



The Crime of Rape in India: Provisions of Law and related amendments

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ABSTRACT: Crimes against women have become common phenomena which are reported daily in our newspapers. India is passing through a very turbulent phase with regard to women security and cases of rapes, sexual assaults, acid attacks are on the hike on a daily basis. Despite of several changes in the provisions of law and criminal procedure, only few perpetrators of such heinous crime are punished, rather the victims become a accused of filing a false case because the prosecution was not able to prove the allegations beyond reasonable doubt. Due to various child rape incidents, the demand for making anti-rape laws had been more stringent. The infamous Kathua rape case and the Unnao rape case shook the conscience of the entire nation and the triggered the demand of more amendments and gave birth to The Criminal Law Amendment Act, 2018. It is need of the hour to change the thinking and mentality of people along with judicial awakening. The responsibility of protecting women should not be confined to the police authorities but it is duty of the general public also. Changes must be made not only in the laws as well as in the mindset of the people so that rape victims would no longer be victimized.

KEYWORDS: Rape, Victim, Amendmend

INTRODUCTION

Crimes against women have become common phenomena which are reported daily in our newspapers. India is passing through a very turbulent phase with regard to women security and cases of rapes, sexual assaults, acid attacks are on the hike on a daily basis. The patriarchal setup of the Indian society and the “dominance” of men in the society also led to added problems for the victims of these crimes. One of the biggest hurdle before Indian judicial system while giving justice to the rape victims that the idea of accused being innocent until proved guilty, which tends to reduce the number of convictions in case leads to increasing trauma towards victims.

The Rape survivor has to go not only through the trial of the courts but also through public trial of people which attach a stigma too to the rape victim. Many times, they are blamed for filing a “false” case only due to the fact that the case is not conclusively proved by the prosecution that rape has been committed. It is said to be one of the most controversial issues, and therefore, it is a challenge to the contemporary thinking which perhaps makes it the most under-reported crime. Despite of several changes in the provisions of law and criminal procedure, only few perpetrators of such heinous crime are punished, rather the victims become a accused of filing a false case because the prosecution was not able to prove the allegations beyond reasonable doubt. The crime of rape in Indian society has become a common behavior with cases being reported but many remaining unsolved for years.

CHANGES BROUGHT AFTER THE CRIMINAL LAW AMENDMENT BILL, 2013

In general sense, rape means anything which is done by using force and without the consent. According to Oxford Dictionary, meaning of rape is “to force to have sex with you when they do not want to by threatening them or using violence”. In common parlance rape is described as sexual intercourse with a woman without her consent by force, fear or fraud². Section 375 of Indian Penal Code defines the term rape. Section 375 of Indian Penal Code said that a man has committed rape under certain circumstances provided in the section as followings:

1. Without the will of the concern woman (in the time of intercourse)
2. Without the consent of the concern women.
3. If consent is there but it has been taken by threaten and fearing her.
4. If the girl gives consent because she thinks that this man is her legal husband though the man is very much aware of the fact that she is not his wife.
5. When the girl gives her consent but in that time her mental condition is not sound or at the time of intoxication.
6. When the age of the girl is 16 years of age then with or without consent of the girl if any intercourse has been there then it is considered as rape.

² Bhupinder Sharma v State of Himachal Pradesh AIR 2003 SC 4684

So, it is clear that to prove that a particular intercourse is rape or not absence of consent is essential. If consent is there, then rape cannot be committed. But it is also essential that consent must be free consent at that time.³

Various amendments were done with this definition in the past years. After the famous case of *Tukaram vs. State of Maharashtra*⁴ which is commonly known as The *MATHURA RAPE CASE*, the first social reform was done. In this case it was overturned by the Bombay High Court that there was a huge difference between consent and passive submission. It was observed that mere surrender to another person's lust should not be treated as consent but it was overturned by the Supreme Court and acquitted all the accused. It was criticized by the civil society. This case became the first case in a way to social transformation perspective, which led to public outrage and as a result, the reforms have been made in the then laws.

The Criminal Law Amendment, 1983 has been made after the Mathura Rape Case. The main features of the criminal law amendment Act, 1983 are relating to definition of the offence of rape. Section 375 IPC provided six circumstances that can be said to be sufficient to constitute rape. The primary condition necessary for crime of rape is that there must be the commission of sexual intercourse between the man and the woman. Rape can only be committed if the sexual intercourse has been done without the consent of the victim, but this is not always the case, rape can be committed even after consent has been obtained if the age of the woman is below the age of sixteen years. The circumstances required for the commission of rape it can be broadly divided into three parts. The first two clauses deal with sexual intercourse with a woman 'against her will' and 'without her consent'. This means that the woman is consciously capable of giving or not giving consent to the act.

