VIEW ON LAWS RELATED TO STATUTORY RAPE : A COMPARATIVE ANALYSIS IN THE STUDY OF STATUTORY RAPE LAWS IN MALAYSIA AND REPUBLIC OF INDIA

By

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Abstrak

Adalah merupakan satu tanggungan jenayah bagi seseorang lelaki yang melakukan hubungan seksual dengan gadis bawah umur. Kanun Kesiksaan adalah merupakan satu-satunya undang-undang tunggal untuk kesalahan jenayah berkenaan. Peruntukan di bawah seksyen 375 (g) Kanun Kesiksaan di Malaysia menetapkan bahawa seseorang lelaki adalah melakukan jenayah rogol apabila hubungan seksual dilakukan dengan seorang wanita di bawah umur 16 tahun. Adalah tidak material jika hubungan seks dilakukan samada dengan kerelaan atau tanpa kerelaan wanita itu. Undang-undang meletakkan rogol statutori sebagai satu jenayah tanggungan tegas. Perbuatan merogol itu sendiri mencukupi untuk menunjukkan niat tertuduh. Dalam bahasa perundangan , hubungan seksual oleh seorang lelaki dengan wanita di bawah umur diistilahkan sebagai rogol statutori. Kajian ini dilakukan untuk melihat sejauhmana peruntukan undang-undang sedia ada digunakan untuk menangani jenayah rogol statutori di Malaysia. Dalam pada itu, perbandingan dilakukan dengan Negara India untuk menilai kedudukan pentafsiran undang-undang rogol statutori di Negara tersebut. Analisis perbandingan bagi kedua-dua Negara ini bakal menunjukkan tahap aplikasi Common Law Inggeris dan setakat mana kedua-dua Negara masih bergantung terhadap prinsip-prinsip common law dalam undang-undang mereka. Kajian dilakukan berdasarkan penyelidikan doctrinal. Ini merangkumi penggunaan statut, keputusan kes mahkamah dan juga artikel journal. Analisis perbandingan ke atas undang-undang rogol statutori di Malaysia dan India bakal mewujudkan penambahbaikan ke atas kedudukan undang-undang sedia ada. Ianya juga akan mendatangkan keberkesanan terhadap kaedah yang digunakan. Kajian ini juga bertujuan untuk meningkatkan tahap kefahaman dalam undang-undang rogol statutori.

Abstract

It is a criminal liability for a man who had sexual intercourse with the underage girl. Penal Code is the only single law for the criminal offense. Provisions under section 375 (g) of the Penal Code in Malaysia has codified that a man is guilty of the crime of rape through sexual intercourse with a woman under the age of 16. It is immaterial if the sex is done either by consent or without the consent of the woman. The law puts a statutory rape as a strict liability crime. The act of rape itself is able to indicate the intention of the accused. In legal, sexual intercourse by a man with a female under the age of 16 termed as statutory rape. This study was done to see the extent of the existing law used to overcome the crime of statutory rape in Malaysia. In addition, comparisons were made with the Indian to assess the legal interpretation of statutory rape in their country. A comparative analysis of the two countries is at once will show the application of English common law and the extent of which the two countries still rely on common law principles. The study was based on doctrinal research. This includes the use of the statute, the case laws and journal articles. A comparative analysis of the statutory rape laws in Malaysia and India will create an improvement over the existing law. It will also cause the effectiveness on the methods used. This study aims to improve the efficiency of statutory rape laws.

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TABLE OF CONTENT

Page

List of Abbreviations

MPC	Malaysian Penal Code
CPC	Criminal Procedure Code
PC	Penal Code
IPC	Indian Penal Code
EA	Evidence Act
IEA	Indian Evidence Act
BEIC	British East India Company
CRC	Convention on the Rights of the Child
CLA	Civil Law Act
SOA	Sexual Offences (Amendment)
SOA	Sexual Offences Act
COA	Court of Appeal
(DNA)	Deoxyribonucleic acid

IA	Identification Act
PA	Police Act
FC	Federal Constitution
FC	Federal Court
SCJ	Sessions Court judge
CLJ	Current Law Jurnal
MLJ	Malayan Law Jurnal
SCO	Syariah Criminal Offences
SEA	Syariah Evidence Act
SPC	Syariah Procedure Code
CA	Child Act

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Indian Penal Code 1860

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Evidence Act 1950

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Malaysian Evidence Act 1950

Civil Law Act 1956

Offences against the Person Act 1828

Substitution of Punishments for Death Act 1841

Penal Servitude Act 1857

Offences Against the Person Act 1861

Criminal Justice Act 1948

Sexual Offences Act 1956

Criminal Law Act 1967

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Syariah Procedure Code 1997

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Child Act 2001

Indian Criminal Procedure Code 1973

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

In Malaysia, rape is one of the capital crimes whenever violence is involved in order to assault women for the purpose of having unlawful sex intercourse with force. Statutory rape is the crime similar in nature, but specifically, statutory rape is involved when the age of the victim is less than sixteen years old. Malaysian Penal Code (Act 574) (hereinafter PC) is the only single statute which codified offence of statutory rape in Malaysia.

PC provides provision to sexual relations with women under sixteen years old whether it is committed with the consent of the woman or not is an offence. No matter what the excuses are, if the woman is under sixteen years of age when sex is committed, then it is a statutory rape. This provision is designed for the purpose of protecting those especially the children. Rape offence is defined in section 375(g) of PC when man is said to commit "rape" when having a sexual intercourse with a woman who is less than sixteen years old. Even if it is done with consent, that consent is immaterial and it is not valid under the law. Penetration is sufficient enough to constitute the sexual intercourse related to the offence of rape. Whoever commits the offence in particular, will be punished under section 376(1) of the PC. In reference, section 376(1) PC provide *"Whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping"*.

This study analyzes primarily on the challenges faced by the existence of provision related to statutory rape. It will also provide a comparative study between the procedural approaches and focuses on Malaysia and India only. In brief, it is an open statement that India is having a literal approach in interpretations about statutory rape. In Malaysia, it is safe to say that decisions of the cases are made based on the facts from each individual case. Section 375 (g) of Malaysian PC is in *pari materia* with section 375 (6) of The Indian Penal Code. The differences are that the Malaysian law on statutory rape refers to a woman who is less than 16 years old and as in India, the law refers to a woman who is less than 18 years old.

1.2 Problem Statement.

Pertaining to the concluded data, statutory rape is a problem that must be addressed within a holistic approach where the problems contained needed to be unlocked through the legal process. It is a crime which often being associated with the violation of the rights of children and has a negative impact on the personal development of individuals involved. Long-term effects of abusive behavior done by the offender to the victims will provide unnecessary emotional burden faced by them. Thus, it can be said that no court in this world could give justice accordingly replacing the honor and dignity in which had been insulted on them, especially on the moral and physical aspect suffered by the victim as a result of the crime committed. However the law adopted the methodology in sentencing as a remedy. This is expected to commensurate with the offence committed and for the purpose of providing example for others to refrain from this kind of crime. The purpose of this study is to observe the atmospheric sphere of the challenges faced

by the criminal justice system in approaching the problems caused by the crime including public interest, sentencing, evidence and its probative values and others. Sometimes even the court in adjudicating the crimes of statutory rape dictates that there is no element of coercion, sexual act done on a love bond, there is no physical violence and the victim would understand the impact and consequences of the act. This kind of submission makes no sense on statutory rape. The victim must be protected from the abusive behavior form the accused.

India brings the literal approach in interpreting the provision of rape. Recently, superior court in Malaysia has chosen to apply golden rules of interpretation in statutory rape law. Although this was not prevalence in the method of interpreting a statute, judges provide reasons in their judgment based on the facts differing from one case to another. In Malaysia, rape does not fall as crime of trivial nature. Mandatory punishment as provided in section 376 (2) (d) of the Malaysian PC stipulates that whoever commits rape shall be punished with imprisonment for a term of not less than 5 years and not more than 20 years and shall also be liable to whipping. This is a reason to justify that statutory rape is a not crime of trivial nature. However there is a situation when bond of good behavior as provides in section 294 (1) in Criminal Procedure Code were used by the court to replace the imprisonment sentence in statutory rape. This study will address the matter in which had been stated above.

1.3 Objective of the Study.

In essence, this study will analyze the issues on statutory rape in Malaysia and India. It is coupled within appropriate observation and suggestion on how both of the countries had taken their approaches in managing statutory enforcement in the law on statutory rape. This study is aimed to achieve the following objectives:

i. Discussions on legal reasoning, this includes the studies towards the law on evidence, the scholars opinion and the judicial precedent.

ii. To provide enlightenment in the law on statutory rape in both countries

iii. Comparative analysis between Malaysia and India towards their approach in statutory rape criminal litigation.

1.4 Significance of the study.

Although Malaysia and India are generally based on the English common law, this research will show the differences on the approaches taken by the two countries. This will be done by scrutinizing case law of these two countries to discover the method in addressing the problem of statutory rape. Expert's opinions will be consulted for a better understanding of the issue. This study would reveal as to what extent the common law of England would still prevail and plays its role. When a nation become independent, the tendency of making its own interpretation of laws

began to promulgates. This can be seen in the judgment of M.C Mehta v Union of India & ors[1] when Justice Bhagwati[2] dictates that "*India cannot allow its judicial thinking to be constricted by reference to the law as it's prevails in England or for the matter of that in any other foreign country*". This also bring significance, by choosing India as a comparison, study on the law of statutory rape will be done simultaneously between Malaysia, India and England.

In statutory rape, offenders often use violence on victims. This kind of violence and coercion sometimes causes the victim surrendered to the act. This is also being mitigated by the accused as the reason in which, sexual intercourse is committed by the victim's consent to the act. This study focuses on the passive submission and consent. It emphasizes that willingness of the victim by passive submission is to be differentiate with consent. On the other word, passive submission by the victim cannot be construed as consent. Consent will cause the victim being subject to the act, but passive submission of the victim to the sexual intercourse sometimes is done by the reason of coercion. A woman who is less than 16 years old is actually not capable of giving consent because of their physiological and psychological condition. It can be concluded that issue of consent does not have any relevancy in statutory rape laws.

In addition, this study may also benefit and assists the researchers, teachers, law students to serve as a reference.

[1] M.C Mehta v Union of India [1987] SCR 1 819
[2] Chief Justice of the Indian Supreme Court.

1.5 Research Methodology.

1.5.1 Research Design.

In connection to legal research, it can be noted that there are two types of research namely doctrinal research and non-doctrinal research. In this sense, doctrinal research is concerned to the legal issues and principles while on the other hand non-doctrinal research involves people, social values and social institutions.

Research design for this study is based on a doctrinal research where it will be a “library based research”. Hence, a library based research generally relies on published material and it includes academic journals and books as well as any other information which is available in the public domain, for example newspapers, magazines or reliable online resources.

At a glance of legal research, it is observed that there are four categories of research and they are history, analytical, comparative and philosophical. All four of these methods differed from each other in terms of characteristic and how researchers can employ them in legal research. Perusing into history, it is a recollection of past events or combination of events and historical analysis is therefore a method of divulging from records and accounts on what had happened in the past. Researchers contemplate various sources such as old case law and legislation in finding reasons for the position of law which could be drawn from scrutinizing the case law.

Analytical on the other hand relies heavily on critical thinking and application of an area of research and this act as a tool to gain data. Consideration are done and recorded for the purpose of analysis. Comparative research focuses on comparing on two or more issues or problem. Through comparison, the similarities and differences and the strengths and weaknesses will be identified. The last type of research is philosophical where research is done based on the nature or existence of ideas from a particular area of study.

Therefore, alongside doctrinal research, this study also provides its importance on a comparative research method. This method is being employed to examine the legal position in two countries and as mentioned before, this study compares the statutory rape laws practiced by Malaysia and India. From this context, the method of research is essential in discovering the similarities as well as the differences between the two countries. By comparison, future development of a legal framework may be achieved if necessary.[3]

The types of research methodology which will be employed throughout this study is doctrinal research and comparative research where it is concerned more on analyzing and comparing the existing legal rules, principal, provision as well as case law related to statutory rape in Malaysia and India. The ultimate reason for employing this methodology is to provide a new set of understanding in statutory rape laws.

[3] Source: http://econ.upm.edu.my/researchbulletin/artikel/Vol%204%20March%202009/19-24%20Adilah.pdf

1.5.2 Scope of the Study.

As aforementioned, this study focuses on comparison of statutory rape laws and enforcement of the Penal Code between Malaysia and India. Emphasis on the study covers the approaches by the judiciary in trial regarding statutory rape. Analysis on the legal provisions under the Criminal Procedure code and Evidence Act will be reveal and from there the problem and workable solutions will be identified.

1.5.3 Types of Data.

Scrutinizing into types of data, it can be submitted that the primary source such as case law illustrates the offences in statutory rape. Statutory provision in Malaysian and India such as PC, Criminal Procedures Code (CPC) and Evidence Act (EA), will also be used in gathering information or substances for the aforementioned research project and thus, assisting the whole of the research process. In this sense the Penal Code, Criminal Procedure Code and the Evidence Act in Malaysian and India which provides provision related statutory rape, will mainly be referred and be taken into consideration to complete this study.

In relations to secondary sources, they are defined to be sources which have been interpreted and also primary sources which had been analyzed. Here the textbook of statutory rape laws, journal

articles, information from the website and online material will be referred in order to gather more reliable information and strengthen the understanding of the study. As a result, the depth on understanding the study will be sufficient with the finding of these secondary sources and analyzing views which varies from each sources.

1.5.4 Data Collection Method

The data collection method for this paper is mainly interpreting and analyzing both primary and secondary sources. This is reasoned as research for this paper will be carried out using the library based approach as mentioned supra. The undertaking of this research requires heavy reading and thorough understanding of statutory rape laws of both the jurisdiction. The ways in which the provision may give impact to the legal framework when statutory rape offences are been reported and also how effective the provision is to curb the offence of statutory rape. Besides perusing law books, other legal research method will be used by going through case laws related to the research topic. Reflection upon cases will be use to obtain information from the practical point of view and also understand the extent to which the provision used by the legal enforcers.

By reading the case law from Malaysia and India, it will add a better scope to the research questions which has been formed and therefore, it is important for one to look into case law when undertaking legal research as court on many occasions take into consideration the principles which relates to each cases on its facts. Moreover, reading and extracting information from legal journal articles will also play essential part of data collection method.

1.5.5 Analysis on Data

The analysis of data will be done by interpreting, accessing and scrutinizing the data which will be collected. Since this is pure legal research, primary and secondary sources are ultimately incorporated to undertake the research. Through a careful reading and study of those sources, the data analysis will allow the researcher to gain insights on statutory rape. In order to endow with full insight of this area of law, it is essential to note that the researcher will make a brief account on historical background of statutory rape and following that, an overview of statutory rape will be presented. Besides that, researcher will also identify, interpret and analyze the Malaysian and India current position of statutory rape under the relevant provision and its impact on this area of law. Each position will be discussed correspondingly.

So far as this study is concerned, it also involves a comparative analysis and at this juncture, a thorough comparison will be done with the relevant facts, principles, concepts and provisions being identified from both jurisdictions. This comparative analysis will be carried out in order to decide and whether the current provision to both countries is adequate to fight against statutory rape. As a part of the conclusion, based on the analysis done, the researcher will provide some legal recommendation on how to further improve the implementation of statutory rape laws.

Content analysis will be applied where it focuses on the reading and analysis of judgment, legislation as well as policy documents relating to a particular area of law. Contemplating into legislation, the statutory interpretation will be employed. Rules of interpretation consists of literal rule where meaning of the statute will be considered as it is and golden rule and mischief rule which does not take the meaning literally and the purpose behind the statute will be looked at.

1.5.6 Limitation of the Study

One of the major limitations of the study which have been identified by the researcher is that lack of reference that can be used as a guide in Malaysia. In contrast the strict approaches taken by the India to deal with the issue will be analyzed. Malaysia generally sticks to the common law in making decision. Supreme Court in India through the decision declared that rape is violating the provision of article 21 of the Constitution of India[4]which is right to life. In Malaysia, there is no declaration on that part. The lack of scholarly reference in Malaysia include the Malaysian case law is a constraint that limits the study.

Due to many case law under statutory rape laws in Malaysia are not reported, the researcher may get those unreported cases from other sources such as the court if they are not available on any database. This can act as a solution to the limitations of this study. However, in order for future

[4] State of Himyar Pradesh v Sri Kant Shekari [2004] 8 SCC 153

researchers to overcome these limitations, they should consult a more comprehensive database for a detailed study.

1.6 Literature Review

1.6.1 Statutory Rape and the Law.

Statutory rape is a sexual intercourse by an adult with a person below a statutorily designated age. The criminal offense of statutory rape is committed when an adult sexually penetrates a woman who, under the law, is incapable of consenting to sex which is normally less than 16 years old[5]. The phrase statutory rape is a term used in some legal jurisdictions to describe sexual relations that occur when one participant is below the age required to legally consent to the behavior. Although it refers to adult engaging in sex with minors under the age of consent, the age at which individuals are considered competent to give consent to sexual conduct is a generic term. Very few jurisdictions use the actual term "statutory rape" in the language of statutes. Different jurisdictions use many different statutory terms for the crime, such as "sexual assault," "rape of a child," "corruption of a minor," "carnal knowledge of a minor," "unlawful carnal knowledge", or simply "carnal knowledge." Statutory rape differs from forcible rape in that overt

[5] Malaysian Penal Code; Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

force or threat need not be present. The laws presume coercion, because a minor is legally incapable of giving consent to the act[6].

