



## THE RIGHT OF COMPENSATION TO THE HIV VICTIM IN MALAYSIA: AN ANALYSIS FROM THE CASE OF ABD RAHIM BIN ABD RAHAMAN V PUBLIC PROSECUTOR

Mazita Mohamed<sup>1</sup>  
Marina Hj Hashim<sup>2</sup>  
Asmar Abdul Rahim<sup>3</sup>

<sup>1,2,3</sup> School of Law, UUM College of Law, Government and International Studies, Universiti Utara Malaysia  
Email: <sup>1</sup>mazita@uum.edu.my, <sup>2</sup>marina@uum.edu.my, <sup>3</sup>asmar@uum.edu.my

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**Abstract:** *In a criminal trial, the stature of the victim is only limited to being a witness or purveyor of evidence. Issues concerning the victim of a crime normally concern the punishment of criminals. Inevitably, the victim's interest as the aggrieved party has not been properly taken care of. For instance, the court in seeking justice would award the appropriate punishments or sentences to the accused whilst neglecting or overlooking the aspect of 'curing' or 'relieving' the victim's pain and suffering from the criminal act. In relation to HIV transmission in sexual offences, one may suffer a lifetime 'pain' mentally, physically and emotionally. In addition, economically one would further have to bear medical costs and expenses. Thus, the court in carrying out justice may both compensate the victim and punish the offender simultaneously. In line with the above scenario, this paper seeks to analyse the case of Abd Rahim Bin Abd Rahaman v Public Prosecutor with regard to the Court's effort in affirming the seriousness of the HIV transmission in sexual offences. The finding shows that section 426 of the Criminal Procedure Code allows the court to make an order for the payment of compensation to the victims subject to the application made by the Public Prosecutor. The case of Abd Rahim however did not discuss the issue of compensation in depth. As a concluding suggestion, the Public Prosecutor in assisting the Court to delivering justice should also address the issue of compensating the victim by invoking section 426 of the Criminal Procedure Code (Act 593).*

**Keywords:** *HIV, Penal Code, Compensation, Section 426 Criminal Procedure Code (Act 593).*

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## **Introduction**

Generally, the victim's rights to receive compensation have been recognized by the United Nations in 1985 through the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Under this declaration, it is the primary responsibility of the offender to pay compensation if necessary to the victim or the deceased's family. Compensation can be in the form of return of property, payment for damages, injury or claim for any expenses. However, due to a system of justice that focused too much on punishing criminals, the needs of crime victims are not properly addressed especially on the issue of compensation. The financial compensation could reduce the suffering and pain experienced by the victims (Izawati Wok, 2010).

HIV victim usually suffers mental, physical, emotional stress and economic losses. They have to worry about medical bills to be paid and also physical recovery in order to return to work (Wallace, 2007). Basically, the victim of a criminal act wants justice. They want the perpetrator to be punished, undergoing a rehabilitation process or the court directs the perpetrator to pay the amount of compensation for injury or loss suffered by them (Karmen, 2004). In criminal court, the offender would be punished but it is unfair if a criminal court that deals with the case would burden the victim to go to another civil court to file the compensation claim against the offender (Ashworth, 1999). Therefore, those who have been infected with AIDS as a result of sexual intercourse also want the infected person to receive appropriate penalties as well as financial compensation.

## **Research Methods**

This study was based on legal research method. Legal research means a systematic study of a law, principle, concept, theory, doctrine, cases decided, legal institutions, legal issues, issues or combination of (Anwarul Yaqin, 2007); (Zahraa, 1998).

This study used the analytical and critical method in discussing the case of *Abd Rahim Bin Abd Rahaman v Public Prosecutor*. According to Charterjee (2000) content analysis method is used to analyze the cytological contents of a document. This gives the researchers the opportunity to review, criticize, cancel, amend or replace loopholes in the law.

## **HIV and Development**

Between the year 1983 and 1984, the virus that caused AIDS had been found in different laboratories and had been given different names (Seth, 1998). American researchers Richard Galo had named this virus as the human T-lymphotropic virus (HTLV-III) and the same virus had been named lymphadenopathy-associate virus (LAV) by Luc Montagnier, French researcher (Stine, 2009). Jay Levy, a researcher at the California Institute of Cancer Research at San Francisco, had found AIDS-associated retrovirus (ARV) (Seth, 1998). Because these three variants were of the same virus, they were renamed in 1986 as the Human Immunodeficiency Virus type -1 (HIV-I) (Seth, 1998).

