

**IN RAPE CASES, IT IS DANGEROUS TO ACT ON THE EVIDENCE
OF THE COMPLAINANT ALONE:
CRITICALLY ANALYSIS**

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1432/2011

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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An academic exercise submitted in partial fulfillment of the requirements for
the degree of
BACHELOR OF LAWS (LL.B)

**Faculty of Syariah and Law
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Zulhijjah 1432/ November 2011

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SUPERVISION

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DECLARATION

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I hereby declare that the work in this academic exercise is my own except for quotations and summaries which have been duly acknowledged.

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ACKNOWLEDGEMENT

Grateful to Allah Subhanahu Wa Ta'ala and His Messenger Muhammad Sallallahu 'Alayhi Wassallam.

I am overwhelmed in all humbleness and gratefulness to acknowledge my debt to all those who have helped me during the time I wrote this research.

Foremost, I would like to express my sincere gratitude to the committee involved in approving my project paper topic especially to Associate Professor Dr. Muhaimin Ayus Bin Noordin as the Dean Faculty of Shariah and Law and Dr. Abdurrahman Haqqi as Acting Head of Law Programme.

Special thanks and appreciation is due to Dr. Sulaiman Dorloh, supervisor of this academic exercise for his continued support and guidance during the writing of my research. His guidance helped me in all the time of research and writing of this project paper.

My special thanks to the Government of His Majesty the Sultan of Brunei Darussalam, who granted me a scholarship to pursue my study at Sultan Sharif Ali Islamic University.

Lastly but not least, I would like to thank the members of my family – who gracefully accepted my long hours at work on this academic exercise and not to forget to a person who had helped me in printing all my research work, references and as well as in printing this all pages of my project paper, I would like to thank him a lot and appreciate his kindness.

ABSTRACT

IN RAPE CASES, IT IS DANGEROUS TO ACT ON THE EVIDENCE OF THE COMPLAINANT ALONE: CRITICALLY ANALYSIS

The research aims to investigate the impact on the accused if the judge deliver his/her judgment based upon the evidence of the complainant alone with regards to whether the accused was really guilty of charge of rape or attempted to rape. The finding of this study is ultimately, the risk of deciding the judgment based upon the evidence of the complainant alone is false allegations of rape and questions whether the complainant are becoming aware of 'Rape-Revenge' within the criminal justice system, whether they believe these allegations impact on the overall convictions rates of rape, what can be done to address false allegations that enter the police/courts process and what, if, any are the problems that they may cause. Particular attention will be paid to the recent dominance of legal media commentary and the views of professionals relating to the dangerous of acting on the evidence of the complainant alone in convicting the accused in rape cases. The Judge had always warned themselves not to convict the accused in rape cases upon evidence of the complainant alone as this will affect the criminal justice system. Therefore, this research presents some valuable points and research on how to deal with the evidence in rape cases and as well as the risk and impact of relying upon the evidence of the complainant alone.

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Singapore

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Model Penal Code (MPC) 1962
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Sexual Offences Act 1956
Sexual Offences Act 2003
South Australian Evidence Act 1929

ABBREVIATIONS

A-G	Attorney General
BLR	Brunei Law Report
Cap.	Chapter
CCA	Court of Criminal Appeal
CJ	Chief Justice
Cr App	Criminal Appeal
Crim LR	Criminal Law Report
HC	High Court
IC	Intermediate Court
<i>Ibid</i>	ion beam induced deposition
JCBD	Judgments of Court of Brunei Darussalam
KB	Kings Bench
LJ	Lord Justice
LP	Legal Practitioner
MLJ	Malayan Law Journal
QBD	Queens Bench Decision
p.	Page
pp.	Pages
PC	Privy Council
PP	Public Prosecutor
R	Regina
Rep	Repetition
SASR	South Australian State Report
SLR	Singapore Law Report
V	Versus

INTRODUCTIONS

Rape is often considered to be one of the most mischievous crimes to be committed against an individual, be it male or female. It can, and has, presented unique challenges to the legal system as it is not the incident that has to be proved, but the intention.

