

CAN RAPE EVER BE JUSTIFIED?

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ABSTRACT

Rape is considered to be *Malum in Se*. In the current scenario of India, the foundation of rape and assault has prospered gigantically lately and is contemplated as a national concern. Rape and Assault are subjected as of the significant vicious violations which are conferred against women throughout the globe. Today, India's need is monetary changes; we may have brought new financial approaches, new monetary methodologies yet we neglect to get the essential change in the flexibility of women. The dignity of women is always put into question by men and rape is contemplated as one of the suitable examples for infringement of dignity of women by men.

The present article discusses the meaning of rape, its bifurcation along with the recent amendments and judicial pronouncements in India.

INTRODUCTION

Rape in its most natural term can be defined as ‘the ravishment of woman’ without her consent, by force, fear or fraud, or as “the carnal knowledge of a woman by force against her will.”¹

A crime that has a catastrophic effect on the victim; it has been depicted as a beginning of a nightmare. It is a crime so violent and heinous, which is regarded as a dangerous, life-threatening act to the woman’s life in which humiliation and fear are her dominant emotions. It is a crime so harsh which not only hinders the women mentally or physically but also leaves a devastating impact on her family, society, and country as a whole. In a common understanding, rape is observed as an unlawful sexual involvement which is carried out forcibly or under threat against a person’s will. In recent years, there has been a hard hike in the proportion of rape. It is ending up such a typical thing in our daily papers that we are well-suited not to give careful consideration.

RECENT STATISTICS OF RAPE IN INDIA

According to the latest data available in the year 2016, 106 rapes per day were recorded on an average in India, in furtherance to which four out of every ten victims were minors. The report of The National crime records bureau (NCRB)’s “Crime in India 2016” states that the offenders in 94.6 percent cases were none other than the relatives of the victim including her father, brothers, grandfathers, sons or acquaintances. The report also highlighted that a total number of 38,947 rape cases were registered in the nation under Protection of Children from Sexual Offences Act (POSCO) along with Section 376 and supplementary relevant sections of the Indian Penal Code. Amid these 38,947 cases, in 36,859 situations, accused are associated to the victims, it said.²

According to Delhi Police Data, more than five rape cases were reported every day last year in the national capital, and in most cases, the accused was known to the victim.³

¹ KVS Sharma, KSN MURTHY’S, Criminal Law (Indian Penal Code) 727, (Lexis Nexis, First Edition, 2017)

² Source: <https://www.thequint.com/news/india/india-rape-data-106-rapes-per-day-4-in-10-victims-minors>

³ Source: https://www.business-standard.com/article/pti-stories/over-five-rapes-cases-reported-every-day-in-2017-118011101337_1.html

The recent statistics show that there has been a rise of about 82% in child rape cases from 10,854 in 2015 to 19,765 in 2016.⁴

Furthermore, Rape can be classified into:

- Marital Rape
- Custodial Rape
- Child Rape

MARITAL RAPE: OVERVIEW IN INDIA

Marital rape refers to an act of unwanted sexual intercourse by a man with his wife obtained by threat, force, physical violence, or when she is not able to give her consent. It is a non-consensual demonstration of brutal depravity by a spouse against the wife where she is physically and sexually manhandled. Marriage does not empower a spouse to have forcible sexual intercourse with another spouse without spouse consenting to it. The forceful sexual intercourse takes away her fundamental right guaranteed under Article 21 of the Constitution of India. Marital rape is unquestionably a sexual, domestic and mental abuse on the partner in the marriage as the spouse committing marital rape is disrespecting and disregarding the other spouse's feelings attached to the dynamic act being happened to them. In a marriage, there should be universal regard, space, and friendship among the couple and not the suffocation which is appended with coercively giving outright physical rights to the only companion in the marriage.

Marital Rape can be classified into three forms:

Battering rape: Battering rape refers to an act when both physical and sexual violence occurs together. The victim may encounter the physical and sexual abuse in the meantime, or one may

⁴ Source: <https://www.indiatoday.in/india/video/in-the-heart-of-darkness-child-rape-statistics-in-india-1231838-2018-05-11>

happen after another. The rape may happen after the real viciousness as an endeavor to make up.

Force only rape: Force only rape means when husband use only the amount of force or power necessary to coerce their wives. It takes place in the absence of physical violence by the husband on his wife.

Obsessive/ Sadistic Rape: obsessive or sadistic rape is a kind of rape that includes torture or unreasonable sexual acts. This kind of marital rape tends to be exceptionally brutal and result in physical injuries.

