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**THE LAW OF GENDER-BASED VIOLENCE**  
**IN TIMOR-LESTE**  
April – November 2005

**JSMP Report**

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The Judicial System Monitoring Programme (JSMP) was set up in early 2001 in Dili, Timor Leste. Through court monitoring, the provision of legal analysis and thematic reports on the development of the judicial system, JSMP aims to contribute to the ongoing evaluation and building of the justice system in Timor Leste. For further information, and to access the reports, justice updates and press releases referred to in this report, see [www.jsmp.minihub.org](http://www.jsmp.minihub.org)

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# THE LAW OF GENDER-BASED VIOLENCE IN TIMOR-LESTE

## April – November 2005

### EXECUTIVE SUMMARY

This report analyses the law of gender-based violence in Timor-Leste through legislation, international law and 12 decisions of the district courts handed down between April and December 2005. Gender-based violence (GBV) includes cases of sexual and domestic violence in which the victim is a woman. The report is intended to provide court actors and the community with a legal guide for GBV cases as well as to follow up an earlier JSMP Women's Justice Unit report of April 2005 on judicial decision-making.

Between April and November 2005 the Women's Justice Unit (the WJU) monitored the four district courts in Timor-Leste. WJU staff sat in court during hearings and trials in GBV cases and, where cases were finalised, obtained a copy of the decision. The WJU monitored 35 separate GBV hearings in this period and staff members obtained a copy of the decision in 12 finalised cases.<sup>1</sup> 2005 was an important year in the development of the justice system in Timor-Leste because all serious cases were handled by visiting international judges and often also by international prosecutors. The courts became more efficient and the average time between arrest and trial was reduced.

This report begins with an outline of the changes that occurred in the court system, describes the methodology of this report and then analyses those decisions obtained relating to GBV cases. Analysis of the 12 decisions reveals that they decide 13 separate cases, ten sexual violence and three domestic violence cases. Ten cases resulted in a conviction. All of the victims were women and half were minors when the crimes occurred. All of the accused were men and were adults at the time of the alleged crimes.

Following this overview of decided cases, Section 2 looks at the jurisprudence of the decisions in five key areas for resolution of GBV cases in Timor-Leste: the law of consent in sexual violence cases, the definition of violence or threat in sexual violence cases, the use of evidence, the application of sentencing principles and the relationship between the formal justice system and the traditional justice system.

The general findings of the report include:

- The justice system is mainly being accessed by young unmarried women victims of GBV. Crimes, particularly sexual crimes, against older or married women are rarely being tried in the courts.
- Judicial decision-making has improved greatly since the last review period in the depth and completeness of analysis.
- Some courts are showing more empathy towards women and children victims, seen in the type of sentences and judges comments in decisions. Some decision-makers, however, still rely on gender-stereotyped assumptions to decide credibility.
- Evidence presented to courts is often weak, and not probed with sufficient rigour. For example, much weight is given to witness demeanour and expert testimony is never called.

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<sup>1</sup> The 33 cases included 14 handing down of decisions, 4 pre-trial hearings and 17 trials. These do not by any means represent the total number of GBV hearings held in Timor-Leste in the monitoring period.

- Courts still demonstrate a lack of understanding of international legal principles around gender-based violence.
- Gender-based crimes are still not being considered sufficiently “grave” and sentences are too low. Orders for compensation to victims however is a promising step in recognising victim’s needs.
- Reference to traditional law in some cases also promises new ways to make the justice system more meaningful to victims, perpetrators and their communities, although a number of procedural matters need to be resolved.

It should be mentioned here that the legal framework within which these decisions have been made is, in early 2006, being superseded by a new Timorese Criminal Code and Criminal Procedure Code. The discussion in this report will still continue to be relevant, however, because many of the concepts are general and arise in gender-based violence cases everywhere and it is likely that the old framework will still be applied in some cases that occurred before the changes came into use.

Finally, the WJU would like to express its gratitude to the district courts for their support of our research by allowing JSMP monitors to attend trials in cases of GBV.

## 1. INTRODUCTION

Violence against women is an international problem. Too often, women are the victims of anger, frustration, exploitation, abuse of power and gender stereo-typing, compounded by the post-conflict situation present in Timor-Leste since 1999. *The Declaration on the Elimination of Violence against Women* defines such violence as:

[A]ny act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.<sup>2</sup>

Gender-based violence in this report is taken to relate particularly to acts of domestic and sexual violence against women.

Too often, violence against women is not seen as a crime but rather as a family problem to be resolved at the family or village level.<sup>3</sup> Courts and judicial decisions are among the most important avenues for emphasising the criminal nature of gender-based violence, deterring such violence from being repeated, and explaining how the law should be applied. It is essential, therefore, that the way the law is interpreted and applied in Timor-Leste’s courts is consistent, is in accordance with international standards and principles, and responds to the social and cultural realities of Timor-Leste.

This report is a review of how the law of gender-based violence is applied in Timor-Leste through analysis of 12 decisions handed down between April and November 2005 in GBV cases. Rather than analysing each of these cases individually, the WJU has focussed on five issues which arise regularly in such cases to determine patterns in reasoning and to assess whether there have been developments in the law since the WJU’s previous report in April 2005.

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<sup>2</sup> Article 1, Declaration on the Elimination of Violence Against Women, adopted by General Assembly resolution 48/104 of 20 December 1993.

<sup>3</sup> In 2005, as part of its district training on women’s rights and the legal process, the WJU organized ten focus groups in five districts with communities to discuss attitudes to gender-based violence. The overwhelming response from community leaders, including members of women’s organizations, was that GBV was first a family problem and only if it was very serious or if the family negotiations failed should it be taken to the police.

The report begins with the background of the WJU, the legal context during the monitoring period and the methodology of the report. The main body of the report is a description of the relevant criminal law provisions and then an analysis of judicial decision-making in five areas most relevant to the development of GBV law in Timor-Leste. The issues considered are:

- Consent as a defence in rape cases
- Violence or threat of violence as an element of a rape charge
- Evidence brought in GBV cases
- Sentencing
- Use of traditional law

### **Background to the WJU**

The WJU was formed in April 2004 after JSMP research found that women were not accessing the justice system and, where they were, their cases were not being heard and decided.<sup>4</sup> It now has four staff, three national staff and one international advisor.

The core of WJU's work is monitoring the courts and writing thematic reports on issues facing women in the justice system. Although sexual violence cases are usually closed, in early 2004, His Excellency Claudio Ximenes, the Chief Justice of the Court of Appeal, granted formal authorisation for JSMP staff members to monitor GBV cases, subject to approval from the victim and the accused. The WJU also discusses cases with prosecutors and lawyers and obtains copies of decisions where possible.

As well as court monitoring, the WJU also makes submissions on legislation affecting women, writes press releases and justice updates, gives training to community leaders throughout the country on women's rights, and works with the legal profession and other gender based or legal NGOs.

### **Background to the Justice Sector in Timor-Leste in 2005**

The decisions and analysis in this report should be understood in the context of the many changes that occurred in the formal justice sector in Timor-Leste in 2005. One of the main changes was the 'internationalisation' of the courts. The majority of national judges were suspended from the bench and most prosecutors and public defenders stopped appearing in court, as they failed their state-run examinations in January and May 2005 respectively.<sup>5</sup> This meant that all district court cases were handed to the four international judges that had arrived from Lusophone countries in late 2004 and most prosecutions of serious crimes were prosecuted by international prosecutors. Most defence work was taken on by Timorese private lawyers. This situation will continue until judicial actors begin to graduate from the Judicial Training Centre in 2007.

The suspension of national court actors was an enormous burden placed on the international actors in the district courts, particularly until their numbers were increased to five judges and more prosecutors in September 2005, and it had significant logistical consequences for the district courts. For example all files, which were in Indonesian, Tetum or local languages, had to be translated into Portuguese for the new court actors to understand. Hearings were also conducted in Portuguese requiring translation for the parties and their legal representatives. All decisions were handed down in Portuguese. This made the process more confusing for national court actors, victims and their families, defendants, and court observers such as journalists and JSMP monitors.

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<sup>4</sup> See JSMP, Women in the Formal Justice Sector: Report on the Dili District Court, Dili, April 2004.

<sup>5</sup> Three national judges were given special dispensation to continue on the Special Panels and the Court of Appeal.

A second relevant development in the justice sector in 2005 was an expansion and improvement in the administration of the courts. The Oecusse and Suai District Courts began regular operation and the Baucau District Court increased its hearings from one day a week to three days a week in November 2005. Further, cases were distributed efficiently to prosecutors and were heard with greater speed and regularity.<sup>6</sup> The WJU has observed subjectively that GBV cases were being heard and decided much more efficiently in 2005 than in previous years. Nevertheless, the development of an efficient court administration system is still in its very early stages and no case-tracking system has yet been implemented. This makes monitoring cases from commencement to conclusion a challenge.

## **2. METHODOLOGY**

Between April and November 2005 WJU staff attended the district courts as frequently as possible and monitored cases of violence against women. Staff completed detailed forms for each case monitored and consulted regularly with prosecutors and lawyers. In some cases, staff also interviewed the victim after the case had concluded. Where possible, the WJU obtained copies of the decisions, either directly from the judge or from the lawyers involved in the case.