The Malaysian and Indian Penal Code were in pari materia when both of the countries have the same statutory provision that refers to section 375 of the Penal Code for the definition of rape and statutory rape. It also has the same codification provided in section 376 of PC for the punishment. Historically, the Malaysian Penal Code was adopted from the Indian Penal Code 1860. The age for woman to give consent to sexual intercourse for Malaysia is above 16. Prior to 2013, Indian Penal Code has the same age of consent, but due to the amendment in the Indian Criminal Law, the age of consent for India was altered to be 18 years old.[7]

Laws against statutory rape were designed to protect adolescent girl from sexual exploitations towards sexual activities. Statutory rape laws are based on the premise that until a person reaches a certain age, that person is legally incapable of consenting to sexual intercourse. Thus, the law assumes, even as she is willingly engaged in sexual intercourse, she is incapable to give consent. By making it illegal for an adult to have sex with a minor, statutory rape laws aim to give the protection to the minor against adults in a position of strength over the youth.[8]Such laws

[6] http://dictionary.lawyerment.com/topic/statutory_rape/
[7] Indian Criminal Law Amendment in 2013
[8] Rationale of statutory rape laws http://dictionary.lawyerment.com/topic/statutory_rape/

effectively determine that children and young people below the age of consent do not have the emotional maturity to consent to sexual activities.

In relation to sexual abuse charges in each state and territory, the key differences between child sexual assault and adult sexual assault is that adult sexual assault is based on the absence of sexual consent, whereas in child sexual assault, the issue of consent is superseded by age of consent laws.[9]

In scrutinizing through the fact given, an important distinction should be made between "willingness" and "consent". A child may be willing to engage in sexual behavior; however, as they do not have the psychological capacity to give consent according to the law, all sexual interactions between an adult and a person under the age of consent are considered abusive[10]. The opinion by the scholar as be seen above can be referred by the court in delivering the decision in any trial. The different between willing to have sexual activity and give consent to that activity must be differentiate before the courts provides their reasoning.

[9] Eade, L. (2003). Legal incapacity, autonomy, and children's rights. *Newcastle Law Review*, *5*(2), 157-168
[10] Barbaree, H. E., & Marshall, W. L. (2006). An introduction to the juvenile sex offender

According to Ryan (1997)[11], the key elements of consent include:

- understanding what are being proposed without confusion (not being tricked or fooled);
- knowing the standard for the behavior in the family, the peer group and the culture (both parties have similar knowledge);
- having an awareness of possible consequences, such as punishment, pain, pregnancy or disease (both parties similarly aware);
- having respect for agreement or disagreement without repercussion; and
- Having the competence to consent (being intellectually able and unaffected by intoxication).

From these circumstances, the opinion of the scholars in their respective fields will assist the process to provide literature reviews in order to achieve the solution in this problematic issue. Prosecution in statutory rape is in line with international norms as in the Convention on the Rights of the Child (CRC), in Malaysia, the issue of consent does not arise when a person has sex with a minor under the age of 16 years. *According to the committee on rights of the child Implementation Handbook for the CRC, a girl under the age of 18, is a minor and is not in position to give informed consent.* The law on statutory rape is meant to protect young girls below 16 years from being abused, tricked or harassed into having sex. The law is based on the premise that until a person reaches at a certain age, that individual is legally incapable of consenting to sexual intercourse. In 42 out of 54 articles and two Optional Protocols, the CRC spells out the basic human right of every child based on four core principles: Survival; Development; Protection; and Participation[12].

[11] Ryan, G. (1997). Perpetration prevention. In G. Ryan & S. Lane (Eds.), *Juvenile sexual offending*
[12] www.unicef.org/malaysia/childrights_crc.html

1.6.2 The Statutory Rape in Malaysian Penal Code

Rape is provided under section 375 of the Malaysian Penal Code. According to this section, 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 placing 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,

(f) with her consent , when the consent is obtained by using his position of authority over her or because of professional relationship of trust or in relation to her,

(g) with or without her consent, when she is under 16 years of age.

It has been provided in section 113 of Evidence Act 1950 that "*it shall be a presumption of law that a boy under the age of 13 years is incapable of committing rape.*"[13]A sexual intercourse with a woman under the age of sixteen years old is statutory rape as defined under section 375 (g) of Penal Code. It is mandatory for the court in Malaysia to impose imprisonment sentence for any person who is convicted for rape for a term not less than five years and also shall be liable for whipping as been stipulated in section 376 (2) (d) PC.

It is generally believed that there should be some evidence of violence presented on the victim before accepting that the rape had taken place. The evidence of violence is expected to arise from the rapist who uses physical force on the victim or by the victim struggle. The evidence of violence may justify that there was no willingness on the part of the prosecutrix for sexual intercourse during the act and it's derived from 19th century English Common Law.[14]This belief has unfortunately led the court to look at the presence of some forms of physical violence on the victim to corroborate the allegation of rape in Malaysia. The subsection "against her will" is generally established with the presence of physical violence. It usually causes burden on the rape victim to show the evidence of physical violence that could be considered as an act against her will.

[13] Section 113 Malaysian Evidence Act 1950.

[14] Nadesan K. Management of rape survivors. Ceylon Med J 1999; 44(3): 109-13.

1.6.3 Statutory Rape in Indian Penal Code.

According to section 375 of the Indian Penal Code, an allegation of rape has to satisfy either of the following criteria that sexual intercourse between a man with a woman in the following circumstances:

(1) It is against the will of the woman;

(2) It is without her consent;

(3) Consent was given under duress;

(4) Consent obtained by fraud examples like when she believes that the man is her husband

(5) Consent obtained by reason of unsoundness of mind or intoxication.

(6) If the woman is below the age of 18 years, sexual intercourse is deemed to rape.

In India, rape trial is done in camera. This is for the protection of the victim against humiliation in adducing evidence in the trial. In Trilochan Singh Johar v State[15] an application for trial in camera without disclosing the name of the applicant is allowed and her father was not allowed to seek quashing of the complaint in the interest of family honor.In India non consented sexual intercourse between a man and his wife would not amount to rape if the wife is 16 years or older and it is an exception to the definition of rape[16]. According to section 376 (1) of the Indian Penal Code, the minimum sentence for a convicted rapist is seven years provided that the court may, for adequate and special reasons to be mention in the judgment, imposed of a sentence by

[15] Trilochan Singh Johar v State [2002] Cr LJ 528 Delhi.
[16] See Ratanlal,Dhirajlal ,The Indian Penal Code pg 754.

imprisonment of either description for a term of less than ten years.[17]Imprisonment may be extended for a term up to 10 years.

The crime of statutory rape in India provides the impression that it is not regardless from any criticism. As early in 1972 in the case of Tukaram's (this will be dealt in the next chapter).The response from the community on this matter had led changes in the rule of the court in protecting their citizens. The internal intervention in India brought different trends in the context of justice. Prior to the incident, presumption of consent was embodied in Section 155 (4) of the Indian Evidence Act allowed defendants to offer evidence about victim's character and sexual history during the trial. In 2002, there was an amendment in section 155 (4) of the Indian Evidence Act, the provision of presumption of consent repealed and an impeachment of generally immoral character of the prosecutrix is no more in practice.

1.6 Conclusion

To a larger extent, literature review indicates that the statutory rape literature focused more on the legal interpretation of scholars opinions and how the law related to statutory rape should strike a balance between the accuse who in the position of taking advantage and the prosecutrix that should be protected from the statutory provision. Sexual intercourse to a child who is less than 16 years old should be avoided based on the fact that they are not prepared for any consequences such as pregnancy or giving birth to a child.

[17] Section 376 (1) of Indian Penal Code 1860

Statutory rape law is more than adequate to protect young female from being victimized by a crime against humanity. It is also a tool in combating child prostitution or a weapon to curb the symptoms of pedophilia to grow within the community. The constraint which sometimes reduces the effect of the existence of this law is the failure to provide a literal interpretation of the mechanisms that being used to safeguard the well-being of children. Due to the gap between the literature and its interpretation, this study will contribute to patch the weakness between them by analyzing the provisions related to statutory rape and also brings empowerment to the law on statutory rape based on the comparison of position between Malaysia and India

CHAPTER TWO

HISTORICAL REVIEW OF STATUTORY RAPE

2.1 Introduction.

As previously disclosed, statutory rape laws in Malaysia and India are in pari materia when these two countries were found to use the same section as provided under section 375 of the Penal Code. This of course brought great significance to the practice and application of the law. Statutory rape is one of the criminal legislation specifically designed to protect the interests of the underage girl. In a related matter, the law is used as a tool by every government to protect the well-being of society as a whole. Increasing statistic involving statutory rape victims by each year, able to indicate the extent of the severity of the problems experienced by the underage girl who is the victim of this violent crime.

2.2 The Reception of English Common Law in India and Malaysia

To understand the position of the common law of England in question, it is important to look at the history of the inclusion of the English law into the two countries. In India, the Common Law is a system of law based on recorded judicial precedent. It came to India through the invasion of British East India Company. A charter was granted to the company by King George I in 1726 for the establishment of the Mayor Court in Madras, Bombay and Calcutta. After company victory

in Battle of Plassey[18], its judicial function expanded and by 1772 the company's court expanded out from the three major cities. In the process, the existing Moghul Legal System (Government of Moghul) in this part was slowly replaced. After the first war of Independence in 1857, the control of company territories in India was passed to the British Crown. Being part of the empire saw the next big shift in Indian legal system. In 1860, the Indian Penal Code was drafted based on the application of the law in England.

In Malaysia, the influx of English law lagged compared to India. This can be observed through the first Royal Charter of Justice that only arrived in Penang in 1807. Royal Charter of Justice refers to the permission granted by the British Crown for a reception of statute which gives power to the East India Company to operate a competent legal system and establish reception of English common law. The law that's applied is English law as Administered in England on March 1807.These Charters of Justice were significant for the herald of the reception of the English common law and equity into the Malay Peninsula. In the Goods of Abdullah Malkin R (judicial recorder) stated that;

"*I refer to the case of Rodyk v Williamson in which I expressed my opinion that I was bound by the uniform course of authority to hold that the introduction of the Kings Charter into these*

[18] The **Battle of Plassey** was a decisive victory of the British East India Company over the Nawab of Bengal and his French allies on 23 June 1757

Settlements had introduced the existing law of England except in some cases where it was modified by express provisions, and had abrogated any law previously existing."[19]

The application of English Common Law in Malaysia later adopted the provisions of section 3 (1) of the Civil Law Act 1956 (hereinafter CLA).This section was specifically reiterated opinion by Malkin R as the English recorder who presided In the Good of Abdullah case. In section 3 (1) CLA 1956, Common Law in Malaysia is subject to such qualification as local circumstances render necessary.

2.3 The Historical Background of Statutory Rape in English Common Law

English Common Law dictates that statutory rape is a gender-specific offense. Which means if a sexual relationship occurred among men with a person who is not his wife and also aged less than 16 years, only the men who are considered to have committed the offense and who will be accountable of the punishable offence. Under the early English common law a male could not be convicted of rape if the female had consented to the activity.[20] But as England codified its

[19] In the Goods of Abdullah (1835)2 KY Ecc 8, at pages 9-10.

[20] Lisa Fuentes, The 14th Amendment and Sexual Consent: Statutory Rape and Judiciary Progeny", Women's Rights Law Reporter, Rutgers Law School Publications, Vol. 16, no. 2, Winter 1994

statutory rape law in the Statute of the Westminster of 1275,[21] the King prohibited that none do ravish any maiden within who aged less than 12 years old who was regarded as unable to consent. The offense was made a capital one in 1285. The age was lowered to ten in 1576. Any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, shall be a felony.

The idea behind such laws at that time was less about the ability or lack thereof to consent to such activity on the part of the female, and more about protecting white female and their pre marital chastity. It is considered at that time that female who is less than 12 years old is a commodity or as a property.[22]The common law defines rape as "the *carnal knowledge of a woman forcibly and against her will*". The common law defined carnal knowledge as the penetration of the female sex organ by the male sex organ. At one point as noted by Sir William Blackstone in his *Commentaries on the Laws of England* by 1769, the common law had recognized that even a prostitute could suffer rape if she had not consented to the act. One of the most oft-quoted passages in our jurisprudence on the subject of rape is by Lord Chief Justice Sir Matthew Hale from the 17th century, *"rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.*"[23] Lord Hale is also the origin of the remark, *"In a rape case it is the victim, not the defendant, who is on trial."*

[21] (1275**,** 1285, 1290), three statutes important in medieval English history, the first Statute of Westminster **(**1275), written in Old French.

[22] Lisa Fuentes, The 14th Amendment and Sexual Consent: Statutory Rape and Judiciary Progeny", Women's Rights Law Reporter, Rutgers Law School Publications, Vol. 16, no. 2, Winter 1994

[23] Rape - Overview; Act and Mental State, Wayne R. La Fave Professor of Law, University of Illinois, "Substantive Criminal Law" 752-756 (3d ed. 2000)

Section 16 of the Offences against the Person Act 1828 read as follows: And be it enacted, that every person convicted of the crime of rape shall suffer death as a felon. Here, "death as a felon" means death by hanging and confiscation of the land and goods, which were pronounced against felons, as opposed to the quartering which be fallen on traitors. Thus, it was assumed that the definition of rape was so well understood and established by the common law of England that a statutory definition was unnecessary.[24] The death penalty for rape was abolished by section 3 of the , which substituted transportation for life. Transportation was abolished by the Penal Servitude Act 1857, which substituted penal servitude for life.

These sections were replaced by section 48 of the offences against the Person Act 1861. 1885 in England, conservative party pure reformist and feminist together successfully lobbied Parliament to rise the age of consent to 16[25]. Penal Servitude was abolished by the Criminal Justice Act 1948, which substituted imprisonment for life. These sections were replaced by sections 1(1) and 37(3) of, and paragraph 1(a) of the Second Schedule to the Sexual Offences Act 1956. Rape ceased to be a felony on 1 January 1968 as a result of the abolition of the distinction between felony and misdemeanor by the Criminal Law Act 1967. A statutory definition of "rape" was provided by section 1 of the Sexual Offences (Amendment) Act 1976. This was intended to give effect to the Report of the Advisory Group on the Law of Rape (Cmnd 6352). In January 1982, the Government accepted an amendment to the Criminal Justice Bill the effect of which, if enacted, would be to compel judges to sentence men convicted of rape to imprisonment. This

[24] (1907) 97 Southwestern Reporter 668 [1], (1907) 79 Arkansas Reports 303 [2], 9 Annotated Cases, American and English 412 [3]

[25] Statutory Rape Law in Historical Context at http://sunypress.edu

followed a case earlier that month in which John Allen, 33, businessman and convicted of raping a 17-years-old hitchhiker, had been fined £2,000 by Judge Bernard Richard, who alleged the victim's "contributory negligence."[26]

Section 1 of the Sexual Offences Act 1956 was substituted on 3 November 1994 by section 142 of the Criminal Justice and Public Order Act 1994, providing a new and broader definition. That section was replaced on 1 May 2004 by section 1 of the Sexual Offences Act 2003, providing a still broader definition.References to vaginal or anal sexual intercourse were replaced by references to penile penetration of the vagina, anus or mouth. It also altered the requirements of the defense of mistaken belief in consent so that one's belief must be now both genuine and reasonable.

2.4 Federated Malay States Penal Code (1936) and the Penal Code Act 574

The codification of The Penal Code for the whole Malaysia (Malaya before 1957) was only done in 1948. It had been extended throughout the Federation of Malaya by virtue of the Penal Code (Amendment and Extended Application). Ordinance, 1948' (1952) is the first Penal Code which applicable throughout Peninsular Malaysia. Previously the Penal Code of Straits Settlement first adopted in Perak by Order in Council of June 28, 1884 was used to overcome issues about

[26] Bell, Patricia (January 14, 1982). "Negligence And A Fine For Rape". *The Glasgow Herald*. Retrieved October 27, 2013

crimes in Perak state. This Penal Code was replaced by the Federated Malay States Penal Code chapter 45 which was used as a tool in combating crimes in all Malay States in 1936. The Malaysia Penal Code Act 574 is adopted based on Indian Penal Code (IPC) 1860[27]. It is also a historically pointed out that section 375 which include the provision of Statutory Rape in Malaysian Penal Code has it based from the codification of section 375 of the IPC.

2.5 The Deviations of Common Law Principles by the Indian Court.

Prior to 1986, conclusion made that the Indian Court is still depending heavily on the English common law. For examples, the principles of corroboration, the modesty or chastity of the victim opens to be assassinated in rape cases. Experts' opinion in the past had been discussed by using the common law system. The applications of English common law are widely used only to gain attention by the Supreme Court of India in 1986 during the trial in MC Mehta v. Union of India & Ors.[28] Chief Justice Bhagwati in his judgment has set a new Indian stance to re-evaluate their reliance on the practice of the application of common law. Through the case, Justice Bhagwati dictates that "w*e cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country."*

[27] Reception of English Law in Malay States by Priya Shan at Academia.edushareresearch.
[28] MC Mehta v. Union of India & Ors 1987 SCR (1) 819

M.C Mehta v Union of India & Ors, witnessed on how the application of English common law principle had been changed. Strict liability was abolished and principles of absolute liability were set as new law in similar circumstances. Previously most of the cases in India have followed precedent of common law. One of the precedents set up in Ryland v Fletcher[29]which dealt with principle of strict liability was considered but few parts of the judgment were overruled.[30]This can be considered as a deviation of the traditional principles of common law system by Indian judges.

2.6 Malaysia Recent Development by the Appellate Court Judgment in Statutory Rape

In Malaysia, a recent case decided in PP v Mohamed Malek Ridzuan B Che Hassan[31] concluded that consistency of victim testimony during the trial increased her credibility and reliability of the evidence. The victim is a student aged 12 years and 9 months was raped by a 20 year old male and defense submitted by the accused was that penile penetration doesn't occur and he did not insert his penis into the victim vagina. As a defense he claimed only to insert his finger into the victim's genital. Court of Appeal refused to accept the defense of the accused on the account of the credential and credibility of the testimony by the prosecutrix. One of the evaluations made by the appeal court is by the reasoning from the Indian court to be brought for the purpose of providing the maximum evaluation on evidence gave by both of the parties.

