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Gang Rape: The Conundrum of Judicial Interpretation & Gender-Neutrality

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ABSTRACT

The Criminal Law (Amendment) Act, of 2013 brought significant changes in Indian laws regarding sexual offences in the aftermath of the tragic 2012 Delhi gang rape case that has led to widespread implications in the Indian Judicial System. Even, the Bharatiya Nyaya Sanhita, of 2023 have brought substantial change in the provisions of sexual offences. Amongst them, the provision of gang rape has undergone significant changes. This research paper seeks to provide a comprehensive analysis of the concept of gang rape in India with a particular focus on the issue of “common intention” required for joint liability in the offence of gang rape. This paper argues that the Criminal (Amendment) Act, of 2013 has created a substantial interpretative issue by changing the definition of offence in the provisions of law. It further delves through various case laws and critiques the changes brought forth by the amendment. This paper will further seek to elaborate on why women should also be held liable as perpetrators for the offence of gang rape if she aids in the commission of rape and at the end, will further try to establish why a properly substantiated definition, removing all the fallacies that subsist because of the changes brought forth by the amendments is the need of the hour.

I. INTRODUCTION

In India, women face various types of violence, like domestic abuse, dowry-related abuse, and sexual violence amongst which one of the most heinous crimes remains the offence of gang rape. In India, the offence of gang rape has significantly evolved over the years, the most widespread change among all was the changes brought forth by the Criminal (Amendment) Act, of 2013 which was enacted after the brutal gang rape and murder of a young women in Delhi in 2012, which sparked national outrage for more stringent laws regarding sexual offences.

This paper is structured into two sections: *firstly*, it will delve into the issue of whether the Criminal (Amendment) Act, of 2013 created an interpretative issue in the provisions of gang rape rather than improving the legal framework. It begins by bringing a comparison between the pre-2013 and post-2013 definitions of gang rape. Subsequently, it emphasises on how the

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new law in distinguishing the concept of ‘membership of group’ and ‘common intention’ seems to have confused the principle of group liability. *Secondly*, this paper will further develop an interplay of gender neutrality with the provision of the offence, emphasising whether there is any need to widen the ambit of the offence to include women also as perpetrators.

II. CONUNDRUM OF JUDICIAL INTERPRETATION

The Criminal (Amendment) Act, of 2013², brought a substantial change in the definition of gang rape. Before 2013, gang rape was defined as: “*Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention each of the persons shall be deemed to have committed gang rape*”.³ The provision implies that when persons act in a group with a common intention to commit rape of women, then only, each one of them would be held liable for the offence. Section 34 of the IPC asserts that “*When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.*”⁴ Thus, the definition of gang rape signifies an articulation of the principle of joint liability, which is defined in section 34 of the Indian Penal Code of 1860. In other words, the provision of gang rape embodies the principle of *joint liability*⁵, wherein the existence of common intention is a crucial factor.⁶

After the said amendment in 2013, the definition of gang rape was articulated under section 376D as follows: “*Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape...*”⁷, which is now laid down in section 70 of the Bharatiya Nyaya Sanhita, 2023. From the provision, it can be apprehended that if a person is part of a group involved in the offence of gang rape, it is sufficient to hold that person liable for the said offence even if he didn’t act in furtherance of the common intention. The amendment appears to have tried to distinguish between constituting a group and acting in furtherance of the common intention, and it has likely confused the principle of joint liability. This conceptual confusion arising from the flawed drafting of the provision is bound to create

² The Criminal Law (Amendment) Act, 2013, No.13, Acts of Parliament, 2023 (India).

³ The Indian Penal Code, 1860, § 376 (2), No. 45, Acts of Parliament, 1860 (India).

⁴ The Indian Penal Code, 1860, § 34, No. 45, Acts of Parliament, 1860 (India).

⁵ The Bharatiya Nyaya Sanhita, 2023, § 3(5), No. 45, Acts of Parliament, 2023 (India).

⁶ Mukesh V. State (National Capital Territory of Delhi), (2017) 6 S.C.C. 1.