The 12 decisions are not all of the GBV cases decided by the district courts in this period. With only four staff, it was not possible for staff to visit all courts at all times. The Oecusse and Suai courts were monitored in entirety because the dates of operation were clear and staff stayed in the district in those periods. The Baucau and Dili District Courts were more unreliable as days of operation changed and schedules were either not prepared or were subject to change at the last minute.

The 12 decisions are also not highly representative of judicial decision making in Timor-Leste because seven are from one judge. This is because that judge heard all cases of sexual violence against minors, she gave copies of her decisions to JSMP immediately after the case was decided, and she was the exclusive judge in Oecusse and Suai as well as occasionally in Dili. The remaining decisions are from three of the four other international judges.

The substance of this report follows a report published by the WJU in April 2005 that analysed 11 decisions in GBV cases. In that report the WJU noted that women's cases were being heard and decided, an improvement on earlier periods, but the quality of justice was often poor. The report found that sentences were too short for the crimes committed, international standards were not being applied effectively, legal reasoning in many of the decisions was inadequate and gender sensitivity or awareness of children's rights was not being displayed.

As a result of these findings, this report has taken a more thematic and in-depth analytical approach to determine exactly what the courts position is on a number of issues central to concepts of GBV, in light of international standards of justice and notions of gender sensitivity. This approach was also taken to maximise its usefulness after the Indonesian Penal Code (KUHP) is withdrawn and replaced by the Timorese penal code in early 2006.

WJU staff analysed each of the decisions in detail according to the five themes chosen as most important at this time in the justice sector's development. We researched the national and international law on each theme and then compared how judges had applied the law.

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<sup>6</sup> See JSMP, Overview of the Justice Sector 2005, Dili, January 2006.

The result was unexpected – almost a text-book of the law of GBV in Timor-Leste, as well as an analysis of judicial-decision making in the new country.

### 3. OVERVIEW OF THE DECISIONS

This report analyses 12 decisions drawn from the four district courts operating in Timor-Leste. One decision from Oecusse involved one accused but two victims from two entirely separate and unrelated incidents so has been counted as two cases

| District Court | No. Decisions |
|----------------|---------------|
| Dili           | 5             |
| Baucau         | 1             |
| Suai           | 2             |
| Oecusse        | 4 (5 cases)   |

Attached to this report is a breakdown of the 12 decisions according to the type of case, the character of the victim and accused, and the result. Some points worth highlighting from this breakdown include:

- Of the 13 cases, ten were cases of sexual assault (nine rape cases and one harassment) and three were domestic violence (two assaults and one murder).
- All victims were women. All defendants were men.
- Six victims were minors under Indonesian law (under 15 years of age), five of whom were victims of sexual violence. All victims of sexual violence, however, were young: only one was over 18 years of age. The average age of the victims of sexual assault was 14.67 years.
- All defendants in cases of sexual violence were adults, the youngest aged 18 years and the eldest aged 80 at the time of the trial. The average age of the defendant (where the ages were reported) was 40.43 years.
- In the cases of domestic violence monitored by JSMP, all defendants were adult and the victims were of varied ages and demographic groups a child, an elderly woman, a wife.
- All sexual assault victims were unmarried except one whose husband was in West Timor.
- In the ten cases of sexual violence, the victim knew the accused in seven cases. In four of those cases, the accused was a member of the victim's family.
- In five cases the suspect denied the charges absolutely. In seven cases the accused admitted the act but not the intention. In only one case did the suspect admit the crime completely.
- In ten cases of 13, the defendants were found guilty.
- In the six cases in which the crime of rape was proved, the highest sentence was six years and the lowest two years.

This analysis emphasises yet again the extreme vulnerability of women to suffering violence perpetrated by men, including men they know and trust. They also highlight a significant gap in who accesses the formal justice system – WJU's monitoring suggests that adult married women who suffer sexual and domestic violence apparently rarely use the formal justice

system for crimes of sexual violence. In only two cases was a married woman the victim, but in one case her husband was in West Timor at the time of the offence.

Possible reasons for married women not bringing sexual violence cases to the police include that rape in marriage is still not a crime in Timor-Leste so rape by a husband cannot be prosecuted, and also that rape outside of marriage is a source of deep shame. . In relation to crimes of domestic violence, it is likely that the nature of the crime itself, community attitudes and those of police and court actors that see domestic violence as a family or community problem. If these cases are being dealt with at all, it is likely that they are being handled through traditional justice.

Cases of male rape are not being heard at all by the courts in Timor-Leste. An obvious reason for this is that only women can be victims under the Indonesian rape provisions.

## **4. ANALYSIS OF GENDER-BASED VIOLENCE CASES**

### **A. Applicable Law**

The applicable criminal law in Timor-Leste in 2005 was the Indonesian Criminal Code (KUHP) and criminal procedure provisions contained in UNTAET regulations.<sup>7</sup> International general and customary law principles and certain treaties are also directly incorporated into the law of Timor-Leste under the Constitution.<sup>8</sup> At the time of writing this report, this system was in the process of being replaced by a new Timorese Penal and Procedural Codes but that had not yet come into effect. Even when the new system is in place, many legal concepts that arise in cases of rape and domestic violence will continue to be relevant. The following is a general outline of the broad legal framework before the changes. More specific law on particular issues is set out in the relevant sections below.

### **Domestic Violence**

Under Indonesian law, domestic violence is not a separate crime. Domestic violence cases are usually charged as “maltreatment” (also known in common law systems as assault or grievous bodily harm) or murder, depending on the injury suffered by the victim.<sup>9</sup> The “domestic” aspect of the crime is only considered as an aggravating factor in sentencing. Hence, where an accused is convicted of harming a family member, the sentence is increased by one-third. UNTAET Regulations and international law do not add anything further to how this law is interpreted.

### **Sexual Violence**

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<sup>7</sup> UNTAET Regulation 25/2001 on Amendment of Regulations 2000/11 (Organisation of the Courts) and 2000/30 (Transitional Rules of Criminal Procedure) (14 September 2001).

<sup>8</sup> According to the RDTL Constitution, Article 9:

1. The legal system of East Timor shall adopt the general or customary principles of international law.
2. Rules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette.
3. All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid.”

<sup>9</sup> Maltreatment is set out in sections 351-356 of the Indonesian Penal Code (KUHP). The code does not define maltreatment, but commentary to the section describes it as: “something which causes feelings of discomfort (suffering), pain, or injury.” R. Soesilo, *Kitab Undang-Undang Hukum Pidana: Serta Komentar-Komentarnya Lengkap*, Politeia Bogor, 1996.

The law of sexual violence in Timor-Leste is complex but also very progressive. The basic law is set out in the KUHP, which contains a number of crimes of sexual violence, most importantly rape and statutory rape:<sup>10</sup>

**Article 285:** Any person who with violence or threat of violence forces a woman who is not his wife to have sexual relations with him, will be punished, for the violation, with a sentence of imprisonment up to 12 years.

**Article 287: (1)** Any person who out of marriage has carnal knowledge of a woman who he knows or reasonably should presume that she has not yet reached the age of fifteen years or, if it is not obvious from her age, that she is not yet marriageable, shall be punished by a maximum imprisonment of nine years.

The application of KUHP provisions are subject to rule 34.3 of UNTAET Regulation 2001/25 On Transitional Rules of Criminal Procedure. Rule 34.3 sets out evidentiary requirements in sexual violence cases, a process for determining consent, and a definition of force:

In cases of sexual assault:

- (a) no corroboration of the victim's testimony shall be required;
- (b) consent shall not be allowed as a defence if the victim:
  - (i) has been subjected to or threatened with or has had reason to fear violence, duress, detention, or psychological oppression, or
  - (ii) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (c) before evidence of the victim's consent is admitted, the accused shall satisfy the Court (*in camera*) that the evidence is relevant and credible;
- (d) prior sexual conduct of the victim shall not be admitted as evidence.

Rule 34 was taken directly from the rules applied in the International Criminal Tribunals for the former Yugoslavia and Rwanda. It was "revolutionary" when it was introduced in the ICTY as it was the first time a clearly gender-sensitive and aware approach was explicitly set out in legislation.<sup>11</sup>

## B. The Law of Consent

The question of consent is central to most areas of law, including contracts or property law, which rely on the parties to an act both understanding and freely agreeing to take part.

Consent is also a key issue in cases of rape and other sexual assault and in the majority of such cases is the main issue which courts have to decide. In seven out of the ten decisions in sexual violence cases obtained by WJU, the defendant raised consent as a defence to the charge. That is, the defendant admitted that he had sexual intercourse with the victim but said that it was not forced; the victim consented. This is consistent with patterns in other countries too.<sup>12</sup>

There are three main issues with the concept of consent: What is consent? When does the court have to decide whether the victim consented? If so, what factors should courts take into account?

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<sup>10</sup> Indonesian law does not expressly prohibit rape in marriage or rape of a male.

<sup>11</sup> See eg. B. Bedont and K. Martinez, "Ending Impunity for Gender Crimes under the International Criminal Court", *The Brown Journal of World Affairs*, Vol. VI, Issue 1: 65-85. 1999.