[29] Ryland v Fletcher [1868] UKHL 1 LR 3 HL 330

[30] http://www.legalservicesindia.com/article/article/legislation-&-common-law-indian-legal-system-587-1.html

[31] PP v Mohamed Malek Ridzuan B Che Hassan [2014] COA 1 MLJ 363

In this case, Malaysian court also takes into the consideration on judgment from Singapore Court regarding to the case involving sexual assault. In the case of Kwan Peng Hong v PP [2000] 4 SLR 96 HC, Yong Pung How CJ on page 104 dictates, "*but I also took great care to make clear that's it is dangerous to convict on the words of the Notification of Complaint alone, unless her evidence Compelling or is unusually convincing.* In short the court is to be extremely cautious in relying on the sole evidence of the Notification of Complaint for a conviction.Unusually the compelling or convincing phrase simply meant that the Notification of Complaint in which the evidence of the victim was so convincing and eventually the prosecution case was proved beyond reasonable doubt solely on the basis of that evidence[32].

In 2007, Chief Justice of Malaysia, Tun Ahmad Fairuz Abdul Halim questioned the need to resort to the English common law despite Malaysia have since been independent for 50 years and proposed to replace it with Islamic law jurisprudence or Sharia law. However, the Malaysian Bar Council responded by stating that the common law is a part of Malaysian legal system and that there is no basis in replacing it. Appeals to the Privy Council in England as practiced by the Malaysian as an appellate jurisdiction in the past has already been abolished in 1985. The Malaysian attitude on appreciating the ruling by the Indian court is one of the reasons on which this study was conducted. This is the evidence by the recent ruling by the Malaysian Court of Appeal in a statutory rape law trial.

[32] PP v Mohamad Malek Ridhzuan B Che Hassan [2014] COA 1 MLJ 363

2.7 The Used of Forensic Evidence in Rape Cases

In Malaysia Deoxyribonucleic acid (DNA) as such are regulated under the Deoxyribonucleic acid (DNA) Identification Act 2009. It is the act to provide for the establishment of a forensic DNA Databank Malaysia, the taking of DNA samples, forensic DNA analysis, the use of DNA profiles and information. Under section 45 of the Indian Evidence Act 1872 which in pari materia with section 45(1) of Malaysian Evidence Act 1950, it has been provided that, when the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinion upon the point of person specially skilled in that foreign law, science or art, or in question as to identity are relevant facts. In subsection (2) of the same act, this will be pronounced as an expert opinion.

Deoxyribonucleic acid (DNA) is a molecule that encodes the genetic instructions used in the development and functioning of all known living organisms. It were to be used as an evidence to be produce in court as an additional and such kind of forensic evidences. Usually DNA profiling is an experiment of the blood, mucous, semen, hair or pubic hair, nail clip or saliva of the accused and the victim. This forensic evidence will be analyzed to corroborate the evidence which tend to connect the accused and the kind of evidence which tend to implicate him with the crime. This kind of evidence can be procured at the scene of crime or on the victim body or clothes.Medical officer from the government hospital is the one who collects that samples through examination on the victim at the hospital and these samples were send to Chemistry

Department to be analyzed by the expert. This evidence is being produced in court by using the provision in section 45 of the Evidence Act 1950 by the experts on that field. In order to determine whether scientific evidence is admissible, the court may consider whether the principle or technique has been or can be reliably tested, to peer review or publication, known or potential rate of error, standards or organizations controlling the procedure technique, whether it is generally accepted by the community, and the technique was created or conducted independently of the litigation.[33]

In Malaysia, penetration is necessary to be the important element in rape, the absence of DNA by the accused spermatozoa in the vagina cannot be considered as that the crime of rape did not occurred. This is decided by Justice Tee Ah Siang in Barero.[34]Whereas in the case of Cheong You Hoi v PP[35] held that the law does not require semen to prove the occurrence of rape. The important issue is just penetration and the evidence had to be proven. DNA should be deemed as a proof that can facilitate that it was the accused that penetrate his penis into the victim vagina as decided in Ahmad Najib B Aris v PP.[36]

It was a settled law that in Prithi Chand v State of Himachal Pradesh[37]Supreme Court justified that mere absence of DNA of accused spermatozoa cannot cast a doubt on the correctness of the prosecution case. In some cases decided, forensic examination revealed that there is semen stains

[33] http://www.legalserviceindia.com/articles/medooo.htm
[34] Barero case (No. K42 - 10 of [1993] High Court of Sabah
[35] PP v Cheong You Hoi [1999] 5 MLJ 518
[36] Ahmad Najib B Aris v PP [2007] 2 MLJ 505
[37] Prithi Chand v. State of Himachal Pradesh, (1989) Cr LJ 841: AIR 1989 SC

on the vaginal swab and victim trousers. The Supreme Court held at best, this kind of evidence can be revealed as a commission of sexual intercourse. This can be seen in the judgment of Taneezuddin v State,[38] but then it is not necessary to proved that rape had occurred. The presence of DNA in the form of semen on the clothes of the accused is not evidently shows rape occurred. In Raju v State of Madhyar Pradesh[39]whereby recovery of semen stained at the underwear of the accused, could not be itself support the allegation of rape. In Pawan v State of Uttaranchal[40] it is already a settled law that semen stained recovered from the accused underwear with other circumstances evidence was held sufficient to lead to conviction of the accused.

To conclude, DNA is the evidence on a sexual assault against a woman. But it cannot cast the doubt on prosecution case. DNA only leads to sufficient conviction. In India, law on rape does not hold that in a rape case, there must be a sexual intercourse followed by spermatozoa ejaculation. The presence of DNA of the accused through the detection of DNA found on the victim's body, clothing or place where the rape occurred would provide supporting evidence through expert testimonies that the defendant is the person who is closely linked to the crimes.

[38] Taneezuddin v State (NCT) Delhi [2009] 15 SCC 556
[39] Raju v State of Madhyar Pradesh [2009] AIR SCC 858
[40] Pawan v State of Uttranchal [2009] 3 All LJ SC 637

2.8 Conclusion

Statutory rape law development grows in line with the influence of English common law. Statute of Westminster in 1275 was the earliest laws that can be associated with this crime. 1885 in England, pure party reformists and conservative feminist successfully lobbied the Parliament to rise the age of consent to 16. In Malaysia, common law of England entered and brought together a Charter of Justice in 1807 in Penang, turned to lead the formulation of the Penal Code of the Straits Settlements in 1884. During 1936, the Federated Malay States Penal Code, chapter 45 has been done and effective only in the states of Perak, Selangor, Pahang and Negeri Sembilan. Later in 1948, the Penal Code Amendment and Extended Application 1948 (1952) was enacted to allow the use of the Penal Code as a crime-fighting statutes across the Malay Peninsula at the time. Statutory rape through the eyes of history is legislation aimed at protecting girls aged less than 16 years of by being victimized by desires of men greed lust. Statutory rape is remains under the Convention on the Rights of Child (CRC).It is already a settled law that a woman who is under 16 years old is incapable to give consent to sexual intercourse, thus a man will be held liable if he penetrate a woman below that age.

The English law reception in India started as early in 1726. In 1860 codification of the Indian Penal Code start the full inclusions of the English Common Law which bring the statutory rape law in India. In 1986, Indian judiciaries' dictates that they shall not constricted to the English principles of common law and shall move to introduce their own principle and promulgated their own principal of law in India.

CHAPTER THREE

STATUTORY RAPE IN MALAYSIA

3.1 Introduction

The criminal justice system in Malaysia, is based on four main elements include the Police, Public Prosecutor, Judiciary and Prisons. The existence of these four elements is a journey across time from pre-independence era to the present day. Although all four characters are different, their existence is precisely to ensure that livelihood is enjoyed by all parties where order and peace will be maintained in society. Apprehension and prosecution of offenders is one of the police task which has been stipulated in section 3 (3) of the Police Act[41]. In explaining the purpose and power of the court and prosecutors, Articles 121 to 131A of the Constitution[42] is specifically related to the former, while article 145[43] covers the specific provisions relating to the power of the latter. The prison is the correctional centers that provide remedy to isolate any convicted offenders who had already violated the law.

Statutory rape law is a piece of equipment to protect the interests and rights of young female. Generally, it is designed to ensure the welfare of a minor can be preserved. Sexual intercourse with a minor is an offense which warrants a statutory mandatory imprisonment for a man who has been found guilty of the offense.

[41] Section 3 (3) Police Act 1967 is provision related to the Statutory powers which Constitute the Malaysian Police.
[42] Articles 121 to 131A of the Federal Constitution are referring to the source of power in the federal judiciary.
[43] Article 145 of the Constitution refers to the jurisdiction and duties of the Attorney General of Malaysia.

The prosecution has to establish the evidence of the age of the prosecutrix as cited in the case of Mohd Salleh b Nik Mohd Yusof[44]. In these circumstances, birth certificate has to be produced as an evidence of the victim age. These had been cited in the case of Jamaluddin b Hasyim v PP.[45] If there is no birth certificate to be produced, then identity card can be produced because it is likely to have information about the date of birth of the victim. This is also had been cited in the cases of Mohd Salleh b Nik Mohd Yusof. In Jamaludin b Hasyim v PP, the appellant succeeded in his appeal against a statutory rape conviction. The learned judge held that in the absence of birth certificate indicating proof of the victim age, the offense of statutory rape is not established.

3.2 Attorney General and its Obligation.

It is justified by the Federal Court, that Attorney General of Malaysia (AG) has the responsibility to conduct the criminal prosecution in Malaysia. In Johnson Tan Hang Seng v PP[46] Chief Justice Suffian held that "*it was the duty of the Public Prosecutor to prosecute and it must not be a thought that he may act dishonestly. The public of whose interest he is the guardian, has a right to expect him act honestly. His principle concerned being to maintain the rule of law so that there will be no anarchy and to maintain standards in public life.*"

[44] Mohd Salleh B Nik Mohd Yusof v PP [2005] 3 AMR 107
[45] Jamaluddin B Hasyim v PP [1999] 3 CLJ 640 .
[46] Johnson Tan Hang Seng v PP [1977] 2 MLJ 66 (FC)

Charging the accused is one of the examples of accountability by the Attorney General to maintain and uphold the law. It is in line with article 145(3) of the Federal Constitution which stated the duties of the Attorney General are to initiate, conduct and to stop the prosecution in criminal cases.

In June 2, 2013, The Star Online[47] reported statement from Malaysian Attorney General that "*Rape offenders should be meted harsh sentences to deter others from committing similar crimes against women and children. The department's stand is that rape cases require deterrent sentencing to reflect the abhorrence and revulsion of the public towards such crimes. This aberration of justice for those who most need the protection of law must be rectified. In determining the appropriate punishment, especially for statutory rape cases, among the major factors to be considered by all parties involved is public interest and the seriousness of offence committed.*

The commitment shown by the Attorney General as a stakeholder on a legal issue involving statutory rape is not only justify their accountability but has been practiced in a positive manner by the department. It is consistent with the famous speech from Lord Hewart[48] that *"Justice should not only be done, but should manifestly and undoubtedly be seen to be done***"**.

Sessions Court in Kota Kinabalu Sabah on December 12, 2013 ordered a 40-year-old restaurateur defense on the charge of raping a 12-year-old girl. The case received wide coverage

[47] The Star On Line is one of the Online Newspapers in Malaysia.
[48] Gordon Hewart, 1st Viscount Hewart, PC (7 January 1870 – 5 May 1943) was a politician and judge in the United Kingdom.

because the rape took place in February and the accused married the victim with the consent of the family in May 2013. In June 2013 AG still continue with the prosecution and accused were charged on July 1st 2013 even the accused and the victim had already married in May 2013.

This case shows that the marriage reason, cannot be as an excuse for the accused or incapable of preventing the charge against him. On Feb 3, 2014, the Sessions Court sentenced him to 12 years imprisonment and 2 strokes after he is convicted. Charging the accused in this case could be an example of accountability by the Attorney General to maintain and uphold the law. It is in line with article 145(3) of the Federal Constitution which stated duties of the Attorney General are to initiate, conduct and to stop the prosecution in criminal offense.

3.3 Mens Reus (guilty mind) and Actus Reus (guilty act) in the Crime of Rape.

Intention is meant, deliberately of having sexual intercourse with the victim by realizing that the victim disapproval to the act. This is very important because in general, the offender pleaded that he believes that the victim did consented to the act when the incident occurred. The mens rea is the mental state of the accused before or at the time he committed an offense. In rape cases, the accused must know that the prosecutrix does not consent to the sexual intercourse or be reckless whether she consents or not. The mens rea in rape can be seen from the application of the common law principal. In R v Pigg[49] it was held that "*A man is reckless if he was indifferent and gave no thought to the possibility that prosecutrix might not be consenting in circumstances*

[49] R v Pigg [1982] 2 All ER 591 CA

where, if any thought had been given to the matter, it would have been obvious that there was a risk that she was not consenting."

What is important by recklessness is, the accused are not concerned as to the state of mind of the prosecutrix whether she consented to the act or not. When the accused is aware that there is any possibility that the prosecutrix is not consenting and proceed to have intercourse, he does it so recklessly. Lord Hailsham in DPP v Morgan[50] concluded that mens rea required *"an intention of having intercourse, willy nilly, not caring whether victim consent or not."*Another way of putting the situation is to think about whether the accused have the attitude that he did not care whether she is consenting or not and still want to have intercourse with her regardless. It is submitted therefore that mens rea is an intention to have sexual intercourse with the victim knowing that she does not consent or being aware that there is possibility that she does not consent.

In law terms, actus reus is the act of the accused in committing the offense. It is provided in the Malaysian Penal Code that penetration is sufficient to constitute rape. In a trial of rape, it is necessary to prove whether sexual intercourse is natural or unnatural. But it is not necessary to prove the completion of the intercourse by the emission of seed. The intercourse shall be deeming complete upon proof of penetration only. The slightest penetration will suffice. In the case of vaginal intercourse, any penetration to the female genitalia was enough at common law. It is not necessary to prove that hymen was ruptured or the vagina in its proper sense was

[50] DPP v Morgan [1975] 2 WLR 913 [1976] AC 182

penetrated. The actus reus of rape will be discussed afterward in medical jurisprudence in reference to penetration.

3.4 Medical Jurisprudence Reference to Penetration in Malaysia.

A legal requirement to prove the incident involving the rape is penetration and it is sufficient for the crime of sexual intercourse. The crime of rape in Malaysia and India stated that it is well established law that in order to prove rape, the male genitalia full inclusion in the woman's vagina and the exit of semen is not required. Malaysian Court of Appeal in recent decision of PP v Mohamad Malek Ridhzuan[51] B Che Hassan also referring to the textbook of Medical Jurisprudent and Toxicology which is used as to conclude the expert opinion in the rape cases. In writing the book of Medical Jurisprudence, Dr Modi[52] stated at page 61 that,

"*Thus to constitute the offence of rape, it is not necessary that's there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite*

[51] PP v Mohamad Malek Ridhzuan B Che Hassan [2014] 1 MLJ 363

[52] Medical Jurisprudence and Toxicology 21st edition , Dr Jaising P Modi.

possible to commit legally the offence of rape without producing any injury to the genitals or vagina leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give any opinion that no rape had been committed. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that's can be made by the medical officer is that's there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

Paragraph cited by 61 pages of the book Medical Jurisprudence and Toxicology by Dr. Jaising P Modi were so much related in the making of judicial decision in rape cases. What is important is the penetration of a penis in the vagina is sufficient without the need of male semen and the absence of injury either on the penis or in the vagina of women is not an excuse that no rape occurred. Also the full penetration and ruptured of the victim hymen is not necessary to constitute rape. Based on the opinion of Dr Jaising P. Modi, the question of rape can only be decided by the court. Medical officer is not entitled to conclude that the rape did not happen. Judicial power is capable of making decisions of rape through their reasoning toward evidence. In Malaysia, a similar assessment at High Court was made in the case Nasrul Annuar b Abdul Samad[53], the prosecution failed to prove that penis of the accused did penetrate the prosecutrix vagina. Victim only assumed that penis has entered the vagina because she did not see the penetration. The medical report supplied say tearing may occur due to the entry of the penis, fingers or other blunt objects. The accused was acquitted because the issue of penetration failed ensured.

[53] Nasrul Annuar b Abdul Samad [2005] HC 1 MLJ619

However Nasrul Annuar decision could be distinguished by the case of PP v Mohamed Malek Ridhzuan Che b Hassan[54]. In Malik, the consistency of the evidence of the accused managed to convince the court that the penetration occurs. This is because besides seeing penetration, the victim can tell clearly how sex had been committed by the accused. The victim even can give evidence as it can be illustrated by the Court that sex is supposed to happen in this case. When challenged by defense counsel, the victim still can assert by no hesitant that it is the accused who having sex with her. It can be said that penetration is an important element and this evidence were so compulsory and necessary for the court to imposed conviction toward the offender who commits the crime.

3.5 The Rules on Corroborative Evidence in Statutory Rape in Malaysia

Malaysia has a common standard with British Law when it comes to sexual offences where in this situation evidence on the allegation of sexual assaults must be corroborated. The concept of corroboration was explained by Lord Reading in R v Baskerville[55], it is stated that,

"Corroboration is independent testimony that affects the accused by connecting or tending to connect him with the crime. It must be evidence which implicates him, that is, which confirm in some material particular not only to the evidence that a crime has been committed, but also that the prisoner commits it".

[54] PP v Mohamed Malek Ridhzuan Che b Hassan[54] [2014] Court of Appeal 1 MLJ 363.
[55] R v Baskerville[1916] 2 KB 658 CCA

Corroboration is required as a matter of practice and prudent. The judge has the discretion in insisting on the requirement of corroboration. In Malaysia, this matter also stated by Justice Augustine Paul in Aziz b Muhamad Din v PP[56] when he said that *"in certain types of cases there is a rule of practice which requires evidence to be corroborated. This includes the evidence of a complainant in a case involving a sexual offence".*

As been mentioned, corroboration that comes from independent evidence is important to be produced to secure conviction of the accused. It has been cited in the case of Attan b Abdul Gani v PP[57]where a list of principles of corroboration was laid down. One of the guidelines is that, all that is required is that there must be some additional independent evidence rendering it probable that the story of the complainant is true and that is reasonably safe to act upon it. Corroboration is crucial to be evaluated by the court because the court will find that if evidence were not corroborated then the accused can be acquitted of the charges as it unsafe to secure conviction as been mentioned by Justice Augustine Paul in the case of Aziz B Muhamad Din v PP.

