

Judicial Activism vis-a-vis Indian Rape Laws

Vardhaman Vinayak Ahiwale

Vice-Principal, K.B. H. Law College, Malegaon, Nashik, Maharashtra (India)

ARTICLE DETAILS

Article History

Published Online: 10 November 2018

Keywords

Judiciary, Judicial Activism, Judgments, Rape Victim, and Rape Accused

Corresponding Author

Email: vardhamanva[at]gmail.com

ABSTRACT

In India, failure to perform constitutional obligations by legislature and executive bodies, has forced the judiciary, to perform more active role, rather than remaining mere onlooker and sticking to traditional work. Therefore, to discharge constitutional obligations, judiciary has exercised and evolved its jurisdiction by courage, creativity with vision, vigilance and practical wisdom and have shown activism in numerous judgments in rape cases. To protect the interest of rape victim judiciary have granted the interim compensations to rape victim, compensation to foreign national rape victim, connected the offence of rape with violation of fundamental rights, mentioned not to question the chastity of rape victim etc. Sometimes, it has issued important guidelines to have legal assistance to rape victim, holding camera trial, to prevent sexual harassment at work place. And also held that, if victim turned hostile still the accused would get punished. Recently, recognized the 'marital rape' indirectly.

On the other hand to protect the interest on innocent rape accused the court have delivered judgments, mentioning that, the testimony of victim cannot be treated as gospel truth, conviction on mere conjuncture or surmise is not acceptable, if intercourse is committed with consent before marriage but failed to keep promise of marriage due to unavoidable circumstances does not amount to rape. In addition to these, court issued the guidelines about under what circumstances the death penalty or life imprisonment can be granted in rape cases. It means that, whenever required the apex court, became extra active and delivered the numerous judgments, not for vain glory but to perform constitutional obligation to protect the interest of victim of rape and innocent rape accused.

The Constitution of India, has created the three important organs namely legislature, executive and judiciary. The legislature makes the law, executive an implement the laws and judiciary interpret the laws, which are the first and foremost functions of these organs. These organs never transgressor into function of each other's in normal time and perform their functions separately. But due to, failure to perform the constitutional obligations by the legislature and executive, specially protecting the fundamental rights of the citizens of India, people are approaching towards the judiciary as a ray of hopes. In such situation, judiciary cannot be a mere spectator and witness such grave injustice caused to innocent people¹.

Therefore, our Indian constitution has assigned very active role to the judiciary, for protecting the rights of the citizens. As a result of this, judiciary has exercised and evolved its jurisdiction with courage, creativity and circumstances and with vision, vigilance and practical wisdom. Judiciary doing all this is not for vain glory but it is in discharge of constitutional obligation through various decisions, which work as a legislations². When we go into details of Indian rape laws, it seems that some vacuum are left by the legislature, which were causing trouble and injustices upon the victim of rape and other issues connected with it. That vacuum should have been removed by the legislature itself, but it failed to do so. Therefore, that job is done by the judiciary, to protect the interest of rape victim and guiltless rape accused.

¹ See generally.

² Dr. J.N. Pandey, "constitutional Law of India" Central Law Agency, Allahabad 52nd Edi (2015) at P.417

In the landmark judgment³ the Supreme Court has clearly mentioned that, the 'rape' is not only the crime against the person, it is a crime against the entire society. It destroys the entire psychology of woman and pushes her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society, which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is therefore the most hatred crime. It is a crime against basic human rights and is also violate, the victims most cherished fundamental rights, mainly right to life and personal liberty enshrined under article 21 of the constitution of India and in its noble preamble⁴. This decision of court, has clearly pointed out the connection of rape and violation of fundamental right, through it activism. In this case the court had awarded the interim compensation to the rape victim.

