

## ***TESTIMONIUM DE AUDITU IN THE CASE RAPE OF CHILDREN'S***

**Citra Dewi Keumala, Rizanizarli, Syarifuddin Hasyim**

Magister Ilmu Hukum, Fakultas Hukum, Universitas Syiah Kuala

E-mail: citradewikeumala@gmail.com

**Abstract :** A judge can impose a sentence on a person, if the judge has at least two valid pieces of evidence as stated in Article 183 of the Criminal Procedure Code. However, in handling cases of child sexual abuse, most of the witnesses presented in the trial include hearsay evidence or it can be called as a testimony obtained from other people. This study aimed to determine the strength of a hearsay evidence given by a witness in a crime of child sexual abuse and to explain the judge's consideration regarding the hearsay evidence in imposing a sentence of child sexual abuse crime. The data of this study were obtained through a literature review and an interview with the informants. The research found that the strength of a hearsay evidence was stated in the Constitutional Court Decision Number 65/PUU-VIII/2010 in this criminal trial as a real effort to protect the rights of the suspects and defendants. In addition, the judge's consideration regarding the hearsay evidence could be seen by the fact that the evidence was not completely rejected by the judge. Although the testimony given by the witness was not valid as a evidence, it was useful as a guide in handling the case. Therefore, it is recommended to develop the results of the Constitutional Court Decision Number 65/PUU-VIII/2010 regarding the hearsay evidence that can be used by judges and qualified as a free evidence (*vrij bewijskracht*).

**Keywords:** Evidence, Hearsay, Child Sexual Abuse.

**Abstrak:** Hakim dapat menjatuhkan pidana kepada seseorang, jika hakim sekurang-kurangnya memiliki dua alat bukti yang sah terdapat dalam KUHAP Pasal 183. Namun dalam penanganan perkara jarimah pemerkosaan terhadap anak, sebagian besar saksi yang dihadirkan dalam persidangan termasuk *Testimonium De Auditu* atau dapat disebut keterangan yang diperoleh dari orang lain". "Penelitian ini bertujuan untuk menjelaskan kekuatan pembuktian kesaksian *Testimonium De Auditu* dalam Jarimah pemerkosaan terhadap anak dan menjelaskan pertimbangan hakim atas kesaksian *Testimonium De Auditu* dalam memutuskan Jarimah pemerkosaan terhadap anak. Data yang terdapat dalam penelitian ini melalui peninjauan kepustakaan serta wawancara narasumber. Metode yang digunakan dalam penelitian ini adalah yuridis normatif, Dapat disimpulkan bahwa hasil penelitian mengenai kekuatan *testimonium de auditu* diakui dalam Putusan Mahkamah Konstitusi Nomor 65/PUU-VIII/2010 dalam peradilan pidana ini sebagai upaya nyata perlindungan terhadap hak-hak tersangka dan terdakwa, serta pertimbangan hakim menggunakan kesaksian *Testimonium de auditu* tidak sepenuhnya ditolak hakim, meskipun kesaksian yang diberikan oleh saksi tersebut tidak bernilai sebagai alat bukti melainkan sebagai petunjuk dalam memutuskan sebuah perkara. Maka disarankan untuk dilakukannya pengembangan atas hasil Putusan Mahkamah Konstitusi Nomor 65/PUU-VIII/2010 mengenai *testimonium de auditu* tersebut dapat digunakan oleh hakim namun kembali lagi kekuatan alat bukti persangkaan hakim ini pada dasarnya adalah bebas (*vrij bewijskracht*).

**Kata Kunci:** Pembuktian, *Testimonium De Auditu*, Pemerkosaan Anak.

## **INTRODUCTION**

From a legal point of view, there are categories of behavior that conform to norms, and some behavior is also classified as a form of norm violation. "Behavior that deviates from the norm will usually arise a new problem in the field of law and harm the community"<sup>1</sup>. Violation of norms is usually the public opinion considers violation as a crime within the scope of criminal law and crime is a social phenomenon that is felt by humans, even the state.

Criminal acts can occur anywhere and anytime and occur in various forms, one of which often acts of sexual violence against children. Sexual violence is an act that violates human rights, sexual violence itself can be interpreted as an act of sexual harassment that forces someone who is not aware or powerless to fight back, there are various kinds of actions that can be considered as sexual violence, including sexual harassment. verbally and non-verbally, and rape.

