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Seeking Justice for Victims of Sexual Crime is a three-year study conducted by Women's Centre for Change (WCC), Penang. The book contains detailed data, statistics and information on sexual crimes and trials of sexual crime from the Penang courts and three national newspapers from 2000 to 2004. This project is a pioneering study in Malaysia on the treatment of cases of sexual crime in court.

The key findings of the study revealed that 45 per cent of sexual crime cases did not go to trial as they were discharged not amounting to acquittal. The conviction rate stood at only four per cent. The book contains valuable data from the cases – profile of victims, the accused, trial process, verdicts and sentencing. The book also analyses the structural and attitudinal factors within our criminal justice system.

Seeking Justice for Victims of Sexual Crime is a documentation on how our criminal justice system treats victims of sexual crime. It raises fundamental questions about gender and justice, and has recommendations for improvement.



Women's Centre for Change
Penang

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SEEKING JUSTICE FOR VICTIMS OF SEXUAL CRIME

Women's Centre for Change, Penang

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**James Lochhead
and Tan Pek Leng**

With inputs from the WCC Research
and Advocacy Project Sub-committee

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Research and Advocacy Project Sub-committee

Lalitha Menon (Chairperson), Lim Kah Cheng,
Shakila Abdul Manan, Hajar Abdul Rahim, Honey Tan Lay Ean,
James Lochhead, Tan Pek Leng, Maznah Mohamad,
Zarizana Abdul Aziz, Loh Cheng Kooi, Karen Lai,
Adilah Ariffin and Angeline Loh

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Women's Centre for Change

24-D Jalan Jones

10250 Penang, Malaysia

Tel: 04-228 0342

Fax: 04-228 5784

Email: wcc@wccpenang.org

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EDITING AND PROOFREADING BY

Loh Cheng Kooi, Jackie Tan Joo Phaik and Sudandarambal Saminathan

COVER, LAYOUT AND DESIGN BY

Adrian Cheah, Neo Sentuhan Sdn Bhd

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Women's Centre for Change
Pusat Kesedaran Wanita
(formerly Women's Crisis Centre)

The Women's Centre for Change (WCC), Penang is a non-governmental, non-profit organisation dedicated to the elimination of violence against women and children, and the promotion of gender equality. Established in 1985, WCC provides services in counselling, legal advice and shelter for women in crisis, irrespective of their ethnicity, religion and social background. WCC also conducts outreach programmes on sexual abuse prevention for children and youth, and on gender awareness for the public. WCC is a member of the Joint Action Group for Gender Equality (JAG) which actively campaigns for policy and legal reforms affecting women and children.

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List of Abbreviations

AC	Appeals Court
ACP	Assistant Commissioner of Police
AWAM	All Women's Action Society
CA	Court of Appeal
CID	Criminal Investigation Department
CJS	Criminal Justice System
DC	Defence Counsel
DNA	Deoxyribonucleic Acid
DNAA	Discharge not amounting to acquittal
DPP	Deputy Public Prosecutor
FC	Federal Court
HC	High Court
HIV	Human Immunodeficiency Virus
HMCPSP	Her Majesty's Crown Prosecution Service Inspectorate
HMIC	Her Majesty's Inspectorate of Constabulary
IGP	Inspector-General of Police
ILKAP	Institut Latihan Kehakiman dan Perundangan (Judicial and Legal Training Institute)
IO	Police Investigation Officer
JAG	Joint Action Group for Gender Equality
NGO	Non-governmental organisations
OKT	<i>Orang kena tuduh</i> (Suspect)
OSCC	One Stop Crisis Centre
PDRM	Polis DiRaja Malaysia (Royal Malaysian Police)
SC	Sessions Court
SIS	Sisters In Islam
SP	<i>Saksi Pendakwa</i> (Prosecution Witness)
SPSS	Social Scientific Statistical Software
STD	Sexually Transmitted Diseases
SUHAKAM	Suruhanjaya Hak Asasi Manusia Malaysia (Human Rights Commission of Malaysia)
TPR	<i>Timbalan Pendakwaraya</i> (Deputy Public Prosecutor)
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
US	United States
USM	Universiti Sains Malaysia
WAO	Women's Aid Organisation
WDC	Women's Development Collective

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Mohamad Imtiaz

WCC Research and Advocacy Project Team

Volunteers: Lalitha Menon, Lim Kah Cheng, Shakila Abdul Manan,
Hajar Abdul Rahim, Zarizana Abdul Aziz, Maznah Mohamad and
Anuradha Madhur

Consultants: James Lochhead, Tan Pek Leng and Honey Tan Lay Ean

Staff: Loh Cheng Kooi, Adilah Ariffin, Karen Lai, Angeline Loh,
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Our sincere apologies to those that we may have inadvertently left out.

Preface

The Women's Centre for Change (WCC), Penang has been monitoring newspaper reports of sexual crimes for years and has often noted with despair cases where the rape victim's testimony is not accepted or is treated with suspicion due to late reporting of the crime and of the high incidence of cases where the accused were acquitted due to insufficient evidence. These cases prompted WCC to embark on a three-year project in 2005 to study how the judicial system deals with sexual crimes and the extent of gender sensitivity displayed by all key players involved in the judicial process - the police, the prosecutors, the defence counsels and the judges. Little did we know the tremendous amount of work it would entail taking on this challenging task.

A WCC Sexual Crime Project subcommittee was formed (later renamed the Research and Advocacy Project sub-committee, in short, 'Rappers'), consisting of volunteers, lawyers, researchers and WCC staff. This unique combination of legal and academic minds no doubt enriched our project greatly, but it also meant that there were so many diverse issues of interest that the court questionnaire we finally came up with consisted of no less than 336 items of questions!

Needless to say the project was a long and arduous journey of which the first step was to obtain permission from the various courts to allow us to undertake the data collection. The WCC staff then had to station themselves in the various courts in Penang to painstakingly glean the relevant data from the files of sexual crime cases covering a five-year period from 2000 to 2004. This was a daunting task as the trial records were hand written and sometimes incomplete. On one occasion, the staff found themselves in the dusty storeroom of a court and had to literally climb over the huge stack of files to locate the files of the sexual crime cases!

Similarly, the WCC staff had to go to the University Sains Malaysia Library every day for months on end to collect data from newspaper reports of every sexual crime case in three newspapers: The Star, New Straits Times and Utusan Melayu for the same period. Notwithstanding the mountain of data collected, we also conducted interviews with judges, prosecutors, investigating officers, defence counsels, and personnel of various government agencies like the Penang Hospital's One Stop Crisis Centre and Chemistry Department. For a more complete picture, Court observations were also made at rape trials and selected cases were studied in-depth. Perhaps the most difficult of all the tasks was the analysis of the huge data collected and the writing of this book.

This project lasted over five years, from the time the project was conceived in 2004 till the production of this book. It was only with sheer determination and grit, and the tenacity and dedication of the WCC Rappers that a project of this magnitude was able to come into fruition. From time to time there was a change of composition with some leaving and new ones joining in. What was remarkable, however, was the commitment and resolve of each member of the team, regardless of whether the person was a staff member, consultant or volunteer, to ensure the completion of the project. For this, WCC wishes to extend our utmost appreciation to all who saw us through the project.

We hope that this book will be of immense use to many levels of people including researchers, academicians, NGOs, police investigators, prosecutors, defence counsels and judicial officers. By developing a better understanding of sexual crime cases and its victims, the stakeholders involved can work effectively towards the process of improving the support system and attaining justice for victims of sexual crimes.

Finally, WCC sees this book not as the end of the journey but as the beginning of more opportunities for greater discourse on the subject. We hope that the book will serve as a foundation for more concerted efforts to redress the many aspects found wanting in the passage of a sexual crime case – from the time of the complaint to the disposal of the case – so that victims of sexual crimes ultimately find justice and the public have more faith in the judicial system.

Lalitha Menon

Chairperson

Research and Advocacy Project Subcommittee

Women's Centre for Change, Penang

1

CHAPTER ONE

Introduction

WHY THIS BOOK

The Women's Centre for Change (WCC), Penang has been involved in advocacy and service provision for women, especially women who are the victims of domestic and sexual violence, since its inception in 1985. Through this experience spanning more than twenty years, WCC has observed many worrying trends – trends, if not arrested, mean intensified violence against women and continued trauma for them. We have seen an increase in the incidence of sexual crimes, a significant proportion of which involves young victims and perpetrators. We have seen the trauma suffered by our clients as a result of sexual assault which is further exacerbated as they meander through the criminal justice system – uncertain of the procedures, uncertain if they can rely on any support system, and uncertain if their day in court will bring them justice. The obstacles they face in the course of seeking justice which could range from unsympathetic and insensitive treatment by the police, poor support and communication from the public prosecutors, and the intimidating atmosphere in the courtroom, have led to many victims not proceeding with their cases. We have also seen how gender biases continue to influence and affect the investigation, prosecution and arbitration of sexual crime cases. Victims of sexual crime still face persistent prejudices that not only add to their psychological ordeal but can also have an adverse impact on the outcome of their cases.

In order to conduct effective advocacy against sexual violence, WCC saw the importance of drawing attention to and campaigning on these issues based on well-grounded data and information. Hence, we embarked on this research project to collect and document information and statistics on sexual crime and sexual crime trials so that WCC can:

- publish, discuss and act concretely on the issues related to sexual crimes against women;
- enhance gender awareness within the judiciary and relevant government agencies on the situation of violence against women;
- lobby for legislative reforms that would ensure a fair trial and trial experience for the victims of sexual crime.

The key findings of our research are that **45 per cent of court cases in our sample did not go to full trial**, and of the contested cases that were heard in full, **only four per cent resulted in a**

conviction. This proves that our initial concerns are justified. Much needs to be done to improve the system so as to ensure justice for the victims of sexual crime. We hope that by highlighting these issues, this book can make a meaningful contribution in that direction.

OUR RESEARCH

This research is part of a three-year European Commission funded project entitled **Building Greater Democratic Processes and Citizens' Participation through Advocacy, Education and Reforms and Enhancing the Monitoring of the Commitments of the Malaysian Government (2005–2007)**. The project involved three Malaysian women's organisations, one of which was WCC.¹ The WCC component focussed on **Advocating Non-Discriminatory Practices and Reforms in the Judiciary and Related Government Agencies**, and was divided into four parts:

- documentation of media archives (media research);
- researching of court cases (court research);
- holding of dialogues with the judiciary in Penang and with prosecutors at the national level;
- lobbying for relevant reforms of legislation and practices.

This book draws particularly on the first three chapters, which have been completed, and emphasises the fourth chapter – the need for advocacy and reform, which is on-going.

This book should be seen as extending all the documentation and campaigning done previously with regard to violence against women in Malaysia. Such campaign work has most significantly been co-ordinated since 1985 by the coalition of women's groups, the Joint Action Group for Gender Equality (JAG).² JAG has drawn on research and documentation provided by member organisations and others, and has been in the forefront of the struggle to establish recognition of and action on rape, domestic violence, sexual harassment and other forms of violence against women. This has included consistent and inclusive recommendations to government and to non-government agencies about initiatives that could help reduce violence against women and provide better support for victims.

By widening the focus on sexual crime, this book represents an extension of the discussion beyond rape and domestic violence, the two areas on which there has been the most focus in the past. By showing that many of the prejudices and biases that have been documented as relevant to rape, for example, are also relevant to other sexual crimes, this research is able to add a wider picture of what happens to victims of such crimes within the criminal justice system in Malaysia.

1. The other two partners were the Women's Development Collective (WDC) and the All Women's Action Society (AWAM).

2. Previously known as Joint Action Group against Violence Against Women (JAG-VAW). JAG-VAW was formed in 1985 by several women's groups to launch the campaign against violence against women. In 2008, the core members are AWAM, WCC, WDC, Women's Aid Organisation (WAO) and Sisters-in-Islam (SIS).

SEXUAL CRIME

Within the context of Malaysian law, sexual crimes include the following:

- outrage of modesty
- kidnapping or abducting a woman
- persons living on or trading in prostitution
- rape
- statutory rape
- incest
- carnal intercourse against the order of nature
- carnal intercourse against the order of nature without consent
- outrage of decency
- inciting a child to an act of gross indecency
- word or gesture intended to insult the modesty of a woman

The findings of this book are based on an analysis of completed trials of the above sexual crimes which were conducted in the courts in Penang during the years 2000 to 2004 and newspaper coverage of sexual crime trials during the same period.

SCOPE OF THE BOOK

Analysis of the information compiled from the court files resulted in a huge corpus of data, the most salient of which are presented in Chapter Two. The data demonstrate that there are indeed many issues that demand attention and concern, such as the young age profile of the victims and the accused, the long length of time taken for the trials to be concluded, the high incidence of 'discharge not amounting to an acquittal' (DNAA), and the low rate of conviction of those claiming trial.

Chapter Three links the statistical findings on the outcome of sexual crime trials to the on-going discussion about the overall state of Malaysia's justice system. Optimum access to justice for victims of sexual crime is related to such issues as the resourcing and professionalism of the judicial system and all other agencies involved in the investigation and prosecution of such crime. One of the issues involves the professionalism of the police force such as the manner in which reports are accepted and recorded, and the way investigations are conducted. Another issue is the professionalism of the prosecution: the quality of case preparation and presentation, and the effectiveness of re-examination. The huge backlog of cases in our country which crucially affects the chances of a fair and expeditious trial, and the effectiveness of inter-agency cooperation, are other concerns. All the above have a bearing on sexual crime trials.

Besides these structural issues, patriarchal attitudes which pervade the judicial system and continue to have a hold on the people who work within it constitute another barrier to justice for the victims of sexual crime. In Chapter Four, we discuss in depth the impact of these attitudes, epitomised by a variety of myths and stereotypes related to sexual crime and female behaviour. This impact is described not just in relation to what happens in the courtroom, but also at every stage of the criminal justice system - from reporting to investigation, the decision to prosecute, and finally to the trial itself.

The research draws the links between sexual crime and the wider social discourse, especially as it pertains to gender and gender-based power relations in our society. In Chapter Five, we focus in particular on how this dominant social discourse affects the media. We look at whether there is a link between attitudes in the courtroom and society at large towards female victims, and the way the media reports sexual crime. We also examine if the media reinforces prevailing gender biases.

By synthesising the discussions in the previous chapters, Chapter Six presents WCC's recommendations for improvements to the criminal justice system so as to ensure better justice and a better trial experience for the victims of sexual crime in Malaysia. Through the findings and recommendations presented, we hope that this book can help put into effect initiatives that would make the journey of a sexual crime victim to justice and recovery as effective and well-supported as possible.

CHAPTER TWO

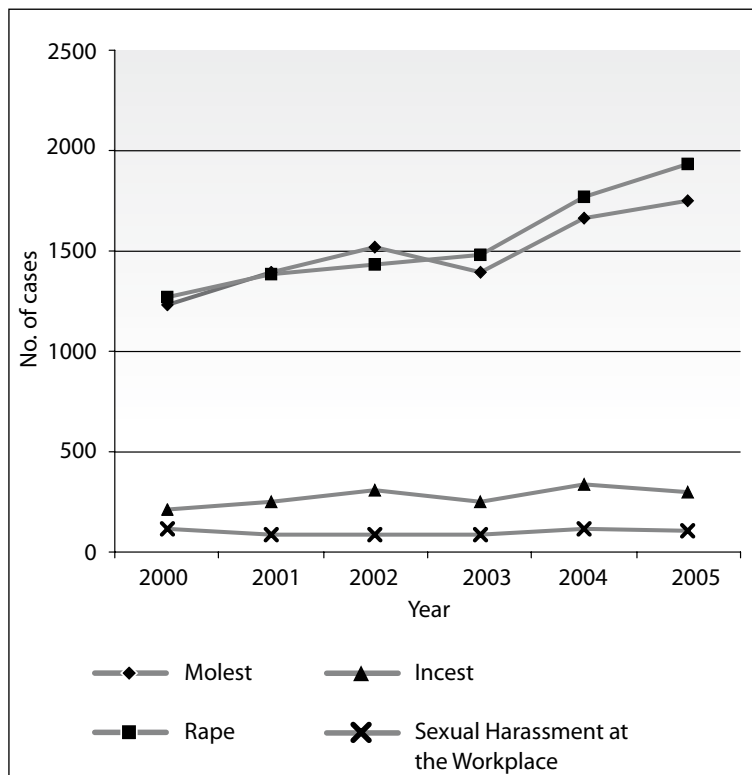
A Profile of Sexual Crimes in Penang

WCC's research covered a period when reported incidences of sexual crimes were on the increase. This was especially true of molest and rape cases, which increased by 41 per cent and 59 per cent respectively from year 2000 to 2005 (Figure 2.1). The number of incest cases fluctuated but the total number of cases in 2005 (295) exceeded that of 2000 (213) by nearly 40 per cent.

The rising number of reports does not necessarily mean that the actual number of sexual crimes being committed has increased. It may be that, for example, more victims or other complainants are reporting the crimes. Research elsewhere has shown that recorded rape offences rise when society becomes less tolerant of rape, thus encouraging reporting and leading to changes in

the way the police respond to and record rape allegations.¹ But whatever the reasons for the increased numbers, it becomes more important that we understand the different factors that precipitate these crimes, the profiles of the crimes and what happens to sexual crime victims. Armed with that understanding, we can make a collective social response, both in bringing the perpetrators of crime to book and in offering the victims the fullest possibility of justice and recovery.

Figure 2.1: Number of sexual crime cases, 2000-2005



Source: Royal Malaysian Police, Bukit Aman, 2006

1. Temkin (2002), p.21

METHODOLOGY

The methodology of the research, designed with the aim of achieving this understanding, comprised two main components: court research and media research.

Court Research

With the cooperation of the courts, WCC was able to study all closed sexual crime cases² in the subordinate courts of Penang between 2000 and 2004. This excluded any appeal hearings at the High Court or above. The resultant 439 cases covered a wide variety of sexual crimes.

Analysis of the 439 cases was based on a comprehensive questionnaire. For single victim/accused cases, the questionnaire may cover some 190 items of data. For multiple victim/accused cases, there may be a maximum of 336 items of data. In such multiple cases, it can involve four victims and five accused.

The data included information about the charge, which court heard the case, profile of the victim(s), profile of the accused, profile of the judges, prosecutors, defence counsels and watching brief counsels, the plea, the conduct of the case (including issues raised by the prosecution, the defence and in cross-examination, the length of time of the trial and whether any evidence was heard *in camera*), the verdict, the sentence, and information relating to remand and bail. The data were analysed using the SPSS software.

Interviews were also conducted with key personnel, including sexual assault survivors, judges, deputy public prosecutors, prosecuting officers, defence counsels, investigating officers, police officers, and staff of agencies like the Chemistry Department or One Stop Crisis Centre.

In addition, WCC undertook other work. Direct observations of rape trials were made. Four high profile sexual assault cases from the same time period of the research were selected and studied.³ An analysis of law journal reports on sexual crime trials was undertaken. Also, some preliminary research was conducted on certain key background areas. This included looking at the history of court recording, at One Stop Crisis Centres (OSCCs), and at medical evidence including the role of the Chemistry Department and Departments of Serology and Pathology. Recent police initiatives in establishing Sexual Crime Units and steps taken to support sexual crime victims and investigations, and the general issues pertaining to the workings of the criminal justice system, were looked at.

2. These are cases where the verdict had been announced and there was no pending appeal.

3. The four special case studies involved: a) a case where several university students were accused of raping a minor b) a case where a policeman was accused of raping two migrant workers detained in a police lock-up c) a high profile rape-cum-murder case, and d) a case of incest against a minor, which went through various appeal procedures and is of interest because of the differing legal arguments and judicial interpretations of issues such as corroboration.

In doing the court research, we were guided by four main objectives:

- to gain an insight into how the legal and judicial systems deal with cases of sexual crime which are filed in court;
- to gain an overview of the gender awareness and sensitivity of the judiciary;
- to gauge the extent to which myths and stereotypes about survivors of sexual crime influence the conduct, outcome, and sentencing of trials concerning sexual crime;
- to determine whether the survivors of sexual crime obtain justice by analysing the conviction rates and sentencing patterns.

Media Research

For the media research, WCC collated further data on various aspects of sexual crime such as the profiles of victims, the accused, judges, sentencing patterns, attitudes of judges, defence counsels and prosecutors at the national level. This was done by collecting these data from reports of court trials contained in *The Star*, *New Straits Times* and *Utusan Malaysia* for the period 2000 to 2004. These data were also analysed using SPSS.

In addition, the media research sought to examine how the media reported sexual crimes and in what way these reports influence perceptions and the prospects for justice and recovery for the victim. To achieve this objective, a detailed analysis of the language and manner of reportage of three of the four high profile cases mentioned above, was undertaken.

As set out in the concept paper of the project, the court and media research examined the evidence raised in sexual crime trials in order to *enable us to come to some conclusions how myths and stereotypes impact on the conduct of the trial, verdict and sentencing*. In combination with our findings on the structural issues within the criminal justice system that hamper the delivery of justice to the victims of sexual crimes, we hope that this research fulfils one of the project's overall aims, which is *to be able to publish, discuss and act concretely on the situation of sexual crimes against women and children in Malaysia, with a focus on judicial responses to them*.

Limitations

Before we present the data and arguments, we should note that several limitations affected the conduct and quality of this research.

Firstly, the court research questionnaire could be considered too ambitious. It provided for up to 336 data entries, all of which had to be gleaned from court case notes. This was not only a very time-consuming task, but was also often disappointing, since not all the data sought by the questionnaire were available in all the cases. The data are extracted from the hand-written notes made by the judges or magistrates (the present system of court recording) and it became clear that some of the data were not recorded, such that we did not get the full profile of all the aspects of the court process that we had hoped for. But, as will be seen, there is more than sufficient data to provide much insight and increased understanding of what is involved in sexual crime trials.

Secondly, with regard to the court observation (court watch), there were the inevitable difficulties of scheduling. With trials often being heard over a long period of time, at different times on different days with weeks or months in between, it is almost impossible to schedule a court watch in a way that captures the entire process. Further, the court watch may not be definitive in its observation since different cases with different judges or magistrates, prosecutors, defence counsels, may have a different dynamic. Nevertheless, the court watch does give some insight into the 'culture of the courtroom', which is its main contribution.

Thirdly, official background data are lacking or difficult to obtain. Very little is available in the public domain, although it should be noted that the police have made good efforts to collate and present reported crime statistics. It is also often the case that requests for interviews with officials from the different government agencies are subject to bureaucratic procedures that in turn entail long waits. The responses may similarly be 'official' in the sense of being cautious, non-committal and offering little in terms of new or deeper insights.

Fourthly, in the media research, the very fact that the media reports covered only a selection of the sexual crime trials render the data less useful as they cannot be considered wholly representative of the national situation. This is compounded by the unequal coverage by geographic areas, with the urban and larger localities getting much greater coverage simply by virtue of the larger number of journalists stationed there. Selectivity of the media itself possibly skewed the data as cases which would garner more public interest, especially those that contain elements of sensationalism, were given fuller coverage.

COURT DATA

In this chapter we will present our analysis based on the court research. The findings of the media research are discussed in Chapter Five.

From the records of the 439 sexual crime court cases, we have data related to: the types of sexual crime and the courts in which they were heard, the number and sex of judges and magistrates involved in hearing the cases, the number of prosecutors and defence counsels similarly involved, the number, nationality, race⁴, sex and age of the accused and of the victims, the relationship between the accused and victim, the location of the crime, whether the accused had legal representation, the length of time the cases took, the sort of defence arguments proffered, and the verdicts and sentences.

All these add significantly not just to our understanding of the profile of sexual crime, but also crucially help us focus on the trial process and outcomes in sexual crime cases. Before discussing the wider issues which this data suggest may be important, let us first look at some of the figures

4. As the nationality and race data are not directly related to the issues discussed in the book, they are presented in Appendix 2 instead of in this chapter.

and their relevance. The five main categories of data presented here are: profile of sexual crimes, profile of the victims, profile of the accused, the trial process, and the verdicts.

PROFILE OF SEXUAL CRIMES

Types of Cases

Our case sample of 439 are categorised into the following types of sexual crime:

Table 2.1: Types of sexual crime⁵

	Frequency	Percentage
Penal Code		
S354 Outrage of Modesty	184	41.9
S366 Kidnapping or abducting a woman	1	0.2
S372A Persons living on or trading in prostitution	3	0.7
S375 Rape	39	8.9
S375(f) Statutory rape (sexual intercourse with person under 16)	101	23.0
S376A Incest	5	1.1
S377A Carnal intercourse against the order of nature	12	2.8
S377C Carnal intercourse against the order of nature without consent	5	1.1
S377D Outrage of decency	4	0.9
S377E Inciting a child to an act of gross indecency	5	1.1
S509 Word or gesture intended to insult the modesty of a woman	25	5.7
S511 Attempt (to do any of the above)	4	0.9
Women and Girls Protection Act 1973 (repealed 2001)		
S16(1)(i) refers to the use of females for prostitution	4	0.9
S19(1) Persons living on or trading in prostitution	10	2.3
S21 Suppression of brothels	36	8.3
Child Protection Act 1991 (repealed 2001)		
S26(1) Abuse, neglect or abandonment of a child	1	0.2
Total	439	100.0

5. For a fuller description of each of these crimes and the legal provisions for prosecuting them, refer to Appendix 1.

The data in Table 2.1 show that cases investigated in our court research covered a wide range of sexual crimes. The majority - 349 cases - fell within the broad category of sexual assault where the victims were, in the vast majority of cases, female. These were the rape (S375), statutory rape (S375(f)), outrage of modesty (S354), and insult to modesty (S509) cases. Seventy-four of the cases were related to activities which may be consensual but which are deemed by the government as immoral. These include 53 cases related to prostitution which were either charged under S372 of the Penal Code or under one of the three sections of the Women and Girls Protection Act, which has since been repealed and the offences placed under the Child Act 2001. A further 21 cases, involving both male and female victims, were offences under Section 377 of the Penal Code, which covers 'carnal intercourse against the order of nature' and 'outrage of decency'. Five cases pertained to incest and the remaining six cases were crimes against children.

This represents a range of sexual crimes with differing dynamics. We will be presenting overall figures and profiles from our sample, but will be giving greater prominence in our later discussions to the situation with regard to sexual assault crimes, specifically those charged under S354, S375 and S375(f) and S509.

The relatively low number of incest cases in our sample appears to be in line with the fact that Penang generally has a low proportion of incest cases compared with the rest of Malaysia. Between 2000 and 2003, for example, Penang accounted for just 2.9 per cent of the reported incest cases in Malaysia, and this declined to 1.9 per cent for 2005 and 2006.⁶

Where the Cases were Heard

The type of offence committed determined which court the cases were tried in, so all the cases in our study were heard in the subordinate courts in Penang. The subordinate courts consist of the Sessions Court, the Magistrate's Court and the Court for Children. Sessions Courts are presided by Sessions Court judges while Magistrate's Courts and Courts for Children are presided by magistrates.

The **Sessions Courts** have the jurisdiction to hear all criminal cases other than offences punishable by death. Except for the sentence of death, a Sessions Court may pass any sentence including natural life sentence.⁷

The **Magistrate's Courts** have jurisdiction to try all *criminal* offences for which the maximum sentence does not exceed 10 years' imprisonment or is only a fine.⁸

6. Royal Malaysian Police (PDRM) statistics.

7. Sections 63 and 64 of the Subordinate Courts Act 1948.

8. Section 85 of the Subordinate Courts Act 1948.

The **Juvenile Court** was part of the Magistrate's Court but has been replaced by the Court for Children.

The **Court for Children** was established under the Child Act 2001.⁹ The Court consists of a magistrate who shall be assisted by two advisors. The court is not open to the public. If a child is found guilty of an offence, the court will make any one of the orders prescribed as punishment under the Act.¹⁰ For capital offences, the child shall be detained in prison for an indeterminate time 'during the pleasure of the Ruler'.

A little over half of our cases (234 or 53 per cent) were heard in a Magistrate's Court, 175 (40 per cent) in a Sessions Court, 13 (3 per cent) in the Juvenile Court and 17 (4 per cent) in the Court for Children, as shown in Figure 2.2.

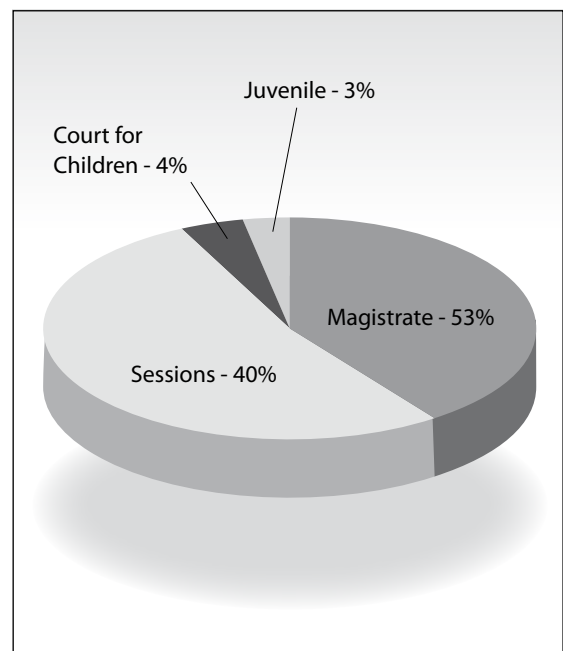
Sessions Court Judges and Magistrates

There are a number of important issues relevant to the discussion about Sessions court judges and magistrates such as the actual number of judges and magistrates, the schedule of cases they are assigned to hear, and the training and resources available to them. These affect both the length of time a trial takes – a crucial issue – and the kind of input they give to the trial.

Research done overseas shows that the background of the judges and magistrates may be important in determining the kind of attitudes and assumptions they bring to the court.¹¹ There is considerable discussion in some of the literature about possible judicial prejudice which is conditioned by the low level of awareness and sensitivity to gender issues. This is a serious concern, given that the vast majority of cases feature a female victim and a male accused.

In Malaysia, there are a significant number of *female* Sessions judges and magistrates, as detailed in Table 2.2:

Figure 2.2: Breakdown of cases by court (%)



9. According to Section 2 of the Child Act 2001, a 'Child' is a person under the age of 18 years, and for the purposes of criminal proceedings, means a person who has attained the age of 10.

10. Section 91 of Child Act 2001.

11. See for instance, LaFree (1989); Office for Criminal Justice Reform (2006); Smart (1989).

Table 2.2: Sex of sentencing Sessions judge or magistrate¹² by type of court

Court	Male		Female		Total	
	Number	Percentage	Number	Percentage	Number	Percentage
Sessions	104	59.4	71	40.6	175	100.0
Magistrate's	100	42.7	134	57.3	234	100.0
Juvenile	4	30.8	9	69.2	13	100.0
Court for Children	4	28.6	13	71.4	17	100.0
Total	212	48.3	227	51.7	439	100.0

More than half the magistrates were female, and the proportion of female Sessions court judges was also relatively high, at 41 per cent. This situation, whereby there are significant numbers of female Sessions court judges and magistrates, stands in contrast to many other countries, including western countries.¹³ It has implications for any discussion about judicial bias, and we will return to this in a subsequent chapter.

A complicating factor concerning the role of Sessions court judges and magistrates in sexual crime trials in Malaysia is the number of judges or magistrates in any one case. Just over half our sample cases involved at some stage more than one judge or magistrate, and 20 per cent had three or more. Where there are just two judges or magistrates, it may be that the first one was present only at the mention of the case (the initial hearing when the case is allowed to proceed and be scheduled), with the second one dealing with the case proper, once the trial gets under way. Where there are three or more, this will have implications for continuity and scheduling, and is linked to the issue of the length of trial,¹⁴ which will be discussed more fully in our next chapter.

12. In tables relating to Sessions court judges and magistrates in our sample cases, we present the information as it refers to the judge or magistrate who delivers the verdict. In other words, we have taken the characteristic (sex, for example) of the judge or magistrate from our data on the first judge in cases where there is only one judge or magistrate, and from our data on the last judge or magistrate, where there are more than one judge or magistrate.

13. In the Malaysian court system, the higher the court level, the lower is the proportion of females. At the time of writing, in Penang there are 15 judges and magistrates in criminal jurisdiction, comprising 4 Penang High Court judges, all male; 4 Sessions Court judges (1 in Georgetown, 3 in Butterworth), all female; 7 Magistrates (2 in Georgetown, 1 in Balik Pulau, 1 in Butterworth, 2 in Bukit Mertajam and 1 in Jawi), 4 female, 3 male (Figures by the Penang courts).

14. The "length of trial" refers to the time period between the date of the first mention of the case and the date when judgment is declared in the court of first instance (the Magistrate's Court, the Sessions Court or the Court for Children). It does not include any appeal to the High Court.

The Complainants

From our sample, the victim was not the complainant in 130 (30 per cent) of the cases (Table 2.3). Many of these were in ‘victimless’ crimes, such as those charged under Section 19(1) or Section 21 of the Women and Girls Protection Act 1973 (now repealed), which have to do with prostitution. Here, it is usually the police who make the complaint and are the chief witnesses in the prosecution.

Table 2.3: Incidence of cases where the victim was not the complainant by selected types of sexual crime

Selected types of sexual crime	Number	Percentage for each specific offence
S354	27	20.8
S375	1	0.8
S375(f)	34	26.2
S509	4	3.1
S19(1)	10	7.7
S21	36	27.7
Overall Total	130	–

But there were also some cases where, even though there is a female victim of a sexual crime, someone else has lodged the police report which initiated the investigation.

As Table 2.3 shows, in one out of three statutory rape (S375f) cases, the victim was not the complainant. Although we have information for only a limited number of these cases (24 out of the 34), by far the most common complainant was either the victim’s mother or father (17 out of the 24). Less common is a complaint by a welfare officer, (four out of the 24) and in one case, the police.

In the 15 per cent of outrage of modesty (S354) cases where the victim was not the complainant, parents accounted for 14 of the 24 cases where we have information. Other relatives accounted for six, friends or fiancées for three, and the police for one case. In one rape case (out of the 39) where the victim was not the complainant, the complaint was made by a village committee member.

Cases where the victim is not the complainant are in the minority, but (as in statutory rape) may be a significant minority.

PROFILE OF THE VICTIMS¹⁵

In the 439 cases, there were a total of 458 victims. Not every case has a victim. This was true for 31 cases in our sample, which involved police prosecutions of, for example, brothel owners.¹⁶ In the 408 cases where there was one or more victim, there were a total of 458 victims. This is because some cases have more than one victim. Specifically, in our sample, there were 25 second victims, 15 third victims, 8 fourth victims, and 2 fifth victims. Sixteen of the 50 victims in cases involving more than one victim were foreigners.¹⁷

In cases where there were multiple victims, the majority of the victims (33) were involved in cases related to prostitution, the offences being committed under S372A, S21, or S19(1). Ten were victims of S509 offences, four were victims of outrage of modesty assaults (the accused charged under S354) and three, all foreigners, were multiple victims of a rape offence (S375).

In only three cases was there a record of the victim suffering from a disability – in all three cases, this was recorded as ‘mental disability’. Disability of the victims is known to cause particular challenges to the criminal justice system, but the very small number of cases involving disabled victims means our practical experience of these challenges remains limited and raises the possibility that their access to justice is also limited.

Sex of Victims

Of the 458 victims, 438 (**95.6 per cent**) were female and 20 (4.4 per cent) were males. In other words, it is females who make up the overwhelming proportion of victims of sexual crime, and this is of course critical in our understanding and response to the issues related to such crimes. Gender issues come squarely into the centre of the discussion, and the relevance of attitudes, myths and stereotypes related to women, men and to sexual crime, become of paramount concern.

The fact that **96 per cent** of contested cases result in the (male) accused being acquitted or discharged should never be far from our thoughts. It is female victims who are overwhelmingly affected.

15. There is a debate about whether to use the word ‘victim’ or ‘survivor’. For many, use of the word ‘victim’ implies a passivity that disempowers women (the main ‘survivors’ of sexual crime). We do not mean to do this, and choose to use ‘victim’ only because ‘survivor’ implies that the person has actually gone through a positive process since the crime, which is by no means always the case. Whatever word is used, it is absolutely essential that proper support facilities be put into place at every stage of the criminal justice process to help the victim/survivor not just attain justice but also regain her self-respect and self-worth.

16. There were 29 cases under S21 (suppression of brothels), and 1 each under S377D and S19(1). The accused were all Chinese except for a Malay in the S377D case.

17. The breakdown of foreigners is three involved in S372A, S21 and S19(1) cases, two in S509, two in S354 and three in S375 cases.

Age of Victims

Nearly half of the victims whose ages were recorded¹⁸ were 16 years old or younger. The full breakdown is shown in Table 2.4, including by selected types of sexual crime.

