



# **GAP ANALYSIS ON INVESTIGATION AND PROSECUTION OF RAPE AND SODOMY CASES**

**STRENGTHENING THE CRIMINAL JUSTICE SYSTEM'S  
RESPONSE TO SEXUAL VIOLENCE IN SINDH**

# **GAP ANALYSIS ON INVESTIGATION AND PROSECUTION OF RAPE AND SODOMY CASES**

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# EXECUTIVE SUMMARY

The prevalence of sexual violence, particularly rape, sexual assault and sexual abuse is an undeniable reality in Pakistan<sup>3</sup>. The high incidence is well reflected in the recent upsurge of reportage of rape and sodomy cases, such as the most recent and infamous Lahore motorway rape case<sup>4</sup>. Despite the rising numbers of such cases the conviction rate is abysmal, with official reports citing it as low as 0.3%<sup>5</sup>, making it imperative to make a nuanced study of the operational factors in the Criminal Justice System (CJS) of Sindh contributing towards the alarmingly high rates of acquittal. Thereby, this particular research provides a narrowed focus on the gaps in investigation and prosecution of rape and sodomy cases, which due to their central contribution to responding to incidents of such violence, are presumed to contribute to this low conviction rate.

The study utilizes a mixed method approach wherein it analyses a set of 50 case files which have attained a final judgment from this district courts from across the districts of Karachi East, Karachi West, Karachi South, Karachi Central, Karachi Malir and Hyderabad. The quantitative three-tiered analysis of the 50 case files (via the Cascade framework) reveals a 16.8 months average trial time, compared to the legally required 3 months<sup>6</sup> where it takes 9.6 months on average from framing of charge to the date of final order, as opposed to the legal mandate of investigation not exceeding 15 days<sup>7</sup>, with extensions granted by the court based on need. A higher proportion of procedural time is taken in trial. Based on statistical anomalies, the case files undergo segmentation wherein cases with abnormally high investigative or prosecutorial delays (i.e., 32 in total) are analysed critically to capture further nuances.

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<sup>3</sup> Web Desk, 13-11-2020, “11 rape incidents reported in Pakistan every day, official statistics reveal”, The News, <https://www.thenews.com.pk/latest/743328-about-11-rape-cases-reported-in-pakistan-every-day-official-statistics-reveal>

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> Section 344A, Code of Criminal Procedure 1898

<sup>7</sup> Section 167, Code of Criminal Procedure 1898

The incorrect use of medical terminologies is recorded as one of the prominent gaps across investigation and the prosecution. More specifically, the reliance on statements of victims and complainants, and medical evidence at the exclusion of other corroboratory evidence suggests a malignant practice during investigation. The FIRs are rushed, not allowing the victim the time to properly recall the details of the event which is compounded by the inadequate scrutiny of the 173 CrPC challan by the prosecutors at a later stage.

The inconsistencies noted between the 164 statement and examination-in-chief of the victim are symbolic of the lack of preparation of the prosecution witness and the lack of collaboration between the IOs and the prosecutors, at large. On the other hand, the widespread ambiguities in regards to what evidence should be required in cases of attempted rape vs rape together with the perpetuation of rape myths in judgements such as ‘absence of marks of violence leading to acquittal’ are gaps this study succeeds to highlight. By providing an in-depth qualitative and quantitative analysis of the 50 case files, this study seeks to serve as a pathway for CJS actors for self-improvement which ultimately pushes for creation of policies that enhance and expedite the overall responses of rape and sodomy cases within Sindh.



# INTRODUCTION

The prevalence of sexual violence, particularly rape, sexual assault and sexual abuse is an undeniable reality in Pakistan. While exact figures remain unclear due to severe underreporting of incidents and the lack of a cohesive nation-wide or even province wide data base tracking cases, there is no disagreement of the high incidence of such cases. Examples include the recurrence of sexual violence, particularly of children in Kasur<sup>8</sup>; the infamous motorway rape case in Lahore and rape and murder of a 5-year-old girl in Sindh<sup>9</sup>; the reported sexual abuse of 93 children and 782 missing children in Sindh between January – August 2020<sup>10</sup>; and 17 gang rapes recorded by Sindh Police in September 2020 alone<sup>11</sup>. Despite stringent legal reform on child sexual abuse and rape, the conviction rates for such cases are abysmal. In 2020, War Against Rape, a Karachi based organization estimated a less than 3% conviction rate across the country<sup>12</sup>.

The law relating to rape, sexual harassment and other sex crimes has been amended between the period of 2006-2016 to create increased number of offences and penalties and a more victim/survivor-centric approach in trial. However, although many welcomed these amendments, these have also been heavily criticized for creating a legal regime by which required standards of proof are made even higher due to raised penalties in already difficult to prove offences.

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<sup>8</sup> Masood, S. “Rapes and Killings of Children Haunt a Corner of Pakistan”, The New York Times, 03-10-2019, accessed on 05-11-2020

<sup>9</sup> Masood, S & Ives, M, Rapes of Woman and 5-Year-Old Fuel Outrage in Pakistan, The New York Times, 11-09-2020, accessed on 05-11-2020

<sup>10</sup> Ferozi, M. “Abduction, abuse of children on rise in Sindh: report”, Daily Times, 13-09-2020, accessed on 05-11-2020

<sup>11</sup> Statistical & Analysis Wing, Crime and Investigation Wing Sindh, “Monthly/Update of Heinous Crimes of September 2020”, Sindh Police, [https://sindhpolice.gov.pk/announcements/heinous\\_crime\\_reports.html](https://sindhpolice.gov.pk/announcements/heinous_crime_reports.html), accessed on 01-11-2020

<sup>12</sup> News Desk, “Conviction rate in rape cases under 3 % in Pakistan: report”, Global Village Space, 15-09-2020, <https://www.globalvillagespace.com/conviction-rate-in-rape-cases-under-3-in-pakistan-report/>, accessed on 05-11-2020

While welcoming an expanded definition of rape, similar concerns are being raised about the penalties and solutions presented by the Anti-Rape Ordinance 2020, which the Government of Pakistan has approved, but has not yet been implemented<sup>13</sup>.

While recognizing the heavy influence of the socio-cultural economy on a societal response to sexual violence and decisions on pursuing it in or out of court, this study is grounding itself purely within the framework of the criminal justice system (CJS). It aims to provide a Sindh specific evidence-based perspective to the existing literature and on-going discourse on factors within the operations of the criminal justice system (CJS) contributing to this low conviction rate. It also provides a set of robust recommendations to better inform future programming, the primary research question for this study is:

**What are the investigative and procedural gaps resulting in protracted trials in rape and sodomy cases in Sindh?**

Specifically, it seeks to identify the points of delay during the investigation and trial stage of such cases and then to describe these delays both quantitatively and qualitatively from a procedural perspective. It also establishes a baseline for future analysis to assess the future success of Gender Based Violence (GBV) courts established in these districts since November 2019<sup>14</sup> by setting a precedent for legal research work in the province. Additionally, it analyses the judicial processes and language used in the case and court documentation of such cases through a gender-justice framework.

This study is divided in 3 parts.

**Part 1** presents a qualitative analysis based on the cascade framework provided below, couched within the procedural framework of criminal cases from registration of the FIR until the verdict.

**Part 2** provides a qualitative analysis of the overall criminal justice ecology, identifying cross-cutting systematic internal and external issues.

**Part 3** provides recommendations for each key actor in the CJS

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<sup>13</sup> Siddiqui, N. "President approves anti-rape ordinance to ensure speedy trial, strict punishments", Dawn News, 15-12-2020, <https://www.dawn.com/news/1595907>, accessed on 19-12-2020

<sup>14</sup> Law and Justice Commission of Pakistan, Press Release October 9, 2019.

# RESEARCH METHODOLOGY

The study adopts a mixed-methods approach wherein the 50 case files of rape and sodomy were collected and analyzed both quantitatively and qualitatively. The rationale for using a mixed-methods approach stems from the fact that combining the strengths of qualitative and quantitative helps in “developing a stronger understanding of the research problem as well as overcome the limitations of each study design”<sup>15</sup>. AQUAL-oriented mixed methods research is deemed appropriate at this juncture to identify the specific procedural and investigative gaps of the police, medico-legal department, prosecution and the courts. This is triangulated with the gendered findings from the judicial process and language analysis. By pin-pointing the specific areas or processes where gaps, delays or clear gender violations occur, it will grant us specific focus for initiatives aimed at criminal justice reform. An in-depth assessment of the data revealed that all 50 cases should be accounted for in one single category since across the sample statistical anomalies exist with regards to delays in different stages of the case. Therefore, the analysis of the case files is segmented into categories; cases without major outliers and cases with major outliers. The latter is further segmented into two categories; cases with one major delay and cases with more than one major delay. This segmentation increases the robustness of the analysis and provides more validity to the data.

## a. Sampling Frame

The study is based on an analysis of 50 case files of rape and sodomy from Karachi and Hyderabad, project districts for Legal Aid Society’s “Strengthening the Criminal Justice System’s Response to Sexual Violence in Sindh” project. The six districts in Sindh include Karachi East, Karachi West, Karachi South, Karachi Central, Malir and Hyderabad.

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<sup>15</sup> Creswell, J. W., & Creswell, J. D. (2017). Research design: Qualitative, quantitative, and mixed methods approaches. Sage publications, pp. 264

The case files were all taken from the courts of District and Session or Additional District and Session Judges i.e., the trials with jurisdiction to try rape and sodomy cases. Gang rape cases proceeding in Anti-Terrorist Courts were not analysed due to the different jurisdictions and processes of the courts. An analysis of the special procedures of the Anti-Terrorist Courts would not be an effective indication of the functioning of normal courts. All the case files selected for the study resulted in acquittals, allowing us to be able to identify reasons for the lack of prosecutorial success, and thus gaps.

The breakdown of case files from each district is shown below.

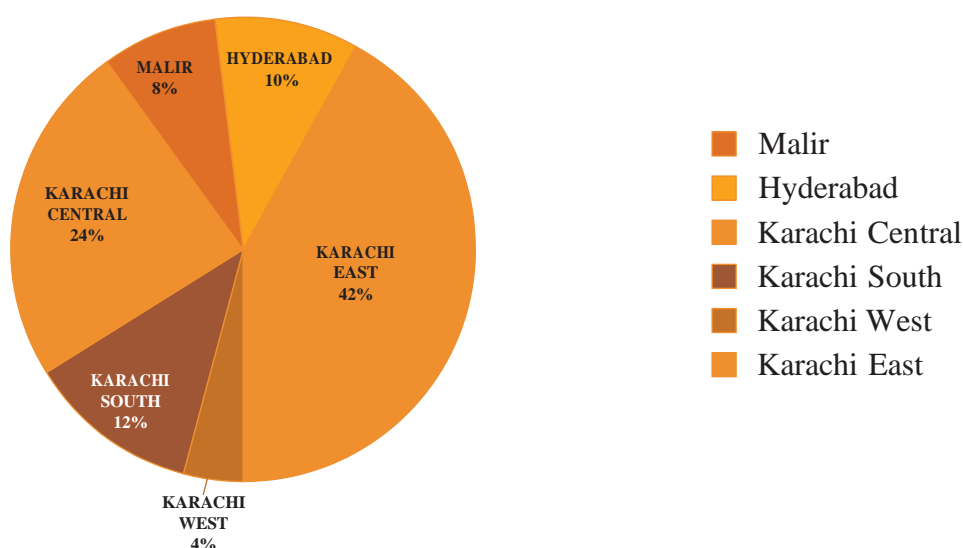


Figure 1: Composition of case files from each district

The cases were identified and data was provided by the Office of the Prosecutor General, Sindh and with support of the District Public Prosecutors from all of the above-mentioned districts. The District and Sessions Judge, Karachi East also provided case files to the LAS team from his jurisdiction for analysis. The cases originate from 2016 onwards, after the promulgation of the Criminal Law (Amendment) (Offences Relating to Rape) Act 2016.

For purposes of confidentiality, the details of the case, including the case number, FIR number and names of parties have not been revealed. Instead, numbers have been allocated to each case file e.g., LAS #1; LAS#2 etc. This is done not only to ensure the report follows the ‘do-no-harm’ principles and respects the confidentiality of the victims/survivors/complainants; but that this is also done in accordance with law. Section 376A of the PPC mandates that the identity of the victim cannot be disclosed in any manner whatsoever.

## b. Research Methods

We deploy multiple methods towards our aim of describing the gaps in the investigative and litigation journey of rape and sodomy cases in Sindh, Pakistan. These methods run in a three-tiered process described below. Findings from each stage help us to inform the next stage – this is an adaptive iterative model wherein our primary data is dynamic as the findings from each stage become hypotheses for the next stage.

### i. Stage 1—Literature Review

In this stage, we looked at international and national literature focused on challenges in prosecuting cases of rape and sodomy in courts including a gendered focus. This also includes an analysis of existing law and policies. National case precedents on rape and sodomy cases are studied in-depth to establish a framework of analysis for evidence, operation of courts and other key directions from the courts. Additionally, previously published gap analysis studies on rape and sodomy cases in Punjab were also studied in-depth to derive themes and categories for analysis.

### ii. Stage 2—Cascade Analysis

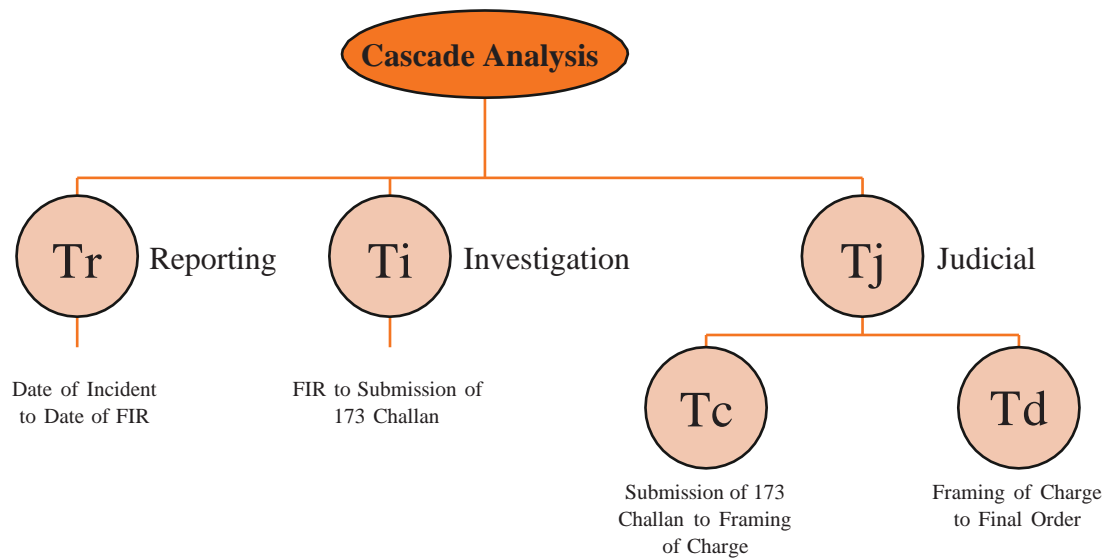
The framework provides basis for a three-tiered analysis of the procedural and investigative delays in the CJS relating to rape and sodomy cases. The study adopts the following quantitative formula to calculate average procedural timeline across 50 cases:

$$Tr + Ti + Tj (Tc + Td) = To$$

Where;

- **Tr** stands for Average time taken to report the crime
- **Ti** stands for average time taken to investigate
- **Tj** stands for average time taken for conclusion of trial (Including framing of charge)
- **Tp** stands for average procedural delay, this comprises of Ti and Tj
- **To** is the summation of delay in reporting the crime and procedural delay (Tr+Tp)





*Figure 2: Cascade Analysis Framework*

For the purpose of succinct analysis, the study will be particularly looking at the Tj phase of the cases which comprises of;

- (i) Time taken from submission of Final Challan to Framing of charge (Tc)
- (ii) Time taken from Framing of Charge to Date of Final Order (Td)

The study assesses the investigation by the police, the interface of the investigation with prosecution, and follows these through to the outcomes of the evidence during the trial. The analysis seeks to identify any emerging patterns in the criminal justice system leading to reasons for acquittals. We describe this using a cascade analysis wherein the journey of each case is fitted into the framework developed during stage I and then analyzed for the length of time taken, delays and gaps in each phase.

### iii. Stage 3 – Qualitative Analysis of Judicial Process

An in-depth qualitative analysis of the judicial processes was conducted to identify patterns of gaps and challenges faced in court at the trial phase of the case. It looks to identify procedural gaps, and a gendered analysis of the entire process of investigation and prosecution. Particularly it seeks to analyse whether social norms and responses to sexual violence were taken into consideration and appropriately responded to during the investigation and prosecution; or use of evidence which is insensitive and insulting to victims (e.g. use of two finger test or virginity testing); or the use of rape myths as a defence strategy (e.g. use of sexual history); or the language used in orders and

judgments not being gender friendly (e.g. use of language of consent instead of violence or minimizing violence); or the reasoning used in judgments using anti-gendered arguments or bias (e.g. claiming rape of a married or divorced woman is not as bad as that of a virgin young girl). The goal here is to assess whether the judicial processes and language reflects the parameters of gender justice. If yes, how? And if not, then what gendered norms does the processes and language represent or reinforce?

#### iv. Stage 4—Feedback on Analytic Findings using SAST

We take the findings from our second stage to two kinds of audiences and incorporate their feedback using focused interviews and discussions. This is an adapted version of Strategic Assumptions Surfacing and Testing (SAST) wherein procedural delays and gaps are discussed with an operational team to elicit hidden “human” perceptions that influence actions. Such perceptions are hard to capture using exploratory interviews or surveys. We do this in the following three ways:

A. Focus Group Discussions (FGDs) were conducted with police investigators who have been involved in rape and sodomy cases or are currently working in the districts where cases have been taken from. The objective of the FGDs is to create a more in-depth understanding of the procedural issues highlighted through review of the findings.

B. Key Informant Interviews (KII) were conducted with the Police Surgeon Sindh and with private prosecution lawyers to have a more in-depth understanding of the on-ground experiences and challenges faced at trial.

C. Trainings were conducted on Investigation and Prosecution of Rape and Sodomy Cases with Investigating Officers (IOs), Public Prosecutors and District and Session judges in GBV Courts across Sindh in November – December 2020<sup>16</sup>. The salient features of the discussions were captured to contribute to the analysis in this paper.

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<sup>16</sup> Police training was held with 7 Public Prosecutors on 16th & 17th November 2020; with 27 Investigating Officers on 30th November & 1st December 2020; and 28 GBV Court judges on 7th & 8th December 2020

# ASSUMPTIONS

There is a bias within the study emerging from certain assumptions. These assumptions are borne out of the researchers' experiences with prior litigation and research on sexual violence, and access to justice in Pakistan and the CJS's response. These assumptions are also widely held within the contemporary CJS and borne out of a shared belief of what is wrong and can be improved.

For full transparency, we have listed down our presumptive assumptions as follows:

- The limited statistics evidence the low convictions in sexual violence cases.
- The survivor/victim's experience in and with the justice sector has been challenging and negative.
- There are many gaps in police investigation of rape and sodomy cases which result in the low conviction rate.
- The court system, including the courtrooms and processes, are not gender friendly.
- Gender Based Violence courts (GBV) established in November 2019 have not yet become fully operational and do not function in the manner that was intended.
- Court processes are often delayed which increase pressure on the survivor/victim and survivors/victim's family.
- There are social pressures on victims/survivors to avoid accessing the formal justice sector for redressal of cases of sexual violence and accessing informal paralegal justice systems.
- There are social pressures on victims/survivors and their families to compromise the case out of court.
- Often victims/survivors, particularly women and girls going through sexual violence trials feel re-victimised because of the court and trial process.
- The judicial system has an implicit gender bias impacting its treatment of women and children by either the presumption of rape myths of adopting a paternalistic/protectionist approach.

# LIMITATIONS

The following are some limitations for this study.

