

Developments in the Law Relating to Rape and Incest in Malaysia[†]

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I. Introduction

In 2003 and 2004, Malaysians were shocked by several headlines in the daily newspapers reporting several rape cum murder cases. Among these was the case of a computer engineer (Nor Suzaily) who was brutally raped and murdered in an express bus,¹ followed by the case of Canny Ong. Canny Ong was kidnapped in a parking lot of a shopping complex. After several days, she was found dead and it was reported that she was also raped.² The hue and cry of the public was at a peak when Nurul Huda, a girl aged 8 years, was raped and murdered in Tanjung Kupang, Kulai, Johor. The victim was raped and strangled to death by the attacker.³

[†] The authors chose to publish this paper as it was presented at the Inaugural University of Malaya Law Conference. The law discussed herein is as that in force at November 2005. On 7 September 2007, some of the amendments to the law discussed in the paper were brought into force. The Penal Code (Amendment) Act 2003 (Act A1210), and the Penal Code (Amendment) Act 2006 (Act A1273) were enforced on 7 September 2007 *via* PU (B) 321/2007; while the Criminal Procedure Code (Amendment) Act 2006 (Act A1274) was enforced on 7 September 2007 *via* PU (B) 322/2007.

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¹ *Utusan Malaysia*, 27 April 2002.

² *Utusan Malaysia*, 24 February 2005.

³ *Utusan Malaysia*, 18 January 2004.

In the cases reported, rape was not only committed by strangers but also committed by those close to the victims. Cases of incest are reported almost everyday in our newspapers. Perpetrators of incest included people who are supposed to be the protector of the victims. Sad but true, they were fathers, brothers, grandfathers, uncles and others who were closely related to the victims. Young children were subjected to various forms of sexual exploitation. In some cases, the victims became pregnant. It is unfortunate that some of the victims were unaware that the "act" done on them was legally and morally wrong. In 2005, 1030 rape cases were reported between January and July. 672 of the cases or 65.24% involved under aged girls. Out of the 672 cases, 491 involved victims of 15 years old and below. It was also reported that 251 perpetrators were the boyfriends of the victims while 196 were strangers.⁴

The above mentioned crimes occur not only in our society but also in other parts of the world regardless of religion, status, age and race. The fact that these heinous crimes are committed either by a gang or an individual raises a very serious threat to society in general, and to women in particular. Thus, the government as *paren patriae* and also protector of the citizen has to address the issue.

II. Rape

In Malaysia, the offence of rape is governed by the Penal Code and is regarded as a very serious offence as reflected in the punishment provided.⁵ Section 375 of the Penal Code defines "rape" as:

⁴ *Utusan Malaysia*, 23 September 2005.

⁵ KC Vohrah J in *Public Prosecutor v Nordin bin Yusmadi* [1996] 2 CLJ 90 stated:

Rape is a serious offence reflected in that Parliament has imposed a minimum of 5 years imprisonment for the offence. It cannot be treated lightly. (At p 95.)

A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

Firstly - Against her will.

Secondly - Without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception.

Fourthly - With her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent.

Fifthly - With her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under sixteen years of age.

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception - Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognised in the Federation as valid, is not rape.

Explanation 1 - A woman -

(a) living separately from her husband under a decree of judicial separation or a decree *nisi* not made absolute; or

(b) who has obtained an injunction restraining her husband from having sexual intercourse with her, shall be deemed not to be his wife for the purposes of this section.

Explanation 2 - A Muslim woman living separately from her husband during the period of "iddah, which shall be calculated in accordance with Hukum Syara", shall be deemed not to be his wife for the purposes of this section.

On the issue of rape, this article will focus on the victim and the perpetrator.

A. Victim

If the victim is under the age of 16 years, it is rape under s 375 of the Penal Code whether or not she consented to the sexual intercourse.⁶ This provision acts as a deterrent to curb the frequency of sexual exploitation of young girls. The number of reported rape cases involving boyfriends and girlfriends is high. This is a worrying trend as it also involves young girls who actually consented to the "act", but their

⁶ As absence of consent is irrelevant for proving the offence, the prosecution does not have to prove absence of consent in order to secure a conviction. In the case of *Jamaluddin v Public Prosecutor* [1999] 4 MLJ 1, the conviction and sentence of the appellant for the rape of a woman allegedly under 16 years of age was set aside on appeal on the ground that the identity card of the woman concerned, on which the prosecution had relied for the required proof, could not in law be used to prove her age or date of birth. The defence counsel in the case of *Mohd Salleh MK Mohd Yusof v Public Prosecutor* [2005] 2 CLJ 655 relied on the case of *Jamaluddin* to support his contention that an identity card was not an acceptable proof of a person's date of birth. In this case, there were two under aged women. The prosecution tendered a birth certificate for one girl, while a copy of identity card was tendered to prove the age of the other girl. However the court rejected the argument based on the fact that there were differences between the identity card in *Jamaluddin* and that in *Mohd Salleh*. The difficulties raised in these two cases, particularly that in *Jamaluddin*, are no longer an issue now. This is because a change was made in the year 2001 by PU(A) 232/01 whereby the first six digits of an identity card could represent the date of birth.

partners are “trapped” as the girls are under aged. The “consensual act” would be exposed when the “victim” is threatened by the family members, becomes pregnant or when the relationship turns sour. For example, in *Nasrul Annuar Abd Samad v Public Prosecutor*,⁷ the complainant admitted during cross examination by the defence that she made the police report for fear that she might be scolded or beaten by the parent.