Table 2.4: Age of victims by types of sexual crime (%)¹⁹

Age	S354	S375(f)	S375	S509	S19(1)	S21	All victims
4-10	7.6	2.2	–	–	–	–	5.9
11-16	31.0	97.8	–	22.6	20.0	–	43.6
17-20	22.8	–	50.0	22.6	20.0	11.1	18.9
21-30	23.4	–	41.2	29.0	6.6	50.0	18.4
31-40	8.8	–	5.9	12.9	20.0	2.8	7.6
41-50	6.4	–	2.9	–	13.3	5.6	3.7
51-60	–	–	–	9.7	13.3	5.6	1.5
61-70	–	–	–	3.2	6.6	–	0.4
Total number of victims	171	101	34	31	15	18	408

The age profiles are noticeably different for different types of sexual crimes. This is partly because of definition, true particularly for statutory rape (S375(f)) for which the victim is by definition under 16.

Sexual assault crimes, including rape (S375) and (S375(f)) and outrage of modesty (S354), show a younger profile of victims than other sexual crimes. At the same time, we need to note that there are older victims: 15 per cent of those surviving an outrage of modesty assault were aged over 30, with six per cent being over 40; also, nine per cent of rape victims were over 30. Other sexual crimes have a higher proportion of victims over 30, and this needs to be acknowledged. There is still the myth that ‘genuine’ sexual crimes are only perpetrated against younger females. Sexual crimes can and do happen to any age group (and either sex).²⁰

The age profile of the victims derived from our court research is corroborated by other sources. This is especially true of rape cases, where 72 per cent of the victims from our sample were below the age of 16. Our media research also found that 62.5 per cent of the rape victims were in this

18. We have the age information for 408 out of the 458 victims. In the other cases, the age was not recorded, including 18 cases involving foreigners.

19. Not including cases where information is not available or unknown.

20. Eleven (57.8 per cent) of the male victims were aged 16 or below, two were aged 17-20, one was in his twenties, one in his thirties and one in his fifties. In 4 cases, the age was unknown. The proportion of male victims under 16 is higher than for the female victims of sexual crime.

age cohort. Police statistics for reported rape cases further confirm these findings as between 2000 and 2004, 51 per cent of the victims were below 16, and 73 per cent of them were below 18. Similar data were contained in *The Rape Report* produced by All Women's Action Society (AWAM), which recorded that 56 per cent of women reporting rape were under 16.²¹

In order to underscore the young age of the sexual crime victims, we made a comparison between their age profile and the age profile of Penang's total female population in 2000 (Figure 2.3). We chose to profile the female population simply because the vast majority of the victims of sexual crime are female.

The actual figures are shown in Table 2.5.

Figure 2.3: Comparison of female population of Penang (2000) with our sample of victims, by age cohorts

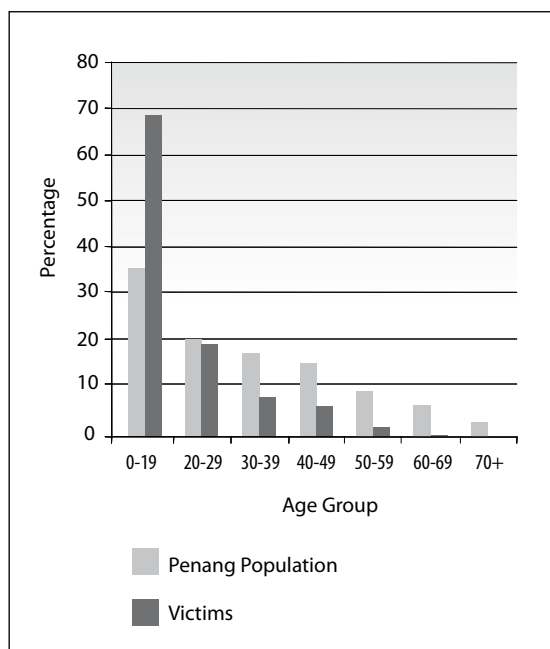


Table 2.5: Comparison of female population of Penang (2000) with our sample of victims, by age cohorts

	Females in Penang		Total Penang Population	Our Sample Victims
Age	Number	%	%	%
0-14	160,296	25.8	26.8	} 68.4
15-19	56,369	9.1	9.1	
20-29	123,927	19.9	19.3	18.4
30-39	98,966	15.9	16.0	7.6
40-49	78,488	12.6	12.6	3.7
50-59	50,009	8.0	8.1	1.5
60-69	31,451	5.1	4.9	0.4
> 70	22,333	3.6	3.2	–
Total	621,839	100.0	100.0	100.0

21. This included rape, statutory rape and incest in a sample size of 739. See Alina Rastam (ed) (2002), p.40.

Unsurprisingly, the percentages for the different age cohorts of the female population bear a close resemblance to the overall Penang population, but the same cannot be said when we compare the age profile of the sexual crime victims with that of the female population. The way in which sexual crime affects particularly younger persons is shown in the fact that 68 per cent of the victims in our sample are below 20 as compared to 35 per cent for the overall female population.

Reasons for the Young Age of Victims

Elsewhere, studies report the same kind of age profile. One recent study states:

Age is the biggest risk factor for being a victim of a sexual offence. Young women aged 16 to 19 are most likely to be victimised. Women aged 20 to 24 have an almost equally high risk of experiencing some form of sexual victimisation. With regard to rape, 16- to 19-year old women were over four times as likely to have reported being raped in the last year than women from any other age group. This finding is in line with those from most other surveys on violence against women.²²

The study then goes on to make the very important point that, although the significantly higher risks revealed for younger women are likely to be 'real', reflecting the lifestyles and circumstances of younger women,

...the key characteristics could be those of men, rather than women. Young men are more likely to be the perpetrators of crime than any other group and young women are more likely to socialise and be in the company of men aged under 25.

We will be carrying the profile of the accused, including their age profile, later in this chapter. It concurs with the observation that it is younger men who predominate, and we would do well to internalise the idea that *the key characteristics could be those of men, rather than women* not just in terms of age but in many other issues related to sexual crime.

Relationship of Victim to Accused

One very significant aspect of our research is tracing the personal relationship (if any) that exists between the victim and the accused. This has been the subject of intense scrutiny in research in other jurisdictions and has to do with the myth that most sexual crimes are committed by persons who are strangers to the victims. Our sample as well as Malaysian police statistics and other Malaysian-based research have confirmed that this is indeed a myth.

22. UK Home Office (2002), p.2.

Despite the fact that it has been shown that most sexual assaults, including rape, are perpetrated by someone known to the victim, this ‘stranger myth’ continues to receive wide currency. We need to bury this myth once and for all. Police statistics, for example, tell us that 82 per cent of the victims knew their attacker in reported rape cases nationwide between 2000 and May 2004.²³ AWAM’s research on rape found a very similar figure: 84 per cent of victims knew their attackers, meaning that stranger rape accounted for just 16 per cent of the cases.²⁴ More recent research in Kelantan, coincidentally on 439 sexual assault cases seen at the Hospital Universiti Sains Malaysia (USM), also reported that only 12 per cent of the accused was a stranger. In 88 per cent of the cases, they were known.²⁵

These findings are quite conclusive. Our research also indicates the same story, as presented in Table 2.6.

Table 2.6: Relationship between victim and accused (no. of cases)

	S354	S375(f)	S375	S509	Overall ²⁶	Overall (%)
Neighbour	17	5	1	4	32	14.3
Acquaintance/friend	22	22	6	2	62	27.8
Colleague	8	-	-	1	15	6.8
Boyfriend/fiance	4	7	-	0	13	5.8
Stranger	25	2	4	7	51	22.9
Family member	7	8	1	3	29	13.1
Teacher	1	-	-	-	1	0.4
Bomoh	1	-	-	-	1	0.4
Employer	-	-	-	-	12	5.4
Others	-	-	-	-	7	3.1
Total (with information)	85	44	12	17	223	100.0
No information recorded	99	57	27	8	216	

Again, the figures indicate that only in a minority of cases are strangers involved in sexual crime cases. They accounted for 23 per cent of the cases in our sample where information about the relationship was available.²⁷

23. PDRM statistics, Bukit Aman, various years.

24. Alina Rastam (ed.) (2002), p.41.

25. Mohammed Nasimul Islam et al (2006), p.31.

26. These figures are for ‘first victims’. This is to avoid figures being skewed by over-representation of certain categories by including subsequent victims which, for example, would add 16 more to the category of ‘employer’ because of prostitution-related crimes.

27. This was one area where information was incomplete. There was no record of the relationship in 187 of the cases where there was a victim. For the sexual assault cases (rape, statutory rape, outrage and insult to modesty) especially, there were not enough data for us to conduct a definitive analysis. Incidentally, the overall figures here stand in stark contrast to findings from the media component of our research, where 61 per cent of the sexual crime cases given coverage by the media involved a stranger. See Chapter 4 for discussion of this.

We can add the Malaysian statistics to research from overseas, which consistently reports that sexual crimes committed by strangers are in the minority, and emphasises the fallacy of the presumption (the myth) that a rape or sexual crime is only ‘genuine’ if it is perpetrated by a stranger.²⁸ The insidiousness of myths and stereotypes and the manner in which they get in the way of justice is an issue which we will be discussing more fully in Chapter Four.

PROFILE OF THE ACCUSED

There were a total of 617 accused in the 439 cases we studied. This is because some cases had more than one accused. To be specific, 383 (88 per cent) of the cases involved just one accused, and 56 (12 per cent) involved ‘multiple accused’, ranging from two to sixteen. The majority of the multiple accused cases (65 per cent) involved four or fewer accused.²⁹ The cases involving three or more accused were mainly sexual assault cases, including rape, statutory rape, outrage of modesty and carnal intercourse against the order of nature (S377A). Seven of the S377A cases involved six or more accused, all with female victims.

Sex of the Accused

Of the accused in the sexual crimes, **97 per cent were male** and only three per cent (a total of 13 accused) female. This is even more skewed than the sex breakdown of the victims. It is important to note that this situation is fundamental to the discussions about our response to sexual crime where the offences overwhelmingly involve a female being attacked by a male. Hence, it is essential that we understand the social contexts in which discourses and decisions in the courtroom about such attacks are set. Only then will we be able to understand how our criminal justice system is presently responding to them and why. This understanding is crucial if we wish to grapple with ways to enhance the quality and effectiveness of the response. Obviously, gender is a key issue in sexual crimes; thus, being sensitive to how gender bias and stereotypes could influence responses to victims and their trial process, is central to our later discussion.

Age of the Accused

The age profile of the accused, as presented in Figure 2.4, shows that the majority of them (62 per cent) were aged 30 or below. Although this profile is in the higher age category when compared with the victims where 68.4 per cent were aged 20 or below, it should still be a matter of concern that most of the sexual crimes were perpetrated by those in the younger age groups.

28. See, for example, Petrak and Hedge (2002) for the UK; Madigan and Gamble (1991) for the US; and Eastaugh (1993) and Lievore (2004) for Australia.

29. For practical reasons, our questionnaire covered only up to four accused. In addition, in many cases the details of the accused may not actually be available. For example, the police may not have apprehended all the suspects, although the notes for the case indicate that the accused, with a number of others, committed the offence.

Table 2.7 maps the age of the accused against the age of victims by types of crime. This clearly shows how much younger victims are generally, and specifically for certain types of sexual crime such as the outrage of modesty (S354) and insult to modesty (S509) cases (leaving aside statutory rape (S375(f)), which by definition has all victims under the age of 16). However, cases prosecuted under S509 show a particularly high proportion of victims in the 51-60 age cohort, nearly one in ten, which is much higher than the overall victim percentage for this age group. For the outrage of modesty (S354) cases, 61 per cent of the accused were below 30, but 61 per cent of the victims were below 21. In rape (S375) cases, although young accused constituted a significant majority (more than the average), the victims are younger still.

Figure 2.4: Age profile of accused (%)

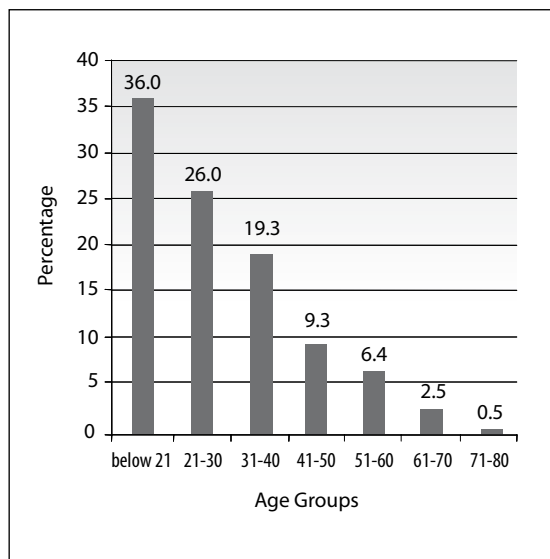


Table 2.7: Age of accused against age of victim by selected types of crime (%)

	S354		S375 f		S375		S509		Overall ³⁰	
AGE	Accused	Victim	Accused	Victim	Accused	Victim	Accused	Victim	Accused	Victim
14-21	30.6	60.9 ³¹	59.8	100.0	48.0	50.0	8.0	55.2	36.0	68.4
22-30	30.0	23.7	22.8		30.2	41.2	44.0	29.0	26.0	18.4
31-40	21.2	8.9	7.1		16.3	5.9	36.0	12.9	19.3	7.6
41-50	11.9	6.5	3.9		4.6	2.9	4.0	–	9.3	3.7
51-60	3.6	–	4.7		–		8.0	9.7	6.4	1.5
61-70	1.6	–	1.5		–		–	3.2	2.5	0.4
71-80	(1 case)	–	–		–		–		0.4	–
Total actual numbers	193	169	127	101	44	34	25	31	483	408

30. Of those cases for which we have the information.

31. This is not an exact match because the age grouping for victims is actually 0-20 and then 21-30, and of course we also have significant numbers of very young victims (5.9 per cent aged 10 or under). See full table in Victims section. But the comparisons here give an indication of the different profiles.

In view of the comparative age profiles of the accused and victims, we would like to re-emphasise the point that the young age of the accused might have a direct impact on the high proportion of young victims, that is, given that ...*[y]oung men are more likely to be the perpetrators of crime than any other group and young women are more likely to socialise and be in the company of men aged under 25,*³² they are at greater risk of being victims of sexual crime.

THE TRIAL PROCESS

The presentation of information gleaned from the 439 cases of sexual crime has two main purposes. First, it makes available data on a variety of facets that would enhance our understanding of sexual crime and sexual crime trials. Secondly, it provides the background for further explorations as to why the verdicts for sexual crime trials have only a very low **four per cent conviction rate** in contested cases.³³

The actual process of the trial is therefore central to this discussion. This section presents some statistics from our sample relating to issues that are linked to this process, including the way charges are preferred and the pleas of the accused.

Charges and Pleas

The range of sexual crimes and the laws under which the charges were preferred have been discussed earlier in this chapter. Ensuring the charge is correct is basic to the case going forward. Unfortunately, there have been instances of cases being discharged because of poor police procedure, including the preparation of such charges. There have been suggestions (both from judges here and discussions abroad) on the merits of having alternate charges, not only to cover the prosecution in case one charge fails, but also to help the profiling of sexual crime by making sure that the full extent of the crime is covered in the charges. In cases of sexual assault, for example, one would then also prefer charges of actual bodily harm. From our sample, it would seem that in Malaysia there are few sexual crime cases where alternate charges are made. It happened in only just over two per cent (a total of nine) of the cases.

Our research findings, which accord with those of studies elsewhere, show that the accused tend to plead guilty only where the offence is relatively minor. For more serious crimes, with more severe punishments, the percentage of not guilty pleas increases. So in cases of insulting the modesty of women, 72 per cent of accused had pleaded guilty by the time of the trial. A very similar percentage was recorded in cases of suppression of brothels. However, for the cases of outrage of modesty, only 32 per cent pleaded guilty. For the more serious crimes, the corresponding figures were 17 per cent for statutory rape and 13 per cent for rape cases.

32. UK Home Office (2002), p.2.

33. Two were S354 cases, 2 S375(f), 3 S377A, 1 S377C and 1 S19(1).

In line with this, 19 per cent of the guilty pleas were recorded in the Sessions Court, 72 per cent in the Magistrate's Court, five per cent in Juvenile Court and four per cent in the Court for Children. We note that in the Juvenile Court, 62 per cent of the accused children admitted their guilt and in the Court for Children, 41 per cent pleaded guilty; likewise, in the Magistrates' Court, 23 per cent and in the Sessions Court, eight per cent.

VERDICTS

A crucial finding from our sample relates to the verdicts, as shown in Table 2.8.

Table 2.8: Verdicts in sexual crime trials

Verdict	Frequency	Percentage
Discharge not amounting to acquittal	198	45.1
Pleaded guilty	137	31.2
Discharged and acquitted without defence called	32	7.3
Discharged and acquitted after trial	3	0.7
Discharged and acquitted, charges withdrawn	39	8.9
Found guilty after trial	12	2.7
Discharged and acquitted, accused died	5	1.1
Case transferred	7	1.6
Case cancelled, accused absconded	1	0.2
Unknown verdict	3	0.7
Unknown-notes incomplete	1	0.2
Accused sent to mental hospital	1	0.2
Total	439	100.0

The data show that in 31 per cent of the cases, the accused pleaded guilty. In the remaining cases (302), 12 resulted in a guilty verdict. There are two ways of looking at this. It can be claimed, with justification, that the conviction rate is $149^{34}/439$, which is 34 per cent, if we include the cases where the accused pleaded guilty. That should be acknowledged.

But the fact remains that if the accused claim trial, they stand a **96 per cent chance of being found not guilty**.

Not only does this imply that there is a huge waste of police and court time and resources, but in terms of gaining justice for sexual crime victims, particularly if the high percentage of the

34. The 137 who pleaded guilty and the 12 who were found guilty after trial.

‘discharge not amounting to acquittal’ (DNAA) verdicts is also taken into consideration, there is no starker statistic to emphasise that something needs to be done. On the basis of this alone we need to consider all the profiling, identifying of issues, discussions, and recommendations that are presented in the rest of this book.

We can also look at the verdict by selected types of case as presented in Table 2.9.

Table 2.9: Verdict by selected types of crime ³⁵

	S354		S375		S375(f)		S377A		S509		S19(1)		S21		TOTAL (all cases)	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%
Dismissed not amounting to acquittal	79	42.9	28	71.8	58	57.4	3	25.0	6	24.0	3	30.0	9	25.0	198	45.1
Pleaded guilty	59	32.1	5	12.8	17	16.8	1	8.3	18	72.0	1	10.0	26	72.2	137	31.2
Discharged and acquitted without defence called	14	7.6	3	7.7	10	9.9	0	0.0	0	0.0	2	20.0	0	0.0	32	7.3
Discharged & acquitted after trial	2	1.1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3	0.7
Discharged and acquitted, charges withdrawn	17	9.2	1	2.6	10	9.9	6	50.0	1	4.0	3	30.0	0	0.0	39	8.9
Found guilty after trial	3	1.6	2	5.1	4	4.0	0	0.0	0	0.0	0	0.0	0	0.0	12	2.7
Discharged and acquitted, accused died	1	0.5	0	0.0	1	1.0	0	0.0	0	0.0	1	10.0	0	0.0	5	1.1
Case transferred	5	2.7	0	0.0	0	0.0	2	16.7	0	0.0	0	0.0	0	0.0	7	1.6
Case cancelled, accused absconded	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	2.8	1	0.2
Unknown verdict	2	1.1	0	0.0	1	1.0	0	0.0	0	0.0	0	0.0	0	0.0	3	0.7
Unknown – notes incomplete	1	0.5	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	0.2
Accused sent to mental hospital	1	0.5	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	0.2
Total	184	100.0	39	100.0	101	100.0	12	100.0	25	100.0	10	100.0	36	100.0	439	100.0
Total contested cases	125	67.9	34	87.2	84	83.2	11	91.7	7	28.0	9	90.0	10	27.8	302	68.8

The situation for contested cases (i.e. leaving aside the guilty pleas) by selected types of sexual crime is as follows:

- in S354 cases, three out of 125 contested cases resulted in a guilty verdict (2.4 per cent);
- in S375(f) cases, four out of 84 contested cases resulted in a guilty verdict (4.8 per cent);
- in S375 cases, two out of 34 contested cases resulted in a guilty verdict (5.9 per cent).

35. The cases not included in here are: S366 (1, pleaded guilty); S372A (3, all DNAA); S376A (5, 2 found guilty after trial, 1 DNAA, 2 discharged for other reasons); S377C (5, 2 DNAA, 2 pleaded guilty, 1 discharged and acquitted without defence being called); S377D (4, 3 DNAA 1 pleaded guilty); S377E (5, 2 DNAA, 2 pleaded guilty, 1 discharged and acquitted without defence being called); S511 (4, 1 DNAA, 1 discharged and acquitted without defence being called, 1 found guilty after trial, 1 discharged and acquitted because accused had died); S16 (1) (1) (4, all pleaded guilty); S26(1) (1, discharged after charges withdrawn).

There were no guilty verdicts in the seven contested insult to modesty cases.

In other words, there are serious and major problems in getting convictions once an accused claims trial. This is true for all sexual crime offences, and certainly true for sexual assault cases, illustrated here under S354, S375, S375(f) and S509.

If these statistics were replicated across the system, the present situation amounts to little more than a licence to commit a sexual crime, knowing that if one pleads not guilty, one is extremely likely not to be found guilty of the offence.

Police Definition of 'Solved' Cases

This situation contrasts strongly with recent claims by the police that the solution rates for criminal offences in Malaysia is very high. For example, police statistics state that the 'men in blue' solved 73,281 or nearly 37 per cent of the 198,622 criminal cases in 2006. In 2005 it was reported that police solved 48 per cent of the 157,459 cases recorded. According to Federal Criminal Investigation Department director Datuk Christopher Wan Soo Kee, police solved close to 90 per cent of the 4,458 rape and molestation cases reported in 2006, and a similar proportion in 2005. He ascribed the high solution rate to that fact that most accused were known to their victims.³⁶

Official police statistics³⁷ also recorded that, for example, in Penang in 2005, 64 out of 71 reported rape cases were solved. This is a 90 per cent solution rate. Out of the 106 suspects in these cases, 47 were caught. This is a 44 per cent apprehension rate.

We can see from the last paragraph that we need to be very cautious about the definition of the word 'solved'. The police adopt the Interpol definition, which sets four criteria for it:

- If there is a confession or solid evidence against the accused
- The accused is caught red-handed though he pleads not guilty
- The accused is identified regardless of whether he has been detained, is still at large or has died
- Investigations show that no offence has been committed

This is not equivalent to how many crimes are either prosecuted or convicted. Indeed, one study conducted by a member of the Malaysian police force showed that in 2004, out of a total of 1,797,105 reported crimes, only 252,427 (14 per cent) were investigated. The rest fell into other categories, as follows: 'Refer to Magistrate' (12 per cent); 'No Further Action' (12 per cent); 'No Offence Disclosed' (15 per cent); 'Refer to Other Agencies' (36 per cent); or 'Other Reports' (11 per cent).³⁸

36. As reported in *The Sun*, 19 March 2007.

37. Supplied by PDRM, Bukit Aman.

38. ACP Amar Singh Sidhu (2005), p 7.

Hence, even where the crime has been categorised by the police as ‘solved’, there remains a very long journey between the identification of the suspect and a trial which ends in conviction, with many challenges along the way. This would seem to be particularly true for sexual crimes, including sexual assault. So the key issue here is: Can victims feel confident in a system where 96 per cent of contested cases are resolved in favour of the accused? Furthermore, should we not feel alarmed, and if so, what can we do about it?

CONCLUSION

This chapter has highlighted two critical areas.

Firstly, it has presented various profiles pertaining to the who, what and how of the 439 sexual crime cases we examined. The 439 cases cover a range of sexual crimes, including a significant number of sexual assault cases. The data give us insight into more than just rape cases, which has been the centre of attention in research conducted up to now.

A number of issues were noted, including:

- the overwhelming majority of cases involve a crime perpetrated by a male against a female
- the majority of the accused are below 30 while the majority of the victims are below 21. But there are accused and victims from all age groups: no one is immune from sexual crime
- 77 per cent of the victims knew the accused.

Two key statistics were highlighted. These are both related to the verdicts: the high rate of DNAA and the low rate of conviction of those claiming trial.

In **45 per cent** of all cases, the verdict is **DNAA**. We need to find the reasons for this unacceptable high figure.

The low conviction rate in cases where the accused pleaded not guilty is also shown by our statistics. In 137 of the 439 sample cases (31 per cent), the accused pleaded guilty. But in the remaining 302 cases where the accused claimed trial, only 12 resulted in a guilty verdict. This works out to a **four per cent** conviction rate for cases where the accused pleads not guilty – a shocking figure.

These two key findings mean that a review of the system is urgently called for.

Secondly, this chapter raises issues related to sexual crimes. One crucial aspect is how to increase the conviction rates. In this regard, Malaysia is no different from many other jurisdictions around the world. Solutions to this problem are needed not just to avoid the huge amount of

wasted police and court time and resources, but to rectify the situation which, if allowed to continue, will further undermine the confidence of both victims and the public in our criminal justice system.

In the next few chapters, we will explore the factors that have brought about the current incapacity of the criminal justice system to deal effectively with sexual crimes. We shall start by looking at the structural issues, which may help to explain the high rate of DNAA and the low rate of conviction.

3

CHAPTER THREE

Structural Factors in the Outcome of Sexual Crime Trials

One major factor which contributes to the less than satisfactory outcome of sexual crime trials (especially the high rate of DNAA and the low rate of conviction) is the way the criminal justice system as a whole is resourced. These structural factors include the lack of victim support, the unacceptably long time the trials take and the less than desirable level of professionalism in the criminal justice system – they form the main subjects of discussion in this chapter.

Having sufficient resources properly allocated is key to an effective delivery of justice, true for sexual crimes as it is for all crimes. This allocation of resources affects a number of factors which impinge on the efficacy of the criminal justice system, including:

- the provision of adequate victim, family, and witness support;
- the provision of appropriate assistance, especially in the lower courts, to allow speedy and effective dealing with cases (this includes additional help to Sessions Court judges and magistrates in preparing and recording the cases, and the provision of other necessary supporting court personnel, such as interpreters);
- the recruitment and retention of enough human resources to reduce the workload that personnel in the criminal justice system have to bear (this relates to police and staff in other agencies, judges, magistrates, prosecuting officers, investigation officers, defence counsels and other court officials) and includes having an appropriate salary package;
- the transfer of Sessions Court judges and magistrates and the impact these have on the continuity of cases;
- the effectiveness of the orientation new staff receive, the effective monitoring of performance, and support for professional development for all staff at all levels;
- the extent and impact of training, which for those involved in sexual crime trials must include heightening their awareness of gender issues;
- the provision of appropriate buildings designed to take into consideration not just the needs of courts but also those of victims and of other agencies (like the Welfare Department).

To discuss these factors in greater detail, let us first look at the reasons quoted for handing down a verdict of discharge not amounting to an acquittal (DNAA) in our sample cases. Out of the 198 such verdicts, we were able to identify reasons for them in 169 cases from the judges' or magistrates' notes. The reasons given are tabulated in Table 3.1.

Table 3.1: Reasons for DNAA

Verdict	Frequency	Percentage (of the 169 cases)
Victim not found/did not turn up	59	34.9
Other witness not present	12	7.2
Combination of the two	6	3.6
Prosecution not ready	11	6.6
Warrant not executed	2	1.2
Requested by DPP	52	30.8
Other reasons ¹	17	10.1
Accused absconded or left country	10	5.9
Total	169	100.0

Two main factors stand out.

The first most common reason is the fact that the victim fails to show up in court, or cannot be found. This accounts for over a third of the DNAA verdicts. If we add in reasons like the failure of witnesses to turn up, or a combination of the two, this accounts for nearly half of the cases (46 per cent).

The second most frequently cited category is ‘requested by the DPP’. This could cover a multitude of situations, but certainly indicates that the Deputy Public Prosecutor (DPP) cannot pursue the case with any confidence any more. In our dialogue with the prosecutors, it was indicated that in many of these instances the request would have come at the insistence of the victim or her family who wished to drop the case. Difficulties encountered in the collection or presentation of evidence was also stated as a common factor. The latter might be read as an indication of a ‘failure’ on the part the prosecution, which can fall under the category ‘prosecution not ready’.

In both instances, the length of time the trial takes is a contributing factor. Our data show that the longer the trial goes on, the more likely it is for the victim to drop out. Table 3.2 shows that there is a key period, between a year and two years, when the victim may need extra support and encouragement to carry on.

1. The ‘other reasons’ include the fact that the accused had already been detained too long, that there were ‘new developments’ in the case, that the previous judges’ notes were illegible, and that the case was simply ‘not progressing’.

Table 3.2: DNAA verdict due to the victim not turning up/not found against the length of time the case took

	Frequency	Percentage	Cumulative Percentage
1-3 months	1	1.7	1.7
4-6 months	9	15.3	16.9
7-12 months	8	13.6	30.5
13-24 months	28	47.5	78.0
25-36 months	6	10.2	88.1
37-48 months	5	8.5	96.6
49-60 months	1	1.7	98.3
85-96 months	1	1.7	100.0
Total	59	100.0	

In instances where the DNAA was ‘requested by the DPP’, our data show that the period between 13 and 24 months seems particularly important. Fifty-six per cent of the DNAA verdicts were returned because of this reason. Thirty-two per cent of such verdicts were given in cases lasting less than a year, and the remaining 12 per cent in cases lasting more than two years.

These then are the most crucial areas that we need to focus in our quest to identify and implement appropriate interventions and reforms within the criminal justice system. The structural issues we will investigate in this chapter include victim support, delay in trials, and professionalism in case preparation and prosecution.

VICTIM SUPPORT

From research in other jurisdictions, our own data, and the discussion with the prosecutors, it is clear that one major factor for the high rate of DNAA and the low rate of conviction involving sexual crime cases is the fact that victims drop out of their own cases. Many victims and their families and witnesses find their involvement in a criminal trial daunting. There are several possible reasons for this, but the most important conclusion is that victim support is currently inadequate. Whatever can be done to support victims and their families and witnesses, and relieve their stress, should be carried out.

Lowering Attrition Rate

From our dialogue with DPPs and other concerned parties, in cases of victims refusing to continue with their cases, family dynamics come into play. Although we are unable to present clear statistics showing how frequently this factor applies, we are told, for example, that police reports may be lodged by victims of rape (often on the family's insistence) as a 'protective' rather than a 'punitive' measure. In other words, the victim has been encouraged to lodge a police report as possible 'protection' against the consequences of becoming pregnant, for example, and/or as a 'bargaining tool' in any negotiation with the accused and his family. In these cases, the victim's family already knows that they will be pursuing a separate strategy to 'settle' the matter. This, we are told, may even include the marriage of the victim to the accused.

If and when such a case comes to court, especially where the victim is not the complainant, there may be difficulties once the victim is called upon to give evidence – she may be a reluctant or indeed a hostile witness. In other instances, family pressures may be enough to compel the victim to give up the case.

This factor of family strategies and pressures is possibly more significant in the statutory rape cases. In other words, the degree to which family pressures cause the victim to give up on a case remains uncertain. What is clear is that there is considerable complexity when it comes to reactions to sexual assault. Much ambivalence exists not only within the victim herself, but also within her family, friends, colleagues and the community.

Such attitudes are described in an earlier WCC book *Shame, Secrecy and Silence*,² and anticipates some of the discussion on attitudes in our next chapter. Ambivalence about who is to blame (the victim is still blamed by many) and what needs to be done (avoiding public scrutiny, which may be seen to bring shame and stigma to the person and her family and community) still leads to many cases being discontinued, much to the frustration of the prosecutors. Hence, we need to challenge attitudes and provide better support to the victim at the family level; in other words, to work with the victim and her family.

Improving Victim Support

Many victims of sexual assault suffer from trauma, such as unpredictable and intense emotions which may have serious and debilitating effects on the victim if they are not treated. There is considerable work being done elsewhere in the world to establish 'rape trauma syndrome' as an official medical condition admissible in court. But we already know the sort of symptoms sexual assault victims might suffer from. They may experience exaggerated nervousness or jumpiness, painful memories and intrusive thoughts about the assault, nightmares, sleeping problems,

2. Rohana Ariffin (ed) (1997).

and difficulty concentrating. They may blame themselves, may feel dirty and their self-esteem may plummet. It is possible that they will suffer from diagnosable conditions, including post-traumatic stress disorder (PTSD) or dissociative identity disorder, and may be prone to self-injury, panic attacks, and flashbacks.

When a case drags on over a length of time, the chances of a victim being able to overcome any trauma diminishes. This is particularly true if there is limited understanding of what form this trauma may take, meaning very little support is available for the victim.

Trauma may also be exacerbated if the victim has to meet the accused and his family and friends at the courtroom constantly. So, it is important to consider how the actual environment in the court either protects or intimidates victims of sexual crime. Having separate waiting rooms for victims is one way to avoid intimidation, confusion or trauma resulting from face-to-face confrontation with the accused or their friends or family. Making sure that the victims (and witnesses) are reassured about courtroom layout and procedures through familiarisation programmes is another.

Understanding the experience of the victim, including the possibility of trauma, will also help us come up with appropriate procedures prior to the trial. For example, considerable headway has been made in some states regarding the issue of identity parades. Previously, during identity parades in many police stations, the victim had to personally touch the accused. This is recognised as being unnecessarily traumatic for a victim of sexual crime, similar to a situation where she has to face her attacker in open court. Identity parades featured in at least ten per cent of the cases in our sample.³ But now in Penang, for example, police have installed one-way mirrors in every district police station, obviating the need for face-to-face identification. This is a very positive step and needs to be replicated across the country.

In addition, victims and witnesses are often asked to attend court several times over a potentially long period. Each attendance is in itself traumatic and disruptive. They have to apply for leave, forgo income, and bear travel and other costs. Support at the court may be poor – reasons for attending court or the progress of the trial may not be explained to them, and much of the time in court is spent doing nothing but waiting.

Problems of this kind are not confined to the victims of sexual crimes. Hence, the solutions need to take into consideration the system as a whole. The provision of victim support has to cover the entire range of crimes. However, victims of sexual crimes have certain specific needs that require special consideration. There is no lack of models for victim support programmes practised in other parts of the world that we can draw upon to fashion our own.

3. Of course where the victim knows the accused, which is the case in the majority of sexual assaults, there would be no necessity for an identity parade.

Adopting a Victim's Charter which is effectively disseminated and implemented is one strategy. More importantly, investing in Witness Support programmes and Victim Support facilities at the court have been found to be very positive in helping people new to the criminal justice system understand its processes and build their confidence. The UK's Witness Support programme states:

Many witnesses feel worried about going to court, regardless of whether or not they were the victims of the crime. Victim Support runs the Witness Service in every criminal court in England and Wales to give information and support to witnesses, victims, their families and friends when they go to court.

We help:

- *witnesses who are called to give evidence, including defence witnesses;*
- *victims of crime and their families and friends attending court for any reason;*
- *children as well as adults.*

Witness Service staff and volunteers can give you:

- *someone to talk to in confidence;*
- *a chance to see the court beforehand and learn about court procedures;*
- *a quiet place to wait;*
- *someone to go with you into the court room when giving evidence;*
- *practical help (for example with expense forms);*
- *easier access to people who can answer specific questions about the case (the Witness Service cannot discuss evidence or offer legal advice);*
- *a chance to talk over the case when it has ended and to get more help or information.*

Like the rest of Victim Support, the Witness Service is free and independent of the police or courts.⁴

Most of these aspects are very relevant to us in Malaysia, and indeed have already been incorporated into a pilot project conducted in some Kuala Lumpur courts by the police. This is a very positive initiative which now needs evaluating and replicating to other parts of Malaysia.

It is crucial to identify whose role it is to support the victim and her family. There is discussion about getting non-governmental organisations (NGOs) more involved but whether this is on a voluntary or paid basis still needs to be discussed. Dealing with the family dynamics immediately after a report is lodged may be better done by properly trained police officers, possibly together with welfare officers or staff from agencies like the One Stop Crisis Centres. There are obvious implications for resourcing and delineation of responsibilities.

4. From http://www.victimsupport.org.uk/vs_england_wales/services/witness_services.php

At the court itself, there are better opportunities for programmes involving volunteers. Here the general attitude to the victim, the kind of support available, the relationship between victim and officials at the court, are of fundamental importance in giving the victim some kind of confidence in the system. Where the experience is negative, the victim will have less reason to continue with the trial, especially if it is drawn out over many months or years.

