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THE LEGAL PROOF OF MACAU SCAM IN MALAYSIA

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ABSTRACT

Although there are 5218 Macau scam cases reported since January to October 2020, from the total of the cases, 1420 cases were charged and 2676 were arrested by the Royal Malaysian Police (RMP). This fact can be considered as strong evidence to prove that Macau scam is getting increasingly serious and has the potential to become even worse in the future. Therefore, this study is conducted to investigate the legal meaning of Macau scam, the relevant provision in Malaysian Statute, the methods of proving and the standard of proof applicable in convicting Macau scam crime. Empirical methods of investigation based on available reported cases about Macau scam or fraud are developed herein. Application of such methods will analyse each of the issues highlighted in this study. This study found that Macau's scam means that the fraudulent act deliberately cheats someone to get fast money by making them suffer a loss of money. Besides that, there are provisions that may be applicable to Macau scam; as one of the forms of fraud contained in the Penal Code (Act 574), Section 24, Section 25, Section 415, Section 170 and Section 420. Reviewing cases of fraud as the basis for the Macau scam, it was explicitly stated in most cases that the burden of proof rests with the prosecutor or the group who wished to allege the Macau scam. The standard of proof in civil trials is in the balance of probabilities. The impact of the study is on phone users; victims of Macau scams and legal practitioners in Malaysia. Future studies may be conducted in the field of legal remedies for a Macau scam crime.

Keywords: *Cheat, fraud, legal proof, Macau scam, Malaysia*

Introduction

Possessing other people's property illegally are seriously infringing on the people's legitimate rights and interests (Chen, 2020). In recent years, Malaysia has detained and deported 744 Chinese members of the Mainland Criminal Unions operating in the South East Asian nation to China. All 744 suspects have been accused of trans-national crimes, mainly fraud, the most infamous of which is called 'Macau scam.' The 744 people listed above are just those deported, although several more are accused of being linked to 'Macau scam' (Meneses, 2017). The 'Macau scam' union, which had been crippled in 2013, made at least 1,000 calls a day and was bound to be victims daily. The number of scam victims seems to be increasing especially rapidly in Malaysia, where new reports appear every week (Lam, 2019).

According to Head Department of Commercial Crime Investigation, Royal Malaysian Police (RMP), there are 5218 Macau scam cases reported since January to October 2020. From the total of the cases, 1420 cases were charged and 2676 were arrested by the Royal Malaysian Police (2020). The victims of scam are about three thousand cases mostly women aged 51 years and above including retirees, teachers, factory workers, company managers and even a student. It could also happen to any people especially senior citizen or people from rural area that is vulnerable to scam (Mubarak et al., 2019).

The Macau scam tale is well known (Meneses, 2017) and how they operate have been widely published in newspapers, news portals and social media ("Learn to recognise," 2020). They use every possible technique to deceive people. Generally, the scammers employ the same modus operandi which is phoning victims while posing as bank officers by using the Voice Over Internet Protocol (VOIP) (Meneses, 2017). However, the modus operandi of these Macau scammers is becoming more extensive ("Learn to recognise," 2020). For example, their latest tactic is by manipulating Transaction Authorization Code (TAC) to steal their victim's money. Instead of waiting for victim to call them, scammers can even call the victim right away. This tactic is considered to be more effective because scammers can try to persuade the victim (Mubarak et al., 2019).

While VOIP calls is one of the trademarks of the scam because it's the way they display the actual phone number of banks or government departments and offices on the receiver's mobile phones, making it easy for syndicates to dupe their victims." (Meneses, 2017). Scammer will try to play with their victim emotion by making up a story to scare them or put them into complicated situation. Then, scammer will trick the victim with an easy way out from their miserable problem by asking them to pay some amount of money (Mubarak et al., 2019).

