



## The Power of Evidence of Victims in Immoral Criminal Procedure in the West Pasaman Court

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### **Abstract**

Referring to Article 185 paragraph (7) of the Criminal Procedure Code which in essence explains that "the testimony of witnesses who are not sworn eventhough in accordance withone another, does not constitute evidence, but if the statements are in accordance with statements from sworn witnesses, it can be used as additional tools other valid proof. This raises problems in the level of practice when the childis confronted as a victim of an immoral crime, usually there are no witnesses who see and hear the criminal events committed by the perpetrator sofcrime. Instead, there is only child (not yet capable of law) as a witness who experienced the crime. However, the child's information is only used as a guide or only used to streng then the belief of the Judge because the information given by the child is considered not to meet the requirements as a witness information according to the Criminal Procedure Code. In this regard, we can see and analyze the judges' judgmentrelated to the power of proof of children witness from victims within immoral criminalaction in the jurisdiction of West Pasaman District Court. The formulation of the problem in this study is How is the power of witness information by victim's child in the case of immoral crime in the jurisdiction of the West Pasaman District Court ?. This research is a normative juridical research through case approach, law approach and conceptual approach. This research is descriptive. The results showed that The power of proof of witness information by victim'schild in immoral acts has diverse legal force. First, it is based on whether a Victim's Child can be sworn in court, so that the information by victim's childis recognized to have the same legal force as the witness's statement in the event that the victim's child can be sworn in providing information. Second, the information by the victim'schild Streng then the judge's conviction or atleast provides guide for the judge to support the evidence of alleged criminal acts of immorality. Third, the judge did not judge the information by the victim's child to have the power of proof be cause it was considered to be incompatible and independent.

**Keywords:** *The Power of Proof; Victim's Child; Witness Testimony; Immoral Criminal Action*

### **A. Introduction**

One form of crime that always lurks children is immoral crime. According to Leden Marpaung, the word *asusila* or "morality" can be interpreted as "morality has an understanding of language, courtesy,

civility, customs, and good order.<sup>1</sup> In the perspective of society, that morality is said by Leden Marpaung as a behavior that is right or wrong, especially in matters related to their sexual incidents.<sup>2</sup> Meanwhile, according to Barda Nawawi Arief, it is explained that the law views decency as behavior, deed, conversation and even anything that must be protected by the law concerned with the norms of decency for the realization of morality and order in social life.<sup>3</sup>

Referring to the types of immoral crimes that are generally regulated in the Criminal Code above and comparing them with the Child Protection Law as *lex specialis* which regulates child protection, we can see the types of immoral crimes regulated in the Child Protection Law, namely the criminal act of intercourse with Children, criminal acts of obscenity against children, and criminal acts of exploitation of children both economically and sexually. All types of immoral crimes regulated in the Child Protection Law are regulated in Article 80, Article 81, and Article 88 of the Child Protection Law.

With regard to law enforcement against immoral crimes against children where the perpetrator is an adult, law enforcers are guided by the procedural law stipulated in Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP). Although the Child Criminal Justice System Law (SPPA) regulates children as witnesses and children as victims of criminal acts as defined above, in principle, the SPPA Law regulates the examination process relating to cases of children in conflict with the law where the perpetrator is a child. Thus, when a criminal act is committed by an adult against a child, the applicable procedural law is the Criminal Procedure Code.

During the criminal proceedings / examinations in court, there was a flow / stages that the Defendant had to go through, one of which was the evidentiary stage. Evidence relates to the provisions containing outlines and guidelines on the methods justified by law to prove the guilt charged to the Defendant.<sup>4</sup> Evidence also relates to the truth of a criminal event committed by the Defendant so that he can be held responsible for the crime.<sup>5</sup> Therefore, evidence in court examination plays a very important role, because with a proof the fate of the Defendant is determined, and only by proving a criminal act can a criminal sentence be imposed.<sup>6</sup>

In general, the process of proving a criminal act is regulated in Articles 183-189 of the Criminal Procedure Code. At this stage of proof, the Judge is required to examine the means of evidence which are valid according to law before verifying whether or not a Defendant is guilty of a criminal act. With regard to the imposition of a criminal offense against the Defendant, it is regulated in Article 183 KUHAP which reads: "A judge may not impose a sentence on a person, unless with at least 2 (two) valid pieces of evidence he is convinced that a criminal act actually occurred. and that the Defendant was guilty."

Seeing from the formulation of the witness testimony above, it can be said that the witness's testimony is very important, not only because of the degree of truth and it is placed in the first order of other evidence, but also because witness testimony is given by humans so that the witness testimony cannot be equated with other evidence.<sup>7</sup>

If a person who will provide testimony as a witness is an adult according to law and has met the legal requirements of a witness testimony as evidence as stipulated in the Criminal Procedure Code, then this does not cause a problem in proving a criminal case. However, there are times when a criminal act or

<sup>1</sup> Leden Marpaung, 2008, *Kejahatan Terhadap Kesusilaan dan Masalah Prevensinya*, Jakarta : Sinar Grafika, p.3.

<sup>2</sup> *Ibid.*, p.3.

<sup>3</sup> Barda Nawawi Arief, 2016, *Bunga Rampai Kebijakan Hukum Pidana*, Bandung : Kencana, p.45.

<sup>4</sup> M. Yahya Harahap, 2012, *Pembahasan Permasalahan dan Penerapan KUHAP Pemeriksaan Sidang Pengadilan, Banding, Kasasi, dan Peninjauan Kembali*, Jakarta : Sinar Grafika, p.278.

<sup>5</sup> Darwan Prinst, 2002, *Hukum Acara Pidana Dalam Praktik*, Jakarta : Djambatan, p. 106.

<sup>6</sup> Andi Sofyan, 2012, *Hukum Acara Pidana Suatu Pengantar*, Yogyakarta : Rangkang Offset, p.351.

