Protection for Sexually Abused Children: Issues on Law and Policy in Malaysia

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ABSTRACT

Child sexual abuse (CSA) is a heinous offence. Incest and rape committed on a child are offences of CSA which are punishable under the Penal Code (Revised 1997) of Malaysia. In the introduction, this paper describes CSA and the severity of its effects on the victims. The objective of this paper is to examine the existing laws and policy in Malaysia regulating CSA, with focus on rape and incest. Using qualitative method, cases of rape and incest on children which have been decided by the courts which were reported in the leading law journals in Malaysia were analyzed. The findings revealed that there are three main issues in CSA cases: discovery of the CSA, challenges in prosecuting the perpetrator of CSA and the punishment for CSA. Analysis of the cases also found that the child would suffer in silence over a long period until such time when the child can no longer endure the sexual abuses or hide evidences of the sexual abuse; usually when the sexual abuse resulted in pregnancy. It was also discovered that the sexual abuse would usually occur in the absence of the child’s mother or female caregiver. The Child Act 2001 has made it mandatory for family members and caregivers to report immediately if he/she believes on reasonable grounds that there was CSA. However, aside from implementing severe punishment for CSA, the recommendation put forward in this paper is to enhance community involvement and increasing awareness as well as educating the society in preventing CSA.

Keywords: incest; sexual abuse; welfare; conviction; child.

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INTRODUCTION

Child abuse is one of the elements of child maltreatment where it may involve physical, emotional or sexual violence on a child. Child sexual abuse (CSA) is any form of sexual activity perpetrated against a minor by threat, force, intimidation or manipulation (Collin-Vezina, Daigneault & Hebert, 2013). Although there are various forms of CSA, rape and incest are among the severe types of CSA committed on a child. While rape is an act of sexual intercourse against the victim’s will, incest involves sexual relationship between closely related persons who are forbidden by law to marry (Zaizul, Ab. Aziz, & Fakhrul Adabi Abdul Kadir, 2013). There is a widespread disgust at incestuous activity and generally accepted is the wrongfulness of sex with children (Roffee, 2014). The perpetrator of incest, being related and acquainted to the victim, should be protecting the victim instead of sexually abusing her/him. By sexually abusing the victim, the perpetrator is causing a breach of trust (Tan, 2003). CSA is a global problem affecting various economic levels but underreporting of the offence is a universal dilemma (Aydin et al., 2014, Weatherley et al., 2012). While evidences of physical abuse may be visible on the child’s body which would facilitate the process of discovery of the abuse, sexual abuse is often more difficult to detect. This is so if the child is of such tender age that he or she may not be able to comprehend the abuse or the child was threatened to silence by the perpetrator who is acquainted to the child (Schaeffer, Leventhal, Asnes, 2011). Taking legal actions against a perpetrator of child sexual abuse would be highly dependent on the reporting of the crime. A perpetrator who commits CSA in Malaysia may be charged with either rape or incest, where the provisions for these offences are relatively different. This paper discusses the existing laws and policy in Malaysia regulating CSA, with focus on rape and incest. Qualitative analysis is made on the cases of rape and incest on children which have been decided by the courts, drawing on three main themes: issues in discovery of the CSA, challenges in prosecuting the perpetrator of CSA and the punishment for CSA.

Criminalizing Child Sexual Abuse: implications and impediments

Rape and incest committed on children are among the most brutal form of CSA in Malaysia and are criminal offences under the Malaysian Penal Code (Act 574). With the rampant incidents of rape and incest in the 1990s, various sectors had urged for more severe punishment to be imposed for sexual offences, particularly rape and incest (Vibhute, 1998). The Penal Code has since been amended to impose harsher punishment. Section 375 stipulates that rape occurs when a man has sexual intercourse with a woman against her will and without her consent, as well as four other exceptional situations.
where consent of the woman was not freely given. Sexual intercourse with a victim who is under the age of sixteen years is deemed to be rape, whether it was committed with or without her consent. The punishment for rape under section 376(1) is imprisonment up to 20 years and the perpetrator will also be liable to whipping. However, if rape was committed with elements of force, coercion, duress or if the victim is a child below 16 years old, the punishment is enhanced to imprisonment of not less than 5 years and not more than 30 years as well as whipping under section 376(2). If in the event of committing rape, the perpetrator causes the victim’s death, the punishment is further increased to an imprisonment term of not less than 15 years and not more than 30 years with whipping of not less than 10 strokes.