Extending support to victims and their families will also take the pressure off the relationship between the victim and the prosecutor. This is an important and a complex relationship. From our dialogue and interviews with Deputy Public Prosecutors, the limitations to such a relationship need to be clearly recognised. Prosecutors are not allowed to ‘coach’ their witnesses, which includes any victims giving evidence, and can lose the case if such coaching is proven in court by the defence. Yet, given that there is often no other victim support available, prosecutors frequently find themselves offering the kind of counselling and even financial help to victims which need to be provided by others.

Investing in the whole area of victim support is one which many other jurisdictions have taken very seriously. By providing good victim support, confidence in the system will increase. A victim who is given emotional support and who is properly briefed on court procedures, for example, would feel much more confident, less anxious and be better able to give coherent evidence.

Providing the victim with a range of options for giving evidence has also been a feature of other jurisdictions. There is increasing discussion on this in Malaysia, too. For example, giving the victim an option of providing evidence through a video link, or from behind a screen, are innovations introduced by courts in other countries to give the victim confidence in the system as she feels intimidated by the prospect of giving evidence in open court.⁵

Looking into the range of options for compensating the victims will also help increase confidence in the system and motivate them to continue with their cases. The Malaysian Criminal Procedure Code provides for compensation to be paid to the victim by the offender who is found guilty of a criminal offence, including a sexual crime. However, few – if any, victims of sexual crime – have been known to make such claims for compensation, possibly due to ignorance of such a provision.

Better victim support that translates into a more effective investigation and trial process does not only benefit the victims but also serves the public interest in helping to increase the conviction rate. It will also help break the possibility of a vicious circle, whereby victims who have a negative experience of the system not only drop out but carry a message to others that all the trouble and trauma is ‘not worth it’. On the other hand, victims who have a positive

5. There is of course discussion about the effectiveness of these options which would need to be considered carefully in assessing the viability of introducing these options here. We can note that for children's evidence, the option of video is already being used.

experience of the system will do the opposite. Their positive experience is also a key factor in helping them come to terms personally with what has happened to them.

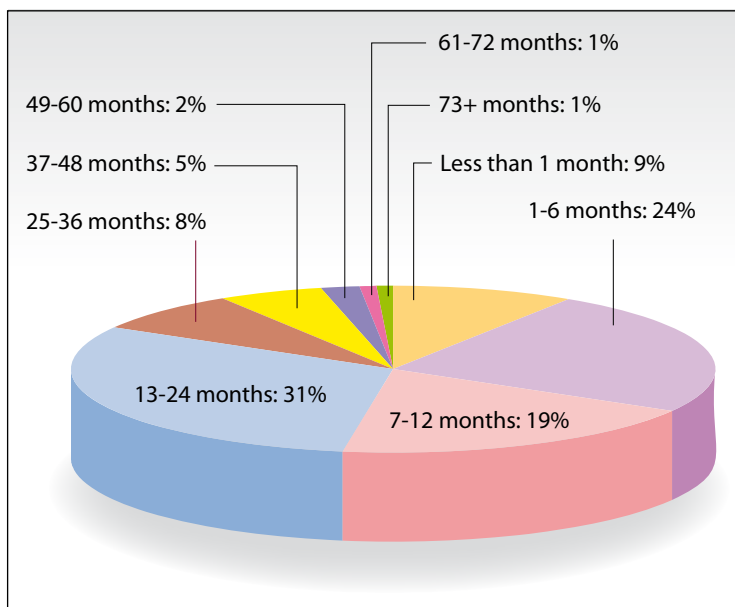
LENGTH OF TIME OF TRIALS

Another major structural factor is the length of time taken for the trials, that is, the period between the first mention of the case and the delivery of the judgment on it in the court of first instance. A long-drawn period between the time the accused is charged and the actual conclusion of the trial does not only put extra pressure on the victim, her family, and witnesses, but also on the whole criminal justice system. It appears to be a major factor contributing to the high rate of DNAA.

How long does it take before sexual crime cases come to trial and are completed? As Figure 3.1 shows, from our sample of 439 sexual crime cases, 48 per cent of the cases took over a year to complete⁶, with 18 per cent (about one in six) taking more than two years. In cases where the accused pleads guilty, almost half of the cases took less than a year.

Specifically for sexual assault cases, insult to modesty cases were dealt with relatively quickly (not least because 72 per cent pleaded guilty), but statutory rape cases were relatively long – 65 per cent took longer than a year, with the majority of these dispensed within two years. Although just over half of outrage of modesty cases were completed within a year, one in five of these cases lasted more than two years. For rape cases, just under half (46 per cent) took longer than a year, with five per cent taking longer than two years.

Figure 3.1: Length of time for disposal of cases



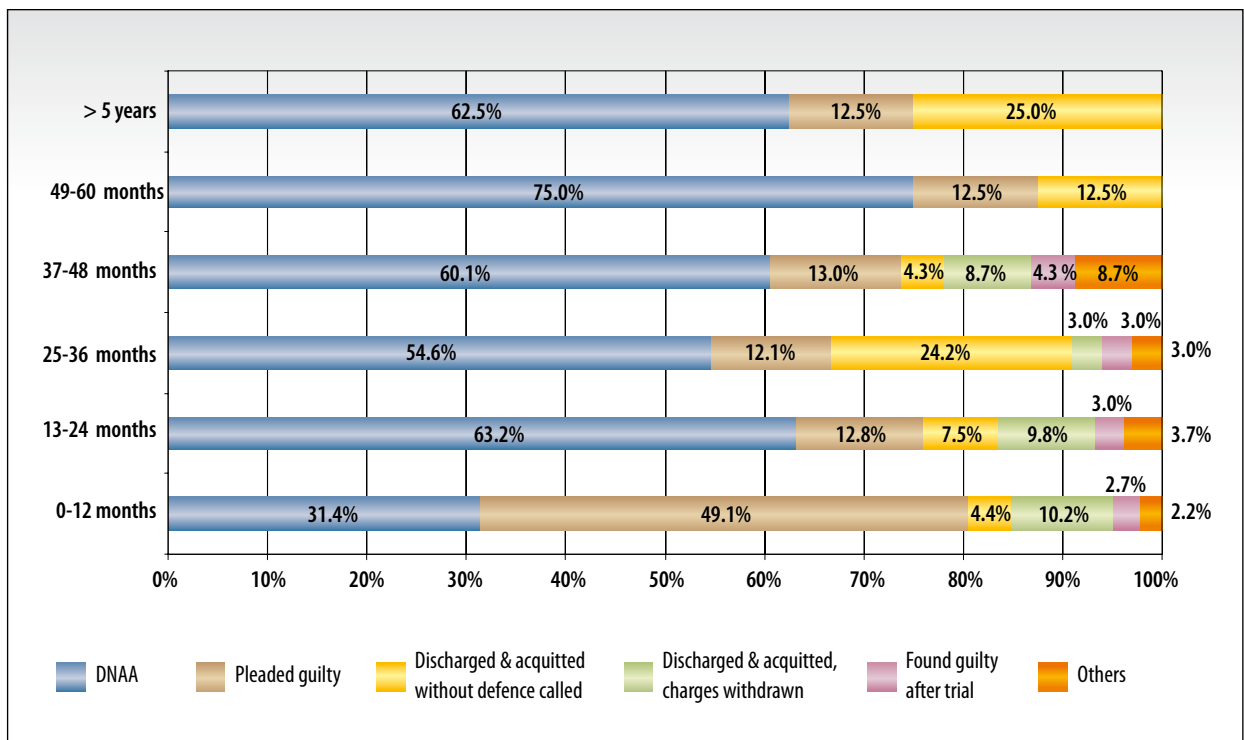
Note: We have no information for eight cases (hence this breakdown is for 431). Two cases took more than eight years.

6. This does not include any appeal, which of course may mean the case takes many more years.

Length of Time and the DNAA Verdict

The correlation between the length of time a case takes from going to trial and the verdict is shown in Figure 3.2. It is clear that the longer the period taken to complete the case, the more likely it was to result in a DNAA verdict. For cases lasting less than a year, just under a third resulted in a DNAA verdict. This proportion rose the longer the cases went on. In cases which took four to five years, 75 per cent resulted in a DNAA verdict. The statistics also show that no case lasting more than four years resulted in a conviction. The statistics also show that no case lasting more than four years resulted in a conviction.

Figure 3.2: Length of time for disposal of cases against verdict



Note: We have no information for eight cases. The category 'others' includes discharged and acquitted after trial, discharged (accused died), or accused absconded (case struck off).

Another related correlation is the length of time a case takes and the number of judges or magistrates involved in it. This is related to the overall resourcing of the system. The insufficient number of judges and magistrates to service the system effectively leads to delays in the hearing and the postponements of cases. A vicious cycle can develop as a prolonged prosecution period can mean that the judges or magistrates may be transferred or retire. During that time, fresh hearings may be necessary as new judges and magistrates handle the cases.

As Table 3.3 shows, 94 per cent of the cases that lasted less than a year involved only one or two judges, whereas this is true of only 54 per cent of the cases which lasted more than two years.

Table 3.3: Length of time the case takes to complete by number of judges/magistrates

Length of time	One or two judges		Three or more judges		Total	
Less than a year	213	94.3%	13	5.7%	226	100.0%
13 – 24 months	91	68.4%	42	31.6%	133	100.0%
More than 2 years	39	54.2%	33	45.8%	72	100.0%
Total	343	79.6%	88	20.4%	431*	100.0%

* Note: We have no information for eight cases.

Besides these continuity issues, our interviews also revealed that an increased length of time can pose serious difficulties for key witnesses, including victims and expert witnesses such as medical personnel. Last minute notification of court hearing dates, times and postponements waste key witnesses' time and affect their subsequent confidence and motivation to turn up. As mentioned earlier, the lack of support for the victims and witnesses could impact on evidence in support of the prosecution's case, which in turn could affect chances of a conviction.

Clearly this is something that needs to be addressed, and affects all criminal cases, not just sexual crimes. In our criminal justice system there are too few judges and magistrates; therefore, they are so overburdened with caseloads that cases take years to go to trial.

For example, as of January 2005, there were 68,984 civil cases pending at the High Court, 89,709 cases pending at the Sessions Court and 122,816 cases pending at the Magistrate's Court. Further, there were 3,754 criminal cases pending at the High Court, 5,931 cases pending at the Sessions Court and 334,983 cases pending at the Magistrate's Court.⁷ These are very high numbers. The relatively low number of judges in Malaysia (2.4 judges per million population, compared to 10.5 in India, 57.1 in Australia, 51 in the UK and 75 in Canada) and nearly 500,000 new cases registered a year make scheduling case hearings challenging.⁸

The consequences have been spelt out:

It is clear that undue delay in civil and criminal cases creates many problems and it impacts significantly on the legal profession, the Courts, victims, accused persons, litigants and the economy of the country.⁹

7. Suhakam (2005), p.1. The figures were obtained from the Chief Justice of the Federal Court.

8. Figures quoted in *New Straits Times*, 7 April 2007.

9. Suhakam (2005), p.2.

It affects both the accused and the victims.

Extensive delay not only violates the right to fair trial but it also impinges upon the right to personal liberty. In certain instances, prolongation of a trial may lead to the accused being made to suffer more than what the law provides. In addition, the right to be tried without undue delay also affects the right of victims. Victims have the right to “effective remedy” and “prompt redress”. These rights are enumerated in article 10 of the Universal Declaration of Human Rights (UDHR) and article 4 of the UN Basic Principles of Justice for Victims of Crime and Abuse of Power, which states that victims are entitled to prompt and effective redress and that judicial mechanisms should facilitate and enable victims to obtain redress “through informal or formal procedures that are expeditious...”¹⁰

Delays are not just caused by the severe pressure of the number of outstanding cases waiting to be heard, they may also be caused by the prosecution. Reasons for this may include: prolonged investigation in certain cases, delay in preferring charges, delay in responding to representations made by defence counsel either for reconsideration of charge or a reduction of charge, last minute amendment of charges, last minute inclusion of co-accused or application for a joint trial, or late supply of documents to the defence.

Delays may also be caused by the defence. Reasons may include last minute appointment of counsel by the accused person, last minute representations to the Public Prosecutor, late application to the prosecution for documents, delay in obtaining proper instructions from the client, delay in giving proper advice in cases that merit pleading guilty to the charges preferred, delay in giving notices of defence of alibi.¹¹

To these can be added the unavailability of witnesses, the frequent transfer of prosecution officers, Magistrate’s and Sessions Court judges, delay in delivery of grounds of judgment, and the prolix procedure of examining witnesses. All these factors may lead to recurrent and expensive adjournments.

In tackling these issues there needs to be focus on the issues of professionalism and adequate resourcing, and case scheduling. The comments made by Judge HC Chin in 2004, are pertinent. Although the comments obviously refer to Sabah, the points are relevant to the entire Malaysian system.

Even now, despite Kota Kinabalu having three Sessions Courts and four Magistrate’s Courts, there are only three prosecution officers to serve these seven courts. At any given time, only three criminal cases can proceed since one prosecution officer can attend to only one court while the criminal cases of the other four courts have to wait. It is this sharing

10. Ibid.

11. This is adapted from Haji Mohd Apandi bin Ali, “Pre-Trial Discovery in Criminal Proceedings”, paper delivered to 11th Malaysian Law Conference, Kuala Lumpur, Malaysia, 8-10 November 2001.

by these seven courts of the three prosecution officers (and worse previously as there was lesser number of prosecuting officers) that had caused staggered trials...This shortage had gone on for some years now and of course with it the backlog of criminal cases. Not only does it cause backlogs but a lot of part heard cases as well which more often than not had to be heard de novo, that is, all over again. Quite a number of rape cases faced and are facing such problems, all because of staggered trials and the officers being transferred away before the cases are completed.

The number of cases that have to be reheard over the years are quite large and it is a tremendous waste of time and it is sad that this had gone on despite what the Supreme Court had said, supra, because if the trials had not been staggered you would not get such large number of cases that required rehearing by the officers who took over the post. The people who suffered most are the rape victims because they have to come to court again and again to relive their horrible experience on account of the cases having to be heard de novo; in one recent case for the third time because the previous hearings were aborted on account of the successive transferring away of the officers who heard that case.¹²

Human Rights Commission of Malaysia (Suhakam) offers a further summary of the challenges:

Thus far, the problem of undue delay in civil and criminal cases has been tackled through reforms in practice and procedure. However, reforms in practice and procedure are inconsequential without a supporting framework of Court resources. Concerns were expressed at the forum that shortage of judges and the increased rate at which cases are being registered in Court has led to the difficulty in obtaining trial dates and to the situation where the date of trial is fixed between 1-3 years thereafter. In addition, inadequate Court administration, mismanagement of resources, disorganised assignment of interpreters, unavailability of Courtrooms, the time wasted by Judges having to take down notes of proceedings by hand and incompetent Court staff have prevented Judges from completing cases efficiently and speedily.¹³

Court Recording of the Notes of Proceedings

The present system of court recording is governed by the Criminal Procedure Code,¹⁴ which provides for manual recording by judges or magistrates. This puts a heavy responsibility on their shoulders and is an issue which has been the subject of various recommendations over the years from a variety of different quarters. For example, one former Chief Justice has stated that ‘It’s high time the Criminal Procedure Code is amended so that judges don’t need to take notes of criminal trials by hand’,¹⁵ and said that using computers to take down notes of court proceedings would be a ‘tremendous leap in the administration of justice.’¹⁶

12. Judge HC Chin, Judgment in Criminal Trial No: 45-01-2004, High Court Sabah & Sarawak, 11 August 2004.

13. Suhakam (2005), p.iii.

14. Sections 266 and 272.

15. Former Chief Justice Tun Mohamed Dzaiddin Abdullah, quoted in *The Star* 7 February 2007.

16. Ibid.

Pilot projects of various sorts have been launched, and there have been various announcements about (and considerable investment in) the e-judiciary project which has been touted as the means to transform court recording and certain procedures. For example, here is a description of a pilot project in Sabah:

For the past several years it has been the practice of the Sandakan and Tawau High Courts and now the Lower Courts Sandakan to record evidence in civil trials using computers. With this system the Bench and counsel are no longer required to write the evidence as adduced during the hearing. That is done by the Court Recorder using computer and specially designed software for such purpose. At the end of each page of the recorded testimony of a witness it is printed automatically and the Bench and counsel are given a copy each so that at the end of the trial a complete set of uniform transcript is in the possession of the respective parties. All errors are corrected while the recording is done and only grammatical and spelling mistakes are allowed to be altered by the counsel at the end of the proceeding. All counsels in the proceeding are to sign on one set of the transcript indicating their approval and to be returned to the Recorder so that sufficient fair copies can be prepared for the Court docket and in the event of an appeal.¹⁷

Advances in IT hold out the prospect of a workable e-judiciary system which would incorporate three main components: the case management system, the court recording and transcription system, and a common information technology infrastructure which includes email and internet services. Courtrooms could be equipped with computers, video/telephone conferencing equipment, and document storage, retrieval and display technologies, so that judges, magistrates, prosecution and defence lawyers and other court officials would have instant access not just to the pleas, evidence and exhibits of particular cases but also to case laws and statutes.

The government is pursuing all this. According to the Minister in the Prime Minister's Department, 'time is of the essence and the sooner we have the system in place, the better, especially to help reduce delays and postponements.'¹⁸ The present status of the project is, however, unclear. There have been delays and it is uncertain when e-government intends to put the system in place.

Modernising the system of court recording can bring many benefits: it would relieve the extra burden on judges and magistrates, help speed up trials, and help provide a more accessible and comprehensive transcription of court proceedings which would in turn help speed up appeals, if any. Furthermore, it would free judges and magistrates to observe more closely the demeanour of the witnesses and the accused.

Improvement of the court recording system would also generally help research like ours. An e-judiciary system needs to also allow easier public access to judiciary services, and increase the availability of, and access to, court information. We have noted that not all data is presently

17. 2004 report on http://www.p.sabah.gov.my/khkmn.sdk/court_work_chart.html

18. Datuk Seri Nazri Aziz, quoted in "E-judiciary to go nationwide", *New Straits Times*, 12 January 2007.

recorded. To plan appropriate initiatives and changes, as comprehensive a picture as possible of what is happening is desirable. Reforming the court recording procedure would be one part of our plea for all involved agencies to make data collection and publication more systematic, comprehensive and available in the public domain.

Consequences of Undue Delay

Consequences of undue delay include the undermining of public confidence in the justice system and the extensive waste of manpower for judges, magistrates, lawyers, police, witnesses, and others involved in court hearings.

Especially crucial for sexual assault trials, undue delay creates problems of lost evidence, witnesses forgetting the facts, or witnesses dying or becoming not contactable. The difficulties of gathering witnesses include those presenting medical evidence. There may also be an increased likelihood of inconsistency in the testimony of the victim which may well be construed as 'lying', both due to the effects of trauma and the inaccuracy of recall because of the time lag. Further, the victim herself may find it increasingly difficult to sustain the motivation to continue with the trial, as her trauma, possible pressure from family and community, and/or possible realisation of the huge challenges appearing in court presents become ever more significant the longer the case goes on. The healing process, so essential for all the victims, may be jeopardised.

PROFESSIONALISM IN CASE PREPARATION AND PROSECUTION

Another major structural issue is that in certain instances there are flaws in case preparation or presentation which leaves the judge or magistrate little choice but to declare a verdict of DNAA (Refer to Table 3.1). This is confirmed by the interviews we conducted and our dialogues with the DPPs and the judiciary.

Case preparation leads us to consider many different aspects of what happens earlier in the journey of the victim towards obtaining justice. It relates to how the victim is received at the initial report stage, how well equipped the investigating officers are in terms of being able to carry out full investigations for each crime, how effective the communication and sharing are between the different agencies who may be involved in the case, and how well supported the victim is throughout this process.

Some of these issues have consistently received serious and public airing. These include the need for professionalism in investigation, the need for experienced and committed prosecutors, the need to speed up cases (reduce the inordinate length of time many cases presently take), and the need to expand training. The police themselves are active in their contribution to the discussion,

as seen by a variety of statements by politicians, government agencies and concerned NGOs.¹⁹ For example,

*It is no secret that the police contingents at the district level are facing varying degrees of human resource shortages. The shortage of personnel is particularly acute in the Criminal Investigation Department (CID), a department at the forefront of crime fighting....The police force needs to attract a larger pool as well as better quality human resources.*²⁰

Our interviews with key police and prosecution personnel also indicate major challenges with regard to workload and the capacity to compile and properly present any necessary evidence. This includes following up on leads, properly attending to (medical) evidence, and properly tracking potential witnesses. It is an on-going concern. Recent media coverage has highlighted the possibility that there are still too many cases where poor preparation and presentation of cases by police and DPPs have led to the accused walking free.²¹ Further, there is a need for better supervision and training of new recruits by older and more experienced staff.

Medical Evidence and Reports

The collection of medical evidence exemplifies some of the structural, institutional and 'professionalism' difficulties which still exists across the system.

In rape trials, medical evidence may be absolutely crucial given the probability that little other 'hard' evidence will be available. Judges and magistrates may be looking for medical evidence as vital corroboration, a word that has special significance in sexual assault cases. Of course the reality is that such evidence may not be readily available, not least because of the fact that the majority of sexual assault victims do not immediately report the crime. However, this should lead us to ensure that we maximise the possibilities in cases where such evidence does exist.

The whole issue of forensics has occupied considerable space in discussions and initiatives in most jurisdictions, in Malaysia as in other countries. In terms of whether we are equipped as a country to deal with the vital medical evidence in those cases where it is available, feedback would suggest both positives and negatives exist.

19. References to this discussion is on-going throughout this Report. There have been many comments and suggestions over the years, including from the Prime Minister (see for example a major statement reported in the media on 4 April 2007), other Ministers, government agencies like Suhakam (see its 2005 Report on Fair and Expeditious Trials), the Royal Commission to Enhance the Operation and Management of the Royal Malaysian Police (Police Commission) set up on 4 February 2004, the Bar Council, and others.

20. Inspector-General of Police, YDH Tan Sri Mohd. Bakri Bin Hj. Omar, Conference Keynote address on Industrial Security Issues, 26 July 2004, Gurney Hotel, Penang.

21. Front-page newspaper coverage in the New Straits Times throughout the second week of August 2007 culminated in a long interview with the Attorney-General and some of his officers on 12 August 2007, centring on preparation and 'sloppiness'.

One major scientific advance which has had significant implications for the apprehension and prosecution of criminals has been with regard to deoxyribonucleic acid (DNA) profiling. Malaysia has made considerable investment in appropriate facilities. It set up its first DNA laboratory in 1993, purchased two hi-tech automated DNA analysers in 2001 (which have the ability to produce good DNA evidence within a relatively short time span) and currently operates two state-of-the-art laboratories.²² These are run by the Chemistry Department - one in Petaling Jaya and the other in Kuching. A third laboratory is due to open in Penang soon.²³

Tests are conducted at these laboratories on evidentiary biological samples such as bloodstains, seminal stains, hair and other biological samples encountered in the investigation of murder, suspicious deaths, rape and other sexual offences, assault, and various other crimes.²⁴ Other tests (blood tests, for example) are conducted by pathology departments in local hospitals or clinics.

For rape and other sexual assault cases, there is a standard rape kit which contains the necessary equipment and packaging, as well as a detailed report form. However, the majority of cases coming to the Chemistry Department do not use these kits. Instead, all kinds of samples in all kinds of containers are delivered. This is one of the reported difficulties. Others include:

- **Lack of harmonisation between agencies:** Communication between police and hospitals is sometimes lacking, as is communication even between different departments within a hospital. Harmonisation is essential given, for example, that some evidence collection will be done in the post-mortem room but others will be collected in the emergency centre or at clinics. Maintaining the clear chain of evidence is essential, especially if the case comes to court.
- **Cold cases:**²⁵ In many cases, there will be no analysable (DNA) evidence, because the case is 'cold'. However, there probably needs to be some agreement about exactly when a case is cold; certainly the quicker the sample is taken, the better, but there is the possibility that DNA samples could be analysable if collected up to a week after the event.
- **At the point of collection of the samples:** This is a delicate job, because DNA samples are easily contaminated, for example, by other fingerprints (collectors and handlers should wear gloves) or saliva (for this reason, investigating officers are warned not to speak when collecting/looking at samples). Not all samples are retrieved properly.

22. The laboratories are capable of analysing 16 DNA samples in an hour. DNA profiling for criminal cases can be fast-tracked, but normally takes up to three months, given the demand. For example, in 2003, over 4,000 samples from 694 cases were analysed, mostly from rape or murder cases.

23. Information for this section was obtained from Jabatan Kimia and from the article 'Nailed by DNA', (www.sun2surf.com/article.cfm?id=3765), 25 June 2004.

24. See <http://www.kimia.gov.my/engver/forensik%20main.htm>, and note it also provides paternity and kinship testing services to government agencies, the private sector and individuals.

25. A 'cold case' refers to a crime or accident that has not been solved and is not the subject of current criminal investigation or civil litigation, but for which new information could emerge from new witness testimony or re-examined archives, as well as retained material evidence. (Wikipedia)

- **Understanding what samples go where and how:** The Chemistry Department's laboratories only deal with certain tests; other tests (for example, on blood) should be sent to local serology/pathology departments. However, the Chemistry Department reports receiving a whole hotchpotch of samples, including samples for STD or HIV testing which is not within the ambit of its laboratories. Further, samples may not be in the proper containers, may not be labelled properly, and may already be out of date. We were told that some police departments wait to accumulate a number of samples before despatching them to the Chemistry Department. As was reported to us, 'There should be minimal delay time between collection and submission to the department. We have a number of sexual assault cases where these cases reach us six months after the incident although the test samples were promptly collected.'²⁶

- **Shortage of staff:** Although there has been significant recruitment over the last three years, 'training takes time and scientists and trained staff are still lacking.'²⁷ This is even more so because demand for the services has grown 30 per cent in the last year alone.

- **Communication about progress of the case:** There is very little information given to the Chemistry Department regarding the progress of a case. For example, if the case is already dealt with, the Chemistry Department will not know and may still be processing samples. This is clearly a waste of time and resources.

- **Lack of knowledge on the part of judges, magistrates, DPPs and others:** Forensics and medical testing is a very specialised area, so it is unlikely that others in the criminal justice system will be able to attain complete knowledge of procedures and scientific bases for evidence. There are reports that evidence from such testing is still not made full use of by the prosecution, and not given due weight by judges or magistrates. Better use of pre-trial briefings (called by the DPP) is suggested for the former, and for the latter, where a judge has cited lack of confidence in any forensic evidence as part or all of the reason for dismissing a case, the Chemistry Department will conduct its own internal enquiry as to what went wrong and how to correct it. In most cases, it would seem that the problem stems from poor presentation of evidence by the Chemistry Department officers in court.²⁸ Given that the forensic division in Petaling Jaya is internationally accredited, standards are high and any faulting of the system is likely to be a misperception. There are sporadic training opportunities for stakeholders to gain awareness, but these are probably limited by time and interest.²⁹ We will return to this in our recommendations.

26. Interview with official from the Chemistry Department, June 2007.

27. Ibid.

28. It should be noted that there is a moot-court programme in the Chemistry Department where new case scientists will be exposed to mock trials and giving of expert evidence. New scientists should be encouraged to sit in at real court cases where their senior colleagues give expert evidence.

29. Training departments like Judicial and Legal Training Institute (ILKAP) run sessions on medical evidence and forensics. Reportedly, in this as in many other training programmes, those attending are not necessarily highly motivated to learn and/or it is a difficult subject to cover in a short time.

So while the Malaysian government is clearly aware of the possibilities of medical evidence, not least through DNA profiling, and has invested significantly in the science, the capabilities of local investigations to exploit forensics properly may still fall short. There is still a lot of room for work on establishing and monitoring basic procedures and protocols in the taking, protecting, labelling, and despatch of samples.

Further, providing training and institutional support for inter-agency awareness and exchanges is also something highlighted by key informants to our research. We also note that elsewhere in the world, the key part forensics plays in the solving of sexual assault cases has led to the establishment of specialist forensic nursing posts. There, specially trained forensic nurses take charge of the medical side of sexual assault cases (also offering appropriate emotional and other support to the victim).³⁰ This is a practice Malaysia can emulate.

As we have also noted, delays in trials can pose serious difficulties for key witnesses such as medical personnel. Last minute notification of court hearing dates, times and postponements which waste medical professionals' time can affect their subsequent confidence and motivation to turn up. Moreover, the possibility that the prosecution has not paid sufficient attention to forensic evidence may also affect court evidence tendered on behalf of the victim. Any downgrading of its value will of course affect chances of a conviction.

One Malaysian study reports the difficulties doctors can face: often given very short notice to attend hearings, they are forced to cancel appointments at great inconvenience to themselves and their patients, only to find all too often when they get to court that they either have to wait for hours or the case has been postponed (again).³¹ This may affect the way the evidence is produced in court. In one of our cases, the judge notes:

No seminal fluid/sperm found by Doctor. TPR [DPP] said that he wanted to call chemist first before IO: but the DNA report was not ready because of backlog. Finally called IO but chemist was never called and DNA report not produced. Prosecution closed case and offered chemist as witness to Defence.

One hopes that this kind of case presentation is limited to very few cases; we need to try to make sure this does not happen at all.

30. For example, research done at St Mary's Hospital in London showed that setting up a dedicated and female forensic team for sexual assault cases helped improve the speed and reliability of documentation, especially of weekday daytime reports and had a hugely positive knock-on effect for all involved in the investigation and in the court. Further, it had the beneficial effect too of restoring a sense of control to the victims during their medical examination – often conspicuously absent and a contributor to the feeling that the reporting/trial process is nothing less than a 'second assault'. See Regan, Lovett and Kelly (2004) and also Kelly and Regan (2003).

31. Rohana Ariffin, (ed) (1997), p134-135.

Prosecution Weaknesses

Judges and magistrates are not the only people who play a key role in deciding the outcome of a case. The prosecution also plays an important role. In looking at reasons why cases in our sample were 'discharged not amounting to acquittal' (DNAA), Table 2.8 showed that seven per cent were 'discharged without the defence being called' and nine per cent were 'discharged and acquitted, charges withdrawn'. Table 3.1 further showed that in seven per cent, it was noted that the prosecution was simply 'not ready'. In 31 per cent of the cases, the discharge was at the request of the DPP.

Without more detail, what the exact circumstances may have been in these cases remain a matter of conjecture. From the judge's notes in some of the cases, there was clearly room for improvement in prosecution; inconsistencies remained unchallenged, points made by the defence were allowed to stand, and other witnesses were simply not called. For example, in one case the judge noted:

The prosecuting officer did not re-examine many issues brought up by Defence, did not call father as witness and did not reply to Defence's submission.

Or in another,

If there was a Chinese neighbour who has seen the said incident, that neighbour has not been called by the prosecutors to give evidence. The failure to call the witness who has seen the incident causes the downfall to the prosecution's case. In addition, there have been some doubts if such wounds on the complainant's left-hand existed, why haven't the prosecutors submitted medical reports to that effect or referred to the hospital on the injuries sustained by SP1. This has given rise to doubts if SP1 (prosecution witness) has had such injuries or not in consequence of being beaten by the offender.

Again, in one of our cases, the judge noted:

In examination, there appears to be no question asked whether she verbally resisted or what she said to the OKT(accused) when the acts were happening. The re-examination did not go through points brought up in cross exam.

and

When investigating officer SP7 was asked by the TPR (DPP) why there were differences between the testimonies and the charges, he replied that 'there was confusion, too many cases and too little time.' Is this answer appropriate? A charge involves the rights of an individual. Therefore, the charges should only be made when the testimonies are clear and verified.

Minimising inconsistencies because of poor case preparation will need action related to issues of professionalism, training, and general resourcing of the criminal justice system.

For example, it is recorded in the UK that sexual assault cases

*... are not always allocated to specialist prosecutors, and prosecutors do not always take advantage of opportunities to learn from unsuccessful cases. Cases are not always analysed effectively, leading to incorrect charges sometimes being laid. The efficiency and quality of service to the victim varies considerably between areas where there is high caseworker cover and continuity of prosecutor and those where there is not. The national guidance for prosecutors is in need of updating and expansion.*³²

In Malaysia, besides the DPPs, police prosecutors are also involved in dealing with sexual crime cases such as molest and outrage of modesty but not in the prosecution of rape or other offences tried by the Sessions Court. Ensuring proper training, exposure and experience for all these prosecutors is of paramount importance. Ensuring that caseloads are light enough to allow for sufficient time for case preparation is also crucial. With regards to training, it noted that for the 15 suggested training programmes for 2007 of the Prosecution Division in the Attorney-General Chambers, none of them pertained specifically to sexual crime prosecution. There are many on general themes, including trial advocacy, appellate advocacy, charges and joint trial and so on, which of course will be relevant. But there is nothing specific on the prosecution of sexual crimes either in 2006 or 2007.³³ This situation is far from ideal and there is an urgent need to take positive steps to address the issue.

Improving the System

Clearly, ensuring that there is adequate resourcing and adequate skilling is basic to improvements across the criminal justice system, including in cases of sexual crime. Merely increasing numbers will not be enough so providing the appropriate training, motivation and professional ethics are also essential. Investment in systematic training is a must for any organisation. There have been concerted efforts to devise appropriate training courses through designated training institutions like the Judicial and Legal Training Institute (ILKAP), but the attitude to training is still far from perfect.

In terms of structuring training, a review of the present system is probably in order. For example, the Suhakam report recommends a separation of the training for the judicial service and that for the legal service. It conceives of a new National Institute for Judges tasked with the sole responsibility of planning, formulating, training and providing advanced legal education for all members of the Judiciary, in both the lower and the superior courts. Institutions like ILKAP would then be made responsible for advanced legal education solely for legal officers. Such suggestions are well worth considering.

32. Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) and Her Majesty's Inspectorate of Constabulary (HMIC) 2002, p.7.

33. See <http://www.agc.gov.my/agc/agc/pro/programBI07.htm>. We can also note that in the ILKAP course schedule for 2007, out of 35 courses offered, one is a five day course offered on the Effective Prosecution of Sexual Offences. We do not have information about how many and who attended.

Specifically with regard to the investigation and prosecution of sexual crimes, there have been some major initiatives to make the most of existing resources and skills, taking into consideration the special circumstances and needs of victims of sexual crime. The One Stop Crisis Centres in General Hospitals, and other specialist units including Sexual Crime Units and the recently established Division for the Investigation of Sexual Abuse of Children (D11) are positive examples of Malaysian government initiatives.

In these examples, Malaysia, like other jurisdictions, is learning from the experience of sexual crime victims, acknowledging the special problems relating to supporting victims of sexual crime, and the investigation and prosecution of sexual assault cases. Part of the objective of all this is to institutionalise the sensitivity and expertise needed to deal with cases of sexual crime; in other words, there is a need to address simultaneously both structural and attitudinal challenges.

One Stop Crisis Centres (OSCCs)

One Stop Crisis Centres, situated at the Accident and Emergency Department of government hospitals, offer the sort of comprehensive support needed by victims of violence,³⁴ including medical, legal and counselling support. They are designed to put an end to the situation whereby victims of sexual assault have to go to numerous agencies, each time repeating their story and intensifying their trauma. Knowing this, many victims choose not to subject themselves to the ordeal. The first OSCC was set up in Kuala Lumpur in 1994, but it was only in 1996 that the Minister of Health directed every state hospital to set up such a centre. The OSCC is clearly a positive initiative.

As the Women's Aid Organisation noted:

*On paper, the OSCC looks like a good solution. With the involvement of the Ministry of Health, women's groups, the police, the Medical Social Workers Department, Legal Aid and the Islamic Religious Bureau in developing a protocol for crisis intervention, survivors of rape and domestic violence should receive efficient, sensitive and comprehensive attention from such centres.*³⁵

Stressing that this is an initiative that deserves our full support, we need to point out, nonetheless, areas that still require improvement. These include both structural and attitudinal challenges.

The structural challenges include:

34. The OSCCs tend to be associated with helping victims of rape, domestic violence and child abuse, but in theory any victim of any sexual assault can attend these centres.