<sup>7</sup> *Ibid.*

a criminal act that is suspected to have occurred is only witnessed / experienced by a child, especially a child who has seen, heard and experienced a criminal act related to the crime of decency.

According to the law, in principle, children are not prohibited from becoming witnesses during examination at court proceedings. However, if we look at the provisions of the SPPA Law and the Child Protection Law, there is no one provision related to specific arrangements regarding the legal force of the testimony of the Child Witness or Child Victim. So that with regard to the testimony of the Child Witness or Child Victim, the power of proof still refers to the Criminal Procedure Code.

This raises a problem when a child is presented as a victim of an immoral crime in which in the crime, usually no witnesses have seen and heard the criminal incident committed by the criminal. However, there were only children (not yet legally competent) as witnesses who experienced the crime. Children as witnesses can only be heard as witnesses but without oath as explained in Article 171 of the Criminal Procedure Code, namely:

"Those who are allowed to give statements without oath are:

- a. children who are not yet fifteen years old and have never been married;
- b. people are mentally ill or mentally ill even though sometimes their memories come back. "

However, often the child's testimony is only used as a guide or is only used to strengthen the judge's conviction because the information given by the child is deemed not fulfilling the requirements as a witness statement according to the Criminal Procedure Code. This refers to Article 160 paragraph (3) of the Criminal Procedure Code which explains that witnesses are obliged to take an oath or promise in relation to information that is true according to their respective religions. Furthermore, according to Article 161 paragraph (2) of the Criminal Procedure Code it is also explained that "in the event that the time for taking hostage has passed and the witness or expert still does not want to be sworn in or make promises, then the information that has been given is information that can strengthen the judge's conviction". From the description of the two articles, it can be seen that in giving testimony, the witness is obliged to take an oath or promise, in the event that this is not carried out, the testimony given by the witness only serves as a confirmation of the Judge's conviction.

Furthermore, referring to Article 185 paragraph (7) of the Criminal Procedure Code, which basically explains that "the testimony of a witness who is not sworn in, although in accordance with one another, does not constitute evidence, but if the testimony is in accordance with the testimony of a sworn witness, it can be used as an addition to other legal evidence ". So it can be said that a witness statement from a person who is not sworn in has no power as valid evidence.

From this explanation it can also be seen that the testimony of a witness who is not sworn in, especially in this context, is a child victim of immoral crime, it must be supported by the testimony of another witness who is sworn in so that it can be used as another "additional legal evidence", in this can be used as a guide by the judge to strengthen his conviction about a crime that has occurred. However, as previously explained, due to the nature of immoral crimes, it tends to occur without witnesses seeing and hearing, or in other words only experienced by the child of the victim directly making the crime difficult to prove.

From the above description, it can also be concluded that in order for a statement without being sworn to be used to strengthen the conviction of a Judge, it must meet the minimum requirements,

namely: a. There must first be valid evidence; b. There are at least 2 (two) valid evidence; c. There is a match between the statement without being sworn in with valid evidence.<sup>8</sup>

As stated above, that for immoral crimes involving children as victims, it is very difficult to bring witnesses as evidence at trial, because in such immoral cases, it often happens that no witnesses see and know the incident (criminal incident what happened), only witnesses who heard the incident afterwards or witnesses who could show the whereabouts of the Defendant and the victim's child at that place (TKP). This makes Law Enforcement, especially the Public Prosecutor, must be very skilled in assessing the criminal incident that occurred and finding evidence and making the Judge believe that an immoral crime has indeed occurred.<sup>9</sup>

In practice at the West Pasaman District Court, the author analyzes 3 (three) cases of immoral crime, in which 1 (one) criminal case is related to sexual intercourse with a child, and 2 (two) cases constitute a criminal act of sexual immorality against a minor. The three cases to be discussed can be seen in the Decision of the West Pasaman District Court Number: 80 / Pid.Sus / 2019 / PN Psb dated 2 September 2019 on behalf of the Defendant Karsi Bin Maris Summons Karsi, Decision Number: 98 / Pid.Sus / 2018 / PN Psb dated 1 August 2018 in the name of the Defendant Hamzah Haz and Decision Number: 191 / Pid.Sus / 2019 / PN Psb dated 26 February 2020, on behalf of the Defendant Erwin Tanjung Summons Awen Bin Padek.

In Decision Number: 80 / Pid.Sus / 2019 / PN Psb dated September 2, 2019 on behalf of the Defendant Karsi Bin Maris Summon Karsi, the Judge sentenced the defendant to 9 (nine) years in prison and a fine of Rp. 300,000,000 , - (three hundred million rupiah) provided that if the fine is not paid, it will be replaced by imprisonment for 4 (four) months. In this verdict, the Defendant Karsi Bin Maris Summoned Karsi was legally and convincingly proven guilty of committing a criminal act "by forcefully forcing a child to have intercourse with him". At the trial, the public prosecutor submitted evidence in the form of witness and expert testimony. Witness testimony consists of :

- a. Child Victim (age 6 years);
- b. Herlina (Mother of Child Victims);
- c. Hamidah (Aunt of Child Victims);
- d. Erita Fitnawilis (Grandmother of the Child Victims); and
- e. Khoirunnas (guard / manager of PT.Sawita's palm oil mill waste pool / place where the crime of sexual intercourse occurs).

Furthermore, in Decision Number: 98 / Pid.Sus / 2018 / PN Psb dated 1 August 2018 on behalf of the Defendant Hamzah Haz, the Judge sentenced the Defendant to imprisonment for 5 (five) years and a fine of Rp. 100,000,000, - (one hundred hundred million rupiah) provided that if the fine is not paid then it is replaced by imprisonment for 3 (three) months. In this verdict the Defendant was legally and convincingly proven to have committed a criminal act of "forcing a child to commit obscene acts".

During the examination at trial, the public prosecutor submitted evidence of witness testimony consisting of the victim's child (17 years old) who experienced the incident, then the father, mother and brother of the victim's child as de auditu witnesses. From the evidentiary process at trial, with due observance of the evidence and evidence presented so that it is believed that the Defendant's act has fulfilled the element of "by violently committing intercourse with a child".

