

## **JUDICIAL CONTRIBUTION & PUNISHMENTS IN RAPE CASES: SPECIAL REFERENCE TO INDIA**

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### **Abstract**

In India, 41% population were below 18 years in 2001. Recently National Crime Record Bureau of India has reported that 445 million persons are below 18 years constituting nearly 31.8% of the total populace of India. Statistics on CSA are varied since reporting is not very encouraging because of various compelling factors. It is reported that one in 9 girls and one in 53 boys under the age of 18 years experienced sexual abuse by an adult. In this section of the thesis, legal regimes and policies on child sexual exploitation have been discussed to understand the best practices prevailing in various jurisdictions relevant for Indian scenario. The preventive and curative strategies are key considerations in formulating legal policies to protect children against sexual exploitation. Various legal issues related to child sexual abuse (CSA) in various jurisdictions in India have been discussed.

**Keywords:** *Judiciary, Rape, Women etc.*

### **1. INTRODUCTION**

The Indian Penal Code, under section 90 deals with consent known to be given under fear or misconception. This provision of the penal code does not define 'consent' but describes what not consent is. For sexual conduct and the rape jurisprudence, "Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, expresses willingness to participate in the specific sexual act provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity". "Consent for section 375 IPC, requires voluntary participation not only after the exercise of intelligence based on knowledge of the significance and moral quality of act after fully exercised the choice between resistance and assent" hold the apex court of India.

The Supreme Court of India in *Anurag Soni v. the State of Chhattisgarh* has dealt with involuntary consent for 'false promise to marry' amounting to the misconception of facts under section 90 of the penal code. In *Deepak Gulati v. State of Haryana*, the court held that "Consent may be expressed or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, in a balance, the good and evil on each side." Section 114-A of the Indian Evidence Act prescribes

the presumption that in a prosecution of rape under section 376 of the penal code, where sexual intercourse is proved and the question is whether it was without the consent of the woman and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. In India, the age of consent for sex under the ambit of section 375 of the penal code, has been enhanced on several occasions as tabulated below in Table 1.

Post *Nirbhaya* Rape case, the Justice Verma Committee has recommended to reduce the age of consent from 18 to 16. Justice Dharmesh Sharma of Delhi District Court rejected the plea of the Delhi Commission for Women and Delhi Police for prosecuting an adolescent accused under the POCSO Act having consensual sex with a minor. The court observed, "I am afraid that if the interpretation is allowed, it would mean that the human body of every individual under 18 year is the property of the state and no individual below 18 years can be allowed to have pleasures associated with one's body".

**Table 1**

**The progressive changes in age of consent brought under the Indian penal laws**

Year	Age of consent u/s 375 of IPC (5 <sup>th</sup> clause) [in years]	Age of consent u/s 375 IPC (the Exception) [in years]	Minimum age of marriage under the Child Marriage Restraint Act, 1929. [in years]
Indian Penal Code, 1860	10	10	-
Amendment Act, 1891 (Act 10 of 1891)	12	12	-
Amendment Act, 1925	14	13	-
Amendment Act, 1929 (after enacting the Child Marriage Restraint Act 1929)	14	13	14
Amendment Act, 1940 (amendment of IPC and Child Marriage Act)	16	15	15
Amendment Act, 1978	16	15	18

The apex court of India in *Independent Thought v. Union of India* held that sexual intercourse with a female of age below 18 years irrespective of her marital status amount to rape. The court observed that the exceptional provision of Section 375 of the penal code grants impunity to husband breaching fundamental *jus cogens* norms necessary for due diligence standard of the human rights. The court held that the Exception 2 of section 375 is arbitrary,

capricious and violates articles 14, 5 and 21 of the Indian constitution and inconsistency with the provisions of the POCSO Act, 2012. The Court read down the Exception 2 of Section 375 IPC: "Sexual intercourse or sexual acts by a man with his wife, the wife not being 18 years, is not rape". However, the literature review suggests that the interpretation of this provision of law by the apex court in this judgment is yet to be implemented.