- While LAS provided the District Public Prosecutors with criteria for case files, the ultimate selection of the case files depended on the availability of files i.e., which case files were still available at the court as all case files are hard copies and have not been digitised. .
- The initial sampling frame of 100 case files was reduced to 50 as a result of most case files showing similar patterns in terms of investigative and procedural delays and gaps. Accounting for data saturation and to maintain the robustness and validity of the research, only 50 case files have been analyzed.
- The initial research methodology called for the distribution of case files to be split into 70 % acquittal and 30 % conviction. This was changed to a complete focus on acquittal cases for two reasons. First to be able to provide a more concrete focus on gaps through analysis of reasons for acquittal. This was felt to be more appropriate given that studies such as that of War Against Rape estimate that 97 % of rape cases result in acquittal<sup>17</sup> ; secondly, most conviction cases from the time period of our sampling frame have been appealed against and are currently under trial in the Sindh High Court. LAS feels inappropriate to comment on cases currently sub judice before the High Court in fear of conflict of interest. Therefore, the final sample consists only of case files which resulted in acquittals.
- Case files are often incomplete and missing documents, resulting in the researchers relying on testimonies or orders for relevant data or being unable to analyse certain aspects of different cases.
- The Prosecutor General wished to be part of the FGD with prosecutors but due to his unavailability, a scheduled feedback discussion with prosecutors could not occur. However, due the feedback of prosecutors was gathered through the training conducted with prosecutor's on 16<sup>th</sup> and 17<sup>th</sup> November 2020.
- Sitting judges were not interviewed for this study due to purposes of confidentiality and to ensure their impartiality and independence.

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<sup>17</sup> News Desk, "Conviction rate in rape cases under 3 % in Pakistan: report", Global Village Space, 15-09-2020, <https://www.globalvillagespace.com/conviction-rate-in-rape-cases-under-3-in-pakistan-report/>, accessed on 05-11-2020

- Translation of all statements made to the police or medico-legal and testimony in court from Urdu or other local languages to English for official record has lost value during translation as the actual words and terms used by these individuals were not recorded.
- Judges may not be fluent in English which may lead to an incorrect usage of language in judicial orders, impacting the analysis.
- The initial sample of case files included a comparison district Sukkur as well which had to be excluded due to administrative and logistical barriers.
- The inclusion of Sukkur as a suitable comparison group was premised on the existence of a functional Dar Ul Aman and the presence of a bench of the High Court. Due to its exclusion, the study suffers from a lack of a value-added comparative analysis which would have helped to study differences across seven districts.
- The Covid-19 pandemic has affected the identification and receipt of case files.
- The Covid-19 pandemic has also created difficulties in conducting the FGDs.



# OVERVIEW OF TIMELINE OF INVESTIGATION & PROSECUTION OF RAPE AND SODOMY CASES

The scope and objective of this study required at the onset a detailed quantitative analysis of the 50 case files to be able to provide a baseline and framework for a more in-depth qualitative analysis. The succinct analysis presented below provides a snapshot of the timelines calculated for this study with 3 levels of analysis:

- i. The overall timelines rape and sodomy cases from registration of the FIR to the conclusion of trial with the verdict;
- ii. Division of the timeline as per 2 phases i.e., investigation (from registration of the FIR until submission of the charge sheet under Section 173 CrPC) and prosecution (which includes pre-trial and trial); and
- iii. Average timelines of critical steps in the entire processes of investigation and prosecution of rape and sodomy cases.

The timelines evidenced through this cascade framework identified target areas for further investigation and unpackaging for this study. This cascade framework provides average timelines for each step of the 50 rape or sodomy cases analysed for this study. However, these can be indicative of the timelines of all rape and sodomy cases in the criminal justice system. This framework also confirms the underlying assumptions of delays in these cases that go well beyond the legal limits as prescribed under the law that support the rationale for the study.

## BASELINE: TIMELINE OF RAPE AND SODOMY CASES

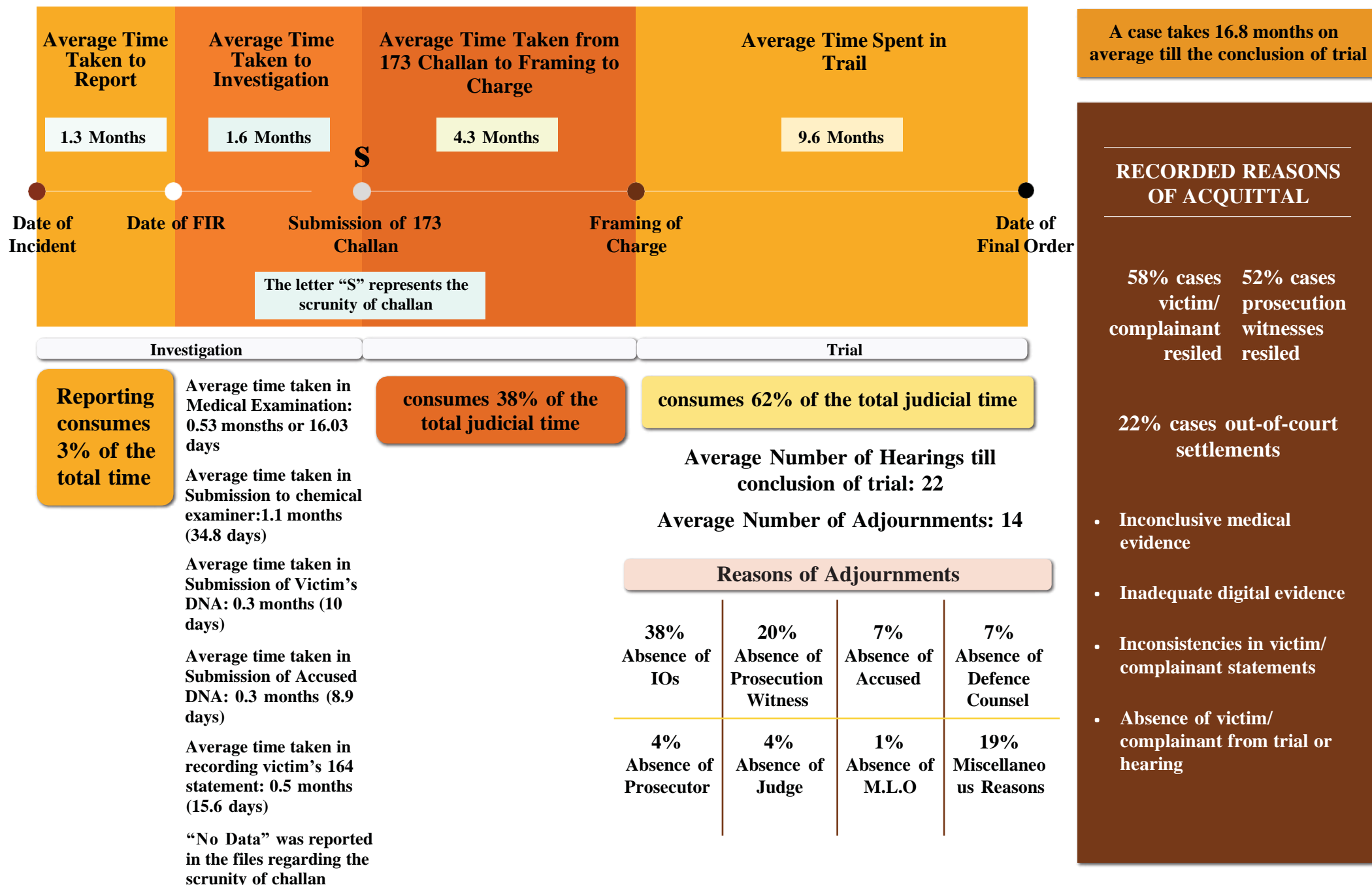


Figure 3: Baseline: Timeline of 50 Rape and Sodomy Cases

The total procedural time (investigation + prosecution/ trial) is revealed to be an average of 15.5 months across all 50 cases. Thus, right from the date of incident to the date of final order, on average each case took a total time of 16.8 months to reach a conclusion.

It is important to be mindful that these timelines are reported in averages and that delays in any stage vary from case to case. For example, in LAS Case# 14 it took 15 days to complete the investigation, however the framing of the charge took around 10 months; a further 10 months were spent during the trial phase which led to the case's conclusion in more than 20 months.

### a. Timelines of Investigation of Rape and Sodomy Cases

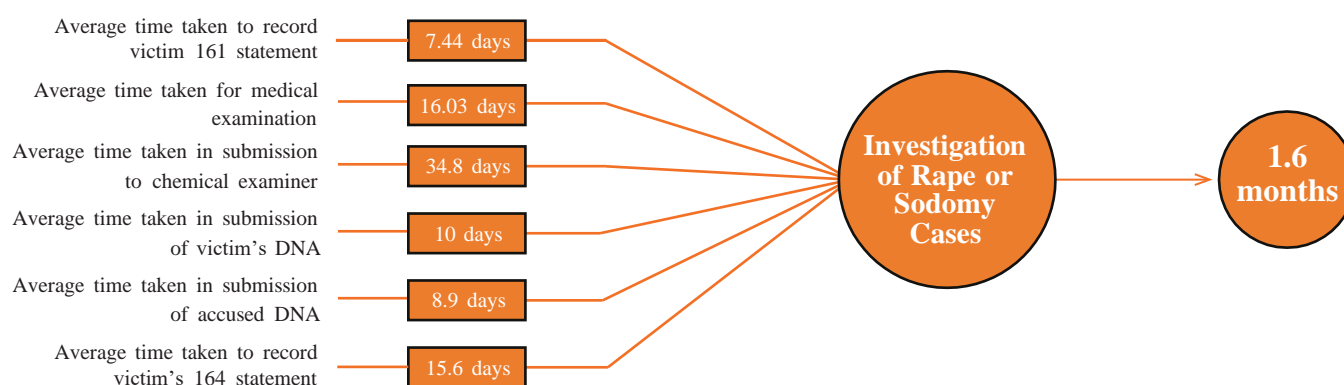


Figure 4: Averages for Investigation stage in Rape and Sodomy Cases

The Code of Criminal Procedure (CrPC) 1898 provides a definitive timeline for investigation of all criminal cases. As per Section 173 CrPC, an interim or final challan must be submitted to the court. Special permission must be sought to continue investigation beyond the mandated 14 days.

On average it takes the police 1.6 months to conclude their investigation and submit a final challan which is then carried forward by the prosecutor in framing the charge. Delays in the initial phase of the case such as registration of FIR and completion of investigation contribute significantly to delays that occur in the later stages of the case.

Provided below is a summary of investigative timelines which are most pertinent to the outcome of trial. All figures in numbers of days are calculated from the date of registration of FIR.

	TIMELINE OF VICTIM'S MEDICO LEGAL EXAMINATION	TIMELINE OF SUBMISSION OF EVIDENCE TO	TIMELINE OF SUBMISSION OF VICTIMS' DNA	TIMELINE OF CONDUCTING ACCUSED DNA	TIMELINE OF RECORDING OF VICTIM'S
MINIMUM (# OF DAYS)	0	0	1	2	1
MAXIMUM (# OF DAYS)	336	373	33	33	105
AVERAGE (# OF DAYS)	16	34.8	10	8.9	15.6
NOT CONDUCTED (# OF CASES)	9	25	30	30	25
NOT STATED (# OF CASES)	7	10	10	10	6

Table 1: Summary of Investigative Delays

## b. Timelines of Prosecution and Trial of Rape and Sodomy Cases

In this study, Tj is total pre-trial (i.e. submission of challan/charge sheet to the court under Section 173 CrPC to the framing of the charge) & trial time (from framing of the charge until delivery of verdict) and comprises of the following:

- Tc : Total time taken to frame charge
- Td : Total time taken by trial

### Proportion of Tj taken by Tc and Td

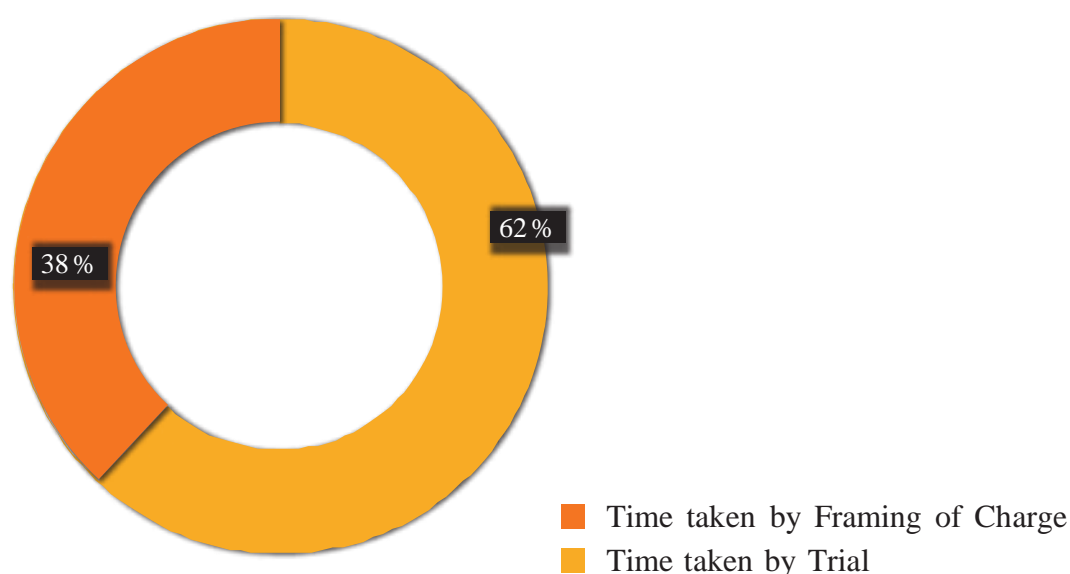


Figure 5: Proportion of Average judicial time (Tj) taken by Tc and Td

Under Section 344A <sup>18</sup>of the CrPC, “the Court shall, upon taking cognizance of a case under section 354A, 376, 377 and 377B of the Pakistan Penal Code, 1860 (Act XLV 1860), decide the case within three months failing which the matter shall be brought by the Court to the notice of the Chief Justice of the High Court concerned for appropriate directions”<sup>19</sup>.

The figure above shows that the framing of charge takes an average time of 4.3 months i.e., 38 % of the pre-trial & trial time. This essentially means that after the submission of the challan the case is left pending for a full quarter of the year. Once the matter reaches the courtroom it takes 62 % of the time i.e., a further **9.6 months** on average from the framing of the charge.

The cascade framework thus reveals that the average time taken from framing of the charge to a final order from the trial court is 9.6 months. This shows an astronomical delay of six months in the conclusion of trial. Trial thus takes three times more time to conclude than what is stated in the law. This delay is the culmination of all previous delays that occur in a case; which makes the total time spent by the prosecution/judicial side on average a total of **14 months** from the submission of the final challan to date of verdict.

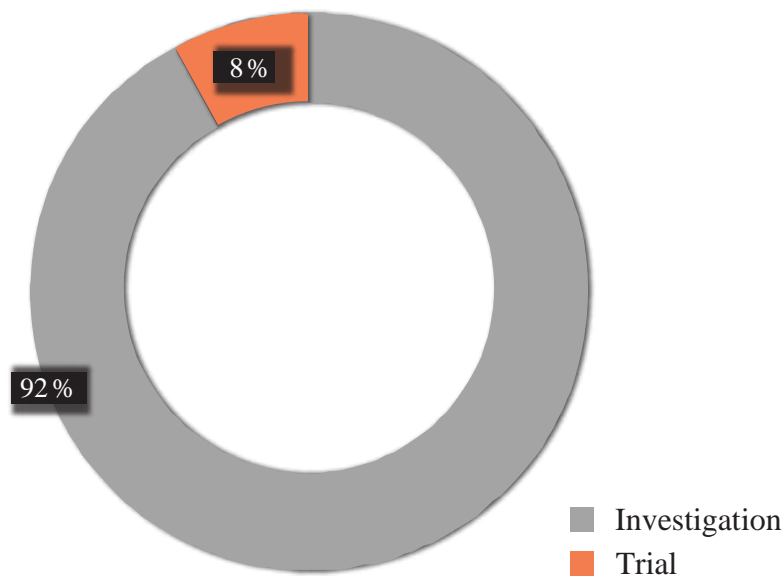
<sup>18</sup>The Criminal (Amendment) (Offences relating to Rape) Act, 2016

<sup>19</sup>Criminal(Amendment)(Offenses relating to Rape) Act, 2016  
[http://www.na.gov.pk/uploads/documents/1481353702\\_249.pdf](http://www.na.gov.pk/uploads/documents/1481353702_249.pdf)



### c. Proportion of time between Investigation vs. Trial

#### Proportion of Procedural Time taken by Ti and Tj



*Figure 6: Proportion of Procedural Time taken by Investigation and Trial*

The figure above provides a breakdown of the proportion of procedural time taken by investigation and trial. It is observed that only 8% of this time is taken up by investigation and 92% of the time is that of trial, which if calculating on minimum days of investigation (i.e., 15 days) and maximum of trial (i.e., 90 days), should be 14.82 % and 85.7 %. This challenges the assumption that delays on the side of the police result in delay of the conclusion of the case. This does not however make a comment on the quality of investigation.

# PART I:

IDENTIFICATION AND  
OBSERVATIONS ON PROCEDURAL  
ISSUES IN RAPE AND SODOMY CASES

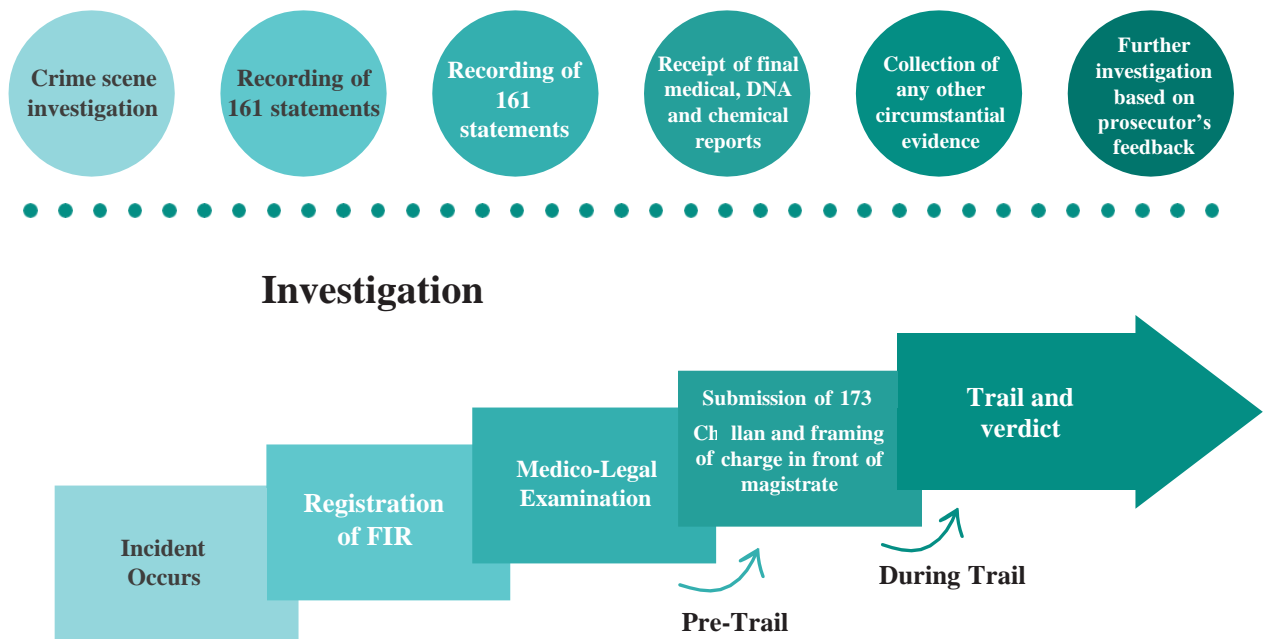


Figure 7: Procedural framework of criminal cases

## 1. Recording of the FIR

The FIR is the very first part of a criminal investigation under Section 154 CrPC 1898. It is on the basis of an FIR that an investigation formally commences. It cannot be used as an independent substantive piece of evidence, but may be used to corroborate or contradict a statement of a victim/survivor or complainant.

### 1.1. Delay in Registration of the FIR

There is a presumption that there is a large delay in reporting cases of rape and sodomy. Focusing on this delay is a common legal strategy as noted above, often used by the defence. The figure below shows that on average time taken to report takes a mere 3 % of total time of the case, whereas the time spent in procedures takes a massive 97 % of total time. The findings of the analysis show that in 24 % (12) of the cases the crime was in fact reported on the same day, with only one being reported as late as 1462 days after the incident.

