

The Complexity of Determining Indicative Evidence in The Rape Criminal Act

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ABSTRACT

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The rise of rape cases in Indonesia has resulted in social unrest, especially among women and children. Sometimes, judges have difficulty determining indicative evidence of rape cases. This study aims to analyze the strength of the evidence as consideration for judges in the criminal case of rape. This research is normative legal research. The data used in this research is secondary data obtained through a literature study and analyzed juridically normative based on a statutory and conceptual approach. The legal materials used in this research are primary and secondary legal materials. The study results show that rape is the most difficult crime to prove, considering that this kind of crime is often committed in places where it is difficult to find witnesses. Judges experience difficulties in concretely explaining evidence. Even in court practice often experience difficulties in applying it. These difficulties can then have implications for the decision that the judge will release because the decision is dominated by the judge's verdict, which may be excessive. Indicative evidence is the only indirect evidence among other evidence formulated in Article 184 of the Criminal Procedure Code.

1. INTRODUCTION

Indonesia has faced many criminal problems, including moral crimes, especially cases of rape committed either en masse or individually.¹ It affects the community's social conditions since they will feel uneasy with various kinds of sexual violence. It mainly has implications for women and children who are more vulnerable to becoming victims of sexual violence, particularly cases of rape. Rape can be a bad experience and sometimes even cause problems afterward, such as stress, low self-esteem, and suffering. Therefore,

¹ & SH I. G. A. Saputra, M. Yuliantini, N. P. R., SH, and L. M Mangku, D. G. S., "Perlindungan Hukum Terhadap Anak Sebagai Korban Tindak Pidana Pelecehan Seksual Di Kabupaten Buleleng," *Jurnal Komunitas Yustisia* 2, no. 1 (2019).

it does not rule out the possibility of a rape victim who commits suicide.² Rape, in this case, has become a type of decency crime that requires serious attention from all parties, especially the government. That is because rape cases can lead to more severe and diverse problems in the life of the state, society, and the lives of women and children who become the victim of rape crime.³

Victims of rape crime may experience various suffering, both physically and psychologically, such as prolonged trauma due to a lengthy examination procedure to the point of proving that the victim's position is only a complement or part of the evidence, not a seeker of justice.⁴ In proving in court, the role of the victim is more as part of the search for material truth, namely as a witness. Meanwhile, at the stage of enforcing the judge's verdict, the victim was often disappointed by the criminal sentence, which could be relatively light for the preparation of rape. In some cases, the perpetrator of rape was acquitted because it was deemed insufficient evidence.⁵ That is not proportional to the suffering that the victim must endure as a result of rape.⁶

Not all criminal cases of rape have an easy proving process. The evidence of a rape case in the community's life is so minimal that the judge will use the examination by using the instructions.⁷ In such a condition, not many rape cases reach the court level due to the various obstacles experienced by rape victims, especially related to proving criminal procedural law. The proof in a case of rape is included in the criminal procedure law that seeks material truth, which differs from the purpose of civil procedural law, which focuses more on formal truth. It demands that the judge must not be satisfied with formal truth.⁸ Thus, in strengthening his conviction, the judge can ask for evidence from both parties, namely the defendant and the public prosecutor, and witnesses presented from both parties. Therefore, it is miserable when handling the criminal act of rape is protracted, but when it is at the trial stage, the defendant is only acquitted on the grounds of a lack of evidence.

On the other hand, the prosecutor has submitted witness testimony and *visumetreperitum* as supporting letter evidence. The existence of these two pieces of

² A. D. Parker and J Brown, "Detection of Deception: Statement Validity Analysis as a Means of Determining Truthfulness or Falsity of Rape Allegations," *Legal and Criminological Psychology* 5, no. 2 (2000): 237–59.

³ M. Yuliantini, N. P. R., SH, "Legal Protection of Women And Children From Violence In The Perspective Of Regional Regulation of Buleleng Regency Number 5 Year 2019," *Jurnal Pendidikan Kewarganegaraan Undiksha* 9, no. 1 (2021): 89–96.

⁴ Syarif Fadillah, *Victims of Crime in the Perspective of Victimology and Islamic Criminal Law* (Jakarta: Ghalia Press, 2004).