<sup>12</sup> See B McSherry, "Constructing Lack of Consent" in P. Eastaerl (ed.) *Balancing the Scales*, Federation Press, Sydney, 1998.

## **What is consent?**

Consent means active agreement to something, or “free agreement”, usually indicated by some positive action. For example, consenting to the terms of a contract is shown by signing a document and is void if made under duress or misapprehension. In the law of sexual violence, consent has often been viewed much more broadly – for example silence has been sometimes interpreted as consent – but this view has been changing and courts internationally are requiring positive actions on the woman’s part to prove consent.

The ICTY case of *Prosecutor v Kunarac* makes one of the most definitive statements on this issue. The Chamber stated that consent must be: “given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.” The focus should be on serious violations of sexual autonomy, which occur when: “the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.”<sup>13</sup> Violence, threats, or taking advantage of the victim may be evidence of non-free consent.<sup>14</sup>

The KUHP rape provision Article 285 does not explicitly require lack of consent, but non-consent is implied by default by use of the term “force “. The courts in Timor-Leste have not defined consent in any of the decisions obtained by JSMP so it is difficult to see what approach courts are taking.

## **When Does the Court have to Address Consent?**

The second controversial issue in discussing consent and sexual violence is when courts must turn their minds to the issue – is it part of every rape case? UNTAET Regulation 2001/25 places the onus of raising and proving consent on the accused. Under Rule 34.3(b)-(c) consent is only an issue if the defendant raises it as a defence to the charge and he can only do this under certain circumstances. The rule sets out a chain of reasoning as follows:

1. Has the court found that the victim had sexual intercourse with the accused?
2. If yes, has the court found that she did so because she was forced by violence or threat of violence to herself or another?
3. If so, the charge can be proved. If not, has the defendant raised consent as a defence? That is, has the defendant admitted that he had sexual intercourse with the victim but argued that she consented?
4. If not, then the crime may be proved. If yes, has the defendant provided relevant and credible evidence that the victim consented?
5. If yes then he can raise consent as a defence and the court must decide considering all the evidence whether the victim consented.

Rule 34.3 was precisely intended to limit the cases in which the harrowing and difficult process of determining consent must be undertaken by courts. As one commentator on the ICTY noted:

[Article 34.3] protects the victim from flagrantly offensive allegations. By implementing a control mechanism, namely the judges, insinuations of consent cannot be used wantonly to harass a witness and impede honest testimony.<sup>15</sup>

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13 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, 2001, par 434.

14 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, 2001.

15 Fitzgerald K, “Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law”, *European Journal of International Law*, vol. 8, no. 4, 2003.

Consent was only an issue in three of the ten cases of sexual violence considered in this report. In these cases the defendant admitted having sexual intercourse with the victim and raised consent as a defence. In the other seven cases consent was not an issue because the accused admitted all charges, or he did not admit to sexual intercourse and so could not raise a defence of consent. In the remaining cases the victim was a minor and the statutory rape provisions, for which consent cannot be raised as a defence, were used to charge the accused.

However, detailed attention was given to consent in six cases, suggesting that it was considered where it was not necessary and that the courts are sometimes not correctly following Rule 34.3 or KUHP. In two cases, the victim was a minor and consent should not have been an issue because the law does not allow for consent in these cases (see below).

In another case, consent was considered unnecessarily because the accused denied all charges and so once it was found that sexual intercourse had happened with “force”, the charge should be proved. In that case a 17-year-old girl accused her father’s nurse of raping her. The defendant said that he had just been talking to the girl, that he did not have or attempt to have sexual intercourse with her. He did not raise consent as an issue. As a result, the focus of the case should have been whether sexual intercourse had taken place and whether there was force or threat of force, and not with the question of consent. The court spent much time looking at whether the victim had wanted to have sexual intercourse with the perpetrator and set out the relevant facts proving non-consent in detail (see discussion of factors below). This made the case more complex, and perhaps more traumatic for the victim, than it needed to be.

Further, although this report is not addressing procedural aspects of sexual violence cases, it should be noted that in no case monitored by JSMP has the judge taken evidence from the perpetrator or other witness in a closed court to determine whether the defence of consent can be raised.

### ***Was consent determined as a defence to a charge?***

In two of the cases in which consent was a real issue, the accused successfully proved that the victim had consented and was found not guilty of rape. In only one case was the defendant found guilty because he could not prove that the victim consented.

In the case in which the accused was found guilty, the Court took the correct approach as set out in Rule 34. In that case, the victim, who was 25 years old and had children of her own at the time of the crime, alleged that her father had raped her six times. Her father admitted to having intercourse with his daughter five times, but said that it was consensual. The Court, in a short judgement, immediately addressed whether the evidence of consent raised by the perpetrator was relevant and credible. It found the likelihood of a daughter freely agreeing to have intercourse with her own father so incredible that it refused to accept the accused’s evidence and the defence could not be raised. Accordingly, the accused was found guilty.

A different court, however, did not follow the reasoning process as set out in Rule 34 because it did not consider consent as a defence to a charge once the prosecution had proved that sexual intercourse took place, but rather as an essential element of the case. In the case, which occurred in Dili in 2003 and was heard in May 2005, the victim alleged that she had been forced to have sexual intercourse with two men.<sup>16</sup> She stated in her written

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<sup>16</sup> Dili District Court, 24/C.Ord/2003/PD.DIL, 18 May 2005.

statement that she had been visiting her brother in Dili but he was not home. She alleged that the two accused, who lived near to her brother but whom she had never met, called her over, invited her in and then raped her. Both accused admitted that each had intercourse with the victim but claimed that she freely consented to the acts.

The prosecution's evidence was very weak in this case because the victim did not attend the trial and could not be cross-examined, and the medical report found no evidence of injury suggesting force or violence. In JSMP's respectful opinion, it would have been open to the Court to find the accused not guilty on the grounds that the evidence of the prosecution was not enough to prove the charge, without the need to address the issue of consent.

Even if the Court did go onto considering the defence of consent, the reasoning under Rule 34 meant that the onus was on the two accused to bring evidence that was relevant and credible. What is "relevant and credible" is open to discretion, but in JSMP's view, evidence that a 17-year-old Timorese girl consented to intercourse with two complete strangers for no remuneration is highly incredible. It would have been open to the Court, in JSMP's respectful opinion, to note that such evidence was not credible but to still find both accused not guilty because the prosecution had not proved the charge.

### **Factors to take into account when considering consent**

Deciding whether or not a woman was forced (i.e. did not consent) to have sexual intercourse with the accused is one of the most difficult decisions in rape cases. Many factors can be considered – What was her state of mind? Did she verbally protest? Was there a physical struggle? Is her story believable? Different judges have given weight to different factors.

Rule 34 gives a general guide to what kinds of factors should be taken into account. It makes the test an objective one – what actually happened, not what did the victim or the accused believe was happening. It is not enough for the victim to say she had not wanted to have sexual intercourse, she must show that actual force was used, or that her belief that force or harm might be used against her or another was "reasonable". Similarly, it is not enough for the perpetrator to say that he thought the victim was consenting. He must bring evidence to show why he thought so, and the evidence must be "relevant and credible".

The courts have explained in several cases precisely what led them to find that the victim did or did not consent.

In the case mentioned above heard on 18 October in Oecusse, the Judge explained that none of the facts proved in the case indicated consent but many facts pointed to non-consent, including:

- The victim said in her statement that she did not consent
- Even the accused did not say that the victim consented (although he denied that anything happened at all)
- The victim had spoken of committing suicide following the incident, suggesting trauma
- The accused had entered the victim's room when she was asleep
- Physical force was proven to have been used by the accused – he had pushed her against the wall and pulled down her arms.<sup>17</sup>

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<sup>17</sup> Oecusse District Court, 18/C.Ord/TDO/2003, 18 October 2005.

In another case, the same court tried an adult man for rape of a 12-year-old girl. The victim claimed that the accused had raped her in his house when she went to the river to wash clothes. The defence stated that accused was in love with the victim and that she had wanted to have sex with him. The Oecusse District Court listed the following facts to show that the victim did not consent:

- The testimony of the victim was rich in detail and her demeanour was sincere
- Another witness testified that the victim was bleeding heavily from her vagina after the incident, suggesting force. According to the witness the victim bled for two months
- The victim is a child
- It was clear that the victim did not want to marry the defendant. The Judge stated: "the emphasis of the victim is to repudiate any idea of marriage or even financial compensation, according to the traditions of this country, demonstrating clearly the trauma resulting from the incident, which is not compatible with a consensual relationship."<sup>18</sup>

In a case decided by the Dili District Court,<sup>19</sup> in which the accused was found not guilty, the Court listed the following facts as persuasive in finding that the victim was not telling the truth and had consented:

- The demeanour of the suspect when giving his evidence was "sincere"
- The demeanour of the victim when giving her evidence was "studied, thoughtful and reflective"
- The victim's statement had factual irregularities that suggested her evidence was unreliable. Namely she said that she had not met the accused before the crimes occurred, which the Court said was unlikely because they lived near to each other.
- The victim had waited a year to report the crime and only reported the crime after the accused had refused to marry her.

