



Conviction Of Sexual Offenders In India: Need To Address The Gaps

Dr. Harleen Kaur, Assistant Professor, Campus Law Centre, Faculty of Law, University of Delhi, India. Email: harleenkauradv@gmail.com

Abstract : The psychological change in the mindset of the society with respect to victims of sexual offences indeed has led to increase in number of reporting of First Information Reports (FIR) .However, unfortunately despite of the significant shifts in the substantial as well as procedural laws related to sexual offences over the years it is witnessed that there is still huge gap between the procedure prescribed under law and the actions undertaken in practice. The conviction rate of such offences is very low. Therefore, this article tries to identify all the lacunas right from filing of FIR till the pronouncement of the judgment by the court and provides for various suggestions to ensure that no preparators of such offences go unpunished

Key words: Victims, Sexual Offences, Lacunas, Investigation, Conviction

I. INTRODUCTION

In recent years the crimes rate of sexual offences against women are increasing rapidly. These crimes take place in every society and often causes severe and irreparable damage to the mental and physical health of the victims. It entirely disturbs the psychological and social well-being of the victims because of stigmatization in the society/community and the degradation of status in the families and neighborhood. These victims are often treated as rotten human being by the society although they are not at fault. Instead of being treated with humanity they are left over which entirely crush their will power to recover from the trauma. The justice delivery system also in such cases fails to deal effectively as it should.

While the conviction rate for all crimes against women stands at a measly 19% across India (compared with an average conviction rate of 47% for all crimes), again, there are wide differences across different states. Northeastern states, quite notably, have relatively high conviction rates ranging from 25% to 70% (with the exception of Assam). On the other hand, states like West Bengal, Gujarat, and Karnataka have rates of less than 5%. Data on conviction rates for rapes as well follow the same trend, with an all India rate of about 25% in 2016(NCRB,2016).

Though after the 16th December Nirbhaya Gang Rape Incident in Delhi in 2012 and in the wake of series of child rape in 2018 various amendments have been made to the Indian Penal code (IPC), 1860 and to the procedure to be followed during the investigation and trial of such sexual offences under the Code of Criminal Procedure(Cr Pc),1973. However, despite of such procedural amendments, the Criminal justice system has failed to convict sizeable amount of accused. Right from filing of FIR to judgement pronounced by the court, there is huge gap between the procedure prescribed under law and the actions undertaken in practice. According to NCRB, 98 percent of the rapes in the country are committed by someone known to the victim. A measly 10 percent of the rapes are reported and out of which, 25.5 percent of the felons are convicted. Since 2014, crimes against women are on an upward trend. From 38,385 cases in 2014 and 41,001 in 2015, the number of cases of crimes against women has risen to 41,761 in 2016. In 2016, 3,22,949 cases were registered for crime against women in India. The number of cases registered in 2016

involving assault on women (Sec 354 of IPC) was 39,543; sexual harassment (Sec 354A of IPC) was 27,344; Assault or Use of Criminal Force to Women With Intent to Disrobe (Sec 354B of IPC) was 9,737; Voyeurism (Sec 354C of IPC) was 932; Stalking (Sec 354D of IPC) was 7,190 and Insult to modesty of women (Sec 509 of IPC) was 7,305(NCRB,2016).

II. FACTORS RESPONSIBLE FOR LESSER CONVICTION OF THE SEXUAL OFFENDERS

Some of the factors that are responsible for lesser conviction of the accused persons in such offences and which needs to be addressed are seen as under:

A. Inadequate Gender Representation in the Police Force

As per proviso of Section 154 of the CrPC, amended by Criminal Amendment Act, 2013, it is mandatory that the statement of Victims of offences under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code shall be recorded, by a woman police officer or any woman officer. But according to survey conducted by Human Rights Watch, the said amended rule is not being practiced. The reason behind non-compliance is the lack of woman in the Police Force in India (HRW,2017). Despite several advisories issued by the Ministry of Home Affairs, There are only 7.28% women in the Police Force(Economic Times,2018& CHRI,2018).A skewed police force with adequate gender representation is a major practical barrier in effective implementation of legislation intended for the protection of women.