### Proportion of Total time taken by Tr and Tp

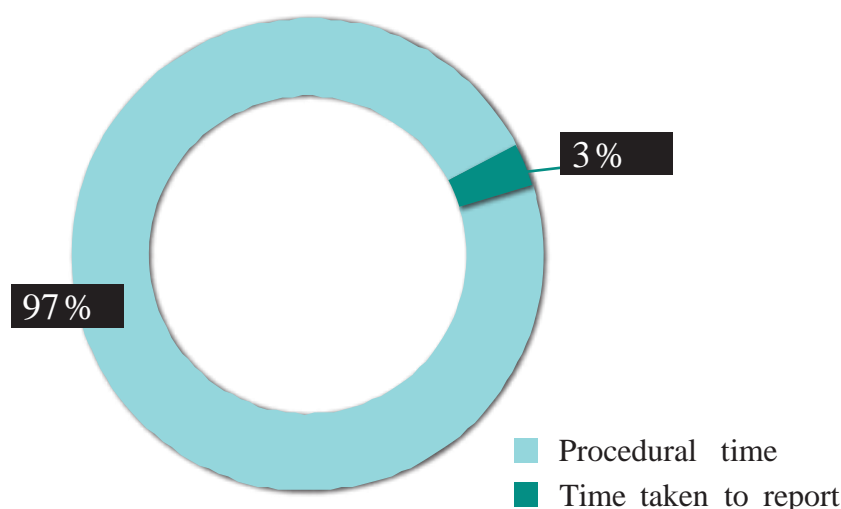


Figure 8: Proportion of Total Time (To) taken by Tr & Tp

It can be inferred from this finding that reporting the crime does not constitute a significant proportion of total time and that victims and complainants who approach the court, to a great extent do not in fact delay the reporting of the crime to the police.

Nevertheless, one of the first tactics a defence counsel uses<sup>20</sup> is to put a dent into the prosecution case is to highlight any delay in registration of the FIR in a case. The principles behind this, as put forward by the courts, is that whenever there is a delay in registration of FIR, it loses the advantage of spontaneity, thereby raising a potential chance of introduction of coloured version or concocted story. This infers that there may have been avoidable consultations and deliberations on the part of complainant. However, if the delay is explained, it is not fatal to the prosecution case<sup>21</sup>. Several cases in fact specify in cases of rape and sodomy, a further relaxation must be allowed, given the heinous nature of the crime and its impact on the victim, family etc.

The trainers throughout all 3 trainings conducted with IOs, prosecutors and judges<sup>22</sup> emphasised the need to explain the delay to allay any assumptions of embellishment in the FIR and provide clear factual details of alleged offence. This is also important for purposes of medical investigation to evidence the impact of delay on any physical or psychological medical evidence, which shall be discussed in detail below. The trainers also provided concrete recommendations on how to ensure this information is included.

<sup>20</sup> As evidenced in all 50 case files, as noted by the police, prosecutors and judiciary at the training, and the primary author's own experience

<sup>21</sup> 1999 SCMR 1102

<sup>22</sup> Police training was held with 7 Public Prosecutors on 16th & 17th November 2020; with 27 Investigating Officers on 30th November & 1st December 2020; and 28 GBV Court judges on 7th & 8th December 2020

The police trainers, during their training emphasised the several opportunities the police had to explain this delay through raising the question with the complainant and recording their response at one or more of the following junctures: at registration of the FIR; recording of the 161 statement of the complainant; second recording of the 161 statement of the complainant; and during collection of evidence (e.g., by capturing evidence of any sort where a parent may have spent a few days searching for the victim, or including as witnesses members of the local jirga or panchayat or elder who may have attempted to elicit a compromise instead of pursuit of a criminal case).

The lawyers who conducted the training of Prosecutors reiterated time and again that if the police have failed to explain this delay, the prosecutors still have space to fill in this gap during recording of the testimonies of the complainant and the police and any other relevant witnesses through strategic questioning techniques and development of case strategy with the prosecution witnesses.

The primary author along with the Judges who conducted the trainings involving GBV Court Judges, all underlined the judge's power to clarify reasons for delay, if any, through use of a judge's inquisitorial powers to directly question a witness at any time during trial and call for further evidence under Section 342 CrPC.

## 1.2. Length of time to record the FIR

One of the questions often raised in the examination and cross-examination as seen in the case analysis, is of how long it takes to note down an FIR. This is based on the presumption that an FIR must be written verbatim. However, looking at the language of the FIRs, it is clearly not verbatim, but a summary or interpretation of the complainant's words. All FIRs have similar language, organisation and information presentation, indicating clearly that the complaint is transferred into the language of the police. This risks the loss of information through translation or emphasis on different aspects of the complaint etc.

Changing of police practice on writing FIRs will be challenging, however, emphasis must be placed at training academies to include basic and in-service training on how to record FIRs to ensure effective capturing of the complainant's narrative and not to lose it through police translation and summarisation.

## 1.3. Limited Use of the FIR at Trial

The police, prosecution and defence place a great deal of emphasis on the FIR. The police often claim that they delay in registering the FIR to be able to conduct some investigation prior to its registration to make it a stronger document. Others admit



that they guide the complainant in certain embellishments in their narrative to strengthen the FIR.

During the trial, the case files evidence, as supported by all lawyers (prosecutors and trainers) the complainant and police are often cross examined at length about the FIR, with efforts to demonstrate contradictions between the FIR and testimony of the complainant, witnesses including the police. For example, often the defence particularly draws attention to the fact that the name or identity of the accused is not mentioned in the FIR. This has been seen to have negative impact on the prosecution case.

However, the police, prosecution and even the judiciary are not seen to recognize that the FIR is a mere document that initiates the entire investigation process. At bare minimum, it is only meant to give information that a criminal offence has been committed. It is not required to have details of the offence e.g., assailants, or location of crime etc. These details are to be submitted in later reports of the police and prosecution based on investigation. Thus, the defence questioning the complainant or police on such details based on the supposed contradictions of the FIR is seeking to discredit these witnesses and hence their testimony through emphasising contradictions in a document which should have no bearing on the conclusions of the investigation <sup>23</sup>. It is essential for the complainant, police, prosecution and judiciary to be aware of the limits of the FIR and not be prejudiced by the lack of details of the offence in this document, where it is not required.

#### 1.4. Accusations of Falsified FIRs

Another massive issue occurs again and again in cases where out of court settlements have been reached or presumed to have been achieved and the complainant turns hostile. In several cases, the complainant stated in court that they are illiterate and could not read the FIR, or did not read it, or it was not read back to them or that they were asked to sign or put their thumb print on an empty sheet. Thereafter they testify that they did not make statements recorded in the FIR e.g., identification of accused. This negates the entire prosecution case when the complainant himself/herself has now stated the FIR was false to begin with.

For this purpose, police must devise a method to overcome this hurdle. Options may include taking a photograph of the complainant with the completed FIR or ensure the complainant places his/her thumb print on the text of the FIR to demonstrate it having been written before them. This may strengthen the prosecution case, allowing them to continue with the prosecution even if the complaint has compromised out of court as rape and sodomy are crimes against the state not an individual. Thus, the state may be able to continue with prosecution.

<sup>23</sup>This strategy was discussed at length in both the prosecutors and police trainings.

## 2. Medical Examination & Submitting Samples for DNA and Forensic Analysis

Medical evidence is an essential factum in criminal cases. With key precedents such as the Salman Akram Raja case<sup>24</sup>, and critical legal amendments to rape laws and processes through 2016<sup>25</sup> Federal and 2017<sup>26</sup> Sindh amendments, the requirement of DNA testing and legally prescribed procedures for medical examination of both the victim and perpetrator have been given special attention.

### 2.1. Standards of Medical, Chemical & DNA Reports

Medical evidence has the potential to fully support the prosecution case to provide evidence beyond reasonable doubt by being able to provide direct and specific evidence against the accused. In a 1999 SC case<sup>27</sup>, an examination of an 11/12-year-old victim gave clear medical evidence of rape. For younger victims, it may be easier to identify medical evidence of rape. Where victims may be older and sexually active, the evidence is not as simple, for example, simply recording a recently torn hymen. In a 2010 SC case<sup>28</sup>, the faulty medical evidence resulted in the reversal of a conviction. Here, the victim was a married woman. The medical report gave a general report that she was used to sexual intercourse and found semen. The court found the medical evidence “only reveals about sexual intercourse of a married woman. It does not show as to the nature of sex she had undergone or been subjected to either forcibly or otherwise”. A 1999 PHC case<sup>29</sup> demonstrates a much more detailed medical report which contributed to the rejection of the accused’s bail. The report confirmed that there was discharge and that intercourse had been recent in addition to other physical injuries.

Thus, for medical evidence to be successful, it must provide the specific medical details which may include a timeframe for when sexual intercourse was committed last, presence of semen, group semen testing, DNA testing etc. In fact, the lack of medical detail is one of the justifications for acquittal used in the Mukhtar Mai case<sup>30</sup>. The judgment states “The omission of DNA and group semen test, which would have been strong supporting evidence to the testimony of the victim, has not been done”, stating that the prosecution could have sought the chemical examiner’s opinion deciding whether “sexual intercourse was by one individual or more”, particularly as this was a case of death penalty.

The medical evidence must connect the accused to the crime, as noted in the above judgment and was reiterated in a 2015 SC judgment<sup>31</sup>.

<sup>24</sup> Salman Akram Raja and others vs. Government of Punjab (2013 S C M R 203)

<sup>25</sup> Criminal Law (Amendment) (Offences Relating to Rape) Act 2016

<sup>26</sup> Code of Criminal Procedure (Sindh Amendment) Act 2017

<sup>27</sup> Mehboob Ahmad vs. The State (1999 SCMR 1102)

<sup>28</sup> Ijaz Ahmed vs. The State (2010 SCMR 141)

<sup>29</sup> Muhammad Sagheer vs. The State (1999 PCrLJ 962)

<sup>30</sup> The State vs. Abdul Khaliq (PLD 2011 Supreme Court 554)

<sup>31</sup> Imran alias Dully and another vs. The State (2015 SCMR 155)

Although the accused confessed, the court found the confession suspicious and looked to the medical evidence to assess the culpability of the accused, which was found wanting.

Recovered sheets with blood were found to have human blood by the Chemical Examiner, but the lack of group<sup>2223</sup> testing along with other articles found to have blood, limited its evidentiary usefulness due to its ambiguity. While rape of the deceased victim was confirmed, there was no medical evidence to connect the accused to the crime, resulting in a weak prosecution case. A positive medical examination report of victim could only establish commission of offence, but such report alone could not help the prosecution to identify the culprits. This was reiterated in a 2019 case<sup>32</sup>, which states: “Chemical Examiner reported stated semen had been found in swabs, “but the entire record is silent qua the grouping of semen and there is no report produced by the prosecution in which DNA has been confirmed... in the absence of semen grouping as well as DNA test, no accused could be held guilty of commission of the offense of “zina”... if classification or grouping of semen is not conducted in a rape case, it could not be proved that particular accused person had committed the offence...”.

However, in a 2020 Supreme Court case, the court highlights that the lack of a DNA report was not sufficient to secure acquittal where there was substantial corroboratory evidence to secure conviction beyond reasonable doubt<sup>33</sup>. This highlights the importance of corroborative evidence in addition to medical evidence and not a complete dependence on medical evidence. Additionally, in a historic judgment of the Lahore High Court in 2021, the two-finger test and virginity testing was banned as it is “illegal and against the Constitution of Pakistan”<sup>34</sup>.

## 2.2. Timeline of conducting medical examination of the victim

Despite the increased focus on medical evidence, in 16% (9) cases, as noted below, victim’s medico-legal examination was not conducted; in others, it was done after the recommended time of 72 hours. Further, in many cases, final reports of the Medico-legal department and Chemical Examiner were not available, negatively impacting the prosecution case. This is unfortunately not unusual and has also been seen in reported case judgments. For example, in a 2016 SC judgment<sup>35</sup>, the missing final report from the Chemical Examiner resulted in weakening the case. This highlights the need to understand the reasons for delay at the Chemical Examiner and Forensic labs and ensure these delays are eliminated, particularly in light of the legal time limit of 3 months for rape and other sexual abuse cases<sup>36</sup>.

<sup>32</sup> Allah Ditta alias Dittu v. The State (2019 PCrLJ 1316)

<sup>33</sup> Zahid vs. The State (2020 SCMR 590 Supreme Court)

<sup>34</sup>Correspondent, 04-01-2021, “LHC declares two-finger tests for sexual assault victims illegal”, <https://www.geo.tv/latest/328108-lhc-declares-two-finger-tests-for-sexual-assaults-illegal>

<sup>35</sup> Muhammad Nawaz vs. The State (2016 SCMR 267)

<sup>36</sup> Section 344 A CrPC

	TIMELINE OF VICTIM'S MEDICO LEGAL EXAMINATION	TIMELINE OF SUBMISSION OF EVIDENCE TO CHEMICAL EXAMINER	TIMELINE OF SUBMISSION OF VICTIMS' DNA	TIMELINE OF CONDUCTING ACCUSED DNA
MINIMUM (# OF DAYS)	0	0	1	2
MAXIMUM (# OF DAYS)	336	373	33	33
AVERAGE (# OF DAYS)	16	34.3	10	8.9
NOT CONDUCTED (# OF CASES)	9	25	30	30
NOT STATED (# OF CASES)	7	10	10	10

*Table 2: Summary of Investigative Delays*

There is an average time of 16 days in conducting the medical examination. In only 7 of the remaining 42 cases where medical examination was conducted, the date of the medical examination was not mentioned. In 16 % of the cases, medical examination was not conducted at all.

In only 10 cases victims were medically examined on the same day as the FIR. In 42 % (21) of the cases medical examination of the victim was conducted after a period of 72 hours of the occurrence of crime which essentially means that the medical evidence lost its conclusiveness or weakened. The average delay in this was 47 days. The data also suggests that in 20 % (10) of the cases the medical examination of the victim was conducted after a delay of more than 72 hours from the time of registration of FIR. Medical examination of accused was conducted in 66 % (33) of the cases, however in 7 of these cases dates of the medical examination were not mentioned. In 34 % (17) cases the accused was not medically examined.

This delay or lack of conducting a medico-legal examination is an important finding. Due to the time sensitive requirement of medico-legal evidence, this is very concerning. In order to capture bodily fluids or other forensic evidence, samples must be collected from the body at the earliest. For cases of rape, this must be done within 72 hours to be able to collect samples of any semen or other bodily fluid. Medical evidence, if found, can be one of the most conclusive form of evidence. However, when conducted late or improperly, it is not safe to rely upon. Furthermore, the law makes it mandatory for a DNA test to be conducted within the optimal time<sup>37</sup>.

Thus, the delay in conducting a medical examination; or where the medical examination is not conducted (16 %) has massive negative impacts on the trial, particularly for the judges in making their final decision. In several of the judgements analysed, the judges have specifically referred to the lack of medical evidence as one of the reasons why the case has not been proven beyond doubt.

<sup>37</sup>Section 156-C, Code of Criminal Procedure 1898

Further, as per the 2016 amendments<sup>38</sup> clearly state that the victim, if female, is supposed to be examined by a female medical practitioner immediately after commission of the offence; however, the data shows that in only half of the cases this requirement of medical examination being conducted immediately after commission of the offence was fulfilled.

### 2.3. Submission of Samples to Chemical Examiner

Chemical examination in cases of rape and sodomy is conducted to detect sperm, hair and nail of the accused on the victim's clothes or bedsheets etc. This can be a crucial piece of evidence which can be utilized to prove that the accused is guilty.

In 50 % of the cases samples for chemical examination was not collected or the collected samples were not submitted to the chemical examiner. An average timeline of 34.8 days in submitting samples for chemical examination also contributes to delays in the entire investigation process and reduces the chances for successful prosecution.

### 2.4. DNA Analysis

In cases of rape and sodomy DNA analysis report is by far the most crucial piece of corroborating evidence that can substantially prove that the crime was committed by the accused.

The data evidences that in 30 cases no DNA analysis was conducted or that the police failed to submit samples of the victim and accused for the analysis. On average it takes the police 9 days to submit samples for the DNA analysis. Even in cases (25) where the medical examination was conducted within the 72-hour timeframe, it is observed that there are massive gaps pertaining to DNA analysis of the victim and accused.

It is indicative from the findings that the police have not displayed a strong impetus to follow required procedure to collect substantive evidence for the prosecution. This is in disregard of the latest amendments in law mandating collection and submission of DNA samples to be sent at the earliest to the forensic laboratory <sup>39</sup>.

The majority of case files themselves were also missing crucial documents relating to medical and chemical examination including request letters for examination; memos on collection of swabs and DNA analysis reports.

<sup>38</sup>Section 164A Pakistan Penal Code 1860

<sup>39</sup>Section 164B Pakistan Penal Code, 1860; Qanun-e-Shahadat, 1984

## 2.5 Reasons for Delay and Challenges in Collection and Submission of Samples for Chemical, Forensic and DNA Analysis

The responsibility of gathering and submission of samples for such analysis lies on the police. It is the police that must direct the medico-legal department on what it requires for purposes of its investigation e.g., requirement of blood samples etc.; provide samples of clothing or bedsheets or any other material for chemical and forensic analysis; provide payment to the laboratories for these samples to be tested in a timely manner. In many cases, the police and even the medico-legal examiners often fail to fulfil these requirements. Following are some examples.

**Failure to collect clothes worn at time of incident:** Often, victims will have changed clothes before coming to the police station, losing vital evidence in the process, absolving police of responsibility. However, if clothed, the police and medico-legal must ensure those clothes are preserved and sent for analysis.

**Lack of collection of additional material for analysis:** During investigation, police does not often collect other material for analysis. Even in these 50 cases, in only 1 case were the bedsheets submitted for analysis. DNA and other forensic evidence may be collected from anywhere at the crime scene (to be discussed in more detail later). For example, as Dr. Summaiya Syed Tariq, Additional Police Surgeon, noted during the training of IOs, a bottle or glass from crime scene could contain DNA of the accused which may be critical for establishment of an accused's presence at the crime scene.

**Medical examination not comprehensive:** The medico-legal examiner also plays an important role here. The examiner must take the lead in collection of all forms of evidence on the body of the victim. Often, as noted in the majority of the medico-legal reports examined for this study, and confirmed by the prosecutors and Dr. Summaiya Syed Tariq, only examine the victim's body for obvious physical marks of violence and the vagina or anus for evidence and collection of swabs. It is essential that the whole body be checked as the contact between the victim and accused may have resulted in the transfer of physical evidence in addition to semen which may include saliva, blood, skin fibres or other trace evidence. In addition to just examination of the vagina or anus, finger nails, arms, legs etc all may have some sort of physical evidence. Medico-legal officers unfortunately do not have readily available updated resources such as oblique and ultraviolet lights to help spot hair and fibre and blue light to assist in detection of semen. Thus, close physical examination and samples must be collected carefully and sent for analysis.



The police and prosecutors stated that it is not uncommon that the medico-legal doctors themselves do not conduct a thorough examination. In fact, Dr. Summaiya notes that they are often reluctant to clearly state if rape has occurred or provide detailed evidence to avoid being caught in a big contentious trial. Needless to say, this negligence has a massive impact at trial.

**Lack of skills of police in collection of DNA and forensic evidence:** The police are not provided adequate training, particularly practical skills, and correct techniques of collection of DNA and forensic evidence at the crime scene. This will be critical for the successful implementation of the SoPs being developed for this purpose. The Sindh High Court, in the case of Kainat Soomro and Others currently sub judice before the court, has ordered the police to develop Standard Operating Procedures for DNA in rape cases<sup>40</sup>. The SoPs will be finalized shortly. However, the challenge will remain on ensuring its implementation in the field through effective training and monitoring to achieve desired results.

A Training Needs Assessment of the Sindh Police <sup>41</sup> reveals that while theory of crime scene management and forensics is taught to the police, there is limited practical exercises which build the skills of police officers in the field. Further, the time period of trainings is quite large (ranging from 10 – 12 years in some cases) resulting in many police officers not having been provided training of any of the new techniques in recent years.

**Delayed of non- payment of charges for chemical & forensic analysis & DNA tests:** One of the biggest hurdles remains payment of the charges of the laboratory, without which the testing will not be done. This is one of the biggest complaints heard from private prosecution lawyers and clients that the victim is asked to pay for costs for DNA and Forensic testing. This is incorrect and mala fide on the part of the police. It is in fact senior police official who has the finances for this purpose and must be approached by the investigating officers for release of funds. However, this process of release of funds is complicated and lengthy, during which the medical and chemical evidence is either not sent, or has been sent but not analysed or report will not be generated until complete payment is made. Even so, these reports form some of the biggest delays. Thus, in a large number of cases, as prosecutors report, the cases are run on interim charge sheets because the final reports from forensics or the chemical examiners are unlikely to arrive within the 14-day time requirement. Senior police officials should be held accountable for delays in release of payment, and the following delay in release of reports.

