



ACCOUNTABILITY FOR RAPE

A CASE STUDY
OF LODHRAN

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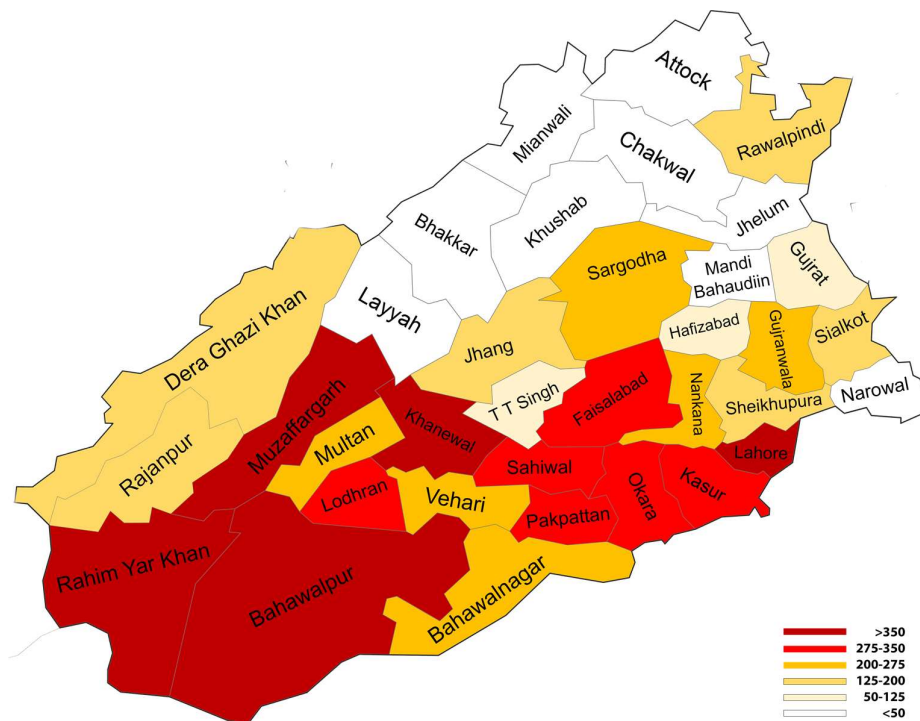
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1. Introduction

1.1 Overview

Rape remains one of the major crimes in Punjab since the last few years.¹ Data reveals that the incidence of reported rape increased from 3089 cases in 2015 to 3560 cases in 2016-an increase of approximately 15%. Moreover, apart from Lahore, most of the high-intensity areas of reported rape are concentrated in the region of Southern Punjab.

Figure 1: Reported Incidence of Rape Crimes in Punjab 2016-2017



Source: Public Prosecution Department, Punjab

Despite an increase in reporting of rape crimes, accountability remains a challenge for victims of rape in Pakistan. While a majority of these crimes continue to be unreported,² even when victims do report and trigger the criminal justice process, the

¹Public Prosecution Department, Punjab, Data on Major Crimes for years 2015-2017.

²Human Rights Commission of Pakistan, 'State of Human Rights of Pakistan 2017', March 2018, <http://hrqp-web.org/publication/wp-content/uploads/2018/04/State-of-Human-Rights-in-2017.pdf> (Accessed 13 May, 2019); Human Rights Commission of Pakistan, 'State of Human Rights of Pakistan 2018', March 2019 (Accessed May 20, 2019)

percentage of convictions is extremely low. During the period of this study (2016 and 2017), almost 96% of those accused of rape were acquitted.

The Case Study reveals that one of the major reasons for acquittals in rape cases is the *resiling* of the witnesses.³ In Punjab, almost 87% of the cases decided during the period 2016-17 were early acquittals, primarily due to lack of evidence. Since witness testimony is considered primary evidence in Pakistan’s criminal justice system, the *resiling* of witnesses⁴ results in extremely high percentage of acquittals. This observation is consistent with other non-compoundable offences⁵ including robbery and dacoity, where witnesses *resiled* in almost 90% of the total cases decided during 2016 and 2017⁶.

While it is important to understand the socio-cultural, legal and economic factors that contribute to such a high percentage of witnesses *resiling* (87% for rape cases), this Case Study focuses on the remaining 13% of cases that were decided on merit. **Table 1** indicates that during 2016 and 2017, almost 3 out of every 4 cases decided on merit resulted in an acquittal. Such high rates of acquittal necessitate an inquiry into the legal framework on accountability for rape, with a need to critically examine the evidentiary challenges that formulate the burden of proof for an alleged victim of rape and the institutional structures that aid in the collection of evidence in rape cases.

Table 1. A Brief Overview of Rape Cases in Punjab (2016 & 2017)

	Total	% Age of total
Cases Decided	5852	100%
Convictions	216	3.7%
Acquittals	5636	96.3%
Acquittals due to Resiling of Witnesses	4903	83.8%
Acquittals due to Insufficient Evidence	155	2.65%
Acquittals on Merit	578	9.9%

Source: Public Prosecution Department, Punjab

1.2 Objectives of the Study

The focus of the Study is to identify the challenges victims/complainants face in

³ Sohail Akbar Warraich, ‘Access to Justice for Survivors of Sexual Assault.’ December 2015. [http://af.org.pk/gep/images/publications/Research%20Studies%20\(Gender%20Based%20Violence\)/Access%20to%20Justice%20for%20Survivors%20of%20Sexual%20Assault%20final%20with%20branding.pdf](http://af.org.pk/gep/images/publications/Research%20Studies%20(Gender%20Based%20Violence)/Access%20to%20Justice%20for%20Survivors%20of%20Sexual%20Assault%20final%20with%20branding.pdf) (Accessed 15 May, 2019)

⁴Often, the *resiling* of witnesses suggests that an out-of-court settlement took place in these cases, with a greater reliance on informal mechanisms of dispute resolution.

⁵Non-compoundable offences are generally more serious offences, for which a compromise is not permitted under the law. Section 345 of the Code of Criminal Procedure, 1898, lays out the compoundable offences; all other offences are non-compoundable.

⁶ Public Prosecution Department, Punjab

seeking accountability for rape in the Court of First Instance (“CFI”), in particular. The court of first instance, in rape cases in Pakistan, is the Court of Sessions or Sessions Court. It is outside the scope of this Study to assess or comment on whether any or a significant number of these cases might have been overturned on appeal in higher courts.

The main objective of the Study is to identify the evidentiary challenges for victims/complainants of rape and to assess its correlation with high rates of acquittal through:

1. Investigation & assessment of the burden of proof on victims/complainants
2. Investigation & evaluation of evidence currently relied upon in courts in cases of rape and judicial appraisal of the same
3. Investigation & assessment of processes, protocols, trends and patterns which contribute to high acquittal rates
4. Identification and investigation of bars to access to justice for victims/complainants, especially at the court of first instance, i.e. the trial court.

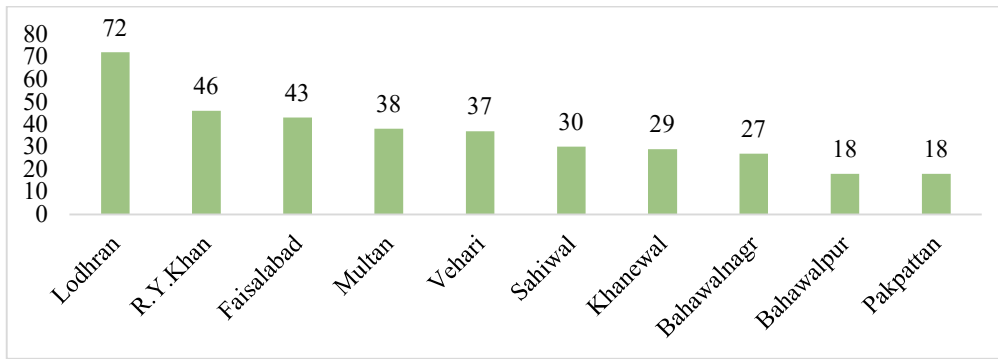
1.3 Sampling Methodology

A two-tiered sampling technique was adopted for this study. This comprised of the following steps:

- a) Identification of a sample district for the case study
- b) Identification of a suitable sample size of case files for the case study

Determination of the Sample District: The sampling data on the total number of rape cases registered and decided by the courts in 2016 and 2017 was obtained from the Public Prosecution Department, Government of Punjab. This data provided an initial understanding of the trends in case registration and decisions made pertaining to rape cases in 36 districts of Punjab (Annex – I). Based on the available data, the top ten districts in terms of the highest number of contested acquittals were calculated and the district with the highest number of acquittals was selected to be the district for this Case Study.

Figure 2. Top 10 Districts for Contested Acquittals for Rape Cases in Punjab (2016-17)



Source: Author's calculations based on data from the Judgment Files

Fig. 2 reflects that in 2016 and 2017, the highest number of contested acquittals was found in District Lodhran⁷ (72 cases) followed by Rahim Yar Khan (46 cases) and Faisalabad (43 cases). A review of the acquittal rates also reaffirms the earlier observation that South Punjab had a much lower conviction rate in rape cases compared to Central and North Punjab.

In view of these observations, Lodhran was selected as the best-suited district for the purpose of this Study. Not only did it have the highest number of acquittals in rape cases among all districts during the period under consideration, the district is also situated in South Punjab (comprising approximately one-fourth of the total acquittals in the region).

One important aspect of the sampling framework needs to be mentioned here:

An initial request for data to the District Court resulted in numerous files being provided that included acquittals under Section 265-K of the Code of Criminal Procedure, 1898 (hereinafter referred to as “265-K”)⁸. Upon inspection, the author and the researchers concluded that the treatment of both types of cases (with or without 265-K) is similar to each other and no clear distinction in grounds for acquittals can be made, except that an application for early acquittal was made in the 265-K cases. Some of these grounds for acquittals were also found in cases of non-265-K, making it difficult to treat them as a separate category.

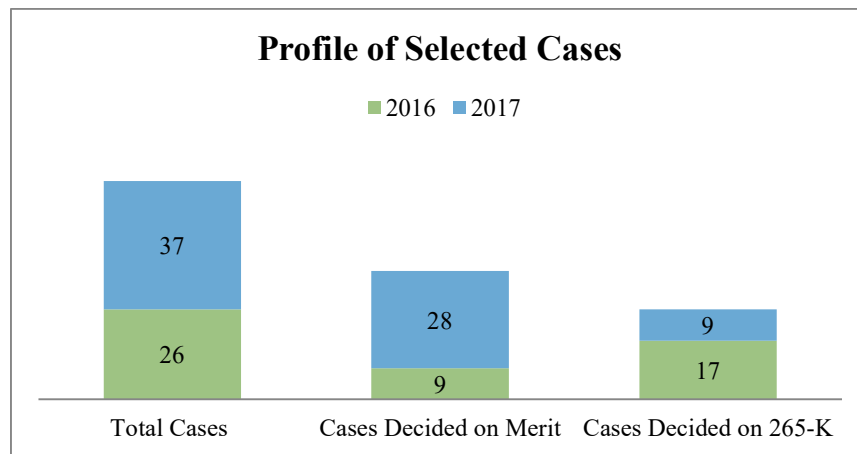
1.4 A Brief Profile of the Selected Cases

⁷Lodhran District is one of the 36 Districts of Punjab. It is located in Southern Punjab, with a total population of 1,700,620 (according to the 6th Population and Housing Census, 2017)

⁸ Code of Criminal Procedure 1898, Section 265-K: “Nothing in this chapter (XXII-A) shall be deemed to prevent a Court from acquitting an accused at any stage of the case. If, after hearing the prosecutor and the accused, and for reasons to be recorded, it considers that there is no probability of the accused being convicted of an offence”.

Due to limitations of resources and access, non-probability purposive sampling⁹ was used to draw out a sample of 66 cases from the list of decided cases provided by the District Court. After data cleaning, 3 out of these 66 cases were dropped due to incomplete information resulting in a **final sample of 63 judicial cases** that were used for final analysis.

Figure 3. Profile of Selected Cases



Source: Author’s calculations based on data from the Judgment Files

It must be noted that all 63 cases of acquittals examined have not been appealed against in higher courts. For the majority of victims, the decision of the trial court remains the only conception of justice and accountability, and hence identifying the specific challenges for victims at this stage is a priority of this Study. For the purpose of analysis, all cases (including early acquittals) are treated as similar to one another and no bifurcation is made in the overall trends.

The total 63 cases reviewed under this Study include 37 cases of contested acquittals – cases in which the trial completed its natural course resulting in an acquittal for the accused – and 26 cases in which the courts accepted 265-K applications.

⁹ Non-probability Sampling is a sampling technique where the odds of any member being selected for a sample cannot be calculated. This technique relies on the subjective judgment of the researcher. Given constraints of time, resources and access, it was not possible for researchers to randomly sample the entire population and hence the non-probability sampling method was employed.

2. Institutional and Legal Framework

2.1 Law & Rules Governing Rape

This Chapter highlights key features of the legal framework governing the offence of rape (“the offence”) in Pakistan.

The Constitution of Pakistan provides the first affirmation of protection against and accountability for rape through fundamental guarantees for all citizens, which include protection of human dignity, the right to life and equality. Thereafter, the Pakistan Penal Code, 1860, in Section 375 and 376, lays out the offence and punishment for rape, gang rape and more recently, rape of a minor. Some of the significant legislative developments in relation to rape laws in Pakistan include the Protection for Women (Criminal Laws Amendment) Act of 2006, which most notably makes it impossible to convert a claim of rape into fornication or adultery,¹⁰ and most recently the Criminal Amendment (Offences relating to Rape) Act of 2016, which has amended the Pakistan Penal Code, 1860, the Code of Criminal Procedure, 1898 and the Qanun-e-Shahadat (Law of Evidence) 1984, in meaningful ways as applicable to the offence of rape.

The existing legal provisions provide some important protections for rape victims.¹¹ These include removing grounds to present evidence which attacks the character of the victim of rape¹²; protecting the identity of the rape victim during proceedings; stipulating a time-frame in which the trial court has to decide the matter and a subsequent time limit for decisions on appeal; provisions mandating legal representation for the victim; protocols for recording the victim’s statement and

¹⁰The Protection for Women (Criminal Laws Amendment) Act 2006 inserts section “5A. No case to be converted lodged or registered under certain provisions. – No complaint of Zina under section 5 read with section 203A of the Code of Criminal Procedure, 1898 and no case where an allegation of rape is made shall at any stage be converted into a complaint of fornication under section 496B of the Pakistan Penal Code and no complaint of fornication shall at any stage be converted into a complaint of Zina under section 5 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No. VII of 1979) or an offence of similar nature under any other law for the time being in force.”

¹¹This report uses the word victim to refer to a person against whom an offence of rape has been allegedly committed and who has decided to report through registration of an FIR and contest the case in trial. It is not the subject of this report to assess whether rape in fact happened in any of the cases under examination or to comment on the merits of an acquittal; rather the purpose is to assess how the trial courts reached an assessment using the law that a rape allegation was not proved by the complainant/victim (the report also interchangeably refers to victims/complaints on several occasions) and what the current practice in trial courts reveals for a complainant/victim burden of proof, legally and in practical terms.

