

Rape – the Malaysian scenario

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INTRODUCTION

In spite of heavy punishment, including the death sentence in some countries, rape still remains a serious problem in many parts of the world. Proving a case of rape in a court of law is a very challenging task. There are many reasons attributed to this situation. Rape being a criminal offence, a proof beyond reasonable doubt is necessary before establishing guilt. In many instances the offence is committed in the absence of any eyewitness. Owing to various reasons even other corroborative evidences are either lacking or absent. As a result, in many rape trials the court is in a dilemma. The court is often caught between the testimony of the alleged victim and the suspect. Generally in any criminal trial independent corroboration may be necessary before establishing guilt. In many countries the evidence ordinance pertaining to rape laws has been amended to accommodate uncorroborated testimony of the victim. However, in practice, the task becomes difficult for the court in the absence of independent corroboration. The doctor may play the important role of providing the necessary corroborative, scientific evidence to prove a case of rape. The doctor's opinion is expected to be independent and scientific and therefore it not only corroborates the crime but may also help an innocent person who has been wrongly implicated.

In many countries, particularly in the West, there are full-time forensic physicians who are specially skilled to undertake the examination of sexually abused victims. Their ability to conduct scientific examination and to provide objective opinion may help the court to arrive at a firm decision. In Malaysia, however, clinical forensic medicine is not included in the undergraduate curriculum and postgraduate courses are only available in forensic pathology. There are no trained full-time forensic physicians to undertake forensic clinical examinations. The respective clinicians in larger institutions and non-specialist medical officers in smaller hospitals undertake clinical forensic examinations. The majority of

doctors who undertake such examinations have no previous training in such procedures. Therefore it is not surprising that, in many instances, the quality of clinical forensic examinations show many shortcomings

RAPE LAWS AND INTERPRETATION

Rape is dealt under section 375 of the Malaysian penal code'. According to this section a man is said to commit "rape" who has sexual intercourse with a woman under the following circumstances:

- a. Against her will.
- b. Without her consent.
- c. 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.
- d. 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.
- d. 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.
- e. With or without her consent, when she is under sixteen years of age (statutory rape).

The word "rape" is probably derived from the Latin "*rapere*" which means "to snatch." It is generally believed that there should be some evidence of violence present on the victim before accepting that rape had taken place. The evidence of violence is expected to arise from the rapist who uses physical force on the victim or by the victim's struggle. This so-called evidence of physical violence to justify that there was no will on the part of the woman for sexual intercourse was derived from early 19th century English Common Law.² This belief has unfortunately

led the court to look for the presence of some form of physical violence on the victim to corroborate the allegation of rape. The sub-section "against her will" is generally established by the presence of physical violence. However, this belief is presently considered as unfair and law reforms in many countries have changed their rape laws to overcome this attitude. At present in most countries the main issue pertaining to rape is the question of valid consent for intercourse.

The Malaysian law on rape still retains the sub-section "against her will" in its legal definition under section 375 of the penal code.' The above sub-section "against her will" usually places the burden on the rape victim to show evidence of physical violence that could be considered as an act against her will. As already mentioned, the absence of injuries does not necessarily mean that the woman was a willing partner. Owing to many reasons, a victim may not resist the rapist and in that event the chances of a physical attack by the rapist is reduced. When victims are taken by surprise they may be too scared to resist. More importantly, in many instances the rapist is an immediate family member, a close relative or a friend. Several cases are actually incest and many more are statutory rapes where the victims are under the age of sixteen years. According to national statistics for the year 1997, 1998 and 1999, 56, 54 and 68 percent respectively of reported victims of incest were under the age of sixteen years. Naturally these are considered as statutory rape. During the same period referred to above almost fifty percent of reported rape victims were under the age of eighteen. Social and domestic pressures, particularly in this part of the world, prevent these unfortunate victims from resisting or lodging a complaint with the law enforcement. Therefore under such situations it is very unrealistic to expect a woman to show evidence of resistance or any other physical violence. In Malaysia, it is still a rule of law that the testimony of the complainant in a sexual offence case need to be corroborated by an independent witness such as medical evidence or any other evidence.'

