caution rule. If the reasoning is that the residual category of suspect witnesses should go the way of accomplices, then it may well be that the mandatory caution rule should apply. The second assumption is that the corroboration rules apply to sexual offence victims and children with full force. Again, as we have seen, our recent sexual offence and children cases are quite equivocal about whether there is still an iron-clad requirement to administer any particular warning. The shakiness of

[90] [1996] 1 SLR 510, 517-8.

these two assumptions must detract from the authority of the central pronouncement that the court will no longer countenance a residual category of suspect witnesses.

## X. Concluding Themes

Things are certainly in a state of flux. Historically, the status and content of the corroboration rules have never been certain. Legislative intervention did away with the corroboration rules for accomplices, but left in considerable doubt whether a completely discretionary system, or a new caution rule took its place. Recent judicial pronouncements have thrown into doubt the existence of the corroboration rule for sexual offence complainants and child witnesses. What we do know is that there is a clear legislative and judicial leaning in favour of a more discretionary system. Meanwhile, the identification guidelines seem to apply with full force as if locked in a time-capsule, although the residual category of suspect witnesses seem to have gone, albeit on less than satisfactory grounds.

There is much to be said for a unified approach toward the treatment of suspect witnesses. The traditional corroboration rules are out of favour, so the choice is between treating all suspect witnesses like all other witnesses and leave assessment of credibility to the trial judge's discretion, or placing all these witnesses under a caution rule compelling the trial judge to show that suspect witnesses have been treated carefully.

The root of the historical and contemporary agony over corroboration rules have to do with the inability of the law to decide between rules and discretion. There are obviously strongly held but opposing views amongst our judges. As we have seen, neither claim is to be dismissed lightly. At a more basic level, whether one settles for rules or discretion, lies the seemingly intractable problem of one person's word against another – that of oath against oath. To convict in such a case would appear to be defiance to the principle of proof beyond reasonable doubt, but to acquit in all such cases would be too much of a sacrifice to the mission of the law to bring offenders to justice. It is not a wonder that our courts and judges vacillate and continue to do so.[91]

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