As for example, the scammer would call their victims, impersonate as an officials and informed that he / she has overdue loan payments or unpaid fines. The victim panics and readily follows the orders of the official person, including moving large amounts of money to the bank accounts of another group ("Learn to recognise," 2020). In another version, the scammer pretended to be a bank officer says that the victim's personal information had been misused to apply for a credit card which had been used in some transactions. Only after the victim had performed the transactions as instructed would he realise that his money had been transferred to another account without his realisation (Meneses, 2017). Some of them would inform their victims that he or she has been found to be involved in money laundering and that their accounts have to be closed following which the suspects would then instruct their victims to transfer their money into another account (Meneses, 2017).

In the case of Public Prosecutor v Muhammad Zikri Bin Baseri [2020] MLJU 674, the presented case of the prosecution before the court was that on the date of 14/9/2018, while at home, SP1 received an anonymous phone call from a Chinese man by the name of Josiah Eng, claiming to be from CIMB Visa Gold. Josiah Eng told SP1 that his personal details were used to register a CIMB Visa Gold Card under the number of 4572522445158836 in Setia Alam, Shah Alam for a sum of RM 8,925.70. SP1 was then given a phone number (03-92122090) for complaint to be lodged at Bank Negara Malaysia wherein a different man by the name of Yong Kah Seng spoke in that line. He gave an ID number of 21889 to SP1 and directed SP1 to go to the ATM machine to change the details. As a consequence of that, SP1 lost a sum of RM 19,980.01 where such sum was transferred to the account of the accused person bearing the account number of 7625514402. The judge Saravanan A/L Meyappan, M stated that the court being a court of justice to the citizenry is sympathetic towards the monetary loss of SP1 in this

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case as almost every day, many innocent people are constantly becoming prey to the heinous fraudulent scams. Even though these scams have been widely published in newspapers, news portals and social media (“Learn to recognise,” 2020).

Based on the newspaper and numbers stated by RMP, supported by the reported case in law journal showed that Macau scam cases often happens in Malaysia recently and this situation is increasingly alarming. However, the alleged case cannot necessarily be proved entirely due to the proof needed in every case. Moreover, the scam apparently had operated from other countries such as Cambodia, Indonesia, Philippines and Thailand therefore significantly reducing the risk of being detected and prosecuted (Meneses, 2017). Hence, this study conducted to examine the legal proof for Macau scam cases in Malaysia.

In order to prove the case of Macau scam, it is important to know the meaning of Macau scam and the legal requirements set out in the Malaysian act on Macau scam. That is to say, that the proof is parallel to the provision specified on the basis of the description. The discussion would then explore the definition of the Macau scam, the legal provisions, and the legal proof to allege the Macau scam case.

Methodology

This study is a qualitative research focusing on the legal proof of Macau scam in Malaysia. The research design of this study is content analysis. Data were collected using document analysis, namely books, articles, journal, case reports and other materials relating to the topic of this study. The empirical methods of investigation are based on the available reported cases about Macau scam or fraud are developed herein. The application of such methods analysed for each of the issues are highlighted in this study. Empirical research in law involves the study, through direct methods rather than secondary sources, of the institutions, rules, procedures, and personnel of the law, with a view to understanding how they operate and what effects they have (Baldwin & Davis, 2012). In this study, the theory on the origins of Macau scam, the meaning of scam, the reliable provision statute and the cases about Macau scam was determined. In terms of analysing the legal proof of Macau scam, this study reviewed the cases of alleged fraud and Macau scam recorded in the Malaysian legal journal.

Macau Scam Meaning

Macau scam is said emerged as a new name instead of a typical name; scam. However, the origins of Macau scam are still debated. According to some sources, The Macau scam was named because it is believed that this form of scam originated in Macau (Meneses, 2017) or that the first victims came from there (Lam, 2019). Another theory suggests that Macau lends its name to the fraudulent behavior precisely because the scams are so common in Macau (Lam, 2019).

While the roots of Macau's scam remained unclear, it could be said that the concept of scam is sufficient to be explored in terms of understanding the significance of Macau's scam. Scam defined as a fraudulent business scheme (The Free Dictionary, 2020); a fraudulent or deceptive act or operation an insurance scam (Merriam-Webster, 2020); an illegal plan for making money, especially one that involves tricking people: an insurance scam (Cambridge Dictionary, 2020); a confidence game or other fraudulent scheme, especially for making a quick profit (Dictionary.com, 2020); a swindle (The Free Dictionary, 2020); to defraud (The Free Dictionary, 2020); to cheat (The Free Dictionary, 2020); or defraud (The Free Dictionary, 2020) with a scam.

