

EXECUTIVE SUMMARY

Prosecuting sexual offences is a fine balancing act between seeking justice and taking care of victims' well-being

This article sheds light on how prosecutors exercise care and caution when handling sexual offences. This is to protect victims who may be traumatised, and at the same time, ensure that evidence is presented well in court.

Generally, the degree of culpability of a sex crime offender depends on the victim's age. The younger a victim, the heavier the penalty. Not knowing a victim's age is not a reason for defence.

Parliament recently amended the Penal Code in 2019 such that victims of sexual crimes may receive better protection, regardless of their gender. For instance, the offence of rape is now more broadly defined, to include penile-oral and penile-anal penetration, on top of penile-vaginal penetration.

Prosecuting “sexual predators”: Striking a balance between pursuing justice and protecting traumatised victims

A woman who went out to party at a nightclub, got drunk and was raped, a perverted father who sexually assaulted his daughter, a girl under the age of 16 who was impregnated by her boyfriend, a female teacher who had sex with a male student such sexual offences occupy the news headlines from time to time, igniting heated discussions.

From offences such as outrage of modesty and taking upskirt videos, to the most serious sexual crimes - rape, when a person satisfies his/ her sexual desires inappropriately, they not only cause victims physical harm, but also leave indelible mental scars.

Parliament amended the Penal Code last year so that victims of sexual crimes, regardless of their gender, receive better protection. In this issue of "Know the Law", Deputy Senior State Counsel Mr. Winston Man and Deputy Public Prosecutor Ms. Eunice Lau from the Attorney-General's Chambers' (AGC) Crime Division explain some of the key factors to take note of when prosecuting sexual crimes and the challenges they face when handling such cases.

“Sexual predators” are not necessarily males

When we talk about sexual crimes, the first thing that comes to mind is usually men harming women. However, the fact is that the genders of the perpetrator and victim may also be reversed.

Deputy Senior State Counsel Mr. Man pointed out that a few years ago, there was a case in which a female teacher was charged and convicted for having sex with a male student. Regardless of whether it is a man who sexually assaults a woman, or a woman who sexually assaults a man, or sexual assaults between two men or two women, local laws are sufficient to bring perpetrators to justice.

Taking Section 376 of the Penal Code as an example, besides pointing out crimes committed by men, it also expressly states that it is an offence for “anyone” to use any body part or object to penetrate a victim’s private parts or anus.

In one case, BAB, a woman who posed as a man, used a dildo and her finger to sexually assault a girl who was only 13 years old to 14 years old from 2012 to 2013. She faced 20 counts of sexually penetrating an underage girl and one count of outrage of modesty.

The High Court originally ruled that the sexual penetration charges only applied to male offenders and acquitted BAB of these offences, sentencing her to eight months' imprisonment for outraging the girl’s modesty. However, the Court of Appeal later overturned this decision. In 2016, it ruled that the provisions relating to sexual penetration of a minor can also apply to female offenders, and increased BAB’s sentence to 10 years behind bars.

In fact, after the amended Penal Code came into effect this January, the offence of rape is now more broadly defined. Mr. Man elaborated that while only penile-vaginal penetration would have constituted an offence of rape in the past, the scope of the provision has now been broadened to include penile-oral and penile-anal penetration.

Degree of culpability depends on the victim’s age

The degree of culpability of a sex crime offender often depends on the age of the victim. The younger the victim, the heavier the penalty, and an offender cannot use ignorance of the victim’s age as a defence.

For example, according to the Penal Code, the maximum sentence for sexually assaulting a minor under the age of 16 is 10 years. However, if the victim is under 14 years of age, the maximum sentence can be up to 20 years. As for commercial sex, such as prostitution, it is an offence to engage in sexual transactions with persons under the age of 18, and this will attract a sentence of up to seven years in prison.

Deputy Public Prosecutor Ms. Lau explained that in the eyes of the law, the younger the victims, the more vulnerable they are, so stricter laws are needed to protect them. Even if the sexual act was consensual. As long as the victim is not of legal age, the sexual act would still constitute a crime.

“In terms of sexual crimes, our country's laws are ‘paternalistic’. That is to say, even if a minor decides he/she is mature enough to decide whether to have a taste of forbidden fruit, the law still forbids it.”

In addition, Mr. Man emphasised that according to Section 377D of the Penal Code, barring very few exceptions, an accused person generally cannot use ignorance of the victim’s age as a defence. The fundamental reason for having such legislation is to protect vulnerable minors.

Unspeakable pain

“I am afraid. If my friends or colleagues learn about this, how will I be able to move on?”

In 2015, a woman was raped at MacRitchie Reservoir Park. She initially refused to file a police report for fear that people around her would know about it.

For three months thereafter, the victim had nightmares almost every night.

The woman’s experience is an example of the mental trauma that many victims have to overcome, which adds to the complexity of handling such cases.

Mr. Man, who has eight years of experience handling sexual crimes, said, “Sexual cases are inherently sensitive, so the prosecutor has to be very careful when handling such cases. In addition to taking care of the victim’s mental well-being, the prosecutor must also ensure that the evidence is well presented in court.”

In the course of handling the case, the prosecution will try their best to accommodate the victims’ requests so as to minimise their trauma. Ms. Lau said, for instance, if a female victim feels that she is unable to narrate the assault to a male prosecutor, they will arrange for a female prosecutor to take over the case.

While the prosecution usually agrees to a victim's requests in this regard, Mr. Man pointed out that they also hope that female victims can get used to narrating incidents in front of males, because the trial judge may possibly be a male.

“It is precisely because the law recognises the trauma suffered by victims that, no matter how serious the sexual crime is, as long as the accused is willing to plead guilty, they will be accorded some sentencing discount, as the victims are spared from the trauma of having to testify in court. ”

Prosecutors also face challenges when making victims recount their ordeals

In order to bring perpetrators to justice, prosecutors cannot avoid making victims recount their experience, even though they know that the victims are still reeling from their inner trauma. In the process, prosecutors also face inner struggles.

In a rape case that concluded in 2018, a father was sentenced to 26 years in prison and 24 strokes of the cane for raping his 14-year-old daughter.

Mr. Man, who was in charge of the case, said candidly, "It is not emotionally easy when dealing with sexual crimes because we feel sorry for the victims. At the time of the incident, the girl was only 14 years old. While she was on the witness stand, I had to make her to recount the fact that her father had raped her eight times."

In another case, a girl was reluctant to narrate her ordeal to two male prosecutors, who were in charge of the case, how her father had forced her to perform oral sex on him and molested her. Ms Lau was assigned to take over the case and interview the victim. The girl was between six and eight years old at the time of the crime, which spanned over three years.

Ms. Lau said that even when faced with a female prosecutor, the girl was still reluctant to provide details of the assaults. It was only after three or four interviews, with trust established between them, when the girl eventually opened up.

"For many hours, we just sat down and she would tell me about extracurricular activities and other things, but as soon as she had to talk about the incidents, she would become reticent. I spent a lot of time coaxing her to make her trust me, and finally she told me what happened."

Ms. Lau said, "I felt very distressed at the time because I knew that asking her to recall the experience of being sexually assaulted would bring her a lot of pain."