B. *Perpetrator*

Contrary to popular belief that perfect strangers are the main perpetrators in rape, cases show that most rape incidents were committed by those known to the victims. They were neighbours,⁸ family friends, teachers, religious teachers, *bomohs*⁹ and also child minders. It is submitted that as these are persons in a position of trust, the punishment for rape against them should warrant a severe punishment. However in Malaysia, there is no special category of rape committed by such persons. Realising the fact that cases of rape and incest often involve perpetrators close to the victims who abuse their position of trust or authority to satisfy their lust, it is suggested that s 376 of Penal Code be amended to impose severe penalties on them.

In *Public Prosecutor v Shari Abd Wahad*,¹⁰ the appellant, a Muslim religious teacher, was found guilty of raping his student aged

⁷ [2005] 1 CLJ 193.

⁸ In the case of *Sidek bin Ludan v Public Prosecutor* [1995] 3 MLJ 178, a neighbour aged 63 was found guilty of committing rape on a child aged nine years old.

⁹ See *Public Prosecutor v Abdul Rahman Mohamad* [2005] 1 CLJ 700. In Malaysia, *bomoh* is synonymous with the word shaman. According to Cambridge Advance Learner's Dictionary, a shaman is a person possessing special powers to control or influence good and evil spirits. These powers enable him to discover the cause of illness, bad luck etc. A *bomoh* is also known as a *dukun* amongst the Malays.

¹⁰ [1993] 4 CLJ 279.

13 years and 8 months. The appellant had in fact committed the offence several times. According to the court:¹¹

In sexual offences, the fact that the offender is of an age where he can be regarded capable of protecting the victim instead of raping her, is an aggravating factor to be taken into account. In the instant appeal, the respondent as a Ko-ran teacher was expected to protect the young victim and he had abused that trust or confidence when he raped her. The sentence of 5 years imprisonment with effect from 10 June 1990 on the respondent would, to borrow the words of Eusoffe Abdoolcader J (as he then was) in *PP v Teh Cheng* [1976] 2 MLJ 187 be a lesson to him once he heard:

... the creaking of the prison doors closing shut behind him will afford the respondent ample opportunity to ponder on his folly in the company he keeps and give others of his ilk and equally gullible, cause to reflect on the desirability of the company they should or rather should not keep ...

However, in this case, the accused was sentenced to five years imprisonment and spared from whipping as he was over 50 years old. In *Sarkawi bin Dahlan v Public Prosecutor*, the perpetrator, who was trusted as a father by the victim, was sentenced to 15 years of imprisonment by the trial court.¹² Jeffery Tan J said:¹³

No question about it, rape is a vile and serious offence, and a light sentence was out entirely of the question in the present case. The appellant should be severely punished. The fact of the matter was that the appellant committed a despicable act. The appellant had raped a young gullible girl who trusted the appellant as her "bapa angkat".¹⁴ As rightly held by the trial court, the appellant had not only

¹¹ *Id* at p 280.

¹² The Court of Appeal later reduced to 10 years imprisonment.

¹³ [2004] 8 CLJ 611.

¹⁴ "Bapa angkat" in the Malay language means "foster father".

raped but also betrayed his victim - *Boleh dikatakan mangsa boleh dianggap sebagai cucu dia, Dia telah mengambil kesempatan terhadap mangsa yang menganggap dia sebagai bapa angkat ...*¹⁵

Of late, the perpetrators seemed to have become more aggressive where they not only raped but also killed their victims. Cases involving victims such as Nor Suzaily, Canny Ong, Nurul Huda and Siti Syazwani Ahmad Dasuki¹⁶ are some examples. The victims were brutally raped and murdered in all the four cases.

C. Punishment

Section 376 of the Penal Code provides that:

Whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

Following s 376, a person convicted of rape should be sentenced to between five to 20 years of imprisonment¹⁷ and whipping.¹⁸ In the

¹⁵ These words in the Malay language mean "The victim can be considered as his grandchild. He has taken advantage of the victim who considered him as his foster father."

¹⁶ In this last example, Siti Syazwani, a nine years old girl was raped and murdered in an oil palm estate.

¹⁷ The minimum period of imprisonment of five years was introduced on 5 May 1989.

¹⁸ A statutory maximum punishment of 24 strokes of the whip is prescribed under s 288(i) of the Criminal Procedure Code. In the case of *PP v William Ayau* [2005] 6 CLJ 289 (a case of incest but the accused was charged under s 376 of the Penal Code as it was a year 1999 case) the court said:

Quite apart from terms of imprisonment as stipulated under s 376 of the Penal Code, the other element in the penalty provision is that of whipping. The words employed are "and shall also be liable to whipping". Applying the natural and ordinary meaning of these words, I am of the view that

case of *Nordin Yusmadi v Public Prosecutor*,¹⁹ KC Vohrah J said:²⁰

The minimum term of imprisonment shall be not less than five years and that is clear from the peremptory language used in s 376. The punishment of whipping is however discretionary.

