

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 6

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Rape Sentencing in India: Need for Uniform Sentencing Guidelines

J LAKSHMI CHARAN¹

ABSTRACT

*In rape sentencing, Indian courts exercises its judicial discretion based on two considerations. The foremost consideration by courts for exercising judicial discretion in rape sentencing is based on certain factors such as facts and circumstances of the case, victim's consent, marital status, acquaintance of accused etc. In rape cases, the Courts consider victim's consent as one of the mitigating factors in sentence reduction that has been witnessed in *Tukaram v. State of Maharashtra*, the Supreme Court reduced the sentence stating that the victim is sexually active and she had given her passive consent since there are no injuries on her body. In general, the courts decide whether the rape victim had given her consent or not based on the medical report except in certain rapes such as custodial rape, gang rape, rape on pregnant women etc., the courts presume there is absence of consent, if the victim states in her testimony that she did not give her consent. But the World Health Organisation (WHO) Report – 2019 states that only 30% of rape cases, victims have visible injuries upon their bodies. Hence, the courts shall consider other factors while deciding the question of victim's consent.*

The other consideration is the prevailing theory of punishment in the country. In India, the Supreme Court did not consistently apply any particular punishment theory in convicting rape offenders. However, usually Indian Courts apply reformatory theory of punishment in rape cases i.e., the courts examine whether there is any possibility of accused being reformed, if the answer is affirmative, then the courts reduce the sentence of accused. Based on this theory, young age, social background of the accused may be considered as mitigating factors. Such mitigating factors seems unjustifiable and would give lenience to the accused and other persons to commit sexual offences. The courts must adopt any one of the punishment theories and also address various factors to be considered in mitigating and aggravating the sentence. This study aims to deeply investigate the existing inequalities prevailing in the Indian Criminal Justice System and thus, emphasis the need for adopting uniform sentencing guidelines in crimes against women and children.

Keywords: *Indian Criminal Justice System, Judicial Discretion, Rape Sentencing, Uniform sentencing guidelines.*

¹ Author is an Assistant Professor at School of Law, Mahindra University, India.

I. INTRODUCTION

India's first systematic penal code was drafted in the 1830s by the First Law Commission, chaired by Lord Macaulay. The draft code was extensively reviewed and revised by Sir Barries Peacock, Chief Justice of the Calcutta Supreme Court and the code was officially enacted as the Indian Penal Code 1860 on October 6, 1860. In the realm of criminal procedure in India, one of the earlier vestiges was the Regulating Act 1773. This act established several courts across India, including Calcutta, Madras, and Bombay. These courts adjudicated the cases involving British citizens, applying procedures aligned with British legal practices. In 1861, the Indian Criminal Procedure Code was enacted to deal with the procedural aspects which was replaced by the Criminal Procedure Code, 1973 based on the reports of the Indian Law Commission (1958, 1967 and 1969). Despite the amendments to the Code of Criminal Procedure, 1861 (major amendment in 1969 and 1973 replacement), the sentencing system in India does not seem to have opted either the flexible guideline system followed by the United Kingdom or the restrictive grid-based system followed by the USA.

II. STATUTORY PROVISIONS DEALING WITH RAPE SENTENCING IN INDIA

Indian Penal Code, 1860

Chapter-XVI of IPC deals with Offences affecting Human Body and the sub-chapter on "Sexual Offences" (section 375 – 375E IPC) deals with the offences of rape, statutory rape and other sexual offences. According to Section 375 IPC, rape is said to be committed by a man who inserts his penis or objects to any extent, or, any body parts other than penis, mouth into the private parts (vagina, mouth, urethra, or anus) of a woman, or, manipulates any woman's body parts to cause penetration into her vagina, urethra, anus or any body parts of woman or compels her to do so with him or any other person under the circumstances falling under any of the following seven descriptions - a) against her will, b) without her consent, c) consent obtained by placing her or any interested person in fear of death or hurt, d) consent obtained by the man knowing that he is not her husband and such consent is given by her believing that he is another man to whom she is lawfully married, e) consent given due to unsound mind, or, intoxication, or, any stupefying or unwholesome substance administered by him personally or any other person. Consequently, she is unable to understand the nature and consequences of the consent given by her, f) with or without her consent, when she is under eighteen years of age, g) when she is unable to communicate consent.