In an alleged rape of a Fulbright Scholar of the USA by famous Indian cine director, the Delhi High Court observed that despite the unwillingness of a woman her partner can assume consent if her resistance is evidently feeble. The Court held that "In an act of passion, actuated by libido, there could be myriad circumstances which can surround consent and it may not necessarily always mean yes in case of yes or no in case of no. Everyone is aware that individuals vary in relation to exposing their feelings. But what has to be understood is that the basis of any sexual relationship is equality and consent." Indeed, the court accepted the defense argument on the strength of Justice Bland opinion, that a 'no' on the part of woman, may mean a 'yes' if it is a feeble no. Sarijita Jana has suggested that Affirmative Model of consent must be adopted from an objective point of view to emphasize that the victim's consent to sex is specific and particular rather than being assumed on a wholesale basis. Jana suggested that the provisions of absolute affirmative consent need to be introduced for the rape jurisprudence in India, to enforce "full and meaningful effect to women's right to control their bodies". The Supreme Court of Canada postulated a decisive touchstone for sexual consent holding that "only a yes means yes" and explicitly negated the concept of 'implied consent' in sex. Consent is an affirmative decision to engage in a sexual liaison, both participants must be equally and concurrently be receptive during an entire sexual encounter.

There are several issues pertaining to consent for sexual activity. It is normally understood that once a female gives 'sexual willingness', 'it is forever'. Does stereotype 'Once willing - willing forever' has legal sanctity? Can a woman pull back her consent during a sexual activity during the act or even after penetration for various reasons like her partner started to exert excessive force and violence beyond her tolerance? These are grey areas which have no answer in the existing legal lexicon or available academic inputs. The literature survey suggested that the concept of consent is still blurred in Executive (for investigation) as well as Judiciary (for adjudication) parlance and needs academic deliberations.

## **2. PUNISHMENT POLICY IN INDIA**

Punishment policy is a necessity to bring uniformity, consistency and certainty in awarding penalty. During this research, a trend is observed that before the POCSO Act into existence, in most of the child sexual abuse cases, the death sentence was approved by the apex court. However, in the POCSO cases, the death penalty has invariably been commuted to life imprisonment or lesser punishment. Timely execution of death penalty is yet another issue,

and the *Nirbhaya* case has been a glaring example where convicts' advocates used every delaying tactics even beyond available in the books to avoid execution of death penalty, and execution was kept languishing for many years. Thus, punishment policy continued to be a burning issue in the Indian legal system. Regarding punishment policy in India, Justice Krishna Iyer eloquently observed, "It is unfortunate that there are no penological guidelines in the statute for preferring the lesser sentence, it being left to ad-hoc forensic impressionism to decide for life or death".

The judicial decision making is a complex phenomenon, fittingly observed by Benjamin N. Cardozo, "The great tides and currents which engulf the rest of men do not turn aside in their course, and pass judges by" (Cardozo, 1976). How judges think, they judge (Capurso, 1999). Justice Douglas of the US designated the doctrine of collective conscience as a euphemism. He observed, "... judges are as human as anyone and as likely as others to see the world through their own eyes and find the collective conscience, remarkably similar to their own." "Judges are the keepers of the law and the keepers of boundaries cannot also be among outriders", said Lord Devlin (Devlin). The assessment of the severity of crime and quantum of punishment depends upon the judge's perception, sometimes diagonally opposite despite similar circumstances of the incidents.

The Apex Court of India has culled out certain parameters to designate a case under 'the rarest of rare' (RoR) doctrine emphasizing mainly on the aggravating and mitigating circumstances to award death sentence where offences are committed in enormously brutal, diabolic, grotesque, revolting and dastardly manner, arousing strong and extreme indignation of the community. The doctrine of 'collective conscience of the society' remained the focal point in the jurisprudence of the death penalty, as depicted in the *Machhi Singh* case where 17 murders were committed by 12 accused. The apex court sentenced Machhi Singh, Jagir Singh and Kashmir Singh to death after observing:

Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty...

The Indian Supreme Court said, "It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial." Neither the judges are prepared to evaluate the will of the masses. The doctrine of collective conscience may led judiciary to get affected by external factors especially like media

spectacle, public demonstrations etc. and even the Law Commission of India also considered the doctrine as 'amorphous'. The apex court further observed that "The constitutional role of the judiciary also mandates taking a perspective on individual rights at a higher pedestal than majoritarian aspirations."

