A

PP

v.

RUSYDI OKP HARUN

B

HIGH COURT, BRUNEI DARUSSALAM
MOHAMMED SAIED CJ
[CRIMINAL TRIAL NO: 17-2003]
12 JUNE 2004

C ***CRIMINAL PROCEDURE:*** *Statement - Ordinary statement - Statement of accused charged with raping stepdaughter - Recorded by Senior Inspector of Police - Declaration not signed by the defendant and the Senior Inspector of Police - Whether statement reliable - Criminal Procedure Code (Cap. 7) s. 117(1)(2)*

D ***CRIMINAL LAW:*** *Rape - Penal Code, s. 376(2) - Allegation of - Penetration - Whether sufficient evidence of penetration - Penal Code (Cap. 22), s. 375 - Credibility of victim - Whether adversely affected - Whether court satisfied beyond reasonable doubt that defendant was guilty of offence of rape*

E

EVIDENCE: *Findings - DNA findings - Semen detected on cloth allegedly used in rape incident - Semen matched DNA profile of blood specimen of defendant - Whether conclusion unchallenged - Whether DNA findings undisputed - Whether this was strong evidence corroborating the*

F *testimony of the victim*

EVIDENCE: *Medical evidence - Findings - Whether sexual intercourse ruled out - Whether medical evidence offered substantial corroboration to the evidence of Miss X*

G

CRIMINAL PROCEDURE: *Sentence - Offence of rape - Stepfather raping stepdaughter under 14 years of age - Whether a serious case which called for condign sentence*

The defendant was alleged to have committed rape by having
H sexual intercourse with a Miss X, aged 13 years and 9 months without her consent, an offence punishable under s. 376(2) of the Penal Code. On 23 April 2003, the defendant was alleged to have collected Miss X from school and drove her to a lonely spot in a jungle, the girl maintaining that the defendant had lain on top of
I her and she felt his penis entering and she was in pain. According

to Miss X, the defendant had ejaculated outside her body on a piece of cloth used as a floor mat in the car. The girl did not complain or report the matter for fear of defendant's threats against her if she did. She had even denied the incident to her mother (PW4), who had received an anonymous telephone call informing her that her daughter had been seen coming out of the jungle with the defendant. Three days later, Miss X's aunty (PW3) had asked the girl to tell her the truth because the police had called. Miss X felt scared and recounted the incident. A senior inspector of police recorded an ordinary statement from the defendant but neither the defendant nor the senior inspector signed the declaration at the back of the statement form. The defendant denied taking his stepdaughter into the jungle on 23 April 2003, just as he denied having sexual intercourse with her during the period of time. He maintained that he had taken his stepdaughter straight home from the school, and on the following day when it was alleged that he had again picked up the girl from school, he maintained that he was on duty and had not left the fire station at the relevant time. The burden was on the prosecution to prove each and every element of the charge beyond reasonable doubt and that the burden on the defendant, if he was to prove any facts, was the lesser burden of proof on a balance of probabilities.

Held:

(1) The declaration was there for a specific purpose. It was imperative that not only the recorder of the statement reads out and explains it to the accused person but also asks him to sign in her presence there and then, and that the recorder and the witness affix their signatures to it as well then and there. Merely to say that the recording officer had overlooked to sign it, or believed or took for granted that the defendant had signed the declaration was not an appropriate or acceptable explanation. Such slipshod and careless manner affects the entire statement. It was unjust and wrong in principle to place any reliance on the statement. (paras 71, 72 & 73)

(2) Miss X's claim that the defendant had collected her from school on 24 April 2003 was contradicted by both the defendant and his witness DW2, the CRO, whose duty it was to maintain the attendance book and the day/night book

recording the movement of the staff and their whereabouts. It appeared obvious from the two books of record maintained at the fire station when compared with the evidence of both the defendant and the CRO that they did not reflect the true and actual position. The procedure was lax, not fool proof, and was not always followed so that it could be easily manipulated and used to suit one's convenience as and when required. It could not be said with any certainty that it would reflect the correct position and whereabouts of the staff at any given time. Those shortcomings which were clearly deliberate in keeping an accurate and true record in the day/night book lent credence to the evidence of PW4 that the defendant had collected her from the police station on 24 April 2003 at lunch time, dropped her home to cook lunch and had proceeded to fetch Miss X from her school, and later returned home with the girl. (para 86 & 87)

(3) Admittedly, Miss X had not made a spontaneous complaint, nor was it a voluntary one. It was from the standpoint of a frightened little girl who had allegedly been warned a few times of the dire consequences if she revealed to anyone what the defendant had done to her. The court does not think that the circumstances in which Miss X narrated what had befallen her could be said to adversely affect her credibility or consistency in any way. In the circumstances of this case and scrutinizing the evidence closely, particularly of a girl still of tender years as against her stepfather, a fireman much bigger and stronger than her, taken to a lonely spot in a jungle doing her stepfather's bidding, her conduct showing absolute obedience and submissiveness to the defendant's directions and not mentioning the incident to anybody later at home out of the fear that the defendant had instilled in her mind of the dire consequences to her if she reported it to anyone at home, were all clear and distinct pointers to the mental state of the girl. Considering what had befallen her in such a situation, it was hard if not quite impossible to take a contrary view. (paras 88 & 89)

(4) The owner of the car BQ5095 gave evidence that she had placed a blue green cloth in her car, and that it was in the car on the day of the alleged incident. One Dr Syn, whose report was admitted by the defence, detected semen on the same piece of cloth, and according to his unchallenged

conclusion it matched the DNA profile of the blood specimen of the defendant. There was no extraneous evidence which might cast doubt on the presence of the defendant's semen on exh. P2 seen in the car driven by the defendant on the day of the incident or any other evidence which conflicted with the suggestion that the defendant was responsible for the crime stain. The court was satisfied beyond reasonable doubt that the undisputed DNA findings placed the defendant at the scene which was at the place identified by Miss X. This was strong evidence corroborating the testimony of Miss X. (paras 94 & 95)

(5) The medical evidence taken in its totality did not rule out sexual intercourse having taken place. Both doctors who examined the girl have extensive experience in their fields of specialty and neither was prepared to rule out sexual intercourse having occurred with Miss X. Both emphasized that non-presence of the hymen and absence of any injury to her vagina did not negative sexual intercourse having occurred. There were quite a lot of discharges found within her vagina, which was indicative *inter alia* of sexual intercourse having occurred. This court was satisfied that the medical evidence offered substantial corroboration to the evidence of Miss X. (paras 100 & 101)

(6) Having considered the veracity of the witnesses in the light of the case as a whole and for reasons given, this court accepted the prosecution evidence, including that of Miss X, as true. This court was satisfied beyond any reasonable doubt that the defendant was guilty of the offence of rape of Miss X, a girl under 14 contrary to s. 376(2) of the Penal Code as charged and was convicted accordingly. (para 105)

(7) The defendant, as the stepfather of the girl, breached the trust which his conduct entailed in relation to his stepdaughter, taking advantage also of her youth and her helplessness in a lonely place which led to her absolute submissiveness to his directions. Because he pleaded not guilty, he was not entitled to the discount given usually to those who plead guilty, thereby saving the victim the unfortunate experience of having to give evidence in court of an intimate nature, as well as the mental torture the girl was made to endure. This was a serious case by any account, and deserved a condign sentence. (paras 114 & 115)

A ***Per curiam:***

(8) Men who consider such girls of tender years, be they their own daughters or others not related but of the same age group, as soft targets for the gratification of their base and evil
B intentions, must expect no mercy from these courts. (para 119)

[A sentence of 15 years' imprisonment and 15 strokes fully merited in this case to commence from the date of his remand in custody.]