From these examples and other cases monitored by JSMP, it seems courts in Timor-Leste are deciding the issue of consent in a number of ways. These include determining the general credibility of the victim and perpetrator, looking at medical reports and other objective evidence, and the behaviour of the victim after the alleged rape.

These factors are used by courts all over the world but each presents risks and should be used with caution and sensitivity. For example, witness demeanour has been shown to be a highly subjective and unreliable gauge of a person's honesty.<sup>20</sup> Difficulties in assessing the honesty of witnesses are even further compounded if there are cultural and gender differences. Many cultural reasons affect the way a young Timorese woman may present

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18 Oecusse District Court, 20/TDO/2005, 21 October 2005.

19 Dili District Court, 09/PID/2004/PD.DIL, 15 July 2005.

20 The Hon Justice Kirby AC CMG, 'Judging: Reflection on the Moment of Decision', TJR, vol. 4, 1999, p. 189 at p. 193; Re, L,'Oral Evidence v Written Evidence: The Myth of the "Impressive Witness"' (1983) 57 ALJ 679; Timothy R Levin, Hee Sun Park and Steven A. McCornack, 'Accuracy in Detecting Truth and Lies: Documenting the "Veracity Effect"', Communication Monographs, vol. 66(2), 1999, p. 125; Chih-Chen Lee, 'The Effect of Levels of Probing on the Detection of Deception in Audit Oral Evidence', Dissertation Abstracts International, vol. 61(8-A), 2001, p. 3243; and Paer Anders Granhag and Leif A. Stroemwall, 'Deception Detection Based on Repeated Interrogations', Legal and Criminal Psychology, vol. 6(1), 2001, p. 85-101.

herself when facing an unfamiliar and male-dominated courtroom and discussing a highly personal and, in her mind, shameful experience. These reasons are probably not clear to an international judge. In JSMP's respectful view, behaviour that is "thoughtful and reflective" could mean a whole range of emotional states, not just that a witness is lying. To decide the case on this basis risks relying on numerous gender and cultural stereotypes that could be misleading.

Further, relying on a victim's conduct after an alleged incident to assess whether a crime was committed opens the court up to relying on assumptions and gender stereotypes about what "normal" behaviour would be. For example, in the case above, the court found it meaningful that the victim had not reported the rape until a year after the incident, however many studies have shown that victims of sexual violence often do not report the crime immediately.<sup>21</sup> As another Judge of the District Court in Timor-Leste recognised:

It's absolutely comprehensible, to anyone with a minimum capacity of comprehension and discernment, that there are a dozen reasons why a young girl who has become the victim of a violent act would not want to talk of this...including her shame, the embarrassment and the fear which are all characteristics of victims of sexual abuse.<sup>22</sup>

The fact that the victim waited until her pregnancy was visible to tell her parents and a year to report the crime is not necessarily evidence that she is fabricating the rape and could very well be evidence of the shame and trauma she experienced because of the rape.

### ***Where are the objective factors?***

In determining the question of consent, surprisingly little attention is given to what actually happened during the alleged crime: Did the victim protest? Did she cry, scream or shout? Were any threats made? Was there physical force? Showing that the victim's evidence is generally unreliable, or that her behaviour after the incident is unusual, are only some of the factors the court should consider and should not be the focus of the court's inquiry. The objective facts of what happened, in JSMP's respectful view, are the factors envisaged by Rule 34.3 to determine consent. That is the prosecution must provide evidence of force or threat of force or reasonable belief that the victim or another would be subjected to this. Further the accused must provide relevant and credible evidence that the victim consented.

Sometimes these objective facts were considered, as shown above, such as whether the victim was asleep when the accused entered her room and whether physical force was used. But in general, little weight or discussion is given to these facts in any of the decisions reviewed by JSMP. For example, in the case from the Dili District Court discussed above, the victim alleged that the accused had raped her five times, but he said that they were in a relationship and had consenting sexual intercourse which led to her pregnancy. At no point in the decision did the judge make findings on what happened in any of the incidents of sexual intercourse to determine whether they were consensual. Rather he relied on the general assessment of the credibility of the witnesses.

By not relying on, or even making findings on the facts of what happened between the victim and perpetrator, courts are not fulfilling their obligations under Rule 34.3.

### **Sexual Assault of Minors**

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21 Office of Violence Against Women "Myths and Facts about Sexual Violence", The American Academy of Experts in Traumatic Stress, <http://www.aaets.org/article119.htm>

22 Oecusse District Court, 20/TDO/2005, 21 October 2005.

Because half of the victims in the cases monitored by JSMP in this period were minors (under 15 years), five of whom were victims of sexual violence, JSMP also looked at how the statutory sexual assault provisions were implemented by the district courts in 2005.

Sexual assault of a minor amounts to statutory sexual assault punishable by a maximum of nine years imprisonment.<sup>23</sup> The penalty for statutory rape increases to a maximum of 12 years, the same as for ordinary rape, where the victim suffers “serious injury”.<sup>24</sup> Statutory sexual assault is much easier to prove than ordinary rape because consent is irrelevant. To prove statutory rape the prosecutor only needs to show that an act of “carnal knowledge” happened between the accused and the victim and that the accused knew or should have known that the victim was aged less than 15 years. The prosecution does not have to show that the accused used violence or forced the victim. Because consent is not examined in statutory rape cases, cross-examination can be less traumatic for the victim.

The cases monitored show that:

1. The prosecution is properly using the statutory rape provisions to charge the accused where the victim is a minor. In all cases where the victim was a minor, the accused was charged under Article 287.1, although in some cases as an alternative charge.
2. In all cases where the victim was a minor the accused was found guilty, although in one case the conviction was under the ordinary rape provision, not statutory rape.
3. In most cases where the court relied on Article 287.1, it did not consider consent.

For example, in one case tried in Suai, a six-year-old victim accused her adult brother-in-law of raping her. The Court looked at the evidence of the child and her mother as well as the medical report to determine that sexual assault had occurred. The Court did not look at whether the act had been forced. It found the defendant guilty under Article 287.

In another cases, consent was considered even where the rape was of a minor. The minor was 12 years old and claimed that the accused had picked her up from the Liquica market where she was sleeping, carried her to a nearby river and raped her. The accused said he had asked the girl to have sexual intercourse and she had agreed but asked for money. The accused admitted that they had sexual intercourse and, given the victim was obviously a child; this would be enough to prove statutory rape. Nevertheless, the court stated that the injuries to the victim suggested non-consent and took the statement of the victim as evidence that she was forced. In JSMP’s respectful view, even discussing whether the victim consented in a statutory rape case may give the erroneous impression that sexual intercourse with a minor is acceptable if she consents.<sup>25</sup>

The Court used Article 285 not Article 287 in the Oecusse case described above (in which the 12-year-old victim was raped by a man who said he was in love with her and that she consented). The prosecution had brought both charges as alternatives. The Court said in the decision that it chose Article 285 because the child was injured during the rape and article 285 includes an element of violence and thus a higher maximum sentence. JSMP acknowledges the difficulty faced by the court in this case. As the requirement for “serious injury” under Article 291 is high, it might not have been proved in this case so the maximum

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23 Article 287 (1) Any person who out of marriage has carnal knowledge of a woman who he knows or reasonably should presume that she has not yet reached the age of fifteen years or, if it is not obvious from her age that she is not yet marriageable, shall be punished by a maximum imprisonment of nine years.

24 Article 291, KUHP. Under Article 90 of KUHP, the definition of “serious injury” includes, among others, any injury which is permanent or which endangers the life of the victim, or prevents the victim from continuing his or her work, or causes psychological damage for longer than four weeks.

25 Dili District Court, 50/C.ord/TDD/2005, 4 October 2005.

sentence available would only have been seven years. However, using the ordinary rape provision opened the child victim to the difficult process of cross-examination on consent, which may only have increased her trauma. It also gives the impression to the community that it is acceptable to have intercourse with a child under 15 if she consents.<sup>26</sup>

Overall, however, JSMP notes that prosecutors and courts are very aware of the special needs of child victims and are using the law in the best way to accommodate these.

### **C. “With violence or threat of violence...”**

Another controversial concept in sexual violence cases is whether force, and what kind of force, is needed to show that a case is rape rather than free sexual intercourse. This has legal implications, but also practical evidentiary implications as discussed below.

#### **Legal definitions of “force”**

Indonesian law requires that the prosecution prove that the accused use “force or threat of force” to make the victim have sexual intercourse with him, to prove the charge of ordinary rape.<sup>27</sup> Commentary to the Indonesian Penal Code states that “force” is physical force only,<sup>28</sup> but Indonesian law must be read subject to UNTAET Regulations and international law.

Rule 34.3, of UNTAET Regulation 2001/25 refers to a much broader concept of force involving psychological force, as well as fear of harm to another:

[Where the victim] (i) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or (ii) reasonably believed that if the victim did not submit, another person might be so subjected, threatened or put in fear.

