The Responsibility on the Shoulders of Courts and Doctors to Provide Proper Legal Protection to Rape Victim

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Abstract
Rape is not only a crime against the person of a woman; it is a crime against the entire society. It destroys, as noted by the Supreme Court [1], the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21 of the Constitution of India, 1950. The low rate of convictions in cases of rape raises serious questions about the workings of the law. The amendments seem to have had little effect and merit closer examination. There is reluctant recognition of the amendments and its swamping under pre-conceived notions. After more than two decades since legal reforms gave rape victims more leverage in the courtroom; we need to change society's attitude towards rape.

Introduction:
It is unfortunate that respect for womanhood in our country is on a decline and cases of molestation and rape are steadily growing. Decency and morality in public and social life can be protected only if courts deal strictly with those who violate the social norms. Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. When a woman is ravished, what is inflicted is not merely a physical injury but the deep sense of some deathless shame. The physical scar may heal up, but the mental scar will always remain.[2] The offence of rape is in simplest term is 'the ravishment of a woman without her consent by force, fear, of fraud' or as 'the carnal knowledge of a woman by force against her will'. While the murderer destroys the physical frame of his victim, a rapist degrades and defiles the soul of a helpless victim.[3]

To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. Corroboration is not the sine qua non for conviction in a rape case. Refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule is adding insult to injury.

The amendments:
The alarming frequency of crime against women led the parliament to enact Criminal Law Amendment Act 1983 (act 43 of 1983) to make the law on rape more realistic. By this act, sections 375 and 376 IPC were amended and certain more penal provisions were incorporated for punishing such custodians who molest a woman under their custody or care. Section 114A IEA was also added in the Evidence Act for drawing a conclusive presumption as to the absence of consent in certain prosecutions for rape, involving such custodians. Section 327 of the Code of Criminal Procedure which deals with the right of the accused to an open trial was also amended by the addition of sub-sections (2) and (3).[4] The amended provisions of the Section 327 Criminal Procedure Code impress upon the Presiding Officers to hold the trial of rape cases 'in camera' rather than in open court.

When the sexual intercourse is admitted by the accused but with consent, but victim states in her evidence before court that the act was done without her consent; then the court will presume that she had not given the consent as per amendment 114A Indian Evidence Act in cases of custodial rape. So admitting sexual intercourse with consent is suicidal for the accused.

The offence of rape occurs in Chapter XVI of the Indian Penal Code. It is an offence affecting the human body. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act 1983 and several new sections were introduced by the new act, i.e. 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intention to curb with iron hand, the offence of rape which affects the dignity of a woman.

In view of the object of preventing social victimization or ostracism of the victim of a sexual offence for which the section 228A Indian Penal Code has been enacted. It makes the disclosure of identity of a victim punishable. The name of the victim is to be suppressed. The printing or publishing of any matter which may make known the identity of the victim can be punished.
Section 164A Criminal Procedure Code has been added by Amendment Act 2005 to provide for a medical examination of a rape victim by doctor employed in government hospital and in absence of such, victim can be examined by any other private doctor whose name is entered in the state medical register.

The legislature brought about an amendment in by Act 4 of 2003 (sec. 3) by inserting a proviso to section 146 of the Indian Evidence Act 1872 that in a prosecution for rape it shall not be permissible to put questions in the cross-examination of the victim with respect to her moral character. This led to the deletion of the section 155 (4) of the Indian Evidence Act in 2003, whereby the ‘generally immoral character’ of the victim cannot be a ground raised by the accused for rape.

**Duty of doctor in rape cases:**
Examination of the rape victim should be carried out as early as possible without any delay with consent preferably by a lady doctor as per the s. 164A CrPC which is binding force on the doctors.

History taking in the case of medicolegal reports especially rape cases should be avoided. It is a means of harassment for causing humiliation to the victim of crime. A victim of rape has already undergone a traumatic experience and if she is made to repeat again and again in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted by the court as discrepancies and contradictions in her evidence.[5]

In a case in Delhi High Court [6] it was submitted that even in the MLC it is recorded that according to the victim ‘somebody’ raped her and there is no mention of the accused. The document was prepared by a doctor who may or may not have found it necessary to mention the name of the alleged rapist particularly since he was the stepfather of the victim. In the same case doctor did not notice any bloodstains on the victim’s clothes, but the Investigating Officer did notice and this discrepancy cropped up in the case.

