



JUDICIAL
SYSTEM
MONITORING
PROGRAM

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The Asia Foundation

Australian
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Charging, Trials and Sentencing in Cases of Sexual Violence in Timor-Leste 2012-2015





"Working to guarantee justice for everyone"

JSMP's vision

A democratic society that guarantees justice and human rights for everyone

JSMP's mission

JSMP works in a spirit of collaboration to improve and protect democracy, law, justice and human rights through:

- monitoring
- legal education, and
- advocacy

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EXECUTIVE SUMMARY

Sexual violence is a critical issue for women and girls in Timor-Leste. Studies have shown that a large number of Timorese women experience gender-based violence, including sexual violence, in their lifetimes. A 2015 study conducted by the Asia Foundation found that 34 percent of Timorese women aged 15-49 experience sexual violence in their lifetimes. Forty one per cent experience this from an intimate partner, and 14 per cent of women have been raped by a non- intimate partner.

Despite these recent statistics, cases involving sexual violence account for only nine per cent (9%) of criminal cases in the courts. This shows that courts are hearing only a small number of the actual incidents of sexual violence that occur in Timor-Leste.

Women and child victims in Timor-Leste may not report sexual violence for a number of reasons. Many are pressured by their families to settle matters through the informal justice system, others fear stigmatization or lack awareness about the formal justice system, and there remains a perception that violence that occurs within the home is a private family matter. When the legal system fails to act with due diligence to punish offenders and deliver justice for victims, it further deters victims from seeking redress through the formal justice system.

In recent years, courts in Timor-Leste have made important progress in their handling of sexual violence cases. This has included more appropriate sentencing in cases of sexual abuse of minors, and civil compensation being awarded to victims. However, JSMP has observed that many cases of sexual violence continue to be handled inadequately. In particular, through its court monitoring activities, JSMP has observed errors in the charging of perpetrators, and sentencing is inconsistent and often not commensurate with the gravity of the crime committed. The legal system has also adopted practices that fail to adequately protect victims' rights, including rights to confidentiality and safety.

While some of the barriers to reporting listed above will require time and resources to overcome, all judicial actors in Timor-Leste can make immediate changes to make the formal legal system a safe place where victims of sexual violence receive justice.

Charging

Flawed application of the law by public prosecutors can result in weak or incomplete charging, which can lead to lenient sentencing or, in the worst case, the acquittal of perpetrators. Selecting the most appropriate charge is important, but can be difficult in sexual violence cases due to the variety of offences in the Penal Code. JSMP has observed the below common charging errors.

- When more than one offence may apply to a criminal act, prosecutors should select the most specific, broadest and most complex provision, and main provisions take precedence over the subsidiary provisions (Article 42 of the Penal Code). JSMP observes this principle being applied incorrectly in cases of sexual abuse of minors where often the defendant is charged under Article 172 for rape instead of Article 177(1), which specifically addresses abuse of minors.

- Court actors, including public prosecutors and judges, often misunderstand or misapply the provisions in the Penal Code dealing with aggravation. JSMP has observed three common problems:
 - public prosecutors and courts fail to identify the existence of aggravating factors;
 - courts fail to take all relevant aggravating factors into account; and
 - court actors use the wrong article of the Penal Code to apply aggravating factors.
- The Penal Code provisions on rape and other sexual offences apply equally to sexual violence within marriage and other intimate relationships. However, JSMP's case monitoring has shown that the prosecution of rape within marriage is virtually non-existent.
- JSMP consistently observes Article 23 of the Penal Code on attempt being incorrectly applied in crimes of sexual violence. In particular, prosecutors have charged with attempt when the crime has actually been committed, particularly in relation to rape cases under Article 172.

Evidence and Trials

Sexual violence cases can be difficult to prove as there are often no witnesses to the events and no physical evidence. It is important for the prosecutor and the court to carefully consider all evidence, but JSMP has observed instances where courts consider evidence that is not relevant, and put too much weight on that evidence.

- Timor-Leste has a force-based rape provision that requires proof that the perpetrator used violence, serious threats or rendered a person unconscious for the purpose of sexual acts. In practice, this has been difficult for victims to prove and, even when violence or threats are present, court actors in Timor-Leste often consider the victim's lack of physical resistance or shouting as evidence of consent.
- JSMP has observed that courts consider a lack of medical evidence to be cause for acquittal or more lenient sentences in sexual violence cases. There are many reasons why a victim may not have obtained a medical report, including fear of stigma, no knowledge of the legal system or untrained police who fail to refer victims to appropriate health facilities. The Court must be willing to convict based on other corroborating evidence.
- Courts have inferred from a victim's delay in reporting a rape that she consented to sexual intercourse, or that it did not occur. Victims often delay reporting to authorities for a number of legitimate reasons, including humiliation, and lack of access to police. International best practice recommends courts draw no adverse inference from any delay in reporting.

- In Timor-Leste, victims of sexual violence are frequently forced to have contact with their perpetrator during the trial process, including having to wait in the same waiting room and travelling to the court in the same vehicle. Victims, including child victims, also give evidence in the courtroom in front of the perpetrator, with no effort being made to shield the view of the victim.
- Victim's privacy is an issue in many sexual violence cases. Courts print the full names of both the victim and defendant on the court schedule and, in the past, some mobile courts have allowed members of the public to watch trials and take photos. These practices can cause humiliation and pose serious risks for victims.

Sentencing

There are often numerous aggravating and mitigating circumstances that the court must consider when sentencing, and calculating penalties in a methodical manner can be difficult. JSMP has observed that sentencing in crimes of sexual violence can often be inconsistent and not commensurate with the relevant offence.

- When suspended sentences are applied, courts are not providing reasons for suspending the sentence as required by Article 68 of the Penal Code, and are not applying any further conditions or additional orders such as requiring the perpetrator to make a public apology (Article 69(2)(b)) or requiring him to be monitored and adhere to a social reintegration plan (Article 71).
- Sentences have been considerably reduced as a result of mitigating circumstances that should not have been taken into account, or applied to such a degree. This includes the defendant's occupation or profession, whether or not he or she is respected in the community, and other aspects of the defendant's social position. These cannot be seen as mitigating factors that diminish the guilt of the perpetrator.
- It is common for courts in Timor-Leste to have regard to informal mediation between the families of the defendant and the victim when sentencing. Courts need to consider the circumstances of each case and each victim, and whether the victim was involved in the mediation and received the restitution.
- Since 2012, compensation has only been awarded in 17 cases of sexual violence monitored by JSMP to decision. Compensation needs to be used more effectively applied by courts as it can provide a remedy for the victim and can cover financial costs associated with the violence.

Based on the findings of this report, JSMP makes the following recommendations to improve charging and sentencing in cases of sexual violence, and the treatment of victims during the trial process. These changes aim to enhance protections and deliver just outcomes for victims.

Recommendations

1. Public prosecutors must carefully consider the evidence in each case, and, in accordance with Article 42 of the Penal Code, should select the charge that is the most appropriate and provides the most serious penalty available. In particular, when charging sexual crimes against minors, prosecutors should use Articles 177(1) (sexual abuse with penetration) and 177(2) (sexual abuse without penetration), as these provisions recognize the severity of sexual violence against children by applying heavier penalties and lighter burdens of proof.
2. Public Prosecutors must identify and apply appropriate aggravating articles to the original charge, including specific aggravating circumstances (Penal Code Articles 173 & 182) and general aggravating factors (Article 52). When more than one aggravating circumstance is present, courts should apply a sentence towards the maximum end of the relevant sentencing range.
3. Prosecutors must recognize that sexual violence within marital and intimate partner relationships is a crime and should be charged using the applicable offence in the Penal Code. Sexual violence within marriage must always be charged as an aggravated offence due to the familial relationship (Articles 173(a), or Article 182(d)). Sexual violence within a marriage is also a general aggravating circumstance under Article 52(2)(l) and warrants a heavier sentence within the minimum and maximum sentencing range for that offence.
4. The public prosecution service should develop legal guidelines on charging in crimes involving sexual violence. The legal guidelines should clarify the issues raised in Recommendations 1-3.
5. The public prosecutor must recognize that rape under Article 172 of the Penal Code includes vaginal, oral or anal sex, including digital penetration and use of an object, and charge appropriately. In rape cases, public prosecutors and courts should not require evidence of physical injury when considering if a victim was forced or threatened, and lack of resistance or calling out should never be considered to be evidence of consent in rape cases.
6. Courts must not accept lack of medical evidence of injuries caused by an alleged sexual violence as conclusive proof that the sexual assault did not occur. Prosecutors should be able to establish a case based on the victim's testimony and other corroborating evidence, even if there is a lack of medical evidence showing direct injury from the sexual assault. The Court must look to other evidence presented by the prosecutor, and inconsistencies in the defendant's arguments.
7. The Government, through the Ministry of Health and Judicial Training Centre (CFJ), must provide sufficient resourcing for court actors to be trained on how to use medical evidence, including the Medical Forensic Protocol.

- 8.** Courts must use existing provisions in the Criminal Procedure Code to minimize contact between victims and the defendant during a trial, particularly child victims of sexual abuse. In accordance with the Criminal Procedure Code, in cases involving a sexual offence against a minor, the courts should – as a general rule – close proceedings to the public. In cases characterized as sexual violence against an adult, the court should consider closing proceedings to the public where it would preserve the human dignity of the victim.
- 9.** When sentencing, courts must adhere to the following guidelines:

 - a.** When identifying mitigating factors courts must show that the circumstance reduced the culpability of the perpetrator, and the need for punishment. Personal characteristics of the accused, such as their age or social standing, do not reduce the culpability of the accused or the need for punishment, and should not be considered mitigating circumstances.
 - b.** When the perpetrator has provided restitution under customary law, courts must consider the facts of each case to determine whether that restitution has in fact gone to the victim, or to the victim’s family.
 - c.** In all cases of sexual violence the courts should consider ordering the convicted person to pay compensation to the victim to acknowledge and redress the suffering they have experienced.
 - d.** In accordance with Article 68(2) of the Penal Code, the courts should provide grounds for their decision to apply a suspended sentence and, when a suspended sentence is handed down, the courts should apply additional orders, particularly to prevent contact between the perpetrator and the victim.
- 10.** Sentencing guidelines should be developed to ensure consistency in sentencing outcomes. These guidelines should clearly outline general sentencing principles, aggravating and mitigating factors using examples, rules for repeat offenders, guidance on alternative penalties and provide for the calculation of civil compensation.

1. INTRODUCTION

Sexual violence is any sexual act or attempt to obtain a sexual act through coercion, or unwanted sexual comments or advances directed against another person, regardless of the relationship with the victim.¹ Sexual violence can occur in any setting, including work and home, and 'coercion' can involve physical violence, psychological intimidation or other threats.²

While sexual violence can be directed at men and boys, statistics worldwide show that women and girls are overwhelmingly the victims of sexual assaults. Data suggests that globally 35 per cent of women have experienced physical or sexual violence in their lifetimes, and 30 per cent have experienced intimate partner violence.³ In Timor-Leste, the gendered nature of sexual violence is illustrated by JSMP's monitoring statistics from 2012-2015, in which only one of the 271 sexual violence cases involved a male victim. For this reason sexual violence is a form of gender-based violence and a violation of women's human rights.