Rape is the taking of sexual intimacy with an unwillingly person by force or without consent. Historically, rape was regarded as offence that could be committed only against woman not married to the defendant, and it was seen both as a crime of violence against her and as a property crime against females and males, and it is viewed both as a crime of violence and as violating an individual's basic right to decide with whom to have sex.¹

Many victims are reluctant to go to the police because a rape investigation can be a long and deeply embarrassing process in which they have to reveal intimate details of their private lives before anyone is brought to court. A review into the handling of rape complaints also says some victims may be being put off reporting attacks because of the often-quoted claim that only six per cent of rapes lead to a conviction.²

Although acknowledged as a social problem that is massively under-reported to the police, there is disagreement over how prevalent rape is. Not surprisingly, research produces different findings depending on the populations surveyed and the methods used.³

¹ Stephen J. Schulhofer, (1998). *Unwanted Sex*; Susan Estrich, (1987). *Real Rape*.

² Per Richard Ford, Home Correspondent, *All rape victims 'should have specialist advice'*, say *Stern Review*, *The Sunday Times*, London, March 2010.

³ Hofer, 2000; Russell and Bolen, 2000; Schwartz, 1997).

CHAPTER ONE

DEFINITIONS AND ELEMENTS OF RAPE

Perhaps more than any other type of crime, rape reflects the imprint evolving social values, practices, and understandings. For instance, at early common law, and for many centuries thereafter, rape was defined as

“the carnal knowledge of woman forcibly and against her will.”(Per William Blackstone, *Commentaries* 210 (1769)).⁴

1.0 According to Common Law

The common law defined rape tersely as “carnal knowledge of a woman forcibly and against her will.” Rape included only sexual intercourse; it did not include other sex acts such as oral or anal sex or consensual sex with minors. Those acts usually punished as crimes. Because the brevity of the common law definition, courts had explain its terms in greater detail. ⁵

Basically, the common law definition of rape is “the act of having unlawful carnal knowledge by a man of a woman, forcibly and against her will.” In reflecting on the common law, as compared to statutory law, one court indicated that common law rape is the act of a man having unlawful carnal knowledge of a female over the age of 10 years by force without the consent and against the will of the victim.

1.0.1 Unlawful⁶

Unlawful, as used in this context, is defined as “not authorised by law,” and interpreted to be intercourse between those who are not husband and wife. Under the common law, and

⁴ Brody David C., Acker James R., Logan Wayne A., (2001). *Criminal Law*. (United StatesL Aspen Publishers),p419.

⁵ Singer Richard G., Fond John Q. La, (2010). *Criminal Law*. 5th Edition. (United States: Aspen Publishers),pp.239-240.

⁶ Pullock Joycelyn M., (2009). *Criminal Law*. 9th Edition. (United States: Anderson Publisher),p.202.

as defined by most early statutes, rape was an act of sexual intercourse with a female, not the wife of the perpetrator. The rationale for the concept that intercourse between husband and wife was lawful was that the matrimonial consent that the wife gave when she assumed the marital relationship could not be revoked. A seventeenth-century jurist, Matthew Hale, formulated the concept that by “their mutual matrimonial consent and contract the wife hath given of herself in this kind unto her husband, which she cannot retract.”

1.0.2 Carnal Knowledge (or Sexual Intercourse)

Carnal knowledge is synonymous with sexual intercourse. Regardless of the definition used, according to all authorities, to complete the crime of rape there must be some penetration, although the least penetration is sufficient. According to one court, the slightest penetration of the vulva is sufficient to constitute rape and emission is not necessary. However, the prosecution must prove beyond reasonable doubt that penetration in fact occurred.⁷

1.0.3 Force or Fear

The force that is a necessary element in the commission of the common law crime of rape includes actual physical force in compelling submission of the female and also includes threatened force or violence for the purpose of preventing resistance. This element may be met by showing that there was actual force or that the force was constructive. Forcibly does not necessarily mean violently. The offence is complete even if no actual force is used, it can be shown by the evidence that the woman is made to yield through fear and does not consent voluntarily to the act of sexual intercourse.

The force necessary to constitute rape may also be constructive. For example, if the female is mentally unconscious from drink or is asleep, or from other causes is in a state of insensibility, so that the act of unlawful carnal knowledge on the part of the man is committed without conscious and voluntary permission, force is necessarily involved in the wrongful act itself.