¹² Qanun-e-Shahadat Order 1984, Section 151 deals with ‘impeaching credit of the witness’. Under Section 151(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.” This sub-section has been removed by the Criminal Amendment (Offences relating to Rape) Act of 2016.

conducting the medical examination; protocols mandating the medical examination and DNA of the accused etc.; protocols facilitating the recording of statement of the victims; imposition of penalties on investigation officers for deficient investigations, and explicit reference to and penalties for public servants, including police officers, medical officers or jailors, taking advantage of their official positions to commit rape – to name a few.¹³

However, there remain significant shortcomings of understanding, implementation and access for victims in what the law provides. In addition, there remain gaps in the law and areas for improvement and further law making continue to exist. The focus of this Case Study is in providing insights into the former: the gaps in understanding and implementation of existing laws.

It is also pertinent to mention that laws operate within the broader social context. Social, economic, attitudinal and various other barriers continue to discourage women in accessing justice in direct and discrete ways despite the law. While laws gradually affect changes in perceptions and attitudes of various actors within the legal system and the broader community, that is often a long and slow process facilitated and possible only by strong implementation and accountability. In the absence of that, and on a default basis, actors within the criminal justice system and members of the society are not insulated from the broader social context – which still remains hostile for victims of rape. In several cases, the officials directly responsible for access to justice to rape victims, such as the police, medical personnel, and judges etc. bring their biases with them to work.¹⁴

2.2 Relevant Legal Provisions

The relevant legal provisions as contained in the Pakistan Penal Code, 1860 (PPC), the Code of Criminal Procedure 1898 (CrPC), and Qanun-e-Shahadat (Law of Evidence), 1984 are stated below in their original text:

¹³ Criminal Amendment (Offences relating to Rape) Act of 2016 available at http://na.gov.pk/uploads/documents/1475761256_380.pdf

¹⁴ Human Rights Commission of Pakistan, ‘State of Human Rights of Pakistan 2017’, March 2018, <http://hrqp-web.org/publication/wp-content/uploads/2018/04/State-of-Human-Rights-in-2017.pdf> (Accessed 13 May, 2019); see also Ayesha Khan and Sarah Zaman, ‘The Criminal Justice System and Rape: An Attitudinal Study of the Public Sector’s Response to Rape in Karachi.’, Collective for Social Science Research/War against Rape, 2011, http://www.researchcollective.org/Documents/The_Criminal_Justice_System_and_Rape_NEWF_INAL.pdf (Accessed 13 May, 2019)

2.2.1 Pakistan Penal Code, 1860 (PPC)¹⁵

Definition of Rape:

Section 375 of PPC defines the offence of Rape as:

“A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

- i) Against her will;*
- ii) Without her consent;*
- iii) With her consent, when the consent has been obtained by putting fear of death or of hurt,*
- iv) With her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or*
- v) With or without her consent when she is under the age of 16.”*

Punishment for Rape:

Section 376 of PPC adds:

“(1) Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than 10 years and more than 25 years and shall also be liable to a fine.

*(1A) “Whoever, commits an offence punishable under **sub-section (1)** or sub-section (2) of this section, section 377 or section 377B, and in the course of such commission causes any hurt punishable as an offence under section 333, section 335, clauses (iv), (v) and (vi) of sub-section (3) of section 337, section 337C, clauses (v) and (vi) of section 337F, shall be punished with death or imprisonment for life and fine”*

*(2) When rape is committed by **two or more persons** in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life.”*

*(3) “Whoever commits rape of a **minor** or a person with mental or physical disability, shall be punished with death or imprisonment for life and fine.”*

*(4) Whoever being a **public servant, including a police officer, medical officer, or jailor**, taking advantage of his official position commits rape shall be punished with death or imprisonment for life and fine.”*

¹⁵As amended by the Criminal Amendment (Offences relating to Rape) Act 2016

Protection of Identity:

Section 376A of PPC protects the identity of the rape victim and states in subsection (1):

“Whoever prints or publishes the name or any matter which may make known the identity of the victim, against whom an offence under sections 354A, 376, 376A, 377 and 377B is alleged or found to have been committed, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to a fine”

Sentencing:

Section 55 of PPC provides that the sentence in rape cases will not be commuted:

“Provided further that in a case in which the sentence for life imprisonment has been passed against an offender for an offence punishable under sections 354A, 376A, 377, or 377B, or where the principle of fasad-fil-arz is attracted, such punishment shall not be commuted.

Ineffective Investigation:

Section 166 of PPC and Section 186 of PPC stipulate a penalty for ineffective investigation:

“166 (2) Whoever being a public servant, entrusted with the investigation of a case, fails to carry out the investigation properly or diligently or fails to pursue the case in any court of law properly and in breach of his duties, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

186(2) “Whoever, intentionally hampers, misleads, jeopardizes or defeats an investigation, inquiry or prosecution, or issues a false or defective report in a case under any law for the time being in force, shall be punished with imprisonment for a term which may extend to three years; or with fine, or with both.”

2.2.2 Code of Criminal Procedure, 1898 (CrPC)

Several provisions of the Code of Criminal Procedure deal with the offence of Rape.

Medical Examination of the Accused:

Section 53A of CrPC provides the mandate for and details the procedure for the medical examination of the person accused of rape.

On medical examination of the accused, Section 53A states:

(1) When a person is arrested on a charge of committing an offence of rape,

*unnatural offence or sexual abuse or an attempt to commit rape, unnatural offence or sexual abuse under **section 376**, section 377 and section 377B respectively and there are reasonable grounds for believing that an examination of this person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.*

- (2) *The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely: -*
- a) the name and address of the accused and of the person by whom he was brought;*
 - b) the age of the accused;*
 - c) the description of material taken from the person of accused for DNA profiling; and*
 - d) other material particulars in reasonable detail.*
- (3) *The report shall state precisely the reasons for each conclusion arrived at.*
- (4) *The exact time of commencement and completion of the examination shall also be noted in the report. The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate through Public Prosecutor referred to in section 173¹⁶ as part of the report referred to in that section.”*

¹⁶ Code of Criminal Procedure 1898, Section 173: Report of police officer. (1) Every investigation under this Chapter shall be completed, without unnecessary delay, and, as soon as it is completed, the officer in charge of the police-station shall, [through the public prosecutor] (a) forward to a Magistrate empowered to take cognizance of the offence on a police-report a report, in the form prescribed by the Provincial Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond and, if so, whether with or without sureties, and (b) communicate, in such manner as may be prescribed by the Provincial Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given. Provided that, where investigation is not completed within a period of fourteen days from the date of recording of the first information report under section 154, the officer in-charge of the police station shall, within three days of the expiration of such period, forward to the Magistrate through the Public prosecutor, an interim report in the form prescribed by the Provincial Government stating therein the result of the investigation made until then and the court shall commence the trial on the basis of such interim report, unless, for reasons to be recorded, the court decides that the trial should not so commence."

Medical Examination of the Victim:¹⁷

Section 164A CrPC states:

*“(1) Where an offence of committing rape, unnatural offence or sexual abuse or attempt to commit rape, unnatural offence or sexual abuse under **section 376**, section 377 or section 377B respectively of the Pakistan Penal Code, 1860, is under investigation, the victim shall be examined by a registered medical practitioner, in the case of female victim by a female registered medical practitioner, immediately after the commission of such an offence:*

Provided that in all cases, where possible, the female victim shall be escorted by a female police officer or a family member from a place of her convenience to the medical examination.

(2) The registered medical practitioner, to whom such victim is sent shall without delay examine him or her and prepare a report of the examination giving the following particulars, namely:

- a) the name and address of the victim and of the person by whom she was escorted;*
- b) the age of the victim;*
- c) the description of the material taken from the body of the victim for DNA profiling*
- d) marks of injury, if any, on the body of the victim;*
- e) general mental condition of the victim; and*
- f) other material particulars in reasonable detail.*

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the victim, or his or her natural legal guardian, to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigation officer who shall forward it to the Magistrate along with other requirements as specified under clause (a) of sub-section (1) of section 173.

(7) Nothing in this section shall be construed as rendering lawful any examination

¹⁷A registered medical practitioner means a medical practitioner who possesses any qualification recognized as such under the Pakistan Medical and Dental Council Ordinance (XXXII OF 1962) and whose name has accordingly been entered in a Register maintained by the said Council and has been authorized by the Government to conduct such examination.

without the consent of the victim or of any person authorized under subsection (4).

DNA Test:

Section 164B of CrPC deals with the DNA test of the victim and the accused:

*(1) Where an offence under **section 376**, section 377 or section 377B of the Pakistan Penal Code, 1860... is committed or attempted to have been committed or is alleged to have been committed, Deoxyribonucleic Acid (DNA) samples, where practicable, shall be collected from the victim, with his or her consent or with the consent of his or her natural or legal guardian, and the accused¹⁸ during their medical examinations conducted under section 164A, within optimal time period of receiving information relating to the commission of such offence.*

(2) The DNA samples collected under sub-section (1) shall at the earliest be sent for investigation to a forensic laboratory whereat these shall be properly examined and preserved:

Provided that the confidentiality of such examination shall at all times be observed.”

Recording of Victim’s Statement:

Section 154 of CrPC states:

*“Provided that if the information is given by the woman against whom an offence under section 336 B, section 354, section 354A, **section 376** or section 509 of the Pakistan Penal Code, 1860, is alleged to have been committed or attempted, then such information shall be recorded, by an investigating officer in the presence of a female police officer or a female family member or any other person with the consent of the complainant, as the case may be:*

*Provided further that if the information is given by the woman against whom an offence under section 336B, section 354, section 354A, **section 376** or section 509 of the Pakistan Penal Code, 1860, is alleged to have been committed or attempted, is distressed, such information shall be recorded by an investigating Officer, at the residence of the complainant or at a convenient place of the complainants choice, in the presence of a police officer, or family member or any other person with the consent of the complainant, as the case may be.”*

Section 161 of CrPC adds:

*“Provided that a statement of a woman against whom an offence under section 336B, section 354, section 354A, **section 376**, or section 509 of the Pakistan Penal Code,*

¹⁸Jurisprudence of the Higher Courts states that the DNA of the accused in allegations of rape under Section 376 of PCC is mandatory; *Salman Akram Raja v the Government of Punjab through Chief Secretary and Others*, [2013] SCMR 203 (SC)

1860 (Act XLV of 1860), is alleged to have been committed or attempted, shall be recorded by an investigating officer, in the presence of a female police officer, or a female family member or other person of her choice.”

Trial to be in camera:

Section 352(2) of CrPC states:

“(2) Notwithstanding anything contained in sub-section (1), the trial of offences under sections 354A, 376, 376A, 377 and 377B of the Pakistan Penal Code, 1860 shall be conducted in camera.

Provided that the Presiding Officer, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the court.

(3) Where any proceedings are held under sub-section (2), the Government may adopt appropriate measures, including holding of the trial through video link or usage of screens, for the protection of the victim and witnesses.

(4) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish or broadcast any matter in relation to any such proceedings, except with the permission of the Court.”

Right to Legal Representation:

Section 161 A of CrPC states:

*“(1) Where an offence under section 354A, **section 376**, section 377 or section 377B of the Pakistan Penal Code, 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 his or her right to legal representation.”*

(2) If the victim requires free legal aid the police officer shall provide the list of lawyers maintained by the Provincial Bar Councils for this purpose.”

Time-Frame & Conclusion of Trial:

Section 344A of CrPC states:

“The Court shall, upon taking cognizance of a case under sections 354A, 376, 377, and 377B of the Pakistan Penal Code, 1860, decide the case within 3 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.”

Appeal:

Section 417(5) of CrPC states:

“(5) An appeal against an order of conviction or acquittal under sections 354A, 376, 376A, 377 or 377B of the Pakistan Penal Code, 1860 shall be decided within 6 months.”

2.2.3 Qanun-e-Shahadat Order (Law of Evidence) 1984

Under the Criminal Law Amendment (Offences Relating to Rape) Act 2016, Article 151 of Qanun-e-Shahadat Order, 1984, was amended to omit clause (4).

This clause stated: *“(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.”*

Section 151 of the Qanun-e-Shahadat Order, 1984 deals with the credibility of witnesses and as amended states that

“...the credit of a witness may be impeached in the following ways by the adverse party or with the consent of the Court, by the party who calls him:

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be un-worthy of credit;

(2) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;”

3. Case Study: Lodhran Findings & Observations

This Chapter discusses and analyses the Case Study's main findings in light of the examination and review of the 63 judicial files from the District Court. The research identifies that the following evidence was relied upon in rape cases, which has had an impact on acquittals in a majority of cases:

1. Timeline of the Case and Delays on File
2. Witness Testimony
3. Medical & Forensic Evidence
4. Conduct of the Victim, including sexual history and character

In addition to the above mentioned, the research records miscellaneous aspects of the judgments reviewed including a lack of uniform format of judgments and lack of reliance on legal precedent in a majority of cases; variable age of the victim in several of the files relied upon; a note on how courts rely on notions of the ideal accused, and how motive has been inferred in a majority of the case files.

3.1 Timeline & Delays on File

This section looks at available data within the case files pertaining to the time spent at various stages of a case i.e. from the occurrence of the incident till the decision. For analyzing the time it took to decide cases, averages were taken for all decided cases, as well as separately for cases where FIRs were registered after 2016; as per section 344A of Criminal Law Amendment (Offences Relating to Rape) Act of 2016, all rape cases must be decided within 90 days.¹⁹ It is pertinent, therefore, to see if this legal requirement has been met for the cases under consideration or not.

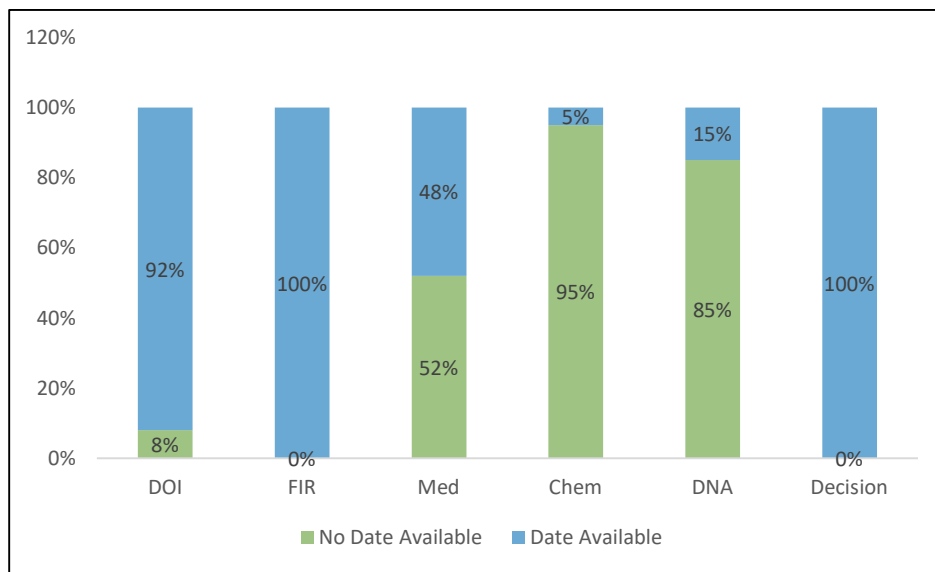
It is important, however, to be cognizant of the fact that these averages only apply to the sample population analyzed in this Study and should not be taken as an average for all cases registered after 2016 (where FIR was registered in 2016 or later), since the sample population is not representative of all cases registered after 2016. Of the total 63 cases examined in this Study, there are 24 cases where the FIR was registered either in 2016 or later. Only these 24 cases formed the sample population for this section.