His Lordship further said:²¹

Rape is a serious offence reflected in that Parliament has imposed a minimum of 5 years imprisonment for the offence. It cannot be treated lightly. It will be a sad day when persons found guilty of rape can plead that they were young when they committed the offence and ask for lenient sentences and then be dealt with leniently.

Because rape is a very serious crime in that it poses a threat to the social wellbeing of the country and also to reflect public disapproval of the offence, in most cases severe custodial sentences were imposed to deter the perpetrator from committing the same crime in the future. Further, it is also thought that severe punishment would serve as a general deterrence to the public at large. In *R v Roberts*, the English Court of Appeal enunciated:²²

besides imposing imprisonment sentence, the learned judge is required by the said provision to impose whipping on to the accused. There is a long line of authorities to say that the existence of the word "shall" denotes a mandatory requirement. In this regard, what was required was that the accused be sentenced to a term of imprisonment of not less than five years but not more than twenty years AND the accused shall also be liable for whipping.

¹⁹ [1996] 2 CLJ 90.

²⁰ *Id* at p 94.

²¹ *Id* at p 95.

²² [1982] 1 All ER 610 at p 610.

Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Second, to emphasise public disapproval. Third, to serve as a warning to others. Fourth, to punish the offender, and last, but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these in cases of rape vary widely from case to case.

In *Mohamed Senik v Public Prosecutor*,²³ the accused was convicted of the offence of statutory rape. The victim was 13 years old. She delivered two babies as a consequence of the rape. The accused was sentenced to 18 years imprisonment and ten strokes of the *rotan*.²⁴ In the case involving victim Noorsuzaili Mokhtar (*Hanafi Mat Hassan v Public Prosecutor*²⁵), the accused was found guilty by the court for raping the deceased and was given a maximum jail term of 20 years and 12 strokes of the *rotan*. The accused in the rape cum murder case of Nurul Huda was also sentenced to a maximum jail term of 20 years and 12 strokes.²⁶ However, in several cases, the court did not impose severe punishment on the accused due to several factors such as the accused's age, the contributory element by the victim and the accused being a first time offender. In *Sarkawi bin Dahlan v Public Prosecutor*,²⁷ the High Court reduced the punishment

²³ [2005] 1 LNS 74.

²⁴ On appeal, the Court of Appeal ordered the punishment to run from the date the accused was arrested, not the date the judgment was delivered by the trial court. However, the Court of Appeal affirmed the punishment of 18 years of imprisonment and 10 strokes. See *Utusan Malaysia*, 15 November 2005.

²⁵ [2003] 6 CLJ 459.

²⁶ See *Utusan Malaysia*, 26 January 2004.

²⁷ [2004] 8 CLJ 609.

for rape from 15 years to 10 years after taking into consideration that the appellant was already 65 years old. Jeffery Tan J said:²⁸

But it was overlooked that the advanced age of the appellant was also a mitigating factor. The appellant was 65, and the trial court ought to have taken that into account. The trial court ought to have considered that an unduly long but even though deserving sentence could mean that the appellant would remain in prison for the rest of his natural life. An unduly long sentence could mean that the appellant would have no hope to return to society. And that, even in the light of the magnitude of the crime, would be harsh and callous. That is not to say that the instant crime should be condoned. But the appellant should not be literally left in prison for the rest of his natural life, which given the age of the appellant would be the probable result if the 15 years sentence were to be affirmed.

In an unreported case, a farmer aged 60 years old was sentenced to 10 years imprisonment after he was found guilty of raping a child aged 12 years and 3 months.²⁹ The perpetrators in both cases were spared the whip due to their age.³⁰ However, as the number of rape and incest cases involving perpetrators of 50 years is on the increase, the government has proposed to amend s 289 of the Criminal Procedure Code to extend whipping to those aged above 50 years.³¹ If in any case where whipping is spared, a heavier penalty

²⁸ *Id* at p 611.

²⁹ See *Utusan Malaysia*, 7 March 2005.

³⁰ Section 289 of the Criminal Procedure Code provides:

No sentence of whipping shall be executed by installments, and none of the following persons shall be punishable with whipping:

- (a) females;
- (b) males sentenced to death;
- (c) males whom the Court considers to be more than fifty years of age.

³¹ See further discussions below.

can be imposed by increasing the term of imprisonment.³² It is submitted that the move is commendable as it serves as a deterrent to those who are regarded as respectable figures in a family or society due to their age.

The court will also take into account the victim's role in contributing to the commission of the crime. In the case of *Mohd Salleh MK Mohd Yusof v Pendakwaraya*,³³ the High Court illustrated three hypothetical instances of sexual intercourse with an under aged girl:³⁴

The first is sexual intercourse on a commercial basis with a professional sex provider of fifteen. The second is sexual intercourse in an unguarded moment between a young man and a girl of fifteen and a half who are fast and long-standing lovers. The third is sexual intercourse between a middle-aged man and a naive and helpless girl of eight. All the

³² Section 291 of the Criminal Procedure Code 2004 was proposed to be amended to provide that if a person was spared from whipping, an additional term of imprisonment for a term could extend to 24 months instead of 12 months. In the case of *Pendakwaraya v Ahmad Osman* [1998] 1 CLJ 66, Hishamuddin Yunus J said:

Faktor keempat ialah berdasarkan kepada peruntukan s 289 Kanun Acara Jenayah dan usia responden, iaitu, 57 tahun, Mahkamah Sesyen dihalang oleh undang-undang dari menjatuhkan hukuman sebat ke atas responden, sedangkan dalam kes-kes seperti kes ini mahkamah, pada kebiasaannya, akan juga menjatuhkan hukuman sebat sebagai tambahan kepada hukuman penjara. Oleh yang demikian, hukuman penjara yang lebih berat hendaklah dikenakan sebagai ganti.