There are two types of HIV, namely HIV-1 and HIV-2. HIV-1 is a common and dangerous type while HIV-2 acts like HIV-1 but is rather slow compared to HIV-1 (Dzul kifli Abdul Razak, 1990). HIV-2 was found among prostitutes in South Africa in 1985. In America the

first HIV-2 case was reported in 1987; brought by South African women. Both types of HIV can occur simultaneously (Kartikeyan, Bharmal, Tiwari & Bisen, 2007).

There are five phases in the HIV infection (Harvey, 2007). The first phase is the 'asymptomatic incubation period' where this condition will last for four to six weeks. This phase is also known as a 'window period' because at this time even though one has been infected, yet he has not shown any change or sign that he has been infected. This period is dangerous because one is unaware that he has been infected. During this time the first antibodies have been detected and the infected person will change from HIV negative to HIV-positive. This is known as 'seroconversion' (William Sunbeck, 1995).

The second phase is called 'acute primary infection' which will last for a period of one to two weeks. In this phase someone will have an early symptom of infection but cannot identify what is the cause. At this stage one has had enough antibodies to detect the virus.

'Asymptomatic' is the next phase in which this phase will last for three to fifteen years. At this stage a person looks healthy but HIV will continue to multiply in his blood and tissues and slowly destroy his immune system. The duration of the period varies depending on several factors such as health, personal care and medical treatment received.

The fourth phase is known as 'symptomatic' where the signs that one has been infected can be seen. Among the signs are fever, sweating at night, lymph nodes, weight loss, rash, diarrhea, fatigue and others. This phase continues from one to three years. Finally the fifth phase, at this stage someone is said to have AIDS and many signs of infection can be seen at this stage. Death is an end to all suffering.

Understanding the phases of HIV infection is important to see the patterns and signs of infection. It is also essential to prove that there has been an infection through sexual intercourse in court.

### **Mode of Transmission HIV**

Medical studies have identified that HIV can be transmitted in many ways. Firstly, the transmission can occur through sexual intercourse, i.e. example rape and other sexual misconduct. Secondly, the transmission can happen through blood donations and transfusions. In this case, the HIV infection occurs when the donated or transmitted blood contains HIV virus, the use of disinfectant and syringes in medical procedures, tattoos, etc. Thirdly, HIV can also be transmitted during pregnancy and after delivery, such as breast feeding and surgical procedures. Finally, is the transmission of HIV through organ transplant, where the transfer of the kidney, liver, heart, pancreas, bones and skin organ, involving the organ containing blood or vascular tissue, skin membranes etc. (Alistair Orr, 1988).

Sexual intercourse between males is not only considered contrary to the order of nature but also it is highly potential in transmitting HIV/AIDS (Harlina Halizah Siraj, 2011). Under the Malaysian Penal Code, a person is said to commit carnal intercourse against the order of nature if he has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person (Section 377A, Penal Code). The punishment for committing carnal intercourse against the order of nature with consent is imprisonment for a

term which may extend to twenty years, and shall also be liable to whipping (Section 377B, Penal Code).

In case of committing carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, one shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping (Section 377C, Penal Code). The possibility of transmitting HIV through unnatural offences and the need to protect the society from the virus has been affirmed in the case of *Abd Rahim bin Abd Rahaman v Public Prosecutor* [2011] 2 MLJ 28. This article aims to discuss provisions relating to unnatural offences under Penal Code (Act 574) and the issue of HIV victim's right of compensation under Section 426 Criminal Procedure Code (Act 593).

### **The Law on HIV Under the Penal Code**

For the better protection to the victims with regard to the sexual offences and HIV/AIDS, the Penal Code has been amended recently in the year 2014 (Marina Hashim, Mazita Mohamed & Asmar Abdul Rahim (2016)). However the amendment of Section 376 (2) (i) of the Penal Code has witnessed the need to prevent the transmission of HIV/AIDS in Malaysia in rape cases only. Section 376 (2) (i) of the Penal Code states "whoever commits rape on a woman when he knows that he is afflicted with the Human Immuno-Deficiency Virus (HIV), Acquired Immune Deficiency Syndrome (AIDS) or any other sexually transmissible disease and the virus or disease is or may be transmitted to the woman, he shall be punished with imprisonment for a term of not less than ten years and not more than thirty years and shall also be liable to whipping." Despite rape, in fact, the transmission of HIV can also occur through other kinds of sexual offences such as unnatural offences. Indeed, HIV is more potentially infectious in unnatural sexual offences (Kohsin, 2010).