⁵ Syarif Fadillah.

⁶ C McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence," *The Journal of Criminal Law* 81, no. 5 (2017): 367–92.

⁷ Darmoko Yuti Witanto and Arya Putra Negara Kutawaringin, *Judge's Discretion (An Instrument for Enforcing Substantive Justice in Criminal Cases)* (Bandung: Alfabeta, 2013).

⁸ B Stanko and E Williams, *Reviewing Rape and Rape Allegations in London: What Are the Vulnerabilities of the Victims Who Report to the Police?* (cullompton: Willan, 2009).

evidence fits for the judge to judge the existence of an agreement even though it is not explicitly shown. That is where the judge's duty is demanded in carrying out a thorough examination that is wise, solely for the sake of upholding legal justice.

In trial practice, confidence in determining whether an act, event, or situation is an indication, all of which must be considered carefully and thoroughly, is placed on the judge.⁹ However, in several cases, the fact that has occurred illustrates that *Visum et repertum* as evidence of letters is often not considered. It becomes difficult to prove rape cases because the evidence only puts forward the victim's testimony as a witness. Based on only one witness, namely the victim-witness, the process of proof is again clashed with the *Unus Testis Nullus Testis* principle. If we pay closer attention to the testimony of a victim-witness and the receipt of a *Visum et repertum*, documentary evidence can be the basis for an indication as valid evidence.¹⁰

The formulation regarding the meaning of indicative evidence is contained in Article 188 Paragraph (1) of the Criminal Procedure Code, which determines that an indication is an act, event, or situation due to its compatibility, either between one another or with the criminal act itself which indicates that it has been a criminal act occurred and who did it.¹¹ Based on the formulation of the article, it can be said that instructions are indirect means of proof because the judge must connect one piece of evidence with other evidence and select those that are compatible with each other in concluding the evidence.¹²

However, in reality, judges put forward and prioritize looking for witness statements that are not easily found in the crime of rape. Apart from being a victim-witness, the witnesses presented in the majority were witnesses whose nature was *testimonium de auditu* (testimony or testimony due to hearing from other people).¹³ The Witness statements proving the criminal act of rape generally come from relatives of the victim who first received the victim's report. In this case, their testimony can be accepted as a means of evidence if there has been correspondence between the witness's testimony connected with *visum et repertum*. *It can be withdrawn and considered* indicative evidence.¹⁴ The evidence for guidance should meet the minimum requirements of at least

⁹ Hari Sasangka, *Law of Evidence in Criminal Cases* (Bandung: Mandar Maju, 2003).

¹⁰ Darwan Prinst, *Hukum Acara Dalam Praktek* (Jakarta: Djambatan, 1998).

¹¹ Frans Maramis and Jolly K. Pongoh, *Procedural Law and Criminal Justice Practices* (Manado: Unsrat Press, 2016).

¹² Aranburu X. A, "Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases," *Law & Social Inquiry* 35, no. 4 (2010): 855–79.

¹³ Abdul Wahid, *Protection of Victims of Sexual Violence (Advocacy for Women's Human Rights)* (Bandung: Refika Aditama, 2011).

¹⁴ Andi Hamzah, *Certain Offenses (Speciale Delictum) in the Criminal Code* (Jakarta: Sinar Grafika, 2014).

2 (two) valid pieces of evidence as to the basis for a judge to impose a sentence on the accused of rape.¹⁵

Based on the description of the problems described above, it is essential to study the evidence in proving criminal cases more deeply. That was carried out in the form of research which was later entitled "The Complexity of Determining Indicative Evidence in the Crime of Rape". In this research, it is conveyed that there is complexity in determining evidence of rape, so this research needs to be carried out.

