

Legal Measures on Preventing Child Sexual Abuse in Malaysia

WAN NOOR AISHAH SOFIA WAN ZAINUDDIN

NURIN HIDAYATI NORDIN

FATIN FAQIHAN AZMI

NIZAMUDDIN ALIAS

ABSTRACT

Child sexual abuse is a worrying trend as cases have been found to increase year by year. This article discusses the definition of child sexual abuse, its development over the years and its current legal position. The methodology used is qualitative by using comprehensive review of existing literature and relevant legislations. Existing legislations and judicial decisions have been analysed in detail. Comparisons are also made with selected Commonwealth countries like Singapore and India. It is found that the existing legislations need to be improved by amending current legal position such as making the offence gender neutral which means victims can be male or female children.

Keywords: Criminal law, sexual abuse, children

INTRODUCTION

Child sexual abuse is not a recent occurrence and it is a matter that should not be ignored. Even though there the government takes various actions, the number of child sexual abuse cases still continues to rise. According to The Bukit Aman Women and Children Sexual Crime Investigation Division, there have been a total of 18,329 reported cases of sexual crimes against children for five years until 2023. Even with child sexual abuse laws in place, Malaysia continues to have an alarming number of child sexual abuse cases. Despite the increased punishments for rape and incest, there are a lot of child sexual abuse cases have been reported. This mostly happens because in most cases the perpetrator is someone that is close to the child. As recorded by Jabatan Kebajikan Masyarakat, there were approximately over 2,789 children needed for protection in 2009 and this number increased to 4,295 in 2014. In 2009, over 447 children had been sexually abused by their parents, guardians, or other family members and the number

increased to 465 cases for the following year. Additionally, 320 cases from 2009 have been categorised as child sexual abuse or child that is at risk of being sexually abused whose parents or guardians failed to take action to protect the child from such abuse. To make matters worse, the number increased to 519 cases in 2010.

Child sexual abuse is a crime that not only happen in our society but also in other parts of the world. The government plays the role as protector and ‘*parens patriae*’ to the citizen and it should critically address this issue. Therefore, the government has enacted several laws in order to protect the safeguard and welfare of the child. These laws are one of the methods designed to ensure that all government plans and policies are carried out effectively. These laws attempt to stop these offences from being committed. As a party to the Convention on the Rights of the Child (“CRC”)¹, Malaysia has implemented a number of policies intended to safeguard the rights of children. In criminalizing the offence of child sexual abuse including rape and incest, the Child

Act 2001 (“CA 2001”)² was passed. Its provisions are mostly in accordance with the provisions of CRC.

Additionally, other legislations recognise the rights of the child and their protection from sexual abuse such as Domestic Violence Act 1994, the Penal Code and Sexual Offences Against Children Act 2017.

WHO IS A CHILD?

Age is the fundamental element in determining whether a person is considered a child or not. It is important to determine in advance whether a person is a child since there are specific provisions of law that protect a child. The definition of a child is controlled by the applicable laws according to their particular objectives. The Children Enactment 1992 was the first piece of legislation pertaining to child protection, and it specified that the age of a child should not be greater than 14 to be eligible for protection. With the following Children Ordinance 1927, the definition of a child was expanded from 14 years old to 16 years old. Later, The Children and Young Person Act 1947 introduced a new definition of a child which is a person above the age of 14 and below the age of 18.

With several laws already established to protect children, CA 2001 provides them with greater protection and is carried out for the best interest of the child. Generally, Malaysian legislations on children whether civil or shariah are in line with Article 1 of CRC. Article 1 of CRC defines a child as anyone below the age of 18. Similarly, the CA 2001 also gives the same definition of child i.e. ‘child’ as anyone who is under the age of 18. Prior to the promulgation of CA 2001, the Age of Majority Act 1971³ defines a child by setting the age of majority as 18 years old. In short, a person who is below the age of majority which is 18 years old is considered as a minor under Malaysian law and shall

enjoy any protection as provided by the law.

WHAT IS CHILDREN SEXUAL ABUSE?

Child abuse is one of the forms of child maltreatment which can also include physical, emotional, or sexual abuse of a child. Child sexual abuse is any sexual action or conduct committed against a child through force, threat, or intimidation. Child abuse is defined under the CA 2001 as any situation in which a child has been or is notably at risk of being sexually abused, physically or emotionally abused, or neglected in terms of receiving proper care, food, shelter, clothing, medical attention, supervision, and safety, or in other situations where the child has been abandoned. Child sexual abuse can be defined as the involvement of minors in sexual activities that they do not completely understand and know the nature of sexual activities or the effect of sexual activities. This definition can be further seen under Section 17(2)(c) of the CA 2001, a child is sexually abused when he is involved in any sexual activities whether as an observer or participant in any sexual activities for any pornographic, obscene, indecent material, videotape, recording, photograph, film or sexual exploitation by anyone for the purpose of sexual satisfaction of himself or others.

