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# Rape and Indian Judiciary

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## ABSTRACT

*Rape is one of the most shameful and heinous crime against woman in the world. With the increase in number of rape cases, rape laws are getting stricter day by day. This article aims to provide the brief introduction of rape, it's punishment and the rights available to the rape victim.*

*This article consists of 5 parts i.e.- Introduction of rape, Ingredients of rape, Circumstances under which the situation is rape, Punishment for rape including punishment in other countries and Right of rape victims.*

*This article shows the new changes in the rape laws by the Indian Parliament and the Indian Judiciary.*

**Keywords:** *rape, right to life, victim, sexual assault, victim compensation.*

## I. INTRODUCTION

Rape is one of the most common crime against women in India. Rape is like a stigma which exists in the society since the beginning of human kind. Rape is a very severe crime which have the victimizing impacts on the victims. Rape is violation of RIGHT TO LIFE guaranteed under ARTICLE-21 OF THE CONSTITUTION OF INDIA.

The word 'RAPE' has been derived from Latin term 'RAPIO'- TO SEIZE. Thus, rape means there is a presence of forcible seizure.

{While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female – JUSTICE A PASAYAT.}<sup>2</sup>

IN STATE OF PUNJAB VERSUS RAMDEV SINGH, it was held by the honourable supreme court that the offence of rape is an infringement of fundamental right to live under the constitution of India. It is evident that rape is a very severe crime against women.

In INDIAN CRIMINOLOGY, rape has been defined under section- 375 INDIAN PENAL CODE. i.e.-

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<sup>2</sup> <https://blog.slsh.edu.in/2021/04/16/does-sexual-intercourse-on-the-pretext-of-a-false-promise-to-marry-amount-to-rape/>

## II. INGREDIENTS

In short, the offence of rape as defined under section 375 INDIAN PENAL CODE, is a sexual intercourse by a person with a woman against her will and without her consent under any of the circumstances mentioned below:

- There must be a sexual intercourse by a man with a woman.
- The sexual intercourse should be under any of the following situations mentioned under any of the clauses of section-375.

## III. CIRCUMSTANCES UNDER SECTION 375

### (A) Against Her Will

The word 'Will' here refers to the power of the mind by which we determine either to do something or not. The words 'against her will' indicates that the act is done in spite of the resistance of the woman to the doing of it when she was in her complete senses. (conscious). In *State Of Uttar Pradesh Vs. Chotteylal (2011) 2 Scc 550* – the honourable apex court held that expression 'against her will' would mean the intercourse done by man with woman despite her opposition.

### (B) Without Her Consent

Explanation 2 under section 375 talks about the meaning of consent. Consent means an intelligent, positive concurrence of the will of the woman. When there is a objection or opposition by a woman, there is no consent. Consent obtained by fear, fraud, mistake or under misconception of fact is void and won't be considered as a lawful consent under law. In *Queen Vs. Flattery*- The girl visited the accused's clinic for treatment and gave consent for the surgical operation. The accused on the pretext of performing sexual operation had sexual intercourse with the girl. It was held that girl's consent would not free him from him from his act as the consent was given under the mistake of fact. The onus of burden of proof in these types of offences lies upon the prosecution. The defence council has no necessity to prove the consent of woman during the intercourse.

### (C) Consent Procured By Putting The Woman Under Fear Of Death Or Hurt Is No Consent In Law:

Clause (3) of section-375 lays down a rule that consent obtained by putting the woman under fear of death or hurt is not a valid consent under law. The consent of the woman must be freely and voluntarily. In *State Of Maharashtra Vs. Prakash Air 1992 SC 1275* – In this case, a police constable along with a business man has sexual intercourse with a woman by beating

her husband and threatened her to put him in a police remand. The hon'ble Supreme Court in this case held that this case will be liable under section 375(3) as an offence of rape as a threat to use of force is a sufficient element to constitute rape. One of the most criticized judgement in this regard is *Tukaram Vs. State Of Maharashtra Air 1979 Sc 185 (Also Known As Mathura Rape Case)* - Mathura was an 18-year-old harijan girl who was called at police report on abduction report. When she was about to leave the police station, she was kept back at the station by one of the constables, Ganpat who was on duty. After that she was raped in a toilet. Another constable also tried to rape her but he was so intoxicated and did not succeed in his attempt. Both the accused constables were found not guilty because of the following reasons:

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- There was no sign of injury on her body which shows that the intercourse was a peaceful affair and there was no resistance from the girl's side.
- There was no element of fear present.
- The girl didn't object when the constable asked him to stay, she allowed Ganpat to satisfy his lust with her,

This judgement by apex court was criticized because it violated human rights and protects woman under the law and the constitution of the country.

