

CHARGING STANDARDS IN RAPE CASES

1. Purpose

- (i) The standards contained in this chapter are designed to assist prosecutors in selecting the most appropriate charge(s) in sexual offences under the Pakistan Penal Code
- (ii) These standards do not
 - a. override the code of conduct issued by the Prosecutor General.
 - b. override the need for consideration to be given in every case whether a charge is in the public interest
 - c. override the consideration that each case is to be considered on its individual merits
- (iii) These standards should not be used for an investigatory decision. The correct guidance for investigatory decisions is contained in separate guidance issued by the Prosecutor General. However, this guidance must be kept in mind by police officers while recommending charges.

2. General Charging practice

A prosecutor must keep in mind the following general principles while selecting charges:

- (i) The charges should reflect the seriousness/gravity and extent of the accused's offending, thereby allowing the courts to sentence appropriately.
- (ii) The choice of charges should enable the case to be prepared and presented in a clear and simple way.
- (iii) There should be no overloading of charges by selecting more charges than necessary.
- (iv) There should be no overcharging by selecting a charge that is not supported by evidence in order to show resolve and/or seriousness in dealing with criminal conduct.

3. Sexual offences

- (i) There are a number of sexual offences in the Pakistan Penal Code. Since acts of sexual nature may attract a number of these offences, it is important to know these offences. These offences are:

- Pornography, section 292 A, 292 B and 292 C PPC
 - Assault or criminal force to woman with intent to outrage her modesty, section 354 PPC
 - Assault or use of criminal force to woman and stripping her of her clothes, section 354A PPC
 - Rape, section 376 PPC
 - Attempt to commit rape, section 376/511 PPC
 - Unnatural offence, section 377 PPC
 - Attempt to commit unnatural offence, section 377/511 PPC
 - Sexual abuse, section 377 B
 - Cohabitation, section 493-A, PPC
 - Enticing or taking away or detaining with criminal intent a woman, section 496A, PPC
 - Fornication, section 496B
- (ii) Sexual offences often precede, follow or take place concurrently with offences relating to marriage. Offences relating to marriage which may take place along with sexual offences are:
- Marriage ceremony fraudulently gone through, section 496 PPC
 - Prohibition of forced marriage, section 498B

4. Conduct contrary to section 375 PPC

The offence

- (i) The offence is committed when a man has sexual intercourse with a woman under the following circumstances
- Against her will
 - Without her consent
 - With her consent, when the consent has been obtained by putting her in fear of death or of hurt
 - With her consent, when the man knows that he is not married to her and the consent is given because she believes the man is another person to whom she is or believes herself to be married to
 - With or without her consent when she is under 16 years of age

Sexual conduct necessary to constitute the offence

- (ii) The offence is committed when a man has sexual intercourse with a woman
- (iii) Since the term 'sexual intercourse' is not defined in the Pakistan Penal Code, hence the dictionary meaning of the term may be used.
- (iv) The dictionary meaning of the term is, a) heterosexual intercourse involving penetration of the vagina by the penis, b) intercourse (oral or anal) that does not involve penetration of the vagina by the penis
- (v) Anal intercourse between a man and a woman cannot be charged under this section since it falls under section 377 of the PPC
- (vi) Oral intercourse falls within the meaning of sexual intercourse and can be charged under section 376
- (vii) Heterosexual intercourse occurs when penetration takes place regardless of its extent and duration. 2004 PCRLJ 1661
- (viii) Where a sexual activity does not fall within this section, alternative offences of sexual nature such as section 354, 354 –A, 377 B, 377-A or 509 PPC may be considered.
- (ix) Ejaculation is not necessary to constitute the offence of rape. However, ejaculation may provide evidence of the offence.

Against Will

- (x) The term "against will" encompasses inability of a person to make a choice because of her circumstances. Muhammad Ashraf Vs. The State, 1997 P.Cr. L.J 1351 (FSC).The circumstances will include
 - Fiduciary relationships;
 - Relationships of supervisory control;
 - Positions of command;
 - Sustenance and protection such as a parent-child relationship.
- (xi) Where a girl has been groomed for sex from a younger age, she is presumed to have lost her ability to make a choice.

Without Consent

- (xii) Consent signifies agreement to do an act freely. It also encompasses situations in which a person is unable to make an

informed choice due to lack of capacity; for example, mental disease, intellectual ineptitude, intoxication etc.

- (xiii) Submission does not necessarily mean consent. Consent should be free, real and intelligent (PLD 1959 WP Lahore 38). The absence of marks of violence should be analyzed depending on the circumstances of the case. (For instance, marks of violence may be absent because the woman submitted due to fear or because she was of diminished intellect or that the woman was a willing partner and so on and so forth)
- (xiv) A charge of rape is not maintainable where the woman being over 16 years of age has consented to sexual intercourse with a man not married to her, whether she is married to another man or not. In such cases appropriate charge is fornication under section 496-B PPC.
- (xv) The following are typical examples of lack of consent:
- Victim having the freedom and capacity to make a choice refuses to agree to the activity
 - Victim suffers from mental illness, or intellectual ineptitude and is unable to give her consent
 - Victim through drink or other drug is unable to make a conscious decision
- (xvi) The evidence of sexual experience may affect the credibility of an unmarried victim in certain circumstances, but it may not be sufficient of itself to prevent a prosecution for rape
- (xvii) Consent of a married woman to sex with her lawfully married husband is subject to the rules of shariah. The relevant rules are as follows:
- a. Where a marriage has taken place at a young age, the woman has the right to exercise the option of puberty (khayar-ul-baloogh)
 - b. Where a woman is incapable of exercising the option of puberty or has not been provided a meaningful opportunity to exercise the right, consent is not granted

Consent granted by woman due to threats

- (xviii) The use of force, or threats to cause death, or injury vitiates consent.
- (xix) Whether an act constitutes force or a threat will depend on the circumstance of a particular case.