Sexual violence has a profound and far-reaching impact on victims. At the individual level, as well as causing serious physical injury and health issues such as sexually transmitted infections and unwanted pregnancies,⁴ crimes of a sexual nature have an intense psychological impact on victims. These harms can last a lifetime and span generations, with adverse consequences on education, employment, crime and the economic wellbeing of individuals, families, communities and wider society.⁵ Sexual violence can also affect the social well being of survivors as they can be stigmatized or ostracized by their families and communities.

Sexual violence is a critical issue for women and girls in Timor-Leste. Studies have shown that a large number of Timorese women experience gender-based violence, including sexual violence, in their lifetimes. A 2015 study conducted by The Asia Foundation found that 41 per cent of women aged 15-49 had experienced sexual violence by a male partner (past or present) in their lifetimes, and 14 per cent of women had been raped by a man who was not their intimate partner.⁶ This research also shows high rates of sexual violence against children, with 75 per cent of women and men surveyed reporting that they had experienced some form of physical or sexual abuse as a child. In November 2015, the Committee on the Elimination of Discrimination against Women highlighted sexual abuse of girls as a particular issue of concern in Timor-Leste.⁷

¹ World Health Organization, 'World report on violence and health' (2002) page 149, available at: http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf.

² Ibid.

³ World Health Organization, 'Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence', (2013) available at: http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf.

⁴ Above n 1.

⁵ World Health Organization, 'Preventing intimate partner and sexual violence against women' 2010, pages 15-17, available at: http://apps.who.int/iris/bitstream/10665/44350/1/9789241564007_eng.pdf.

⁶ The Asia Foundation, 'Health and life experiences baseline study' (2015) available at <http://asiafoundation.org/publications/>. As indicated by the statistics, most rape is perpetrated by male intimate partners, and even among the 14 per cent of women who were raped by a non-partner, in 43% of cases the rapist was someone known to them (family member, family friend, teacher, neighbour).

⁷ Committee on the Elimination of Discrimination against Women, Concluding Observations: Timor-Leste, No. CEDAW/C/TLS/2-3, 20 November 2016.

The Government of Timor-Leste has an obligation to protect women and children from sexual violence. This includes establishing an effective legal framework that holds perpetrators accountable and delivers justice for victims. However, JSMP has observed that many cases of sexual violence continue to be handled inadequately by the courts in Timor-Leste. In particular, through its court monitoring activities JSMP has observed errors in the charging of perpetrators, and sentencing is inconsistent and is often not commensurate with the gravity of the crime committed.

The legal system has also adopted practices that fail to adequately protect victims' rights, including rights to confidentiality and safety. These have included mobile courts sessions hearing cases of sexual violence in public,⁸ and victims who are minors giving evidence in front of the accused.⁹ These practices often result in women and children being re-victimized through the trial process.

This report recommends means to improve charging and sentencing in cases of sexual violence, and the treatment of victims during the trial process, with the objective of enhancing protection for victims and delivering just outcomes.

In January 2015, JSMP made a submission to National Parliament seeking reforms to a number of sexual offence provisions in the Penal Code.¹⁰ While JSMP continues to advocate for these reforms, this report will focus on improving the application of the existing legal framework to better protect victims of sexual violence.

1.1 Legal framework

Timor-Leste has a legal obligation to ensure women and girls are able to live free from violence. Timor-Leste has ratified a number of important international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which requires State Parties to promote gender equality and take immediate steps to eliminate all forms of discrimination against women and girls. CEDAW also requires State Parties to:

- ensure laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity; and
- take all legal and other measures necessary to provide effective protection to women against gender-based violence, including effective legal measures, such as penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence.¹¹

⁸ JSMP, 'Overview of Justice Sector 2014' (2014) at 22, available at: www.jsmp.tl; See also JSMP Press Release, 'Victim of Sexual Assault dissatisfied with the mobile court trial that was open to the public' (3 October 2013), available at: www.jsmp.tl.

⁹ See JSMP Press Release, 'Court acquits defendant in case of sexual abuse of a minor' (7 August 2013), available at http://jsmp.tl/wp-content/uploads/2013/01/PR-Tribunal-Absolve-kazu-Abuzu-Seksual-ba-menor_ENGLISH.pdf.

¹⁰ JSMP, Submission to the National Parliament of Timor-Leste, 'Improving the Penal Code to better protect women and children' (January 2015) available at: www.jsmp.tl.

¹¹ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 (11th session, 1992), available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>), para 24(b) and 24(r) respectively.

In accordance with Article 9 of the Timor-Leste Constitution, CEDAW was immediately applicable following ratification in 2003.¹² Article 9 states that 'any international convention ratified by the state shall immediately become part of the Timorese legal system and prevail against any law that might contradict it'. This means that the Government has an obligation, under both national and international law, to adopt and incorporate CEDAW in national legislation and national policies.

The Timor-Leste Constitution also contains broad guarantees of gender equality. Article 16 of the Constitution on universality and equality states that all citizens are equal before the law, regardless of their gender. Article 17 on equality between women and men states that women and men shall have the same rights and duties in all areas of family, political, economic, social and cultural life.

The Penal Code (Decree Law No. 19/2009) was drafted to guarantee the protection of the fundamental rights and freedoms enshrined in the Constitution, including those listed above. It outlines a process to punish offenders and deliver justice for victims. Crimes involving sexual violence are all contained in Chapter III of the Penal Code. Within this Chapter, Section II deals with crimes of sexual aggression (rape and sexual coercion), and crimes of sexual abuse (sexual abuse of a minor, sexual acts with an adolescent, sexual abuse of a person incapable of resistance, sexual fraud and sexual exhibitionism) are addressed in Section IV.

1.2 The vital step: implementation

While adopting legislation that criminalizes sexual violence is an essential starting point, these laws can only be effective if cases are being reported and processed through the formal justice sector. However, while recent data shows that 34 per cent of all Timorese women experience sexual violence in their lifetimes (41 per cent by an intimate partner and 14 percent by a non-intimate partner), cases involving sexual violence account for only 9 per cent (9%) of criminal cases in the courts (see Table 1 and Graphs 1 and 2 below). This shows that courts are hearing only a small number of the actual incidents of sexual violence that occur in Timor-Leste.

Women and child victims in Timor-Leste may not report sexual violence for a number of reasons. Many are pressured by their families to settle matters through the informal justice system, others fear stigmatization or lack awareness about the formal justice system, and there remains a perception that violence that occurs within the home is a private family matter. In addition, when the legal system fails to act with due diligence to punish offenders and deliver justice for victims, it further deters victims from seeking redress through the formal justice system.

While some of the barriers to reporting listed above will require time and resources to overcome, all judicial actors in Timor-Leste can make immediate changes to make the formal legal system a safe place where victims of sexual violence receive justice.

¹² Timor ratified CEDAW without reservation in 2003. CEDAW became immediately applicable in Timor-Leste following publication of its ratification in Timor-Leste's Official Gazette.

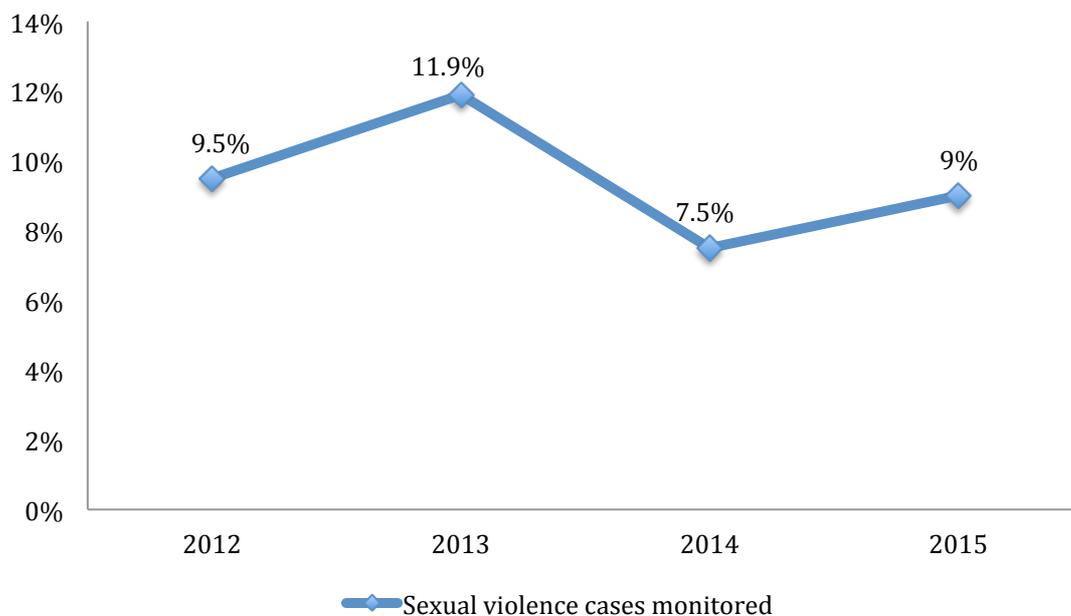
2. JSMP COURT MONITORING STATISTICS

Over the last four years, 2012-2015, JSMP has monitored 271 cases of sexual violence in the four districts of Dili, Baucau, Suai and Oecusse. Sexual violence cases represent 9 per cent (9%) of all criminal cases monitored by JSMP over this period. All of these cases involve male defendants, and all but one involve female victims.