SHREDS OF EVIDENCE OF MARITAL RAPE

The marriages in our society at large are more often seen to carry the burden of high moral expectations rather than addressing the hidden realities of married life. For addressing the issue of hidden realities behind the closed doors, we would have to ask the question to ourselves that how actually will one prove that his/her spouse is raping he/she. To get justice in marital rape cases in the Court, it is essential to prove before the court that the sexual intercourse was forced on the spouse or the sexual intercourse was obtained by threat, force or physical violence.

Under section 102 of Indian Evidence Act, 1872, the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side. Therefore the burden of proof lies on the victim who alleges that he/she is a victim of marital rape. Proving a marital rape is very difficult, as it brings out the dark reality of married life.

To prove the barbarity of sexual intercourse or forced sex by one's spouse, there are few pieces of evidence one can rely on-

- Physical injuries around the vagina and anal areas, lacerations, bruising.
- Brutal conduct in sexual intercourse, e.g. mental torture, battery, etc.
- Nail marks, scratches, or any physical injuries in the body.

- The damages in women's genital and rectum lead to the sound and evocative proof that women are subjected to very violent and harsh rapes.

CUSTODIAL RAPE

Custodial rape is a rape executed by a man appointed by the state in a supervisory or custodial position, for example, a police officer, public servant or jail or hospital employee. It incorporates the rape of youngsters in institutional care, for example, orphanages.

Custodial rape is a type of rape which happens while the victim is in "custody" and constrained from leaving, and the rapist is in power that is keeping the victim in custody. When it occurs in jail, it is known as prison rape. While a few meanings of custodial rape characterize it as occurring in a state-owned organization and executed by a state agent, the term all the more, by and large, alludes to any circumstance where the power of a state agency is utilized to empower rape; in this way, when prisoner-on-prisoner rape occurs because of disregard by the prison authorities, it might be viewed as custodial rape.

Legal provisions for custodial rape are obscure and scarcely executed in India. Sexual offenses committed by police hardly comes to light as the victims are afraid to speak out and do not have the critical avenues to request legal advice and fight for justice against police when the only access to justice they have is the police.

CHILD RAPE

Child abuse is a condition of passionate, physical, financial and sexual ill-treatment to a person beneath the age of eighteen and is an all-inclusive predominant phenomenon. Child abuse is a worldwide concern and has been an issue despite the fact that many initiatives have been taken by the government to avoid and curb it. According to WHO: "Child abuse or maltreatment constitutes all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of

responsibility, trust or power."⁵ Statistics demonstrate that child abuse and child rape cases continue expanding for the previous years. Children encounter brutality in all space most commonplace to them, for example, in school, homes, and society they live in. They additionally endure abuse and ill-treatment in orphanages, instead of confinement and on roads. The willful abuse of children has been perceived universally as an issue of substantial sociological impact with lawful significant and medical concern.

India having a population of approximately 1.2 billion people constitutes as world's second populous country. Out of the total population, 39% are children.⁶ This is a tremendous number of children that the nation has to take care of. Child rape and child abuse majorly takes place due to the inefficiency of the victim to react and respond to a situation as he/she barely knows what is happening with her. In the age where the child should learn to grow, play and indulge in activities that would make it a better and confident individual, they're sexually abused which spoils and shatters the whole childhood of the person.

RAPE AND THE LAW

The offence of rape and assault is considered to be heinous and brutal, so there was a need to criminalize the offence to safeguard the dignity and integrity of women in our society. For this, the provision of rape was inserted in the Indian Penal Code, 1860 under Section 375 along with its punishment prescribed under Section 376 of the Code. The act states that:⁷

A man is said to commit "rape" if he—

- a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her do so with him or any other person; or

⁵ World Health Organization (1999): Report of the Consultation on Child Abuse Prevention; Geneva, http://www.who.int/violence_injury_prevention/violence/neglect/en/

⁶ Census 2011

⁷ Indian Penal Code, 1860, Section 375

Source: <http://ncw.nic.in/acts/theindianpenalcode1860.pdf>

b. Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her do so with him or any other person, or

c. Manipulates any part of the body of a woman to cause penetration into the vagina, urethra, anus or any ~ of the body of such woman or makes her do so with him or any other person; or

d. Applies his mouth to the vagina, anus, urethra of a woman or makes her do so with him or any other person, under the circumstances falling under any of the following seven descriptions:— First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, because of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Provided that a woman who does not physically resist the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception I.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape.⁸

⁸ *Ibid*

LANDMARK CASES AND JUDICIAL PRONOUNCEMENTS

1. Mathura Rape Case

The outrageous instance of *Tukaram and Another v. Territory of Maharashtra*,⁹ generally known as the Mathura Rape Case, prompted to radical changes in the area of rape laws governing in India. This case saw the issue of custodial rape of a young orphan girl named Mathura who started working as a laborer at Nushi's house. Over the span of work, she created sexual relations with Ashok, the son of Nushi's sister and later on got married. Based on a report filed by her brother that expressed Mathura had been kidnapped, the statements of all the concerned parties were recorded, after which Ganpat asked Mathura to stay inside the police headquarters. After closing the doors and turning off the lights inside, he took her up to the washroom and assaulted her regardless of her resistance.

