

Gender Bias in Thai Supreme Court's Verdict

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1. Introduction

In Thailand, it is widely believed that the court verdicts are straight – forward exercises of rationality and legal logics free from personal value. Court verdicts are neutral, no gender bias in their decisions. This is conventional belief it is therefore understandable why Thai lawyers, including academics, have been paying little attention to analyze Thai court verdicts. The role of the court is similar to legal machines.

My study is to raise the question on the mainstream belief by looking into court verdicts in the crime of rape during the past 50 years so as to find how the court define what consensual or forced sex is, and what factors lead to the reduction or increase of punishment.

2. How Thai Court Interprets “Consensual Sex” on the Rape Case.

Although rape is a crime under Thai criminal code, the court's reasoning on what constitute rape is still problematic.

Consent is very important issue in the court's consideration in the rape case. In most cases, male defendant usually claimed that woman agreed to engage in sexual activity not by force, the plaintiff usually expressed the opposite. Nonetheless, most cases do not have hard evidence or witness – incidents usually took place in places far away from eye witness such as at motels, houses, in the jungle etc. Without any witness, it is difficult to prove whether such sexual incident fall in the category of consensual sex or rape. The

disputes are often “word against word”. The court usually relies on some specific reasoning to define what consensual rape is.

Based on Supreme Court verdict in the past 50 years, the study found that the court constructs 3 main factors constituting rape: A) wound B) duration of time when the incident is revealed to others and C) victims' background

A. Wound

Since rape can not be consensual sex, the main factor which is used to prove whether it is a rape case is wound. If woman has a wound, it means that she was struggling against the forced sex. By this logic, in any rape case, woman has to have wound.

It is important to note that, words spoken in the court from woman who has wound is more reliable than those who have not. Furthermore, the more wound and the seriousness of the injury make evidences stronger for the court to listen.

An example of a rape case, a little girl was raped and attacked by a janitor until she had severe wounds. She was taken to the hospital immediately to receive the skull operation. Twenty days later, she sent a letter accusing the suspect to the police. Then the police brought the suspect to her and she confirmed he was the rapist.¹

In most cases, if woman is raped and murdered, the court strongly confirms that it is not consensual sex. Then further issue for the court's consideration is to identify the right suspect by looking through the evidences related such as hair, pubic hair etc.²

B. Time

The other factor which is used to prove whether it is a rape case is the length of time before victims taking any action after the incident had occurred. Those actions include

¹ Supreme court's verdict no. 857/1993

² Supreme court's verdict no. 4437/1988

when the victim reveals about the incident to another person, report to police, and went to see doctor. If victim waits for a long period before taking such actions, the case tends to be concluded as consensual sex, not a rape.

Based on the Supreme Court verdict, many cases that women reported rape incident to the police immediately after it happened, the court tended to consider the case as a rape. For example, the case that a woman told her family and the police right after the incident, the police arrested the man on the day after receiving the report. In this circumstance, woman's words in the court are credible.³

In short, if plaintiff reports to police directly and immediately, plaintiff's testimony in court sounds "reliable, strong, credible and hearing as the truth". The immediate action of the woman implies that it is not consensual sex. On the other hand, the longer time the woman takes to proceed with any action on reporting the incident makes the plaintiff less credible.

Looking through another case, a woman accused a man on raping her one day after another. Several days after the rape incident, she revealed what happened to her family. Her family asked the man to marry her but to no avail. Later, it became a case in the court.⁴

For this case, the Court's opinion was that it was too long a period for the plaintiff to take action after the rape had happened and the family's marriage proposal was "doubtful". Based on the Court, "it's doubtful on the intention of the plaintiff" to consider this case a rape case. Therefore, the court considers other evidences to support the claim that it was consensual sex.

³ Supreme court's verdict no. 2249/1984, 2115/1990

⁴ Supreme court's verdict no. 2238/1984

Based on the Supreme Court verdict, the length of time before victim takes any action including telling another person and report to the police is also the important factor. In other words, the faster the victim reports the incident, the more credible the testimony. On the contrary, the longer the victim waits before reporting the incident, the less credible the testimony.