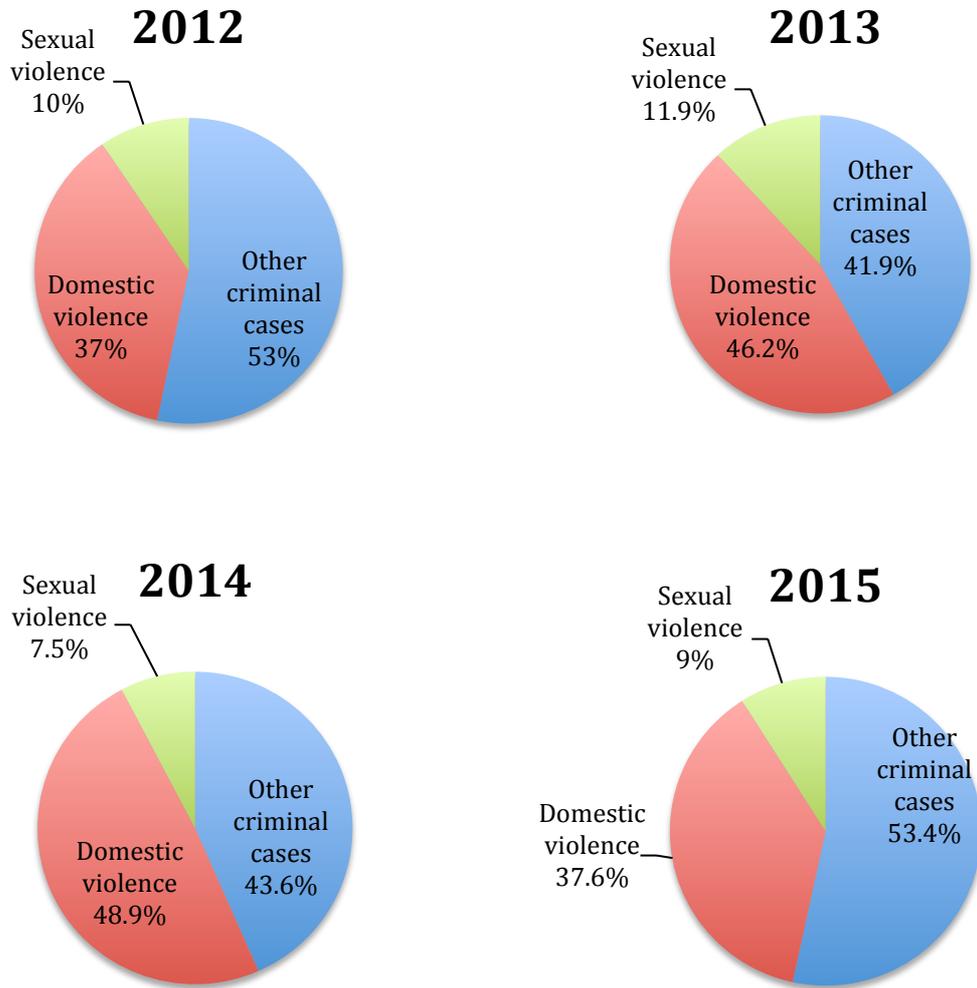
Table 1. Number of sexual violence cases monitored by JSMP, 2012-2015

	2012	2013	2014	2015	Total
Number of sexual violence cases monitored	41	57	71	102	271
Other criminal cases monitored	389	424	880	1036	2729
Total	430	481	951	1138	3000

Graph 1. Percentage of sexual violence cases from total cases monitored by JSMP, 2012-2015



Graph 2. Percentage of sexual violence cases compared to number of domestic violence cases monitored by JSMP, 2012-2015



Map 1. Sexual violence cases monitored by JSMP by jurisdiction, 2012-2015

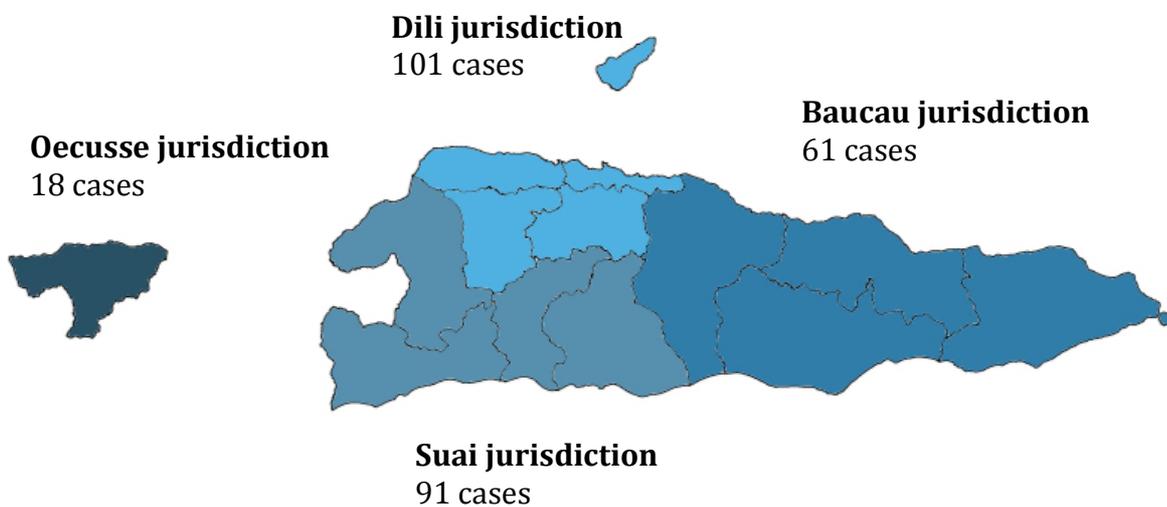
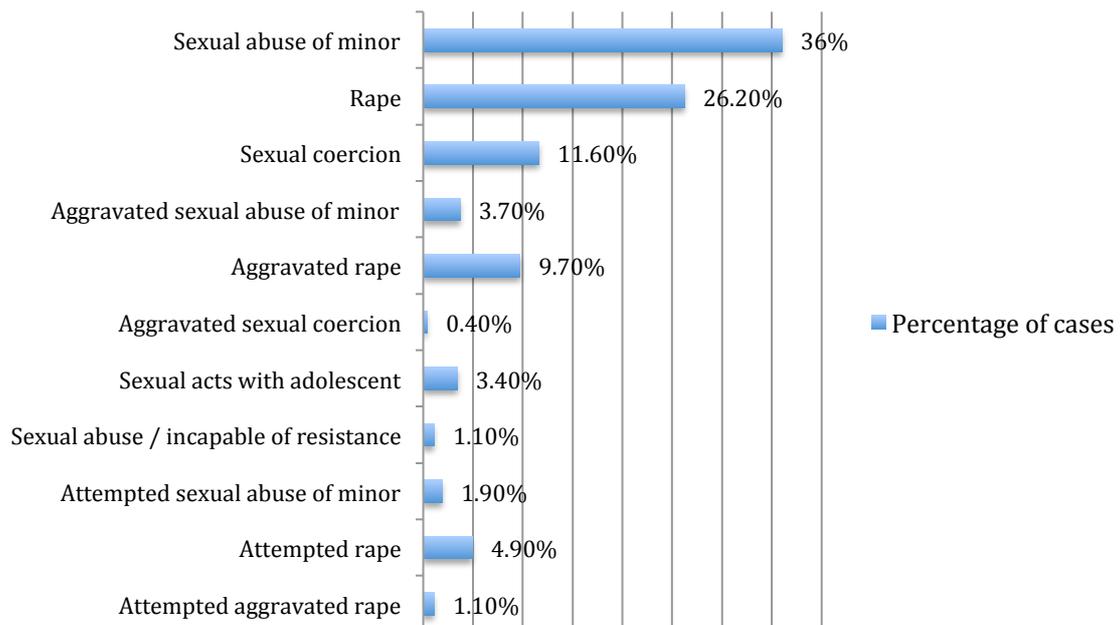


Table 2. Types of sexual violence cases monitored by JSMP, 2012-2015

Offence	2012	2013	2014	2015
Sexual abuse of a minor, Art 177(1) & 177(2)	16	22	26	33
Rape, Art 172	12	14	20	23
Sexual coercion, Art 171	0	2	13	17
Sexual abuse of minor with aggravation	0	4	0	6
Rape with aggravation, Art 172 & 173	3	6	4	13
Sexual coercion with aggravation, Art 171 & 182	0	0	0	1
Sexual acts with an adolescent, Art 178	4	2	2	2
Sexual abuse of a person incapable of resistance, Art 179	0	2	1	0
Attempted sexual abuse of a minor, Art 23 & 177	1	1	2	1
Attempted rape, Art 23 & 172	4	4	2	3
Attempted rape with aggravation, Art 23, 172 & 173	1	0	1	1
Exhibitionism, Art 181	0	0	0	1
Sexual acts with an adolescent with aggravation, Art 178, 182	0	0	0	1
Total number of sexual violence cases	41	57	71	102

Graph 3. Types of sexual violence cases monitored by JSMP, 2012-2015



3. CHARGING IN CASES OF SEXUAL VIOLENCE

To ensure any sentence is commensurate with the gravity of the offence committed, it is crucial that public prosecutors charge perpetrators of sexual violence with the most appropriate and most serious offence available, based on the circumstances of each case.

Flawed application of the law by public prosecutors can result in weak or incomplete charging, which can lead to lenient sentencing or, in the worst case, the acquittal of perpetrators. JSMP recently observed a case where the offender was acquitted because he was mistakenly charged with sexually abusing a minor (under 14 years) under Article 177(1) when the victim was not a minor at the time of the abuse.¹³ The consequence of incorrect charging in this case was severe, leading to acquittal and the accused returning to the community without punishment.

Selecting the most appropriate charge can be difficult in sexual violence cases. As shown by table 2 below, there are a variety of offences contained in the Penal Code, including a combination of numerous aggravating factors, which provide prosecutors with a choice of different charges. This section examines some common charging errors and seeks to provide recommendations on how to address such issues in the future.

Table 3. Comparison of most common sexual offences

Offence	Victim age	Elements - Intent	Elements- Action or conduct
Sexual Coercion Art 171	More than 14 years old	<ul style="list-style-type: none"> • Intent to compel another person, against their will, to endure or practice any act of sexual relief 	<ul style="list-style-type: none"> • Use of violence, serious threat, or making the other person unconscious or unable to resist
Rape Art 172	More than 14 years old	<ul style="list-style-type: none"> • Intent to compel another person to have sexual intercourse against their will 	<ul style="list-style-type: none"> • Use of violence, serious threat, or making the other person unconscious or unable to resist; • Penetration of the vagina, anus or mouth with a body part or object.
Sexual abuse of minor Art 177(1)	Less than 14 years old	<ul style="list-style-type: none"> • Intent to have sexual intercourse with a minor under the age of 14 	<ul style="list-style-type: none"> • Penetration of the vagina, anus or mouth with a body part or object
Sexual abuse of minor Art 177(2)	Less than 14 years old	<ul style="list-style-type: none"> • Intent to engage in sexual acts with a • minor under the age of 14 	<ul style="list-style-type: none"> • Engaged in an act of "sexual relief" (this is not defined, however would include all acts of a sexual nature, not including penetration)
Sexual acts with an adolescent Art 178	Between 14 and 16 years old	<ul style="list-style-type: none"> • Intent to engage in sexual acts with a minor between the ages of 14 and 16 	<ul style="list-style-type: none"> • Took advantage of the victim's inexperience; and • Engaged in a sexual act.

¹³ JSMP Press Prelesee, 'Dili District Court acquits defendant in case of sexual abuse of a minor' (19 October 2015), available at http://jsmp.tl/wp-content/uploads/2015/01/PRLaihaprova-sufisienteTDDabsolveKazuviolensiaseksual_ENGLISH1.pdf

3.1 Multiple possible charges

Article 42 of the Penal Code on the concurrence of provisions guides prosecutors on charging when more than one offence may apply to a criminal act. In all cases, prosecutors should adhere to the following rules:

- the most specific provision takes precedence over the general;¹⁴
- the main provision takes precedence over the subsidiary;¹⁵ and
- the broadest and most complex provision takes precedence.¹⁶

JSMP has observed these rules being applied incorrectly in cases of sexual violence, particularly when prosecutors must choose between charging a defendant with sexual abuse of a minor with penetration under Article 177(1) or rape under Article 172.