C **Case(s) referred to:**
B (A Minor) v. DPP (HL) [2000] 2 AC 428
Junit v. PP [1994] JCBD 347
PP v. Amir Mohammad & Ors [1996] 5 MLJ 159
R v. K [2002] 1 AC 462
D *R v. Millbery & Ors [2003] 2 Cr App R (S) 142*
Reg v. Prince [1875] LR 2 CCR 154

Legislation referred to:
Criminal Procedure Code, s. 117A, 117(1), (2), 221
Penal Code, ss. 375, 376(2)

E **Other source(s) referred to:**
Ratanlal & Dhirajlal, *Law of Crimes*, 24th edn, pp 1789, 1790

For the PP - Pengiran Jasmine Bahrin DPP (Cik Noradinah DPP with him)
For the defendant - Hj Zul Sukarla; M/s Zul-Sukarla Law Office

F

JUDGMENT

Mohammed Saied CJ:

G **[1]** The defendant was charged with the offence of rape in that on 23 April 2003 between 12.45 to 1.15 in the afternoon in the vicinity of Kampong Sungai Tanit, Temburong, did commit rape by having sexual intercourse with a Miss X aged 13 years and 9 months without her consent, an offence punishable under
H s. 376(2) of the Penal Code.

[2] Section 375 of the Penal Code defines the offence of rape as follows:

I

375. 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 five 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 her consent when she is under 14 years of age.

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

[3] The following facts were agreed:

1. At all material times, the defendant was Miss X's (female, date of birth 7th July, 1989) stepfather. The defendant is married to Miss X's mother.

2. On 23rd April, 2003, at about 12.45 midday, Miss X, who was on that day aged 13 years and 9 months was picked-up from her school, Sekolah Menengah Sultan Hassan, Bangar, Temburong, Brunei Darussalam by the defendant who was driving motor vehicle registration No. BQ5095.

[4] The mother of Miss X is PW4. Miss X is her daughter from a previous marriage. She is now married to the defendant who is a fireman and they live at the firemen's barracks, Temburong. PW4 works as a cleaner at the Temburong Police Station.

[5] It is agreed that Miss X was born on 7 July 1989. She lived with her grandmother (PW1) and her grandfather (PW2) in Kampong Puni, Temburong. Living with them also is their other daughter (PW3) with her husband and their four children.

[6] Miss X gave evidence *via* one-way video link. There were TV monitors in the courtroom: one on the judge's bench, one for counsel and the third was at a convenient place for the defendant to see the image of PW5 clearly on the monitor. The sound

A system worked satisfactory through the TV monitors. PW5 sat in a room adjoining the court where the trial was being conducted. One court interpreter sat with her in that room throughout her evidence. The door of this room was kept closed and was opened only once when Miss X was asked to identify her assailant. A
B person standing in the door of the adjoining room where PW5 was would be directly opposite the dock where the defendant was seated facing the same door. Her evidence was taken in camera.

[7] In April 2003 PW5 was studying in Form II at the Sultan
C Hassan Secondary School in Bangar. A relative drove her to school in the mornings. Her grandmother (PW1) said that the school is about 2 1/2 to 3 miles from her home and that her mother (PW4) drove her to school. The school finishes at 12.30pm. Her mother would collect her from the school at
D 12.30pm, and take her to her grandmother's place. According to PW5 she would get home in six to eight minutes, depending upon the state of the motor traffic at the time. She attended a religious school, the Puni Primary School, in the afternoon, and was in Primary V at the time.

E **[8]** On 23 April 2003 Miss X waited for her mother after the Secondary School finished at 12.30pm. At about 12.45 she saw her stepfather instead in her mother's car, a black Toyota BQ5095. This fact was admitted by the defence. Miss X got into
F the car. On the way she noticed that the defendant took a different route, which led to the arabic or religious school, but not the one that she attended. She said that the defendant proceeded to a small road leading to Sungai Tanit, and there was no traffic on the road. She asked where he was taking her, to which the
G defendant replied, "arah datu", without mentioning whereto. He drove into a jungle and stopped at a small junction, where there were trees and rocks on both sides of the road. The defendant picked-up a blue-green cloth from the passenger side floor of the car, and asked her to get out of the car and follow him. They
H walked for about four minutes and he led her to a small path going into the jungle. There he asked her to take off her skirt and underwear. She did as told. She saw there was a folded colourless cloth on the ground, which the defendant spread out, and asked her to lie down on it. Miss X said that the defendant
I then had sexual intercourse with her. Explaining the action she said that the defendant's penis entered her vagina, it felt hard and

she felt pain as it entered her vagina. She could not recall for how long it continued. She said that after the sexual intercourse he ejaculated on the blue-green cloth. A

[9] Miss X did not say anything but her stepfather admonished her, saying, "Don't tell your grandmother, or she will kill you", and that if she told anyone, the police would arrest her. She said that her father was scaring her and she was afraid. After he had wiped his penis with the blue-green cloth, he asked her to dress up, which she did. He took along the blue-green cloth but she did not know what happened to the transparent cloth. She said that he was scaring her and told her, "Don't tell your aunt. Don't tell anybody". B C

[10] The girl said that she felt sad about the incident, she was afraid and had pain after the intercourse. She did not understand why her stepfather had done this to her. D

[11] The defendant placed the blue-green cloth like before as floor mat in the car. On the way after he exited from the junction the defendant reminded her, "Don't forget. Don't tell anybody about what we did". E

[12] The defendant took her to her grandmother's home. She did not have a watch but felt that she was late getting home. She was in a rush. She rushed in, and had a bath. Her private parts felt painful and she saw a "bit of blood there". Upon being asked by the court what she meant by "a bit of blood", she said she meant a small quantity, and that when she took off her underwear she noticed blood on it also. She cleaned her underwear and walked to the religious school. She said that because she was afraid, she did not tell anybody about what had happened. F G

[13] Miss X said that she had started to menstruate at the age of 12, but was not having her menses at the time of this alleged incident.

[14] Her mother PW4 said that on previous occasions whenever her husband fetched her daughter from school they would get home by 12.45pm, but on the 23rd the defendant was late returning home by about half hour. When she remarked that he was late the defendant is alleged to have replied that he had gone to the station, that being a reference to his place of work. She H I

said that this late return home made her restless and worried. She said it was difficult for her to explain her state of mind but she did not feel too good. However, she took Miss X to her grandparents' home.

[15] The following day, 24 April, while at work at the police station PW4 received a telephone call from an anonymous person who told her that her husband was seen taking her daughter past the arabic school as though they were coming out of the forest, and the caller advised her to ask her daughter. She said that because of this telephone call she wanted to go to the school to ask her daughter about what she had been told but the defendant beat her to it as he had the car. She said that he first dropped her home as she had to cook lunch and then went to fetch her daughter.

[16] Meantime, as usual Miss X waited for her relative to take her to school, and at 12.30 waited for her mother to take her home. Instead of her mother, she saw her stepfather waiting for her. He took her to her mother at the firemen's barracks. On the way he said to her that when they reached home and her mother asked why she was late getting home, where she went after class, she should just reply that her stepfather was getting something from his friends at Kampong Sungai Tanit.

[17] The girl said that when they reached her mother's home in the barracks, she did ask her that same question and Miss X repeated what the defendant had taught her to say in reply. Her mother seemed to believe her. After her mother and the defendant finished their lunch her mother took her to her grandmother's home. On the way her mother asked her if her stepfather had disturbed or touched her breast or anything. Upon being told that it was not so and that it was true he had not done anything to her, she felt relieved but PW4 said that her heart was beating faster. PW4 explained to her that her reason for making that enquiry of her getting home late the previous day was because somebody had told her that Miss X had been seen coming out of the jungle at Sungai Tanit. Again, Miss X denied going to the jungle and said that that they had taken that route for her stepfather to get his things at Kampong Sungai Tanit.

[18] Miss X said that after religious school on 24 April she went to stay at a relative's home until 26. But on 25 her auntie (PW3) telephoned and asked where had the defendant taken her on 23 April. She gave her the same reply that she had given to her mother. Her auntie asked her to return home, which she did. Her grandmother had gone to visit a relative and upon her return home she saw that Miss X was alone in her room.

[19] PW3 saw her niece in her room and asked if it was true that she and her stepfather had gone to Sungai Tanit for his things. She repeated that it was true. After her auntie left the room the telephone rang and PW3 picked it up. Then she returned to Miss X and said, "You better tell the truth. That was the police on the telephone". Hearing this Miss X felt scared and then told her the truth, that Rusydi had raped her. At about the same time her grandmother returned from Lawas and, upon being told of the incident, PW1 asked her if it was true that Rusydi had taken her to the jungle behind the arabic school, unfolded a cloth and had asked her to lay down. PW1 then asked her, "What did he do? Did he take you as a wife, did he work on you?" She explained that she meant to ask her if he had raped her. Miss X replied that he did not put the water in, which the defendant had explained to her that had he done so she would get pregnant, and that was why he had poured it on the cloth. The girl told her that the defendant had advised her not to tell her mother or she would chop her to death.