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<sup>8</sup> Hana Krisnamurti, 2016, "Kedudukan Saksi Anak Dalam Pembuktian Perkara Pidana", *Jurnal Wacana Paramata, Volume 15 Nomor 2*, p.7.

<sup>9</sup> Muhadar, dkk, 2009, *Perlindungan Saksi & Korban Dalam Sistem Peradilan Pidana*, Surabaya : Putra Media Nusantara, p.169-170

However, in the case on behalf of the Defendant Erwin Tanjung, Summoning Awen Bin Padek, the Judge in Decision Number: 191 / Pid.Sus / 2019 / PN Psb dated February 26, 2020, released the Defendant because of that of all charges (*vrijspraak*). At the trial, evidence was submitted in the form of witness testimony consisting of the victim's child, then the father and mother of the victim's child, and neighbors of the victim's child, but the judge in his consideration only considered the witness as *de auditu* witness.

In his consideration, the Judge was of the opinion that the testimony of the child of the victim and the testimony of the Defendant had each independently contradicted one another against the obscene act the Public Prosecutor was accused of so that the minimum proof that must be fulfilled with 2 (two) valid evidence in this case was concluded. has not yet been fulfilled to raise the conviction that the defendant was guilty of doing it as the public prosecutor charged.

In connection with the background described above, the problem can be formulated by asking the following questions: (1) What is the basis for the Judge's consideration regarding the testimony of the Child Victim witness in deciding immoral criminal cases at the West Pasaman District Court and (2) How is the power of evidence witness Child Victim in an immoral crime case at the West Pasaman District Court ?

## **B. Research Methods**

This research will be compiled using a *normative juridical*<sup>10</sup> research type, namely an approach that uses a positivist legislative conception, which views the law as identical to written norms made and promulgated by authorized institutions or officials. So that this conception sees law as a normative legal system that is independent, closed and detached from the real life of society.<sup>11</sup> This research uses a *statutory approach*, a *historical approach*, and a *conceptual approach*.<sup>12</sup> The data used in this research is secondary data, namely library materials that include official documents in the form of laws and regulations, books, scientific papers, articles and documents related to research material.<sup>13</sup> The data collection technique in this study was carried out by literature study, then the analysis was carried out qualitatively.

## **C. Results and Discussion**

### **1. The Evidence Power of Child Victim Witness in Immoral Crime Case at the West Pasaman District Court**

In practice at the West Pasaman District Court, the author analyzes 3 (three) cases of immoral crime, in which 1 (one) criminal case is related to sexual intercourse with a child, and 2 (two) cases constitute a criminal act of sexual immorality against a minor. The three cases to be discussed can be seen in the Decision of the West Pasaman District Court Number : 80 / Pid.Sus / 2019 / PN Psb dated 2 September 2019 on behalf of the Defendant Karsi Bin Maris Summons Karsi, Decision Number : 98 / Pid.Sus / 2018 / PN Psb dated 1 August 2018 in the name of the Defendant Hamzah Haz and Decision Number : 191 / Pid.Sus / 2019 / PN Psb dated 26 February 2020, on behalf of the Defendant Erwin Tanjung Summons Awen Bin Padek.

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<sup>10</sup> Zainuddin Ali, *Metode Penelitian Hukum*, Jakarta: Sinar Grafika, 2016, p. 12.

<sup>11</sup> Rony HanitjoSoemitro, *Metodologi Penelitian Hukum dan Jurimetri*, Jakarta : Ghalia Indonesia, 1998, p. 13-14.

<sup>12</sup> Peter Mahmud Marzuki, *Penelitian Hukum : Edisi Revisi*, Jakarta : Prenadamedia Grup, 2011, p. 133.

<sup>13</sup> SoerjonoSoekanto dan Sri Mamudji, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, Jakarta : Raja Grafindo, 2011, p. 12.

Referring to Hana Krisnamurti's opinion in her article regarding the position of the Child witness in proving a case it is explained that in order for a statement without being sworn to be used to strengthen the conviction of a judge, it must meet at least the following conditions, namely : <sup>14</sup>

- a. There must first be valid evidence;

Judging from the criminal evidence in the Karsi case above, it can be seen that the public prosecutor presented quite a lot of evidence as an effort to be able to prove the alleged criminal act committed by the defendant and enforce the law against the criminal act of intercourse that occurred.

Through such efforts, we can find out through the judges' decisions and considerations above, that this is very helpful in fulfilling the need for 2 (two) valid evidence and strengthening the conviction of judges as regulated in Article 183 KUHAP.

- b. There are at least 2 (two) valid evidence;

From the description of the case above, it can be seen that at least there are several pieces of evidence guided by the judge in deciding the alleged criminal act committed by the Defendant Karsi, namely Evidence for Witness Information, Expert Statement which strengthens the Child's Statement so that it becomes an appropriate unit to strengthen conviction of judges and serve as evidence of evidence, as well as documentary evidence in the form of *visum et repertum*.

- c. There is a match between the statement without being sworn in with valid evidence.

From the explanation above, it can also be seen that between the testimonies of witnesses presented by the public prosecutor, both auditors in the form of the victim's family, the testimony given by Khoirunnas, and the support of the Expert's statement that was presented became a single piece of information that was in accordance with the statement of the child victim.

Judging from the evidence and evidence submitted by the Public Prosecutor and the defense delivered by the Defendant, as well as the judge's consideration regarding the Hamzah Haz case, we can see that in the Hamzah Haz case, in principle the judge assessed the testimony of the Child Victim as a tool. valid evidence, so it can be said that the statement of the Child Victim in the Hamzah Haz case has evidentiary value as witness testimony. In accordance with the provisions of Article 171 in conjunction with Article 163 of the Criminal Procedure Code, the victim's child who is 17 (seventeen) years old can be sworn in to provide a statement. This is an important matter for judges to make the testimony of the Child Victim as evidence for witness testimony. In addition, evidence in this case is relatively not as difficult as in other cases, because the Defendant admitted in principle the act he committed against the victim's child.