After *the Nirbhaya's*⁵ gang rape case the drastic amendments⁶ were made in penal laws. The statutory definition given under sections 375 & 376⁷ of Indian Penal Code has covered majority of facets of rape but not the all. Therefore, wherever needed, the court has delivered the numerous judgments, by crossing traditional functioning of it, to

³ *BodhisattwaGautam v. SubhraChakraborty* AIR 1996 SC 922 See also PK Das, "Handbook on Anti-Rape laws in India", LexisNexis, Haryana, Second Edition (2017) at p. 3

⁴ Ibid

⁵ *Mukesh and Another v. State for NCT of Delhi and Other*, Criminal Appeal No. 607,608,609,610 of 2017[arising out of S.L.P. (Criminal)No. 3119-3120 and 5027-502 of 2014

⁶ The Criminal Law (Amendment) Act 2013 (13 of 2013) has been made, to amend the Indian Penal Code, the Code of Criminal Procedure, 1973, the Indian Evidence Act, 1872 and the Protection of Children from Sexual Offences Act, 2012.

⁷ For details See: The Indian Penal Code 1860 Bare Act with Short Comment, Professional Book Publishers, Delhi (2018) at PP 139-146

stop the unjust hardship causing to victim of rape. During mid-nineties in *DhanjayChatterji*⁸ case the Supreme Court has awarded the death penalty in rape and murder of 18 years school going girl, by treating it as a rarest of rare case. Because, it was a cold blooded, preplanned, brutal murder after being committed of rape. Further, court mentioned that, the object of sentencing should be to look that, such crime should have satisfaction that justice has been done⁹. Court also opined that, measure of punishment in such cases should be depend upon the atrocity of the crime, the conduct of the criminal and the defenseless victim¹⁰.

Many a times, as per the requirement of the cases, the apex court had issued the guidelines in several rape cases. In *Delhi Domestic Working Women's Forum*¹¹ case, in which the gang rape was committed by seven army personnel during the travelling in train. Here, the Supreme Court issued the broad guidelines to assist the rape victim. These guidelines deals with the legal representation to rape victim, till the end of case and police are under duty to inform about such assistance by providing list of the advocates willing to act in such rape cases. It has also mentioned that, in all rape trials anonymity of victim must be maintained as far as necessary¹². Further, the court directed to set Criminal Injuries Compensation Board to award the compensation to victims¹³. In another landmark judgment in *Vishakha*¹⁴ case the Supreme Court had issued a guidelines to prevent the sexual harassment of working women at work place. In the present case gang rape was committed by five men of upper caste community, on social worker in Rajasthan in 1992, who was trying to stop child marriage in her village. These landmark guidelines were in force till the Act of 2013¹⁵ enacted by the parliament. Surprisingly, it took almost 21 years to legislature to make legislation on such serious issue of women.

In *Sakshi v. Union of India & Another*¹⁶ the guidelines were issued and had given stress upon, holding camera trial in child sex abuse cases, to enable such victim to be a little comfortable and answer the questions with greater ease and thereby improve the quality of evidence of a prosecutrix. Because there she would not be so hesitant to depose frankly, as she may be in open court under the observation of the public. Court further directed that, as far as possible trial of such cases may be conducted by lady judges, wherever available, so that child statement in such atmosphere would assist the court to discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities. In *State*

of *Maharashtra v. Madhukar N. Mardikar*¹⁷ case the Supreme Court held that, "the unchastity of woman does not make her open to any and every person to violate her, as and when he wishes. She is entitled to protect herself, if someone attempt to have sexual intercourse against her will. Therefore, merely because she is of easy virtue, her evidence cannot be thrown overboard".

In another case¹⁸, the apex court held that, if the rape is committed by the public functionaries on foreign national woman, the compensation can granted for the violation of fundamental right. And there is no doubt that this right is available to all. So the relief can be granted on constitutional provisions as well as Human Rights Jurisprudence, based on the Universal Declaration of Human Rights, 1948, which has international recognition as a 'Moral Code of Conduct'. In *State of Karnataka v. Krishnappa*¹⁹ case held that, sexual violence is an unlawful intrusion of right to privacy and sanctity. It also offends the dignity of victim of rape.

In one case, to strike the balance between the interest of victim of rape and innocent accused, the court delivered the decision and held that, "testimony of victim of rape cannot be presumed to be a gospel truth and observed that false allegations of rape, can cause equal stress, humiliation and damage to the accused as well"²⁰.

Now a days, in number of rape and murder cases, the death penalty were awarded and at the same time, there are cases wherein, the life imprisonments were awarded by the court. Hence, to remove the confusion about, in which cases of rape and murder the death penalty can be awarded and in which such cases the life imprisonment can be awarded, the Supreme Court in its judgment²¹ has given brief grounds which are just like guidelines, while confirming the death penalty or life imprisonment in rape and murder cases.

