

January-June 2019

Volume 28

Issue 1

PRINT ISSN: 2277-1867
ONLINE ISSN: 2277-8853



JOURNAL OF FORENSIC MEDICINE SCIENCE AND LAW

Official Publication of Medicolegal Association of Maharashtra

Editor-in-chief

Dr Ravindra Deokar

Associate Editors

Dr Sadanand Bhise

Dr Sachin Patil

**MULTISPECIALITY, MULTIDISCIPLINARY, NATIONAL
PEER REVIEWED, OPEN ACCESS, MLAM (SOCIETY) JOURNAL**

Editorial Office Address

Department of Forensic Medicine, Third Floor, Library Building, Seth G S Medical College & KEM Hospital, Parel, Mumbai-400 012

Email id: mlameditor@gmail.com Phone: 022-24107620 Mobile No. +91-9423016325



Review Article

Overview of rape related laws in India and necessary recommendations

Sachin S Patil^a, Ravindra B Deokar^b, Harish M Pathak^c^aAssociate Professor, ^bProfessor (Additional), ^cProfessor & Head,
Department of Forensic Medicine, Seth G S Medical college & KEM Hospital, Mumbai-400012.

Article Info

Key words
Anti-rape laws
India
Amendment

Abstract

Rape is one of the universal and below reported crimes against women in India. The term 'rape' was first time coined in our lawful constitution was when the IPC was prepared in 1860. Numerous incidents of rape that triggered protest by general public and activists against rape. **Rameeza Bee rape case** of 1978 was one such case. But [Mathura Rape Case](#) in the state of Maharashtra was one that shaped hue and cry on a countrywide extent for the first time. Statistics indicated that India saw a 336% increase in child rape cases from 2001 to 2011. This alarming trend led to the need for a 'special legal procedure' for child victims of sexual offences resulting in POCSO act. Anti rape laws in India had most of the times seen the face of modification only when heinous incidence of sexual assault occurred followed by uproar of public. This ultimately forced the government and administration to amend the laws to fill the existing loopholes and to make more stringent laws.

1. Background

Rape is one of the universal and below reported crimes against women in India.¹ The term 'rape' was first time coined in our lawful constitution was when the IPC was prepared in 1860.²

During British era, rape was used as one of the weapon of oppression by British as a foreigner-coloniser. After independence, in 1970s, the rape by police, army, security forces, and '*landlord rape*' became major issues.¹

1860: Indian Penal Code

In Section 375 IPC, only the person committing rape would be liable for punishment and not the victim, however Section 377 IPC makes punishment liable for both partners. This excuse prevents male rape victims from complaining against their accused as it will also open them up to prosecution.

How to cite this article: Patil S S, Deokar R B, Pathak H M, Overview of rape related laws in India and necessary recommendations. J For Med Sci Law 2019;28(1):17-21

*Corresponding author: Dr Sachin patil, Associate Professor, Seth G S Medical College & KEM Hospital, Mumbai, Maharashtra. Email: sachinpatilmdfm@gmail.com Mobile: +91-8108609282

There was no clause for sexual intercourse without consent among husband and wife. To summarize, the least penalty for rape was as relaxed as two years in prison (the same as perjury) and maximum punishment was imprisonment for life.

1983: The Criminal Law

Numerous incidents of rape that triggered protest by general public and activists against rape. **Rameeza Bee rape case** of 1978 was one such case. It took place in Hyderabad where a Rameeza Bee was sexually assaulted by numerous policemen.¹

But [Mathura Rape Case](#) in the state of Maharashtra was one that shaped hue and cry on a countrywide extent for the first time.¹ A young tribal girl named Mathura was sexually assaulted by two policemen while in custody on 26th March, 1972. Court set free the accused policemen considering the fact that Mathura was actually 'accustomed to sexual intercourse', The Supreme Court Judges justified that Mathura had not raised any alarm and there were no noticeable injuries or struggle marks on her body. Presuming her active sexual life, it was thought by the court that she might have provoked the cops to perform sexual intercourse with her. This judgment caused mass out roar throughout the country and demanded amendments in the law. This resulted in amendment in anti rape laws in 1983.