In *Bachan Singh v. State of Punjab* the apex court further elaborated the conditions for imposing death sentence: "(i)

The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability; (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime';

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstance of the crime and provided, and only provided, the option to impose a sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances; (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

On death penalty for the stepfather accused of killing after the rape, his 7 years old, the Supreme Court of India observed that "The manner in which the deceased was raped may be brutal but it could have been a momentary lapse on the part of Appellant, seeing a lonely girl at a secluded place. He had no pre-meditation for the commission of the offence. The offence may look a heinous, but under no circumstances, it can be said to be a rarest of rare case". In 1994, the apex court has differently viewed that "The court must not only keep in view the rights of the criminal but also the right of the victim of crime and society at large while considering the imposition of appropriate punishment." In this case, a minor female was raped in her home by Dhananjay, a 39 years guard of the apartment where the deceased was living. He was the first person judicially executed in India in the 21<sup>st</sup> century and hanged in Alipore Central jail on 14<sup>th</sup> August, 2004.

Evident arbitrariness in awarding punishment, especially the death penalty, maybe demonstrated by a case from Uttar Pradesh, where Harbans Singh, Jeeta Singh and Kashmira Singh were awarded death penalty by the trial court, and the Reference was approved by the High Court for the murder of a family of four. All three convicts on death row separately appealed before the apex court. Jeeta Singh filed an appeal but it was dismissed by the Supreme Court on April 15, 1976, and he was hanged on October 6, 1981. In Kashmira Singh's appeal, a bench of Justice P.N. Bhagwat and Justice Fazal Ali, on April 10, 1977,

commuted death penalty into life imprisonment. Justice Sarkaria and Shinghal dismissed the appeal of Harbansh Singh on October 16, 1978. His review petition was also dismissed on May 9, 1980 by Justice Sarkaria and AP Sen, a bench of the apex court. The President of India too dismissed his petition for commutation of sentence in August 1981. However, the apex court stayed the execution of hanging. At this stage, the apex court shockingly realized inadvertent gross injustice committed to three convicts, equal parties to the crime and equally guilty. On the travesty of justice, PN Bhagwati observed, "This is a classical case which illustrates the judicial vagaries in the imposition of the death penalty and demonstrate vividly, in all its cruel and stark reality, how the infliction of death penalty is influenced by the composition of bench". He further poignantly observed, "The question may be asked by the accused: Am I to live or die depending upon the way in which the benches are constituted from time to time? Is that not clearly violative of the fundamental guarantees enshrined under Articles 14 and 21?".

Italian Jurist Cesare Beccaria eloquently questioned the death penalty by observing, "It is not absurd that the law, which detect and punish homicide, should, in order to prevent murder, publicly commit murder themselves" He further said, "For punishment to be just it must have only that degree of intensity to suffice to deter men from crime".(Beccaria, 1764). In case the punishment for the offence already committed was the same as the punishment for murder, the perpetrator, said Lord Thomas Babington Macaulay, would have no restraining motive. "The courts must not only keep in view the right of the criminals but also the rights of the victims of a crime and society at large while considering the imposition of appropriate punishment" observed the Supreme Court of India.<sup>153</sup>The Law Commission of India has recommended that "The death penalty be abolished for all crimes other than terrorism related offences and waging war."

The National Law University, Delhi has conducted a detailed empirical survey of 385 prisoners under the death row and published the Death Penalty India Report (DPIR) in 2016. Maximum death convicts were from Uttar Pradesh (79) followed by Bihar (53) and Karnataka (45). 213 persons (62 from Uttar Pradesh) were convicted for murder simpliciter followed by 84 (15 from Maharashtra) for sexual offences, and 31 (12 from Karnataka) for terror. This study also emphasized for the need of comprehensive punishment policy for India.

### **3. JUDICIAL CONTRIBUTION IN LAW MAKING: LANDMARK JUDGMENTS ON RAPE**

Indian judiciary has contributed immensely in developing rape jurisprudence. On the future perspective of a rape survivor, the apex court, in a case of 9 year old victim, observed that "... having lost her virginity still remained unmarried ... and that her future chances for getting married and settling down in a respectable family are completely marred." In *State of*