([Translation] The fourth factor is based on s 289 of the Criminal Procedure Code and the respondent's age, that is 57 years old. The Sessions Court is barred by the law from imposing whipping on the respondent although normally the court would impose whipping in addition to imprisonment. Thus, a longer period of imprisonment should be imposed as a substitute.)

³³ [2005] 2 CLJ 655.

³⁴ *Id* at p 663.

three instances are by definition and classification crimes of rape.

In delivering the judgment in the above mentioned case, Abdul Aziz J said:³⁵

Where the court is given the power to pass a sentence within a prescribed range, the court while taking note of public clamour, must not allow itself to be carried away by forgetting the importance of weighing the penalty to be imposed against the circumstances of the offence.

In this 1990 case, the appellant was sentenced to five and a half years of imprisonment for statutory rape by the Sessions Court. The punishment was increased to 10 years and 3 strokes in 1996 on appeal by the prosecution. On further appeal by the offender, the Court of Appeal in 2005 restored the punishment meted by the Session Court. In this case, two under aged girls were raped at a waterfall under the pretext of bathing and "curing" them. No violence or aggravation was used against them. Both the victims admitted that they liked to ramble around and had a bad reputation in their community. They did not lodge a police report when taken to the police station, instead they later went to a friend's house in another district. They also admitted having followed another male stranger who indulged in sexual intercourse with them. Based on the facts of the case, Abdul Aziz J concluded that:³⁶

We are of the view that the learned judge, in increasing the term of imprisonment for each of the offences from five years and a half to 10 years, took into account factors that, in themselves or in the light of the facts and circumstances of this case, do not justify the enhancement.

In an unreported case, a fisherman aged 59 was sentenced to 12 years imprisonment for raping a girl aged 11 years 7 months. The

³⁵ *Id* at p 656.

³⁶ *Id* at p 668.

girl was pregnant as a result of the act. According to the trial judge, although severe punishment had reduced the number of rape cases, in this case, there was no evidence of violence. The offence occurred in the day time and the victim was the one who went to the accused's house.³⁷

The fact that the accused is a first time offender may also reduce the sentencing. In *Chang Wan Chuan v Public Prosecutor*,³⁸ the appellant was charged with an offence of committing carnal intercourse against the order of nature without the victim's consent under s 377C of the Penal Code and the offence of rape under s 376 of the Penal Code. He was sentenced to 10 years imprisonment effective from the date of arrest and two strokes of *rotan* for the offence under s 377C, and 10 years imprisonment effective from the date of arrest and three strokes for the offence under s 376. On appeal, the court reduced the sentence of imprisonment from 10 years to seven years but affirmed the imposition of the total of five strokes. Mohd Ghazali Yusoff J said:³⁹

It is my view that a sentence of ten years imprisonment for each of the charges is quite excessive. The appellant is a first offender and was 34 years old when he was charged. Under the circumstances, I would think that justice will be best served if I reduce the sentence of imprisonment to seven years, respectively.

In summing up the issue of punishment in rape cases, it is submitted that rape is a serious offence as it affects not only the victim but also the victim's family and society. Thus, in cases involving young children as victims, the court should impose severe punishment and send a strong message to the society that the act is condemned. Children can easily be manipulated by perpetrators who commit sexual act without the element of violence.

³⁷ See *Utusan Malaysia*, 1 August 2005.

³⁸ [2003] 4 CLJ 647.

³⁹ *Id* at p 666.

III. Incest

Incest was first introduced as an offence in England in the Punishment of Incest Act 1908.⁴⁰ The Act prohibited sexual intercourse between a male with his daughter, sister or mother. In 1956, the Sexual Offences Act was enacted to deal with incest cases. In the Sexual Offences Act 1956, marriage and sexual relationship between parent, child and siblings were prohibited.⁴¹ Several years later, incest was also made an offence by other jurisdictions in Europe and elsewhere in the world including the United States of America and France.⁴²

In Malaysia, incest was made an offence by way of amendment to the Penal Code in 2002.⁴³ Provisions of incest are found in ss 376A⁴⁴ and 376B.⁴⁵ Prior to the amendment, charges for

⁴⁰ See Bailey, Victor, "The Punishment of Incest Act 1908: A Case Study of Law" [1979] *Crim LR* 708.

⁴¹ *Ibid.*

⁴² Menon, Malathi, "Incest: The Legal and Medical Response in Malaysia", Project Paper, Faculty of Law University of Malaya, 1987/88.

⁴³ Penal Code (Amendment) Act 2001 (Act A1131) via P U (B) 234/02. The amendment came into force on 1 August 2002.

⁴⁴ Section 376A of the Penal Code provides:

A person is said to commit incest if he or she has sexual intercourse with another person whose relationship to him or her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person.