In Malaysia the recent case by the Court of Appeal in PP v Ewe Peng Lip[58] highlighted that physical medical examination conducted by 3 doctors on the 4 years old child found no evidence to corroborate the injury on the child in the incident. Respondent was accused in raping the child in the kindergarten in 2008 and was charged in 2012 in the Session Court. He was found guilty

[56] Aziz b Muhamad Din v PP [1996] HC 5 MLJ 473.
[57] Attan b Abdul Gani v PP [1970] 2 MLJ 143
[58] PP v Ewe Peng Lip [2013] COA (unreported), accused sentenced to 20 years jailed in Penang Session Court, acquitted by Penang High Court on appeal and COA uphold the High Court judgment.

and sentences to 20 years in prison by the Session Court judges in Penang. On appeal to the High Court, he was acquitted based on the reason that evidence from the child testimony is unsworn evidence and must be corroborated. The child cannot remember the exact place where the incident has occurred. The DNA of semen is negative. Moreover the child seems to be fantasizing of what happened to her. The prosecutor appealed to the Court of Appeal which later on set aside the conviction from the Session Court and uphold the High Court judgment.

3.6 The Concept of *Stare Decisis* (Let the Decision Stand).

The doctrine of stare decisis is the method used in court to make adjustments and create bonds of the latter court to follow former court decision. It is practice in English common law as early as 1833 when Baron Parke J in Mirehouse v Rennell[59] said *"Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedent; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised."*

[59] Mirehouse v Rennell (1833) 1 Cl & F 527, 546

However, Lord Morris in Conway v Rimmer[60] dictates that sometime the deviation from the concept of binding precedent (stare decisis) is necessary where "*though precedent is an indispensable foundation upon which to decide what the law is, there may be times when a departure from precedent, is in the interests of justice and the proper development of the law*".

Stare decisis is closely related to the doctrine of judicial precedent which in the case of Young v Bristol Aero Plane Company Limited[61] when Court of Appeal elaborated it much further

a) *Court of Appeal is entitled and bound to decide which of two conflicting Decisions of its own it will follow.*
b) *The court is bound to refuse to follow a decision of its own which though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords;*
c) *The court is not bound to follow a decision of its own if it is satisfied that's the decision was given per Incuriam*[62].

In Nor Afizal Azizan v PP[63] it can be justified that Court of Appeal still referring to pre independent case of Tukiran b Taib v PP.[64]In this case Justice Bellamy dictates that "*it is desirable that young offender between the ages of 17 and 21, who are also first offender should be kept out of prison, if possible"*. In Nor Afizal, appellant aged 19 years and an accomplished bowler by profession, had pleaded guilty to a charge of raping a 13-year old minor, and in

[60] Conway v Rimmer [1968] UK 2 House Of The Lord
[61] Young v Bristol Aeroplane Company Limited[61], [1944] 1 KB 718 COA
[62] Wrongly decided.
[63] Nor Afizal Azizan v PP [2012] COA 4 MLRA
[64] Tukiran b Taib v PP [1955] 1 MLJ 24

consequence, was in bond of good behavior for five years in the sum of RM25, 000 under section 294 (1) of the CPC to replace the imprisonment sentences by Session Court Judge (SCJ). It was in the view of the learned SCJ, in not imprisoning the appellant under section 376 of the Penal Code, that public interest would best served by not imposing an imprisonment sentence.It was the learned SCJ's further view that the appellant deserved a second chance since the sexual encounter was consensual and involved no violence and because the appellant was a first and young offender, had shown genuine remorse over the crime and has had a bright future in life.

On appeal,the learned Judicial Commissioner (JC) however opined that the rehabilitative sentence thus imposed by the SCJ was inappropriate and inadequate. In the circumstances High Court (HC) set aside the bond of good behavior and substituted it with a term of imprisonment for a period of five years. Dissatisfied, the appellant appealed to the Court of Appeal (COA). It was argued essentially that it was wrong of the JC to have interfered with the SCJ's decision, as the SCJ committed no error in law or principle in preferring to invoke section 294 (1) of the CPC. In the COA which is the highest appellate court for trial in subordinate court, it was held by the President of the Court of Appeal that the learned SCJ is right.

COA set aside the HC judgment by restoring the SCJ judgment and releasing the accused on bond of good behavior. The decision by this appellate court created a negative public respond that the judiciaries have sent the wrong signal to the society. It was concluded that offences in statutory rape imposed a mandatory 5 years imprisonment to the convicted accused. Hence, the

judgment from the appellate court have received a quick respond from the Minister in the Prime Minister Department that amendment must be made to bar section 294 (1) of the CPC to be used as a replacement for imprisonment sentenced in statutory rape.

COA in Nor Afizal Azizan v PP said that "*the accused and prosecutrix had a consensual sex around midnight on July 5 2010. They checked in into the hotel to be together for a night. The next morning the boy sent the girl back home. The girl did not complaint to anybody. The matter only came to light on July 19 2010 when her father read her diary where she had indicated having sexual intercourse with the appellant. Her father lodged a police report despite her repeated denial to her father on the truth of what she had stated in the diary*".

It has been stated in paragraph 24 of the judgment that whatever sentence to be imposed must be based on the facts on each individual case. Also observation of the appellate court should not be misconstrue as intending to have blanket application for all cases involved young offender charged with the similar offence. But at still, the judgment by the COA had been criticized as it could not give any contribution to the development on law of statutory rape in Malaysia. Moreover, COA also considering that it is a consensual act between the parties involved which show the insensivity of the court in the statutory rape law.

Literally the judgment in Nor Afizal Azizan saw an element of non-compliance on the principle of stare decisis. This can be seen in the case of PP v Chuah Guan Jiu[65] where the HC sentenced the accused to 66 month in prison after he had been convicted of raping a 12 years old girl. In PP v Mohd Musa b Ahmad[66] HC also sentenced the accused of 12 years in jail with two strokes after convicted of raping a 14 years old girls. Both of this cases refused to follow the decision of the COA which replaced the imprisonment sentences on the accused and imposed a bond of good behavior for 5 years under section 294(1) (CPC). At a glance, judgment by the COA, cannot deliver any contribution to the development toward the crime of statutory rape in Malaysia. As a reason, a decision from the appellate court must deem to bind the decision of a subordinate court but this is not the case in Nor Afizal.

3.7 The Application of Section 294(1) CPC in Statutory Rape

As a response to the decision by the COA, it is better to have a look at the impugned provision that has been stated in section 294 (1) of the CPC. Sentences for a conviction in statutory rape cases in Malaysia initially reflect the jurisdiction of the Session Court in accordance with the provisions in the PC. However, there are also cases where the court considers it is necessary for them to decide based on consideration of all the facts presented. The applicability of section 294 (1) of the CPC is widely applied by the Malaysian Court when it's involved offence which is

[65] PP v Chuah Guan Jiu [2012]
[66] PP v Mohd Musa b Ahmad [2013] 8 MLJR 466

trivial in nature and accused is the first offender. Section 294 of CPC is a substitute to replace the imprisonment sentenced in. This is done by the court for the purpose to rehabilitate the accused.

Section 294(1) of CPC provides; *"When any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any Court if it appears to the Court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the* ***trivial nature*** *of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond"*

Application of section 294 (1) in statutory rape offence is been practiced openly by the judges. In of PP v Yeo Tian Su,[67] SCJ stated that "*even Parliament fixed that punishment under section 376 of Penal Code is mandatory imprisonment between 5 to 20 years, it has never been the intention of Parliament to take over the court's discretion in sentencing offenses committed by the accused"*. The court should look at the case based on facts and not on the type of offense. SCJ leaned on the results in Abdul Karim v Regina[68] where Justice Brown stated *"the particular offence and the particular offender are the concern of the court whose business is which to decide what is merited punishment upon the fact of the individual case"*.

[67] PP v Yeo Tian Su[67] [2008] Criminal Case No 62-21-2008 Sessions Court (unreported)
[68] Abdul Karim v Regina[68] [1954] 1 LNS 3

In Yeo Tian Su, the accused was ordered to be released on bond of good behavior bond with RM10, 000.00 bails without charge and with one surety for a period of four years. Accused is a 23 years old man raped the 15-year old victim in a house at Taman Mengkuang, Masjid Tanah, Mallaca in March 2008. He changed his plea to guilty during the trial at the age of 25 in 2010. Judge also dictates that the sexual intercourse is based of love bond and the 15 year old victim consented during the incident took place. SCJ in Yeo Tian Su also referred to judgment in the case of Mohamad Arfah Jasmi v PP[69] where Hamid JC held that "*statutory rape should be seen on social issues and religious approach. Parents and authorities should also give moral education and imprisonment of the offender will only add to social problems."*

Application of section 294(1) CPC also had been discussed in Gan Heng Kwang v PP[70]. In this case Justice Ahmad set aside the seven years imprisonment and replaced with good behavior bond for 3 years under with RM 10,000.00 with one surety. In PP v Muhammad Irwan Bin Zakariah[71], the prosecution did not pursue appeals against the sentence passed by the court and the prosecution satisfied with sentence passed under section 294(1) of CPC. Based on the finding by the HC Judge, the issue of consent that is immaterial seems to be forgotten by the judges in statutory rape cases. To the judges, statutory rape crime is something agreed upon by both parties and is likely to *consensus ad idem.*[72] This should not been construed in a case such as statutory rape.

[69] Mohamad Arfah Jasmi v PP[69] [2008] 7 CLJ 836 HC
[70] Gan Heng Kwang v PP Muar High Court of Criminal Appeal No: 42A -C- 7-2010 in Johor (unreported case)
[71] PP v Muhammad Irwan Bin Zakariah Malacca High Court, Criminal Appeal No: 42H, 91-2010(unreported case)
[72] Latin word which means agreement to the same.

The tendency of judges to place a bond of good behavior to replace the mandatory imprisonment sentence is often observed after they make a reference on the case of PP v Yeong Yin Choy[73] on the pre conditions that have to be satisfied when resorting to section 294(1) of the CPC, court went on to consider that "*though he is free on bond, the conviction is a registered offence and can be taken into consideration in future offenses, the appellant was 19 years old at the time of the offence and 20 years old at the time of his Plea. Also, there was consent between the parties and the appellant limit pleaded guilty and was remorseful"*.

In other situation, there's also an opinion of the court that unwillingness of the Public Prosecutor who did not continue their appeal towards the application of section 294(1) of CPC to accused in a statutory rape cases reflect the satisfaction of the Public Prosecutor on the sentenced imposed by the court. In PP v Yeo Tian Su[74], Justice Bakar dictates that sentenced that had been imposed in PP v Noorhafizi b Mohd Sakri[75] and in PP v Azman B Misnan[76] which made the applicability of section 294 (1) CPC is a conclusion that imposing bond of good behavior is something that is normal in statutory rape cases.

Although the court has the power to determine the punishment which is considered commensurate with the offense committed, it is important to look to the offense committed by the offender. In statutory rape the victim's consent is not relevant when making a judgment. It is

[73] PP v Yeong Yin Choy [1976] 2 MLJ 267

[74] PP v Yeo Tian Su[74] [2008] Criminal Case No 62-21-2008 Sessions Court (unreported)
[75] PP v Noorhafizi b Mohd Sakri High Court Criminal Appeal No 42-24-2004 in Muar, Johor (unreported case)
[76] PP v Azman B Misnan Criminal Appeal 42-6-2005(unreported case)

contended that an important distinction should be made between "willingness" and "consent". A child may be willing to engage in sexual behavior; however, as they do not have the psychological capacity to give consent according to law, all sexual interactions between an adult and a person under the age of consent are considered abusive[77].

In Tan Bok Yeng v PP[78], Sharma J. had occasion to state: *"It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interests have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society"*

Age of consent laws are designed to protect children and young people from sexual exploitation and abuse. Such laws effectively determine that children and young people below the age of consent do not have the emotional maturity to consent to sexual activities. In relation to sexual abuse charges in each state and territory, the key difference between child sexual assault and adult sexual assault is that adult sexual assault is based on the absence of sexual consent, whereas in child sexual assault, the issue of consent is superseded by the age of consent laws[79].

The different between willing to have sexual activity and give consent to those activity must be differentiate by court before giving their reasoning. Through the research conducted, it can be

[77] (Barbaree & Marshall, 2006)
[78] Tan Bok Yeng v PP [1972] 1 MLJ 214
[79] (Eade, 2003).

concluded that the application of section 294 (1) CPC can never be applied to statutory rape cases. Statutory rape is a form of criminal abuse of underage girls and it is violent crime to the victim and also will bring negative effects on physical and mental of the victims. Lord Diplock described in Bremer Vulkan Schiffbau v. South India Shipping[80] that's *"inherent court's jurisdiction is a general power to control its own procedure so as to prevent its being used to achieve injustice"*.

It is an offence of capital punishment if an adult man, in order to satisfy his sexual greed and lust desire, use his personal advantages with or without using force or coercion to induce underage girl to have sex with him. This will make him manipulate a child to achieve his indulgence satisfaction. It is unnecessary for the court to apply the inherent jurisdiction and place a bond of good behavior to replace mandatory imprisonment. It seems like court failed to consider that in statutory rape, the issue of consent is superseded by age of consent laws. Moreover the decision of the Malaysian court to impose a bond of good behavior to be replaced imprisonment sentences are not encouraged due to the reason that statutory rape is not a trivial offences as stipulated in section 294 (1).It is clearly justified that in section 376(2) (d) of the PC mandatory imprisonment is not less than 5 years and the maximum sentences goes up to 20 years. Moreover, accused is liable to whipping. It is justified by the Penal Code that statutory rape is not an offense which is trivial in nature.

[80] Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd [1981] HL

3.8 Application of Sworn and Unsworn Testimony of Section 133A under Malaysian Evidence Act 1950.

Section 133A of the Evidence Act (EA) was introduced in Malaysia on 1971 after the amendment of the EA[81]. In Malaysia, the existence of section 133A[82] makes a different on how the court must adhere to the provision in the EA especially on the child evidence. In Malaysia, section 133A provides that "*any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269[83] of the CPC [Act 593] shall be deemed to be a deposition within the meaning of that section. Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support there of implicating him.*"

It is clear by the provision stipulated in section 133A of the EA, accused can be convicted when a child victim give her verbal evidence under a sworn testimony. But when a child adduced evidence without understanding the nature of an oath and gave testimony on unsworn evidence, accused can only be convicted when there is an independent evidence to corroborate the

[81] Based on the Dictate stated by Abdul Malek B Ishak JHC in Sidek b Ludan [1995] 3 MLJ 178
[82] 133A of the Malaysian Evidence Act 1950 (testimony on child witness by sworn or unsworn in court)
[83] Section 269 CPC is reading over evidence and correction to the witness.

testimony of the child witness. In Yusaini bin Mat Adam v Public Prosecutor[84] the Session Court convicted the appellant for the offence of rape committed to a girl aged 10 years 8 months. The girl was at the age of 11 when she gave evidence in court during trial. The court did hold an inquiry to form an opinion whether the child was in the position to be sworn in accordance with the requirements under section 133A of the EA 1950. The girl gave contradictory evidence and the observations noted by the judge showed that she behave strangely through the trial.[85]HC allowed the appeal and stated when accepting the evidence of a child, trial court ought to examine whether the child had sufficient appreciation of the responsibility of telling the truth upon pain of punishment for perjury. On the failure of the trial court to follow the procedure in section 133A, EA, the conviction should be set aside.

When children are involved, the need for corroboration is twofold according to Mohamad Yusof Rahmat v. Pendakwaraya[86], the Court of Appeal said at paragraph 19 at page 680, "*We must not forget that we are here dealing with the evidence of a child of tender years who is involved in an allegation of rape where even if she is an adult requires corroboration because a woman has a temptation to exaggerate an act of sexual connection, and for a child of tender years for his or her known aptitude to confuse fact with fantasy - see Din v. PP [1964] MLJ 300. We must distinguish between a statement that should be corroborated because of the nature of the offence such as rape or corruption and that is because the tender age of the witness. The first requires corroboration because the honesty of the witness may be questionable. These offences are easy to be alleged but difficult to disprove. The second because of the tender age of the witness who*

[84] Yusaini bin Mat Adam v Public Prosecutor [1999] 3 MLJ 582 HC
[85] The demeanour of the witness as stipulated in section 271 of the CPC. Magistrate has to record the the demeanour of the witness.
[86] Mohamad Yusof Rahmat v. Pendakwaraya [2009] 2 CLJ 673 COA

could be influenced by adults and his own imagination. The evaluation of evidence in each of the categories must be distinguished. Here in this instant case, we are faced with both the nature of the offence and tender age of the witness. Thus, the probative value of this corroborative evidence which were principally former statements by the victim is of little significance".

In the paragraph, it is justified by the reasoning of the COA that corroboration is still needed when a child give her testimony because of two reason. The first is because the child of tender years is known with aptitude to confuse fact with fantasy. The second is because of the tender age of the witness who could be influenced by adults and his own imagination.