Sexual harassment is unwanted sex-related behavior, including requests for sex, and other verbal or physical

behaviors that refer to sex.<sup>2</sup> Rape is one of the categories of sexual harassment and occurs a lot in Indonesia, the perpetrators regardless of age, from children to adults. Unfortunately, the behavior of a person who is still a child can commit acts of sexual violence, this behavior arises because of a lack of parental supervision or associating in the wrong environment. The Criminal Code (KUHP) regulates rape in Articles 285 to 291, while Qanun Number 6 of 2014 concerning Jinayat Law regarding rape is contained in Articles 48 to 60.

Criminal acts are also referred to as *jarimah* in Qanun Number 6 of 2014 concerning Jinayat Law in Article 1 number 16. The definition of rape is contained in Qanun Number 6 of 2014 Article 1 number 30 which reads "Rape is sexual intercourse with the Faraj or rectum of another person as a victim. with the perpetrator's penis or other objects used by the perpetrator or against the victim's Faraj or penis with the perpetrator's mouth or against the victim's mouth with the perpetrator's penis, with violence or coercion or threats against the victim.

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<sup>1</sup> Bambang Waluyo, *Pidana dan Pemidanaan*, Sinar Grafika, Jakarta, 2000, hlm. 3

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<sup>2</sup> Fiana Dwiyantri, "Pelecehan Seksual Pada Perempuan di Tempat Kerja (Studi Kasus Kantor Satpol PP Provinsi DKI Jakarta)", *Jurnal Kriminologi Indonesia*, Universitas Indonesia, Vol. 10, No. 1, Mei 2014, hlm. 54-56.

Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection in Article 76D reads "Everyone is prohibited from committing violence or threats of violence to force a child to have intercourse with him or with other people", and article 76E reads "Every People are prohibited from committing violence or threats of violence, coercing, deceiving, committing a series of lies, or persuading children to commit or allow obscene acts to be carried out.

The sanctions against the perpetrators for their actions are contained in Article 81 paragraph (1) which reads "Everyone who violates the provisions as referred to in Article 76D shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiahs)" and 82 paragraph (1) which reads "Everyone who violates the provisions as referred to in Article 76E shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years. and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiahs)".

The opinion of PAV Lamintang and Djisman Samosir regarding rape is the act of a person who with violence or

threats of violence forces a woman to have sexual intercourse outside the marriage bond with herself.<sup>3</sup> Rape is rampant because most people are not able to control their passions, so without any doubt, they rape other people just because they want to fulfill their satisfaction.

Rape crimes generally occur in women, especially children, perpetrators in carrying out their actions are easier to deceive women and children because they are considered weak objects. In connection with the development of Human Rights (HAM), the rights of children have again received the attention which has been neglected since there are still many cases that befall children.<sup>4</sup> In essence, children's rights are human rights that are owned by all children wherever they are, guaranteed, protected, and must be fulfilled by their parents, family, community, government, and state.<sup>5</sup>

Currently, rape is a crime that attracts the attention of the entire

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<sup>3</sup> Abdul Wahid dan Muhammad Irfan, *Perlindungan Terhadap Korban Kekerasan Seksual*, Rafika Aditama, Bandung, 2011, hlm. 40.

<sup>4</sup> Riza Nizarli, "Hak-hak Anak dalam Berbagai Peraturan Perundang-undangan dan UUPA", *Jeumala*, No. 19, 2006 : 3-12.

<sup>5</sup> Riza Nizarli, Suwanto, Adwani, Dahlan, "Pemenuhan Hak Pendidikan Anak Terpidana di Lembaga Pembinaan Khusus Anak (LPKA) di Banda", *IOSR Journal Of Humanities and Social Science (IOSR-JHSS)*, Vol. 23, No. 7, July 2018 : 19-25.

community, because rape does not only occur in big cities where awareness or knowledge of the law is relatively developed, but also occurs in rural areas where traditional traditions and values are still relatively preserved.

Rape is a form of sexual deviation carried out with violence in the form of forced intercourse. Every act that violates the law must be severely punished, in this case, the role of law enforcers is required to be professional in resolving cases of rape to obtain justice. Judges as one of the law enforcement officers in Indonesia, must be able to do justice in handling a case, because judges have been given the authority to examine and decide a case. The judge to decide the case fairly must examine the data received during the trial process, which can be seen from the evidence of letters, witnesses, confessions, and oaths in the trial.