⁴⁵ Section 376B provides the punishment for incest as follows:

- (1) Whoever commits incest shall be punished with imprisonment for a term of not less than six years and not more than twenty years, and shall also be liable to whipping.
- (2) It shall be a defence to a charge against a person under this section if it is proved -
 - (a) that he or she did not know that the person with whom he or she had sexual intercourse was a person whose relationship to him or her was such that he or she was not permitted under the law, religion,

incest were made under s 376 of the Penal Code.⁴⁶ However, s 376 has some limitation as incest also covers sexual intercourse between two willing adults. According to Datuk Seri Utama Dr Rais bin Yatim when proposing the bill in Parliament:⁴⁷

Akhirnya, suatu kesalahan baru dikemukakan untuk dijadikan undang-undang negara iaitu jenayah incest yang ditakrif sebagai perbuatan jenayah yang melibatkan consanguinity atau affinity yang dilarang. Huraianya adalah seperti yang terkandung dalam rang undang-undang tersebut dan apa yang telah diputuskan untuk dicadang ialah supaya denda tidak terlibat tetapi penjara dan sebatan adalah dijadikan asas hukuman sekiranya terbukti perbuatan jenayah yang terkutuk itu. Memandangkan bahawa sumbang mahram menjadikan sebahagian daripada jenayah yang meluas masa ini, kerajaan telah bertindak agar ianya dikenakan peruntukannya sebaik sahaja peruntukan yang ada di perenggan seksyen 375 dalam Kanun Keseksaan.

([Translation] Finally, a new offence is presented to become a national law wherein the offence of incest is defined as a criminal act involving consanguinity or affinity which is not permitted. The explanation in the bill as proposed is that no fine will be involved but imprisonment and whipping will be the basis of the punishment if it can be proved that the heinous act has been committed.)

custom or usage applicable to him or her to marry that person; or

- (b) that the act of sexual intercourse was done without his or her consent.

Explanation - A person who is under sixteen years of age, if female, or under thirteen years of age, if male shall be deemed to be incapable of giving consent.

⁴⁶ Section 376 of the Penal Code provides for the punishment of rape. It reads as follows:

Whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

⁴⁷ See *Malaysian Parliamentary Debate*, Vol 38-43, August 2001.

Generally, incest refers to a sexual activity between very close family members in which the individuals involved are prohibited from marrying each other under the law, religion, custom or usage.⁴⁸ On this issue, reference has to be made to the Islamic Family Law (Federal Territories) Act 1984⁴⁹ for Muslims and the Law Reform (Marriage and Divorce) Act 1976⁵⁰ for non-Muslims since there are no explanations on this matter in the Penal Code. Section 9 of the Islamic Family Law (Federal Territories) Act 1984 provides the types of relationships prohibiting marriage as below:

(1) No man or woman, as the case may be, shall, on the ground of consanguinity, marry -

(a) his mother or father;

⁴⁸ Both English and French criminal laws regard a sexual relationship between minors under 18 and their parents as "incest". In England, the Sexual Offences Act 1956 prohibits both marriage and a sexual relationship between parent and child and siblings. Section 10 of the Act states that:

- (1) It is an offence for a man to have sexual intercourse with a woman he knows to be his granddaughter, daughter, sister or mother.
- (2) In the foregoing subsection "sister" includes half-sister, and for the purposes of that subsection any expression importing a relationship between two people shall be taken to apply notwithstanding that the relationship is not traced through lawful wedlock.

Whereas s 11 of the Act states that:

- (1) It is an offence for a woman of the age of sixteen or over to permit a man whom she knows to be her grandfather, father, brother or son to have sexual intercourse with her by her consent.
- (2) In the foregoing subsection "brother" includes half-brother, and for the purpose of that subsection any expression importing a relationship between two people shall be taken to apply notwithstanding that the relationship is not traced through lawful wedlock.

⁴⁹ Act 303.

⁵⁰ Act 164.

(b) his grandmother or upwards, whether on the side of his father or his mother, and his or her ascendants, how-high-soever;

(c) his daughter or her son and his granddaughter or her grandson and his or her descendants, how-low-soever;

(d) his sister or her brother of the same parents, his sister or her brother of the same father, and his sister or her brother of the same mother;

(e) the daughter of his brother or sister, or the son of her brother or sister and the descendants, how-low-soever, of the brother or sister;

(f) his aunt or her uncle on his father's side and her or his ascendants;

(g) his aunt or her uncle on his mother's side and her or his ascendants.

(2) No man or woman, as the case may be, shall, on the ground of affinity, marry -

(a) his mother-in-law or father-in-law and the ascendants of his wife, how-high-soever;

(b) his stepmother or her stepfather, being his father's wife or her mother's husband;

(c) his step grandmother, being the wife of his grandfather or his husband of her grandmother, whether on the side of the father or the mother;

(d) his daughter-in-law or her son-in-law;

(e) his stepdaughter or her stepson and her or his descendants, how-low-soever from a wife or a husband with whom the marriage has been consummated .

Section 11 of the Law Reform (Marriage and Divorce) Act 1976 stipulates the relevant restrictions on marriage as:

(1) No person shall marry his or her grandparent, parent, child or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, great-niece or great-nephew, as the case may be:

Provided that nothing in this subsection shall prohibit any person who is a Hindu from marrying under Hindu law or custom his sister's daughter (niece) or her mother's brother (uncle).