*Maharashtra v. Madhukar Narayan Mardikar* the Supreme Court of India held that “Even a woman of easy virtue is entitled to privacy and no one can evade her privacy as and when he likes. She is entitled to protect her person if there is an attempt to violate her person against her wish. She is equally entitled to the protection of law. Therefore, merely because she is of easy virtue, her evidence cannot be thrown overboard.” In a rape case where victim was mentally challenged and got impregnated, Justice Arijit Pasayat aptly observed that “While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female” Justice Krishna Iyer on rape said, “When a woman is ravished, what is inflicted is not mere physical injury but the deep sense of some deathless shame. A rape! A rape! Yes, you have ravished justice; Forced her to do your pleasure. ... Judicial response to Human Rights cannot be blunted by legal bigotry.” The apex court has issued detailed guidelines related to assistance for victim of rape in *Delhi Domestic Working Women's Forum v. Union of India*. Although there are zillions of relevant pronouncements of the Indian Courts on sexual offences, however, few judgments of the Indian apex court, on sexual exploitation having significant bearing for strengthening child rights and related legal policies, have been briefly discussed below:

### 3.1 Mathura Rape Case<sup>1</sup>

A 14 years orphan *adivasi* girl was raped on March 26, 1972 by two constables Ganpat and Tukaram in Desai Ganj police station of Bombay. Her parents died in her early age and she was living in stark poverty with her brother, who was a labourer. It was established during trial that on the direction of the police, the Prosecutrix came to the police station at about 9 PM with her family members for inquiry of a complaint made by her brother Gama alleging that the prosecutrix was kidnapped by the neighbours. Late in the night about 10.30 PM, the family members were sent outside the police station and girl was asked to stay back. Ganpat took her to the backside of the police station and raped despite her protest and stiff resistance. Tukaram fondled her, but could not penetrate her because he was too drunk. The crime report was lodged after public outcry, medical examination conducted after 20 hours delay of incident revealed no injury or semen stains on her person, but semen stains were found on her clothes, and hymen was reported old ruptured. Investigation concluded, and both accused were charge-sheeted.

In June 1974, the district court acquitted both the accused policemen, tagging the victim survivor a “shocking liar” whose testimony was “riddled with falsehood and improbabilities”. Based on state appeal, on October 12, 1976, Nagpur Bench of the Bombay high court reversed the trial court order and awarded five years sentence to Ganpat for rape; and Tukaram got one year for the “assault or criminal assault to a woman with intent to outrage

<sup>1</sup> Rafiq v. State of Uttar Pradesh (1980) 4 SCC 262 paras 7 & 8 : 1980 SCC (Cri) 947 : 1981 AIR 559 : 1981 SCR (1) 402

her modesty". The apex court under appellate jurisdiction, on September 15, 1978 acquitted both the accused despite holding the commission of sexual act by the constables. The apex court viewed that whole sexual affair was peaceful and the story of stiff resistance was totally false and uncorroborated.

The impugned judgment of the apex court brought utter shock among academia and public-spirited persons. Renowned jurist Prof. Upendra Baxi observed travesty of justice and disgrace to human dignity in the judicial pronouncement. In order to raise voice of "millions of Mathura's", he wrote an open letter to the Chief Justice of India, co-signed on September 16, 1979, by other prominent Indian scholars, underpinning dire need of liberation from male dominated colonial legal notions of the elements constituting the concept of consent. He advocated, in his letter, to define custodial rape, to shift burden of proof, non-disclosure of identity of rape victim in public domain, to get rid of absurd metrics like the two-finger test in medical examination, and to escalate quantum of punishment, etc. The letter could not get media attention in India, however, was published in the Dawn newspaper in Pakistan. Subsequently it was published in India, which lit the fire mainly amongst women to agitate against the plight of Mathura. On the International Women Day, March 8, 1980, street protests were organized in Delhi, Bombay, Nagpur and Hyderabad. The social movement resulted in the formation of first women organization by Seema Sakhre. Various socio-legal concerns raised by Prof. Baxi became a legal reality in the Indian legal lexicon particularly by the Criminal (Amendment) Act, 1983 and 2003, and the POCSO Act, 2012, which shall be discussed in subsequent sections of this dissertation.