Even though the judge's decision was related to the Hamzah Haz case, the judge did not explicitly explain the strength or value of the evidence and evidence submitted by the Public Prosecutor and the Defendant respectively, but through the reconstruction of the case and the judges' considerations as explained previously we saw that:

- a. Information about the victim's child supported by his brother as a witness. Although at the time of the incident his brother did not see the act directly, but after the act occurred where his brother met the Child Victim and the Defendant, and the Defendant also stated that he made a mistake and regretted his actions.

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<sup>14</sup> Hana Krisnamurti, *Loc. Cit.*

b. The defendant admitted to his actions and stated that the act occurred due to his mistake.

Judging from the evidence and evidence submitted by the Public Prosecutor and the defense presented by the Defendant, as well as the judge's consideration regarding the Erwin Tanjung case, in Erwin Tanjung Hakim's case he did not consider the victim's child testimony as a valid evidence, or or not to be able to strengthen the judge's conviction. Through the Judge's statement that the testimony of the Child Victim and the Defendant's Statement was independent, it showed that the Judge did not consider the statements of other witnesses.

Even though the judge's decision was related to Erwin Tanjung's case, the judge did not explicitly explain the strength or value of the evidence and evidence submitted by the Public Prosecutor and the Defendant respectively, but through the reconstruction of the case and the judges' considerations as explained previously we saw that :

- 1) The criminal act allegedly committed by Erwin Tanjung as explained in the indictment, charges and case chronology of the case, was not committed once but was an alleged obscene criminal act that had been committed many times.
- 2) Considering as described in the judge's consideration above, that it is very difficult to prove a case of immoral crime, let alone a criminal act of obscenity. So even though the alleged criminal act committed by Erwin Tanjung is alleged to have been repeatedly committed, the focus of evidence should be directed at the allegation of the last obscene criminal act committed by the Defendant.
- 3) Proving a criminal act of obscenity is also more difficult than proving a criminal act of intercourse because in principle, *visum et repertum* cannot provide any legal facts relating to obscene acts. It is different from the criminal act of sexual intercourse as described in the Karsi case, where the *post mortem* contributes greatly to the evidence because it can show that there is indeed a bruise or abrasion on the victim's genitals. Therefore, it is clear that proving an alleged obscene criminal act that has just occurred will be relatively heavy, especially if the obscene act has been repeated.
- 4) In principle, the Defendant in the trial rejected the BAP that was submitted, even denied the conciliation letter made in front of the investigator which basically clearly stated that the Defendant admitted to committing obscene acts against the child victim. However, it is quite unfortunate that the Public Prosecutor did not try to bring the Verbalisan Witnesses to court to be able to refute the defendant's testimony.
- 5) In proving an alleged criminal act, even though the judge will judge the legality of the evidence, the Public Prosecutor has the role of taking various actions in such a way as to present evidence and evidence that can convince the Defendant.
- 6) It is also quite unfortunate that in the Erwin Tanjung case, the expert was not assisted by the presence of an expert to provide information related to the psychology of the child and whether the child was physically and mentally healthy and spoke honestly, as in the Karsi case.
- 7) In addition to the lack of evidence, we can also compare it with the Hamzah Haz Case, even though the Public Prosecutor in the Indictment did not present an Expert Statement in the trial or presented a Verbalisan Witness to lock in the denial of the Defendant's Statement, however the child is considered to have the legal power to be heard completely his statement, so that the Child's Statement in the Hamzah Haz Case is one of the keys to proving the alleged obscene crime against the Defendant Hamzah Haz.

8) Meanwhile, in the Erwin Tanjung case, this seems to be a series of shortcomings of the prosecutor in presenting evidence and evidence so that the judge cannot consider many things related to the power of proof of the victim's child or other evidence.

9) Apart from that, as explained in the judges' considerations above, both the Public Prosecutor and the Judge did not try to further investigate the Defendant's statement which had been judged to be independent, because according to the author the Defendant stated that there was a nude photo of a woman showing her breasts without In principle, the face which he has removed corresponds to the testimony of the Child Victim, as well as the audited witness assessed by the judge.

Referring to Hana Krisnamurti's opinion in her article regarding the position of child witnesses in proving a case it is explained that in order for a statement without being sworn to be used to strengthen the conviction of a judge, it must meet at least the following requirements, namely :<sup>15</sup>

a. There must first be valid evidence;

Judging from the criminal evidence in the Erwin Tanjung case above, it can be seen that the evidence submitted by the Public Prosecutor, namely:

1. Witness statement

- a. Child Victim Witness
- b. Witness Satiyo
- c. Witness Epi Nopia Susanti

2. Letters

Visum et repertum Number: 88 / AV / IS / IX-2019 dated September 19, 2019 signed by dr. Ardiles, Sp. OG.

Meanwhile, at the trial the Defendant filed a defense by presenting the Witness statement by Kasman SM, in addition to the Defendant's own statement.

Referring to the first opinion above, that there must be valid evidence, then legally positive in Indonesia based on the Criminal Procedure Code, we can judge that, the Child Victim's Information as described above, because it is not yet 15 (fifteen) years old, the statement is according to the explanation. Article 171 KUHAP can only be used as a guide or at least to strengthen the judge's conviction, if the judge later assesses and finds that the statement of the Child Victim can strengthen his conviction and is in accordance with other evidence.

So that when viewed from the composition of the evidence submitted by the Public Prosecutor, the writer can judge that the evidence and evidence to be proven in court is minimal enough to prove obscenity against this child compared to the evidence in the Karsi Case and the Hamzah Haz Case.

b. There are at least two valid pieces of evidence;

Judging from the two witnesses other than the Child Victim witness who was presented in the trial, both were categorized by the judge and based on the law of evidence that applies as auditing witnesses, because no witnesses saw or heard the alleged criminal act. So that in principle, the evidence becomes very heavy when the judge only judges that the witness's testimony is the auditing witness and in the end it is true that in his decision the judge did not consider it.