[20] Then her grandmother took her to the firemen's barracks in her car. When her mother (PW4) came out, the grandmother asked her if she knew that Rusydi had raped her daughter, and said, "Did you know that Rusydi take her as a wife? Aren't you ashamed marrying the daughter, marrying the mother?" Hearing this PW4 asked her daughter who was still in the car to come inside quickly as the defendant was at home and wanted to go to Limbang. PW5 went inside and her mother asked her to speak to the defendant and tell the truth. Before she could speak the defendant is alleged to have said that rather than disturbing her he would prefer to disturb the prostitutes in Limbang. He continued to say, "You are my stepdaughter. I see you as a daughter. Why should I disturb you, I have other relatives who I would disturb rather than you".

[21] Later her uncle, Abdul Nasir bin Haji Besar (PW7), rang her from Brunei Muara and asked if it was true that her stepfather had disturbed her, to which her answer was in the affirmative.

[22] The grandmother took the girl and her mother to the police station. Miss X appeared as if she was afraid, her face was pale and she was silent. PW1 made a report about this matter. That report is one of the items that had been agreed and is to the following extent:

> On 25 April, 2003 at 1500 hours, at that time I was at home, address No. 28, Simpang 321, Kg Puni, was informed by my daughter (name suppressed by Court) PW3 where she said that Miss X (F 13th) was believed to be incest by the stepfather, named Rusydi bin OKP Harun (M 40th).

[23] Miss X was asked about it and she told the police briefly that her stepfather had raped her and told the police where it happened.

[24] The police asked the defendant to report at the police station. He arrived in his wife's car. Three or four policemen took Miss X to her mother's car, where she pointed out the blue-green cloth on which, according to her testimony, the defendant had ejaculated and she had seen semen on it on 23 April. In court she identified the cloth in photographs P/D and P/E. PW1 said that she used that piece of cloth as a floor mat in the car, and had put it in the car about two months before the incident.

[25] After Miss X had given her statement and identified the blue-green cloth, she led the police to the scene.

[26] Subsequently during the trial more facts (1 to 11) were agreed between the parties, and reduced into writing stating the name of the victim as well as of her close relations. In setting out those agreed facts and throughout this judgment I have suppressed the names mentioned in the document, and instead given their witness number wherever I found it necessary. Continuing the numerical order from the previously agreed two facts, those additional agreed facts are as follows:

> 3(1) In the afternoon of 25th April, 2003, the victim (Miss X) together with her mother (PW4) and her grandmother (PW1) attended Temburong Police Station to lodge a report attached herewith as Appendix 1.

4(2) After giving her statement to the Royal Brunei Police Force at Temburong Police Station Miss X identified to the said police a blue-green cloth which Miss X has identified and has been tendered as P2. Photos marked D-E were taken of P2 by PC4372 Joannes anak Mulok in the motor vehicle registration No. BQ5095 Toyota Starlet which it was found in is attached and marked herewith as Appendix 2 together with the key produced by PC4372 and certified translated copy.

5(3) P2 was kept in police custody and a Police Exhibit Form was duly issued, marked and annexed as Appendix 3.

6(4) Miss X was then brought by the police to the place of incident. She was then brought to the jetty outside Temburong Police Station and was brought to Bandar Seri Begawan jetty *via* a police boat together with several police escorts. P2 was also brought by the police escorts.

7(5) Upon arrival at the jetty in Bandar, Miss X was passed to Police Officers from the Domestic Violence Unit including W/Sgt. 2000 and was then brought to RIPAS Hospital where a medical examination was conducted by Dr Ni Ni, P2 was also handed to W/Sgt. 2000 which she brought to the Domestic Violence Unit.

8(6) Miss X was then placed in a Government welfare house called Taman Nurhidayah, Pulaie where she still stays now.

9(7) On 28th April, 2003, Miss X was brought by Domestic Violence Unit Police Officers to the scene of the crime *via* a police car. Miss X was first brought to the Temburong Police Station and then to the place of incident.

10(8) At the scene, Police Officer 4256 Hj Jeffry did a sketch plan of the area that was pointed out by Miss X and confirmed by her, a copy of which is marked and annexed herewith as Appendix 4. Police Officer PC4256 Hj Jeffry then took the sketch plan back to the station and produced a fair sketch, marked and annexed herewith as Appendix 4A.

11(9) At the scene, Miss X showed PC4372 Joannes anak Mulok the place of incidents being the alleged place where the motor vehicle registration No. BQ5095 Toyota Starlet was parked by the defendant during the commission of the offence, the entrance to the jungle and the place where the alleged rape took place. The pictures being those marked A-C together with the key produced by PC4372 and certified translated copy is attached and marked herewith as Appendix 2.

12(10) The defendant came to the Temburong Police Station sometime in the afternoon of 25 April 2003. The defendant was arrested and was kept in police custody overnight. On 26 April 2003, the defendant was escorted to the jetty outside Temburong Police Station and was brought to Bandar Seri Begawan jetty *via* a Police Boat. Upon arrival at Bandar Seri Begawan jetty, the defendant was brought to the Domestic Violence Unit, Police Headquarters, Gadong by Police Officers.

13(11) On 21st January, 2004, both the defendant and Miss X gave a sample of blood at RIPAS Hospital. The sample of blood together with the said cloth was brought for DNA sampling at DNA profiling laboratory Centre for Forensic Science, 11 Outram Road, Singapore by the police. A copy of the DNA report is attached and marked herewith as Appendix 5.

[27] The DNA report prepared and certified by Dr Christopher KC Syn, Analyst, Singapore states that three exhibits, wax sealed "Commissioner of Police Brunei" and marked "V.1", "V.2", and "S.1", were submitted to the Centre for Forensic Science by ASP Masni binti Haji Jamil. The exhibits were found to be:

V.1 One piece of cloth. It was examined for the presence of blood, but none was detected. Semen with spermatozoa was detected on the piece of cloth. The deoxyribonucleic acid (DNA) profile was obtained by amplification of DNA extracted from the semen stain on the cloth. The results are shown in the table below.

V.2 One blood specimen, marked (name mentioned but suppressed by Court, the corresponding witness number inserted instead) PW5. The DNA was obtained by amplification of DNA extracted from the blood sample. The results are shown in the table below.

S.1 One blood sample, marked Mohammad Rusydi bin OKP Awang Harun. The DNA profile was obtained by amplification of DNA extracted from the blood sample. The results are shown in the table below.

[28] Explaining his conclusion Dr Syn stated:

The DNA sample of the semen on the exhibit 'V.1' is found to match the DNA profile of the blood specimen marked 'S.1' at genetic loci D8S1179, D21SII, D7S820, CSF1PO, D3S1358, THO1, D13S317, D16S539, VWA, TPOX, D18S51,

Amaelogenin, D5S8178, and FGA. The probability of another person, selected at random from the Malay population, having the same DNA profile, is estimated to be 1 in 3.2 quadrillion (3.2 x 10^{15}). A

[29] At about 5pm, on 25 April, some policemen escorted Miss X in a boat to RIPAS Hospital. Upon arrival at the tambing jetty Insp. Sapiah escorted her to the hospital, where a lady doctor examined her body, including her vagina. Dr Ni Ni Aung (PW9) of the Obstetrics and Gynaecology Department of RIPAS Hospital, with experience of 30 years since qualification and 16 years since fellowship and had worked at RIPAS Hospital for more than seven years, examined Miss X at about 9pm. She did not find any outward sign of injury. She did local examination of her private parts, but saw no obvious injury; she looked for the hymen but could not find it. She said that normally a girl of the patient's age would have the hymen but if she had an injury at a young age she might not have it. She used a small speculum, which she could easily manoeuvre inside the vagina but could not find any injuries. However she found quite a lot of discharges, which could have been normal physiological discharges, or secretions after sexual intercourse or premenstrual discharge. She took the routine swabs from the vagina for the presence of spermatozoa and enzymes, and also took her blood and urine samples to check for infection. She said that absence of injuries did not rule out rape, keeping in mind that Miss X came to hospital two days after the incident; the incident of rape itself may have been gentle or if some lubricant or with a condom some lubricant might have been used. The doctor said that Miss X looked slightly distressed. She opined that the absence of the hymen, the 'plenty' of secretions in the vagina and her slightly distressed condition made her assume that Miss X had been raped as alleged. B C D E F G

