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## Rape and Sexual Offences: Legal and Social Challenges in Convicting the Accused

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### Abstract

This paper was written to highlight issues regarding rape and sexual assault reports which still rank the highest of all the violent crimes in Malaysia. The various sections of the Penal Code punish the perpetrators and over the years, various amendments have been made to intensify the punishment with the hope of deterring and mitigating this heinous crime. Despite this, the reported numbers still run high while many more go unreported. The findings of this paper is based on 31 court cases reported in the law journal from 2019 to 2022. It also highlights the development of the Penal Code, the procedures in court and the challenges affecting the outcomes of the court cases. The paper highlights issues affecting the punishment meted out to the perpetrators which include time lapse between the incident and the reporting, lack of evidence, technical and procedural impediments and the defence raised by the accused (mainly in relation to the victims' promiscuity and sexual behaviour). Recommendations are given to overcome some of the challenges faced by the victims in the process of reporting the cases and during the court hearing. Further research could be conducted to analyse the important issues pertaining to the different types of rape and sexual assaults.

### Introduction

In Malaysia, rape and sexual assaults record the highest number of violent crimes with 1,582 cases in 2020 (Crime Statistics Publication, 2021). Malaysia has adopted the 2030 Agenda for Sustainable Development and is pursuing the achievements of Sustainable Development Goals (SDG). The Sustainable Development Goals are the United Nations blueprint to achieve a better and more sustainable future for all. They address the global challenges we face, including poverty, inequality, climate change, environmental degradation, peace, and justice. However, the assessments of SDG 16 on Peace, Justice, and Strong Institutions particularly on the indicators of the proportion of population subjected to physical, psychological, and sexual violence in the previous 12 months, showed that further development is needed to significantly reduce all forms of violence (DOSM, 2022). Despite being a signatory to UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Malaysia has yet to succeed in reducing sexual violence against women. From 2005 to 2014,

the Ministry of Home Affairs recorded 28,741 reported rape cases but only 16% (4,514) proceeded to trial, with only 2.7% (765) of cases reaching a guilty verdict (WAO, 2019).

Under the Malaysian law, rape is defined as sexual intercourse with a woman without her consent or against her will, and the element of penetration is crucial to constitute rape. Various categories of rape are listed as offences punishable under the Penal Code (Revised 1997). Sexual intercourse with a woman is also rape when her consent is obtained by putting her in fear of death or hurt; when she is unable to understand the nature and consequences of what she is consenting to; or when her consent is obtained by using a position of authority, a professional relationship, or other relationship of trust. Sex with a girl below 16 years of age is statutory rape, irrespective of whether she consented or not.

Rape is the severest of sexual offence. It destroys the victim's life and affects the stability of the family, more so when the perpetrator is a family member. Ninety percent (90%) of rape perpetrators are those that are known to the victim and studies show that victims of acquaintance rape are blamed more than victims of stranger rape (Persson & Dhingra, 2022; Gravelin et al., 2019). Great difficulty presents itself when it comes to reporting a family member or an acquaintance of the family. There is a probability that at the trial, these female victims of sexual violence are ridiculed, devalued, and humiliated (Hamid, 2021).

#### Fear

Child Sexual Abuse is such a disgusting act that shakes the mind of a child, and as a result of this, a child is always in the shadow of fear and never gets out of it. Fear by children of being taken away from their parents most childhood abuse goes unreported.

#### Self-harm

Aggression towards self as in self-blame, self-harm, and suicide are common consequences of sexual abuse. Those people who were sexually abused in childhood are more inclined to commit suicide than a normal person.

#### Sexual Health

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A rape victim always lives in the shadow of fear and does not get out of it, especially if the victim is a child. Aggression towards self, for example self-blame, self-harm and suicide are common consequences of rape (Bhuptani & Messman, 2021). The rape victims face depression, anxiety, eating disorders and post-traumatic stress disorders. The perpetrator could also repeat the "sexual act" causing the victim to feel guilty and shameful (Gupta &

Garg, 2020). Rape victims also report injury (e.g., bruises, vaginal tears), and sexually transmitted disease as a result of the rape. A high number experienced some form of impact as a result of violence by a rape perpetrator. Among U.S. women, the adjusted odds of experiencing asthma, irritable bowel syndrome, frequent headaches, chronic pain, difficulty sleeping, activity limitations, poor physical or mental health, and use of special equipment (e.g., wheelchair) were significantly higher for lifetime rape victims compared with non-victims (Basile et al., 2021).

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Sexual Health

Convicting a rape perpetrator is challenging despite having the laws in place. This paper discusses the provisions and development of the Penal Code on rape and sexual offences. This paper analyses rape and sexual offences cases from 2019 to 2022 to highlight the varying judgments imposed by the Court and the reasons for this. The thirty-one cases analysed highlight the issues in relation to the judgments meted out to the perpetrators of rape and sexual offences.