Incest, as prescribed under section 376A, is an offence of sexual intercourse involving parties (the perpetrator and the victim) who are in a relationship whereby they are forbidden to marry each other under the law, religion, custom or usage. The punishment for incest under section 376B is imprisonment of not less than 6 years and not more than 20 years. However, if rape was committed in the incestuous act, section 376(3) provides an enhanced punishment of imprisonment of not less than 8 years and not more than 30 years with whipping of not less than 10 strokes. In sum, the maximum punishment for both rape and incest could be extended to 30 years imprisonment upon fulfilling the requirements.

Being a signatory of the Convention on the Rights of Children (CRC), Malaysia has established various measures to protect the rights of children, albeit making reservations to some of the articles in the CRC. In addition to criminalizing the offence of CSA in the form of rape and incest, the Child Act 2001 (Act 611) was passed to make provisions in line with article 19 of the CRC. Under section 7 of the Child Act, a Child Protection Team (CPT) was established for the purpose of coordinating locally-based services to families and children if the children are in need of protection or are suspected of being in need of protection. The CPT consists of a ‘Protector’ (who is a social welfare officer), medical officer and senior police officer. Section 17(1) provides that among the situations where a child is deemed to be in need of protection is when the child is physically or sexually abused by his parent, guardian or member of extended family or that the child has been/ at risk of being physically or sexually abused and his parent/guardian has not protected or is unlikely to protect the child despite knowing of such abuse.

When a child is deemed to be in need of protection, the child will be placed under temporary custody of the protector as provided under section 18, and if necessary to be sent for medical examination as stipulated under section 20. The Protector may also authorize hospitalization (section 22) and
medical treatment (section 24). Upon medical examination or treatment, the child in need of protection may be taken to a place of safety or be placed in the care of a fit and proper person (section 25). In addition to giving protection to a victim or a child in need of protection, parents, family members or child care providers who fail to report to the Protector when he/she has grounds to believe that the child was sexually abused, will be punished with imprisonment of up to two years or a fine of up to RM5,000 (sections 28 and 29).

Despite the laws on CSA being in place, the occurrence of CSA in Malaysia remains at a distressing rate. Reported cases on CSA are said to be high (Chen and Sumari, 2012) and the number of CSA cases have not dwindled regardless of the enhancement of punishment for rape and incest. In 2009, there were 2,789 children in need of protection and the number increased to 4,295 in 2014. Out of the total sum in 2009, 447 children were sexually abused by the child’s parent, guardian or family member as compared with 465 sexually abused children in 2014. Further, in 2009, 320 cases reported were categorized as those where the child has been sexually abused or is at risk of being sexually abused but the parent or guardian is not protecting the child from such abuse despite having knowledge of the abuse. The figure for this category rose to 519 cases in 2014 (JKM, 2014).

The escalating number of reported CSA could be due to two main reasons: more children fall victim to CSA or that there are more CSA cases being reported to the authorities. Reporting the crime is the first step towards bringing an end to the sexual abuse suffered by the victim. In addition, reporting is also crucial for treatment and rehabilitation of the victim (Aydin et al., 2014). CSA victims require assistance from service providers; institutional support and treatment are extremely important for the victims to survive the ordeal that they had endured (Hockett and Saucier, 2015). Receiving immediate attention and action from service providers such as the welfare agency is also imperative in protecting children’s best interest (Mulder-Westrate, 2012) especially when parents or guardian may be at crossroads in determining whose interests to protect first. Although on the surface, CSA may be perceived as a private matter encircling certain dysfunctional families or family members, CSA is in fact a societal problem. The aftermath of CSA is not merely a private matter of the family but it affects the society in terms of providing the necessary service and support such as medical treatment for the CSA victim, legal proceedings against the perpetrator, moral/emotional/spiritual/financial support for the victim and other affected family members. CSA has been found to have incurred economic costs to the society (Habetha et al., 2012). However, while the economic loss of CSA is significant, preventive efforts could reduce child
maltreatments and abuse (Fang et al., 2015) and thereby, reducing the societal costs on the ramification of CSA. Preventive actions as well as rehabilitation and treatment could be taken if CSA is discovered. Early detection and reporting of the crime is essential mainly for the child’s best interest but also for the benefit of the family and society.

