

LEGAL PERSPECTIVES TOWARDS FORGERY, FRAUD AND FALSIFICATION OF DOCUMENTS: RECENT DEVELOPMENT

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ABSTRACT

Forgery, fraud and falsification of documents are categorized as white color crime offences because they are associated with the modification of documents with the intention to deceive others and normally involve illegal monetary benefits. The existence of falsification and forgery is always associated with the intention to commit fraud. Both falsification and forgery have similarities in nature but carry a difference in provision under the statute. As far as this matter is concerned, to establish a successful prosecution and civil claim, the prosecutor and claimant must prove the intention and conduct of the accused person that falls under the respective statutory provision. However, in 2015, the application of evidential standard for these three types of crimes is the difference in civil action, even though this act is an offence under the Penal Code. In relation to that, this paper examines the relationship between fraud, forgery and falsification, evidential aspects together with the recent legal development and proposes a recommendation in relation to prosecutorial matters and civil claim.

Keywords: *forgery, fraud, falsification, evidence*

INTRODUCTION

Forgery and falsification of document are considered as a crime when there is an intention to commit fraud. Therefore, forgery and falsification of documents is a mechanism to commit fraud. Generally, fraud can be

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defined as including activities that include theft, corruption, conspiracy, embezzlement, money laundering, bribery and extortion (Mohammed, 2002). Fraud involves using deception to dishonestly make a personal gain for oneself and/or create a loss for another (Yusuf Ibrahim Arowosaiye, 2012). Although definitions vary, most definitions are based around this general theme which is the intention to defraud others. In the evidential context, the reasonable and acceptable definition depends on the circumstances of the case and the degree required for the purpose of admissibility of evidence, and it must be noted that fraud can exist in the forgery and falsification cases (Hadi KA., Paino.H., & Pauzi, SF., 2014). This is because a fraudulent act must be associated with the act of forgery and falsification as the tools for the commission of the said crimes. This proposition was clearly stated in the case of *Great Eastern Life Assurance Malaysia Berhad v. Siu Yan Tam & Anor [2014] MLJU 273*.

In the context of definition of forgery, Black Latter Law, a basic and fundamental principle of law defines forgery as making a false document to deceive. The meaning of deceive and the act of making the false document for the purpose of fraud must be read together and reinforce one another (Rantanlal & Dhirajlal, 2007). This definition suggests the act of making false documents with the intention to commit fraud which in the term known as *mens rea* is the key ingredient to the prosecution or in the civil action to initiate legal proceeding. The act of making the false document alone without any intention to commit any criminal act does not constitute forgery, fraud or falsification but it is not necessarily the accused person that obtains any advantage and benefit over that particular act. In the case of *Yap Toon Choy v. Hong Leong Bank Berhad & Anor [2012] MLJU 288*, the court held that the act of forgery is not established if it had been made out of negligence because there is no present of intention. It is submitted that forgery can be a vehicle to commit other offences such as fraud, cheating, breach of trust and misappropriation of property and falsification of documents (Zhang, 2012).

For further elaboration of falsification of documents, Section 477A Penal Code stated the ingredient of falsification of documents. The scope of this section develops two offences, namely:

1. Falsifying of accounts and

2. Making or abetting the making of false entry, or omitting or altering, or abetting the omission or alteration of any entry. These two sections had been read separately and independently.

However, to prove under this section, the prosecution or claimant for civil action must prove:

1. The persons coming within the purview must be a clerk, officers or servant and
2. He must willfully and with intent to defraud in terms of destroy, alter, mutilate, or falsify any books, paper, writing, valuable security. The critical aspects of this section is it only deals with certain and specific professions. It is because the act of falsification requires the accused person to have a possession over the documents.

Provision under section 477A Penal Code was extended under section 89 Anti-Money Laundering and Anti-Terrorism Act 2001 as stated:

'A person, with intent to deceive, in respect of a document to be produced or submitted under any provision of this Act, who makes or causes to be made a false entry, omits to make, or causes to be omitted, any entry, or alters, abstracts, conceals or destroys, or causes to be altered, abstracted, concealed or destroyed, any entry, forges a document, or makes use of or holds in his possession a false document, purporting to be a valid document, alters any entry made in any document, or issues or uses a document which is false or incorrect, wholly or partially, or misleading. The section imposed punishment to a fine not exceeding one million ringgit or to a term of imprisonment not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.'