The medical examination of the victim forms an important part of the investigation. The injuries that are suggestive of resistance offered by the victim or an attack by the rapist will provide strong corroborative evidence. Such a finding will be of immense help to the court in arriving at a judgement. But as already explained, in many instances there are no injuries present to support a struggle or a physical assault. It is

important that the doctor bears the above facts in mind. In the absence of any injuries, the doctor who examines the victim should seek explanation as to why there was no struggle or what prevented the victim from struggling. It is alleged that in the absence of physical injuries the law enforcement agencies and doctors are reluctant to accept the statement of the victim. The doctor should show great care in obtaining a detail history from the victim. He should have skill and experience in handling such a victim and in eliciting a good history.

CONSENT FOR SEXUAL INTERCOURSE

In many jurisdictions, consent for sexual intercourse becomes the sole issue in deciding whether rape has been committed. Consent when given should be free, voluntary and informed. A person who gives consent should understand the exact purpose for which the consent is given. She should be of consenting age and in a mental state and of mental development to understand the implications. There should not be any force, duress or fraud while obtaining consent. The responsibility also lies with the person who seeks consent to be satisfied that the woman is consenting freely after having understood the implications. The English Law on Rape is very clear on this issue. It says that at a trial for a rape offence the jury has to consider whether the man believed that the woman was consenting to sexual intercourse. The presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.⁴ In many countries the rape laws have been amended whereby the defendant has to prove that there was consent for sexual intercourse. The above Evidence Act shifts the burden of proof onto the accused to prove innocence. According to earlier laws the prosecution has to establish lack of consent on the part of the alleged victim. In Malaysia the position still remains unchanged and the prosecution has to establish that the woman did not consent.

For a girl the consenting age for sexual intercourse is sixteen years. Therefore, sexual intercourse with or without consent with a girl who is under the age of sixteen years is considered as "Statutory Rape". In Malaysia a person under the age of eighteen years is considered a child. Therefore a person under the age of eighteen generally cannot give consent for medical treatment. However, a girl under the

age of eighteen but over the age of sixteen can give valid consent for sexual intercourse. A similar situation prevails in other countries as well. In Malaysia, prior to the Penal Code (Amendment) Bill of 1986 the age of consent for sexual intercourse was fourteen years. At the University Malaya Medical Centre (UMMC), the Paediatric Department handles rape victims who are under the age of eighteen years whereas victims over the age 18 years are handled by the Gynaecology department. However, the gynaecologist conducts the genital examination in all cases. The Child Protection Committee (CPC) and the Intervention of Sexual Assault and Molestation Team (INSAN) are two UMMC based organisations that oversee the management of child and adult sexual assault victims.

MARITAL RAPE

Traditionally it is considered that it is not legally possible for a husband to rape his wife unless the "wife" is below the stipulated legal age and in Malaysia it is 13 years. It was believed that consent to marriage is also consent to sexual intercourse and as long as the marriage is in existence this right to intercourse cannot be revoked. Women's groups have argued that by giving such immunity, the marriage license can indeed be called a "license to rape". It is significant to note that marital rape is not recognised in Malaysian Law. Being a Muslim country, regard may have been given to the Quran which says that it is a wife's duty to submit to the husband's sexual needs, and therefore there is no such thing as marital rape. On the other hand, the Quran also emphasises that men should at all times respect women and value their freedom. The only exception in the Malaysian penal code is when the wife is under the age of thirteen years and during the *eddah* period, which is the period when the wife has to wait for 3 months before divorce is final, to determine if she is pregnant.' In a 1991 case, *Regina v R* (1993 1 CLJ), the English court held that there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with the husband, therefore a husband could be convicted of rape or attempted rape of his wife where she had withdrawn consent to sexual intercourse.

INTERCOURSE IN LAW

In Malaysia vaginal penetration by the penis, however slight, is sufficient to constitute sexual

intercourse for the offence of rape. Even the tip of the penis between the labia has been accepted as intercourse in law. If penetration cannot be satisfactorily proved the defendant may be convicted of attempted rape and if intent is not proved he may be convicted of indecent assault.^{6,7,8} It is not necessary to prove the completion of sexual intercourse by orgasm or ejaculation of semen.