**Discovery of child sexual abuse and actions taken: the role of a trustworthy confidante**

Enforcement of the existing laws and policies in protecting children from CSA require concerted effort not only from the legal circle but more prominently from those closer and nearer to the victim. Legal actions can only be commenced against the perpetrator upon discovery of the abuse. Similarly, treatment and rehabilitation for the CSA victim can only be given upon ascertaining that the abuse has taken place. Disclosure of CSA by the affected child, however, is often not immediate. A study of 327 cases revealed that children disclosed CSA due to: a) internal stimuli such as nightmares; b) disclosure facilitated by outside influences (e.g. the child was questioned), and c) disclosure due to direct evidence of abuse, for example, the child’s abuse was witnessed (Schaeffer, Leventhal, Asnes, 2011). According to Collin-Vezina, Daigneault & Hebert (2013), disclosure of CSA is a delicate and sensitive process influenced by implicit or explicit pressure for secrecy, feelings for responsibility or blame, feelings of shame or embarrassment, or fear of negative consequences. In addition, ethnic and religious cultures may also influence the process of disclosure and can act as either facilitators or barriers to the telling and reporting of CSA. An analysis of rape victims and survivors revealed that among the reasons the victim sought for help is because they wanted justice, they were concerned for health risks, they needed medical attention and due to social concerns (Hockett & Saucier, 2015).

CSA is a silent ‘disease’ and often discovered when the victim can no longer tolerate or hide the effects of the abuse. In Malaysia, discovery of CSA would be further hampered due to the social stigma as well as culture of keeping silence on sexual matters which are viewed as taboo (Nen et al. 2012). One of the most common causes of discovery is when the abuse ended in pregnancy of the victim, particularly in incest cases where the victim often keeps her pregnancy under wraps for fear of social stigma (Razali et al., 2014, Yuksel, 2008). In 2014, the statistics in Malaysia showed that the highest number from the source which reported CSA was the government hospital. The government hospital has been consistently the main source reporting cases on CSA since 2009. Pregnancy as well as other medical or mental health problems which require hospitalization or medical treatment would
result in opening a can of worms for rape and incest cases which otherwise would have been kept a dark secret.

Analysis of the cases decided by the courts in Malaysia revealed that the victim’s pregnancy and subsequent delivery of baby were common grounds for discovery of CSA. For instance, in the case of *Tuan Mat Tuan Lonik v PP* [2009] 4 CLJ 638, the victim (aged 12) suffered four years of being raped by her step-father before the discovery. The torture she endured was only discovered when she delivered a baby boy. The rape occurred late at night between 2 to 5am in the family home in Kuala Kerai. The victim’s mother lodged a police report resulting in the step-father being charged for 5 counts of rape. The accused pleaded guilty. The Sessions Court initially sentenced him to 15 years imprisonment and 10 strokes of whipping for each offence, where the jail sentence was to run consecutively resulting in a total of 75 years in jail. However, on appeal, the sentence was reduced to 30 years (taking into account the average life of a Malaysian man, accused would be 70 years when released) and maximum 24 strokes of whipping in line with section 288(5) of the Criminal Procedure Code.

Similarly, in four other cases reported in the law journal, pregnancy and delivery of babies as a result of the rape or incestuous acts were the breaking point of discovery: *Idris Sidek lwn PP* [2008] 9 CLJ 15, *Leken Gerik (M) v PP* [2007] 8 CLJ 158, *Amran Mohd Jin v PP* [2007] 2 CLJ 545 and *Mohd Zandere Arifin v PP* [2006] 5 CLJ 663. It is startling to note that the victims had managed to conceal their pregnancies, particularly from their mothers or other female adults in the family who could and should assist the victims during pregnancies which would be traumatic for the victims to endure as the victims were of very young age.