⁷ *Ibid*,p.202

Without force, actual or constructive, there can be no rape. If the prosecution can show that actual force was used, or he can show that the victim submitted as a result of terror or fear caused by threats or intimidation, or if the force is constructive in that the woman is unconscious, this is sufficient to meet the “force” requirement in proving the crime of rape.⁸

1.0.4 Without Consent or against the Will⁹

This element, which is sometimes stated in terms such as “without her consent,” has been interpreted to mean that the sexual act must be committed against the will of the woman without the will of the woman without her voluntary consent. Intercourse accomplished by force is without consent; however, voluntary consent given at any time prior to the penetration deprives the subsequent intercourse of its criminal character, regardless of how reluctantly it may have been given or how much force therefore had been employed. Whether the consent was voluntary depends upon the facts of each particular case and if the jury, after hearing all of the evidence, finds that there was consent at the time of the intercourse even though there was some persuasion in the initial contact, the court will be hesitant to find this element of the crime.

It is not necessary that the victim resist physically if the evidence indicates that she physically feared the defendant and expressed her unwillingness to engage in intercourse. When the victim is prevented from resisting by the threats of creating bodily harm, accompanied by apparent power of execution, this element of crime of rape is present. On the other hand, early cases also sometimes discussed the “utmost resistance standard.” This was the idea that a woman should want to resist all at all costs any attempt of rape. If she did not appear to have any injury, there was an inclination to use that as evidence that consent was granted. Some cases have led to seemingly unfair findings, such as case in which a woman had been in a physically abusive relationship with the assailant but had left him. He threatened her and her mother if she did not accompany him and then took

⁸ *Ibid*,p.203

⁹ *Ibid*,p.203-204

her to a house and told her she was going to have sex with him. Even though she told him she did not want to, she did not physically resist, arguably because she was the victim had not consented, there was no showing of force or threats to overcome the resistance of the victim.

There can be no consent if the woman is wholly insensible so as to be incapable of consenting. When a man has reduced a woman to a state of insensibility through alcohol, she is unable to give consent; however, cases have held that inducing a woman to drink intoxicating beverages or to use drugs to excite her passions, leaving her at the same time capable of comprehending the nature of the act, does not amount to rape, because there has been consent.

1.0.5 Of a Female

Under common law, only women could be raped, and only men could rape (although a male victim would be protected under the laws of assault and battery). The history of this crime originates in the man's dominion over his female relatives (both spouse and child). The rape was seen as an offence against her, but also against him. It was, in a sense, affront to his property rights because any resulting pregnancy might be the seed of the rapist instead of his, confusing the rightful lines of inheritance.¹⁰

2.0.6 Mens Rea

The mens rea of common law rape was intentional. The perpetrator also has to know that the victim is not consenting to sexual intercourse.¹¹

1.0.7 Common Law-Statutory Rape

Under the early English cases, it was not rape to have sexual intercourse with a female child if she consented. However, later English statutes included sections that provided that females under 12 years of age were incapable of consent, and to have sexual

¹⁰ *Ibid*,p.204

¹¹ *Ibid*,p.205

intercourse with a female child under this age was considered rape, even though there was consent. This had come to be known as statutory rape.¹²

Generally, the prosecution had to prove:

Firstly the defendant had sexual intercourse (penetration by the penis of the vulva); secondly with a woman not his wife; thirdly using physical force or the threat of force; and fourthly without her consent.

1.1 According to Michigan's Statute

One of the earliest and best known of the new sexual assault laws is Michigan's statute, which incorporated language defining unwanted sexual conduct in 1974 (*Michigan Criminal Code* 2005, s 750.520). It provides:

First degree: This consists of "sexual penetration," defined as sexual intercourse, cunnilingus, fellatio, anal intercourse, "or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." In addition one of the following must have occurred:

1. The defendant must have been armed with a weapon.
2. Force or coercion was used, and the defendant was aided by another person.
3. Force or coercion was used, and personal injury to the victim was caused.

Second degree: This consist of "sexual contact," defined as the intentional touching of the victim's or actor's personal parts or the intentional touching of the clothing covering the immediate area of the victim's intimate parts for purposes of sexual arousal or gratification.

"Intimate parts" is defined as including the primary genital area, groin, inner thigh, buttock, or breast. In addition, one of the circumstances required for first-degree criminal sexual conduct must have existed.