[30] Dr Ni Ni Aung handed over the smears that she had taken to Dr Satyavani. She stressed that her line of work was gynaecology, and her sub-specialties were family planning, which included male and female organs and secretions, oncology, sub-fertility, ultrasound and pathology. She explained that present in semen are spermatozoa, acid phosphotase and enzymes, all in high level. Absence of any signs of these from the vagina was not consistent with allegation of rape, for if a condom had been used by the man there would not be any secretions nor would there H I

be any vaginal cells or spermatozoa on the male organ after sexual intercourse. In a question from the Court the doctor said that the other possibility would be that the man had wiped his male organ after sexual intercourse. She said that there would be vaginal cells on the male organ where ejaculation occurs during sexual intercourse but not where ejaculation occurs outside the body of the woman, for instance, on a piece of cloth, in which case she was not sure whether there would be any vaginal cells on the cloth, but she added, "May be".

[31] The other medical evidence came from Dr Pemasiri Upali Telesinghe (PW6), who is a Specialist Pathologist at the RIPAS Hospital. He has been a pathologist for the past 32 years, and has testified in court numerous times. As pathologist he is in charge of all blood and tissue testing on hospital patients, he does autopsies and examines male persons accused of sexual offences and also examines smears taken from victims of sexual offences. On 26 April 2003 he examined smears that had been taken by Dr Ni Ni Aung from Miss X the previous day. He made a written report Path. 457/2003/D (B) dated 30 April 2003. He examined the smear for the presence of spermatozoa, and did tests for acid phosphotase and for bacterial infection or gonococci. Spermatozoa was not detected and the other two tests were also negative. He explained that acid phosphotase is an enzyme secreted by the prostate gland in males. He said that some people do not produce spermatozoa due to previous illness or failure of spermatozoa production by the testes, and there would not be any spermatozoa in males who have had vasectomy, so that to prove the existence of semen, the secretion from the testes was the only way. He explained the gonococci is a sexually transmitted disease and has the shortest incubation period. He said that if the victim of a sexual case is presented for examination after three days of the incident and if the test is positive for gonococci, then the alleged assailant would have gonohorrea in the instant case the test was negative.

[32] Dr Telesinghe said that semen has two components: spermatozoa and acid phosphotase, ie, acid secretion. He said that usually ejaculation contains 6-10 million ml of spermatozoa and about 3000 units per litre of acid phosphate. The reading that he had of the presence of acid phosphate was 5 u/1, which meant that there was no spermatozoa in the sample. He emphasized that this test result did not mean that sexual intercourse had not

occurred. It meant that there was no ejaculation within the vagina. He said that acid phosphotase is an unstable enzyme and if the lady concerned used soap to cleanse herself the alkaline contents of the soap would destroy the acid phosphotase in the semen.

[33] Later Miss X was taken to Taman Nurhidayah, a Government Welfare Home Centre.

[34] Next day, 26 April, she was taken to Gadong Police Station where she made a statement, a copy of which was given to her. At 9am, Senior Inspector Halimah binti Nayan (PW8) of the Domestic Violence Unit took over the investigations of this case in Crime Report 39 of 2003, which was about a girl aged 13 who had allegedly been raped by her stepfather. Half an hour later she saw the girl PW5 in DSP Aminah's office and on instructions proceeded to take a statement from the girl, after which she sent her to Taman Nurhidayah.

[35] The Senior Inspector said that PC4238 Aw Ku Safajaya (PW10) brought the defendant into her office on the same day at 1515 hours. She recorded a statement from him. The defence counsel objected to the admissibility of the statement on the ground that he had made it involuntarily for various reasons: that he had been remanded overnight in Bangar Police Station, Temburong, and was given a plate of stale noodles which he did not eat, and was not given any drink; that overnight at Bangar Police Station police personnel had approached him on a number of occasions and forced him to confess and as a result of those visits he had not had proper sleep; that during those visits he was told that he had better confess because the police at the Headquarters at Gadong would not tolerate him if he did not confess and would be given far worst treatment than what he had received at Bangar; that he was allowed to wear shorts only, it was cold during the night and he was not given any blanket or mattress and had to use a concrete slab to sit or lie on; that the next morning he was given just a cup of tea for breakfast; that he was not given an option to make or not to make a statement other than a confession; that he was not informed of the offence for which he had been arrested and no notice was read out to him; and lastly he was not given any food or drink when he arrived at the Police Headquarters at Gadong, before the statement was taken from him.

[36] I admitted the statement into evidence after holding a *voir dire*. I took heed of the fact that no statement had been recorded from him at Bangar Police Station, that whereas he had allegedly been scared by some police officers at Bangar that he would be hurt at the Police Headquarters if he did not admit the offence, upon arrival at the headquarters, nothing untoward seems to have occurred, and that there was no evidence that he had asked for food or drink at the headquarters and was denied by the police. I concluded:

> Taking into account his complaints about the treatment at Bangar, the evidence leaves no doubt in my mind that the circumstances at the headquarters were totally different. In any case the alleged complaints taken singly or cumulatively are not of such a nature so as to render the statement in question that was made at the Police Headquarters, inadmissible. Those complaints against the police officers at Bangar may call for adverse criticism and may diminish the value of their testimony, but I do not see how the alleged conduct of the police at Bangar would impact the statement that was made at the Police Headquarters to the Senior Inspector soon after the defendant's arrival there. There was sufficient interval of time in between and there is no evidence of anything that might have been done at the Police Headquarters, such as to occasion real and substantial prejudice to the defendant.

[37] Accordingly I ruled that the statement had been made voluntarily and admitted it in evidence under the provisions of s. 117(1) and (2) of the Criminal Procedure Code.

[38] On 28 April, the police escorted Miss X to the scene of the incident, where they took some photographs. Later a rough sketch was prepared. She explained photos P/A, P/B and P/C of the scene. The blue-green cloth (exh. P2) shown in photos P/D and P/E was identified in court by Miss X after it was taken out of a sealed envelope.

[39] The last item of prosecution evidence relates to the occasion when the defendant and his elder sister accompanied by Orang Kaya Ampading and his wife called on PW2, the grandfather of Miss X. According to PW2 who upon being asked by court gave his age as 'one year more than 80', they saw him five days after his granddaughter had gone to Pulaie, that is, she had been sent to Taman Nurhidayah. I may repeat that she was taken to this Welfare Home after Dr Ni Ni Aung (PW9) had finished her examination of the girl on 25 April 2003. On this reckoning those

four persons, including the defendant, would have seen PW2 on or about the 30th of the month. PW2 said that after he had welcomed them, the defendant's sister said that Rusydi had committed a big offence, and went on to say, "We have a big wish and we ask for sympathy, if Rusydi was to be imprisoned for 20 years, ask for reduction and if he was to be whipped 15 times, ask for it to be reduced". PW2 said that his reply was that there was nothing he could do, and it was for the court to decide. He said that he knew the offence committed was rape. According to PW2 the defendant's mother and his sisters came again the following day.

[40] Learned defence counsel submitted no case to answer at the close of the prosecution evidence. I held that a *prima facie* had been made out by the prosecution and put the defendant on his defence. Learned counsel informed the court that he had already explained to the defendant his options under s. 221 Criminal Procedure Code, and as such there was no need for the court to repeat them. He said that the defendant had elected to give evidence.