### **Development of the law in Malaysia on rape and sexual offences**

Since its passing in 1976, the Penal Code of Malaysia has been amended from time to time to penalize sexual offences such as rape, incest and outraging the modesty of women and children. The alarming increase of rape on women and children urged lawmakers to amend the Penal Code so that the crime is appropriately punished and also to deter its repetition and its commission by others. The scope of rape and other sexual offences were broadened, and harsher sentences imposed. Presently, seven situations constitute rape under section 375 of the Penal Code. The ensuing section 376 amendment enhances the punishment for rape. Furthermore, other types of sexual offences are now criminalized under the Penal Code such as gang rape, incest, and other unnatural sexual offences. Table 1 presents the various

provisions on rape and sexual offences under the Penal Code, the punishment imposed on these offences and the amendments thereof.

Table 1

*Punishment on rape and sexual offences under the Malaysian Penal Code*

NO	PENAL CODE	PREVIOUS PROVISION	CURRENT PROVISION	LATEST AMENDMENT
1	Section 375: Rape	6 categories of rape.	7 categories of rape.	2007
2	Section 376: Punishment for rape	Imprisonment: 5 to 20 years.  Whipping: Discretion of the court on the number of whippings.	General provision under section 376(1): Imprisonment 20 years maximum and whipping.  Rape under section 376(2): Imprisonment 10 to 30 years.  Rape under section 376(3): Imprisonment 8 to 30 years. Whipping minimum 10 strokes.  Rape under section 376(4): Death penalty or imprisonment 15 to 30 years and whipping minimum 10 strokes.	2017
3	Section 375A: Husband causing hurt to have sexual intercourse	No provisions	Imprisonment up to 5 years.	2007
4	Section 375B: Gang Rape	No provisions	Imprisonment 10 to 30 years.	2014
5	Section 376B: Punishment for incest	Imprisonment 6 to 20 years	Imprisonment 10 to 30 years and whipping.	2017
6	Section 377C: Committing carnal intercourse against the order of nature without consent	Imprisonment 5 to 20 years and whipping	Amendment to make whipping compulsory. No amendment to the duration of imprisonment.	2017

NO	PENAL CODE	PREVIOUS PROVISION	CURRENT PROVISION	LATEST AMENDMENT
7	Section 377CA: rape using sexual objects other than penis	Imprisonment up to 20 years.	Imprisonment 5 to 30 years and whipping.	2017
8	Section 377D: Outrages on decency	Imprisonment up to 2 years.	No amendment.	1989
9	Section 377E: Inciting a child to an act of gross indecency	Imprisonment up to 5 years and whipping.	Imprisonment 3 to 15 years and whipping.	2017

Based on Table 1, the maximum imprisonment term for rape and sexual offences involving penetration is 30 years, which is of an extended duration in view of the severity of the crime. Among them are: gang rape, incest, rape of a victim who is below 12 years old, non-consensual statutory rape, rape which resulted in injury to the victim or puts the victim in fear of death or hurt, rape committed in the presence of an audience, rape on a pregnant victim, rape which causes the victim to become insane, rape by a perpetrator who knows that he is positive for sexually transmissible disease, rape which causes the victim to commit suicide, and rape on a victim who suffers from mental disability, emotional disorder or physical handicap at the time of the crime. The enhancement of scope of rape and punishment is necessary as perpetrators of rape are becoming more dangerous and violent. The severest punishment for rape is the death penalty where the rape or attempt to commit rape results in the death of the victim.

Apart from the Penal Code and all its provisions, there are specific laws which criminalizes sexual offences against children, and it is contained in the Sexual Offences Against Children Act 2017 (SOACA). Preventing the victimization of female children by sexual predators from turning them into objects of pleasure by sexual predators and with the certainty and likelihood of such objectifying turning into rape or other sexual offences against children, SOACA prohibits sexual related offences such as child pornography and other forms of physical or non-physical sexual acts. Table 2 outlines the punishment for the offences under SOACA.

Table 2

*Offences and punishment under SOACA*

<b>SEXUAL OFFENCES (SOACA)</b>	<b>PUNISHMENT</b>
Section 5: Making, producing, directing the making or production of child pornography	Imprisonment 30 years maximum, whipping minimum 6 strokes.
Section 6: Making preparation to make, produce or direct the making or production of child pornography	Imprisonment 10 years maximum and whipping.
Section 7: Using a child in making, producing, directing the making or production of, etc., child pornography	Imprisonment 20 years maximum, whipping minimum 5 strokes.
Section 8: Exchanging, publishing, printing selling etc., child pornography	Imprisonment 15 years maximum, whipping minimum 3 strokes.
Section 10: Accessing, having in possession etc., child pornography	Imprisonment 5 years maximum or fine RM10,000 or both.
Section 11: Sexually communicating with a child	Imprisonment 3 years maximum.
Section 12: Child grooming with the intent to commit sexual offence	Imprisonment 5 years maximum, whipping.
Section 14: Physical sexual assault on a child	Imprisonment 20 years maximum, whipping.
Section 15: Non-physical sexual assault on a child	Imprisonment 10 years maximum or fine RM20,000 or both.