<sup>15</sup> *Ibid.*



In connection with the testimony of the audit witness, it is interesting to explain a little and explain what Rinaldi Yushar Rosadi explained, in his article entitled "Application of Unus Testis Nullus Testis Principles ....".<sup>16</sup> According to Rinaldi, referring to Russell Tytler's opinion, which states that : *"Reliability of data, and validity in relation to data and to experimental design, all relateto 'within science' question that can, in principle, be answered by examining the material evidence thoroughly and thusan other evidence pertaining the matter could also be gathered"*.<sup>17</sup> It can be seen that in order to obtain and assess evidence properly, the evidence obtained and / or presented must be examined carefully because if it is linked and studied between one another, the existing evidence may be related to one another, and from In this relationship, other evidence may also be presented that can be used in examination at trial.

Referring to the above opinion, in principle as previously explained, that the Defendant's statement relating to deleting nude photos showing the breasts of a child is something that can be further explored and is in accordance with the child's statement and witness testimony.

The lack of witness testimony made the judge finally judge that the testimony of child witnesses stood alone, so the judge indirectly applied the nullus testis unus testis principle (one witness is not a witness, or one evidence is not evidence). This is also in line with Article 185 paragraph (2) of the Criminal Procedure Code, which states that "the testimony of a witness is not sufficient to prove that the Defendant is guilty of the act he is accused of".

Meanwhile, if seen from the evidence of the letter submitted in the form of visum et repertum above, which basically explains that there are no visible tears in the pubic membrane and no visible signs of violence on other parts of the body. It can be seen that such a clear visum et repertum does not provide any guidance and explains any legal facts that support the alleged criminal act of child sexual abuse.

As is well known, the alleged criminal act committed by Erwin Tanjung is a criminal act of obscenity which is of course very different when it is a criminal act of sexual intercourse against a child, which leaves physical marks in the form of bruising or tearing of the hymen on the child's genitals.

c. There is a match between the statement without being sworn in with valid evidence.

The statement of the victim's child in the Erwin Tanjung case, in principle, is in accordance with the testimony of other witnesses submitted by the public prosecutor. However, it is quite unfortunate that the judge denied the testimonies of other witnesses, because they were deemed invalid or at least not having any evidentiary value.

Starting from the three cases related to immoral crime above, it can be seen that in cases of immoral crime there are several differences and characteristics that result in differences in judges' judgments in determining the strength of evidence against the testimony of child victim witnesses. In the Karsi Bin Maris case, Karsi Summons as in the Decision of the West Pasaman District Court Number : 80 / Pid.Sus / 2019 / PN Psb dated September 2, 2019, it can be seen that the crime imposed on the perpetrator is immoral, especially the criminal act of intercourse against children Whereas in the case of the defendants Hamzah Haz and Erwin Tanjung, Awen Bin Padek's summons as Decision Number : 98 / Pid.Sus / 2018 / PN Psb dated 1 August 2018 and Decision Number : 191 / Pid.Sus / 2019 / PN Psb dated 26 February 2020 The two defendants were charged with immoral crimes in particular relating to obscene acts against children.

A part from that, other characteristics, it can be seen that in the Karsi case and the Erwin Tanjung case, the child was not yet 15 (fifteen) years old. Meanwhile, in the Hamzah Haz case related to immoral

<sup>16</sup> Rinaldi Yushar Rosadi, "Penerapan Asas Unus Testis Nullus Tesis oleh Hakim dalam Membebaskan Terdakwa dari Dakwaan dan Upaya Hukumnya oleh Jaksa" Jurnal Verstek Vol. 1 No. 1 Fakultas Hukum Universitas Sebelas Maret, p.298.

<sup>17</sup> Ibid.

crimes, the child at that time was 17 (seventeen) years old. Although according to Article 171 of the Criminal Procedure Code and its explanation, children under 15 (five halves) are not considered to be fully accountable for their actions, while children who are 15 (years) are deemed able to fully account for their information in the eyes of criminal law (*interpretation of argumentum a contrario*), however, in accordance with the Child Protection Law and the SPPA Law, child victims who are 17 (seventeen) years old in the Hamzah Haz case are still considered as children.

In contrast to the Karsi case above, although the judge did not explicitly explain that the testimony of witnesses other than the testimony of the Child Victims had evidentiary value and was recognized as valid evidence, it is clear that at least the judge used it as a clue for him because there was compatibility with one another, and support for *visum et repertum* which shows that there are indications that criminal acts of sexual intercourse against child victims may occur.

Furthermore, in the Karsi and Hamzah Haz Case, the Judge considered that the Defendant's actions had been legally and convincingly proven to have committed an immoral crime as indicted by the Public Prosecutor. Whereas in the Erwin Tanjung case, the Judge actually considered that the Defendant was not legally and convincingly proven to have committed the crime of immoral (immoral) against the victim's child, so that the Defendant was declared free from all legal charges filed by the Public Prosecutor.

Through the description of the case and the characteristics above, we can conclude that the Judge in the Karsi case did not use the Child Victim's Statement as evidence for witness testimony or in other words, but the judge made the Child Victim's statement an indication for the judge or at least to strengthen the judge's conviction. In relation to the criminal acts that have been committed, as regulated in the Criminal Procedure Code. Whereas in the case of Hamzah Haz above, the judge made the statement of the Child Victim as a means of evidence so that the statement of the Child Victim has a very significant evidentiary value because the child in his statement has been sworn in and is appropriate with Article 160 paragraph (3) of the Criminal Procedure Code.

