

Judicial sentencing remarks and the re- victimisation of victims of sex offences

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- With the rise of state-centred justice (rather than victim-centred justice)
 - Victims became “saddled with enforcement and prosecutorial responsibilities for a process that did not address their needs or their losses” (Young 2001, p6).
 - As criminal justice systems became bureaucratised and public officials professionalised, a greater “distance [grew] between the victim, the offender and the criminal process” (Sanders 1999, p1)
 - The absence of a precise role for the victim, other than as a prosecution witness, is inconsistent with the victim’s actual importance to the criminal justice system.



Raising the status of victims in the criminal justice system:

- Elevating victims' rights is seen as an appropriate way to ensure victims are given their proper status in the criminal justice system.



Literature Review

Judicial sentencing remarks and the re-victimisation of victims of sex offences



According to critics the law:

- perpetuates gendered stereotypes about female and male sexuality
- their roles in relation to both sex and violence.

Criminal-justice practitioners, including judges and magistrates:

- redefine and reconceptualise victims' experiences to fit that law.

(Wykes & Welsh, 2009)



Studies and commentaries reveal that courts focus on:

- the victim's state of mind;
- her or his behaviour;
- other factors attributable to the victim.



The victim is on trial rather than the defendant.



Jurors are asked to decide whether the victim deserves protection under law, rather than whether the victim was sexually assaulted (Clark 2008).



Judges:

- Are influenced by the myths that permeate case law and sentencing manuals.

- Impose sentences that rarely, if ever, equate with the statutory maximums.

- Sentencing remarks show they take into account classical (mis)understandings of sexual assault, for instance:
 - offender-excusing;
 - victim-blaming;
 - acquaintance-justifying; and,
 - that real rape is stranger-rape

(Kennedy, Eastal and Taylor 2009, see also Bouhours & Daly 2008; Taylor 2004)



Results

What impact do judges' sentencing remarks have on victims of sexual assault?



Witness Assistance Service (WAS):

- Victims tend to actively listen to judges as they make their remarks. Judges can “make a difference” --
 - Case example: Judge’s non-verbal communication indicated that s/he was listening to the victim’s evidence and later impact statement, then spoke with victim when addressing the effects of the offence in his/her sentencing remarks. Victim felt judge listened and heard what s/he said.
 - Judge simply said s/he read the victim’s impact statement. Victim saw the lack of attention as further confirmation that the trial was about the offender.

- Victims are distressed when judges seem to be “belittling them”, even “re-victimising them” – comments perceived as ‘victim-blaming’ are “demeaning” --
 - Case example: Judge asked the victim whether she would, in her VIS, be acknowledging “some of her responsibility”

- Victims really appreciate the judge acknowledging them and the harm; it amplifies the vindication felt on hearing a guilty verdict --
 - Case example: Judge told an 8 year old victim-witness s/he was brave and thanked her/him for giving evidence.



Witness Assistance Service (WAS):

- Some judges dedicate much time in their remarks to summarising the evidence.
- Victims, however, often have not told their family (including spouse or parent) and close-friends the intimate detail.
 - Case example: Both adult and child victims have stated they were embarrassed, felt uneasy, even ashamed and unclean “all over again”.
- Alternatively, some judges remarks are precise, not graphic.
- The “dramatic” inconsistencies in judges’ approaches to sentencing remarks hamper victim-preparation.
- Some victims find it useful to hear judges outlining their reasoning.
- Some judges suggest up-front that the sex offender deserves to be imprisoned, which raises victims’ expectations. After canvassing evidence & submissions for and against, however, when judges suspend the imprisonment, some victims expectations are dashed.