Despite criminalizing extensively, the whole spectrum of rape and sexual offences, as well as enhancing the punishments, the number of reported cases of rape and sexual offences has not reduced significantly. To convict a person accused of rape is not easy and takes time. When a person is charged for rape or sexual offence, as any other criminal cases, there are procedures which must be followed. Most rape and sexual offences cases are heard at the Sessions Court. When in court a person is charged, and so following its reading he becomes the accused, pleads either guilty or not guilty. If the accused pleads guilty, the victim will not have to go through the anguishing process of giving evidence in court and being cross-examined by the defence lawyer. The prosecution would not have to call witnesses to testify in court and so the trial procedure shortens. Here the perpetrator is allowed to mitigate for lesser sentence before the court pronounces its punishment. If either the accused or the prosecution is not satisfied with the punishment meted out, there always is a right of appeal to the High Court. The High Court then decides whether to allow or refuse the appeal. However, when the accused pleads not guilty when charged, the case proceeds with witnesses (victim included) testifying in court and evidence must be adduced by the prosecution to prove a prima facie case against the accused. If the court is satisfied that the prosecution has proven a prima facie case, the accused is called to defend himself who is at liberty to produce witnesses and evidence, which is then subjected to prosecution's cross-examination. Thereafter, the court decides accused's guilty or innocence and the punishment if found guilty. However, if the court decides that the prosecution has not proven it prima facie (usually when there is insufficient or inconclusive evidence) against the accused, the accused is not called to answer the charge and hence discharged unconditionally. When the court decides that there lies a prima facie case against the accused, then the accused must answer and make a defence and when found guilty at the end of the defence's case, both the

parties (i.e., the prosecution and the accused) may appeal to the High Court against whatever decision the Sessions Court make if dissatisfied. Hence, from the time the rape or sexual offence occurred and reported, several years elapse before a perpetrator is found guilty and punished.

When a court makes its decision on a case, the written judgment is not be accessible to the public. Records of its judgment is obtainable from the leading law journals in Malaysia namely, the Malayan Law Journal (MLJ/MLJU) and the Current Law Journal (CLJ). Cases reported in the MLJ/MLJU and CLJ are the judgments of the High Courts which means that these cases traverse both the trial and the appeal processes. These law journal reported cases disclose the facts of the case and the grounds of their judgments and form the primary source of the law in Malaysia to substantiate the relevant legislation. Most cases involving rape or other sexual offences end at the High Court and only in rare cases with pertinent legal issues would go further to the Court of Appeal stage. Therefore, the judgments reported in the MLJ/MLJU or CLJ are comprehensive and is reflective of the cases filed in court. The ensuing part of this paper examines the cases reported in the law journals with the following objectives: first, to examine the outcomes of recently court prosecuted rape cases and secondly, to analyse how rape and sexual offences may be avertible based on the outcomes of the cases.

### **Methodology**

The paper carries out empirical analysis supported by a doctrinal study on rape and sexual offences cases from 2019-2022. The selected time frame envelops judgments on rape and sexual offences covering the latest amendments to the Penal Code culminating with the passing of SOACA coming into effect after 2017. Cases are selected using purposive sampling based on two criteria: first, the charge in the cases must either be of rape or any other sexual offences, and secondly, the case has been concluded with a decision of the High Court. Specific keywords in English and Bahasa Malaysia which are peculiar to rape and sexual offences cases are used in search of the relevant cases. To avoid the redundant inclusion of cases arising from duplicity or multiplicity reporting in other law journals, only one is selected. Cases which are not conclusively judged and decided on the charge (i.e., those appealing on certain legal issues or admissibility of evidence) are also removed from the sample. The search yielded 31 cases, and these were analysed for the grounds of their acquittal, the reasons for their conviction, the differences in the sentences passed, the defences raised by the accused, the relationship of the victims and their perpetrators, the ages of the victims, the duration of the cases and the nature of rape or sexual offences. The findings are presented below.

### **Result and Discussion**

The cases retrieved were the decisions of the High Court from various states in Malaysia. Except for one, all cases went up on appeal to the High Court from the decision of the Sessions Court. The only case that was not up for appeal was one which came within the High Court's original jurisdiction for rape causing death under section 376(4) and murder under section 302 of the Penal Code. That case was heard in the High Court because only the High Court has jurisdiction to impose the death penalty for offence of murder. Based on Table 3 below, most of the victims were minors (below the age of 18 years old) at the time of the rape/sexual assault. The cases show that the perpetrators are people familiar to the victims, the most common of which being the stepfather (7 cases). Only in 4 cases were the rapists strangers or intruders unfamiliar to the victims.



Table 3

*Age of victim at the time of the sexual assault and relationship of perpetrator*

Case No	Age of victim(s)	Perpetrator
1	6 years old	Uncle
2	15 years 4 months	Brother-in-law
3	14 and 15 years old	Father
4	34 years old	Superior in the office
5	14 years and 7 months	Acquaintance
6	15 years and 2 months	Member of auxiliary police force
7	15 years old	School bus driver
8	12 years and 5 months	Victim's brother (13 years 8 months)
9	23 years old	Transporter
10	14 years and 7 months	Boyfriend who subsequently married the victim
11	15 years and 10 months	Gang rape of 4 accused persons
12	13 years old	Stepfather
13	11 years old	Stepfather
14	13 years old	Father of victim's friend
15	15 years and 5 months	Relative of victim's father
16	15 years old and 11 years old	Uncle
17	11 years and 6 months	Stepfather
18	14 years old	Stepfather
19	34 years old	Father-in-law
20	42 years old	Relative of victim's husband
21	17 years old	Uncle
22	15 years and 7 months	Stepfather
23	26 years old	Intruder / stranger
24	14 years old	Stepfather
25	11 years old	Father
26	22 years old	Intruder / stranger
27	13 years old	Stepfather
28	13 years old	Fiancé of victim's sister
29	Not stated (married woman)	Intruder / stranger
30	Not stated (factory worker)	Intruder / stranger
31	Not stated	Not stated