### **The Rights of Compensation to the HIV Victim in Malaysia**

Compensation has two functions. Firstly, in most cases compensation can act as addition to the main penalties, and it is given priority over fines. In this case, compensation acts as a redeeming element. Secondly, compensation may also be a major punishment, or the only order awarded by the court (Ashworth, 2005). Compensation is a reformation for moral violations of the offender on the victim. It is also part of the criminal justice system which is in line with the other criminal philosophies (Dunpark Committee, 1978).

In Malaysia, the power of the court to order payment of damages is set out in section 426 of the Criminal Procedure Code (Act 593) (CPC), in which the court in convicting any person of any offence may order offenders to pay compensation to victims suffering from physical or personal injury and loss of property. It is obvious from this provision, other than personal injury, other forms of injury such as mental trauma or defamation caused by the offence may also be compensated (Marina Hashim, 2014). The offender must be convicted of an offence before the court ordering a compensation order against him. This can be seen in the case of *Yap Eu Leong Sunny v The Public Prosecutor* [1994] 3 MLJ 434, where Haji Abdul Malik bin Haji Ishak JC stated in *obiter*: -

*"...The compensation order was a kind of sentence. Section 426 of the CPC gives power to the court to order compensation to the victims of offences and costs of*

*prosecution. The offender must have been convicted. The payment of compensation may be made to any person, or to the representative of any person, injured in respect of his person, character or property by the crime or offence for which the sentence is passed,...*

The amount of compensation to be paid to the victim by the offender is to be fixed by the court (Section 426 (iv) CPC). The Court in fixing the amount will consider various factors such as the nature of the crime, the injury suffered, the capacity to pay and other circumstances (Mohamed Akram, 2008). However, this compensation order will not prevent the victim from pursuing a compensation claim under civil law. Indeed, this Section 426 of the CPC which provides compensation to the victims has been rarely used by the court. (Mohammed Akram, 2008; Izawati Wook, 2010). However, in the case of *Public Prosecutor v Law Lu Keng* (Muar High Court Criminal Appeal No: 42-8-1990), section 426 of the CPC was applied, where the High Court had made an order for compensation in homicide case.

The High Court in this case confirmed the sentence passed by the Lower Court against the respondent and the payment of RM10,000 as compensation to the widow of the victim. Izawati Wook (2010) suggested that in order to encourage the use of such provisions by a court in Malaysia, the provision shall be amended requiring the court to give reason if it fails to make such order especially in a case where the court can fix the quantum of compensation.

**An Analysis: The Case of Abd Rahim Bin Abd Rahaman V Public Prosecutor [2011] 2 MLJ 28**

***Fact of the Case***

In this case the accused was charged with 22 counts of sodomy under s 377B of the Penal Code against a 14-year-7-month old male victim. On the facts, the accused was suffering from HIV. 10 charges were tried in Sessions Court No 5 and the other 12 were tried in Sessions Court No 6. The accused pleaded guilty to all 22 charges and was convicted and sentenced as in Table 1.

**Table 1: Charges and Sentences**

Case Number	Charge	Sentence
62–52 of 2007 (Court 6)	Three charges under s 377B of the Penal Code.	Eight years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently.
62–54 of 2007 (Court 6)	Three charges under s 377B of the Penal Code.	Eight years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62–56 of 2007 (Court 6)	Three charges under s 377B of the Penal Code.	Eight years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.

62–58 of (Court 6)	2007	Three charges under s 377B of the Penal Code.	Eight years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62–53 of (Court 5)	2007	Three charges under s 377B of the Penal Code.	Seven years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently.
62–55 of (Court 5)	2007	Three charges under s 377B of the Penal Code.	Seven years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62–57 of (Court 5)	2007	Three charges under s 377B of the Penal Code.	Seven years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.
62–59 of (Court 5)	2007	One charge under s 377B of the Penal Code.	Seven years imprisonment and one stroke of whipping for each charge. Sentences to run concurrently but consecutively with any other sentences.

Source: *Abd Rahim bin Abd Rahaman v Public Prosecutor* [2011] 2 MLJ p31-32

The sentence at Sessions Court No 5 was 28 years of imprisonment and 10 strokes of the cane in respect of 10 charges. Where as in Sessions Court No 6, for the 12 charges, the accused was sentenced to a total of 32 years' imprisonment and 12 strokes of the cane. The accused then appealed to the High Court against the sentences but the appeal was dismissed and the sentences affirmed. On appeal to the Court of Appeal, the court had reaffirmed the decision by the High Court and dismissed the appeal.