However, in the Erwin Tanjung case as described above, the Judge did not use the testimony of the Child Victim as evidence for witness testimony and also did not make the statement of the Child Victim as an indication for the judge, so it can be said that the statement given by the Child Victim does not have legal force for the judge. This is because the judge judged the testimony of the Child Victim and the testimony of the Defendant to stand alone. Meanwhile, the statement of the Child Victim cannot be said to be in accordance with the testimony of other witnesses who gave the testimony audibly.

In connection with this audited witness testimony, with reference to the decision of the Constitutional Court Number : 65 / PUU-VII / 2010, made a renewal by granting the request for review of Article 1 points 26 and 27 of the Criminal Procedure Code. In the verdict read out on August 8, 2011, the Constitutional Court stated that "Article 1 number 26, and number 27, Article 65, Article 116 paragraph (3) and paragraph (4) of Law Number 8 of 1981 concerning Criminal Procedure Law are contradicts the 1945 Constitution of the Republic of Indonesia (UUD 1945) as long as the understanding of witnesses in these articles does not mean someone who always hears, sees, and experiences an event."<sup>18</sup>

This decision has several implications in criminal procedural law in Indonesia, if it turns out that the witness is not necessarily the person who saw, heard, and experienced a criminal event. As in the ruling of the Constitutional Court Decision, the meaning of witnesses and witness testimony in Article 1 number 26, Article 1 point 27 of the Criminal Procedure Code has been declared contrary to law and has no binding legal force. This means that these provisions cannot be used as a legal basis in determining the criteria for witnesses and witness testimony.

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<sup>18</sup> Eny Harjati, "Implikasi Yuridis Mengenai Saksi dan Keterangan Saksi dalam Perkara Pidana Setelah Putusan Mahkamah Konstitusi Nomor : 64/PUU-VII/2010", Jurnal Hukum Februari 2015, p.4.

The Constitutional Court did not provide clear enough limits on the extent to which the value of a person's testimony could be used as a witness. The judge's consideration given by the panel of judges who decided the case only explained that the value of the witness's testimony did not lie in whether he saw, heard and experienced an event himself. However, it lies in the relevance of the testimony given to the on going case.<sup>19</sup>

Regarding the relevance of witness evidence, according to M. Yahya Harahap, looking for relevance must be tested the way the examination is based on the legal basis, so that in seeking and directing witness testimony during examination, it is truly aimed at urgency in accordance with the desired legal provisions themselves.<sup>20</sup>

The relevance of evidence can simply be measured from whether the evidence is in accordance with the proven facts.<sup>21</sup> Relevance is very important in terms of proof of criminal cases. The importance of the meaning of relevance explained by Eddy O.S Hiraaj in proving a criminal case is as follows : <sup>22</sup>

- a. Evidence must be relevant or related;
- b. Evidence must be reliable, meaning that the evidence is reliable so that to strengthen the evidence it must be supported by other evidence;
- c. Evidence must not be based on undue suspicion, it must be objective in providing information about a fact.

Based on this opinion, the judge should be able to judge the strength of proof of witnesses from child victim witnesses as something that strengthens the judge's conviction or at least provides an indication that other statements submitted by the public prosecutor regarding the alleged immoral crime committed by the Defendant Erwin Tanjung are testimony which is relevant or related to the child's description. Apart from that, the testimony can be trusted, because the judge should judge that it is impossible for the Child Victim to make up a story to put the Defendant in court, and how much shame must the parents bear by legally investigating the Defendant's actions. Meanwhile, in relation to this information, it must provide objective information regarding a fact, according to the author of the statement of the Child Victim, as well as the testimony of other witnesses which the judge assesses as auditing statements principally explaining the fact that Erwin Tanjung has visited the victim's child several times. It is strange when an elderly person mingles with the victim's child and the fact is that there is a naked photo of a child that has been deleted as conveyed by the defendant. This is consistent with the statement of the child victim that he was asked to take a photo of his breast.

So that according to the author, the judge's consideration in assessing the strength of evidence against the child victim's testimony in the Erwin Tanjung case is a wrong consideration or at least is the judge's consideration that is only confined to the legal positivist Criminal Procedure Code which states the strength of proof of child victim witnesses, without seeing and comparing them. with the latest legal developments relating to the witness's testimony. In addition, the judges did not evaluate and consider the legal facts carefully to uphold justice in the settlement of Erwin Tanjung's immoral crime.

In addition, based on the description above, it can be seen that the validity of children's statements has the power of proof for judges. The judge's assessment is subjective because the assessment of the witness's evidence is generally not binding, as is the testimony of the witness's child. It can be said that the evidence for witness testimony as valid evidence is free and imperfect and does not determine or

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<sup>19</sup> *Ibid.*, p.9.

<sup>20</sup> M.Yahya Harahap, *Op. Cit.*, p.144.

<sup>21</sup> Eddy O.S. Hiraaj, *Op. Cit.*, p.13.

<sup>22</sup> *Ibid.*

bind. The judge is free to judge its perfection and correctness. There is no requirement for judges to accept the truth of any witness testimony, including children of witnesses.

However, on this basis, judges are required to be wise and assess and decide the strength of the statement of child victims in a comprehensive manner. In addition, it is stated that it is difficult to prove a criminal act of immorality, let alone an obscene crime where physically when a *visum et repertum* is carried out it will not provide any legal guidance or explanation. So that the judge must be able to pursue and consider and explore other evidence, such as the suitability of the opinion of the Defendant and the Child Victim (who is not yet 15 years old, because it is deemed not to have the power of proof). This is in contrast when the victim's child is acknowledged as a witness in the criminal act of child molestation as in the case of Hamzah Haz.

It is also related to the three cases above, as it is explained that although the power of proof is determined by the judge in deciding a criminal case. However, the public prosecutor also has a significant role in upholding justice in solving immoral crimes against children. The Public Prosecutor has a major contribution in presenting evidence and evidence at trial, then the Public Prosecutor after presenting evidence and evidence also has the obligation to carry out legal reconstruction in proving criminal acts, understanding and analyzing legal findings in examining evidence or evidence in court so that the judge has a complete picture or at least provides an understanding of the judge regarding the condition and situation of the case.