In most countries, including Malaysia, the rape laws are related to unlawful sexual intercourse between a man and a woman. The French law, however, is a striking exception to this general rule. French law defines rape as any act of sexual penetration of any nature committed on another person by violence, constraint, threat or surprise.⁹ According to French law, rape does not concern only penile penetration of the vagina or an offence involving only a man and a woman. The 1997 Anti-Rape Law of Philippines is also similar. It included insertion of the penis into another person's mouth or anal orifice, or the insertion of any instrument or object into the genital or anal orifice of another person without consent as rape. At present many countries have replaced the crime of rape and other traditional sex crimes with a series of gender neutral and graded offences with appropriate punishments. In most countries the term "sexual intercourse" has been replaced by "sexual penetration". The term "sexual penetration" is defined to include sexual intercourse, cunnilingus, fellatio, anal intercourse or any other intrusions involving any part of a person's body or of any object into the genital or anal opening of another person's body.

EXAMINATION OF THE VICTIM

General considerations

In most instances the police produces the victim. Even so, a valid consent has to be obtained from the victim prior to medical examination. If the victim is under the age of eighteen years, consent has to be obtained from a parent or guardian. In Malaysia, many hospitals refuse to examine a victim unless a police report has been made. However, at the University Malaya Medical Centre, even in the absence of a police report, the victims are examined. However, the victims are cautioned and the various specimens collected from the victims are preserved for a prolonged period of time in the event a victim decides to make a delayed report. It is true that in the absence of an initial report to the police there are logistical difficulties encountered by the doctors.

History taking

The doctor who examines the victim should direct his attention to the mental state, mental and physical development, the state of the clothing and the general behaviour of the victim. The weight, height and apparent age have to be noted. A detailed history has to be obtained from the victim, which should cover the entire episode, including the actual sexual act. Also, questions have to be asked about the menstrual history, previous sexual exposures, surgical operations, childbirth, sexual intercourse with husband or boy friend within the last few days of the alleged rape, and the use of tampon, etc. Such information should be considered by the examining doctor in arriving at a reasonable conclusion.

In many countries, including Malaysia, the procedural law does not permit any cross-examination at the trial stage regarding the victim's sexual experience with persons other than the defendant. The 1988 amendment on the Evidence Act in Malaysia, Section 146A states that no question in cross-examination shall be adduced or asked concerning the sexual activity of the complainant with any other person other than the accused. This is a progressive step, because previously the victims during cross-examinations were asked about their sexual encounters with persons other than the suspect in order to discredit their moral behaviour. Such questioning became inevitable in the adversarial court system. However, at present such questions are not allowed.

It is important to remember that all that is related by the alleged victim need not be true or accurate. There are instances where false complaints of rape have been made to the police.^{10,11} It is also well known that many genuine cases of rape are not brought to the notice of law enforcement agencies owing to various reasons some of which have already been discussed.

Examination of the victim

After obtaining the history, the victim is subjected to a careful physical examination. The entire body is carefully examined for the presence of injuries, which may suggest physical violence and struggle. Often the injuries are trivial and faint and therefore needs careful examination. Injuries to the genital area, the state of the hymen and the vaginal introitus need to be examined carefully under good lighting, to detect evidence of vaginal penetration. If any bite wounds are present, ideally the services of a

forensic odontologist should be sought.¹² The bite mark may be that of the assailant or rarely self-inflicted to implicate an innocent person or for any other reasons, and hence an expert opinion may be useful.¹³ The University of Malaya Forensic Pathology Unit has the services of a specialist Forensic Odontologist.

Collection of trace materials and other specimens from the victim employing correct techniques, appropriate instruments and containers, forms an important part of the medical examination.