Even there are similar ingredients required under this section but different punishments are imposed against the accused person which draws the confusions among members of legal fraternity. In *Pendakwaraya v. Ong Seh Seng*, the appellant was charged under section 4(1) Anti Money

Laundering and Anti-Terrorism Act for having forged 75 invoices belonging to a company owned by him. This case illustrates the act of forgery and falsification of documents not only limited within the meaning and sentencing jurisdiction of the penal code but also include other statutory provision. Generally, the standard of proof for criminal prosecution must be done ‘beyond reasonable doubt’ and for the civil claims the required standard to proof is ‘balance of probabilities’. However, in civil claim, before the decision of *Sinnayah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584*, the court will adapt ‘beyond reasonable doubt’ when there is a question of criminal in nature such as the allegation of fraud, falsification and cheating but with the exception of forgery cases.

It is submitted that, for forgery cases, the question of applicability of standard of evidence is different from falsification and fraud in the civil claims. The court applied the ‘balance of probabilities’ standard of evidence in forgery cases, even though it is criminal in nature (Gottschalk, 2010). This application of ‘balance of probabilities’ was further illustrated in the case of *ML Breadworks Sdn Bhd v. Malayan Banking Berhad [2012] MLJU 962*, when the court stated:

‘This issue is in question of fact to be determined by the court on the evidence adduced at trial, the burden here is on the Plaintiff to prove that the signatures on the disputed cheque were forged or unauthorized, the standard is that balance of probabilities. The summary is therefore the burden of proof of the forgery lies on the plaintiff alleging the forgery on the balance of probabilities’

This different approach draws critique because forgery is the act of crime which the standard must be the same as other crime stipulated in the Penal Code (Ng, 2001). The importance of standardization of legal treatment in criminal offences was mentioned in *Narayan Chettyar v. Official Assignee, Rangoon AIR 1941 PC* when the court held, *‘Fraud of this nature, like other charge of criminal offences, whether made in criminal or civil proceedings, must be established beyond reasonable doubt’*.

However, the Federal Court in 2015 based on the judgement in *Sinnaiyah & Son Sdn Bhd v. Damai Setia Sdn Berhad [2015] 7 CLJ 584*, stated:

'With respect, we are inclined to agree with the learned counsel for the plaintiff to the correct principles to apply as explained in re B (Children) (supra). It is this; that the law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. As such, even if fraud is the subject to civil claim, the standard of proof is on the balance of probabilities. There is no third standard, and neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts'.

This judgement is followed by the recent case of *Jeyasurian a/l Periasamy v. Periasamy a/l Vellasamy [2016] MLJU 1037*, when the court emphasised the standard of proof for fraud in the civil claim is the 'balance of probabilities'. Both cases illustrated the development of the laws when it comes to the concept of burden of proof. Before the Sinnaiyah case, fraud related offenses must be proven 'beyond reasonable doubt' either in civil and criminal matters but after 2015, the Federal Court drew a line between civil and criminal standard of proof in relation to fraud related offenses.

Thus, this paper examines the concept of falsification, forgery and fraud under legal perspectives particularly in elements, prosecution and evidential aspects. The brief elements in relation to the above mentioned concept are also discussed by examining the arguments and the judgement in the reported case law for better understanding. Apart from that, the proposed recommendation and possible future research have been included in this paper.

Falsification and Forgery

Falsification of documents can be explained as the act of destroying, altering, mutilating, or falsifying any original documents. In the accounting context, it is referred to as false accounting which is the falsification, concealment, or destruction of records, (Shah, Butt, & Tariq, 2011) and it is commonly used as the way to trick people into parting with money or any other property, or to cover up what have been done by falsifying the account (Rantanlal & Dhirajlal, 2007). Based on this situation, forgery and falsification have a common definition. There are several cases to illustrate the concept and

idea of falsification and forgery. First, in the case of *R v. Shama* 91 Cr App R138, the act of falsifying the documents include the act of made a false entry. This case indicates that the modification of account or any other document can be considered as falsification of document. Thus, it can be said that forgery and falsification have similarities. Second, in the case of *Tan Ker Loo v. Pendakwaraya* [2011] 7 MLJ 714, the court ruled the knowledge over falsifying the documents which is important to determine criminal liabilities. In this case, the court emphasised that the element of knowledge is an important aspect of determining the conviction for falsifying the specific documents for the purpose to defraud others and obtain specific financial advantages. Third, in *R v Broot* [1988] VR 1, the court elaborated the definition of forgery as '*the fraudulent making or alteration of the writing to the prejudice of the other men's right*'. The presumption of possession has been used in order to prove that there is an intention and knowledge over the matter. Therefore, the prosecution had a liberty within its discretions within the legal proposition to initiate a legal action, either under forgery and falsification.