Third degree: This consists of sexual penetration accomplished by force or coercion.

¹² *Ibid*,p.205.

Forth degree: This consists of sexual contact accomplished by force or coercion.¹³

Despite these advances in rape law, keep in mind Professor David Bryden's (2000) assessment of the reality of current sexual assault law:

"Most legislatures and courts still define rape narrowly. In acquaintance rape cases, in most states, nonconsensual sex is not rape unless the perpetrator employs force or a threat of force, or the victim is unconscious, badly drunk, underage, or otherwise incapacitated. Even if the victim verbally declines sex, the encounter is not rape in most states unless the man employs "force." Sex obtained by nonviolent threats ("you'll lose your job," etc.), or by deception, usually is not a crime."

1.2 According to Law Dictionary

Rape is generally defined as sexual intercourse (vaginal or anal) with a woman or another man without their consent as a result of physical force or threats, or because the person was unconscious or asleep, or because consent as to the nature of the act was obtained through fraud. It is also rape if the person is mentally incapable of understanding what is being consenting to.¹⁴

1.3 According to Penal Code (Cap. 22) of Laws of Brunei Darussalam

According to the Laws of Brunei Darussalam, Chapter 22 of the Penal Code, Section 375 defined rape as;

"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 5 following descriptions –

- (a) against her will;
- (b) without her consent;
- (c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt;
- (d) with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is, or believes herself to be, lawfully married;
- (e) with or without consent when she is under 14 years of age."

1.4 According to Malaysia and Singapore Law.

Section 375 of the Singapore Penal Code, stipulates that;

- "(1) Any man who penetrates the vagina of a woman with his penis —
- (a) without her consent; or
 - (b) with or without her consent, when she is under 14 years of age, shall be guilty of an offence.

¹³ Samaha Joel, (2010). *Criminal Law*. 10th Edition. (United States: Cengage Learning Publisher),p.332.

¹⁴ Edited by Elizabeth A. Martin, (2003). *A Dictionary of Law*. 5th Edition. (United Kingdom: Oxford University Press),p.208.

(2) Subject to subsection (3), a man who is guilty of an offence under this section shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

(3) Whoever —

(a) in order to commit or to facilitate the commission of an offence under subsection (1) —

(i) voluntarily causes hurt to the woman or to any other person; or

(ii) puts her in fear of death or hurt to herself or any other person; or

(b) commits an offence under subsection (1) with a woman under 14 years of age without her consent, shall be punished with imprisonment for a term of not less than 8 years and not more than 20 years and shall also be punished with caning with not less than 12 strokes.

(4) No man shall be guilty of an offence under subsection (1) against his wife, who is not under 13 years of age, except where at the time of the offence —

(a) his wife was living apart from him —

(i) under an interim judgment of divorce not made final or a decree nisi for divorce not made absolute;

(ii) under an interim judgment of nullity not made final or a decree nisi for nullity not made absolute;

(iii) under a judgment or decree of judicial separation; or

(iv) under a written separation agreement;

(b) his wife was living apart from him and proceedings have been commenced for divorce, nullity or judicial separation, and such proceedings have not been terminated or concluded;

(c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife;

(d) there was in force a protection order under section 65 or an expedited order under section 66 of the Women's Charter (Cap. 353) made against him for the benefit of his wife; or

(e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred to in paragraph (d), and such proceedings have not been terminated or concluded.

(5) Notwithstanding subsection (4), no man shall be guilty of an offence under subsection (1) (b) for an act of penetration against his wife with her consent.”

Rape is dealt under section 375 of the Malaysian Penal Code. According to this section a man is said to commit “rape” who has sexual intercourse with a woman under the following circumstances:

a. Against her will.

b. Without her consent.

c. With her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception.

d. With her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent.

e. With her consent, when at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent.

f. With or without her consent, when she is under sixteen years of age (statutory rape).