35. Women's Aid Organisation, (2005) 'What Happens After Rape?', *Sunday Mail* 20 February.

- **Difficulty in getting cooperation amongst the interagencies involved:** There is a reported lack of communication between the agencies (including the police, medical agencies, and NGOs) providing services at the OSCCs. For example, the OSCC may not get feedback on what has happened to a client once they have left the Accident and Emergency Department, even if they are warded (which would be in the Obstetrics and Gynaecology ward) or are referred for counselling. There is then uncertainty of what happens to the victim, and a lack of coherence in their support and follow-up. Protocols and methods for coordination between different departments and agencies need be institutionalised so that there is such communication and proper procedures to ensure smooth implementation. Our interviewees reported that this is only likely to happen when there is a particular ‘champion’ (a particular person) ready to fight for the effectiveness of the Centre and to insist on the inter-agency cooperation. Without such a ‘champion’, progress is likely to be slow.
- **Procedures not followed:** For example, in Penang and possibly elsewhere, it is not always the case that investigating officers come to the OSCC, meaning the victim still has to go to the police station to make a report before returning to the OSCC for examination. There is also considerable pressure put on the victim to make a police report first because without the report, the OSCC will only treat immediate injuries and not collect the forensic evidence that may be used in a court case.
- **Shortage of staff:** This may mean that the victim and family members traumatised by the sexual crime often do not get the necessary counselling and follow-up care because of staff and time constraints. Shortage of staff also afflicts other agencies such as the Welfare Department, including social workers, and the police, generally.

Sexual Crimes Unit

The establishment of the Sexual Crimes Unit in 1986³⁶ is another good example of an initiative to ease the journey of the victim through the criminal justice system. This specialist section is designed to provide expertise, coupled with supportive attitudes and motivation, to the investigation of sexual crime. It may be no coincidence that it has been chosen as one of the police departments to go through an MS ISO 9001 certification exercise. This means that there is commitment to benchmarking and meeting internationally ascribed standards in every facet of its work. For this unit, as for all other agencies involved, adequate resources, appropriate training and effective monitoring and enforcement are basic if successful investigation is to lead to successful prosecution:

*This is a challenge to prove ourselves, that our duties and responsibilities are performed and executed to the highest quality. To achieve this we need to change our mindset and our attitude towards work and the way we work.*³⁷

36. This followed the strong campaign against violence against women by women's groups, coordinated by the Joint Action Group Violence Against Women (JAG), started in 1985.

37. Inspector-General of Police Tan Sri Bakri Omar, quoted in *The Star*, 3 August 2006.

From our interviews, it would seem that the Sexual Crimes Unit still faces definite challenges, especially with regard to recruitment, training and caseloads. For example, very basic training is given after an officer is seconded to the unit, but no systematic training schedule follows after that. Attracting enough women officers to the unit also seems problematic, although the acceptance that women officers are to be preferred is a major step forward. Most positively, however, the existence of the unit demonstrates official awareness that both structural and attitudinal factors need to be tackled if we are to increase conviction rates in sexual crime cases and offer the best chance of justice and recovery to victims of sexual crime.

Even though this Unit is one of several positive steps, obviously there are still many areas that need to change and increase effectiveness, such as the perennial problem of insufficient personnel, training and equipment.

CONCLUSION

In looking at possible reasons for the high number of verdicts in which the victim was 'discharged not amounting to acquittal', and the very low number of convictions in our sample of sexual crime cases, we argued that there are both structural and attitudinal factors which need to be tackled. These are often intertwined.

In looking at structural factors, we noted that the overall resourcing of the criminal justice system has had implications for the number of professionals employed at any level of the system, which in turn has implications for caseloads. Resourcing will also determine levels of skills, through provision of training, appropriate career development paths, and encouraging and monitoring professionalism – not least in terms of professional ethics.

The high backlog of cases in Malaysia's courts, the relative low number of judges and magistrates, the reported shortfall of police officers by the IGP himself, and the feedback from our interviews relating to prevailing challenges in investigation and prosecution of sexual crime cases, all contribute to high DNAA and low conviction rates.

The relative lack of victim support, the probability that trials will continue over a relatively extended period, possibly presided over by more than two judges or magistrates, and the remaining challenges to sound investigation and case presentation, are all areas which need to be tackled.

Tackling these structural challenges alone will not solve the problems as there are other issues to sexual crime trials that also need serious attention and action. They have to do with attitudes which will form the basis for the discussion in our next chapter.

Attitudinal Factors in the Outcome of Sexual Crime Trials

Sexual crimes have a very particular profile. In our sample, 96 per cent of all victims were female and 97 per cent of all accused were male. This gives sexual crime a special dynamic, one which brings it into the arena of gender relations. These notions include pervasive myths and stereotypes about female sexuality and behaviour, as well as notions of what is acceptable male behaviour.

MYTHS ABOUT SEXUAL CRIMES

Much of the literature about attitudes to sexual crimes refer to the on-going myths and stereotypes which continue to influence attitudes and judgments. These myths and stereotypes recur again and again in the literature; many of them have been extensively discussed in reference to the crime of rape. The relevance of the myths and stereotypes will vary from one particular sexual crime to another, but the totality of the myths will continue to be central to our discussion of how far victims of a sexual crime can access justice.

The myths and stereotypes can be broken down into those that centre on the victim, those that centre on the male, and those focussing more on the incident. Myths and stereotypes that centre on the victim include:

- *Women lie about being sexually assaulted. They report sexual assault only in order to get even, to get revenge, because they are sexually frustrated and because they feel guilty about having sex. This myth is connected to the belief that the testimony of the female victim in court should be distrusted.*
- *Genuine victims would report a sexual crime immediately.*
- *Women who are sexually assaulted must have asked for it, by the way they dress or act.*
- *Women cannot be sexually assaulted by their husbands or boyfriends. There is no such thing as date rape – if a woman is dating, what does she expect?*
- *Nice girls do not get sexually assaulted; only a certain type of women does.*
- *Women secretly want to be sexually assaulted. They enjoy it.*

The myths and stereotypes that centre on the male attacker include:

- *Sexual crime is a crime about sex (passion and/or desire). Men who sexually assault women are sexually starved. When an individual commits rape it's because he is 'turned on' and has uncontrollable sexual urges. As well as 'excusing' the crime, this myth also leads to the suggestion that castration of the perpetrator will solve the problem.*
- *Men who assault women are of a particular type. It's easy to spot a sex offender – they are creepy and have shifty eyes. They are monsters. They are mentally ill. Men of certain races and backgrounds are more likely to sexually assault women.*
- *Sexual assault is committed by strangers. Women are sexually assaulted by sex-crazed strangers while they are alone in a dark alley or deserted places. Keep away from deserted places and the problem will be solved.*

Those that relate to the incident itself include:

- *Sexual crime does not happen very often.*
- *It is only sexual assault if physical violence or weapons are used. It must involve physical violence. A woman who does not resist cannot claim rape or assault.*
- *Men cannot be raped; they can resist.*
- *The best way for a woman to protect herself from sexual assault is to avoid being alone at night in dark, deserted places, such as alleys or parking lots. It is a spontaneous act. Unpremeditated.*
- *Unless she is physically harmed, a sexual assault victim will not suffer any long-term effects.*
- *Talking about it only makes it worse.*

The influence of these myths and stereotypes creates a doubt about the truthfulness of the victim's account and a suspicion about her motives and behaviour. Many 'excuse' the assault by the man. Together they establish a culture of scepticism about the victim which seriously undermines her chances of justice.

Related to this is the widespread subscription to notions of what defines a 'genuine' sexual assault. As one writer puts it (for rape, read sexual assault):

In everyday understanding, rape is commonly seen as an attack in the dark by a stranger on an unsuspecting victim who puts up physical resistance against her attacker. The more a specific incident differs from this prototypical representation of the 'real rape', the smaller the number of people prepared to consider it as rape. This reduction of the 'real rape' stereotype to stranger assaults affects the way in which people evaluate and respond to the fate of rape victims. Victims whose experiences deviate from the 'real rape' stereotype ... are more likely to be blamed for the assault and less likely to receive sympathetic treatment from others. Moreover the real rape stereotype affects women's self-identification as victims of rape.¹

1. Krahe (2001), p.186.

The message from this last sentence is crucial – the myths and stereotypes of sexual assault do not just prejudice justice but also prejudice the victim's own sense of self-worth. This makes it even more compelling for us to get rid of the myths and stereotypes and get on with the business of treating people (whether female or male) and cases, on their merits.

Where people do subscribe to the notion of a 'genuine' sexual crime, it is based far more on assumptions than on fact and bears little relation to the reality of sexual assault. In discussing attitudes in and out of the courtroom, this book extends the considerable discussion exemplified in previous reports such as those done by AWAM, WCC, JAG and researchers in other parts of the world.² Further, we need to read all this in conjunction with our next chapter on the media, to understand that the kind of myths and attitudes we are talking about are not confined to the courtroom or within the criminal justice system. These attitudes are perpetuated by key influencers, of which the media is one. Tackling the bias within the criminal justice system will lead us to tackling the bias that exists on the wider societal level.

A number of studies have shown that victims of sexual crime may be viewed with suspicion at any juncture of their relationship with the criminal justice system.³ When they report the crime, they may be doubted; in the course of the investigation, investigators may also be sceptical of the claims of the victim; in the courtroom, the victim again will be subjected to a barrage of questions relating to her credibility. Practices such as the corroboration warning indicate how far the culture of scepticism has been institutionalised. The kind of defence arguments offered are symptomatic of the influence of myths and stereotypes.

So in addition to tackling the sort of resource issues that we described in our last chapter, tackling these myths and stereotypes, and tackling this culture of scepticism, where the story of the women is doubted from the beginning, are absolutely key to better conviction rates, better justice, and a better chance of recovery for the victim.

Though not every case fails because of the bias of key participants, precisely because of the special circumstances of sexual assault crimes, there must not be room for any prejudice against the victim due to distorted ideas of what should happen, or has happened. There is every indication, however, that such prejudice is still present.

Let us look more closely at the issues as they appear in the courtroom.

2. See for example: Alina Rastam (ed) (2002); Rohana Ariffin (1997); LaFree (1989); Corbett and Larcombe (1991); Harris and Grace (1999); Heenan (2002-2003) and Taslitz (1999).

3. See for example: US Department of Justice (2002); Rennison (2002); Plumer (1995); UK Home Office, CPS and Court Service (2002).

CORROBORATION IN RAPE CASES

In cases of rape, the court is bound to give itself what is known as the ‘corroboration warning’. Corroboration is defined to mean ‘confirmation’⁴ by way of ‘independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence’.⁵ The requirement of corroboration for the evidence of rape complainants has been recently described as ‘a rule of practice having the force of law’.⁶

This means that in practice and procedure, the court must warn itself of the danger of convicting the accused without corroborating evidence. Although the uncorroborated evidence of a rape complainant will not automatically be rejected by the court (since in law, such evidence is still admissible), if it appears that the court has not given itself this mandatory warning, the conviction, if any, could be set aside.⁷ The warning must appear in the judgment or grounds of decision of the trial court,⁸ although ‘no particular form of words is necessary for this purpose: what is necessary is that the judge’s mind upon the matter should be clearly revealed.’⁹ Rape complainants, therefore, face the prospect of convictions against the accused being set aside because this technical requirement is not met.

It is to be noted that this requirement for a corroboration warning exists in very few trial circumstances; indeed, it applies only to evidence given in court by accomplices,¹⁰ children of tender years,¹¹ and complainants in cases of sexual crimes. In other words, the testimony of a (female) sexual crime victim is placed in the same category as the statements of children who are thought too young to know the truth, and accomplices who are thought to tend lie to save themselves.

What is the justification for viewing the testimony of a female victim of rape in such a light? In 1964, in what is still a leading Malaysian case on corroboration, the Federal Court attempted to explain the necessity for corroboration of the evidence of the different categories of witnesses, as follows:

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4. DPP v Hester (1973) AC 296, referred to in Aziz bin Muhamad Din v Public Prosecutor (1996) 5 Malaysian Law Journal (MLJ) 473, 484 (HC) per Augustine Paul JC.
 5. From the locus classicus R v Baskerville (1916) 2 KB 658, 667 per Lord Reading CJ, followed in Ah Mee v PP (1967) 1 MLJ 220, 222 (FC) per Ong Hock Thye FJ.
 6. Public Prosecutor v Mohd Ridzwan Bin Md Borhan (2004) 5 MLJ 300, 302.
 7. Teo Say Eng (2000), p. 110.
 8. Ng Yau Thai v PP (1987) 2 MLJ 214, 216 (SC) per Seah SCJ, referred to in Aziz bin Muhammad Din v Public Prosecutor (1996) 5 MLJ 473, 485 (HC) per Augustine Paul JC.
 9. Chiu Nan Hong v PP (1965) 1 MLJ 40, 43 (PC) per Lord Donovan.
 10. See Section 133 of the Evidence Act 1950, read together with Section 114 (illustration (b)).
 11. There is no definite age limit for a ‘child of tender years’. The competency of child witnesses to give sworn evidence depends not upon their age, but upon their understanding (R v Williams (1835) 7 C & P 320 and R v Travers (1726) 2 Str 700, followed in Sidek Bin Ludan v Public Prosecutor (1995) 3 MLJ 178, 184 (HC) per Abdul Malik Ishak J). The proviso to Section 133A of the Evidence Act 1950 makes clear that the evidence of an unsworn child witness must be corroborated, failing which the accused cannot be convicted. In contrast, the court can convict the accused without corroboration of the evidence of a sworn child witness provided that an exhaustive warning under ‘the old rule of prudence’ has been given on the dangers of doing so (see Sidek Bin Ludan v Public Prosecutor (1995) 3 MLJ 178, 183 (HC) per Abdul Malik Ishak J).

*... the desirability for corroboration of the evidence of the prosecutrix in a rape case... springs not from the nature of the witness but from the nature of the offence.*¹² *Never has it been suggested that the evidence of a woman as such invariably calls for corroboration. If a woman says her handbag has been snatched and if she is believed there can be no question of a conviction on such evidence being open to attack for want of corroboration. If however, she complains of having been raped, then both prudence and practice demand that her evidence should be corroborated.*¹³ (emphasis added)

The courts provided additional insight into this scepticism:

*... the necessity for corroboration, generally speaking, is not so imperative with regard to the identity of her assailant as to the fact of the offence itself. It is here that there is danger. The temptations of a woman to exaggerate an act of **sexual connection are well known and manifold.***¹⁴ (emphasis added)

*I warn myself that, on a charge of rape, it is dangerous to convict on the evidence of the complainant alone, since **experience has shown that female complainants have told false stories for various reasons.***¹⁵ (emphasis added)

*... in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or the girl alone. This is dangerous because human experience has shown us that in these courts **girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.***¹⁶ (emphasis added)

*In sexual cases it (the danger of convicting without corroboration) is the danger that **the complainant may have made a false accusation owing to sexual neurosis, jealousy, fantasy, spite or a girl's refusal to admit that she consented to an act of which she is now ashamed...**In the case of a sexual offence the danger may be hidden.*¹⁷ (emphasis added)

Statements like these clearly exemplify the sort of subjective ideas about women which are held by some people in positions of power and authority, and which would then be an obstruction to justice in sexual crime cases. The fact that these ideas have been 'institutionalised' through the practice of the corroboration warning is very worrying; it means complainants of rape are disadvantaged from the start because their honesty and integrity are fundamentally doubted.

12. Although legal references make clear that the requirement also applies where the victim is male, reported court decisions in this area have been on cases of rape where the victims are female by virtue of the requirement of Section 375 of the Penal Code.

13. *Din v Public Prosecutor* (1964) MLJ 300, 301 (FC) per Thomson LP

14. *Ibid.*

15. *Public Prosecutor v Emran bin Nasir* (1987) 1 MLJ 166, 171 (per Roberts CJ).

16. *R v Henry, R v Manning* (1968) 53 Cr App R 160, 153 (per Salmon LJ).

17. Eleventh Report of the Criminal Law Revision Committee (Cmd 4991), UK, para 186.

Changes Required on the Issue of Corroboration

There have been suggestions that the corroboration warning should be removed. As Federal Court judge Justice Augustine Paul has pointed out,

*... it is hard to see why the same considerations (...) do not apply in cases involving other offences. A false accusation concerning other offences can just as easily arise from sexual neurosis, jealousy, fantasy or spite. The danger is no less hidden in such cases. It may be the case that such motives to falsely implicate may have a particular bearing upon sexual cases, but surely, this should only mean that the evidence must be sifted with care, which should, in any event, be done in all cases.*¹⁸

The further difficulty with the requirement of corroboration in sexual crime cases is that the law's classification of evidence which amounts to corroboration and to proof of the complainant's credibility (which is related) is itself rooted in myths and perceptions of the 'genuine' sexual crime. This includes looking for medical evidence which may not exist, and also for evidence from many of the areas which are discussed below, not least of which is evidence arising out of the behaviour of the victim before, during, and after the alleged incident.

In looking for medical or 'behavioural' corroboration, judges or magistrates may fail to realise that victims of sexual crimes often do not react in the same way that victims of other offences do. For example, studies have shown that victims of rape cases are more likely to remove all physical evidence such as traces of blood or semen from their bodies or clothing due to their psychological aversion to the fact that their bodies have been violated. Therefore, in reality there may not be any such sought after medical evidence (or its quality may have been jeopardised to the point where its usefulness as evidence is negated). This is over and above the shortcomings in the collection, labelling and despatch of medical samples, as described in our previous chapter. Further, studies also show that in cases of sexual offences, delayed reporting is the norm rather than the exception.¹⁹

The conclusion has to be, therefore, that what might constitute corroboration in cases of sexual offences may not necessarily be the same manner of evidence which are normally accepted or looked upon as corroboration in other cases. Although it is possible to convict on the uncorroborated evidence of the complainant alone, members of the Malaysian judiciary are rarely prepared to do so in practice in cases of rape. During our dialogue with them, members of the Penang Bench explained that they were bound by the requirements of the law. Though we agree with the fundamental maxim that it is better to release ten guilty persons than to wrongly convict one who is innocent, we do not see why the same considerations are not applied in cases involving other offences.

18. Augustine Paul (2003), p.1014.

19. See Alina Rastam (ed) (2002); Morash (2006); Kelly, Lovett and Regan (2005).

We therefore support efforts by judges to take a more progressive stand in this area, by adopting the view that

*... a Court must not merely reject a prosecution for rape on the basis that there was no independent corroboration. It is time to look seriously into this field of crime. Victims of rape also need justice.*²⁰

Legislation in many other jurisdictions has already removed the obligation to give a corroboration warning in cases involving sexual offences. In the UK, for example, the old English common law rule which required a corroboration warning in cases involving rape has now been abolished by Section 32 of the Criminal Justice and Public Order Act 1994,²¹ a move hailed by UK barristers as a major improvement in the conduct of rape trials.²² Similarly, in Southern Australia, Section 34i(5) of the Southern Australian Evidence Act 1929 abolishes the mandatory requirement to give a corroboration warning in sexual cases.²³ Indeed the Penang judges and magistrates who attended our dialogue expressed their readiness to do away with the corroboration warning if the law is so amended.

Based on these developments, we see no reason why the corroboration requirement should not be abolished in Malaysia. By this, we are in no way suggesting that the burden of proof should be relaxed in sexual crime cases per se, as we are fully aware of the accused's fundamental right to be presumed innocent until proven guilty beyond reasonable doubt. Instead, what is proposed is an approach which considers the evidence as a whole, as articulated by Justice Augustine Paul in the following extract:

*it would be wrong to be bogged down by technicalities, especially when it has no logical bearing to the problem at hand ... In my view, the right approach is to analyse the evidence for the prosecution and for the defence, and to decide whether the complainant's evidence is so reliable that a conviction based solely on it is not unsafe. If it is not, it is necessary to identify which aspect of it is not so convincing and for which supporting evidence is required or desired. In assessing the supporting evidence, the question then is whether this supporting evidence makes up for the weaknesses in the complainant's evidence. All these would, of course, have to be done in the light of all the circumstances of each case and all the evidence, including the defence evidence, as well as accumulated knowledge of human behaviour and common sense ... **This way, the proper weight is given to the right evidence, and no undue weight is assigned to some evidence merely because it is called 'corroboration' or 'supporting evidence'. Likewise, it ensures that insufficient weight will not be given to other evidence merely because there was an absence of 'corroboration' or 'supporting evidence' in relation to some other issue where such evidence is not even necessary To recite mechanically that it is unsafe to convict without corroboration and to delve into what is or is not, technically speaking, corroboration without relating the evidence to the relevant issues would obfuscate the matter, which is essentially a factual one. It would be a true instance of not seeing the wood from the trees.***²⁴ (emphasis added)

20. *Pendakwaraya v Pretum Singh a/l Lal Singh* (2004) 6 MLJ 599, 604 (HC) per Kamalanathan Ratnam J.

21. Cited in Augustine Paul (2003), p.1016.

22. Temkin (2000), p. 236.

23. Cited in Augustine Paul (2003), p.1016.

24. *Ibid*, p.1018-1019.

DEFENCE ARGUMENTS

The institutionalisation of gender bias is discriminatory and we need to get rid of it. Resulting from such bias, there are a number of issues which may work to the detriment of the victim in the process of the trial. For example, since the burden of proof rests with the victim, she is the one who for all intents and purposes is ‘on trial’, and may have to face defence arguments which draw on the myths and stereotypes described above.

Table 4.1 presents the frequency in which defence arguments were put forward in our sample of sexual crime trials. A particular case may have more than one defence argument.

Table 4.1: Number of times a particular issue was raised by the Defence in cross-examination

	S354	S375(f)	S375	Overall	Mentioned by judge
	Total of 24 cases	Total of 17 cases	Total of 5 cases	Total of 52 cases	in acquittal cases
False report	11	5	1	19	1
Behaviour	8	15	5	32	6
Prior relationship	5	5	4	16	1
Consented to act	1	12	5	21	7
Alcohol/drugs	1	1	1	3	1
Clothing	2	0	2	6	0
Location indicates consent	4	2	1	8	1
Time indicates consent	2	1	1	4	0
Lying/inconsistency	21	12	4	42	12
(No) injuries	13	3	3	22	3
Post-offence behaviour	17	3	3	26	7
Delay in reporting	10	4	3	20	0

As it is our contention that most of these defences draw on the myths and stereotypes described above, this in turn, maintains the culture of scepticism which disadvantages a female victim. We shall look at each of them more closely below.

Consent

In our case sample, consent was raised as an issue not just in all rape trials²⁵ but also in the trials of other sexual assault cases, including outrage of modesty cases. The key issues related to

25. Including statutory rape cases under Section 375(f) of the Penal Code, which deems that consent is irrelevant when the victim is under 16 years of age.

consent are very similar to those related to corroboration and discussions of, for example, the behaviour of the victim and her choices. They refer to subjective notions and to the myths and stereotypes that pervade decisions in the criminal justice system.

Burden of Proof

The Malaysian legal definition of rape as set out under Section 375 of the Malaysian Penal Code contains six sub-paragraphs (a-f); five have a direct reference to 'consent'.²⁶ Accordingly, alongside proof of sexual intercourse and penetration, the prosecution must show proof of absence of consent (or that the victim's apparent consent, if any, was involuntarily given, based on factors such as fear of death or hurt, or other threat or inducement to consent).

As in all criminal proceedings, the burden of proof in sexual crime cases is always on the prosecution to establish the charge against the accused 'beyond all reasonable doubt'²⁷ in accordance with the fundamental principle that the accused is innocent until proven guilty. In legal terms, there are two key elements in any crime – an *actus reus* and a *mens rea*. For our purposes, the *actus reus* refers to the physical element of the sexual assault and the *mens rea* refers to whether or not the person committing the assault had a 'guilty mind' in committing the offence.²⁸ The proof in a sexual assault case then extends to two areas. To prove rape, for example, the prosecution would need to prove: 1) that sexual intercourse did actually take place and 2) that the victim did not consent to sexual intercourse.²⁹

This burden on the prosecution to prove a lack of consent has been heavily criticised as being unfair as it amounts to a burden to prove a negative. Further, questions have been raised as to the criteria the courts use to decide on the admissibility of evidence relating to consent.

Interpretation of Consent by the Courts

Malaysian courts have defined 'consent' as 'voluntary accordance with...what is done or proposed by another'³⁰ and as 'an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side'.³¹

The difficulty in proving consent in sexual assault cases, particularly in rape cases, has been described by the court as follows:

Consent is a mental element which by its very nature cannot be proved by direct evidence, and even if one breaks open the brain of another to look for consent, one can never succeed at all, for it is all too common to hear that the face and the person can be seen, but the mental element is not even remotely visible. Therefore, it is essential to look at

26. The amendments to the Penal Code in 2006 include the insertion of a new subsection 375(f) which negates consent, when the consent is obtained by the accused using his position of authority over the victim or because of professional relationship or other relationship of trust in relation to her. The current subsection 375(g) was previously 375(f) prior to the amendments.

27. Public Prosecutor v Mohd Ali Bin Abang & Ors (1994) 2 MLJ 12, 19 (HC) per Chong Siew Fai J.

28. Archard (1998), p.132.

29. Ibid, p.142.

30. R. v. Abu Kassim bin Babu (1940) MLJ 243.

31. Abdul Hamid v. Public Prosecutor (1956) MLJ 231.

*the surrounding circumstances to arrive as nearly as possible to the true position in this case.*³² (emphasis added)

What, then, are these ‘surrounding circumstances’ which tend to prove or disprove consent?

Importantly, Section 8(2) of the Evidence Act 1950 renders relevant the conduct of the complainant, whether before or after the offence, in determining whether consent was present or absent in a particular case.³³ This, together with the evidential burden on the prosecution to prove lack of consent, creates a situation where the focus of a sexual assault trial is not on the accused’s behaviour, but on whether or not the complainant’s actions and words were sufficient to constitute consent or otherwise.

Thus, the behaviour of the victim is likely to become a major focus of the trial. As a result, she is often subjected to ‘strenuous cross-examination, harassment and intense scrutiny of her private life by the defence counsel in the attempt to prove she consented to the rape.’³⁴

This cross-examination can be on her relationship with the accused, her manner of dress, her demeanour and her response to the accused’s sexual advances (such as whether she attempted to resist or escape the assault). Defence counsels, for example, often attempt to use evidence of past sexual experience to ‘play to the commonly held myth that sexually active women ask to be raped.’³⁵

As a matter of litigation tactic or strategy, they may suggest that just being in the company of a man or men is equivalent to consent to a sexual act. For example, culling from one of the cases in our survey:

*Defence Counsel: You had stated that you did not consent to the rape, so why did you follow them when they asked you to come with them in the first place?*³⁶

The assumption here is that any familiarity with the accused constitutes consent to sexual activity. To disprove this, the court seems often to require a marked change in behaviour, including extreme physical resistance. The AWAM report notes that, ‘The court expects the survivor to have put up a struggle as evidence of her non-consent to sex, and to have sustained injuries in the process.’³⁷

The view of the British Court of Appeal in *R v Olugboja* (1981) 3 All ER 443 stated that ‘every consent involves a submission, but it by no means follows that a mere submission involves

32. Public Prosecutor v Hassan bin Shamsudin (1981) 2 MLJ 1, referred to in Public Prosecutor v Mohd Ridzwan Bin Md Borhan (2004) 5 MLJ 300, 305 (HC) per Low Hop Bing J.

33. The specific types of conduct which are seen as relevant (e.g. physical resistance, promptness in lodging a complaint, signs of distress) are discussed in detail in the section on corroboration.

34. Alina Rastam (ed) (2002), p.62.

35. Ibid.

36. Ibid.

37. Ibid, p.64.

a consent.’ Any presumption that submission means consent demonstrates again how the key decision about innocence or guilt incorporates social conventions or expectations which may be discriminatory against women.

*Most strikingly the law has frequently been prepared only to see resistance to force as evidence of non-consent. There is a double error here. **First, it is mistaken to think that consent can be negated only by a use or threat of force ... Second, it is a mistake to think that the only evidence of such force could be resistance to it.** A judgment that passive submission is the prudent response to a threat of overwhelming superior force is more reasonable, on many occasions, than a decision to resist. As Susan Estrich notes, ‘**Rape is most assuredly not the only crime in which consent is a defence; but it is the only crime that has required the victim to resist physically in order to establish non-consent.**’³⁸ (emphasis added)*

The non-existence of injuries, as we have mentioned, can be the outcome of many factors, including the result of fear. The assumption that a particular behaviour should be followed by all victims does not correspond to the reality of sexual assault. Many factors come into play and each person may react and behave differently. The concern is that when judges or magistrates deem an act ‘consensual’, *they do not discover some independent, objectively verifiable truth. Rather, they create an interpretive truth based on notions of worthy, coherent narratives and moral judgment about the gendered meaning to be ascribed to the man’s and woman’s social behaviour.*³⁹

In other words, the decision of the court may be tied to subjective notions of what did or should have occurred. We need to understand and make others understand that

*Consent is an action, not the lack of response. Consent is an active response; it is not silence.... If you did not consent, nothing else – not your sexual history, not your relationship with the other person, not your alcohol intake, not your clothing – absolutely nothing else matters.*⁴⁰

Changes Needed on the Issue of Consent

In order to move towards a more objective understanding of consent, many jurisdictions are exploring potential reforms, including looking at how to shift the burden of proof away from the victim towards the accused, and to provide (non-exhaustive) definitions of what constitutes consent. So, for example, some jurisdictions have:

- changed the burden of proof to rest more on the defence;
- introduced definitions of consent, including having a well-defined, non-exhaustive list of situations in which consent will be deemed to be absent;⁴¹

38. Archard (1998), p.140.

39. Taslitz (1999), p.141.

40. ‘All About the Law’, <http://incestabuse.about.com/cs/daterape/a/consent.htm>

41. As in the example of India since 1983, which has reversed the evidential burden of proof in relation to consent to rest on the defence: once the complainant alleges that she did not consent to sexual intercourse, a presumption of lack of consent is raised which the accused then has to disprove by showing evidence of consent on her part.

- codified existing law ‘by providing that the prosecution need not adduce evidence of resistance or words or conduct indicating absence of consent in order to establish lack of consent’;⁴²
- introduced a definition or circumscribing of what can be considered ‘reasonable’ in relation to the defence that the accused ‘reasonably’ thought the victim was consenting;
- introduced an ‘active’ rather than ‘passive’ model of consent where participants in a sexual act must take positive steps to ensure the act they are engaging in is consensual.⁴³ Guidelines for an active model of consent include:
 - Each act of sexual intercourse must be consensual: there is no ‘on-going consent’ (i.e. past sexual history does not determine present consent).⁴⁴
 - There must be an agreement between the two parties at the relevant time. Consent can be withdrawn at any time. The agreement can be considered void if it has been gained by deception (e.g. doctor saying he needs to examine the patient).
 - There are cases (e.g. New Jersey Supreme Court 1992) where sexual penetration was held to be non-consensual even though accomplished without force or coercion. Penetration without the *affirmative and freely-given permission of the victim* is held to be sexual assault.⁴⁵
- adopted a new type of ‘reasonableness test’, moving away from the concept of a ‘reasonable person’ to a requirement that the prosecution prove that the accused did not have a ‘reasonable belief in consent.’⁴⁶

The search for appropriate reform is the search to remove, or at least limit, the potential for subjective and possibly misogynistic views to impinge on the verdict. It is also a search to mitigate the syndrome in sexual assault trials where it is the victim, rather than the accused, who is on trial. However, in all such searches for appropriate reform, one of the cardinal principles of law – the presumption of innocence of the accused – must be maintained. But there is an increasing number of reforms elsewhere in the world which honour this principle, yet adopt a more gendered view on consent. Malaysia can use them as models and inspiration. In other words, we are looking to establish a situation whereby *‘the law should concern itself with how behaviour between the genders is currently patterned, and not seek to enforce an ideal of such a behaviour which does not conform to the reality.’*⁴⁷

42. Temkin (2005), p.176. Such lists include situations such as where the victim was subjected to violence, including violence against a third party; where the victim was subjected to threats (including threat to take or deny contact with their children; threat of dismissal from their job; threat of destruction of property, of financial or emotional value; threat to report a serious offence committed by the victim, to the police or immigration department); where the victim was unconscious or asleep; or where the victim ‘lacked capacity’, which may be due to mental or physical disability or as a result of drink or drugs. The latter (especially alcohol) is presently the subject of intense debate in the UK.

43. Scottish Law Commission 2006, para 3.32.

44. There is evidence that this principle has begun to emerge in Malaysia: ‘someone who has had sex with a person before is not deprived thereby of the right to refuse on a future occasion’. *Public Prosecutor v. Jamlong Manmool* (1993) 1 CLJ 212 at 219.

45. See ‘Rape Law: Lack of Affirmative and Freely-Given Permission’, State ex rel. M.T.S., 609 A.2d 1266 (NJ 1992), Harvard Law Review 106, 4 February 1993.

46. Minister of State in the Home Office, quoted in the Report of the Select Committee hearings on Home Affairs Fifth Report, UK Parliament, London, 10 July 2003.

47. Archard (1998), p. 31.

This is true for all our recommendations, and extends to other areas of defence arguments which we will now consider.

Other Attitudinal Issues in Sexual Crime Trials

Corroboration and consent are two key issues in sexual crime trials, especially in sexual assault cases. In our discussion of both of them, references have been made to other issues which crop up again and again in sexual crime trials. The behaviour of the victim, her previous relationship with the accused, the past sexual history of the victim, the time and location of the incident (as indicating consent), late reporting, false reporting, and/or evidence of lying or inconsistency (often under aggressive defence cross-examination) are all used by the defence to undermine the credibility of the victim and the witnesses, successfully, if our figure of a four per cent conviction rate in contested cases is anything to go by.

These arguments centre on the credibility or the 'believability' of the victim. This then often becomes the determining factor in the outcome of the trial.

Behaviour of the Victim

Crucial here is the issue of behaviour, that is, the behaviour of *the victim*. Here are examples from the judges' notes in during cross examination:

Defence Counsel: When your father was assaulting you, why didn't you shout for help?

Victim: I didn't shout for help because he would have hit me.

DC: If your father hit you, you could alert your sister and brothers.

Victim: I was scared for them too.

DC: Given the position of the door, you could have run out, rather than waiting for your father to undress you.

Or, as in the following defence submission:

Wouldn't a woman whose breast has just been fondled feel herself in danger when the man who has just done the fondling starts talking obscenely? Wouldn't she have run for help at the first opportunity? But the victim in this case did not do so. Doesn't this show that the complaint in this case is a fabrication?

Because it is the victim who is 'on trial', a key objective of the defence is then to discredit her. But the discredit is not an 'evidentiary' matter; rather, it is 'proven' by a mixture of indications and implications that the victim has strayed from a 'norm'. This, it is implied, means that she is wholly or partially responsible for the crime.

Little may be spared in the efforts to imply such deviation: the daily routine of the victim, the family situation, the type of relationship with the accused, past (and often apparently unconnected) events, as well as the victim's dressing and behaviour at the time of the incident and subsequent to the incident - all have been produced as part of the 'defence'.

It is important to stress that the 'norms' that are referenced may not be objective norms. Common sense would tell us that different people behave differently, and that different people have very different reactions to events, especially traumatic events like sexual assault. We recall the words of Judge Augustine Paul, which we quoted earlier, on the need to draw upon 'the accumulated knowledge of human behaviour and common sense'. This will not tell us that all women react and behave in the same way, yet this is what is often presented in court. We need to be very keenly aware of whose subjectivity and prejudice any such claimed 'norms' reflect.

This does not occur only in Malaysia. Evidence from elsewhere also records how judges or magistrates have been influenced by such factors as how a victim sits, where she lives, and her physical appearance in court.⁴⁸

Difficult though it might be, we need to move beyond making subjective judgments about behaviour, moral or otherwise. As one activist group states:

*The Coalition considers it outrageous that consent to sexual intercourse can currently be inferred from a woman's dress or physical appearance or her participation in everyday social activities such as accepting a car ride, a dinner invitation, or the act of having a drink and a friendly chat with a man.*⁴⁹

We endorse this sentiment, and ask for a reconsideration of what questions can justifiably be posed in court.

Relationship between Victim and Accused

Discussions on issues of behaviour can be linked to the actual relationship between the victim and the accused. Again, it is to do with myths and stereotypes.

More than twenty years ago, in 1986, American researcher Susan Estrich concluded that stranger rapes were among the most reported crimes in the country and sustained high conviction rates whereas non-stranger rapes (the majority of rapes) were among the least reported with high attrition rates at all stages of the subsequent journey through the criminal justice system.⁵⁰ Our data and discussion in Chapter Two have already debunked this myth. The fact that 'stranger rape' and other sexual crimes being perpetrated by strangers are heavily in the minority has been confirmed by Malaysian statistics.

This is also confirmed by the plethora of research done overseas. For example, it is reported that only 12 per cent of rapes recorded by the police in the UK in 1996 were categorised as 'stranger' rapes (down from 30 per cent in 1985).⁵¹ The British Crime Survey found an even lower proportion of rapes to be committed by strangers (eight per cent). Nearly half (45 per cent) of rapes reported to the survey were committed by perpetrators who were the victims' partners at

48. Temkin (2000), p.225

49. Corbett and Larcombe (1991), p.132.

50. Estrich (1986).

51. Harris and Grace (1999), p.5.

the time of the incident.⁵² The irrefutable fact is that most sexual assaults are inflicted by people known to the victim.