After he was done, Tukaram came and attempted to rape her as well but failed, as he was intensely intoxicated. Mathura, later on, portrayed the entire episode and was then medically analyzed. The reports stated Mathura's age to be between 14-16 years, and her hymen uncovered old breaks however there was no damage on her body.

This case was contemplated to be massive, both from a social and lawful point of view. It started the public protest for the first time about rape in India and impelled the change of rape laws. It offered to ascend to a women's movement in India, growing a large group of gatherings committed to empowering women. Finally, individuals here started to see gender-based violence for what it indeed is: a ruthless demonstration of power.¹⁰ The Supreme Court held that Mathura had raised no alarm; and also that there were no visible marks of injury on her body thereby suggesting no struggle and therefore no rape.¹¹ The judge noted, "Because she was used to sex, she might have incited the cops (they were drunk on duty) to have intercourse with her."¹²

⁹ (1979) 2 SCC 143

¹⁰ Source: <http://edition.cnn.com/interactive/2013/11/world/india-rape/>

¹¹ Indira, Jaising (20 January 1999). "Slamming the doors of injustice on women". *The Indian Express*.

¹² Mala Khullar; Ihwa Yoja Taehakkyo (2005). *Writing the Women's Movement: A Reader*. Zubaan ISBN 8186706992

2. Nirbhaya Gang Rape

December 16, 2012; the cold night that shook the entire nation by the fatal and brutal gang rape of a 23-year-old girl Nirbhaya in the National Capital, has been one of the most brutal incidents that have ever taken place in the country.

Nirbhaya, a paramedical student hailing from Delhi was returning after watching a movie with her friend. The private bus in which they were offered a ride was none other than the bus in which the accused persons were already traveling. Little did those two know that the ride in the bus would uncoil into a frightful night terror and would cost Nirbhaya her life.

Over the next 30 minutes, the two were brutally beaten into submission, stripped and Nirbhaya gang raped by all six men inside the moving bus, including the driver.¹³ During all this, the bus passed through police checkpoints escaping detection because of the dark-tinted glass on the bus windows.¹⁴ Because Nirbhaya was fighting back, the rapists inserted iron rods into her private parts, ripping her intestines. They then threw the two unconscious, naked bodies out on the road.¹⁵

Due to the extreme brutality and cruelty involved in the Nirbhaya case, the fast track court adjudicated the matter to serve speedy justice to the victim. The fast track court tried the matter in hand and adjudicated all the merits of the case after which the decision by the court was finalized and upheld by the High Court.

The Nirbhaya case was not the first rape case that came into the picture, but this incident shook the Manmohan Singh government as it led to significant protests in the nation regarding the protection and safety of women. A committee named “Verma Committee” headed by Former Chief Justice of India J.S. Verma, was established to amend the laws relating to the safety and protection of women in India. The committee held that rape is not merely a crime of passion but also an expression of power. The Criminal Law (Amendment) Act, 2013 which was established by this committee post the Nirbhaya case made various criminal acts punishable

¹³ Shubhomoy Sikdar, Delhi gang rape: victim narrates the tale of horror, *The Hindu*, 23 December, 2012

¹⁴ Kishwar Desai, In india, the law seems firmly on the side of the rapist, *The Guardian*, 20 December, 2012, Source: <http://www.theguardian.com/commentisfree/2012/dec/20/india-law-rape>

¹⁵ Frank Jack Daniel, India rape accused hunted victim, aimed to kill: police, *Reuters*, 11 January, 2013, Source: <http://www.reuters.com/article/2013/01/11/us-india-rape-charge-idUSBRE90A05G20130111>

under Indian Penal Code, 1860 which were not considered as an offense before this amendment. It further enhanced the punishment of the rape, and it also amended the age of juvenile from 18 to 16 years.