Most cases of rape cause difficulties in proving the crime, both in the prosecution process and in the decision-making process. In addition to the difficulties above, there are difficulties in proving such as rape or fornication which usually occurs without being witnessed or without the presence of other people. The evidentiary system is a regulation regarding the types of

evidence that can be used, the details of the evidence, and describes how the evidence is used and how judges form beliefs before the court.

The use of witness testimony *de auditu* in the case of finger rape against children is contained in decision Number 06/JN/2019/Ms.Lsm 3 witnesses gave information that they did not see directly by imposing an 'uqubat in prison for the defendant for 160 months (one hundred and sixty), then in the decision Number 04/JN/2020/MS.Str, there were 5 witnesses who gave information which they did not see directly and sentenced them to prison for 180 (one hundred and eighty) months, and the decision Number 0003/JN/2016/MS.Ttn 3 witnesses gave statements that they did not see directly handing down 'uqubat Ta'zir lashes in public as many as 125 (one hundred and twenty-five) times against the defendant, all of the witnesses contained in the decision can be said to be testimony *de auditu*.

Based on the description above, to get the results of the evaluation of the explanation above, those who want to see how the evidence system is in deciding cases of rape against children and how the judge's considerations in

deciding cases use the testimony of Testimonium De Auditu.

## METHOD

Research requires data that can provide scientific truth, as an effort to develop, discover and study science. This can be done scientifically, to obtain accurate data on this research material, the method used in this research is called normative juridical law research, normative juridical legal research as a legal research method carried out by examining library materials or primary and secondary data. In this type of legal research, the law is often conceptualized as what is written in legislation or the law is conceptualized as a rule or norm which is a benchmark for human behavior that is considered appropriate. The type of legal research carried out in a normative juridical manner is where the law is conceptualized as what is written in the legislation (law in books) or the law is conceptualized as a rule or norm which is a benchmark for human behavior that is considered appropriate.

The approach method is a way to approach the object of research. Regarding the type of research used is normative juridical, then the approach used in this research is a library approach, namely understanding books,

studying laws and regulations, and other documents related to this research.

## RESULT AND DISCUSSION

### A. Evidence System in Deciding Cases

In theory there are two systems of proof as follows:<sup>6</sup>

#### a. Passive Evidence System

- 1) The passive proof system (Positief Wettelijk) is a proof system that relies on evidence only, namely evidence that has been determined by law.
- 2) A defendant can be found guilty of committing a crime only based on valid evidence.
- 3) Evidence established by law is important. The judge's conviction was completely ignored.
- 4) In essence, if a defendant has fulfilled the methods of proof and valid evidence, namely those determined by law, the defendant can be declared guilty and must be punished.

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<sup>6</sup> Alfitra, *Hukum Pembuktian dalam Beracara Pidana, Perdata, dan Korupsi di Indonesia*, Raih Asa Sukses (Penebar Swadaya Grup), Jakarta, 2011, hlm. 28

- 5) A judge is like a robot running the law. However, there is good in this proof system, namely that the judge will try to prove the defendant's guilt without being influenced by his conscience so that it is truly objective. That is, according to the methods and evidence determined by law.
- 6) The positive proof system sought is formal truth. Therefore, this evidence system is used in civil procedural law.

#### b. Negative Evidence System

The negative proof system (Negatief Wettelijk) is very similar to the conviction in the raises proof system. The judge in deciding whether or not a defendant is bound by the evidence determined by the law and the judge's conviction (conscience). So, in a negative system two things are conditions for proving the defendant's guilt, namely:

- 1) *Wettelijk* : the existence of legal evidence that

has been determined by law.

- 2) *Negatief* : there is a conviction (conscience) of the judge, based on the evidence the judge believes the guilt of the defendant.

#### **B. Judges' Considerations in Deciding Cases Using Testimonium De Auditus Testimony**

Evidence is very important in the process of examining court proceedings, because the activities of the entire criminal case settlement process, from the beginning of the investigation to the final decision, are delivered before the trial by the panel of judges, of which all are related to evidence and how to prove it. Evidence can determine whether the defendant is proven guilty or not guilty of committing *jarimah* which is then indicted based on the indictment made by the public prosecutor.