Any attitude which downgrades the 'seriousness' of a sexual assault or other sexual crime because the perpetrator is not a stranger ought to be discarded. It is a prejudiced attitude which has no basis in fact, as pointed out by Kate Clark:

*If it is thought that an attack from someone who the victim knows is less devastating, 'less fiendish', this is also false: violence from someone known will probably be endured over a longer period of time, access to the victim is unlimited, and the after-effects are harder to recover from because a trust has been violated and the victim is less likely to confide in others, and if she does, is less likely to be believed.*⁵³

Research from abroad has attempted to quantify to what extent the 'stranger myth' has impinged on both decisions to prosecute cases and courtroom verdicts. The findings are divided as to how much influence the nature of the relationship between victim and accused has in predicting prosecutorial decisions as well as court outcomes. Older research⁵⁴ argues that the offender-victim relationship is an important predictor of the outcome of legal proceedings and that crimes between intimates are perceived as less serious than crimes between strangers. More recent work indicates that this correlation is becoming less important.⁵⁵ Hence, in one respect at least, positive change seems to have occurred in this area over the years.

Hopefully, this means that key people now understand that sexual crimes are more likely to be committed by people known to the victim, and that this fact does not diminish the seriousness of the crime.

Past Sexual History

The fact that the majority of sexual assault crimes are committed by persons known to the victim also means that the issue of consent and the issues of behaviour before, during and after the crime, become ever more pertinent. Also, one of the more invidious issues that then arises in the courtroom is that of the victim's past sexual history.

There have been long-standing concerns about the relevance and admissibility of evidence concerning a complainant's sexual history and character in sexual crime trials, especially rape trials. Again, the concern derives from the implications which follow from an introduction of sexual history. The implication is that after a woman has said 'yes' once, she is always going to say yes.

52. Home Office (UK) (2002) p.1. This latter figure includes marital rape, a crime which is not recognised in Malaysia and so does not appear in Malaysian statistics.

53. Clark (1992), p.224

54. Estrich (1987) has a good discussion on this. See also Black (1976); Gottfredson & Gottfredson (1988) and LaFree(1989).

55. See for example Spohn and Holleran (2004); or Kingsnorth, MacIntosh & Wentworth (1999).

*One prevailing assumption about female sexuality that is particularly prevalent and obnoxious in the way in which it informs the application of rape laws is the notion that a woman is always consenting to sexual penetration until she proves otherwise.*⁵⁶

The discussion of the victim's past sexual history in a sexual crime trial plays to this assumption. It should be noted that, if the accused has prior convictions, they are generally not admissible as evidence. This is because the law accepts that the accused should be tried for the specific acts alleged to have been committed in relation to the offence before the court, and not acts which took place at a different time. In contrast, 'rape culture consistently denies female sexuality the ability to change over time.'⁵⁷ It is increasingly realised that this assumption is unacceptable and perverts the course of justice.

In Malaysia, this recognition has already been given some acknowledgement. The addition of Section 146A to the Evidence Act in 1988 means that no evidence and no questions in cross-examination shall be adduced or asked concerning the sexual activity of the complainant with any person other than the accused. This was a major step forward in protecting the victim from being trashed.

Of course it will only protect victims if it is properly enforced. There are good examples from our cases, notably:

DC: Are you still a virgin?

DPP: Objection. Section 146A of the Evidence Act.

DC: Because the defence is voluntariness, so the question is important and we have to ask this question.

Judge: Objection sustained.

But we do wonder how far such protection is guaranteed. In our sample, in 16 out of 52 cases where there were records of cross-examination, reference was made to a defence of 'prior relationship'. The AWAM report⁵⁸ noted blatant examples where the court allowed improper questioning and this has also been reported from other jurisdictions which have attempted to introduce similar guarantees. For example, the UK Home Office reported that there was 'overwhelming evidence that the present practice in the courts is unsatisfactory and that the existing law is not achieving its purpose.'

It suggested that the law 'should be amended to set out clearly when evidence on a complainant's previous sexual history may be admitted in evidence.'⁵⁹ It should be noted that this would not completely rule out the relevance of a past sexual relationship with the accused, but the circumstances under which such evidence is permitted needs to be very carefully delineated.

56. Corbett and Larcombe (1991), p.134.

57. Heath (2005), p.36.

58. Alina Rastam (ed) (2002), p. 68-69.

59. Home Office (UK) 2006, paras 9.64 and 9.72.

In Australia, despite evidentiary reforms limiting the use of sexual history evidence, studies in several Australian jurisdictions demonstrate that this evidence is still being widely used and that its use may, in fact, be increasing.⁶⁰ So changing the law does not guarantee change in courtroom practice.⁶¹

Some crucial principles and points for us to consider have been raised in discussions elsewhere. For example,

*... the prohibition has been extended to apply to evidence that the complainant is 'not of good character (whether in relation to sexual matters or otherwise)'. As well as prohibiting evidence of the complainant's sexual behaviour outside the subject matter of the charge, it also prohibits any other behaviour (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), that might found the inference that the complainant is 'likely to have consented to those acts' or 'is not a credible or reliable witness'. Moreover, the prohibition applies to the prosecution as well as the defence. Like the previous legislation, the act lists a set of exceptions but only allowing specific facts or occurrences of sexual or other behaviour demonstrating the complainant's character, condition or predisposition. In addition, such facts or occurrences must be relevant to establishing whether the accused is guilty as charged and also must have a probative value that is both significant and 'likely to outweigh any risk of prejudice to the proper administration of justice'. Further, it is indicated that this consideration of justice must include taking account of a complainant's dignity and privacy.*⁶²

The role of the judge or magistrate in this, as in other matters, is critical. They need to play their part in protecting victims and other witnesses from defence efforts that often push courtroom etiquette to the limit in their attempt to discredit the character of the victim in a way that may have nothing to do with the course of justice. Attempts to bring in matters such as the victim's previous sexual experience, for example, need to be exposed as too often fraudulent and degrading.

60. See for example Mack & Roach Anleu (2000); Heenan (2002-2003); and New South Wales Department for Women (1996).

61. As a recent report in a UK newspaper states: *Devious barristers and ignorant judges have undermined an attempt to improve the conviction rate in rape cases by excluding evidence of the victim's sexual history, with many women still facing the indignity of being cross-examined about their sex lives in court, according to research sponsored by the Home Office. The research, published yesterday, says that rules introduced in 2000 to ban defence barristers from depicting rape victims as promiscuous have been 'evaded, circumvented and resisted' with the result that the reform has failed to have any impact.* The Guardian, 21 June 2006.

62. Scottish Executive (2006). And we can note that what have come to be termed 'rape shield laws' stem from these presumptive intrusions into irrelevant personal histories. They exist in many jurisdictions and have changed over the years. For example, the concern about such intrusions has been expressed in Canada in such cases as *P v Seeboyer* 1991, *R v Connor* 1995 and *R v Darrach* 2000. Changes in legislation in Canada as in many countries have sought to limit when and how previous sexual history can be used in court, have ensured that the accused's personal counselling records are not available, have extended the protection of the identity of the accused and have reworked the definition of consent.

Time and Location

In pursuing further our discussion of the way assumptions about behaviour are exploited by the defence to discredit the victim, the issues of time and location become relevant. In our profile, in 16.6 per cent of the outrage of modesty cases where there are notes of cross-examination, the issue of location was raised by the defence in a manner that suggested consent. In 7.7 per cent of all cases where such records were available, the issue of time was raised in like manner.

Again, prevalent myths and stereotypes of what constitutes 'good' behaviour and what does not are pertinent. For example, it is consistently suggested that the victim's presence in a place such as a disco or a pub, or even going to the home of the accused, somehow automatically means she is consenting to whatever sexual act subsequently takes place.⁶³ This is also the case if the hour is late or otherwise unusual. We need to ask ourselves what preconceptions are at work here and whether they constitute an objective or a subjective 'truth'. If the latter, then we need also to ask what can be done to ensure that misguided notions about female choice and behaviour do not obstruct the course of justice.

Another myth relates to the notion that a genuine sexual crime can only happen in a location strange to the victim. This is tied to the (false) idea that sexual crimes, particularly sexual assault, are unpremeditated, random attacks. The notion of the 'dark alley' is part of this mythical imagination of sexual crime.

The reality is very different. From our case sample, about 72 per cent of sexual crimes took place in a building, in many cases buildings known to the victim. Indeed, in 21.6 per cent of the cases, the crimes took place in the homes of either the accused or the victim. There were a wide variety of locations, however. In only 28 per cent of the cases did the crime take place outdoors. This was relatively consistent for the different types of sexual crime we covered.

Other Malaysian findings are similar. For example, police statistics state that 4,266 (68 per cent) of rapes reported nationwide between 2000 and May 2004 took place in a residential house or building.⁶⁴ AWAM's study also reports that 67 per cent of rapes took place in a home or building.⁶⁵ The study based on 439 cases from Kelantan shows that nearly all rapes occurred at or in the vicinity of the victims' homes or the offenders' homes.⁶⁶

63. There are many cases round the world where defence lawyers attempt to impugn consent by the victims, by associating them with what they (the defence) consider sexually immoral locations. We might recall the recent and well-aired Subic rape case from the Philippines, where the defence continually emphasised the 'naughty and notorious' bars which is where the victims worked. We return to the issue of prejudices which affect particular groups of people (women), including sex trade workers, the disabled and migrant workers, but here we note again the preconceptions and 'guilt by association' which so often characterise sexual crime trials.

64. PDRM, Bukit Aman. We might also note that in the same statistics, 372 reported rapes (5.9 per cent) took place in a hotel or lodging house, 245 (3.9 per cent) in a vehicle and 45 unrecorded. The rest were categorised as *semak/tempat sunyi/tempat awam* (bush/quiet place/public place).

65. Alina Rastam (ed) (2002), p.41.

66. Mohammed Nasimul Islam et al (2006), p.34.

The same situation is found abroad. The British Crime Survey, for example, notes that:

*The 'myth of the safe home' is well established in the literature surrounding violence against women. Evidence from the current study confirms that women are far more likely to be sexually victimised in their own home than any other location ... nearly three-quarters (74 per cent) of incidents involving partners occurred in the victim's own home and a further 16 per cent occurred in the offender's home. This pattern is almost exactly the same for attacks by ex-partners. Attacks by 'dates' occur in a variety of locations, but are most likely to occur in the home of the offender. Over half (55 per cent) of female rape victims were raped in their own homes.*⁶⁷

The figures referred to in this survey of course include marital rape, a crime (and therefore a statistic) which 'does not exist' in Malaysia. This helps hide the true extent to which Malaysian women are sexually assaulted in their own homes, but at least we know that sexual crime is more likely to take place indoors than outdoors, and often in a place which the victim either knows or actually inhabits. Recognition of this fact should limit, if not negate entirely, the impact of any defence arguments about location.

On the issue of time, we again need to be aware of what this argument is playing to: is it asking us to subscribe to the notion that a woman can only be innocent if she conforms to what society subjectively thinks she should do in any given situation at any given time? That is clearly not what justice is about. Nor is it fair to impute that she consented to a sexual act just because she happened to be in a particular place at a particular time. Again, the victim is on trial and up against a host of assumptions and presumptions that work against her and make it much more difficult for her to get justice.

Late Reporting

When examining the case notes in our sample, it was noticeable that there were numerous instances when the judge or magistrate made notes on the timing of the reporting of the crime. It would seem that this is an area of pre-occupation. And one of the 'myths' highlighted in discussions here, as elsewhere in the world, has to do with reporting.

There are two aspects to the issue of reporting a sexual crime. One is the perception of 'false reporting', which is discussed in the next section. The other is late reporting. The two are not unconnected; the lateness of a report of a sexual crime may induce the judge or magistrate to think it is a false report.

There are many reasons a victim may delay reporting. They have been widely researched and documented. Trauma is one, the shame and stigma attached to sexual assault is another. In Malaysia, this is especially relevant, particularly given potential family and community reactions.

67. UK Home Office (2002), p.3.

Narratives such as:

I arrived home at 7am in the morning. Once I reached home, my mother and grandfather were at home. I did not say anything to my mother because I was afraid my mother would be angry...I did tell what happened to me to my friend, Zura, the very next day...When I went back home, my mother asked me why were my clothes dirty and I said I fell down. I said that because I was afraid of my mother.

or

I made a police report on 20th May at 12.40 midnight. According to the report I made, I was raped on 19th May. I was late in making a report because I did not want to make a report. I did not want to go to the police station. I did not want to make a report because I was afraid the person who raped me would find me again.

or

Yes, it's true I did not make a police report until 11 months after the incident. I was scared. I didn't tell my mother because I was afraid, I was not brave.

or exchanges such as:

DC: Why not tell that you were raped?

Victim: At that time I was afraid, I was embarrassed to tell my boss that I was raped.

or

Judge: Did you tell anyone about the incident?

Victim: I didn't tell anyone because I was scared my father would beat me.

are all too common. Unfortunately some judges, magistrates or defence counsels seem to know best how victims should behave.

DC: SPI didn't tell of her 'rape' to her mother or her friends for five days. This is not consistent with the behaviour of sexual assault victims.

DC: What was the reason for the late report? The incident happened on 18th October but the police report was only filed on the 21st. In the report, the complainant says that she didn't make a report immediately because she was afraid and ashamed. But there is no medical evidence from a doctor or evidence of sick leave produced in this court to support such a statement.

Again, we must stress that it is the victim who is on trial, it is she who is being subjected to all sorts of innuendoes and assumptions, and it is she who is being asked to explain herself. The explanation of course needs to be sought; but surely we can seek it in a more supportive context, where we are sensitive not just to her possible trauma but also to the culture and environment from which the victim comes. What are the reasons for her not to report and how can we help overcome them?

There is extensive literature on this issue⁶⁸, and we would do well to note what it says. In terms of reporting, the reasons why a woman (or man) may not report the crime, or report it late include:

- fear of embarrassment or humiliation when making the report;
- fear that s/he will be blamed for the crime by families, friends, the police, medical officers and/or anyone else to whom s/he makes the report or has to suffer the consequences of making a report;
- feeling of guilt (this is well-documented – victims blame themselves even where they clearly have no reason whatsoever to do so);
- uncertainty as to what will happen if they make a report;
- fear of the publicity and the trial process;
- fear of retaliation by the accused or her friends/family;
- pressure from the family not to report to ‘safeguard’ the family’s name.

A further pressure not to report may derive from the sort of relationship the victim has with the accused (research indicates that many women are less inclined to report rapes by boyfriends, friends or dates). And, in a much wider context, pressure may also be due to the stigma attached to being a victim of sexual crime, where the worth of the individual becomes devalued, irrespective of her innocence. It is not easy to deal with the consequences of being a victim to a sexual crime, and we need to be much better aware and more sensitive to the contexts of those consequences.

It is significant that the study done by AWAM shows that the average number of days that lapsed before a victim made a police report was 14 for rape, 40 for gang rape, 42.3 for statutory rape, and 89.1 for incest.⁶⁹

False Reporting⁷⁰

Earlier we talked about how the existence of the corroboration warning in a sexual crime trial reflects a presumption that a woman is likely to lie. This same presumption applies to the actual reporting of a sexual assault. A late report is, as we have discussed, all too often interpreted by the court as somehow being ‘not credible’. Very much the same logic leads to victims being accused of making a false report.

68. One major earlier study in Malaysia is the WCC study (Rohana Ariffin (ed)) published in 1997. This contains a wealth of information and evidence about rape, its contexts and meanings, and the implications for a just response.

69. Alina Rastam (ed) (2002), p.70.

70. False reporting should not be confused with technical errors, although in the courtroom the defence may attempt to link the two. Unfortunately, there would seem to be far too many cases where there are mistakes made: mistakes on the charge sheet (wrong name, date, address and/or time, for example) or discrepancies between recorded statements and testimony in court can lead and have led to accusations by the defence of false reporting. This should be seen as a separate issue – and of course one still needing our emphatic attention.

One interview we conducted with a defence lawyer exemplifies the worst of such prejudices. In the lawyer's opinion, the allegation of rape is a tool, open for abuse by vindictive women. In his words, 'any slightest claim, they claim rape'.⁷¹

According to him, women are capable of 'lying, concocting and fabricating'. He is not convinced by research which shows that women are not any more likely to lie than other witnesses. 'Men never rape; women consent.' In his mind, when a woman puts up a struggle, it is nothing out of the ordinary. It doesn't mean she does not want it. And if you are going with someone you know, 'all the more that person expects you to agree to sex.'

Research over the years has indicated the persistence of the belief amongst some of the people in authority in the criminal justice system that false reporting in sexual crime cases is widespread. For example, in our research, the three DPPs we interviewed agreed that something in the region of 20 per cent of reported cases of rape would be false.⁷² In 19 out of the 52 cases (37 per cent) where a defence is recorded in our sample, false reporting was offered as one of the defence arguments. Our research and evidence from our interviews show that there is consistent over-estimation of the incidence of false reporting by the police and prosecutors.

According to Malaysian police statistics, however, between 1998 and 2001, the number of false reports of rape cases in Penang was 18 out of 237 cases, or 7.6 per cent.⁷³ Research from elsewhere indicates that false reporting of sexual crimes is on a par with false reporting of other criminal activities. As one study concludes, after reviewing the literature:

*There are false allegations. However, at maximum they constitute nine per cent and probably closer to three per cent of all reported cases. An over-estimation of the scale by police officers and prosecutors feeds into a culture of scepticism which in turn leads to poor communication and loss of confidence between complainants and police.*⁷⁴

In other countries, special training is given to the police to counter the possibility of over-estimation and prejudice. Concerted efforts are clearly needed to rid our society of attitudes which presume a tendency among victims to cry wolf over sexual assaults, not least among those who are in charge of delivering justice.

Credibility

False reporting is one example that is often brought up by the defence in court to infer that the victim is lying. Implying that the victim is either a liar or is unreliable because her evidence is inconsistent is a major defence tactic to discredit the victim and render her accusation baseless. Our profile indicates the regularity with which 'lying and inconsistency' are used by the defence

71. We are obliged to maintain the anonymity of the interviewee.

72. We interviewed two prosecuting officers, two investigating officers, three DPPs, one judge and two survivors.

73. Statistics from PDRM, Bukit Aman.

74. Kelly, Lovett and Regan (2005), p.83.

in sexual crime trials: it was raised in 21 out of the 24 outrage of modesty cases where there is record of defence, 12 out of 17 statutory rape trials, four out of five rape cases, and 42 out of the total 52 cases where we have information.

The inconsistencies may arise due to either lack of recording or inconsistency in recording. These could occur in a report, in a statement or on the charge sheet. For example,

For the incident at accused's house, testimony from SP3 is inconsistent with P8. According to the statement in P8, the incident took place at accused's friend's house at Mutiara P---, Bayan Lepas, while according to SP3 testimony in Court, the incident took place at accused's flat in Bayan Lepas, near the golf course. In P8, it was stated that accused had inserted his penis into SP3's mouth but in SP3's testimony in Court, there was no mention of this.

The apparent contradiction in the testimony of the victim may also be considered proof that she is untrustworthy. For example, in one case, the defence highlighted the discrepancy between how many times a young victim had claimed she had been raped by her father. She had stated five times, but under intense questioning the victim finally admitted,

I said five times. The first time, there was penetration. The second time, there wasn't. I agree I didn't understand the definition of rape.

The defence argued that the discrepancy actually proved that the victim was malicious and that such inconsistency was proof of her vendetta against her father. The intensity of the questioning would have been highly traumatic for the victim.

The defence may even try to have the whole case dismissed on such inconsistency. From one of our cases:

DC: *Apply to impeach credibility of witness in view of 'material contradiction' as above: 155 (C) Evidence Act.*
 DPP: *Witness admitted she had made a mistake and showed honesty.*
 Court: *Not allowed. Witness has explained the inconsistency.*

The response of the judge or magistrate is crucial here, as in other areas. There are good examples from our cases where common sense prevails, and which are therefore examples of good practice. In another of the cases we studied, the judge stated:

I agree in scrutinising evidence by the SP1 (survivor), there are inconsistencies in her evidence. Minor inconsistencies by SP1 cannot be avoided ... witnesses will give evidence according to their own perception ... The question here is: are the existence of differences and inconsistencies enough to damage the credibility of the witnesses? From all the evidence of prosecution's witnesses, none of their credibility was challenged or damaged. Although there is existence of differences and inconsistencies, they are minor and cannot damage the credibility of the prosecution case.⁷⁵

75. The judge in this case also referred to PP v. Datuk Harun bin Haji Idris (no.2) (1977).

Or, in yet another case:

The survivor has explained that when she was at the police station after the incident she was in a state of panic, scared and worried. The survivor was asked to narrate what happened and survivor narrated the incident non-chronologically ... People at the station said that there are many Bangladeshi and this has been interpreted by somebody else, so SP1 said (accused was) Bangladeshi. I accept the explanation by SP1, due to the pressure and the situation of SP1. I considered SP1's explanation as credible and what happened did happen and can be accepted, thus SP1's credibility is not questionable.⁷⁶

The effects of trauma or a long delayed trial which result in faded memories and/or a reluctance to recall the event, are obvious reasons why some testimonies may appear inconsistent. Again, the issue is crucially about awareness and attitude; the challenge is as much about improving the culture of the courtroom as about getting the law and the preparation and prosecution of cases right.

Possible Bias of Judges or Magistrates

In determining factors which contribute to the low conviction rate, one aspect to highlight may be the inherent male bias within the judiciary, not least in those responsible for the judgment. This may make more obvious sense in a judiciary where male judges and magistrates predominate although patriarchal views are not necessarily the sole preserve of men. In Malaysia, with the mix of both female and male judges and magistrates, it is a little more complex to 'prove' male bias.

One approach would be to look more closely at the sex of judges and magistrates who deliver the verdict in particular crimes. In our sample, this breakdown is as shown in Table 4.2.

Table 4.2: Sex of sentencing judge or magistrate by selected types of crime

	Male		Female		Total	
	Number	Percentage	Number	Percentage	Number	Percentage
S354	84	45.7	100	54.3	184	100.0
S375	27	69.2	12	31.8	39	100.0
S375(f)	57	56.4	44	43.6	101	100.0
S509	14	56.0	27	44.0	36	100.0
S21	5	13.9	20	86.1	25	100.0

But any conclusion about whether female judges or magistrates are any more or less likely to be sympathetic to the victim(s) is difficult. The very few convictions render any analysis of guilty verdicts according to the gender of the presiding judge or magistrate meaningless. Certainly, no assumption can be made that female judges or magistrates are any more or less sympathetic to victims of sexual crime than their male colleagues.

76. Case citation.

Table 4.3: Selected verdicts by sex of sentencing judge or magistrate

Verdict	Male		Female		Total	
	Frequency	Percentage	Frequency	Percentage	Frequency	Percentage
Discharge not acquittal (DNAA)	96	48.4	102	51.6	198	100.0
Pleaded guilty	65	47.4	72	52.6	137	100.0
Discharged and acquitted without defence called	20	62.5	12	37.5	32	100.0
Discharged and acquitted charges withdrawn	23	59.0	16	41.0	39	100.0
Found guilty after trial	4	33.3	8	66.7	12	100.0
Total (all cases)	212	48.3	227	51.7	439	100.0

Note: Not included in the listing are unknown verdicts, cases cancelled or transferred and cases where the accused absconded, died or was sent to a mental home or discharged and acquitted after trial (three cases).

As will be seen, there is no obvious trend differentiating the verdicts of female judges or magistrates from those of their male counterparts. We should not forget that the 2:1 split in returning guilty verdicts after trial in favour of female judges refer to just 12 cases out of the 439 and cannot therefore be used to prove any point.

What remains is the low conviction rate and the high DNAA rate. This means that, as with other key participants in the system, judges and magistrates irrespective of sex are not adequately aware, trained and committed to seeking appropriate changes to ensure justice for sexual crime victims.

Common Defence Tactics

We have noted the types of defence arguments that are used to undermine a victim's credibility. Beyond the actual argument, there is also the manner in which the defence puts these arguments across. There are instances of defence counsels conducting the defence so aggressively that it borders on harassment. This has to be stopped.

For one, this aggression is highly insensitive, and is significantly responsible for many victims being forced to re-live their trauma. For example:

Victim: ... accused said he wanted to puas hati (satisfy) himself.

DC: What do you understand by the word 'puas hati'?

Victim: I understood what accused meant.

DC: In your understanding what did accused want to do?

Victim: There were only me and accused at that place, when accused said he wanted to puas hati, accused wanted to do something to me. I immediately cried and I asked him not to do anything to me.

DC: Don't do what?

Victim: Don't do something ...

This type of cross examination is humiliating and degrading and has been a major cause for concern in many jurisdictions. It should be in ours. Further, the aggressive demeaning of the victim is often accompanied by unethical practices, for example, asking a question knowing it will be barred, no matter how insensitive and traumatic for the victim.

There is an important general point to be added here to our observations about 'the culture of the courtroom'. Because criminal trials are predominantly oral procedures in which the victim is tested on explicit details of the offence by telling her or his story in front of a judge or magistrate, some victims are at a particular disadvantage. Victims who are inarticulate, educationally or intellectually disadvantaged, suffering from emotional problems or trauma, or confused by the different languages that may be used in court, clearly can face special difficulties.⁷⁷

Inconsistencies in truthful accounts can be the result of a victim's difficulty in understanding lawyers' language, questions asked in a non-chronological order, particular types of evidence being inadmissible, or the length of time the trial takes. Mature, intelligent victims with good Malay or English skills might be better able to understand what they are being asked, to respond to questions clearly and effectively and to cope with cross-examination. We must recognise that the likelihood of conviction depends primarily on the victim's ability to articulate what happened and to convince a judge or magistrate that a sexual crime occurred. This is an area of increasing comment and research for those involved in sexual crime, and research demonstrates how assessments of victim credibility may be affected by her age, intelligence, socioeconomic status and cultural background.⁷⁸

Further, the defence is intricately linked to the propagation of the myths and stereotypes about sexual assault and women's behaviour. We know that these myths and stereotypes are highly misleading. So, are there not ethical issues here? Many commentators would argue that there are, and that the key participants in sexual crime trials (judges, magistrates, prosecution officers, defence counsels and police) need to adopt a different style in sexual crime trials where respect, sensitivity, better understanding of the issues, patience and common sense prevail, putting an end to the recycling of disproved myths and stereotypes, implications, assertions and harassment.

Crucial to all this is our awareness of the scenario which is often summed up as 'the second rape'. This is where the court process, with its spotlight centred on the victim rather than the accused, too often means that the victim is forced to relive the experience in all its detail, in an atmosphere of aggression, suspicion and disrespect. As one writer puts it rather starkly:

*There is no difference between being raped and giving evidence as a key witness at the trial of your alleged rapist, except that this time it happens in front of a crowd.*⁷⁹

77. Taslitz (1999) contains a powerful exposition of all this.

78. See for example Smart (1995).

79. Corbett and Larcombe (1991), p.132.

The import of this observation is relevant for other sexual crime cases too.

Training prosecutors, judges and magistrates taking a more assertive line, for example, on defence attempts to introduce sexual history, is an immediate positive step forward. But more than this, we need to inculcate a general sensitivity in the court process which then is able to challenge

*...misogynistic attitudes and stereotypical assumptions about male and female sexuality... the fallacies and prejudices in many arguments... so that victims are not systematically trashed in court.*⁸⁰

This implies looking at the whole issue of advocacy and particularly how a defence might or might not be conducted. If harassment and intimidation of the victim by the defence are seen as a justifiable part of discrediting the victim and her testimony, this of course has potentially serious consequences on the victim, who is 'systematically trashed'. It so often leaves the victim not just re-traumatised, but bitter and disillusioned with the criminal justice system.

This area is increasingly part of the search for a more humane and a more just court process. For example, in the UK it is accepted, and stated in the General Code, that, 'A practising barrister has an overriding duty to the court to ensure in the public interest that the proper and efficient administration of justice is achieved.' It is also stated that s/he must not 'deceive or knowingly or willingly mislead the court.'⁸¹

So defence tactics in sexual crime trials which breach these principles should not be tolerated. A wider understanding of the myths and stereotypes, and of exactly how and why they are misleading, will go a long way to ensure that unethical defence tactics would be ruled out of the court process. Defence claims as well as defence behaviour must correspondingly change.

This of course is a tall order, given the likely persistence of attitudes amongst those charged with dispensing justice. Again, we can learn from other jurisdictions. Their experiences demonstrate time and again that even where there has been a change in the substance of the law, with the anticipation of a significant and positive effect for better justice, these hopes are too often dashed because of the lack of response from those charged with delivering justice. For example, 'the impact of the reforms on prosecution and conviction rates has been manifestly disappointing. Radical reformers did not sufficiently reckon with the attitudes and practices of those who administer the law, from police officers to jurors.'⁸²

This means that in order to obtain the optimum chance of justice for victims, we must be determined to upgrade our present understanding of both the law and the processes related

80. Temkin (2000), p.240.

81. England and Wales, General Council of the Bar, Code of Conduct for Barristers (2004) para 202 ff.

82. Temkin (2005), p.186.

to sexual crime prosecution, be ready to amend and change the law as appropriate, but most of all, tackle our own and our community's attitudes and awareness of the assumptions made regarding sexual crime. As surmised below:

*Attention needs to be given to making the law more effective by stronger education of barristers and judges about the law itself **and the social context in which it operates.***⁸³
(emphasis added)

This approach presumes the maintenance of the adversarial system which the Malaysian courts practise, but seeks a better trial experience and outcome for the victim through inducing attitudinal changes in those who administer the law.

A different approach that has been adopted by a number of jurisdictions to ease the trauma of the victim during the trial is to temper the adversarial system with some empathy. This system of 'empathic adversarialism' has three key features:

- Victims would be permitted to tell uninterrupted narratives on direct examination;
- They could be cross-examined through an 'intermediary' who would proffer defence counsel's questions in a less abusive form;
- Their testimony would be supplemented by expert testimony about the social context of sexual assault, women's and men's differing social behaviour and communication styles, the subconscious processes blocking jurors' and judges' empathy for sexual crime victims, etc.⁸⁴

Under this judicial system, the prosecutor would conduct extended sessions for the victim to familiarise her with the law of evidence and provide practice sessions to enable the victim to testify naturally within the confines of the law of evidence. The use of an intermediary, besides preventing witness bashing, can also help the trial judge carry out his/her duties more effectively, as Andrew Taslitz opines:

*The trial judge is ill-equipped to curb defence counsel's tactics. The need to appear impartial renders the trial judge reluctant to intervene on cross-examination. Indeed, the judge's own socialisation in adversarial culture makes distinguishing aggressive from abusive and distorting cross hard. Furthermore, if the judge joins too actively in questioning, the distance necessary to the role of objective umpire may be lost.*⁸⁵

The role thus falls on the intermediary to act as buffer between the victim and the defence counsel. It is recommended that the 'intermediary' should be a non-lawyer, preferably a social worker or psychologist who is trained in the workings of an adversarial system, the dynamics of rape and the judicial reasoning processes. However, the intermediary must be a neutral

83. Kelly, Temkin and Griffiths (2006), p.67.

84. Taslitz (1999), p.115.

85. Ibid, p.118.

participant, never meeting or discussing the case with any witness or attorney. 'The intermediary's role would be that of an aide to the court in administering justice.'⁸⁶

This more humane and empathetic approach to conducting sexual crime trials is definitely worth considering for the Malaysian judicial system.

ATTITUDINAL ISSUES IN PRE-TRIAL PROCESSES

If the starting point is one of scepticism by those responsible for receiving and/or acting on reports of sexual crime, the chances of justice are clearly diminished. In Malaysia we need to be very aware that there appears to be widespread prejudice amongst service providers against the victim. In charting the responses of different service providers to what they saw as the main reason for rape and incest, the AWAM study found that nearly a third answered that it was the fault of the victim. For Welfare Officers, this was a staggering 70 per cent and for Police Officers, 67 per cent.⁸⁷

Further, research conducted on 422 Malaysian medical undergraduates of both sexes found that only 19 per cent of the female students and 11 per cent of males had what was described as a positive attitude relating to gender (stereotypes). The research recommended that courses on sexual violence be included in the medical curriculum, with the perceived advantages being increased awareness, better management skills, victim support and ability to initiate preventive actions.⁸⁸

If uncertain or prejudiced attitudes are widespread amongst service providers, the same situation could well hold true for personnel elsewhere in the criminal justice system. Again we need to stress how important it is to tackle the situation not just at one point of the system, but throughout.⁸⁹ It is precisely the initial attitude of distrust towards the complainant which provides fertile ground for the pervasiveness of those myths and stereotypes which characterises sexual crime trials and pervert the course of justice.

Reporting and Investigation Stage

The decision to report a sexual crime is made by the victim based on a number of factors. They are complex. The victim's own personal reaction to the crime is complex enough, and is made more complex by the reactions of her family, friends, community and/or the criminal justice

86. Ibid, p.118.

87. Alina Rastam (ed) (2002), p.30.

88. Sivagnanam et al (2005), p.3

89. And indeed the situation in society as a whole. Our analysis of the way the media report sexual crime cases, conducted as part of this research, makes a number of points about the assumptions/presumptions which inform such reporting. They reflect exactly the sort of biased notions that we have mentioned here and do nothing to help society take a properly informed and respectful stand on sexual crime issues.

system. Notions of guilt, shame, confusion, stigma and fear are still all too prevalent, helping to maintain a situation where the majority of victims choose not to report the crime.⁹⁰ This is clearly unfortunate and unacceptable if we are concerned about justice.

Reporting the crime is crucially important. It is not just about ensuring that perpetrators of crime are brought to justice. It is also about opening up the possibility of personal recovery for the victim. For example, research shows that those who report sexual assault are much more likely to access health care and personal support in the period after the attack. One such study indicates that over half of those who reported rape accessed medical treatment compared to under a fifth of those who choose not to report.⁹¹

Reporting, therefore, is not just about courtroom justice. Reporting also acts as a gateway to a range of other services. And these may not just be short-term. We recall our earlier discussion about the sort of traumas which may be experienced by victims. Studies like those done by Hanson⁹² found that a quarter of adult rape victims experienced severe and long-term impacts, and this is one example where access to professional help would be extremely beneficial to victims of sexual assault.

So for victims to have the best chance to access justice and to access necessary health care and other support, all of us have a part to play in ensuring the response to sexual crime is appropriate. This applies both to the criminal justice system, from the moment of the report, and to the wider society, including the media.

Respect and Sensitivity

But the concern is not about reporting alone. It is about what happens at the police station and subsequently. It is about the victim being taken seriously. It is about those 'gatekeepers' to the system: the police at the local police station, the nurse and doctor at the hospital or clinic, and the investigating and prosecuting officers. It is about these key people being free from prejudice and assumption, being able to treat cases on their own merits, being sensitive to the needs of the victim.

As mentioned in the last chapter, in Malaysia there have been a number of positive initiatives to tackle exactly this. They include the setting up of One Stop Crisis Centres at government

90. In the UK, for example, a 2002 research review estimated that between 5 per cent and 25 per cent of cases are reported to the police. The Rape Crisis Federation of England and Wales suggested that only 12 per cent of the 50,000 women who requested their services in 1998 reported the crime of rape to the police. Further, it was estimated that only one in five of reported cases actually reaches the trial stage. And of these, half or less result in a conviction. In Malaysia, we could do with some comprehensive statistical research on this. Anecdotal evidence, partially based on small urban samples, tells us that one in ten rapes are reported, but more work needs to be done to verify this.

91. See Rennison (2002) and Resnick et al (2000).

92. Hanson (1990).

hospitals, the recent setting-up of special units to deal with children's cases (under D11⁹³) and the establishment of Sexual Crime Units to handle the investigation of sexual crimes. The purpose of these units is to ensure that the process of reporting and medical examination is as sensitive and supportive as possible, and to avoid the delays, indifference and repetition of statement taking that used to characterise sexual crime reporting.

