

Lidija Grubić-Radaković
Judge of County Court
in City of Zagreb
Zrinjevac 5
41000 Zagreb
C r o a t i a

RAPE VICTIM AS WITNESS IN CRIMINAL PROCEDURE – SUGGESTIONS TO REFORM PRESENT CONDITION

S U M M A R Y

The subject of the paper is contemplating the problems connected with specific position of a victim as injured party and at the same time witness of criminal-law cases of sexual delinquency, especially criminal acts of rape. Suggested solutions to reform present conditions could be included in criminal procedure of accusatory as well as the accusatory-inquisitional mixed type, without entering all of constitutionally guaranteed defendant's rights. Furthermore, the suggested solutions in some particular aspects provide opportunity for faster and more efficient establishment of material facts, what is absolutely one of the most essential guarantees of the defendant's rights. The problem has been divided into: 1. cases when criminal act is not indicated – the solution for "dark number" lies in motivating victims by forming institutionalized protection of victim's physical and mental integrity, and 2. special problems in connection with the estimation of the evidentiary weight of the testimony in cases when there are no material traces of the committed act, suggesting three variations of the possible procedural solutions of the professional intermediation while estimating the defendant's testimony. Offered solutions, especially in part regarding criminal procedure, could entirely be included in the phase of presenting the evidence as a bond between direct evidence, which for now, mostly make in all procedural regulations, expert reports, in their firmly determined – by law and practice – frames, which in this particular types of procedure do not respond completely to all requirements of the integral establishment of the material facts.

Suggestions for legislative solutions are: institutionalization of the interdisciplinary professional help, ad hoc forming of a group of experts and inside judicial establishment the existence of specific fully employed specialists, who shall, if needed and when required by procedural subjects (police, hearing judge, appellate court), give expert help and advice, level of evaluation being the same as in expert reports.

It is a notorious fact that there exists a "dark number" of undocumented sexual crimes, primarily rape, and neither law-makers, nor legal practice have agreed upon a solution which would assure the rape victim a certain level of protection in the course of a criminal proceeding. It is well known that victims of sexual crime, in addition to the trauma of rape, if they really decide to file a criminal charge, experience further attacks on their integrity what objectively humiliates them further as they have to endure detailed investigations that cause

them to "relive" the rape in at least three occasions (the police report, the evidentiary investigation, at the trial). It is also necessary to take into account the victim's fear of the offender's possible reprisal, as first, the offender compelled the victim to submit to the rape by force or by threat of imminent death, serious bodily injury to be usually inflicted on the victim or a person close to her/him/ and second, the police and the court continue to treat the victim as any other witness without consideration of the trauma inflicted by the crime and the fear of reprisal. From that standpoint, it seems impossible to find a procedural rule which shall make it possible to discover the highest possible number of offenders and/or to initiate criminal acts. Providing maximum legal protection for the defendant in course of the proceeding (whose procedural rights must be not only respected but developed as well and under no circumstances the basic principle of presumption of innocence can be deviated from) complicates the search for a solution to this procedural question when dealing with sexual crimes.

The legal rules currently in force are unsatisfactory as they do not firmly guarantee protection of the victim from further humiliation; ensure that the victim's testimony including the motive for filing the complaint shall be objectively and completely reviewed; and finally, most importantly – that in the course of the proceeding it will be possible to establish the material fact of guilt or innocence with the greatest degree of probability. In striving to find a solution to this issue we constantly have to keep in mind the procedural rights of the defendant, not violating any existing governing criminal procedure rules (directness, contradictoriness, presumption of innocence, *in dubio pro reo*).

