

ELEMENT OF CONSENT IN STATUTORY RAPE LAW: AN ANALYSIS UNDER THE MALAYSIAN PENAL CODE

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Lack of consent is a necessary element in every rape case. However, making sexual contact with a minor or incapacitated person who actually consented does not mean that it is not a rape. This is because, the consent here may result from either forcible compulsion by the perpetrator or an incapacity to consent on the part of the victim. The law provides that persons who are physically or mentally helpless or who are under a certain age in relation to the perpetrator are deemed legally incapable of consenting to sex. This law automatically shows that the rapist is guilty of the offence of rape if the victim is under age even she consented to the act. Hence, this paper will discuss law relating to the rape offences involving minors under section 375(g) of the Malaysian Penal Code. A legal analysis will be made to see whether certain circumstances should be considered to acquit the accused on the basis of genuine consent given by a person. By giving this exception to certain genuine consent cases, the law is assumed to ensure the protection given to minors under the law is not misused.

Keywords: statutory rape; minor's consent

I. INTRODUCTION

In spite of heavy punishment, rape remains a serious problem in many parts of the world. Proving a case of rape in the court of law is really a heavy task. This is because rape is a criminal case and it is necessary to establish the standard of 'beyond reasonable doubt' to convict the accused. Under section 375 of the Penal Code, a man is said to commit rape when he has sexual intercourse with a woman without her consent. Hence, the prosecution has to establish a prima facie case against the accused. Two elements to be proved are, the non-consent and the penetration. If the accused fails to raise any doubt, then he will be found guilty. However, the provision further states that the consent of the girl under sixteen years of age is immaterial. The end result of the subsection is that, the prosecution does not have to prove any non-consent, but only the penetration.

In many trials, the court is in dilemma to establish a rape case. 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 of violence is expected to arise from the rapist who uses physical force on the victim or by the victim's struggle. However, this evidence is no more material in case of under-aged rape. Whether there is force or consent given by the girl, the accused will be found guilty if the penetration is proved. The conviction can be made by the judges even if the 'real consent' had been given by the girl.

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Therefore, the above sub-section 375 (g) “with or without her consent” waives the burden of proof on the rape victim to establish that she had not consented to the sexual intercourse. Hence, the absence of body injuries or any other physical violence does not affect the judgement of the court even if the girl is a willing partner or enemy to the accused.

II. HISTORICAL DEVELOPMENT

The word “rape” is probably derived from the Latin “rapere” which means “to snatch.” The common law defined rape as “the carnal knowledge of a woman forcibly and against her will” (Wayne, 2000). In other words, it means that, the victim has to confirm that there was no consent given on her side, Hence, the victim was required to prove a continued state of physical resistance to show the non-existence of consent given. This so-called evidence of physical violence to justify that there was no will on the part of the woman for sexual intercourse (Nadesan, 1999).

Historically, rape was defined as unlawful sexual intercourse with a woman against her will. The essential elements of the crime were sexual penetration, force and lack of consent. Women who were raped were expected to have physically resisted to the utmost of their powers or their assailant. Nevertheless, not in all cases, lack of consent will also amount to rape. It means that, rape can still be committed even if the victim consented to the intercourse. According to section 375 of the Malaysian Penal Code, the offender can still be charged for rape if the woman is under the influence of the offender or the woman is under the age of 16 years old even if the consent is given. This has been established by the court in statutory rape cases of *PP v Mohd Musa* [2013] 8 MLJ 466; *PP V Abdul Malek Abdullah* [2013] 8 MLJ 251 and *PP v Mohd Malek Ridzuan* [2014] 1 MLJ 363. In these cases the accused were sentenced between 8 to 14 years of imprisonment. This shows that consent given by under-age girls are invalid and renders the accused guilty of an offence of rape.

The above judgements were given based on the statutory rape provision in the Malaysian Penal Code. Section 375 of the Penal Code (Act 574) states that:

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

- (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;
- (e) 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;
- (f) with her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her;
- (g) with or without her consent, when she is under sixteen years of age.

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

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

From the above statement, section 375(g) clearly states that ‘the consent’ is immaterial in cases which the victim is under 16 years of age. This provision seems to open gate for false charge against a man who has a girl- friend under the age of 16. Hence, this provision will be analysed further to see whether it gives an opportunity to women in certain situations to lodge report of rape even they have given consent to the act. The provision laid down a legal principle that an offence of rape will be charged upon a man simply because the woman is under age and under the ‘influence’ of the man.