#### ***Analysis of The Case***

There are two main provisions in Malaysia pertaining to unnatural offences namely carnal intercourse against the order of nature under section 377A (with consent) and Section 377C (without consent) of the Penal Code. Punishment for committing carnal intercourse against the order of nature without consent is provided under section 377B of the Penal Code where the punishment is imprisonment for a term which may extend to 20 years, and shall also be liable to whipping. Where as in the case of committing carnal intercourse against the order of nature without consent, section 377C provides for imprisonment for a term of not less than five years and not more than 20 years, and shall also be liable to whipping.

In reference to Table 1, it is clear that the decision made by the Sessions Courts had considered the following grounds:-

- (i) the number of charges the appellant was charged with, namely 12 at Sessions Court 6, and ten at Sessions Court 5;
- (ii) the maximum sentence under the relevant provision being 20 years;

- (iii) the victim was less than 15 years old and not mature enough to know the consequences of his act;
- (iv) the acts were repeated almost daily from 18 April 2007 until 9 May 2007;
- (v) the issue of public interest, what with the rise of this type of cases in our society; and
- (vi) the danger of allowing the appellant to move freely within the fabric of society when he is a threat to young boys.

The High Court affirmed the conviction and upheld the sentences. The grounds were the offences being serious ones, the victim being very young and the acts amounted to absolute sexual abuse. The accused later appealed to the Court of Appeal on the ground that the overall sentences were too severe.

The Court of Appeal held that the sentences were within the scope of the sentence permitted to be meted down by the court and not excessive or have militated against any known legal principles. The court also has taken into consideration the public interest and the appellant's in delivering the judgement.

### **Observations/Suggestions**

Section 376(2)(i) of the Penal Code has been amended recently to curb the spreading of HIV/AIDS in Malaysia *vis-a vis* in rape cases only. However the transmission of HIV not only occurs in rape cases; as the virus is highly potential being transmitted especially in unnatural sexual offences. The judgement in the case of *Abd Rahim bin Abd Rahaman v Public Prosecutor* showed that the court has affirmed the seriousness of HIV transmission sexually namely in unnatural offences. Further, our observations/suggestions of the case are as follows:-

#### ***Punishment***

The Court of Appeal had reaffirmed the decision of the High Court in which the accused had been sentenced to the total number of imprisonments at Sessions Court No 5 for 28 years' imprisonment and 10 strokes of the cane in respect of 10 charges. Whereas in Sessions Court No; 6 the accused was sentenced to a total of 32 years' imprisonment and 12 strokes of the cane for the 12 charges. The court in meting down the sentences had taken into consideration factors such as the offences were serious one, the fact that the victim was very young and the acts amounted to absolute sexual abuse.

The court also had strucked a balance between the public interest and the interest of the appellant. In this case the court had taken into consideration the fact that the offender is a HIV/AIDS patient and his style for certain sexual inclinations, thus letting him loose among young boys will do no good. As per Suriyadi JCA at para 10: "We, needless to say, found that the sentences are not excessive bearing in mind the condition of the appellant and the age of the victim. The sentences can serve as a warning to those who might have the intention to commit the kind of offences".

#### ***Compensation***

With regard to the order of compensation to the victim, this issue was not being considered in this case. Noted that the victim had been sodomised by a HIV positive accused, hence a normal person would have the emotional distress of contracting AIDS. Furthermore, there is no cure for AIDs. Although section 426 of the CPC allows the court to make an order for the

payment of compensation to the victims, this order is subjected to the application made by the Public Prosecutor.

Thus, it is clear that for the court to exercise its power to make an order for compensation, there must first be an application by the Public Prosecutor; without which, the court is not entitled to grant the order. In *Abd Rahman's* case, there was no mention of any application for an order of compensation made by the Public Prosecutor. Therefore, it is suggested that in future, the Public Prosecutor may have to give a thought of the application of section 426 as the victims normally not only yearn the offender being punished but, compensating them also will play an important role in the victim's recovery.

Even though compensation would not be able to reinstate the victim to its original position, compensation may reduce or ease the burden suffered by the HIV infected victim. The role of Public Prosecutor is very important because even if Section 426 of CPC is available, if there is no application then, the court cannot be blamed of being reluctant to invoke Section 426 of CPC thus awarding a compensation order in making decision. Both Court and Public Prosecutor have to be aware of the need of the crime victims in order to make sure justice is being carried out properly.

### **Conclusion**

From the above case, it is crystal clear that the court acknowledged the need to suppress the transmission of HIV sexually. By imprisoning offenders for a long period, indirectly the society can be protected from this danger and deter the offender from committing the same offence. It is observed that the issue of compensation in this case was not highlighted though the provision of section 426 of the CPC is ever available.

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