Prosecution

Under the Federal Constitution, the court does not have a power to instruct the public prosecutor to initiate any criminal proceeding against the accused person (Baljit Singh, 2011). Having said that, the prosecution enjoys a significant power to select any criminal prosecution that is suitable under its own perspectives. Article 143 of the Federal Constitution clearly stated:

'The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before the Syariah Court, Native Court and Court Martial'

This supported by the wording under Section 376 (1) of the Criminal Procedure Code as:

'The Attorney General shall be a Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under the Criminal Procedure Code'

Third, in the case of *Dato' Raja Azwane Bin Raja Ariff & Anor, Dato' Tan Kim Kuan v. Dato Man Bin Mat [2009] MLJU 1480*, the learned counsel for the petitioners have summarized the act of oppression by falsifying the company resolution and signature of the directors. Therefore, this act is one form of white color crime and should be proven beyond reasonable doubt. Thus, possession alone with regard to the false documents does not constitute the accused person to be liable for the falsification until and unless, the prosecution is able to prove the motives and intention of the parties involved that refers to an intention to defraud others.

Fourth, in the case of *Harun Bin Abdullah v. Public Prosecutor [2009] 3 MLJ 337*, the credibility of the prosecution witness has not been successfully discredited, and therefore, his evidence remained good. The charge against the appellant was forgery and not cheating the prosecution witness and as such, there was no requirement of corroboration. Therefore, the prosecution witness was not an accomplice, for the charge against the appellant was one of forging or falsifying the specific document, of which at all relevant times was well within the custody and knowledge of the appellant and not others. Having sifted the evidence, no evidence was found to show that the High Court's judge's factual finding on this issue was erroneous. Harun Bin Abdullah's case indicates that the falsification of document must be specifically proven and not merely based on unreasonable presumption. The presumption must be credible enough for the court to accept such arguments. Fifth, in *Ketua Polis Ibu Pejabat Kontingen Polis Seremban & Anor v. Manoharan a/l Dorasamy [2004] 3 MLJ 565*, It was subsequently discovered by the Road Transport Department, Seremban that a syndicate in Sabah was responsible for falsifying and forging motor vehicle registration numbers, chassis numbers and engine numbers registered in that State but eventually brought into West Malaysia and this included the said motor vehicle purchased by the respondent. In this case, the prosecution was able to proof all the ingredients of falsification of documents as per required under the Penal Code. The reason of the conviction is the prosecution was able to prove the intention of the accused person to defraud others by way falsifying the documents. In this case, the evidence tendered in court showed that the falsification is made to obtain certain advantages and the intention to defraud others is clear enough for the court to decide on conviction. This case illustrates the relationship between forgery and falsification. The nature of the crimes is similar with one another. It is further submitted that

the prosecution has an absolute discretion to decide on what ground and provision that should be applied for the purpose of prosecution.

Punishment

In general, for punishment under statutory provision, regardless whether it is a white color crime or not, the court has laid down certain aspects and the concept of punishment in the case of *Leong Kok Huat v. Public Prosecutor [1998] 6 MLJ 406*. In this case, the court emphasised that the sequence of the three limbs of the ‘penalty part’ is first, a fine, followed by ‘the imprisonment term’ and lastly ‘the whipping sentence’. By that order, the court inferred that it must have been the intention of the legislature to punish the offender like the accused first, by an appropriate fine if the facts against his wrongful act are justified before considering the other alternative penalties. For that reason, the purpose of the law is to ensure the guilty person can be punished in accordance of law if the case can be proven beyond reasonable doubt. Thus, the standard of proof requires to be tendered as per charge and not outside the scope of the charge. This means for fraud, forgery and falsification of documents, the court only imposed a punishment if the prosecution is able to proof beyond reasonable doubt and the intention of the accused person to defraud others.

Fraud

Intention to defraud or to commit is the key to establish a conviction for fraud related offences (Bicknell, Danna E, 2009). However, the legal meaning is not mentioned specifically under the Penal Code as it depends on the circumstances of the case and conduct of the accused person. Parsons (2000) argued that, it is difficult to prove intention because it is difficult to evaluate a person’s state of mind. Thus, under the common law, to establish the collaboration of chain of events, it is required as in the case of *Takako Sakao v. Ng Pek Yuan & Anor [2009] MLJU 836*. In this case, the court ruled in order to establish the intention of the parties involved, where the court will examine all the circumstances of evidences and presumption of guilt. The court in this case further elaborated and imposed three tests required to established for the offences related to the financial crimes, which included falsification, fraud and forgery as; first, whether there is an intention to defraud others, second whether the fact surrounding the case reflects the

intention of the accused and third, the fact must be collaborated to each other without breaking any chain of events. Without intention, the act of forgery, falsification and fraud cannot be said as a crime. This element is necessary for the prosecution or the claimant to prove and suggest to the court that, the accused conduct is preparing to defraud others and the presumption with the intention to defraud others can be invoked.