(2) No person shall marry the grandparent or parent, child or grandchild of his or her spouse or former spouse.

(3) No person shall marry the former spouse of his or her grand-parent or parent, child or grandchild.

(4) No person shall marry a person whom he or she has adopted or by whom he or she has been adopted.

(5) For the purposes of this section, relationship of the half blood is as much an impediment as relationship of the full blood and it is immaterial whether a person was born legitimate or illegitimate.

(6) The Chief Minister may in his discretion, notwithstanding this section, grant a licence under this section for a marriage to be solemnised if he is satisfied that such marriage is unobjectionable under the law, religion, custom or usage applicable to the parties thereto and, where such marriage is solemnised under such licence, such marriage shall be deemed to be valid.

In discussing the offence of incest, several factors need to be considered. They are:

- (i) It will be an offence of incest although the sexual intercourse takes place with the consent of both parties who are prohibited

from marrying each other unless one of them or both are under aged. This means that both the parties can be charged and convicted for the same act and offence.⁵¹ However, s 376B(2)(b) provides that it shall be a defence if the sexual intercourse takes place without consent. The explanation under s 376B provides that any female under sixteen years of age and any male under thirteen years of age, shall be deemed to be incapable of giving consent.

- (ii) The important mental elements under s 376B is that both the parties, when having sexual intercourse, must know that his or her partner is a person whose relationship to him or her is such that he or she is forbidden to marry under the law, religion, custom or usage.⁵² This is because the element of *mens rea* is a paramount feature of any criminal act.⁵³
- (iii) Incest has a wider scope than rape. Incest may be committed by a male or female, but only a male is capable of raping under s 376 of the Penal Code.⁵⁴

A. Punishment

To date, most incest cases reported were committed before s 376A and s 376B were introduced. Thus, the perpetrators were charged for the offence of rape. Since the amendments have introduced a specific section on incest and have specified a penalty for the offence, one may ask about the kind of punishment which should be imposed for committing the offence of incest? Should we impose deterrent sentences to deter others from committing the similar offence or should we look at other punishment principles such as retribution, rehabilitations

⁵¹ See s 376A of the Penal Code.

⁵² See s 376B(2)(a) of the Penal Code; see also the discussion in Hill, Barry & Flether-Rogers, Karen, *Sexual Related Offences* (London: Sweet & Maxwell, 1997); *R v Gordon* [1925] 19 Cr App R 20.

⁵³ *Lim Chin Aik v R* [1963] AC 132.

⁵⁴ Section 375 of the Penal Code.

and others? Of course the court will always look at the facts of the case before passing any sentences. This is important as sentences passed must reflect the abhorrence of society to such acts.⁵⁵

Section 376B of the Penal Code provides a mandatory custodial sentence for incest. If convicted, the accused will be punished with imprisonment for a term between six to 20 years and whipping.⁵⁶ However, if the offender is a female, a male sentenced to death, or a male aged above fifty years, he or she cannot be sentenced to whipping.⁵⁷

In the case of *Ismail Rasid v Public Prosecutor*,⁵⁸ the accused pleaded guilty to two charges of raping his own daughter aged 14 years, and was sentenced to 12 years imprisonment and three strokes of the *rotan* for each charge. On appeal to the High Court it was also discovered that the appellant had also been convicted of raping another daughter aged 12 years, and was sentenced to 15 years imprisonment and six strokes of the *rotan*. The appellant had appealed against the sentences imposed by the trial court. The appellant did not plead to reduce the sentence but instead pleaded that all his sentences be made to run concurrently. In dismissing the appeal, KN Segara J stated that:⁵⁹

Incest is a sin that can hardly be forgiven. Therefore, when a father rapes his daughter and is convicted in court, any sentence passed must reflect the abhorrence of society to such a heinous and despicable act. A sufficiently strong and effective signal must also be sent out to would-be

⁵⁵ See *Ismail Rasid v Public Prosecutor* [1999] 4 CLJ 402.

⁵⁶ Section 376 of the Penal Code provides the punishment of imprisonment of not less than 5 years and not more than 20 years and whipping. Section 288 of the Criminal Procedure Code provides a maximum of 24 strokes for an adult and 10 strokes for a youthful offender.

⁵⁷ Section 289, Criminal Procedure Code.

⁵⁸ [1999] 4 CLJ 402.

⁵⁹ *Id* at p 403.

rapists of this species that the court would not hesitate to come down hard on them, in order to protect those naive, helpless and innocent children who had placed unquestioning trust, faith, loyalty and confidence in their fathers to be role models as well as pillars of strength and protection at all times, only to see their lives shattered, humiliated and traumatised by an act of lust that could have easily been curbed and controlled by any self-respecting human being.