<sup>40</sup> Khurshid. J. 13-11-2020. High Court seeks final SOPs for investigating sexual assault cases. The News

<sup>41</sup> Zia M, & Aziz, A. (2020), Training Needs Assessment of the Sindh Police, Karachi, Pakistan, Sindh Police, Legal Aid Society, ICRC



## 2.6 Chain of Custody, Transport and Storage of Medical and Forensic Evidence

Another concern relating to DNA, samples for medico-legal department or chemical examiners or forensic departments is the chain of custody, resources at the time of transport and storage. Dr. Qarar, Dr. Summaiya and SSP Korejo all highlighted the role of the police in potentially damaging the samples. They noted that police officers usually travel on motorbike and do not have the necessary equipment for transport. Dr. Qarar noted one particular example where a police officer took all samples in plastic bags on his motor bike and got into an accident on the way in which the glass vials and bottles were smashed, destroying all medical evidence in the case.

Additionally, police stations or even government medical facilities are not equipped with the appropriate resources and equipment to ensure optimal storage of samples including e.g. ensuring right temperatures etc. A 2019 case<sup>42</sup> recognised this issue noting “this advance microbiological technique to generate identical profile requires optimal storage and transportation conditions to rule out even the minutest contamination, facilities hardly available even in tertiary hospitals.”

Thus, there is no way of being sure that samples are not contaminated or ruined. This issue has been touched upon in a 2019 case<sup>43</sup> which identifies that lack of DNA does not result in automatic acquittal due to associated complication. This makes chemical and forensic evidence suspect. The majority of the cases analysed correctly confirmed unbroken seals and which officer transported and delivered them etc. However, there is little or no discussion on quality of sample and whether it had been potentially damaged in the sample cases.

The forthcoming SoPs on DNA are much required and awaited. Their practical application must also be a high priority for the police, including monitoring of officers in the field to ensure these SoPs are being fulfilled. It is also hoped sufficient resources shall also be provided to facilitate the required changes as per the SoPs.

## 2.7 Outdated Medical Legal Examination Form & Challenges in Understanding Medical Language

Sections 53A (Medical examination of a person accused of rape) and 164B, CrPC (Medical examination of the victim of rape) provide specific instructions of whom can conduct medico-legal examinations, who all may be present and giving specific requirements of what information should be included in the report. However, the format of the medico-legal reports have not been amended accordingly.

<sup>42</sup> Ibid

<sup>43</sup> Yasir Ayyaz vs. The State (2019 PLD Lahore 366)

## 2.8. Medico-Legal Reports and Language

The medical reports and statements of medico-legal officers are quite technical and use technical medical terms, as is expected. However, police receive limited training on medical jurisprudence, while prosecutors and the judiciary are not. However, all 3 institutions are challenged by the technical language and demonstrate a limited understanding of the medical report and how to use it strategically.

Medical reports should be used by the police as further indications and guidance for their investigation. It may be used to guide the statements made under Section 161 CrPC of different eye witnesses, interrogation of the accused etc.

These reports should be used by prosecutors in developing of their legal strategy. Prosecutors should engage with medico-legal officers in advance of their testimony to understand what the report says. For example, in LAS Case #35, the medical report states the vagina of a 9-year-old girl was ‘congested’. Medically this means either the child has an infection or in recent history, she was touched sexually. The Examination in Chief conducted by the Prosecutor did not elaborate on this fact, to provide the judge an understanding of what the medical report has truly discovered. The judge in his deliberations, thus, only focuses on the part of the report which stated there were no marks of violence on the body of the victim and declared the potential incident ‘improbable’.

The majority of cases which included medical reports included language relating to whether there were marks of violence on the body of the victim/survivor. As Dr. Qarar Abbasi, Police Surgeon Karachi noted, which is also reiterated across judicial precedents of superior courts, that marks of violence are not necessary for proving rape. He stated that he is not often asked to go into more details in court beyond asking if there are marks of violence or was there proof of rape. He also noted that violence of the vagina or anus does not necessarily get recognised as “marks of violence” as well. He went on to emphasise that it is very rare that a medico-legal report can in fact tell you if there was rape. He stated that marks of violence MAY be an indication, but not all cases of rape have marks of violence. A medico-legal report can most often simply tell you if there has been sexual assault, intercourse or any sexual activity. It cannot tell you if the intercourse was rape or consensual. With young girls, he noted, the tearing of the vagina and first-time penetration leaves marks, which is why it is sometimes easier to prove rape of young girls and the medical emphasis on practices which fall into the scope of virginity testing. With married girls or women, particularly those who gave birth recently, this is harder due to the fact that there will be no such marks. The medical examination merely states whether there has been any recent sexual intercourse.

What is essential for the police and prosecution is to be able to create a straight line between accused and alleged victim whether through chemical examination and cross match of DNA if semen is found or through circumstantial and corroborative evidence.

Without understanding what a medical report can and cannot prove and what the technical language means, the actors (police, prosecution and judiciary) are handicapped in being able to effectively use these reports. For example, in many cases, judges only take the term ‘no marks of violence’ or lack of semen as corroboration that the offence did not occur. Instead, there is no discussion on whether a condom was used, or recognition that penetration not ejaculation creates the offence or that certain terms indicate sexual violence has occurred.

Medico-legal officers should be trained to use a less technical way of expressing themselves for the lay persons in the criminal justice system. They should also refrain from statements such as “Rape is not proven” or “I have not seen any marks of rape” because this is not strictly correct as there may be other forms of evidence that may prove rape. Sexual intercourse or semen, which is what victims/survivors are tested for, on their own do not prove ‘rape’. If there are no obvious marks of violence etc., it does not mean rape did not occur, just that there are no marks to support that it did.

## 2.9. Virginity Testing & 2-Finger Test Continues Being Used

The practice of virginity testing and the 2-finger test continue to be widely used, despite the World Health Organisation having clearly stated that there is no medical basis for the conclusions of these tests as they are not medically sound indications of prior sexual activity.

“Virginity testing, which is presently an integral part of the medical and vaginal examination of a complainant of a sexual offence, is a gynaecological examination apparently intended to determine whether a female has had or is habituated to sexual intercourse. This examination usually takes two forms: (i) an inspection of the hymen for tears or the size of the vaginal opening; and (ii) a “two-finger test” in which one or more fingers are inserted in the vagina to assess the size of the vaginal opening and to check the degree of vaginal penetrability and whether the vestibule is congested due to the use of force. The premise upon which the test is based is that if the vagina admits two or more fingers with relative ease, the woman is likely to be previously sexually active and the ease with which the fingers penetrate the woman is assumed to be in direct proportion to her sexual experience. Similarly, the state of the hymen is supposed to be indicative of prior sexual experience, which apart from being inaccurate, is also completely irrelevant to a charge of rape following the omission of section 151(4) from the Qanun-e-Shahadat Order, 1984 by the Criminal Law (Amendment) (Offences Relating to Rape) Act 2016. The premise of the tests are also flawed because of the underlying assumption that only the overt use of force can result in a lack of consent to a sexual encounter and victims who have suffered as a result of covert use of force could be presumed to have consented.”

Internationally, these tests have been recognised as a violation of human rights but in Pakistan, “women are subjected to this extremely invasive and unlawful test, not on the basis of any sound medical practice, or to reach a scientifically sound conclusion, but on pre-conceived notions of the physiology of a sexually “chaste” woman and the morality of a rape victim.” A 2019 judgments supports this perspective, stating:

“presence of old healed hyman as an argument to impeach prosecutrix credibility is preposterously fallacious. Hard work, age beyond nobility and household pursuits and folk sports in vogue amongst girls cause rupture of hymen more often than not. Interregnum between assault and medical examination itself provided healing period. Virtue of a woman is not embedded in her anatomy; it gleams in her soul on the basis of her conduct as of human being, found above reproach in the present case.” <sup>44</sup>

Despite attempts at eliminating this practice by the judiciary through case law and active engagement with the medico-legal department, the cases evidence the continued use of these two methods. In a historic judgment of the Lahore High Court in 2021, the two-finger test and virginity testing have been banned as it is “illegal and against the Constitution of Pakistan” <sup>45</sup>. A similar petition is present before the Sindh High Court, demanding elimination of the test in its entirety. The Government through the Health Department should take urgent steps in revising curriculum for health practitioners and medico-legal departments and eliminate the test. The Sindh High Court should direct all courts to ensure that this test should not be a consideration on their judgments and to further direct medical officers to desist from this practice.

## 2.10 Disproportionate Focus on Medical Evidence to Neglect of Other Evidence

With increased information about medical and forensic evidence for rape, there has been an increased reliance on medical evidence to prove rape to the exclusion of other forms of evidence including circumstantial evidence. Thus, the police and prosecution focus primarily on the medical evidence and often judges become reliant and comfortable giving convictions upon only medical evidence, which a tangible form of evidence if found, as opposed to circumstantial evidence.

In very few cases analysed for this study, were other forms of evidence gathered. In some cases, clothes of the victim (if same ones worn at time of incident) were taken, in another the bedsheets from where the offence allegedly occurred. Aside from this, independent witnesses or eye witnesses to the incident (while some who witnessed the arrest or drawing of the site map) were not brought on record or in court. No technological evidence was brought forth where it was alleged that there had been photos or videos made on the mobile phones of the accused; call records to ensure an alleged victim who

<sup>44</sup> Yasir Ayyaz vs. The State (2019 PLD Lahore 366)

<sup>45</sup> Correspondent, 04-01-2021, “LHC declares two-finger tests for sexual assault victims illegal”, <https://www.geo.tv/latest/328108-lhc-declares-two-finger-tests-for-sexual-assaults-illegal>

claimed elopement had in fact had a previous relationship with the accused; geo-tracking to identify the whereabouts of the accused and victim at the time of the alleged offence etc. Even the medical evidence is limited. For example, where semen is found on the victim or victim's clothing, and on the accused, no cross-match is made to confirm whether the semen does in fact belong to the accused.

This study identifies 3 primary issues which challenge the reliance on medical evidence. These are based on assumptions made by the criminal justice system or gaps.

First, there is a presumption that rape resulted in ejaculation. The law specifically states that penetration is sufficient to constitute the offence of rape. This was reiterated in a recent Lahore High Court Case<sup>46</sup>.

The focus on DNA and semen takes away from the fact that ejaculation and semen are not confirmed proof of rape. This was highlighted by Dr. Qarar Abbasi, Police Surgeon Karachi, who reiterates that the lack of semen or marks of violence does not mean that rape did not occur.

Secondly, there is a presumption that the accused rapist did not wear a condom. If the rapist wore a condom, there would be no semen present in the body of the victim. This was noted in a 2019 case<sup>47</sup> which states:

“...we have in our minds that the appellant must have resorted to safe sex by adopting some precautionary measures for not leaving behind stains of his semen.”

Thirdly, there is a high level of difficulty of using medical evidence to prove rape when the alleged victim is a married woman. The medico-legal departments continue using virginity testing. Several cases reported use of the 2-finger test as part of their examination. In young girls, this results in ease in proving some form of sexual assault, while in older married women, it proves nothing. Thus, in addition to this being a violation and heinous practice against girls and women, it also is based on no scientific evidence or proof and thus negates its usefulness. A 2019 judgment<sup>48</sup> discusses the outdated practice of virginity testing, with an indirect reference to the 2-finger test:

“presence of old healed hymen as an argument to impeach prosecutrix credibility is preposterously fallacious. Hard work, age beyond nobility and household pursuits and folk sports in vogue amongst girls cause rupture of hymen more often than not. Interregnum between assault and medical examination itself provided healing period. Virtue of a woman is not embedded in her anatomy; it gleams in her soul on the basis of her conduct as of human being, found above reproach in the present case.”

The impact of the ban of the use of this test in Punjab is yet to be seen. A similar ban is hoped in Sindh, which will require the re-training of several medico-legal officers, police and prosecutors to re-direct their minds to other forms of evidence and arguments based on alternate medical evidence.

<sup>46</sup>Dilawar vs. The State (2020 MLD 155)

<sup>47</sup>Khalid Hameed vs. The State (2019 PCrLJ 1188)

<sup>48</sup>Ibid

### 2.11. Sole focus on Physical Health

The medico-legal examination focuses entirely on physical health of the victim. It does not take into account any psychological assessment or support to the victim. A few medico-legal officers do mention that the victim was oriented or not at the time of examination, but this too is at the discretion of the medical officer. The damage identified or considered for purposes of penalties is only physical and medical treatment is also only physical. No special measures are taken for child victims either.

The police, prosecutors and judges all emphasised the psychological damage of rape and sodomy on a victim and its impact on their life as a whole, impact on the trial and the further impact of the trial on their psychological help. Yet, no assistance of any kind is available. Dr. Summaiya highlights that once again it is the discretion of the medico-legal examiner if she/he provides an assessment of the mental state of the victim or further refers them for psychological support.

## 3. Recording Statements

### 3.1 Recording the 164 Statement of Victim, Complainant and Witnesses

In Pakistan, there is a high reliance upon the solitary statement of the victim as possibly the most important piece of evidence. The Supreme Court has declared, which has been echoed in the lower courts, that a conviction of rape can be made on the basis of the sole statement of the victim as long as it ‘inspires confidence’.

“It is well settled by now that “there is no denying the fact that acid test of the veracity of the prosecutrix’s (sic) statement is the inherent merit of her statement because corroborative evidence alone could not be made in a base to award conviction”<sup>49</sup>.

There are two opportunities for a victim to record the statement: at the beginning of the investigation and at trial. The law stipulates that the investigation officers are required to present the victim in front of a Judicial Magistrate after her medical examination is conducted to record her statement under Section 164 CrPC. If the accused was given an opportunity to cross-examine the victim at the time of giving the statement, the victim’s statement in front of the magistrate is admissible in court as part of the prosecution’s evidence.

<sup>49</sup>2011 SCMR 1665



TIMELINE OF VICTIM'S STATEMENT u/s 164 Cr.PC	
MINIMUM (# OF DAYS)	1
MAXIMUM (# OF DAYS)	105
AVERAGE (# OF DAYS)	15.9
NOT CONDUCTED (# OF CASES)	25
NOT STATED (# OF CASES)	6

Table 3: Summary of Delays in recording victim's statement u/s 164 Cr. PC

The primary object of the statement under Section 164 CrPC (164 Statement) is to ensure a record of voluntary statements during the investigation which may be used as evidence later in trial.

In 50 % (25) cases the police did not present the victim in front of the magistrate to record her statement. The average timeline for recording of the statement was 15.9 days which is the total time period allotted to the police to complete the investigation. Given the significance and importance of the 164 statement, this average delay should be unacceptable.

It is critical to record the statement of the victim/complainant at the earliest as there is great emphasis on the solitary statement of the victim as it is a key piece of evidence. Delay in recording of a statement may be used against the victim/complainant as it is often seen to allow time for them to make improvements on their story. The immediate or earliest recording of a statement is given more value. Further, this reduces the opportunity for external pressure to be placed on the victim/complainant and family to compromise the case. Additionally, if the victim/complainant turns hostile or does not come to court, this testimony may be used for continued prosecution of the case.

Additionally, senior police officials recommend the recording of the testimonies of key prosecution witnesses under Section 164 CrPC before the Magistrate. As SP Tariq Malik emphasised during his training with the police, his own experience has taught him the importance of recording the evidence of prosecution witnesses, particularly private witnesses. He noted that due to the delays, there is increased time without adequate protection for witnesses, allowing for pressure to be placed on the victim/complainant to compromise, or threaten or bribe the witnesses to change their testimony, or simple the witnesses moved and can no longer be traced at the time of trial. By recording the evidence under Section 164 before a Magistrate, he had seen cases resulting in conviction based on 164 statements.



It is essential for the Prosecutors to also play a pro-active role. Under Section 9 of the Criminal Prosecution Service (Constitution, Functions and Powers) Act 2009, they can return the case to the IO for further investigation. This may well include the enforcement of the requirement to record the victim or complainants 164 statement. The responsibility also falls on Magistrates reviewing the 173 challan at time of submission to mandate recording of the 164 statement if it has not yet been done.

The IOs and prosecutors both however highlighted a point of great worry that it is not uncommon for the staff of the Magistrate to take money for the recording of 164 Statements. It was recommended to both that in such cases, complaints of corruption must be made to the MIT Department of the Sindh High Court.

It is a concern that the police do not follow the most essential procedures when investigating a rape or sodomy case. Additionally, the low ratio of recording of 164 statements in the sample for this study, also reflects the lack of role played by the prosecution and/or the judiciary in ensuring this requirement is fulfilled. This on a whole considerably weakens the prosecution's case as there is severe lack of conclusive evidence which consequently translates into giving the accused the benefit of doubt, and it is observed that this becomes the deciding factor in acquittals.

### 3.2. Statements to the Police under Section 161 CrPC

The object and purpose of section 161 CrPC is to collect evidence regarding commission of an offence by examining and recording the statements of the material witnesses of the commission of the offence. As such, these statements are not admissible in court for purposes of seeking corroboration or assurance for the testimony of the witnesses in court. However, it can be used for contradicting prosecution witnesses and for no other purpose.

On the face of it these do not appear to play a major role. An examination of the case files however shows a different picture entirely. These statements are regularly used in court to contradict the victim/complainant and other witnesses whose 161 statements often do not match with the testimony given in court. Such inconsistencies in statements makes the witness seem untrustworthy and makes all evidence given unreliable, a ploy used often by the defence.

There are several examples of this. For example, in LAS Cases # 1, 41 and 43. In LAS Case #1 again, the victim was allegedly blackmailed previously as per her 161 Statement but no mention of that is given at trial. In LAS Case #37, the victim changed her statement between Examination in Chief and Cross-Examination, as did the victim in LAS Case #8. In LAS Case #43, the victim didn't mention a gun in the FIR, 161 statement, or in Examination in Chief, but mentioned it in her Cross-Examination.

There are two primary reasons for this. First is the fact that police do not consider 161 statements to be important and deal with in a cursory manner. In a training with 27 IOs,

none of them were aware of the impact of 161 statements in court and thus its importance. This is indicative of the understanding of IOs who may not have as much experience in court to understand the nuances of trial and use of the 161 statement. Recognition of its importance requires police to use a very different tactic in conducting the interviews. For example, victim-centric approach must be used in interviewing the victim; the types of questions asked must vary between open ended and leading and probing questions. Efforts must be to facilitate as much information and detail as possible to ensure there are no inconsistencies later during trial.

The police officers during the training recognized that they paid limited attention to recording the 161 statement. Communication, particularly with GBV victims is an essential component of good policing. The Training Needs Assessment of the Sindh Police<sup>50</sup> identifies that while police officers do study various different subjects such as community policing and human rights during their training, communication as a separate whole subject is not taught to them. Further, there is little practical development of communication skills or interviewing vulnerable victims, be it victims of GBV or other offences.

Second, there is little or no preparation of the victim or complainant for trial by the public prosecutor. If a private lawyer is hired, there may be better results. However, with public prosecutors, the victim often sees the statements given a year earlier a few minutes before going on stand to refresh their memory. It is natural to forget details or remember more details at a later stage. A proper preparation of the victim/complainant for recording of testimony and for cross-examination would be critical strategically done the day before or earlier than the trial by the prosecution.

Prosecutors during the training stated they have little time, if any, to collaborate or coordinate with the prosecution witnesses. Specifically, they noted lack of space to strategize with the victim or prepare the victim or witness beforehand. The additional workload is another reason they highlight as a challenge in focusing too much on one case. However, they admitted that greater preparation would benefit their cases with measures as simple as sending the victims or prosecution witnesses copies of their previous statements a night or two before their case is heard etc.

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<sup>50</sup> Zia, M & Aziz, A. (2020) Training Needs Assessment of the Sindh Police, Sindh Police, Legal Aid Society, ICRC

## 4. Critical Components of Investigation

### 4.1. Rape: Offence with 2 Crime Scenes

In a rape there are two crime scenes: the location where the rape took place and the rape victim's physical person, including the clothing worn by the victim and the perpetrator. Both should be secured at the earliest possible.

The victim's body is examined by the medico-legal officer, who conducts the physical examination and collects all physical samples from the body for further analysis. As discussed above, efforts must be made to ensure the medical examination happens as early as possible after the incident and that the victim does not change her clothes nor showers prior to the examination.