In criminal proceedings for rape as a whole the evidentiary procedure is in most cases reduced to one fact – the victim who embodies in herself/himself two different aspects of evidence to establish this one fact. The victim presents: indirect or personal evidence by reproducing her/his very own perception of the act, and direct or material evidence which is the consequence of the offender's criminal act, namely the violation of psychic and physical violation of the victim. Therefore, in order to solve the procedural problem and to be able to completely establish the facts in course of the proceedings, victim's role should be divided into two main groups, second of which has two possible variations regarding possibilities in providing evidence:

I. Rape victims who do not report the crime – because reasons of shame, fear of reprisal or fear of possible condemnation from the community.

II. Rape victims who report the crime and who cause a criminal proceeding to be initiated – in this case there are different ways of establishing the facts, depending upon available evidence. We can draw a distinction between:

1. Rape victims who have visible injuries which are the consequence of violence and their resistance;
2. Rape victims without any visible injuries as the victim was not able to resist due to the circumstances in which the crime was committed (because of disproportionate strength of the offender, serious threat which breaks resistance in itself).

I GROUP – how to encourage reporting of a rape

A procedural solution has not been found, especially not a compulsory norm, which the victim is certain will protect her/him to such an extent (knowledge of jurisprudence) that she or he knowing of the existence of such protection, shall be encouraged to report the criminal act and participate in the criminal proceeding. One of the solutions would be to encourage police protection during the police investigation and court evidentiary investigation (when it is, as according to our Criminal Procedure Act, in the court's competence) and the fact that most evidence has already been collected before the main hearing, diminishes the risk that the victim will suffer reprisal from the offender as a result of reporting the crime. The police investigator and the investigating judge, after having been appraised of the necessity of giving police protection, would be in charge of making a decision whether or not to provide police protection. But, I believe that the better solution is to institutionalize social services and to incorporate them in criminal proceedings, including preliminary criminal proceedings (for example during the police investigation, when it exists, before the preliminary investigation proceedings). Were such a solution to be established, the Criminal Procedure Act should be amended to provide social – safety prevention, from the inception of preliminary criminal proceedings through the phase of pre-trial investigation to the main hearing, without any possibility of expanding or restricting legal rights of the victim – witness in the proceeding. Similarly, such an amendment, except regulating care for victim's psychosocialisation without influencing the testimony of the victim as relevant evidence, must not restrict any of the procedural rights of the defendant.

II. GROUP – Possible criminal procedural rules related to the evaluation of the victim's testimony in the criminal act of rape.

1. Rape victims with visible injuries and other material evidence – the injured party presents at the same time both indirect and direct evidence. The indirect evidence consists of the witness's testimony and the direct evidence consists of the physical injuries, traces of sperm, traces of fibers from the offender's clothing and other similar material evidence. Technically it is simpler to establish facts where there are visible injuries, because the witness's testimony is supported by material evidence as well as by an expert witness's report in a classical procedural form. We would not, in such cases, make any changes to the law, as the positive rules are satisfactory to establish the facts, without infringing the procedural rights of the defendant in the procedure with respecting all valid maxims in the elements of criminal procedure and without expanding in any way the procedural rights of the injured party. But, the application of the proposed amendments to the law intended for cases in which the court does not have enough evidence and therefore the judicial evaluation necessarily comes into the first place, should not be omitted.

Case No. 1:

A female refugee from Bosnia and Herzegovina, a thirty two year old S. V., lives with her husband, his mother and a six year old son in a rented apartment in Zagreb. In order to make the living, apart from working regularly as a cleaning lady in a hospital, she cleans a caffe bar in one of the city suburbs in the after afternoons till 10 o'clock p.m. The offender is a regular guest in a caffe bar the victim works at. One evening when it was raining very hard, the lady owner of that caffe bar asked the defendant to give S. V. a ride to the bus station, what she accepted. A fifty three year old unemployed plumber, P. K., did not drive S. V. to the

