Challenges in admitting canine evidence in malaysia

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Abstract

Dogs are used by the police and other enforcement agencies to track and trace perpetrators and to look for evidence, dead bodies, narcotics, weapons and explosives. It is a common knowledge that dogs are very intelligent animal with great sense of smell. Dogs are used as an instrument by the enforcement agencies around the world to assist in criminal investigations. Canine evidence has been adduced and admitted in many jurisdictions around the world. However, there has not been any decision by the Malaysian Courts in admitting canine evidence. Although canine evidence is of importance in locating and proving a crime, there are serious challenges and concerns for canine evidence to be admitted by the Malaysian Courts. This article will highlight the challenges in admitting canine evidence by the Malaysian Courts.

Abstrak

Anjing telah digunakan oleh pihak polis dan pihak berkuasa lain untuk menjejak dan mengesan penjenayah dan untuk mencari keterangan, mayat, narkotik, senjata api dan bahan letupan. Suatu perkara yang diketahui umum adalah bahawa anjing merupakan haiwan yang sangat pintar dengan deria bau yang baik. Anjing-anjing digunakan sebagai satu instrumen oleh pihak berkuasa di

serata dunia untuk membantu dalam siasatan jenayah. Keterangan anjing pengesan telah dikemukakan dan diterima di mahkamah di pelbagai bidang kuasa di serata dunia. Namun, sehingga kini, tidak terdapat apa-apa keputusan mahkamah Malaysia yang menerima keterangan anjing pengesan. Walaupun keterangan anjing pengesan adalah penting dalam membuktikan jenayah, terdapat cabaran dan kebimbangan untuk keterangan anjing pengesan diterima oleh mahkamah di Malaysia. Artikel ini akan mengariskan cabaran-cabaran dalam menerima keterangan anjing pengesan oleh mahkamah di Malaysia

Keywords

cabaran-cabaran keterangan anjing pengesan, keterangan anjing pengesan, kebolehterimaan, polis

Introduction

Police dogs are intelligent and highly trained animals as they have excellent olfactory sense which help them to track and trace evidence and suspects. Dogs have been trained and are being trained by law enforcement agencies to locate drugs, currency (United State v Funds in the Amount of $30,670 United States Currency, cell phones (Penelope Green, 2010), contraband, explosives and weapons around the world. Dogs are used to track and trace suspects (Andrew Taslitz , 1990; Winston v. State; Winfrey v. State; Innocence Project of Texas, 2019) and to conduct search and rescue. Tracking is a process whereby the dog uses its nose and sense of smell to follow an invisible scent path to catch a person, weapon or narcotics (Persall & Leedam, 1958). Police dogs are also increasingly being used to find bodies and body parts in a crime (Andrew Rebman et al, 2000). As a result of the dogs' capabilities and functions, the use of police dogs in criminal investigation has been increasing rapidly. Police dogs are also found to be very cost effective and efficient, hence why they are used largely to prevent crime (O'Block Doeren & True, 1979; Lily & Pucket, 1997). Evidence given by the dog handler or its trainer is referred to as canine evidence or dog tracking evidence. Courts in many other jurisdictions around the world have accepted and admitted canine evidence.

In Malaysia, the Royal Malaysian Police has used police dogs for crime prevention since the early 1960s. The Royal Malaysian Police had formed its own K-9 unit locally in 1968. The dogs used by the police force were adopted from other countries such as Germany, Czech Republic, China and United Kingdom. These dogs are very expensive with a price tag of approximately 33,000 Ringgit Malaysia (which translates to approximately 7,500 United States Dollar) each due to its traits and character of a police dog. The police force uses three main breeds in tracking and tracing which are the German Shepherd, Belgian Shepherd and Labrador Retriever. These police dogs will undergo extensive training for four months to a year together with its handler. There are four main jobs carried out by these dogs:

(1) cadaver dogs to find dead bodies and body parts; (2) general purpose dogs used for riot control and search of lost item and missing people; (3) drug detection dogs to find narcotics; and (4) explosive and firearms detection dogs. There have been many successful raids, tracks and searches by the local K-9 unit (Cilisos, 2019).