In 2013, the Criminal Law (Amendment) Act made significant changes to section 375 IPC. In a rape case, even the slightest penetration of the victim's vagina (including labia majora viz.,

outer skin of the vulva) is punishable u/s. 376 IPC and also included all forms of penetration such as oral form and insertion of any objects. In 1983, the Criminal Law (Amendment) Act inserted the provisions of Statutory Rape under Section 376 IPC. This amendment also inserted section 155(4) of Indian Evidence Act, 1872 provides that when the prosecution is able to prove sexual intercourse with the person-in-authority/accused, then the court shall presume that such sexual intercourse is non-consensual. Thus, the issue of consent is irrelevant in specified rape offences. However, victim's consent plays key role in determining the offence of rape as well as determining the length of sentence. The courts often consider victim's conduct, past sexual history, marital status etc., are the mitigating factors which are impermissible mitigating factors and the sentencing guidelines shall clearly address the list of permissible and impermissible mitigating factors.

Criminal Procedure Code, 1973

The Criminal Procedure Code, 1973 divided the trial into two distinct phases - 1) Guilt determination phase, 2) Sentencing phase. In the trial phase or guilt determination phase, the court based on arguments and evidence produced may either convict or acquit the accused. If the accused founds guilty and convicted, then the sentencing phase begins. In the sentencing phase, the court hears evidence and arguments relating to relevant factors for sentencing. After hearing both the parties, the Courts pronounces the quantum of sentence imposed on the accused. In the sentencing phase, the judges have been given wide discretionary powers under section 235, 248, 325, 360 and 361 of Criminal Procedure Code.

Chapter XVIII Section 235 CrPC., 1973 deals with Judgment of Acquittal or Conviction in the Court of Session. According to section 235 of CrPC, 1973, the judge shall pronounce judgment after hearing arguments. If the accused is convicted, the Judge shall hear the accused on question of sentence and then the judge shall pass sentence after considering the mitigating and aggravating factors. According to Section 325 CrPC, when the Magistrate is of opinion that the accused is held guilty but the sentencing power of the magistrate is insufficient to provide severe sentence, then the Magistrate may commit the convicted person to Chief Judicial Magistrate for providing severe punishment. However, section 235 of CrPC, 1973 does not prescribes any procedure for forming an opinion that the Powers of Magistrate are insufficient to adequately punish the convict.

Section 360 CrPC, 1973 deals with order to release on probation of good conduct or after admonition. According to section 360(1) CrPC, 1973, the Court may release the offender on probation of good conduct who has no previous convictions in the following conditions - (a)

When the offender is below 21 years of age is convicted with imprisonment for a term of seven years or less, or (b) If the offender is any person or woman and the offence is not punishable with life imprisonment or death. In these circumstances, the magistrate upon considering various factors such as age, character of the offender, circumstances for commission of offence etc., may release the offender with personal bond (with or without sureties) to keep the peace. In cases of theft, dishonest misappropriation, cheating or any other offence punishable below two years imprisonment or fine only, the court considering the age, character or antecedents, physical or mental condition of the offender, any extenuating circumstances under which the offence was committed may release the offender on admonition.

The Indian Criminal Justice System provides unfettered discretionary powers to judges while pronouncing sentences to the offenders. In *Gurubaksh Singh Sibbia v. State of Punjab*, the Supreme Court upheld the discretionary powers of judges based on two reasons – 1) The appellate courts have competent and experienced judges to exercise judicial discretion properly, 2) The lower court decisions are subject to appellate review that ensures appellate courts to rectify the trial court's abuse of powers. However, the appellate courts exercise its discretionary powers to commute death sentence to life imprisonment or to any other sentence based on facts and circumstances of the case. Such judicial discretion may be limited through uniform sentencing guidelines for same or similar offences.

III. ROLE OF MEDICAL EVIDENCE IN RAPE PROSECUTION

The Indian Courts consider medical evidence as one of the crucial pieces of evidence in determining the sexual intercourse is consensual or not. According to section 164-A CrPC, the rape victim shall be sent for medical examination before any Registered Medical Practitioner within twenty-four hours from the time of receiving information relating to commission of sexual offences. During victim's medical examination, the Registered Medical Practitioner is bound to collect all relevant biological evidence such as blood, semen, other body fluids, injury marks etc. Typically, the Indian Courts examining the medical reports finds that there are no injury marks on the victim's body, consider sexual intercourse as consensual. However, the World Health Organisation (WHO) Report – 2019 states that only 30% of rape cases, victims have visible injuries upon their bodies. Almost 70 percent of rape victims do not have physically injuries on their bodies.