In Sidek bin Ludan v PP[87]a conviction cannot stand on the uncorroborated evidence of an unsworn child witness. It is insufficient for the trial court to merely administer a warning on the dangers of so convicting as the amendment now makes it a rule of law, more explicitly, that the evidence of an unsworn child witness shall be corroborated "*In must be borne in mind that an infant of any age may be sworn as a witness in any criminal case, provided that such infant appears sufficiently to understand the nature and moral obligation of an oath or understands the duty of speaking the truth. In my judgment, competency depends not upon its age, but upon its understanding The competency of any child (child witness included) to testify as a witness is a condition precedent to the administration of an oath or affirmation, and clearly, it is a question distinct from that of his credibility when he has been sworn or affirmed. In determining the question of competency, the court acting under s 118 of the Act, is entitled to test the capacity of a witness by putting proper questions. The court has to ascertain the intellectual capacity and*

[87] Sidek bin Ludan v PP [1995] 3 MLJ 178

understanding of the witness (child witness included) to give a rational account of what he has seen or heard or done on a particular occasion."

In Sidek b Ludan, accused was charged of statutory rape after a mother of the victim lodged a police report. In this case, two of the prosecution witness testified on oath. On appeal to the High court it is stated that the trial court was erred in admitting the witness testimony when it is done in a wrong way. The trial court failed to conduct a "voir dire" on both of the female witness who is 8 years old. High court after examined the note of proceeding at the trial court found that the process of the trial court was sufficient. Trial court wrote that both of the 8 years witnesses understand the nature of an oath and trial court accepted the evidence and conviction on the accused is proper. High Court dismissed the appealed and restored order by the trial court.

In PP v Mohammad Terang Bin Amit[88] the evidence of unsworn witness cannot corroborate the evidence of another unsworn witness. Only the sworn evidence can corroborate the evidence of unsworn evidence.

In Mohd Yusrahairee b Md Yusup v PP[89] the issue whether the complainant had complained at the "first reasonable opportunity" is a question of fact that must be considered based on the fact of each case. Thus, if there are valid reasonable reasons which prevented the victim from making her complaint at the earliest reasonable time, the lapse of time from the happening of the incident to the time of making complaint ought not to be considered as delay.

[88] PP v Mohammad Terang Bin Amit [1999] 1 MLJ 154.

[89] Mohd Yusrahairee b Md Yusup v PP Case No: SBW 42A-2/10-2011

As for Malaysia, section 133A of the Evidence Act 1950 gives a different assessment of the evidence of children. Malaysian court held that judges should make an assessment of whether the children understand the meaning of the oath and conduct early assessment in the trials. If the child understands the requirement to speak the truth but did not understand the oath, the judge can still accept the evidence of the children, but the conviction on the accused cannot be made without evidence on oath and reliance on unsworn evidence to convict the accused is not allowed by Malaysian law. In of Tajuddin Salleh v PP[90]it was held that a failure to comply with Section 133A of the EA is fatal to the conviction and not curable under Section 422 of the CPC.

3.9 Possibility to Act on Consensual Sexual Intercourse Which Amount to Statutory Rape for Muslim

In Nor Afizal Azizan v PP[91], and other cases such as [2013] 8 MLJ 466[92] , [2014] 1 MLJ 363[93], PP v. Mohammad Arfah Jasmi[94] and all of the cases that involved statutory rape, it is obvious that the prosecutrix is less than 16 years old. They consented to the sexual intercourse. In the judgment it will be noted that there is a consensual sexual intercourse and sometimes it is not the prosecutrix who lodge the police report. In this sense, the argument by Malaysian former Chief Justice can be referred when he commented that in a case involving young couple, the girl also contributed to the act and he said both of them are guilty and it is not fair if only the man is

[90] Tajuddin Salleh v PP (2008) 2 CLJ 745
[91] Nor Afizal Azizan v PP [2012] 4 MLRA,
[92] PP v Mohd Musa b Ahmad[2013] 8 MLJ 466
[93] PP v Mohd Malek Ridzhuan b Che Hassan[2014] 1 MLJ 363
[94] PP v. Mohammad Arfah Jasmi [2008] 7 CLJ 836

penalized[95]. By referring to his comment, practice can be made for the Public Prosecutor to send the prosecutrix to the Syariah Court to be investigated by the enforcement officer in the Syariah Court on consensual sex between them. But this kind of practice is only applicable to Muslim couple and only applies to underage female who consented to the sexual intercourse after accused had been convicted. DPP can apply to the Session Court to bring the consented female to face the religious department. The reason is provided in section 23(2)[96] of Syariah Criminal Offences (SCO) (Federal Territories) (FT) 1997 (Act 559).

In section 72 (1) (a) as provided in the Syariah Criminal Procedure (SPC) Federal Territory (FT)(1997), a judge may take cognizance of an offence upon his own knowledge and with evidence to support that such offence has been committed. Evidence to support that such offence already committed by the woman concern shall be peruse from an application of the note of proceeding under section 222 (1)[97] of the SPC. In subsection (2) an application for a copy of the record will be made by the Syariah prosecutor from the civil court. Section 433 (1) of the CPC is in pari materia with section 222 (1) of the SPC which stated the provision to apply the note of proceeding regarding the matter.

[95] http://www.themalaysianinsider.com/malaysia/article/zaki-courts-should-decide-punishment-for-statutory-rape

[96] Sec 23 (2) Any woman who performs sexual intercourse with a man who is not her lawful husband shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

[97] If the complainant or the accused or any person affected by a judgment or order passed or made by a Court desires to have a copy of any judgment, order or other part of the record, he shall, on applying for such copy, be furnished there with by the Court

Malaysia is having a dual system of court and it has been prescribed in article 121A of The Federal Constitution (FC)[98]In Sukma Darmawan v Director of Prison,[99]appellant went to the Federal Court to appeal about the prosecution that was conducted in the civil court.He stated that as a Muslim, he and his accomplices should be charged in the Syariah Court on the reason that the offence committed is also prescribed under section 25 of the SCO. Federal Court held that "*article 121(1A) FC should not be construed literally as it would give rise to consequences which the legislature could not possibly have intended*". The court preferred "*to construe both clauses (1) and (1A) of article 121 FC together and choose a construction which will be consistent with the smooth working of the system which this article purports to regulate, and reject an interpretation that will lead to uncertainty and confusion into the working of the system".*

The provisions of sections 59 of the Interpretation Act[100]is also been mentioned by the court when in the judgment the court says that accused can be charged whether in a civil or in the Syariah Court.

By this virtue and when articles 160(2) of federal law[101] in FC be read to this judgment, the Public Prosecutor with the permission granted by the Session Court and after the male accused

[98] Article 121A of The Federal Constitution said that the Civil Court have no power in the matter pertaining to Syariah Law
[99] Sukma Darmawan v Director of Prison [1999**] FC 2 MLJ 241**
[100] Interpretation Act 1948 and 1967 (Act 388) *The provisions of sections 59 of the Interpretation Act[100] so that where an act or omission is an offence under two or more written laws the offender may be prosecuted and punished under any of those laws, so long as he is not prosecuted and punished twice for the same offence'*. The final decision of the court is that *'where an offender commits an offence triable by either the civil court or a Syariah court, he may be prosecuted in either of those courts'*

convicted in a statutory rape trial, apply to enforced the Syariah Law to the consented female who formerly being a victim in the statutory rape trial. Accused cannot be charged under section 23 (2) because he had already been sentenced by the civil court and it is contrary to the provision under articles 7 (2) of the FC which prohibited a person who is already convicted or acquitted to be charged under the same offences.In Section 83 (3) of the Syariah Evidence Act 1997(SEA), it is stipulated that a person who is not `adil[102] is competent to give bayyinah[103] but not competent to give syahadah[104]. In these circumstances, the Syariah Court can give permission for the man who commits sexual intercourse with the underage female to be called to adduce the evidence on the matter and it is reasonably to be done even if he is not the `adil witness.

In SEA 1997, there is nothing about evidence on accomplice such as section 133 of the EA 1950. The evidence on a convicted person can be used to tell the court that sexual conduct between him and the woman (who is victim in the civil court) did happened and there is no law in Malaysia which can barred a man from giving his evidence that sexual intercourse did happened between them. Even if the convicted accused is a non Muslim, he will also be allowed to enter the Syariah Court to give his evidence. This kind of argument may be considered as a move to curb the social problem in statutory rape.

[101] Article 160(2) of Federal Constitution "law" includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof;
[102] In section 83 (1) Syariah Evidence Act 1997 (Federal Territories) A Muslim is deemed to be 'adil if he carries out his religious obligations, performs the prescribed religious duties, abstains from committing capital sins and is not perpetually committing minor sins.
[103] Bayyinah is regarding to testimony
[104] Syahadah is a sworn testimony

Section 2 of SPC provides a person who is above 10 years old but less than 16 years old is youthful offender. As a youthful offender, Syariah Court can invoke section 128 of the SPC. Section 128 SPC is in pari materia with section 294(1) of CPC. Syariah court also has the discretion to impose a bond on a good behavior. A girl who is less than 16 years old who consented to the sexual intercourse can be imposed by a bond on a good behavior for a term not less than 2 years. Section 128 of SPC can be read together with section 130 (a) (b) and (c) of the same code to strengthen the condition in the bond.

In PP v Kok Wah Kuan,[105] The respondent who was 12 years and 9 months old at the time of the commission of the offence was charged in the HC for the offence of murder punishable under section 302 of the Penal Code. He was convicted and ordered to be detained during the pleasure of the Yang di-Pertuan Agong pursuant to section 97(2)[106] of the Child Act (CA) 2001. On appealed COA upheld the conviction but set aside the sentence imposed on him and released him from custody on the sole ground that section 97(2) of the CA was unconstitutional. Public Prosecutor appealed to Federal court (FC).

Richard Malanjum Chief Justice of Sabah & Sarawak in FC dictates that, "*The courts cannot obviously be confined to "federal law". Their role is to be servants of the law as a whole. Law as a whole in this country is defined in art. 160(2) to include "written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having*

[105] PP v Kok Wah Kuan [2007] **FC 5 MLJ 174**
[106] Detained of a child that convicted for a murder at the pleasure of The Yang Dipertuan Agong.

the force of law in the Federation or any part thereof". Further, "written law" is defined in Article 160(2) to include "this Constitution and the Constitution of any State". It is obvious, therefore, despite the amendment; the courts have to remain involved in the interpretation and enforcement of all laws that operate in this country, including the Federal Constitution, State Constitutions and any other source of law recognized by our legal system. The jurisdiction and powers of the courts cannot be confined to federal law".

It is justified by the Federal Court that the jurisdiction and powers of the court cannot be confined only to Federal Law. Articles 121 (1) of the FC also provide that "*inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law"*

In passing the order for the girl who is consented to the sexual intercourse after accused had been convicted, the court should also have civil jurisdiction which conferred by articles 160 (2) of the FC which consists of written law or common law in so far as it is in operation in the Federation or any part thereof or in any part of the states. In a classical case of Jones v Randall.[107], it was held that the courts are "guardians of public morals", it is obvious, therefore, despite the amendment of the articles 121 of FC, the courts have to remain involved in the interpretation and enforcement of all laws that operate in this country, including the FC, State Constitutions and any other sources of law recognized by our legal system. The jurisdiction and powers of the

[107] Jones v Randall (1774) 1 Cowp 17, p 39

courts cannot be confined to federal law[108]. Thus, Public Prosecutor can apply through the civil court for an order to send the consented underage girl to face the state laws under section 23 (2) of the SCO in the Syariah Court. Hence, this also means that civil court is also upholding the Syariah law that was introduced by all the states in this country except for the Federal Territory, Putrajaya and Labuan which their Syariah Law was enacted under the power of the Yang Dipertuan Agong. This case may be made significance to interpret that section 23(2) of the Syariah Offences can also be recognized by the civil court jurisdictions.

Public Prosecutor can also apply to the civil court after the accused was convicted and before the judge passing any sentences to him. The female who consented to the sexual conduct may be brought to face the Syariah Court and this should not be interpreted as a move to punish the victim. When the court passes any order for the victim, it must be think that the court are obliged to do so for the purpose of public interest and welfare of the prosecutrix. It is understood that by reason of physical, mental and emotional immaturity, a child is in need of a special safeguard care and assistant. The child may undergo a rehabilitation program which imposed by order form the Syariah Court. In Section 376 (1) of the CPC (Act 593), Public Prosecutor may have all the control of the prosecution and procedure under the act. Session Court shall have the jurisdiction to hear and to determine in the matter of statutory rape and also have the power to pass any sentence allowed by the law other than the sentence of death[109]. This power should be interpret as a power conferred by the written law legislated by the federal or by the state government including referring the matter to the Syariah jurisdiction. As it have been provided in articles

[108] PP v Kok Wah Kuan [2007] FC 5 MLJ 174 http://www.kehakiman.gov.my/directory/judgment Pg 7
[109] Section 64, The Subordinate Court Act 1948

121(A) of the FC, the civil courts shall have no jurisdiction in respect of any matter in syariah laws. If an underage girl admits that she consented to the sexual act with the convicted accused, she must face the consequences under the Syariah Law and the offence is Zina[110].

Imposing the order provided in section 128 of the Syariah Criminal Procedure Code is one of the examples that applicable by the Syariah Court to create a preventive measure for the young female (age 10 to 16) to curb the social problem. Powers of the court in the community to curb incident involving statutory rape should be understood before efforts are made to condemn the ideas. However, there are also times when the court has to take simple steps in making decisions relating to statutory rape. Although the court decision was based on the facts that arise in every case, strict interpretation should be preferred in the case of statutory rape as the for the benefit for the victim. It must be noted that free sex was often brought the negative impacts toward society at large.

[110] Prohibited Sexual intercourse between a man and a woman in Islamic jurisdiction

3.10 Conclusion

Discretionary power of the court for whatever reason should not be done outside the scope which the law had permitted. In section 294 (1)[111] (Act 593) it is crystal clear that only when accused commits an offense of trivial nature (minor offense) or to any extenuating circumstances, it is expedient for the court to released the accused on a possible bond of good behavior. It is still fall under the duty of the court to impose such order to fulfill the criteria in sentencing methodology for the purpose of rehabilitation. It is the obligation of the court to ensure that the intention of the parliament when law on statutory rape being passed is to protect a young female from being abused by male adult in order to satisfy the sexual desire. Superior court should consider renouncing the position of law addressing the statutory rape. COA should also expunged the finding by the HC in PP v Yeong Yin Choy (at pg 50), *that even accused was free on bond; the conviction is a registered offense and can be taken into consideration in future offenses*. It is cleared that the statutory rape did not fall as an offense in trivial nature. Thus, section 294(1) of the Criminal Procedure Code does not applied as to replace the mandatory imprisonment sentence. The law itself stated in section 376(2) (d) PC, that there is mandatory for the court to imposed the imprisonment sentence for the accused in statutory rape crimes. The need to expunge the impugned judgment of PP v Yeong Yin Choy will be dealt exclusively by Suo Moto Cognizance motion which will be explain in next chapter.

[111] Section 294(1) of Criminal Procedure Code provides that a person can be contracted on a bond of good behavior if the offences that was committed is an offense of trivial in nature (trivial offense means minor offense)

Lord Diplock in the House of the Lord in Kawasaki Kishen Kaisha v Hong Kong Fir,[112]once dictate that **"***The common law evolves not merely by breeding new principles but also, when they are fully grown, by burying their ancestors"*.It is concluded by House of Lord that dependant to the precedents which are not relevant to the facts of the case should be reconsidered and the superior court is the best position to bury the principle which can be considered as per incuriam in the court of law.

[112] Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] EWCA Civ 7 Para 59

CHAPTER FOUR

STATUTORY RAPE IN INDIA

4.1 Introduction

Back in 1892, the age of consent for female sexual intercourse in India raised from 10 to 12 years old. 1949, it was raised to 15 after agitation from women groups about the adverse effect of early pregnancy. In 1982, it was again raised to 16.[113]In 2012, the Protection of Children from Sexual Offences Bill raised the age of consent to 18.[114]Although,the Criminal Law (Amendment) Act 2013 initially sought to lower the age to 16, but it was set at 18 years old due to political pressure from conservative parties.[115]Recently India had its female age of consent for sexual intercourse at 18 years old. However, in the state of Manipur, there are amendments to the law in 1950 where rape under section 375 through Act 30 (Union Territories Law Act) was introduced. From the amendment, the age of 16 has been replaced by the age of 14 where it is limited to the state of Manipur alone.[116].

In India, it is stipulated that no criminal charge of rape can be committed against a spouse who is married to 15 years-old girl. Under section 198 (6) of Indian Criminal Procedure Code, no Court shall take cognizance of an offence under section 376 of the Indian Penal Code 1860 where such offence consists of sexual intercourse by a man with his own wife being under fifteen years of

[113] "Age of Confusion". *India Today*. 1 April 2013. Retrieved 23 February 2014

[114] "Age of consent to be fixed at 18 yrs". *Hindustan Times*. 9 June 2012. Retrieved 23 February 2014

[115] "Govt relents, keeps age of consent for sex at 18". *Zee News*. 19 March 2013. Retrieved 23 February 2014

[116] Ratanlal & Dhirajlal's The Indian Penal Code pg 752.

age, if more than one year elapsed from the date of the commission of the offence. In 1987 and 1991 the number of cases reported was 7767 and 9793 respectively. National Crime Bureau Reported (NRCB) about 26% increase in number in the year 1992. In 2012, 25,000 rape cases were reported across India. Out of these, 24,470 were committed by relatives or neighbors. There is one rape in every 54 minutes. Rape in India has been described by Radha Kumar[117] as one of 's most common crimes[118] against women.