As most CSA victims in Malaysia are female children and the perpetrators are male (JKM, 2014), female guardian or caregiver of the CSA victim plays a significant role in discovering the sexual abuse. Caregivers responding to a disclosure of CSA is said to be able to facilitate successful rehabilitation for a CSA victim or prevent these outcomes through their choice of decisions (Walker-Descartes et al., 2011). When the perpetrator is a male family member, the task of the female guardian or caregiver, usually mother, is of utmost importance in detecting the abuse and henceforth, protecting the child from further abuse. In most cases, when the victim revealed the incestuous abuse or rape to the mother, the mother’s action would be to lodge a police report and bring the child for medical examination. In the case of *Sanusi Mat Karto v PP* [2009] 7 CLJ 236, the victim (aged 12) confided in her mother after being raped by her grandfather on a number of occasions. The heinous acts were committed by the grandfather in a deserted palm oil
plantation when he sent her to school. The victim’s mother lodged a police report upon discovery of the incest. The grandfather was convicted for incest and sentenced to 15 years of imprisonment but was spared the whipping in view of his age. This case illustrates the significance of a mother’s role in protecting her minor child who had been sexually abused and that she was prepared to bring action against her own father. A mother’s firm decision and swift action in bringing the matter into light is fundamental for her child’s protection and the child’s well-being as the mother has to be a pillar of strength in challenging situations.

However, in some unfortunate situations, mothers are hesitant in reporting the abuse. This could be due to their emotional conflict and anguish upon discovery of the CSA: they are torn between reporting against a loved one and protecting another. Mothers who are financially dependent on the male perpetrator (usually husband) may procrastinate in reporting the crime as it would affect the economic stability of the family with the arrest of breadwinner of the family or they are in denial of the abuse or simply embarrassed by the abuse (Karol et al., 2016; Vibhute, 1998).

In Ghazali bin Abd Majid Iwn Pendakwa Raya [2012] MLJU 345, it took the mother one month to report the abuse to the authorities after the victim disclosed the abuse to her mother. It was only after the victim was hospitalized for venereal disease, suffered from hysteria, depression and tried to commit suicide that the mother lodged the report. In this case, it was the victim’s proactive friend who informed the teacher and the latter interviewed the victim before taking the victim to the hospital. The victim was raped by her father since she was 11 years old. The discovery was made when the victim was 16 years old and was living in a boarding school. During a power failure at the school’s hostel one night, the victim told her friend that she is afraid of the dark as she would be reminded of her father raping her. The rape often occurred in the middle of the night, in the dark, when everyone else in the house was sleeping. Although she tried to tell her mother, she was not taken seriously until she was hospitalized. The father was subsequently charged with 3 counts of incest where he pleaded guilty and was sentenced to 25 years imprisonment as well as 24 strokes of whipping. Analysis of this case uncovers three main points:

a. When the mother or other female adult does not take the victim’s complaint seriously the CSA may prolong and result in damaging consequences to the victim.

b. When the mother is not responsive to the complaint made, the victim may reveal to another trustworthy confidante such as her friend.

c. Teachers in schools can also discover the changes in the victim as a result
of the offence being committed on the victim or have access to discovery of the offence.

The case above corresponds with earlier findings that older children were more likely to disclose CSA to peers while younger children were more likely to disclose to adults (Schaeffer, Leventhal, Asnes, 2011). If CSA occurred at home, it is likely for the victim to regard school as a safe place and the victim would most likely confide in her friends or even teachers when support from a reliable adult is needed. As children spend a substantial amount of time of the day in school, teachers would be the most likely persons to observe signs of abuse on children. It has been suggested that teachers be included as those under obligation to report the abuse (Weatherley et al., 2012). The case above is evidence of the important role of a teacher as a trustworthy adult who can facilitate the revelation of CSA.

Another case whereby the CSA victim was ‘rescued’ by her teacher is *PP v Mohd Yani bin Che Dan [2010] MLJU 501*. In this case, the victim (aged 16) was raped several times by her own father, in the family home when no one else was at home. The victim informed her counsellor teacher who counselled the victim on two occasions and subsequently wrote a letter to the victim’s mother. The mother then lodged a police report and victim was examined by a doctor at the hospital. As a result, the father was charged and found guilty. In this case, the child’s plight might not have surfaced had the teacher not played her role in advising the mother. Although the mother lodged a police report and took the child for medical treatment, subsequently the mother had a change of mind and wanted to retract the complaint. It is possible that she wanted to retract the complaint after being persuaded by her husband or she was worried of the consequences of her husband being imprisoned. But the fact that she was prepared to retract the complaint indicates that she did not have her child’s best interest in mind. It was fortunate for the child that the investigating officer prevented the mother from retracting her report. The father was sentenced to 20 years imprisonment and 6 strokes of whipping. This case shows that in the event a mother is incapable of being the protector of the abused child, intervention from teachers and other authorities would be highly required.