Sexual abuse includes both abnormal sexual behavior and acts of molestation, such as touching, kissing, and touching children's private parts. The act of sexual abuse includes the act of having sexual intercourse with a minor, rape, incest, exposing genitalia, sexual sadism, child prostitution, and pornography. Among various types of child sexual abuse, cases of rape and incest often occur. Rape is an act of sexual intercourse committed against the victim, whereas incest is a sexual intercourse between closely related

people who are not allowed to get married. The act of incestuous conduct is widely despised, and it is generally agreed upon that having sex with children is terrible. Given their relationship and familiarity with the victim, the offender is responsible for protecting the child rather than sexually abusing them. Though child sexual abuse is a worldwide issue impacting all socioeconomic categories, underreporting of the offence is a persistent problem. While physical abuse may have obvious evidence on the child's body, sexual abuse is frequently difficult to determine. This could happen if the child is so young that the child does not know he or she was sexually abused or if the perpetrator, who is widely known to the child, threatens to have the child silenced.

Child sexual abuse is considered as silent offence that goes unnoticed until the child is unable to conceal or bear the consequences of the abuse. The discovery of child sexually abused cases will be further impeded since Malaysian society believes that talking openly on sexual matters is viewed as a taboo. One of the most frequent reasons for the discovery of child sexually abused cases is pregnancy, especially in the case of incest where the child often hide her pregnancy out of fear or social embarrassment. Most Malaysian cases showed that child sexual abuse was frequently discovered as a result of the victim's pregnancy and the infant's afterward delivery. This can be seen in the case of *Tuan Mat Tuan Lonik v PP*.⁴ Before the discovery, the 12 years old girl suffered four years of sexual abuse done by her stepfather. It was stopped until she gave birth to a boy that the pain that she had suffered became apparent. The rape was committed at night between 2 am until 5 am. After the discovery of that act, the mother of the victim filed a police report which resulted the stepfather was charged with five counts of rape.

In some cases, rape is not only committed by strangers but it is also committed by people who are closest to the

victim. In the case of incest, it is very heartbreaking because the perpetrator should be the person who is supposed to protect the victim from external dangers and threats. The child is too naive and vulnerable to sexual exploitation that ends in pregnancy. Based on the statistic, Malaysia had the highest number of child sexually abused reports among all reporting sources and since 2009, the government hospital has continuously become the primary source of information and data about child sexual abuse reports. Approximately over 1030 reported rape cases throughout seven months and 672 of 1030 of the cases concerned with underaged girls. In addition, a drastic increase in the number of child sexual abuse cases can also be seen when the Ministry of Home Affairs declared that a total of 8,579 cases of rape involving children under the age of 18 were reported between 2013 and 2018.

The government made a significant move by introducing and implementing The Sexual Offences Against Children Act 2017 ("SOAC"). SOAC was enacted in July 2017 to address specific sexual offences against minors that the CA 2001 and Penal Code ("PC") do not sufficiently address. Social media has been used as the main medium of grooming minors. Improvements that are provided in this act are establishments of new offences including child pornography, child grooming, and physical and non-physical sexual assaults against minors. The provision in this act tightens the scope of the offence against children by emphasizing offences that are not specified in other acts. As an illustration, Section 11 of SOAC criminalised the act of sexually communicating with a child. Sexual communication includes all forms of communication, such as texting, emailing, writing notes, orally speaking, sending sexually explicit texts encouraging a child to engage in sexual activity or having sexual conversations with them. This provision is in *pari materia* with the

provision in the Sexual Offence Act 2003 of the United Kingdom. Therefore, in deciding whether the communication is considered sexual or not, the court will look into whether the communication concerns sexual activity in which the perpetrator asks the victim to engage in sexual activity and if the communication itself would be regarded as sexual by any reasonable person. This offence can be seen in the case of *R v Bradburn (Ashley)*,⁵ when the perpetrator sends a picture of his erect penis in exchange asking the child to send a photo of her breasts.

As cases of child sexual abuse are increasing, the relevant authorities are working diligently to ensure that these cases will decrease over time. Various efforts and measures have been taken such as enacting and implementing new laws on child sexual abuse, increasing the punishment of the offence, as well as widening the scope of the types of offences that can be prosecuted. These steps have been taken by the Malaysian government in ensuring its future generation being adequately protected.