**(D) Consent Accorded Under A Conception That The Person Is The Husband Of The Woman Is Not A Valid Consent: -**

This is a case of deception in which a person pretends as a husband of the woman only for the sole purpose of sexual intercourse. In *Bhupinder Singh Vs. Union Territory Of Chandigarh (2008) 3 Crlj 3546 (Sc)* – The complainant and the accused were married then, she become pregnant. One day she met her husband's two friends accidentally who told her that husband was already married before and had children. She lodged a rape complaint. The accused was held guilty of rape because the consent of the woman was on the belief that the person is her husband.

**(E) Consent Procured By A Woman Of Unsound Mind Or Under The Influence Of Intoxication**

This clause was added by the Criminal law (Amendment) Act of 1983. This clause was added to protect the woman whose consent was taken under intoxication. In such cases, it was shown that the consent of woman is not a legal consent as it is not free and voluntarily.

**(F) Consent Of A Girl Under 18 Years Of Age Is Not A Valid Consent In Law**

The Criminal (Amendment) act of 2013 raised the age from 16 to 18. In this clause, it was held that sexual intercourse with or without consent with a woman under 18 years of age will be considered rape. It is because a woman under 18 years of age is considered not fully capable of giving her consent for sexual intercourse. In *Harpal Singh's Case Air 1981 SC 361* – the Honourable Supreme Court held that even if the girl under the age of 18 is herself willing to have sexual intercourse, then also, the accused would be liable under this clause.

#### **IV. PUNISHMENT FOR RAPE**

SECTION 376 INDIAN PENAL CODE TALKS ABOUT THE PUNISHMENT FOR RAPE.

- In INDIA, With the introduction of ANTI RAPE BILL OF APRIL 2013, rapists are now liable to life imprisonment and even the death sentence.
- FRANCE – The rapists are punished for 15 years of imprisonment which can extend to 30 or life imprisonment depending on the case.
- CHINA – Under the Chinese law, death sentence is the punishment for rape. In some cases, castration is also used.
- SAUDI ARABIA – In Saudi Arabia, beheading in public after sedating the rapist is the punishment for rape.
- AFGANISTHAN – Depending on the judgement, rape victim in Afghanistan is either shot in head within 14 days or hanged to death.

#### **V. RIGHTS OF RAPE VICTIM**

- Right To Zero Fir.
- Free Medical Treatment In Any Hospital (Whether Public Or Private)
- No Two-Finger Test During Medical Examination
- Harassment Free And Time Bound Police Investigation
- Trial With Full Dignity, Speed And Protection
- Right To Seek Compensation

##### **(A) Right to File Zero Fir**

Zero FIR means that the victim can file an FIR at any police station whether the police station is under the jurisdictional limitations of the incident or not. Later then, FIR will be transferred to the police station under the jurisdictional limitations.

**Justice Verma's Committee** introduced the concept of zero FIR after the Nirbhaya rape case. Also, the MINISTRY OF HOME AFFAIRS ISSUED AN ADVISORY DATED 10-05-2-13 ON ZERO FIR.

The concept of ZERO FIR is introduced due to various reasons: -

- To avoid any kind of delay
- To collect evidence timely
- To procure important information from the eye-witnesses
- To ensure the case to proceed fast
- To maintain law and order

[“JUSTICE DELAYED IS JUSTICE DENIED” – which means if the person doesn’t seek legal assistance timely then there is no ray to justice and thus amounting to a loss of the essence of the case.]<sup>3</sup>

### **Case Law**

In *Kirti Vashisht Vs. State And Ors. (Date Of Order – 29-11-2017)* – it was held that even if the incident took place out of the jurisdictional limit of the police station, then also police will be obliged to take the information on the offence and register this as a ZERO FIR. The said FIR would be registered without any delay.