B. Lack of Sensitization on the part the Victim about the Purpose of the Medical Examination and the Precautions to be Observed until it is Complete

Section 164(A) Cr PC explains the legal requirements for medical examination of a victim of rape. One of the main elements of this is that the consent of the victim is mandatory and should be part of the report. Only with the consent of the victim (and in the case of a minor by the parent or guardian) may the examination be conducted by any registered medical practitioner. It also mandates that a medical examination must be carried out within 24 hours of the police receiving information, thus recognizing this as a medicolegal emergency and putting a timeframe for the investigating officer. Section 357C of Cr PC states that all hospital whether private or public shall conduct medical examination free of cost immediately without any delay.

Also, in the case of State of Karnataka v Manjanna(2000), the Supreme Court directed that the medical examination of a survivor / victim of sexual violence should be done immediately and no hospital/doctor should delay examination for want of police requisition. Since the purpose of the examination under the amended law is to provide first aid to the victim, psychological counseling to cope with trauma associated with the assault, in addition to, documenting bodily injuries and condition for evidentiary purposes. Like all medical procedures, this examination can only be conducted with the express consent of the patient, more so, since it involves invasive procedures. Procedurally, the Investigating Officer takes the complainant for her medical examination immediately after the registration of FIR, within 24 hours; in some cases, however, the medical examination might precede the FIR. It is important that the examination is conducted at the earliest after the crime, so that the significant evidence (such as semen, scratches, hair etc) from the body of the complainant is not lost. While it is desirable that the complainant does not

bathe, clean, change her clothes, urinate or defecate until after the examination is complete, this is not always the case as the trauma of the assault and the stigma of disclosure silences women until such time they find the courage and support to complain. In such cases, evidence may be lost, which is not damaging to the case, so long as the medical report states the delay, and records the intervening activities which explain the loss of evidence. The protocol remains, that whenever rape is reported, the medical examination must follow at the earliest. Therefore under such scenario it becomes imperative to inform the victims about the purpose of the medical examination, or about the precautions that must be observed until it is complete, such an information would not only ensure the “informed consent” on the part of the complainant to the medical examination but would also help her to know the value of the medical report as evidence, the precautions necessary for preserving evidence, and to alert the doctor to marks or injuries on her body that might otherwise be overlooked. In *Dilip vs. State of Madhya Pradesh*(2013) the Hon’ble Supreme Court ruled that the State should issue guidelines for examination of cases of sexual violence including guidelines for medical examination, which should include physical and psychological treatment. It also emphasized the need for preparing the examination report without delay

C. Dearth of Forensic Labs

One of the causes behind the significant delay in releasing forensic science laboratory (FSL) Reports is the dearth of Forensic Labs. Also, it is usually seen that hospitals seize clothes of the victim and send them for forensic examination, regardless of its relevance. The shortage of well-equipped, hi-tech laboratories and inadequate staff strength have resulted in 12,072 DNA samples from as many sexual assault cases piling up in three of the six central forensic science laboratories (CFSLs) across India till December 2017, where they await examination, according to Directorate of Forensic Science Services (DFSS) data(Hindustan Times,2018).

D. Delay in Trial due to Repeated Adjournments

Delays in the trial add to the mental anguish of not only the prosecutrix and her family, but also the accused. Longer proceedings leave prosecutrices in a state of uncertainty, and they are more susceptible to pressures from the accused to drop the proceedings. The proviso to Section 309 of CrPC states that the inquiry or trial an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code (45 of 1860) should be completed within two months. In practice, average time period taken to record just the deposition of the prosecutrix is 37 weeks ie, 8.5 months (Partners for Law in Development, 2015). However, the 2 months period to complete trial as stipulated by law is not only unrealistic on account of the different stages involved in trial and the interaction with different institutions, but also threatens the fair trial rights of the accused. A practice that Presiding Officers can adopt to overcome this, is to conclude the deposition of the prosecutrix at the beginning of the trial, by conducting it on a day-to-day basis. It is also necessary to exercise greater vigilance in granting adjournments, by the refusing adjournments and the imposition of costs.

E. Slow ‘Fast-Track Courts’ & High Pendency of Appeals

Every conviction related sentence passed by the trial court is generally appealable to the High Court. Section 374, Cr.P.C which governs the provision of appeals in case of convictions didn’t lay down any specific provisions for disposing of the appeals. Need for streamlining appeals in a time bound process with regard to rape cases has always been

demanded by the legal experts and Law Commission (Law Commission of India,2000). Despite the establishment of Fast Track Courts (FTCs) for trying crime against women (esp. offences like rape) there is a huge gap in the cherished objective of FTCs and actual ground realities. The NCRB report of 2016, indicates a high pendency percentage of 87.7% in rape cases, with national conviction rate at modest 25.5%. In 2016 there were 1,52,165 cases for trial, out of which 1,18,537 are cases in which trial is still pending from the previous year and 33,628 new cases were sent for trial in 2016(NCRB,2016). The rising number of vacancies in judiciary, inadequate budgetary allocation for infrastructure development, and unrealistic disposal targets for judicial officers, have raised grave questions on judicial capacity to ensure fair and speedy justice in India.