OFFENCES OF CHILD SEXUAL ABUSE IN MALAYSIA, SINGAPORE AND INDIA

Statutory Rape

Rape in general is sexual intercourse by a man through penetration of penis to a woman. Section 375 of Penal Code (PC) constitutes the offences of rape. *Actus reus* elements in proving the offence of rape are that the offender must be a man, the victim is a woman and the penetration through penis of the man on the vagina of that woman.⁶ The *mens rea* elements to prove charge against rape is stated in subsection (a) until (g) of this section. Among the requirements are the lack of will⁷ and consent⁸ of that woman. On the other hand, statutory rape is an offence of having sexual intercourse with a female below 16 years

old, despite with or without the minor's consent.⁹

Statutory Rape in Malaysia

Section 375(g) of PC focuses on the rape of minors, which is an offence committed by a man who rapes woman under 16 years old, notwithstanding with or without the consent. Elements of statutory rape as illustrated in *Muhammad Zakwan bin Zainuddin v Public Prosecutor* and other appeals¹⁰, are sexual intercourse and the age of the victim.¹¹ The court added that once the age of the victim has been confirmed under sixteen years old, the consent of the victim is immaterial.¹²

The punishment for statutory rape is imprisonment maximum of 30 years and minimum of 10 years and may liable to whipping.¹³ Even though the punishment for statutory rape as stated in Section 376(2) is the same, the offender can be charged under either Section 376(2)(d), which is offences of rape on minor under 16 years old without the minor's consent, or Section 376(2)(e), for minors under 12 years old, with or without her consent. The punishment provided in Section 376(2) is applicable to victims under 16 years old, without her consent and below 12 years old, with or without consent, which means if the sexual intercourse was consented to by the minor under 16 years old and above 12 years old, the punishment for the offender is Section 376(1) which is imprisonment maximum 20 years and may be liable for whipping. This can be seen in *Public Prosecutor v Maxesythal ak Sulang*¹⁴, where the minor in this case is 14 years old and 7 months and consented to the sexual intercourse. The High Court affirmed the previous court decision on the offender, which is 3 years of good behaviour bond and RM3000 of an undeposited bond. The court stated that Section 376(2) cannot be not applied given that the victim is above 12 years old and consented to it. Therefore, the appeal was dismissed and the previous court decision that the offender should be

punished under Section 376(1) of PC was affirmed.

These are the cases that discuss statutory rape e.g. *Public Prosecutor v Rayno Dhey Addy George*¹⁵ (“Rayno Dhey”) and *Ching Lee Soon v Pendakwa Raya*¹⁶ (“Ching Lee Soon”). Both cases deal with offences of rape on a minor, however in the Rayno Dhey case, the victim was 13 years old meanwhile the victim in Ching Lee Soon was 7 years old. Rayno Dhey is an appeal case in the High Court of Kuching, in which the offender appealed the conviction and sentence by the previous court. The offender was charged under Section 376(2)(d) of PC and the court sentenced him to 18 years of imprisonment and 12 strokes of whipping. The offender raised the defence that the sexual intercourse was indirectly consented through the act of the victim laying down banana leaves on the floor. The victim in this case was 13 years old and 4 months. The court held that in cases of statutory rape, the elements of consent are immaterial as stated in Section 375(g), but may be relevant in sentencing. Through the medical evidence given by PW4 that there is a newly formed abrasion on the posterior fourchette of the victim, which indicates a forceful intercourse and the victim’s confession that she saw the offender inserting his penis, thus the court affirmed the previous court decision and dismissed the appeal.

On the other hand, Ching Lee Soon is also an appeal case, where the offender was convicted of statutory rape under Section 376(2)(e) of PC and sentenced to 18 years of imprisonment and 7 strokes of whipping. The offender appealed on the basis that the victim’s confession cannot be accepted as evidence and the sentence on him was harsh and excessive. The victim in this case is 7 years old and the High Court of Kuala Terengganu, through its findings in the previous decision affirmed the act of rape committed by the offender. In this case both elements of penetration and the age of the victim were fulfilled. The court rejected the offender’s claim that the victim’s confession

cannot be accepted as evidence on the ground that a child’s testimony can be accepted by the court if it is found that the child is able to understand and justify her statement and knows the responsibility to speak the truth. Furthermore, the medical evidence given by SP8, that there were tears on the hymen of the victim is sufficient to prove that the offender had committed sexual intercourse on the victim. The court affirmed the previous court’s decision and held that the punishment of 18 years of imprisonment and 7 strokes of whipping is not excessive as the act of the offender had impacted the victim physically and mentally.

Statutory Rape in Singapore

Meanwhile, in Singapore, the law governing statutory rape can be found in Section 375(1)(b) of the Singapore Penal Code (“SPC”), which is penetration from a man on the vagina of a woman under 14 years old, notwithstanding with or without her consent. Comparing this section to Section 376(g) of PC, the consent is still immaterial and what differentiates both countries’ offences is the age of the minor, which in Singapore is lower by 2 years of age than Malaysia.