4.2 Historical Background of Statutory Rape Law in India

India enacted the rape-related crimes as early as 1860. The crime was provided under section 375 (6) of the Indian Penal Code (IPC). Under this section a man who commits a sexual relationship with a woman who is under 18 years old will be guilty on the offense of rape and consent is immaterial. In the case of Vishaka v State of Rajasthan[119] , Ajit Prasayat J observed that *"while the murder destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female*; *sexual harassment is nothing less than the showcasing of male dominance. Given an opportunity, such men (those committing sexual harassment) would try fulfilling their desire.*

[117] Radha Kumar is an author and expert on ethnic conflicts and peace processes and is currently Director-General of the Delhi Policy Group
[118] Kumar, Radha (1993). The History of Doing: An Account of Women's Rights and Feminism in India
[119] Vishaka v State of Rajasthan [1997] AIR **SC** 3011

Justice Krishna Iyer also observed in a very famous case of Rafiq v State of Uttar Pradesh[120] "*A murderer kills the body but a rapist kills the soul"*. Kiran Bedi[121] observed *"The law of rape is not just a few sentences. It is a whole book, which has clearly demarcated chapters and cannot be read selectively. We cannot read the preamble and suddenly reach the last chapter and claimed to have understood and applied it.*"

Earlier rape law in India are antiquated, for instance, justice has failed the victim due to the interpretation of law, assessment of evidence, long delays at the trial, harsh and humiliating cross examination of the victim are reported with alarming frequency. This chapter deals with the incumbencies of the existing laws related to rape in India and from recent development in this field.

The trial in Tukaram v State of Maharashta[122] which ended at 1979 in India's Supreme Court triggered for rape reforms in India after while some other cases like Mohd Habib v State of Delhi[123] and State of Punjab v. Gurmit Singh[124] and other cases, continued to the expansion in

[120] Rafiq v State of Uttar Pradesh [1980] Cr LJ 1344 AIR 1981 **SC** 96

[121] Dr Kiran Bedi The Joint Commissioner of Delhi Police Joined Indian Police Service in 1972 (the first woman in India to do so).

[122] Tukaram v State of Maharashtra, 1978 Cr LJ 1864, AIR 1979 SC 185

[123] Mohd. Habib v State of Delhi (1989) CrLJ 137 Delhi

the matter of statutory rape in India. In Mohd. Habib v State, the Delhi High Court acquitted a man who raped a seven years old girl, asserting that there were no marks of injury on his penis. The Court refused to take cognizance of the bite marks on the victim's person and the fact that she suffered a ruptured hymen on account of the sexual assault. Even the eye- witnesses, who witnessed this ghastly act, could not sway the High Court's judgment. In this case, the application of law is not in tandem with the requirements of justice and manifests the unfounded reasoning of the Indian courts when dealing with matters of rape and the allied sexual offences. This case creates a sensational issue in management of justice in Indian High Court. Developments in the law saw the approaches adopted by the court are different in India in the present circumstances.

The Supreme Court decision in Tukaram's case in 1979[125] played an important role in the realization of the need to sensitize the law as well as the attitude of the Judiciary. There is also a move to avoid the victim of the crime from being victimized again by the Court and from loopholes in the law. In this case, Mathura a tribal girl aged 14-16 was raped by two policemen within the police station. The Sessions judge acquitted the accused and held there was no "satisfactory" evidence, medical or otherwise to decide the offence of rape. Mathura was termed as a "shocking liar" who "habituated to sexual intercourse" and there was a world of difference between rape and sexual intercourse which in the present case was with the prosecutrix's consent. On appeal, the High Court reversed the order of acquittal and convicted the accused on

[124] In State of Punjab v Gurmit Singh [1996] 2 SCC 384

[125] Basu, Moni (8 November 2013). "The Girl Whose Rape Changed A Country". *CNN*. Retrieved 7 December 2013.

the grounds that “consent” and “passive submission”. It is submitted in the High Court that consent and passive submission does not amount to the similarly. In this case Tukaram (2nd accused) was sentenced to 1 year imprisonment because of criminal outrage of modesty while Ganpat(1st accused) was sentenced to 5 years imprisonment because of rape.

However, the decision of the High Court was reversed by the Supreme Court which acquitted the accused taking into consideration on the fact that Mathura had not “raised any alarm for help.” There is “absence of any injuries or signs of struggle” on her body. The Court ruled that the alleged intercourse was a peaceful affair and with her consent and the onus was always on the prosecution to prove ingredients of the offence beyond reasonable doubt which was not so in the Tukaram’s.

The judgment was received with shock and outrage. An “Open Letter” was subsequently addressed to the Chief Justice of India by four eminent law teachers (Professors Upendra Baxi, Raghunath Kelkar and Lotika Sarkar of Delhi University and Vasudha Dhagamwar of Pune). Urging for reassessment towards the decision and the prevalent law.It highlighted the injustice done by the judgment. The authors of the letter viewed the decision as a sacrifice of basic human rights and a blatant violation of the Right to Life under Article 21 of the Constitution of India with complete disregard for the socio-economic and legal awareness of the victims of such a

crime.[126]The Mathura decision outcry paired with the intensification of pressure by the legal fraternity, social organizations and the general public, led to the 84th Report and eventually the Criminal Law (Amendment) Act 1983. One of the major things included in the amendment is the burden proof of innocence is on the accused. The Indian Evidence Act (IEA) 1872 was amended by adding section 114A. It was made to draw a presumption as to the absence of consent in certain prosecution for rape. In case of a prosecution for rape under Section 376 (2) (a), (b), (c), (d), (e) and (g), it means that where sexual intercourse by the accused is proved, the question is whether it was without the consent of the woman alleged of being raped. In section 114A IEA, *when she stated in her evidence before the Court that she did not consent, the Court shall presume that she did not consent*.[127]

Tukaram's case has received criticism from the legal fraternity, even though it is a decision of the Supreme Court of India. It is because the question of consent or surrender was discussed in detailed at Punjab Haryana HC. In Rao Harnarain Sheoji Singh Singh v The State of Punjab,[128] *"A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be "consent" as understood in law."*

[126] "In memoriam: Lotika Sarkar 1923 – 2013". feministsindia.com. Retrieved 4 June 2013.

[127] Section114A Indian Evidence Act 1972.
[128] Rao Harnarain Sheoji Singh Singh vs. The State of Punjab AIR [1958] PH 123 563 1958 Cri LJ.

Consent as a defense to a charge of rape requires voluntary participation after the exercise of intelligence based on the knowledge of moral quality of the act and the free exercise of choice between resistance and assent. There is a difference between consent and submission. Consent involves submission but not vice-versa. Consent in order to be a valid defense to rape, must be an act of reason accompanied with deliberation after the mind weighing the good and evil and with the capacity to withdraw assent as per one's will. Consent therefore implies the *"exercise of a free and untrammeled right to forbid or withhold what is being consented to*[129]*."*It is always voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former." The reading of this decision naturally leads to questioning the correctness of the Mathura case judgment.

In addition after Tukaram's decision, the 84th Report on Rape and Allied offences focused on the controversial "consent" issue while emphasizing that consent was an antithesis of rape and consent must be real and not vitiated by any duress. Submission to intercourse or a mere act of helpless resignation in the face of inevitable compulsion could not be deemed to be consent. In India whoever commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine. Provided that the court may for adequate and special reason to be mentioned in the judgment, impose a sentence of imprisonment for a term less than seven years as provided in section 376 (1) of the Indian Penal Code.

[129] Rao Harnarain Sheoji Singh Singh vs. The State of Punjab AIR [1958] PH 123 563 1958 Cri LJ

In Rajan v State of Rajasthan[130] the girl being below 16 years of age. The court said that the fact that she was the consenting party to the rape was immaterial. Also the fact that she had sexual experience was no defense. In Naresh v. State of Haryana[131], when the prosecutrix is a minor aged below 16 years, the question of her being a consenting party to the sexual intercourse does not arise or is of no consequence. In India, character assassination of prosecutrix is prohibited. This can be found by insertion of a proviso clause to section 146 of the Indian Evidence Act vide the Evidence (Amendment) Act, 2002 which prohibits putting forth of questions about the prosecutrix's character in cross examination. Section 155 (4) of the Indian Evidence Act 1872 was omitted vide the Indian Evidence (Amendment) Act, 2002. Prior to its omission of the sub clause, permitted the man prosecuted for rape to show that the prosecutrix was of generally immoral character so as to impeach her credit as a witness.

The Supreme Court in Gurmit Singh's[132] case expresses strong disapproval of tendency of the Courts in casting a stigma on the character of the prosecutrix which often discouraged victims from reporting cases of rape. The Courts were expected to exercise self-restraint while recording findings which had repercussions on the future of the victim and society as a whole. The Court ruled that even though the victim as "habituated to sexual intercourse", it could not be inferred that she was of a "loose moral character". She had rights to privacy and refusal to submit herself to sexual intercourse with anyone despite her promiscuity in sexual behavior in the past. She was not to be treated as a "vulnerable object" or a "prey" for sexual assault or as an accomplice to the crime. The deletion of this clause removed the hardship faced by the prosecutrix as a result of

[130] Rajan v State of Rajasthan [2002] Cr LJ 3152 (Raj)
[131] Naresh v. State of Haryana, (1997) 2 Crimes 587 (P & H)
[132] State of Punjab v Gurmit Singh [1996] AIR 1393 SCC 384

doubts cast on her previous character during the trial. This was followed by the Supreme Court in State of Uthar Pradesh v Om[133]and Millind Ambadas Mhaske v State of Bombay[134] where the court said that "*bad character of the prosecutrix does not enable the accused to escape from his culpability"*.

Offense of rape has received further reform in 1994 when the Supreme Court of India allowed the application of NGOs for rape offenders to compensate their victims. This involves through application in the case of Delhi Domestic Working Women's Forum v UOI.[135]The Supreme Court laid down broad guidelines to deal with rape cases. The guidelines suggested constitution of a Criminal Injuries Compensation Board for awarding compensation to the victim for financial loss, loss of employment, suffering as a result of rape inter alia providing them with legal assistance at the police station, informing victims of their right to representation and maintaining anonymity of the rape victim.

The question of awarding compensation to rape victims arises before the Apex Court in the Railway Board of India v Mrs Chandrima Das AIR[136] where Supreme Court recognized the right of a foreign national to live with dignity under Article 21 of the Constitution which applies to non-citizens as well. The State was under obligation to protect the life of every person in the country under this Article. Rape was a gross violation of the Right enshrined in Article 21 of

[133] State of Uthar Pradesh v Om [1998] SCC (Cr) 1343
[134] Millind Ambadas Mhaske v State of Bombay [1998] Cr LJ 357
[135] Delhi Domestic Working Women's Forum vs. Union of India 1995 SCC (1) 14, JT 1994 (7) 183
[136] Railway Board of India v Mrs Chandrima Das AIR [2000] SC 988

Indian Constitution. The Supreme Court upheld the decision of the Kolkata High Court awarding the victim compensation of a sum of ten lakhs[137] and held the Union Government vicariously to pay damages for the heinous act by the railway employees. Supreme Court displayed the sensitivity required in this case and the punishment and awarding compensation was a step forward in the movement of reforming the Rape Law.

4.3 Application of bond of good behavior by the provision in section 360 Indian CPC

Drastic changes have been made in the Indian law on rape. In Section 376(1) of the Indian Penal Code minimum of 7 years' imprisonment has been imposed as punishment for rape. The maximum is being imprisonment for life or imprisonment for a term which may extend to 10 years. Imposition of fine is made compulsory. The proviso to sub-section (1) of Section 376 says that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term less than 7 years. Dr G. Kameshwari[138] in her opinion stated that offense dealing with rape of a child, minimum sentence may be prescribed without giving any discretion to the courts to award a lesser sentence below the minimum.

[137] **1 Lakhs equivalent to 100000 rupees/ 100000 rupees equivalent to RM 5372.64 by means 10 lakhs is RM 53,726.40**
[138] Asst. Professor, University College of Law, Osmania University, Hyderabad

In State of Madhyar Pradesh v Babulal,[139]the court has laid down the principal that rape cases need to be dealt sternly and severely.A social sensitize judge is a better armor in case of crime against women. Once a person is convicted for an offence of rape, he should be treated with a heavy hand and must be imposed adequate sentences. This goes to show that Supreme Court is keen in eliminating social disorder by the heavy hand of judicial process. The refusal to grant probation to the person found guilty of rape has been held to be proper.

But when accused is a child, Supreme Court refuses to grant an imprisonment sentences to the accused. In Satto v State of U.P[140] three boys, between the ages of 10 to 14 years, were convicted of raping an eleven-year-old girl and were sentenced to 2 years' rigorous imprisonment by the trial court. The High Court of U.P. upheld the conviction and sentence of the accused. The Supreme Court ordered the release of the appellants on probation of good conduct and was committed to the care of their respective parents. It can be said based from the judgment from the court, the practice of imposing a bond of good behavior in Indian Court is depend on the age of the accused. The Supreme Court in India is so reluctant in releasing the accused on a bond for good behavior as a substitute for imprisonment. The offense of rape was considered as a very serious crime as it affected the freedom and also violated the personnel liberty of the woman involved in the crime.

[139] State of Madhyar Pradesh v Babulal 2008 AIR 2008 SCC 582
[140] Satto v State of U.P (1979) 2 SCC 628 : 1979 SCC (Cri) 534

4.4 Delays in Lodging a Report on Crime of Rape

The 172 Law commission report and the Bill of 2010 makes useful recommendations concerning recording of statements of the victims, First Information Reports (FIR) and medical examination. It is important to note that delaying in filing a FIR in rape cases is not fatal to the prosecution case if properly explained. The Court should be sensitive to the fact that in such cases the delay may be due to the stigma often associated with the crime and the hesitation in the mind of the victim to report the case for fear of her and her family name being tarnished as a result.

In Jito v State of Himyar Pradesh[141], delay in lodging FIR sufficiently explained. In this case a girl less than 16 years was rape and she had disclosed the fact to her parents without delay after been rescued. The Supreme Court had to consider whether 10 days which had been taken to lodge the Police report is fatal to the case. The court then accepted the explanation by the family members that they had taken the step after due deliberation of the family honors which is essentially involved in a misfortune of this kind. In Sri Narayan Saha v State of Tripura[142]delay does not necessarily indicate that the victim version is false.

[141] Jito v State of Himyar Pradesh [1990] Cr LJ 1434
[142] Sri Narayan Saha v State of Tripura [2004] 7 SCC 775

4.5 The Constitutional Argument in Indian Statutory Rape Law in India

Supreme Court in Bodhisattwa Gautam vs. Subhra Chakraborty[143] said that court is expected to deal with the cases of sexual crime against women with utmost sensitivity. Such cases needed to be dealt sternly and severely. In a writ petition, the Supreme Court in Sakshi v Union of India[144] addressed itself to the problem of sexual abuse of children as a rising phenomenon and how to interpret the relevant provisions. Considering various aspect for the crime, Supreme Court of India declared rape to be a crime against basic human rights. In State of Himyar Pradesh v Sri Kant Shekari[145] the Supreme Court declared sexual offences to female is to be a crime against basic human rights and consider it as the violation of the victim fundamental right under article 21 and also adds that the victim of rape is not accomplices to the crime.

In the 172 Law commission report and the Bill of 2010 of India, from the time of the enactment in 1860, the term Rape has been synonymous with a crime wreaking devastation and degradation on the victim's honors and resulting in traumatic effects with the consequent loss of the chastity and jeopardizing the prospects of her marriage. Only in the last few decades, a gradual shift from viewing rape as "the ultimate violation of self" to "violation of human rights of a woman." The substitution is required because the traditional definition of rape which is based on the common law system.

[143] Bodhisattwa Gautam vs. Subhra Chakraborty reported in [1996] 1 SCC 490

[144] Sakshi v Union Of India[144] [1999] Cr LJ 5025 SC

[145] State of H.P v Sri Kant Shekari [2004] 9 SCC 153

The intervention of violation on human rights of a woman was first introduced by Justice Krishna Iyer in the case of Rafiq v Uttar Pradesh[146]. He reportedly said that "judicial response to human right cannot be allowed to be blunted by legal jugglery". This kind of reasoning was followed by Apparel Export Promotion Council v. A.K. Chopra,[147]when it is the first case in which the Supreme Court applied the law laid down and upheld the dismissal of a superior officer of the Delhi Based Apparel Export Promotion Council. He was found guilty of sexual harassment of a subordinate female employee at the place of work on the ground that it violated her fundamental right guaranteed by article 21 of the constitution.

In A.K Chopra, Supreme Court observed, that *" In cases involving human rights, the Courts must be alive to the International Conventions and Instruments as far as possible to give effect to the principles contained therein- such as the Convention on the Eradication of All forms of Discrimination Against Women, 1979 [CE DAW] and the Beijing Declaration directing all state parties to take appropriate measures to prevent such discrimination."*[148]

The guidelines and judgments identified sexual harassment as a question of power exerted by the perpetrator on the victim. Therefore sexual harassment in addition, violates of the right to safe working conditions is also a violation of the right to bodily integrity of the woman.

[146] Rafiq v U.P [1980] AIR 1981 SC 96
[147] Apparel Export Promotion Council v. A.K. Chopra, (1999) 1 S.C.C. 759

4.6 The Indian Court Ruling towards Law on Corroboration

Corroboration of evidence is stipulated in section 8, 114, 133 and 157 of IEA 1872. This is a kind of independent evidence which tend to support the testimony of the prosecutrix in offense related to sexual assault. Indian court of law also has the similar system as the common law previously and based on this, the rules on corroboration in England were applicable in India such as narrated in Baskerville[149] case. When the evidence of the complainant were presented to the court, the judges have the task to evaluate whether corroboration are required to support the story by the complainant. In some cases, rules regarding of advisability of corroboration should be present to mind of judge. But on the other hand he may dispense the independent evidence to support the complainant story if he feels it is safe to do so.