Besides, there are the definition for scam in *Pendakwa Raya v Ihebom Obinna Edward* [2017] MLJU 2263 stated as “a fraudulent scheme performed by a dishonest individual, group, or a company in an attempt to obtain money or something else of value. In another case; *Mun Yi Quan v Lembaga Pencegahan Jenayah & Ors* [2020] MLJU 683, Macau scam has been mentioned as a cheating scheme. Therefore, the concept of a Macau scam also included an act of cheating. Briefly, scam is a fraudulent act by tricking others into making fast money.

The definition of scam is the same as that of fraud. Thus the concept of scam also applies to the definition of fraud. Fraud means the intentional use of deceit (Law.com, 2019), a trick or some dishonest means to deprive another of his/her/its money, property or a legal right (Law.com, 2019). In the broadest sense, fraud can encompass any crime for gain that uses deception as its principal modus operandi

(Wells, 2010). Based on the meaning discussed regarding fraud, the legal definition for fraud is the same action; to deceive someone with a false statement. To be defined as fraud, the party committing it should be acting in order to deceive the other party (Hajdari & Erlule, 2018). The meaning of Macau scam encompassed the fraudulent act intentionally to cheat any person to obtain quick money by making them suffered for loss of money.

Reliable Provision Statute for Macau Scam Crime

There is no legal provision in Malaysian statute stated on Macau scam. However, there are provisions that could be related to Macau scam; which is in Penal Code (Act 574). There are three words that could be reliable for Macau scam crime which is fraudulently; dishonestly and cheating. Firstly, the word “fraudulently” stated in Section 25 Penal Code (Act 574) that is “a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.”

Secondly, the word “dishonestly” in Section 24 Penal Code (Act 574) stated that “whoever does anything intending to cause wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing dishonestly” (Halsbury’s Laws of Malaysia, 2017).

Thirdly, the word “cheating” in Section 415 Penal Code (Act 574) that is “whoever by deceiving any person, whether or not such deception was the sole or main inducement, (a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property; or (b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property, is said to “cheat”.

These three provisions clearly stated about a person doing crime to others with intention. This is coinciding with the Macau scam which is a crime doing by someone or a group of people to cheat other person for sum of quick money intentionally. As for prosecute, Macau scammer could be prosecuted under the provisions of the law relating to fraud. It is Section 170 Penal Code (Act 574) which stated about personate a public servant and Section 420 Penal Code (Act 574) about cheating and dishonestly inducing delivery of property. Accordingly, whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office, or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office.

The Macau scam appropriate with the meaning of both of this provision. There are cases which the scammer pretended to be a bank officer told that the victim’s personal information had been misused to apply for a credit card which had been used in some transactions. Pretending to be a bank officer is a crime as stated in Section 170 Penal Code (Act 574). Besides, the Macau scammer personated many other public servant and they could convince the victim as they are really a public servant.

Result and Discussion

Legal Proof of Macau Scam

Since the Macau scam is not mentioned in any legal provision, but based on the definition it is stated clearly in the earlier discussion; second subtopic above that the legal definition for fraud is the same action; to deceive someone with a false statement. In other words, Macau scam are included in the meaning of fraud.

Thus, the issues raised in this study whether Macau scam cases had been alleged in court as a part of the fraud crime? Who supposed to prove Macau scam cases? What is the standard of proof for Macau scam cases? To answer each of this question, it is important to review on the cases of alleged fraud and Macau scam recorded in the Malaysian legal journal. In order to answer the first question, searching for the Macau scam cases founded that there were two cases in the legal journal; *Pendakwa Raya v Ihebom Obinna Edward* [2017] MLJU 2263 and *Mun Yi Quan v Lembaga Pencegahan Jenayah & Ors* [2020] MLJU 683. Unfortunately, the facts for both cases merely describing the circumstances and how Macau scam operate. However, searching for fraud cases found hundreds of cases that could be relate to the Macau scam cases in terms of legal proof.