¹⁹ "The Court shall, upon taking cognizance of a case under sections 3544, 376, 377 and 3778 of the Pakistan Penal Code, 1860 (Act XLV of 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."

3.1.1 Availability of Data on Key Dates

The judicial file of a case should ideally provide a timeline of all steps and procedures of legal inquiry relevant to the allegation. These include information on the date of occurrence, registration of FIR, medical examination, chemical examination and DNA, statement of complainant or any witnesses etc. as well as date of the decision. The review of judicial case files, as shown in Fig. 4, reveals that while information on the date of incident, FIR and judicial decision is available in a majority of cases, more than half of the files do not contain any information on medical examination (Med). Similarly, limited information is available on when chemical (Chem.) and DNA examinations were conducted; only 3 (5%) and 10 (15%) of the examined case files included details on Chemical. and DNA tests respectively.

Figure 4. Availability of Dates in Judicial Files



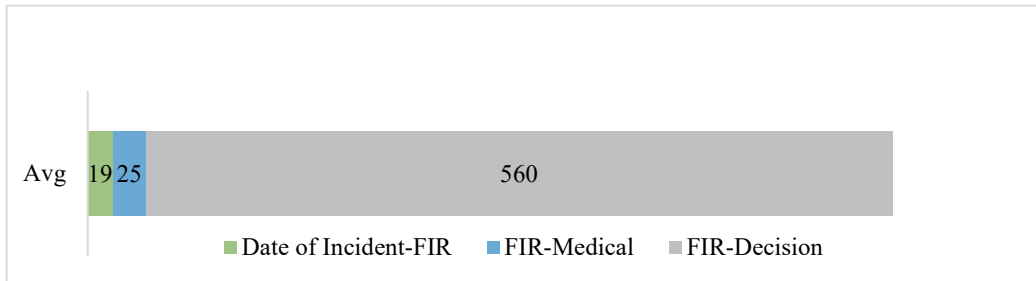
Source: Author's calculations based on data from the Judgment Files

DOI: Date of Incident Med.: Medical Examination Chem.: Chemical Examination

3.1.2 Average Duration of Cases

Fig. 5 provides the average number of days that were spent on each major stage of the case i.e. from the date of the incident to registration of FIR, from registration of FIR to the date of medical examination and the average duration for the completion of a case from the registration of FIR till decision.

Figure 5. Average Duration (days) of All Cases



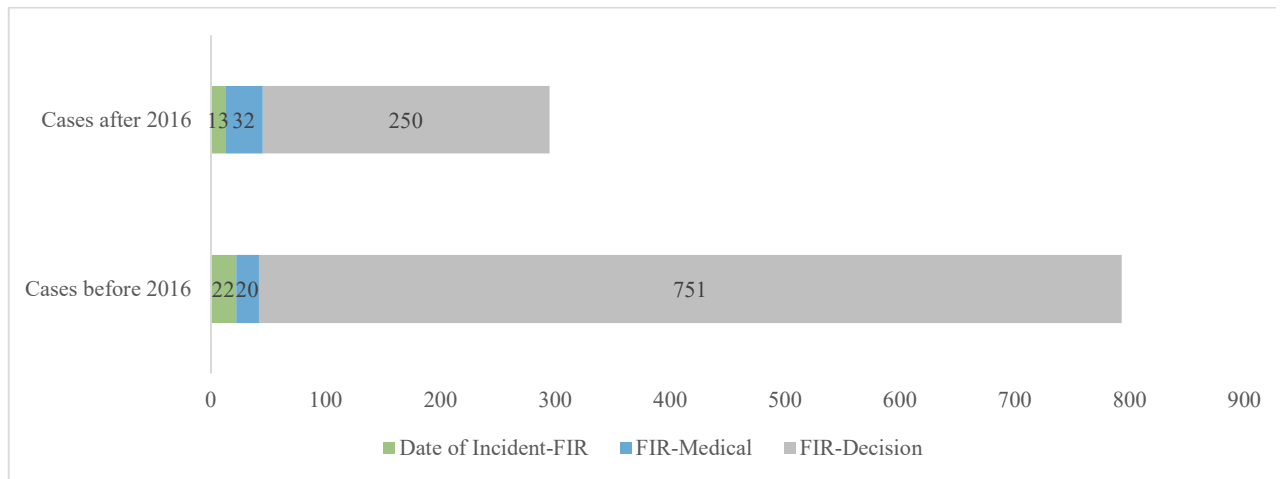
Source: Author's calculations based on data from the Judgment Files

Fig. 5 shows that on average, a case took 560 days from registration of FIR to its decision. Considering that the average delay is such, it is unlikely that section 344A of Criminal Law Amendment (Offences Relating to Rape) Act of 2016, which requires all rape cases to be decided within 90 days, is complied with.²⁰ This is confirmed through the findings presented in Fig 6., which show that, for cases registered after 2016 which were a part of the sample, it took an average of 250 days for a case to be decided after the registration of FIR, almost three times more than the stipulated duration.

A delay on file, either in reporting of the offence, or in conducting the medical examination or any other aspect, has been unfavorable for the victim/complainant in a majority of the cases, and in support of the accused. Delays also affect the credibility of other witnesses in the case; judges tend to have a notion that if a truthful witness saw something suspicious, they would have reported it immediately. Judges have noted undue delay in reporting in several judgments.

²⁰Code of Criminal Procedure 1898, Section 344A: "The Court shall, upon taking cognizance of a case under sections 354A, 376, 377, and 377B of the Pakistan Penal Code, 1860, decide the case within 3 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."

Figure 6. Average Duration of Cases Registered before & after 2016

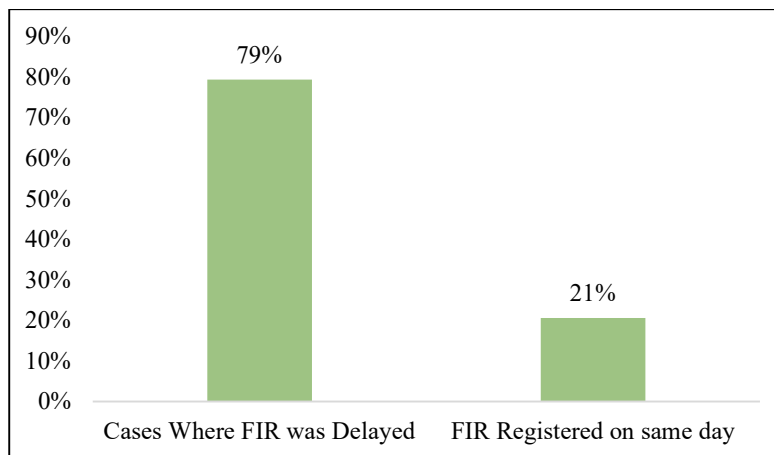


Source: Author’s calculations based on data from the Judgment Files

3.1.3 Reporting the Offence

As observed from the files, the reporting of the offence on average takes between a few days to a few weeks from the date of the incident. The cases under review show the longest period of delay in reporting from the date of the incident as 329 days²¹ and the earliest, as the same day of the incident. Fig. 5 shows that on average it took 19 days for a victim to get a FIR registered. The average duration has dropped to 13 days for cases registered after 2016 (as shown in Fig. 6), which suggests that the situation may have improved post passage of the Criminal Amendment (Offences Relating to Rape) Act, 2016 (as also highlighted above from the decrease in the days it took to decide cases). However, it remains on the higher side and needs to be brought down significantly if any chance of collecting meaningful medical evidence is to exist.

Figure 7. Delay in Registration of FIR from Date of Incident



²¹Sessions Case No. 106/OSC of 2014, Case FIR NO. 855/2013

Source: Author's calculations based on data from the Judgment Files

In total, there are 50 cases with a delay of one or more days taken in the registration of FIR; approximately 79% of the cases reviewed, as shown in Fig.7.

Amongst other aspects, the reporting of the offence often depends on when the victim returns home. Several cases of rape involve abduction of the victim as the circumstance surrounding and enabling rape. Naturally, it is not possible for the victim herself to report the rape at the time of the incident if she is abducted. However, the victim's case suffers for the lack of reporting of the abduction by her family members and other witnesses as well.

Some studies have also noted that since women are often not the key decision makers in the family, they may face significant resistance from members of the household in registration of a FIR²²; the perception that respectable families and their women are expected to remain quiet about such incidents can cause a delay in reporting and registration of FIR. This perception, present within law enforcement and other stakeholders as well, makes reporting the opposite of the natural response for many victims and their families. Moreover, the men of the family occupy the traditional role of interacting with the police and similar external actors; building a consensus around the issue within the family can be a slow process leading to several days of delay.

As shown in Fig. 8, in approximately 36 (57%) of the cases, another family member has filed the FIR on behalf of the victim; while in the remaining cases the victim filed herself though family members still acted as witnesses in support of the complaint.

²²Adnan Sattar, 'The Laws of Honour Killing and Rape in Pakistan: Current Status and Future Prospects', AAWAZ, Programme, 2015, Pg-18, <http://www.aawaz.org.pk/cms/lib/downloadfiles/1448430520v2%20Final%20AS%20Laws.pdf>. (Accessed 13 May, 2019)

Ayesha Khan and Sarah Zaman, 'The Criminal Justice System and Rape: An Attitudinal Study of the Public Sector's Response to Rape in Karachi.', Collective for Social Science Research/War against Rape, 2011.

Figure 8. Details of Complainant



Source: Author's calculations based on data from the Judgment Files

3.1.4 Delay in Medical Examination

A delay in reporting of the offence results in a natural delay in other related processes, such as a delayed medical examination, DNA test etc. However, in addition to the delay in reporting being one reason for the delay in subsequent processes, there are several cases where a medical examination or DNA test has been delayed even after the FIR was registered promptly. These delays have not been sufficiently explained in the judicial files reviewed, yet have been noted in remarks in the judicial files to negatively impact the case of the victim.

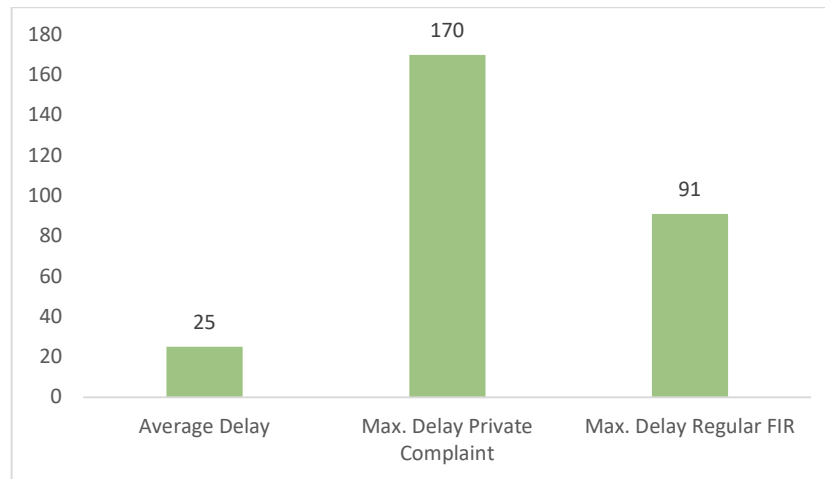
According to the legal framework, the victim must undergo a medical examination as soon as possible, i.e. on the same day as the registration of FIR (relevant provision to be inserted in a footnote). However, as shown in Fig. 9 below, the average duration between registration of FIR and medical examination is 25 days, with the maximum delay of 170 days in the case of a private complaint²³ and 91 days in a normal FIR.²⁴ A delay results in loss of essential medical evidence, which is reflected in the majority of medical examination reports that remained inconclusive.

A review of the cases registered after 2016, included in our sample, reveals that the average delay in **medical examination** is higher for these cases, with an average of 32 days as compared to 20 days for cases registered before 2016 (See Fig.5 and 6). Such a delay in medical examination makes the exercise almost redundant and negatively impacts a victim's access to justice. In 52 out of 63 cases (82.5%) examined, there was a delay of more than 72 hours in getting a medical examination from the date of the FIR.

²³ Sessions Case No. 117/OSC of 2017, Private Complaint No. 38/2017: A private complaint is a complaint that the victim/complainant files directly in the court, usually as a result of being dissatisfied with the police investigation:

²⁴Sessions Case No. 38/2013, Case FIR No. 572/2012

Figure 9. Delay in Medical Examination (days) post-FIR



Source: Author's calculations based on data from the Judgment Files

In several cases, dates of the medical, chemical examination and DNA tests were not available, as they were not stated clearly in the judicial files. Hence, it was not possible to assess further delays in between the various stages of collecting the complete medical and forensic evidence (see Fig.4).

3.1.5 Delay Noted in Judgment

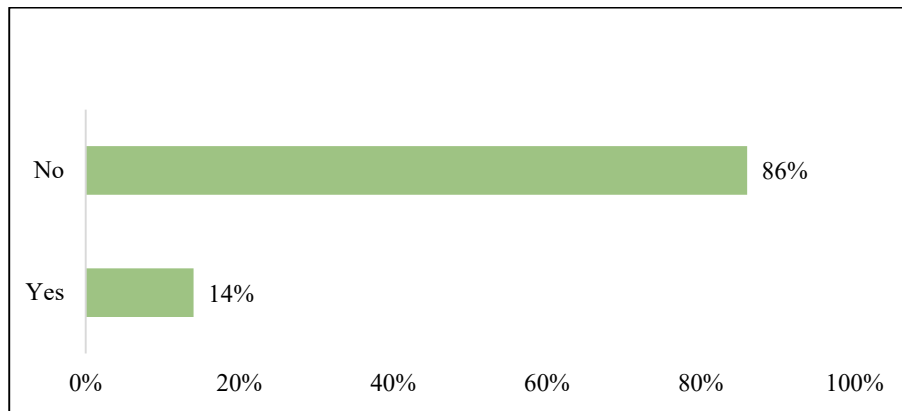
As discussed, a delay in any of the aforementioned processes can lead to loss of critical evidence, which would naturally have a negative impact on a decision in favor of the victim. However, as shown in Fig.10, in only 9 out of the total 63 cases examined (approximately 14% of total cases), judgments made a direct reference to delays in one or more processes and/or stated it as a reason in support of the acquittal of the accused. For instance, judgments have stated, “delay in lodging of FIR registration...is fatal to the prosecution case”²⁵ and that the witnesses “...despite availing time did not bother to report the matter to the police.”²⁶

Several other cases have also been affected by delay, which contributed to the acquittal of the accused – such as inconclusive medical evidence or healing of violent injuries due to a delayed medical examination. However, while judges have not made an explicit comment on the issue of delay in their judgments, they have mentioned the inconclusive medical evidence as contributing to acquittal.