One example of a successful track and trace was where a dog in the Malaysian Police K-9 unit made history when a German Shepherd became the first ever dog in Malaysia to be awarded with the 'Jasamu Dikenang' (translated as 'Your Services Remembered') medal. Lao Wu, the police dog named is five years and six months old of age, was given the medal for assisting the police force in searching a suspect who has committed grand theft auto which was believed to have fled four kilometres from the crime scene deep into a palm oil plantation nearby. A police officer who had arrived at the crime scene earlier had tried to stop the suspect. However, he had to shoot the suspect on the leg as he was trying to abscond from the crime scene. Lao Wu and his dog handler was subsequently then called in to the crime scene to assist the team to locate the perpetrator. Lao Wu and its dog handler then found a bloodied t-shirt on the ground. The bloodied t-shirt was believed to have been left behind by the perpetrator after wiping off the gunshot wound on his leg (New Straits Times, 2020). Lao Wu then led the police force into the palm oil plantation where they discovered upon a river. Lao Wu then insisted on crossing the river indicating that he is detecting the perpetrator's scent across the river. After crossing the river at six in the morning, Lao Wu managed to track and found blood stains on the ground. Prior to that, Lao Wu had also gone back and forth several times between the palm oil plantation and the main road. Subsequently, Lao Wu led the police force to an abandoned house where they found the suspect hiding behind the house in a weak state. The suspect did not resist arrest and had admitted to the police that he had a few times walked over to the main road to wait for a friend who was going to pick him up (New Straits Times, 2020). However, his friend did not show up and therefore hid at the abandoned house (The Star, 2020).

Another example of a successful tracing was a Labrador Retriever named Black which assisted the police in arresting a drug dealer. The Malaysian Police raided the drug dealer's house and arrested the drug dealer. However, the police force were not able to find the contraband in the dealer's house. Without the drugs, there was no evidence to charge and convict the drug dealer. Black was then called in to the scene to assist the police. Black then had successfully sniffed out 126.4gram of heroin stashed in several plastic bags hidden under a box in a hut near the drug dealer's house. In October 2021, the Langkawi police held an appreciation ceremony for Black in assisting the police to arrest the drug dealer. For his hard work and courage, Black was awarded a lot of food and certificate of appreciation (Says, 2021). Two police dogs from the Johor branch police's K-9 unit were also recipients of the Johor Police Chief Award. The two German Shepherd dogs, named Mailo and Barny received their medals in conjunction with the 214th

Police Day here for helping the police to locate the body parts of a lady murdered by her husband in Kota Tinggi, Johor (Malay Mail, 2021). Although there have been many successful tracks and traces by these police dogs in criminal investigation, there is yet to be any decision on whether canine evidence has been admitted and considered by the Malaysian Courts. There are many challenges faced for canine evidence to be admitted by the Malaysian Courts.

However, there are instances where by the police dogs failed to find the body or weapon. In the murder case of Datuk Sosilawati Lawiya and three others, the two German Shepherd that was used to locate human remains did not find anything at the farm in Banting. Police dogs also was used to find the missing Irish teenager Nora Anne who went missing. Although the dogs had picked up Nora's scent about 100 metres from the window of the villa, the dogs failed to find her (The Star, 2020).

Research methodology

The researcher in this paper adopted a qualitative research method. The researcher in carrying out this research focused primarily on challenges of admitting canine evidence in Malaysian Courts. Doctrinal legal research was also employed to thoroughly examine articles and provisions under the Evidence Act 1950 challenges and concerns of admitting canine evidence in Malaysia. Malaysian cases on the subject matter were also examined. The researcher also analysed case law decided by courts in other jurisdictions. Further, the researcher has also analysed and conducted research using secondary resources such as legal journals, books as well as relevant writing on the subject matter. The method and critical analysis is also adopted for the purpose of analysis of data in this paper (Ramalinggam Rajamanickam et al., 2015; Ahmad Azam Mohd Shariff et al., 2019; Ramalinggam Rajamanickam et al., 2019).

Results

The researcher in this paper outlines challenges of admitting canine evidence in Malaysian Courts.

Challenges in Admitting Canine EvidenceAdmissibility of canine evidence pursuant to Malaysian Evidence Act 1950

In Malaysia, the relevancy and admissibility of evidence in court is governed by the rules of evidence as set out under the Malaysian Evidence Act 1950. However, to date there is no decision made with respect to the admissibility of canine evidence in Malaysia and there is no clear provision to admit canine evidence under the Malaysian Evidence Act 1950. With the rampant use of police dogs in criminal investigations, it is necessary to ponder whether the interpretation of the dogs behaviour and actions by the dog handler could qualify as an expert opinion under section 45 of the Malaysian Evidence Act 1950 as a dog handler is regarded

to person on specially skilled in handlings dogs to track and trace. Section 45 of the Malaysian Evidence Act 1950 provides that:-