Case study 1

The 12-year-old victim was walking along the road when the defendant stopped his motorbike and tried to pick her up. She refused, but he persisted until she eventually agreed to get on his bike. When they arrived at the victim's house the defendant followed her inside, removed her clothes, grabbed her breasts and inserted his hand into her vagina. The victim ran away and alerted her family. She suffered injuries to her genital area as a result of the acts.

The public prosecutor charged the defendant with sexual abuse of a minor, with penetration, under Article 172(1) of the Penal Code.

At trial the Defendant confessed to the charges and testified that he had already paid UD\$2000 to the victim's family.

The Court said that there was no 'sexual intercourse' and therefore amended the charge to sexual abuse of a minor without penetration under Article 177(2) of the Penal Code with aggravation factors due to the victim's age under Article 182(1)(a) of the Penal Code.

The Court sentenced the defendant to 13 years in prison and ordered him to pay \$3000 in civil compensation to the victim.

In this example the prosecutor incorrectly charged under Article 172 instead of Article 177(1). The charge was flawed since the victim was under 14 years of age at the time of the offence and the crime of sexual abuse of a minor with penetration, Article 177(1), specifically provides for this. Article 177(1) also offers a heavier penalty - 5-20 years imprisonment as opposed to 5-15 years under Article 172.

In cases of sexual abuse against minors it is particularly important for public prosecutors to select the most specific offence because these provisions recognize the severity of sexual violence against children by applying heavier penalties and lighter burdens of proof. For example, as shown above in Table 3, while Article 172 requires the prosecution to prove that the defendant used force or threats to achieve sexual intercourse, Article 177(1) only requires proof of intercourse with a minor under the age of 14. This shows the importance of prosecutors charging under Article 177(1) and not Article 172.

¹⁴ Penal Code Article 42(a).

¹⁵ Penal Code Article 42(b).

¹⁶ Penal Code Article 42(c).

3.2 Identifying aggravating factors

Court actors, including public prosecutors and judges, often misunderstand or misapply the provisions in the Penal Code dealing with aggravation.¹⁷ Aggravating circumstances increase the seriousness of the offence or the offender's culpability, within the sentencing range for that offence.

There are two types of aggravating circumstances in the Penal Code; specific aggravating circumstances (Articles 173 & 182) which raise the minimum and maximum sentence available to the court, and general aggravating factors (Article 52), which means the court should impose a sentence towards the higher end of the sentencing range. Specific aggravating circumstances are more relevant in charging, whereas general aggravating circumstances are more relevant for sentencing.

For crimes of sexual aggression (rape and sexual coercion), Article 173 of the Penal Code can be used to increase the penalty range when the crime is committed in one or more aggravating circumstances:

- through abuse of authority arising from a family relationship, guardianship, hierarchical or economic dependence (for example, children, cousins, aunts and uncles, grandparents) or labour-related dependence (such as housekeepers, servants, maids and other workers);
- through taking advantage of a position of authority in certain education, correctional and health related institutions (such as teachers and doctors);
- upon the unconscious or disabled; or
- against victims under the age of 17.¹⁸

For rape, the term of imprisonment may be increased from 5-15 years to 5-20 years, and for sexual coercion from 2-8 years to 4-12 years.

Article 182 applies to both Section II (crimes of sexual aggression) and Section IV (crimes of sexual abuse) as well as Section III (crimes of sexual exploitation), and raises both the minimum and maximum terms of imprisonment by one third where:

- the victim is less than 12 years of age;
- the perpetrator transmits venereal disease, syphilis or AIDs;
- the offence results in death or suicide (including attempts); or
- the victim and the perpetrator are related by blood (to the second degree) or adoption (first degree), or the victim is co-habiting with the perpetrator under similar conditions or where there is a hierarchical, economical, or work-related dependence.

¹⁷ For these reasons JSMP has advocated for changes to Articles 173 and 182 of the Penal Code to simplify the provisions, and to add additional aggravating factors to expand the protection for women and children and bring Timor-Leste into line with regional best practice regarding sexual crimes; see Penal Code submission, above n 10, 28.

¹⁸ Against victims under the age of 17.

Article 42 provides that articles 173 and 182 cannot apply concurrently. The court will determine whether article 173 or 182 is specifically applicable to the facts of the case in order to determine the sentencing range.

Table 4. Comparison of aggravating factors in sexual assaults

Article 173	Article 182
<p>Applies to: Sexual coercion (article 171) Rape (article 172) ONLY</p>	<p>Applies to: Sexual coercion (article 171) Rape (article 172) Sexual abuse of a minor (article 177) Sexual acts with adolescent (article 178) Sexual abuse of a person incapable of resistance (article 179) Other crimes involving sexual acts or sexual exploitation (articles 174-176 and 180-181)</p>
<p>Crime occurred through taking advantage of duties exercised or office held in a prison, educational or correctional establishment, hospital, mental institution, rest home, clinic or other health establishment or establishment intended to provide assistance or treatment</p>	<p>--</p>
<p>Victim is an unconscious or incapable person who is particularly vulnerable by virtue of disease, physical or mental deficiency</p>	<p>--</p>
<p>Victim aged less than 17 years of age</p>	<p>Victim is less than 12 years of age at time of act</p>
<p>Crime occurred through abuse of authority arising from a family relationship, ward or guardianship, or hierarchical, economic or labour-related dependence</p>	<p>Victim is a descendent, collateral, relative or similar to the second degree, a person adopted by or who has adopted the perpetrator or a person cohabiting with the perpetrator under similar conditions or there is a hierarchical, economical or work-related dependence</p>
<p>--</p>	<p>Perpetrator transmitted venereal disease, syphilis or AIDS to the victim</p>
<p>--</p>	<p>Due to the act, victim attempts or commits suicide or the same results in death</p>

In practice, JSMP has observed public prosecutors and courts encounter three common problems when applying aggravating factors:

- public prosecutors and courts fail to identify the existence of aggravating factors;
- courts fail to take all relevant aggravating factors into account; and
- court actors use the wrong article of the Penal Code to apply aggravating factors.

As recently as July 2015, JSMP observed a case where the court found a person guilty of aggravated sexual abuse of a minor under Article 177(2) in conjunction with Article 173 due to the familial relationship between the victim and the defendant.¹⁹ However, as described above, the aggravating factors in Article 173 only apply to the offences within that section – namely, rape (Article 172) and sexual coercion (Article 171). The court should have charged the offender with aggravation under Article 182.

The case studies below illustrate problems with identifying aggravating factors and the failure to take all relevant aggravating factors into account when charging and sentencing cases of sexual violence.

Case Study 2 – failure to identify aggravating factors

The defendant knocked the victim to the ground with the intention of having sexual intercourse with her, but the victim kicked the Defendant, causing him to fall to the ground. The victim fled and told her parents. She was only 11 years old at the time of the incident.

The defendant was a neighbor and lived close to the victim. Often the victim would help the defendant to sell firewood, and the defendant would sometimes pay the victim 15-20 cents for helping him.

The public prosecutor charged the defendant with attempted sexual abuse of a minor under Article 177 and Article 23 of the Penal Code.

The court found the defendant guilty and sentenced him to 3 years in prison, suspended for 4 years.

In this case, the court failed to identify that the victim's young age of 11 was an aggravating factor. Under Article 182 of the Penal Code, if the victim is less than 12 years of age at the time the act was committed, the sentence range must be increased by one third. Thus, the applicable sentence range would have been increased by a third, and then 'extraordinarily mitigated' under Article 23 because it was an attempted crime.²⁰ This means the applicable sentence would have been one year and four months to seventeen years and nine months.

¹⁹ Case Number 92/pen/2015/TDS. See also case Number 207/Krime/2014/TDO where the same charging error was made.

²⁰ In accordance with Article 57 of the Penal Code this means that:

For a prison sentence: the maximum penalty limit is reduced by one third; if the minimum limit is reduced by one fifth or 30 days (depending on whether it is over or under three years); and if the maximum prison sentence is less than 3 years it can be substituted with a fine. For a fine: the maximum limit is reduced by one third and the minimum to the legal minimum.

Similarly, it is rare for the courts to take all relevant aggravating factors into account. Under Article 182, only one aggravating factor can be used to increase the sentencing range, however, the presence of multiple aggravating factors should be 'weighed in determining the specific penalty' (Article 182(2)). When more than one aggravating circumstance is present, courts should therefore apply a sentence towards the maximum end of the relevant sentencing range.

Case Study 3 - multiple aggravating factors

In this case, the victim – a girl in her early teens – was raped ten times by her uncle, the defendant. Each time, the defendant entered the victim's room during the middle of the night and used both threats and force to have sexual intercourse with her. As a result, the victim became pregnant.

The public prosecutor charged the defendant with rape under Article 172, with aggravating factors under Article 173(d) because the victim was under 17. The court sentenced the defendant to eight years in prison.

In this case, the public prosecutor recognized the victim's young age as an aggravating factor pursuant to Article 173(d), but failed to identify the existence of other aggravating circumstances. In particular the familial relationship between the defendant and victim under 173(a), or the number of times the defendant raped the victim in accordance with Article 52(2)(g).

The fact that the court had not taken all aggravating factors into account is reflected in the leniency of the sentence. The sentencing range for aggravated rape is 5 to 20 years in prison. Eight years is close to the minimum sentence available and certainly does not reflect the presence of at least three aggravating factors, which significantly increase the seriousness of the crime and culpability of the perpetrator.²¹

3.3 Recognizing sexual violence within marriage

The provisions of the Penal Code on rape and other sexual offences apply equally to sexual violence that occurs within marriage and other intimate relationships. However, JSMP's case monitoring has shown that, in practice, the prosecution of rape within marriage (marital rape) is virtually non-existent. JSMP has only ever monitored one case of attempted marital rape, which was charged as a simple assault and resulted in a fine.

Marital rape is not specifically criminalized in Timor-Leste. The Committee on the Elimination of Discrimination Against Women recommended in 2009 that a provision be included in the Penal Code to specifically criminalize marital rape.²² Again, in 2015, the Committee expressed its concern at the lack of such a provision in Timorese law, and called on the Government of Timor-Leste to 'Review the Penal Code so as to... specifically criminalize marital rape in civil, religious and customary marriages as well as rape in de-facto unions'.²³ JSMP has also consistently called for the inclusion of marital rape as a specific offence in the Penal Code.²⁴

²¹ This issue of sentencing is discussed further in Section 5 of this report.

²² Committee on the Elimination of Discrimination against Women, Concluding Observations: Timor-Leste, No. CEDAW/C/TL/CO/1, (7 August 2009).

²³ Above n 7.

²⁴ JSMP, Submission to the National Parliament on Improving the Penal Code to better protect Women and Children, 2015, above n 10, pages 16-20 and Shadow Report from NGOs JSMP, PRDET and ALFeLa, 'Timor-Leste Government's progress in implementing CEDAW' (2015), page 21.