²⁵Sessions Case No. 19/OSC, Case FIR NO. 457/2016

²⁶Sessions Case No. 15/OSC, Case FIR NO. 255/2014

Figure 10. Mention of Delay in Judgment



Source: Author's calculations based on data from the Judgment Files

3.2 Witness Testimony

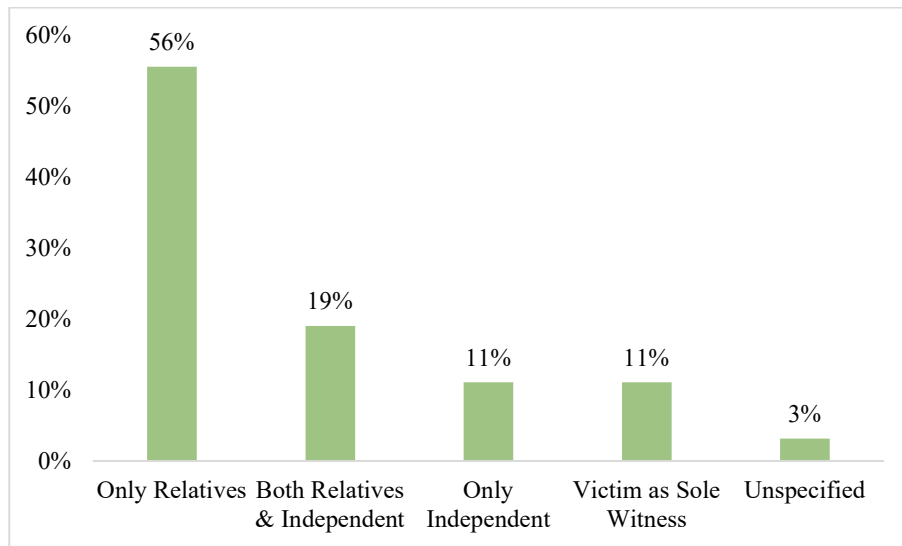
Witness testimony is vital evidence in rape cases. This includes, the testimony of the victim herself, as well as that of other witnesses on behalf of the victim/complainant and the accused. Although, under the law, the sole testimony of the victim is sufficient in cases of rape,²⁷ this is not how the courts regard it in a majority of cases under review; independent eye-witness and other independent witnesses to rape appear to be a necessity in practice, even if not in law, one without which conviction is often difficult or rare.²⁸

In all cases reviewed, the prosecution has furnished a number of witnesses on behalf of the victim/complainant. These include witnesses' known (such as relatives) and unknown (bystander, street vendor etc.) to the victim/complainant as well court witnesses, such as police and investigating officers, medico-legal officers and experts etc.

²⁷The State v Abdul Khaliq [2011] Criminal Appeals No.163 to 171, S.M. Case No.5/2005 (SC): http://www.supremecourt.gov.pk/web/user_files/File/Crl.P.163_to_171_S.M.C.5_2005.pdf (Accessed 15 May, 2019)

²⁸Sessions Case No. 61/OSC of 2017, FIR No. 120/2016: "...only evidence of victim is on record and only on the solitary statement of the victim, accused... cannot be convicted."

Figure 11. Types of Witness Testimonies



Source: Author's calculations based on data from the Judgment Files

As shown in Fig. 11, in a majority of cases, 35 out of 63 (56% of total cases), the witnesses for the victim/complainant included only relatives of the victim. In 12 cases (19% of total cases) witnesses included both relatives and independent unrelated individuals, and in 7 cases (11%) only independent witnesses testified. Moreover, there were 7 cases in which the victim was the sole witness (sole testimony); in 61 out of 63 cases there was a clear mention of witnesses, while the judgment files did not specify the witnesses in 2 cases.

In many cases on file, it was observed that these relatives lived nearby or in the same neighborhood and/or worked at the same place. Consequently, there was a higher probability that they witnessed the incident. This also applies to other cases on file, which involved abduction from, or rape within, the house of the victim. Moreover, the number of witnesses claiming to have witnessed the act of rape itself is fewer than eyewitnesses of various other stages of the incident, such as abduction of the victim from a street and such like events.

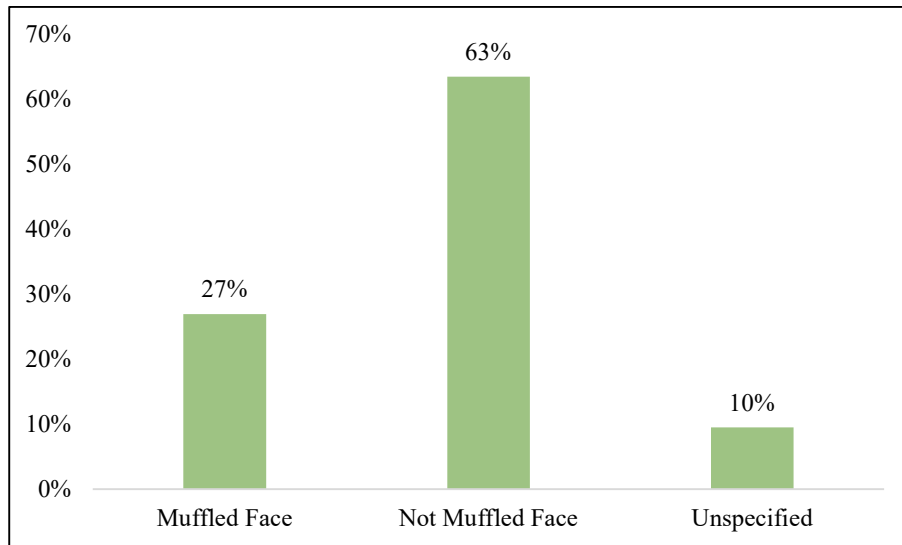
The research shows that the following factors have had an impact on this tier of evidence in rape cases.

3.2.1 Inconsistency in Victim Testimony

Muffled face/Retraction: Inconsistency in the testimony of the victim herself or instances where the victim explicitly exonerates the accused at some stage during the trial contributed significantly to acquittal. In a significant majority of cases, the court pointed out to some kind of inconsistency in the account of the victim. The most predominant is the victim initially recognizing and naming the accused to later changing that statement to claim that the accused had a muffled face. This was seen in

more than one-fourth of the cases, (27% of total cases), where the witness testimony claimed that the accused had a muffled face.²⁹

Figure 12. Cases where Victim states that the Accused had a Muffled Face



Source: Author's calculations based on data from the Judgment Files

In some cases, retraction was due to the influence of the 'respectable of the locality', who intervened to settle the cases out of court against the victim and in support of the accused. In one such case, the victim retracted her initial allegation against the accused stating that she nominated him on the basis of a suspicion and the accused has satisfied his innocence through the 'respectable of the locality'.³⁰ In other cases, the victims have taken letters of innocence and exonerated the accused.³¹

In these cases, the judge more readily relies on the sole testimony of the victim/complainant as the star witness. In one such case of 2017, the Additional Deputy Public Prosecutor stated in court that some prosecution witnesses had been influenced by the accused, and hence, stressed the need to summon the remaining witnesses. However, the court disagreed (and the courts consistently disagree in such

²⁹This outcome was visible in a majority of cases in which a 265-K application was filed and the judge acquitted on the basis of this feature alone. For instance, in the cases examined for 2017, there are a total of 8 cases in which the victim has stated her failure to recognize the accused due to a muffled face etc. In 5 out these 8 cases (62.5%) an application for 265-K was accepted by the trial court. However, this reason for acquittal was also noted in other cases in which a 265K was not filed, namely in 3 out 8 (37.5%) cases of 2017. For example, Sessions Case No. 17/O.S.C of 2015 FIR No. 219/2015; Sessions Case No. 06/O.S.C of 2017, FIR No. 301/2016;; Sessions Case No. 15/O.S.C of 2015, FIR No. 255/2014

³⁰ Sessions Case No. 29 of 2016, Case FIR No. 179/2008

³¹ Sessions Case No. 17/OSC of 2015, Case FIR No. 74/2015; Sessions Case No. 33/OSC of 2016, Case FIR No. 286/2015; Sessions Case No. 42/OSC of 2015, Case FIR No. 369/13

cases) relying overwhelmingly and exclusively on the account of the star witness.³² The court stated, “the complainant.... who is the main and important witness of the case has taken somersault and has turned hostile exonerating the accused, there will be no probability of conviction of accused and further proceedings would be a futile exercise.”³³ Similarly, in a 2016 case, the trial court affirmed, “When the victim and the complainant have not supported the prosecution version, even if remaining PWs [Prosecution Witnesses] be summoned and their statements be recorded, no probability of conviction is left in this case.”³⁴

In several of these cases where the victim changes her statement, the victim is declared a hostile witness by the prosecution.

Failure to Remember Accurate Date/Details: In a number of cases, the judge has noted the inability of the witnesses to remember accurate details. These include discrepancy of dates, times, circumstantial details, or changes/additions in the accounts of the witnesses in depositions from what was said in their statements during the FIR etc. For example, in one case, the judge materially noted the fact that the victim in her FIR complaint only stated that the accused grappled with her but in her deposition she added that the accused tried to commit rape with her.³⁵ Similarly, in another case, the judge noted an irregularity where the victim had mentioned 2 unknown accused in the complaint but in her deposition in court, stated that there were 3 unknown persons.³⁶ In several cases, the victim confused the exact date and time of incident and was penalized for that.

While several cases point out inconsistency in the testimony of the victim and other witnesses, in no case, has the judge noted any possibility of discomfort of the victim in giving testimony – arising out of trauma resulting from the violation itself or through being in the presence of the accused or other witnesses. In no judgment is there evidence that courts noted such challenges or facilitated testimony of the victim under these conditions. Contrary to that, in a 2017 case, the court noted the inability of the victim to communicate the violation to any other prosecution witness due to her insanity. The judge states “when victim...was found insane, how could she inform the complainant [and Prosecution Witnesses] about the alleged occurrence committed by the accused present in court”.³⁷

Moreover, in a significant number of cases on file, the FIR and the statement of the victim was recorded by a male investigating officer (I.O.) and there is no mention of a

³² Sessions Case No. 54/OSC of 2014 (Para. 5), FIR NO. 428/2014; Sessions Case No. 10/OCS of 2016 (para.6), FIR NO. 40/2016; Sessions Case No. 38/2013 (Para. 12), FIR NO. 572/2012

³³ Sessions Case No. 54/OSC of 2014 (Para. 5), FIR NO. 428/2014

³⁴ Sessions Case No. 38/2013 (Para. 12), FIR NO. 572/2012

³⁵ Sessions Case No. 224/OSC of 2012 (Para.9), Case FIR No. 343/2010

³⁶ Sessions Case No. 54/OSC of 2016 (Para. 11), Case FIR No. 10/2016

³⁷ Sessions Case No. 18/OSC of 2016 (Para. 13), Case FIR No. 157/2016

female officer or a female family member being present on the occasion – as required under the law (both under Section 154 and Section 161 of the CrPC 1898).³⁸ Section 154 of CrPC further stipulates that if the woman giving information is one against whom the offence of rape “is alleged to have been committed or attempted is distressed, such information shall be recorded by an investigating officer, at the residence of the complainant or at a convenient place of the complainant’s choice...”³⁹ There is no example of a case on file where the investigation officer or any other stakeholders have registered the notion of distress on part of the victim/complainant; a majority of the statements are recorded within police premises, which often amount to hostile environment.⁴⁰

3.2.2 Presence of Eyewitnesses/Witnesses

In a significant number of cases the lack of an eyewitness and/or other independent witness often plays a crucial role in establishing credibility of the victim’s account, and in assessing whether or not rape has occurred.

In several cases reviewed, judges have made explicit comments to this effect; a 2017 judgment states that the “...only evidence of the victim is in picture and she got no independent witness to support the said version of rape.”⁴¹ Similarly, the court has noted in other cases of 2017 that “no witness came with the claim that he witnessed Nadia Bibi in naked condition and also seen...Accused in naked condition”⁴²; “...neither the complainant nor the PWs are eye witnesses of the alleged occurrence or any offense was committed by the accused in their presence.”⁴³

3.2.3 Relatives vs. Strangers

The judgments reviewed show inconsistencies on what the requirement for a credible witness is in a rape case. Judges have taken a variable and case-to-case approach on the issue of credibility of witnesses *known* and *unknown* to the victim.

In several cases examined, the relationship between the victim and the witness has been cited as a reason affecting the credibility of the witness. In contrast, some other judgments cite the independent witness (i.e. not a relative to the victim) as being too remote and hence, discredit those statements as well. For example, in a case of 2017, the judge stated, “it is an admitted fact that no relative of the complainant had

³⁸ Code of Criminal Procedure 1898, Section 161

³⁹ Code of Criminal Procedure 1898, Section 154

⁴⁰ Due to the judicial file containing incomplete information, it is unclear whether a particular protocol, as required under the law, was followed or not in a vast majority of cases.

⁴¹ Private Complaint No. 158/2017 (Para. 23)

⁴² Sessions Case No. 49/OSC of 2017 (Para. 18), Case FIR No. 45/2017

⁴³ Sessions Case No 18/OSC of 2016 (Para 12), Case FIR No. 157/2016

witnessed the occurrence. [Prosecution witnesses] introduced by complainant were all strangers.”⁴⁴

In cases where the witnesses are relatives of the victim, the perception of judges that relatives are often included in a case to validate false and frivolous cases creates a natural bias against them as witnesses. Moreover, judges often perceive that relatives of the accused, who are nominated as co-accused/accomplices, are artificially and vindictively involved in a frivolous and false manner to strengthen the case of the victim. Both these biases harm the victim’s case, for example, in a 2017 case, the judge remarked: “it is a trend in our society that all innocent/relatives of the actual accused are involved in the case and the present case is one of the example.”⁴⁵ This bias clearly benefits the accused.

3.2.4 Conduct of the Witness affecting Credibility

Several judgments have assessed the credibility of a witness’s account by comparing the way he/she behaved to the way he/she should have behaved in the judge’s opinion; there is an expectation of a specific conduct from a witness for his/her credibility. This includes bystander responsibility in some accounts.⁴⁶

This also includes expectations of a specific conduct from the victim herself (as a witness); however, that will be covered under a separate heading in this Case Study. Similarly, the expectation of judges that witnesses should report promptly has been discussed in the earlier sections of this Case Study.

Several judgments remark that the witnesses produced by the prosecution have only witnessed the abduction and not the act of rape itself. However, if in a rare case, someone does claim to witness the act of rape, it is more likely that the judge would dismiss the claim, stating that ‘if the witness was present, why did he/she not intervene to prevent the incident from happening?’ The credibility of the prosecution eyewitnesses is usually affected by a failure to intervene.

Furthermore, in several cases it was observed that a failure to retrieve material evidence, such as weapon or clothes, is often taken to discredit the witness’s account, which in turn is held against the case of the victim.

⁴⁴ Sessions Case No. 58/OSC of 2016 (Para. 10), Case FIR NO. 113/2016

⁴⁵ Sessions Case No. 21/OSC of 2016 (Para. 10), Case FIR NO. 455/2016

⁴⁶ Sessions Case No. 136/OSC of 2017 (Para. 19), Case FIR No. 122/2017: if the victim was abducted in a public place, there would be some witnesses from individuals, as well as some intervention from the general public to prevent that.

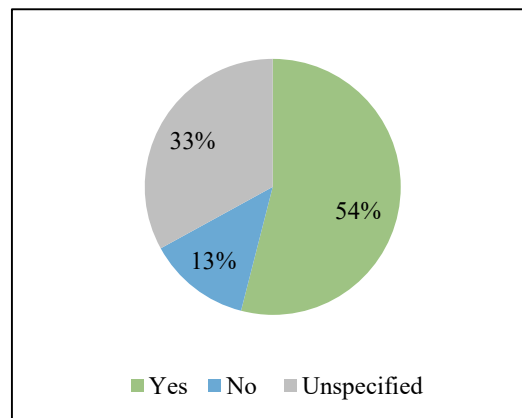
3.3 Medical Examination & Conduct of Victim

Medical and forensic evidence play a crucial role in determining rape cases and corroborating the testimony of the victim and witnesses. Although not mandatory for the victim and requiring express consent, in a majority of cases, the absence of a medical examination of the victim adversely affects a decision in her favor. As per the law, the medical examination⁴⁷ and DNA test⁴⁸ of the accused does not depend on the consent of the accused, and can be forcefully conducted.