The next two clauses provides that consent of women is obtained due to coercion by putting her or any of her family member to threat of hurt or grievous harm and it also deals when the consent is obtained through misconception. The last two clauses states with the situation when the consensual sex takes place with underage females.

Explanation of the term 'Sexual Intercourse' and 'Penetration'

Before the amendment of 2013, sexual intercourse was taken to mean the penetration of the male genital organ into the female genital organ only. The courts interpreted the term sexual intercourse as "mere slightest or partial penetration of the male organ within the labia majora or the vulva or pudenda is sufficient to constitute 'sexual intercourse'⁵. The courts have stressed on the fact that the depth of the penetration is immaterial⁶. It is also laid down that there is no requirement for injuries to be present on the private part⁷ of the woman to constitute rape.

³ JANUARY 18, 2018 <https://legaljugaad.wordpress.com/2018/01/18/rape-laws-in-india-a-critical-analysis/>

⁴ AIR 1979 SC 185

⁵ Madan Gopal Kakkad vs Naval Dubey (1992) 3 SCC 204

⁶ Wahid Khan v State of Madhya Pradesh (2010) 2 SCC 9

⁷ Fateh Chand vs State of Haryana, (2009)15 SCC 543

The hymen need not be ruptured⁸. Thus the essential condition of rape is only penetration and not ejaculation. Ejaculation without penetration will constitute as an attempt to rape and not rape actually⁹. These conditions were expressly mentioned by the Supreme Court in the case of “State of Uttar Pradesh v Babulnath”¹⁰. The court in this case while delving into the essential ingredients of rape made the observation that “To constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with the emission of semen and rupture of hymen. Even Partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purposes of section 375 and 376 of the Indian Penal Code. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stain”¹¹. An important issue of widening the ambit of section 375 to include the any bodily penetration as rape was raised in the case of Smt Sudesh Jhaku v KCJ & Ors.¹² The petitioners wanted to increase the ambit of the definition to include penetration of any male body part into any orifice in the woman’s body. This however was rejected by the court which was not in favour of tinkering with the existing definition of the term. The court said that it was necessary to prevent chaos and confusion in the society with regard to the changed definition of rape and hence Section 375 should not be altered.

It is also important to note that there is also an exception to section 375. The exception is known as Marital Rape. Marital Rape is defined as non consensual sex with wife who is over the age of 15 years. The crux of the argument is that any coercive or non consensual sex with a wife over the age the age of 15 years will not be considered as rape within the purview of section 375. The immunity of the husband from getting convicted for marital rape arises from the assumption that after marriage husband gets a lifelong consent for sexual intercourse with his wife. This is a very problematic situation according to me because this is in contravention to the statute that states that the minimum age for marriage of a woman should be 18 years. So if that is the case a man cannot marry a wife who is of 15 years of age.¹³

⁸ Guddu vs State of Mp,(2007)14 SCC 454, 2006

⁹ Ramkripal Shyamlal Charmakar vs State of Madhya Pradesh(2007) 11 SCC 265

¹⁰ (1994) 6 SCC 29

¹¹ Ibid.

¹² (1998) Cr LJ 2428

¹³ Satwik Singh, WB NUJUS, <https://www.lawctopus.com/academike/comparison-critical-analysis-rape-laws-criminal-law-amendment-2013/>

Punishments

Section 376 of the IPC stipulates the punishments that are awarded if a person is convicted of rape. There is a minimum punishment of seven years and it can also be given with a fine and extend to life imprisonment. However Section 376(2) provides the situations where the quantum of punishment will be very high and it will include rigorous imprisonment which will not be less than a term of 10 years.

The punishment for gang rape is provided under sub section 2 of section 376 IPC which postulates that when a woman is raped by more than one person then each of the person will be convicted of the crime of gang rape and the punishment would not be less than ten years of rigorous imprisonment in such cases.

CHANGES BROUGHT IN LAWS AFTER THE DELHI RAPE CASE

The Criminal Law Amendment Act of 2013 was brought into effect after the horrific Delhi Gang Rape case which shocked the whole nation with the brutality of the act committed. Widespread protests and agitations forced the legislature to contemplate the changing of the prevalent rape laws. The basic idea was to make them more stringent and introduce harsher punishments besides broadening the ambit and definition of the term rape. Late Justice J.S.Verma, Gopal Subramaniam and Ex-Justice Leila Seth comprised the rather famous ‘Justice Verma Committee’ which was made to collect suggestions and make recommendations for the legislature to make a law to combat rape and other crimes against women¹⁴.