Aside from teachers, other female adults who may facilitate discovery of CSA are extended family members of the victim such as aunt or grandmother. Where the perpetrator of CSA is the father or step-father, the victims may be prevented from disclosing the abuse to the mother as the presence of the perpetrator would limit the victim’s access to confide in her mother. In such circumstances, opportunities to confide in other female adult in the family or extended family would assist the victim in obtaining
the necessary help and support. In the case of *PP v Pretum Singh Lall Singh [2004] 6 CLJ 521*, the victim (aged 14) was sexually abused by her father since she was 9 years old. The incestuous rape occurred when the mother was away at work or not at home. Her father threatened to kill her and her mother if she tells anyone. The ordeal was finally disclosed to the victim’s aunt and mother when they were at their grandmother’s place in the absence of the father. It was also discovered that the victim’s older sister was also raped by their father. The victim’s aunt and mother then lodged a police report, resulting in the perpetrator to be charged and convicted to 20 years of imprisonment and 15 strokes of whipping.

It is natural for a female child to be more comfortable in disclosing CSA to a maternal figure in view of the nature of the abuse which would make it difficult for the child to express to a male, particularly when the perpetrator is a male. However, the role of a father in detecting CSA should not be disregarded. Where the perpetrator is a step-father, the biological father who has access to the child must also be attentive to the changes in the child which could be signs of CSA. In *PP v Mohd Romzan Ramli [2008] 8 CLJ 128*, it was the victim’s father who noticed the signs of CSA and took actions to protect the child. The child was 11 years old and lived with her mother who had remarried after divorcing from the child’s biological father. The step-father raped the child on numerous occasions and threatened her to silence. The child’s father discovered that she was raped on noticing changes in her where she exhibited behavioural and emotional symptoms as well as urination problems causing her to wear pampers at night. The father lodged a police report and brought the child to stay with him. The child had to be treated by a psychiatrist as she was referred to psychiatry department in the hospital and Social Worker was engaged for further assessment and counselling. The step-father was convicted for committing incest and was sentenced with 11 years of imprisonment and 3 strokes of whipping.

In sum, discovery of CSA would be alleviated if victim of CSA is able to confide in a trusted person who can provide emotional and physical support as well as assist the victim to obtain legal protection and medical treatment. The Ministry of Women, Family and Community Development of Malaysia has established measures of reporting child abuse such as the Talian Nur, Child Line and Nur Alert which can be easily accessible to children. However, it is still imperative that families/extended families, schools and community be involved in protection of children against CSA and be aware of signs of CSA. Discovery of CSA is the first step towards eradicating the threat to victimized children. Actions pursuant to discovery are important in ensuring protection of the sexually abused children through legal measures.
Witnesses, evidence and obstacles in prosecuting child sexual abuse offences

Upon the CSA being discovered, a police report has to be lodged and investigations have to be carried out. The police report complaining the occurrence of the CSA is usually lodged by the parent/guardian of the CSA victim or the Protector under the law, namely an officer from the Social Welfare Department (SWD) or a medical officer. Once the report is lodged, it is the task of the authorities to conduct an investigation. The police would carry out investigations on the crime to build its case to prosecute the perpetrator. On the other hand, the SWD officer would carry out investigation on the family background to determine whether other children in the family are being abused, whether the sexually abused child is safe to remain at home or find other placement for the child.