3.3.1 Medical Examination of the Victim

As shown in Fig. 13 below, the judicial files reveal that medical examinations of the victim were conducted in 34 out of 63 cases (54%), while a specific mention of the date of medical examination is available for only 29 of these cases. In 8 out of 63 cases (13%), the judicial file explicitly notes that the medical examination of the victim was not conducted, and it remains unclear whether it was a result of the victim's refusal or not. In 21 of 63 cases (33%), there is no mention of the medical examination of the victim in the judicial file so it remains unspecified whether a medical examination happened or not.

Figure 13. Medical Examination of the Victim



Source: Author's calculations based on data from the Judgment Files

⁴⁷Code of Criminal Procedure 1898, Section 53A deals with medical examination of the accused and states that "(1) When a person is arrested on a charge of committing an offence of rape... and there are reasonable grounds for believing that an examination of the arrested person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose."

⁴⁸Code of Criminal Procedure 1898, Section 164B states that when an offence of rape "is committed or attempted or is alleged to have been committed, DNA samples, where practicable, shall be collected from the **victim with his or her consent** or with the consent of his or her natural or legal guardian and **the accused during the medical examination conducted under Section 164A** within the optimal time period of receiving information relating to commission of such offence."

As per the statutory requirement, a female medico-legal officer conducted all medical examinations.⁴⁹ However, in a majority of cases reviewed, a male investigating officer accompanied the victim to the hospital for her medical examination and there was no mention of whether a female officer was present or not. If not, this is contrary to the legal requirement whereby the victim must be accompanied by a female police officer/guardian of her choice and comfort for the medical examination.⁵⁰

Victim's refusal of Medical Examination

The refusal/lack of medical examination significantly weakens the prosecution's case and sheds doubt on the victim. In a few cases on file, the investigating officers have claimed that the victim refused to get a medical examination, while the victim contends that she was not taken for a medical examination. For example, in one case where the victim claims that the investigating officer did not produce her for the medical examination, the Judge stressed in his judgment (without reference to any provision of the law) that the victim did not submit any application in the court of Learned Illaqa Magistrate for obtaining the order for her medical examination,⁵¹

3.3.2 Medical Examination of the Accused

In relation to the medical examination of the accused, Fig. 14 shows that in only 13 out of 63 cases (21%) was the medical examination of the accused conducted. In one case on file, it is expressly stated that the medical examination of the accused was not conducted, while in the remaining 49 cases, it is unspecified whether the medical examination of the accused was carried out.

As stated above, under the existing legal framework governing rape, the medical examination of the accused does not require the consent of the accused, and must be conducted where there are reasonable grounds for believing that an examination will afford evidence. It remains unclear under what circumstances there would not be reasonable grounds for believing that a medical examination and DNA of the accused in a rape case would afford evidence.⁵² Consequently, if it definitively took place only in 21% of the cases, this is a cause for concern. Moreover, in an alarming 78% of the cases, the judicial file provides no information on whether an examination of the accused took place or not. A judicial file should contain clear information on and related documentation of the medical examination of the accused.

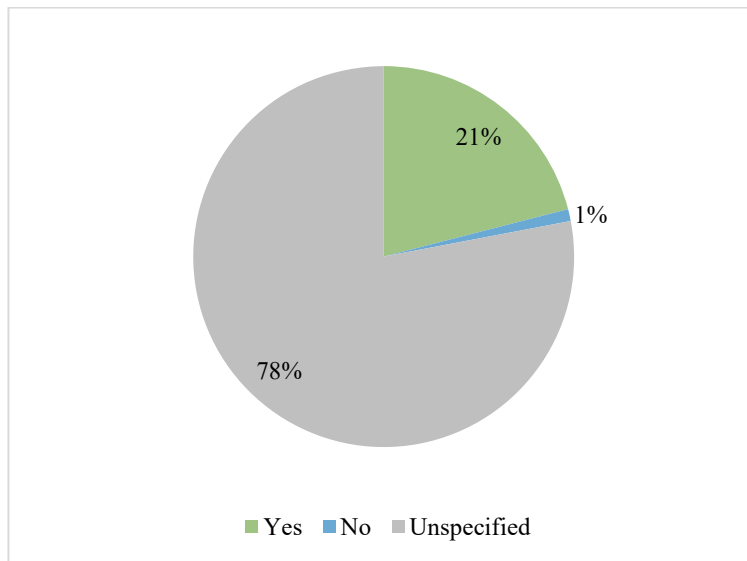
⁴⁹Code of Criminal Procedure 1898, Section 164 A (1)

⁵⁰*Ibid*

⁵¹ Sessions Case No. 24/H.C of 2015 (Para. 17), Case FIR NO 31/2015

⁵²Criminal Amendment (Offences relating to Rape) Act of 2016, Section 53A

Figure 14. Medical Examination of the Accused

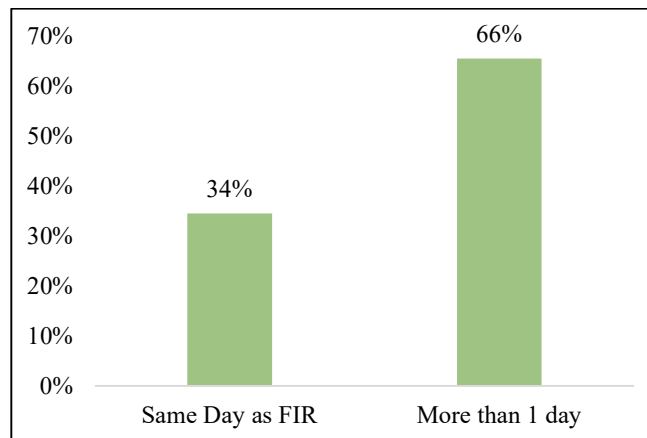


Source: Author's calculations based on data from the Judgment Files

3.3.3 Delay in the Victim's Medical Examination

As shown in Fig.15, the medical examination of the victim was conducted on the same day as registration of FIR for 10 out of 29 cases i.e. approximately 34% of the cases where details of medical examination are present. Only 4 of 29 (14%) victims had the medical examination on the same date as the incident. This implies that for almost two-thirds of the total cases, medical examination did not take place on the same day as the FIR.

Figure 15. Delay in Medical Examination after FIR



Source: Author's calculations based on data from the Judgment Files

3.3.4 Copy of Medical Report

None of the case files had attached a copy of the actual Medical Report of the victim or accused in them. In most of the cases, the examination of the medico-legal officer is detailed via their witness statements or through copy pasting of extracts from the Medical Report. It is, therefore, not possible to discern if the medical examination follows a set pattern or not, because if the witness statements are considered, they do not necessarily follow a format. Many of the extracts from the medical report and witness statements of the medico-legal officer, relied upon in the judgment, contain incomplete information, whereby at times no information is given on the process of examination, the gender and age of the victim and detection of signs of violence on the body of the victim. However, those may just be extracts picked from the actual medical report, since the complete report has not been attached.

3.3.5 On Accessibility of the Medico-legal Officer

In a number of cases the doctor who conducted the medical examination was no longer available at the time of the cross-examination, and a different doctor confirmed the original medical report (i.e. by verifying the handwriting of the original doctor).

An interview with two senior officials of the office of Surgeon Medico-Legal Punjab⁵³ shed light on some of the challenges in this regard that impact accessibility of medical examination for victims – and the overall quality of the medical examination itself. There is an overall shortage of medico-legal officers in the country⁵⁴, with the province of Punjab being no exception.⁵⁵ The specific shortage of female medico-legal officers, a necessity for rape examinations, further aggravates the problem.

As per the terms of their service, medico-legal officers are required to serve in ‘the periphery’ – that is rural or remote areas as opposed to the urban areas – for only a mandatory period of 6 months. Thereafter, significant numbers of medico-legal officers leave for other locations or leave altogether (as informed during the interview); there is an immense reshuffling of personnel after every 6 months.

⁵³Anonymous, Interviewed by Author and Research Team, July 2, 2018

⁵⁴Kazi Mudesar. “An insufficient medico-legal system for the city with the highest crime rate.” Express Tribune, June 29, 2017. <https://tribune.com.pk/story/1445531/insufficient-medico-legal-system-city-highest-crime-rate/> (Accessed on 15 May, 2019); Khan Gohar, “Hyderabad, Jamshoro hospitals face serious shortage of MLOs.” Dawn News, June 7, 2018. <https://www.dawn.com/news/1412437> (Accessed on 15 May, 2019)

⁵⁵Jafarey Aamir, Shekhani Sualeha “Pakistan’s flawed forensic investigation in rape cases is the weak link in the justice system.” Dawn News, January 2, 2018. <https://www.dawn.com/news/1380349> (Accessed on 15 May, 2019)

The working environment and conditions of these officers are quite harsh with insufficient remuneration and lack of protection against harassment. Every medico-legal officer, in addition to conducting medical examinations, is also responsible for post-mortems and daily emergency work. As part of their work, they often have to attend court hearings, wait for long hours for the proceedings and face harassment from officials and other private individuals exerting personal and political pressures.⁵⁶ Such an environment, we were informed, distinctly and disproportionately affects female medico-legal officers, and it has resulted in a challenge for the department to ensure both their presence and quality in various rural areas.

During our interview, we were informed of cases within the province where a female medico-legal officer was not available in a particular area. In one case of appeal to the Office of Surgeon Medico-Legal Punjab (also the controlling body of all medico-legal officers within the Province), a rape victim from Hafizabad could not get an immediate medical examination due to lack of a female medico-legal officer present in the jurisdiction at the time. She was sent to the nearby District of Gujrat. However, due to jurisdictional issues, she was refused medical examination there too. There was a subsequent appeal to the Office of the Surgeon Medico-Legal Punjab, which then directed relevant officials to conduct her examination. By this time several days had passed, impacting the value of the evidence generated. Similarly, in light of such issues of accessibility, it is unclear whether the majority of victims retain the courage to persist in their attempts to report and seek justice.

Moreover, mobility of women is often dependent on other family members and the same reasons which impact a delay in reporting, also have an impact on accessibility of a medical examination for victims. Finally, the process of under-going a medical examination in itself can be deeply traumatizing for victims, and lack of support, counseling and such facilities affects accessibility for victims as well, which will be further explained below.

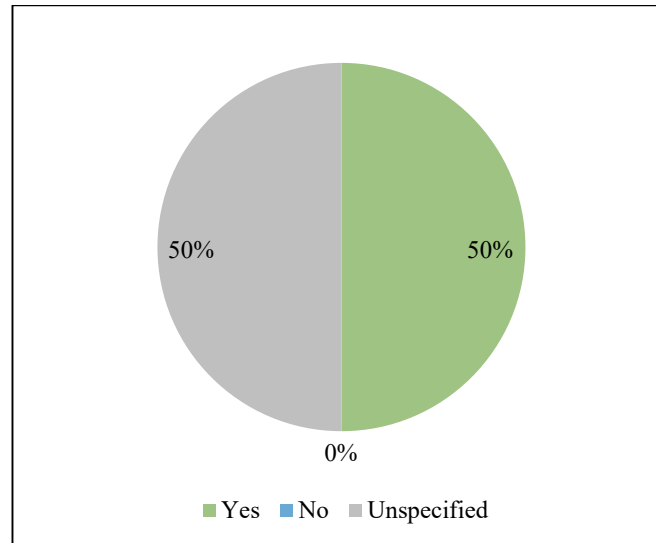
3.3.6 The Two-finger Test & the Torn Hymen

A significant majority of medical examinations in rape cases include the two-finger test and assessment of the condition/presence of the hymen, which is not an explicit requirement under the law but part of the medical practice. The two-finger test involves a female medico-legal officer inserting two fingers into the vagina of the victim to assess whether both fingers can be easily inserted without pain, tightly inserted with pain, or one finger can be inserted with pain noting bleeding or not etc. The purpose is to assess whether the victim is a virgin or previously habitual to sexual intercourse. An intact hymen suggests that the victim is a virgin, a freshly torn hymen

⁵⁶ Officials from Surgeon Medico-Legal (Punjab) interviewed by Author with Research Team, July 2, 2018

indicates that the victim is not a virgin as a result of a recent sexual intercourse, while a hymen ‘old torn ruptured and healed’ indicates prior history of sexual intercourse. Several judgments indicate that the opinion on the two-finger test and hymen determines whether or not the presumption should be in favor of the victim or the accused in a rape case.

Figure 16. Mention of Two-Finger Test in Case File



Source: Author’s calculations based on data from the Judgment Files

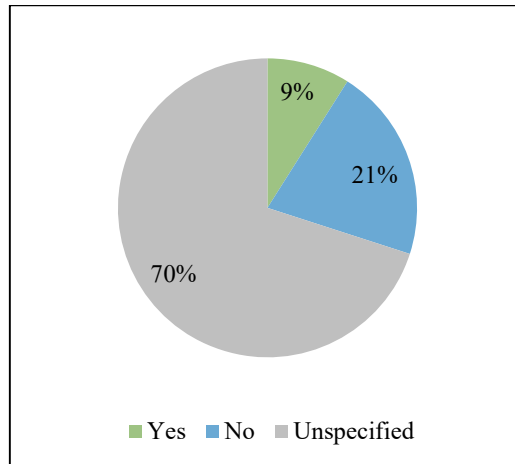
As shown in Fig. 16, in 17 out of 34 cases (50% of total cases), where the mention of a medical examination is made in the judicial case file, the medico-legal officer explicitly stated in words the use of the two-finger test and the generic result was: “two-fingers easily entered”, the insertion of one finger, including variations such as tightly and easily, with and without pain. However, it was not clear from the judgments what difference two fingers easily to tightly made on the issue of plausibility of rape. In the remaining 17 out of 34 cases (50%), the medical examination was conducted on file, but the words ‘two-finger test’ were not explicitly stated in the extracts mentioned in the judicial file. Interviews with the medical practitioners, however, confirm that medical examination normally involves the use of the two-finger test and this practice is widespread.

3.3.7 Semen & DNA

As part of the medical examination of the victim, the medico-legal officer takes a total of 8 swabs of material from the vagina, which is then sent for further chemical examination to identify presence or absence of semen. These swabs are sealed and handed to the investigation officer (Police) and have to be forwarded as soon as possible.

In only 6 out of 63 cases, approximately 9% of total cases, there is a mention of DNA tests being conducted for the accused. In 13 out of 63 cases (21%), the DNA test of the accused was not explicitly mentioned. In 44 of 63 cases (70%), it is unspecified whether the DNA tests of the accused happened or not.