The offence rape was now amended and broader meaning was given which was comprehensive enough to include every kind of penetration whether it is in any body part of the woman or girl. This was said to be the most important change because earlier section 375 of the IPC only accepted the Penile Vaginal penetration as rape. It would be considered as the most efficient tool in widening the ambit of the term rape which was being demanded earlier on the basis of the recommendations given by the fifth law commission report. Some suggestions about registering complaints and medical examination was also included. The report categorically mentioned, “Any officer, who fails to register a case of rape reported to him, or attempts to abort its investigation, commits an offence which shall be punishable as prescribed”¹⁵

An extensive recommendation was given by committee regarding avoiding marital rape as well as rapes committed via commission of void marriages. This was very important because Marital Rape is a loophole that is very explicit on the face of it. The Code of Criminal Procedure also underwent a similar overhauling attributed to

¹⁴ http://en.wikipedia.org/wiki/J._S._Verma

¹⁵ Report of the Committee on Amendments to Criminal Law Pg 416; last accessed 3 August 2014

the new law and had previously gone through the same process after the judgment in the Supreme Court decision in the “Gurmit Singh Case”¹⁶.

The Justice Verma committees report also recommended many essential things which can take an important role to gender equality and social transformation. It includes many things; these are as follows:

1. Police reforms
2. Educational reforms
3. Special training for boys
4. Special training for the officers who are in criminal justice system
5. Establishment of rape crisis centers.

A new crime that was introduced was ‘voyeurism’ which means the recording or viewing images, movies or any such media material without the permission of the person portrayed or screened in them would result in penal punishment. . A ‘voyeur’ is defined as “a person who derives sexual gratification from the covert observation of others as they undress or engage in sexual activities.”¹⁷ Voyeurism is a criminal act which creates apprehension for society and is infringement of expectations of privacy that all citizens have about their body which they do not wish to expose it to others¹⁸.

Another very important change which was the much required in the procedure was, Section 114A of the Indian Evidence Act was amended, relating to providing evidence in the court of law. This was done to maintain that despite there being the lack of consent given by the women, there was often a character assassination of the women at the court trials which was very unfortunate. Section 53A of the Indian Evidence Act was also introduced provides that in a trial of sexual assault or rape, the evidence could not be admissible in the court of law which is relating to the victim’s previous sexual experience or even for a matter of fact her ‘character’.¹⁹ On instances of rape or sexual assault cases the evidence concerning consent is often derived on the basis of the past conduct of the woman which seems rather frivolous as at the instance of the abuse she might not have consented thus constituting the criminal act. In earlier cases prostitutes could be raped and their right would not be protected as the victim’s previous sexual experience and “promiscuous character” would always malign the proceedings and create a bias in the judiciary’s mind. The sole reason for this inclusion of this amendment was to prevent the breach of privacy of the victim’s sexual history by preventing it to be included as a piece of evidence in court. The new law

¹⁶ State of Punjab v. Gurmit Singh, AIR 1996 SC 1393

¹⁷ Oxford English Dictionary, available at <http://bit.ly/YN2ZvI> accessed on 2 August 2014

¹⁸ Lance Rothenberg, Rethinking Privacy: Peeping Toms, Video Voyeurs, and the failure of criminal law to recognize a reasonable expectation of privacy in the public space, American University Law Review, 49, 1127,(1999)

¹⁹ Satwik Singh, WB NUJUS, <https://www.lawctopus.com/academike/comparison-critical-analysis-rape-laws-criminal-law-amendment-2013/>

protected defamation of the woman and rights of the woman to live with dignity²⁰. Lastly and very importantly, Sexual Harassment at Workplace (under section 354 of the IPC in addition to the Sexual Harassment at Workplace Act, 2013) was also introduced and an enhanced definition of rape provided for in the amended law.

CRIMINAL LAW AMENDMENT ACT, 2018

Due to various child rape incidents, the demand for making anti-rape laws had been more stringent. The infamous Kathua rape case and the Unnao rape case shook the conscience of the entire nation and the triggered the demand of more amendments and gave birth to The Criminal Law Amendment Act, 2018.

Brief facts of Kathua rape case and Unnao rape case

An 8-year-old girl was raped in Kathua, a district of Jammu and Kashmir. It has been alleged that she was kept in a Shrine for several days and raped continuously and later murdered. The Unnao rape case was another shock to the nation where a teenage girl accused an MLA of raping her in the year 2017. She tried to set herself on fire in front of the MLA's residence in Unnao, northern Uttar Pradesh.²¹

The Criminal Law Amendment Act, 2018

The President had promulgated the Criminal Law Amendment Ordinance on 21 April 2018 because parliament was not in session that time. The Criminal Law (Amendment) Bill was then tabled before the Parliament which replaced the Ordinance. The Bill was passed by the Parliament on 6th August 2018. Then, the President gave assent to the Bill and thus, the Criminal Law (Amendment) Act, 2018 came into force.²²

This followed the Criminal Law (Amendment) Ordinance, 2018 and brought amendments in four major Acts.