Case Study 4: Attempted rape charged as simple assault

A husband came home intoxicated in the early hours of the morning and tried to force his wife to have sexual intercourse. When she rejected him he became physically aggressive, punched her in the stomach and cut her arm with a saw.

The public prosecutor charged the husband with simple assault under Article 145 of the Penal Code, in conjunction with Article 35 of the Law Against Domestic Violence. The public prosecutor asked for a suspended sentence because this was the first time that the defendant had committed a crime and the problem had been 'resolved' between the two families.

The court sentenced the defendant to one year in prison, suspended for two years and ordered him to pay a fine of \$45.

In this case, the public prosecutor should have charged the defendant with attempted aggravated rape under Articles 172, 23 (attempt) and 173(a) (aggravation due to the defendant's abuse of authority arising from a family relationship). The sentencing range for this crime is one year to 13 years and 4 months. The fact that the violence occurred within a marriage is also a general aggravating circumstance under Article 52(2)(l) and warrants a heavier sentence within the minimum and maximum sentencing range for that offence. JSMP considers that, had the public prosecutor charged the defendant correctly, he would have received a custodial prison sentence. In JSMP's opinion, attempted marital rape is a serious crime and perpetrators should be punished accordingly.

When sexual violence within marriage is not properly charged and sentenced, this provides a further disincentive for women to report these crimes. It also strengthens the perception that men can force their partners to have sexual intercourse, which is contrary to the specific inclusion of sexual violence as a form of domestic violence in Article 2(2)(b) of the Law Against Domestic Violence (LADV).

Similar to domestic violence, there are already considerable barriers to women reporting sexual violence within marriage. This includes fear of the potential financial impact on her family and children, divorce or abandonment, pressure to resolve the dispute within the family or community to maintain social harmony and a general lack of awareness about the formal justice sector or about the criminal nature of violence within marriage. For these reasons, when women turn to the formal justice sector for assistance, it is crucial that they are provided with adequate support and protection. One of fundamental aspects of this is the correct charging of offenders.

3.4 Attempt in cases of sexual violence

An attempted crime can be prosecuted when a person has decided to commit a crime and has tried to start committing the crime but has been stopped for reasons beyond their control,²⁵ such as a neighbor seeing the event and intervening. Under Article 24, an attempt is punishable with an 'extraordinarily mitigated' penalty.²⁶

²⁵ Penal Code Article 23.

²⁶ See footnote 20 above for explanation of 'extraordinarily mitigated'.

While these provisions apply more broadly across the Penal Code, JSMP consistently observes them being incorrectly applied in crimes of sexual violence. In particular, prosecutors have charged with attempt when the crime has actually been committed, particularly in relation to rape cases under Article 172.

Case Study 5 – Attempted rape

The public prosecutor alleged that the defendant tried to force the victim to have sexual intercourse, but she refused. He then forced the victim to have oral sex and ejaculated onto the body of the victim, causing her to vomit twice.

The public prosecutor charged the defendant with attempted rape under Article 172 and Article 23 of the Penal Code.

In this case, the public prosecutor charged the defendant with attempted rape because the defendant tried to have sexual intercourse with the victim, but she resisted. However, this was the incorrect charge because the definition of rape in Article 172 of the Penal Code includes vaginal, oral or anal sex, including digital penetration and inserting any object into the victim’s anus or vagina.²⁷ Therefore, the defendant raped the victim because he forced her to engage in oral sex.

During the trial, the court recognized this error in interpretation and amended the indictment to remove the charge of attempt. The court sentenced the defendant to 10 years and 6 months in prison, and ordered him to pay US\$700 compensation to the victim. JSMP commends the court’s recognition that forced oral sex constitutes rape, but encourages the public prosecutor to ensure the correct charge is applied in the first instance.

4. EVIDENCE AND TRIAL PROCEEDINGS

4.1 Evidence

Sexual violence cases can be difficult to prove for a number of reasons, including that there are often no witnesses to the events and no physical evidence. In Timor-Leste a lack of strong investigation skills by prosecutors (and often police) means that even if any evidence is presented to the court it is often of poor quality. This means it is even more important for the prosecutor and the court to carefully consider all available evidence to support the charge. However, JSMP has observed many instances where courts are considering evidence that should not be considered, or putting too much weight on that evidence.

4.1.1 Evidence of consent in rape cases

In Timor-Leste, rape is criminalized under Article 172 of the Penal Code. This Article provides that any person who uses violence, serious threats, or renders a person unconscious, or in a condition where resistance is impossible, to have vaginal, anal or oral sex with a person, or to introduce objects into the vagina or anus of a person. This offence is punishable with 5 to 15 years imprisonment.

²⁷ Article 172 does not require that the perpetrator ejaculate inside the victim.

In practice, it has been difficult for victims to prove that a perpetrator used violence, serious threats or rendered them unconscious for the purpose of sexual acts. It is particularly difficult if there were no witnesses or if the victim did not sustain any physical injuries. Moreover, even when violence or threats are present, court actors in Timor-Leste often consider the victim's lack of physical resistance or shouting as evidence of consent.

Case Study 6 - Rape – dragged from the street

A 22 year-old woman was on her way home from buying something at the kiosk. The defendant, a 42 year-old man, suddenly appeared in the street, and dragged the victim from the road into a nearby field. There, he hugged and kissed the victim, removed her clothes and underwear and had sexual intercourse with her.

In court, the defendant claimed that the intercourse was consensual (*hakarak ho hakarak*) and that he did not force the victim to have sex with him. He also said that he gave the victim \$20 after they finished having intercourse. The victim agreed that they had sexual intercourse, and conceded that she did not resist or shout out.

The public prosecutor asked the court to acquit the defendant because the facts and evidence did not prove that the defendant had committed the crime. The public defender asked the court to acquit the defendant because he did not commit the crime. The court concluded the case by acquitting the defendant.

In this case there was evidence the defendant had used violence in order to have sexual intercourse with the victim. The defendant dragged her forcefully from the street and into a field, where he removed her clothes and had sexual intercourse with her. Although the defendant claimed the intercourse took place with the victim's consent, it is highly unlikely that she freely consented after being dragged from the street by a stranger. In this case, it appears that the court considered the victim's lack of physical resistance or shouting as evidence that she consented to the sexual intercourse.

Consent should not be implied from lack of resistance. There may be many reasons why a victim does not actively resist unwanted sexual intercourse. For example, many victims experience immobility/paralysis during rape, which is often described as 'freeze fright'. This is a physiological reaction to a perceived attack or threat in which the person becomes involuntarily immobile or paralysed as part of their body's evolutionary response to danger.²⁸

These issues all flow from the fact that Timor-Leste has a force-based rape provision that requires proof that the perpetrator used violence, serious threats or rendered a person unconscious for the purpose of sexual acts. In contrast, the international best

²⁸ Grace Galliano, Linda Noble, Carol Puechl and Linda Travis, 'Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and its Correlates' available at Australian Institute of Criminology: http://www.aic.gov.au/media_library/publications/proceedings/20/galliano.pdf. See also Katrina Marson 'Jury convinced by expert evidence on "freeze fright" response in rape victims' Sydney Morning Herald 6 April 2014, available at: <http://www.smh.com.au/comment/jury-convinced-by-expert-evidence-on-freeze-fright-response-in-rape-victims-20140406-zqrkd.html> where a doctor with extensive experience in forensic medicine and specialist expertise in sexual health testified in a recent Australian rape trial that the freeze fright reaction has been documented in approximately half of rape cases since the 1970s.

practice definition of rape does not require proof that the victim physically resisted, does not accept submission as consent and requires both parties to ensure the other is consenting to the activity.²⁹ This is often called a consent based rape provision.

The UN recommends countries adopt a consent based rape provision for a number of reasons. It avoids 'secondary victimisation' of rape and sexual assault victims because instead of examining the victim's behaviour the court looks at the steps taken by the defendant to ascertain the victim's consent, or at the coercive circumstances in which the rape took place. This approach also recognises that force is just one of a range of circumstances in which sexual contact is criminal because it occurs without consent. Coercion, fraud and abuse of power are other circumstances where, even though physical force (or threats of force) is not used, a woman might not consent to sexual acts.

In its submission to the National Parliament on improving the Penal Code to better protect women and children, JSMP strongly recommended the adoption of a consent-based rape provision in Timor-Leste.³⁰

4.1.2 Medical Forensic Reports

There are many barriers to women and child victims of sexual violence obtaining documentary evidence, such as a medical forensic report, following a sexual assault. Around 70 per cent of Timor-Leste's population lives in rural areas, and women in these areas do not have immediate access to medical clinics or hospitals. Even when they do, often the health personnel from whom they seek assistance are not trained in identifying and referring victims of sexual violence to proper medical facilities, and do not treat victims sensitively. Victims may also fear medical examination, or lack an understanding of the legal system and the existence and purpose of medical evidence.

Psychosocial Recovery & Development in East Timor (PRADET), Timor-Leste's only psychosocial service for people experiencing trauma and mental illness, is working to overcome some of these challenges. PRADET conducts medical forensic examinations for victims of violence, including sexual violence. With international assistance PRADET has developed a 'Medical Forensic Protocol' (MFP), which enables a full account of the victim's story, thorough examination and careful documentation of the victim's physical injuries. It can only be used, however, by personnel who have specifically been trained in its use, and only at the four district referral hospitals and the national hospital in Dili.

Training to become an accredited examiner takes five days of theory and five days of practical training, with an examination at the end. However, due to resourcing constraints, as at the end of 2014 the Institute of Health Sciences (INS) was only been able to accredit a total of 34 health workers across Timor-Leste,³¹ and only a further 16 examiners were trained in 2015. PRADET requires support from the Government

²⁹ Bianca Fileborn, *Sexual Assault Laws in Australia* (Resource Sheet, Australian Centre for the Study of Sexual Assault, February 2011), 7.

³⁰ Above n 10, page 19.

³¹ PRADET, '2014 Annual Report' (2014) at 11.

of Timor-Leste to expand the use of the MFP in a timely manner to ensure essential services are provided to women across Timor-Leste.

As a result of these challenges, medical evidence is not frequently introduced to support sexual violence cases. In 2015, courts were presented with medical evidence in only 29 out of the 102 sexual violence cases.³²

However, despite their limited use, JSMP has observed that the courts consider a lack of medical evidence to be cause for acquittal or more lenient sentences, particularly in cases involving the sexual abuse of minors. In one such case, the court sentenced the defendant to three years in prison, suspended for four years. One of the reasons the court provided for the lenient sentence was the lack of medical evidence showing sexual abuse.³³ Case Study 7 is another concerning example of this.

Case Study 7 – Acquitted due to lack of evidence

The defendant grabbed the 15-year-old victim, forcefully grabbed her genitals and covered her mouth so she could not scream. The defendant removed the victim's clothes and raped her. He threatened to kill her if she told anyone.

