

Challenges in Prosecuting Gender-based Violence

By

Dr. M. Shahrukh Shahnawaz

Advocate High Court

- Effective Prosecution of GBV
- Challenges in Prosecuting GBV

1. Understanding the victims of GBV

- Understanding **victim behaviour** and its **social context** is critical to understanding the obstacles victims face in dealing with the criminal justice system.
- Prosecutors need to appreciate the **gendered nature of the crimes of violence against women and girls** and how the **context of women's roles in society** and **discrimination against women** generally may factor into the victim's reaction to the violence as well as her participation in the criminal justice process.

2.The Role and Rights of Victims

- The role of the victim in criminal cases is usually as a **key/star witness** for the prosecution.
- The victims **are not clients** of the prosecution **nor are they generally viewed as parties** to the criminal proceedings.
- In some places, however, they **can be *partie civile*** (become parties to claim damages) to the case and **have the right to legal counsel**.
- Nevertheless, it is not victim's responsibility to push the case through each phase of the system.
- Once the victim reports to the police, the State has the responsibility to investigate the case, prosecute the offence where there is sufficient evidence and ultimately hold the offender accountable by punishing his criminal behaviour.

3. Right of Legal Assistance in Pakistan

- **161A. Legal representation of victim of rape, etc.**
- (1) Where an offence under section 354A, section 376, section 377 or section 377B of the Pakistan Penal Code, 1860 (Act XLV of 1860) has been committed or attempted to be committed, the police officer after recording the information under section 154 shall inform the victim, against whom such offences have been committed or attempted to be committed, **of the right to legal representation.**
- (2) If the victim under subsection (1) requires free legal aid the police officer shall provide him the list of lawyers maintained by the Provincial Bar Councils for this purpose.].
- Included via amendment in 2016

4. General Assembly resolution 40/34.

- **The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power—General Assembly resolution 40/34**
- Victims should be treated with compassion and respect for their **dignity**.
- Victims are entitled to **access** the criminal justice system and have prompt redress.
- Victims should be **informed** of their rights, their role and the scope, timing and progress of their case and the disposition of their case.
- Victims should be allowed to **express** their views and concerns and to have them presented and considered at appropriate stages of the criminal case.

- Victims should have proper **assistance** throughout the legal process.
- Measures should be taken to **minimize inconvenience** to victims, protect their privacy, when necessary, and ensure their safety, as well as their families, from intimidation and retaliation.
- Unnecessary **delays** in the disposition of cases should be avoided.
- Victims are to be entitled to **fair restitution and compensation**.
- Victims should receive the necessary material, medical, psychological and social **assistance** through governmental, voluntary, community-based and indigenous means.

5. Economic and Social Council resolution 2005/20.

- **The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.**
- These guidelines were adopted in 2005, and provides a framework on how to enhance the protection of child victims and witnesses, including girl victims of gender-based violence, in the criminal justice system.

- **Be treated with dignity and compassion.**
- This includes ensuring that girls are treated in a child-sensitive manner throughout the justice system, including evidence collection, interviews, examinations and other forms of investigation.

- **Be protected from discrimination.**
- Age should not be a barrier to a child's right to participate fully in the justice process.
- Every child should be treated as a capable witness, subject to examination, and her testimony should not be presumed invalid or untrustworthy by reason of the child's age alone as long as her age and maturity allow the giving of intelligent and credible testimony, with or without communication aids and other assistance.
- This right recognizes that special services and protection will be needed to **take account of** gender and the different nature of special offences against children, such as sexual assault.

- **Be informed.**
- From their first contact with the justice process and throughout the process, children, their parents or guardians should be promptly and adequately informed of their rights, the available protective measures, dates and location of hearings, etc.

- **Be heard and to express views and concerns.**
- This includes consulting with children as well as enabling them to freely express their views.

- **Effective assistance.**

- This includes access to a wide range of assistance, such as financial, legal, counselling, health, social and educational services, physical and psychological recovery services and other services necessary for the child's reintegration.

- **Privacy.**
- Measures should be taken to protect children from undue exposure to the public.

- **Be protected from hardship during the justice process.**
- Measures could include accompanying the children throughout the justice process, with trials to take place as soon as practical, etc

- **Safety.**

- Appropriate measures should be in place that require the reporting of safety risks. Safeguards should be put in place to prevent intimidation, threats and harm to the child.

- **Reparations.**
- Reparations should achieve full redress, reintegration and recovery. Procedures for applying for reparation should be readily accessible and child-sensitive. Reparations include restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings.

- **Special preventive measures.**

- This focuses on children who are particularly vulnerable to recurring victimization or offending.