⁷ The Indian Penal Code, 1860, § 370 (D), No. 45, Acts of Parliament, 1860 (India).

interpretative issues in cases of gang rape.⁸

In *Pardeep Kumar V. Union Administration, Chandigarh*, The Apex Court held that to prove the offence of gang rape, the prosecution has to satisfy that *firstly*, there is a group of persons where there is prior concert or meeting of minds of all the persons constituting the group to act with the common intention to commit rape on a victim. *Secondly*, more than one person had acted in concert with the common intention to commit rape and *thirdly*, that one or more persons have actually committed the offence of rape.⁹ If the following conditions are fulfilled, every person in the group is deemed to have committed the offence of rape in the essence of joint liability, even also if the accused unlike other members of the group could not perpetuate the act because of some reason.

The same principle was also upheld by the Hon'ble Supreme Court in the case of *Bhupinder Sharma vs State Of Himachal Pradesh*, wherein it held that even though the accused was in the stage of undressing and failed to commit the act owing to the reason that the victim ran away, still then the accused acted in furtherance of the common intention to commit rape on the victim and thus, would be held liable for the offence of gang rape and by operation of the deeming provision per se will attract minimum punishment.¹⁰ The ratio was also upheld by the Apex Court in the case of *Ashok Kumar V. State of Haryana*, wherein the Court asserted that there must be a meeting of the minds (common intention) to invoke the principle of joint liability and hold all the accused liable under the provision and subsequently opined that it is not enough to have the same intention independently of each of the offenders, there must be a common intention of the whole group to act upon.¹¹ The Hon'ble Supreme Court of India while deciding the case of *Om Prakash V. State of Haryana*, relied on the earlier precedents and further held that the mere presence of a man when rape is being committed by another, wherein no common intention or prior concert for committing rape could be established, the accused cannot be held guilty for the offence of gang rape.¹² All of the landmark judgements indicate that the *presence of a group*¹³ along with the *action in furtherance of the common intention* to rape the victim are the constituting elements of the offence of gang rape.

The landmark judgement by the Supreme Court of India, in the case of *Mukesh V. State (National Capital Territory of Delhi)*, popularly known as the *Nirbhaya Gang Rape* case that

⁸ Satish Mrinal, *Laws Relating to Sexual Violence in India: Constitutional and Human Rights Dimensions*, 15 J. Nat'l Hum. Rts. Comm'n 225 (2016).

⁹ *Pardeep Kumar V. Union Administration, Chandigarh*, (2006) 10 S.C.C. 608.

¹⁰ *Bhupinder Sharma V. State Of Himachal Pradesh*, (2003) 8 S.C.C. 551.

¹¹ *Ashok Kumar V. State of Haryana*, (2003) 2 S.C.C. 143.

¹² *Om Prakash V. State of Haryana*, (2011) 14 S.C.C. 309.

¹³ *Pardeep Kumar V. Union Administration, Chandigarh*, [2006] 10 S.C.C. 608.

prompted the Criminal Amendments in 2013, elaborates on various elements that resonate with the interpretative issues and conceptual confusion that is argued in this paper. The court in this case heavily relied on the earlier established precedents advocating the principle of common intention to hold an individual liable for the offence. It held that there was a sharing of common intention and jointness in the commission of rape and their actions were in furtherance of their common intention and thus, held them liable for the offence of gang rape. The Judgement predominantly aligns with the pre-2013 framework of the rape laws emphasizing the collective liability of individuals through the lens of shared intent. The amended provisions have created several interpretative issues of whether mere presence or association with the group without direct participation in the offence of rape can hold someone liable for the offence of gang rape or whether merely facilitating the actions of the group without having the common intention to commit rape, can also hold someone liable and several others.¹⁴

The ambiguities that arose as a result of the amendment require substantive analysis of the precedents and provisions of the statutes to resolve the said issues before creating any further confusion regarding the interpretation of the provision. This further requires careful analysis of what approach the courts have adopted in the cases of gang rape that were booked under the new law after the amendment. Exploring such a case, The Supreme Court of India, in *Manoj Mishra @ Chhotkau V. The State of Uttar Pradesh* extensively analysed the charge of the offence of gang rape under Section 376D of the IPC, and in this case, modified the conviction from 376D to 376 of Indian Penal Code of 1860. The court held that if one person is merely facilitating the actions of the accused and no direct involvement or presence is there at the time of the commission of the offence of gang rape, then that person cannot be said to have the common intention as like the convicts to rape the victim and thus, cannot be held liable for the said offence.¹⁵

Even after the amendment of the provision in 2013, the Courts are interpreting the provision through the earlier precedents established regarding the offence of gang rape. In the case of *Sandip V. State of Maharashtra*, The Bombay High Court upheld a similar legal position as had been decided by the precedents. It held that there must be a meeting of minds of all the persons in the group and their acts must be in furtherance of the common intention before the deeming fiction of the law could be enforced against the accused.¹⁶ Similarly, in the case of *Laxminarayan Dhruv v. State of Chhattisgarh*, The High Court of Chhattisgarh, held that to

¹⁴ Mukesh V. State (National Capital Territory of Delhi), [2017] 6 S.C.C. 1.