F. Absence of Effective Psychological Counseling to the Complainant

Recognizing the impact of rape on the psychological and emotional state of the complainant, the Mo HFW Guidelines prescribe that the medical examination must also include psychological counseling to help her cope with in the aftermath of the assault, including in relation to the social and cultural notions of stigma and shame, within her family or community. However, there is no information about the approaches and content of such counseling under the existing laws.

G. Non-Routing of Cross Examination questions through the Presiding Officer

The defence questions are inevitably hostile, often sexually explicit, intended to insinuate lack of resistance to imply consent. This practice continues. To counter this, one of the guidelines as laid down in the case of Sakshi v. Union of India (2004) requires questions in the cross examination to be routed to the prosecutrix through the Presiding Officer, to prevent harassment and intimidation by the defence Counsel. This is not an established practice. The practice seems to be followed only when the cross examination gets unacceptably offensive, after the distress of the prosecutrix becomes apparent. Mandatorily routing cross examination questions through the Presiding Officer would go a long way in minimizing the stress and harassment faced by the prosecutrix during the trial.

H. Injuries on Body

Injury on the body of the person of the victim is not a sine qua non to prove a charge of rape. Absence of injury having regard to overwhelming ocular evidence cannot, thus, be the sole criteria for coming to a conclusion that no such offence had taken place as held in the case of Dastagir Sab and Ors. vs. State of Karnataka (2004). The Ministry of Health and Family Welfare Guidelines also stipulate that if there are any injuries on the body of the survivor, these must be noted. This enables the judge to ascertain the severity of violence and the extent of force involved in the incident. Injuries are entirely unrelated to the question of consent, since the Supreme Court recognizes that mere submission, and the absence of resistance, cannot be equated to consent to sexual intercourse. If someone does not resist sexual violence, that alone cannot be construed as offering consent to the sexual act. This clearly indicates that presence of resistance injuries is not required to prove a case of sexual violence (Narayana reddy, J. 2017). The World Health Organization world report on violence and health also states that injuries are present only in 33% cases of sexual violence. The absence of injuries could either be due to the victim being unconscious because of having been drugged or intoxicated. The absence of injuries could also be because the survivor/victim was overpowered or silenced with threat or harm to her or her family. Injuries may also not be present because the accused used a lubricant (Krug EG

et al., eds.,2002). This understanding is now incorporated into the definition of consent in Explanation 2 to S.376, IPC by the 2013 Amendment.

Therefore, while noting the presence of injuries contributes to evidence in court, making an express noting of the absence of injuries is irrelevant to the trial, and can serve to prejudice the trial.

I. Re-victimization of Rape Victims

The experience of rape may be one of great trauma for them, which is relieved in court while recounting the incident. Defence Counsel insist on scrutinizing the minutiae of the incident repeatedly to embarrass the witness, twist their meanings and create inconsistencies. Since there is normally great stigma and embarrassment also attached with any discussion on sex and sexual violence, deposing about rape in front of a large public in court might not elicit a frank deposition from the witness.

In *State of Punjab v. Gurmit Singh* (1996), the Supreme Court acknowledged that trial processes often 're-victimize' rape victims. Therefore, observing that the crime of rape not only causes physical harm to the victim but also violates the privacy and personal integrity of the woman along with causing her massive psychological damage, the Apex court suggested the victims of rape be treated with utmost sensitivity during the trial and also urged them to believe the testimony of the prosecutrix and not look for minor contradictions in it which aren't of fatal nature especially if rest of the testimony is otherwise reliable. Further, referring to the amendment brought about by Section 327 of the CrPC by the 1983 Amendment Act which mandated the inquiry and trial of rape under Sections 376-A, 376-B, 376-C, 376-D of the IPC to be held in camera and lamenting the fact that the lower courts were not adhering to the law, it opined that the language of the provision is shall and not may making it mandatory for the courts to follow the procedure. Thus, it held that it is mandatory for the courts to hold in camera trials and the courts are obliged to act accordingly.