In delivering the judgment, the learned judge also commented on the issue of discount of the sentence if an accused person pleaded guilty. According to the judge:⁶⁰

Offenders think that a plea of guilty would enable them to escape the consequences of a severe penalty. It is a fallacy to think that the courts are prohibited from meteing out the maximum sentence permitted for the offence, upon a plea of guilty. Judicial officers, too, should not labour under the notion that in determining an appropriate sentence, a 'discount' should automatically be given in all cases upon a plea of guilty, without prior exercise of judicial discretion to all facts and circumstances relating to the offence, the offender, the victim, the interest of the public, as well as the Malaysian culture, social behavior and propriety. This appeal before me is a classic example of a case where no "discount" should be given to the appellant for having pleaded guilty. The sentence must reflect Malaysian society's abhorrence to crimes of this nature. The appellant should be kept away from his daughters for as long as possible - and, not just his daughters, perhaps, other children as well, for he may consider them as desirable prey to satiate his lust. Accordingly, under s 316(b) Criminal Procedure Code the sentence imposed by the learned Sessions Court judge is set aside and substituted therefore a sentence of 20 years imprisonment and 5 strokes of the *rotan* for each of the two charges. The term of imprisonments is to run from the date of arrest.

⁶⁰ *Ibid.*

A discounted sentence on account of a plea of guilty should not be given automatically to an accused person merely because, by saying "My Lord, I plead guilty to the charge", the courts' time will be saved. In a case where public interest demands a deterrent sentence, the plea of guilt should not automatically entitle an accused to get a lesser punishment.⁶¹ This is because the offence of incest causes a great impact on the victim, especially for an under aged girl, physically and psychologically. Thus, it should be one of the aggravating factors that may enhance the punishment. Furthermore, if the accused had committed the same offence on more than one victim, the punishment should be greater.⁶² The deterrence principle will be the best approach for this kind of offence. At times, severe punishment *per se* may not deter the wrongdoer but hopefully it may deter others from committing the same offence.⁶³

In the case of *Pendakwaraya v Ahmad Osman*,⁶⁴ the accused aged 57 years, was convicted for three counts of rape and one attempted rape of his own daughter. For the first charge, the victim was just nine years old. For the other 3 charges, the victim was 9 years and 16 years of age respectively. He was sentenced to 15 years imprisonment for the first, second and third charge, and 10 years imprisonment for the charge of attempted rape. All the sentences were ordered to run concurrently. Dissatisfied with the decision of the trial judge, the learned Deputy Public Prosecutor appealed to the High Court to enhance the sentences. In allowing the appeal, the learned judge said:⁶⁵

⁶¹ *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 CLJ 57.

⁶² See Rook & Ward, *Sexual Offences* (London: Sweet & Maxwell, 1997).

⁶³ In *Public Prosecutor v Lee Tak Keong*, Zakaria Yatim J said:

... the court must take into consideration the element of public interest. This means that the court must impose a deterrent sentence not only to deter the respondent from committing the same offence again but to deter others from committing the same type of crime ... the court must also consider society's abhorrence of this type of crime. ([1989] 1 MLJ 307 at pp 307-308).

⁶⁴ [1998] 1 CLJ 66.

⁶⁵ *Id* at p 67.

Kes yang di hadapan saya pada hari ini, kebelakangan ini, tidak lagi merupakan suatu kes luar biasa. Kes-kes seperti ini, dewasa ini, kerap berlaku dalam masyarakat kita. Ini adalah suatu fenomena yang membimbangkan dan memalukan. Kes hari ini bukan semata-mata kes kesalahan merogol. Keburukannya lebih dari itu. Kes hari ini adalah juga kes sumbang muhrim atau inses. Kes hari ini adalah satu-satunya petanda betapa seriusnya penyakit sosial yang melanda masyarakat kita pada masa kini.

([Translation] The case before me today, of late, is no longer an extra ordinary case. Lately, this type of cases occurred frequently in our society. This is a worrying and embarrassing phenomenon. Today's case is not just a case of rape. The wickedness of the act is more than that. It is also a case of incest. The case is one sign that shows how serious the social illness that is happening in our society today.)

In dealing with the issue of the appropriate punishment for the offence of rape within the family or incest, it was held that:⁶⁶

Dalam kes di hadapan saya sekarang, dengan berasaskan prinsip kesalahan berlainan bersama dengan prinsip keseluruhan, saya membenarkan rayuan Pendakwa Raya terhadap perintah Hakim Mahkamah Sesyen yang mana telah memerintahkan supaya kesemua hukuman hendaklah berjalan serentak. Saya mengenyepikan perintah ini. Sebaliknya saya memerintahkan supaya hukuman tempoh penjara bagi kesalahan pertama dan kedua berjalan berasingan, dan hukuman penjara bagi kesalahan ketiga dan keempat hendak berjalan serentak dengan hukuman penjara bagi kesalahan pertama. Kesan perintah ini ialah responden akan menjalani hukuman penjara selama tiga puluh tahun kesemuanya, iaitu, lima belas tahun bagi

⁶⁶ *Id* at pp 72-73.

kesalahan pertama dan kemudiannya diikuti pula dengan lima belas tahun lagi bagi kesalahan kedua. Pada penghakiman saya, tempoh ini adalah adil dan munasabah memandangkan faktor-faktor yang telah disebutkan di awal penghakiman ini.

([Translation] In the case before me now, based on the distinct offences principle and totality principle, I allow the appeal by the Public Prosecutor against the order of the Sessions Court Judge who has ordered that all the sentences to run concurrently. I set aside the order. In turn, I order that the jail sentence for the first and second offences to run consecutively and the jail sentences for the third and fourth offences to run concurrently with the jail sentence for the first offence. The effect of this order is that the respondent will serve 30 years of imprisonment, that is, 15 years for the first offence and followed by another fifteen years for the second offence. In my judgment, the duration is fair and reasonable taking into account all factors mentioned in the earlier part of this judgment.)