If the police officer refuses to register a case under ZERO FIR, then he would be eligible for imprisonment under section 166A. The imprisonment can vary from 6 months to 2 years depending on the case.

### **(B) Right To Free Medical Treatment In Any Hospital (Whether Public Or Private)**

Under 327-C provision of law, any hospital whether public or private cannot refuse to provide the first-aid or medical treatment to the rape victim, free of cost. However, if any such hospital refuses to do such, then such hospital will be liable under section-166-B INDIAN PENAL CODE and subject to imprisonment up to one year or fine or both.

### **(C) Right To No Two-Finger Test**

Two finger test or PV (PER VAGINAL) was a test used during the medical examination of the rape victims to figure out the laxity of muscles down there (vaginal muscles). In this test, two fingers are put inside the woman’s vagina which will be in direct proportion to the sexual experience of the rape victims. If the fingers slide inside her easily, then she is presumed to be sexually active whereas if the fingers fail to penetrate her then it is alleged that the rape case is a false claim because she has an intact hymen which would be a proof of her being a virgin.

This right is understood with reference to section 164-a the code of criminal procedure

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<sup>3</sup> <https://blog.ipleaders.in/zero-fir-meaning-significance/>

This was added by 2005 amendment. On 25 July 2017, THE MINISTRY OF HEALTH AFFAIRS issued guidelines and drafted new rules for forensic medical examination of the rape victims. The two-finger test was taken down as medical practice after this guideline.

### **Case Law**

**Lillu Alias Rajesh and another Versus State of Haryana Citation- 2013(14) SCC 643** – In Para-13 of this case, Supreme Court held that two-finger test violates the right of privacy of rape survivors. It also affects the mental integrity and dignity of the victim. The bench also asked the government to provide the better forensic technique to support victim's claim of sexual assault.

### **(D) Right To Harrassment Free Investigation**

Earlier, when FIR was registered rape victims were being harassed by the police in the police station. But now, according to the new provisions i.e.- section 157 CRPC a woman police will come to the place convenient to the victim to take a statement in the presence of any guardian whoever the victim likes to.

The statement recorded will be recorded under section 154. The statements of rape victims are to be recorded in the camera. This provision protects the victim right to privacy.

### **(E) Right To Trail With Dignity, Speed And Full Protection: Provisions Of Law Under This:**

According to section 26-A CRPC. The trail will be conducted by lady judge as far as practicable. Questions related to sexual act or sex history is irrelevant and such questions would be invalid in law.

As per 327(2), all the proceedings related to offence of rape would be in camera and if anyone wants to exercise any proceeding, then he has to take the prior permission from the magistrate.

As per section 327(3) The court proceedings in the rape trail will not be published keeping in the mind the privacy of the victim.

Every investigation under this Chapter shall be completed without unnecessary delay.

### **Supreme Court's Ruling On Protection Of Rape Victim- Mahendra Chawla Vs. Union Of India (05-12-2018)**

In this case, it was held that if victim does not want to disclose the real name, then she can submit the application to not to disclose the original identity and to give her a new identity. Also, if there is a threat to the victim, then the police will install security device and if the threat

continues, then the victim's family will be relocated.

#### **(F) Right To Seek Compensation**

##### Section- 357 A VICTIM COMPENSATION SCHEME

This provision was added by ***Supreme Court's Guidelines Issued In Nipun Saxena Vs. Union Of India.*** – The national legal service authority then issued rules for victim compensation scheme for woman victim. This scheme was introduced on 11-05-2018 in the Supreme Court and ordered all States and Union Territories to apply.

It was also held that it is not compulsory that the compensation will be awarded once the case gets over. This rule was held by the Calcutta High Court's Judgement – ***Serina Mondal Alias Diyada Vs. The State Of West Bengal And Ors. 2018 SCC Online Cal 4238.***

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