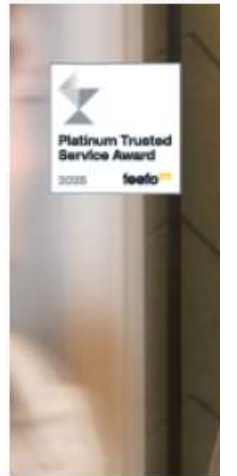
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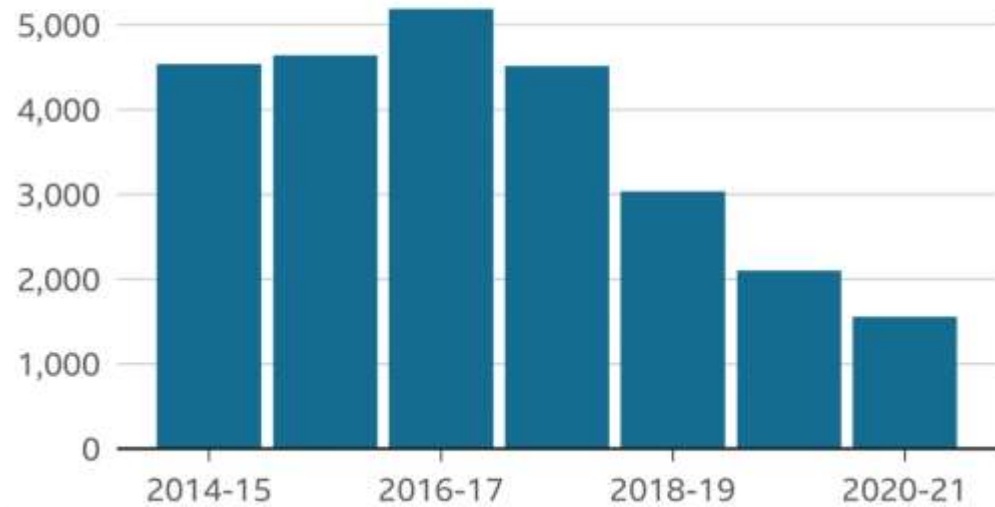
- <https://www.theguardian.com/law/2024/dec/06/trials-collapse-as-victims-abandon-cases-amid-long-court-delays>

- <https://www.bbc.com/news/uk-48095118>



Rape prosecutions are falling

Rape-flagged cases with a prosecution outcome



Source: Home Affairs Select Committee

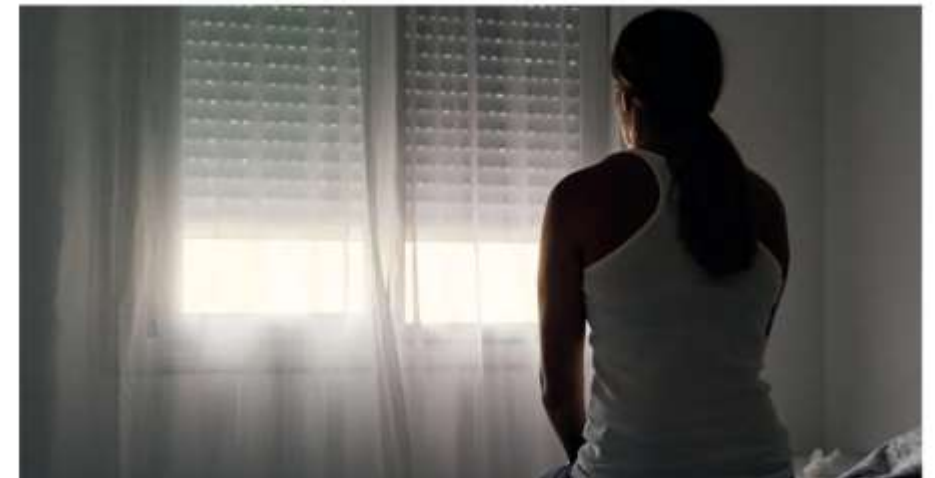


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6.Evidentiary Issues

- **Testimony of the victim**
- The testimony of the victim in cases of violence against women and girls remains the central piece of evidence put forth by prosecutors.

a. Considerations in situations of girl victims

- Regarding the testimony of a young female victim, prosecutors need to review the relevant criminal procedures as to whether the victim will be considered competent to be a child witness at the criminal trial.
- Generally, the judge will decide whether the child knows the difference between the truth and a lie, the consequences of taking an oath and whether the witness can accurately recount the details of the event.
- Also in situations where the girl does not want to testify or it is considered too traumatic for the victim, consider whether the jurisdiction allows prosecutors to submit the victim's **out-of-court statements**.

- Many girls make the **initial disclosure** of abuse to family members or friends. In some jurisdictions, statements made by a girl victim concerning sexual or physical violence are admissible in the criminal case under certain conditions.
- If the violence is **disclosed** to the police, or to a forensic child interview specialist, the child's statement might be admissible as substantive evidence **without** having the child give oral testimony. In these cases, the prosecutor usually needs to call as a witness the person to whom the disclosure was made.
- Such statements can be made admissible under articles 19 and 46 of QSO.

b. Sexual history of the victim

- Many jurisdictions prohibit the introduction of evidence of the **victim's sexual behavior** that is unrelated to the incident being prosecuted to prevent the defence from abusing the criminal justice system to harass the victim.
- This is also to rebut the traditionally held notion that a woman who has **consented to sex** previously is more likely to have consented to the incident in question. For those jurisdictions that have **rape shield laws**, prosecutors should ensure that this is not weakened by loopholes or by unfavourable judicial interpretation.