This is the approach taken in international criminal law. For example, the chamber in the International Criminal Tribunal for Rwanda case of *Akeyasu* stated: “Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion.”<sup>29</sup>

The Special Panels for Serious Crimes in Timor-Leste adopted this broader definition when it considered the rape case of Francisco Soares. It said: “the law does not require physical force”, and held that the general circumstances in which the act occurred could constitute force or the threat of force (for example the violence of 1999, and the fact that the defendant was a militia leader).<sup>30</sup> Further, the Special Panels gave more weight to whether there was consent, not whether the accused used physical force. It said: “this Court considers as

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26 Oecusse District Court, 20/TDO/2005, 21 October 2005.

27 Article 285 of KUHP uses the word “kekerasan” which literally means “violence”. However, as the accepted English translation has used the term force, that will be used here also.

28 Commentary to the Indonesian Penal Code described “kekerasan” in Article 89 as “the use of energy or physical strength in an improper way”.

29 International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T (Sept. 2, 1998)

30 Special Panels Case 14/2001, paras. 42-44.

persuasive the absence of consent as the central element of the definition of the crime of rape.”<sup>31</sup>

The courts in Timor-Leste have taken a consistent approach to the concept of force, but not one which agrees with the definition under Rule 34.3 or international law. In a number of decisions obtained by the WJU, the court clearly defined force in purely physical terms. For example in one case the Dili District Court stated that Article 285 is:

Sexual relations with the victim where the aggressor uses violence or threats with the practice of *violent acts against the victim that puts the victim in a position of incapacity to resist*<sup>32</sup>.

In another case from Oecusse, the Judge explained:

The use of force is the use of a man’s strength which is greater than a woman’s in order to have sex with her against her will.<sup>33</sup>

A similar approach has been implicitly taken in other cases. For example, in two cases, the defendant pulled on the arms of the victim, he pushed the victim, or he was clearly bigger than the victim and could overpower her. This was described as force.

JSMP respectfully submits that these definitions of force are still too narrow to be in accordance with international law, or the correct interpretation of the law in Timor-Leste, as defined by the Special Panels. As the Special Panels noted, the Indonesian provisions should have been considered in light of Rule 34 which includes duress, detention, psychological oppression or the fear of such harm being suffered by another.

It is difficult to know if this broader definition would have affected the outcome in other cases because such factors were not considered by the Court.

### **The difficulty of proving physical force**

As well as for legal reasons, practical considerations also suggest that the definition of force should be seen more broadly. In particular, it is very difficult to prove physical force unless real scars or bruises are left after an incident. As one international researcher stated:

The effect [of requiring physical force] is to require conclusive physical evidence of force or some other 'physical' corroboration of the victim's testimony, in order to sustain a rape conviction. The unenviable choice for women then, is to sustain extensive physical injury in addition to the rape, or to risk disparagement and disbelief.<sup>34</sup>

Clearly, injuries may be used as evidence of force or non-consent. This was demonstrated in decisions in Timor-Leste in the last six months. In two cases, the court accepted that violence had occurred. In these cases the victim was a minor and her hymen was broken as

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31 Special Panels Case 14/2001, paras. 69.

32 Dili District Court, 09/PID/2004/PD.DIL, 15 July 2005.

33 Oecusse District Court, Case No. 18/C.Ord/TDO/2003, 18 October 2005.

34 Donna Stuart, “No Real Harm Done: Sexual Assault and the Criminal Justice System”, in P. Eastaer, Without consent : confronting adult sexual violence : proceedings of a conference held 27-29 October 1992, Canberra, Australian Institute of Criminology, 1993

a result of the rape, which caused heavy bleeding. Evidence of bleeding and damage was taken as evidence of violence.<sup>35</sup>

However, lack of physical injury cannot be taken as evidence of consent or lack of force. The crime may not leave marks or cause injury to the woman's body, particularly if psychological pressure is used or even if she was not a virgin and so her hymen was not broken by the rape. In one case in 2005, the court gave much weight to a medical report which stated that there was no injury to the woman's genitalia except for an old scar.<sup>36</sup> In JSMP's view, however, this does not necessarily mean that rape did not occur, just that there is no evidence of physical injury.

Threats are even harder to prove. In one case the Suai District Court held that although the victim claimed that her face was covered with cloth and she was threatened with a machete during the rape, it was her word against the suspect's and the Court stated that it was bound to believe the accused where the evidence was not clear. It is difficult to know what the victim in this case could have done to prove the threats of violence occurred, given that the rest of her testimony was held to be credible.

The WJU accepts that violence is a part of the current legislation and is likely to be part of the new penal code, but urges the court to consider the issue of consent as central to a charge of rape, rather than clear evidence of physical violence.

#### **D. Evidence in GBV cases**

Evidence is a challenging aspect of prosecuting crimes of sexual assault and domestic violence. Due to the nature of these crimes, very often there are no witnesses and it is left to the word of the victim against that of the perpetrator.

Under UNTAET Criminal Procedure rules the accused must provide his testimony and be cross-examined and then both sides have the right to call evidence and cross-examine. The UNTAET provisions are progressive in that no corroborating evidence is required to support a victim's claim that sexual assault occurred.<sup>37</sup> Further, evidence of a woman's prior sexual conduct is not admissible.<sup>38</sup>

#### **Testimony**

The evidence submitted in rape and domestic violence cases monitored by JSMP is usually scant. The Court is left to rely mainly on the testimony of the perpetrator and victim and sometimes on witnesses. The WJU is not aware of any expert evidence in cases of gender-based violence.

WJU commends the courts, however, for abiding by the restrictions on evidence set out in Rule 34.3. In no decision analysed by the WJU was the prior sexual conduct of the victim admitted and taken into consideration by the court. Further, the courts did not require corroborating evidence to prove the charge of rape, although, of course where witnesses were available the case was strengthened.

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35 Dili District Court, 50/C.Ord/TDD/2005, 4 October 2005; Oecusse District Court, 20/C.Ord/TDO/2005, 21 October 2005.

36 Dili District Court, 24/C.Ord/2003/PD.DIL, 18 May 2005.

37 UNTAET Regulation No. 2001/25 amending UNTAET Regulation No. 2000/30 on the Transitional Rules of Criminal Procedure, Article 34.3(a)

38 Ibid, Article 34.3(d)

The new Code of Criminal Procedure does not explicitly place these limits on evidence in sexual violence cases, but requires that evidence admitted be “relevant” and not be “suggestive or impertinent”, which could be read to accord to the principles underlying Rule 34.3.<sup>39</sup>

WJU noted above that significant weight was given to the manner in which evidence was given to the court. Decisive findings were often made on the clarity with which a witness spoke and the “honesty” of their presentation. WJU again points to the considerable research on the dangers of relying solely on witness demeanour, particularly in cross-cultural situations.

### **Medical and Other Expert Evidence**

The collection and analysis of medico-legal evidence is of crucial importance in securing convictions in cases of sexual assault and domestic violence. Meticulous documentation of physical and psychological harm can be decisive in building a criminal case against a perpetrator of violence. But in order for the system to work properly, forensic doctors must be trained to conduct a thorough examination, ask the right questions, handle the physical evidence in an appropriate manner, and testify as to their findings.<sup>40</sup>

In five of the 13 decisions obtained by WJU, a medical report was tendered as evidence in the case. This evidence was decisive in all of these cases.

For example, in a case heard in Suai in August 2005 mentioned above, the victim was a six-year-old child who claimed to have been raped by her adult brother-in-law. She had run from the place where the event was alleged to have happened and told her mother, who then took her to a clinic for an examination. The medical report stated that there were some small abrasions around the child’s vaginal area. On this basis the Court found that attempted rape but not rape had occurred.

In another case heard in Dili in May, the victim (who did not attend the trial) was found to have falsely accused the two defendants, partly because of the contents of the medical report prepared soon after the alleged incident. The report noted only old scars around the vaginal area, not evidence of recent forced sexual intercourse.

Given the weight that is attached to medical evidence, it is important that doctors carrying out the examinations are well-trained in both examination and report writing. Unfortunately JSMP is aware that specialised training has been provided to only one doctor in all of Timor-Leste, who works in Dili. Victims in the districts are left to go to local health clinics where doctors are completely untrained in medical examinations for court purposes. Further, the reporting form (forensic protocol) has not yet been approved by the Ministry of Health so that doctors and nurses are using their own forms and language to describe what they see.<sup>41</sup> Not only does this mean there could be confusion or error in the physical examination, it also means that victims are not receiving a psychological health assessment. This diminishes significantly the strength of the medical evidence.

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39 Criminal Procedure Code, Article 129.

40 Human Rights Watch, *Stopping Violence Against Women: What will it take?*  
<<http://www.hrw.org/backgroundunder/wrd/fiveplus.htm>>, June 2000

41 The forensic protocol has received tacit approval from most relevant parties and should come into practice in 2006. WJU interview with Emily Roynstead, international adviser to Pradet Timor-Lorosae, 16 December 2005.

JSMP urges the Ministry of Health to finalise the reporting form and process as soon as possible and to provide special training to all community health doctors in how to conduct an examination.