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Therefore, in pursuance of answering the next question should be the discussion on the allegation cases of fraud that could be suitable for the claimant of the Macau scam in Malaysia. The first consideration for the proof in the Macau scam case is that the prove for the cases laid to the prosecutor or who wants to convince the court that the prima facie case exists. The burden of proof is on the party and they should establish the proof in court. An evidence is said to be accepted if the proof satisfies the court based on section 3 of the Evidence Act 1950. A fact is said proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

In the Macau scam case, the prosecutor or the plaintiff should prove the cases on the evidence of the facts they obtained from the victims and should explain the circumstances of the cases that may lead to the incidence of a Macau scam case, such as the loss of the amount of money due to the fraud committed by the scammer. The burden of proof laid to the prosecutor or plaintiff in this case as he alleged the Macau scam happened. In criminal cases it is trite law that the prosecutor bears legal burden as stipulated under section 101 Malaysian Evidence Act 1950. See the case of *Aziz Bin Muhamad Din v PP* [1996] 5 MLJ 473. If fraud is alleged to be a civil suit, the plaintiff will have a legal duty on him to prove his case, while the defendant will have the burden of proof to provide sufficient evidence to raise an issue on the issues to be considered. The rule is that “the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it”.

In this regard, it should be referred to the leading decision of the Court of Appeal in *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1 which reaffirms the rule that “he who asserts must prove”, whereby *Siti Norma Yaakob JCA* (as she then was) instructively held as follows:- “He who alleges must prove such allegation and the onus is on the appellant to do so. Thus, it is incumbent upon the appellant (the party who alleges) to produce as witness to prove the allegation. This is agreed by the judge *Abdul Aziz JC* in *Yong Chou Chuen v Ling Ming Sing & Anor* [2004] 7 MLJ 551 stated that the burden to prove a case in a criminal case rests on the prosecution throughout the case.

Followed then by the judge *David Wong JCA* in *Sha Kannan & Anor v Arunachalam A/L Venkatachalam & Anor And Another Appeal* [2017] MLJU 1568 who mentioned that the burden of proof is always on the party who asserts the affirmative. However in this case, in first appeal, both the Appellants were present at the trial and only the 1st Appellant took the stand and gave testimony. When cross-examined, the 1st Appellant conceded that he had no personal knowledge of the transactions fashioned out by his late father and it was only his late father who knew what really transpired. By this very concession, the law is quite clear and that is those evidence were at best hearsay evidence which in law has no evidential value. In the second appeal, the Appellant did not take the stand but instead sent his grandson to tender a statement sworn before a notary public in India. His reason for his absence was that he had a medical issue but no evidence was produced to prove that medical impediment. Again, when cross-examined, the grandson witness conceded that he had no personal knowledge of the transactions fashioned by his grandfather. That concession in fact did not enhance the case for the Appellant. On the contrary, the Appellant had failed miserably in discharging his burden of proof. In other words, the appellant who should prove the fact which they verily believe and state that the document in Tamil was obtained by misrepresentation in the cases but found absent from the court and the evidence unproved in that case. If the appellant would like to shift the burden of proof to the defendants, they must discharged their burden of proof at first. The judge in *Selvaduray v Chinniah* [1939] 1 MLJ 253 said if that party fails to discharge the original burden of proof, then the other party need not adduce any evidence.

The judge, *Rose CJ* in the case of *Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society) v Koh Kim Guan* [1959] 1 MLJ 173 agreed with the standard that Plaintiff has to prove his claim. Significantly, the learned judge has gone into the evidence carefully and reached the conclusion that plaintiff has every opportunity to protest about excessive interest he paid but has not done so for the last ten years. As the learned judge rightly pointed out that he had not breathed a word of dissent or discontent or objection to the defendant or anyone for the whole of ten years that the loan was in operation. The plaintiff had at all relevant times the benefit of counsel to advise him what to do. The learned judge found that the plaintiff had failed to prove his claim.