When the court has to form an opinion upon a point of foreig

nlaw or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

Such persons are called experts

Section 45 of the Act above provides areas where an expert's opinion would be allowed as evidence by the Malaysian Court on areas of foreign law, science or arts, identifying the genuineness of a person's handwriting or identifying fingerprints of a person. Subsection 2 of the same Act provides that the person who is giving the evidence or opinion is regarded as an expert. According to Section 4 of the Malaysian Evidence Act 1950, an expert is a person who has specialised knowledge or skill based on training, study or experience. The Malaysian Supreme Court in the case of Junaidi bin Abdullah v PP has laid down the test pursuant to Section 45 of the Malaysian Evidence Act 1950:

In our view, the test to be applied for the purpose of s 45 of the Evidence Act 1950 is this. First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry? The answer to both questions must necessarily depend on the facts of each particular case.

There was also another case which discussed on the expert opinion. In PP v Muhamed bin Sulaiman, the evidence of a bullet from the defendant's rifle was the only evidence available to connect the defendant to the murder. The Learned Trial Judge in that case ruled that the evidence of the chemist on the bullet was inadmissible because there was inadequate evidence of his background and competency and the chemist had not produced the a single shred of evidence on how he arrived at the said decision. On appeal, the deputy public prosecutor submitted that the Trial Judge made an error in not treating Mr. Lum, the chemist as a person "specially skilled", in thinking that the chemist's failure to produce the data to determine whether or not he was an expert and in rejecting the chemist's evidence that it had not been destroyed or disproved during cross examination, the Court of Appeal accepted the chemist's opinion on the basis that although he had no academic training, he may have practical experience gained in the department. The Court of Appeal propounded that:

This is because while the expert must be "skilled", he need not be so by special study, he may be so by experience, and the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

Although the dog handler may have acquired the necessary skill of reading and interpreting the dogs' behaviour so as to given an expert on the subject matter as set out in the above case law, the position of canine evidence is not clear under

the four scope stated in Section 45 of the Malaysian Evidence Act 1950. Although the olfactory of the dog, biology and anatomy of the dog refers to science but the evidence is given by the dog handler which does not fall under any of the limbs to be regarded as an expert. This shows that Section 45 of the Malaysian Evidence Act 1950 is not comprehensive to cover all scope particularly in fields that are constantly advancing. Therefore, the position taken by other countries with respect to expert opinion should be considered.

In 2003, the Indian Law Commission of India has passed the Indian Evidence (Amendment) Bill 2003 primarily to amend Section 45 of the Indian Evidence Act 1872 to add addition scope of expert witness on "footprints or palm impressions or typewritting or usage of trade or technical terms or identity of persons or animals." This shows that the current Section 45 of the Indian Evidence Act 1872 is not sufficient and reformation and amendment is necessary with the advancement of science and technology today. Singapore Academy of Law's Reform Committee had recommeded that Section 47 of the Singapore Evidence Act be amended. The Committee's recomendations were implemented by the Evidence (Amendment) Act 2012 which was passed on 14 February 2012 (Evidence Amendment Bill, 2012). The scope of expert opinion was expanded to exhaust a range of expert opinion which may be helpful to the court by admmitting all points of "scientific, technical or other specialised knowledge". Prior to the amendment, Section 47 of the Singapore Evidence Act only permits expert evidence in five areas which are "foreign law, science or art, handwritting or finger impression". Anything arising out of the fields not listed under Section 47 is inadmissible. The approach taken by Singapore is considered general and complete as it includes all scope of expert.

The Second review of the New Zealand Evidence Act 2006 makes a provision under Section 25 for the admissibility of an opinion given by a person who possess specialised knowledge or skill in respect of a particular subject matter. By placing reliance on the opinion of experts where the conviction was based on the evidence collected by deploying the faculties of the canines, the Court of Appeal in R v Lindsay found it to be satisfactory as the handler was fully aware of what his dog was thinking at the relevant time. The Court also opined that there are certain safeguards in place, and it is only when the dog and its handler (giving evidence on his behalf) are fully qualified and trained, such evidence would be acceptable (Lavanya S, 2022). In the United States, Rule 702 of the Federal Rules of Evidence, provides for statutory recognition to an opinion/ testimony given by a person who is an expert based on scientific, technical or specialised knowledge which will inevitably assist the judge to understand the evidence and determine the fact in issue (Lavanya S, 2022).