- (xx) The victim should believe that if she didn't consent, the threat will be carried out i.e. the offender or someone on his behalf is likely to kill or hurt her or her loved ones
- (xxi) It must also be proved that either the offender knew or had reason to believe that the consent was given under fear. The phrase "reason to believe" requires that a reasonable person in the position of the offender would appreciate that the victim's consent was given in consequence of fear.
- (xxii) The factors for determining whether any threat was made include
- Threats may be made orally, in writing or by signs
 - Whether the threats are accompanied by violence
 - Whether the threats are made in the immediate presence of victim
 - Whether the threats are made by offender or someone else on his behalf
 - Threats should be real and serious
 - There has to be causal link between the threats and the act of submission by victim.
 - Whether the victim had effective and immediate recourse to resist the threats i.e. calling police
 - Whether the offender was known to the victim
 - Whether the offender was armed
 - Whether the offender's history of sexual offences or violence was known to the victim
 - Whether the victim was vulnerable because of her age or dependence on the offender in terms of emotional or financial support, or was traumatized by the incident as a whole
 - Whether the activity was preceded or attended by violence

Consent granted under Misconception of fact (see section 90 PPC)

- (xxiii) Misconception of fact occurs when the woman believes herself to be married to the man who committed sexual intercourse
- (xxiv) Misconception may be regarding the identity of the man or it may be regarding the validity of marriage
- (xxv) Where the consent is obtained by misconception, it is necessary to prove that offender knew that he was not married to the victim,

and either knew or had “reason to believe” that the consent was given because of misconception of fact of marriage.

- (xxvi) The knowledge or belief should exist at the time of the commission of offence.
- (xxvii) In cases of misconception regarding the validity of marriage, prosecutors must distinguish between a void and an irregular Muslim marriage
- (xxviii) A void marriage is illegal ab-initio and cannot be legalized by a subsequent act of parties. Examples of void marriages include marriage with persons related by consanguinity.
- (xxix) An irregular marriage is not unlawful per se and may become lawful if the hindrance to marriage is removed. An irregular marriage is not known to shiah law.
- (xxx) The woman’s consent should arise from her belief. Belief is less than knowledge.
- (xxxi) Where a woman grants consents because she believes that she is married to the person when she is not married to him and the man knows that she is not married to him and she has granted consent mistakenly or because of her incorrect belief or knowledge, there is no consent
- (xxxii) The charge should not be used where-
 - Where both the man and woman believe they are married to each other although the marriage is not legally valid.
 - Where sexual activity arises from a marriage, which is invalid on account of mutual *bonafide* mistake as to the identity of the parties

Consent of underage victim

- (xxxiii) Consent is immaterial where the girl is less than 16 years of age
- (xxxiv) Evidence regarding age includes, but is not limited to-
 - Birth certificate
 - Academic transcripts
 - Medical determination of age like ossification tests

Who may be charged?

- (i) Where more than one man has raped the victim on the same occasion, all of them should be charged as principal offenders.

Defenses

- (ii) The following defenses are not acceptable in law

- a. that the act was committed on the instructions of a *panchayat*
- b. that the act was done for the benefit of the woman
- c. that the man was intoxicated (where he took the intoxicant voluntarily)- (see section 86 PPC)

General Exceptions

- (i) A person must not be charged for rape where he has committed the act under threat of death within the meaning of section 94 PPC.

Alternate charges

- (i) A case in which an offender has committed various acts of sexual nature over a period of time may attract a number of different and sometimes overlapping offences.
- (ii) Where rape is committed in a forced marriage, a joint charge under section 376 and 498 B can be made.
- (iii) The evidence of forced marriage will be relevant for proving lack of consent to the sexual intercourse. It may not be sufficient of itself to prove it.
- (iv) Similarly, the offence of 'Deceitful cohabitation' contrary to s 493-A PPC may overlap with the offence of rape. Its elements are:-
 - to deceitfully cause a woman
 - to believe that she is married to the offender
 - and to cohabit with him.
- (v) It carries a penalty of rigorous imprisonment up to 25 years and fine
- (vi) Where the cohabitation involves penetration, the conduct will fall both under the offence of rape and section 493 A.
- (vii) Cohabitation means living together as husband and wife, without being husband and wife.
- (viii) The key distinctions between the two offences are:
 - Cohabitation may involve sexual activity which is penetrative or non penetrative.
 - It is necessary to prove the intent to deceive in the offence of deceitful cohabitation

- (ix) The key distinction between the offence of rape and fornication (section 496 B) is that in the latter there is a consensual sexual activity between a man and woman who are not married to each other. Where absence of will or lack of consent cannot be established to the required standard of proof, a charge under section 376 PPC is not appropriate. A charge under section 496B should only be made when there is evidence of consent and not lack of proof of absence of consent or will. The offence of fornication carries a penalty of rigorous imprisonment up to 5 years and fine.
- (x) The offence of sexual abuse under section 377 B covers a wide range of sexual conduct against children of less than 18 years old. It will involve penetrative activity other than the sexual activity covered under section 375 PPC. It could be non penetrative. Consent is immaterial.

Penalty (section 376 PPC)

- (i) The offence carries a punishment of death or imprisonment of either description for up to maximum period of 25 years and a minimum period of 10 years and fine
- (ii) Where it is committed by two or more person in pursuance of common intention, the punishment is death or imprisonment for life
- (iii) Where the victim is a minor or mentally disabled person or offender is a public servant who has abused his official position in committing the offence, the punishment is death or imprisonment for life and fine