In the case of *Yatin Bin Mahmood v Mohd Madzhar Bin Sapuan & Ors* [2010] 8 MLJ 647, it is clear that the onus is on the plaintiff to prove his case; to establish the alleged fraud. It may be true that the plaintiff established a prima facie case, but at the conclusion of the trial the learned judge has found that the position was exactly even, that any preponderance in the plaintiff's favour had disappeared. That being the case the plaintiff must necessarily fail, as he has not discharged the onus which is upon him. No doubt the defendant would equally have failed if he had been the claimant and had tried to establish, as a substantive part of his case, the alternative version which he tried to prove in answer to that of the plaintiff. But as he was not the claimant, that consideration is quite immaterial. It is quite sufficient for his purpose if he can satisfy the court that the plaintiff has not established his case.

Based on the cases, the prosecutor who wants to allege Macau scam need to establish the case and need to prove that fraud could be alleged. Interestingly, the burden of proof can be changed. But if the plaintiff or the prosecutor want to shift the burden of proof to the defendants, he must discharged their burden of proof beforehand. If he fails to do so, the defendants need not adduce any evidence. Regarding this burden of proof, the discussion then will answer the last issues on this topic; the standard of proof for Macau scam cases.

In Malaysia, the standard of proof in criminal cases must be proof beyond reasonable doubt. Previously, Fraud in civil suit also required the same standard. This was declared explicitly in leading case; *Saminathan v Pappa* [1981] 1 MLJ 121 which stated that the onus of proof for fraud in Malaysia is proof beyond reasonable doubt. This case is about allegation of fraud viz. that the respondent had misrepresented to the Collector of Land Revenue that the appellant desired the transfer of the title of the land to her. However, there was no evidence that any such representation was ever made to the Collector of Land Revenue and therefore the Federal Court were clearly entitled, if not bound, to reject the learned judge's finding in this matter.

There were two other findings by the learned judge of fraud in this case, that had not been pleaded. The first was that the respondent's application to the Ruler in Council for consent to the transfer was supported by a statutory declaration in which she stated that Palaniandy and the appellant were "still living in India". The statement that the appellant was in India was not correct but there was no evidence that it was relevant to the decision of the Ruler in Council. If the appellant was relying on this misstatement as having induced the Ruler in Council to assent to the transfer it was for him first to plead it and then to prove it beyond reasonable doubt. As he had failed to do this, the Federal Court contend that it was right in holding that this finding of fraud by the learned judge cannot stand.

The second finding of unpleaded fraud made by the learned judge arose out of the sale agreement and the payment of the purchase price. There was conflict of oral evidence on this point but the learned judge held that the respondent had not proved that she had paid the full purchase price at the time of the transfer. The Federal Court relied on the documentary evidence and rejected the learned judge's reasoning on this point. The failure of the respondent to pay the purchase price in full and punctually, even if proved beyond reasonable doubt, could not in law amount to fraud or entitle the unpaid vendor to defeat the registered proprietor's title.

On the basis of this, the respondent as registered proprietor had an indefeasible title to the land and as the appellant had failed to prove fraud or misrepresentation or that the registration was obtained by means of an insufficient instrument, she was entitled to judgment against the appellant.

The judge Abdul Aziz JC also consent about this burden of proof for criminal case. In the case of *Yong Chou Chuen v Ling Ming Sing & Anor* [2004] 7 MLJ 551, he said: It must be remembered that in a criminal case, the burden to prove a case is beyond reasonable doubt. Likewise in the case of *Yatin Bin Mahmood v Mohd Madzhar Bin Sapuan & Ors* [2010] 8 MLJ 647, *Vernon Ong JC* stated that the standard of proof is that of proof beyond reasonable doubt. However, in his opinion the existence of fraud dependent upon the circumstances of each particular case. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof must carry a high degree of probability so that on the evidence adduced the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case (See *Ping Anak Layang v Jee Shik Chuong & Anor* [1991] 2 MLJ 422; *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34; *Kanathasan a/l Subramaniam v Puspharanee a/p Pakiri* [2016] 6 MLJ 114).