On-scene physical evidence is anything tangible that can establish a crime was committed or link the crime and the victim and/or the perpetrator and the victim. First responders to the crime scene must secure it to try to ensure no contamination of the scene and potential evidence. The objectives of the search of a crime scene in a rape case are the same as in any other major case<sup>51</sup>:

1. Reconstruct what happened and establish that a crime occurred;
2. Identify, document and collect evidence of what occurred;
3. Link the victim and the suspect to the scene of the crime;
4. Identify and locate any witnesses; and
5. Identify and apprehend the person(s) who committed the crime.

However, in order to collect such physical evidence, the IO must be first be able to recognize such evidence. And further, if not collected, preserved or analysed properly, it will fail to be admissible in court.

It is a common practice in rape and sodomy cases to only focus on the body of the victim as the main 'crime scene'. On-scene physical evidence is a crucial element in rape cases, often ignored. When identified, it is not unusual for the crime scene not to be cordoned off, resulting in contamination. The lack of focus on the crime scene was noted by Dr. Summaiya in her trainings with police and prosecutors both, which was reiterated by both police trainers SP Tariq Malik and SSP Faizullah Korejo. This tendency has grown with increased focus on medical evidence and DNA, as noted earlier, reducing focus on other forms of evidence to an almost negligible degree. Basam Dahri, a criminal lawyer, while discussing this with the police at the police training highlighted the importance of simple measures, such as even taking photographs of the crime scene with their own phones.

<sup>51</sup> Jetmore, L. Dr. (2006), 'Investigating Rape Crimes, Part 1: Guidelines for first responders', United States, Police 1 Lexicon, <https://www.police1.com/police-products/investigation/evidence-management/articles/investigating-rape-crimes-part-1-guidelines-for-first-responders-Szghj3goS1WxaXUu/>, accessed on 18-12-2020

In the cases examined, there had been little or no efforts to collect evidence apart from the statement of the victims or medical evidence. Police officers made memo of sites and completed documentation, but apart from one case, no evidence from the site was taken for further examination. For example, it is only in LAS Case #2, the police took the bedsheets and pillow cover but these were not presented in court. No circumstantial evidence was presented nor was evidence from private, natural witnesses etc., even when they were available as per original FIR and 161 statements of the other witnesses.

While there is training of all police officers on crime scene investigation, this has had limitations in the field. The Sindh Police has created special Crime Scene Units which have anecdotally shown to have better results. However, they cannot be expected to be there for every single crime scene. Specific queries should be raised within the police to diagnose why the in-field impact of crime scene investigation is limited.

The lack of additional evidence other than medical and statement of the victim or complainant makes the prosecution case incredibly weak as even solitary statement of the victim is strengthened by circumstantial or corroborative evidence. Further, it is not uncommon for the victim/complainant to reach an out of court settlement and resile from the case or turn hostile at trial. Given that rape and sodomy are considered crimes against the State, even where the victim resiles, the Government may continue to pursue the case. With strong circumstantial evidence, the prosecution could continue the case based on this evidence alone. Types of evidence including on-site evidence, technological evidence such as geo-tracking etc. must be taught to all IOs, and made available to them.

## 4.2. Importance of Documentation

Police officers have a large number of registers aka roznamchas and other documents that need to be filled on a regular basis, including their daily diary. These are all documents that may be used as substantive evidence in court. This may include the daily diary, site maps, memos, case zimnis etc. If a police officer forgets or is negligent about completion of any of these, their evidence and testimony may become suspect and the veracity challenged, including witnesses to any documents etc.

Police officers must be aware of the importance of these documentations and to cross-check their own processes to ensure all are completed. The Prosecutor should also ensure all police documentation is consistent and in order before submission of the case to the court under the 173 challan.

In all the cases files, one of the most common strategies of the defence lawyer was to cross-examine the police officers in minute detail on these documents etc. For example, in LAS Case #2, by asking all police officers details of the different documents, when they were signed, how long each one took etc., the lawyer systematically destroyed police timeline and exposed all irregularities in their practice. This has the instant effect of casting doubt on their investigation as a whole. This is pertinent given the reputation of the police to fabricate evidence and principle of benefit of doubt to be provided to the accused.

### 4.3 Making a Case against the Accused: Generalised Evidence vs. Direct Evidence

One of the biggest critiques of the police investigation, was a lack of direct evidence against the accused. This included whether there was lack of evidence or whether the police failed to explore all options and opportunities to capture different sorts of evidence.

The police and prosecution during investigation and construction of a case must ensure there is direct evidence against the accused toward commission of the crime itself.

In a 2016 case<sup>52</sup>, the only evidence found against the accused was of him removing the dead body and no direct evidence was submitted of the actual commission of the crime. Thus, his conviction was over-turned on the basis of extension of benefit of doubt to the accused. In a 1977 case<sup>53</sup>, the court held that there were “missing links in the case”<sup>54</sup> i.e., whilst the deceased victim may have last been seen in his company, there needed to be direct evidence linking the accused to her rape and murder. In a 2013 PHC case<sup>45</sup>, the failure to specifically mention the accused in her statement before the Magistrate led to the court concluding that nothing on record connected him to the alleged offence, thus granting his bail.

This issue was highlighted through the cases analysed for this paper. In 58% of the cases, the complaints/victims did not support prosecution case at trial, with several of them presumably compromising out of court, for example in LAS Case #8. Without additional corroborative or circumstantial evidence directly against the accused, the cases failed instantly. In other cases, no direct evidence was available or made available. For example, in LAS Case # 25, where there was no incriminating evidence against the accused and in LAS Case #33, where the judge wrote in his final judgment that the prosecutor’s case “did not inspire confidence”.

<sup>52</sup>Sarfaraz Ahmad vs. The State (2016 SCMR 1635)

<sup>53</sup>Rehmat alias Rahman alias Waryam alias Badshah vs. The State (PLD 1977 Supreme Court 515)

<sup>54</sup>Ibid

<sup>55</sup>Rahim Shahid vs. The State (2013 YLR 2642)

## 5. Scrutiny of the 173 Challan

Upon conclusion of the investigation, the police submit its report to the prosecution in the form of the 173 challan, which is scrutinized by them as under Section 9 Criminal Prosecution Service (constitution, Functions and Powers) Act 2009. Common practice is that this is the point where the Prosecutor gets involved.

Under Section 9 of the 2009 Act, the public prosecutors have specific tasks and powers when the police submit a challan for approval before them. Simply put, the prosecutor can send it back to the police for further investigation within 3 days<sup>56</sup>; or submit the 173 challan before the court and proceed to trial<sup>57</sup>. Prosecutors can also take measures of action against faulty investigations.

This role of prosecutors in scrutiny of the challan is perhaps the most essential role of the prosecutor. For example, the submission of the final challan is by the prosecutor, which gives full details of the accused as well as all claims and evidence against him/them. Thus, upon examination if the accused have not been assigned a specific role in the commission of the offence in the statements of the victims and witnesses and challan, as was in the Mukhtar Mai case<sup>58</sup>, the case against them would fail resulting in acquittal. Further, the prosecution must assess the evidence against each individual accused to be able to put it to him during the examination. If not done, the evidence can be used for maintaining a conviction or sentence. For example, in a 2016 SC case<sup>59</sup>, the prosecution made the error of not putting the medical evidence to the accused during his examination as per required procedures, thus it could not be used against him for maintaining the conviction or sentence.

From examination of the 50 case files, there is little evidence that the prosecution has utilized the option to send the case back to the police for further investigation. This assumption is based on the insufficient evidence on record in these cases, and glaring gaps in the prosecution case, which could potentially have been strengthened with some additional investigation and evidence collection.

There are several instances where it is evident that the police should have gathered more evidence e.g., in LAS Case #1, there were alleged nude pictures of the victim on the phone of the accused but neither the mobile phone nor pictures were recovered and brought onto evidence by the police. In other cases, geo-tracking would have clarified where the accused or alleged victim was at the time of the alleged offence etc. In LAS Case #33, there were allegedly neighbors who were attracted due to hue and cry, but none of them were brought forward as witnesses.

<sup>56</sup>Section 9(4)(a), Sindh Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2009

<sup>57</sup>Section 9(4)(b), Sindh Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2009

<sup>58</sup>The State vs. Abdul Khaliq (PLD 2011 Supreme Court 554)

<sup>59</sup>Ibid



As noted earlier, the primary focus of police, and also of prosecutors is on solitary statement of victim, interested eye witnesses and medical evidence. Prosecutors should build case on evidence apart from just witness statements and medical evidence. They must point to the police what is missing and give recommendations of what type of evidence is needed. If police are not aware of legal minimum standards and different types of evidences available or required, prosecutors should and direct police on additional investigation.

In other cases, where the alleged victim clearly states she is married on her own free will, the case for rape is taken up for trial, further evidence at an earlier stage would have allowed the case to be concluded earlier. For example, in LAS Case #42 where the parents of the alleged victim had filed a case of abduction and rape, the alleged victim was in fact had married of her own free will and has a one-year-old child with her alleged abductor and rapist. This fact, if had been brought on record by police or prosecution would have allowed for conclusion of case much earlier.

Scrutiny of the challan should also include making corrections where necessary. For example, in LAS Case #40, the accused allegedly put his organ in the mouth of the child, which would be a crime of sexual abuse under S. 377A and B of the PPC, instead the case was tried under S. 376, which would clearly fail as the offence did not meet the requirements of Section 376PPC.

Discussion with the Prosecutors during training revealed that the Prosecutor who conducts the scrutiny of the challan is different from the one who pursues the case. This can lead to some complications as the Prosecutor taking the case to trial may have very different views of the development of the litigation strategy as per their experience. Several prosecutors felt the scrutiny and litigation of case should be done by the same person.

## 6. Framing of the Charge

Once the prosecutors have finalized the challan, the entire investigation report and evidence is submitted before a Magistrate for their approval to take the case to trial. The first step, and what we are considered the initiation of the trial for the purpose of this study, is that the charge must be framed.

As per law, “a charge should state the offence committed by the accused and mention the specific name, section and sufficient description of the offence; if no any specific name has been given to it by law, there should be sufficient definition of it. The charge must allege all facts which are essential factors of the offence in question but there is no set yardstick fixed qua the particulars which should be mentioned in the charge as it depends upon the circumstances of the case. Magistrates may preferably adopt the language of the relevant section in which charge is being framed. After the charge is framed and read over to the accused in the language he understands, the Magistrate shall record plea of accused in the words nearest possible as uttered by him”<sup>60</sup>.

<sup>60</sup>Manzoor Z. (2017) Criminal Court Proceedings: Bench Book for Magistrate. Karachi, Sindh Judicial Academy



There are 3 opportunities during the process of submission and initiation of trial that provides opportunity to identify the exact offence with which the accused is to be charged:

- (i) The police identify the specific legal provisions and offences which the accused is being charged with when submitting the 173 challan to the prosecutor
- (ii) The prosecutor confirms the specific legal provisions and offences which the accused is being charged with when submitting the 173 challan to the court
- (iii) The Magistrate, looking at the entire prosecution case and evidence makes the final decision about which offences the accused will be charged with and the specific legal provisions.

In addition to this, at any time during the trial, the presiding judge may amend the charge if it is felt the evidence leads to a different offence.

The analysis of the case files, and discussions with the prosecutors and various private lawyers including those who work at War Against Rape, Barrister Jaffer Raza, Basam Dahri and Sara Malkani, all note that the charges framed incorrectly can be a problem. For example, in several cases of rape, the section of ‘attempt’ (Section 511 PPC) is added unnecessarily. This leads to the requirement of proving a different offence than that which was actually committed. Further, there is a lack of clarification for many that penetration does constitute rape – which is in fact specifically mentioned in the definition of ‘Rape’ under Section 375 PPC. However, the pursual of the charges framed, judgments and litigation strategy seen in several cases is the prosecutor and wrong wrongly defining this as ‘attempt’ instead of rape. For example, in LAS Case #35, the medical report clearly states it is a case of attempted rape of a girl of age 9/10 as opposed to rape itself. However, the judge ignores the testimony of the medico-legal officer and focuses on the statement “no marks of violence” noted in the report and states “these facts of the case itself look to be imaginary and un-believable under the circumstances”, which is wholly incorrect. The judge must recognize that attempted rape did occur, but there is insufficient evidence to prove it was the accused who committed the offence.

In several other cases, the offence which the accused is being tried for, but in fact another offence is proven or the facts emerging evidence that the wrong section has been included in the charge. For example, in LAS Case #23, whilst evidence was being recorded, it became clear the alleged offence was that of sexual abuse under Section 377 A & B, PPC as opposed to rape.

This indicates that all 3 tiers of scrutiny are not necessarily clear about the differences between rape, attempted rape nor clear on the reasons for addition of sections of attempt or common intention (Section 34 PPC, another commonly added section).

## 7. Preparation of the Prosecution Case

Each prosecutor decides his/her litigation strategy based on the evidence presented to them by the police. Prosecutors receive no formal training; thus, their planning is based purely on their own experience. The examination of the case files in this study evidences mis-management of the way and manner in which cases were planned and prosecuted. The gaps in prosecution case preparation are discussed below.

### 7.1. Lack of early coordination with the police

When a FIR is registered, a copy is sent to the Office of the Prosecutor General. However, the practice here is that the prosecutor does not get involved with the case at the investigation stage, despite the fact that they can and as international experience shows us, should. Discussions with both police and prosecution however reveals that both institutions feel that prosecutors should in fact get involved at this stage. Both feel that working collaboratively from early stages of the investigation, it would improve the entire process of investigation and prosecution. Mechanisms for this collaboration should be explored to create a sustainable and enforceable model.

### 7.2. Issues with Correct Framing of the Charge

This has been discussed above. However, here it must be mentioned that the prosecution and Magistrate have a specific duty and the time to ensure that the correct charges are submitted to the court or admitted for trial. There should be little allowance for mistakes or negligence on part of prosecutors at this stage.

### 7.3. Lack of Preparation of Prosecution Witnesses by Prosecutor

There is an apparent complete lack of preparation of Prosecution Witnesses by the Prosecutor. When asked, the prosecutors say they usually meet with clients on the morning of the case; or right before; or have a discussion on the phone. Prosecutors also have limited space to conduct such interviews in a desired manner, often sharing office space with no private rooms available for this purpose. This limited contact is insufficient for any effective case preparation and testimony preparation. Prosecutors must work in collaboration with victim/complainant and reassure them throughout the process and ensure they follow basic requirements during their examination in chief and cross-examination e.g., not the exaggerate/improve their testimonies in court. The 50 cases files are full with examples where better preparation would have resulted in improved testimonies without harming the prosecution case. Some of the issues identified have been discussed below

### a. Forgetting Crucial Information.

In many cases, the testimony is being given months or years after the incident. All of the actors in the trial may forget some detail or the other ranging from forgetting dates, to forgetting sequencing of events etc. This was seen across many of the testimonies in these cases. For example, forgetting details of dates or times to exact sequences of events etc.

If given access to files in advance or being advised by prosecutor to revise and recall dates a few days before the trial, this could have overcome. Revision of the statements and medical reports etc. made under Section 161 and 164 for the complainant, victim and other eye witnesses would be crucial. Revision of police reports or medical reports for the IO and medico-legal officers would also be beneficial. For medico-legal officers, as Dr. Qarar shared, they are often not informed in advance which case they are being called for. They appear in court, get case file from prosecutor then find out, giving them a short while to re-familiarize themselves with the case. This could be overcome by a simple call or text from the prosecutor a day before and sharing of relevant documents to assist the memory.

### b. Preparing Non-Government Witnesses for Testimony

Witnesses on a stand may have many different reactions. Some may freeze, some may enjoy the moment in the spotlight, others may appreciate being able to tell their story. This requires some understanding of victim psychology and the additional trauma of testifying and threat of re-traumatisation. This may result in different outcomes in terms of testimony. Thus, for example, some witnesses may not give complete information. E.g., In LAS Case #1, the victim allegedly abducted on bike, but does not explain why she got on the bike (i.e., were there weapons etc.? Was she threatened etc.?); In LAS Case #3, the complainant does not provide explanation as to why he registered and FIR against his cousin for the abduction of his wife and there is no understanding of how he came to this conclusion.

Others may feel compelled to enhance their story to gain favour with the judge. For example, in LAS Case #1, the victim did not mention the alleged abductors having weapons until the Examination in Chief, which was not believed by the judge.

The prosecutor should also play a critical role in preparing them for the cross-examination. As a legal practitioner, the prosecutor would be aware of the weaknesses in the case and prepare the witnesses for questions that will most likely be asked and what answers to prepare.

The guidance from the prosecutor prior to trial is critical to assist them. Discussion on questions that will be asked by the prosecutor or defence counsel may help them prepare better for trial, including reminders not to enhance testimony

### c. Preparing Government Witnesses for Testimony

While IOs and medico-legal officers are used to giving their statements, it is necessary for the prosecutors to also provide guidance to them regarding the specific nature of the case. For example, there are several examples where the IOs and other police officers are giving contradictory statements, which the prosecutor should have prepared them for in advance.

Medico-legal officers should also be guided on what to say and how to say it. For example, in LAS Case #37, the woman medico-legal officer clearly stated the allegations of rape by the victim are not supported by medical evidence. However, as noted by Dr. Qarar, medical evidence cannot for fact state if rape was committed, but can confirm if there was sexual activity. Thus, it may be better to say the medical evidence is unable to comment whether rape had occurred or not. A neutral statement is required as opposed to an opinion as to whether it supports the allegation or not.

Dr. Summaiya during her training with prosecutors highlighted that prosecutors do not ask adequate questions of medical officers. She also noted this might be because prosecutors do not have a strong grasp on medical evidence and terminology. She however stated that this is precisely why prosecutors should ask more rigorous questions of the medical officers to give their expert opinion. She advised that prosecutors should have regular phone calls with medical officers while preparing a case strategy to best understand exactly what to ask at the time of testimony.

#### d. Inconsistencies Between Statement Given Under S. 161; S. 164 CrPC; Examination in Chief and/or Cross-Examination

There are several examples of inconsistencies in different statements of the witnesses. For example, in LAS Cases # 1, 41 and 43. Using the example of LAS Case #1 again, the victim was allegedly blackmailed previously but no mention of that is given at trial. Delay in registration of FIR was touched upon, without explanation in Examination in Chief that victim/complainant had to file an application under S. 22A&B in the court to get FIR registered. In LAS Case #37, the victim changed her statement between Examination in Chief and Cross-Examination, as did the victim in LAS Case #8. In LAS Case #43, the victim didn't mention a gun in the FIR, 161 statement, or in Examination in Chief, but mentioned it in her Cross-Examination.

Witness preparation would be critical for avoiding or pre-empting these issues and strategizing how to deal with it at the time of examination in chief. The lack of preparation becomes evident with the defence counsel effectively discrediting the witness, resulting in weakening the case of the prosecution.

Further, if felt necessary, the prosecution can record a supplementary 164 statement to bring in any other material fact into evidence.

#### e. Contentious issues being brought out by defence instead of prosecution.

Good case preparation involves pre-empting what issues the defence counsel will use to challenge the prosecution case through cross-examination and to prepare a counter strategy in advance.

Instead, there are several examples in the cases where there are controversial issues or common gaps which can easily be handled by the Prosecutor if presented from the prosecution side, instead of it being brought up during cross-examination. By handling it through examination in chief, the prosecutor could take away the 'controversy' and control the narrative.

For example, in LAS Case #1, the defence highlighted rumours of an affair between the accused and alleged victim; in LAS Case No 43, the defence revealed that texts from the father's phone were sent to the accused prior to the alleged incident, indicating a previous relationship between the two and thus indicating that she had gone and had a sexual relationship with her own free will and was not abducted. Instead, the prosecution could have admitted that there was a relationship and focused on how despite this the abduction and rape occurred. There are several cases where the question of delay of FIR was raised and held against the prosecution because the delay was not explained. The delay could have easily been explained in the Examination in Chief, for example in LAS cases # 32, 35, 37, 38 and 43 which involved a variety of different reasons including attempting to compromise out of court; using own devices to find and recover victim of abduction; unwillingness of police to register FIR etc.

#### 7.4. Not All Prosecution Witnesses Are Called

There are a number of prosecutions witnesses the prosecutor decides not to call upon for various reasons. This includes cases where there may be 6 or 8 original witnesses on the challan, but not called during trial for example in LAS Cases #31, 41 and 44.