Errors made

Besides the lack of comprehensiveness of scope of expert witness in Malaysia, there is also possibility of errors being made by both the police dog and the dog handler. There may be situations where the digs give our false (Daniel

Owen, 2014). A dog may also fail to alert to the presence of evidence or maybe the crime was done in a manner which the dog was not trained for. There are also possibilities of false positives. This is because to a certain extent, some dogs have very strong detection capabilities which enable them to alert to the traces of the evidence that is looking for which are below the detection limits. These dogs may also alert to other ordinary household items such as soaps, perfume and condiments. Canine alerts are also not always corroborated by the actual presence of the target that it is looking for, for instance narcotics. In many instances, the dog may identify the traces or lingering smell from an object or evidence that was previously present at the location but was subsequently removed from the location. Additionally, there may be instances where by the dog handler might have mistakenly read the dogs actions as alerting when actually the dog is not alerting. This would definitely give out a false dog alert (Daniel Owen, 2014; Jennifer Ashley et.al, 2007).

Jerzierski, Ensminger and Pepet (2016) observes that "if sniffer dogs used systematically for forensic purposes are correct in 90% of trials, a statistical test would warrant finding that dogs are able to detect or identify the odour but from a legal point of view, there is still a concern about the 10% failure rate." Factually, dogs that have less than 10% failure rate is found to be the best dogs for detection (Ensminger et al., 2010; Jezierski, 2016). There have been cases where errors have resulted in harmful consequences for people. One good example is the case of Calvin Lee Miller, who was wrongly sentenced and imprisoned in Texas for the crime of robbery and sexual assault based on questionable sniffer dog evidence (Hylton, 2009; Lisa Lit et al., 2018).

In the case of Ramesh v State of Assam, the Indian Supreme Court propounded that:

There are inherent frailties in the evidence based on sniffer or tracker dogs. The possibility of an error on the part of the dog or its master is the first among them. … The possibility of a misrepresentation of a wrong inference from the behaviour of the dog could not be ruled out. Last, but not the least, is the fact that from a scientific point of view, there is little knowledge and much uncertainty as to the precise faculties which enable police dogs to track and identify criminals. … Investigating exercises can afford to make attempts or forays with the help of canine faculties but judicial exercise can ill-afford them.

Similarly, following the case of Dafedar and Ramesh, the Supreme Court in the case of Borthakur v State of Assam the Supreme Court held that:

The law in this behalf, therefore, is settled that while the services of a sniffer dog may be taken for the purpose of an investigation, its faculties cannot be taken as evidence for the purpose of establishing the guilt of an accused.

Cueing

There is also a possibility of cueing (Earth Erowid, 2011). Cueing basically means a circumstances or situation of a handler, or someone else in a dog's

presence, (California v White) providing a conscious or unconscious signal to the dog that influences the sniffer dog to carry out a trained behaviour pattern (US v Traver). The phenomenon is sometimes called the "clever Hans", a term coming from a horse that seemingly always tapped a hoof the correct number of times in answer to arithmetical questions (Paul C. Giannelli, 2013). A dog handler may give off subtle or sometimes not so subtle, (Byron Pitts, 2014) cues that influences the dog's ability to alert locations (Paul C. Giannelli, 2013; John Lentini, 2006).

Hearsay evidence

Another challenge is that canine evidence could be hearsay evidence and therefore cannot be admitted as evidence by the court. The reason for canine evidence being hearsay is because a dog is an instrument and not a witness. The dog's handler is the witness who will testify on the dog's alerts and background of the track and trace. The police dog cannot be called to take a stand in the witness box and to give its testimony under oath and consequently submit itself to be cross examined by the defendant's counsel. This contravenes Section 6 of the Malaysian Evidence Act 1950 as oral evidence must be direct evidence which must be one who perceived the fact through a medium of his senses. In the Indian case of Dafedar v State of Maharashtra, the Court highlighted that:

There are objections which are usually advanced against the reception of [dog tracking evidence]. First, since it is manifest that the dog cannot go into the box and give his evidence on oath, and consequently submit himself to cross examination, the dog's human companion must go into the box and report the dog's evidence, and this is clearly hearsay. Secondly, there is the feeling that in criminal cases the life and liberty should not be dependent on canine inferences.

It was also stated that

The tracker dog's evidence cannot be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. Dogs are intelligent animal with many thought processes similar to the thought process of human beings and wherever there are thought processes there is always the risk of error, deception and even self-deception. For these reasons, we are of the opinion that in the present state of scientific knowledge of dog tracking, even if admissible, is not ordinarily of much weight (Ian Frekelton, 2020).