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Also stated in the case of *Tang Yoke Kheng (Trading As Niklex Supply Co) v Lek Benedict and Others* [2005] SGCA 27 that fraud is a criminal cases and the burden of proving fraud lay with the prosecutor which he had to discharge by proving his case beyond reasonable doubt. Nevertheless, the burden of proving fraud in a civil case lies with the party alleging it, but the infusion of a shared criminal element (fraud) in civil proceedings tends to create some uncertainty as to the standard of proof required. The degree of proof is not as stringently required as it would be in a criminal case because it is accepted that the standard of proof in a civil case is that based on a balance of probabilities. But what is the standard of proof when fraud is alleged in civil proceedings? In this case, the judge refer to the Evidence Act (Cap 97, 1997 Rev Ed) before considered the judicial statements regarding the standard of proof. In regard to the meaning of "proved", a fact is said to be "proved" when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

Hence, the civil standard of proving on a balance of probabilities applied in this case where fraud was the subject of a civil claim. However, because of the severity and potentially serious implications attaching to a fraud, the court's expectation of proof would be higher even in a civil trial. The more serious the allegation, the more the party on whom the burden of proof fell had to do in order to establish his case on a balance of probabilities.

However, based on the Supreme Court of Canada case, *F.H. v. McDougall*, [2008] S.C.J. No. 54, it was inappropriate to say that there were legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. In determining whether the correct standard had been applied, the appellate court had to take care not to substitute its own view of the facts for that of the trial judge. If a responsible judge found for the plaintiff, it had to be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test. 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. The evidence must be scrutinized with care by the trial judge in deciding whether it is more likely than not that an alleged event has occurred. Further, the evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test.

In Australia, the court in *Rejfek & Anor v McElroy & Anor* [1965] 39 ALJR 177 (HC) reminded that the "clarity" of the proof required, where so serious a matter as fraud is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved. But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.

Regarding this matter, the case of *Tang Yoke Kheng (Trading As Niklex Supply Co) v Lek Benedict and Others* [2005] SGCA 27 stated that the real problem is more a semantic one than one of logic. There are, indisputably, only two standards of proof. For criminal cases, the standard is proof beyond reasonable doubt; for civil matters, the standard is that of a balance of probabilities, where, minimally, the party charged with the burden of proving will succeed if he can show just that little more evidence to tilt the balance. The prosecutor in a criminal case will have to furnish more evidence than just that little more to tilt the balance. So when fraud is the subject of a criminal trial, there is no difficulty appreciating what burden falls on the prosecutor. But since fraud can also be the subject of a civil claim, the civil standard of proving on a balance of probabilities must apply because there is no known "third standard" although such cases are usually known as "fraud in a civil case" as if alluding to a third standard of proof. However, because of the severity and potentially serious implications attaching to a fraud, even in a civil trial, judges are not normally satisfied by that little bit more evidence such as to tilt the "balance". They normally require more. That more is commonly described as "a burden that is higher than on a balance of probabilities, but lower than proof beyond reasonable doubt as stated in the

cases, "proof is required on a preponderance of probabilities", or in reliance of the "different degrees of probabilities" notion.

The disparate standard of "proof beyond reasonable doubt" in criminal cases, and "proof on a balance of probabilities" in civil ones, is a distinction established by judicial licence in the courts to emphasise the point that the graver the consequences, the more severe the requirement for proof ought to be. The "beyond reasonable doubt" standard in criminal cases was firmly established, and was so recognised to express the idea that the distinction between the two standards is really a difference in the degrees of probabilities, which is to say, that "proof beyond reasonable doubt" is also a measure based on a balance of probabilities since "beyond reasonable doubt" falls short of absolute certainty, and is not proof "beyond a shadow of doubt".

The anxiety of applying the correct standard of proof of fraud in a civil case is more evident in judicial formulations such as "a degree of probability which is commensurate with the occasion", and "proof going beyond the usual civil standard of proof", than in the actual application by judges who usually, and instinctively, know that they need not apply the stringent standard as that required in a criminal case, and yet not find fraud in the same way they would find.