In Singapore, punishment of statutory rape is divided into two categories. If the offender is found guilty of rape on a minor under 14 years old but with her consent, the punishment is in Section 375(2) of SPC, which is imprisonment maximum 20 years and may be liable of fine or caning. Meanwhile, if the offences committed on minors under 14 years old without her consent, as laid down in Section 375(3)(b) of SPC, the offender will be punished with imprisonment minimum 8 years and maximum 20 years and caning of 12 strokes.

One of the cases on statutory rape in Singapore is *Public Prosecutor v Yue Roger Jr.*¹⁶ In this case, the accused was convicted of statutory rape. There was also a sexual

penetration with objects and he was sentenced with 25 years of imprisonment. Unlike other cases, this case is unusual as the report was only made 5 years after the act was committed. The victim in this case was below 14 years old when the alleged acts committed by the offender. The accused was charged with 48 charges including sexual intercourse, sexual penetration with objects and forcing the victim to perform fellatio on him. The court in this case relied on the victim's testimony, the offender's statement through investigation and psychiatrist's interviews with the offender ("three main sources of evidence"). The offender raised defense on the basis that the objects of sexual penetration were not found and there was no blood or pain by the victim because of the sexual penetration. However, the court through its findings on three main sources of evidence was satisfied that the charges by the prosecution were established beyond reasonable doubt. The evidence includes the offender has been in a relationship with the victim, the offender has had sexual intercourse with the victim, the offender and the victim has performed oral sex and the offender has penetrated the victim's vagina with objects. Moreover, based on the offender's statement, the victim and him have a relationship and the victim has not denied this statement. This constitutes that the act was committed with the victim's consent. The court viewed that consent is irrelevant in case of statutory rape, however in term of sentencing, the consent is relevant. Therefore, the court convicted the offender with two charges, first is statutory rape under Section 375(1)(b) of SPC and sexual penetration under Section 376A(1)(a) and (b) of SPC. The court sentenced the offender with 25 years of imprisonment, which equivalent to 14 years under Section 375(2) of SPC for statutory rape with consent and 11 years of imprisonment on sexual penetration as provided in Section 376A(3) of SPC.

Statutory Rape in India

Despite Malaysian Penal Code is in *pari materia* with the Indian Penal Code ("IPC"), the law governing rape and statutory rape are different. Firstly, Section 375 of IPC mentioned four acts of man that constitutes rape; (1) through penetration of his penis to vagina, mouth, urethra or anus of a woman, (2) inserting any object or part of body into vagina, urethra or anus of a woman, (3) act of manipulating a woman with her own part of body to cause penetration into the vagina, urethra, anus or any part of body of that woman, and (4) putting his mouth to vagina, anus or urethra of a woman. This section also outlined seven circumstances of the victim, in which a rape accusation must satisfy one of the following circumstances to be liable. The sixth circumstances is that the victim must be under 18 years of age, notwithstanding consent. All the above constitute statutory rape in IPC.

In IPC, there are two types of punishment on statutory rape. Firstly, as provided in Section 376(1) of IPC, if a man has committed rape on a minor under 18 years old, with or without her consent shall be punish with imprisonment minimum 7 years and maximum to imprisonment of life and also be liable of fine. However, as provided under Section 376(2)(i) of IPC, if rape is committed on a minor under 16 years old, the offender is punishable with imprisonment minimum 10 years and maximum imprisonment for life and shall be liable for fine too.

One of notable case on statutory rape in India is *State of Karnataka vs Raju*.¹⁷ This case was an appeal brought to the Supreme Court of India by the prosecution on the decision of appeal made by the High Court of Karnataka. In the previous trial, the court convicted the offender under Section 376 of IPC and sentenced him to 7 years imprisonment. The offender then appealed to the High Court of Karnataka, in which the court reduced the imprisonment to 3 years on the

basis that the offender was 18 years old, illiterate and rustic. Given that the victim was below 10 years old when the crime was committed, the Supreme Court in view that the offender should have been convicted under Section 376(2) in which the punishment should be imprisonment for minimum 10 years. The trial court decision on 7 years of imprisonment was already an exceptional sentence for special and adequate reasons on considering the offender's age and background. Thus, the Supreme Court dismissed the appeal and set aside the High Court decision. Furthermore, the court also restored the trial court decision which is 7 years of imprisonment.

INCEST

Incest can be defined as sexual intercourse with a family member. Incest is a form of sexual abuse happened at home. The law governing on incest, especially on minor is essential to protect them from long term physical and emotional harm.¹⁸

Incest in Malaysia

In Malaysia there is no specific law of incest on minors. However, there are 2 provisions that governs the offence of incest. Incest is provided under Section 376A of PC when any individuals has sexual intercourse with other person, in which that individual has relations that prohibit the individual to marry that person. As can be seen in Section 376A of PC, the law on incest covers both heterosexual and homosexual incest. Unlike rape, the perpetrator in this charge can be man or woman, and the same goes to the victim. Punishment of incest as stated in Section 376B of PC is minimum 10 years imprisonment or maximum 30 years imprisonment and may also be punishable of whipping. Furthermore, Section 376B(2) of PC states that a minor under 16 years old for female and 13 years old for male are not capable on giving consent, thus they cannot

be charged on offence of incest. In addition, the law on incest is also provided in Section 376(3) of PC. The section states that a man who has committed rape on woman whom he has family relations with and prohibited to marry because of law, religion, custom or tradition, shall be punished of imprisonment minimum 8 years and maximum 30 years and at least 10 strokes of whipping.