The grounds for death penalty are i. the cruel, diabolic, brutal, depraved and gruesome nature of the crime ii. The crimes results in public abhorrence, shocks the judicial conscience or the conscience of society or community iii. The reform or rehabilitation of the convict is not likely or that he would be a menace to the society iv. The victim were defenseless v. the crime was either unprovoked or that it was premeditated and also the criminal background of accused²². On the other hand while converting death into life imprisonments the grounds like i. the young age of accused ii. The possibility of reforming and rehabilitating the accused iii. The accused has no prior criminal record iv. The accused was not likely to be menace or threat to the community²³ etc. are given. Afterwards, these grounds have been used in several cases by the court, including *Nirbhaya's*²⁴ rape and murder case.

⁸ *Dhananjay Chatterjee alias Dhana v. State of West Bengal* AIR 1994 SCW 510 ⁹ *See Kamata Tiwari v. State of Madhya Pradesh* AIR 1996 SC 2000., *Mohd. Mannan Abdul Mannan v. State of Bihar* (2011) 5 SCC 317.

⁹ Ibid

¹⁰ Id

¹¹ *Delhi Domestic Working Women's Forum v. Union of India* (1995) 1 SCC 14

¹² *See also* Section 228A of Indian Penal Code 1860

¹³ Ibid

¹⁴ *Vishakha v. State of Rajasthan* AIR 1997 SC 3011

¹⁵ The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, has superseded the *Vishakha* case Guidelines. *See also Apparel Export Promotion Council v. A. K. Chopra* AIR 1999 SC 625

¹⁶ Writ petition (Cri.) 33 of 1997 and judgment deliver on 26 May 2004 *See also The State of Punjab v. Gurmit Singh & Others* 1996 AIR 1393. The *Sakshi* case guidelines are in addition to this *GurmitSingh's* case guideline.

¹⁷ AIR 1996 SC 1393

¹⁸ *Chairman Railway Board v. Chandrima Das* AIR 2000 SC 988. This is the example, wherein the compensation was granted under Public Law for the rape victim.

¹⁹ (2000) 4 SCC 75

²⁰ *Raju . State of Madhya Pradesh* (2008) 15 SCC 133

²¹ *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546

²² Ibid

²³ Ibid

²⁴ Supra at p 1

In *Deepak Gulati v. the State of Haryana*²⁵, wherein the issue before the court was, whether the person who committed a sex with the consent of lady but failed to keep promise of marriage, be held liable for rape? While answering negatively court said that, if due to some unavoidable reason, marriage could not take place though the person intends to marry, than it does not amount to rape. Because, there may be occurrence of some unexpected circumstances, which were beyond his control. Therefore, such cases should be treated differently. The court also made it clear that, if at the initial stage or at the particular stage accused had not intension, to marry with the victim and committed sex with the lady, than in such cases the accused will be punished for rape, as the victim has given consent due to misconception²⁶. But in the present case when the incidence had took place victim was 19 years old and she had idea about the difficulties to marry due to caste issue. Therefore, after taking into account all the fact and circumstances, court has rightly said that, the accused is not guilty of offence of rape.

Recently, in *Independent Thought v. Union of India and Another*²⁷ case the NGO had filed a PIL challenging the constitutional validity of exception second of section 375²⁸ of Indian Penal Code 1860. While delivering the judgment, court criminalized the sexual intercourse with minor wife i.e. whose age lies between fifteen to eighteen years. And mentioned that, this exception second of section 375 of IPC is violative of articles 14, 15 and 21 of Constitution of India. And being a married with such minor girl, cannot validate sexual intercourse. Actually, such exception clause in rape laws was contrary to the purpose of prohibition of Child Marriage Act 2006 and also Protection of Children from Sexual Offences Act (POCSO) 2012. And therefore, the court has struck down the said exception of Section 375 of IPC. Now, it is irrespective whether the girl is married or not, if she is below eighteen years, she will always remain a child and sexual intercourse with such minor girl will now attract a minimum rigorous imprisonment of ten years²⁹. In this case, Supreme Court has partially recognized the marital rape but failed to recognize it fully just like other countries has done it³⁰.