If in the trial court the judge declares that the defendant is proven guilty, then the court will decide on the criminal (punishment) to the defendant, and if the defendant is not proven guilty

then the defendant is acquitted, then if the charge against the defendant is proven, but the action is not classified as a crime, then The defendant was acquitted of all legal charges. The judge's belief is a prerequisite that must be contained in the process of the birth of a verdict (decision).

The judge may not decide a case merely relying on the facts or objective conditions that occur in a case, the judge must use his belief in various facts and objective conditions that the defendant is indeed guilty. There is a close relationship between valid evidence and the judge's belief with each other if the judge's belief arises because of the presence of valid evidence. Therefore, a shred of evidence in the trial shows that the presence of witnesses, as well as witness testimony, is a factor in the success of uncovering a criminal act.

The judge's statement is a statement of the State official who is authorized for the decision. A judge's decision is not only based on juridical provisions but also based on conscience.<sup>7</sup> To be able to form a judge's belief in deciding a case, it is necessary to have an element of proof, a judge can impose a sentence on a person

if the judge has at least two valid pieces of evidence contained in Article 183 of the Criminal Procedure Code. Regarding legal evidence, it is regulated in the Law. -The Criminal Procedure Code (KUHAP) in Article 184 reads:

- (1) The valid evidence is:
  - a. Witness testimony;
  - b. Expert testimony;
  - c. Letter;
  - d. Instruction;
  - e. Defendant's statement.

In Qanun Number 7 of 2013 concerning Jinayat Procedural Law regarding valid evidence, it is contained in Article 181 which reads:

- (1) Valid evidence consists of:
  - a. Witness testimony;
  - b. Expert testimony;
  - c. Evidence;
  - d. Letter;
  - e. Electronic evidence;
  - f. Defendant's confession;
  - g. Defendant's statement.

Criminal Procedural Law is a complement to criminal law, in other words, criminal procedural law is often referred to as formal criminal law.<sup>8</sup> As mentioned earlier, Article 184 paragraph (1) of the Criminal Procedure Code specify limited evidence following the law.

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<sup>7</sup> Bambang Sutyoso, *Reformasi Keadilan Dan Penegakan Hukum di Indonesia*, UII Press, Yogyakarta, 2010, hlm. 95

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<sup>8</sup> Suyanto, *Hukum Acara Pidana*, Zifatama Jawara, Sidoarjo, 2018, hlm. 1

Apart from this evidence, there is not enough evidence to prove the defendant's guilt. The chairman of the trial, the prosecutor, the defendant, or the legal advisor are bound and limited to the use of the evidence. they have no right to use the evidence they want other than the evidence specified in Article 184 paragraph (1). Providing evidence in other ways than those mentioned in Article 184 Paragraph 1 has no value and does not have binding evidentiary power.

Evidence in the form of witness statements is very commonly used as a settlement of criminal cases, the information given by witnesses is intended to find out whether an act has indeed occurred a criminal act committed by the defendant. The testimony of a witness referred to in deciding a case must come from a witness who heard and saw the incident itself. Witness in Indonesian is a noun that means "a person who sees or knows for himself an event (event)".<sup>9</sup> The role of witnesses in every criminal case, especially cases of rape against children is very important because a witness's testimony can influence and determine the judge's decision.

However, in the decision of the Constitutional Court Number 65/PUU-VIII/2010 concerning the review of Law Number 8 of 1981 concerning the Criminal Procedure Code as long as the witness is understood in Article 1 number 26 and number 27, Article 65, Article 116 paragraph (3) and paragraph (4 ), Article 184 paragraph (1) letter a of the Criminal Procedure Code is contrary to the 1945 Constitution, the definition of a witness is expanded to "a person who can provide information in the context of the investigation, prosecution, and trial of a criminal act which he has not always heard of himself, he has seen and experienced. Alone".