Prosecutor must also ensure correct witnesses are called at the time of submission of challan to the Court. For example, it is essential to call forth the Magistrate who recorded the statement of the victim or complainant under S. 164 CrPC as a witness. In LAS case #2, several private witnesses were mentioned in the police report. However, none of them were brought to record their testimony at the trial. This is even more essential in case the victim decides not to pursue the case. For example, in LAS case #29 when this occurred the prosecution could have continued prosecuting the accused based on the victim's 164 statement and provided corroborative evidence for her statement. This is discussed in greater detail below whilst discussing situations whether the victim/complainant resiles from the case or settles out of court. Briefly, once it is ensured that 164 statement was not given under duress and the defence was given an opportunity was given to cross examine her the state ment can be used for further prosecution.

#### 7.5. Strategy Must Be Developed for Cases of Abduction vs. Elopement

There were several cases where there were accusations of abduction and rape and then the female recanted at trial and stated it was a case of elopement.

Prosecutors must closely scrutinize the challan in cases of alleged abduction of a girl to ensure she has not eloped or married of her own free will. In such cases, further investigation must be conducted to ensure this is not the case. For example, in LAS Case #42, the alleged victim was married to the alleged rapist and they had a home and baby together.

However, at the same time, the police, prosecutors nor judiciary must not presume that marriage between victim and accused should not automatically mean accused did not rape victim. There must be further investigation. For example, there are examples where a girl/woman registers the FIR and records her statement under Section 164 of abduction, then changes it at trial. The presumption made is that she is telling the truth at trial. Resultantly the prosecutor does not call the IO, medical officers or even private witnesses. However, the question that should also be asked is why she did not reveal this to the Magistrate when recording her statement, where she would have also had the protection of the court.

Thus, when was she telling the truth? This must be explored further and the presumption of truth at trial must be overshadow the duty of the prosecutor to try to protect the victim.

## 8. Trial of Rape or Sodomy

For purposes of this study, trial is considered to have started with the framing of the charge.

### 8.1. Reduction of trial time

The legally mandated trial time is 3 months in cases of rape, sodomy and other forms of sexual violence including sexual abuse. However, as noted earlier in this paper, the actual trial time takes much longer. In particular, the framing of the charge takes the most amount of time. The data reveals that prosecution and trial phase take up 92 % of overall procedural time compared to investigation's 8 %.

#### a. Timeline of Total Pre-Trial & Trial Process

The figures below identify the average timelines of a trials progress including average number of hearings, adjournments, and thereafter unpacking common reasons for delays.

##### 8.1.1. Framing of Charge

As noted earlier, Figure 5 shows that of the framing of a charge takes an average time of 4.3 months i.e., 38 % of the pre-trial & trial time. This essentially means that after the submission of the challan the case is left pending for a full quarter of the year. Once the matter reaches the courtroom it takes 62 % of the time i.e., a further 9.6 months on average from the framing of the charge.

The scope of this study did not allow for an in-depth analysis of the reasons for delay of framing of the charge. However, this was raised at different forums. Mr. Abdur Razzak, MIT II, SHC noted that the process for framing of the charge takes time i.e., sending notice to the accused may take time if notice is not received i.e., first notice is sent through bailiff and if not received, this will be repeated several times where bailiff will report to the court every time he/she is unable to deliver the notice resulting in a court date and will make another attempt upon order of the court. If notice through bailiff has failed, then the court shall order pasting of the charge sheet at the last known address. If this too fails, at the next data at the court, order may be given for publication in the newspaper. In the following date, proof of publication shall be shown.



This process can take months resulting in great delay in timelines. The GBV Courts established in Sindh do not cover Magistrate Courts and no law or policy provides a speedy mechanism prior to framing of the charge which may allow the process to move more swiftly.

### 8.1.2. Number of Hearings

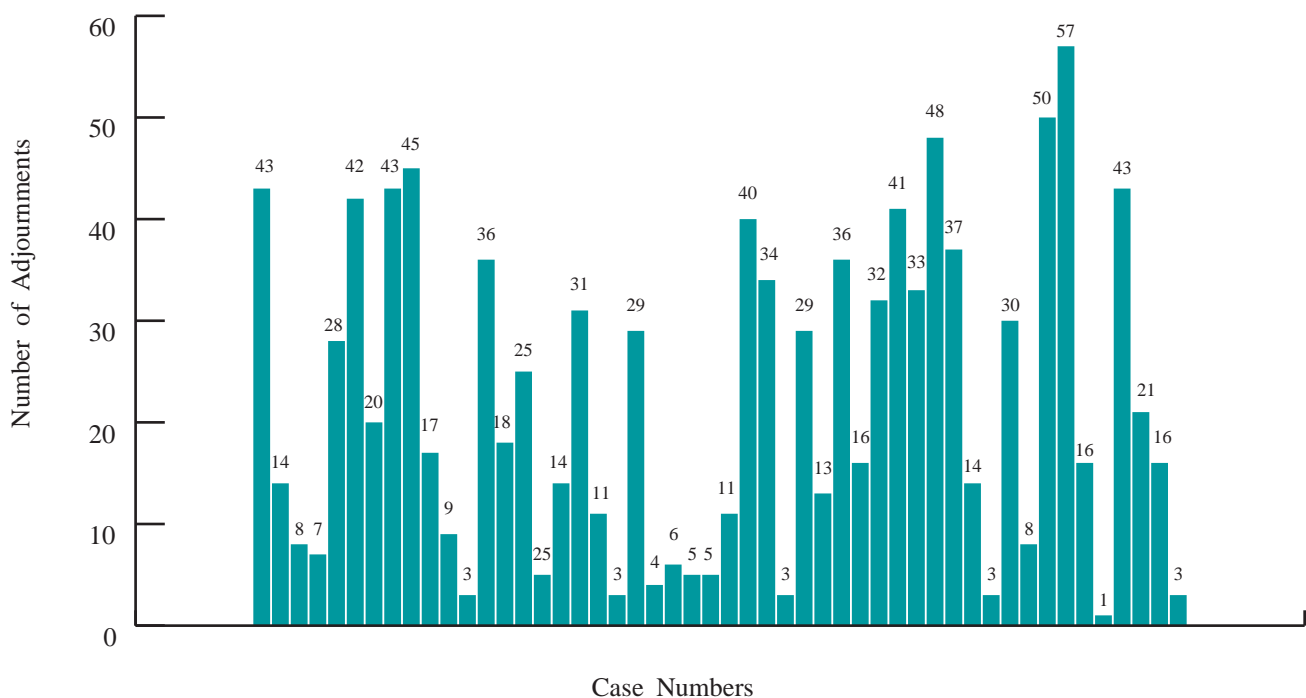


Figure 9: Number of Hearings in each case

The figure above shows how many hearings there were in each hearing. There are variations across the sample with some cases having just 3 hearings while others took more than 40. On average each case took 22 hearings till the conclusion of trial. It has been observed that cases with higher numbers of hearings generally take more time to conclude. Adjournments constitute the single most important reason for the high number of hearings.



### 8.1.3. Adjournments

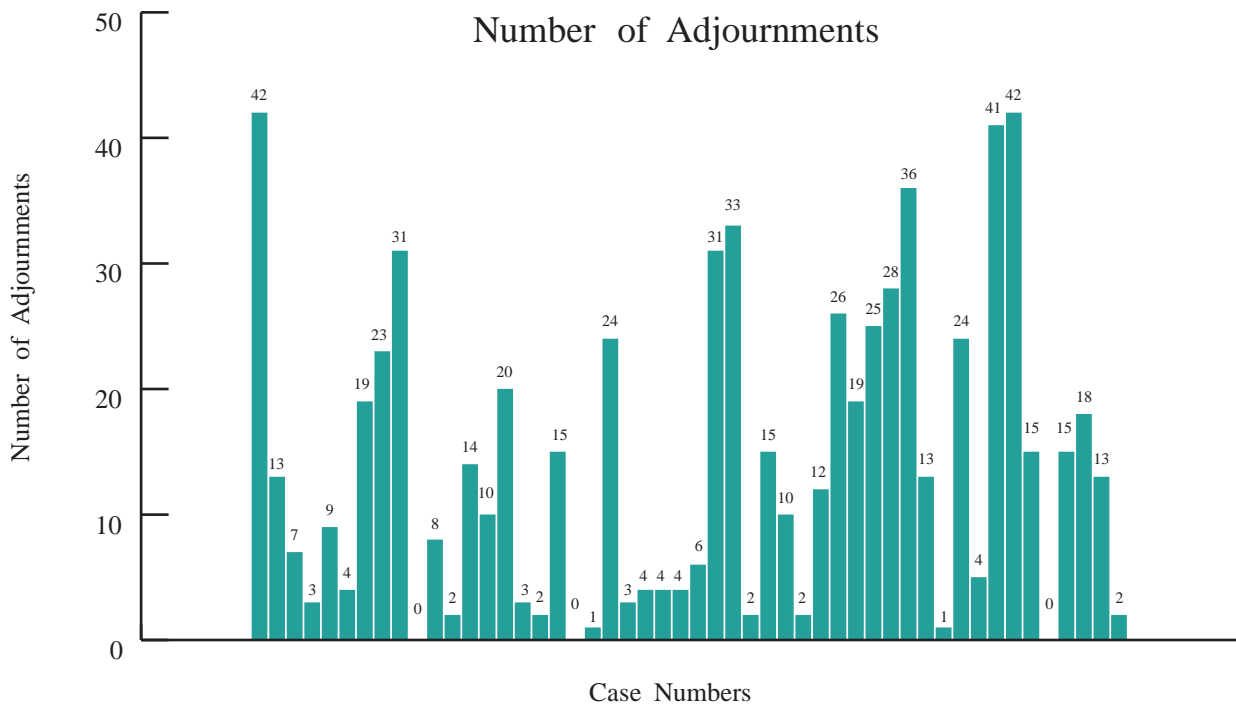


Figure 10: Number of Adjournments in each case

The figure above shows the number of adjournments in each case. Average number of adjournments in each case are 14.

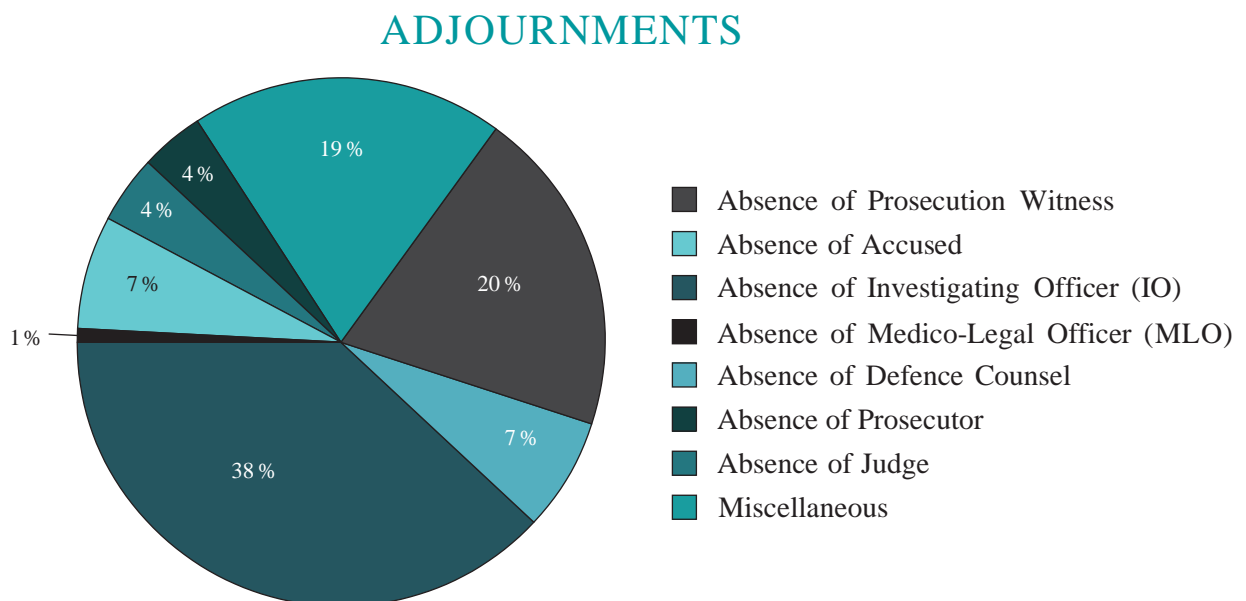


Figure 11: Reasons for adjournments and proportion of each reason

The figure above is a visual depiction of the reasons for adjournment and shows the proportion of each actors' contribution to the adjournments. The data suggests that the most common reasons for adjournments take place due to absence of the primary actors in the case i.e., complainants, witnesses, accused, counsel, judge etc. From the chart above it can be observed that absence of the Investigating Officer comprises the largest proportion (38 %) of adjournments; followed by prosecution witnesses (20 %); miscellaneous reasons (19%); 7 % each for absence of accused and defence counsel; 4 % each for absence of judge and prosecutor; and 1 % for absence of medico legal officer.

Miscellaneous reasons included;

- Strikes called by KBA
- Failure of I.O to present evidence in court
- Bail application
- Adjournment applications from defence counsel and/or prosecution
- Bar elections
- Infrastructural issues

Different courtrooms were revealed to have different methods of dealing with rape cases. In GBV Courts of Karachi East, cases are run on a day-to-day basis with the GBV Court operating on a daily basis. In Hyderabad, one day a week is appointed for GBV Court i.e., Tuesday, which may result in trials taking slightly longer to conclude. Model Courts on the other hand have shown great results due to their robust case management systems. This difference is also due to the lack of guidelines of SoPs for GBV Courtrooms to allow for a consistent well thought out approach focusing on reduction of trial time.

There is an assumption, which has also been tried out internationally, that swifter justice and conclusion of the case allows for less time for compromise and increased trust in the system. This was the intention of the legislators who passed the 2016 amendments to law, providing a time limit to these trials. Further directions from the Sindh High Court may be sought to provide a realistic process and plan for concluding cases within the required time limit.

## 8.2. Lack of Use of Special Protection Measures

Special protection measures must be used by the court to ensure the experience of the criminal justice system does not further contribute to the trauma of the victim.

“Criminal Justice Systems (CJS) around the world introduced special courts and procedures on dealing with cases relating to different forms of GBV and Violence against Women and Girls (VAW). These courts and procedures recognize and response to the difficulties victims/survivors of GBV and VAWG have in accessing the CJS, which include social, structural and systemic challenges.”<sup>61</sup>

<sup>61</sup>Legal Aid Society. (2020). “Background Note: Special Courts and Procedures for Gender-Based Violence (GBV)”, Karachi, Legal Aid Society

The objectives of these mechanisms<sup>62</sup> are:

- To reduce the trial time
- To create a safe space and environment for women, children and vulnerable groups
- To improve the experience of victims/ survivors in the CJS through adoption of a victim-centric approach and reduction of insensitive treatment

The use of special protection mechanisms is provided legal cover under Section 352 CrPC and includes mandatory conducting of rape and other sexual violence trials in camera. Other special protection measures to be potentially used include in camera trials, removal of the accused from the courtroom during testimony, testimony through video-link or pre-recorded video testimony, use of a commission to record evidence; and the use of a child psychologist to interact with the child or question the child instead of defence counsel etc.

Additionally, the Sindh Witness Protection 2013 also provides protection (albeit limited without it being effectively implemented). Section 4. allows witness' identity to be hidden: use of mask; change voice or appearance; other segregation; video-conferencing; relocation of witness; change accommodation; financial compensation; security to family. Section 16 states that if Court decides life or security of witness threatened: make witness protection order, seal documentation etc.

On-ground experience of LAS lawyers and researchers provides the knowledge that screens are used in several courtrooms for giving testimony in cases of rape, including the GBV courtrooms in Karachi East and Hyderabad. Beyond this, courts were not seen to be taking consistent steps for additional use of other special protection mechanisms, particularly when child victims are involved.

Special protection mechanisms may be applied for by the prosecutors and private lawyers in order to provide enhanced protection of the victim and improve their experience of the criminal justice system and try to avoid re-traumatization at the trial stage. However, none of the case files examined for this study revealed any application of usage of special protection mechanisms. This was confirmed with prosecutors and judges.

The judges, particularly GBV Courts should ensure that such special protection mechanisms are easily available for victims, taking the discretion to implement some of them on their own accord, especially when involving children. In particular, judges should have a strong hold over the courtroom set up and trial management to make allowances for such mechanisms and remain flexible to change processes to suit the different needs of the alleged victims.

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<sup>62</sup>Ibid

### 8.3. Dealing with Resiling Witnesses or Complainants and Hostile Complainants and Witnesses

Attrition rates during trial remain high with many victims/complainants compromising the cases out of court, and thus becoming hostile witnesses and not supporting the prosecution case. In the case files examined for this study in 58 % cases, the victims/complainant turned hostile and did not support the prosecution case.



Figure 12: Hostile Victims/ Complainants and out of court settlements & Tp

The reasons or circumstances leading to this conclusion are summarized below. The victim/complainant stated:

- They had wrongly identified the accused and that this was in fact not the person; or
- They had never mentioned the name of the accused in the FIR or their statements and it had been added illegally by the police; or
- There was previous enmity so they had concocted a case against the accused;
- They were married to the accused and therefore it was not ‘rape’; or
- They had gotten married to the accused after the rape; or
- They revealed and out of court settlement and no longer wanted to proceed with the case.

### 8.4. Increased Use of Powers of Judge in Trial

Attrition rates during trial remain high with many victims/complainants compromising the cases out of court, and thus becoming hostile witnesses and not supporting the prosecution case. In the case files examined for this study in 58 % cases, the victims/complainant turned hostile and did not support the prosecution case.

### Legal Powers of a Judge in Investigation

The court may issue summons to a person in whose possession or power a document or thing is believed to be requiring him to attend and produce it if felt it is necessary or desirable for purposes of investigation. The Court may also summon letters, telegrams etc (Sections 94 & 95 CrPC). Non-production of these documents, the court may issue a search warrant for the recovery of such items.

The court may also alter charge anytime before judgment is ordered and may either proceed with trial or direct a new trial (Section 227 – 232 CrPC).

The judge may acquit the accused at any stage of the trial if he finds the charge to be groundless and no probability of the accused being convicted (Section 249A & 265K CrPC)

The Court, if it considers necessary, may at any stage of inquiry or trial put questions to the accused to enable him to explain any circumstances appearing in the evidence against him. This questioning is generally done after the prosecution witnesses have been examined and before his defence (Section 342 CrPC).

The judge decides whether any evidence and the manner the alleged fact is proved is relevant or not, and is therefore admissible in trial. (Section 131, Qanun e Shahdat (Law of Evidence) 1984)

The court also have control over whether a witness shall be compelled to answer questions put to him. Thus, if the question would result in imputation which would or should not affect the opinion of the court, or there is a great disproportion between importance of importation against witnesses evidence and importance of evidence. However, refusal to answer may lead to inference that answer given may be unfavourable (Section 143 Qanun e Shahadat (Law of Evidence 1984)). Or where questions are intended to insult or annoy. (Section 148 Qanun e Shahadat (Law of Evidence 1984)).

The judge may in order to discover or obtain proof of relevant facts, ask any questions to any of the parties or witnesses and may order production of any document or thing. (Section 540 CrPC and Section 161, Qanun e Shahdat (Law of Evidence) 1984).

Under Section 202 CrPC., a court, on receipt of a complaint of an offence, may postpone the issue of process to the accused and may direct an investigation to be made by the Justice of the Peace or by a police officer or by a private person. A Court of Session may direct an investigation to be made by any Magistrate or Justice of the Peace to determine the veracity of the complaint.

The trial process can be a traumatizing one for the victims. Not only is the victim expected to share the experience of the crime committed against them in public and re-live it, but thereafter they will be questioned extensively by the defence lawyer to try to prove they are lying. This is coupled with other trauma related to protracted rape trials, delays, high costs, gender insensitive attitudes etc.

Judges play a critical role in how a trial is conducted in addition to ensuring Special Protection Mechanisms are in place. The following key aspects arose through analysis of case files and discussions with all the actors in interviews and during the trainings.

#### a. Inappropriate cross-examination

A cross-examination in an adversarial trial is meant to try to destroy the narrative of the witness and impeach their credibility. In essence they have to try to show they are lying or do not have full knowledge of the events that occurred.