The doctor shall forward the report without delay to the Investigating Officer noting the exact time of commencement and completion of the examination.[7] However in the famous Mattoo case [8] the parcel of clothes of the victim, the vaginal swabs and the slides as per post mortem report were handed over the Inspector Lalit Mohan on 25-1-1996 after the conclusion of post-mortem. The report was definite and categorical about handing over of the articles on 25-1-1996. However in the court, police deposed that the said parcels were collected from the doctors on 29-1-1996. There is no explanation as to what happened or in whose possession the articles were from 25-1-1996 to 29-1-1996 and so the possibility of tampering with the articles could not be ruled out. The findings of the trial court acquitting the accused were justified. It is the duty of the doctors and the police to maintain the chain of custody in such cases. In this case the trial court has rejected the DNA test and the found the doctor Dr.G.V.Rao of CCMB Hyderabad not to be a trustworthy witness.

It has been repeatedly held by the Supreme Court that the name of the rape victim should not be disclosed. Mentioning the name of the victim in any publication, paper, book, giving news item in press conference by the doctor; is not only contrary to the views expressed the Supreme Court but also contrary to the statutory law under s.228A Indian Penal Code which makes it punishable with imprisonment for two years and fine. However it has been seen that author of book like Textbook of Forensic Medicine and Toxicology – Principles and Practice [9] is not conscious of the amendment or do not realize its importance in showing the face and genital area in photos with name and address thus disclosing the identity of the victim of sexual offence. In view of writ petition [10] before the High Court, in case of victim of sexual offences, the publication of photographs of such victims in newspapers, journals and magazines would fall under category of making disclosure of identity of victim and thereby such act would fall under s. 228A IPC. Circular dated 15-7-2002 issued by Director General of Police to stop permitting women victims of violation being photographed. The High Court has taken a serious view of the matter, and has ordered it to be implemented by all the police officials in letter and spirit; so that the guilty may be brought to the book. There have been instances [11] where the Courts have set aside the conviction and acquitted the accused, solely on the ground that the victim was medically examined but the doctor who examined her did not come in the witness box to prove the report and the prosecution did not take care to examine the lady doctor. Even serologist report was on the record but the same was not proved. The High Court was of the opinion that non-examination of the doctor and non-providing of an opportunity to the accused person to cross examine the lady doctor. Even serologist report was on the record but the same was not proved. The High Court was of the opinion that non-examination of the doctor and non-providing of an opportunity to the accused person to cross examine the lady doctor is a fatal one and is a great lacuna in the prosecution case. On the basis of this view the High Court acquitted the accused on benefit of doubt.

As per the Section 204 Criminal Procedure Code, regarding attendance of the witness, in event of non-compliance with the process, it would be the functioning of the court to compel attendance of the doctor. As per Constitution of India, Article 21,
Expeditious disposal does not mean that evidence, whether prosecution or defence, should be cut short and judgment be pronounced without examining material witness. Procedural law is required to be adhered to. Magistrates have been directed to issue summons to witnesses concerned at new and correct address.[12] However if unsuccessful, then he shall resort to other coercive measures.

**Duty of judiciary in rape cases:**

It has been repeatedly held by the Supreme Court in various judgments [13,14] that the name of the rape victim should not be disclosed. Of course if it is absolutely unavoidable as for example when framing the charges against the accused, the identity of the victim may be disclosed but not otherwise. The Supreme Court has observed that the name of the victim has been mentioned in many judgments by the trial courts. This is not only contrary to the views expressed by the Supreme Court but also contrary to statutory law (228A IPC). The Supreme Court has directed the trial courts that when they are dealing with the cases of the sexual offences the name of the victim should not be disclosed.[15] The Punjab & Haryana High Court circulated a copy of judgment Angrej Singh v. State of Punjab (P&H) 2007 (1) RCC 235 among the learned session judges working in the states of Punjab and Haryana for strict compliance of the observations of the Apex court while interpreting section 228 A (1) IPC and to make the trial court conscious of the amendment. Section 327 (2) and (3) of Criminal Procedure Code are in the nature of exception to the general rule of open trial, in spite of the amendment, however it has been seen that the trial courts either are not conscious of the amendments or do not realize its importance for hardly does one come across a case where the trail of rape case has been conducted by the trial court ‘in camera’. It casts a duty on the court to conduct the trial of rape cases etc. invariably ‘in camera’. The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327 (2) and (3) CrPC and hold the trial of rape cases ‘in camera’. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a victim because she would not be so hesitant or bashful to depose frankly as she may be in an open court under the gaze of public. The improved quality of evidence would assist the courts in arriving at the truth and sitting truth from falsehood.[16] The Privy Council in 1913 has clearly held that the evidence of the victim may be recorded in an open court, after taking all the precautions, after sending the general public, press and other persons, including junior advocates of the defence counsel.[17]