There is also another Uganda case where the Uganda Court considered many cases where police dogs were used to track and trace and some judges found canine evidence as hearsay evidence and therefore inadmissible while others held that additional evidence explaining the faculty by which these dogs are able to follow the scent of one human being, rejecting the scent of all others would suffice (Uganda v Muheirwe Chris & Ors). In the case of Rex v White, the Court decided that canine evidence is hearsay by the using the following analogy:

Let us suppose that the most skilful of trackers was employed to tract the murderer, and that he had followed courses such as those taken by the fogs, and thereafter had communicated his observations and conclusions to another. But before the trial, he died. Under our rules of evidence, that another could not be called as witness to tell what the tracker told him, the evidence would have to be excluded (Don E. Cummings, 2013).

Environmental factors play an important role

There are several environmental factors that impact the competence of the police dog in tracking and tracing which are temperature, humidity and wind. For example, in cadaver detection, cadaver dogs' purpose are to trace the scent of rotting flesh and remains. A scent cone spreads from a deceased person in the same fashion of that a live person. However, the odour that the dog searches for in this case is a generic scent of death caused by the chemistry of decomposition (Rebmann, David & Sorg, 2000). Additionally, the scent of decomposition can also be carried by the water from where the body or remains was found causing the dog to alert some distance away from the actual location of the body. Further confounding the issue is the fact that the water that moves the scent can be water from above or underground (Rebmann, David & Sorg, 2000).

With respect to narcotics, the scent cone is affected by the turbulence or waves as it is diffused from the drugs (Bryson, 2000). The scent odour from the narcotic drifts at the whim of the air currents (Robicheau J, 1996). If the contraband is hidden in a vehicle, the scent of the contraband may seep out through gaps of the trunk or doors as it is pushed by wind on the opposite direction of the vehicle (Remsberg, 1995).

Time also plays an important role as it has an impact on the strength of the scent. For instance, if an object is moved or touched, human scent is then automatically transferred to that object (Bryson, 2000). During an object recovery, the oils from the skin of the suspect or perpetrator have been transferred onto the evidence. The object or evidence is composed of a scent different than that of the surrounding area. According to Bryan (2000), scent diffuses away from objects with time. As time passes, the scent of the object begins to absorb the odour of the surrounding environment. Although canine is capable of locating such objects or evidence (i.e. guns) up to 48 hours after the crime has been committed (Kristofek, 1991), any further delay work against the police dog in tracking and tracing (Bryson, 2000), Similar to an area search, the police dog brought downwind and directed to search the area, or, items of evidence can be identified while the dog and handler are actively tracking a suspect (Guzlas, 1993).

Conclusion

Canine evidence is exceptionally important in a criminal justice system particularly in criminal investigations. However, there are data that shows that

canine evidence should be approached and accepted by the Court with caution. Canine evidence has a long history and it has been accepted by Courts in other jurisdictions with the exception of a few countries such as India and South Africa. In India and South Africa, there have been inconsistent positions taken by courts. However, if the reliability of the canine evidence can be proven then Courts in both the jurisdiction would not hesitate to admit them. Based on the research above, it is clear that there are many challenges and concerns of admitting canine evidence in Malaysia. There are a few courts in other jurisdictions that have decided that canine evidence is hearsay evidence because the evidence is given by the dog handler by interpreting the dogs' reactions and behavior.

Additionally, the dog cannot go to the witness box and be cross examined and tested. In other parts of the world, dog handler is regarded as an expert and its opinion is accepted by the court. This is because a dog handler can be considered as an expert for having a specialized knowledge obtained through experience or training. However, in Malaysia, the scope and area of expert is not wide enough for dog handlers to be regarded as expert. Another important challenge is environmental factors which such as humidity, temperature and time which plays a vital role in tracking and tracing. Further, dogs are not 100% accurate in tracking or tracing. There is a risk that the dog may identify the perpetrator wrongly. Dog handlers may also make mistake in interpreting the dog's alerts. However, there may be solution to these challenges particularly to the reformation and amendment of the law especially to widen the scope of witnesses of Section 45 of the Malaysian Evidence Act 1950, drawing guidelines in admitting canine evidence, giving canine evidence low probative value and corroborating canine evidence with other supporting evidence. Additionally, training procedures and procedures for tracking and tracing can be drawn to ensure the best evidence is adduced to court.

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