In Pakistan, it is extremely typical for the defence lawyer to use aggressive questioning as a strategy while conducting the cross-examination. This may include both verbal and physical body language. Further, the questions asked are meant to discredit the witness. Dis-crediting female witnesses particularly in rape cases usually means either attempting to prove they were in a consensual relationship with the accused, or was promiscuous and therefore cannot be believed. Other questions intended to disbalance the victim/witness are also often asked. Objections of the prosecution lawyer are often ignored and are rarely ever brought on record.

Until the 2016 amendments, character assassination on the basis of sexual history of the victim was given legal cover<sup>63</sup>. While this provision was repealed, it has left a mark on how rape trials are conducted even today. Thus, arguments that the victim may have consented based on past behaviour and her ‘immorality’, continue to be arguments put forward. However, it must be noted, the analysis of the case files for this study revealed positive changes in this regard. While some cases did refer indirectly or directly to her character in relation to potential sexual relationships, the senior researcher for this paper, based on her extensive experience on researching cases and judgements of sexual violence, evidences the reduction of focus on a woman’s sexual history. For example, terms that used to be common such as “woman of easy virtue” or “loose morals” were not seen. Indirect reference of sexual relationships to damage credibility of victim/witness were seen in LAS Case #1 with rumours of an affair with accused; and LAS Case #43 with insinuation of relationship with accused prior to alleged incident.

However, judges are given specific powers to put an immediate stop to indecent or scandalous questions (Section 146 Qanun e Shahadat 1984) and questions intended to insult or annoy (Section 148 Qanun e Shahadat 1984), which is backed by case law from the Supreme Court <sup>64</sup>. Through regular use of these provisions, judges can control the overzealous defence lawyer, to avoid the potential increased trauma of the victim.

<sup>63</sup>Section 151(4), Law of Evidence (Qanun e Shahadat) 1984

<sup>64</sup>1996 SCMR 3

### b. Powers to direct questions at any stage during the trial

The judge can choose to direct questions to any of the witnesses at any time during the trial. Using this power, judges can choose to direct the cross-examination of the victims themselves. This should particularly be used when a judge observes the victim is distressed or if the victim is a child. This can also be used to clarify any statement of a witness or ask for further information. For example, in LAS Case #2, the alleged victim, a young boy repeatedly stated the alleged accused committed a “dirty act” and no clarity exactly what act was committed was given in the evidence i.e., specifying difference between the different offence that could have been committed (e.g. sexual abuse under S. 377 A & B or sodomy under S. 377). The prosecution in this case should have pointed to the medical report to allow for identification of offence and the should have asked court question for his/her own clarity to be able to give a complete and proper decision on the case.

Discussion with the judges during the training highlighted the need for judges to use their own intuition on deciding when to act or not to act. Another recommendation from the judges was to ensure documenting censure by the judges of the defence counsel.

### c. Powers of evidence collection

Earlier sections have noted the challenges in evidence collected by police and presented by the prosecutors. However, it is critical note that even at trial, the judge has additional powers to call and demand for any form of evidence. It is unfortunate that this was not seen in the cases analysed for this study. Various types of evidence could have been called for including compelling appearance of private witnesses such as those in LAS Case #44, where private witnesses were mentioned on 173 challan but were not brought to court; calling for expert witnesses e.g., to identify psychological trauma of victims, or to talk to children effectively; calling for geo-tracking of presence of accused or victim at the time of the alleged offence etc.

## 8.5. Correct terminology of offence must be used

The importance of the use of the correct terminology and legal provisions is a critical component for judges in particular.

“Language” is the most important tool judges have at their disposal in changing social mindsets and stereotypes<sup>65</sup>. But as much as it can be used for positive change, it can be used to perpetuate existing stereotypes.

<sup>65</sup>Finley, Lucinda M. (1989). "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning". Faculty Scholarship Series. Paper 4011. [http://digitalcommons.law.yale.edu/fss\\_papers/4011](http://digitalcommons.law.yale.edu/fss_papers/4011)



Legal language is also a product of social construction, reflecting the biases and values of the societal norms, the concepts, categories and terms that laws uses and the reasoning structure within which it expresses itself has the potential to shape the understanding of situations. Through the way it defines things and talks about events, it has the power to silence alternative meanings and suppress other stories <sup>66</sup>. An examination of judgments can see the personal views of judges emerging from the text itself. These definitions and terms identified by the judges have a direct impact on shaping our understanding, thought process and assumptions about the way people think<sup>67</sup> and social issues.””<sup>68</sup>

There is a tendency when dealing with violence against women that different approaches are used as part of the ‘protectionist approach’ i.e., to protect women and society from the heinousness of the act. A judge’s own cultural background also influences the way they think and thus make their decisions. Some of these can be unintentionally gender blind. For example, in LAS Case #10, where a woman accuses her father-in-law of rape, the judge states that no man would stand by and let his wife’s honour be tarnished by his father. However, in Pakistani patriarchal society, it is much less likely a man will allow his father to go to jail for raping his wife than to simply divorce his wife and brand her a liar.

Keeping this in mind, judges must be mindful of the language they use in their judgments. Bias or a protectionist approach often has an unintended impact, which have been discussed through the different sections above:

- Reinforcing stereo-types of expected behavior of women i.e., she must struggle and fight and resist, resulting in marks of violence and raising hue and cry.
- Using the language of consensual acts to describe assaultive acts e.g. zina instead of zina bil jabr
- Disbelief and assumption of ‘immorality’ tied to reporting
- To minimize the violence<sup>69</sup>

Efforts must be made to create self-awareness of ones own bias and attempt to use gender appropriate language when discussing cases of violence against women and gender-based violence.

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<sup>66</sup>Ibid

<sup>67</sup>Ibid

<sup>68</sup>Ahmed, Z.; Mirza. A. & Zia, M. (2014) “Facilitators Toolkit on Training of Judges on Delivery of Justice, Issues Faced by Gender and Human Rights”. Karachi, Legal Aid Society

<sup>69</sup>Ibid

# PART II:

## ANALYSIS OF FINDINGS

# 1. ISSUES ENDEMIC TO CRIMINAL JUSTICE ECOLOGY

## 1.1. Gaps in Training

Many of the issues identified here in process and procedures or practices of the criminal justice actors are largely reflective of the training received by them, or not received by them.

The police and judiciary are two actors who receive proper, planned training, especially at the time of recruitment and at the time of every promotion. The prosecution receives no formal training, nor do medico-legal officers. Both are expected to bring with them their professional expertise acquired while receiving their certifications.

Neither the police nor judiciary have any proper formalised and consistent gender sensitisation training to provide a basis for the manner and form of their operations. Gender sensitisation trainings orient trainees on understanding the contribution of society in the formation of gender roles, understanding how this can be changed, their own bias and how to recognise and counter it. This base is essential to form an analytical lens for the actors involved. Based on this, the interpretation of laws, cases at hand and even how to manage a trial or investigation would be more gender friendly, to take into account gender norms whilst doing their work.

To illustrate this point, we examine the numerous cases of alleged abduction and rape but are in fact women who have married of their own free will. The cases analysed for this study, the response of the CJS was to accept at face value at trial when the victim stated she had married of her own free will. No further evidence to the contrary or to support it is given. With regards to investigation, the role of the police where during investigation it becomes clear it is a matter of elopement as opposed to abduction must be clarified i.e., whether they pursue the case or not. If it is a case of elopement, they must gather evidence of marriage and present it to the prosecutor, and then court. If they believe it is abduction, then further investigation for this purpose must be conducted. Sole reliance in such cases on medical and solitary statement is an inefficient and ineffective investigation. Further inquiry is needed to substantiate one of the allegations.

This evidence situations where parents of the girl attempt to punish the girl for exercising her own will or to 'show face' by pretending she's been abducted and raped, which is considered far less bad than her exercising her right to marry. This is a prime example of gender discriminatory behaviour, the investigation and prosecution may change keeping in the mind the recognition of discrimination in this pattern.

Training on gender would assist in questioning a female victim, analysing evidence etc. While ad hoc trainings have taken place, and the police does touch upon this in human rights and community policing, these are not specifically regularised or part of the official curriculum.

In addition to this, police in particular does not display the level of skills expected of them. Whether it is about what evidence to collect, how to collect DNA from a crime scene, recognising a crime scene and taking appropriate steps to secure it, or even their interview and interrogation techniques, the police performance is often low.

A Training Needs Assessment of the Sindh Police<sup>70</sup> reveals training provided to police officers, including investigators is primarily academic. While rape and medical jurisprudence are touched upon, there is insufficient focus on this for a holistic comprehensive understanding of this topic. Further, the lecture-based training as opposed to skills-based training results in inefficient capacity once in the field. Further, updated laws, particularly regarding rape are not taught and precedents, which provide a guideline and identify the minimum standards of evidence and investigation are not taught at all. Nor are these taught in the field. Trainings are also only conducted at the time of promotion which can be between 5 – 14 years depending on the tier of promotion. In-service trainings are ad hoc and not streamlined or regularly planned for this in-between promotion time period.

Resultantly, the FGD with Investigating Officers revealed that none of the senior IOs even knew about the 2016 and 2017 legal amendments, both of which contain crucial changes in substance and process relevant to their work. It is only recently, in April/May 2020 that the very first batch of specialised cadre of Investigators and Inspectors Legal completed their training and joined the police force. Their success in the field remains to be assessed.

Prosecutors and medico-legal officers are not given any specific training, which leaves gaps in their knowledge and skills when dealing with such cases, which is a great concern as it negatively impacts the outcome of these cases.

The police, prosecution and judiciary all fall short in their understanding and knowledge of medical and forensic evidence.

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<sup>70</sup>Legal Aid Society, Training Needs Assessment of the Sindh Police, Sindh Police, Legal Aid Society & International Committee for the Red Cross, 2020

## 1.2. Limited knowledge of Correct Legal Provisions

The lack of knowledge of the police evidenced during the FGD on recent laws, amendments and precedents raises concerns as to the police's capacity to respond effectively for cases. Thus, for example, this explains cases from those analysed of rape which had penetration (which falls within definition of rape) and not ejaculation as cases of rape; case of child marriage, as in LAS Case #32, not being registered under the Sindh Child Marriage Restraint Act 2013 etc.

Examination of the FIRs, other police documents, legal applications, prosecutors' arguments, judicial orders reveals a mixture of terminologies being used to describe rape. There is a tendency to try to minimize the harm in cases involving violence against women, particularly rape. This results in the use of consensual language instead of actual language, using alternative words or euphemisms instead of actually describing what happened.

This can be seen throughout the majority of the cases being examined. Some examples include using the term "zina" i.e., illicit intercourse, which is consensual, instead of "zina bil jabr" which means rape; sexual intercourse which once again indicative of consensual sexual relations as opposed to rape.

Other examples, include in LAS Case#35 where throughout the documentation and trial, there is failure on part of police and prosecution to describe exactly where the accused put his fingers on the body of the victim. Without clarity, the victim's statement is also not strong. In Case #44, it was stated throughout documents that the accused "pushed different body parts". There is no clarity given on what that actually means. In LAS Case # 37, the medico-legal officer described the offence as "victim had been a victim of sexual harassment".

There is a danger in not identifying or using exact and proper terminology in legal cases. For example, in LAS Case #35, the inability of the court to be able to identify exactly what happened, there was no direct evidence gather, resulting in acquittal. Further, contrasting this to any other criminal law case, the proper terms are used such as "theft", not "an unknown person who took away things without permission" etc.

Correct legal terms must be used for criminal offences. Correct anatomical words must be used to ensure no confusion for further evidence, examination, cross-examination and decision making.

## 1.3. Limited Qualitative Monitoring and Evaluation in the Field

The lack of knowledge of the police evidenced during the FGD on recent laws, amendments and precedents Monitoring and evaluation of most of these actors occurs on a quantitative level i.e., how many numbers disposed of by a judge or investigation

closed by police. However, there is no consistent focus on qualitative monitoring and evaluation, particularly with a gender lens. The superior authorities or monitoring units need to be aware of the qualitative impact of the performance of these actors to be able to effectively measure improvement in their behaviour and skills in such cases.

#### 1.4. Lack of Specialisation

GBV, specifically sexual violence is a complicated issue which needs to be investigated, prosecuted and handled with extra care. While GBV Court judges have been selected and trained at the Punjab Judicial Academy in November 2019, many still require more training and comprehensive understanding of the subject.

Apart from these judges, there is no specialisation within other actors for such cases. There is a misconception that GBV cases, particularly sexual violence cases, do not require a nuanced and specific approach as opposed to the routine work. In fact, in addition to the normal professional skills required by these actors, it is essential that they have the knowledge and skills to deal appropriately with such cases to achieve satisfactory results. For example, interviewing techniques of a rape victim must be adjusted to appreciate the trauma and its after effects.

Having specialised units on such issues has been done internationally with great success. Specialisation means better understanding of the type of crimes, their ecology and hence how to respond to them. Improved appreciation of social or gendered social rules and constraints and how to include this within CJS actors' professional skills while responding to such cases has resulted in improved experience of victims navigating the CJS and conviction rates. Working with smaller specific groups allows for more in-depth and holistic training based on their needs.

#### 1.5. Lack of Guidelines or Standard Operating Procedures for GBV Courts

A nuanced approach towards management of the courtroom and trial is also needed particularly in sexual violence cases, which was specifically recognised in the 2016 law. While GBV Courts have been established, their effectiveness varies according to additional policy measures made to support these structures. For example, in Karachi East, the timelines of cases are much faster due to the dedicated court and ability to run trials on a daily basis, as opposed to Hyderabad which hears GBV cases only once a week, thus resulting in greater delay.

## 1.6. Lack of use of Special Protection Mechanisms

In the Kainat Soomro and others case (C.P. No.D-5920 of 2015), the objective of the petition was to demand the implementation of the judgment of the Salman Akram Raja case, which provides specific processes and procedures in rape case. This is further supported by the 2016 law, which gave legal cover to several of the recommendations in the case.

In the Kainat Soomro case, the MIT, Sindh High Court reported in February 2020 that screens had been placed in majority of courtrooms across Sindh to allow victim's to record their statements behind that. In August 2020, an Assessment of the GBV Courts across Sindh revealed that while many had screens, some did not.

However, apart from screens there is no effort to include any other type of special protection mechanisms. Prosecutors in particular, have not been seen to place applications for any such protection for their client. The law, for example, specifically states that video-link testimony may be used. This has not been applied for or used in any case. Other forms of special protection mechanisms include trials to be held in camera; requesting accused not to be present in the room at the time of testimony; ban interaction between accused and victim; separate waiting rooms for victims and family; allowance for pre-recorded evidence or recording evidence through a commission etc.

While the judges (both Magistrate and District and Session Judges) can ensure that such facilities and opportunities may be provided in their courtroom or adjoining areas, the onus for application of these measures lies upon the prosecutor to actually apply for these protections. However, the judge may also play a proactive role upon assessing the distress of the victim and ascertaining their wishes.

## 1.7. Lack of Victim Support Services

The presumed objective of the GBV Courts is to improve the experience of the victim in a friendly environment. This in recognition of the secondary trauma a victim may experience during the trial. This is especially true of the adversarial nature of the criminal trial in Pakistan, which is combative with the victim/complainant in the middle of that combat.

Looking at the Lahore example of the GBV Courts and international examples such as New Zealand, India, South Africa and the United Kingdom there are a series of victim support services that are provided that assist the victim through this entire process. It is unfortunate that this has yet to happen in Sindh. Again, with no SoPs or guidelines, there seems to be a lack of purpose or consistency of the GBV Courts.



Gaps in the process where victim support services could assist include the following issues:

- No pre-trial orientation of the victims
- Uninformed participation leads to further exploitation
- No psychological aid or counselling of victim
- Avoiding confrontation with accused
- Shelter and counselling to combat stigma and further vulnerability to violence
- No special care for children

### 1.8. Special Mechanisms and Measures for Child Victims

There are currently no special measures in place when the case involves a child. At the very least, a psychologist should be available at the medico-legal department. A child psychologist or specialist should work with the police and court, particularly when there is a need to record a child's statement. Further, a child should be assessed by a psychologist to assess whether they are competent to give testimony. Other measures such as anatomically correct dolls must also be provided so that children can use actions to depict exactly what happened to them if they are unable to use words to describe it.

## 2. EXTERNAL FACTORS INFLUENCING THE CJS

### 2.1. Perpetuation of Rape Myths and Gender In-Sensitivity

There is a presumption of neutrality in the judiciary. A judge is supposed to examine the facts in a completely neutral manner and not let his/her own bias impact their decision-making. However, the reality is that this is never really the case. Examination of the case law demonstrates a wide variety of gendered bias thoughts and behaviour, with rape myths being evidence through a large part of the decisions made by the police on what to investigate and what not to investigate and deliberation of judges. For example, the requirements relating to delay in registration have a gendered context to them. Delay in registration of the FIR must be explained, which prosecutors have been seen failing to do in many of the cases. However, judges themselves should also take a more lenient view in cases of rape and sodomy, given the socio-political context of Pakistan, which has been recognized by the superior courts in Pakistan. The relaxation in reporting is based on the acceptance by the court that the social taboos, heinous nature of the crime and shame associated with the victim may result in some time to make the decision to initiate a criminal case. Reiterating this point, the SC<sup>71</sup> accepted a delay of 10 days, where the victim's shame in telling her mother and the attempts to reach a compromise through a panchayat were made. The court stated here:

“[I]n such-like cases, the victims and their parents think several times before reporting the matter to the police, as unfortunately it becomes difficult to marry the victim respectably after the tragedy”<sup>72</sup>.

Even as far back as 1981 case<sup>73</sup>, the Supreme Court accepted that constant fear and threat from the petitioner in whose house the victim lived in was a justifiable reason for delay in reporting.

This study shall illustrate the point relating to negative impact of how rape myths play a pivotal role in evidence of rape cases through the example of the requirements relating to the “solitary statement” of the victim

#### Solitary Statement of Victim & Expectations of ‘Resistance’

In Pakistan, there is a high reliance upon the solitary statement of the victim as possibly the most important piece of evidence. The Supreme Court has declared, which has been echoed in the lower courts, that a conviction of rape can be made on the basis of the sole statement of the victim as long as it ‘inspires confidence’.

“It is well settled by now that “there is no denying the fact that acid test of the veracity of the prosecutrix’s (sic) statement is the inherent merit of her statement because corroborative evidence alone could not be made in a base to award conviction”<sup>74</sup>.

<sup>71</sup>Yasmin Butt vs. Majid Baig alias Bobby Pehlwan and another (2008 SCMR 1602)

<sup>72</sup>Ibid

<sup>73</sup>Hamid Khan vs. The State (1981 SCMR 448)

<sup>74</sup>2011 SCMR 1665

The need for the statement to inspire confidence however results in the need to impeach the credibility of the statement. This is done through the character assassination of the victim, which is often based on gendered stereotypical perceptions based on rape myths. Until the 2016 amendments, character assassination on the basis of sexual history of the victim was given legal cover<sup>75</sup>. While this provision was repealed, it has left a mark on how rape trials are conducted even today. Thus, arguments that the victim may have consented based on past behaviour and her ‘immorality’, continue to be arguments put forward. However, it must be noted, the analysis of the case files for this study revealed positive changes in this regard. While some cases did refer indirectly or directly to her character in relation to potential sexual relationships, the senior researcher for this paper, based on her extensive experience on researching cases and judgements of sexual violence, evidences the reduction of focus on a woman’s sexual history. For example, terms that used to be common such as “woman of easy virtue” or “loose morals” were not seen.

The Supreme Court (SC) has contributed to this change by making consistent attempts to thwart the excess of case law attacking women prosecutrix by stating that:

“We have not been persuaded to agree with the prime contention of the learned Advocate Supreme Court that since the vagina of Mst. Asia Bibi admitted two fingers easily hence being a lady of easy virtue her statement should be discarded for the simple reason that even if it is admitted that she was a girl of an easy virtue, no blanket authority can be given to rape by anyone who wishes to do so.”<sup>76</sup>

However, the courts continue to give contradictory judgments with many routinely using these lines of arguments to discredit the victim’s statement. For example, in a 2006 case<sup>77</sup>, the loss of virginity of a 16-year-old girl resulted in the judge stating that it would be ‘...be highly unsafe to believe the ipsi dixit<sup>78</sup> of unchaste girl’.