Based on the above cases, severe punishment seems to be the courts' stand in dealing with cases of rape within family members or incest regardless of the background and the age of the offender. Imposition of longer terms of imprisonment seems to be the best approach to hinder the accused from interfering with the life of the victim. This seems to be the correct approach in terms of sentencing principles for rape cases as pointed out by the English Court of Appeal in the case of *R v Roberts*.⁶⁷

In *Public Prosecutor v Pretum Singh Lall Singh*,⁶⁸ the respondent was acquitted by the Sessions Court on the charge of raping his own daughter. The accused was acquitted because the medical evidence which showed tears in the vagina was inconclusive to support the charge of rape. According to the doctor who testified,

⁶⁷ *Supra* n 22.

⁶⁸ [2004] 6 CLJ 521.

such tears could also have been caused by masturbation. However, the victim denied that she had ever done the act. It was further held by the trial judge that since there was no independent corroborating evidence therefore it was unsafe to convict the accused. Dissatisfied with the decision, the prosecution appealed to the High Court. In allowing the appeal, it was held that:⁶⁹

In passing sentence I considered the effect of the accused's conduct on his young daughter. She would have to live with the stigma of such a cruel act by a father who was both duty and morally bound to have protected her. She would have to live with the trauma of having been raped by her own father, for the rest of her life. The respondent's lust knew no limits. He threatened and cowed a little girl into submission to satiate his unnatural urge. Even in the animal kingdom the youngs are protected by the parents. Since I found no satisfactory mitigating factors I sentenced the respondent to the maximum 20 years in prison and ordered that he receive 15 strokes of the *rotan*. I refused the request for a stay of execution of the sentence but granted a stay of execution of the strokes pending hearing of this appeal.

The welfare of the victim appears to be the paramount factor to be considered by the courts when giving judgment on cases of incest. The punishment must reflect the abhorrence of society to such heinous act. Factors such as the age of the victim, violence used, relationship between the victim and the accused, whether the accused has committed a similar offence on more than one victim, impact to the victim physically or psychologically, and others should be the aggravating factors that enhance the punishment against the accused.⁷⁰ Above all, public interest should be the main consideration in dealing with cases of incest. VT Singham J in the case of *Public Prosecutor v Badron Zamanuddin* rightly pointed out that:⁷¹

⁶⁹ *Id* at p 530.

⁷⁰ See Rook & Ward, *supra* n 62.

⁷¹ [2005] 5 CLJ 493 at p 500.

Public interest and justice demands that the court must show its abhorrence and one of the ways was to impose a deterrent sentence. People who commit sexual offences on children and on their own children or blood relatives deserve no mercy from this court. Public interest must be reflected in the sentence imposed by the court to deter other would be offenders especially in cases involving sexual offences on children more so when the victim is a child and blood relative, where as a result of the heinous crime not only the victim has to go through a traumatic experience of the unpleasant experience but that feeling is imposed and shared by the parents as well.

IV. The Proposed Amendments *via* the Penal Code (Amendment) Act 2003⁷² and the Criminal Procedure Code⁷³

Realising that the heinous crime of rape and incest are becoming a further threat to the society, especially to children, an amendment was made to s 376 of the Penal Code *via* the Penal Code (Amendment) Act 2003 to enhance the punishment for rape and incest. The amendment to s 376 reads:

9. Amendment of section 376.

The Code is amended by substituting for section 376 the following section:

376. Punishment for rape

(1) Whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

(2) Whoever commits rape on a woman whose relationship to him is such that he is not permitted under the law, religion,

⁷² Act A1210.

⁷³ Bill, DR/162004.

custom or usage, to marry her, shall be punished with imprisonment for a term of not less than fifteen years and not more than thirty years, and shall also be punished with whipping of not less than ten strokes.

(3) Whoever whilst committing or attempting to commit rape causes the death of the person on whom the rape is committed or attempted shall be punished with death.

From the above proposed amendments, it is clear that the government considers the offences of rape and incest very seriously, especially for incest as the proposed minimum mandatory punishment is 15 years of imprisonment while the maximum punishment is 30 years of imprisonment. The proposed amendments to the Criminal Procedure Code include the amendment to s 289, which allow the courts to impose whipping on male offenders above 50 years of age if convicted under ss 376, 377C and 377E of the Penal Code. Further, in order to ensure that those convicted with sexual offences⁷⁴ do not repeat the same offence, the proposed amendment to s 295 of the Criminal Procedure Code provides for police supervision between one to three years after the perpetrator is released from the prison.

V. Conclusion.

To date, the offences of rape and incest have become more rampant and thus require immediate attention of the government. One option is to have proactive and systematic policies, plans and strategies to address the issue. Amending the law *per se* would not solve the problem, although it may reduce the number of the cases. Public cooperation to work hand in hand with the government seems to be the best option to curb such crimes. If we fail to act more proactively to solve this problem, Malaysia will no longer be a safe place for our daughters, sisters, mothers, wives and others.

⁷⁴ Offences under ss 376, 377C and 377E of the Penal Code.