This reasoning is logically correct, but the rejection of a third test and the reference to the application of the civil standard (on a balance of probabilities) to cases of fraud, without more, is not entirely satisfactory. First, in using a scale (say, from 0 to 1) to determine the balance of probabilities, one would be assuming that there is an objective standard by which evidence (quantitatively and qualitatively) may be assessed inerrably. But that is rarely possible, if at all. Although the premise itself is perfectly logical in that a balance of probabilities merely requires the court to decide which of the two cases is more probable (that is, on proof greater than 50%, or in Lord Hoffmann's terminology, >0.5 on a scale of 0 to 1), it is not realistic to apportion grades to evidence - on any scale, be it a scale of 0 to 1, 10, or 100 because of the subjectivity of such an exercise.

Secondly, the application of a scale of points to evidence (and the assumption that all evidence is quantitatively and qualitatively homogeneous) naturally assumes also that all evidence may be presented at a single level only. The problem with this assumption is easily demonstrable. Let us take two hypothetical cases. In each case, the plaintiff adduces evidence, the sum of which is x , and where x , say, consists of one witness and one document. The defendant adduces his evidence, the sum of which is y , and where y , say, consists of only one witness. The court may find that in each case, x is >0.5 (on a scale of 0 to 1) - more than y . However, let us assume that in one of the cases, the evidence of x is quantitatively and qualitatively superior to the evidence of x in the other case. Yet, if the court in both cases were to apply the balance of probabilities test, it would have reached a decision in favour of x , that is to say, finding x to be >0.5 on a scale of 0 to 1. There would be no problems of consistency and evaluation if they both concerned a simple breach of contract. But if they were both civil cases involving fraud, then the court in the other case may not find in favour of the plaintiff on the ground that it was not satisfied that x was >0.5 , *ie*, more than y . It will be seen, therefore, that the two cases could have been presented at different levels.

Hence, the test of a balance of probabilities, by itself a simple test of ascertaining >0.5 on a scale of 0 to 1, may vary according to the levels at which the evidence is presented as well as the nature of the issues in dispute. In other words, in the case of a case involving fraud, the court's expectation of proof of >0.5 on a scale of 0 to 1 would be higher, bearing in mind that in each case the court is balancing the case of the plaintiff against the case of the defendant. Thus, it has no concern with what evidence some other plaintiff or defendant may adduce.

In *Re B (Children)* [2008] UKHL 35, the judge Lord Hoffmann is of the view that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. The degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen. *Re H (minors)* makes it clear that it must apply the ordinary civil standard of proof. It must be satisfied that the occurrence of the fact in question was more likely than not. He agrees that clarity would be greatly

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enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

Also in Australia, the court in *Rejfeke & Anor v McElroy & Anor* [1965] 39 ALJR 177 (HC) reminded that the standard of proof to be applied in a case and the degree of persuasion needed to reach that standard are not to be confused. The court emphasised that the difference between the criminal standard of proof and the civil standard of proof is crucial as even if the fact found in a civil case is grave, the mind is only to be reasonably satisfied instead of being free of any reasonable doubt. His Honour in this case held that for the appellants to succeed in the action, the deceit of which the appellants complained had to be established to his satisfaction beyond all reasonable doubt. The latest of the line of decisions of the Supreme Court of Queensland insisting that any conduct which is criminal must be established in a civil action according to the criminal standard of proof. The criminal standard of proof was to be satisfied where the "cause of action is founded on a tort amounting to a criminal offence."

However, in 2015, the Federal Court altered the standard of proof involving allegation of fraud in the case *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] MLJU 0292. The judges decided that the standard of proof in a civil claim for fraud is only based on a balance of probabilities and not beyond a reasonable doubt. Moreover, they said: at 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 in a 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.'