2. RESEARCH METHOD

This research was normative legal research (juridical normative) with the consideration to study rules or regulations.¹⁶ The Criminal Code (KUHP) and the Criminal Procedure Code (KUHAP) studied the legal rules. A statute approach and a conceptual approach were used in this study. The statutory approach was used to study or examine all regulations relating to the initiation of the formation and implementation of the law against the legal force of evidence as evidence in the rape criminal case. The conceptual approach taken in this study included examining doctrines, principles, and concepts in the science of law concerning legal issues, which were the main issues being studied, namely the legal strength of evidence in the criminal case of rape.¹⁷

Analysis of legal materials is a description of the analysis methods that include using the collected data in solving research problems. Primary and secondary legal materials were obtained from the results of literature studies analyzed and studied for their legal relevance to describe the conceptions and theories in this study.¹⁸

3. RESULTS AND DISCUSSION

3.1. Indicative evidence and Legal Power of Proof

The process of proof of crime aims to find material truths or actual truths. Evidence in the court process is proving the defendant's guilt following what has been charged.¹⁹ According to M. Yahya Harahap, what is meant by proof is the central point of a case examination in a court session. Evidence includes outlines and guidelines on the ways justified by law to prove the guilt charged to the accused. The evidence contains the

¹⁵ Afrianty D, "Agents for Change: Local Women's Organizations and Domestic Violence in Indonesia. Bijdragen Tot de Taal-, Land-En Volkenkunde," *Journal of the Humanities and Social Sciences of Southeast Asia* 174, no. 1 (2018): 24–46.

¹⁶ Soerjono Soekanto, *Legal Normative Research in Brief* (Jakarta: Rajawali Press, 2014).

¹⁷ Amirudin and Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: PT Raja Grafindo Persada, 2008).

¹⁸ Bambang Sunggono, *Metodologi Penelitian Hukum* (Jakarta: PT Raja Grafindo Persada, 2011).

¹⁹ M. Yahya Harahap, *Discussion of Problems and Application of the Criminal Procedure Code: Court Session Examination, Appeal, Cassation, and Retrial* (Jakarta: Sinar Grafika, 2000).

provisions governing evidence justified by law that the judge can use to prove the accused's guilt.²⁰

The examination of the criminal case must not exceed what has been charged. Evidence at trial must be based on the indictment made by the public prosecutor.²¹ Article 183 KUHAP stipulates that a judge may not impose a sentence on a person except with at least 2 (two) valid pieces of evidence. Limitatively, article 183 KUHAP provides that in proving guilt, a defendant must fulfill at least 2 (two) pieces of evidence that can give conviction to the judge of the defendant's guilt.²²

Evidence has an essential role in proving a crime.²³ Insufficient evidence can result in the accused not being subject to criminal sanctions. Article 184 Paragraph (1) KUHAP determines valid evidence, among others, as follows:²⁴

1. Witness testimony;
2. Expert Statement;
3. Letter;
4. Instructions;
5. Defendant statement.

It is tough to explain the meaning of directive evidence concretely. There are often difficulties in applying it in judicial practice. These difficulties have implications for the decisions that the judge will issue. It is considering that the verdict is dominated by the judges' subjective judgments, which can be excessive. To avoid the subjective domination of judges in the application and assessment of the indicative evidence, judges must do so wisely, complemented by conducting examinations with complete accuracy and thoroughness based on their inner heart.²⁵ The judge must strictly guide warning of Article 183 Paragraph (3) of this Criminal Procedure Code. It is used by the judge intending to use evidence as a basis for evaluating the defendant's guilt. Therefore, through the demand for the responsibility of conscience, the judge has been warned to be prudent, especially when he will use directive evidence in proving a criminal case.

It can be understood that Article 188 Paragraph (2) of the Criminal Procedure Code based on the description above limits the judge's authority in obtaining the evidence

²⁰ M.Yahya Harahap, *Discussion of Problems and Application of the Criminal Procedure Code: Court Session Examination, Appeal, Cassation, and Retrial* (Jakarta: Sinar Grafika, 2000).

²¹ A Budiono et al., "Visum Et Repertum in the Evidencing Process of Rape in Indonesia," *Indian Journal of Forensic Medicine & Toxicology* 14, no. 2 (2020): 168–71.

²² D. S Lev, *The Criminal Regime: Criminal Process in Indonesia. In Figures of Criminality in Indonesia, the Philippines, and Colonial Vietnam* (Cornell: Cornell University Press, 2018).