[41] The defendant (DW1) gave his age as 41. In 2003 he worked as fireman with the Fire Service Department, Temburong, and he was fireman ABKS100. This prefix stands for Ahli Bomba Kelas Satu, meaning "Class Fireman Class 1". He lived with his wife and two children aged about 4 and 6. He said that he went to pick-up his stepdaughter from school on 23 April 2003. The traffic was heavy around the school compound and he arrived at the school at about 12.30. Five minutes later she came and got into the car. He said that it took him about 20 minutes to get out of the school compound because there were too many cars. He said that after leaving the school compound he drove for about 25 minutes in very congested traffic to the firemen's barracks. There his stepdaughter went inside his home to the sitting room where she met her mother, and he went in to eat. He said that the mother and daughter were chatting and later his wife drove her daughter in her car to her grandmother's home, while he stayed at home.

[42] The defendant denied taking his stepdaughter into the jungle on 23 April 2003 between 12.45pm, and 1.15pm, just as he denied having sexual intercourse with her during the period of time.

[43] An officer at the fire brigade known as the CRO keeps a record of all that happens at the fire station. On 24 April the CRO on duty was ABKS110 Lain anak Asun (DW2). All the particulars in the attendance book are filled by the CRO on duty.

[44] DW1 said that he was on duty on the 24th from 9am, until 1.15pm, on the 25th April, and during those duty hours he was not allowed to go out anywhere, not even to his home, except to answer a fire alarm.

[45] The defendant said that he did not fetch his stepdaughter from school on 25 April 2003, and was not home in the firemen's barracks during the morning. He said that after finishing his duty that day he returned home, had a bath and rested at home in the bedroom. Suddenly his wife woke him up and asked him to go to the living room, and when he got there she said in the presence of his mother-in-law and his stepdaughter that he had raped his stepdaughter. He denied the allegation and said to his wife, "No, because I consider her like my own daughter". His mother-in-law also made the same accusation, adding that she would report the matter to the biological father of PW5, who would take the necessary action. He repeated his denial of the accusation. He said that his mother-in-law took him to the police station. He went in a different car.

[46] At the police station the defendant went straight into the investigating officer's room where he was questioned. One of the officers asked him to confess and he alleged that he was threatened also.

[47] The defendant denied the suggestion that he had ever taken Miss X into the jungle in the vicinity of Sungai Tanit.

[48] The defendant was shown the photographs PD and PE. He said he did not recognize the cloth depicted in the photographs.

[49] At this point in evidence of the defendant, the Deputy Public Prosecutor referred to s. 117A of the Criminal Procedure Code (Cap. 7) and submitted that the defendant could not without leave of the court adduce evidence in support of an alibi unless "before the end of the prescribed period, he gives notice of particulars of the alibi". I pointed out that the defence seemed to be a complete denial of the charge and that I did not think that the defendant was relying on any alibi. Learned defence counsel confirmed that the defence was not one of alibi. The prosecution did no pursue this matter any further.

[50] The defendant was shown exh. P5, the statement that he had made to the police. He agreed making all the answers recorded in the statement except the long answer to the 5th question, which concerned his whereabouts on 23 April 2003. His answer was:

> In the morning I was at Kampong Kinua, Jalan Temada Temburong together with my first wife and at about 0900 hours, I was drinking whisky about half a bottle mixed with ice to be a medicine to my body, if I do not drink, my body is weak and shaky. At about 1150 hours I went to Sekolah Menengah Sultan Hassan Bangar to take my stepdaughter named (the name has been suppressed by Court) PW5 after mutual consent from my second wife. When I arrived at the school at about 1245 hours, we then went straight to one jungle area where I do not really remember. When we arrived there, I then stopped my car and my stepdaughter went out and I followed her from behind. Not far from the said place my stepdaughter then stopped and I was also bewildered. At the time, she brought a piece of coloured cloth which I was not sure either blue or green which she had taken from the front passenger seat foot place, which she laid out ontop of the ground scattered with. Then I asked her, what is this? At that time she did not answer and she just smiled. Then she took off her long skirt and her underwear and held my hand, I then opened my trousers and had intercourse with her and at the time of intercourse, I came to realise and was scared and then I stood up and ejaculated on the cloth. After that I then brought her back to the house of her grandmother in Kampong Puni and then I went back to my barracks and went straight to sleep.

[51] The defendant said that he did not give this answer, this because he did not agree with this paragraph. He said that the instruction he received about signing this statement was, "Wherever you agree you sign and wherever you disagree you need not sign". He did not sign at the end of the above paragraph because he did not agree to it.

[52] With regard to the declaration on the reverse side of the first page which does not bear his signature the defendant explained that he did not sign it because "what is found in the declaration as to what I had done on 23 April is not the same" as his evidence in court the previous day. His counsel asked him, "Did you ever tell the police the same as you told the court yesterday? A. No, because I was disturbed mentally".

[53] He said that he was not questioned before he made his statement, exh. P5, nor in Temburong. He denied seeing the blue-green cloth which was shown to him by his counsel and replied that he had never seen it before.

[54] The defendant agreed that he had given his blood sample at RIPAS Hospital willingly in the course of police investigation into this case but he was never told the purpose for which it was required. He said he did not harbour any fear when he gave his blood sample.

[55] The defence called CRO KS110 Lian anak Asun (DW2) of the Fire Service Department, Temburong. He has a service record of 17 years or so with this department. Amongst his duties as CRO is to record the movement of the staff coming into and going out of, the fire station in the day/night book, exh. D2 and D2A. He said in 2003 the staff at Bangar fire station totalled 30, and were divided into three groups: A, B and C, with him being the CRO of the three groups. Each group had work shift duty of 24 hours, so that at any given time only one group would be on duty while the other two were resting. The group on shift had to stay on duty 24 hours, and they contributed for buying food which they cooked at the fire station. They could sleep at the station while on stand by duty.

[56] The other record that is kept is of the individual duties of members of the group. This is the attendance book, exh. D1 and D1A. According to this record he himself was on duty on 24 April 2003. In the group on duty 'B' sheet that day was ABKS100 who was the driver of the Fire Brigade Vehicle ET/1. Group B started duty at 9am, that day and were to come off at 9am, on the following day, the 25th.

[57] DW2 said that any member of the group on duty desirous of leaving the station for whatever purpose had to obtain permission to leave and it would be recorded in the day/night book, but not in the attendance book.

[58] He said that there was no entry in the day/night book record for 24 April 2003 of the defendant leaving the station during duty hours. He said that as the duty CRO he sounded the bell at 1215, signifying the mid-day break for Group B for their lunch and rest. He said that at that time the defendant was at the station and had his lunch there too.

[59] The record for the following day, 25 April showed that the defendant who was one of the five on duty went out to Bukok Primary School on a cleaning campaign, headed by ABK62. They are recorded as having left at 0727 but he did not know when they returned as he had knocked off duty at 9am.

[60] The Indian counterpart to our law is s. 375 of the Penal Code. The only discernible difference is that it has six descriptions of the offence, rather than five as in the local legislation. Missing from our law is the fifth Indian constituent; otherwise the remaining five descriptions are the same. The Indian sixth clause and our cl. (e) are in pari material, in that they deal with the same subject matter. In the *Law of Crimes* by Ratanlal & Dhirajlal, 24th edn., the learned editors in their commentary on this section say at p. 1789:

> If the girl is less than 16 years of age, for 16 substitute 14, "her consent is immaterial. A girl who is below 16 years of age if taken forcibly by the accused persons to another city and kept there for a long period, even if she had consented to accompany them it would not amount to the exercise of discretion. If once it was proved that the girl was below 16 years of age, the question of consent did not arise and the fact that no injury was detected on the private parts of the girl or that she was found to have been used to sexual intercourse also become irrelevant. Even if the girl who is 14 years of age, is not 'modest' and is a willing party or even if she invited the accused to have sexual intercourse with her, the act would still be an offence under this section.

[61] It is clear therefore that it is the age of the victim minor girl that is the deciding factor, consent or the absence of it being irrelevant. I do not think that it could be said of this penal provision that it is capable of two interpretations and the interpretation which is most favourable to the defendant, must be applied. That this section of the law is one of strict liability regarding the age ingredient of the offence is clear, and one could trace its origin to *Reg. v. Prince* [1875] LR 2 CCR 154. Whereas doubts have been expressed elsewhere as to the whether the strict liability regarding the age ingredient would further the purpose of the penal provision, the principle enunciated in that ancient case had remained unaltered until only recent years in some countries there has been some change keeping in conformity with their own peculiar social and moral attitudes which may not

universally be the same, see for example *B. (A Minor) v. DPP (HL)* [2000] 2 AC 428; *R v. K* [2002] 1 AC 462, HL. But the old penal provision is still to be seen in the Penal Codes of some other countries in this region besides Brunei Darussalam, to name but a few Malaysia, Singapore and India.

