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By Prema Devaraj

'Digital rape' acquittal a mind-boggling decision

The recent acquittal of a 60-year-old man by the Court of Appeal over four charges of raping a 14-year-old girl has outraged people, from the ordinary person on the street, to ministers in Parliament. Despite DNA testing confirming the man as the father of the child borne from the alleged rape, the perpetrator has been set free due to what seems to be a technicality in the law.

Without the judgement of the Court of Appeal, it is difficult to ascertain the reasoning behind the decision. Nevertheless, the defence counsel for the accused has reportedly cited several reasons for the Court of Appeal's decision, including late reporting (the family only lodged a report after they failed to get compensation), the victim's unreliability i.e., inconsistencies over the date and place of the incident, her creation of a story of sexual intercourse and her claim of not knowing she was pregnant.

The Women's Centre for Change, Penang (WCC) would like to state clearly that irrespective of when, where or how the victim was impregnated, whether she consented to or initiated sexual contact, when the report against the accused was lodged or whether she knew she was pregnant or not, the point is simply this: a 60-year-old man should not have engaged in any sexual activity (whether it involved his penis, fingers or any other part of his body) with an underaged 14-year-old girl.

The decision of the Court of Appeal to acquit the accused has resulted in a nationwide debate about the issue and there is now an understanding as to the need to broaden the definition of rape to include the use of objects or bodily parts of a perpetrator, not just the penis (e.g. fingers or tongue etc), into the orifices (e.g. vagina, urethra or anus) of a person. Currently there have been urgings for a revision of the case.

Accessing justice for victims of sexual crimes is extremely difficult. Police statistics indicate that less than 10 percent of reported rapes result in a charge being brought against the perpetrator. Data from Parliament show that in sexual crimes involving children in 2013, the conviction rate for rape was 3 percent.

Legal options

In the interests of justice in sexual crime cases, the following legal options should be consistently practiced:

i) DPP discretion in conducting prosecution:

- DPPs can proffer alternative charges in sexual crime cases when the facts indicate more than one offence had been committed. In this case, based on the facts, an alternative charge could have been added in the beginning e.g. sexual connection by an object (Section 377CA of the Penal Code), or of child sexual abuse (Section 17(2)(c) of the Child Act 2001),
- DPPs can apply to the court to have the charge amended if necessary,
- DPPs can invite the Court to find the accused guilty of a lesser charge.

ii) Judicial discretion in the interest of justice:

Section 60 of the Courts of Judicature Act (1964) allows the Court of Appeal to make any order in the interests of justice. In this particular case, the Court of Appeal did not have to be bound by the charge of rape alone. It could have exercised its discretion, based on the facts before the court.

Even if the accused was charged with rape, the court could have convicted the accused of sexual connection with an object i.e., his finger; or of child sexual abuse, if the court was satisfied that these other offences had been proved.

Both the DPPs and the courts have a role to play in ensuring that justice is served. As unpalatable as the Court of Appeal decision has been for many, it has exposed the gaps not just in the legislation but also in the application of the law. We now have before us an opportunity to improve on legislation, prosecution and judgements pertaining to sexual crime. None of us should allow the ball to drop where sexual crimes are concerned. We have to work harder to ensure justice for all victims of sexual crimes.

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