Figure 17. DNA Test of the Accused

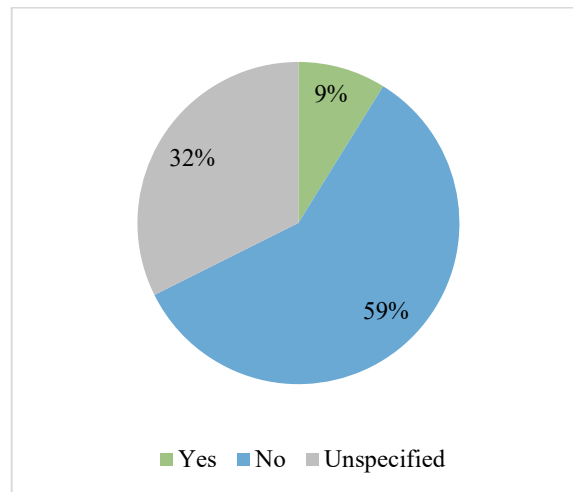


Source: Author's calculations based on data from the Judgment Files

Moreover, as shown in Fig.18, in 20 cases (59%), no semen was found on victim upon medical examination, while in the remainder of cases (32%) it was unspecified. In only 3 out of 34 cases (9% of cases where medical examination was conducted) semen was found on examination of the victim but a DNA analysis of the accused was not conducted except in one of these cases.⁵⁷ In one particular case, there were multiple semen stains on the clothes of the victim; however, a test was not taken to assess this information further.

⁵⁷Semen was found on victim in Sessions Case No. 224/OSC of 2012, Case FIR No. 343/2010;; Sessions Case No. 136/OSC of 2017, Case FIR No. 122/2017; Private Complaint No. 38/2017;Sessions Case No. 117/OSC of 2017Case FIR NO. 300/2016 (Saddar Kehror Pacca). However, DNA test of the accused was conducted in only Sessions Case No. 136/OSC of 2017 Case FIR No. 122/2017. In Sessions Case No. 224/OSC of 2012, Case FIR No. 343/2010, , it is unspecified on file whether DNA test of the accused took place, while in Private Complaint/FIR NO. 300/2016, DNA test of the accused did not take place; hence, semen could not be matched.

Figure 18. Seminal Stains on Victim



Source: Author's calculations based on data from the Judgment Files

In 12 out of 34 cases analyzed (35%), the victim had changed clothes at the time of the medical examination, and in 3 cases, the files explicitly note that the victim had showered prior to the medical examination. In such a situation, semen and other material evidence is not likely to remain evident, even if it was there at some point. Moreover, as a number of cases deal with abduction, the victim usually reports much after 72 hours, which already makes the DNA test less reliable. Only in 4 cases (12% of the 34 cases where medical examination was mentioned) was the medical examination conducted within 24 hours of the incident.

In one case, the victim's DNA could not be matched because the accused's DNA test had not been conducted. There is also only one case in which buccal swabs of the accused were taken and matched with the stains found on the victim⁵⁸ and another where the DNA of the accused was matched with the DNA of the victim's newborn.⁵⁹ Other than that, in no other case have swabs of the accused been taken. In fact, in one case, despite having found semen staining on the victim's clothes, the semen of the accused was not sent to the serologist for matching, and the judge did not take notice of this beyond quoting precedent that discredited the victim's case: "where semen of accused was not sent to the serologist for semen grouping, semen found on vaginal swabs was of no evidentiary value."⁶⁰ No indication was provided in the case of why the semen of the accused was not sent for testing. It is also interesting to note that the judge did not draw any conclusion of the accused's guilt from this, as they normally do in the case of the victim.

⁵⁸Sessions Case No. 136/OSC of 2017, Case FIR No. 122/2017 (In the statement of doctor as PW4)

⁵⁹Sessions Case No. 18/OSC of 2016, Case FIR No. 157/2016 (Para. 8 and 9)

⁶⁰Sessions Case No. 117/OSC of 2017 (Para. 23), Private Complaint No. 38/2017,

There are many cases in which the medical report of the victim contains the statement: “No seminal fluid was found, therefore no further DNA analysis was conducted” or “No DNA could be conducted”. However, it is unclear if this refers to the victim or the accused, because in most of these case files, the medico-legal officer mentions sending vaginal swabs for DNA analysis and the investigation officers mention taking the accused for a DNA test.⁶¹

Furthermore, as per the law, penetration is enough to constitute rape and there are cases in which the medico-legal officer specifically states that ejaculation is not necessary for penetration to have taken place.⁶² Pursuant to the law, the precondition for rape is penetration, and penetration does not require complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration with or without emission of semen is sufficient to constitute the offence of rape as defined under the law. The depth of penetration is immaterial.⁶³

However, existing medical processes to determine rape do not sufficiently accommodate for this possibility and continue to heavily rely on presence of semen. It appears necessary to find semen stains and if not found, the process is halted (as mentioned above in the case of DNA tests) and the medico-legal officer and/or the judge simply concludes that no rape occurred.

3.3.8 Presence of Violence

In 5 out of 34 cases (15% of total cases in which medical examination was conducted), the medical examination showed signs of violence – with one case in which the court speculated that the harm was self-inflicted.⁶⁴ There was no presence of violence in 20 out of 34 cases (59%) while in 9 cases (26%), it was not specified in the judicial file whether any violence existed – which means violence could or could not have been present.

A reliance on presence of violence to differentiate rape from consensual intercourse is problematic as it necessitates violence and the presence of signs of violent resistance to prove rape for the victim. In several judgments, judges have confirmed this reliance noting that “no signs of violence or injury...on the person of the victim...”⁶⁵ were found.

⁶¹The author and the researchers had limited access to the DNA Process due to limited time, resources and access.

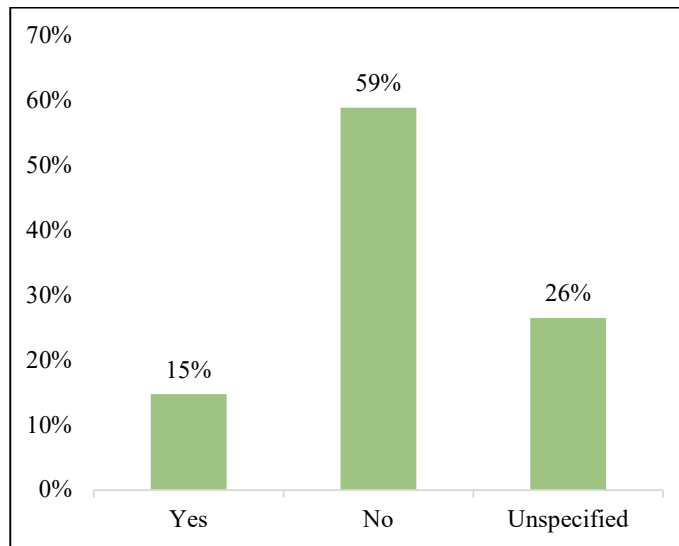
⁶²Sessions Case No. 38/2013, Case FIR No. 572/2012: Cross examination of the Medical Legal Officer – She also stated, “As far as penetration is concerned no one can surely tell as to whether the same has occurred or not)

⁶³*ibid*

⁶⁴Sessions Case No. 224/OSC of 2012, Case FIR No. 343/2010

⁶⁵Sessions Case No. 20/OSC of 2016, (Para.2), Case FIR No. 223/2016

Figure 19. Detection of Violence in Medical Examination



Source: Author's calculations based on data from the Judgment Files

In a case of 2017, the judge held that there should be medical evidence to support the allegation of “Zina” (Rape), but because no signs of resistance were seen on the body of the victim, and the medical evidence did not support the allegation of rape.⁶⁶ The problem with this approach is that it fails to consider other possible reactions of individuals in crisis situations such as rape victims. Many individuals, in such circumstances, freeze or become numb as a result of shock or due to fear; in these cases, marks of violence would not be present because physical resistance was probably not met with.⁶⁷ Furthermore, if the victim is unconscious, she cannot possibly resist.

Moreover, in many cases on file, the medical examination has taken place much after 72 hours and so, even where marks of violence would have been present, they are likely to have healed by the time the examination is conducted. There are only two cases in 2016 and two in 2017 where the examination was conducted within 24 hours, and a total of 9 cases altogether from both years where the examination was conducted within 72 hours.

⁶⁶, Sessions Case No. 124/OSC of 2017 (Para. 22), Case FIR No. 195/2017

⁶⁷James W. Hopper, "Why many rape victims don't fight or yell." The Washington Post, June 23, 2015 https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell/?noredirect=on&utm_term=.c61fb613d69b (Accessed 15 May, 2019); Crist Carolyn. "Many rape victims experience 'paralysis' during assault." Reuters Health, June 15, 2017. <https://www.reuters.com/article/us-health-rape-tonic-immobility/many-rape-victims-experience-paralysis-during-assault-idUSKBN19626W> (Accessed 15 May, 2019); Sarah G. Miller, Staff Writer "Many Women Experience Paralysis During Sexual Assault" Live Science, June 7, 2017. <https://www.livescience.com/59388-sexual-assault-paralysis.html> (Accessed 15 May, 2019); Russo Franchine, "Sexual Assault May Trigger Involuntary Paralysis." Scientific American, August 4, 2017. <https://www.scientificamerican.com/article/sexual-assault-may-trigger-involuntary-paralysis/> (Accessed 15 May 2019)

Requiring violence as a proof for ‘real’ violation of the body is an outdated and incorrect way of looking at the issue. There is growing acknowledgement around the world that rape can be non-violent and that, therefore, the necessity of violence should not be part of rape law.⁶⁸ Finally, it remains unclear what the evidentiary value of medical and forensic evidence altogether is. Firstly, it has not been given importance consistently by judges in the cases examined. Some judgments make no mention whatsoever if any medical examination took place or not; others find it to be relevant only when it does not prove the victim’s case. Secondly, although the presence of medical evidence is not mandatory to prove rape under the law, it is important to state that the process of a medical examination in itself is not designed to identify rape in a majority of cases for victims. It does not take into account the duration after which the victim is examined after the date of incident or the various circumstances (non-violent, unconscious) in which rape can take place, the different types of victims (married, unmarried), and the range of sentiments/reactions a victim can have during the process.

The medical test seems to employ a single, uniform process aimed at only providing useful information on a hypothetical ideal victim – a virgin and unmarried woman against whom force was used exhibiting fresh injuries, a freshly torn hymen, genital injuries and the presence of semen – and who immediately visits the Police Station to report rape and is medically examined on the same day as a result. However, this is far from the reality rape victims find themselves in, which fact is entirely ignored by the judges.

3.3.9 A Note on Married Women

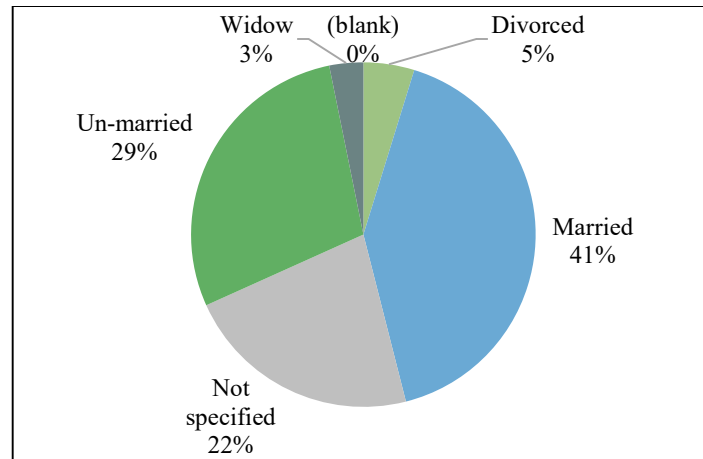
In 26 out of 63 cases (41% of total cases), the victims were married women. A significant number of the judgments specifically noted the *impossibility* of assessing rape as a result – other than through clear violence.

⁶⁸ Grace Galliano, Carol Puechl, Linda A. Travis. ‘Victim Reactions During Rape/Sexual Assault: A Preliminary Study Of The Immobility Response And Its Correlations.’ <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.515.8310&rep=rep1&type=pdf> (Accessed 15 May, 2019); Ro Christine, “Why most rape victims never acknowledge what happened.” BBC, November 6, 2018. <http://www.bbc.com/future/story/20181102-why-dont-rape-and-sexual-assault-victims-come-forward> (Accessed 15 May, 2019); Anna Moller, Hans Peter Söndergaard, Lotti Helström “Tonic immobility during sexual assault – a common reaction predicting post - traumatic stress disorder and severe depression.” *Acta Obstetrica et Gynecologica Scandinavica*, June 22, 2017 <https://obgyn.onlinelibrary.wiley.com/doi/full/10.1111/aogs.13174#http://onlinelibrary.wiley.com/doi/10.1111/aogs.13174/full%20>. (Accessed 15 May, 2019)

The position of married women is particularly problematic under the existing medical process. If the results of medical examination show ‘an old torn hymen’ and that the vagina admits two fingers ‘loosely’ – it is usually perceived as an indication that no rape has been committed. However, all married women are likely to have these results, as there is a high probability that they would have engaged in sexual intercourse before with their husbands.

Furthermore, there have been cases where judges have disregarded evidence of semen stains on the victim where the victim was a married woman. For example, in one such case, the judge stated, “admittedly the victim was a married woman and the report of the Chemical Examiner that the swabs were stained with semen was inconsequential.”⁶⁹ In these cases, it remains unclear, how the existing process of conducting medical examinations is able to generate useful results to assess rape of a married woman.

Figure 20. Marital Status of Victims



Source: Author’s calculations based on data from the Judgment Files

3.4 Conduct of the Victim

In a number of cases, judgments have made different references to the conduct of the victim. These references have come in the form of expectations of resistance from the victim - such as the judge noting an absence of use of force by the victim as relevant, lack of hue and cry, delayed reporting or keeping silent on her abuse, etc.⁷⁰ In other instances, the courts have inferred conduct and character of the victim through the

⁶⁹Sessions Case No. 224/OSC of 2012 (Para.11), Case FIR No. 343/2010

⁷⁰Sessions Case No. 124/OSC of 2017 (Para. 19), Case FIR No. 195/2017: The victim was abducted to a different city and the journey lasted approximately 8 hours. The judge remarked, “...how can it [be] possible that...accused [kept] her silent in that journey for about two weeks. So, the element of abduction and enticement cannot be considered.” -

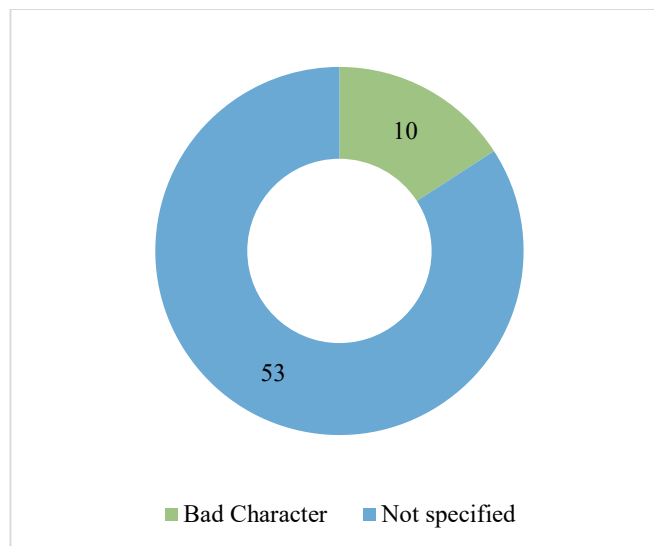
medical report relying on the two-finger test, a torn hymen, absence of violence or injury, as well as through statements of other witnesses.