[62] It follows that where the prosecution establishes the girl's age being below 14 years at the time of the occurrence of the sexual intercourse, a defence that the defendant believed on reasonable ground that she was over 14 years of age would be to no avail and the defendant would be guilty of the offence contrary to this section and be punishable for the rape irrespective of any such belief on the part of the defendant.

[63] In this case there is no contestation as to the age of the girl. It was agreed by the defence that the date of birth of Miss X was 7 July 1989. She was thus 13 years and 7 1/2 months of age at the time of the alleged offence, and as such it would fall under s. 375(e) of the Penal Code. It was also agreed that the defendant is the stepfather of Miss X.

[64] The other ingredient that has to be proved by the prosecution beyond any reasonable doubt is that the defendant had sexual intercourse with Miss X on the day in question. According to the explanation appended to s. 375, penetration is sufficient to constitute sexual intercourse necessary to the offence of rape. In the *Law of Crimes (supra)* the authors comment in para 18 at p. 1790:

> To constitute penetration it must be proved that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. The only thing to be ascertained is whether the private parts of the accused did enter into the person of the woman. It is not necessary to decide how far they entered. It is not essential that the hymen should be ruptured, provided it is clearly proved that there was penetration even though partial. For the offence of rape to be committed, it is not necessary that there should be complete penetration ... in *Reg v. Ferroll Green*, J, directed the jury that vulval penetration only was sufficient, under the law of India, to constitute rape without actual seminal emission.

[65] There the victim was aged six, she had not complained nor was there any injury to her private parts. She was found to be suffering from gonorrhoea, so was the accused. It was clear that

the penetration, if any, had been only vulval. Green J, directed the jury that this was sufficient to constitute rape, and the accused was convicted of rape.

[66] Learned defence counsel rightly submitted that the burden on the prosecution is to prove each and every element of the charge beyond reasonable doubt, and that the burden on the defendant, if he has to prove any facts, is the lesser burden of proof on a balance of probabilities.

[67] As has been mentioned earlier I ruled the statement made by the defendant to the police in the course of investigations to PW8 admissible, despite some objections from the defence. If what is stated therein is accepted, the statement would not only conflict with the defence upon which he relied during trial but may add further to the strength of the prosecution case. The Senior Inspector recorded it on Police Form 22 after she had read over to him the declaration at the back of the first page. The defendant is alleged to have said that he understood the declaration and agreed to give a statement in the form of question and answer. After it had been recorded PW8 asked the defendant to go through it, make such amendments as he wanted. The Senior Inspector said that he did not have any amendments to make and she read out the printed declaration at the back of p. 1 and then he signed the statement, and so did the Senior Inspector.

[68] In order to appreciate the importance of this declaration it is reproduced hereunder:

> I, (name) declare that this statement (consisting of ... pages, each signed by me) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I may be liable to prosecution if I have willfully stated in it anything which I know to be false or do not believe to be true, and shall be signed by the maker, the recording officer and the interpreter.

[69] This declaration, which is in two languages – Malay and English, – requires the maker to indicate in the dotted space the number of pages of the statement, and at the end of the declaration requires the signatures of the person making the declaration, the recording officer and the interpreter. The original Malay version of this declaration has not been completed and of the three persons required to affix their signatures thereto, there appears only the signature of the recording officer who also filled

in the defendant's name and the number of pages. The name of the maker is missing from the English version, so too the number of pages; the maker of the declaration has not signed it nor has the recording officer, the only signature at the bottom is that of the witness, PC4256 (PW3). What he was witnessing remains a mystery to me.

[70] During cross-examination it was put to the recording officer that the declaration at the back of p. 1 which she claimed to have read out to the defendant and which the defendant said he understood, did not bear his signature notwithstanding that he had been specifically asked to sign at the end of the declaration. The Senior Inspector said that she did not ensure that the defendant had signed at the end of the declaration. When re-examined by the Deputy Public Prosecutor, the Senior Inspector explained that she had seen the defendant put his signature against every answer, so had believed that he had signed the declaration also.

[71] The declaration is there for a specific purpose and it is imperative that not only the recorder of the statement reads out and explains it to the accused person but also asks him to sign it in her presence there and then, and that the recorder and the witness affix their signatures to it as well then and there. Where the maker of the statement refuses to sign the declaration in all respects, the fact of his refusal ought to be recorded. Whereas all the other answers made by the defendant bear his signature at the end of each answer save the 5th, the space for his signature at the end of the declaration is conspicuous by the absence of his signature. In this situation the defendant's explanation that in not signing at that particular place was in compliance with what he had been told by the recording officer, that is, he was to sign only if he agreed with his answer as recorded, seems to me quite reasonable. Explaining the reason why he did not sign at the end of that particular answer to question 5 he said that it was because he did not admit what had been recorded.

[72] I must emphasise that such slipshod and careless manner of recording such a statement may, as in this case, affect the entire statement. As is apparent from the wording of the declaration the signature is to the truth of what is stated in each page of the statement, so that the absence of the signatures of the three rather going to the truth of what is stated on each page, in my opinion effectively goes to negate it irrespective of the answers that

do bear the defendant's signature. The lone signature of the witness at the bottom of the declaration is of no avail in such circumstances and does not and cannot supply that which is missing that the declaration requires. To merely say that the recording officer believed or took for granted that the defendant had signed the declaration and that she had overlooked to put her signature to it is not an appropriate or acceptable explanation for those omissions.

[73] In the circumstances I am led to the conclusion that it would be unjust and wrong in principle to place any reliance on the statement, PP5, and I am ignoring it completely.

[74] Learned defence counsel's next argument is the credibility issue, referring to the credibility of Miss X who had claimed that the defendant had collected her from school on 24 April 2003, which it is submitted is contradicted by both the defendant and his witness DW2, the CRO at the time, based on the fire station's attendance book and the day/night book. It is submitted that contrary to the claim made by Miss X that her stepfather had collected her from the school on 24 April 2003 the two record books of the fire station supported the defendant's contention that he did not go to the school to fetch Miss X home. It is also maintained that the defendant could not have left the fire station during lunch break that day because the only way out was through the office of the CRO, who testified that he did not see any of the staff pass through his office on the way out.

[75] The attendance book (exh. D1A) shows that the defendant ABKS100 was on duty as driver of the Fire Brigade Vehicle ET/1 from 0900 hours on 24th April until 0900 on the next day. The excerpt from the day/night book (exh. D2A) for 24 April 2003 shows that the defendant was on duty in Group B that day as driver of ET/1 from 9am, on the 24th to 9am, on 25 April. DW2 said that any member of the various groups on duty wanting to leave the station for whatever purpose would have to get permission from the fireman and then it would be recorded in the day/night book only. He said that the record for 24 April 2003 did not have any entry to show that the defendant left the station during duty hours. He testified that as CRO that day he sounded the bell at 1215 hours for the midday break for Group B and members of this group including the defendant rested at the fire station and had their lunch there.

[76] Under cross-examination the CRO (DW2) admitted as recorded in exh. D2A that he left the station at 9am, to see a doctor. He said that he returned before 10am. He agreed that his return is not recorded in exh. D2A. He explained the reason for the non-recording of his return to the station was that he had not gone out for a long time. He disagreed with the suggestion that anyone could leave the station without being recorded in the book.

[77] The CRO's attention was next drawn to the entry in exh. D2A for 0906 hours, recording the departure from the station of vehicle ET/1 driven by fireman driver (FD) 100, that being the defendant, for a test drive to Bangar Camp. Again, he agreed that there is no record of when this vehicle returned, the reason he gave was that Bangar Camp is not far from the fire station.

[78] The CRO explained further under cross-examination that his temporary replacement CRO during his absence from his office would jot down the happenings during the absence on a piece of paper, which he (DW2) would transfer into the day/night book on his return. He said that his replacement, who was there in his place at the time, forgot to write down the time people including the defendant returned from Bangar Camp.