The legal meaning of intention is not mentioned under the Penal Code. It is subjective in nature and only can be determined by circumstances of the case and concealment of the materials and fact during trial. It must be noted, without any direct evidence that can be produced before the court, that the prosecutor and a claimant in the civil claim must be able to tender collaboration of circumstances evidence. Ahmad (2008) elaborated the legal framework for fraud with special references to credit card fraud. The main problem is when it comes to the interpretation and definition of a specific provision under the penal code itself. This is because there is no direct interpretation on what constitutes fraud and there is no clear provision in relation to credit card specifically (Ahmad, 2008). Thus, one of the important and effective circumstances evidence is expert evidence from the expert witness. However, the collaborative in respect that is presented before the court must be credible and reliable as its requires collaborating with the circumstantial evidence (Krishnan, 2010). This argument was stated in the case of *Lo Vung Chung v. Public Prosecutor [2011] MLJU 1171*, where the appellant was found guilty for the charge of forgery and the court further explained that there was a solid circumstantial evidence to uphold the conviction. The circumstantial evidence must be interrelated with each other without the possibility of the presence of reasonable doubt. Furthermore, in the case of *Ko Chee Huat v. Pendakwaraya [2009] MLJU 440*, the court ruled the possession of forged document, and in this case forged credit card, which justified the presumption of intention to use it for fraudulent purposes. Based on these two cases, the documentary evidence as to the forged document is an essential for any claim or criminal prosecution. This includes the presumption of intention without proving the real intention to establish *prima facie* in the prosecution case. The conceptual aspect of possession was illustrated in earlier case of *Tee Thian See v. Pendakwaraya [1996] 3 MLJ 209*, where the court ruled that it is necessary for the prosecution to prove that the accused had a possession of 28 counterfeit credit cards and not necessarily to prove that the accused

had an intention to used it. This case illustrates that the presence of knowledge is sufficient to establish the presumption of guilt for the act of forgery without proving the actual reason of possession. This proposition can lead to the concept of strict liabilities under the criminal offences. In our opinion, the strict liabilities concept cannot be applied for white color crimes by the reasons of; first, it involves various documentation that the possibility of it be in the possession of innocent party is high. Second, the prosecution needs to establish real intention and motives which means the collaboration of evidence must be strong enough for the court to accept the evidence and third, to identify whether or not there is an element of fraud through falsification and forgery, expert evidence is required through an expert witness. Based on these aspects, to apply possession for all white color crimes is not accurate in relation to safe conviction.

The establishment of presumption depends on the rationality of the circumstances of fact related to the case in questions. The presumption can be applied by looking into consideration the circumstances of the case and the nature of how the offences have been committed. In *Berry v. British Transport Commission [1961] 3 All ER 65 75*, the court ruled '*presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because, if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own.*' Furthermore, in *Bradford Third Equitable Benefit Building Society v. Borders [1941] 2 All ER 205*, the court ruled that it is important to understand whether or not the defendant have knowledge over the said false statement. As this matter is within the judicial investigation, the court laid out the foundation by stating it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons, which will include the plaintiff in the manner, which resulted in damage to him. It is submitted that the testimonial from the witness must be interrelated with the documentary evidence that has been tendered before the court, and the witness is the key for a successful prosecution and remedy in the civil claim. The meaning of *intent to defraud* is mentioned in the celebrated case of *R v Wines (1953) 37 Cr App R 197*. The fact of this case is a man falsified certain accounts to show that the firm that employed him was doing better than it was. The appellant argued that he made no monetary gain out of

this. He merely did so in order to retain his employment with the firm. The arguments of the appellant suggested that there must be further benefit from the said act to constitute a fraud. However, the court ruled by assertion of the meaning of defraud:

'To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action'

Based on this judgment, there must be an intention of the accused person to deceit others regardless of whether or not the accused person successfully obtains the benefit over the act of fraud. The court further elaborates that the intention can only be proven in the presence of preparation, action and conduct of the accused person. These interrelated activities must be proven through various means such documentary evidence and witness testimonial before the court. This judgement indicates the important of circumstantial evidence in order to prove the accused person's conviction.