According to the examination protocol at the UMMC, alleged rapes less than one week old are considered as "acute cases". This time frame was adopted due to the belief that spermatozoa may be detected in the cervical canal up to one week after the last intercourse.¹⁴ This protocol is intended to provide maximum advantage to the victim. Such cases are immediately attended to. However, if the alleged offence is more than one week old, a less intense procedure is followed. Admission to a ward is decided on an individual basis. At the UMMC, the concept of a "One Stop Rape Crisis Centre" is followed to a great extent. The objective of this concept is not only to meet the medical, legal and emotional needs of surviving victims but also to established a system that will accommodate all aspects of the problem, hopefully paving the way for a national and an international strategy in the future. The INSAN and the CPC comprise doctors from gynaecology, paediatrics, psychiatry and forensic departments, hospital-based medical social workers and nursing sisters.

EXAMINATION OF THE SUSPECT

Often the police produce suspected rapists for medical examination. The protocol to be followed is basically the same as for the alleged victim. A valid consent for examination is essential. The doctor should be unbiased as the person produced is only a suspect and not proved of the offence and he may well be innocent. During the interrogation no police officers are allowed to remain in the examination room.

Special emphasis has to be paid to examination of the male genitalia. The development of the penis, its size, whether circumcised or not, whether the prepuce is retractable or not, development of the testicles, evidence of vasectomy are important observations. In an uncircumcised person, the prepuce should be retracted and the frenulum

carefully examined, because this may be injured during intercourse.

A unique practice in Malaysia relates to the request by the police for suspects to be examined for potency. In many other countries, the need for such an examination usually arises when the suspect claims impotence as a defense. Police frequently link potency with the so-called "masturbation test" and suspects are routinely produced before doctors for this test, believing that suspects who succeed in ejaculation can be considered potent. This practice is at present being severely discouraged. The doctors at the UMMC Accident and Emergency Department are advised to refrain from the so-called "masturbation test" to establish potency.

A detailed investigation for potency usually becomes necessary when the suspect claims that he is impotent. Initial examination will reveal his incapacity if there are obvious anatomical abnormality, inherited genetic disorders or definite illnesses that may affect potency. Test for impotency involves a physical examination, thorough clinical examination and relevant laboratory investigations. The majority of male impotence, particularly in young men, is due to psychological causes. Hence a clinical examination for male impotency invariably involves a psychiatric assessment. There is certainly no place for masturbation.

FINAL REPORT

The entire exercise is to finally submit a report to the court and to give oral evidence if necessary. The details have to be carefully and accurately documented in a chronological order. Nothing should be spoken from memory. No report or oral evidence will be acceptable in a court of law unless it is based on documented materials. The final decision as to whether it is a rape or not, is a matter for the court to decide. The doctor at no stage should refer to rape. His responsibility is to document the injuries, the state of the hymen, vagina etc. and to determine whether there was any evidence of sexual intercourse. Besides, he will have to comment on other related medical matters such as pregnancy, venereal diseases, etc. Evidence of sexual intercourse certainly does not mean that rape had taken place. On the other hand totally negative medical findings does not rule out rape. The doctor's role is to provide independent, scientific, corroborative evidence whenever possible that may support various claims. It should be borne in mind that the medical evidence is only a part of the overall

investigation and is useful to corroborate other non-medical evidences.

TEACHING OF FORENSIC MEDICINE

In Malaysia, there is insufficient emphasis in the teaching of forensic medicine. In most medical schools, a few lectures are delivered to undergraduates and that too is in forensic pathology rather than forensic medicine. In most medical schools even though the forensic section is referred to as a forensic medicine unit, in fact it is essentially a forensic pathology unit and it is nearly always part of the department of pathology. Whatever little practical training medical undergraduates receive is also in forensic pathology. There is minimal or no training in clinical forensic medicine. There is no mandatory examination in either forensic pathology or clinical forensic medicine in the undergraduate curriculum. However, when the undergraduates qualify as doctors they are expected to undertake full medico-legal responsibilities such as conducting medico-legal autopsies and carrying out clinical examinations on victims who are sexually or physically assaulted and provide reports to courts or to give oral evidence. The present situation appears quite paradoxical. Postgraduate training is available only in forensic pathology through a four-year full time Master of Pathology programme. There is no established post for forensic physician in the Ministry of Health or in the Universities. At present respective specialists in larger hospitals and non-specialist medical officers in smaller hospitals undertake forensic clinical examinations. None of them have any specialised training in the subject and hence the quality of their examination in most instances may have various shortcomings.

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