In punishing the accused found guilty of rape or sexual assault, the law gives the courts the discretion to mete out sentences ranging between the minimum and the maximum prescribed in the Penal Code as shown in Table 1 above. Precedents set by the earlier decisions of the courts of co-ordinate jurisdiction and those of the higher-ranking, namely the Courts of Appeal and the Federal Court, also guide the court's sentencing discretion. Among the things the sentencing court considers are: 1) the gravity and seriousness of the offence, 2) the protection of the public interest, 4) the records, if any, of the accused's other criminal convictions, and 5) any guilt plea of the accused. The duration of the sentence also depends on the number of charges against the accused and whether there was a single or multiple counts or occasions of rape. Hence, the sentences vary from case to case. Table 4 presents

the findings on the number of charges against the accused and the sentences meted out by the courts. The data below shows that an accused charged with multiple counts of rape, or more than one charge of sexual offence is subjected to heavier punishments and longer sentences.

Table 4  
*Charges and sentences*

Case No	Offences	Guilty / acquitted	Sentence		
			Imprisonment	Whipping	Others
1	2 charges	Guilty	13 years (concurrently)	3 strokes	
2	1 charge	Acquitted	-	-	Sentence set aside.
3	2 charges	Guilty	30 years total (consecutively)	15 strokes	Counselling & police supervision.
4	1 charge	Acquitted	-	-	Sentence set aside.
5	1 charge	Acquitted	-	-	Sentence set aside.
6	1 charge	Guilty	16 years	5 strokes	
7	1 charge	Guilty	7 years		Rehabilitative counselling & police supervision 2 years
8	1 charge	Guilty	-	-	2 years good behaviour bond
9	2 charges	Guilty	27 years total (consecutively)	5 strokes	
10	1 charge	Guilty	-	-	3 years good behaviour bond
11	1 charge	Guilty	8 years (1 <sup>st</sup> to 3 <sup>rd</sup> accused) Henry Gurney School (4 <sup>th</sup> accused)	3 strokes (1 <sup>st</sup> to 3 <sup>rd</sup> accused)	
12	2 charges	Guilty	25 years total (consecutively)	13 strokes	
13	2 cases (multiple)	Guilty	25 years total (concurrently)	50 strokes	
14	1 charge	Guilty	25 years	10 strokes	
15	1 charge	Guilty	12 years	5 strokes	
16	2 charges	Acquitted	-	-	Sentence set aside.
17	1 charge	Guilty	15 years	10 strokes	
18	4 charges	Guilty	32 years total (concurrently & consecutively)	24 strokes	
19	2 charges	Guilty	15 years (concurrently)	Set aside	

Case No	Offences	Guilty / acquitted	Sentence		
			Imprisonment	Whipping	Others
20	1 charge	Guilty	10 years	3 strokes	Rehabilitative counselling & police supervision 3 years.
21	1 charge	Guilty	12 years	2 strokes	
22	2 charges	Guilty	18 years	10 strokes	
23	2 charges	Acquitted	-	-	Death penalty for murder.
24	1 charge	Guilty	4 years		
25	16 charges	Guilty	75 years total (consecutively)	12 strokes	
26	2 charges	Guilty	13 years (concurrently)	7 strokes	
27	1 charge	Acquitted	-		
28	1 charge	Acquitted	-		
29	1 charge	Guilty	13 years	12 strokes	
30	3 charges	Guilty	10 years (concurrently)	4 strokes	
31	1 charge	Prima facie case			De novo set aside.

When exercising its appellate jurisdiction, the High Court usually does not interfere with the decisions of the lower courts unless there are errors emanating from within the lower courts' judgements. Of the 31 cases studied, 16 decisions made by the lower courts were upheld by the High Court with their convictions and sentences affirmed. Conversely, in 2 of the 6 cases the sentences passed by the Sessions Court were enhanced upon review by the High Court on appeal whereas in the other 4 the sentences were reduced. At the appellate stage, the prosecution succeeded in 17 cases whereas the accused succeeded in 14 cases. Of the 31 cases, most of the accused were found guilty whereas only in 7 were they found not guilty and acquitted. The duty placed upon the Prosecution in convicting rape or other sexual offences offenders is onerous, for in trying to prove the charge against the accused the prosecutor is bedevilled with multifarious challenges. Detailed analysis of the sample of cases on the issues and challenges which affect the outcomes of the cases in court are as follows:

#### a. Discovery of rape / sexual assault and support for the victim

The reporting of rape and sexual assaults is not contemporaneous with or made so soon after the commission of the act. They are often discovered and reported much later. Victims who are minors are easily threatened by the perpetrator into silence and secrecy. Based on examined cases, rape or sexual assault committed by perpetrators known to the victim are discovered when the victim begins to show signs of depression or mental health issues, when the victim can no longer bear the recurring torture and when the victims begin to show signs of being pregnant. In the case of *Public Prosecutor v Christian Berry AK Douglas [2021] MLJU 766*, incestuous rape was discovered when the 13 years old victim was brought to the hospital by her mother when the victim complained of stomach pains. The medical examination

revealed her pregnancy. Similarly, in 2 other cases, *Public Prosecutor v Tamlaran A/L Subramaniam [2020] MLJU 1738* and *Selvakumar Shanmugam v Public Prosecutor [2020] MLJU 2444*, pregnancy of the victims resulted in the discovery and disclosure of the rape.