In *Osman bin Maimon v Public Prosecutor* and another appeal,¹⁹ the offender appealed to the High Court of Taiping against the sentence made by the Sessions Court. The background facts of the case is the offender committed incest on his stepdaughter which resulted the victim's pregnancy. In the court of first instance, the evidence given and the offender's guilty plea were sufficient for the court to convict him. The offender was convicted based on Section 376A of PC i.e 2 charges of incest, in which both charges shall be punishable 10 years imprisonment and 10 strokes of whipping in accordance with Section 376B(1) of PC. The offender appealed stating that the sentence is excessive and asked the sentence to be reduced on the basis that his age is already 58 years old with low income and has family to support. The High Court was in view that the sentence of imprisonment held by the court below is not excessive considering that the victim's life had already been wrecked and left a permanent scar in her life. However, the court found that 10 strokes of whipping for each charge is excessive in view of the offender's age. Thus, the court affirmed the imprisonment of 10 years for each charge and reduced the strokes from ten for each charge to three strokes.

In the case of *Abdul Hardy bin Razali v Public Prosecutor*,²⁰ the appeal was made by the offender on conviction and sentence made by the Session Court. The facts of this case are that the offender has committed incest on the victim, which is his 10-year-old stepdaughter.

The Session Court convicted the offender under Section 376A of PC and sentenced him with 17 years of imprisonment and 10 strokes of whipping under Section 376B of PC. For the appeal on conviction, the court rejected the offender's claim on the basis that the elements of incest which is sexual penetration is fulfilled through the testimony of PW6. The witness stated there was old tear on the hymen of the victim since the report was made a month after the incest was committed. The relationship was also established as the victim was the stepdaughter of the offender which he cannot marry. On the appeal against the sentence, the court is in view that the 13 years of imprisonment is not excessive. The court also added that the act of incest is considered a heinous crime as the victim will carry the trauma throughout her life. Thus, the court dismissed the offender's appeal and affirmed the decision made by the previous court.

On the contrary in *Suharman bin Mohamad Noor @ Ismail v Public Prosecutor* and another appeal,²¹ the offender in this case was convicted of aggravated incestuous rape under Section 376(3) of PC. The case was an appeal against a decision of the Session Court. He was sentenced to 25 years of imprisonment and 10 strokes of whipping concurrently. In this case the offender has committed rape on his stepdaughter for several times. The High Court is in view that in this case the elements of aggravated and incestuous rape were fulfilled. The court also found that the prosecution has established a prima facie case against the offender and has proven beyond reasonable doubt. The victim was 11 years old and is a stepdaughter of the offender. Based on the evidence available, the offender forced the victim to have sexual intercourse with him, there is tear in the victim's hymen, as well as the existence the offender's semen on victim's clothes. Thus, the court dismissed the appeal and affirmed the Session Court's decision.

Incest in Singapore

Contrary to Malaysia, Singapore, on the other hand has amended law on sexual abuse of minors. This amendment can be seen in Section 376A until 376G of SPC. Sections 376A - 376G of SPC mainly focus on offences of sexual assault through penetration on minor under 16 years old. The court in *Public Prosecutor v Tan Meng Soon Bernard*²² held that the purpose of amendment of Section 376A-376G was to protect minors from being sexually abused. Some of the provisions are also gender neutral, which protects both male and female minors from their abusers.²³ However, incest as stated in Section 376G is a general law governing incest on offenders above 16 years old and victims above 16 years old. Emphasis on minors can be seen in Section 376G(6) of SPC as it provides that victims of offences under Section 376AA who is below 18 years old are exempted from being charged under incest.

Singapore does not have specific law on incest on minors. Furthermore, the age requirements stated in Section 376G confirms that the victim must be above 16 years old for incest to be liable. If an offence of rape committed by a man who has family relation with the victim and the victim is below 16 years old, Section 376G does not apply. In *Public Prosecutor v NF*,²⁴ the accused was charged with rape to his own daughter who is 15 years old under Section 376(1) of SPC. The court in this case was aware of the lack of law on incest on minors, thus it referred the case of *R v William Christopher Millberry*²⁵ ("Millberry case"). In the Millberry case, there are 4 types of rape offences, which are (1) non-aggravating rape, (2) aggravating rape, (3) repeated rape of same victim and (4) rape by offender who remain threat to society. The court in this case is in view that familial rape falls below second category of rape. Based on the findings of various previous cases on similar issues, the court held that the accused was guilty and

sentenced him 15 years of imprisonment and 12 strokes of whipping. This is because it was incestuous rape and the victim is under 16 years old. However, in *Ng Kean Meng Terence v Public Prosecutor*,²⁶ the offender has familial relationship with the victim as the godfather of the victim. The court charged the offender under Section 376(1) of SPC and found that the offences fall between the first and second category of rape as laid down in the *Millberry* case. The court views that there is clear breach of trust and position by the offender but not as serious as familial rape, thus sentenced the offender of 13 years imprisonment and 12 strokes of caning.