bus station, but in the opposite direction. He stopped the car on a side road in the corn stubble field, where he raped S. V. three times in different ways, and then, and after continuing the drive for some time, asked her to get out of the car into the rain and mud, in a place 2 km away from her home. He states at the court that he and S. V. really had a sexual intercourse, but that both sides were willing. The victim's testimony was quite the opposite, stating that after her consternation and refusal, the defendant had strongly hit her head with his fist, then had torn off her clothes, and after her screaming and struggling with her hands and scratching with her nails, he took out an object which she was not able to see clearly in the dark, telling her it was a pistol, and that he was going to kill her if she kept resisting. After the first sexual intercourse the victim succeeded in opening the door of the car, and started running, but slipped and the defendant reached her, dragged her back into the car, tied her both hands with safety belts, grabbed her by her hair and forced her to felatio, and then again to another intercourse, hitting her abdomen at the same time with his fists, and striking her head against the back of the car seat. The court has fully accepted the testimony of the victim, as according to the expert witness's testimony, the location, sort and mechanism of making the injuries corresponded completely to her description of his violent behaviour. The defendant's injuries which were found during the examination, corresponded also to the description of her resistance. Pursuant to the victim's testimony, the material evidence and controlling evidence (expert witness's testimony for judicial medicine) the court ruled the defense of the accused to be unfounded.

2. Rape victims without visible injuries, with little or without material evidence – In this circumstance the only evidence is the testimony of the victim, and the controlling evidence assists the judicial evaluation in such a manner that it generally makes it more difficult and subject to a layman's psychological knowledge, unless an expert witness is called to testify. Danger also lies in the judicial evaluation of the defense of the accused i.e. the demeanor of the defendant and the persuasiveness of the rape victim in her/his version of the description of the crime. There arises the question of to what extent and to what limits can the judge objectively evaluate the evidence without any analysis of a person who presents a subjective picture based upon his or her psychological predispositions and spectre of motives. Currently, the law foresees the possibility of using expert testimony to establish mental state tempore criminis, and although such expert testimony can be applied to the injured party, it is basically used to protect the procedural rights of the defendant, where his mental state is questioned. As the form of expert's testimony is very strict and as the law narrowly prescribes in which cases and for what purpose the expert witnesses can be used, evaluation of the victim's personality in context of the experience in which she/he was the object of the offender's criminal act, is not regulated, i.e. evaluation of the authenticity of her/his story through indirect and impartial expert opinion. Such opinion of experts belonging to specific profession or scientific discipline must not attempt to evaluate the victim's testimony which is exclusively within the competence of the court, but must be exclusively connected with the evaluation of the personality of the victim.

Case No. 1:

M. Z. persuaded a female minor J. K. to give her a ride home from the place she had parted with her girl-friend. But, he turned the car to the highway and started driving towards Osijek. He had stopped the car for three times, and raped her. He kept telling her and at the same time pulling her by her hair, that if she resisted he would kill her and put a curse on her, so by that he overcame her resistance. At the main hearing the accused confessed the sexual

intercourse (the injured party was virgo intacta before that sexual experience took place) which act he committed three times claiming that willingness was mutual and even more that the injured party participated, emphasizing the victim's motivation for filing a complaint fear of her father as she had not come home on time. The victim had visible injuries, but according to the opinion of an expert witness of a judicial-medical profession, considering their location and kind, could have been the product of violence, as well as the result of the fall and self-injury by hitting, for example, hard surface. The victim, immediately upon her return to Zagreb, with the help of her friend whom she had called from the public telephone booth, filed a complaint. After doing that, she informed her parents about her accident. It was established that her parents were very strict in bringing her up. The court fully accepted the victim's testimony. The court in its decision stated that victim was believed by reason of the consistency of her testimony throughout the proceeding, her persuasiveness, absence of doubt regarding the possibility of her false charges due to the motives produced by the defense, as the family did not inflict any punishment upon the victim because of her absence from home, that is, the victim was believed on the basis of judicial evaluation of the available evidence.