Our legal system entirely ignored the rapes by public servants till then. But it was this case that a new kind of rape was introduced called 'Custodial Rape' which comprises of rapes of females while in custody of public servants. Till this point, it was the survivor female's responsibility to prove that the sexual intercourse was not consensual but with this amendment, court will presume that female is telling the truth about consent of sexual intercourse. Since then the concept of 'consent' became fundamental part of rape. This amendment also prohibited the revealing of victims' identity and barred the 'character assassination' of rape victims in court. It's thanks to this amendment that rape victims now have pseudonyms like 'Nirbhaya'.

It also added the categories 'mass' and 'gang'rape to the already existing individual rape as well as 'in camera' trial and the onus of proof about consent for sexual intercourse to be shifted onto the accused instead of the victim.¹

2002: Amendment to Indian Evidence Act

In spite of prohibition of the 'character assassination' in 1983 Criminal Amendment act, there was no clear cut definition to embrace cross-examination of a rape victim. PIL filed by an NGO named Sakshi in which they pointed out that women didn't feel comfortable about reporting rape for the reason that "the objective of the defence in rape trials was to disgrace and demean the sexual integrity of the victim" rather than to treat them as someone who had experienced mental and physical trauma and someone who needed to be sheltered.

In Section 155 (4) of the Indian Evidence Act 2002, the defence lawyer could discredit a rape victim's testimony by proving that she was of 'immoral character' which consist of inquiring the her of precedent sexual acts. This specific clause was deterrent for rape victims to file a case. Hence amendment of this clause was done in 2002. Subsequent to this amendment, the cross-examination of a rape victim was banned.

2012: Protection of Children from Sexual Offences (POSCO) Act

Statistics indicated that India saw a 336% increase in child rape cases from 2001 to 2011. The According to National Crime Record Bureau, 48,338 child rape cases were recorded for this period. This alarming trend led to the need for a 'special legal procedure' for child victims of sexual offences resulting in POCSO act. Till then, only clause of statutory rape mentioned in the IPC which penalises sexual intercourse with a girl under 16 years of age despite of consent.

However, there was no difference in trial procedure for children involving age below 16 years. The resultant POSCO Act takes into account the special conditions in which a child could be sexually abused. For example, accused might be

child's relative or guardian. The Act made provision for the police in charge to defend the victim child during the investigative process.

Now the police had to confirm that child has got shelter and protection as well as providing emergency medical treatment. It also gives direction to special courts for conducting the trial in-camera and not disclosing the identity of the child, as well as keeping it as child-friendly as possible. The Act also makes provision for fast tracking the cases of child sexual abuse within a year and making the reporting mandatory. Another big lacunae was that it does not take into account crimes against male-children. This loophole was rectified in 2012 with POSCO or the Protection of Children from Sexual Offences Act. The new Act was made gender-neutral and also included other forms of penetration in addition to peno-vaginal penetration. The Act also included the abetment of child sexual abuse as an offence and included non-penetrative assault, sexual harassment and child pornography.

2013: Criminal Law (Amendment) Act

On December 16, 2012, a 23-year-old physiotherapy intern, Nirbhaya was brutally gang-raped in a moving bus. After struggling to survive in the hospital, she succumbed to her injuries on December 28. The brutality and violence of the case led to widespread protests around the country.

There was demand of not only for change in the law but also for how the crime of rape was looked at. This proved to be the biggest turning point for anti-rape laws in India. This pressurized the legal system of India to reassess the existing laws and also realized that numerous other crimes that were particularly against women like stalking, acid attacks, and voyeurism was missing from our legal framework.

This led to the 2013 Criminal Law Amendment. New offences like stalking, acid attacks, and voyeurism were inculcated into the definition of rape. Even the threat of rape is now considered as a crime. The minimum punishment was raised from seven years to 10 years

imprisonment. In cases where victim died after rape or was in a vegetative state, the minimum punishment was increased to 20 years. This was the first time that the vegetative state was also incorporated ever since the landmark Aruna Shanbaug case.

When Nirbhaya case was in trial, the character of the victim was debated inspite of the 1983 and 2002 amendments in force. As the victim was a young professional, her freedom and 'western' lifestyle were considered as 'invitations' for rape. To circumvent this in the future, this amendment reiterated that the 'character of the victim' was absolutely immaterial to rape cases.