All these initiatives notwithstanding, anecdotes from interviews with Malaysian sexual crime victims would indicate that insensitivity and prejudices persist. Blaming and/or ridiculing the victim are unlikely to result in a supportive environment at any stage, including the all important reporting stage. As Rohana Ariffin stated in 1997,

*There are frequent complaints by victims of the manner in which they were treated, questioned and even ridiculed by certain members of the police, judiciary, medical and welfare departments. It is because of the fear of such negative responses that rape victims are often unwilling to take the matter to the authorities ... when victims come to the police station to make a report, it seems that anyone or everyone has the right to question, pass a remark or comment on their case.*⁹⁴

Starting from a premise of disbelief is clearly not the way to go, and yet things may not have changed substantially. In an interview we conducted with a victim in 2007, we found the same things repeated:

(The doctor) was not patient. I was crying. When I did not open my legs immediately, the doctor scolded me and said if you don't want the examination immediately come back in a few days after all is healed ... The way she was asking question was impatient and not sympathetic. Then,

*When the IO (investigation officer) was drafting, she was impatient as well. She asked me to hurry up because she was in a rush. She wanted me to speed up. She asked questions impatiently ... then she asked me to type my own report. We were in the IO's room. She was talking loudly. Policemen were in and out and around. I was uncomfortable because everyone knew I was a rape survivor. One policeman actually told the IO to shut the door. But the IO did not. I typed my own report and the IO did her own thing.*⁹⁵

Although we recognise that not every service provider, not every court official, has such an attitude, we are concerned that there are still many who do and we need to aim at improving the sensitivity of these personnel.

93. D11, set up by the police in May 2007, has been charged with handling sexual crimes, crimes against children and abuse (including cases of domestic violence) and the Victims Care Centre. The new division has child protection units in Kuala Lumpur, Penang and Johor. They record victims' statements and tender them as evidence during court hearings, saving the children the trauma of having to face their abusers. There is also the intention to provide counselling - most senior officers have either a degree or a diploma in psychology specialising in counselling.

94. Rohana Ariffin (ed) (1997), p.247.

95. Interview with victim, conducted in the course of this research.

Collection of Evidence

In the last chapter, we noted the challenges faced in the process of collection and presentation of evidence such as institutionalising professionalism and inter-agency cooperation. To this we also need to add attitudinal factors. This is highlighted by, for example, a UK study:

It is vital, therefore, for both the complainant and criminal justice system that access to, and practice within, the health sector combines availability, sensitivity, awareness and professional standards. Medical examiners need to be aware of the meaning of both rape and forensic examinations for victims/survivors, that they are likely to be feeling dirty, ashamed, vulnerable and extremely sensitive to any implication that they are not telling the truth. They also need to be aware of the legal context in which they are gathering evidence and need the skills, experience and technical resources to adapt the process to the specifics of each case.

The study concludes ‘it is vital, therefore, that examiners endeavour to document all evidence which might support the woman’s story.’⁹⁶

So as well as addressing the ‘structural’ issues of ensuring skilling and commitment to following proper procedures in the collection, labelling, sharing and use of evidence, and looking at how to institutionalise regular and effective inter-agency cooperation, there will also need to be a change of mindset. Professionals need to understand the importance of full and proper documentation, not just as part of their professional ethic but also as part of a necessary, increased sensitivity of our criminal justice system to the experience of women.

Decision to Prosecute

Such sensitivity and awareness has also been discussed in research abroad in connection with the next stage in the journey to the courts and to justice. This refers to the decision by the DPP, based on the Investigating Officer’s report, to prosecute or not. After the report and the investigation, will the case now go to court? Here, research has centred on the role of the DPP, and the factors that may influence the decision to prosecute.

As one commentator pointed out, ‘The prosecutor’s authority ... is of pivotal importance in the administration of criminal justice. Prosecutors ... hold the key to the door of the criminal trial process. Apart from the quite exceptional case of private prosecution there is no trial unless the prosecutor initiates legal action against the accused.’⁹⁷ In other words, ‘the prosecutor controls the door to the courthouse.’⁹⁸

This is important, not least because the court represents the ultimate commitment of our country to prosecute and punish offenders for transgressing the laws drawn up to safeguard

96. Kelly and Regan (2005), p.5.

97. Potas (1984), p.37.

98. Neubauer (1988), p.200.

the rights of citizens. If the DPP throws out a high number of cases even before they reach the court, we should be worried. Further, if cases are allowed to continue but result in a high number of acquittals or discharge, we should be doubly concerned.

Of course, well-founded prosecutorial decisions are dependent on effective support for the complainants as well as professional and well-resourced investigation. But where attrition rates are high and conviction rates low, as is the case with sexual crimes in so many countries, it is hardly surprising that prosecutorial decision-making has come under scrutiny. The finding is that it is not only 'evidentiary factors' that may come into play.

In assessing evidentiary sufficiency, prosecutors consider how strong the case will be when it is presented in court and whether the evidence provides reasonable prospects of conviction. The reasonable prospects test is applied in the knowledge that the jury's decision to convict is based on the stringent standard of beyond reasonable doubt. Assessments of the prospects of conviction take into account factors such as the competence and credibility of witnesses and the impression they are likely to make on the judge or jury, the admissibility of evidence, lines of defence open to the alleged offender, and any other factors that could affect the likelihood of a conviction.⁹⁹

This brings us back to familiar territory – victim credibility, this time as assessed by juries (in Malaysia's case, judges or magistrates) who also may well be influenced by myths about sexual crimes. Another study by Lievore concludes:

These studies have demonstrated that prosecutors' case processing decisions in adult sexual assault cases are shaped by both structural and attitudinal factors. To a large extent, prosecutorial decisions are driven by legal considerations relating to evidentiary sufficiency and the prospects of conviction. There is also substantial empirical evidence that, in some circumstances at least, prosecutors' decisions are influenced by variables that are extraneous to the legal elements of the case. The finding that some prosecutors actively look for factors that discredit victims and provide a legal rationale for rejecting cases has raised a particular concern about biased decision-making on the basis of gender stereotypes.¹⁰⁰

On the other hand, there are studies which find that prosecutors tend to see no reason to discontinue most cases. The victim's word is sufficient grounds for prosecuting, as long as her evidence is inherently credible. Some prosecutors advise the victim when the prospects of conviction are poor; because jury decisions in these cases are often unpredictable, they offer the victim the choice of proceeding or withdrawing.¹⁰¹

99. Lievore (2004a), p.1.

100. Lievore (2004b), p.1.

101. For example: *The overwhelming factor is the wishes and well being of the complainant. I rarely proceed if the complainant doesn't want to ... I make sure they're taking an informed position. If they're frightened of the system, I try to explain it to them, encourage them by reminding them about how far they've come and the gains they've made. I acknowledge their progress and allay their fears through information and by demystifying the process. If they're recalcitrant and I'm unable to confirm their position, I recommend discontinuance.* (prosecutor quoted in Lievore (2004b), p.3).

In Malaysia, there is very little research on this topic. The challenge for us is to minimise discontinuation based on the subjective attitudes of DPPs. There will always be contentions over whether to bring the case to court. In some cases, the DPPs' decision based on their assessment of the evidence may conflict with the victim's desire to exercise her right to a trial. Conversely, the DPPs may in some cases judge that it is in the public interest to proceed with a trial even if it is against the victim's wishes.

Further, as we have discussed, communication with the victim is essential. Earlier Malaysian research and our interviews indicate a shared situation with other jurisdictions, where some prosecutors drop cases without adequate or any explanation to victims, treat victims with disrespect, and have an inadequate understanding of the consequences of sexual assault.¹⁰² We would do well to look closely at the situation in Malaysia, not least through commissioning and supporting some serious research into this area. From this, some idea as to the extent of the challenges can be assessed.

Victim Support: A Key Issue in Securing Convictions

Confronting and overcoming the challenges are absolutely basic to providing a decent, supportive and appropriate response to victims of sexual crime.

*If the criminal justice system as a whole is to meet the needs of (sexual assault) victims, the system must be seamless in its professionalism and sensitivity. This should be from the time an allegation is made to the conclusion of the issue, whether that end is judicial or administrative.*¹⁰³

And, crucially, there is a link between the quality of the response and the outcome, as the UK research quoted above found. 'We consider that the treatment afforded to rape victims throughout the investigative process is **key to the prospects of securing a conviction.**'¹⁰⁴ (emphasis added)

The report goes on:

Interviews with police personnel revealed that in many cases the availability of trained staff to receive (rape) victims was problematic across the service. This was particularly evident where the level of trained staff is low and availability is spread across a large geographic area. It is most important at the outset of the process, where it is essential that the victim feels supported by the police.

102. Kelly and Regan (2001).

103. Home Office UK (2002), para 4.1.

104. Ibid, para 3.1.

So getting all this right serves all our purposes. It helps set the tone for a professional investigation that is free from encumbrances of subjectivity and prejudice. This is then more likely to help good case-building and presentation. But it also sets the tone for a supportive and positive experience for the victims. And we should not forget that even where there are difficulties in getting a conviction, the quality of the response is crucial in helping the victims come to terms with their experience. This is often referred to as 'procedural justice' and recent research confirms its significance in affirming or negating the victims' sense of procedural fairness, and in affecting both their consequent sense of self-worth and respect for the criminal justice system.

The fact that (procedural justice) may be more, or at least as, important as eventual outcomes is evidenced by the responses of those women whose cases resulted in acquittals, but who were supported throughout by (specialist victim support teams). Whilst all were disappointed in the outcome, none regretted pursuing the case. This contrasts sharply with research participants whose cases were dropped or lost at an earlier point, and who encountered limited support. Many of them were profoundly dissatisfied with the responses they encountered, saying that if they were ever sexually assaulted again they would not report and that they would discourage a friend from doing so.¹⁰⁵

In other words, if we get our response right, it is possible that attrition rates will drop. But if we allow present problems to continue, attrition rates will reproduce themselves to the point where the 'justice gap' becomes a chasm.¹⁰⁶ For the sake of our criminal justice system, and for the sake of all sexual crime victims, we clearly cannot afford to let this happen.

How can we solve some of these problems and institute some best practices in the courtroom? The use of expert witnesses is one of the features of empathic adversarialism. Even if we do not adopt this system as a whole, the use of expert witnesses can nonetheless be introduced to the Malaysian courts as a means to help create a better understanding of all the issues related to attitudinal biases that might arise in the course of a trial. Expert witnesses can be called in to testify on issues such as differing reactions to trauma and international research findings on late reporting, false reporting, the culture of scepticism, amongst others. In our dialogues with the judges and magistrates, and with the DPPs, the suggestion was not rejected, though there was some discussion as to who could be considered an 'expert'. We look forward to further positive discussion of this proposal.

105. Kelly, Lovett and Regan (2005), p.88

106. Borrowing from the title of Kelly, Lovett and Regan (2005): *A Gap or a Chasm? Attrition in reported rape cases*.

CONCLUSION

In making recommendations for change and in attempting to optimise the chances for justice and recovery for sexual crime victims, we have argued that some major structural changes, including legal and procedural changes, are necessary. But we have also argued that to pursue structural changes alone is unlikely to effect the necessary result. Attitudinal changes are equally essential. Changing assumptions, changing perceptions, and changing peoples' biases are critical if we are to bring about a better criminal justice system which is more responsive to the experiences and needs of female victims of sexual crime as a prelude to better conviction rates.

We have stressed that not everyone involved in the system has a prejudiced attitude. But we have noted that there is considerable evidence to show that too many still do. From the earlier studies like that conducted by AWAM, we are aware of the extent of the perception by service providers that the woman may be blamed for her sexual assault. Thirty-four per cent of all providers interviewed by AWAM held this opinion; slightly more females subscribed to it than males, and a very worrying 67 per cent of police and 70 per cent of welfare officers had this attitude.¹⁰⁷

We talked of the myths and stereotypes that inform attitudes like these. We noted the distinction many people still make between a 'genuine' sexual assault and a 'non-genuine' one. We noted the continued existence of defence arguments in the courtroom which refer to myths and stereotypes, appealing to a conception of the female victim as someone to be viewed with deep suspicion and circumspection. This culture of scepticism is then both underpinned and reinforced by, for example, the existence of the corroboration warning.

There will be (hopefully, many) police, doctors, investigating officers, prosecutors, defence counsel, judges and magistrates in the system who do not subscribe to such a culture, but the challenge is to get everyone observing a particular standard which is respectful, supportive and non-judgmental. We have talked at length about how subjectivity gets in the way of justice and recovery not just in the courtroom but throughout the victim's progress through the system from the moment she reports the sexual crime. As one local NGO puts it:

*The support that follows after (a sexual assault) is crucial to help the healing of the individuals, and forms an important step in eliminating the issue. When the system that is instituted to help survivors re-victimises them again and again, we have to seriously examine ourselves. How is it that after so many efforts at public education on the dimensions of rape, police officials are still inexcusably demonstrating prejudice that continues to silence and blame survivors? Why are our medical officials concerned more about legality than the welfare of patients? In what way is it possible for us to demand more accountable services from the government, and support women in our country who have been through such violence?*¹⁰⁸

107. Alina Rastam (ed) (2002), p.30.

108. Women's Aid Organisation (WAO) (2005), Ibid.

A crucial element here is ‘respect’. In attempting to reduce prejudice and discrimination to the minimum, being able to respect individuals equally, regardless of gender, ethnicity, age or any other characteristic, is basic. Where women are victims of sexual crime, the myths and stereotypes that are used by some to denigrate her experience and probably allow perpetrators to walk free are an attack on such respect. Subjective interpretations of personal behaviour become enmeshed with the judgment of the victim and justice is not served.

*In trying to locate the wrongs involved in certain forms of sexual conduct the most fundamental principle is respect for a person’s sexual autonomy. Autonomy is a complex idea but in the context of legal regulation of sexual conduct it involves placing emphasis on a person freely choosing to engage in sexual activity. Respect for autonomy operates at two levels. Where a person participates in a sexual act in respect of which she has not freely chosen to be involved, that person’s autonomy has been infringed, and a wrong has been done to her. This generates a fundamental principle for the law on sexual offences, namely that any activity which breaches someone’s sexual autonomy is a wrong which the law should treat as a crime.*¹⁰⁹

Getting to the point where everyone shares a healthy respect for every other person’s autonomy is an objective we all to strive for. This is what, in the end, will break any bias and scepticism against women, and will help allow both the victims of sexual crime and us – as a society – to access justice and recovery which is fair, non-judgmental and respectful.

Having argued that structural challenges cannot be treated in isolation from attitudinal challenges, we need also to argue that attempting to change attitudes only in the criminal justice system is an exercise in futility. This is simply because the attitudes we have described are located not just in the criminal justice system but in society as a whole. Part of the understanding about the social context of the law includes understanding the social context of gender bias. Where do attitudes that are sceptical or denigrating to the experience of women come from? How are they reinforced? How can we break them?

As part of our research, we focussed on how the media report sexual crime. The media obviously play a major role in both reflecting and influencing the attitudes and assumptions in our society, and examining how they report sexual crime may help us understand better the social context of gender attitudes and bias. We deal with this in the next chapter.

109. Scottish Law Commission (2006), para 2.3.

5

CHAPTER FIVE

Role of the Media in Sexual Crime Trials

We have seen how the victims of sexual crime have to deal with a multitude of obstacles in their journey through the criminal justice system, not least of which are the attitudinal prejudices from various quarters. This is to be expected since what is played out in the courts is a reflection of the values and perceptions in the larger society which still subscribes to numerous myths and stereotypes about sexual crimes, as we discussed in the previous chapter. In the same way, the media – being also a microcosm of a society that continues to be largely patriarchal – is an integral part of the process in displaying gender bias in its coverage of sexual crimes. As Helen Benedict describes in her insightful research, the press is

a prominent part of the cycle of injustice that traps victims (of sexual crime) ... (and) tended to perpetuate rather than debunk the myths and misunderstandings that so hurt victims, not intentionally perhaps, but through habit and ignorance.¹

The cycle of injustice sees the press playing the role not just of a mirror, but also a determinant. In other words, more than merely reflecting the public's deep-seated and often distorted beliefs about sexual crime, the types of cases the media chooses to highlight and the way it reports them often serve to reinforce these beliefs. And this is why it is crucially important for us to focus our attention on the media in our quest for greater justice for the victims of sexual crime; the media not only reflects public opinion but also shapes it. If the media can be sensitized and educated to free itself of the influence of myths and stereotypes in its reportage, and to stop propagating them (even if inadvertently), it will go a long way towards helping to dispel these biases in the larger society. Better still if the media can be an agent of change to bring about a public discourse on sexual crime that is grounded on an accurate and empathetic understanding of the victim's experience.

However, before this can happen, media practitioners have to deal with the structural and attitudinal constraints within the newsroom, much like the personnel in the criminal justice system.

1. See Preface of Benedict (1992).

STRUCTURAL CONSTRAINTS IN THE NEWSROOM

Reporters and editors operate under constant time pressure and constraints. Competition between the media organisations means that they are perpetually trying to outdo each other, racing to be the first to come out with the hot story, the scoop. In addition, the deadline is always hanging over their heads. These two pressures, combined, lead reporters to take short cuts, to come up with their copies faster than they should (possibly at the expense of quality), to fall back on well-worn notions (like myths and stereotypes) rather than to research more deeply and think more carefully about the impact and implications of their stories.

Another structural constraint derives from journalistic rules which require that reporters must base their stories on sources they have to quote. Given the hold that myths about sexual crime still have on the public psyche, reporters may be using sources who express views that are prejudiced against the victims. These views would be incorporated into the news stories and in this way disseminated and reinforced further. Once a case goes to trial, court reporters are normally prohibited from speaking to the defendants or witnesses and mostly base their reports on what one or the other lawyer says. Hence, if the reporters do not have the disposition to seek insights from elsewhere, they often become unwitting mouthpieces of the lawyers. We have seen the way defence counsels manipulate the sexual crime myths in their trial arguments, and by reporting and quoting what is said by the defence counsels, the media helps to spread and strengthen these arguments. Most damagingly, when the utterances of the defence counsels are splashed across the pages as headlines, they take on a semblance of fact and are mistaken as such by the readers.

Finally, like it or not, media organisations are business concerns – needing to turn in a profit and therefore needing to go for ‘what sells’. This often means highlighting and sensationalising crime, including sexual crime – the more violent, the more steamy, the more kinky, the better. Some media practitioners have justified such practice on grounds that they are only giving the public what they want. However, a poll conducted by the American Society of Newspaper Editors showed that most of the 1,600 adult respondents regarded the press as being exploitative. Seventy-eight per cent of them thought that the reporters were only concerned about getting a good story and were not worried about hurting people, and 63 per cent thought the press took advantage of ordinary people who became victims of circumstances.²

Many of these structural pressures on reporters and editors are not likely to go away, but the onus is on them to deal with these challenges in a more responsible way. Changing their attitudes would help, of course.

2. Benedict (1992), p.265.

ATTITUDINAL CONSTRAINTS IN THE NEWSROOM

Being as much members of society as anyone else, reporters cannot be expected to be untouched by the dominant patriarchal gender perspectives and sexual crime myths. They, unavoidably, bring this baggage with them into the newsroom and their stories would then be coloured by them. Under the circumstances, women tend to fare badly in the hands of the press and are assigned the subordinate roles of sex objects, wives, mothers or crime victims. Rarely would they be portrayed as self-determining individuals. Following Helen Benedict again:

*When a reporter sits down to write a story about any woman, therefore, let alone a woman who has been victimised in a sex crime, he or she has an enormous burden of assumptions, habits, and clichés to carry to the story. Not only are the conventional images of women so limited, but our very language promotes those images. It is not surprising, therefore, that the public and the press tend to combine the bias in our language, the traditional images of women, and the rape myths into a shared narrative about sex crimes ...*³

To add to the problem, the profession encourages a hunger for bylines and front-page scoops, which exerts another pressure:

*increasing the reporter's likelihood to cater to the 'baser instincts' of the press and public to go for sexy, sensational stories rather than careful, in-depth reporting.*⁴

The result of these two factors is that the victims of sexual crime become typecast into the 'virgin' or the 'vamp'. The 'virgin' is the innocent victim who has been sullied by a depraved and perverted monster; the 'vamp' is the woman who, by her looks, behavior or what is generally considered loose morality, drove the man to such extremes of lust that he was compelled to commit the crime.

*Both these narratives are destructive to the victims of rape and to public understanding of the subject. The vamp version is destructive because it blames the victim of the crime instead of the perpetrator. The virgin version is destructive because it perpetuates the idea that women can only be Madonnas or whores, paints women dishonestly and relies on portraying the subjects as inhuman monsters. Reporters tend to impose these shared narratives – which are nothing but a set of mental and verbal clichés – on the sex crimes they cover, forcing the crimes into proscribed shapes. They do this through their choice of vocabulary, the slant of their leads, and the material they choose to leave out or put in, and they often do it unconsciously ... As long as rape myths hold sway, journalists are going to continue to be faced with the excruciating choice between painting victims as virgins or vamps – a choice between lies.*⁵

3. Ibid, p.23.

4. Ibid, p.7.

5. Ibid, p.24.

OUR MEDIA RESEARCH

As discussed above, changing society's perception of sexual crimes and their victims constitutes a big part of the battle for obtaining greater justice for the victims. The media, being a key instrument for shaping public opinion and values, can play a major part in bringing about this change both by choosing what it reports and how it reports them.

The media research for this book was conducted to examine both these aspects of media coverage of sexual crimes. For the first of these purposes, data obtained from the reports of sexual crime trials that were contained in *The Star*, *New Straits Times* and *Utusan Malaysia* for the years 2000 to 2004 were analysed and compared with similar data obtained from the court research.⁶ This analysis allowed us to gather further data on sexual crime trials conducted both in Penang and other states in the country. We were then able to compare the statistics from the media research with those collected from the Penang court research. Some similar trends were discerned through this comparison, but there were also instances where the two components of the research turned up divergent results. These differences may be due to the fact that the media research was based on a sample which was pre-selected by the press and may reflect some of the biases that determined which cases received coverage. The second part of the media research involved careful examination of the language used in reporting sexual crimes to determine the perspective and value system which informed the coverage.

DATA FROM THE MEDIA RESEARCH

We present here the data from the media research, based on the 801 cases that were reported during the 2000 to 2004 period in the three newspapers examined, making relevant comparisons with corresponding data from the court research.

On types of crime, Table 5.1 shows that the proportion of outrage of modesty cases reported in the press (15.5 per cent) was far lower than that found in the court cases tried in Penang (41.9 per cent).⁷ This was most likely because such cases were deemed minor and uninteresting and were not picked up by the press. In contrast, rape cases of various categories (S375, S375(f), S376) made up 64.3 per cent of the media reports as against 33 per cent of the Penang court cases. Once again, media judgment as to what would be sensational and able to draw reader attention could have come into play here.

6. The original intent of the media research was to collect a database of sexual crime data at the national level as a comparison with the Penang data obtained through the court research. However, due to the limitations explained in the Introduction, the research became focussed more on an evaluation of the way the media covered sexual crimes instead.

7. The court statistics referred to in this chapter are the statistics derived from the research based on the Penang court files, which have been discussed in Chapter Two.

Table 5.1: Types of sexual crime (Media cases)

		Frequency	Percentage
Penal Code			
S354	Outrage of modesty	124	15.5
S366	Kidnapping or abducting a woman	0	0.0
S372	Exploiting any person for purposes of prostitution	10	1.2
S372A	Persons living on or trading in prostitution	0	0.0
S372B	Soliciting for purpose of prostitution	2	0.2
S373	Suppression of brothels	2	0.2
S375	Rape	134	16.7
S375(f)	Statutory rape	232	29.0
S376A	Incest	149	18.6
S377	Buggery with an animal	2	0.2
S377A	Carnal intercourse against the order of nature	62	7.7
S377C	Carnal intercourse against the order of nature without consent	21	2.6
S377D	Outrage of decency	5	0.6
S377E	Inciting a child to an act of gross indecency	11	1.4
S509	Word or gesture intended to insult the modesty of a woman	12	1.5
S511	Attempt (to do any of the above)	13	1.6
Women and Girls Protection Act (repealed 2001)			
S16&18	Prostitution and trafficking of females	10	1.2
S19	Persons living on or trading in prostitution	5	0.6
S21	Suppression of brothels	0	0.0
Child Protection Act 1991 (repealed 2001)			
S26	Abuse, neglect or abandonment of a child	5	0.6
Child Act 2001: Child sexual abuse, child trafficking & prostitution		2	0.2
TOTAL		801	100.0

This selectivity was most pronounced in the instance of incest cases. In the media, they constituted 18.6 per cent of all reports, compared to just 1.1 per cent of the Penang court cases. While it needs to be acknowledged that Penang has one of the lowest incidences of incest in the country, the high number of reported incest cases does point to the press highlighting such cases because of their ‘news value’. Such selectivity is, of course, not necessarily bad; it should not be forgotten that the press played a crucial role in bringing the issue of incest into the forefront of national attention through headlining a number of cases in the 1990s. The ensuing public outcry,

Table 5.2: Number of incest cases reported to the police, 1997-2005

Year	Number of Cases
1997	173
1998	179
1999	167
2000	213
2001	246
2002	306
2003	254
2004	335
2005	295

Source: PDRM

Table 5.3: Age of victims

Age of Victim	Percentage
0-10	12.4
11-15	45.6
16-20	20.1
21-30	16.4
31-40	4.1
41-50	1.2
51-60	0.1
61-70	0.0
71-80	0.2

Table 5.4: Age of accused

Age of Accused	Percentage
11-15	1.1
16-20	20.1
21-30	31.7
31-40	18.8
41-50	17.9
51-60	6.2
61-70	3.1
71-80	0.9

together with findings from studies conducted by the police and the Malaysian Crime Prevention Foundation, led to the inclusion of an incest clause in the Penal Code in 2001. Since then the number of incest cases reported to the police has been generally on the rise (see Table 5.2).

As in the case of the court research, analysis of the media data showed that the victims of sexual crime came predominantly from the younger age groups. Table 5.3 demonstrates that in both instances, a very high proportion is concentrated in the 11-15 age group, showing a clear need to focus attention on this vulnerable group in terms of sexual crime prevention and victim support programmes. Research has shown the long-term effects of the trauma from sexual assault on the victims in terms of their self-esteem, how they deal with sexual relations later in life, and their ability to cope with other personal relations. Although victims of all ages require support and assistance, the sheer number of young victims calls for specialised programmes to cater to them.

Similar parallels between the court and media research findings were found with regard to the age of the accused as shown in Table 5.4.

The high proportion of young accused raises two major concerns. First, taken together, the high number of young victims and young accused could point to an increased incidence of consensual sex between young adults. These *suka sama suka* cases are treated as statutory rape under Malaysian law. Women's organisations have been advocating amendments to the rape laws in view of the high incidence of such cases. The better way to deal with them would be education on safe and responsible sex and on respect, rather than punitive actions. A measure of the success of such advocacy is the removal of the minimum sentence for statutory rape cases where consent is proven in court, as

proposed by the Special Parliamentary Select Committee on the Penal Code and Criminal Procedure Code and passed in Parliament in 2006.

The second cause for concern is that the high proportion of young accused may indicate that a culture of violence, in particular violence against women, is still very much embedded in the psyche of young men in the country. This is definitely worrying and calls for the expansion and intensification of education and gender sensitisation programmes targeted at this group. The impact of conviction on the lives of this community of young men is another issue that warrants attention. Besides the concern that sexual crimes are primarily committed by the young, similarly the implication of the high representation of the young victims has been referred to in Chapter Two.

It is worth noting, however, that in the cases reported by the media, the accused from the younger age groups (especially those aged 30 and below) tended to receive lighter sentences than the older offenders, both with respect to sexual crimes as a whole and to rape cases specifically. Figure 5.1 reflects this situation with respect to rape. A higher proportion of the accused were either acquitted or received shorter prison terms if convicted.

Figure 5.1: Age of accused in rape cases matched against sentences



The sympathy that judges sometimes displayed towards the younger accused was also reflected in some of the remarks made by them when passing sentence, such as:

the court feels that a jail sentence will not be so appropriate due to his young age and it is more appropriate that ... (the accused) be given another chance to be a good citizen.

or

I sincerely hope you will repent and not commit any offence again. You are still young and have a long way to go. Don't waste your time idling and, as mentioned by your counsel, you have a bright future.

These lighter sentences might reflect the courts' consideration that young offenders be given a chance to reform; it might also reflect consideration given to the accused in *suka sama suka* cases. But the question that is more pertinent to us is: what are the complementary measures undertaken to bring about attitudinal changes among these young offenders, especially in relation to gender relations and sexual crimes? What role can the media play in this? We will discuss this more fully in a later section.

In one important area, there was a strong divergence between the media and court data. This is with regard to the relationship between the victim and the accused, described in Table 5.5. The media data showed an overwhelming proportion of stranger cases (61.3 per cent) in contrast to 23 per cent among the court cases. The proportion of sexual crimes committed by family members was also higher among the media cases than among the court cases. In contrast, the percentage of cases where the accused was an acquaintance, friend, boyfriend or fiancé was much lower among the media cases than the court ones.

Table 5.5: Relationship between Victim and Accused

Relationship	Percentage
Stranger	61.3
Family Member	23.5
Acquaintance/friend/ boyfriend/fiance	6.0
Neighbour	1.6
Colleague	1.6
Employer	2.0
Teacher	1.0
Others	3.1

There may be various possible reasons for this discrepancy, but it may well point to the kind of selectivity by the press based on the attitudinal factors discussed earlier. We recall Benedict's warning about the way the press 'tend to combine the bias in our language, the traditional images of women, and the rape myths into a shared narrative about sex crimes' and also recall our earlier discussion about what is seen as a 'genuine' sexual crime. The 'stranger myth' figures prominently in the (false) definition of a 'genuine' crime. By choosing to report so many cases where a stranger is the perpetrator (in contradiction not just to our Penang case figures, but figures produced by the police and by other Malaysian research), the media is, consciously or unconsciously, perpetuating the myth further.

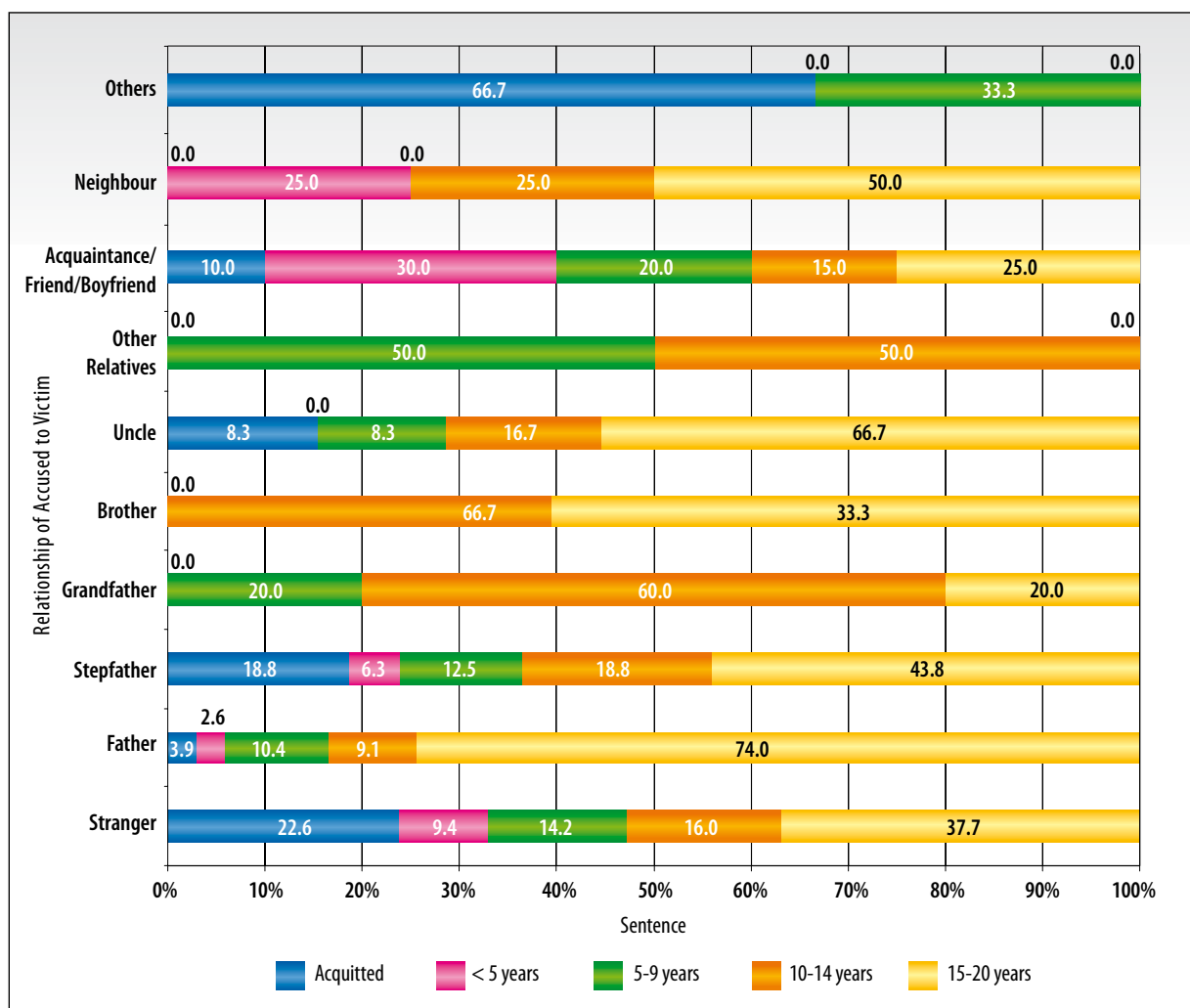
The prevalence of family members as perpetrators derives mainly from the (over-)reporting of incest cases, as described above. Of the incest cases reported in the press, the vast majority (62 per cent) were committed by the fathers of the victims as Table 5.6 shows.

Table 5.6: Relationship between victim and accused in incest cases

Accused	Number	Percentage
Father	133	61.6
Stepfather	26	12.0
Uncle	21	9.7
Grandfather	14	6.5
Brother	8	3.7
Other relatives	14	6.5

Fathers who committed incest were also subjected to the heaviest penalty, as shown in Figure 5.2 below, with only 3.9 per cent of those accused being acquitted and 74 per cent of them being given the heaviest sentence of 15-20 years' incarceration. Next in line were uncles and stepfathers, 67 per cent and 44 per cent respectively of whom received the maximum sentence. The 2006 amendment to the Penal Code enhanced the

Figure 5.2: Relationship between victim and accused in rape cases matched against sentences



punishment for incest to 'imprisonment for a term not less than eight years and not more than thirty years, and shall also be punished with whipping of not less than ten strokes', showing the severity with which it is viewed. In comparison, 38 per cent of strangers and 25 per cent of acquaintances, friends and boyfriends who committed rape were given the maximum sentence.

Attitudinal Issues in the Court Room

Remarks made and lines of questioning and argument adopted by various parties in the court room may be reflective of their attitudes towards sexual crime. Although the number of remarks documented in the media research were limited, they do point to the fact that the myths discussed in the previous chapter are evident and still affect the court process not only in Penang, as shown by the court research, but also in other parts of the country.

As previously stated when discussing attitudinal issues in the court room, defence counsels – whether they actually believe the sexual crime myths or not – often use them to present their cases against the victims. Among the cases documented by the media research was one where the defence counsel alleged that a hairdresser had consented to having sex with her alleged rapist on the grounds that other witnesses had testified that she knew the accused and had been seen having dinner with him at a roadside stall on the night of the incident.⁸ This plays to the assumption that being in the company of a man is equivalent to consent to a sexual act, something we have discussed fully in the 'consent' section in Chapter Four. Using the same line of reasoning, the defence counsel in another case claimed that some teenage girls had 'freely consented to engage in sex' on the grounds that they had willingly followed the accused to a club.⁹

Of even greater concern is the fact that certain judges also demonstrated, through their remarks, that they were influenced by the rape myths. In a case where a police constable was charged with the rape of two women who were detained on charges of illegal entry into the country, the judge remarked that:

*(it) looked like the sexual act was something between a married couple...it looked like it was done more on consent.*¹⁰

because

*both women did not even push Razali (the accused) away or scream; there was no medical evidence of any bruises; both women took their clothes off and both women had entered the country illegally; the sexual intercourse seemed to be voluntary. The women's testimony showed there was no pushing and screaming in the incident.*¹¹

In addition to the above remarks, the judge also cast doubt on the victims' credibility due to the delay in lodging police reports over the alleged rape. The perspective adopted by the judge showed that he subscribed to many of the myths that surround sexual crimes, as described above.

8. *New Straits Times*, 4 May 2002.

9. *Ibid*, 16 February 2000.

10. *The Star*, 24 September 2002.

11. *New Straits Times*, 25 September 2002.

In another rape case, the judge questioned the credibility of the victim on the grounds that she did not shout or attempt to escape when the alleged offence took place. He remarked,

*It was not denied by the victim that there was ample opportunity for her to do so that day ... the victim had ample opportunity to scream for help or free herself but did not do so ... there were many ways she could have fought him. It was clear that the victim had never complained to anyone before she lodged the police report ... she could have complained to her father, the doctor who treated her or her best friend.*¹²

Here again the judge demonstrates belief in a variety of myths, including the myths that a genuine victim is one who puts up resistance, and would report the crime without delay.