3.4.1 Previous Sexual History

The character of the victim, as an integral factor contributing to acquittals, is explicitly relied upon in 10 out of 63 judgments (16%), while the remaining 53 (84%) judgments do not make a direct reference to the character of the victim. Clear references to the character of the victim are mentioned in various forms in the judgments. For example, in a 2017 case, the Judge noted that the victim was “a lady of easy virtue and hence corroboration of her statements was needed...”⁷¹. The Judge remarked that the character of the victim was highlighted by her father-in-law, who claimed that she had illicit relations with the accused. The same judgment further affirmed the importance of the victim’s good character by adding, “I do agree with the learned counsel for prosecution that simple penetration is sufficient and positive report of swabs and DNA are not a requirement of law but I would say that when the victim is enjoying bad character, then these things are important to believe her version.”⁷²

Despite amendments to the Law of Evidence by the Criminal Law Amendment (Offences Relating to Rape) Act 2016, removal of grounds allowing evidence of bad character of the victim, judges continue to rely on this – in practice.

Figure 21. Character of the Witness Commented Upon in the Judgment



Source: Author’s calculations based on data from the Judgment Files

⁷¹Sessions Case No. 124/OSC of 2017 (Para. 26, 21), Case FIR No. 195/2017; Sessions Case No. 03/OSC of 2016 (Para. 21), Case FIR No. 801/2015; Sessions Case No. 136/OSC of 2017 (Para. 16), Case FIR No. 122/2017

⁷² Sessions Case No. 124/OSC of 2017 (Para. 23), Case FIR No. 195/2017

3.4.2 Expectations of Resistance

As noted in section 3.3.8, in several cases reviewed, the judge has explicitly stated an expectation that the victim defend herself against the accused, and thereafter inferred the absence of self-defense, if the victim did not have the expected injuries. For example, in one case, the judgment notes: "...the age of the complainant is more than 60 years while she is also a woman of weak physique but surprisingly not even a slightest injury including any bruise is available on any part of her body."⁷³ In another case, the judge noted the strength of the victim stating "...victim...who is a well-built village woman was sufficiently equipped with a "dranti"⁷⁴ for the purpose of her defense. However, contrary to this fact she proved to be an easy prey before the accused."⁷⁵

As detailed above, the lack of marks of violence in the medical examination become the basis for believing the accused. Viewing it as such ignores the victim's experience and also ignores the ways in which women may be subdued and made to engage in sexual activity that they do not consent to, but are powerless against. This places a significantly higher burden on victims to prove rape.

3.4.3 Expectations of a Prompt Report

Other references to the conduct of the victim relate to expectations of prompt registration of FIR from both the victim and other family members of the victim. In several judgments, comments have been made to this effect. For example, in one case the judge noted, "...it cannot be believed that a woman passed through agony of commission of rape but remained mum for a long time due to reason of blackmailing and on one day when the accused person again came to her for committing rape with her, she resisted, made hue and cry..."⁷⁶ In another case the Judge noted "...if a loving daughter is kidnapped, how the said parents can sit peacefully in their house without doing the needful about the search of their kidnapped daughter."⁷⁷ In this case, the court noted that delay in lodging an FIR and presenting the victim to the investigation officer 2 days after she returned from her abduction gravely affected her case. Such comments are not only conclusive but also weaken the case of the victim by casting doubt on the character of the victim unnecessarily.

⁷³ Sessions Case No. 30/OSC, (Para. 6), Private Complaint

⁷⁴ A scythe or sickle shaped blade commonly used as a harvest tool

⁷⁵ Sessions Case No. 235/2012 (Para. 12), Case FIR No. 534/2012

⁷⁶ Sessions Case No. 18/OSC of 2017, (Para. 15), Case FIR No. 457/2016

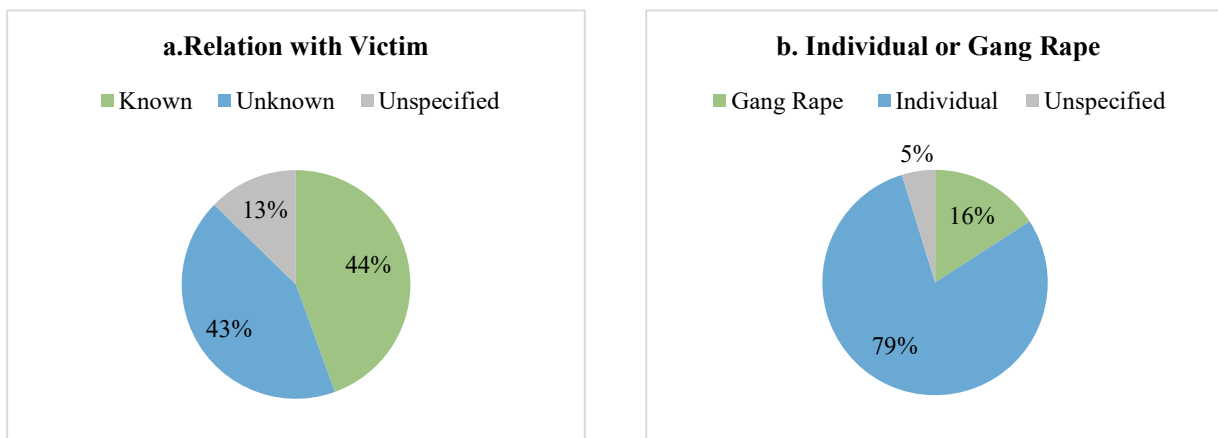
⁷⁷ Sessions Case No. 44/OSC of 2016 (Para. 10), Case FIR No. 115/2016

3.5 Conduct of the Accused

While various aspects mentioned above give us insights on what is perceived as the ideal victim by various stakeholders, most notably judges, the same variables also provide insights on the ideal accused/rapist.

As shown in Fig.26 (a), of the 63 files reviewed, the accused was known to the victim in 28 cases (44%), while in 27 cases (43%), the accused was not known; in 8 cases (13%) it was unspecified. Moreover, Fig. 26 (b) shows that 50 cases (79%) involved a single accused charged with rape, while 10 cases (16%) involved gang rapes and in 3 cases (5%) it was unspecified.

Figure 22. Profile of the Accused



Source: Author's calculations based on data from the Judgment Files

There is no evidence to suggest that the accused in rape cases is more likely to be unknown; however, there is evidence to suggest that victims are often most vulnerable to those who know and have access to them. Despite this, in several cases reviewed, the courts have inferred, and stated on various accounts, the impossibility or lesser likelihood of rape due to the relationship between the accused and the victim. For instance, in one such judgment, the judge reiterated the statement of the accused (who was a relative of the accused) that the victim 'is just like his daughter and sister and he even cannot think about such like occurrence'.⁷⁸ In several other cases, judges are suspicious of victim accounts in which the victim claims to have been forcefully married to the accused.

The courts have also applied the benefit of expectations to accomplices of the main accused. For example, in a 2016 case, the Judge noted it to be against the prudent

⁷⁸Case FIR No. 45/2017 (Para 18)

mind to think that a mother...can be accomplice in such an unethical act committed by her son.”⁷⁹ In another judgment of 2017, the court stated that it does not appeal to the mind that accused persons, who are real brothers of the husband of the victim, can beat their *bhabhi* (sister-in-law).”⁸⁰The assumption that plausibility of rape is diminished because the accused is a close relative of the victim is not based on reality. In another 2017 case, it was noted: “[a]ll accused are close relatives and accused Shehnaz Mai is the wife of Accused Muhammad Younis. It does not appeal to mind that in presence of his wife, the accused can commit such a crime or abduct another lady and confine her.”⁸¹

3.6 Relevance of Motive

In a number of cases, judges have found the allegation of rape as false and frivolous on the basis of previous enmity with the accused.⁸² However, in no case has the alternate logical conclusion been drawn that the victim could be raped as a result of the prior enmity, or that the occurrence of rape is one manifestation of that enmity between the individuals or families involved.

In a majority of cases examined, the existence of previous hostile terms with the accused has been seen in favor of the accused, as opposed to the victim/complainant. This includes any previous litigation between the two parties on issues ranging from custody battles to property disputes.

3.7 Miscellaneous Findings

In addition to the key findings that have been discussed in the previous chapters, there are a few other observations that need to be mentioned. They are discussed in the subsections below.

3.7.1 Lack of Uniform Format

There is no uniform format in which judgments have been written; some judgments are very brief detailing only the facts, while others include detailed excerpts from cross-examinations, including reproduction of excerpts from the original medical report and witness statements. In cases in which a 265-K application was accepted,

⁷⁹ Sessions Case No. 44/OSC of 2016 (Para. 14), Case FIR No. 115/2016

⁸⁰ Sessions Case No. 21/OSC of 2016 (Para. 9), Case FIR No. 455/2016

⁸¹ Sessions Case No. 07/OSC of 2016 (Para. 8), Case FIR No. 423/2015

⁸² Sessions Case No. 54/OSC of 2016, Case FIR No. 10/2016.; Sessions Case No. 99/OSC of 2016 (extortion of money), Case FIR No. 715/2015); Sessions Case No. 136/OSC of 2017 (Dowry and personal grudge), Case FIR No. 122/2017; Sessions Case No. 49/OSC of 2017 (false case to refuse returning of borrowed money of the accused), Case FIR No. 45/2017.; Sessions Case No. 49/OSC of 2017 (false case to refuse returning of borrowed money of the accused), Case FIR No. 340/2016

judgments were generally shorter. However, that is not the rule as it depends on the stage at which such application was accepted during trial.

3.7.2 Lack of Reliance on Legal Precedent

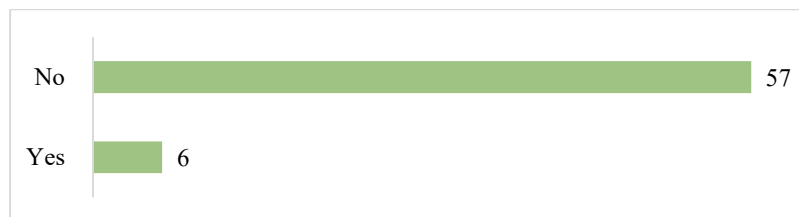
In only a few judgments of the court are references made to jurisprudence of the superior courts of Pakistan.⁸³ In a majority of cases, there is a lack of clear reference to precedent or law. In only 6 out of 63 cases (9.5%) of the total sample did the courts explicitly mention a legal precedent (as shown below in Fig.22). For example, in one case, the judge commented that “the case law relied upon by the learned counsel for the complainant are not identical to the fact of this case”⁸⁴ – with a view to engage with existing case law of the superior courts. However, in a majority of cases, no such analysis was present.

Instead a variety of judgments reference the judge’s personal views on plausibility of a violation based on the social context and characteristics of victims and witnesses. In a significant number of cases reviewed, the judge gave his opinion on the broader social context within the judgment.

The lack of reference to legislation or precedent of the higher courts or legal terminology (which constitute the elements of the offence – for instance, consent etc.), in several cases, makes it hard to decipher the words of judges as distinct from opinions and views – and misapplication of the law, in some cases. It also makes it difficult to determine what the ratio of the case is and how the judgment itself can be used as a legal precedent in another rape case. For example, in one judgment, the judge stated:

“I do not agree with the learned counsel for prosecution that simple penetration is sufficient and positive report of swabs and DNA are not a requirement of law but I would say that when the victim is enjoying bad character, then these things are important to believe her version. The victim is a married lady having two kids and in such a situation, only allegation of penetration would not matter.”⁸⁵

Figure 23. Legal Precedent Cited in the Judgment



Source: Author’s calculations based on data from the Judgment Files

⁸³Sessions Case No. 235/2012 (Para. 11), Case FIR No. 534/2012,

⁸⁴Sessions Case No. 18/OSC of 2017, Case FIR NO. 457/2016

⁸⁵ Sessions Case No. 124/OSC of 2017 (Para 23), Case FIR No. 195/2017

3.7.3 Conduct of the Police

It is pertinent to mention that, as a matter of power and practice, how and whether any specific evidence is collected and presented is the mandate of the police and not within the control of the victim or other witnesses. Despite it being an offence for an investigation officer to hamper the investigation in any way, the enforcement of this provision is very difficult in reality. Moreover, any accountability for deficient police investigation is naturally retrospective in nature, if at all, and the damage to the trial and justice has already happened by such time. Finally, not many victims have the will to fight against the police, or the means and legal access to do so.⁸⁶ In only one case on file did the judge note that the complainant did not say anything in court to the Session judge "...regarding presence or coercion of thanaydar..."⁸⁷

In 7 out of 63 cases (11%), which were private complaints,⁸⁸ victims/complainants have explicitly stated irregularities in police conduct, including refusal to register their FIRs. However, the majority of victims/complainants do not have the persistence and resources to pursue matters as private complaints or resist police actions.

In our present sample, the lack of capacity and will of victims/complainants can be assessed by the fact that no appeal for revision was filed against the acquittals in all cases on file.

3.7.4 Variable Age & Character of Minor

Section 376(3) of PPC establishes the charge for rape of a minor. Age is, therefore, important in rape cases under the legal framework, especially to identify cases involving minors. Furthermore, Section 53A(2)(b) of CrPC requires recording and stating the age of the victim. As per statutory requirement, medico-legal officers are also required to record the age of the victim in the medical report.

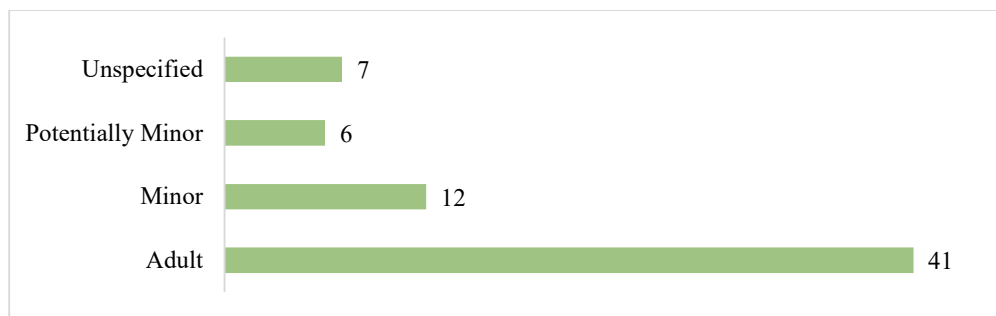
⁸⁶According to a 2018, 88% of women in Pakistan reported having a legal problem however, only 14% turned to an authority or third party to help resolve the problem and 86% did not turn to any authority or third party to resolve the problem. The findings were based on surveys conducted in the fall of 2017 using a probability sample of 1840 adults ages 18+ in the three largest cities (Karachi, Lahore, and Faisalabad). See further at *Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 45 Countries*, World Justice Project, 2018, page 42, https://worldjusticeproject.org/sites/default/files/documents/WJP_Access-Justice_April_2018_Online.pdf (Accessed April 20, 2019)

⁸⁷Sessions Case No. 24/H.C of 2015 (Para. 18), Case FIR NO 31/2015
Thanaydar is generally used to refer to a senior police official, usually of the rank of Station House Officer

⁸⁸Sessions Case No. 220/2016, Private Complaint No. 205; Private Complaint No. 01/OSC of 2015; Private Complaint No. 158/2017; Other Sessions case No. 30/OSC, Private Complaint No. 38/2017;; Other Sessions case No. 30/OSC, Private Complaint; Private Complaint, Other Sessions Case No. 13/OSC of 2016

All judicial files reviewed show that judges have not flagged underage victims or addressed this issue in the legal analysis of the case, as per the law. As shown in Fig. 23, at least 12 out of 63 cases (19% cases) clearly involved minors, with an additional 6 cases (9%) involving potential minors (where multiple age accounts were visible on file with one of these ages as minors). However, in all cases reviewed, the court did not treat the victim as a minor for the purposes of the case and the offence charged was not 376(3) in any of the cases. In a few cases, some references to being a minor were made, but to no benefit of the victim. As per the law, in rape cases involving minors, the issue of consent becomes irrelevant to the offence, and hence it is essential for courts to flag cases involving minors.