Hence, it must be noted that by virtue of section 375(g) of the Code girls under the age of 16 are deemed by the law to be a minor and incapable of giving a valid consent to a sexual act. In the preamble of the Child Act 2001 (Act 611), it was stated that a minor, by reason of his or her physical, mental and emotional immaturity, is in need of special safeguards, care and assistance, to enable him or her to participate in and contribute positively towards the attainment of the ideals of a civil society.

Furthermore, it is generally accepted that under-age girls are at the adolescence stage which is considered as a challenging developmental stage. Adolescents are struggling among other things with issues concerning body image, sexuality, independence and personal identity. This is when they are most vulnerable and often unable to think critically about, or even appreciate, the implications of their behaviours including sexual relationships. Therefore, they need an extra protection until they reach the age of majority.

III. THE DEFINITION OF CONSENT

The Penal Code does not provide a definition of what consent actually means. This leads to a number of problems, including the inappropriate and semantically

curious language of section 375(f) and (g). It is therefore open to the courts to define the word (Stanley Yeo, Neil Morgan, Chan Wing Cheong; 2009). Section 90 of the Code states that:

- A consent is not such a consent as is intended by any section of this Code –
- (a) if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;
 - (b) if the consent is given by a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or
 - (c) unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Hence, according to section 90(c) above, consent is vitiated if it was given by a person under 12 years of age. Further, the provision also indicates that a person under 12 years of age is recognised when ‘the contrary’ appears from the context. However, this consent, again, is immaterial under section 375(g). In other words, the capability of a person to give consent under the age of 12 under section 90 does not mean anything to rape cases.

What is the position of a clear consent given by a person above 12 and under the age of 16? Section 90 of the Code does not state anything on this situation. Again the ability to give consent in this context does not give any extra meaning to rape cases since consent is immaterial for statutory rape cases.

If consent can be given by a person under 12 years of age when it appears so, then how to show it? It has been held that consent always imports submission but submission does not necessarily import consent. This has been held in the case of *Augustine Foong Boo Jang v PP* [1990] 1 MLJ 225. Hence, the consent can be implied the submission of the person plus any corroborative evidence including any prior intimate relationship between the persons.

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IV. DISCUSSION ON “MINOR’S CONSENT”

From the above discussion, it is submitted that consent for sexual intercourse with an under-aged girl is no more becomes the issue in deciding whether rape has been committed. According to section 375(g) of the Penal Code, consent is immaterial if it is obtained from a minor. It means, the accused will still be convicted for rape if the prosecution shows the age.

Relating to the above situation, section 375(g) also rises a question, when a woman can take the opportunity to trap a man using the provision. It is because the

provision can be misused if the woman and man was in a special relation for a long time. They might have the intimate relationship long before that. Yet, the man can still be convicted if the victim is a minor, under 16 years.

When section 375(g) waives the element of consent in establishing a rape case, the conviction of the accused may seemed unfair when the consent was genuinely given by the girl. When an accused is charged with rape claims, and the victim is under 16 years of age, the offence of rape will automatically be established even if the woman did give her consent. Relying on the provisions, certain people can make a bad use of this provision to convict men who are their 'boyfriends' even the intercourse happened with the women's consent.

When a girl is said to give a 'genuine' consent? Consent when given should be free, voluntary and informed. Thus, when a person who gives consent, should have fully understood 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. A girl who is 15 or 16 years of age will have such a capacity to understand the implications of her own act.

Surprisingly to inform, 80 percent from the total rape case, involved women under the age of 16 (Utusan; 2011). To show the big number of cases, from 2007 until 2012, 5976 under age rape cases have been brought for trial (2012: Attorney General's Office). Further, more worryingly, majority of the reported cases revealed that the victims did the sexual intercourse with their own consent. Unfortunately, the accuseds are convicted due to the statutory rape provision under section 375(g) of the Code. Hence, are these convictions justified? The offenders were punished merely due to the statutory rape provision although in fact, consents were given by their partners!

Hence, relying on the above explanation and analysis of the provision also, several legal interpretation and explanation need to be made i.e.:

1. Whether the definition of the word 'consent' under section 375(g) needs to be legally explained to tailor different situations in rape cases;
2. Whether the limit age of 16 under section 375(g) should be reviewed and a lower age of maturity should be considered in order to meet the modern lifestyle; and
3. Whether section 375(g) needs a reformation.

An in-depth research and analysis should be made based on the above questions to allow the Penal Code to give a fairer provision towards statutory rape cases.