This is not meant to imply, of course, that all the parties involved in conducting sexual crime trials are necessarily prejudiced. Indeed, there were instances where judges and prosecutors exhibited sensitivity in dealing with the victims. In one instance, the DPP argued that the victim being acquainted with the offender should not be held as indicative of her complicity in the rape.¹³ In a large number of incest cases and sexual assault cases involving young victims, the judges lashed out at the accused for having committed such despicable acts. Remarks like the following are typical:

*A person like you is perilous to society and your family. I say the longer you stay in jail the better. The Sessions court was right in calling you an animal. Don't you recognise your own children? What is the point of getting married and having children when you can't differentiate human behaviour from animals? You only put on a human facade. What should we do with a person like you?*¹⁴

*There was no more cruel act than for a father to rape his own daughter.*¹⁵

*As the stepfather, the accused had a duty to protect the victim but in this case, he took advantage of her.*¹⁶

However, we recorded no instance where any judge, magistrate, DPP or police personnel explicitly refuted any of the myths and stereotypes pertaining to sexual crimes. We therefore need to reiterate that it is necessary for everyone who is involved in the criminal justice system to be fully aware of and sensitive to gender biases in their treatment of sexual crimes. Defence counsels have to bring themselves up to par with international best practices and desist from playing on myths to conduct their cross-examination or present their arguments. Judges must also be vigilant in ensuring that such questionable defence tactics are not employed. The media also has a role to play, and must avoid reproducing ill-founded remarks unthinkingly. The media

12. Ibid, 14 April 2002.

13. The Star, 8 December 2001.

14. Ibid, 13 October 2000.

15. New Straits Times, 30 May 2003.

16. Ibid, 28 June 2003.

has to do its duty by reporting the actual proceedings in court, but they should also take their duty a step further by commenting on such biased utterances and behaviour where they occur.

It has been suggested that the media would achieve better balance in their coverage of sexual crime trials if they routinely assign someone who is not actively reporting the case – an editor, an ombudsman, a reporter not assigned to cover the story on a daily basis – to write regular analysis and commentary on a more detached basis.¹⁷

In the local context, for instance, instead of treating DNAA cases as being of little interest and news value, more investigation could have been done to explore the causes for the high incidence of DNAA and what implications this has for justice for sexual crime victims. Similarly, in-depth investigations could have been conducted on issues like the length of time of trials, the age profiles of the victims and accused, and/or what actions need to be taken to tackle these issues. In other words, the media can perform a more investigative role with respect to sexual crimes. Why this is not done may be reflective of the low priority the media gives to gender issues. Editors, owners of media and reporters do not set themselves to understand and learn about gender issues, much less gaining a proper perspective on sexual crimes. This, once again, mirrors the situation in the larger society. But it is no excuse. As a community that exerts tremendous influence on public opinion, all involved in the press need to understand what sexual crime really is and why it happens and be part of our wider search for effective justice for all. This includes facing up to our own gender biases.

TRIAL BY MEDIA¹⁸

As mentioned earlier, the media can influence public opinion on particular cases of sexual crime not only by what it chooses to report but how it reports it. By its choice of words, the images it creates of various protagonists in the case, and selective emphasis of utterances made or evidence presented in court, the media develops a story or narrative of the case. As we have seen, this 'rape narrative' or 'sexual crime narrative' is too often based on the prevailing 'cultural narrative' which defines what is a 'good woman' and what constitutes a 'genuine sexual crime'. The 'good woman' is seen as one who remains silent, whether literally or metaphorically, and who does not challenge the accepted norms of social behaviour. We discussed this in the previous chapter. The 'genuine sexual crime', as we have also discussed, is seen as one that conforms with the myths and stereotypes surrounding sexual crime. Narratives are crucial in establishing the reality of people's experience, and where narratives draw on prejudice and bias, and distort that reality, our understanding is diminished and peoples' experience misrepresented. Sexual crime narratives as

17. Benedict (1992), p.261.

18. The discussion in this section draws heavily from Shakila Abdul Manan (2007) 'Victim or Vamp: Representations of Women in Reports on Crimes of Sexual Violence in Mainstream Newspapers', presented at Fiesta Feminista, 15-17 June 2007, Kuala Lumpur and two research reports she completed for WCC: 'Press Coverage of Mohd Faizal's Rape Case: A Case Study' and 'Press Coverage of Pretum Singh's Rape Case: A Case Study'.

presented in the media are arguably such distortions, making the chances for effective justice that much slimmer. Indeed, using its narratives, the media conducts its own trial of the victim and the accused in the public realm.

There has been a recent increase in studies focussing on sexual crime narrative and how language is used to manipulate blame in sexual crime trials.¹⁹ Various techniques are used in this regard.

One of them is '**naming**':

*Different names for an object represent different ways of perceiving it. Different connotations of legitimacy and approval are carried by these labels. The naming of the participant in a case of assault works the same way.*²⁰

Hence, when the press is well-disposed towards an accused, the report would tend to refer to him, for example, by name, marital status, number of children, and/or occupation. Conversely, an accused who is perceived as guilty would be described with words like 'maniac', 'beast' or 'fiend'. It is juxtaposed between the fiend and the non-fiend. In the same way, the victim is granted respectability with labels like 'wife', 'daughter' and 'mother' or through the stating of her profession if she is viewed sympathetically by the press. The victim who is typecast as a 'vamp' would be referred to as 'unmarried mother', 'sexually active girl' or 'prostitute'. But just as the dichotomy between the 'virgin' and the 'vamp' is a false dichotomy, so too is that between the 'fiend' and the 'non-fiend'.

*The distinction between fiends and non-fiends is also a patriarchal myth. It assumes that violent, anti-female attitudes are abnormally rare and that strangers are the men to be feared. Actually attitudes and attacks by men known to their victims are extremely common ... By creating a false dichotomy between fiends and non-fiends, [the media] blurs the wider continuum of male violence against females. The intense hyperbole of fiend naming focusses a righteous fury on stranger attacks, which are actually a very small area of male/female violence. By obscuring the whole range of aggressive acts, it becomes impossible to ask the vitally important question of why, in our society, so many men commit acts of violence against women and girls. Under its veneer of moral indignation against fiends, therefore, (the media) helps to maintain the status quo.*²¹

Another prominent technique used in sexual crime narratives is, of course, that of blaming the victim, blaming which is based on the dominant cultural narrative and the myths that surround sexual crimes. One of the basic premises of the cultural narrative is that of

female silence as the mark of a good woman ... So strong is this theme that women who do speak are themselves seen as violent, aggressing against men. Accordingly, a woman who expresses a need for sexual attention and physical freedom while refusing to 'go all the way' with a man is a 'tease'. She is, on the one hand, consenting to intercourse because

19. See for example Taslitz (1999) and Clark (1992).

20. Clark (1992), p.209.

21. Ibid, p.223-224.

she surely knows that her behaviour can lead only to that inevitable result, and we are all responsible for the foreseen consequences of our actions. On the other hand, she is heading toward that outcome by using her enormous sexual power to torture the male, whom she knows has an uncontrollable need to possess her once she expresses her sexuality. She is thus both consenting to intercourse and deserving of some punishment for her vicious behaviour; therefore she is not really raped.’²² (emphasis added)

A myth that is frequently used to justify blaming the victim is that of **rape as seduction**:

*A woman is often viewed as an ‘aggressor provocateur’ ... an overpowering temptress/temptation, a species of rapist’. A woman may, by her own appearance, flesh, dress, and makeup, assault the man. When the man responds with violence, he acts to defend himself by stopping the provocateur from torturing him when he knows no torture is necessary, for her body bespeaks her need; she wants it too. A man who acts in self-defence is no bully, no rapist.*²³

By choosing, consciously or not, to report sexual crimes using such narratives, our media continues to promote the myths and stereotypes of sexual crime. By so doing, it then continues to deny the reality facing women and victims of sexual crime. The possibility for increasing societal understanding and the possibilities for justice for victims of sexual crime is similarly curtailed. A few case studies of high-profile sexual crime trials in Malaysia will serve to illustrate the points raised above.

Case Studies

The Noritta Samsudin Case

This case involved the charge of rape-cum-murder of Noritta Samsudin, a guest relations officer, brought against Hanif Basree Abdul Rahman, an engineer. Prior to the trial, the press drew upon accepted norms of the ‘**good woman**’ to depict Noritta, portraying her as a filial and obedient daughter, a successful student and a career woman. Notice the **positive** naming here. Quoting kith and kin, adjectives like clever, caring, affable, religious and efficient were used to describe her. She was planning to perform the umrah, but most importantly, she was planning to get married – thus fulfilling the ultimate criterion of being a ‘good woman’. Reader sympathy for her would have been heightened by the assertion that her untimely death had cost her the chance of enjoying marital bliss with the ‘Australian-Chinese boyfriend she planned to marry’.

However, the tide quickly turned against her as the investigation progressed and the police unveiled Noritta’s string of boyfriends and lovers. The media spared no efforts in naming and identifying each of them: Lim Sin Kean, the 38-year-old entrepreneur who was going to marry Noritta; Hanif Basree Abdul Rahman, the 36-year-old engineer who was her ex-boyfriend and the accused; Shahfrul Azrin Azman, the 32-year-old Forex broker; Khairul Anuar Kamaruddin,

22. Taslitz (1999), p.19.

23. Ibid, p.34.

the 22-year-old college student; Mikko Kuoko Johannes Jarva from Finland, etc. Note that they were all identified as being respectable professionals. Noritta was no longer a pious, filial and morally upright daughter but a promiscuous and wanton seducer. She had transgressed and challenged the idealised norms of womanhood and deserved only the disapproval, hostility and condemnation that were hurled at her in later press reports.

The image of Noritta became an increasingly unflattering one of a woman who:

always entered and exited from the condo with other men ²⁴

had friends who stayed overnight ²⁵

worked as a part-time guest relations officer in a karaoke lounge and brought men back home at least once a week ²⁶

when she drinks, you could smell the liquor from her ²⁷

The **naming**, as far as Noritta was concerned, had turned negative. The tirade against her became worse when it was revealed that she engaged in “kinky sex”. Within the prevailing environment of conservative sexual mores in this country, drawing attention to what would be considered deviant sex was a most effective tool for character assassination. The news reports became plastered with statements like:

could have participated in multiple and bondage sex acts ²⁸

sex on the rough floor ²⁹

multiple orgasms as a result of sexual asphyxia ³⁰

Victim may have had oral sex ³¹

Noritta had offended by breaking the culture of silence, by voicing ‘a desire for more than marriage and motherhood,’ ³² by giving rein to her own sexual desires.

24. *The Star*, 11 May 2004.

25. *Ibid*, 18 May 2004.

26. *New Straits Times*, 19 May 2004.

27. *The Star*, 18 May 2004.

28. *Ibid*, 21 May 2004.

29. *Ibid*.

30. *Ibid*.

31. *New Straits Times*, 21 May 2004.

32. Taslistz (1999), p.23.

Just as vilification of Noritta intensified, so did efforts to project a positive image of Hanif. His social standing is verified by repeatedly identifying him as an engineer and the Vice President of the Malaysian Volleyball Society. The image of Hanif as a loving family man, also much loved by his family, was daily portrayed through descriptions of his interaction with his family in the court room:

with his hands cuffed, he was seen kissing his mother's forearm affectionately while she hugged him tightly ³³

his wife sat by his side....stroked his cheek ³⁴

Hanif's wife....sat arm-in-arm ³⁵

He wiped his tears, hugged and kissed his two children and his wife ³⁶

he played and chatted with his eldest bespectacled daughter who rested her head on his shoulder ³⁷

He hugged the girls....showering them with kisses as the packed gallery looked on ³⁸

The last statement was perhaps meant to suggest to the readers that they too, like those in the gallery, should be moved by this show of affection by a loving father. How could such a man have committed rape and murder?

This warm and compassionate portrayal of Hanif stands in stark contrast to the sexual transgressor, temptress and seducer that was Noritta.

Despite mounting incriminating evidence against Hanif's culpability in the sexual acts, a common thread that is woven through the news reports is Hanif's well-placed family solidarity, his supposed strong sense of fatherhood and his family's public display of emotion which together help to contribute to a sympathetic and compassionate portrayal of Hanif. This in turn reveals the dailies' double standards as they are not as willing to 'prosecute' Hanif as an unfaithful husband as they are in assassinating Noritta's character as a sexually promiscuous woman. ³⁹

As Shakila concludes, the media reports had put Noritta on trial and shifted the blame of the crime to her because she had challenged the accepted patriarchal norms. 'Noritta is a

33. The Star, 27 December 2003.

34. Ibid.

35. Ibid, 8 May 2004.

36. Ibid, 1 June 2004.

37. Ibid.

38. New Straits Times, 1 June 2004.

39. Shakila (2007) p. 30-31

transgressor, a sexual deviant, as she has contradicted the accepted ideology of femininity and sexuality; hence, she has to be punished for her sins.’⁴⁰ The language that was used to characterise Noritta and Hanif served to reaffirm the conservative and patriarchal perspective and world-view of our society and to legitimise the stereotypes of what are acceptable behaviour and moral codes for women and men. This practice is commonly employed by the media in other countries as well; an offender’s attractiveness and social standing diminishes his likelihood of guilt, and a sexually active victim is assigned more responsibility.⁴¹

The media could certainly have done better than to reinforce these gender stereotypes. Instead of playing to the gallery and falling prey to sensationalism in order to boost sales, it should have adopted a more ethical and objective stance in its coverage and helped to dispel some of the gender biases that permeated these news reports. But as we have already explained, the media is as much trapped by the dominant cultural narrative as the rest of society. Nonetheless, it needs to train itself to chip away these age-old, baseless notions about gender roles and sexual crimes and help shape a public opinion that is better grounded in fact.

The Mohd Faizal Shamsudin Case

In this case, Mohd Faizal Shamsudin, together with six other university students, were accused of raping a 14-year-old schoolgirl. From the start, the media seemed reluctant to recognise this case for what it was. The rape victim was consistently referred to as ‘girl’, ‘school girl’ and ‘complainant’ as opposed to ‘victim’; the alleged rapists as ‘USM students’, ‘Physics student’ and ‘youths’ as opposed to ‘alleged rapist’, and the act of rape as ‘outrage of modesty’. The use of such euphemisms appears to be aimed at creating doubt in the minds of the readers that an act of sexual violence had been committed. Perhaps the line had already been drawn from the onset because it was a case of respectable ‘USM students’ against a ‘girl’ who was trying ‘to avoid being sent to a reform school’. The **naming** technique has again been used to good effect.

Under the circumstances, the defence counsel had a field day tearing the credibility of the victim to shreds and reinforcing the myth that sexual crime victims are prone to lie. All this was duly reported by the press. According to the defence counsel:

*the girl had admitted...that she lied to her elder sister that the Physics student ... had raped her*⁴²

*the girl was willing to tell a blatant lie to save her skin to avoid being sent to a reform school by her family*⁴³

40. Ibid, p. 30

41. See Taslitz (1999).

42. *The Star*, 14 August 2001.

43. Ibid.

she had a grudge against Mohd Faizal ⁴⁴

when the girl lodged a police report, she claimed that six boys had raped her but during an identification line-up ... she only pointed out one person ⁴⁵

These are clear examples of **blaming the victim** by manipulating the myth that women lie about rape. The news reports were also clear examples of how the press, in failing to seek additional information and insight from other sources, was being 'manipulated' by the defence counsel.

The utterances of the defence counsel were given the credence of fact by having them emblazoned as headlines that read:

Counsel: Girl may have fabricated evidence ⁴⁶

and

Girl 'may have lied about rape to avoid reform school ⁴⁷

The testimonies of the victim's family were also used to reinforce the image of a girl of loose morals whose sister had gone to a nightclub looking for her, assuming she might be there. Within the news reports was

embedded the script of an 'available' and 'willing friend' and party whose acceptance of the rapists' invitations to a drink and subsequently to their house implies her consent to the sex act, hence shifting the blame from the rapists to the rape victim and exonerating the rapists of any crime. In this regard, she is portrayed as a non-genuine victim undeserving of public sympathy. ⁴⁸

Once again, public sympathy for the victim was not forthcoming because she was deemed to have transgressed society's norms of correct behaviour for women. Once again, instead of challenging these stereotypes and myths, the press – through its news reports – have helped to reinforce them.

The Pretum Singh Case

This was a case of a father accused of raping his two under-aged children repeatedly over a period of years. The tenor of the press reports on this case was substantially different from those of the two cases discussed above. For one, as has been noted before, the media has consistently shown abhorrence towards incest cases. Further, this stand is very much in keeping with society's condemnation of this 'unnatural' act and the violation of the trust and responsibility of a father towards his children. Added to that, there is no offending female who has challenged accepted

gender mores. Thus the rape narrative and the cultural narrative were a perfect fit – here was the most fiendish of fiends violating two obvious virgins.

Hence there was no resorting to the use of any euphemisms as in the Mohd Faizal case. The words ‘rape’ and ‘raping’ were liberally used to define this act of sexual assault from the very beginning. References were constantly made to the relationship between the accused and the victim to convey the monstrosity of the act thus:

*The man was charged with ... raping his daughter*⁴⁹

*raping his eldest daughter, now 21*⁵⁰

*raping his younger daughter, now 17*⁵¹

*he systematically and consistently raped his own daughter*⁵²

In this case the **naming** technique was liberally used to cast the daughters as innocent victims of a perverted father. What made it doubly reprehensible was that he raped not just one but two of his daughters.

The frequent temporal references served to underscore the heinousness of the crime further because the rapes were carried out over a long period of time:

*raping his 15-year-old daughter between 1993 and April 1998*⁵³

*raping the girl at the same place between 1989 and May 1997*⁵⁴

*raping his then nine-year-old daughter between 1995 and 1998*⁵⁵

*When I asked my sister, she told me that our father had been raping her since she was in Standard Three and the last time was sometime in May last year*⁵⁶

Mention of the tender age of the daughters confirms their status as innocent, blameless and, therefore, genuine victims and ‘produces empathy for the survivor who must have suffered

49. *The Star*, 16 July 1998.

50. *Ibid*, 15 February 2001.

51. *Ibid*.

52. *Ibid*, 26 February 2004.

53. *Ibid*, 14 July 2000.

54. *Ibid*, 15 February 2001.

55. *Ibid*, 4 March 2003.

56. *Ibid*, 4 February 1999.

great pain and feelings of guilt and shame which, as scholarly studies have shown, most incest survivors have had to struggle with and endure over a long period of time.’⁵⁷

As if committing these monstrous acts of violence were not enough, Pretum Singh showed himself to be totally unrepentant by threatening his elder daughter that he would kill her mother and younger siblings if she disclosed that he had raped her. He also threatened to expose the matter to the daughter’s future husband. All these exposures helped to churn up public revulsion and the press acknowledged the ‘guilt and blame of the rapist in no uncertain terms’.⁵⁸

It is interesting to note that in this case where the victims were acknowledged as being innocent, there was no dehumanisation or objectification of them as in case of Noritta Samsudin or the victim in the Mohd Faizal case. Instead, the victims were granted voice and agency:

*The eldest daughter in her evidence-in-chief: When I asked my sister why she had not complained to anyone regarding the alleged rape, she said she was threatened by our father and because he had also done the same thing to me.*⁵⁹

*The eldest daughter: He said if I refused to return, my sister would be his victim. He also mentioned that if I failed to get back, he would do to her what he had done to me.*⁶⁰

The direct voice of the victim brings out the poignancy of the dilemma and pain she faced and undoubtedly won the victims a lot of public sympathy.

In this instance where there is a convergence between the sympathies of the press, the dominant social values and the gender perspective – that is a convergence between the cultural narrative and the rape narrative – the media did a creditable job in its coverage of the case. But as we have seen in the other two case studies, where social norms cast the victims in a negative light and therefore deny them a fair trial, the media has tended to abide by these norms rather than challenging them. There is a need for the media to question these norms instead of accepting them as given or just. However, in order to make the necessary judgment calls and help change public perceptions of sexual crimes and their victims, media practitioners will need to undergo the requisite gender training and sensitisation.

57. Shakila (2007b) ‘Press Coverage of Pretum Singh’s Rape Case: A Case Study’.

58. Shakila (2007b).

59. *The Star*, 4 February 1999

60. *Ibid.*

CONCLUSION

As we have seen above, the media in Malaysia has been reporting on sexual crime trials with very little attempt to examine the deeper issues that these court cases raise or to evaluate if their manner of coverage helps to preserve and reinforce patriarchal values that deny sexual crime victims a fair trial. Obviously there is a need for the press to review the approach and perspective it has been adopting towards sexual crimes. There is a need for JAG and the individual women's NGOs to engage with the press to bring about greater sensitivity on the part of the latter in the way they deal with sexual crime reporting.

This involvement of the women's groups is crucially important as the experience of the United States demonstrates. Most of the significant American studies on rape were conducted in the 1970s and early 1980s and most of the books on this subject were also published in this period. As a result of the vibrant public discourse, rape coverage in the media in the United States changed radically. The press reported many more rape stories in the 1970s than it did earlier and *shifted its focus from the suspects to the victims, and, for the first time, printed articles on the after effects of rape, on how victims can be helped, on the anger of victims, and on rape as a societal rather than an individual problem.*⁶¹

The Malaysian media would do well to emulate this.

Unfortunately,

*During the 1980s and 1990s, the quality of sex crime coverage has been steadily declining. The swing of sympathy away from victims in recent years has been noticeable enough to result in several organised protests ... Many of the 1970s rape crisis centers and training programs for police and doctors have shut down; the rape crisis centers that still exist are struggling to stay afloat, having lost their previous funding from state and city interests; and the influential National Center for the Prevention and Control of Rape, which funded many valuable studies on the subject, has been whittled down and absorbed into its parent, the National Institute of Mental Health. All in all, rape as a societal problem has lost interest for the public and the press, and the press is reverting to its pre-1970 focus on sex crimes as individual, bizarre, or sensational case histories. Along with the loss of interest has come a loss of understanding.*⁶²

Everyone involved in the issue of sexual crime – which is arguably all of us, but certainly includes the judiciary, the police, relevant government departments and political parties, civil society and community groups – should take heed of this.

61. Benedict (1992), p.40.

62. Ibid, p.251.

The American experience has exemplified the need to tackle sexual crime as a societal issue, requiring the involvement of multiple stakeholders. It may be that women's groups and alliances like JAG and its affiliates will continue to play a central role in educating and sensitising the media, the police, the lawyers, the judges and magistrates, the doctors, the expert witnesses, and society at large – as they have been doing – on the facts about sexual crime and how to prevent and deal with them. But it is not just a women's issue, and far more proactive initiatives need to be taken by all parties concerned to tackle the issues. The recommendations discussed in the next chapter is a good place for all of us to start.

One area of recommendation is that more research and publications need to be produced in order that advocacy and action can be carried out based on a full and factual understanding of the local situation. With more information available and accessible, the media could also more effectively educate itself so that their coverage of sexual crimes would be more enlightened and enlightening. The media needs to be constantly aware of the critical role they can play in bringing about a more progressive gender perspective on sexual crimes.

Helen Benedict has a list of suggestions⁶³ as to how the press can do its job better:

- *Reporters and editors should have guidelines reminding them to be balanced. If a victim's looks are described, then the suspect's must be also ... Crime and court reporters also should be more balanced in their coverage of trials by becoming more independent of manipulation by lawyers and by conducting their own research instead of parroting attorneys.*
- *Reporters should be aware that their role is neither to prefer the defendant's case or the victim's case. Although the emphasis is on protecting the alleged victim of sex crimes from further persecution, the intention is not to suggest that victims are always truthful. Part of achieving balance is to follow up holes in the victims' stories as much as the defendants'.*
- *Reporters should set their sex crime stories in a context that will inform the public of the reality of the crime and help people to protect themselves, rather than feeding fears, myths, and misconceptions. Statistics should be gathered from both the police and local rape crisis centers as the gap between figures from these two groups is usually large. Explanations of why such crimes happen should be collected from researchers, literature, and other victims. Whether the crime is typical or unusual should be made clear. Newspapers could achieve better balance and context if they routinely assign an outsider – an editor, ombudsman, or reporter not assigned to cover the story on a daily basis – to write weekly analysis of the crime and the trial from a distanced perspective.*

63. Ibid, p.260-265.

- *A reporter who covers crime, a huge percentage of which is rape and sexual assault, should understand those subjects. That means not only learning about what rape actually is and why it happens, but facing up to their gender, class and race biases. Such lessons could be learned if all crime reporters and their editors were required to take a quick training course in the field of victimology and sexual assault. Also, reporters, editors and student reporters ought to be assigned some of the major books on rape, sex crimes, incest, feminist linguistics and wife battery. The result of this training should be a clear written policy adapted by every paper on how to cover sex crimes.*
- *Reporters and editors must learn to take pride in reporting rape fairly and accurately rather than sensationally. Reporters must be encouraged to provide accurate information to the public about sex crimes without punishing the victim.*
- *The press must stop being afraid of feminism. Rape cannot be understood without mentioning the role of women and the way men are trained to see them as objects of prey.*

If the Malaysian press could incorporate the above items into a charter for best practices in sexual crime and court reporting, it would go a long way towards improving the quality of the coverage and also allow the media to play an effective role in changing public perceptions about sexual crime, and in addition, contributing to a transformation of the rape narrative, the sexual crime narrative, and the cultural narrative on gender.

6 CHAPTER SIX

Conclusions and Recommendations

In the previous chapters, considerable ground has been covered. This follows WCC's contention that any complete solution to the issues related to justice for sexual crime victims needs to go well beyond merely reforming the criminal justice system. To recap, we have looked at the specific information that emerged about sexual crime trials from the profile of 439 Penang cases. We have used that to explore some of the crucial structural and attitudinal issues that arise in the process of a sexual crime trial. We have also included some comments on what happens earlier in the journey to justice, looking at issues related to the reporting, investigation and decision to prosecute sexual crime. We have also analysed our data obtained from research on sexual crime trials as reported in the media, and discussed the role of the media in reflecting and reinforcing prevalent notions (including the myths and stereotypes) about sexual crime. Let us take time to link all this to a still wider issue.

It is no accident that the overwhelming majority of victims in sexual crimes are female, nor that the overwhelming majority of the accused are male. Sexual crime is not a crime of sex, it is a crime involving issues of power, gender and violence, with sex being used as a tool. But to really get this understood by all those in the criminal justice system, and by the public (men and women) generally, it is crucial we nurture and extend the on-going discourse about sexual crime.

DISCOURSE ON SEXUAL CRIME

Discourses can be described as collections of ideas, concepts, explanations, and experiences which are communicated either in writings or in discussions. They have a vital influence on social life and actions, because they have a vital role to play in the definition of norms. Discourses within formal social control agencies, such as police departments, prosecutors' offices, courtrooms and victim assistance programmes, tell us how events of alleged crime and victimisation are perceived. They contribute to defining certain actions 'fair' and others 'unreasonable' or 'not believable'. Discourse amongst specialists, including medical staff, welfare officers and social scientists, for example, may determine the way an event is valued and therefore the rigour with which investigations are pursued. Discourses within the wider society, including within the media, may present a picture that can either encourage or inhibit the way we respond to and treat victims of sexual crime.

One key question then relates to who or what influences these discourses. One suggested and crucial aspect is implied by the following:

*Society does not want to hear what women have to say about this subject, and men have a vested interest in keeping definitions of sexual violence as narrow as possible. It is vital that women continue to speak, to tell their stories.*¹

We have seen in our discussion on the media how women are expected to submit to the culture of silence. This of course relates to wider issues of gender and power within society, where the voice and influence of women is subordinate to that of men. This is the context in which the prevalence of those myths and stereotypes which have informed so much of our discussion exists. The drawing on these myths and stereotypes then reinforces the culture of scepticism that surrounds, for example, the reporting of a sexual assault.

Such reinforcement helps doubt to creep in at all levels of the system.

*Despite reforms and increased training and education about the needs of crime victims, there is recent evidence that some criminal justice officials, medical personnel and members of the public doubt and disempower the victims of gender-related crime.*²

Again, this relates back to wider socialisation, and what kind of discourse and information is available about gender and sexual crime in particular. Here, the media plays a vital role, and not always a positive one – as discussed in the previous chapter. It showed that sexual crime is a mainstay of the press and other media, because of the special demonology that surrounds sex crime and its apparent attraction to readers or viewers. Salacious reporting, involving references to monsters, sex fiends, evil persons preying on innocent victims, predatory accused, or predatory victims and the sexualisation of the event, is all too common. Further replication and reinforcement of the myths and stereotypes are the result.

So we need to challenge existing stereotypes, existing discourses based on prejudice and subversion of power, and promote an alternative discourse, to debunk the myths and build an awareness of the reality of sexual crimes. Crucial here is paying attention to the experience of sexual crime victims, of allowing their voices to be heard and respected. This will help us move towards a culture of acceptance rather than that of scepticism, from which we can adapt our responses, including our trainings, sensitivities, processes, procedures, and provisions in relation to sexual crime.

1. Hague and Malos (1998), p.8.

2. Monash (2006), p.133.

CONCERTED AND COORDINATED ACTION

The challenges pertain to all levels. For example, we note this press release from the UK Home Office:

*There is a lot more to do especially in changing public attitudes to rape which is why a hard-hitting advertising campaign was launched...*³

The campaign drew attention to the fact that rape occurs where there is a lack of consent, and does not have to involve physical violence. The press release went on,

To secure confidence, the CJS (criminal justice system) must earn the confidence of the rape victim as well as the victim of the burglary or the mugging. To narrow the “justice gap” we must tackle the gap between the number of rapes and the number of convictions. All the parts of the system need to work together to ensure rape victims get the support they need and get justice and ensure that perpetrators know they can’t get away with it. In all areas now the local criminal justice boards are working together - strengthening partnerships between chief constables and chief crown prosecutors and courts, prison and probation.

This is exactly the sort of thing we need to do in Malaysia, for all sexual crimes. There is a need for coordinated responses at all levels and across organisations and individuals. We need to talk about, and take action about, the transformations needed at the macro level (law, state, culture), at the intermediate level (family, community, organisation) and at the micro level (our personal level). Establishing positive partnerships and collaboration between all parts of the criminal justice system and extending them to the wider public is absolutely necessary to give people more confidence in the system and to send the message to perpetrators that (sexual) crime will not be tolerated and that the law will be enforced.

We note that there have been many initiatives taken by government and non-government agencies. To quote just a couple of more recent examples: the Malaysian government reported to UN ESCAP that to eliminate violence against women and the family, the Women Against Violence (WAVE) campaign was launched in July 2001. This has involved a series of training for police, welfare department and medical staff.

*The campaign has been extended to the state as well as the community levels. Those who have registered themselves as volunteers are given training to help out at the one stop crisis centres as well as other organisations that extend support to those in need, especially victims of gender-based violence.*⁴

3. UK Home Office press release, 29 March 2006.

4. See <http://unescap.org/esid/GAD/Issues/Trafficking/Malaysia.pdf>

In the same report, the Government also mentioned its 'Stop Rape: Respect And Restrain' campaign in 2004. It stated that this involved

*integrated and multiple strategies bringing together government experts, NGOs, the private sector and the professional community. The objective of the campaign was to seek views on rape from all parties involved as well as to find effective solutions to the problem.*⁵

Further, in its support for the work of the NGOs in addressing violence against women, the Government disbursed over RM8 million between 2001 and 2003 to 45 NGOs to conduct various programmes.

So there is awareness of the need for concerted and integrated action. What needs to be done is to evaluate the effectiveness of actions so far undertaken (there is very little monitoring or serious evaluation of programmes) and to intensify efforts to cover the range of sexual crime and violence against women.

Further, we remind ourselves that attitudes – including those relating to gender and sexual crime – are not static. They can and do change, and we look forward to the legislation of marital rape and sexual harassment as crimes in our Malaysian criminal justice system.

Many of the changes have come about because stories and narratives from victims of sexual violence have made society realise how broad the continuum of sexual violence towards women is, and how many agents within a society are contributors towards that. The media, government leaders, members of parliament, laws and their enforcement - all set an important tone to guide our response to sexual crime. Where this tone belittles or denigrates, or misleads, the challenges we all face are made harder to overcome. And even harder, then, is the ability of victims of sexual crime to secure not just justice but a closure to their trauma.

Bear in mind that

*We must have victims' justice alongside criminal justice. Of course we must ensure that people are quickly and fairly dealt with, that those who are guilty are brought to justice and those who are innocent are not found guilty. But justice also for the victims who can often come away from the system feeling let down and can often feel that the process and not the truth have been paramount in people's minds.*⁶

We noted in Chapter Four, how getting our response to victims right will not just help in reducing attrition rates, but will allow victims to come to terms more easily with their experience. To get it wrong, however, means that victims are further traumatised and have less chance to heal, and have reduced confidence in the criminal justice system. This will exacerbate non-reporting with a consequent rise in attrition rates.

5. Ibid.

6. UK Government spokesperson, reported in www.SocietyGuardian.co.uk, 28 April 2004.

As one report remarks:

The failure of criminal justice systems to address these stereotypes means that the processes involved in responding to reported (sexual crime) – from early investigation to courtroom advocacy – can serve to reinforce, rather than challenge, narrow understandings of these crimes, who it happens to and who perpetrates it. The attrition process itself reflects and reproduces these patterns.⁷

This also means that, ‘Attrition presents problems other than low conviction rates. It both originates in and leads to the perpetuation of myths and differential treatment of (sexual crime) cases as compared to all other crimes.’⁸

So let us go back to some specific areas where action is necessary, on which to base and extend alternative discussions and discourse.

RECOMMENDED ACTIONS

Collecting and Disseminating Information

The compilation of information and analysis which incorporate the experiences of all those involved in sexual crime is essential, especially from the victims, but importantly also including that from witnesses, police, medical officers, investigators, other agency staff, prosecutors, judges, magistrates, defence counsels and court officials.

The documentation of stories and narratives from women and sexual crime victims themselves is crucial. We should also note that other countries are able to produce a plethora of official statistics, covering all stages and angles of sexual crimes (as indeed they do for other crimes). This means that all interested parties really do know what is going on, and the assessment of the current situation then becomes much more accurate.

In turn, the basis for decisions on improvements similarly becomes much improved as there is less need to guess or assume. In matters of social policy, as in matters of other human decisions, knowing the basic facts is essential.

So to help us understand what is happening in the arena of sexual crimes in Malaysia, we need more information related to every stage of the process: reporting, investigation, prosecutorial decision, as well as in the courtroom. If things need changing, making sure we know what needs changing is a prerequisite.

7. Kelly, Lovett and Regan (2005), p.2.

8. Caringella-Macdonald (1985), p.66.

There are plenty of models of data collection that we can use from the experience of others. We note that the Royal Malaysian Police is one agency which has become much better at providing statistics, and one strong recommendation arising from the research conducted for this book is that other agencies commit to providing systematic, full and public information and statistics to help frame our understanding and response as a society to the issue of sexual crime. Involving the universities and other institutions can also help.

Introducing Better Recording Systems

We noted at several points in our discussion that there were gaps in information being recorded. This is true for the trial process, but it is also true earlier in the process.

Proper recording at all stages will not just allow us to gain a more comprehensive insight into crucial factors of sexual crime. It will also help in the preparation and presentation of cases, aiding the avoidance of sloppy recording of statements, sloppy charge sheets, sloppy investigation and sloppy preparation of evidence and/or witnesses. All these have tarnished sexual crime trials, as they have other criminal cases, and all these need to be vehemently tackled.

So recommendations here would include looking at every point of contact the police and other agencies have with sexual crime victims, with the witnesses, and with possible evidence, ensuring that the relevant people have the relevant skills and attitudes to deal effectively and sympathetically with all victims.

This would involve ensuring adequate data collection procedures are devised, taught and implemented, including a re-evaluation of what information is asked for and how information is recorded, at all stages of the journey through the criminal justice system. It would also entail the institutionalisation of inter-agency communication and cooperation, through establishment of appropriate procedures and protocols. Relying on 'champions' is not enough.

Some jurisdictions have suggested the setting of targets to help focus efforts. This could help lower attrition rates at each stage of the criminal justice process, and/or attain higher conviction rates in contested cases.