Also, medical evidence is just one form of expert evidence which can assist a court to make an informed decision. The role of the expert has been defined as:

The function of expert witnesses is to inform the...judge...of matters about which its lack of specialist skill or experience would leave it ignorant. It is intended to substitute knowledge for speculation.<sup>42</sup>

For this reason, in most jurisdictions expert witnesses are called to present their evidence to court so that they can explain and be cross-examined on their reports. In none of the cases monitored by JSMP in which a medical report was relied upon was the doctor called to give his opinion to the court. This clearly opens medical reports up to misinterpretation, particularly where they are written in a language other than Portuguese and are then translated by non-medical professionals for the court.

JSMP notes also that there is scope for medical professionals to give expert opinions on other issues relevant to sexual violence cases, such as the mental health of particular victims and the impact of violence on victims' mental wellbeing generally. Such evidence goes to both prove the charge and to the gravity of the offence, but in some cases is not being considered at all.

As most judges are also working within a very different cultural context to their own, courts could also call expert evidence on cultural issues to explain the behaviour of the victim or perpetrator. For example, in one case monitored by WJU staff the Judge found it meaningful that the victim had wished to marry the perpetrator and reported the crime only after the marriage was refused. However, traditional justice mechanisms are commonly used prior to using the formal justice system (see below) and marriage is a common traditional solution offered in rape cases to remove the shame of the act.<sup>43</sup> This is not to say that the Judge's decision was wrong on the particular facts of this case, but that prosecutors could consider leading expert evidence to put the actions of the victim into a cultural context.

In summary, JSMP observes that the evidence used in sexual violence cases is still highly rudimentary, usually just the testimony of the victim and the accused. Where other evidence, such as medical reports, is admitted as evidence they are not always prepared by medical professionals and the writers of the reports are not called to explain their findings. Psycho-social and cultural evidence is often completely left out of the equation.

## **E. Sentencing**

One of the most concerning issues highlighted in JSMP's previous report on decisions in cases was sentencing. In JSMP's last analysis of cases between June 2004 and March 2005, JSMP found that sentences were too low considering the crimes that perpetrators had committed.<sup>44</sup>

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42 Samuels G, "Medical Proof and Legal Truth", *Medical Journal of Australia*, (1998) vol. 168, pp 84-87.

43 See E. Harper, "Beyond Brahimi: Lessons Learned From East Timor On The Development Of A Model United Nations Legal Code", *European Journal of International Law*, Prev: 8, 2006/02/08 11:46.

44 JSMP, *Decisions of the Dili District Court June 2004-March 2005*, Dili, April 2005.

The sample of cases in both reporting periods is too low to make any kind of useful statistical analysis, but it does not appear that the situation has changed since the last reporting period. In this section, the WJU looks at the law of sentencing and the general factors taken into account by district courts in Timor-Leste.

## **Law of Sentencing**

Sentencing affects the way communities think about the justice system and is one of the main ways that they decide whether the system is just. Sentences play many social roles, but two of the main ones are punishment and social reprobation for crimes, and deterring others from committing similar crimes. As the Special Panels for Serious Crimes said:

The penalties imposed...are intended, on the one hand, as retribution against the said accused, whose crimes must be seen to be punished [and] to act as deterrence; namely, to dissuade forever, others who may be tempted in the future to perpetrate such atrocities.<sup>45</sup>

The Indonesian codes do not legislate the way to decide sentences, although it is clear that the circumstances of the suspect can be taken into account.<sup>46</sup> General international custom is to look at the maximum sentence for the crime, then look at the usual sentence for that crime of a similar gravity, and then look at factors which aggravate and factors which mitigate the crime.

Under Indonesian law, maximum sentences are set out in KUHP. For example:

| <b>Article of KUHP</b> | <b>Crime</b>                                                                              | <b>Maximum Sentence</b>                                                                                                   |
|------------------------|-------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------|
| 285                    | Ordinary Rape                                                                             | 12 years                                                                                                                  |
| 287, 291               | Statutory Rape                                                                            | 9 years, 12 years if causes serious injury, 15 years if causes death.                                                     |
| 351, 353               | Maltreatment                                                                              | 2 years and 8 months, increased to 4 years if premeditated, 5 years if causes serious injury and 7 years if causes death. |
| 352                    | Minor maltreatment                                                                        | 3 months                                                                                                                  |
| 354, 355               | Serious maltreatment                                                                      | 8 years, 10 years if causes death, 12 years if premeditated                                                               |
| 356(1e)                | Domestic violence (ordinary or serious maltreatment of accused's parent, spouse or child) | Sentence increased by one third.                                                                                          |

Mitigating and aggravating factors depend on each case and even international criminal law does not have commonly agreed factors to take into account. The Special Panels for Serious Crimes was required to: "have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals"<sup>47</sup> including the ICTY and ICTR in sentencing perpetrators of serious crimes for 1999. Under UR 2000/15, they had to: "take into account such factors as the gravity of the offence and the individual circumstances of the convicted person".<sup>48</sup>

<sup>45</sup> Special Panels for Serious Crimes, *The Prosecutor v Sabino Gouveia Leite*, Case No. 4B/2001, 2 December 2002, at p. 43.

<sup>46</sup> "In determining the aggravating and mitigating factors in sentencing, the Judge is obligated to consider the positive aspects and negative aspects of the accused." UU No. 14 1970 On the Main Principles of Judicial Authority, Article 27(2).

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<sup>48</sup> Section 10.2 of Untaet Regulation 2000/115.

## **Aggravating Factors**

The aggravating factors varied between the cases that JSMP monitored. The KUHP sets out provisions to increase sentences where certain factors are present, for example premeditation, where the victim is a member of the accused's immediate family, or where the crime caused serious injury or death (see table above).

These aggravating factors were generally taken into account sentencing decisions. For example, in a case decided by the Dili District Court in which a young man beat his mother while she was preparing for church, the Court noted that:

- The suspect did not confess and did not express remorse
- The accused had deliberately harmed his mother and damaged her personal things
- The victim was injured and had to go to hospital as a result of the crime
- The accused threatened and verbally abused the victim after the attack.

The court found that the maximum sentence for maltreatment was two years and eight months imprisonment which increased to three years and five months because the victim was the accused's mother. The court decided on a sentence of one year and six months after taking all factors into account.<sup>49</sup>

Other aggravating factors were taken into account by courts, even though they are not specifically provided for in KUHP. In four of the six cases in which the victim was a minor, the court took this fact into account as making the crime more serious. In five of those six cases, the perpetrator was a person who the victim knew and trusted and in four of those cases, the breach of trust also made the crime more serious.

In some cases the court took the impact of the crime on the victim into account. In several cases, the court noted that the victim was traumatized following the crime and that her future was compromised.<sup>50</sup>

Yet despite these issues being raised in sentencing decisions, they do not seem to be increasing sentences handed down to perpetrators in GBV cases. For example, in a case of detention and multiple rape of a 12-year-old girl, who was the accused's step-daughter, and in which it was shown that the accused used physical force and threats of death to commit the crime, the convicted accused received only a two-year suspended sentence and was allowed to return home to his village (although on the condition that he not contact the victim). The maximum sentence for this crime, statutory rape, is nine years for just one rape alone. In JSMP's view the many aggravating factors in this case are not reflected in the sentence at all – even if the sentence was still suspended taking into account the circumstances of the accused, it should still have been higher than just two years<sup>51</sup>

## **The circumstances of the convicted person (mitigating factors)**

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49 Dili District Court, Case No. 39/C.Ord/TDD/2005, 18 July 2005.

50 Suai District Court, Case No. 40/C.Ord/TDS/2004. 11 October 2005; Oecusse District Court, Case No. 50/C.Ord/TDO/2005, 4 October 2005; Case No. 18/C.Ord/TDO/2003, 18 October 2005; and Case No. 20/C.Ord/TDO/2005, 21 October 2005.

51 Suai District Court, Case No. 40/C.Ord/TDS/2004. 11 October 2005.

The main reason for the low sentence in the case above was consideration of the circumstances of the accused. The sentence was suspended because the accused was an elderly man and the Court decided that a prison sentence would have been equal to a death sentence.

In the cases monitored by JSMP during the period of this report, the district courts took a comprehensive approach to assessing the circumstances of the accused and respected the rights of the accused. The factors taken into account by the courts to mitigate sentences were quite similar across the cases monitored. They included:

- Whether the defendant had a previous criminal record
- Whether the defendant had admitted any of the facts of the crime. This was so even where the defendant, for example, admitted having sexual intercourse with the victim but denied that it was forced. The more the defendant admitted, the more it was a mitigating factor.
- Whether the defendant expressed remorse for his crime.
- Only two cases looked at the personal circumstances of the perpetrators, both in respect to their age. In one, the accused was a minor and still at school and in the other he was elderly and in poor health. These were considered mitigating factors in both cases.
- Sentences were reduced also where the crime was only an attempt, or where there was not an intention to commit the crime.

These factors seemed to have had more influence on the sentence, or be given more weight, than the aggravating factors. As well as the case above, in another case a young man (a minor) killed his adoptive sister by throwing a log at her head because she did not prepare him food on time, and was sentenced to four years in prison. This was because he did not intend to kill her (and so the murder charge was reduced to assault resulting in death), but also because he was young and had not previous criminal record. That the victim was even younger, that he violated his position of trust as an adopted older brother, and his abused his power over the victim who was effectively adopted as a servant to the family, was not mentioned at all by the court.<sup>52</sup>

### **The interests of the victim**

The interests of the victim traditionally have not been a focus of the retributive or courtroom model of justice. Such justice, as mentioned above, is directed more to punishment of the perpetrator and making a social statement about what is acceptable behaviour.