In the judge's decision relating to immoral crimes against children above, it is known that of the three cases of immoral crimes were prosecuted by 2 (two) different Public Prosecutors, namely in the Karsi and Hamzah Haz Case, the Public Prosecutor who played a role in prosecuting, prosecuted and proved the case, namely Musyiami Ramadhani, Head of Investigation Sub-Division, while in the Erwin Tanjung case it was held by Prosecutor Ade Restu Haryati.

Based on the results of the author's interview regarding the two public prosecutors, it is known that the public prosecutor has the view and admits that in cases where a child is a victim of a criminal act it is more difficult to prove it, although it does not mean that in other criminal acts it becomes easy. However, the difficulty in proving cases of children, especially in the context of immoral crimes, is related to the value of the strength of evidence provided by the Witness Child Victims. Meanwhile, as previously known and explained, the value of the testimony of child victims who do not take an oath cannot be the same as the testimony of a witness who is legally competent.<sup>23</sup>

To be able to prove a case against this immoral crime against a child, the expertise of the public prosecutor is needed to be able to bring in evidence and evidence deemed sufficient to prove the defendant guilty and simultaneously convince the judge. According to Musyiami, explaining that the public prosecutor must be able to play an active role in the evidence because in principle the judge only assesses the strength of the evidence presented, but it is the prosecutor who provides the proof to the judge. This is as stipulated in Article 66 of the Criminal Procedure Code which states "the suspect or defendant is not burdened with the obligation of proof".

In connection with the Erwin Tanjung case, Prosecutor Musyiami rejected the judge's consideration in principle and was of the opinion that the expertise of a public prosecutor was needed in presenting evidence and evidence to be used in evidence at trial. Meanwhile, according to the prosecutor Ade Restu, it was found that he had done his best to prove the case of the child in court. At least with the evidence presented before the trial, according to him the Defendant Erwin Tanjung could be proven guilty of committing immoral crimes in the form of obscene crimes against children. However, the Judge did not agree with the demands of the Public Prosecutor and released the Defendant.

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<sup>23</sup> Interview with Musyiami Ramadhani, S.H., M.H. and Ade Restu Haryati, S.H., M.H., Attorney at the West Pasaman District Prosecutor's Office on May 14 2020 at 13.00 WIB.

Judging from the theory of Justice as explained by John Rawls, namely, in order for humans to find correct principles of justice, humans must return to their original positions. Original position (original position) is a state where humans face other humans as humans.<sup>24</sup>

If you can put yourself in that original position, humans will arrive at the two most basic principles of justice, namely : <sup>25</sup>

- a. The Principle of Equality or the Principle of Great Equal Liberty;
- b. The Inequality Principle.

This principle states that the difference (socio-economic) situation must be given the rules in such a way as to benefit the weakest society.

Referring to the two principles presented by John Rawls, in relation to the description of immoral crimes against children above, it can be seen that :

a. In law enforcement efforts in resolving immoral crimes against children above, Judges as the pinnacle of verdict and justice must provide equality and justice for child victims so that their opinions can be heard and their opinions are legally recognized, by deepening and paying close attention to the relationship between the suitability of children's statements. Victims and other evidence at trial. Accuracy of judges is required so that the principle of equality and justice for children can be achieved. In addition, judges must also understand the development of the nature of witness testimony in Indonesian criminal law at this time. Furthermore, in upholding the law and justice, judges can also strengthen the conviction of judges to seek solutions to allegations of immoral crimes against children.

Nevertheless, the expertise, thoroughness and hard work of the public prosecutor also greatly contributed to the fulfillment of justice for the settlement of immoral crimes against children. As explained above, even though the value of proof is determined by the Judge, the one who has an active role to prove is the Public Prosecutor. So that each other plays an active role in trying to prove the victim's child is important in the effort to resolve immoral crimes against children.

b. The key to the demands of the expertise, accuracy and seriousness of the public prosecutors and judges is also to apply the principle of inequality. Whereas based on the description above, it must be admitted that the settlement of immoral crimes against children has different and difficult characteristics in addition to other criminal acts. Whereas on the one hand it is very difficult to fulfill the provisions of witness testimony in the Criminal Procedure Code (due to the fact that the judge is still very legal positivist in assessing the fulfillment of witness testimony) and judges who may not assess developments in relation to witness testimony are linked to statements of children who do not have the power of proof as a tool. witness evidence, in addition to the difficulty of finding witnesses in immoral crimes against children and not infrequently such as in criminal acts of sexual immorality, documentary evidence such as *visum et repertum* shows or provides clues related to a criminal event that is suspected to have occurred.

So that through the complexity of the problems related to the strength of the child witnesses, judges and public prosecutors must be required to provide justice with due regard to the principle of inequality, that the law must provide protection and justice for crimes that occur to child victims who are weak.

Judging from the theory of legal certainty as conveyed by Lon Fuller, there are 8 (eight) things that must be fulfilled in order to determine laws to run effectively in society. However, in the context of this judge's decision, there are at least 6 (six) things as conveyed by Lon Fuller regarding the law, namely:

<sup>24</sup> Theo Huijbers, *Op. Cit.*, p.197.

<sup>25</sup> *Ibid*, p.200.

### 1. Promulgation or law must be announced;

Based on this theory, judges' decisions have generally been submitted and announced online on the website of the Supreme Court, although currently, according to the author, the Supreme Court limits the publication of its decisions through the website of the Supreme Court.

### 2. Clarity or the law must be clear;

Associated with the three judges' considerations in assessing the strength of proof of the child victim above, we can see that in the case of the three decisions made by the judge have not provided clear legal considerations regarding the judge's consideration of the immoral crime against the child above. In addition, if viewed through the three considerations as a whole, it will be seen that these legal considerations are increasingly unclear and can cause legal uncertainty due to the judge's view of assessing the testimony of the victim's child.