¹⁵ Manoj Mishra @ Chhotkau V. The State of Uttar Pradesh, (2021) AIRONLINE S.C.C. 866.

¹⁶ Sandip V. State of Maharashtra, (2024) S.C.C. OnLine Bom 2397.

hold a person liable for gang rape under section 376D of the IPC or to bring the person under the purview of section 376 (2) (g) of the IPC, the prosecution has to prove that firstly there must be more than one person who acted in furtherance of the common intention and secondly more than one accused had acted in the commission of the offence with the pre-arranged plan and prior meeting of the minds and some element of action in furtherance of the common intention.¹⁷ It can be concluded from the above judgement, that the courts are still following the test established by the precedents to convict a person under the offence of gang rape that requires constituting a group and acting in furtherance of the common intention to commit rape on a victim. This can further be seen in the proposed provision of the offence of gang rape in the Justice Verma Committee recommendations, wherein the wording of the provision aligns with the principles and ratio as set forth by the precedents of the Court and further helps in resolving the issue of ambiguity which has been brought by the amendment of 2013.¹⁸

Thus, examining the Judgements of the Courts, it can be concluded that membership of a group and action in furtherance of a common intention need to go hand in hand and are pre-requisite to convict an individual under the offence of gang rape. Mere membership of a group or the presence of an individual at the place of occurrence when rape was being committed does not hold someone guilty unless and until it can be proved that he had any common intention or meeting of the minds to commit the offence of rape. The wording of the provision of the offence of gang rape, after the amendment of 2013, shows significant flaws which need to be reconsidered by the legislature and further necessities judicial intervention to rectify the law to prevent any potential miscarriage of justice in the future.

III. BROADENING THE SCOPE OF GANG RAPE

Another contemptuous issue that the paper would like to delve into is whether women can be held liable under the provision of gang rape if they act as facilitators or participators in the act of rape. In the case of *Priya Patel vs. the State of Madhya Pradesh*, the Apex Court faced a complex problem of whether a lady could be prosecuted under the provision of gang rape. It held that by a bare reading of section 375 of IPC, it was clear that rape could only be committed by a man. It lays down provisions wherein it asserts when a man can be said to have committed the offence of rape. Section 376 (2) provides categories for certain serious cases which attract more severe punishments. The court, in this case, opined that section 376 (2) (g) asserts that “*whoever commits gang rape*” shall be punished. The court upon looking over the explanation provided in the provision clarifies that only when a woman is raped by

¹⁷ Laxminarayan Dhruv v. State of Chhattisgarh, (2024) S.C.C. OnLine Chh 10959.

¹⁸ Justice J.S. Verma, Justice Leila Seth & Gopal Subramaniam, *Report on Amendments to Criminal Law* (2013).

one or more in a group of persons acting in furtherance of their common intention, each individual is deemed to be liable for committing gang rape by bringing in the application of Section 34 of the IPC as discussed earlier. The Court further asserted that the expression in the section “acting in furtherance of their common intention” relates to the intention of committing rape. It held that it is conceptually inconceivable to hold that women can have an intention to commit rape. Thus, concluding that women cannot be held liable for the offence of gang rape.¹⁹ The Apex Court further in the case of *The State of Rajasthan v. Hemraj & Anr.* stressed that women cannot be held guilty of the offence of gang rape holding up the earlier precedent.²⁰