Case analyses reveal that victims usually disclose rape and sexual assaults to mothers or mother-figures such as aunts or grandmothers, teachers or counsellors, close friends, or older siblings. The first step in the prosecution of the perpetrator of rape or sexual assault is the quick lodging of the police report, as this greatly facilitates and lessens the burden of the prosecution. Delays in reporting have been used by perpetrators to raise doubts about allegations of sexual assaults and which might affect the outcomes of the cases especially if there is a no cogent medical finding indicating the commission of the rape or the sexual assault due to the effluxion of time.

Further to getting the victims to quickly lodge police reports, they also need emotional and physical support and protection from the perpetrators who may inflict further harm or influence the victims into not making the reports or testifying in the courts of law. For victims who are minors, their ordeals worsen if their mothers are prone to not believing them. In 3 out of the 31 analysed cases, the mothers did not believe the victims as the victims are allegedly said to be in “the habit of telling lies” and the perpetrators in all 3 cases were the stepfathers of the victims. Out of those 3 cases, two were convicted while one was acquitted on account of there being insufficient evidence. In the case of *Public Prosecutor v Asmad Bin Akdim [2019] MLJU 1415*, even though the medical evidence shows an old tear in the 13 years old hymen, no other evidence could corroborate the victim’s testimony which the court found to be inconsistent. It would be difficult for the victim at such a tender age to know what to do after such torment, particularly so when there is no support from the mother.

#### **b. Evidence of rape or sexual assault**

Pregnancy of the victims and the DNA profiling of the foetus provide strong evidence to implicate the perpetrator, but this may not be present in all situations of rape. Thus, to prove rape, the prosecution will rely heavily on the medical report for evidence of penetration in the form of the tearing of the hymen. However, if there is a delay in the reporting the crime and the bringing in of the victim for the medical examinations, the medical officers can only estimate when the act of rape happened and if this is the case then it needs other corroborating evidence such as the consistent testimony of the victim, semen of the accused on the victim’s clothes, placing the accused at the crime scene, testimony of witnesses and any other relevant evidence which supports the victim’s version as to what transpired. For example, in the case of *Mohammad Izzudin bin Abdul Rahman v Public Prosecutor [2019] MLJU 1903*, the medical report shows no fresh tear because the victim was a married woman. However, there was sufficient corroborative evidence to support her allegation of rape because the accused had recorded the incident with the victim’s handphone, and the victim managed to call her friend before the accused took her handphone. The friend arrived at the crime scene and found the accused lying on the person of the victim. Similarly, in *Suharman Bin Mohamad Noor @ Ismail v Public Prosecutor & Another Appeal [2020] MLJU 2258*, apart from the victim’s hymen tear, seminal stains found on the victim’s night dress and the accused’s sarong supported the victim’s allegation of rape. Thus, in both cases, the accused was found guilty. Conversely, in *Pendakwa Raya v Muhammad Syahir Naim Bin Ramli [2019] MLJU 665*, the medical evidence showed an old tear which did not support the victim’s

testimony as to the time the rape occurred and the victim's demeanour while giving the evidence did not help the prosecution's case because the victim repeatedly claimed "I don't remember" more than 40 times when she was questioned in court about the rape. Hence, the accused was acquitted. All the medical and forensic evidence require corroboration by the consistent testimony of the victim and from reliable witnesses. Nothing should be inconsistent with and contradict those evidence if the prosecution is to rely on the strength of the corroborative testimony evidence of the victim.

### c. Technical and Procedural Impediments

Case analyses also show that an accused maybe acquitted on grounds of technicality or impediments due to procedural impropriety for non-compliance. Mistakes made by the judge conducting the trial can affect the outcome of the prosecution's case. For example, in the case of *Dolly Bin Surop v Pendakwa Raya [2020] MLJU 1613*, the Sessions Court judge found the accused guilty for 3 counts of rape and 1 charge of physical sexual assault. However, on appeal, the High Court overturned the conviction and set aside the sentence due to a technicality. The accused's main ground of appeal was that he was not given a fair trial as he was denied adequate legal representation during the trial. The accused earlier had legal representation, but the lawyer was found to be absent on only one occasion. The accused was not aware that his lawyer had died, and this fact was only discovered later. Instead of postponing the case and allowing the accused to obtain legal representation, the judge insisted that the case be proceeded with evidence from the prosecution's witnesses. In such a situation, the prosecution cannot have a do-over of the case as it would be double jeopardizing the accused. So unfortunate for the victim in this case as the accused went unpunished for his crimes. The overzealousness of the judge in proceeding with the case without granting a postponement may end up with the backfiring of the prosecution's case. Moreover, in this case the victims' mother lodged the report only after the accused moved out of the house as she feared for the safety of her children. The acquittal of the accused represent grave danger to the victims should the accused revengefully go after their victims upon release, and this may discourage the victims from reporting any future assaults.