It is undeniable that under-aged rape is a serious offence. The rapist will be convicted straight away if the penetration is proved and the girl is under age. In

considering any amendment for statutory rape provisions also, the law should always look at the severity of its punishment compared to the ordinary rape cases. The punishment for statutory rape cases is different. Section 376 states on the heavier punishment of under aged rape. The provision states that:

- (1) Subject to subsections (2), (3) and (4), whoever commits rape shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.
- (2) Whoever commits rape on a woman under any of the following circumstances:
 - (a) at the time of, or immediately before or after the commission of the offence, causes hurt to her or to any other person
 - (b) at the time of, or immediately before or after the commission of the offence, puts her in fear of death or hurt to herself or any other person;
 - (c) the offence was committed in the company of or in the presence of any other person;
 - (d) without her consent, when she is under sixteen years of age;
 - (e) with or without her consent, when she is under twelve years of age;
 - (f) with her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her; or
 - (g) at the time of the offence the woman was pregnant, shall be punished with imprisonment for a term of not less than five years and not more than thirty years and shall also be liable to whipping.
- (3) Whoever commits rape on a woman whose relationship to him is such that he is not permitted under the law, religion, custom or usage, to marry her, shall be punished with imprisonment for a term of not less than eight years and not more than thirty years, and shall also be punished with whipping of not less than ten strokes.
- (4) Whoever whilst committing or attempting to commit rape causes the death of the woman on whom the rape is committed or attempted shall be punished with death or imprisonment for a term of not less than fifteen years and not more than thirty years, and shall also be punished with whipping of not less than ten strokes.

Hence, according to the provision, a heavy punishment for rape i.e. imprisonment for a term which may extend to twenty years will be imposed upon a rapist. A heavier punishment however, is imposed if the rape involved under age woman i.e. the term may extend to thirty years.

This shows that, our legal system does give a serious consideration to reduce the crime of under aged-rape cases. However, the system can be misused by certain

people. The life style nowadays should be considered where women reach their age of puberty even before the age of 10. This shows that most women below the age of 16 already understand the effect of consent in a sexual relationship. It further means that, they understand the consequence of their act in future.

In *Nor Afizal bin Azizah v PP* [2012] MLJU 812, instead of sentence with imprisonment, the learned Session Court Judge place the accused on a bond in the sum of RM25,000.00 for good behavior for a period of five years under section 294 of the Criminal Procedure Code. In this case, the decision was made by the learned Session Court Judge after the court considered that the accused was not only a young offender but also a first offender. Further, other extenuating circumstances and the fact that they had consensual sex are also material.

According to Malaysian former Chief Justice, in a case involving young couple, the girl also contributed to the act and he said both of them are guilty and it is not fair if only the man is penalized (The Malay Insider: 2013). Therefore, apart from punishment under the criminal court, the Public Prosecutor may refer the under-age girl to the Syariah Court to be investigated by the enforcement officer in the Syariah Court on consensual sex between them. But this kind of practice is only applicable to Muslim couple. Section 23(2) of Syariah Criminal Offences (Federal Territories) 1997 (Act 559) states:

“Any woman who performs sexual intercourse with a man who is not her lawful husband shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.”

This alternative punishment may become an effective preventive measures to curb young couple sex. It must be submitted although statutory rape law aims to protect young girls from all forms of abuse and exploitation, the law must not open to be manipulated by irresponsible people.

In spite of heavy punishment, including the death sentence in some countries, rape still remains a serious problem in many parts of the world. For 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 dilemma. This happened also in the rape cases involving minors under 16 years of age, who might understand about the implication of consent. The court is often caught between the testimony of the alleged victim and the suspect. The doctor also may play the important role of providing the necessary corroborative, scientific evidence to show the original condition of the victim. 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 accused whose consent has been given (Nadesan & Omar; 2002).

V. CONCLUSION

After a long legal and social discussion and analysis of the provision section 375(g) of the Penal Code, the author would like to submit that the provision needs further research and reformation on the issue of consent. The court of law should have another thought on the definition of consent and the limit of age that can be considered to be capable of giving consent. The interpretation and the circumstances stated under section 375(g) should be clearly set out in order to have an efficient enforcement. It is also to ensure that the provision will not be manipulated by people for their own interest.

Furthermore, in relation to the penalty for statutory rape which involved young couples, a comprehensive study should be conducted to avoid injustice. It is submitted that imprisonment is not the only safeguard to prevent consensual sex among teenagers. Indeed preventive measures such as sex education, discipline and religious knowledge are more vital.

The final decision as to whether there is a rape or not, is a matter for the court to decide. However the court, is subject to the mandatory provision of the Penal Code i.e. having sex with a minor under 16 years of age is a rape. Therefore, it is the expert's role is to provide independent, scientific, corroborative evidence whenever possible that may show the consent given is genuine and understood by the minor. This will further help the court in giving the sentence to the offender. It should be borne in mind that the medical evidence is also a part of the overall investigation and is useful to corroborate other non-medical or circumstantial evidences.

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