Incest in India

Meanwhile, in India, the law governing incestuous rape has ambiguity in providing protection against the victim, especially on minors.²⁷ The law governing on incest in IPC can be seen in Section 376(2)(f) of IPC. However, this section is general in which the victim can be an adult or a minor as long as there is incestuous rape committed. Not only that, the law governing incest in Section 376(2)(f) of IPC focuses on woman as the victim. Thus, The Protection of Children from Sexual Offences Act 2012 (“POCSO”) has provided law protecting both male and female minor on offences of rape. Section 5(n) of POCSO includes incest as one of an aggravated penetrative sexual assault. The punishment of incest laid in Section 6 of POCSO is punishment minimum 20 years and maximum imprisonment for life and fine, or death penalty.

Incestuous rape in India is illustrated in *Rajinder Kumar vs State of Himachal Pradesh*²⁸ where the offender has sexually assaulted the victim, which is his 14-year-old niece resulting in pregnancy. The court did not discuss on incest, instead it discussed the relationship between the offender and victim resulted to aggravated sexual assault crime. The offender was

charged under Section 376(2)(f) & (n) of IPC and Section 6 of POCSO, and sentenced with 10 years of imprisonment and a fine of 50,000 Indian Rupees.

CONCLUSION

In conclusion, it is evident that offence of child sexual abuse has increased and getting more rampant. It is submitted that the law must be strict on child sexual abuse. Concerning statutory rape in Malaysia, the PC has a clear focus on rape of minors and provisions on punishment are rather adequate. The public should realise the fact that rape victims might be either men or women. While an adult male may be able to refuse or protect themselves from being a victim of rape, a male child may not be able to do so. Therefore, it is important to provide for the law on statutory rape which includes the male child as a victim. According to Section 376(2)(d), an offender who rapes a child under the age of 16 without consent will face a greater punishment than offender who does with consent. This can be seen in *Public Prosecutor v Maxesythal ak Sulang*,²⁹ where the punishment for the accused was 3 years of good behaviour bond due the consensual intercourse with the victim who was 14 years old at that time. While Section 375 of PC mentioned that consent is immaterial for offences of statutory rape, it is advisable that the same principle must be applied in the sentencing.

The government has a duty to protect children, so even in cases when the child gives consent, there is a possibility that she might not be entirely aware of the consequences of such actions. The differences on punishment due to consent show injustice to minors. Additionally, Malaysia should follow Singapore in amending the law of sexual abuse of minors, which must include non-physical offences. As can be seen in SPC, statutory rape is gender neutral offence, as provided in Section 375(1)(b) and Section

375(1A)(b), in which the victim can be both male and female child. Similar to Malaysia, the offender as provided in SPC continues to focus exclusively on men. However, Singapore has improved the law on statutory rape by increasing the age of minors from 14 years old to 16 years old.

Contrary to Malaysia and Singapore, statutory rape in India is defined wider about the acts of the offender. As stated in IPC, rape includes not only penetration of the penis to the vagina but also penetration of parts of the body, objects and mouth on the vagina, anus or urethra of a woman. The punishment of statutory rape is harsh on the basis that the victim will live through the guilt and pains of rape. However, in the case of the State of Karnataka vs Raju,³⁰ the Indian Court is of the view that lower punishment should be given to the exceptional characteristics of the offender. This exception can be seen in Section 360 of the Indian Code of Criminal Procedure 1973 ("ICPC"), where the court may set a lighter sentence if the offender is 21 years old and committed an offence with imprisonment maximum of 7 years or if it is the first offence of the offender. While it is important to take into consideration the offender's background, the court ought to focus more attention on the victim instead. The court should also look into the aggravating and mitigating factor of the offences in imposing a sentence.³¹

With regard to incest, Malaysian law recognizes the offence of incest. However specific offence of incest on minors is yet to be provided. Both Section 376A and 376(3) of PC are the current legal provisions applicable on incest. Nevertheless, Section 376A recognizes both heterosexual and homosexual incest, in which both offender and victim can be either man or woman while Section 376(3) focuses on offences of rape from the offender on victim that he has relationship with. PC also emphasize that a minor is exempted on being the offender of incest. Due to the lacuna in incest of minors, it is submitted that the present law to be

amended to include a specific legal provision in which the focus is on victims of incest who are minors. Furthermore, the punishment should be heavier than the current punishment as provided in Section 376B and 376(3) of PC *i.e* 12 years and maximum 30 years of imprisonment and at least 12 strokes of whipping. Other than that, Malaysia should clarify a wider definition of family relationship in incest, which includes step-parents, adoptive parents, godparents and step siblings.