[79] DW2 said that on the 24th he went for lunch at 1216 hours, after his replacement had had his lunch, and returned after 5 minutes. He agreed that he was not with the defendant the whole time when he was away for lunch because DW2 had to return to his duty, but he disagreed with the suggestion that the defendant had left the premises of the fire station sometime during lunch time without his knowledge. He did not agree when it was put to him that the defendant did not have lunch at the fire station that day, but he agreed that he was not side by side with the defendant between 11.30am, and 1.30pm, that day. He said that none of them are allowed to leave the fire station to pick-up their children from school.

[80] When re-examined DW2 maintained that he saw the defendant at the station when he returned from the hospital having his lunch at the station and had not seen him leave the station after lunch. He said that it was not possible for him to have left without DW2 noticing him, while agreeing that there are entrances and exits which are closed during day-time and the firemen on duty had to pass through the CRO's room to go out of the fire station.

[81] Based on this evidence learned counsel for the defendant submitted that the claim of the defendant's wife (PW4) that her husband had collected Miss X from her school on 24 April had been "proved to be a lie". Counsel relied on *Public Prosecutor v. Amir bin Mohammad & Others* [1996] 5 MLJ 159, 165 where Abdul Malik Ishak J, quoted from the judgment of Syed Othman, J, in *Tua Kin Ling v. Public Prosecutor* [1970] 2 MLJ 61, 63 this passage:

> No doubt the rule is that if a witness had lied on one or two points it does not necessarily follow that his whole evidence should be rejected. (*Khoon Chye Hin v. Public Prosecutor* [1961] MLJ 105). But it is the duty of the Court to sieve the evidence and to ascertain what are the parts of the evidence tending to incriminate the accused which could be accepted.

[82] Reliance is also sought from *Junit v. Public Prosecutor* [1994] JCBD 347, 352 where Roberts CJ, said:

> It is well established, by other cases, that it is proper for a Court to believe part of the evidence of a witness and refuse to accept the rest. In this instance, however, reliability of the story told by Kathrina as to the assault on her is central to the charge. If there is any real doubt as to that, it cannot be said that the prosecution has proved its case to that degree which is required, namely beyond reasonable doubt.

[83] Learned defence counsel submitted that the evidence of Miss X is "central" to the charge, "if the court find real doubt to her credibility as a whole, it would be unsafe to convict D based on the testimony of her alone".

[84] These cases repeat well-established principles of evidence, but what matters most is for the court to "sieve" the whole evidence carefully to reach its conclusion. It will be recalled that the defendant's wife, PW4, said in her testimony that having received the anonymous telephone call on 24 April, she telephoned the defendant at the Fire Service Department and asked why he had gone behind the arabic school, passing through the forest. According to her account the defendant asked her who had told her what she said, that it was libel and that he had gone to see a friend to collect a debt. She then warned her husband, "Don't do something like the other man, or other person, with a granddaughter". Then he asked her who was going to fetch Miss

X. PW4 said that she had wanted to go to fetch her but the defendant had the car, and he first picked her up from the police station at about 12.30pm, dropped her at home as she had to cook lunch, and proceeded to fetch Miss X from the school. She denied the defence suggestion that she had fetched her daughter from the school on 24 April.

[85] As against this evidence of the defendant's wife as well as that of Miss X about the identity of the person who went to collect her from the school on 25 April and she said it was her stepfather, is the evidence of the defendant and the CRO to the effect that the defendant did not leave the fire station and had his lunch there. I have already commented on the unsatisfactory manner in which the two records are kept at the fire station.

[86] It appears quite obvious from the two books of record maintained at the fire station when compared with the evidence of both the defendant and the CRO that they do not reflect the true and actual position. It strikes me that the procedure is lax, is not fool proof, and is not always followed so that it can easily be manipulated and used to suit one's convenience as and when required. In the circumstances it cannot be said with any certainty that it would reflect the correct position and whereabouts of the staff at any given time. The evidence indicates that the CRO, rather than setting an example to his firemen, was not averse from taking liberties with that record book by not correctly recording his return to his office. If that sort of conduct bordering on truancy happened once, the likelihood of it occurring at other times cannot be discounted. To wave it aside on the basis that the distance was short or that the officer had gone out for a short while only do not appeal to me as credible explanation.

[87] Those shortcomings which were clearly deliberate in keeping an accurate and true record in the day/night book lend credence to the evidence of the defendant's wife, PW4, that the defendant collected her from the police station on 24 April at lunch time, dropped her home to cook lunch and proceeded to fetch Miss X from her school, and later returned home with the girl. He was still at home when the grandmother came with Miss X.

[88] The subject of a recent complaint having been made by the girl was not canvassed in this trial. Such a complaint has been held to be admissible not as being evidence of the facts

complained of but as evidence of the consistency of the conduct of the victim with the story told by her in the witness box. There is authority if I mistake not that such a complaint need not be on the earliest opportunity and a complaint made a week after the event has been admitted. In this case there was a gap of some three days before she narrated what had happened. It will be recalled that it was her auntie, PW3, who received the anonymous telephone call and she asked Miss X on 25 April to return home from her friend's home. Until then the girl had stuck to what her stepfather had taught her. But it was only when PW3 told her on her return that the telephone that she had attended to just at that time was from the police, and she had better tell the truth did the girl tell her what had happened. Admittedly it was not a spontaneous complaint nor could it be described as being strictly a voluntary one. I look at it from the standpoint of a frightened little girl who had allegedly been warned a few times of the dire consequences if she revealed to her grandmother or to anybody else what he had done to her. I recall her comment after the defendant had finished with her that he was scaring her. I am not at all surprised considering her age that she should have been in a state of utter fright and had, in compliance with his indirect threats, kept quiet about the incident on reaching home or when taxed by her auntie. In her circumstances, notwithstanding that it was the mention of the police that she revealed for the first time what had happened to her, I do not think that the circumstances in which Miss X narrated what had befallen her on 23 April could be said to adversely affect her credibility or consistency in any way.

[89] In the circumstances of this case and scrutinizing the evidence closely, particularly of a girl still of tender years as against her stepfather, a fireman, much bigger and stronger than her, taken to a lonely spot in a jungle doing her stepfather's bidding, her conduct showing absolute obedience and submissiveness to the defendant's directions and not mentioning the incident to anybody later at home out of the fear that the defendant had instilled in her mind of the dire consequences to her if she reported it to anyone at home, are all clear and distinct pointers to the mental state of the girl. Considering what had befallen her in such a situation I find it hard if not quite impossible to take a contrary view.

[90] Notwithstanding that the issue of consent does not arise in this prosecution, I think that it still remains for the court to consider whether there is corroboration for the victim's evidence.

[91] There is first of all DNA profile evidence contained in the report of Dr Christopher KC Syn, analyst of the DNA Profiling Laboratory Centre for Forensic Science, Singapore, concerning the semen that was detected on the blue-green piece of cloth (exh. P2) which, as stated earlier, matched the DNA profile of the blood sample of the defendant.

[92] Recalling the evidence of PW4, the owner of the car bearing the registration No. BQ5095, who testified that she had placed the blue-green cloth (exh. P2) in her car as mat two months before this incident, and the evidence of Miss X who not only saw it in the car on the day of the incident but saw it in the hands of the defendant after the alleged sexual intercourse with semen on it and which, it was agreed by the defence (para 4(2) of agreed facts), was still in the car at the time and she pointed it out to some policemen.

[93] The defence is a complete denial of the prosecution case, in other words, of the allegation made against him by Miss X.

[94] I have no doubt at all on the basis of the evidence of the owner of the car BQ5095 that she had placed the blue-green cloth in her car, and that it was in the car on the day of the alleged incident. Dr Syn, whose report was admitted by the defence, detected semen on the same piece of cloth, and according to his unchallenged conclusion it matched the DNA profile of the blood specimen of the defendant. The defendant did not request for the forensic science service to make available to a defence expert the databases upon which Dr Syn's calculations were based. I bear in mind the conclusion of the doctor that "the probability of another person, selected at random from the Malay population, having the same DNA profile, is estimated to be 1 in 3.2 quadrillion (3.2 x 1015)". I find no extraneous evidence which might cast doubt on the presence of the defendant's semen on exh. P2 seen in the car driven by the defendant on the day of the incident or any other evidence, which conflicted with the suggestion that the defendant was responsible for the crime stain.