In order to succeed in prosecuting the perpetrator of CSA, the following evidences would be vital: the victim’s coherent and consistent version of the sexual abuse, medical evidence of the sexual abuse, evidence of other witnesses (if any) to corroborate the victim’s version or to lend support to show that the victim had endured the abuse. During investigations by the police and SWD officer as well as when obtaining medical treatment, the victim would have to explain the details of the sexual abuse. While in most cases analysed, the perpetrator pleaded guilty to the charge of incest or rape, there were cases in which the accused did not plead guilty and claimed trial. In the event the perpetrator does not plead guilty to the charges of CSA, the case would proceed with trial and the victim would have to describe the incidents of the abuse in court. The ability of the victim to be consistent in the material facts of the sexual abuse (which has to be corroborated by the medical evidence) would assure a prima facie case against the perpetrator. The defence counsel in representing the accused perpetrator would raise issues of delay in the victim lodging the complaint or police report so as to discredit the victim. In Sanusi Mat Karto v PP [2009] 7 CLJ 236, the victim’s credibility was intact despite being challenged by the defence counsel as her description of the events leading to sexual intercourse was clear and consistent, and supported by medical evidence. Similarly, in PP v Pretum Singh Lall Singh [2004] 6 CLJ 521, the victim gave graphic details of the rape and her version was corroborated by her sister’s evidence as her sister was also raped by their father when she was younger. In both cases, delay in disclosing the CSA was justified and did not affect the victim’s credibility.

However, there are cases where the victim was not able to give a consistent description of the material facts of the CSA resulting in reasonable doubts being raised. The victim’s version was challenged in the case of Md
her version of the occurrence of ‘rape’ was inconsistent and there were no corroborating evidence. In this case, the alleged rape was said to have occurred when the complainant was 13 years old but at the time of trial, the complainant was 17. She was a slow learner with low IQ but was deemed qualified to give evidence under the law. She informed teachers in her school that she was raped by her father and brother. The teachers carried out investigations and brought the matter to the police. The brother pleaded guilty on being charged for incest but the father claimed trial. In addition to the complainant’s inability to give a consistent recount of material facts in her evidence, there were other flaws in the case which resulted in the acquittal of the father. The charge was ambiguous as it did not state the date when the incident took place and it was unfortunate that the complainant’s description of when the incident occurred was challenged as there was evidence that the father was not at home at that time. In addition, the prosecution also did not call material witnesses such as the complainant’s aunt, brother and other siblings who could have corroborated the complainant’s version. Hence, it remains unknown whether the alleged rape by the father actually took place and in such situations, the child’s safety may not be assured.

Similarly, in Jubin bin Batuan v Pendakwa raya [2010] MLJU 1511 the alleged perpetrator was acquitted as the court had serious doubts in the case. The complainant was 10 years old when the alleged incest took place and the alleged perpetrator was the step-father. Although the trial court initially found the step-father guilty, he was acquitted upon appeal in the High Court as the court found serious doubts and contradictions in the complainant’s testimony in court and earlier report. The mother’s evidence did not support the complainant’s version as the complainant was hardly left alone with the step-father (the complainant was living with her grandmother and only came for visits). The complainant had many opportunities to tell someone earlier but only informed her biological father about the alleged incidents 4 years later. Further, the complainant’s allegation that her sisters were also raped was not substantiated by medical evidence which showed no signs of rape. Although medical evidence showed that there were old tears to the complainant’s vagina, there was no corroborated evidence that the step-father was the one who committed the rape/incest.

It is vital for the prosecution to prove beyond reasonable doubt that there was CSA and that the CSA was committed by an identified perpetrator. The perpetrator can only be identified by the victim or witnesses who saw the perpetrator committing CSA on the victim. The place where the offence was committed is also a material fact as that would place the perpetrator at the alleged vicinity within the time frame of the offence being committed.
and eliminate possibilities of the perpetrator raising reasonable doubts on his whereabouts. In *Public Prosecutor v Francis bin Goromon [2012] MLJU I183*, the accused was charged with rape of his 11 years old daughter. There were contradictions in the complainant’s testimony as regards the place where the alleged incident took place and the complainant also could not positively identify the perpetrator. In addition, there were contradictions on the medical report. In view of the reasonable doubts in the material facts, the prosecution had not proven the case against the accused and the accused was acquitted.