Basically in this both provisions, the offence of rape is limited to ‘sexual intercourse’ - in other words, to penetration of the vagina with the penis. Numerous issues arise from conceptualising rape in this way. First, other forms of vaginal penetration, such as penetration with another part of the body or with an object such as bottle are not covered: acts of this sort will have to be covered by other offences, the most likely ones being voluntarily causing hurt or outraging modesty.¹⁵ Secondly, penetration of the anus with the penis and non consensual acts of the oral sex are not covered by rape: acts of this sort would be covered by the “unnatural offences’ of carnal knowledge against the order of nature or outraging decency. Thirdly, penetration of the anus with an object such as bottle would need to be covered by offences such as voluntarily causing hurt. Fourthly, the gender-specific nature of the definition means that rape does not cover sexual violations by men on men, women on women, and women on men. Although crimes of this sort are less common, they are not unknown. Again they need to be covered by the other offences.¹⁶

1.5 Actus Reus

The actus reus of rape is committed where a man has sexual intercourse with a man or a woman without that person’s consent.¹⁷

1.6 Mens Rea¹⁸

The *mens rea* of rape has been changed significantly by the Sexual Offences Act 2003. Under the old law, s. 1(2)(b) of the Sexual Offences Act 1956 stated the *mens rea* required was that: ‘at the time he knows that the person does not consent to the

¹⁵ See *PP v Tay Chee Keong* [1999] SGHC 207 where the accused penetrated the victim’s vagina with his finger and was convicted of outraging her modesty.

¹⁶ Yeo, Morgan, Chan, (2007). *Criminal Law in Malaysia and Singapore*. (Singapore: LexisNexis Publisher), p.329.

¹⁷ Elliott & Quinn, (2008). *Criminal Law*. 7th Edition. (United Kingdom: Pearson Education Limited), p.162.

¹⁸ *Ibid*, p.166.

intercourse or is reckless as to whether that person consents to it'. Recklessness no longer forms part of the *mens rea* of rape. The Sexual Offences Act 2003 requires an intentional penetration and that the defendant did not reasonably believe that the victim was consenting. This latter *mens rea* can be broken down into two questions. Only if the answer to both these questions is yes, will the defendant be found not to have *mens rea*:

1. Did the defendant believe that the victim was consenting?
2. Was that belief reasonable?

Section 1(2) of the 2003 Act states:

“Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps [the defendant] has taken to ascertain whether [the victim] consents.”

It is up to the courts to interpret what is meant by the broad reference to ‘all the circumstances’.

CHAPTER TWO

PROCEDURE OF RAPE LAW

When ever an offence of rape had committed, the victim had to as soon as possible make a report of the complaint to the police. The victim then had to tell the police the whole incident and they will record the complaint and the police will basically make an investigation based on the complaint that had been made to them.

2.0 The Police Response¹⁹

All police officers should have special training in handling sexual assault victims. Whenever possible, an officer without such training should not be assigned to this kind of case. As soon as the officer arrive at the scene, he must announce himself clearly to allay fears the victim may have that the suspect is returning. Explain to the victim what is being done for her safety. If the rape has just occurred, if there are serious injuries or if it appears the victim is in shock, call for ambulance.

Protect the crime scene and broadcast a description of the assailant, means and direction of flight and the time and exact location of the assault. The victim may be unable to describe the suspect because of stress or darkness or because the perpetrator wore a mask or other identity-concealing clothing. A time lapse before reporting the offence can occur because of the victim's embarrassment, confusion or shock or because the victim was taken to a remote area, giving the suspect time to escape.

Establish a command post away from the scene to divert attention from the address of the victim and to preserve the scene. Conduct the preliminary investigation and ascertain the background of both the accuser and, if possible, the accused. At a minimum, officers on the scene should do the following:

- a) Record their arrival time.

¹⁹ Hess Karen M., Orthmann Christine Hess, (2010). *Criminal Investigation*. 9th Edition. (United States: Cengage Learning Publisher), p.326

- b) Determine the victim's location and condition. Request an ambulance if needed. Obtain identification of the suspect if possible.
- c) Determine whether the suspect is at the scene.
- d) Protect the crime scene.
- e) Identify and separate witnesses. Obtain valid identification from them and then obtain preliminary statements.
- f) Initiate crime broadcast if applicable.

Sometimes it is difficult to determine whether an assault or homicide is a sex-related crime. Evidence of sexual activity observable at the crime scene or on the victim's body, genital bruising or injury and sexually suggestive positioning of the body.