In *Sham Singh v. the State of Haryana*³¹ in which the Supreme Court acquitted the rape accused, who has already served seven years sentence out of ten years on the ground that, conviction merely on conjectures and surmises. Court said that, this can be done to take revenge against the family of the accused because of long standing disputes between

accused and victim families. In another case³² court said that though the Prosecutrix turned hostile, it cannot be the ground to get acquitted the accused of rape. If the seismologist report was an expert opinion under Section 45³³ of the Evidence Act, 1872 and was therefore admissible in evidence without being marked an exhibit formally or having to be proved by oral evidence. And it is sufficient to punish the accused of rape. The court also said that neither the accused nor the victim can be permitted to subvert a criminal trial by stating falsehood and resort to contrivances, so as to make it theatre.

In the concluding remark, it can be said that, whenever required the apex court just did not remaining mere onlooker, sticking with traditional job of interpretation, rather it became extra active and delivered the numerous judgments, to protect the interest of victim of rape and innocent accused of rape. In *Raju*, *Sham Singh*, *Deepak Gulati*, *HemidamGandhvi* etc. cases the court has very rightly protected the interest of innocent accused of rape. On the other hand, in *Sakshi*, *Vishakha*, *Dhanjay Chatterjee*, *Baudisattava Gautam*, *Chandrimadas*, *Shankar khade* etc. cases justice is given to rape victim, through its activism except *Independent Thought* case, wherein court failed to recognize marital rape fully, although it had an opportunity to do so.

References

1. "The Indian Penal Code", Bare Act with Short Comment, Professional Book Publishers, Delhi (2018).
2. P K Das, "Handbook on Anti-Rape Laws in India", Lexis Nexis, Haryana 2nd Edition (2017)
3. Dr. S. R. Mayneni, " Law Relating to Women", Asia Law House, Hyderabad 3rd Edition (Reprint 2015)
4. "The Code of Criminal Procedure 1973" Bare Act with Short Comment, Professional Book Publishers, Delhi (2017).
5. K.D. Gaur's "TheText book on Indian Penal Code", Universal Law Publication, Delhi 5th Edition (2015).
6. BatukLal, "The Law of Evidence", Central Law Agency, Allahabad 19th Edition (Reprint 2013)
7. Dr. J.N. Panday's "The Constitutional Law of India", Central Law Agency, Allahabad 49th Edition (2012).
8. 'The Bluebook, A Uniform System of Citation', By Harvard Law Review, 20th Edition (2015)
9. Oxford English Mini Dictionary, University Press, New Delhi, 7th Edi. (2007)
10. www.prsindia.org
11. https://indiankanoon.org/
12. www.supremecourt.nic.in
13. https://indianexpress.com/

²⁵(2013)7 SCC 675

²⁶ Section 90 of IPC which deals with, consent known to be given under fear or misconception will not be a consent at all.

²⁷ Writ petition (Cri.) No. 382 of 2013 decided in the 2017

²⁸ Which deals with, sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen year of age, is not rape.

²⁹ See also The report of the Committee on Amendments to Criminal Law headed by Justice J.S. Verma specially, paragraphs 72, 73 and 74 of the said Report, in which it has been clearly mentioned to recognize the marital rape in India, which is neglected till date

³⁰ See In R v. R. [1991] 4 All ER 481 the House of Lords held that, the husband can be held criminally liable for marital rape under Sexual Offences (Amendment) Act 1976, if he commit sexual intercourse with his own wife, without her consent. Since the husband wife is regarded as equal partners in marriage. And it is unacceptable that by marriage the wife submits herself irrevocably to sexual intercourse in all circumstances.

³¹ Criminal Appeal No. 544 of 2018, delivered the judgment in the month of August 2018

³² *HemidamNanbhaGandhvi v. State of Gujarat*, Criminal Appeal no. 913/2016 decided in the month of September 2018 See *State vs. Sanjeev Nanda*, 2012 (8) SCC 450

³³ For details see BatukLal, " The Law of Evidence", Central Law Agency, Allahabad 10th Edition (2010) at PP. 296-297