While it can be demanding for the victim to remember the details of offensive abuse, an accused cannot be convicted when there are reasonable doubts and loopholes. Although a photographic memory is not necessary, the victim has to be consistent in material details such as where the offence was committed, who committed the offence, when the offence was committed and whom did the victim inform of the offence. Early detection of CSA and prompt actions by the parent/guardian in giving support to the child might aid in preserving the details. Further, when there are witnesses to be called, it is crucial that the witnesses be available to give evidence in court. The failure to call the material witnesses to give evidence in court may not be the prosecution’s fault as it could be due to the witnesses refusing to cooperate or be involved in the case in view of the complexity it causes to family relationship. Thorough investigation before the charge is made against the accused and preparing a flawless charge are also essential steps to eliminate acquittal on the ground of technicality as well as to ensure that the right person is prosecuted.

**Trend of sentencing and punishment for child sexual abuse offenders**

Two types of punishment are imposed for rape and incest under the Penal Code: imprisonment and whipping. These punishments serve as deterrent to the perpetrator as well as to the public. Imprisonment would also ensure the victim’s safety from further possible abuse or assault by the perpetrator. The Penal Code confers judicial discretion to the judges in meting out punishment for CSA. While the maximum punishment is 30 years imprisonment, the courts would consider various factors before passing the sentence. In *Leken Gerik (M) v PP [2007] 8 CLJ 158*, the court stated that before imposing a sentence, the following has to be taken into account: 1) The gravity or severity of facts constituting the offence; 2) Circumstances in which the offence was committed; 3) Rampancy of such offence in the area; 4) The accused’s previous record; 5) The accused’s contribution and support to his family members; 6) The accused’s means; 7) The effect of conviction and sentence on his job opportunities; 8) The age and health of the accused; 9) Whether it is the accused’s first offence; 10) Whether the accused had cooperated with the police after the commission of the offence; 11) Whether
the accused had pleaded guilty; 12) The status of the accused; 13) Whether there was violence during the crime; and 14) Public interest.

In considering the gravity or severity as well as the circumstances in which the offence was committed, the courts would look at, *inter alia*, how long the victim had endured the abuse, how many occasions was the victim subjected to the abuse, the age of the victim and the magnitude of consequences suffered by the victim (e.g. pregnancy, injury, diseases contracted, psychiatric effects). The courts are very firm in passing a sentence which would send a clear message to the public that the courts regard sexual offences against children as serious. The courts would also emphasize on public interest in passing a judgment on the accused. Although the courts would deliberate on the accused’s cooperation or the fact that the accused pleaded guilty, or that the accused’s family is financially dependent on the accused, these factors would not prevail over public interest and protection of the victim. The seriousness in sentencing can be seen in the sample of cases below:

Table 1

<table>
<thead>
<tr>
<th>NO</th>
<th>CASE</th>
<th>OFFENCES</th>
<th>IMPRISONMENT</th>
<th>WHIPPING</th>
</tr>
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<tbody>
<tr>
<td>1</td>
<td>Tuan Mat Tuan Lonik v PP</td>
<td>5 counts of rape</td>
<td>30 years</td>
<td>24 strokes</td>
</tr>
<tr>
<td>2</td>
<td>Sanusi Mat Karto v PP</td>
<td>Incest</td>
<td>15 years</td>
<td>-</td>
</tr>
<tr>
<td>3</td>
<td>Idris Sidek Iwn PP</td>
<td>2 counts of incest</td>
<td>30 years (15 years for each, consecutively)</td>
<td>8 strokes</td>
</tr>
<tr>
<td>4</td>
<td>PP v Mohd Romzan Ramli</td>
<td>Incest</td>
<td>11 years</td>
<td>3 strokes</td>
</tr>
<tr>
<td>5</td>
<td>Leken Gerik (M) v PP</td>
<td>3 counts of incest</td>
<td>13 years and 3 months for each (concurrently)</td>
<td>5 strokes</td>
</tr>
<tr>
<td>6</td>
<td>Amran Mohd Jin v PP</td>
<td>Rape and incest</td>
<td>18 years</td>
<td>12 strokes</td>
</tr>
<tr>
<td>7</td>
<td>Mansor bin Meyon v Pendakwa Raya</td>
<td>3 counts of rape</td>
<td>36 years (12 years for each, consecutively)</td>
<td>8 strokes</td>
</tr>
<tr>
<td>8</td>
<td>Mohd Zandere Ariffin v PP</td>
<td>3 counts of incest</td>
<td>54 years (18 years for each, consecutively)</td>
<td>3 strokes</td>
</tr>
<tr>
<td>9</td>
<td>PP v Pretum Singh Lall Singh</td>
<td>Incest</td>
<td>20 years</td>
<td>15 strokes</td>
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</tbody>
</table>
The cases above shows that the courts put much effort in imposing a harsh punishment on the accused in accordance with the gravity of the offence committed. The distinct feature in sentencing when there are more than one charges of incest or rape is whether the sentence for imprisonment would be consecutively or concurrently. A sentence passed consecutively for each count of offence would result in longer period of imprisonment. Although the maximum punishment for rape or incest is 30 years imprisonment, each charge is regarded separately when a consecutive sentence is passed. Thus, even though the total number of years for imprisonment imposed on the accused may exceed 30 years, it would not contravene the Penal Code as long as the sentence for each charge does not exceed 30 years. The courts would usually pass a consecutive sentence when the ordeals that the victim had undergone were extremely severe and had occurred on distinctly separate occasions. The age of the accused in the light of the average life span of a person would also be taken into account if the court were to pass a consecutive sentence. If the accused would not outlive the consecutive sentence, it is likely that the court would pass a concurrent sentence. As for whipping, while its purpose is to punish the accused by inflicting pain so as to cause remorse and urge repentance, the courts would not impose whipping on the accused if he was too old or was suffering from illness at the time of sentencing. The maximum number of strokes for whipping is 24, in line with the section 288 of the Criminal Procedure Code 2012.