Similarly, to Malaysia, Singapore has no laws with regard to incest of minors and the existing law regarding incest is only applicable to offenders and victims above 16 years old. As illustrated in the case of Public Prosecutor v NF,³² the court was aware with the lack of law governing incest on minors. It also held 4 types of rape in which incest on minor can be categorized as aggravating rape. In Ng Kean Meng Terence v Public Prosecutor,³³ due to lack of law of incest on minors, the accused was charged under Section 376(1) of SPC, which is general law on rape. It is submitted that the current law should be amended to impose specific law on incest on minor so the court can differentiate offences of statutory rape or incest. It does not need to refer to previous decisions to ascertain appropriate punishments on incest. Unlike Malaysia and Singapore, India does not have any specific law on incest. Incest is only mentioned as one of the limbs to constitute *mens rea* of offences of rape. As stated in Section 376(2)(f), incestuous rape is offence of rape by a man to adult and child woman. The law governing incest is limited to man being the offender. This general law on incest is not sufficient in protecting minors, thus the Indian legislative body has made POCSO which protects both male and female child from being sexually abused. However, due to the lack of legal provisions with regard to incest on minors in IPC, the court faces problems in convicting offenders. As seen in Rajinder Kumar vs State of Himachal Pradesh,³⁴ it is observed that the court

avoided discussion on incest and held that the offence as one of aggravated sexual assault crime. Thus, it is submitted that India should also enact specific provisions on law relating to incest on minors.

Child sexual abuse remains a serious issue to the public. The government has a duty to protect minors from being sexually abused. This is crucial as the future of minors could be affected. The government should impose strict provisions relating to sexual offences of minors especially on statutory rape and incest, so that the people will realize its significance. Besides imposing severe punishments, prevention is also very important. Perhaps there should be legal provisions that enable child sexual abuse victims to seek compensation from the offenders. It could be a good deterrent for anyone as the offender not only be punished severely but also has to literally pay the victims as their future has been destroyed. More efforts with regard to raising awareness should also be organized so that everyone joins hands in protecting children.

NOTES

¹General Assembly Resolution 44/25.

²Act 611.

³Act 21.

⁴[2009] 4 CLJ 638.

⁵[2017] EWCA Crim 1399. 376.

⁶Section 375 of PC.

⁷Section 375(a) of PC.

⁸Section 375(b) of PC.

⁹Nor Afizal bin Azizan v Public Prosecutor [2012] 6 MLJ 171

¹⁰[2020] 8 MLJ 420

¹¹Muhammad Zakwan bin Zainuddin v Public Prosecutor and other appeals [2020] 8 MLJ 420, para 55.

¹²Muhammad Zakwan bin Zainuddin v Public Prosecutor and other appeals [2020] 8 MLJ 420, para 41 & 55.

¹³Section 376(2) of PC.

¹⁴[2021] MLJU 948.

¹⁵[2019] MLJU 1736.

¹⁶[2019] MLJU 2102.

¹⁷[2018] SGHC 125; [2019] 3 SLR 749

¹⁸on 14 September, 2007 AIR 2007 SUPREME COURT 3225, 2007 (11) SCC 490, 2007 AIR SCW

5841, 2007 (6) AIR KAR R 212, 2007 (11) SCALE 114, 2007 ALL MR(CRI) 2988, (2007) 58 ALLINDCAS 39 (SC), 2007 (58) ALLINDCAS 39, 2008 (1) SCC (CRI) 787, (2007) 11 SCALE 114, (2007) 2 MAD LJ(CRI) 1622, (2008) 1 KANT LJ 89, (2007) 38 OCR 653, (2007) 4 RECCRIR 278, (2007) 4 CURCRIR 65, (2008) 1 WLC(SC)CVL 83, (2007) 59 ALLCRIC 780, (2007) 3 CHANDCRIC 285, (2007) 4 ALLCRILR 738, 2007 (2) ALD(CRL) 890, 2007 (3) ANDHLT(CRI) 424 SC.

¹⁹A Comparative Study of Legal Protection Policy Against the Sexual Abuse of Children In Brunei Darussalam, Malaysia and Singapore [2021] 1 MLJ clxi, page clxxvi.

²⁰[2019] MLJU 1702

²¹[2021] MLJU 3077

²²[2020] MLJU 2258

²³[2018] SGHC 134; [2019] 3 SLR 1146.