Case No. 2:

A twenty one year old female M. B. was with her girl-friend in a cafe not far away from her home, at about 11 o'clock p.m. when a young man, by whom she was attracted, approached her and suggested a walk, what she accepted. She took her to the nearby playground and they started kissing on the bench for reserve players when three young man's friends approached the bench. Just after that the young man ordered a girl to take off all of her clothes, what she obeyed. She stated that she had done it without resistance from fear of their threatening features, darkness; and drawing a conclusion that her resistance would have been pointless, because of the still of the night, the circumstance that nobody could hear her cries for help (the closest houses were too far away), and the thought that her resistance could provoke their physical maltreatment. They raped her, and two at the same time forced her to coitus interruptus and to felatio. All four of the defendants denied committing the rape, stating conformably that only one defendant had a sexual intercourse with the victim, and that she consented to that, while the three of them were sitting on the bench and watching from the distance of approximately ten meters. The victim was interrogated in the criminal proceeding even five times (police, evidentiary investigation, twice in front of the same tribunal on the main hearing, due to the changed structure of the tribunal on the recommenced main hearing), what was the crucial moment for the court to give her trust, as she remained consistent in her statements, without changing her testimony even in one detail in spite of the long and for her very unpleasant interrogations. The court was also of opinion that under the circumstances, and because of the physical dominance of the defendant, the victim was not in a position to resist adequately, and the decision on the defendant's guilt was influenced by the fact that the victim, in spite of her fear of the offender, was ready to report the act and to be the object of further humiliation by having to endure repeated interrogations.

Case No. 3:

The offende Z. F. (40 years of age) in the period of three years, almost every week, in the same part of the city, near the centre, close to the railway station, kept approaching young females (it was established that they were between 14 and 17 years of age), and telling them always the same story of a female photo-model he was supposedly awaiting, introduced himself as a film-agent and artistic photographer and offered them an engagement for taking their allegedly well paid photographs and publicity abroad. According to his own statement,

300 girls consented to his proposal, and the police found in the search of his apartment and cottage in which he used to take the girls, such number of photographs of their naked bodies in different poses. One of his last victims reported him to the police, and the rest of them were summoned according to the list which was found at his place, and by comparing the photographs. Only seven of the girls admitted they were forced to have sexual intercourse upon their arrival in the apartment, either by blackmail (that their obscene photographs shall be published in domestic print) or by use of the defendant's violence (by slapping, tearing off their clothes, throwing them to the ground), while the other girls either denied the sexual intercourse or admitted the sexual intercourse stating that they consented to it in belief the defendant would promote them as photo-models. It is not in question that all of the girls, regardless of the nature of their statements, were forced or consented to the different kinds of sexual intercourses, some of which were especially humiliating considering their age and the circumstances. In this proceeding the court, with the exception of the defense of the accused based on the fact that the question was whether the willful sexual intercourse took place or there was no sexual intercourse at all, had at disposal only the victims' testimonies and the testimonies of their parents, and the social anamnesis of the court's special education teacher. According to the victims' testimonies, and the evaluation of the cited controlling evidence, a decision was made that even if the violence had been used, there was absence of adequate resistance expected in such situations, so the characteristic of a criminal act of rape was non-existent, and the blackmail was not of a kind to seriously threaten the honour and the respectability of the victims, even more so as they had found themselves in such situation due to their personal consent to be photographed.

The current legal regulations could be amended to provide:

- a) Institutionalizing interdisciplinary experts within the Criminal Procedure Act
- b) Ad hoc formation of an interdisciplinary group of experts pursuant to the Criminal Procedure Act
- c) Establishment of a group of expert consultants/professionals within the judicature organization, pursuant to the provisions of the Act on Courts and the Criminal Procedure Act.

aa) Criminal Procedure Act should specify the establishment of a permanent group of experts appointed by the competent institution. Investigating judge, in accordance with the law for such crimes, would request the commission, comprised of a psychologist, psychiatrist, sociologist and special-education teacher, to carry out a complete examination. That examination would include preparing the victim for all consequences of the criminal proceedings, as well as advising the court on the psychological and psychiatric status of the victim, which would all serve the court to evaluate the victim's testimony. This should help the court evaluate the victim's testimony. The scope of such advice should be defined by law, as it is exclusively meant to help the court to select the necessary evidence, and/or to execute certain acts, in order to collect the controlling evidence only and explicitly for the purpose of correct evaluation of the verity of the injured party's testimony in relation to the defense.