- The Indian Penal Code, 1860
- The Code of Criminal Procedure, 1973
- The Protection of Children from Sexual Offences Act, 2012
- The Evidence Act, 1872

²⁰<http://cis-india.org/internet-governance/blog/the-criminal-law-amendment-bill-2013> accessed on 2 August 2014

²¹ Saumya Sinha, October 24, 2018, <https://blog.ipleaders.in/criminal-law-amendment-act-2018/>

²² Ibid.

The Indian Penal Code, 1860

Before the amendment, Section 376 dealt with punishment for the rape of women in two circumstances.

- Section 376(1) dealt with punishment for rape of a woman in all the circumstances except those mentioned in Section 376(2). The punishment in such cases was rigorous imprisonment of a minimum seven years which may be extended to imprisonment for life. The punishment under this section has now been amended.
- Section 376(2) dealt with punishment for the rape of a woman done by police officers, public servants, member of the armed forces, etc. This punishment has not been amended and is a minimum ten years rigorous imprisonment which may be extended to imprisonment for life.

After the amendment, Section 376 deals with three categories of punishment for rape, apart from rape of women by police officers, public servants, member of the armed forces, etc.

- Punishment for the rape of a woman to be a minimum ten years rigorous imprisonment which may extend to imprisonment for life. {Section 376(1)}. Thus, the quantum of punishment has increased from a minimum of seven years to a minimum of ten years.
- Punishment for rape on a woman less than sixteen years of age has been added by the amendment. Punishment in such cases has to be rigorous imprisonment of a minimum twenty years which may extend to life imprisonment. {Section 376 (3)}
- Punishment for rape on a woman less than twelve years of age has also been added by the amendment. The punishment in such cases is defined as a minimum twenty years rigorous imprisonment which may extend to imprisonment for life. The offender in such cases can also be punished with death penalty. {Section 376AB}

Thus, for the first time, death penalty has been introduced for the offence of rape considering the gravity of the offence.

- Moreover, Section 376DA and 376DB have been added by the amendment which deals with punishment for gang rape on a woman less than sixteen years and twelve years respectively. The punishment in such cases has to be invariably imprisonment of life. However, for gang rape on a woman less than twelve years of age death penalty can also be awarded.
- Clause (i) of Section 376(2) has been omitted.

The Code of Criminal Procedure, 1973

There have been simultaneous amendments in the Cr.P.C to meet the ends of justice in such cases of rape.

- If a person is accused of rape on a woman of under sixteen years of age, he shall not be granted anticipatory bail under Section 438 by a High Court or a Court of Session.
- The amendment has provided for speedy trial and investigation.
 - The investigation has to be mandatorily completed within two months.
 - The appeal in rape cases has to be disposed within six months.
- Moreover, the amendment has also made two changes in Section 439 of the Code.
 - A proviso has been inserted which states that the High Court or the Session Court has to give notice to the public prosecutor within 15 days of which it receives the bail application of an accused of raping a girl under 16 years of age.
 - A sub-section has been inserted which makes the presence of informant or a person authorized by him mandatory during the hearing of bail application of the accused in such cases.

The Protection of Children from Sexual Offences Act, 2012

- Section 42 of the Act which deals with alternative punishment has been amended to include Sections 376AB, 376DA, and 376DB.

The Evidence Act, 1872

- Section 53A and Section 146 have been amended to make the provision of the Act to be in consonance with the amendments in other Acts.

CONCLUSION

The situation of India has changed a lot in few last decades due to rampant change in the social structure of the society, even the combination of new generation's thinking which is conflicting with previous generation's traditional thinking has changed the pattern of crimes committed in India. It is need of the hour to change the thinking and mentality of people along with judicial awakening. The responsibility of protecting women should not be confined to the police authorities but it is duty of the general public also. Changes must be made not only in the laws as well as in the mindset of the people so that rape victims would no longer be victimized.²³ After the incident of rapes, laws might have been become stringent although the enforcement of same would be done but still lacks at ground level because number of cases increasing day by day. The Criminal Law (Amendment) Act, 2018 has brought significant changes in the criminal law of India. These amendments have the objective of making anti-rape laws more severe so that the rate of crime would decrease. However, these amendments need to be supplemented with other significant changes in the criminal justice system of India for overall effective results.



²³ JANUARY 18, 2018 <https://legaljugaad.wordpress.com/2018/01/18/rape-laws-in-india-a-critical-analysis/>