As one of the accused in this case was a juvenile and was also tried as such, another blemish in the system was recognized. Therefore age for being tried in court as an adult for violent crimes like rape and murder was decreased from 18 years to 16 years, that to the Juvenile Justice Act.²

April 09 2013: Supreme Court judgement in case of Lillu @ Rajesh Vs State of Haryana.

An additional obstacle due to which women avoided from reporting rape was the dreaded 2-finger test, in which a doctor inserts '2 fingers' into the vagina to verify its laxity. This test made women feel like objects in evidence, violating her privacy and integrity, instead of treating her like a trauma victim. The Supreme court concluded saying "The two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Hence this test, inspite of being positive, cannot validate the presumption of consent".³

2018: Criminal Law (Amendment) Act

An 8-year-old girl named Asifa Bano was raped and killed in the district of Kathua in Jammu and Kashmir in January 2018. Seven people were named in the case charge sheet, four of whom were police officers charged for attempting to cover up the case. This case led to national outrage, especially because it was against a child, but also because it took place in a temple and was

perpetrated by a priest. It quickly became politicised along the Hindu-Muslim lines. Thus the change was mainly made to POSCO as victim was against a child and punishment for rape of a child below age 16 years a minimum of 20 years imprisonment but also made provision for the death penalty for the rape of anyone under age 12 years.

Thus, for the first time, death penalty has been introduced for the offence of rape considering the gravity of the offence. It also changed the fast-track clause from a one year to 6 months, so that justice could be delivered in such cases without being tinted by politics.

- Under Section 376(1), 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 was increased to 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}³
- 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. Imprisonment of life is awarded as the punishment in such cases. 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.⁴

The Code of Criminal Procedure, 1973

- If a person is accused of rape on a woman of less than 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 lead provision 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 provision 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.⁴

2. Critical Analysis

The death penalty for rape of girl below 12 years will lead to under-reporting of cases, especially in cases of perpetrator being the family member.

- Effectively the punishment for committing rape on a minor girl and committing murder has become same. That can increase the chances of the offender killing the victim.
- Now the accused has no provision to get an anticipatory bail even if there are chances of being booked under a false case.

3. Necessary recommendations

- 1) More emphasis should be given on increasing the conviction rate.
 - 2) Greater attention to be given for providing protection to the victim as well as the witness.
 - 3) Registration of convicted accused as sex offenders for rest of the lifetime and maintaining national registry of Sexual offenders.
 - 4) Sex offenders must wear GPS device, so that their daily movements can be monitored.
 - 5) Romeo Juliet law to be implemented as majority of POCSO cases constitutes consensual sex among teenagers of almost same age⁵. In developed countries like USA, UK etc due to presence of this law, incidence of rape cases appears to be less. In developing country like India where investigating persons and resources are limited, valuable time and resources of investigating authorities and doctors as well as FSL personnel is wasted in dealing with these cases, which could have been utilised in cases where it is absolutely essential.
 - 6) Providing sex education in schools and teaching children about raising alarm in initial stages to prevent big mishaps. It also includes inculcating good moral values and attitude among male children towards females since childhood.
2. Evolution of anti-rape laws in India since 1860. WTD news in Society.
<https://www.youthkiawaaz.com/2018/08/indias-anti-rape-laws-the-evolution/>
 3. Lillu @ Rajesh & Anr vs State Of Haryana on 11 April, 2013. The supreme court of India criminal appellate jurisdiction, criminal appeal no. 1226 of 2011, Accessed on 28 July 2019.
 4. Criminal Law amendment act, 2018, Government of India. Accessed on 28 July 2019.
 5. Romeo and Juliet Law. Section 943.04354 of the Florida Statutes (2008)
<https://definitions.uslegal.com/r/romeo-and-juliet-law/> Accessed on 28 July 2019.

4. CONCLUSION

Anti rape laws in India had most of the times seen the face of modification only when heinous incidence of sexual assault occurred followed by uproar of public. This ultimately forced the government and administration to amend the laws to fill the existing loopholes and to make more stringent laws.

CONFLICT OF INTEREST: None.

References

1. Nagpal H. Historical Journey of rape laws in India, June 2017.
<https://feminisminindia.com/2017/06/22/historical-journey-rape-laws-india/>