²⁴Public Prosecutor v Tan Meng Soon Bernard [2018] SGHC 134; [2019] 3 SLR 1146, para 26.

²⁵[2006] SGHC 165; [2006] 4 SLR 849.

²⁶[2003] 2 Cr App R (S) 31.

²⁷[2017] SGCA 37; [2017] 2 SLR 449.

²⁸Choate, P., & Sharan, R. (2021). The Need to Act: Incest as a Crime Given Low Priority—A View with India as an Example. *Social sciences*, 10(4), 142.

²⁹[2024] HHC 8303.

³⁰[2021] MLJU 948

³¹[2007] 9 S.C.R. 970, 2007 INSC 924

³²Kandya, S. (2021). Sentencing in Rape Cases in India: An Analysis. *Supremo Amicus*, 26, 411 - 431.

³³[2006] SGHC 165; [2006] 4 SLR 849.

³⁴[2017] SGCA 37; [2017] 2 SLR 449.

REFERENCES

Abas, A. B. (2012). Child Abuse in Malaysia: Legal Measures for the Prevention of the Crime and Protection of the Victim. *International Journal of Social Sciences and Humanity Studies*, 4(2), 1-10.

Chandra, R. (2021). Incest Rape: Hidden Slur in Indian Families and the Role of Criminal Law in its Prevention. *International Journal of Multidisciplinary Educational Research*, 10(2), 48-53.

Cheah, I. G. S., & Choo, W. Y. (2016). A Review of Research on Child Abuse in Malaysia. *Med J Malaysia*, 71(Supplement 1), 87-99.

- Choate, P., & Sharan, R. (2021). The Need to Act: Incest as a Crime Given Low Priority—A View with India as an Example. *Social sciences*, 10(4), 142.
- Cooray, M., Jamaluddin, S. Z., & Tahir, Z. (2020). Violence and Sexual Offences against Children in Malaysia: Searching for the Right Approach. *International Journal of Business and Society*, 21(S1), 152-164.
- Engku, A. Z. (2012). Care and Protection Against Child Abuse: With Special Reference to Malaysia Child Act 2001. *Asian Social Science*, 8(1), 202-208.
- Ibrahim, M. D. View on Laws Related to Statutory Rape: A Comparative Analysis in the Study of Statutory Rape Laws in Malaysia and Republic of India. *Ghazali Shafie Graduate School of Law, Government and International Studies, Universiti Utara Malaysia*.
- Kandya, S. (2021). Sentencing in Rape Cases in India: An Analysis. *Supremo Amicus*, 26, 411 - 431.
- Mahmud, I. I. C. J., Pauzi, S. F. M., Ahmad, N., & Hassan, R. A. (2023). The Analysis of Child Sexual Grooming Offences in Malaysia.
- Mansoor, M., Omar, H., Felisiano, I., & Mangsor, M. M. (2022). Legal Literacy in Accessing Justice for Child sexual Abuse, *Malaysian Journal of Social Sciences and Humanities (MJSSH)*, 7(9).
- Justice for Child Sexual Abuse. *Malaysian Journal of Social Sciences and Humanities (MJSSH)*, 7(9), e001784-e001784.
- Mathews, B., & Collin-Vézina, D. (2019). Child Sexual Abuse: Toward A Conceptual Model and Definition. *Trauma, Violence, & Abuse*, 20(2), 131-148.
- Nasrijal, N. M. H., Yusof, M. I. M., Jody, J. M., & Razali, H. Y. (2017). Protection for Sexually Abused Children: Issues on Law and Policy in Malaysia. *JGD* 13(1), 44-59.
- Sajaia, T. (2018). Criminalization of Voluntary Incest Among Adults in Comparative Perspective. *European Scientific Journal*, 14(17), 269-280.
- Sood, G., & Jan, A. (2019). Incest and Sexual Assault on Minor Girls. *International Journal of Trend in Scientific Research and Development*, 3(4), 177-180.
- Suk-Huei, A. L. A Review of the Punishment for Statutory Rape in Malaysia. *Faculty of Law University Malaya*.
- Wan Noor Aishah Sofia Wan Zainuddin
Faculty of Law
Universiti Kebangsaan Malaysia (UKM)
43600 UKM Bangi, Selangor, Malaysia
- Nurin Hidayati Nordin
Faculty of Law
Universiti Kebangsaan Malaysia (UKM)
43600 UKM Bangi, Selangor, Malaysia
- Fatin Faqihah Azmi
Faculty of Law
Universiti Kebangsaan Malaysia (UKM)
43600 UKM Bangi, Selangor, Malaysia
- Nizamuddin Alias
Faculty of Law
Universiti Kebangsaan Malaysia (UKM)
43600 UKM Bangi, Selangor, Malaysia
Email: nizamuddin@ukm.edu.my