
PAST SEXUAL HISTORY EVIDENCE



RCBHC

RESEARCH CENTER, HIGH COURT OF BALOCHISTAN

RESEARCH CENTER, HIGH COURT OF BALOCHISTAN

COURT: HON'BLE CHIEF JUSTICE MUHAMMAD HASHIM KHAN KAKAR
SUBJECT: CRIMINAL LAW/CONSTITUTIONAL LAW
DATE: 22ND JUNE 2024
BY: WASEEM AHMED RAEES AND MUHAMMAD ZAKRIA RESEARCH CENTER

QUERY: **LEGALITY AND ADMISIBILITY PAST SEXUAL HISTORY EVIDENCE (OPINION IN MLC ABOUT THE MALE VICTIM OF SODOMY AS HABITUATED TO SEX)?**

MEMO.

My lord, it is humbly submitted that in continuation of research memoranda submitted on 21st June 2021, on the subject, this Supplementary memoranda is presented for kind perusal.

Evidence focusing a victim's sexual history has long been used in rape trials, to infer consent of the female victim and challenge her credibility. Such inference about the rape victim's sexuality and credibility was based on the assumption that sexually active women are less credible as a witness and more likely to consent. However with the passage of time, the criminal justice systems considered such assumption as myths and as such the sexual history evidence excluded by introducing exclusionary rules in the law to counter myth.

Evaluation of Rape Shield Laws

Justice McLachlin, a Canadian jurist and author who served as the 17th chief justice of Canada from 2000 to 2017 explained in the famous case of R. v Seaboyer:

"These inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited. The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar."

In this light, many jurisdiction across the world have made attempt to impose a restriction on the **sexual history evidence**, often termed as "**rape shield laws**". Such laws limited the Introduction of evidence about the past sexual activity of victim of rape in a sexual assault trial (**sexual history evidence**) or limits cross-examination of victims about their past sexual behaviour in sexual assault cases which was historically allowed to be introduced to establish consent or impeach the credibility of the victim.

Purpose of Rape Shield Law

The primary purpose of rape shield laws was to prevent the victim from double stigmatization, which could further traumatize the victims and discouraged them from reporting the crime. By limiting the admission of irrelevant and prejudicial evidence, these laws sought to create a fairer and more supportive legal environment for victims to seek justice.

The Inclusive Application of Rape Shield Law

Nonetheless, such laws had an inherent problem that they were women inclusive and not covered opposite-sex rapes' cases. Legislators did not write the laws to have the male victims of sodomy in their mind. However, the Courts from different jurisdiction found that the rape shield laws applicable to female cases are equally applicable to male cases where the statutory definition of rape is gender neutral. These courts generally have held that, despite the lack of legislative history supporting such an application, it is consistent with the policies behind Rape Shield Laws to apply them to cases of male same-sex rape.

For example In *Commonwealth v. Quartman*, 312 Pa. Super. 349, 458 A.2d 994 (1983), the Superior Court of Pennsylvania held that the Rape Shield Law, which traditionally protected female victims of rape, also applies to male victims. The court recognized that the Pennsylvania sexual offense statutes are gender-neutral and concluded that evidentiary exclusions established to aid victims of sexual crimes are equally applicable to both male and female victims [Quartman]. The Quartman court specifically addressed the issue of whether evidence of a male rape victim's prior sexual relations with other individuals could be admitted to imply consent. The court found that such evidence has very little probative value regarding consent to intercourse with a particular person at a particular time and that the Rape Shield Law precludes its introduction for that purpose [Quartman].

The rationale for applying Rape Shield Laws to male victims is consistent with the policy goals of these laws. The privacy and dignity of male victims are equally deserving of protection as those of female victims. The potential harm and prejudice that could result from the disclosure of a male victim's sexual history are analogous to those faced by female victims. Furthermore, the gender-neutral language of the statutes supports the inclusion of male victims under the protection of Rape Shield Laws.

The Pakistani Context

Pakistan's legal system inherited rape laws from the British colonial era, primarily based on Victorian principles. The law governing rape was the section 375 PPC which defined rape as non-consensual intercourse with a woman. However, this definition was heavily criticized for being gender-biased, as it only recognized female victims and excluded male victims or cases of same-sex rape. Thus, the development of law came forth and Criminal Law Amendment Act 2021 made the rape gender neutral. **Consequently, an un-consensual act of rape with male same-sex (sodomy) falls within the definition of rape. Now section 377 PPC is only applicable to the consensual act of unnatural carnal intercourses with the same-sex or opposite-sex or committed with animals. In such cases, at the most, if the accused plead that the victim was a homosexual or has a homosexual orientation, and may, with the permission of the Court, produce evidence in support of his plea or apply for conducting medical examination of the alleged victim, which can only be done with consent of victim/passive agent and in case the accused succeed to establish its plea, still he would not be allowed to go free. Otherwise,** in un-consensual sexual assault, all the protection granted to a female victim of rape vis-à-vis past sexual history through rape shield laws, either in the form of statutes such as **Criminal Law (Amendment) (offences relating to Rape) Act, 2016, Criminal Law Amendment Act 2021, Anti Rape Act or rules thereunder** or laws developed by the Superior Courts such as in case of Sadaf Aziz Case (2021 P Cr. L J 205) or in case of **Atif Zareef (2021 PLD SC 550)** can be extended to the male victim of rape of same-sex to protect their privacy and dignity in view of constitutional principles of justice and equality.

Conclusion

In conclusion, the rape shield laws, initially designed to protect female victims of sexual assault, **equally apply to male victims of same-sex rape.** The **inclusive application of these laws is essential to ensure that all victims of sexual assault receive equal protection under the law, regardless of gender or sexual orientation.**

The evolution of rape shield laws, from their origins in Canada to their adoption in various jurisdictions, highlights the importance of recognizing the dignity and privacy of all victims of sexual assault. The Pakistani legal system, having inherited colonial-era rape laws, has taken significant steps towards reform, including the Criminal Law Amendment Act 2021, which made the definition of rape gender-neutral. **The protections afforded by rape shield laws in Pakistan be explicitly extended to male victims of same-sex rape, in line with the principles of justice, equality, and human dignity enshrined in the Constitution of Pakistan.**

The End

RCBHC