2.1 Investigation by the Police

Steck Flynn (2007, p.64) notes, "The crime of sexual assault can be one of the most difficult cases to investigate." Immediate reporting increases the chances of obtaining physical evidence. The initial call concerning a rape (or other sexual offence) is normally taken by the dispatcher, communications officer or complaint clerk. The person taking the call or the complaint immediately dispatches a patrol unit, not only because the rape is felony but also because it is a crime in which the offender may be then tells the victim to wait for the police to arrive if at a safe location and not to alter her physical appearance or touch anything at the scene.²⁰

The victim is asked whether she can identify or describe the suspect, whether she has sustained serious injuries and whether she needs immediate medical assistance. The victim should also be advised not to wash or shower or douche before having medical exam.²¹

2.2 Blind Reporting

Rape victims may feel foolish, hurt, ashamed, vulnerable and frightened. Furthermore, the prospect of reliving the entire experience by having the police ask detailed and personal questions is more than any victims can bear, particularly immediately after the

²⁰ Hess Karen M., Orthmann Christine Hess, (2010). *Criminal Investigation*. 9th Edition. (United States: Cengage Learning Publisher), p.324.

²¹ *Ibid*, p.324

incident. However, given time, victims may come to trust others enough to recount the attack, even hoping to prevent the same assailant from attacking others. Blind reporting allows sexual assault victims to retain their anonymity and confidentiality while sharing critical information with law enforcement. It also permits victims to gather legal information from law enforcement without having to commit immediately to an investigation.²²

The success of blind reporting hinges on whether trust can be established between the victim and the investigator. The legal acceptability of blind reporting varies from state to state, and even from country to country. In jurisdictions where prosecutors accept blind report records, such records become the “fondling document” in the formal sexual assault investigation should be victim decide to file a complaint and proceed with a full investigation. Blind reporting procedures provide for collecting crucial medical legal evidence from sexual assault victims who do report the attack immediately, law enforcement personnel must be prepared for a swift yet sensitive reponse.²³

2.3 Examination of the victim

i) General considerations

In most instances the police produce the victim. Even so, a valid consent has to be obtained from the victim prior to medical examination. If the victim is under the age of eighteen years, consent has to be obtained from a parent or guardian. In Malaysia, many hospitals refuse to examine a victim unless a police report has been made. However, at the University Malaya Medical Centre, even in the absence of a police report, the victims are examined. However, the victims are cautioned and the various specimens collected from the victim are preserved for a prolonged period of time in the event a victim decides to make a delayed report. It is true that in the absence of an initial report to the police there are logistical difficulties encountered by the doctors.²⁴

ii) History taking

²² *Ibid*, p.325

²³ *Ibid*, p.326

²⁴ See Kasinathan Nadesan, Article on *Rape- the Malaysian scenario*, Malaysian J Pathol 2002. p.3.

The doctor who examines the victim should direct his attention to the mental state, mental and physical development, the state of the clothing and the general behaviour of the victim. The weight, height and apparent age have to be noted. A detailed history has to be obtained from the victim, which should cover the entire episode, including the actual sexual act. Also, questions have to be asked about the menstrual history, previous sexual exposures, surgical operations, childbirth, sexual intercourse with husband or boyfriend within the last few days of the alleged rape, and the use of tampon, etc. Such information should be considered by the examining doctor in arriving at a reasonable conclusion.²⁵

In many countries, the procedural law does not permit any cross-examination at the trial stage regarding the victim's sexual experience with persons other than the defendant. The 1988 amendment on the Evidence Act in Malaysia, Section 146A states that;

“ no question in cross-examination shall be adduced or asked concerning the sexual activity of the complainant with any other person other than the accused.”

This is a progressive step, because previously the victims during cross-examinations were asked about their sexual encounters with persons other than the suspect in order to discredit their moral behaviour. Such questioning became inevitable in the adversarial court system. However, at present such questions are not allowed. It is important to remember that all that is related by the alleged victim need not be true or accurate. There are instances where false complaints of rape have been made to the police. It is also well known that many genuine cases of rape are not brought to the notice of law enforcement agencies owing to various reasons.²⁶

iii) Examination of the victim

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

²⁵ *Ibid*, p.4.

²⁶ *Ibid*, p.4.

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