Corroboration is a non essential evidence to be used in order to convict the accused. But as a matter of prudence corroboration ought to be kept in mind of the judges. In cases where corroboration is required, it is not necessary that there ought to be independent confirmation of every material circumstance. All that is required is that there should be some additional evidence rendering to the probability of complainant evidence.The need of evidence to be corroborated in India can be discussed in two occasions. The first is that the court refusal to corroborative evidence to play any role when the victim of rape was at the tender ages. When a young girl of immature years and tender age being raped, and she had made disclosure of it at the earliest

[149] R v Baskerville[1916] 2 KB 658 CCA

possible opportunity to her mother and another person, there was no need for corroboration by independent testimony connecting the accused to the crime. The principles was approved in Rafiq[150] case, when Justice Krishna Iyer observed, *"when no woman of honor will accused another on rape since she sacrifices thereby what is dearest to her, he (the accused) cannot cling to a fossil formula and insist on corroborative evidences, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable."*

The second one can be seen by the judgment of the Indian Supreme Court which also gives a waiver toward elements of corroboration as happened in State Of Maharastha v C.K Jain.[151]In this case, the accused, a police officer isolated a married girl from her husband by locking on cooked-up charges and lodged the girl in a hotel room, visiting her twice at the night and raped her on both the occasions. There was nothing to corroborate the girl evidence except the story to the husband. The Supreme Court restored the sentenced of five years of rigorous imprisonment and commented that acquittal judgment from the high court was done in a wrong appreciation on evidence. Though there was nothing to corroborate her version, the circumstances supported the tale of her unfortunate victimization. It is not necessary that every part of the evidence of the victim should be confirmed in detailed by independent evidence. There can be circumstantial corroboration. The only source of corroboration was her husband and some other whom she had informed about the incident.

[150] Rafiq v State of Uttar Pradesh [1980] Cr LJ 1344 AIR 1981 SC 96.
[151] State Of Maharastha v C.K Jain [1990] 1 SCC 550.

In Bharwada Bhoginbhai Hirjibhai v State[152] Supreme Court held that "*Corroboration is not a sine-qua-non[153] for conviction in a rape case. In the India setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration is adding insult to injury. Further, viewing the evidence of the victim of rape with the aid of doubt-tinged glasses is to justify the charge of male chauvinism in a male dominated society. Thus there is great weight attached to the evidence of a victim of a sexual offence since a woman, especially in our tradition bound society will rarely make a false allegation for fear of being stigmatized or losing her reputation and ruining her prospects of marriage and being considered promiscuous. The corroboration rule was followed by the Courts in a slew of cases but it is yet to find its place in the statute books"*

In Wahid Khan v. State of M.P[154], victim was 12 years old girl raped in an auto rickshaw. The Supreme Court held that the evidence is consistent with the injuries and when it raises confidence, corroboration is not required.The accused was convicted on the prosecutrix evidence.

Previously in the case of Bharwada Bhoginbhai Hirjibhai,[155]Supreme Court held that the tendency in refusal to accept the victim evidence in the absence of corroboration is a rule which adding insult to victim injury. Both of this Indian authority creates a benchmark on position of

[152] Bharwada Bhoginbhai Hirjibhai v State Of Gujarat [1983] Cr LJ 1096
[153] Latin word refers to an indispensable and essential action, condition, or ingredient
[154] Wahid Khan v. State of M.P [2010] 1 SCC Cri 1208
[155] Bharwada Bhoginbhai Hirjibhai [1983] AIR 1983 SC 753 Cr LJ 1096.

the Indian court in dealing with the victim evidence. In Jito v State of Himyar Pradesh[156] it is a settled law in Indian Court that corroboration not necessary on fact and can be dispensed by the judge, if in the particular circumstances of the case before him, he himself is satisfied that it is safe to do so.

Based from the facts given, it can be concluded that corroboration is the principal of the English common law and recently Indian court did not give much attention to the rules on corroboration. Accused still can be convicted even the evidence from the prosecutrix was not corroborated by independent evidence.

4.7 Evidence on Child Witness in India

In India, when rape being committed on a child of tender years, there is no rule of law requiring corroboration from an independent source of the evidence. Every case must depend on its own peculiar facts and circumstances.[157]There is no such provision in section 133A provided in Indian Evidence Act. India judiciaries found that it is not necessary that every part of the evidence of the victim should be confirmed in detailed by independent evidence. There can be a circumstantial corroboration.[158]

[156] Jito v State of Himyar Pradesh [1990] Cr LJ 1434
[157] Ratanlal , Dhirajlal The Indian Penal Code 1860 ed 33 pg 774
[158] The Indian Penal Code 1860 ed 33 pg 775 Rattanlal

In Rameshwar v The State of Rajasthan[159] a minor girl at the age of 8 years old is raped by the accused. Supreme Court stated "*an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his* ***competency****; so also an omission of the Court or the authority examining a child witness formally to record that in its opinion the witness understands the duty of speaking the truth though he does not understand the nature of an oath or affirmation, does not affect the admissibility of the evidence given by that witness. The question is whether the opinion referred to must be formally recorded or whether it can be inferred from the circumstances in which the deposition was taken.*

The question of competency is dealt with in section 118 Indian Evidence Act 1872 where every witness is competent unless the Court considers he is prevented from understanding the questions put to him, or from providing rational answers by reason of tender years, extreme old age, and disease whether of body or mind, or any other cause of the same kind. A judge must state in his judgment on how he is satisfied on the evidence of the minor and the reason must be clear. It is also concluded that it may be that all mothers may not be sufficiently independent to fulfill the requirements of the corroboration. But there is no legal bar to exclude them from its operation merely on the ground of their relationship.

[159] Rameshwar v The State Of Rajasthan [1952] AIR 54, 1952 SC 377

In Mangoo & Anor v State of Madhya Pradesh[160], Supreme Court while dealing with the evidence of a child witness observed that there was always a scope to tutor the child; however, it cannot be alone in the ground to conclude that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring. In Panchhi & Ors v State of U.P[161], Supreme Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law.

In State of M.P v Ramesh & Anor[162], Supreme Court said that it is not the law that if a witness is a child, his evidence would be rejected. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. *"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath"*

[160] In Mangoo & Anor. v. State of Madhya Pradesh, AIR [1995] SC 959,
[161] Panchhi & Ors. v. State of U.P, AIR [1998] SC 2726
[162] State of M.P v Ramesh & Anor, Criminal Appeal 1289 of 2005 (unreported case by Supreme Court)

In State of U.P v Krishna Master & Ors,[163]Supreme Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future.In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and the recording evidence from the child as witness, due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

4.8 Physical Injuries Related to Statutory Rape

In sexual cases on Statutory Rape, the evidence on the physical injuries on the victim is also open to be discussed by the court. In Dastagir Sab v State of Kartanaka[164], presence of injuries is also not a sine qua non for constituting the offence on rape, absence of injuries was sufficiently explained in the case, overpowering and laying with back on comfortable position. This point was also raised in State of Punjab v Ram Dev Singh[165]that injuries become obliterated in 24

[163] In State of U.P v Krishna Master & Ors., AIR[2010] SC 3071
[164] Dastagir Sab v State of Kartanaka [2004] 3 SCC 106 3 MPLJ 154
[165] State of Punjab v Ram Dev Singh [2004] 1 SCC 421 AIR

hours time, absence of such injuries is not material. In Jai Singh v State of Madhya Pradesh[166], forcible intercourse with a girl below 15 years old mere none ruptured of hymen does not necessarily indicates that intercourse act was not committed. The accused was convicted but the sentenced was reduced from 7 years to 5 years of imprisonment. Unruptured of the hymen of a girl was discussed in Mahesh Kumar v State of Rajasthan[167]when it does not necessarily lead to the inference that no rape was committed. In Wahid Khan v State of M.P[168], the fact that hymen was found intact was immaterial to conclude that there is no rape.

The mark of injuries to the complainant whether being traced in the private parts or the body of the complainant after being sexually assaulted were inevitably and seriously discussed by the court in India. In the case of Madan Gopal Kakkad vs. Naval Dubey[169], Supreme Court of India has specifically discussed evidence related injuries on the victim of statutory rape. The accused is a medical graduate has raped a child who is 8 years old. Accused is about 25 years old. During the incident that happened in 1982, the accused had asked her to make fellatio before raping the victim. The victim's father after been informed by the incident went to the accused house and learnt that the accused had made a confession that he had raped the victim but as a medical doctor, he used his knowledge to ensure that victim's hymen is not ruptured during the incident.

[166] Jai Singh v State of Madhya Pradesh [2001] Cr LJ 2278
[167] Mahesh Kumar v State of Rajasthan [1998] Cr LJ 1597
[168] Wahid Khan v State of MP [2010] Cr LJ 517 AIR 2010 SC 1
[169] Madan Gopal Kakkad vs. Naval Dubey & ors 1992 SCR (2) 921

Police report made after the fifth day of the incident and accused was charged under section 376 of IPC. HC convicted the accused but altered the charge under section 354 IPC[170] on the ground that there is no penetration into the victim's genitals. Accused was sentenced to the fine of 3000 Rs. The complainant-appellant filed the appeal by special leave to Supreme Court. The State did not file any appeal. It was contended on behalf of the appellant that the HC erred in holding the respondent guilty of a minor offence under section 354 IPC. All the necessary ingredients to constitute an offence punishable under section 376 IPC had been satisfactorily established and the sentence of fine alone imposed was grossly inadequate and not commensurate with the gravity of the offence committed by the respondent. The Supreme Court on the reasoning used all the necessaries experts' opinion and one of it were from the Parikh's Textbook of Medical Jurisprudence and Toxicology and which the following is found: *"In sexual intercourse, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."* The Supreme Court also referring to the Encyclopedia of Crime and Justice (Vol.4) at page 1356, when it is stated: *"that even slight penetration is sufficient and emission is unnecessary*. Hence accused was convicted in the Supreme Court.

[170] Section 354 is Criminal Outraging of Modesty in Indian Penal Code.

4.9 Evidence on Sole Testimony of the Prosecutrix in Statutory Rape

It was enunciated in B.C Deva v State of Karnataka[171], where the medical evidence did not corroborate the alleged forced of sexual intercourse and the conviction based solely on oral evidence of the prosecutrix, her subsequent conduct was held to be valid. Previously the same principle were enunciated in State of Himachal Pradesh v Raghubir Singh[172]that without corroboration, sole testimony of the prosecutrix can be relied on to convict the accused if her evidence inspires confidence and there is absences of circumstances which militate her veracity. Thus the law that emerges on the issue is to the effect that statement of prosecutrix. If found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix. In Aman Kumar v State of Haryana[173], the court added that if it is not able to accept the version of the prosecutrix, it may seek evidence to lend assurance to her testimony; a kind of assurance which is short of corroboration would suffice.

Therefore, her testimony can be acted upon without corroboration in material particulars. It was stated in Madan Lal v State of M.P[174] normally a woman would not falsely implicate for the offence of rape at the cost of her character. In Indian society, it is very unusual that a lady with a

[171] B.C Deva v State of Karnataka [2007] 12 SCC 122
[172] State of Himachal Pradesh v Raghubir Singh [1993] 2 SCC 622
[173] Aman Kumar v State of Haryana [2004] 4 SCC 379

[174] Madan Lal v. State of Madhya Pradesh, (1997) 2 Crimes 210 (MP)

view to implicate a person would go to the extent of stating that she was raped. A conviction on the sole testimony of the prosecutrix is sustainable where the court is convinced of the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity.

On the facts, however, the court held that prosecutrix did not appear to be witness of sterling quality on whose sole testimony conviction could not be sustained. In Narayan v State of Rajashtan,[175]testimony of the prosecutrix found to be not believable. There was no conviction on that basis.

In Ramdas v State of Maharastra,[176] the same reasoning was held by the court which result no conviction on the accused. It has been observed by the Supreme Court, that evidence of prosecutrix must be given pre dominant consideration and to hold that such evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principle which governs the evidence in criminal matter. In S Ramakrishna v State,[177] Supreme Court discussed the law on conviction of the accused by the sole testimony by the prosecutrix. Ordinarily, the evidence of the prosecutrix should not be suspected and should be believed, particularly because as her statement has to be evaluated on a par with that of an injured witness and if the evidence reliable, no corroboration is necessary. But at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault. It cannot be lost

[175] Narayan v State of Rajashtan [2007] 6 SCC 465
[176] Ramdas v State of Maharastra [2007] 2 SCC 170
[177] S Ramakrishna v State [2009] 1 SCC 133

of sight that rape causes greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly when the large number of accused is involved (gang rape). In Raju v State of M.P[178], the sole testimony by the prosecutrix, can at best, be adjudged on the principle that ordinarily no injured witness would tell lie or implicate a person falsely.

In Moti Lal v State of Madhyar Pradesh[179], she was raped while alone in her hut located in a field. Broken bangles were found there and some blood stains were found on underwear of the accused. The Supreme Court refuses to interfere after the High Court convicted the accused with 7 years in prison. Supreme Court enunciated the principles in other court decision on conviction on sole basis of the testimony of the prosecutrix.

4.10 Unchaste Woman in Statutory Rape

On the law of character assassination of the prosecutrix, insertion of a clause to section 146 of the IEA vide the Evidence (Amendment) Act, 2002 which prohibits putting forth of questions about the prosecutrix's character in cross examination was created. The Supreme Court of India

[178] Raju v State of M.P [2008] 15 SCC 132
[179] Moti Lal v State of Madhyar Pradesh [2008] 11 SCC 122

has decided that in the case of State of Maharashtra v Madhukar N. Mardikar,[180]they held that "*the unchastely of a woman does not make her open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate her person against her wish. She is equally entitled to the protection of law. Therefore merely because she is of easy virtue, her evidence cannot be thrown overboard*." Thus, character, and prior sexual history does not imply consent.

In Maroti .U Wankhede[181], victim age was below 16 at the time of the incident, it was held that her consent if it was there were immaterial. Evidence shows that she tries the best to resist the accused from preventing him committing the offence on her personally. She also took away by accused on a threat. The court imposed imprisonment sentences to the accused. In State of Punjab vs. Gurmit Singh[182], the Supreme Court has advised the lower judiciary, that even if the victim girl is shown to be habituated to sex, the Court should not describe her to be of loose character. In State of Punjab v Ramdev Singh[183] and State of Chhatisgarh v Derha[184] medical evidence that the victim showed signs of previous sexual intercourse, would not have any adverse effect on her testimony. It could not be a ground for acquitting the rapist.

[180]State of Maharashtra Vs. Madhukar N. Mardikar [1991] 1 SCC 57.
[181] Maroti .U Wankhede[181] v State of Maharashtra [2003] Cr LJ 778 (Bombay)
[182] In State of Punjab vs. Gurmit Singh [1996] 2 SCC 384

[183] State of Punjab v Ramdev Singh, AIR [2004] SC 1290
[184] State of Chhatisgarh v Derha[184] [2004] 9 SCC 699

In Banti v State of Madhya Pradesh[185] and in Mohan v State of Madhya Pradesh[186], it is not a defense in statutory rape that the girls were used to sex. According to Supreme Court in State of Uthar Pradesh v Pappu[187], it is not a ground for acquittal of the accused that the prosecutrix was not having a good character and was a girl of easy virtues.

4.11 Judicial Suo Moto Cognizance in India Related to Statutory Rape

In Indian court of law, the "S*uo Moto cognizance*"[188] are been used in order to expunge the reasoning of any judges in any impugned judgment. S*uo moto* describes an act of authority taken without formal prompting from another . The term is usually applied to actions by a judge taken without a prior motion or request from the parties. In October 2013, Indian Session Court judge in Delhi, Virender Baht J dictates a sexist comment while acquitted a man in a rape trial in State of Delhi v Ashish Kumar[189] SCJ 34/13. Virender J said in paragraph 5 of the judgment, "*those girls are morally and socially bound not to indulge in sexual intercourse before a proper marriage and if they do so, it would be to their peril and they cannot be heard to cry later on that it was rape. They voluntarily elope with their lovers to explore the greener pastures of bodily pleasure and on return to their home, they conveniently fabricate the story of kidnap and rape in order to escape scolds and harsh treatment from the parent"*.

[185] Banti v State of Madhya Pradesh [1992] Cr LJ 715
[186] Mohan v State of Madhya Pradesh [2001] Cr LJ 3046
[187] State of Uthar Pradesh v Pappu [2005] Cr LJ 331
[188] Suo Moto Cognizanze is the term to refer the court motion on its own without application from any parties.
[189] State of Delhi v Ashish Kumar[189] SCJ 34/13 (unreported case on rape by a session court judge in Delhi)

As an effect of the Virender J judgment, N. V. Ramana Chief Justice of Delhi High Court then suspended him for all sexual assault cases based from the insensitive comments given in the session court.[190] The observations by the Session Court has lead a Suo Moto cognizance by the High Court In Delhi when Justice Pradeep Nandrajog with Justice V Kameswar Rao referring to Order dated October 07, 2013 SC No.34/2013 in Suo Motu Cognizance which was decide on December 19, 2013,[191] held that "*the trial courts observations were a prima facie insensitive observations and are capable of influencing the police to take up women harassment cases lightly, resulting in an insensitive investigation and complete evidence not being brought before the Court"*. High Court on the judicial side expunges the observations made by the Session Court judgment. It can be said that judicial suo moto can be a tool for a superior court to do whatever necessary to defend justice for the parties involved in a trial. It is not the parties on dispute (prosecutors and defense council) who applied the motion from the court, but it is from the court own motion to expunged the impugned judgment from the inferior court. A motion on its own by the superior court can be used as to correct the error which might derived from the error of the law or facts by their subordinate court.

[190] www.jhatkaa.org/suspend-sexist-judge
[191] W.P.(C) 8066/2013 In High Court of Delhi Dated December 19, 2013 (unreported case)

4.12 Conclusion

Based on the above finding, it seems that judiciaries in India had been working a lot to leave the principal of the common law in deciding for statutory rape cases. Indian has already interpreted the constitutional principal when cases of sexual assault against women are considered a breach of human rights. Hence, sexual assault is a violation of right to life to woman which enshrined in article 21 of their constitution. The rules on corroboration as laid in R v Baskerville is no more a vital principal in their reasoning. In their view, rule on corroboration is replaced by other principal in law which had been introduced by their judges. One of the principal laid by the Indian is sole testimony of the prosecutrix which also plays an important role when the veracity and the truthfulness of the complainant is so convincing. When the accused failed to militate against the veracity of the complainant, conviction can be secured against the accused. Even without the physical injuries on the complainant after the rape incident, accused can be responsible on what had been done to the complainant. Based on their scholar opinion, it is therefore quite possible to commit legally the offense of rape without producing any injuries to the genitals or without leaving any seminal stains. The Suo Moto Cognizance by the Superior Court is a motion on its own therefore applicable to expunge any impugned judgment which is considered as an inherent jurisdiction by the court to correct the law erred by the subordinate court for the purpose of check and balance towards any unnecessary situation in the lower court.