The prosecutor charged the defendant with aggravated rape under Articles 172 and 173(d). The case relied on the victim's testimony, as she did not get a medical report.

The victim testified that she had lost her virginity as a result of the rape, had continued to go to school after the rape and waited three days to report the incident.

The court held that the facts in the indictment and the testimony of the victim raised some doubts. The court reasoned that it would not be possible for a girl who lost her virginity to continue walking to school. In the absence of a medical report, the court acquitted the defendant.

This case shows that there can be many barriers to victims obtaining a medical forensic report. In this case the victim was threatened by the defendant and, because of this threat, was likely too scared to seek immediate assistance. There may also have been other reasons why the victim did not immediately report the crime, such as fear of stigma and trauma.

This case also shows a disturbing lack of knowledge on the part of the authorities of the need to refer the victim to appropriate health facilities to get a medical forensic examination. After three days it is possible that there could still have been some physical evidence to support this young woman's claim, such as an abrasion or tear. Even up to seven days there may be some evidence. However, the police did not properly identify the need for a medical forensic examination. Moreover, the judge's reasoning that a virgin could not walk after being raped shows a concerning lack of understanding of basic human anatomy.

This case demonstrates why courts must not accept lack of medical evidence of injuries caused by the alleged sexual violence as conclusive proof that the sexual assault did not occur. Prosecutors should be able to establish a case based on the

³² JSMP started collecting this data in 2015.

³³ Case Number 13/pen/2014/TDS.

victim's testimony and other corroborating evidence, even if there is a lack of medical evidence showing direct injury from the sexual assault. The Court must look to the other evidence presented by the prosecutor, and inconsistencies in the defendant's arguments.

While the MFP seeks to present evidence in a simple manner, JSMP acknowledges that these reports can be inherently difficult for non-medical professionals to interpret and apply. For example, most studies indicate that more than 70 per cent of pre-pubescent girls, and more than 50 per cent of women will have a normal medical examination following a sexual assault.³⁴ Thus, even when a medical report has been obtained, there may be no physical evidence of a sexual assault. This shows the complexity of interpreting medical forensic examinations and the need for judges to be trained on how to interpret such reports.

In addition, under Article 116 of the Criminal Procedure Code courts in Timor-Leste have the power to ask a medical expert to attend the court proceedings to explain medical forensic reports. However, this has only happened on a few occasions.³⁵ Courts need to utilize this provision more effectively and call experts to assist in interpreting reports.

4.1.3 Delay in reporting

JSMP has observed a number of cases where the court has inferred from the victim's delay in reporting a rape that she consented to sexual intercourse and later changed her mind, or that the sexual intercourse did not occur at all. Case Study 7 above illustrates this point. In this case, the Dili District Court considered the fact that the victim waited three days after being assaulted before making a complaint to the police gave rise to sufficient doubt (in combination with other factors, such as the lack of a medical report) to acquit the defendant.

Victims often delay reporting rape to authorities for a number of legitimate reasons, including:

- fear of stigmatization, humiliation, not being believed, and retaliation;
- financial or emotional dependence on the perpetrator; and
- distrust in, and lack of access to, police, courts or other responsible public institutions.³⁶

International best practice recommends national courts draw no adverse inference from any delay in reporting. The UN recommends that legislation include an express provision 'prohibiting courts from drawing any adverse inference from a delay of any length between the alleged commission of violence and the reporting thereof'.³⁷

³⁴ World Health Organization, 'Guidelines for Medico-legal Care for Victims of Sexual Violence' (2003) page 49, available at: http://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap4.pdf.

³⁵ See, for example, case number 258/pen/14.TDS.

³⁶ Department of Economic and Social Affairs, Division for the Advancement of Women, 'United Nations Handbook for Legislation on Violence Against Women', (2010), page 42.

³⁷ Ibid.

To remove any doubt, JSMP believes that legislative guidance is needed to prevent courts drawing adverse inferences from a victim's delay to report. JSMP has recommended this in its Submission to National Parliament on amending the Penal Code.³⁸

4.2 The trial process

4.2.1 Re-victimization

International best practices requires that a legal system guarantees, throughout the legal process, the complainant/survivor's right to 'protection within the court structure, including separate waiting areas for complainants and defendants, separate entrances and exits, police escorts, and staggered arrival and departure times'.³⁹ These processes aim to protect victims from the trauma of having to confront their perpetrator, which will often be a family member⁴⁰ or someone known to the victim.

In Timor-Leste, victims of sexual violence are frequently forced to have direct contact with their perpetrator during the trial process. JSMP is particularly concerned about the following practices:

- courts, particularly mobile courts, not having a special place for victims to wait separately from defendants. District courts in Oecusse and Suai have facilities to separate victims and perpetrators. However, even where there are separate waiting rooms, JSMP has heard reports of them not being used;
- child and adult victims being forced to sit in the same waiting room with the perpetrator at the prosecutor's office when they were called to make statements during the investigation stage;⁴¹ and
- victims travelling to the Court in a car with the defendant. In 2014 there were still reported instances of police transporting victims of sexual violence in the same vehicle as their perpetrator, sometimes for hours.⁴²

In addition, victims often give evidence in the courtroom in front of the perpetrator, with no effort being made to shield the view of the victim.

³⁸ Above n 10, page 20.

³⁹ Above n 35, page 40.

⁴⁰ Although the prevalence of incest in Timor-Leste is unknown, JSMP monitoring suggests that incest is a widespread problem in Timor-Leste. See JSMP, 'Incest in Timor-Leste' (2012) available at www.jsmp.tl/publikasaun-publications/thematic-reports/.

⁴¹ Institute for Policy Analysis of Conflict (PAC), 'Justice at the crossroads in Timor-Leste' (2014), page 105 available at <http://www.cseashawaii.org/2015/09/justice-at-the-crossroads-in-timor-leste/>.

⁴² Ibid, page 20.

Case Study 8 – Court cross-examines victim of sexual abuse

The public prosecutor alleged that in 2010 the defendant sexually abused his 10-year-old daughter on two occasions.

The defendant and the victim denied the charges but the victim's mother testified that the victim told her that the defendant had sexually abused her.

Because the parties gave contradictory testimony, the court decided to conduct a cross-examination by questioning the witness, victim and defendant again to test the credibility of their evidence.

After the cross-examination, the court was still unsure of the facts, so the court decided to acquit the defendant.

JSMP is very concerned about the method of cross-examination used in this case. The cross-examination of a (then) 13-year-old child in front of the perpetrator, who is her father, is likely to put the child under distress and lead her to be fearful and intimidated.

In this case, the Court could have avoided making the victim provide evidence in front of the perpetrator by using one of the many existing victim and child-friendly provisions in the Criminal Procedure Code for giving evidence:

- a judge can take pre-trial statements for future use where there are grounds for doing so, particularly in relation to victims of sexual violence (Article 230);
- the court can take statements from a witness in her/his home, if unable to appear at the hearing (Article 243);
- the court can remove the defendant from the courtroom if her/his presence could intimidate or inhibit the witness from giving testimony (Article 253); and
- the court can examine statements made to a judicial authority by the defendant, victim or witnesses during investigations (Article 266). For example, in cases involving child victims, the court could examine the victim's statement given to the prosecutor instead of requiring the victim to re-testify in court.

The UN also recommends allowing victims of sexual abuse to provide evidence using alternative methods, many of which have been introduced in other jurisdictions across the world. Timor-Leste's Law on Witness Protection provides for witness concealment during testimony⁴³ and, while not explicitly mentioned, this could include physical screening of the witness box or other such measures. The Law on Witness Protection also allows witness testimony to be taken via teleconference.⁴⁴ Courts in Timor-Leste should use these provisions to protect victims, and to limit contact between victims and the accused. Many of these, particularly the use of screens and special seating arrangements, are low-cost and could easily be implemented in Court across Timor-Leste.

⁴³ Law on Witness Protection Article 4.

⁴⁴ Law on Witness Protection Articles 5 and 6.

JSMP notes that in a 2015 case of rape the victim, a Timorese women who was working overseas in Australia during the trial, was allowed to provide evidence via Skype.⁴⁵ JSMP congratulates the court for their practice in this case, but also call upon all courts in the future to utilize Skype and other similar methods of communication in cases of sexual violence.

4.2.2 Victim privacy

Victim's privacy is also an issue in many sexual violence cases. In this regard, JSMP is concerned about the court's practice of printing the full names of both the victim and defendant on the court schedule, which is in full view of the public. In addition, the Court of Appeal's website prints judgments that contain the identities and details of victims of sexual violence. These practices pose serious risks for victims. Publishing names of the parties can cause humiliation, but can also make the victim vulnerable to intimidation and harm, particularly when attending court and giving evidence.⁴⁶

JSMP is also concerned by the practice of some mobile courts allowing members of the public to watch the trial, take photos, laugh and clap.⁴⁷ This practice fails to protect the dignity of the victim, and does not show sensitivity on the part of courts in cases involving gender-based violence and minors.

JSMP has observed that where the trial is open to the public, victims feel unsatisfied with the process because others know about their case. In one particular 2013 case involving a teenage victim allegedly raped by her stepfather, the victim told JSMP she was pleased that her case was being heard but very sad and embarrassed that the proceedings were open to the public. She said that, because of the trial, people who had not previously known about her case now knew what had happened to her.⁴⁸

This practice is also not consistent with the Criminal Procedure Code, which provides that, in cases involving a sexual offence against a minor, proceedings should generally be closed to the public.⁴⁹ The Criminal Procedure Code also permits the court to close proceedings to the public where it would preserve public morals and human dignity, such as in cases of sexual violence.⁵⁰

JSMP appreciates the mobile court initiative for improving access to justice in remote areas, but further training is required to ensure that all court actors understand how to sensitively treat victims of sexual violence. There have been some instances of good practice. In 2013, JSMP's observed a mobile court request those present to leave the court room before the hearings involving cases of sexual violence

⁴⁵ Case number 0069/15.DICMR.

⁴⁶ Many jurisdictions protect victim privacy by prohibiting proceedings being published in a manner which could lead to the identification of any person involved in the proceedings, either as a party or witness: see, for example, the *Family Violence Protection Act 2008 (Vic)* s166. In practice, this means that courts use numbers or other anonymous descriptors to protect the parties' identities.

⁴⁷ JSMP, 'Overview of Justice Sector 2014' above n 8, at 22; See also JSMP Press Release, 'Victim of Sexual Assault dissatisfied with the mobile court trial that was open to the public', above n 8.

⁴⁸ JSMP Press Release, above n 8.

⁴⁹ Timor-Leste, *Criminal Procedure Code*, Article 76(5).

⁵⁰ Timor-Leste, *Criminal Procedure Code*, Article 76(1).

commenced.⁵¹ However, since this time JSMP has observed such positive practices are still not consistently applied in either permanent or mobile courts. This illustrates that the courts need to be more consistent in their sensitive treatment of victims.