Another common strategy used to challenge the veracity of the victim’s statement is focusing on the lack of active resistance on the part of the victim/survivor, indicating her being a consenting party to the offence. Perpetuating rape myths, a victim/survivor is expected to actively resist whether physically or verbally. Not doing so is now often referred to as “unnatural conduct” of the victim. While several judgments in the case law analysis recognise that this is not possible whether due to the circumstances, many still continue to have this expectation of the victims. Or rather, when a case has other gaps, the lack of ‘raising a commotion’ by the victim is used to justify disbelief in the case.

<sup>75</sup>Section 151(4), Law of Evidence (Qanun e Shahadat) 1984

<sup>76</sup>PLD 2010 Supreme Court 47

<sup>77</sup>Muhammad Akhtar vs. The State (2006 PCrLJ 705)

<sup>78</sup>An ‘ipsi dixit’ is an unsupported statement that rests solely on the authority of the individual who makes it.

In a 2016 SC case<sup>79</sup>, the court deemed the conduct of both the witnesses as “highly improbable as they did not raise hue and cry”. While lack of evidence or other gaps may be justified in overturning the conviction, the reasoning provided for disbelief of the both the female witnesses was based on the fact that they did not behave as ‘rational’ persons would behave. In a contrasting 2002 judgment<sup>80</sup>, the court found victims credible as it is “observed that their conduct was quite natural because soon after they were dropped by accused persons... they raised hue and cry”, in effect stating that if they had not done so, it would have hurt their credibility as victims. In a 1993 case<sup>81</sup>, the lack of “hue and cry” of the abductee resulted in allowing bail of the accused.

Physical resistance is seen to be proved by marks of violence on the body of the victim. While it is advantageous to have physical evidence of any kind, the SC has reiterated that marks of violence are not necessary for proving rape<sup>82</sup>. Many cases recognise that victims are unable to resist or are not expected to physically struggle, thus, there would be no marks of violence. The courts have recognised the physical strength and older perpetrators may result in the victim being unwilling or unable to resist<sup>83</sup> or as a 2014 FSC judgment states<sup>84</sup> “Existence of marks of struggle, presupposes struggle which depends on capability of victim to offer resistance”.

However, despite this, there are contradictory judgments placing different levels of importance on these marks. In a 2002 SC case<sup>85</sup>, the struggle of the deceased was used as proof that “shows that she was not a lady of loose character”<sup>86</sup>. The Mukhtar Mai case<sup>87</sup> must once again be mentioned here where the SC contradicted itself and asserted that a woman being gang raped would be expected to struggle and therefore sustain marks and injuries. A 2012 FSC case<sup>88</sup> follows this line of argument, laying out the expectations of a rape victim:

“The first and foremost circumstance that can be looked for in cases of rape is the evidence of resistance which one would naturally expect from a woman unwilling to yield to sexual intercourse forced upon her. Such resistance may lead to the tearing of clothes, infliction of personal injuries and even injuries on the private parts.”

<sup>79</sup>Muhammad Nawaz vs. The State (2016 SCMR 267)

<sup>80</sup>Bashir Ahmed vs. The State (PLD 2002 Supreme Court 775)

<sup>81</sup>Mahmona Hamayun vs. Abdul Hakim and 2 others (1993 SCMR 893)

<sup>82</sup>Mehboob Ahmad vs. The State (1999 SCMR 1102); Habibullah vs. The State (2011 SCMR 1665)

<sup>83</sup>Mehboob Ahmad vs. The State (1999 SCMR 1102)

<sup>84</sup>Lal Khatoon vs. The State (2014 YLR 1717)

<sup>85</sup>Tariq Mehmood vs. The State (2002 SCMR 1602)

<sup>86</sup>Ibid

<sup>87</sup>The State vs. Abdul Khaliq (PLD 2011 Supreme Court 554)

<sup>88</sup>Zulfiqar Ali vs. The State (2012 YLR 847)

This argument is advanced as recent as 2018 where in a PHC case <sup>89</sup>, a 14-year-old child accused her cousin of raping her. The court held that as there was a valid nikkah, there was no case for zina (fornication), and lack of marks of violence to indicate no use of force or violence and hence, resistance on her part, therefore she was a consenting party and the accused was acquitted.

This contradiction of perspectives can be evidenced in the cases analysed for the purpose of this study. The defence counsels took great pains to establish that the alleged rapes occurred in crowded public or populated places, insinuating that if the victim had so desired, they could have managed to get help or escaped by creating a commotion, whilst also perpetuating the rape myth that rape happens in isolated, private spaces. For example, in LAS Case # 43, the defence counsel ensured that it was brought on record that there were houses between the victim's house and the house of the accused, where the rape allegedly took place. While not explicitly saying so, the defence brought forward the notion that if it was indeed abduction or rape, the woman should have cried out or made 'hue and cry' or resisted somehow, or otherwise informed someone immediately. Another example is that of LAS Case# 7, allegedly the victim/survivor was raped by her brother-in-law in the same house her sister was sleeping in. The judge in his judgment made note that if it had happened, she would have woken up her sister immediately, without consideration in the judgment being given to any other external factors that could have influenced her e.g., trauma; fear of disbelief; fear of harm etc.

The case files evidenced several examples of judgements where any lack of resistance and hue and cry or laid expectations on the women to report or tell someone immediately of the rape, or even of previous blackmail, as in the case of LAS Case# 1. The above-mentioned term of 'unnatural conduct' was used in several judgments. There was no contemplation from the judge as to other factors which may have resulted in the victim's reluctance or inability to cause a ruckus or report rape or blackmail, e.g. fear, threat, trauma, shame, fear of being disbelieved etc. There is also no consideration of the fact that giving testimony in court may also hamper her ability and capacity to give a complete and reasoned testimony due to the additional trauma of the trial itself. LAS Cases #7, 35, 43 the judges all based part of their decision of acquittal on the fact that there are no marks of violence, without consideration of the fact that such marks or lack thereof are not indicative of whether rape occurred as identified in existing precedents of superior courts and do not take into account subjective matter e.g. delay in medico-legal examination.

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<sup>89</sup>Noor Adam vs. The State (2018 YLR Note 62)

Existing case law which should be referred to by the prosecution and judiciary has increased discourse on the surrounding elements which may impact the victim's ability to resist and recognising that girls below the age of 16 cannot give valid consent to sexual intercourse<sup>90</sup>. This has included recognising that resistance is not possible where the accused is armed<sup>91</sup>; recognising that lack of resistance to abduction rape "was understandable as resistance on her part could put her in further trouble with serious consequence"<sup>92</sup>; and the futility of resistance of a pregnant woman surrounded by the accused<sup>93</sup>.

In fact, there was only in LAS Case# 13, where the judge discussed in detail the fact the victim had shown no resistance throughout her alleged abduction and rape when she had plenty of opportunities at different points to do so. Only after a reasoned discussion did he state that her contradictory statements could not be relied upon. This is based on the fact that material contradictions will challenge the veracity of the testimony<sup>94</sup>. Other judgments dismissed her statement merely on the expectation of her active resistance and disbelief when there was no evidence of any such resistance.

This point in particular was dealt with by a 2019 judgment<sup>95</sup>, which SHOULD be a guiding principle for trial court judges dealing with rape cases.

"rape is a particular traumatic violation of an individual. Immediately post-assault, most victims will experience shock, intense fear, numbness, confusion, feelings of helplessness and/or disbelief, in addition to self blame, hyper-arousal and high levels of anxiety.... furthermore, many victims who tell others about their assault must ensure a "second assault" in the form of negative reactions". Therefore, in such like cases, delay cannot be received as a silence, fraught with mischief. The prosecutrix was forced to speak out with only alternate option of suicide when she was coerced once again by the appellants with her nude video footage, in this background....in retrospect, ultimate outburst by the prosecutrix corroborates allegations of threat calculated upon silence."

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<sup>90</sup>Muhammad Aslam vs. The State (1983 SCMR 866)

<sup>91</sup>Yasmin Butt vs. Majid Baig alias Bobby Pehlwan and another (2008 SCMR 1602)

<sup>92</sup>Muhammad Abdullah Yousaf vs. Nadia Ayub (PLD 2005 Supreme Court 252)

<sup>93</sup>Elahi Baksh vs. The State (1992 SCMR 333)

<sup>94</sup>Farooq Ahmad vs. The State (2020 PLD Supreme Court 313)

<sup>95</sup>Yasir Ayyaz vs. The State (2019 PLD Lahore 366)

Further, while the prosecution primarily based its case of such testimonies, did not appear to prepare witnesses in advance or conduct a re-examination of the victim to correct wrongful assumptions or provide an alternative argument as to why there was no active resistance.

These types of conclusions are problematic for later cases, which continue to use this argument of ‘rationality’ without recognising that ‘rationality and ‘irrationality’<sup>96</sup> are “socially constructed yet presented as fact”<sup>97</sup> and this concept is based on binary, male concepts and misconceptions of behaviour<sup>98</sup>. Furthermore, it ignores “that actions being portrayed as

‘irrational’, for example not struggling could also be framed as a logical response to trauma, fear and drive for survival”<sup>99</sup>.

Thus, focus on solitary statement along without adequate witness preparation could be extremely harmful for the case once the veracity of the statement has been damaged. Police must ensure that other evidence to support the solitary statement of the victim be provided. Prosecution must work closely with the witness to ensure they are well prepared to face a defence counsel set on making them contradict earlier statements and their story unbelievable.

Despite vast amounts of precedents providing an alternative perspective, one can see rape myths emerging through the analysis of the judge. It must be positively noted that the victim’s sexual history has not been touched upon except for in one case i.e. LAS Case #43, thereby recognizing that sexual history has no bearing on this one particular incident and act. However, other judgments have been based on facts which perpetuate rape myths.

Another perspective that becomes evident is the need for rape to have been committed in isolated place and being allegedly committed in a ‘crowded katchi abadi’ or in a house near a mosque seems unlikely as per LAS Case #37 and 24.

Judges, particular GBV Court judges must be aware on their own of existing case law challenging rape myths to avoid using the latter in the formulation of their final decision.

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<sup>96</sup>Smith, O & Skinner, T 2017, 'How rape myths are used and challenged in rape and sexual assault trials' Social & Legal Studies, vol. 26, no. 4, pp. 441-466

<sup>97</sup>Ibid

<sup>98</sup>Ibid

<sup>99</sup>Ibid



## 2.2. Limited Inclusion of Natural Eye Witnesses

The majority of the cases analysed have few (if any) eye-witnesses to any of the alleged offences. The majority of the witnesses are family members, relatives or people known to the victim/survivor and family i.e., potentially interested witnesses. The Courts have made clear rules regarding eye-witnesses and interested witnesses. The testimony of an eye-witness requires proof that his presence at the spot was natural, can be reasonably believed and the testimony is free from any kind of intrinsic improbabilities <sup>100</sup>.

Interested witnesses, including those related to the victim may be relied upon. The Sindh High Court specifically states that just because the witnesses were related, that was no reason to disregard their evidence, especially when no enmity, ill will or personal interest had been shown to exist between the accused persons and the interested witnesses<sup>101</sup>, or if proved he had an ulterior motive of implicating the accused <sup>102</sup>. In a 2015 Supreme Court case, the witnesses of a confession were found to not be on good terms with the accused and his family due to political rivalry. Thus, their credibility was immediately suspect and the court found the circumstances revealed did not allow them to rely on their testimonies. However, in another 1992 case <sup>103</sup>, where political rivalry was once again alleged as a reason for false witness, the court found that the level of involvement in politics of the witnesses did not garner suspicion, thereby the witness statements were found to corroborate the statement of the victim, resulting in a guilty verdict. However, in cases involving capital punishment, cannot be solely based on the testimony of an interested witness unless testimony is corroborated by some other independent and unimpeachable piece of evidence or circumstance of the case <sup>104</sup>.

The efforts of the investigation and prosecution must focus on identification of witnesses therefore who:

- Can give a natural explanation of why they were at the spot;
- Witnessed an element of incident itself or something related to it; or any aspects of the aftermath e.g. receiving information, identification of accused etc.;
- Have no ulterior motive against the accused.

The case file analysis reveals that the majority of the witnesses were related through familial ties or friends of the victims/survivors of their families. This point is highlighted by police and prosecution who state that private, independent witnesses are reluctant and refuse to become witnesses in such cases. They state this is a regular challenge for them.

<sup>100</sup> Muhammad Yousaf vs. The State (2020 YLR 1423)

<sup>101</sup> Muhammad Sohail vs. The State (2020 MLD 1515)

<sup>102</sup> Bismillah Jan vs. The State (2020 YLR 1211)

<sup>103</sup> Elahi Baksh vs. The State (1992 SCMR 333)

<sup>104</sup> Bismillah Jan vs. The State (2020 YLR 1211)

Part of the reason is that no one wishes to become embroiled in a lengthy complicated court battles and be constantly called to court for purposes of testimony. However, the police have special powers under Section 160 CrPC to require and mandate any person having knowledge of the offence to appear before them and record statements. They can also mandated to appear in court to give their testimony under Section 103 (5) CrPC.

Thus, it also does raise the question whether based on this assumption, police nor prosecution do not actively pursue private, independent witnesses as should be done.

In the cases analysed for this study, the statements of these eye witnesses (excluding the victim/survivor; complainant and official witnesses such as police or medico-legal) to the police or before the Court have to some extent attempted to fulfil the standards required in court e.g., explaining their presence at the incident or moment (e.g., arrest of accused) they witnessed. However, there is an evident lack of preparation for testimony with the prosecutor in advance. In several cases, the witnesses often contradict each other, or attempt to materially enhance their testimonies. In cases where it becomes clear through action or direct confirmation from parties that an out of court settlement has been reached, the witnesses refuse to support the prosecution version (e.g., refusing to identify accused in court and culprit), effectively damaging the prosecution case.

Emphasis should therefore be placed on capturing evidence and testimonies of independent impartial eye witnesses, who may not necessarily fall under the same pressure. There were numerous cases in the dataset where independent eye witnesses could have been called, who would be crucial to the case, but were not. For example, in LAS Case #48, the neighborhood a.k.a. ‘mohalla’ people apparently came to the house when alleged victim raised hue and cry, but no one was interviewed or called as a witness. In LAS Case#44 the neighbourhood people allegedly beat up the accused when he was caught by them. In LAS Case #2, the neighbours in the building allegedly made allegations about the accused having done this before. However, in none of these cases were any of these people called to the stand.

Discourse needs to be encouraged to resolve this issue and reluctance of people to become independent witnesses, the potential apathy of police and prosecution in pursuing independent witnesses, and potential practices to reduce time requirements and burden on independent witnesses as they record their testimony e.g., video-link testimonies or recording testimony by a commission may be considered.

### 2.3. Out of Courts Settlement

The attrition rates in rape and sodomy cases have always been on the high list. This presumption was further supported by data collected for this study.

As noted earlier, in 58 % of the cases, the victim/complainant turn hostile to the prosecution case. Further analysis reveals that out of the 50 cases, in 23 cases i.e., 46 % of the cases, the victim knew the accused. Of this 46 %, in 19 cases i.e., 86 % of the cases, the victim resiled and compromised with the accused.

With long delays and an unfriendly atmosphere, and historical record, there is little trust in the court. Discussion with the police, prosecution and private lawyers, they all agree that delay is a factor that is fatal to such cases. In a community such as Pakistan, there is a strong community element at play in all such cases. Whether it is jirgas i.e., informal adjudication systems, or pressure from elders or family of the accused, there is always pressure to compromise. The delay, thus increases vulnerability of victims to pressure for compromise, especially when justice seems far and fleeting.

The attrition rates are of huge concern to all working in the CJS. One of the reasonings behind the GBV Courts has been to reduce attrition rates. It is presumed that improved timelines of court cases and improved experience of the victim will lead towards reduction of out of court settlements.

# PART III:

## CONCLUSION AND RECOMMENDATIONS

This study has sought to conduct both quantitative and qualitative analysis of rape and sodomy cases. The quantitative analysis has been critical in identifying junctures and patterns of the proceedings of the cases in particular. The identification of a baseline of the timeline of investigation and trial evidences the non-meeting of legally mandated timelines. The in-depth analysis further reveals that it is the framing of the charge that takes the longest time period, an interesting find as this step is often neglected in favour of focus on the trial process itself. This allows for the police, prosecution and courts to address issues of time delay in their work, with the intention of reduction of this time. These institutions must now conduct their own internal assessments to identify where the delays are in their systems and how to reduce them drastically.

The qualitative analysis identifies procedural, process and cultural challenges and gaps from the three main functions during a case i.e. investigation, prosecution and the trial. Similar issues can be seen across the board including challenges in understanding and using medical evidence, requirement to use correct and gender appropriate language and the need for increased use of special protection measures. Individual challenges for each actor identified provide a framework for training and future evaluation of these actors.

Recommendation		CIS Actor
Policy Development & Legal Reform		
1	Specialised Units/Cadres to be established for GBV cases	Police Office of the Prosecutor General, Govt. of Sindh
2	SoPs for Investigation of Rape and Sodomy Cases to be Developed	Police Home Department Law Department
3	SoPs for Collection of DNA in Rape Cases	Police
4	SoPs/Guidelines for Prosecutors for prosecution of rape and sodomy cases	Office of the Prosecutor General, Government of Sindh
5	SoPs/Guidelines for Operations of GBV Courts (includes victim support services)	Sindh High Court
6	SoPs/Guidelines for Judges of the GBV Courts (includes specialised processes)	Sindh High Court
7	SoPs for Special Protection Mechanisms in Rape and Sodomy Cases	Sindh High Court
8	Legal amendment to ensure sensitive processes in rape and sodomy cases where necessary	Government of Sindh Federal Government
9	Scrutiny of challan and litigation to be done by same prosecutor	Office of the Prosecutor General, Govt. of Sindh
10	Allow prosecutors to refuse to take forward a case due to lack of evidence	Office of the Prosecutor General, Government of Sindh Law Department, Government of Sindh
11	Psychologist to be appointed at the thana level or at Women Protection Cell in each district	Police
12	One Stop Shop to be established based on requirements of each district	Home Department Law Department Health Department Women Development Department
13	New Medico-legal Proforma must be notified	Health Department

Training and Knowledge Building		
1	Mandatory gender sensitisation training included in training	Police Office of the Prosecutor General, Govt. of Sindh Health Department Judiciary
2	On-going Training to be transformed to skill development through adult learning methodology not academic based to increase only knowledge	Police Judiciary
3	Mandatory training for prosecution, especially those posted at GBV Courts on strategic planning & handling rape and sodomy litigation	Office of the Prosecutor General, Government of Sindh
4	Interviewing victim	Police on first interview with victim Recording comprehensive 161 statement in gender friendly manner  Magistrate on recording comprehensive 164 statement in gender friendly manner  Prosecutor in pre-trial meetings with victim/complainant
5	Development of litigation strategy	Office of the Prosecutor General, Govt. of Sindh
6	Preparation of victim for trial	Office of the Prosecutor General, Govt. of Sindh
7	Revising curriculum for health practitioners and medico-legal department	Health Department Medico-Legal Department
8	Improving medical knowledge	Health Department Medico-legal Police Office of the Prosecutor General, Govt. of Sindh Judiciary (Magistrate & District & Session Judges)



Improvement in specific processes required		
1	Thumb print over FIR	Police
2	Faster 164 statements to be recorded	Police Magistrate
3	Ensuring all documentation is timely done and noted	Police
4	Police & prosecution to collaborate from when FIR is registered	Police Office of the Prosecutor General, Govt. of Sindh
5	Medico-legal examination to be conducted at earliest	Police Medico-legal department Health Department
6	Appropriate number of medico-legal officers to be trained & incentivized	Health Department
7	Encourage/mandate private witnesses to record statements and appear in court	Police Office of the Prosecutor General, Government of Sindh Judiciary
8	Prosecutors taking a more pro-active role to return 173 challan to IOs for further investigation is needed.	Office of the Prosecutor General, Government of Sindh Police

Required Resources		
1	Rape kits, sample collection and transport kits	Police Home Department
2	Special Protection Mechanisms to be established in all GBV Courts including waiting rooms, video-link testimonies & required equipment & any other required resources	Law Department  Sindh High Court
3	Resources for One Stop Shops	Home Department Women Development Department

This study has enhanced the understanding of the challenges and gaps in Sindh in responding to rape and sodomy cases and trials. In addition to a contribution to the larger discourse on access to justice and rule of law, this study provides a pathway for these CJS actors for their self-improvement and growth. It is hoped that these key CJS institutions use this document to further create their own policies and improve the overall response in such cases, and ultimately improve the access to justice for victims of rape and sodomy across Sindh.





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