In the case of *Chandrasekaran & Ors v. Public Prosecutor [1971] 1 MLJ 153*, the basis of the prosecution case against the accused was in relation to two forged treasury vouchers, purportedly emanating from the trade division of the Ministry of Commerce and Industry for the purchase of insecticide worth \$111,889.50 and \$95,740.50 together with forged supporting documents, which were presented to the Accountant-General's Department for payment. The accused was the only clerk concerned with the detailed checking and he approved the documents required. It is quite clear that, for the accused's connivance in the fraud, the two vouchers could not possibly have been approved. This case illustrates that the accused conduct provides ample evidence of his guilt, for it cannot be reconciled with his innocence. The court satisfied the evidence before him as an uphold conviction. Based on this case, it can be further argued that the act of the accused person can also be amounted to forgery and falsification because it involves a modification of documents with the intention to defraud others.

IMPLICATION

The ideal concept of justice is to provide fairness in legal proceeding. The differences in approach of evidential standard create legal confusion; this is because of the nature of forgery, fraud and falsification as stated under the Penal Code. As stated before, the definition and concept of forgery, falsification and fraud must be read together with the intention to defraud. Furthermore, falsification of documents and forgery do have similarities in relation to the modification of documents with the intention to defraud others. Having said that, the question arose whereby the evidential standard is different in criminal and civil proceeding, even though these three crimes, namely forgery, fraud and falsification of documents, normally exist to reinforce each other's existence and carry a criminal weightage.

RECOMMENDATIONS

The purpose of law is to uphold justice and to promote fairness. To achieve this objective, the standardization of legal framework is a requirement to avoid contradiction of the law. The proposed standard is to introduce a new provision under the Penal Code. The formation of new regulation includes enhancing the punishment provision and explanation of elements of offences. The introduction of the interpretation section with regards to the fraud, forgery and falsification of document is essential. This is particularly in respect of evidential aspects that must be taken into consideration and emphasis by prosecution and plaintiff to prove beyond reasonable doubt. It is submitted that, the 'beyond reasonable doubt' is supposed to be the standard of proof applicable in civil claim for these types of offenses.

Furthermore, to ensure the uniformity of the laws, the specific statute that deals with white color crimes must be introduced. This includes other offences such as fraud, forgery, falsification of documents and criminal breach of trust. The uniformity of the statute will encourage specific interpretation that can avoid confusion pertaining to the legal term and evidential aspect of the offences. This can assist the court to define and apply the same standard of proof when dealing with fraud, falsification and forgery cases in civil proceedings. Furthermore, the role of the court to standardize the concept and definition of forgery, fraud and falsification

is necessary. This can be done by interpreting this concept clearly in either criminal or civil cases and draw a comprehensive distinction between these three concepts.

Investigation is a crucial part before any criminal prosecution and civil claim can take into effect. It must be noted that, even in the civil claim, the plaintiff is required to formally lodge a police report as an indication that there is a case to be answered. The setting of white color crime unit that specializes in identifying financial crimes must be established. This includes giving more power through law, either to access and collecting evidence for the purpose of prosecution specifically for cross-border crimes based on the accepted international standard. This can be done by strengthening the mutual assistance agreement between countries and must be effectively performed to cater the need of investigation at the international level. Thus, a study on the law for these aspects in relation to standardization and uniformity of the law must be carried out by the respective enforcement institution.

CONCLUSION

As a conclusion, falsification, fraud and forgery carry the same nature which is the intention of the accused person to defraud others. Most of the cases decided by the court involved the modification of original documents for the purpose to defraud others. However, the difference in the standard of evidence applicable for falsification, fraud and forgery requires legal intervention. This intervention means the introduction of uniform law to facilitate the issues of evidence, the rules and standard of proof requirement together with the interpretation section that can clearly define the word forgery, falsification and fraud. The case of Sinnaiyah in 2016 drew a line between civil and criminal burden of proof in relation to fraud related offenses. However, the question of whether the evidence or judgement in the civil proceeding can be used as evidence in a criminal proceeding remains uncertain. This is because both proceedings applied a different standard of proof. Perhaps, the ‘beyond reasonable doubt’ approach needs to be applied in civil and criminal matters related to forgery, fraud and falsification allegation and offences.

Furthermore, falsification, fraud and forgery related cases are the most frequent cases for white color crimes. The main purpose of these crimes is to obtain unlawful gain and cause loss to the victims. As mentioned before, the difference of approach in respect to evidential standard applied generally is not fair. This is because, the concept of ‘beyond reasonable doubt’ and ‘balance of probabilities’ carry massive differences when it comes to the burden of proof and the outcome of the judgement.

Thus, for the future research, the researcher can take into consideration the comprehensive legal framework on falsification, forgery and fraud related cases, the comparative analysis of the said law in accordance to the international standard particularly the United Nations regulations pertaining to financial crimes. In depth analysis of the nature and theory behind forgery, fraud and falsification of documents is also important for the purpose of identifying the reason why the accused person commits such an act.

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