5. SENTENCING

This final section will examine how courts in Timor-Leste are determining applicable sentences in cases of sexual violence where defendants are convicted. Importantly, it will also examine the issue of civil compensation for victims.

Imposing a penalty on a criminal defendant achieves a number of goals, including:

- ensuring the security of the victim;
- deterring criminals from reoffending;
- deterring the community in general from committing criminal offences; and
- facilitating rehabilitation and social reintegration of the convicted into the community.

The Penal Code provides for a range of sentencing options, from prison sentences to alternative penalties such as fines and suspended sentences. The Penal Code favors alternative sentences to prison sentences – Article 68 states that ‘whenever a sentence of deprivation of liberty and another penalty that does not involve deprivation of liberty are alternatively applicable, the court shall give preference to the latter, whenever the latter adequately and sufficiently fulfills the purpose of the penalty’.

The Penal Code also lays out a number of principles to help courts to decide what penalties are appropriate in each individual case. Article 51 of the Penal Code provides that the court is to determine a penalty according to the ‘perpetrator’s guilt and prevention requirements, within limits defined by law’. The court must consider aggravating and mitigating circumstances, as well as explicitly state the grounds for the penalty adopted.

However, despite these guiding principles, sentencing in sexual crimes can be difficult. There are often numerous aggravating and mitigating circumstances that the court must take into account when sentencing, and calculating penalties in a methodical manner can be difficult. As a result, JSMP has observed that sentencing in crimes of sexual violence can often be inconsistent and not commensurate with the relevant offence, and lengths of prison sentences can be vastly different even in cases with similar facts.

Given this, guidance materials, such as a sentencing guide which clearly explains the sentencing process in the Penal Code, may assist courts to hand down consistent and transparent sentences. While maintaining the discretion of judges to determine the appropriate penalty given the circumstances of each case, sentencing guidelines can

⁵¹ JSMP Press Release, ‘Mobile court in Manufahi District shows positive step forward in terms of protecting victims of sexual violence’ (2013), available at: http://jsmp.tl/wp-content/uploads/2013/01/Julgamentu_Movel_SameWJU_ENGLISH.pdf

help to reduce inconsistency in sentencing. JSMP notes that developing such sentencing guidelines is a commitment under Timor-Leste's National Action Plan on Gender-Based Violence.

5.1 Suspended sentences

A suspended sentence is when the court delays when the convicted person will serve his or her prison sentence. If the convicted person does not break the law during the period of the suspension, then no prison sentence will be imposed at all.

Under Article 68 of the Penal Code, the court may suspend a prison sentence of less than three years. The sentence can be suspended for between 1-5 years, and the court must provide reasons as to why the sentence has been suspended, such as:

- the personality of the perpetrator;
- the circumstances under which the crime was committed;
- the perpetrator's previous behaviour and living conditions; and
- most importantly, the perpetrator's likely conduct in the future.

However, JSMP has observed courts incorrectly applying Article 68 in cases of sexual violence.

Case Study 9 – no discretion to apply a suspended sentence

The Public Prosecutor alleged that on 31 July 2013, the defendant had sexual intercourse with the 13-year-old victim. The defendant called the victim into the house, laid her onto the bed, removed her clothes and had sexual intercourse with her.

The Public Prosecutor charged the defendant with violating Article 177(2) of the Penal Code for practicing an act of sexual relief with a minor. The applicable penalty for violating Article 177(2) is 5 to 15 years in prison. The Prosecutor asked the Court to sentence the defendant to 4 years prison suspended for 5 years.

Based on these facts the court found the defendant guilty and sentenced him to 3 years in prison suspended for 5 years.

This case is concerning for a number of reasons. First, the public prosecutor charged the defendant with Article 177(2) of the Penal Code for practicing acts of sexual relief with a minor when the defendant should have been charged with Article 177(1) for having sexual intercourse with a minor.

For the present discussion on suspended sentencing, it is concerning that the public prosecutor asked the court to apply a prison sentence of 4 years, suspended for 5 years. Four years is less than the minimum sentence for Article 177(2), and Article 68 of the Penal Code clearly states that a suspended sentence can only be applied to a prison sentence of 3 years or less. The minimum sentence for both 177(1) and 177(2) is 5 years, therefore the court did not have any discretion to provide a suspended sentence in this case unless extraordinarily mitigating circumstances could be proved under Article 56 (discussed further below).

More broadly, courts in Timor-Leste do not frequently apply suspended sentences in cases of sexual abuse. Of the total 145 cases of sexual violence from 2012-2015 that JSMP monitored through to a decision, suspended sentences were imposed on convicted persons in just below 15 per cent of cases (compared to domestic violence cases in which, for example, in 2015 suspended sentences were imposed in 52% of cases). However, when suspended sentences are applied, JSMP is also concerned that the courts are not providing reasons for suspending the sentence as required by Article 68 of the Penal Code⁵², and are not making any further conditions or additional orders. As a condition of suspending a prison sentence, the Court may make additional orders under the Penal Code, including:

- the perpetrator must make or ensure reparation of the damage caused by the crime within a given deadline;⁵³
- the perpetrator must publicly apologize to the victim;⁵⁴
- the perpetrator must periodically appear before a court, social reintegration officer or non- police entities’;⁵⁵ and
- the perpetrator must be monitored by reintegration services for the duration of the suspension period and adhere to a social reintegration plan.⁵⁶

However, JSMP has not observed these additional requirements being applied in any cases of sexual violence where the perpetrator has received a suspended sentence. It is important, particularly in cases of sexual violence, that the perpetrator is rehabilitated and that contact with the victim and community is tightly monitored to ensure the perpetrator does not reoffend.

When the courts do not impose other obligations with which the convicted person must comply with during the period of the suspension, convicted persons often believe that they have been acquitted. This does not serve the intended deterrent effect of sentencing and does not discourage convicted persons from committing similar acts in the future, nor does it discourage potential perpetrators in the community. Most importantly, victims may not feel that the perpetrator has been appropriately punished and therefore that they have not received justice.

5.2 Broadly interpreting mitigating factors

A mitigating circumstance is a factor that reduced the severity of the charge. There are two different kinds of mitigating circumstances in the Penal Code: general mitigating circumstances and extraordinary mitigating circumstances.

General mitigating circumstances are relevant to sentencing as they reduce the seriousness of the offence or the offender’s culpability, within the sentencing range

⁵² Under article 68 of the Penal Code, the Court must provide reasons as to why the sentence has been suspended, such as: the personality of the perpetrator; the circumstances under which the crime was committed; the perpetrator’s previous behavior and living conditions; and the perpetrator’s likely conduct in the future.

⁵³ Penal Code Article 69(2)(a).

⁵⁴ Penal Code Article 69(2)(b).

⁵⁵ Penal Code Article 70(1)(g).

⁵⁶ Penal Code Article 71.

for that offence. Article 55 of the Penal Code contains a non-exhaustive list of general mitigating circumstances, which includes, for example, the “presence of acts demonstrating sincere repentance of the perpetrator”.⁵⁷

Extraordinarily mitigating circumstances are exceptional factors that reduce the maximum and minimum penalty established for the offence. It must be proven that the circumstances: ‘reduce, to a large extent, the unlawfulness of the perpetrator's conduct, guilt or need for penalty’. Article 56 of the Penal Code contains a non-exhaustive list of extraordinarily mitigating circumstances.

While both lists of mitigating factors are not exhaustive, courts cannot take any factor into account as a mitigating circumstance. In accordance with Article 51 of the Penal Code, it must show that this circumstance reduced the culpability of the perpetrator, and the need for punishment. In contrast, JSMP has monitored cases where the sentences have been considerably reduced as a result of mitigating circumstances that should not have been taken into account, or applied to such a degree, resulting in sentences that do not appear to be commensurate with the crime committed.

For instance, JSMP has observed sentences being reduced due to the age of the defendant, in some cases because he was young,⁵⁸ and in some cases because he was old.⁵⁹ In one case, which involved the sexual abuse of a minor aged nine years old, the court found the defendant guilty, but when considering the sentence the court found the elderly age of the defendant (71 years of age) to be a mitigating factor. The court imposed a lenient sentence of 6 years and 8 months, well below the maximum sentence of 15 years.

JSMP has also observed that the defendant’s occupation or profession, whether or not he or she is respected in the community, and other aspects of the defendant's social position, have been considered to be extraordinary mitigating factors that reduce the applicable sentence in cases of sexual violence.

Case Study 10 – Mitigating factors

The 19-year-old defendant sexually assaulted his six-year-old cousin.

The public prosecutor charged the cousin with sexual abuse of a minor under Article 177(1) of the Penal Code, which carries a minimum sentence of five years imprisonment.

The Court found the defendant guilty of the offence, however ruled that there were extraordinarily mitigating circumstances under Article 56 of the Penal Code. The Court listed the following extraordinarily mitigating circumstances

- A "long period of time had gone by since the crime" (three years from reporting to sentencing);
- The defendant had not reoffended
- The defendant was of a good character as he was a university student, and was "socially well inserted"; and
- The matter had already been settled informally within the family.

The Court sentenced the defendant to three years in prison, suspended for four years.

⁵⁷ Penal Code Article 55(2)(e).

⁵⁸ Case number 134/2014/TDDili.

⁵⁹ Case Number 0195/14.PDDIL.

Article 56 of the Penal Code does provide that making reparations for damage caused or diminishing its effects before trial⁶⁰, and maintaining good conduct 'long after' the crime was committed are extraordinarily mitigating circumstances,⁶¹ and permits the suspension of an extraordinarily mitigated penalty. However, JSMP believes it was not appropriate here for the court to consider the social standing of the perpetrator, or the fact that he was currently attending university. JSMP considers that, in crimes of sexual violence, factors such as these cannot be seen as extraordinary mitigating factors that diminish the guilt of the perpetrator.

It is difficult to comprehend how these mitigating circumstances warranted a suspended sentence (with no reporting or other obligations) when the 19 year-old defendant had sexually abused a six-year-old girl, a crime ordinarily punishable by five to twenty years imprisonment. It is clear that these mitigating factors were not appropriately weighed against aggravating factors such as the fact that the victim was (considerably) less than 12 years of age at the time the act was committed.

This case illustrates the consequences of a broad and arguably incorrect interpretation of the mitigation provisions. Here, a convicted child sex offender with a high likelihood of reoffending was returned to the community unsupervised by any judicial authority. The courts decision is likely to lack any sufficient deterrent effect, puts other children in the community at risk and also sends a message to the community that sexual abuse of children is not a serious crime.

This again highlights the need for sentencing guidelines so that, when multiple aggravating and mitigating circumstances are present, courts can apply a methodical approach to determine a fair and transparent sentence.

5.3 Court considers customary law

When sentencing perpetrators of sexual violence, it is common for courts in Timor-Leste to have regard to informal mediation between the families of the defendant and the victim. Under Article 55(c) of the Penal Code the fact that a perpetrator has made reparations prior to the first trial date can be considered as an extraordinarily mitigating circumstance that can operate to reduce a sentence.⁶² Informal mediation and compensation may also be relevant as evidence of reconciliation between the defendant and victim, which is a general mitigating circumstance under Article 55 of the Penal Code.