The pandemic too contributed to delays in concluding a case. In *Public Prosecutor v Mohammad Fadil Hanapi Bin Md Sahidek [2022] 7 MLJ 270*, the Sessions Court judge (SCJ) who heard the case found that the prosecution had proven a prima facie case. However, the case for the defence of the accused was delayed because of the Movement Control Order (MCO) issued by the nation's health authorities pursuant to the order of the World Health Organisation to contain the Covid19 pandemic. Subsequently, the SCJ was transferred to another court and then, unfortunately, passed away. The SCJ appointed decided to rehear the case "de novo" which means to hear the case afresh i.e., the case would have to start from the very beginning where the prosecution would have to prove a prima facie case once again. The prosecution appealed to the High Court against the "de novo" ruling and the High Court allowed the appeal. Making the prosecution prove the case again is unfair as it would cause the victim a repeat of the trauma in reliving the rape when giving evidence in court and it would give the accused the opportunity and the upper hand to reframe and redesign his defence to counter the evidence once presented by the prosecution. This is another instance of a procedural impediment in court occasioned by a delay in the disposal of the case caused by unexpected event and where the new judge is reluctant to continue the case left by his predecessor.

Another instance of procedural impediment is occasioned by prolonging the time taken to dispose of the case. If the prosecution fails to establish a prima facie case against the accused, the case will stretch as now the prosecution would have to appeal against the decision of the trial judge. Of the 31 cases that were examined, the SCJ in 4 of those cases ruled that the prosecution did not prove a prima facie case and acquitted the accused. However, upon appeal, the High Court in all 4 cases overturned the findings of the SCJ and instructed the cases be returned to the Sessions Court for all 4 accused to enter their defence. However, upon entering their defences, two were found guilty while the remaining two other secured acquittals. Sometimes the cases would have to go up on appeal through two levels before securing a conviction. For example, in *Baharudin Bin Kulop v Public Prosecutor [2019] MLJU 1610*, the case went through 2 facets of appeal:

- 1) The prosecution's appeal to the High Court against the decision of the Sessions Court judge who decided that prosecution failed to prove a prima facie case against the accused was overturned in the appeal and the case reverted to the Sessions Court for the accused to enter his defence; and
- 2) The accused's appeal against the guilty verdict and the sentence given by the Sessions Court was shortened from a 10-year prison term to a 4 year one.

Procedurally correct are the accused's and the prosecutor's rights of appeal to the High Court, but this causes the cases to hover over a longer period before arriving at a final decision. Victims may be discouraged in bringing the action against their perpetrators if they must endure lengthy legal procedures and recall unpleasant incidents repeatedly.

#### **d. Defence Raised by the Accused**

When the prosecution establishes a prima facie case, the accused cannot be denied the right to defend. The accused would avail himself all possible defences to avoid being found guilty of the crime and the most common tactic is to show the victim's promiscuity or that the sexual act was consensual. Findings in the cases examined support previous research (e.g., Rohana & Samuel, 2008) discoveries on victim-blaming and shaming in rape cases. The victim is often perceived as either consenting to the sexual offence or that oft used phrase that she "asked for it" by her suggestive behaviour and dressing. For example, in the case of *Muhammad Zakwan Bin Zainuddin v Public Prosecutor and Other Appeals [2020] 8 MLJ 420*, the defence attempted to discredit the victim as a person of loose character by introducing the screenshots of the victim's WeChat page in the social media where she is alleged to have offered sexual services in return for money. This was duly upheld as inadmissible pursuant to section 146A of the Evidence Act 1950 as evidence of rape was found to be undisputable when she was detained against her will in a house, her clothes and handphone taken away from her until the next day. The victim was gang raped by 6 persons but only 4 of them were charged in court as she could not identify the other two. All 4 accused persons were found guilty and sentenced to a 8 year prison term, except for the 4th accused, a minor who was sent to the Henry Gurney School.

The accused will readily allege the victim's promiscuity and sexual relations with other people when the medical reports of the victim show old tears in the hymen instead of fresh ones. In *Muhammad Farid Shahrizat Bin Mohd Jusri v Public Prosecutor [2021] MLJU 2629*, the counsel for the accused argued in defence that the 'old hymen tear' based on testimony of the medical doctor who conducted examination on the victim stating that there was no fresh tear within the 72 hours prior examination. The accused was examined within 48 hours so the rape could

not have occurred on the date alleged in the charge. The accused was initially found guilty by the Sessions Court, and he was sentenced to 10 years imprisonment plus 3 strokes of whipping. He appealed to the High Court against the conviction and sentence. The High Court allowed his appeal, quashed the conviction, and set aside the sentence as it was not safe to convict him in view of the medical evidence.

Similarly, in *Abdul Rahman bin Rosli v Public Prosecutor [2021] MLJU 554*, the accused's counsel attacked the sexual history of the victim, alleging that she had a host of boyfriends and as there was no fresh hymen tear in the medical report, the tear could have been caused by sexual encounters with others. However, the High Court upheld the accused's conviction by the Sessions Court and affirmed the 16 years prison term and the 5-stroke whipping. Other corroborative evidence of the rape such as the testimony of witnesses which put the accused at the beach being the crime scene was also present. The accused's allegation that he was conducting a drug smuggling operation with other auxiliary police officers was untenable as the accused should not have involved a minor in the operation.