In *Pratap Misra v. State of Orissa*, AIR 1977 SC 1307, the Supreme Court held that the presence of injury marks corroborates the prosecution's version and strengthens victim's claim that she did not give her consent for such intercourse. However, mere absence of injuries does not imply

rape survivor's consent. In *Krishnan Kumar Mallik v. State of Haryana*, 2011 (7) SCC 130, the Supreme Court relied on the medical evidence that shows the victim's Labia Majora and Labia Minora were healthy and there are no injury marks over her body. The medical report states that the hymen had old healed tear and it was neither red hot nor bleeding upon touching, the two-finger test was admitted easily. The Supreme Court mostly relied upon the medical report and acquitted the accused as the prosecution has failed to prove the charges beyond all reasonable doubts.

The Indian Courts held that the medical evidence is relevant under section 45 of Indian Evidence Act, 1872. However, the Courts considered the evidentiary value of medical evidence as corroborative evidence only. In *Anant Chintaman Lagu v. State of Bombay*, 1960 SCR (2) 460, the Supreme Court held that the medical evidence shall not be considered as substantive evidence. In *Solanki Chimanbhai Ukabhai v. State of Gujarat*, 1983 (2) SCC 174, the Supreme Court held that medical evidence is only corroborative evidence along with other independent evidences. In recent times, the Supreme Court made a paradigm shift in giving preference to medical evidence over ocular evidence based on the facts and circumstances of the case. In *Hemudan Nambha Gadhvi v. State of Gujarat*, (2019) 17 SCC 523, the Supreme Court relied heavily on medical evidence which confirmed the presence of semen on the victim's clothes, vaginal smear and vaginal swab samples to convict the accused.

Moreover, the Indian courts relied on virginity tests such as 'two-finger test' and 'hymen test' to determine the virginity status of victim and the hymen rupture may be considered as one of the indicators of penetration respectively. However, the rape myth is that the rupture of hymen occurs due to penetration. But there are instances of married women and pregnant women who had their hymen intact. In *Lillu @ Rajesh and another v. State of Haryana*, (2013) 14 SCC 643, the Supreme Court held that the two-finger test violates the victim's fundamental right to privacy, dignity and thus, the affirmative result of two-finger test does not give rise to presumption of consent. In *State of Jharkhand v. Shailendra Kumar Rai @ Pandav Rai*, 2022 SCC OnLine SC 1494, the Supreme Court held that any registered medical practitioner who conducts per-vaginum examination or two-finger test on victims of sexual assault shall be guilty of misconduct. In spite of this judgment, the medical practitioners continued to conduct two-finger test during medical examination of the rape victim and many trial courts rely on these tests.

IV. ROLE OF INDIAN JUDICIARY IN RAPE SENTENCING

The Indian Judiciary exercises its discretionary powers in imposing sentences anywhere upto the statutory maximum punishment. Unlike developed countries such as the United States of America, Indian Judges neither receives assistance from the probation officers nor reports prepared for such sentence. Since the Legislature did not provide any sentencing guidelines, the Supreme Court of India considered certain factors while imposing death penalty. In *Modi Ram v. State of Madhya Pradesh*, the Supreme Court held that the court must consider both the factors relating to offence and the offender while sentencing. The Indian Courts often consider the following factors such as circumstances in which the offence was committed, victim's conduct (during and after the incident), past sexual history, marital status, virginity status, age of accused, motive of offender, character and antecedents of the accused etc.

Consideration of Factors while sentencing

In *Bachan Singh v. State of Punjab*, AIR 1980 SC 898 and subsequently in the case of *Machhi Singh v. State of Punjab*, AIR 1983 SC 957, the Supreme Court of India laid down the doctrine of “rarest of the rare case” by which death penalty should be imposed only in exceptional circumstances and the reasons to award such sentence must be recorded. This was followed in numerous cases in order to validate the imposition of the death penalty. The Indian Judiciary had strongly expressed the need to have sentencing guidelines to the extent of imposition of death penalty. In *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75, the Supreme Court held that the courts shall determine sentence based on three factors 1) the conduct of the accused, 2) the age and mental state of the victim, 3) gravity of the criminal act. Further, the Apex Court ruled that the judges shall exhibit sensitivity while adjudicating rape cases. However, it is often observed that there exists failure to exhibit such sensitivity in sentencing the rape cases.