With the amendment to the Penal Code, the terms of imprisonment for rape and incest has been increased and the courts have passed sentences to reflect the enhancement of punishment. However, the statistics on CSA cases recorded by the SWD is still on the high side (JKM, 2014) and stern punishment alone may not be sufficient to eradicate or even reduce CSA.

RECOMMENDATION AND CONCLUSION

Malaysia has designed laws and policy in dealing with CSA with the implementation of the provisions criminalizing rape and incest under the Penal Code, regulating the management of CSA cases and victims under the
Child Act 2001, establishment of Social Welfare Department with a special unit on matters involving children, creating a medium for reporting CSA via telephone as well as incorporating some self-protection lessons in children’s school syllabus. However, CSA remains a disturbing social problem which has not significantly reduced over the years. The situation is more delicate when the perpetrator is a family member or familiar to the victim as reporting the offence becomes complicated. Victim of CSA requires support and protection from the persons closest to him/her. In addition to imposing stern punishments to deter commission of CSA, prevention of the offence is of utmost important.

In order to prevent CSA, educating the society would be crucial. Parents would have to be first in line to be trained with knowledge on detecting CSA and actions to be taken in the event of encountering CSA committed on their children. As CSA often occur in the absence of mothers, working mothers have to be cautious in leaving their children at home or in the care of other male members of the family and as much as possible to ensure that a trusted female adult would accompany the children in her absence. Usage of technology as such the webcam or spy camera for home security can be useful to monitor children in the absence of mothers. It is crucial for mothers to be wary of any changes in their children and always keep the door to communication open. Fathers too must be attentive of anything amiss in their children as the perpetrator of CSA could be other family members or someone within the community. When parents divorce, it is pertinent for fathers to keep close contact with the children and be involved in their children’s lives to assist the mothers in monitoring their children. As the perpetrator could be the step-father, fathers who maintain good relationship with their children and former spouses would be able to lend support and take immediate action upon detection of CSA. Teachers and other members of the society too need to be equipped with the knowledge of detecting CSA and measures to be taken if CSA has been detected. Schools would be the ideal place to bring teachers and parents together in initiatives for protection of children. Various NGOs advocating children’s safety and protection can be enlisted to organize awareness programs for children, parents and teachers. Regular sexual awareness education embedded in school syllabus would facilitate in educating children that CSA may also be inflicted by people familiar to the children, and not necessarily from strangers. Children also need to be informed of the available assistance they can get if they are abused. Most importantly, it is pertinent to instil in children that they are not to be blamed for CSA and that there are various measures for protecting them. Eliminating the social stigma of CSA within the society may appear to be a long journey for Malaysia but not impossible to be achieved with collaborative effort from assorted members of the society.
REFERENCES