²³ Butt S, "Religious Conservatism, Islamic Criminal Law and the Judiciary in Indonesia: A Tale of Three Courts," *The Journal of Legal Pluralism and Unofficial Law* 50, no. 3 (2018): 402–34.

²⁴ Liyus H, "Legal Protection for Children Victims of Rape Comparative Study Between Indonesia and Malaysia," *Advances in Social Science, Education and Humanities Research* 44, no. 2 (2020): 6–11.

²⁵ M.Yahya Harahap, *Discussion of Problems and Implementation of Criminal Code (Volume II)* (Jakarta: Pustaka Kartini, 1988).

of the instructions. Thus, the judge may not seek evidence at will from all sources. A judge can use the only source in constructing a tool of evidence for guidance is limited. Besides, it has been determined in Article 188 Paragraph (2) of the Criminal Procedure Code in detail as follows:

1. Witness testimony;
2. Letter;
3. Statement of the defendant.

Since the testimonies of witnesses, letters, and statements of the defendants contain various matters, the law considers that it is necessary to limit these matters too:²⁶

1. Actions;
2. Events;
3. the circumstances referred to, namely in the testimony of witnesses, letters or statements of the defendant himself.

Based on the description above, the assessment of the evidentiary strength of an indication in any particular situation must be carried out by the judge wisely after being examined with complete accuracy and thoroughness based on his conscience.²⁷ On further examination, it is found that Article 188 Paragraph (1) of the Criminal Procedure Code contains the intention that there is no absolute certainty for the defendant who is indeed guilty of the act as charged. Thus, an act, incident or situation can be considered an indication if there is a good agreement between one another and the criminal act itself, which indicates that a criminal act has occurred and that the perpetrator has committed the crime.²⁸

Indicative evidence can be deemed to have the power as valid evidence if there is an agreement obtained from the testimony of witnesses, letters, and statements of the accused. It is as stipulated in Article 188 Paragraph (2) of the Criminal Procedure Code. In assessing the strength of proof of an indication, a public prosecutor must be careful and thorough and do so with due care. It also applies to judges who are required to be wise and prudent in assessing the evidence to avoid assuming that the instruction is a personal opinion or just a presumption or conjecture.

In principle, all evidence has equal value and importance. However, in practice, the application of indicative evidence still depends on the criminal incident in question. Suppose the evidence for the testimony of a witness or other means of evidence is insufficient to prove the defendant's guilt. In that case, the indicative evidence is an effective means to meet the minimum limit of evidence as stipulated in Article 183

²⁶ T Tongat and I Anggraeny, "Abortion Due to Rape in The Perspective of Criminal Law and Health Law in Indonesia," *Journal of Law, Policy and Globalization* 10, no. 3 (2020).

²⁷ Stuntz W J, "The Uneasy Relationship between Criminal Procedure and Criminal Justice," *Yale LJ*, 1997, 103.

²⁸ Langer M, "Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure," *Am. J. Crim. L* 3, no. 3 (2005): 223.

KUHAP. Considered the difficulty of the proving process in the criminal act of rape, indicative evidence is needed to clarify a particular situation related to a criminal act. If a judge uses evidence to prove a criminal case, the judge must be observant and thorough in relating all the conformities found. Thus, it is hoped that the agreement will create a clear and complete indication of the occurrence of a criminal act and prove that the defendant was guilty of the act.

3.2. Indicative Evidence in the Imposing of the Criminal Act of Rape

Indicative evidence (*Aanwijzing*) is indirect evidence that can only be obtained from conformity with other evidence. Indicative evidence is the only indirect evidence among other evidence formulated in Article 184 of the Criminal Procedure Code. It is because the indicative evidence does not allow it to stand alone without other evidence.²⁹ Since it can only be used in urgent situations, indicative evidence can be classified as the last way the prosecutor cannot obtain other evidence.³⁰

Even though all evidence has the same value and priority in principle, its application still depends on the criminal incident in question. Therefore, if the evidence for the testimony of a witness or other evidence is insufficient to prove the accused's guilt, then the indicative evidence is an effective means of meeting the minimum limits formulated in Article 183 KUHAP. Considered the difficulty of the proving process in the criminal act of rape, indicative evidence is needed to clarify a particular situation related to the criminal act so that the judge can pass sentence on to the defendant.