Previous Conduct of Victim

In *Raju v. State of Karnataka*, AIR 1994 SC 222, a lady proceeds on a bus to attend marriage ceremony of her brother. In the bus, two unknown men introduced themselves and promised her to take her the destiny place safely as they are going to the same place. The lady believed them and accompanied with them. The two men suggested her that it was already late, they could stay that night in the hotel and they could start journey in the next morning. During that night, the lady shared same room with the two men and the two accused committed rape brutally against her. The Court held that since the previous conduct of the victim was voluntary and consented to share the same room which caused the commission of crime. Hence, the court awarded 3 years of imprisonment to the accused. The punishment awarded to the accused was

lesser punishment than the punishment prescribed in the statute.

Possibility of Reformation of Accused

In *Mohammad Chaman v. State*, 2007 Cri.L.J. 725, the accused raped and murdered a one-and-half-year-old child and the trial court considered the case to be as one of the 'rarest of the rare' cases and awarded death sentence. The Delhi High Court agreed with the reasoning given by the trial court and affirmed the death sentence. The appellants approached Supreme Court of India which reduced the death sentence to life imprisonment after considering the mitigating and aggravating factors, the court held that this case cannot be considered as rarest of rare cases and believes that the accused is not a danger to the society. Hence, the Supreme court reversed the punishment awarded.

In *Polepaka Praveen @ Pawan v. The State of Telangana*, rep. by its Public Prosecutor, 2019 SCC OnLine TS 2090, the facts of the case are that the accused entered to commit theft in a house and kidnapped a nine-month-old girl baby from the house in Hanumakonda, Warangal District on June 18, 2019. Subsequently, he raped and murdered the baby girl and the police registered crime under Prevention of Children from Sexual Offences (POCSO) Act and IPC provisions. The POCSO Court-cum-Additional Sessions Judge, Warangal District conducted the trial and imposed death sentence considering the case as one of the rarest of the rare cases.

The accused aggrieved by the judgment, appealed before Telangana High Court vide Criminal Appeal and the Hon'ble Division Bench of High Court held that the present case does not fall under rarest of rare cases and the appellant/accused belongs to a schedule caste, illiterate, young, poor and never committed a grievous crime. One of the reasons is that the prosecution had failed to produce evidence to show that the appellant is beyond reformation. Therefore, the High Court reduced the death sentence to life imprisonment till his last breath as it was not a pre-planned rape and murder.

The Government of Telangana aggrieved by the High Court's decision appealed to the Supreme Court through Special Leave Petition (SLP). The Division Bench of the Supreme Court heard the matter and refused death sentence under POCSO (Amendment) Act, 2019 retrospectively as the said act is prospective in nature. The Supreme Court opined that the Court shall award the highest level of punishments in the heinous offences against women and children apart from simultaneously reforming the convict.

The Courts considered various other factors circumstances to mitigate the sentence such as offender's illness, age, socio-economic status i.e., sole bread winner of family. The Indian Courts considered various mitigating factors due to lack of proper legislative guidelines. The

Indian Courts have competent judges who awarded punishments without any bias but the observations made by judges varies due to lack of proper structured sentencing guidelines in these types of offences.

V. COMMITTEES

In India, neither the legislature has issued structured guidelines nor judiciary determined the circumstance of the case. For this purpose, the Government of India appointed various committees such as Malimath Committee, Madhav Menon Committee etc., to draft structured sentencing guidelines as similar to other countries such as the United States of America, the United Kingdom etc.

Committee on Reforms of Criminal Justice System (the Malimath Committee), 2003

In 2003, the Ministry of Home Affairs formed the Malimath Committee which issued a report stating that there is a need to emphasis on the structured sentencing guidelines to maintain consistency in the punishments awarded. However, this committee remains silent regarding the nature of sentencing guidelines to be framed and the statutory body shall frame the guidelines.

Committee on Draft National Policy on Criminal Justice (the Madhava Menon Committee), 2008

In 2008, Madhav Menon Committee reasserted the need for structured sentencing guidelines and provided the following recommendations.

A national policy on sentencing shall seek to address the following issues:

- i. The need for the criminal law to offer more alternatives in the matter of punishments instead of limiting the option merely to fines and imprisonment.
- ii. In respect of the quantum of punishments, the need for constant review to ensure that it meets the ends of justice and disparity is reduced in similar situations.
- iii. A policy to avoid short-term imprisonments and to prevent overcrowding of jails and other custodial institutions, to be rigorously pursued at all levels.
- iv. The need for specific sentencing guidelines to be evolved in respect of each punishment.
- v. Also, there is a need for institutional machinery involving correctional experts for fixing proper punishment.