This has changed over the last few decades as victim advocates have demanded that victims' interests be taken into account by courts. Now, in many countries, victims have the right to address the courtroom about the impact that a crime has had on their life. International standards also advocate for victims' concerns to be considered. For example, the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* includes that:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:  
Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their

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<sup>52</sup> Baucau District Court, Case No. 26/PID.S/2005/TD.BCU, 23 November 2005.

personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.<sup>53</sup>

JSMP notes that several decisions had an attached statement on the impact of the crime on the victim and in these cases the court gave more detailed attention to the victim's circumstances. In other cases the interests of the victim were given much more cursory attention, for example in the case where the son beat his mother above, no description on the impact of the crime other than the immediate physical injury was discussed.

One way to ensure that victims' voices are heard in the court process would be to formalise this and require a victim impact statement to be submitted to the court as part of the case file.

### **Non-custodial sentences in GBV cases**

Another way of recognising victims' interests in sentencing is in handing down non-custodial sentences as well as or in place of prison sentences. Many victims of domestic violence do not bring their cases to court because they rely on the perpetrators for economic support. Further, sexual violence in Timor can ruin a victim's chances of marrying in the future, and thus also damages her economic position. For these victims, incarceration of the perpetrator is not necessarily of great benefit.

Two decisions of the Oecusse District Court in 2005 recognised the material needs of victims and ordered compensation under Article 49.2 of UNTAET Regulation 30/2000 amended by UNTAET Regulation 25/2001. In one case in which a minor was raped by a stranger the court commented in its sentencing considerations: "in Timor-Leste, it is publicly known that the future of a young female victim of sexual violence will be totally compromised, including financial aspects." Accordingly the Court ordered the accused to pay the victim \$1000 as reparations for the damage to her marriage prospects and her pain and suffering.

This is a creative way of making the formal justice system more relevant to victims of GBV and the WJU hopes to see it used in other such cases.

### **F. Traditional Law (*Adat*)**

Another way of making the formal justice system more relevant to the community is by recognising local traditional law (*adat*). *Adat* is a traditional justice system that operates alongside the formal legal system in Timor-Leste and is acknowledged as a source of law in the Constitution.<sup>54</sup> It operates at the local level, from within the family and up to the sub-district, depending on the seriousness of the crime. The processes involve local elders and the families of the perpetrator and victim and promote reconciliation more than punishment or deterrence. According to studies and WJU's own research, victims and their families regularly use *adat* to deal with crimes of violence against women.<sup>55</sup>

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53 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. 40/34, annex, 40 U.N. GAOR Supp, UN Doc. A/40/53 (1985).

54 "The State shall recognize and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law", RDTL Constitution, Article 2(4).

55 See eg. JSMP, JSMP Training Program 2005: Report, Reflection and Recommendations, Dili, February 2005; A. Swaine, International Rescue Committee, Traditional Justice and Gender Based Violence, Dili, August 2003; See above, E. Harper.

The *adat* system is not regulated in Timor-Leste and varies significantly between regions, although most regions share common principles. Studies have found that women are hardly involved in the system and that the system is often in fact biased against women and women are not guaranteed “justice” if they bring a complaint to a local justice hearing.<sup>56</sup> Also, it is very likely that depth of reasoning and quality of justice differs between villages. For these reasons the WJU, along with most international organisations in Timor-Leste, has advocated that victims and communities should bring cases of gender-based violence to the formal system rather than rely on traditional law.

From WJU’s own observation, this push has not been very successful, partly because the formal justice system itself does not sufficiently address the needs of victims and communities – it has been long and slow, held in a different language from local languages, and rarely takes note of the fact that women who send their husbands to prison are left in serious financial difficulty, or that rape ruins women’s chances of marriage and financial security.<sup>57</sup>

Until now, the two systems have been viewed as separate and often in opposition. This separation may be changing, however. Of the 13 cases monitored by the WJU, four cases had also been through an *adat* process as follows:

| No. | Date and Court of Decision           | Facts                                              | When <i>adat</i> used                                                                                                           | How used in Court                                                                                                                                                      | Court’s Decision                                                                                                                                                |
|-----|--------------------------------------|----------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1.  | 4 October 2005, Dili District Court  | Rape of a minor by a stranger in the local market. | Family of accused approached victim’s family but they refused and took case to police. Negotiations continued until sentencing. | The parties came to an agreement and asked the court to dismiss the case to resolve traditionally.                                                                     | The Court agreed to delay the trial for the negotiations to take place but said that it must decide on crimes brought before it.                                |
| 2.  | 11 October 2005, Suai District Court | Rape of a minor 3 times by her step-father.        | <i>Adat</i> tried first but no solution found so case taken to police.                                                          | Not used                                                                                                                                                               | Court decision did not mention.                                                                                                                                 |
| 3.  | 18 October 2005, Oecusse Court       | Rape of a 17-year-old by the local nurse.          | <i>Adat</i> tried first but no solution found so case taken to police.                                                          | The prosecutor sought to bring evidence from the local chief that the accused confessed during the <i>adat</i> process.                                                | The court allowed the evidence of the local chief and relied on it as one factor in finding the accused guilty.                                                 |
| 4.  | 22 November, Oecusse Court           | Rape of a minor by a male relative.                | <i>Adat</i> process began after the police were involved and suspect arrested.                                                  | The defence informed the court that the <i>adat</i> process had come to an agreement between the families and asked the court to take this into account in sentencing. | The court took the agreement into account, giving a custodial sentence but also ordering payment of the remainder of the accused’s debt to the victim’s family. |

These cases reveal that:

- Communities view *adat* and the formal system as operating alongside each other and see no contradiction in seeking justice through both systems at the same time.

<sup>56</sup> See above, Swaine at p. 2; and T. Hohe and R. Nixon, *Reconciling Justice: Traditional Law and State Justice in East Timor* (Final Report), United States Institute of Peace, 2003.

<sup>57</sup> See Above, E. Harper.

- Parties are bringing outcomes of traditional justice processes into the courtroom to affect decision-making.
- Courts are accommodating traditional negotiations but have maintained the supremacy of the formal system by, for example, not dismissing a case to be resolved by traditional means.
- Traditional law can potentially affect cases in the formal system in a multitude of ways including evidence and sentencing.
- In these cases at least, the ways that the courts have recognised *adat* has benefited the victim.

In one case the court also recognised the broader restorative community role played by the justice system, a role normally associated with restorative justice process like *adat*. The decision stated:

[T]he victim is not suffering the disapproval of her society for meeting with a man inside her home...The rejection that the victim suffers is because the problem has not been resolved definitively, the act of the accused that he says he is guilty of and that he intends to make an agreement [to resolve], leaves it clear to the small community in which the victim lives that she was sexually violated by him...The family of the victim has not accepted the agreement in the form proposed by the accused, the case is still open, without solution, it means that the local society and honour of the victim is not repaired, she is seen as spoiled and is not accepted, including not attending school as she was expelled after the incident.

The criminal conduct of the accused has created a social disequilibrium which the victim and her family must resolve through the sentencing of the accused.<sup>58</sup>

The relationship between the formal justice system and *adat* is still being worked out, but these developments suggest that there is much potential for the two systems to complement each other. They also raise issues that need to be resolved for this to work effectively. For example, to what extent does a perpetrator face double jeopardy if he or she is tried by both systems? Similarly, is it fair that a defendant pays traditional law sanctions as well as be sentenced by a court? The solution of the court, of taking the civil sanction into account in deciding the custodial sentence, may be one way of resolving this conflict.

Further there are questions of confidentiality. If traditional dispute resolution processes are to be seen as similar to mediations, anything admitted within them would be confidential. Should defendants be warned in advance that their admissions before local leaders could be used against them in court?

The use of traditional law alongside the formal system is not unique to Timor-Leste; it is a challenge to many developing legal systems, particularly those emerging from an oppressive regime where the formal system is not trusted.<sup>59</sup> JSMP looks forward to further research and exploration into how the traditional system in Timor-Leste can work with the formal system, and thus give people a greater sense of confidence that their legal system represents them and delivers justice.

## 5. Conclusion and Findings

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58 Oecusse District Court, Case No. 18/C.Ord/TDO/2003, 18 October 2005.

59 See eg K. Kinoti, "When culture overrides the law: Does 'rights talk' always get results?", Resource Net, Issue 257, 13 January 2006.

The justice sector has received considerable international support since independence and in 2005 saw significant improvements the administration of justice, such as court sittings being scheduled more regularly, particularly in the courts outside of Dili, more attention being given to legal reasoning by international judges, and the drafting of a new criminal law framework for Timor-Leste which will commence operation in 2006.

Courts are now handling GBV cases on a regular basis and are handing down detailed and considered decisions. Because of this and the changes and developments that have occurred in the justice sector in 2005, now is an important time to consider and reflect on the way that the district courts are treating GBV cases.