However, it is important to recognize that informal mediation often takes place between the families of the defendant and victim, without the informed involvement of the victim. The victim may have also faced significant pressure from the families to reconcile with the defendant. The Court needs to be satisfied that the reconciliation is genuine, having regard to the vulnerability of the victim and history of any violence, physical and sexual, in the relationship.

⁶⁰ Article 56 2(c).

⁶¹ Article 56 2(d).

⁶² for an explanation of 'extraordinarily mitigated' see footnote 20 above.

JSMP has consistently expressed its concern at this practice. While the informal justice sector in Timor-Leste can be beneficial for some victims, resolution and restitution provided under customary practices overwhelmingly fail to deliver justice for women and child victims of sexual violence. In particular, restitution provided under customary law is provided to the victim's family, not the victim.

JSMP has continued to express its concern at the practice of courts not considering the circumstances of each case and each victim, and whether restitution provided under customary law was provided to the victim. JSMP believes this practice places Timor-Leste in conflict with Article 2(f) of the Convention on the Elimination of Discrimination Against Women (CEDAW), which requires states to 'take measures to modify or abolish existing customs and practices which constitute discrimination against women'.

Encouragingly, case study 11 shows that there has been some recent progress on this issue.

Case Study 11: Court rejects traditional compensation

The 12-year-old victim was walking along the road when the defendant stopped his motorbike and tried to pick her up. She refused, but he persisted until she eventually agreed to get on his bike. When they arrived at the victim's house the defendant followed her inside and sexually abused her.

The Court found the defendant guilty of sexual abuse under Article 177(2) of the Penal Code, with aggravating factors under Article 182 because the girl was only 12.

The defendant tried to argue that the case had already been resolved in accordance with local custom, as he had given US\$2,000 to the victim's family. However, the court decided not to consider this compensation because it was given to the victim's family. In addition to imposing a 13-year prison sentence, the court ordered for the defendant to pay US\$ 3,000 in compensation to the victim.

In this case the defendant argued that he had already provided restitution and settled this matter in accordance with customary law. The Court, however, rejected this argument and imposed a heavy penalty on the defendant. JSMP commends the judge presiding over this case for showing sensitivity towards the victim's suffering by rejecting as a mitigating circumstance the traditional settlement that was provided to the victim's family and not the victim. This decision, from October 2015, marked an important step forward and JSMP hopes this case will be a reference point for judges hearing similar cases in the future.

5.4 Compensation for victims

Compensation is a sanction that has a monetary and/or material value determined by the court against the convicted person, because he or she has harmed the other person. The objective of compensation is to repair the harm caused to the victim, and to correct the behavior of the convicted person.

Under Article 104(1) of the Penal Code, courts in Timor-Leste must make a determination on civil compensation for loss or damage resulting from a crime, at the request of the victim as represented by the public prosecutor. The Court shall determine a compensation amount to be awarded to the victim, based on an assessment of the amount of loss or damage caused by the defendant’s criminal act.

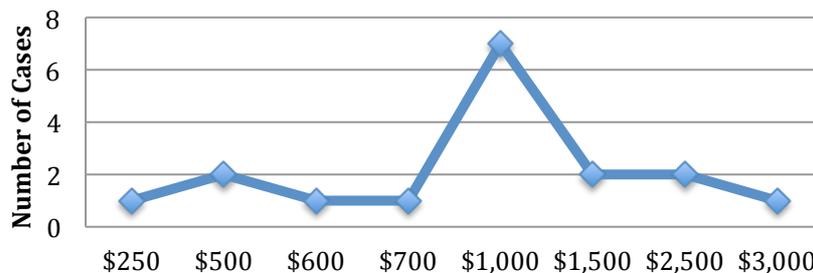
Under Article 72(3) of the Criminal Procedure Code, it is the responsibility of the public prosecutor to include in the indictment the elements required for determining civil liability for a crime. It is therefore the public prosecutor’s duty to establish that the defendant’s criminal act caused loss or damage to the victim, and provide evidence of the extent and value of such loss or damage. Under Article 278(8)(g), taking into account all the proved facts the Court must then decide ‘whether the prerequisites for civil compensation arbitration have been identified’.

The calculation of the amount of compensation is regulated by the rules of civil law.⁶³ The general principles contained in the Civil Code specify that, in addition to compensation for bodily injury or death, the Court must also have regard to serious “non- material damage”.⁶⁴

Based on JSMP observations at the Dili Baucau, Suai and Oecusse District Courts, judges rarely impose an order for compensation against a convicted person in cases involving sexual violence. Since 2012 compensation has only been awarded in 17 cases of sexual violence monitored by JSMP, or eleven per cent (6%) of cases monitored to decision. Compensation was awarded six times in 2013, three times in 2014 and eight times in 2015, and only in cases of rape, aggravated rape and sexual abuse of a minor.

Furthermore, Graph 5 below shows that the level of compensation has varied greatly, from US \$250 in a 2014 case of sexual abuse of a minor,⁶⁵ to US \$3000 in a 2015 case of aggravated sexual abuse of a minor.⁶⁶ Timor-Leste courts most often order compensation of \$1000, which has been imposed on six occasions. It is also interesting that compensation has only been awarded in sexual violence cases heard in the Dili and Suai District Courts. JSMP commends these courts for considering the impact of sexual abuse on victims and awarding compensation.

Graph 5: Compensation in sexual violence cases monitored by JSMP 2012-2015



⁶³ Penal Code Article 104(2).

⁶⁴ Civil Code Article 430.

⁶⁵ Case number 644/2013/TDD.

⁶⁶ Case number 177/pen/2015/TDS.

Requiring perpetrators of sexual crimes to pay compensation to victims is one aspect of sentencing that needs to be utilized more effectively by courts in Timor-Leste. Compensation can provide a remedy for the victim and can cover financial costs associated with the violence, including medical costs and redress for emotional and psychological harm suffered. However, this compensation should not replace criminal penalties such as a prison sentence.

6. CONCLUDING REMARKS

Sexual violence is a form of serious gender-based violence that affects many women and children in Timor-Leste. Research suggests that a large number of women experience sexual violence, particularly by an intimate partner, but only nine percent (9%) of all criminal cases monitored by JSMP are sexual crimes. There are many reasons for this low reporting rate, including that the formal justice sector is currently not a safe place where victims of sexual violence feel they will receive justice.

Charging and sentencing sexual crimes can be complex and JSMP acknowledges the hard work undertaken by prosecutors, defenders and judges, and the challenges they face. JSMP also believes there are small but important changes that can be made that will strengthen the legal system's capacity to effectively deal with sexual cases and enhance victims' trust in the system.

Similarly, JSMP urges the Government of Timor-Leste to ensure adequate resources are targeted to this important area. Timor-Leste has obligations under international law (CEDAW), the Timor-Leste Constitution and national laws to provide effective protection to women against gender based violence, and respect their integrity and dignity. This is in the interests of society as a whole as it is not just individual victims who are harmed by sexual violence but families and communities across Timor-Leste, including future generations.

Based on the findings of this report, JSMP makes the following recommendations to improve charging and sentencing in cases of sexual violence, and the treatment of victims during the trial process. These changes aim to enhance protections and deliver just outcomes for victims.

Recommendations

1. Public prosecutors must carefully consider the evidence in each case and, in accordance with Article 42 of the Penal Code, should select the charge that is the most appropriate and provides the most serious penalty available. In particular, when charging sexual crimes against minors, prosecutors should use Articles 177(1) (sexual abuse with penetration) and 177(2) (sexual abuse without penetration), as these provisions recognize the severity of sexual violence against children by applying heavier penalties and lighter burdens of proof.
2. Public Prosecutors and courts must identify and apply appropriate aggravating articles to the original charge, including specific aggravating circumstances (Penal Code Articles 173 & 182) and general aggravating factors (Article 52). When more than one aggravating circumstance is present, courts should apply a sentence towards the maximum end of the relevant sentencing range.
3. Prosecutors must recognize that sexual violence within marital and intimate partner relationships is a crime and should be charged using the applicable offence in the Penal Code. Sexual violence within a marriage must always be charged as an aggravated offence due to the familial relationship (Articles 173(a), or Article 182(d)). Sexual violence within a marriage is also a general aggravating circumstance under Article 52(2)(l) and warrants a heavier sentence within the minimum and maximum sentencing range for that offence.
4. The public prosecution service should develop legal guidelines on charging in crimes involving sexual violence. The legal guidelines should clarify the issues raised in Recommendations 1-3.
5. The public prosecutor must recognize that rape under Article 172 of the Penal Code includes vaginal, oral or anal sex, including digital penetration and use of an object, and charge appropriately. In rape case, public prosecutors and courts should not require evidence of physical injury when considering if a victim was forced or threatened, and lack of resistance or calling out should never be considered to be evidence of consent in rape cases.
6. Courts must not accept lack of medical evidence of injuries caused by an alleged sexual violence as conclusive proof that the sexual assault did not occur. Prosecutors should be able to establish a case based on the victim's testimony and other corroborating evidence, even if there is a lack of medical evidence showing direct injury from the sexual assault. The Court must look to the other evidence presented by the prosecutor, and inconsistencies in the defendant's arguments.
7. The Government, through the Ministry of Health and Legal Training Centre, must provide sufficient resourcing for court actors to be trained on how to use medical evidence, including the medical forensic protocol.

- 8.** Courts must use existing provisions in the Criminal Procedure Code to minimize contact between victims and defendant during a trial, particularly child victims of sexual abuse. In accordance with the Criminal Procedure Code, in cases involving a sexual offence against a minor, the courts should – as a general rule – close proceedings to the public. In cases characterized as sexual violence against an adult, the court should consider closing proceedings to the public where it would preserve the human dignity of the victim.
- 9.** When sentencing, courts must adhere to the following guidelines:

 - a.** When identifying mitigating factors courts must show that the circumstance reduced the culpability of the perpetrator, and the need for punishment. Personal characteristics of the accused, such as their age or social standing, do not reduce the culpability of the accused or the need for punishment, and should not be considered mitigating circumstances.
 - b.** When the perpetrator has provided restitution under customary law, courts must consider the facts of each case to determine whether that restitution has in fact gone to the victim, or to the victim’s family.
 - c.** In all cases of sexual violence the courts should consider ordering the convicted person to pay compensation to the victim to acknowledge and redress the suffering that they have experienced.
 - d.** In accordance with Article 68(2) of the Penal Code, the courts should provide grounds for their decision to apply a suspended sentence and, when a suspended sentence is handed down, the courts should apply additional orders, particularly to prevent contact between the perpetrator and the victim.
- 10.** Sentencing guidelines should be developed to ensure consistency in sentencing outcomes. These guidelines should clearly outline general sentencing principles, aggravating and mitigating factors using examples, rules for repeat offenders, guidance on alternative penalties and provide for the calculation of civil compensation.

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