Also in *Letchumanan Chettiar Alagappan v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697, the learned judges said that the standard of proof for fraud in a civil proceeding was clearly on a balance of probabilities. In this case, the Court of Appeal held that the instant forgery was falsification of a document, which falsification was a criminal offence. Fraud in a civil case therefore required proof on the standard of beyond reasonable doubt. It could not be denied that forgery is a fraud, and that forgery of the signature on a document is falsification of a document. But if forgery were to be held as fraud without distinction and so to be proved beyond reasonable doubt, then forgery could not have been, an exception to the standard of proof for fraud as such in the *Sinnaiyah* case. But forgery, albeit a fraud, was an exception to the standard of proof for fraud. Federal Court held that a serious misdirection happened on the part of the Court of Appeal which require proof of forgery on the standard of beyond reasonable doubt. Arising from the *Sinnaiyah* decision, the distinction between forgery and fraud is for all purposes eliminated in civil proceedings for purposes of the standard of proof. In any event, it was established by the Federal Court that the standard of proof of forgery in a civil proceeding is on a balance of probabilities. It was wrong to require proof of forgery on the standard of beyond reasonable doubt.

In Singapore, the standard of proof for fraud was altered earlier than Malaysia, as shown in the case of *Alwie Handoyo v Tjong Very Sumito and another* [2013] SGCA 44. The judges in this case mentioned: the standard of proof that applies in all civil proceedings is the balance of probabilities. There is no third legal burden of proof that straddles the civil and criminal burdens. Even though the position on the standard of proof required to establish fraud or forgery appears to be fraught with some uncertainty. It held that even where fraud is alleged in a civil case, the civil standard of proof applies, albeit where the allegation of fraud is serious, the party alleging the fraud has to do more to establish his case. In the light of this uncertainty in previous decisions of this court, it may be helpful if more evidence is given than in an ordinary civil case. Such an inquiry lies, therefore and in the final analysis in the sphere of practical application, rather than theoretical speculation. However, in this case, the standard of proof in

civil proceedings where fraud and/or dishonesty is alleged is the civil standard of proof on a balance of probabilities.

On the basis of the cases examined, the standard of proof for Macau scam allegation should be on the balance of probabilities, as it is the civil case. While Macau scam is a fraud and may be a serious criminal offence in civil suit, referring to the judgement in the case of Sinnayah, the burden of proof will always be the same; the balance of probabilities. The party who alleged Macau scam happened must prove that there is a fact on a tricking or fraud especially for making a quick profit by a person or a group of people resulted in a loss of sum money.

Conclusion

In conclusion, this study disentangles some issues related to Macau scam. Firstly, the discussion justifies the origins and the meaning of Macau scam. Also their modus operandi which is vary in technique to deceive people. The origins of Macau scam are still debated until now and nobody knows precisely where the Macau scam originated. Macau scam means the fraudulent act intentionally to cheat any person to obtain quick money by making them suffered for loss of money.

Secondly, this study considers on the suitable provision which can enclose to the Macau scam because there is no legal provision in Malaysian statute stated on Macau scam. Based on the legal provision in Malaysia, there are provisions that could be relevant to Macau scam; as one of the fraud types which is in Penal Code (Act 574). There are Section 24, Section 25, Section 415, Section 170 and Section 420. The prosecutor or the party who wanted to allege Macau scammer could be prosecuted under those provisions of the law relating to fraud.

Thirdly, this study analyses the legal proof of Macau scam in Malaysia. In terms of legal proof, the study scrutinizes the standard or burden of prove and to who lies this burden of proof. Reviewing cases of fraud as the foundation for Macau scam, clearly stated in most of the cases that burden of proof lies to the prosecutor or the party who wanted to allege the Macau scammer. However, the burden of proof can be changed by discharging the burden of proof from the onus of proof to the other party. In term of standard of proof in Malaysia, the burden of proof in criminal cases must be proof beyond reasonable doubt. While in civil cases, the burden of proof is on the balance of probabilities. As far as this study was concern, the Macau scam categorized as a civil claim with criminal nature. Therefore, the burden of prove is on the balance of probabilities.

In consequence of the increasing rapidly number of scam victims especially in Malaysia, the new Macau scam has become an increasingly serious crime, which affects social stability and the sense of security of the public. Therefore, it should be eradicated by alleging the crime to the severe punishment or other legal remedy which is worth it.

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