Accordingly, the Supreme Court directed as follows:

1. Trial courts must follow the mandate of sec 327(2) of Cr PC, and conduct rape trials in camera as a rule, and a public trial only as an exception.
2. Presiding Officers must be more actively engaged in taking the evidence of the prosecutrix, and not give Defence Counsel unrestrained liberty to intimidate and humiliate her, while ensuring that the fair trial rights of the accused are also protected.
3. As far as possible, ensure that rape trials are presided over by women judges.

J. Lack of Effective Protection of the Victims/Witness of Sexual Offences

Victims are known and accessible to pressure and intimidation from the side of the accused, compelling them to abandon or compromise the case. Despite provisions to shield the victim from the accused in court, easy access outside the court premises elucidates the need for efficient victim witness protection regimes. This is not just a need of the victim or her family, but fundamental to enabling the witnesses to participate in the legal process, and for justice delivery system to function to respond to crimes. Therefore, this calls for effective and broader victim/witness protection Programme in turn.

Though in the case of the *Neelam Katara vs. Union of India and Ors*(2003), the division bench of Hon'ble High Court of Delhi directed operation of Witness Protection Guideline till the time it is replaced by suitable legislation. It stated that while recording statement of the

2210 | Dr. Harleen Kaur Conviction Of Sexual Offenders In India: Need To Address The Gaps

witness under Section 161 Cr. P.C., it will be the obligation or duty of the Investigating Officer to make the witness aware of the Witness Protection Guidelines and also the fact that in case of any threat he can approach the Competent Authority.

Recently in the case of Mahender Chawla & Ors V. Union of India & Ors (2018), the Hon'ble supreme court in exercise of Powers under Article 141 and 142 of the Constitution of India approved the witness protection Scheme 2018 prepared by the Central govt in consultation with NALSA for the protection of witnesses till the time suitable legislation is made in this regard. Though the extant scheme provides wide range of measures ranging from regular patrolling, installation of security devices such as CCTV, fencing, security doors; Suppressing the identity of the witness or changing of their identity; changing their residence; holding of trial in Camera;; recording of the statements in the presence of the additional persons; providing a conveyance in a Govt vehicle to and from the Court on the date of hearing; providing of financial aids from the witness protection Fund for the subsistence of the witnesses etc. Nevertheless it suffers from certain drawbacks such as lack of any provision for witness anonymity protection and provides only for temporary protection of three months to the witness.

K. Lack of Specialized Agency to Provide Support and Guidance to the Victim Before, During and After Trial

The most pressing lacuna in the administration of justice System is the absence of holistic support services for victims of rape, which would enable them to navigate and participate in the justice system with full information, orientation and with access to rights, and also to address the impact of the incident in their personal lives. Therefore, it is important to establish specialized agencies which provide comprehensive support services to victims under one roof, to cut down on the number of different institutions the victim must visit in the aftermath of the incident to receive basic support. Such specialized agencies should be staffed by personnel who are sensitive to the needs and conditions of women victims of violence, and provide the following services:

- a) Assistance in registering the FIR and procuring a copy of the FIR;
 - b) Assistance through the medical examination, in obtaining information on the processes and their relevance, accessing free medical treatment and counseling;
 - c) Applying for and availing compensation under the state victim compensation scheme;
 - d) Liaising with the Investigating Officer to track the status of investigation, and status of bail of the accused;
 - e) Legal advice and support, information on her rights, and orientation on the trial processes;
 - f) Liaising with the prosecuting agency to arrange meetings with the victim, to present her account of the incident, orient her to the deposition processes, and also inform of pressures from the accused and his companions, or her own family, to compromise;
 - g) Monitoring the progress of the trial and update the victim on each stage;
 - h) Providing counseling to the victim and also her family in the aftermath of the incident to mitigate impact of the assault, and respond to any specific need on a case to case basis.;
 - i) Providing access to shelter/alternative accommodation etc.
- L. Conduct of Two-Finger Test

Despite the judgement of the Supreme Court of India in *Lillu v. State of Haryana*¹, that the practice of conducting the 2-finger test during the medical examination of a rape victim is unconstitutional and violative of her privacy and dignity. The test, despite its unscientific nature, has always been used to test the elasticity of a woman's vagina and the presence/absence of tears in the hymen to determine whether she is habituated to intercourse or not and the same is used by the Defence Counsel to cast aspersions on the character of the witness, and by labeling her as a 'loose woman', discredit her testimony. The practice continued for a long time, despite a catena of judgments and an amendment to the Indian Evidence Act holding the character of the victim irrelevant in rape cases. Despite the ban, the two-finger test is being practiced in various parts of the country (Roli Srivastava, 2018).