CHAPTER FIVE

COMPARATIVE ANALYSIS IN MALAYSIAN AND INDIAN STATUTORY RAPE LAW

5.1 Introduction

A.V Dicey a respectable jurist once said that the ordinary court is the best and proper place to settle any dispute arises in law.[192] Every appeal to the superior court will be prescribes as a judicial review. In judicial review, Diplock J in The Secretary of State v Tameside,[193] dictates that "*the test is whether in reaching the decision the decision maker directed himself properly in law and, in consequence, took into consideration the matter which upon the true construction of the act he ought to have considered and excluded from his consideration matter that were irrelevant to what he had to consider*."

In this chapter, comparison will be made based from the position of statutory rape in both countries and to discuss the extent of applicability and relevancy of the common law principal in statutory rape. It has been observed that the Malaysian Court still depend on the principal of the common law in sexual cases. While for India, they had already put up their own interpretation of law related to sexual offences. It has been concluded that case law is judges made law; it's also prescribed as a sources of law. In this situation the interpretation of the judges to the fact of each case will be the key to analyze and finding answers in managing the problems that arises from the statutory rape laws. The wisdom of the judges is essential in order to overcome any

[192] Alfred Venn Dicey . The Law of Constitution pg 202.
[193] The Secretary of State v Tameside [1977] AC 1014 HOL

constraint arising through this statutory offense. Thus, as been mentioned, case law illustrated the offense of statutory rape.

5.2 Perspective in Evidence of Child Witness between Two Countries.

In 1971, amendment of the Malaysian Evidence Act 1950 had inserted and provides provision under section 133A. In summary, section 133A provides that before a child adduced testimony to the court, the court is obliged to make evaluation to find out whether the child understood the nature of an oath to make a child adduce sworn evidence. If the court finds that the child did not understand the nature of an oath, the court can still accept the evidence from a child in the form of unsworn evidence. In doing so, the court must decide whether the child understood the nature of speaking the truth. When court accepted the child testimony in the form of unsworn evidence, the accused cannot be convicted unless there is testimony to corroborate the evidence from the child.

There is no provision such as section 133A in the Indian Evidence Act. From the perspective of the Indians, every person is competent to testify. What is concerned by the court is the competency of the witness as it has been provides in section 118 in Indian Evidence Act 1872. The capability on the child witness to understand the nature of an oath is the things which regarded to credibility of the witness but not its competency.

As aforementioned, Malaysia case law saw the applicability of section 133A and is very much adhered to the provision. If the court failed to apply the provision then the judgment is entitled to be quashed by the higher court when there is an appeal from the accused. It is submitted that the accused cannot be convicted from uncorroborated evidence by the unsworn testimony of the child. In India, what is important, courts have to address the child to find how the child understands the important to speak the truth. In their view, a child is capable to speak the truth. In this sense Indian court found that it is unusual for a child to be malicious and produce a false allegation against the accused. Even if there is a possibility for a child to be tutored and fantasizing something in their testimony, the court still have the chance to re evaluate the evidence of a child by looking at the demeanor of a child and the consistency of the evidence. It is a culture in India that a child will not openly inform anybody about the incident of sexual assault upon her because of the social stigma that will raise the issues on the modesty of the child.

Through the cases presented, it can be seen the difference approach taken by the courts at both countries in handling statutory rape cases. Courts in India are more liberal to evaluate the evidence given by the child. According to them, the evidence of the child victim even without oath and corroboration is acceptable to convict the accused. Age is not an obstacle in their evaluation of the evidence. Section 118 of the Evidence Act 1872 stipulates that unsworn/uncorroborated evidence still can be used against the accused because a child cannot be said to be malicious against the accused. In India when the court found that the child is capable of speaking the truth, then it will proceed to record the evidence and made a maximum evaluation before deliver their judgments.

As to conclude, Malaysia applied a careful attitude towards child evidence while India is more liberal with their interpretation. Countries like Australia, America, and Canada had already made a reformation towards their act. In New South Wales, Australia, the rule on the child to understand the nature of an oath referred to place an unnecessary burden to the child.[194]What is universally important is for the child to understand the nature of speaking the truth and nothing but the truth in a criminal trial. A child must not be positioned liked an adult in terms of adducing their evidence. Even if the child understand the nature of an oath, then he/she is still obliged to tell the truth in the trial proceeding and the truthfulness of the child can be evaluated by the presided judge at the end of the prosecution case.

5.3 Rules on Corroboration

Prior to 1990, both of the countries were using the same reasoning in R v Baskerville which plays an important role on corroborative evidence. Malaysian judges often use this rule in order to secure a safe conviction to the accused. Eventually, Indian court evolves to find their way by not strictly applied to this rule. In Indian Penal Code, it is provided that corroboration is not an imperative component of judicial credence in every case of rape[195]. It is only adequate for the judges to warn themselves of a danger to convict the accused without corroborative evidence. Hence, it is a trite law in India that the rule in corroboration is no longer in the lime light. The rule on corroboration is more a rule of practical wisdom than of law. In case that the child

[194] Child Witnesses: Evidentiary Reforms Kate Warner Lecturer Faculty of Law University of Tasmania Hobart pg 171
[195] This paragraph is already stated in the Indian Penal Code 1860.

explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. When prosecutrix adduced the evidence it is up to the court to evaluate that the evidence and if it is so persuasive and cannot be challenged and used by the accused to militate against veracity or truthfulness of the victim, the court can use the testimony from the victim as circumstantial corroborative evidence to justify offence of rape did happened.

In Malaysia, the rules on corroboration still play an important part in the trial. Hence it is stated by the High Court in Aziz b Mohd Din v PP[196] where Justice Augustine dictates "*in certain types of cases there is a rule of practice which requires evidence to be corroborated. This includes the evidence of a complainant in a case involving a sexual offence"*. It is well quoted that Court of Appeal in the case Mohamad Yusof Rahmat v. Pendakwaraya[197] which had quoted the famous quote of Thompson LP in Din v PP [1964] MLJ 300 FC that corroboration of evidence in prosecutrix in a rape case springs not from the nature of a witness but from the nature of an offense.

[196] Aziz b Mohd Din v PP [1996] 5 MLJ 473.
[197] Mohamad Yusof Rahmat v. Pendakwaraya [2009] 2 CLJ 673 COA

5.4 Evidence on Physical Injuries in Statutory Rape

Indian court does not subjected to the evidence of injuries as to prove offence of rape. Most of the Court found that rape cases are subjected to scholar's opinion in deciding for evidence in sexual intercourse. In rape, the guilty act term held to meant that the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injuries to the genitals or leaving any seminal stains. The opinion of the scholar in India played a vital role in their court to established evidence that rape had occurred. Even if the victim genital is still in normal condition or hymen of the victim is still intact it did not means that offense on rape do not happened. In the celebrated case of Maddan Kakkad, the accused had made a confession that he had raped the victim, but as a medical doctor, he used his knowledge to ensure that victim's hymen is not ruptured during the incident. The court rejected this kind of defense and accused is still convicted.

In Malaysia, physical injuries of the prosecutrix was been discussed in Apara v Sathiah[198]where in offense of rape, it was held that **"***an important source of corroboration is the evidence of SP1, which is the doctor. His report shows fresh injury indicating entry of something. Considering that the complainant complained of entry by a male sexual organ as well as entry by a finger, the corroboration by the doctor's report can be read to be of entry only by something. But by what remains a question. Since the vaginal swab indicated no sign of spermatozoa, that means, while*

[198] Apara v Sathiah [1997] 2 CLJ Supp 393

the possibility is not precluded, there is no corroboration of entry of a male sexual organ as such from the doctor testimony".

It can be said that in the trial of rape, Indian court mostly is referring to the scholar opinion. The opinion from the doctor is only to be considered but still cannot be subjected as a legal opinion. Judges in India can convict the accused based on the sole testimony of the prosecutrix as being discussed before. In Malaysia, evidence of injury whether in the genital area of the victim or at any part of the body is important to corroborate the evidence of rape and play an essential part in to be considered by the judges.

As to conclude, without personnel injuries which can be confirmed by the medical practitioners, there is no sufficient evidence to secure conviction in Malaysia. Compared to India, accused can be convicted even if the doctor stated their medical opinion contrary to the incident. It has been noted by Dr Jasing P. Modi that medical opinion only records the examination by the doctors to the victim, but to secure conviction on the accused; the legal opinions will plays their part.

5.5 Evidence by sole testimony of the prosecutrix.

In statutory rape offences, most of the Malaysian court prefers that testimony of rape victim is insufficient to secure a conviction. In that sense, each particular fact adduced as evidence by the prosecution need to be supported by independent testimony. It has been a standard practice since Din v PP.[199]. Even if there is nothing in the EA to show that corroboration is essential in sexual offense, but as a matter of prudence, judges must be bear in mind the danger to secure a safe conviction without independent testimony which will support the evidence of prosecutrix.

In India, conviction on the sole testimony of the prosecutrix is sustanaible where the court is convinced of the truthfulness of the prosecutrix and there exists no circumstances which cast a shadow of doubt over her veracity.

5.6 A review in "*Suo Moto*" Cognizance.

Judicial review is one of procedures taken by the Malaysian to scrutinize decision from the lower court. It reveals the inherent jurisdiction of the apex court to interfere lower court judgment when situation render necessary. Thus, a judicial review is a process to find justice on a motion on its own by the court and without application any parties to seek justice and fairness. Hence judicial review is only a practice when there is application from either of the parties in the court.

[199] Din v PP [1964] 1 MLJ 300

Suo Moto or *suo sponte* cognizance is a practice by Superior Court to utilize their inherent jurisdiction to review any particular matter in the law. When a court takes *suo moto* action, meaning it starts a legal process on its own. The term is usually applied to actions by a judge without a prior motion or request from the parties. Indian Court had already practice *suo moto* in their jurisdiction. The purpose is to expunge the inappropriate decision of the lower court. One of the examples can be seen in Delhi High Court when High Court expunged the decision by the session court judge in a rape case. The Supreme court in New Delhi also take a suo moto action in Jan 24, 2014 of a horrific incident of gang rape of a young tribal woman by 13 villagers in West Bengal's Birbhum district and issued notice to the state government[200]. Once a court raises an issue suo moto, the court can go about deciding it in one of two ways. It can involve the parties and requested that they submit briefs on the issue to assist the court in reaching a decision. In this context, while the issue may be raised suo moto, the decision on the issue is made in accordance with principles and traditions of the adversarial system.[201]

In Nor Afizal[202] , the Court of Appeal president Justice Raus Md Shariff had noted in the judgment that in the evidence the case, "*there was no conceivable force, duress or pre meditation on the part of the appellant when committing the act, it was a consensual sex and in the same para that the COA was also informed that the appellant is an accomplish sportsman a bowlers who has achieved many successes in the sport"*.

[200] http://timesofindia.indiatimes.com/india/West-Bengal-gang-rape-case-SC-takes-suo-motu-cognizance-notice-to-govt
[201] PLAYING GOD: A CRITICAL LOOK AT SUA SPONTE DECISIONS BY APPELLATE COURTS* ADAM A. MILANI** AND MICHAEL R. SMITH. **. Assistant Professor, Mercer University School of Law; J.D., Duke University; B.A., University of Notre Dame.***. Associate Professor, Mercer University School of Law; J.D., University of Florida.
[202] Nor Afizal Azizan v PP [2012] 4 MLRA 1

In this manner, it is about the accused career as accomplished sportsman which possesses bright future as a bowler when he achieved success in the sports is discussed by the court. Instead of considering the future of the young female who had been raped the court considered the bright future of the accused and sentenced him 5 years bond of good behavior. The judges also dictate that Nor Afizal cannot be applied in all cases. This kind of judgment is considered unnecessary because of the practice in stare decisis (the concept of binding precedent that judgment of the superior should bind the lower court) Even if the accused have a bright future, court must adhere to the provision in the statute in imposing a harsh sentence to the accused as a deterrence and matter of public interest.

Thus, the court should impose a proper punishment to commensurate the offense. In this situation, method in Suo Moto Cognizance can be use by the superior court to squash the decision by the lower court. A motion on its own by superior court maybe can be used as a tool to declare that the application of section 294 (1) in CPC is not appropriate and imprisonment is more adequate sentences for the accused.

As it been observed by Lord Diplock in Tameside [203], *the Court of Appeal did not took into consideration the matter which upon the true construction of the act he ought to have considered and excluded from his consideration matter that were irrelevant to what he had ought to consider*.

[203] The Secretary of State v Tameside [1977] AC 1014 HOL

5.7 Conclusion

In dealing with statutory rape law, Malaysia needs to decide the appropriate step and action that should be taken to curb this crime. Penal Code which is the only law in enforcing the crime of statutory rape already provides the necessary protection for underage girl. The Criminal Procedure code has provided the investigation and prosecution power for the Police and the Public Prosecutor to managed the crime of statutory rape. The application of the provision in the Evidence Act is the most challenging task to be face by the law enforcement regime. Deep understanding towards the law on evidence will help each and every party in the Criminal Justice System in delivering their duty to achieve the highest standard in criminal litigation. It is undeniable that the principal in common law will be used as a reference to serve justice. However undue reliance on common law principal will also stunt the development of local principal. It is undeniable that India had already moved forward with legal reasoning in combating the crime. In India any sexual violation against their women presumed to be an infringement of the right to life.

In law of equity, the remedy of restitution is designed to restore the plaintiff to the position he or she occupied before his or her rights were violated. But it could not be done in the statutory rape law when it involves the infringement of child modesty. In the sphere of statutory rape law, the only remedy that will commensurate the abusive behavior of the accused after conviction is give imprisonment as a harsh sentences to accused.

CHAPTER SIX

CONCLUSION AND RECOMENDATION

In Malaysia, codification of the Syariah law according to the Syariah Criminal Offense (SCO) (Federal Territories) 1997 is the thing that creates difference between Malaysia and India. The criminal court in India only recognized the secular laws. Malaysia has dual system of law which had been formulated by the constitutional amendments in 1988. The amendments had inserted the provision of articles 121A which established the Syariah Court in Malaysia. Item 1 in Second Lists of the Ninth Schedule in the Federal Constitution provides that Islamic law is a matter of the states while criminal laws are under federal administration. Statutory rape law is firstly codified by the introduction of Statute of Westminster in 1275. As a gender specific offense, statutory rape laws emphasized that only man will be punished.

It is obvious that in the trial of statutory rape, court sometimes established the facts that the sexual intercourse is done on mutual consent. By means it is undeniable that the victim consented to the act. As gender specific in nature, statutory rape only placed the offence on the accused and only the man being punished. The enforcement in section 23 (2) of Syariah Criminal Offence will transform the gender specific offence as a gender neutral offences. When a girl consented to the sexual intercourse, she will be the subject to violates the provision stipulated in section 23 (2) of the Syariah Criminal Offences. Section 23 (2) provides "*any woman who performs sexual intercourse with a man who is not her lawful husband shall be guilty of an*

offence". This move should not be interpreted as to punish the underage girl. Thus it is submitted that this effort is one of the way to prohibits and curb pre marital sexual intercourse. The burden to curb promiscuity should be infused at adolescent level. A replacement from gender specific to gender neutral will tend to educate the child not to practice promiscuity in order to curb underage girls from being sexually liberated because of the awareness of the underage Muslim female of the existence of section 23 (2) of the SCO will be applicable to curb this crime.

Insertion of section 133A of the Evidence Act 1950 tends to create anomaly for the Malaysian while there is no same provision related in the Indian Evidence Act 1872. It is unreasonable to place the child at the same level as an adult when they have to understand the nature of an oath before adducing their testimony. What is important is the child must understand the nature to speak the truth and nothing but the truth. It is essential for judges to make a preliminary enquiry as to evaluate the condition of a child before proceed to record the evidences. The judge must state in the note of proceedings that the child understand the nature to speak the truth. Unfortunately it is stipulated in 133A EA 1950 that in unsworn testimony, the accused shall not be liable to be convicted unless the evidence is corroborated by independent testimony to implicate him. It is submitted that even when a person testified with sworn evidence, they must also practice the truthfulness which will give effect towards their veracity. The child should not be treated as an accomplices and their evidence should not be prejudiced. The application of sworn evidence from a child had been repealed in New South Wales and some other countries. If the accused cannot militate the veracity of a child, then he should be convicted without hesitation. Hence, the condition imposed in section 133A should be deleted.

Another recommended proposal is to amend the provision stipulated in section 2 of The Child Act 2001. In the interpretation of section 2, a grave crime does not include rape. It is surprising that offenses of rape are not interpreted as grave crimes in the Child Act. For the purpose to educate the child and create necessary understanding, offences of rape should be stipulated as one of the grave crimes in the abovementioned act.

As a conclusion, implementation of section 294 (1) CPC as to replaced imprisonment sentences by placing a bond of good behavior to the accused must be stopped. Literal interpretation towards provision stipulated in section 294 (1) tells that bond of good behavior can only be applied when offences is trivial in nature. In the other words it is a minor offence. Statutory rape laws provides in section 376 (2) (d) of the Penal Code stipulated that a man who commits statutory rape should be punished for a minimum of 5 years imprisonment which can reaches up to 20 years. A crime with that kind of punishment is not a minor offense. In India a practice to replaced imprisonment sentence with a bond of good behavior had been strictly applied only to youthful offender. Indian Supreme Court once dictates that a refusal to grant probation on sexual offender was held to be proper. It is recommended that only youthful offender is subjected to be placed on bond of good behavior in statutory rape offences.

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