A recommendation from the UK Home Office is also worth considering:

Prosecutors insert a standard paragraph in instructions to counsel, requesting a written report in any case involving an allegation of rape which results in an acquittal. Any written report is used to complete an adverse case report, setting out the factual and legal reasons for the acquittal. The adverse case report is used to discuss with the police any lessons to be learned.⁹

9. HMCPSI/HMSI, (2002), p.13.

Enhancing Skills and Changing Attitudes

Provision of comprehensive information and analysis is the basis for an alternative discourse. Utilising the information and analysis and activating it is the next crucial stage. This involves the discussion within government and non-government circles as to how best to equip judges, magistrates, prosecutors, defence counsels, police, medical, welfare personnel and others involved in the system – in our case, specifically in sexual crime reporting, investigating and trials – with the appropriate information, analysis, skills and resources to carry out their tasks to the maximum potential. Relevant here is the need for the continual upgrading of all these for the personnel involved at every level of the criminal justice system. Training and adequate resourcing are key components in enhancing these skills. The positive steps in recognising the special demands of sexual crimes can be built upon.

With regard to skills building, we are not just talking about the technical skills to do their various jobs effectively but also having the appropriate attitude. Training is clearly vital in ensuring that there is no gender or other biases in terms of attitudes, while there is good awareness of the contexts and general issues related to sexual crime.

Re-visiting the Role of Training: Opportunities, Modules and Status

The necessity of training is well recognised, of course, with training modules and opportunities continually being subject to review and revision. Yet feedback from our interviews tells us that training is still too often treated as a luxury, as an escape from the monotony of daily routines. People see training as a holiday rather than as an opportunity to learn and to improve. Feedback from those involved in training tells us how so often there is little interest and little motivation to gain new knowledge; the good meals being provided are the high points instead.

How do we change this culture?

The acquisition of knowledge and a clearer understanding of the situation are vital to enhancing the delivery of justice in our country, as elsewhere. More training is needed to help overcome shortcomings in the prosecution of cases in court. Steps are underway, for example, to provide DPPs and others with more training opportunities, including the holding of virtual training with the UK's Crown Prosecution Service. Links are being made to other institutions.

But if our culture of training and our attitude to training does not change, the effectiveness of these initiatives will be compromised.

There is much to do, and we are not alone. In the UK, for example, the Home Office notes that, 'The training available to the police does not currently conform to a minimum standard and the availability of staff trained to receive rape victims is problematic across the police service.'¹⁰

10. HMCPSI and HMIC, (2002), p.7.

There are active initiatives to provide the relevant training to the relevant personnel, within the police force as well as within the Attorney General's Chambers, the judiciary, and other agencies. Modules are constantly undergoing review, and the role of training institutions like ILKAP is an on-going and positive discussion. There are positive signs of link-up between some of these agencies and NGOs. All these positive initiatives need to be strengthened and extended, so that a systematic and valued training regime is available for all stakeholders. This would mean, for example, that police officers taking the original report of a sexual crime are supportive of the victim, know the procedures and, if appropriate, are able to record all necessary details without any prejudice. Similarly, when officers join the Sexual Crime Unit, they should be given good initial orientation and training in all the issues (including myths and stereotypes) and have a systematic on-going training programme every year.

We suggest that some of the more specific issues which are particularly important to training programmes related to sexual crime cases include the following:

Sensitivity to the Myths and Stereotypes

Crucial to the discourse of sexual crime are the myths and stereotypes which relate to it.

Debunking these is of paramount importance. A summary of Chapter 4 is appended below:

- the assault is usually committed by person(s) unknown to the victim (stranger rape)
- the assault is predominantly an explosive, unpremeditated act
- the assault is always a violent crime in which physical force is inflicted
- the assault is always characterised by a show of resistance by the victim
- women who are assaulted/raped must have done something to cause it to happen
- most women secretly enjoy being raped
- husbands cannot rape their wives
- allegations of assault are the work of false and malicious women against innocent men
- the assault is committed by a maniac

All these myths have been unequivocally shown to be exactly that – myths. Yet despite the reality, there are still far too many within and outside the criminal justice system who continue to cling to such notions. This then clearly jeopardises the chances of justice being done to the victim.

The myths are borne from a particular attitude, rooted in gender misconceptions and bias. So the training also should highlight the need for everyone involved in the issue of sexual crime to realise what these are. Modules promoting rigorous and extensive discussion of the myths and stereotypes, complete with the evidence refuting them, should be standard for all those involved in recording and prosecuting sexual crimes. So should the modules where our own biases and prejudices are explored in the context of how they might or might not impinge on the delivery of justice. Similar training should be extended to the media.

Understanding of Trauma

Training can also redress the situation where there is often an apparent, complete ignorance of the impact a sexual assault can have on a victim. Part of this is to recognise the existence and influence of conditions like Rape Trauma Syndrome. The latter's status relating to its admissibility in court is still under review, but it is clear that a significant number of sexual assault victims suffer from it as a consequence of the attack. Awareness of conditions like Rape Trauma Syndrome will help, for example, toward explaining any delay in the reporting of the crime, may explain hesitancy or inconsistency in testimony, and may provide strong if not conclusive evidence that intercourse was non-consensual.¹¹ All this is part of understanding the experience of the victim and the consequences of a sexual crime on the victim, and it helps us search for better ways to safeguard our criminal justice system from perverting the experience and failing to take cognisance of the effects of that experience.

Better Understanding of the Medical Facts

The fact that medical evidence plays such a critical role in so many cases of sexual crime means that the whole process of collecting, storing, labelling, despatching, analysing and using such evidence needs to be fully understood by all those who may be involved. This is a prerequisite for best practice to be implemented by all those involved.

This will require inter-agency dialogues and initiatives, some of which are going on but all of which can be intensified and strengthened. This would enhance the role and efficiency of the Chemistry Department, whereby they receive appropriate samples properly collected, labelled and despatched. It would also enhance the role of local serology laboratories, again receiving appropriate samples similarly properly collected, labelled and despatched. Good communication between investigators and laboratories would also reduce workload by the prompt notification about cases which are no longer being pursued, for which samples therefore no longer need processing.

The importance of the 'chain of custody' needs to be affirmed in a way that leaves no one in any doubt about their role in protecting it.

Further, there are still several prejudices related to sexual crime and medical evidence which need to be understood and dismissed. One area which we highlighted above is the whole issue of injuries. Training would emphasise, for example, why there may be no sign of injuries, but which many judges and magistrates and others in the criminal justice system still seem to interpret as evidence against the victim. There are also other medical prejudices which should be highlighted and debunked.¹²

11. http://www.crimeupdate.net/crimebook/index.php?title=Rape_trauma_syndrome

12. For example, there is the popularly held belief that only virgins have hymens. The hymen is in fact tissue which is elastic and this elasticity varies from woman to woman. While there is every possibility of tearing during an initial vaginal penetration, or even a particularly vigorous or violent type of penetration, there is also a possibility that tearing may not always occur. There also needs to be information and discussion about, for example, the nature of vaginal lacerations and how they heal.

Sensitivity to Particularly Vulnerable Groups

As have been discussed, there is the possibility that prejudice exists with respect to certain groups. They include the disabled, sex workers, and migrant workers.¹³

Again, more extensive information and research would be needed to quantify the issue in Malaysia. Our profile disclosed that there were very few disabled victims, but this should not preclude addressing the particular needs of the different disabled groups, and possible attitudes towards them. Appendix 2 shows that there was a significant number of foreign victims of sexual crime, accounting for 10.7 per cent, and in rape cases 26.2 per cent, of the victims. This is despite the fact that such migrant workers are likely to find it very difficult to make a report. Furthermore, this kind of prejudice that may exist towards them may also apply to sex workers.

The difficulties resulting from prejudice have been well discussed elsewhere.¹⁴ We need again to ensure that our own attitudes and assumptions do not discriminate against victims, and that each is given equal status and treatment before the law. Underpinning discussions about these groups would be the fundamental principle of equality before the law, where respect and autonomy are key premises.

As with myths and stereotypes, training in this area should tackle any prejudice, any unwarranted presumptions, that might interfere with a victim obtaining the justice she or he deserves.

Awareness of the Law, the Legal issues and Potential for Change

In addition to adopting unbiased attitudes, a good understanding of the actual law is a prerequisite to the dispensation of justice. All of us involved in the issues of sexual crime need to be fully aware as to what the legal issues and contentions are, especially with regard to corroboration and consent, and the way that myths and stereotypes get in the way of the law as written. Furthermore, an appreciation of how the law works in favour of or against a sexual crime victim would be the first step towards initiating appropriate legal reform.

Undoubtedly, there is a difficult task ahead of us. It will take more than a few cosmetic improvements to begin making legal redress relevant to victims and survivors of sexual assault. As discussed earlier, legal redress is entwined with attitudes, attitudes not just of those within the criminal justice system, but attitudes that exist in our society at large. Many of the recommendations about the legal procedures and changes in the law which have been put forward are aimed at limiting the scope for views and assumptions which are prejudiced and biased against the victim. Many of the recommendations are on how to better support the victim in the system, and to promote a wiser understanding of the contexts which might influence

13. For an example of a government-sponsored research in this area, see Office for Women, Australian Institute of Criminology (2006).

14. See for example Sullivan (2003) or Bridgett and Robinson (1999).

outcomes in sexual crimes. But in the end it is the wider context of how female and male victims of sexual crime are viewed by our society that will determine the kind of chances they have for justice.

Progress has been made, and will continue to be made, in the changing definitions of what constitutes a sexual crime and how we respond to victims. In terms of definition, it should be noted that there is discussion underway relating to legislation for marital rape, and for sexual harassment. Amending the legislation will demonstrate our commitment to the protection of victims of such crime. For marital rape, it will also demonstrate our commitment to the protection of women as wives.

With regard to this, AWAM's statistics for the years 2000 to 2002 show that 52 per cent of women who had been subjected to domestic violence were forced to have sex with their husbands. Women who are raped by their husbands are likely to be raped many times – often 20 times or more.

*These wives are often coerced into sex or are unable to refuse because of threats of physical violence, financial dependence on their husbands, fear for the safety and protection of their children.*¹⁵

But for the moment, Malaysia refuses to accept that a person's rape of his wife is a crime.¹⁶ This used to be the situation elsewhere, of course, as in the UK, and we might refer to the comment from a judge in England, when allowing an accusation of marital rape to stand. He stated that the law 'no longer remotely represents the true position of a wife (a woman!) in the present day'.¹⁷

Further, the entitlement of a husband to beat his wife into submission to sexual intercourse is a 'very sad commentary on the law and a very sad commentary on the judges in whose breast the law is said to reside.'¹⁸

The fact that marital rape is not recognised as a crime represents a patriarchy that is increasingly recognised as unacceptable across the world. Not only does it give a most bizarre entitlement to a husband (to be able to force his wife to accede to his sexual demands), thus failing to protect women who are wives, but the underpinning attitudes that condone such practice may well pervade court hearings of other sexual crimes. This is particularly relevant as more sexual crimes are reportedly committed by partners or friends or dates. It becomes ever more crucial to effect legal changes that make clear what is consent and what is not, what sort of male behaviour

15. As reported in Joint Action Group For Gender Equality (JAG), 'Press Statement cum Frequently Asked Questions on the Report by the Parliamentary Special Select Committee on the Penal Code (Amendment) 2004 and the Criminal Procedure Code (Amendment) 2004' issued on 26 June 2006.

16. In 2006, amendments were made to the Penal Code which includes a new section – Section 375A on husband causing hurt in order to have sexual intercourse.

17. Justice Owen, R v R [1991] 1 All England Law Reports, 747.

18. Ibid.

and male claims may be condoned and what not, and what part evidence such as that of the complainant's previous sexual history can play in a trial. Thus, the reform of the law should include marital rape.

Awareness of the Culture of the Courtroom and Its Impact on Procedures and Verdicts

As our understanding deepens about the particular challenges and effects contingent on sexual crime trials, it is hoped that this will lead to a more informed discourse of how exactly the culture of the courtroom operates either for or against the victim. The culture of the courtroom includes the way the court is arranged, the way the trial is conducted, and importantly, the demeanour and behaviour in court of all the different participants. This includes the way the adversarial system plays out in sexual crime trials, the way attitudes inform the courtroom and procedures, and the way that any gender issues are dealt with within the court.

On the issue of defence tactics in Chapter Four, we noted the suggestions being made around the world that a different style of advocacy may be necessary, especially in sexual crime trials. This follows from an understanding of both the difficulties faced by victims in court, and the responsibilities of the criminal justice system to dispense justice. Adjusting advocacy practices in accordance with our understanding of the situations of sexual crime trials does not jettison another key and basic principle – that the accused is deemed innocent unless proven guilty and must have every right to defend himself.

Such suggestions are increasingly part of the search for a more humane and a more just court process, where a different ethic is enforced in the courtroom and where defence counsels do not 'deceive or knowingly or willingly mislead the court.'¹⁹

Defence strategies which concentrate on the 'systematic trashing' of the victim would no longer be tolerated; this would follow from a full appreciation of the extent to which myths and stereotypes are misleading and reference to them is then a 'wilful deception' of the court. Examining the issues related to the culture of the courtroom is an essential part of the effort to understand why there is such a low conviction rate in sexual crime. How we can adapt and change this culture is a major question for further discussion.

A FINAL SUMMATION

The accumulated evidence and knowledge in the arena of sexual crime attests to an incontrovertible need for change. For example, following the writings of women like Catharine MacKinnon and Susan Brownmiller, we can much better understand how 'the law sees and treats women and the way men see and treat women.'²⁰

19. England and Wales, General Council of the Bar, Code of Conduct for Barristers (2004) para 202 ff.

20. MacKinnon (1983), p.635.

In other words: the law is concerned with maintaining sexual status quo rather than protecting or enhancing, for example, women's right to choose, which of course includes the right to say no.²¹

The part that these fundamental insights play in our present response to sexual crimes is becoming more and more apparent. In the courtroom, the low conviction rates are just the final evidence of the extraordinary difficulty criminal justice systems have in dealing with sexual crimes. Low reporting rates and high attrition rates at all stages are further proof. The question then becomes, 'Why would women have trust in a system which so obviously doesn't trust them? Should women be victimised in many more senses than one?'

Around the world at this very moment, jurisdictions are involved in major exercises to address the challenges so obviously encountered in relation to sexual crime. We have quoted from many of these consultations and other documents in our earlier discussions. Many of the consultations and legal reforms are happening as part of a conscious effort to mend that trust. This is done in the knowledge that to do little or nothing means the legal system is as good as condoning rape and other sexual crimes, because so few are found guilty. People will then inevitably treat the crime with indifference or active disrespect, if they have not already. In so doing, they will be also be treating women with active disrespect, given that 95 per cent of sexual crime victims are women. It would be tantamount to endorsing what one writer calls a 'collective, culturally sanctioned misogyny.'²²

It is mainly men but also women who hold such erroneous beliefs and attitudes. They include people from all walks of life, of all ages, races and religions. They include politicians, corporate managers, and people in the education system, in the health service, in the judiciary. They include husbands. They include those who run and edit and write for the media, with their sensationalising of sexual crime and the re-packaging of its stories into tales that present the lurid and predatory, where women are more often than not portrayed as sexualised and alluring.

All of us have a duty to look at ourselves, and ask ourselves what part we will play in determining how our reactions to the travesties of sexual crimes will 'aid in the creation of a past, present and an anticipated future marking our histories, differences, unities and agendas for action.'²³

We need to, because if we do nothing, the humanity of both women and men will continue to suffer. And so will the chances for justice and healing.

21. This may be illustrated by the fact that women often lose that right (to choose; to say no to sexual intercourse or other sexual practice) when they are wives or prostitutes.

22. Cameron and Frazer (1987), p.164.

23. Plumer (1995), p.77-78.

I

APPENDIX 1

Malaysian Legislation Relevant to Sexual Crime Cases

The main provisions relating to sexual crime in Malaysian legislation are found in the Penal Code. These are supplemented by other legislation (the earlier Women and Girls Protection Act 1973, for example), and there is on-going discussion about introducing specific legislation such as how to deal with sexual harassment at the workplace.

THE PENAL CODE¹

Section 375: Rape

This part of the Penal Code defines rape as penile penetration of the vagina. It gives six circumstances where rape is committed.

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 or without her consent, when she is under sixteen years of age.*

1. In 2006, amendments were made to the Penal Code in Sections 375, 376 and 377 as a result of the Parliamentary Select Committee's recommendations. JAG was one of the key groups who presented their proposals to the Select Committee.

It will be seen that in our text, we make a distinction between S375 (rape) and S375(f) (statutory rape). This is because although both obviously fall under the same section in the Penal Code, Section 375(f) deals exclusively with the rape of a person below the legal age of consent, which is sixteen. The dynamics of reporting, investigating and prosecuting such cases may be a little different therefore, and certainly the burden of proof if a case comes to trial is different, not least in that consent is not an issue.

Section 376 deals with the sentencing for rape. Prior the 2006 amendments on the Penal Code, a person found guilty will be liable to *'imprisonment for a term of not less than five years and not more than twenty years and shall also be liable to whipping'*.

With the 2006 amendments to Section 376, this section now reads,

(1) *..., 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.*

Section 354: Assault of use of criminal force to a person with intent to outrage modesty

This Section is used to prosecute many other sexual assaults but which are not covered by the definition of rape as contained in Section 375. This Section therefore covers oral or anal sexual assault, and vaginal, anal, or oral penetration by other than a penis, and other unwarranted physical sexual attacks (including touching) which are carried out against the victim's will. The phrasing is as follows:

Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with whipping, or with any two such punishments.

Section 509: Word or gesture intended to insult the modesty of a person

The distinction between this Section and the previous one can be said to lie in the physicality of the assault. Section 509 covers the verbal and non-verbal assaults that characterise certain sexual crime offences, such as flashing or verbal sexual harassment. The phrasing is:

Whoever, intending to insult the modesty of any person, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such person, or intrudes upon the privacy of such person, shall be punished with imprisonment for a term which may extend to five years or with fine, or with both.

Under the Penal Code, the sexual crime offences which are offences because they are taboo or deemed immoral include:

Section 376A: Incest

Incest is a sexual crime which has received a significant amount of attention in the press recently. It is defined as follows:

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

The punishment for such an offence is imprisonment for a term of not less than six years and not more than twenty years, and the person shall also be liable to whipping.

Section 377A: Carnal intercourse against the order of nature

The various clauses under Section 377 details sexual or other acts which are deemed offensive and immoral. This particular clause states:

Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.

The sentence carries imprisonment for a term which may extend to twenty years, accompanied by possible whipping.

Section 377C: Committing carnal intercourse against the order of nature, without consent, etc.

This is a similar offence to the above, but includes in its definition that the offence is committed *without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt ...*

The sentence is imprisonment for a term of not less than five years and not more than twenty years and also liability to being whipped.

Section 377D: Outrages on decency

This section covers acts which are deemed immoral.

Any person who, in public or private, commits or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment which may extend to two years.

Section 377E: Inciting a child to an act of gross indecency

This section extends the above to cover children under fourteen.

Any person who incites a child under the age of fourteen years to any act of gross indecency with him or another person shall be punished with imprisonment for a term which may extend to five years and shall also be liable for whipping.

A further section of the Penal Code covers situations where there is an **attempt** to commit any of these crimes: This reads as follows:

Section 511: Punishment for attempting to commit offences punishable with imprisonment

Whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of such offence, shall, where no express provision is made by this Code or by other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided by the offence, provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence.

WOMEN AND GIRLS PROTECTION ACT 1973 AND PROSTITUTION-RELATED OFFENCES

A number of sexual crime cases relate to involvement in prostitution. These include the earlier Women and Girls Protection Act 1973 which was repealed in 2001 (with many of its provisions incorporated into the Child Act 2001). Under this legislation, relevant sections are:

- **Section 16 (1)** covers people involved in running prostitutes (not prostitutes themselves) (sells, lets, hires prostitutes, advertises prostitution, traffics, threatens females to engage in prostitution).
- **Section 19 (1): Persons living on or trading in prostitution** reads ‘*Any person knowingly lives wholly or in part on the earnings of the prostitution of another person not exceeding five years or to a fine not exceeding ten thousand ringgit or to both.*’ (This is of course similar to S372A of the Penal Code (see below), but with a lower sentence maximum).
- **Section 21: Suppression of brothels** reads ‘*Any person who keeps or manages or assists in the management of a brothel shall be guilty of an offence under this section. (includes owner of place) not exceeding five years or to a fine not exceeding ten thousand ringgit or to both.*’

There is also provision regarding prostitution in the Penal Code, under which some of our cases were charged.

Section 372A: Persons living on or trading in prostitution

This section refers to

where any person is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that that person is aiding, abetting or compelling the prostitution of the prostitute with any other person or generally, that person shall, in the absence of any proof to the contrary, be deemed to be knowingly living on the earnings of prostitution.

The sentence is imprisonment for a term which may extend to fifteen years and with whipping and also liability to a fine.

LEGISLATION PROTECTING CHILDREN

There were also cases charged under the Child Protection Act 1991 which has also subsequently been repealed and amalgamated into the Child Act 2001. The cases were charged under Section 26 (1) which refers to the **'Ill-treatment, neglect, exposure or abandonment of children'**.

II APPENDIX 2

Data on Nationality and Ethnicity of Victims and Accused

Although the following data do not bear directly on the main lines of discussion of this book, they are presented here to highlight certain key trends as elaborated below.

DATA FROM COURT RESEARCH

Nationality of Victims

With regard to nationality, out of 458 victims, 49 (11 per cent) of them were foreigners and 409 (89 per cent) were Malaysians.

For sexual assault cases, the nationality of the victims are as follows:

Table A.1: Nationality of the victims by selected types of crime (%)

	S354	S375(f)	S375	S509	Total (for all types of sexual crimes)
Malaysian	87.0	100	73.8	91.4	89.3
Foreign	13.0	–	26.2	9.6	10.7
Total number of victims	184	101	42	35	458

According to the 2000 Population Census, non-Malaysians accounted for four per cent of the total Penang population. This means that compared to their proportion in the overall population, foreigners (at 10.7 per cent) are heavily over-represented as victims of sexual crime. Further, this over-representation of foreign victims is even higher in sexual assault cases. This needs to be stressed. The fact that foreigners are victims of sexual crime is often overlooked. We should particularly note the alarming number involved in rape (S375) cases – 26 per cent of rape victims in our sample were foreign women. This demands special attention. All the foreign victims were female. Many, if not all, would be migrant workers.

Certain groups in our society are particularly vulnerable to sexual crime and are disadvantaged in their quest for justice. These groups emphatically include foreign (female) workers in Malaysia. Their vulnerability is well documented, and derives from their relative isolation, their uncertainty over their rights, the possibility that they will be threatened and/or blackmailed (about losing their jobs, for example) and public indifference. The fact that they appear to the extent that they do in our sample is doubly worrying, since it is highly likely that reporting rates of sexual or other crimes will be much lower amongst this group than for Malaysians. Thus, the cases coming to court are the tip of the iceberg – true for Malaysians but even more true for foreigners.

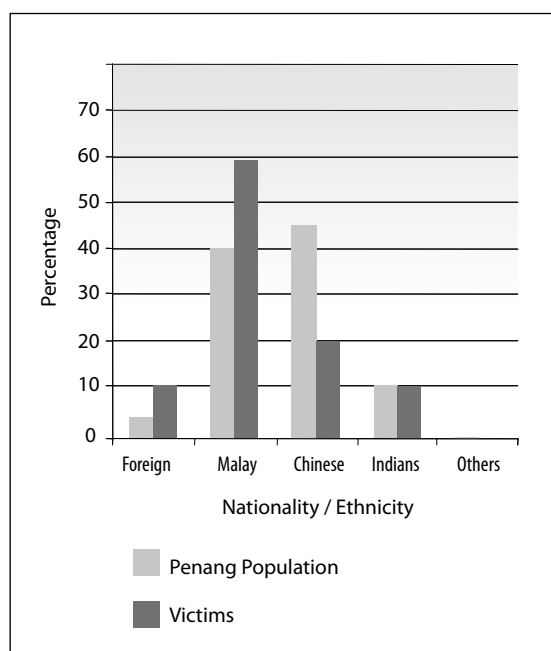
Ethnicity of Malaysian Victims

Of the 407 Malaysian victims whose ethnicity is known to us, 66 per cent were Malays, 22 per cent were Chinese, 12 per cent were Indians and 0.3 per cent were ‘Others’.¹ Again, this is significantly different from the overall composition of the Penang population. In 2000, the ethnic breakdown for the total Penang population was as follows: Malay 41 per cent, Chinese 45 per cent, Indian 10 per cent, Others 0.4 per cent and non-Malaysians four per cent.² Figure A.1 presents the comparison.

In other words, the proportion of Malay victims is significantly higher than their share of the overall population of Penang state, and correspondingly, there are significantly fewer Chinese victims. This is starker when we break it down by selected types of sexual crime.

The very high proportion of Malay victims of statutory rape stands out, as does the higher proportion of Malays overall in the more serious sexual assault cases (i.e. not including S509 cases).³ It is also interesting to note the relatively low proportion of Indian victims in rape and statutory rape cases. Generally, compared to their relative share of the overall population, the proportion of Chinese victims across the range of sexual crime is less than may have been anticipated.

Figure A.1: Nationality/ethnicity of the victims, compared to overall Penang population (%)



1. There were two cases where the information was not apparent. The actual number of cases then are 269, 90, 47 and 1 for the respective ethnic groups.

2. Figures from the 2000 Population and Housing Census, Department of Statistics, Kuala Lumpur.

3. We might also note that all 5 of the incest cases involved Malays. Interestingly, in our media research, incest cases accounted for 18.6 per cent of all cases of the sample reported by the three media, with Malays being the accused in 86 per cent of the cases where ethnicity is known.

Table A.2: Ethnicity of Malaysian victims by selected types of sexual crime (%)

	S354	S375(f)	S375	S509	Total (for all types of sexual crimes)
Malay	67.0	81.2	71.0	50.0	66.1
Chinese	20.4	11.9	22.6	28.1	22.1
Indian	12.6	5.9	6.4	21.9	11.5
Others	–	1.0	–	–	0.3
Total number of victims	167	101	31	32	407

Nationality of Accused

Of the 484 accused, 93 per cent were Malaysians and seven per cent foreign nationals. Broken down by selected cases, the proportions were:

Table A.3: Nationality of the accused by selected types of sexual crime (%)

	S354	S375(f)	S375	S509	Overall
Malaysian	87.0	96.1	97.7	96.0	93.2
Foreign	13.0	3.9	2.3	4.0	6.8
Total number of accused	193	127	44	25	484

Foreign accused constitute a very small percentage of those involved in rape or statutory rape, although their representation is more significant in outrage of modesty cases. Taking this data into consideration, we would like to refute the tendency to exaggerate the extent of ‘foreign’ involvement in crime. Recalling that foreign victims accounted for 26 per cent of rape cases, we stress that it might be more logical to focus on the extent to which foreigners are victims, rather than perpetrators, of sexual crimes.

Ethnicity of Malaysian Accused

Further breakdown by ethnicity shows that 7 per cent of the accused were foreign, 60 per cent were Malay, 20 per cent Chinese, 12 per cent Indian and 0.6 per cent ‘Others’. We can map this against the overall breakdown of Penang’s population in 2000.

Similar to the mapping of the victims shown in the earlier Figure A.1, in terms of the relative proportions compared to the overall composition of Penang's population, it is noticeable that the Malay proportion was significantly higher and the Chinese significantly lower.

It is also noticeable that the cases which had more than one accused involved significantly more Malays. For example, in all the 17 cases involving five or more accused, it was Malays who were the perpetrators.⁴ All these may have some keen sociological interest and deserve further research.⁵

Figure A.2: Nationality/ethnicity of the accused compared with overall Penang population (%)

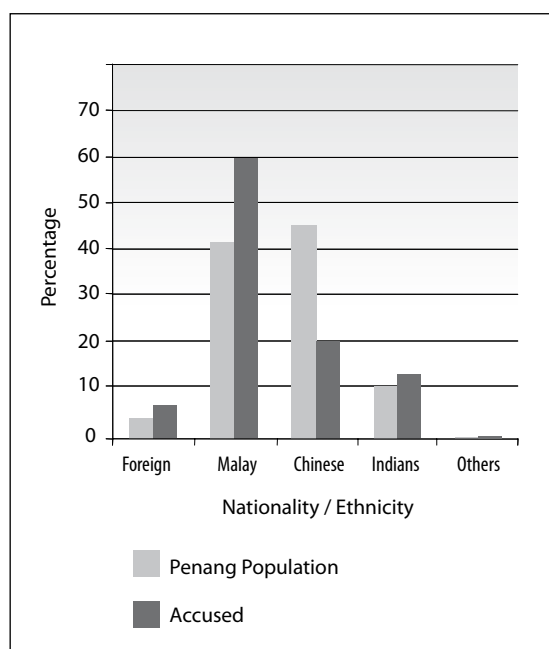


Table A.4: Ethnicity of Malaysian accused by selected types of crime (%)

	S354	S375(f)	S375	S509	Overall ⁶
Malay	65.5	82.0	71.0	50.0	64.5
Chinese	13.2	10.6	22.6	25.0	21.7
Indian	20.8	6.6	6.4	20.8	13.1
Other	0.5	0.8	–	4.2	0.6
Total number of Malaysian accused	168	122	43	24	451

4. And for the 13 cases involving 2 accused, 7 involved Malays and 6 Chinese. For cases involving 3 accused, 7 were Malay, 2 Indian. For cases involving 4 accused, 9 were Malay, 3 Indian.

5. For example, what explains the prevalence of Malays (and the smaller number of Chinese) in statutory rape (S375(f)) cases, the significantly 'less Chinese' and proportionately more Indians in outrage of modesty (S354) cases, and the diminished proportions of Indians in statutory rape and rape cases? What explains the fact that all the 36 accused in brothel cases heard under Section 21 of the Women and Girls Protection Act were Chinese?

6. Of those whose ethnicity is known.

Nationality/Ethnicity of Victims against Nationality/Ethnicity of Accused

Our mapping of the nationality/ethnic relationship between victims and the accused produced the following results:

Table A.5: Nationality/ethnicity/ of the victims matched against nationality/ethnicity of the accused

Victim	Nationality/Ethnicity of the Accused									
	Foreign		Malay		Chinese		Indian		Total ⁷	
	Number	%	Number	%	Number	%	Number	%	Number	%
Malay	15	5.7	220	83.7	7	2.7	19	17.2	248	100.0
Chinese	6	8.7	15	21.7	40	58.0	8	11.5	69	100.0
Indian	7	17.1	1	2.4	4	9.8	28	68.3	41	100.0
Foreign	4	12.1	13	39.4	14	42.4	2	6.1	33	100.0

In other words,

- Where the victim was a Malay, 84 per cent of the accused were Malay.
- Where the victim was Chinese, 58 per cent of the accused were Chinese.
- Where the victim was Indian, 68 per cent of the accused were also Indian. One-third were Malay.
- Where the victim was foreign, only 12 per cent of the accused were also foreign. The rest were Malaysians.

This can be broken down into types of cases, noting the difference of inter-ethnic ‘spread’ between outrage of modesty (S354) cases and rape (S375) and statutory rape (S375(f)) cases.

For cases involving outrage of modesty, of the 112 cases with Malay victims, 77 per cent of the accused were Malays, 13 per cent of the accused were Indian, 8 per cent were foreigners, 1.8 per cent of the accused were Chinese, and 1 per cent of the accused were categorised as ‘Others’. In the 34 cases involving Chinese victims, 38 per cent of the accused were Chinese, 29 per cent were Malay, 18 per cent were foreign and 15 per cent were Indian. In the 21 cases involving Indian victims, 71 per cent of the accused were Indian and 29 per cent were foreign.

For the rape cases, where the information was available (in 16 per cent of the cases, the information was not recorded), where the victim was Malay, the accused was a Malay in 87 per cent of the cases and in both the cases where the victim was Indian, the accused were Indian.

7. The Malay victim total of 248 includes 2 ‘Others’ (0.8 per cent) and the Indian total of 41 includes 1 ‘Others’ (2.4 per cent). We left the ‘Others’ column out of the table here.

There were just 7 cases where the victim was Chinese, out of which three of the accused were Indian, two were Chinese and two were Malay.

With regard to statutory rape (S375(f)) cases, in the instances of the victim being a Malay, 89 per cent (73 out of 82 cases) of the accused were Malay, with 6 per cent being foreign. There was one case of a Chinese accused, two Indian and one 'Others'. Where the victim is Chinese, all the accused (12 out of 12) were Chinese. Similarly, in the 6 cases where the victim is Indian, all the accused were Indian.

In other words, there are distinct trends in the way ethnic relationship between the victims and accused come into play. There is the overall high chance of a sexual crime being confined to the same ethnic group, but the relative percentages do differ from ethnic group to ethnic group, and from one type of crime to another.

DATA FROM MEDIA RESEARCH

The mapping of the relative proportion of the accused documented in the media research according to nationality/ethnicity against the composition of the Malaysian population reveals trends similar to those obtained in the court research (see Figures A.3a and A.3b).⁸ In both instances, it is only in the Chinese community that the proportion of accused was lower than their proportion in the Malaysian and Penang populations respectively.

Figure A.3a: Nationality/ethnicity of accused in media cases compared with overall Malaysian population (%)

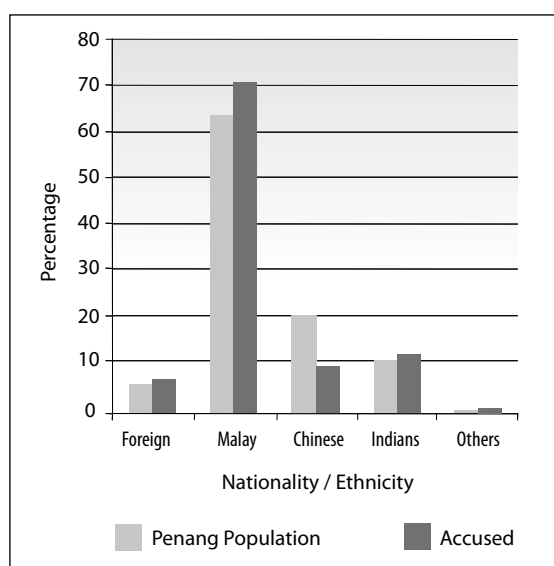
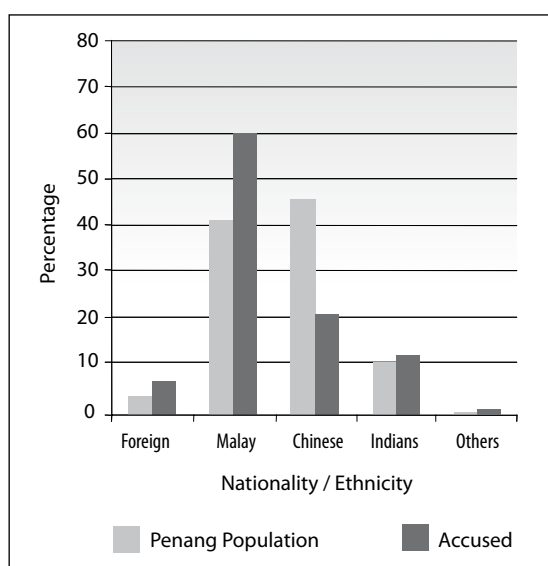


Figure A.3b: Nationality/ethnicity of accused in court cases compared with overall Penang population (%)



8. It was not possible to do a similar comparison for the ethnicity/nationality of the victims because personal particulars of the victims were withheld for many of the court cases reported in the press, particularly where the victim was a minor.

The intra-ethnic nature of sexual crimes which was identified in the court research was similarly noted in the media research except in the case of the Chinese. This intra-ethnic element was stronger for the Malay and Indian communities in the media cases than it was for the court research cases.

Table A.6: Nationality/ethnicity of the victim matched against nationality/ethnicity of the accused

Victim	Nationality/Ethnicity of the Accused									
	Foreign		Malay		Chinese		Indian		Total ⁷	
	Number	%	Number	%	Number	%	Number	%	Number	%
Malay	2	1.2	161	94.7	5	2.9	2	1.2	170	100.0
Chinese	0	0.0	14	63.6	8	36.4	0	0.0	22	100.0
Indian	0	0.0	0	0.0	0	0.0	13	100.0	13	100.0
Foreign	15	13.3	18	15.9	64	56.6	16	14.2	113	100.0

Hence for the media cases,

- Where the victim is a Malay, 95 per cent of the accused were Malay (84 per cent in the court cases).
- Where the victim is Chinese, 36 per cent of the accused were Chinese (58 per cent in the court cases), 64 per cent of the accused were Malay.
- Where the victim is Indian, 100 per cent of the accused were Indian (68 per cent in the court cases).
- Where the victim is foreign, only 13 per cent were foreign (12 percent in the case of the court cases), 57 per cent of the accused were Chinese.

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