III. CONCLUSION AND SUGGESTIONS

As can be witnessed from the discussion made above, lack of education and awareness on the nuances of sexual violence among upholders of the law, ie doctors and Police officers often hinder the survivor's path to justice, leaving the victim traumatized and disempowered. Therefore, in order to reduce the lacunas in the investigation and trial of sexual offences and in order to ensure timely and adequate justice to the victims of sexual offences, there is a need to combat the deep-root causes as discussed in the article thereby raising the standards of investigation. Further Judiciary also has to play an important role to ensure that no preparators of such offences go unpunished in addition to effective implementation of victim friendly laws and mechanisms to aid the victim in reducing the trauma undergone which in turn would go long way in strengthening the mechanisms to secure the conviction of the preparator of such crime since it is not the severity but the certainty of the punishment that deters people from committing crimes. Also there is a need to organize legal awareness programs and Sex Education programs in urban and rural areas with a view to sensitize children, women about such offences this would not only instil necessary confidence required for reporting of such offences but would also make them understand the gravity of the offence and consequently would result in preventing the cases of sexual abuse.

REFERENCES

1. National Crime Records Bureau (NCRB) (2016), "Crimes in India 2016", Available at : <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/Crime%20Statistics%20-%202016.pdf>, Accessed on 10 February 2019.
2. Human right Watch (HRW, 2017) Available at: <https://www.hrw.org/news/2017/11/08/india-rape-victims-face-barriers-justice>
3. Economic times, 2018. Just 7.28 per cent women in police forces: Government data.
4. Available at: <https://economictimes.indiatimes.com/news/politics-and-nation/just-7-28-per-cent-women-in-police-forces-government-data/articleshow/63068249.cms>, Accessed on 18 February 2019.
5. Commonwealth Human Rights Initiative (CHRI, 2018). Available at : <http://www.humanrightsinitiative.org/download/Fact%20sheet%20-%20women%20police.pdf>, Accessed on 15 February 2019.
6. *State of Karnataka v Manjanna* AIR 2000 SC 2231
7. *In Dilip vs. State of Madhya Pradesh* (2013) 14 SCC 331

¹ AIR 2013 SC 1784

8. Hindustan Times (2018). Over 12,000 sexual assault cases pending due to backlog at forensic labs. Available at: <https://www.hindustantimes.com/india-news/over-12-000-dna-samples-from-sexual-assault-cases-pending-examination-at-forensic-labs/story-AzD26fBHTEibaUu7OKinoN.html>, Accessed on 20 February 2019.
9. Partners for Law in Development (2015). Towards Victim Friendly Responses and Procedures for Prosecuting Rape. Towards Victim Friendly Responses and Procedures for Prosecuting Rape. Partners for Law in Development. Available at : <https://pldindia.org/wp-content/uploads/2017/08/handout-2-1.pdf>
10. Law Commission of India(2000). 172nd Report on Review of Rape Laws. Available at https://lawcommissionofindia.nic.in/old_reports/rpt172.pdf
11. Sakshi v. Union of India (2004) 5SCC518
12. Dastagir Sab and Ors. vs. State of Karnataka (2004) 3 SCC 106
13. Narayanareddy, J. (2017). Medical Examination of Survivors / Victims of Sexual Violence: A Handbook for Medical Officers
14. Krug EG et al., eds. World report on violence and health. Geneva, World Health Organization, 2002
15. State of Punjab v. Gurmit Singh(1996) 2 SCC 384
16. Neelam Katara vs. Union of India and Ors(2003)ILR 2Delhi377
17. Mahender Chawla v. Union of India (2018) SCC Online SC 1778.
18. Roli Srivastava[2018].Indian rape survivors still subjected to intrusive, illegal tests. Available at <https://www.reuters.com/article/us-india-sexcrimes-justice/indian-rape-survivors-still-subjected-to-intrusive-illegal-tests-idUSKBN1EZ0PX>.Accessed on 18 February 2019