However, in the case of *Suneeta Pandey Vs. The State of U.P and Another*, the Allahabad High Court held on the contrary. A Single-Judge Bench, going through the amended provisions of Section 375 and 376 of the IPC opined that women cannot commit rape as it is clear from the non-ambiguous language of Section 375, which asserts that a ‘man’ can only rape another ‘woman’. The Court while hovering through the newly amended provision of 376-D of the IPC, which is a distinct and separate offence of gang rape, concluded that to establish an offence under the provision, the prosecution needs to adduce evidence that more than one person acted in concert in furtherance of their common intention to commit rape and if rape has been committed by even one, then all of the accused in the group with common intention would be held liable for the offence of gang rape as it embodies the principle of joint liability. The court further asserted that the term ‘persons’ in the provision should not be interpreted in a narrow sense. According to it, section 11 of the IPC²¹ defines a person as any company or association or body of persons whether incorporated or not. The bench further held that the term ‘persons’ in the Shorter Oxford English Dictionary has been defined in two ways that are firstly, as “an individual human being” or “a man, woman, or child” and secondly as “the living body of a human being”. As such, it concluded that a woman though not capable of committing the offence of rape, if she facilitates the act of rape with a group of persons having a common intention, then she can also be held guilty of the offence of gang rape under the amended provisions.²²

The decision of the court in this case is contrary to what the Apex Court held in the *Priya Patel Case* and thus created more ambiguity and confusion regarding the issue. In the eyes of the law, the Allahabad High Court failed to apply the ratio held by the Hon’ble Apex Court in

¹⁹ Priya Patel V. State of Madhya Pradesh & Anr., (2006) S.C.C.(CRI) 96.

²⁰ State of Rajasthan V. Hemraj & Anr., (2009) 12 S.C.C. 403.

²¹ The Bharatiya Nyaya Sanhita, 2023, § 2(26), No. 45, Acts of Parliament, 2023 (India).

²² Suneeta Pandey v. State of U.P., (2023) S.C.C. OnLine All 44.

the *Priya Patel Case*. Thus, the doctrine of *per incuriam* may apply in this case and hereby may not hold the Judgement of the Allahabad High Court a good law. The law needs to be dynamic and prospective. It is a fact that the Apex Court delivered the judgement in the Priya Patel Case based on the pre-2013 definition of gang rape whereas the Allahabad High Court, conceived the judgement based on the new definition of gang rape inserted under section 376-D of the Indian Penal Code of 1860. Thus, it can be assumed that the High Court may in order to make the law more prospective and dynamic have announced such a ratio.

Interconnecting both the issues addressed in the paper, it can be seen how the amended section 376-D of the IPC, now talking about membership of a group as a factor of liability in the cases of gang rape, created interpretative issues in Suneeta Pandey's case wherein women being part of the group was prosecuted by the Allahabad High Court. It can be concluded that the decision of the Allahabad High Court may not be entirely flawed due to the textual paradox of sections 375 and 376-D of the IPC, but conflicts with the decisions of the Apex Court in the Priya Patel case and voices the need for a more consolidated properly substantiated definition of the provision of gang rape.

In my view, the current law has become outdated in terms of language and intent, and Allahabad High Court's judgement is well-reasoned in light of the amended provisions. With an evolving society, it is a necessity to evolve the law to keep pace with the society. Since there have been cases, wherein women indulge in a group and facilitate the action of rape, there is a dire need for legislation to counter this heinous crime. The provision proposed by the Justice Verma committee is something that can be looked upon in such cases.²³ There should be legislation to hold the accused accountable and liable for their actions and not be acquitted because of gender-specific reasons.

IV. CONCLUSION

Much-needed reforms were tried to be brought forth by the Criminal (Amendment) Act, of 2013 wherein various provisions pertaining to sexual offences have undergone significant change. Section 376-D which was introduced in IPC, tried to distinguish between membership of a group and the act in furtherance of common intention, to bring legal reforms but the flawed drafting of the said provision resulted in interpretative issues which require judicial intervention or legislative reconsideration at this point to prevent any further miscarriage in the administration of justice. The issue of whether women can also be held liable for the offence of gang rape requires careful judicial scrutiny and legislation to hold the perpetrators

²³ Justice J.S. Verma, Justice Leila Seth & Gopal Subramaniam, *Report on Amendments to Criminal Law* (2013).

liable for their acts in a gender-neutral manner. All of this underscores the necessity of properly substantiated legislation that addresses and counters all the fallacies that subsist even after the amendment and adequate reforms must be put in place for the better administration of justice along with protecting the rights of the victim as well as the accused.

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