### **3.2 Ranga-Billa Case<sup>2</sup>**

Kuljeet Singh alias Ranga and Jasbir Singh alias Billa kidnapped the sibling namely Geeta Chopra, 16, and Sanjay, 14, the children of a Captain rank serving naval officer, for extorting ransom. The offenders gave a lift to both minors in their car on the roads of Lutyens' Delhi on August 26, 1978, later the children resisted, the kidnappers first killed Sanjay, and then raped and murdered Geeta. Both Ranga and Billa made a voluntary confession before Metropolitan Magistrate but later retracted. With the matching of hair, fingerprint, blood group in addition to other evidence and witness testimony, the prosecution could establish guilt in the trial court. On 21 April, 1981 the apex court upheld the death penalty awarded by the trial court and high court on the ground that professional murderers posing threat to social order and security deserve to be eliminated. The supreme court observed, "The survival of an orderly society demands the extinction of persons like the accused who is a menace to social order and security. They are professional murderers and deserve no sympathy even in terms of the evolving standards of decency of a maturing society". Both convicts were hanged in

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<sup>2</sup> Kuljeet Singh @ Ranga v. Union of India 1981 AIR 1572 : 1981 SCR (3) 512 : (1981) 3 SCC 324 : 1981 SCC (Cri) 726



Tihar Jail on January 31, 1982. Kirti Chakra was awarded posthumously to the slain children, and the Indian Council for Children instituted two bravery awards in their names.

### **3.3 Dhananjoy Chatterjee Case<sup>3</sup>**

The accused security guard of the building raped and murdered a below 18 years girl in her flat on March 5, 1990. Recovery of broken chain and button of accused from crime scene and recovery of the stolen watch under section 27 of the Indian Evidence Act corroborated the involvement of the accused in commission of crime, resulting in award of death penalty by the trial court and the High Court. The court reflected on the proof required for conviction solely based on circumstantial evidence:

It is settled law that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof.

The apex court dismissed the appeal considering the ingredients of the rarest of rare case, and death penalty was executed on August 14, 2004 in Alipore Central Correctional Home, Kolkata.

### **3.4 The Nirbhaya Gang Rape and Murder Case<sup>4</sup>**

Also known as 2012 Delhi Gang Rape case, involved gang rape and fatal assault on a 23 years old female physiotherapy intern in a moving private bus in South Delhi area in the late night on December 16, 2012. She was travelling with her male friend, who was also assaulted by the perpetrators but survived. This case resulted in huge public protests in India and abroad. One accused was just a few months younger than 18 years of age, hence was dealt under the Juvenile Justice Act. The trial court convicted the perpetrators and sentenced death to four accused on September 13, 2013. Delhi High Court upheld the death penalty in March 2014. On December 18, 2019 the apex court rejected the appeals by the convicts. Ultimately

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<sup>3</sup> Supra note 148.

<sup>4</sup> Mukesh v. State (NCT of Delhi) (2017) 6 SCC 1. In State through Reference v. Ram Singh 2014 SCC OnLine Del 1138 : [(2014) 212 DLT 99 : (2014) 4 DLT (Cri) 337], Delhi High Delhi confirmed death penalty

the death penalty has been executed on March 20, 2020 after prolonged battle delaying the execution.

After Nirbhaya incident, Indian Government constituted Justice JS Verma Committee to recommend criminal law amendments. In the backdrop of this case, the Criminal (Amendment) Ordinance, 2013 was promulgated. Later legislature construed several enactments particularly the Criminal (Amendment) Act No. 13 of 2013, and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act No. 14 of 2013.

#### **4. CONCLUSION**

Child sexual abuse is a global phenomenon since time immemorial. It is a daunting aim for good governance to ensure the protection of children and to administer justice to victims of sexual assaults. Due to zillions socio-cultural and economic factors, many of CSA cases remain unreported. During this study, various facets of CSA have been deliberated to understand law and practice to deal with this menace. Emphasis is placed on impact analysis during the administration of justice in CSA cases in India after the enactment of the POCSO Act. Keeping in view that the nature of evidence and legal doctrines involved in sex crimes having commonalities across the countries using adversarial justice system, the legal process on various tenets of CSA in other jurisdictions have also been studied to capture global perspectives and the best practices used for investigation and trial process. Learning from others' experience is indeed wisdom for life.

However, academic efforts are not accessible in the literature to comprehend the dynamics of existing legal void on various issues of child sexual abuse. Several gaps identified during literature review such as defining consent for the sexual act, age of consent and chronological age versus mental age have also been addressed from a global perspective. The findings of this research are based on observations of the judiciary on various critical issues pertaining to research questions while dealing with matters of child sexual violence at different stages of trial and appeals.

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