C. Victims' Background

Past verdicts also show that the court regularly uses rape victims' personal background to determine whether the alleged crime is rape or sex with consent. The relationship between the victims and the suspects constitute an important element of the Court's consideration. Research shows that if the plaintiff and defendant have had an intimate relationship, there is a tendency that the court will rule it as a "sex with consent" rather than rape.

There was a case whereby the plaintiff claimed she had been raped by a man. The defendant however claimed that it was not a rape but sex with consent. The story goes like this:

The plaintiff went with her relatives to temple fair. On the way back home, she accompanied her ex boyfriend and later claimed that she was raped twice and the man was using knife to force her. The court reasoning was

"...The plaintiff did not go back home with her relative (and the relative went back home earlier), and there was no need for her to go with the defendant, this reflects that the plaintiff had a hidden agenda to go home with the defendant. Based on this, it's doubtful to believe in what the plaintiff had testified rather the incident was a consensual sex."⁵

This shows, in the opinion of the court, if there has been a consensual sex in the past between the victim and the suspect, this tends to repeat.

⁵ Supreme court's verdict no. 4465/1987

These factors above which the court has given weigh as most important in defining whether the incident could be referred as rape or consensual sex narrows down the definition of rape. Consequently, other types of sexual abuses which sometimes happen in the workplace, between employer and employee, supervisors and workers, and between lovers - even intimidated with weapon – have even less chance to be identified as rape case.

This standardization of court opinion further neglects individuality of each person: individual experience, feelings and emotions of the victim etc. As a result, definition of rape becomes static and narrow. And this also leads to stereotyping of how women have to respond to sexual violence.

On the contrary, each person has different ways of responding to rape incidents. Personal feelings, environment, social background and class are all important to determine the way one responds to the incident.

In conclusion, the three factors mentioned above – wound, period of reporting, victims' background - makes "fact finding" procedure of the court focus on the part of the victims. The victims are often 'checked' on their behavior prior to and after the rape incident.

3. Punishment

According to Thai criminal code, using of weapons during the crime of rape such as a gun entails extra punishment.⁶

⁶ article 276 "Whoever has sexual intercourse with a woman, who is not wife, against her will, by threatening by any means whatever, by doing any act of violence, by taking advantage of the woman being in the condition of inability to resist, or by causing the woman to mistake him for the other person, shall be punished with imprisonment of four to twenty years and fine of eight thousand to forty thousand baht.

Nevertheless, this is strictly interpreted by the court. The weapon must be real. If the defendants prove that not real, they would be dismissed from the charge, even if the victims sincerely believed the weapons are real. In addition, if the rapist uses the weapon he must clearly show his intention to hurt the victim with the weapon. One case, the rapist used a knife to threaten the victim but the spring was not in a released position. The court ruled out a heavier punishment for using of weapon.⁷

In opposite, even the defendant found guilty it would not be difficult to get the reduction. If the victims finally agree to receive compensation in – out – of court settlement, court tends to give the defendant suspended jail terms. When the victims stop attending court hearings, for mentioned reason or another, the court often used an absence as a reason to dismiss the case, this again benefits the defendant.

4. Summary

After decades of campaigning for the gender equality, many laws have been changed both in the international and national level. The movement raises awareness to amend discriminatory laws and create new legislation integrating the standard of gender equality such as CEDAW or the constitution of the state. However, these laws remain ineffective if not properly interpreted and enforced by the court.

“Law is as law does” Having new law is not enough but looking into the practice of law or law in action would lead to the deep and broad understanding. Court is not neutral and

If the offence as mentioned in the first paragraph is committed by carrying or using any gun or explosive, or participation of person in the nature of destroying the woman, the offender shall be punished with imprisonment of fifteen to twenty years and fine of thirty thousand to forty thousand baht, or imprisonment for life.”

This article has been amended in 2007 to expand the definition of rape to cover forced and oral sex including a woman whether she is a wife of offender.

⁷ Supreme court's verdict no. 3827/1995

judges are not free from cultural values or gender bias. To provide justice and equality the long – oppresses female gender must be amended and new laws must be legislated.

Changing the laws is important but it is the beginning step toward change. The gender bias will persist if the court still subscribes to patriarchal values and nobody question the verdicts.