The victim's character also came under fire in *Selvakumar Shanmugam v Public Prosecutor [2020] MLJU 2444* where the accused alleged that the victim had boyfriends with the probability of having penetrative sex and who in the course of events became pregnant and disclaimed the paternity allegation of the baby by the victim. The accused also appealed against the conviction and sentence meted out by the SCJ on the ground of inconsistencies of victim's testimony on penetration and time of the rape. The High Court, however, dismissed the accused's appeal and affirmed the conviction as well as the 12-year prison term plus 5 strokes of the whip. The High Court did not want to disturb the findings of the Sessions Court as the SCJ would have found the inconsistencies insufficient to affect the credibility of the victim's testimony.

One of defences raised by the accused in *Mohamad Nazeril bin Mohamad Hamidi v Public Prosecutor [2020] MLJU 353* is that the victim had seduced him. The victim was the niece of the accused's wife. The accused and his wife moved into the victim's family home after he was unemployed. The victim was raped on 3 occasions and finally reported the rape after the accused made sexual advances towards the victim's sister and cousin. The Sessions Court convicted the accused and sentenced him to 12 years and ordered 2 strokes of the whip which was upheld by the High Court on appeal.

#### **e. Sentencing the Accused**

When an accused pleads guilty, the court can exercise its discretion to impose a lower sentence in view of the guilty plea which saves the court's time as witnesses are not required to testify in court. Most cases where an accused pleads guilty there would be no reporting in the law journals unless there is an appeal against the sentencing. Of the 31 cases examined, in 5 the accused pleaded guilty. However, a guilty plea does not necessarily assure a light sentence as the court must balance it with other matters such as the public interest and the ruthlessness expressed in the commission of the crime. In *Miradin bin Abdullah v Pendakwa Raya [2020] MLJU 317*, the accused sentenced to 15 years imprisonment and 10 strokes of whipping appealed against the sentence on the ground that the sentence should be reduced as he had pleaded guilty. However, the High Court maintained the decision of the SCJ as the accused pleaded guilty after 7 witnesses testified. The court considered the victim's traumatic

experience in the commission of the rape and in recounting it during the accused's unsuccessful appeal of the sentence. Contrastingly, in *Mohamad Khairul Bin Mat Razali v Public Prosecutor And Another Appeal [2020] MLJU 349*, the accused changed his plea from not guilty to guilty on the next day after being positively identified by the witness. The High Court allowed the accused's appeal on the reduction of the sentence. The sentence of 16 years imprisonment and 5 strokes of whipping was reduced to 10 years imprisonment and 3 strokes of whipping. The High Court added a further order of police supervision for 3 years upon the accused's release from prison and rehabilitative counselling under section 295(1A) and section 295A of the Criminal Procedure Code. The court viewed his long period of incarceration would do him no good since the 19-year-old was a youthful offender.

Mitigating factors aside affecting the duration of the sentence, the court also decides whether the imprisonment should run concurrently or consecutively if the accused is charged with more than one charges or offences. When sentences run concurrently, the duration of all sentences commence at the same time. For example, if the accused is sentenced to 10 years imprisonment for each of 3 offences charged, the total period of imprisonment is only 10 years if the sentences are ordered to run concurrently. However, if the sentences are ordered to run consecutively, the total period of imprisonment would be 30 years as each sentence of imprisonment are calculated separately. To determine whether the sentences should run concurrently or consecutively, the court would have to look at the nature of the offences, whether they were of the same type and whether it occurred at separate occasions. The courts are guided by the "one transaction principle" which is also known as "totality principle" where sentences run concurrently. In *Public Prosecutor v Mohammad Amirul Asri Bin Zulkifli [2021] MLJU 862*, the court elaborated the elements of the one transaction principle as: (a) proximity of time, (b) proximity of place, (c) continuity of action; and (d) continuity of purpose or design. In 3 out of 31 cases analysed, the High Court rejected the prosecution's appeal for the sentences to run consecutively as the SCJ in these 3 cases had correctly applied the principles. However, in 4 out of 31 cases analysed, the High Court upheld the Sessions Court's decision that the sentences ought to run consecutively.

From the cases examined, the court would be inclined to order the sentence to run consecutively where rape had been recurring over a long period of time. For example, in *Muhammad bin Ismail v Public Prosecutor [2022] MLJU 1494*, the High Court dismissed the accused's appeal and affirmed the sentence given by the Sessions Court of the 20 years imprisonment and the 10 strokes of whipping for the first charge and the 7 years imprisonment plus the 3 strokes of whipping to run consecutively. Rape and sexual offences recurred for 3 years between the 12<sup>th</sup> of March, 2018 and the 4<sup>th</sup> of April, 2021. Thus, it was appropriate that the sentences run consecutively. Similarly, in *Baling Anak Jimbai v Public Prosecutor [2019] MLJU 1817*, the High Court dismissed the accused's appeal on sentence and upheld that the sentence run consecutively. There were 16 charges under section 376B (1) of the Penal Code filed in 7 different cases against the accused.