VI. CONCLUSION

The Malimath Committee and Madhav Menon committee suggested that there is an urgent need for enacting structured sentencing guidelines. The committee also specifies that the statute

prescribes only maximum punishment for the offences which empowers Judges to exercise wide discretionary powers. In India, there are no statutory guidelines to regulate discretion. Therefore, the committee is in favour of a permanent statutory committee for enacting sentencing guidelines. In *State of Punjab v. Prem Sagar*, the Supreme Court of India observed the absence of guidelines on sentencing in India. It also puts the onus on the judiciary for not coming up with guidelines for the same. It observed that while there were punishments laid down from minimum to maximum for the offences, the courts employed different methods in arriving at the final decision and hence there was a lack of uniform guidelines and principles.

In *Narender Singh v. State of Punjab*, (2014) 6 SCC 466, the Supreme Court has emphasized the need of sentencing guidelines stating that there are provisions in other countries which guides judges for awarding specific sentence. However, India does not have such sentencing policy till date. The Supreme Court of India also stated that the prevalence of such guidelines may not only aim at achieving consistency in awarding sentences in same or similar cases but such guidelines shall also prescribe the sentencing policy.

Suggestions for framing sentencing guidelines

Some of the suggestions for framing sentencing guidelines by the legislature as follows:

1. There must constitute a panel consisting of retired Judges for framing up of Sentencing reform committee.
2. The committee must update recommendations from time-to-time basis.
3. The committee must ensure that the legislature or judiciary is framing stringent statutes.
4. The Sentencing committee shall make all endeavors to remove sentencing disparity and enable to maintain transparency.

VII. BIBLIOGRAPHY**ARTICLES**

1. Aggarwal Nomita, *Women and Law in India*, Women's Studies and Development Centre, University of Delhi (2002).
2. Andrew Ashworth, *The Sentencing Guideline System in England and Wales*, 19 *S. Afr. J. Crim. Just.* 1, 22 (2006)
3. CK Boyle & MJ Allen, *Sentencing Law and Practice*, 1985 1st ed., Sweet & Maxwell, London
4. Cyrus Tata & Neil Hutton (ed.), *Sentencing and Society – International Perspective*, 2002 1st ed., Ashgate Publishing Ltd., England
5. Flavia Agnes, *Journey to Justice – Procedure to be followed in a Rape Case*, Majlis, Bombay (1990).
6. Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 *Crime & Just.* 303 (1997)
7. K.D Gaur, *A Test Book on the Indian Penal Code*, Oxford and IBH Publishing Co. Pvt. Ltd., New Delhi (2008)
8. K.M. Sharma, *Law Relating to Rape, Sodomy, Abduction and Kidnapping*, Kamal Publishers, Delhi (1996).
9. Lalita Dhar, *Sexual Harassment at Work Place, old Beginning - New Thinking in Indian Socio-Legal Journal*, Vol. XXX, Jabalpur (January, 2006).
10. Latest view of sentencing policy with reference to the judgment of the Hon'ble Supreme Court and High Court.
11. Lina Gonsalves, *Women and Human Rights*, A.P.H. Publishing Corporation, New Delhi (2001).
12. Martin Wasik, *Emmins on sentencing*, 1998 3rd ed., Blackstone Press Ltd., London
13. Mrinal Satish, *Discretion, Discrimination and the Rule of Law Reforming Rape Sentencing in India*, New York: Cambridge University Press (2017).
14. Philip C. Stenning, *Accountability for Criminal Justice*, 1995 1st ed., University of Toronto Press, Toronto.

15. Press Trust of India, Can't Award Death Penalty Retrospectively: Supreme Court on Telangana's Plea, NDTV (June 17, 2020, 2:00 AM), <https://www.ndtv.com/india-news/supreme-court-cant-award-death-penalty-retrospectively-supreme-court-on-telanganas-plea-2247399>.
16. R.V. Kelkar, *Criminal Procedure*, 2016 6th ed., Eastern Book Company, Lucknow.
17. *Rethinking Rape law - International and Comparative Perspectives* edited by Clare McGlynn and Vanessa E. Munro
18. *Sexual Violence — The Reality Form Women*, The London Rape Crisis Centre Handbook Series, The Women's Press, London (1984).
19. Shobha Sexana, *Crimes Against Women and Protective Laws*, Deep and Deep Publications, New Delhi (1995)