The purpose of having such institutionalization of a permanent group of experts is to ensure maximum objectivity, as, by institutionalization possible influence of the interested parties on the outcome of the proceeding is impossible. It is necessary of course to enable the

public prosecutor as well as the defense to inspect the expert commission's evaluation to enable them to file objections and to answer objections.

bb) Secondly, it is possible to form ad hoc group of experts as consultants or professionals to help the court or the police (providing that an order to establish such a group is always given by the investigating judge upon police request or in course of the evidentiary investigation proceeding). We use the term group advisedly, as we believe an interdisciplinary approach is desirable since past experiences show that multidisciplinary analysis of a person (her/his behaviour, approach to reality, her/his possible contribution to the crime, social conditioning and so forth) is necessary. We suggest requiring ex officio court decision appointing the commission, in order to avoid any possibility that the parties' influence, before the experts opinion and the suggestions to court on possible production of evidence in order to confirm the controlling evidence. As stated earlier the parties must be entitled to object to such expert opinion and their procedural rights must not differ from the case when the expert evaluation is executed.

cc) The problem should necessarily be regulated by two legal regulations i.e. Law on the Courts and Criminal Procedure Act. The consultant/professional group of experts is a permanent body composed of fully employed specialists of various professionals, is narrowly connected with forensics and presents the institution which, within the judicature, functions as expert and advisory assistance to court. It should not be related to specific kinds of criminal acts, but to all criminal acts which require professional assistance in course of the proceedings. Counseling and assistance in the process of collecting the evidence should be restricted to that purpose only, and should be under no circumstances connected with the later possible expert testimony. Expert testimony should be done by an expert witness or an institution outside of this institution, with the purpose of ensuring objectiveness.

Conclusion

I have restricted this analysis as well as the suggested solutions to a small segment of the problems criminal procedure jurisprudence deals with, considering this segment to be important by reason of criminal acts which have unfortunately become very frequent and every day even more widely spread phenomenon. The crisis in this area and the nearby war, have caused considerable increase of the crime rate connected with the violence against humans and property. This circle of criminal behaviour includes criminal acts of rape, which in legal procedures appear more and more in combination with other criminal acts (murder, robbery, extortion, blackmail). In criminal acts of rape, a possible mistake of the court, at the expense of the defendant, is 50:50, as we have just two opposite testimonies. The defense of the accused is mostly based on the psychiatric expert's testimony. The neuropsychiatric and psychological testimony, by observing the defendant's inclination to agresivness, his psychopathological characteristics, neuroticism, alcohol, drugs, influences the evaluation of the defense of the accused and accordingly, his possible behaviour tempore criminis. The evaluation of the victim's behaviour is still dependent upon the judicial conviction and is independent of the fact whether the guilt is decided by a jury or panel of judges or professional judges, depending on the procedural system. Suggested solutions present possible changes of such conditions by legislative regulations, and are based on the practical experience. Professionals of specific fields, so far (qualitatively and quantitatively) not

sufficiently included in the procedure, will positively help to achieve a better judicial evaluation of the evidence, more reliable establishment of facts and by these – to reach more accurate decisions. In doing so, we have made one step further in order to protect human rights in the criminal procedure, even more so as we, in Croatia, are now in the phase of enacting a new criminal procedure act in which we would like to incorporate everything that has practice proved to be the best in the accusatory and the accusatory-inquisitional mixed type procedures.

/Lidija Grubić-Radaković/