Principally, the High Court will not change the sentence given by the Sessions Court unless there are errors made or that the sentence was gravely inadequate in view of the severity of the crime. In 2 out of 31 cases analysed, the High Court increased the sentences because of the brutality of the rape which resulted in the victims suffering from mental disorder and obtaining psychiatric treatment. In *Public Prosecutor v Mohammad Fadzil bin Firman And*



*Another Case [2021] MLJU 2688*, the accused raped the victim in a plantation, robbed her of her handphone and left her by the roadside in the dark. The victim suffered mental disorder, was admitted to the psychiatric ward and given medication for 3 years for acute stress and major depression disorder. She lost her job as a kindergarten teacher due to mental disorder. The prosecution appealed against the sentence and the High Court allowed the appeal. The sentence for rape was increased from 12 years imprisonment to 20 years, while the 4 strokes of whipping was retained. As for robbery, the sentence of 7 years and 1 stroke of whipping was affirmed, and the imprisonment was ordered to run consecutively. Similarly, in *Public Prosecutor v Tamlaran A/L Subramaniam [2020] MLJU 1738*, the prosecution's appeal against the inadequate sentence was allowed by the High Court. As a result of the rape, the 13-year-old victim became pregnant, suffered depression, attempted to commit suicide and was referred to the Psychiatry Specialist Clinic. The accused had lured the victim to his house on 2 occasions and raped her. The accused had a prior criminal record relating to sexual crime and he pleaded guilty only after 5 witnesses testified. The High Court increased the sentence from 12 years imprisonment and 2 strokes of whipping to 25 years imprisonment and 10 strokes of whipping. In delivering the judgment on allowing the prosecution's appeal for enhanced sentence, the High Court judge said: "It is not in the public's interest to pass anything less than a deterrent sentence. The Court must step in not only to show its disapproval but also to prevent the recurrence of such a crime".

### **Recommendation and Conclusion**

The existing laws in Malaysia criminalize rape and sexual assaults. The laws have been amended over the years to enhance the scope of these sexual offences and its punishment to deter the commission of these crimes. However, there are obstacles standing in way of punishing the perpetrators of rape and sexual assaults and these hurdles obstruct when the prescribed prerequisites towards its disposal of the crimes are not met. The start of the legal train in seeking justice against the perpetrator is the requirement of a police report lodged by the victim or an adult representing the victim if the victim is a minor. As most of the victims in rape and sexual offences are females who usually are minors (as can be seen in the cases analysed in this study), it is very important that the rape or sexual assault be disclosed to an adult who can assist the minor in lodging a police report, getting a medical examination, and taking other necessary steps to protect the victim from the perpetrator. Disclosure may not be easy if the perpetrator threatens the minor into silence or secrecy or if the minor does not understand that she is a victim. Hence, it is essential that the caregiver of minors be attentive of any changes in the minor, physically and emotionally since a minor may not know when to disclose the transgression that they had endured.

Although sex education is being taught in schools, it is also essential to educate children on what to do when faced with sexual assaults, such as not to be afraid to disclose to an adult whom they can trust. It is also beneficial to teach children to keep any useful evidence of the sexual assault such as the clothes that they wore when they were being sexually assaulted as seminal fluids from the perpetrator found on the victim's clothes or bloodstains from the victim would corroborate the victim's version of the sexual offence. If possible, recording the sexual attack using mobile phones would be useful as it counts as evidence to corroborate the victim's testimony. Encouraging children to keep a diary or records of the dates on which the sexual assault was committed would assist them in giving consistent evidence to the police, the medical officer who conducts the examination and the court. While it is traumatic

for them to remember and replay in their minds the heinous incidents which they usually want to erase from their memory, it is inevitable to know the facts before any action can be taken and by replaying the incidents, the victims may be assured that they are not to be blamed so that the healing process can begin.

In addition to punishing the perpetrator of rape and sexual offences, it is essential to prevent the occurrence of these crimes. A common trait in all the cases analysed is that the rape or sexual assault occurred when the victim was alone with the perpetrator or if there were others in the premises, they were not aware of the crime being committed as it occurred while they were sleeping or in separate rooms. Mothers and other female caregivers must be wary of leaving their children alone with male “caregivers”, even if it is a family member. Based on the cases where rape was committed by the stepfathers, mothers were inclined to disbelieve their children when they reported being victims of rape. It is possible that this is because the mother is dependent on her spouse for financial or any other forms of support.

From the cases analysed, where the victims are teenagers, rape commonly occurs when they are too trusting of a stranger, that they follow a stranger or an acquaintance to remote places or to unfamiliar places without any companion. Although the courts do not consider the victim’s sexual life or “promiscuity” as a sign of consenting to the rape or sexual assault, medical examination conducted on a sexually active victim may not be sufficient to implicate the perpetrator if there are no other corroborating evidence. Parents need to be aware of the movements of their teenage children and be involved in their lives by knowing the crowd that their children hang out with.

In sum, rape and sexual assault are social problems which require solutions from various aspects. The laws to punish the perpetrator are in place; but they may not be sufficiently deterring as there can be obstacles in penalizing the perpetrator. Aside from punishing the perpetrator by incarceration, it is also essential to provide them with rehabilitative measures to prevent them from committing the crime again upon subsequent release. The courts have ordered rehabilitative counselling under section 295A of the Criminal Procedure Code. Through rehabilitative measures, perhaps the root of the problem as to why the perpetrators commit such crimes can be addressed and preventive actions can be taken.

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