[95] I am satisfied beyond reasonable doubt that the undisputed DNA findings put the defendant at the scene which, I am just as satisfied on the evidence, was at the place identified by Miss X and depicted in photographs PB and PC. To my mind this is strong evidence corroborating the testimony of Miss X.

[96] Learned counsel for the defence submitted that, because the evidence of Miss X was "questionable" as also was the evidence of her mother, PW4, to the effect that the defendant had picked-up Miss X from her school on 24 April 2003, had been "proved to be a lie". This rather circuitous argument seems to be that, on the evidence of the CRO (DW2), the only way out for firemen was through his office and he had not seen the defendant passing through during the lunch break. I have dealt with that evidence already but, at the expense of repetition, will only repeat that the record books, particularly the system in vogue at the time of keeping day/night book for recording in it every movement of the staff, that is, exit and return of any on-duty firemen, having been shown by the evidence of the CRO to be unsatisfactory and unreliable, there was nothing to cast any doubt or suspicion upon the credentials of PW4 being an honest, truthful and reliable witness, as I found her to be in all respects.

[97] It was submitted on behalf of the defendant that the medical evidence "cannot establish that there had been penetration into PW5's vagina".

[98] Miss X gave a graphic account of how her stepfather had sexual intercourse with her. She felt something hard entering her vagina. She described the position of the man on top of her and his body moving up and down. And when she saw him holding the crumpled blue-green cloth she was able to see some semen on it. As seen already, Dr Syn detected semen with spermatozoa on the piece of cloth, which is exh. P2.

[99] In the absence of any other acceptable evidence explaining how the defendant's semen found its way on to exh. P2, I find that this evidence is corroborative of the evidence given by Miss X.

[100] The medical evidence taken in its totality does not rule out sexual intercourse having taken place. Both doctors who examined the girl have extensive experience in their fields of specialty and neither was prepared to rule out sexual intercourse

having occurred with Miss X. Both emphasized that non-presence of the hymen and absence of any injury to her vagina did not negative sexual intercourse having occurred. Dr Ni Ni Aung found quite a lot of discharges within her vagina, which is indicative inter alia of sexual intercourse having occurred. This doctor also found the girl slightly distressed, another indication that entered into her consideration for forming the view that she did.

[101] A colleague of Dr Aung, Dr Telesinghe said that there would be tears in the hymen as well as some contusion in the vulva and along the vagina in a victim having sexual intercourse for the first time. In considering this evidence I am not loosing sight of the fact that the medical examination of the girl took place after two days of the incident and it was because of this lapse of time that the doctors were categorical in saying that the absence of the hymen or contusion to the vagina, if any, did not negative sexual intercourse.

[102] Having consideration the whole body of evidence I am satisfied that the medical evidence offers substantial corroboration to the evidence of Miss X.

[103] Proceeding further and not to be forgotten is the evidence of the 81 year old grandfather of Miss X (PW2). He agreed that he personally did not know of this incident and had been told of it granddaughter had gone to stay in Pulaie. He identified them as Orang Kaya Ampading, his wife, the defendant and his elder sister. He remembered what the defendant's sister said to him in the defendant's presence about their "big wish", telling him that the defendant had committed a "big offence" and asking for sympathy on her brother's behalf. This visit and/or the purpose of the visit as was stated by PW2 was not challenged in any way. Despite his advanced age and the fact that he is the girl's grandfather I am satisfied that there is nothing to cast any doubt or suspicion about the evidence of PW2 and I accept him as a witness of truth. I take this evidence as corroborative of the testimony of Miss X.

[104] The last matter which I think I ought to mention before I take leave of this case concerns certain questions that were put to Miss X during cross-examination, for instance, whether she had the "obligatory" bath which she as a Muslim had to have after sexual intercourse. I did not intervene at the time as the witness had already started to make her reply. Perhaps learned counsel

forgot that he was conducting defence of an accused in a criminal case in a court which lacks jurisdiction over such religious principles as the Hadath bath. It is clear to me that this question was put to Miss X for some specific reason, whatever it may have been is beside the point. Without the proper jurisdiction this court is unable to comment upon the consequences, if any, of not complying with that edict. I mention this now so that this sort of conduct of springing such questions on a witness as young as Miss X, which could possibly unnerve or upset the witness, is not adopted as a tool of cross-examination. But Miss X was not fazed or perplexed, nor did she show any sign of discomfiture when this question was put to her.

[105] In the result, having considered the veracity of the witnesses in the light of the case as a whole and for the reasons I have given, I accept the prosecution evidence, including that of Miss X, as true. I am satisfied beyond any reasonable doubt that the defendant is guilty of the offence of rape of Miss X, a girl under 14 contrary to s. 376(2) of the Penal Code as charged, and he is convicted accordingly.

Sentence

[106] The defendant stands convicted of raping his stepdaughter, Miss X, aged 13 years 9 months on 23 April 2003, contrary to s. 376(2) of the Penal Code.

[107] On the day in question, he picked-up the victim from her school to take her home, but took a different route from the usual taken by her mother, whenever she collected her from school.

[108] When the girl asked him where he was taking her to, he merely said, "arah datu".

[109] This was, as the evidence disclosed, a deliberate trick and he took her to a lonely spot in a jungle, where the offence was committed.

[110] According to the antecedents, he is aged 40. He has one previous immigration conviction.

[111] In *R v. Millbery & Others* [2003] 2 Cr. App. R (S) 142 (CA), Lord Woolf CJ, quoted from the Sentencing Advisory Panel (the "Panel") which had forwarded to the court advice proposing a revision of the current sentencing practice for offences of rape.

[112] While keeping in mind that there are considerable differences in social, communal as well as religious differences between communities living so far apart, some of the underlying sentencing principles can and are invariably used in our courts, if for no other reasons than for the sentencing principles which more often than not are relied upon and applied.

[113] In the case cited, some of the panel's suggested recommendation are quoted at p. 146:

> ... there are, broadly, three dimensions to consider in assessing the gravity of an individual offence of rape. The first is the degree of harm to the victim; the second is the level of culpability of the offender; and the third is the level of risk proposed by the offender to society. We consider that Courts should consider each of these dimensions whenever a sentence for rape is imposed.
>
> We endorse what was stated by Lord Lane in Billam, and repeated by the Panel in its advice, that while rape will always be a most serious offence, its gravity will depend very much upon the circumstances of the particular case as a whole taking into account the three dimensions to which we have already referred.
>
> I keep those three dimensions in mind.

[114] The defendant, as the stepfather of the girl, breached the trust which his conduct entailed in relation to his stepdaughter, taking advantage also of her youth and her helplessness in a lonely place which led to her absolute submissiveness to his directions.

[115] Because he pleaded not guilty, he is not entitled to the discount given usually to those who plead guilty, thereby saving the victim the unfortunate experience of having to give evidence in court of an intimate nature, as well as the mental torture the girl was made to endure.

[116] I am of the opinion that this is a serious case by any account, and deserves a condign sentence.

[117] In the recent case of *Public Prosecutor v. A.I*, High Court Criminal Trial No. 7 of 2003 (unreported), where the defendant pleaded guilty to two counts of rape contrary to s. 376(1) of the Penal Code, which involved rape of the defendant's eldest daughter aged 15, Chong J, imposed a sentence of 15 years' imprisonment with 15 strokes on each charge, the prison terms were made concurrent and the strokes non-cumulative. Those were sentences upon a plea of guilty.

[118] In this case the girl was made to suffer the additional mental torture and anguish of having to recall and live through the incident all over again. I consider this as a far more serious factor.

[119] Men who consider such girls still of tender years, be they their own daughters or others not related but of the same age group, as soft targets for the gratification of their base and evil intentions, must expect no mercy from these courts.

[120] In all the circumstances, I consider a sentence of 15 years' imprisonment and 15 strokes folly merited in this case. That is the sentences I impose on the defendant, to commence from the date of his remand in custody.