The only relief that the nation witnessed regarding this case was when the Apex Court upheld the verdict of death of the four gangrape and murder convicts of Nirbhaya on July 8, 2018. The Supreme Court at the time, in its ruling upholding the death sentence, said that the “brutal, barbaric and the diabolic nature” of the crime could create a “tsunami of shock” to destroy civilized society.¹⁶

Irrespective of the fact that rape and assault have been contemplated to be evil, disgraceful and monstrous, the figure and extent of cruelty and inhumanity have not left the society till date and has been growing.

Earlier, the victims of such a crime were mostly women and girls instead of girls of a tender age. However, as days are passing, even after declaring the commission of rape as a heinous crime and amending its punishment to a greater extent post the Nirbhaya case, rape still takes place. It is the mindset of such hardcore criminals and offenders who do not even think about the victim for once before committing such an act. In the most number of rape cases that came into the picture, the majority of the victims subjected to such brutality and cruelty are women and girls above 16 years of age.

3. Kathua Rape Case

One such infamous case of Kathua, where a minor girl was raped and murdered in Jammu and Kashmir took the entire nation in deep disgrace and is soul crushing. An eight-year Bakherwal Muslim girl went missing from Rasana village of Kathua District on 10th January 2018. Her family filed the First Information Report on 12th January 2018, and her dead body was found on 17th January 2018 from the forest near Devasthan temple in Kathua District. The minor girl was gang-raped & murdered by eight men including a juvenile. The post-mortem report affirmed that she had been gang-raped & murdered by the accused men and the reason behind

¹⁶ Source: <https://timesofindia.indiatimes.com/india/supreme-court-upholds-death-sentence-for-nirbhaya-gangrape-murder-convicts/articleshow/64913627.cms>

her death was found to be “asphyxia leading to cardiopulmonary arrest.” The Supreme Court stated that there should be a fair trial in the murder and rape of the 8-year old.¹⁷

As indicated by the NCRB's statistics, Jammu and Kashmir did not report any instance of rape and assault against youngsters and children in 2015; however, the next year saw an ascent to 21 distinct cases. With the Kathua rape and murder case has prompted an outbreak of outcry across the nation, the truth of the extraordinary and dangerous character of the state for its youngsters and children has gone to the bleeding edge.

In order to curb down the intensity of such heinous crimes in our country that highlighted the unsafe and dangerous domain for a women, the Criminal (Amendment) Act, 2018 was passed that prescribed death penalty to those convicts who rape girls below 12 years of age and made law more stringent against such sexual offences happening daily in our country. The Act provided punishment with life imprisonment or death sentence for the gang rape of a girl below 12 years. It further increased the term of minimum punishment of rape to 20 years and maximum death penalty of a girl under 16 years.

AFTERMATH OF PASSING OF CRIMINAL (AMENDMENT) ACT, 2018¹⁸

Due to the increasing level of the crime relating to sexual offences in our country, there was an urgency to curb down these illegal practices. This Act gave an efficacious impact on the society as numerous cases were tried and adjudicated after the passing of this Act which gave light to the protection of women in our country and ensured in a way that all attempts will be made to reduce and discard such offenses from our society.

- A 19-year old was awarded capital punishment for raping a seven-month-old child in Alwar, Rajasthan on July 18, 2018. This was the first sentence passed in Rajasthan after the amendment of POSCO Act.

¹⁷ Source: <https://www.ndtv.com/india-news/our-real-concern-is-fair-trial-says-supreme-court-on-kathua-rape-case-1843238>

¹⁸ In the accompanying statement, the italics are completely our very own emphasis, with a specific end goal to achieve the gravity of the statement.

- The Madras High Court handed down death penalty to a 23-year-old techie, for murder and rape of a 7-year-old minor girl in July 2018.
- Karnataka Court confirmed the death penalty to a 25-year-old coolie for attempted rape and murder of a 15-year-old girl and pronounced the judgment in 22 days from the date of commission of the offence. This judgment was passed on September 2018.

CONCLUSION

Rape and Assault are among the most elevated types of wrongdoing experienced by ladies in every part of the society. In the ongoing years, there has been a problematic ascent in the proportion of rape in India. It is actual wrongdoing which is progressively picking up permeability as a noteworthy public wellbeing concern. Victims have reported that they confront social shame, disrespect and endure genuine blame if they enrol for protests. It is tough to request help since rape has made them feel powerless, embarrassed and injured. India is well on its approach to being the rape capital of the world. For women in India, fear is a consistent partner and rape is the more unusual stranger they may need to go up against at each corner, any street, any open place, at any hour. We as individuals from society need to comprehend that rape is an extremely grave human rights infringement of a person. The idea of the right to equality revered in our constitution will stay as a dead letter if women of our nation won't have any right over her own body and won't have any alternative of practicing their very own decisions.