This report has taken a conceptual approach to case analysis so that the findings will, as much as possible, continue to be relevant under the new criminal law system entering into effect in Timor-Leste. The five topics selected for analysis are common to many legal systems dealing with violence against women, but are often complex and controversial; we hope this report has shed some light on some of these complexities.

Overall the WJU commends the courts for attending to the efficient disposal of GBV cases and to increasing the depth of judicial-decision making from previous periods. Further, it is clear that many court actors recognise the needs and realities of victims and attempt to understand the cultural context in Timor-Leste, including traditional law. Some decisions handed down in 2005 referring to traditional law were progressive internationally and raise interesting possibilities for development and interaction of traditional and formal justice sectors in the years to come.

Many of the problems identified by the WJU in this report are the result of the continuing process of development of the judicial system in Timor-Leste and the realities of justice on the ground: very short trials relying mainly on witness testimony and with little time to write decisions, the poor quality of medical evidence due to a lack of doctors trained in writing medical reports, lack of available experts to provide expert evidence, no clear sentencing guidelines and a complex patchwork of legal provisions that judges were required to apply in Timor-Leste in 2005.

However, the WJU has found that in certain areas the courts are not applying the law correctly, and some decisions are not in line with international standards, particularly in relation to the concepts of consent and force in rape cases. Further, some, though by no means all, decisions reveal a lack of gender and cultural sensitivity among members of the judiciary, and inadequate appreciation of victims' interests and the affect of violent crime on victims.

Specific findings include:

### **Consent**

- Courts are addressing consent and providing comprehensive reasons for findings on consent. Judicial reasoning is inconsistent, however, and not always in accordance with the law.
- In particular, consent is sometimes addressed in cases where it is not raised as a defence by the accused, or where the victim is a minor and the charge is statutory rape for which consent cannot be a defence. This is clearly contrary to the applicable law in Timor Leste and has the potential to revictimise victims by putting them unnecessarily through a longer and more traumatic court process. It also reinforces the dangerous and erroneous perception that sexual intercourse with a minor is acceptable if she consents.

- In general, courts are recognising the interests of child victims of sexual assault by relying on the less onerous statutory rape provision, although, as mentioned above, this provision is not always applied correctly in that consent is still addressed as an issue.
- Findings on consent too often rely on general witness credibility, rather than on the objective facts of the incident as required by law.
- Findings on credibility in relation to consent in some cases demonstrate a lack of gender and cultural sensitivity.

### **Force of Threat of Force**

- International standard of deciding consent and force are not being applied uniformly or effectively. In particular, courts are requiring that physical force be an aspect of rape cases when, in fact, the definition of force under Timorese law and international law includes psychological pressure or threats.
- Lack of evidence of physical injury is sometimes being taken as evidence of consent or lack of force, contrary to the legal provisions, which define force as including threats and other forms of coercion that leave no physical mark.

### **Evidence**

- Prosecutors are increasingly bringing a range of evidence to prosecute cases of GBV and more cases rely on medical reports and other evidence
- Testimonial evidence is the main form of evidence in most cases, but too much weight is being given to witness demeanour rather than the substance of the evidence.
- Some judges are becoming aware of gender aspects which affect the prosecution of GBV cases, such as late reporting due to the shame and embarrassment suffered by victims.
- Expert evidence is never used, although it would be useful in many cases. In particular, medical specialists are not being called to be cross-examined on their findings.

### **Sentencing**

- Sentencing decisions are acknowledging the circumstances of the victim such as the trauma and the continuing effects of trauma suffered by victims of GBV. Some courts are also recognising the negative impacts of GBV on the community.
- Civil remedies as well as custodial sentences are being handed down to individuals convicted of sexual violence, recognising the economic and other needs of victims who suffer these crimes.
- Courts are consistent in the giving more than adequate attention to the circumstances of the convicted accused when deciding sentences.
- Sentences are too low for the crimes committed. The gravity of GBV crimes is still underestimated and aggravating factors are not being sufficiently taken into account.

### **Traditional law**

- Traditional law values and processes are being incorporated into judicial decision-making in some courts.
- The application of traditional law generally is of benefit to victims and has not prejudiced defendants, although procedural questions need to be determined.

- Incorporation of traditional law has the potential to make the formal justice sector more approachable and receptive to the needs of court users.

These findings highlight a number of specific measures that courts could take to improve the quality of justice meted out to victims and accused in GBV cases, such as:

1. Only addressing the issue of consent if it is raised as a defence by an accused and is an essential element for the court to consider (ie. not in a statutory rape case)
2. Expanding the definition of “force” in line with domestic and international law to include psychological coercion, detention and threats to the victim or another
3. Requiring medical experts to attend court to present findings made in medical reports
4. Calling other forms of expert evidence, for example on issues such as psychological health or cultural factors
5. Treating findings on witness demeanour with extreme caution and with cultural or gender-related factors in mind
6. Requiring victim impact statements to be presented to the court upon sentencing and taking these into consideration when deciding sentences
7. Continuing to look at ways that the formal and traditional justice sectors can work together and complement each other

## APPENDIX A – STATISTICAL BREAKDOWN OF 13 CASES MONITORED

**Table 1: Summary of Cases – Charge, Plea, Result, Sentence.**

| No. | Date of Decision | Crimes charged                       | Charges under KUHP (Art.) | Plea of Defendant | Verdict                            | Sentence                                      |
|-----|------------------|--------------------------------------|---------------------------|-------------------|------------------------------------|-----------------------------------------------|
| 1.  | 18 May 2005      | Rape                                 | 285                       | Not guilty        | Not guilty                         | -                                             |
| 2.  | 19 May 2005      | Rape                                 | 285                       | Not guilty        | Guilty                             | 6 years                                       |
| 3.  | 15 June 2005     | Maltreatment, Abandonment            | 351, 304                  | Guilty            | Guilty – 352 (minor assault)       | 4 months                                      |
| 4.  | 15 July 2005     | Harassment                           | 289                       | Not guilty        | Not guilty                         | -                                             |
| 5.  | 18 July 2005     | Maltreatment - domestic              | 351, 356                  | Guilty            | Guilty - 351                       | 1 year 6 months                               |
| 6.  | 8 August 2005    | Statutory rape                       | 287(1)                    | Not guilty        | Guilty – 287.1                     | 5 years                                       |
| 7.  | 4 October        | Rape and statutory rape - aggravated | 285, 287.1, 288           | Not guilty        | Guilty – 287.1                     | 4 years                                       |
| 8.  | 10 October       | Rape - aggravated                    | 285, 294                  | Not guilty        | Guilty – 287.1                     | 2 years suspended sentence                    |
| 9.  | 18 October       | Rape and harassment, trespass        | 285, 289, 167.1           | Not guilty        | Guilty - 285                       | 6 months suspended sentence, \$100, 1 buffalo |
| 10. | 21 October       | Rape                                 | 285                       | Not guilty        | Not guilty                         | -                                             |
| 10A | 21 October       | Rape                                 | 285                       | Not guilty        | Guilty – 285                       | 3 years, 6 months + \$1000                    |
| 11. | 22 November      | Rape, Statutory Rape                 | 285, 287 (1)              | Guilty            | Guilty - 287                       | 3 years 6 months                              |
| 12. | 23 November      | Murder                               | 338                       | Not guilty        | Guilty -351 (grievous bodily harm) | 3 years                                       |

**Table 2: Sex of Victim and Perpetrator**

| <b>Sex</b>         | Female | Male |
|--------------------|--------|------|
| <b>Victim</b>      | 13     | 0    |
| <b>Perpetrator</b> | 0      | 12   |

**Table 3: Age of Victim and Accused and Relationship of Accused to Victim In Sexual Violence Cases**

| <b>Date of Decision</b> | <b>Age of Victim</b> | <b>Age of Accused</b> | <b>Relationship of Accused to Victim</b>      |
|-------------------------|----------------------|-----------------------|-----------------------------------------------|
| 18/5                    | 17                   | 24, 28                | Stranger                                      |
| 19/5                    | 25                   | Adult (age unknown)   | Father                                        |
| 15/7                    | 17                   | 28                    | Friend                                        |
| 8/8                     | 6                    | Adult (age unknown)   | Brother-in-law                                |
| 4/10                    | 12                   | 22                    | Stranger                                      |
| 10/10                   | 14                   | 78                    | Step-father                                   |
| 18/10                   | 17                   | 40                    | Village nurse who was nursing victim's father |
| 21/10                   | 12                   | 21                    | Neighbour                                     |
| 22/11                   | 12                   | 49                    | Uncle                                         |

**Table 4: Age of Victim and Accused and Relationship of Accused to Victim in Domestic Violence Cases**

| <b>Date of Decision</b> | <b>Age of Victim</b> | <b>Age of Accused</b> | <b>Relationship of Accused to Victim</b> |
|-------------------------|----------------------|-----------------------|------------------------------------------|
| 15/6                    | Adult                | Adult                 | Husband                                  |
| 18/7                    | 74                   | 33                    | Son                                      |
| 23/11                   | 12                   | 17                    | Adoptive brother                         |