- Typical rape shield laws provide that in a prosecution of rape, reputation or opinion evidence of the alleged victim's prior sexual conduct is not admissible.
- For those jurisdictions without such laws, the prosecutor should strenuously object to this evidence as being irrelevant and prejudicial.
- This type of evidence is used by the defence to challenge the respectability and credibility of the victims and rely on damaging stereotypes of victims as being immoral and not worthy of protection.

- **The Anti-Rape (Investigation and Trial) Act, 2021.**
- **Section 13.** Evidence and guidelines.
 - (1) The two-finger virginity testing, for the purposes of medico-legal examination of a victim relating to scheduled offences, shall be strictly prohibited and no probative value shall be attached thereto.
 - (2) In respect of any scheduled offence, any evidence to show that the victim is generally of **immoral character**, shall be inadmissible:
 - Provided that the right of an accused to a fair trial shall not be prejudiced.
 - (3) The testimonies and evidence of victims, accused and witnesses in Court shall be video-recorded, preserved and reduced in writing.

- **Article 151 (4) of QSO (Impeaching credit of witness)** allowed attacking the character of the victim and stated that:
- (4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.
- Omitted in 2016

c. Bad character of the Accused

- In some jurisdictions, the prosecution may not introduce evidence about the accused's bad character to prove that he acted in conformity with that bad character trait.
- However, certain jurisdictions allow for an exception to this general rule prohibiting character evidence. If the accused has introduced character evidence in his own defence to show that he acted in conformity with a good character trait, he has "opened the door" and then prosecution is permitted to rebut this evidence.

- **CrPC S. 340.** Right of person against whom proceedings are instituted to be defended and his competency to be a witness:
- (2)... Provided that he shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of any offence other than the offence with which he is charged or for which he is being tried, or is of bad character, unless.
- (ii) He has personally or by his pleader asked questions of any witness for the prosecution with a view to establishing his own good character, or has given evidence of his good character; or

- **Articles 66 to 69 of QSO** deal with “Character When Relevant” and provide articles 66, 67, 68 and 69
- Article 68. Previous bad character not relevant, except in reply.
- In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

d.No adverse inference from delay in reporting

- It is not uncommon for women victims of violence to **delay** reporting the violence to the authorities. There are legitimate reasons why the victim chooses to delay reporting, and prosecutors should be prepared to argue or call an expert witness to explain this behaviour.
- Furthermore, prosecutors should object to the accused or the courts from drawing any adverse inference from the delay and holding it against the victim and her credibility. In some jurisdictions legislation specifically prohibits drawing adverse inferences from delays in reporting.

- State & others v Abdul Khaliq and others (**PLD 2011 SC 554**)
- In **Mukhtaran Bibi Case**, Justice Nisar stated:
- “The delay in each case has to be explained in a plausible manner and should be assessed by the court on its own merits; in a case of an unmarried virgin victim of a young age, whose future may get stigmatised, if such a disclosure is made, time is taken by the family to ponder over the matter. That situation cannot be held at par with a grownup lady, who is a divorcee for the last many years; the element of delaying the matter to avoid *badnami* may also be not relevant in this case because the incident according to the prosecution’s own stance was known to a large number of people and there was no point in keeping it a secret from everyone.”
- <https://tribune.com.pk/story/157062/deconstructing-the-sc%E2%80%99s-mukhtaran-mai-verdict-%E2%80%94ii>

e. Evidence of expert

- Evidence of expert is dealt with under articles:
- 59. Opinions of experts.
- 60. Facts bearing upon opinions of experts.
- 61. Opinion as to handwriting when relevant.
- 62. Opinion as to existence of right or custom, when relevant.
- 63. Opinion as to usages, tenets, etc., when relevant.
- 64. Opinion on relationship when relevant.
- 65. Grounds of opinion when relevant.

- Generally speaking, issues that give rise to the need for **expert testimony** in cases involving violence against women and girls include:
 - Issues relating to popular myths regarding violence against women
 - Issues relating to the victim's perplexing behaviour (i.e. behaviour caused by post-traumatic stress disorder, dynamics of domestic violence or sexual abuse)
 - Issues relating to medical and forensic issues such as DNA evidence, criminalist work [serology(the study of blood serum), fingerprints'], sexual assault nurse examiners, physicians, etc.

- The use of expert testimony in the prosecution of violence against women cases aims at “leveling the playing field” so that the judges can properly evaluate the evidence and credibility of the victim, rather than on the basis of erroneous assumptions.
- Expert witnesses can explain common victim behaviour, the effects of violence on victims and assist fact finders in evaluating their credibility when the victims’ actions might not be what judges expect.
- In absent-victim prosecutions, expert witnesses can explain why the victim is hostile or reluctant to participate.

Conclusion

- Communication gap between the prosecutors and the victims
- Understanding the rights of victim (to be treated with dignity and compassion)
- Sexual history of victim
- Bad character of accused
- Inference regarding delay in reporting
- Reliance on expert evidence

END