Witnesses are considered capable of determining the direction of a judge's decision, the influence of each witness' testimony gets great attention from legal observers. According to the understanding of witness testimony in Article 1 number 27 of the Criminal Procedure Code which reads "Witness testimony is one of the evidence in a criminal case in the form of testimony from a witness regarding a criminal event that he heard himself, he saw for himself and he experienced it himself by mentioning the reasons for his knowledge. " However, in handling

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<sup>9</sup> Purwa darmita, *Kamus Umum Bahasa Indonesia*, Balai Pustaka, Jakarta, 1976, hlm. 825.



cases of rape against children, most of the witnesses who were presented at the trial included *Testimonium De Auditu* or it can be called information obtained from other people.

*Testimonium De Auditu* means that the information given by the witness does not come from information about events or events that have been directly heard, seen, or experienced by the witness, but is a statement obtained by witnesses from other people. Whereas the definition of a witness himself is clearly stated in Article 1 number 26 of the Criminal Procedure Code which reads "a witness is a person who can provide information for the investigation, prosecution and trial regarding a criminal case which he has heard himself, seen and experienced himself".

According to Sudikno Mertokusumo, testimony is "certainty given to judges at trial regarding events by way of verbal and personal notification by people who are not prohibited or permitted by law, who are summoned in court". In giving testimony before the trial, the witness must take an oath according to his religion so that what he explains has the power to be used as evidence. Usually, witness testimony is the most important piece of evidence in a criminal case.

Evidence in almost all criminal cases always relies on examining witness statements.

For witness statements and testimonies to have value and strength of evidence (the degree of evidence), it is necessary to pay attention to several basic requirements that must be met by a witness. The Criminal Procedure Code itself states the conditions for the validity of a witness statement, which are divided into formal requirements and material requirements. In a formal condition, a witness statement must be given under oath according to the way of their respective religions that he will give testimony following the truth. From a psychological point of view, witnesses who are sworn in before giving testimony are more aware of themselves and their hearts, to be honest in giving statements.<sup>10</sup>

Then if you look at the Criminal Procedure Code, a judge to assess a testimony from a witness in deciding a case is contained in Article 185 paragraph (6) which reads:

In assessing the veracity of a witness's testimony, the judge must pay close attention to it:

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<sup>10</sup> Adhami Chazawi, *Hukum Pembuktian Tindak Pidana Korupsi*, Alumni, Bandung, 2008, hlm. 174.

- a. The correspondence between the testimony of one witness and another;
- b. Conformity between witness statements and other evidence;
- c. The reasons that may be used by witnesses to provide certain information;
- d. The way of life and morality of the witness as well as everything that in general can affect whether or not the information can be trusted.

## **CONCLUSION**

Based on the results of the study, it can be said that a testimony from *Testimonium De Auditu* tends to be unreliable as information that comes from events or events that are heard directly, both seen and experienced by the witness. information obtained as a witness from another person.

Since the issuance of the Constitutional Court's Decision Number 65/PUU-VIII/2010 concerning the review of Law Number 8 of 1981 concerning the Criminal Procedure Code insofar as witnesses are understood in Article 1 number 26 and number 27, Article 65, Article 116 paragraph (3) and paragraph (4), Article 184 paragraph (1) letter a of the

Criminal Procedure Code is contrary to the 1945 Constitution, the definition of a witness is expanded to “a person who can provide information in the context of the investigation, prosecution, and trial of a criminal act which he has not always heard of himself, he has seen and experienced. Alone”. Therefore, the testimony of witnesses who do not see, hear, and know that someone has committed a crime can be used as evidence as long as their statements are relevant and related to the criminal act being litigated and the strength of evidence of witnesses who do not know directly is free depending on the judge's judgment and belief.

The explanation above means that the testimony of *Testimonium De Auditu*, in general, cannot be used as consideration for judges in deciding cases if we look at the meaning of witness statements in the Criminal Procedure Code, but these testimonies can be used as clues to gain the judge's confidence in deciding cases.

## **SUGGESTION**

The government should immediately update the Criminal Procedure Code, especially in matters relating to the law of evidence, and

explain the testimony of witnesses de auditu in it, so that in enforcing the law, law enforcers can have strong guidelines and can avoid differences of opinion.

Basically, according to the Criminal Procedure Code, the testimony of the witness Testimonium De Auditu is not legal evidence in a criminal case. However, the judge as one of the law enforcement officers in Indonesia, which must be able to do justice in handling a case, then the judge has been given the authority to examine and decide a case the judge may not override the testimony of the witness Testimonium De Auditu because the witness can be evidence of instructions important in proving a crime.

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