Witness Assistance Service (WAS):

- A few judges have adopted the practice of discussing the sexual abuse/assault, not excusing the offender and/or minimising the offending.
 - Case example: Conversely, a judge appeared to use a victim's promiscuity since the offence as suggestive that s/he might have contributed to, possibly facilitated, the unlawful sexual intercourse.
- Sometimes judges sentencing remarks are constrained by the 'agreed facts'.
- A few victims who do not agree with the 'facts' as agreed by the prosecution and defence, see judges as complicit in ignoring the truth
- On rare occasions, multiple victims are present but each feels anxious because the judge reveals intimate detail that each victim did not know about others' experiences.
- Victims worry that the media will report from the judge's sentencing remarks.



Sexual Assault Services:

- Victims look on the judge as “divine”, as the “holder of enormous power”. They can be frustrated and their confidence that justice will be done (and the truth discovered) can be further shattered when judges do not control the court-room and allow the defence to dominate the proceedings.
- Victims look for the judge’s non-verbal communication – a smile, pleasant manner of speaking, comforting gesture (eg offering the victim an opportunity to have a drink or go to the toilet).
- Some victims gain strength as their cases progress through criminal proceedings.
 - Case example: Several victims have used the proceedings, such as made a VIS, to ensure the offenders know they no longer have power over them; and, to demonstrate that they are not afraid to say ‘no’ and willing to follow through, despite the personal toll.
- Too many victims feel “so lucky” on hearing a guilty verdict.



Sexual Assault Services:

- One worker said in over 20 years she had not had a victim respond harshly to judges' sentencing remarks, which she attributed to the 'preventive' psychological first aid given to victims before and during criminal proceedings.
- The first aid taught victims to expect that judges will be more preoccupied with the defendant's need for a "fair trial" than the victim's desire for justice; that judges will make statements that mirror the myths and biases associated with sexual assault and sexuality
- Victims are frequently so relieved by the guilty verdict that the impact of the judge's sentencing remarks is not immediate.
- One victim reported that s/he was heartened by the judge's observation that his/her impact statement was a "purposeful" document, which the judge drew from "extensively" (compared to a passing remark) in his/her sentencing remarks.
- Making an impact statement is difficult for victims; reading it out is a great personal challenge them.
- Victims commonly look upon the opportunity to make an impact statement as "being given space", the right to choose (which was taken away by the offender) and to voice in their words (preferably unfettered) the harm done.
- Acknowledgment and a clear demonstration that the judge (who wields significant authority) heard can be liberating for the victim.



Sexual Assault Services:

- A few who heard or read the remarks later are astounded, surprised, embarrassed or angered by the content, especially when information unknown to them is revealed (eg offender has a history of sex offending; judge has “misinterpreted” the victim’s behaviour during or after the offence).
 - Case example: Judge pointed out that the offender had Hep C and made suggestive comment that victim was lucky not to be ill; but victim did not know until the judge spoke. For several months afterwards, the victim followed a self-destructive path (eg drinking heavily, not eating properly)
 - Case example: Judge revealed that the offender had watched the victim’s home and then committed an opportunistic crime, whereas the victim had suspected that the sexually assault was retaliation for a failed relationship. Victim still felt vulnerable but more secure.
- Some sentencing remarks are “very detailed” so family and friends might hear or read more about the offence than the victim had or wanted to tell them.
- Victims of sexual assault tend not to be as dissatisfied with the sentence itself, compared to victims of other offences.
- Given the low conviction rate for sex offences, victims do not plan to be in a position to hear or read judges’ sentencing remarks.



Witness Assistance Service (WAS) & Sexual Assault Service (SAS):

- To mitigate the probable effects, WAS & SAS staff spend considerable time with victims preparing them for the judges' sentencing remarks based on the "worst case examples".
- Victims are told that sentencing offenders is less about the victim and the effects of the offence, and more about the offender.
- Some victims avoid the sentencing hearing because they fear that they will have to "relive the rape or sexual assault" through the judge's sentencing remarks.
- Social workers have devised ways intended to foster victim-resilience.
- Social workers have used judges' written sentencing remarks to demonstrate the influence myths still have in criminal proceedings; to highlight the offender-orientation; to illustrate how judges (mis)construe victims' behaviours when addressing 'blameworthiness'





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