Figure 24. Cases of Minor Victims



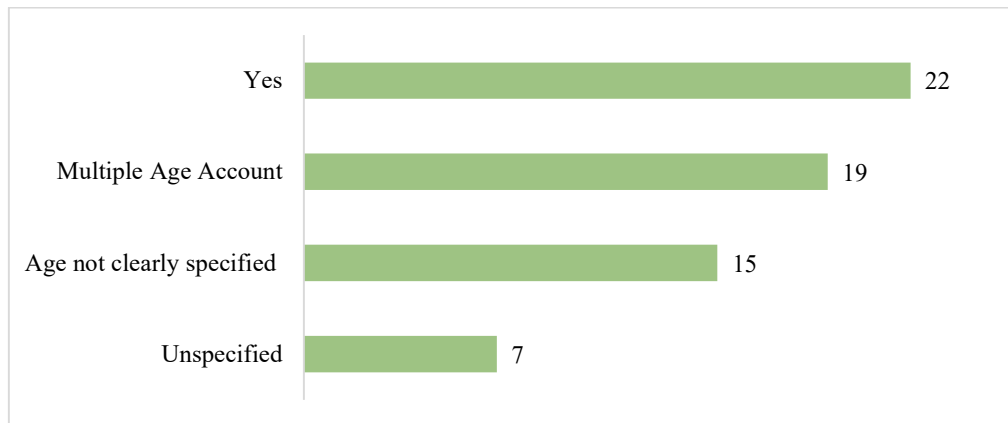
Source: Author's calculations based on data from the Judgment Files

In 7 of the 63 cases (11%), there is no information on the age of the victim, making it impossible to determine if the victim is a minor, while 19 cases out of 63 (33%) show a significant discrepancy in the age of the victim on file i.e. the age of the victim is recorded differently in different documents relied upon by the court. For example, in one case, the cross-examination excerpt of medical examination states the age of the victim as 17 years, while the initial paragraphs of the judgment narrating the facts, indicate that the age of the victim was 18/19 years of age.⁸⁹In another case, there is a greater discrepancy between the age mentioned in the judgment and the age stated in the prosecution witness statement; 16 years and 24 years respectively for the same victim.⁹⁰Moreover, 15 cases (24%) fail to specify one specific age i.e. these judgments state the age as 16/17 or 14/15 as opposed to one specific and definitive age.

⁸⁹Sessions Case No. 235/2012 Case FIR No. 534/2012

⁹⁰Sessions Case, No. 29/2016, Case FIR No. 179/2008

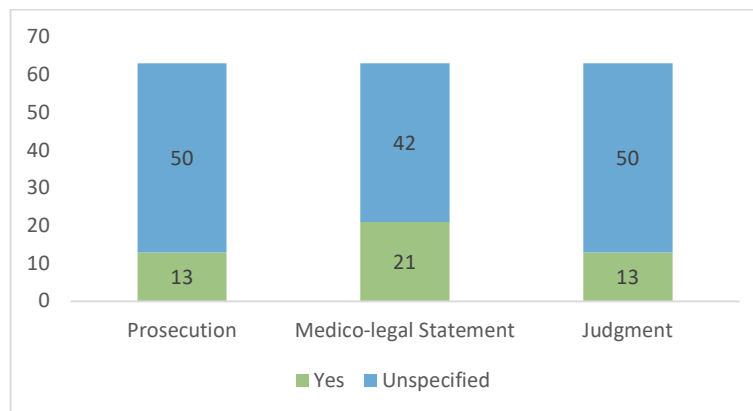
Figure 25. Mention of Age of Victim



Source: Author's calculations based on data from the Judgment Files

There is no indication in the reviewed case files that any specific process was employed to assess the actual age of the victim. References to the age of the victim featured (if at all) either in the medical examination (21 cases out of 63 cases; 33%), in the charge sheet or the judgment (16 cases out of 63; 25%), and more often, in a majority of the cases reviewed, in the prosecution witness statement (50 cases out of 63; 79%) by questioning the victim and other witnesses. However, it is not clear through which source age is confirmed. The existence of a Computerized National Identity Card (CNIC)⁹¹ of the victim or how age was assessed in the absence of a CNIC was not mentioned, nor a birth certificate appears to be used to confirm age of the victim.

Figure 26. Mention of Legal Age in Official Documents



Source: Author's calculations based on data from the Judgment Files

⁹¹ The Computerized National Identity Card (CNIC) is an identity card issued by Pakistan's National Database and Registration Authority (NADRA). The document verifies citizenship and particulars, such as age, place of residence, fathers name etc.

An interview with relevant personnel from the Office of the Surgeon Medico-Legal Punjab⁹² later confirmed that as a practice, the age of the victim is not determined or verified (unless specifically requested, which rarely happens); however, the age of the accused is usually assessed on request of the accused or his family, if the defense claims that the accused is a minor, which happens more frequently.

It was observed that in a majority of cases, the judge is not concerned about the victims' age and makes no mention of it. However, in some cases, the judge has discredited the age of the victim provided on file in light of his personal views. In one such case, the judge stated: "The age of the victim is more than sixteen years. She was [a] mature girl and this situation has been proved through medical evidence. How can [a] fourteen years girls be habitual to sexual intercourse."⁹³ The medical report in this case mentioned the age of the victim as 16 years.

The fact that a victim is a minor is not taken into account, and is discredited or often sidelined in the judgment: in a 2017 judgment the judge notes the fact that [victim's] age is about 16 years and qua abduction and rape, her consent would not matter, but simultaneously affirms that for the conviction of the accused, reliable and cogent evidence is necessary."⁹⁴In another 2017 case involving a minor, the Judge remarked, "As far as the character of the victim is concerned, her age is less than 16 years but her character shows that she herself [tried] to contact with accused..."⁹⁵and "...medical evidence shows that she is not virgin and habitual to sexual intercourse."⁹⁶; in another case of 2017, the judge stated, "the report of the [Medical Officer M.O.]...suggests that (victim) is not...[a] virgin lady and the duration between the time of the occurrence and the medical examination also suggest that the hymen of the victim were ruptured prior to the present occurrence as the same was found healed. No doubt the age of the victim was 14 years at the time of examination but keeping in view the observation made by M.O. i.e. the vagina admits two fingers easily, suggest that she is a lady of easy virtue."⁹⁷ Under the law, intercourse with a minor is rape in all circumstances, irrespective of consent.⁹⁸ The courts have failed to recognize this important aspect in cases involving minors.

⁹² Anonymous, Interviewed by Author and Research Team, July 2, 2018,

⁹³Private Complain No. 158/2017 (Para 28)

⁹⁴Sessions Case No. 61/2017 (Para. 11), Case FIR No.120/2016

⁹⁵ Sessions Case No. 61/2017 (Para. 13), Case FIR No. 120/2016

⁹⁶ Sessions Case No. 61/2017 (para. 11), Case FIR No. 120/2016,

⁹⁷Sessions Case No. 03/OSC of 2016 (Para. 21), Case FIR No. 801/2015

⁹⁸ Section 375(4) of the Pakistan Penal Code states that it is rape when it is "With or without her consent when she is under sixteen years of age"

4. Concluding Note & the Way Forward

This Case Study of Lodhran reveals that, in many aspects, the current system and its implementation is failing victims of rape. At best, it remains unclear how a victim could prove an allegation of rape using the existing processes, and at worst, the current processes do not make it possible for the majority of victims to prove rape. The existing burden and standard of proof required of victims is variable, unclear and disproportionately high in practice – and most of all, does not correspond to the reality of rape. Moreover, the institutional and structural delays during every stage of a rape case, from reporting of incident till decision, make it almost impossible for any meaningful evidence to be collected, and test the resolve of victims/complainants. Only the ideal victim, as explained, above can expect some semblance of justice from the current system.

An examination of judicial files of the trial court in Lodhran identifies several practical challenges of access to justice and accountability for victims of rape. While some of these challenges are due to lack of implementation/interpretation of existing legal provisions and protocols, several other challenges are due to the absence of legal provisions and a failure to carry out reforms of the existing problematic provisions. The Case Study reveals areas for urgent reform, such as the reporting and registration of complaints; medico-legal process that predominantly relies on the two-finger test, presence and absence of hymen, violence, and semen in its assessment of rape; gender sensitization of law enforcement and judicial stakeholders; and revisions in existing legislations.

There remain significant challenges of implementation and interpretation of the Criminal Amendment (Offences Relating to Rape) Act of 2016 and the protections it affords. In a majority of the examined cases, it was noted that despite the above Act outlawing some of the earlier legal provisions and processes, the trial court judges, prosecutors and defense lawyers continued to rely on the same in support of an acquittal for the accused. One clear example of this was the continued reliance on previous bad character and sexual history of the victim, despite it no longer being expressly allowed.

The study reveals that the presence of transformative legal provisions, in the absence of sufficient awareness raising and training of judges and other actors, is unlikely to trickle down to the trial court and shift the status quo for victims of rape. Specific training for trial court judges, prosecutors and other stakeholders, especially on newer legislation, such as the Criminal Amendment (Offences Relating to Rape) Act of 2016, is crucial, as well as trainings on gender-sensitization to reduce attitudinal barriers. There is need to implement and strengthen existing protections.

Legislative & Policy Reform

There is a need to conduct a critical appraisal and review of the existing legal framework to identify areas for reform and gaps requiring further legislation. Existing medical examination processes need to be reexamined and updated to be more responsive to the reality of rape victims, and more respectful of the rights of the victim. The two-finger test should be outlawed for being intrusive and in violation of the victim's dignity – and for its lack of utility.

There is a further need to identify gaps in policy, which have an impact on access. For instance, review of processes for hiring, retaining and selection of female medico-legal officers, and allocation of work of medico-legal officers is required. One recommendation is to reduce existing workload of medico-legal officers, provide better compensation to work outside urban centers, and ensure their protection against harassment. A detailed review of existing burden and standard of proof of victims needs to be done to ensure greater access to justice.

Greater Research and Fact-Finding

There is a need to conduct a deeper study of the subject matter within Punjab as a whole, and in other provinces of Pakistan, to get broader data on problems of access and accountability for victims of rape. This will help identify trends for comparison and a more systematic learning of the problem with a view to finding contextualized solutions. There is a need to conduct detailed qualitative research, which reflects victim experiences of engaging at the trial court level, and supplements the existing quantitative trends.

Protocols to Facilitate Research

There is a need to examine case records and record management protocols of different departments and Court Records to ensure accurate and consistent collection, classification, identification of data, which facilitates both intra-departmental and external research on the specific subject matter and related aspects.

During the course of the research, the author and research team became aware of inconsistencies between case records of the various departments and the District Court. It is unclear at present what caused the discrepancy; for example either data was differently recorded and labeled by various departments, which may have contributed to variation and/or other factors contributing to errors. Moreover, limited willingness to share files and information from certain segments also prevented the author and researchers in conducting a more systematic and holistic study of issues within the District of focus, Lodhran.

There is a need to enable a more thorough research of the subject to identify gaps and areas of legislative and policy reform.

Capacity Building & Awareness Raising

There is a need for capacity building and awareness-raising of relevant stakeholders – Police, Prosecutors, Judges, Medico-legal Officers– on issues of gender-sensitivity, the relevant updated law, protocols and best practices as applicable to victims, and the broader subject of rape to demystify existing myths. Judges should also be provided additional training on legal analysis and judgment writing.

There is a need to examine capacity of each District/locality to comply with existing legal requirements and protocols. This requires an assessment of the number of female medico-legal officers, female police officers (to accompany for victim’s medical examination and recording of statement, as applicable) and legal aid lawyers (for victim’s access to legal representation and filing appeals for revision against acquittals) present in each locality to ensure sufficient capacity exists to meet the legal requirements.

Greater Enforcement of Existing Provisions

There is a need for greater enforcement and strengthening of existing mechanisms to hold police officials/investigating officers accountable for hampering the investigation process. It is important to reevaluate the accountability laws in this respect within the context of variable power dynamics between the victim and the police; a similar need exists in relation to witness protection mechanisms.

There needs to be a deliberate and determined effort to address issues of access to justice and accountability for rape in Pakistan. The above recommendations provide a preliminary framework to proceed further in this direction. This study is the first step to a better understanding of the problems faced by victims in their struggle to seek justice in Punjab, and needs to be supplemented with similar and more in depth initiatives.

Annex – I
Total Number of registered and decided rape cases u/s 376 in 2016 and 2017

District	Total Police Reports Submitted	Total Cases Decided	Conviction	Total Acquittal	Contested Acquittal	Acquittal S.265-K Resiling of Witnesses	Acquittal S.265-K Deficient Evidence	Consigned	Total Disposal
Lodhran	310	252	16	236	72	20	7	61	364
R.Y.Khan	393	370	8	362	46	224	1	130	509
Faisalabad	305	330	14	316	43	258	2	133	497
Multan	257	298	8	290	38	90	0	54	423
Vehari	261	305	13	292	37	26	0	109	439
Sahiwal	298	228	14	214	30	31	0	58	344
Khanewal	355	243	9	234	29	144	0	67	321
Bahawalnagr	277	262	10	252	27	254	19	51	336
Bahawalpur	355	286	8	278	18	140	2	44	362
Pakpattan	305	203	6	197	18	67	6	93	315
Nankana	222	134	2	132	17	53	10	41	198
Okara	332	257	5	252	16	137	0	126	477
Gujranwala	233	161	3	158	16	30	0	42	224
Rawalpindi	143	126	10	116	14	107	9	32	164
Lahore	418	191	3	188	13	198	7	1153	1344
DG Khan	197	161	4	157	13	40	0	61	228
Kasur	285	136	7	179	13	173	2	59	260
Hafizabad	76	42	4	76	13	94	0	13	99
Sargodha	240	183	14	169	12	162	2	46	239

TT Singh	123	97	7	90	12	124	0	13	116
Sheikhupura	174	140	3	137	11	24	0	130	198
Jhang	194	152	6	146	9	252	0	10	177
Sialkot	133	133	6	127	9	316	33	13	151
Rajanpur	128	108	4	104	9	115	0	33	143
Gujrat	112	83	3	80	7	20	13	15	101
Narowal	44	46	6	40	7	236	0	13	65
M.B.Din	160	134	4	130	6	176	3	32	176
Attock	23	36	3	33	6	315	1	3	42
Chakwal	36	34	2	32	6	95	0	1	36
Khushab	39	45	1	44	4	99	3	5	51
Chiniot	66	38	3	35	4	184	0	29	67
Muzaffargarh	396	355	5	350	1	151	6	50	418
Jhelum	19	32	1	31	1	126	0	5	37
Mianwali	23	27	2	25	1	94	24	1	28
Layyah	109	94	0	94	0	73	5	9	108
Bhakkar	79	92	2	90	0	255	0	4	97
Total	7120	5814	216	5686	578	4903	155	2739	9154