The court should not sit as a silent spectator while the rape victim is being cross examined by the defence. It must effectively control the recording of evidence in the court. The court should ensure that cross examination is not made a means of harassment or causing humiliation to the victim of rape. It has been observed that the rape victims are put some rather strange, embarrassing and unwanted questions. The trial judges must appreciate that the purpose of cross-examining a victim of rape is not to humiliate her but to get to the truth of the matter. Consequently questions which have no real relevance to the issues before the court and which are apparently directed to cause discomfiture, if not humiliation, to a victim of sexual offences, should not be permitted. Such questions do not serve the ends of justice and it is pointless allowing any such cross-examination to take place.[18]

The Supreme Court expressed strong disapproval of the approach of the trial court and its casting a stigma on the character or rape victim. Such observations lack sobriety expected of a judge. Even in cases where there is some acceptable material on record to show that the rape victim was habituated to sexual intercourse, no such inference like the victim being a girl of ‘loose moral character’ is permissible to be drawn.[19] No stigma should be cast against such a witness by the courts, for after all it is the accused and not the rape victim who is on trial in the court. The Supreme Court observed that the trial court should not search for contradictions and variations in the statement of rape victim microscopically, so as to disbelieve her version. Wherever possible it may also be worth considering that the cases of sexual assault on female are tried by lady judges [20] wherever available so that the victim can make her statement with a greater ease and assist the courts to properly discharge their duties without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidences in such cases. [21]

The Courts are expected to deal with cases of sexual crime against women with utmost sensitivity. A socially sensitized judge is better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.[22] The legislative wisdom reflected by the statutes has to be respected by the courts and the permitted departure there from made only for compelling and convincing reasons.
Conclusion:
The entire gamut of delays in lodging FIRs, delays in medical examinations, material contradictions in statements made to the police and testimonies in court remain prime factors in the accused's defence. When the victim takes U-turn while giving evidence against the accused then the courts become helpless and the accused is acquitted as the prosecution fails to prove the charges against the accused; which leads to the low conviction rate in such cases. To cover such deficiencies the statement of the victim should be recorded by a magistrate under section 164 CrPC. When the victim is brought to the hospital in serious condition, the dying declaration must be recorded. This will help the court to convict the accused where all the witnesses become hostile including the victim.

Shall the rapist be sentenced to death or not? Opinion may be divided as far as the type of punishment to be given, but everyone undisputedly wants the culprit of the heinous crime should not be allowed to go unpunished. Experience however tells that the definition of rape is not perfect and there are lacunas of which the accused takes advantage. Thus the accused of such a heinous crime as rape escapes unpunished and moves in the society holding his head high. On the contrary the woman although being the victim of physical, mental and sexual exploitation is regarded as characterless, dissolute and promiscuous woman. She suffers life long humiliation, in most of such cases she commits suicide, and children born out of such incidents are also regarded as illegal and looked down upon in the society. The need of the hour therefore is to close the narrow passage through which the accused succeeds to escape. The makers of India’s Destiny have left enough loopholes and lacunae to find an escape with little inconvenience. If the amendments are put to reality then they will provide proper legal protection to rape victim and it will be practically impossible for the rapist to escape punishment.

References:
2. Bhupinder Sharma v. State of Himachal Pradesh (SC) 2003 (4) RCR (Criminal) 960
3. Tulsidas Kanolkar v. State of Goa. (SC) 2003 (4) RCR (Criminal) 964
7. Clause 5 and 6 of Section 164A Criminal Procedure Code
8. State (CBI) v. Santosh Kumar Singh 2007 Cri L J 964 para 23
16. Varadaraju @ Veeran v. State of Karnataka 2005 Cri L J 4180
21. Dinesh @ Buddha v. State of Rajasthan (SC) 2006 Cri L J 1679