This is also in line with the strength of evidence for the three judges' decisions above, the judge's assessment of the strength of evidence also causes legal uncertainty, because the subjectivity of the judge's assessment of the power of evidence depends on the judge's conviction in providing instructions regarding the truth of immoral crimes. that happened to the child.

### 3. Generality or general law;

The author considers that the judge's assessment of the strength of evidence on the testimony of the victim's child above is not generally accepted, but applies partially in accordance with the flow of the judge's understanding and the judge's ability to judge and reconstruct the truth of a crime. The lack of guidelines and guidelines for judges in determining the strength of evidence and making judges' considerations on the settlement of immoral crimes against children makes the judge's decision very inclined to create criminal disparities because the judge's assessment of the power of evidence of the victim's child is the key for the judge to decide on an act. immoral crime against the victim's child.

### 4. Consistency or avoiding contradiction or consistency or avoiding contradictions;

As the author states above, that as a result of the judge's subjectivity in assessing the strength of evidence against the child victim witness in this immoral crime, the decision made by the judge becomes inconsistent or in other words, the decision becomes very premature depending on how the judge assesses the strength. the proof and how the judge understands the evidence in court proceedings, whether the judge puts forward the judge's conviction, or puts forward 2 (two) valid evidence items according to the judge's judgment must be fulfilled.

### 5. Possibility of obedience or the possibility of obedience or must be implemented;

Obedience to the decision, if seen from the point of view of the practice of law enforcement by the judge and the verdict to be handed down by the judge against immoral crimes against children, for the judge himself it would be very possible not to be able to decide the sentence imposed, because as a jurisprudence Regarding the settlement of immoral crimes against children, seeing the varied strength of evidence against the victim's child, the writer considers that the verdict issued by the judge has also become very diverse. So that a guideline is needed to be a signpost for judges in assessing the strength of evidence from the testimony of the child victim by reconstructing the case of immoral crime against the child carefully and completely.

6. Congreunce between official actions and declared rules or conformity with laws and implementing rules.

According to the author, because the key to the various judges' decisions on immoral crimes against minors lies in the understanding of the judge in assessing the strength of evidence against the victim's child testimony or in other words lies in the judge's understanding that immoral crimes against the victim's child were true. This decision currently really depends on the subjective understanding of the judge. Judging from the statutory regulation as a source of formal law, it can be said that the judge's decision achieves compliance with statutory regulations because no law has been violated formally. However, in the context of this immoral crime against children, at least the legal feeling of the community will be hurt or at least this will affect the legal feeling of the community regarding the truth of the immoral crime that occurred. So that the balance and judgment of the judge is not only about fulfilling legal obligations in a formal manner but also related to the fate of a child. Therefore, judges are required to be able to make considerations and assess the strength of evidence against child victims in a comprehensive and holistic manner.

Therefore, the power of proof of child victim witness in an immoral crime case at the West Pasaman District Court can be seen that the Judge in the Karsi case did not make the Child Victim's Statement as evidence for the witness's testimony. The judge makes the statement of the child victim as a guide for the judge or at least to strengthen the judge's conviction. Whereas in the Hamzah Haz Case, the judge made the statement of the Child Victim as a means of evidence so that the statement of the Child Victim had a very significant evidentiary value because the child in his statement had been sworn in and was in accordance with Article 160 paragraph (3) of the Criminal Procedure Code. However, regarding the Erwin Tanjung case, the judge assessed that the information provided by the Child Victims did not have legal force as a means of evidence. Therefore, it can be seen that the judge in assessing the validity / strength of proof of the child's victim's testimony is subjective in accordance with the flow of the judge's legal understanding of legal evidence in court examination. Associated with the theory of justice, it can be seen that child victims of immoral crimes have the potential to continue experiencing injustice in the judge's decision due to the judge's subjectivity in assessing the strength of proof of child victim witnesses.

## ***D. Closing***

### **A. Conclusion**

The strength of proof of child victim witnesses in immoral crime cases at the West Pasaman District Court can be seen that the Judge in the Karsi case did not use the Child Victim's Statement as evidence for witness testimony. The judge makes the statement of the child victim as a guide for the judge or at least to strengthen the judge's conviction. Whereas in the Hamzah Haz Case, the judge made the statement of the Child Victim as a means of evidence so that the statement of the Child Victim had a very significant evidentiary value because the child in his statement had been sworn in and was in accordance with Article 160 paragraph (3) of the Criminal Procedure Code. However, regarding the Erwin Tanjung case, the Judge assessed that the information given by the Child Victims did not have legal force as a means of evidence. Therefore, it can be seen that the judge in assessing the validity / strength of proof of the child's victim's testimony is subjective in accordance with the flow of judges' legal understanding of legal evidence in court examinations. Associated with the theory of justice, it can be seen that child victims of immoral crimes will have the potential to continue experiencing injustice in the judge's decision due to the judge's subjectivity in assessing the strength of evidence from child victim witnesses.

### **B. Suggestions**

1. Judges in their decisions need to be careful and clear in providing legal considerations, so that they can describe the position of the judge's juridical and non-juridical considerations to everyone with an interest in the judge's decision, especially in the consideration of assessing the legal strength of the testimony of child victim witnesses. In addition, judges are expected to be able to understand the latest

developments in the world of law so that they can strengthen the understanding and conviction of judges in relation to a crime, especially immoral crimes against children.

2. The Supreme Court needs to provide guidelines (SEMA) regarding what matters can be used as indicators for judges in determining the strength of evidence against the testimony of child victim witnesses, so that judges in considering the power of evidence against child victims have objective guidelines to reduce judge subjectivity.

3. The legislators, especially the Government and the DPR, need to revoke the provisions of Article 171 of the Criminal Procedure Code relating to statements of children being heard without oath, or to revise the SPPA Law as *lex specialis* by providing regulations and limitations related to statements of child witnesses, so that they have the same proof power as the statements witnesses in Article 184 of the Criminal Procedure Code.

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