The description above has proven that not all criminal cases have an easy proving process. Sometimes, a case is very evident with minimal evidence and cannot identify the perpetrator of the crime. In these circumstances, the law has provided a facility for the judge to determine the complexity through indicative evidence. Article 188 Paragraph (1) of the Criminal Procedure Code determines that an indication is an act, incident, or situation which, because of its compatibility, either between one another or with the criminal act itself, indicates that a criminal act has occurred and who the perpetrator is.³¹

There are 3 (three) indicators that can serve as clues based on the previous explanation, namely, among others: actions, incidents, and circumstances.³² These three indicators have congruence between one another or the conformity that occurs with the

²⁹ R. Soenarto Soerodibroto, *Criminal Code and Criminal Procedure Code (Completed with Supreme Court Jurisprudence and Hogeraad)* (Jakarta: PT. Raja Grafindo Persada, 2011).

³⁰ R. Soenarto Soerodibroto.

³¹ R. Soenarto Soerodibroto.

³² Darmoko Yuti Witanto and Arya Putra Negara Kutawaringin, *Criminal Code and Criminal Procedure Code (Completed with Supreme Court Jurisprudence and Hogeraad)* (Jakarta: PT Raja Grafindo Persada, 2011).

crime by self. In Article 188 Paragraph (2) KUHAP, it has been determined that the instructions as referred to in paragraph (1) can only be obtained from:³³

1. Witness testimony;
2. Letter;
3. Statement of the defendant.

Refer to the explanation of the sentence above. A guide can increase the judge's conviction of the defendant's guilt or innocence. The indicative evidence obtained as referred to in Article 188 Paragraph (2) of the Criminal Procedure Code must then be put together so that one indication can be made which can strengthen the judge's conviction whether the defendant is guilty or not. Besides, evidence such as sperm around the victim's vagina, damage to the hymen, and the victim's underwear can also be used as evidence for supporting evidence in proving whether the victim was raped.³⁴ However, this evidence is unlikely to be found in reports of rape were made several days after the incident. Thus the indication of the necessary evidence becomes weak or no longer visible, making it difficult for judges to believe that an act of rape has occurred.

It is difficult to prove in a criminal case of rape because it is often carried out in a hidden place where no witnesses are found. Moreover, suppose the act is committed between the perpetrator and the victim who has a power relationship (employer and employee or father and child). In that case, it is possible to the necessary evidence will not be easy to obtain. Therefore, this power relationship must consider the judge who examines every case of rape, especially rape committed over the power relationship. Assessment of evidence that can be assembled and explored through the circumstances that arise or indicative evidence can be obtained through a series of events in the criminal case of rape

4. CONCLUSION

Indicative evidence (*Aanwijzing*) is indirect evidence that can only be obtained from conformity with other evidence. Indicative evidence is the only indirect evidence among other evidence formulated in Article 184 of the Criminal Procedure Code. It is tough to explain the meaning of indicative evidence concretely, which even in judicial practice often experiences difficulty in applying it. The difficulty in explaining this indicative evidence can have implications for the decision to be issued by the judge, which is only dominated by the subjective judgment of the judge, which could be excessive. In order to prevent the subjective domination of judges in the application and evaluation of evidence, judges must do so wisely and be accompanied by careful and thorough examination based on their inner heart.

³³ Harahap A, "Use of Instructional Evidence Tools by the Public Prosecutor in the Criminal Prosecution Process," *International Journal Reglement & Society* 1, no. 1 (2020): 1–6.

³⁴ Eddy O.S Hiariej, *Theory & Law of Evidence* (Jakarta: Erlangga, 2012).

It is difficult to prove a criminal act of rape considering that this kind of activity has more often occurred in a hidden place where witnesses cannot be charged. Suppose the evidence for the testimony of a witness or other means of evidence is insufficient to prove the defendant's guilt. In that case, the indicative evidence is an effective means to meet the minimum limit of proof formulated in article 183 KUHAP. Considering that there are difficulties in proving the criminal act of rape, indicative evidence is needed to clarify a specific situation related to a criminal act.

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