

DEATH PENALTY FOR CHILD RAPE: EFFECT ON THE VICTIM

By *Rhea Reddy*

3rd Year BA LLB Student, NALSAR University Of Law

ABSTRACT

On July 10, 2019, the Union Cabinet in India approved amendments to an existing legislation dealing with the crime of sexual abuse against children. These amendments introduced the provision of a death penalty for aggravated sexual offences against children below the age of twelve. This is expected to deter potential offenders and discourage the rising trend of child sexual abuse in India. However, rather than focussing on the deterrent effect it may have on offenders, this paper analyses the amendment from the perspective of the child victim. The author shall ultimately attempt to answer whether the imposition of a death penalty on child sexual offenders indirectly places additional burdens on the victim in the criminal justice system. *Firstly*, the impact of the increase in sentence shall be examined. In this section, the author shall elaborate upon the amendment's impact on rates of reporting and conviction. Furthermore, the consequences of having the same punishment for both murder and child rape shall be analysed. *Secondly*, the author will explore the impact of procedural and institutional difficulties in the implementation of such a measure. *Lastly*, the author shall put forth feasible alternatives to the imposition of the death penalty. After analysing data from reports and studies, the author finds that there are additional burdens placed on the child victim due to the amendment. The rates of reporting and conviction are expected to fall as the victims and witnesses have a greater tendency to turn hostile during the trial. Internal and external pressures on the child victim will rise drastically, with the life of the child put at risk. Additionally, since a higher degree of proof ['rarest of the rare'] is required for a death sentence in India, the existing procedural inadequacies would be exacerbated. This would lead to the creation of a hostile court environment for the victim. Therefore, this paper shall show how the child victim is being harmed by the amendment that seeks to protect it.

INTRODUCTION

In January 2018, an eight-year-old girl from the nomadic Bakerwal community was abducted from Rasana village near Kathua in Jammu and Kashmir, India. A week later, the girl was found brutally raped and murdered. Seven men were accused and put on trial, with six of them being convicted in June 2019. This case, known as the Kathua rape case, caused nationwide outrage and protests in India, but it is far from being an isolated incident. Reports of sexual assault in India have been increasing to concerning numbers, with a rising number of minor children becoming victims. According to the National Crime Records Bureau, 2016, reported incidences of child rape increased by 82% to almost twenty thousand cases in 2016.ⁱ

The Union Cabinet in India has taken some measures to protect the victim and reduce the occurrence of child rape. These measures include instituting child-friendly legal procedures and increasing deterrence to such crimes. Pursuant to these goals, the Protection of Children from Sexual Offences Act, 2012 [Hereinafter, the POCSO Act] was passed into law. On 10 July 2019, the Cabinet approved an amendment to the POCSO Act.ⁱⁱ This Criminal Law (Amendment) Ordinance 2018, introduced in response to the Kathua rape case, specifically aimed to tackle the growing number of child rapes in India. Among other things, it increased the sentence to be awarded in cases of aggravated sexual assault against children below twelve years of age to that of capital punishment.

Many studies on the amendment have explored its predicted deterrent effect. However, in this paper, the focus is on the negative impact that the amendment would have on the child victim in the criminal justice system. Since the foremost aim of the Act is to ensure that the child is protected,ⁱⁱⁱ it would be relevant to examine the effect possible changes, such as harsher trial procedures and increased sentences, have on the children themselves. Consequently, the question that this paper aims to answer is whether imposing the death penalty on child sexual offenders indirectly places additional burdens on the victim in the criminal justice system.

IMPACT OF THE INCREASED SENTENCE

In this section, the author shall attempt to show how the increased sentence would adversely affect rates of reporting and conviction, and how it would result in unintended physical and psychological consequences for the child victim.

IMPACT ON RATES OF REPORTING AND CONVICTION

With the increase in sentence to that of the death penalty, the rates of reporting and conviction for child rape would fall drastically. Official data collected by the National Crime Records Bureau [Hereinafter, the NCRB] show that the offender is known to the victim in 95% of cases that have come under the POCSO Act.^{iv} Furthermore, almost 41% of the offenders have an extremely close proximity to the victim, being the child's father, brother, grandfather, another close relative, or a neighbour.^v Due to this, pressures from within the family or society of the victim may ensure that they suppress any abuse or turn hostile during the trial. This would be especially true in a close-knit societal structure such as the one in India. Empirical studies conducted by the Centre for Child and Law [Hereinafter, CCL] on the POCSO Act in 2017 confirm that the victims turned hostile in 59% of cases of child sexual abuse where family members were concerned. 97.93% of the cases where the victim turned hostile further resulted in acquittals.^{vi}

In states where the death penalty has already been instituted, such as Madhya Pradesh, the percentage of victims turning hostile increased to 86%.^{vii} This could be because the child victim or other members of the family may not want to be responsible for the death of someone close to or part of the family. It would also be harder to collect corroborative medical evidence that results in a higher percentage of convictions,^{viii} as family members who would corroborate the evidence turn hostile when put in charge of deciding whether a person close to them lives or dies. Therefore, rates of reporting and conviction would decrease as more victims and witnesses turned hostile. With the victim turning hostile, collection of medical evidence would become harder,^{ix} further leading to lower conviction rates. Therefore, rates of reporting and conviction would fall due to the implementation of a death penalty.

SAME PUNISHMENT FOR RAPE AND MURDER

Behavioural science investigations have proven that there does exist a linear connection between the law and conduct of the offender.^x Offenders who perceive the benefits of the crime to be greater than its perceived costs go through with the criminal act.^{xi} But in cases where the costs are the same for both crimes (in this case, death penalty) along with low conviction rates, and the offender has additional benefits (such as having no witness testimony), the offender will most likely tailor his behaviour to that which maximises his utilities. Therefore, it can be

reasonably presumed that with no additional consequences, the accused may murder the victims to get rid of evidence of the crime. Especially since medical evidence can be used even if the victim turns hostile,^{xii} the offender would be incentivised to kill the victim and burn the body so that no crucial evidence can be found.^{xiii}

Additionally, threats of murder during the commission of the crime may result in there being no signs of resistance, despite lack of consent. This would have an impact on the veracity of the victim's story even though the POCSO Act prohibits adverse conclusions as to consent if there was no resistance.^{xiv} This is because many judgments resulted in acquittals due to non-appreciation of the social stigma associated with being sexually assaulted, threats, as well as the tender age of the victims which make it unlikely for them to be able to visibly resist.^{xv}

Equating the two offences may also result in the fear of sexual offence as a crime equal to or worse than that of death. This would result in increased self-censorship and lead to lower rates of reporting. The external pressures to maintain silence, along with the dismissive reaction of the parents to the abuse, would further result in the child internalising the fear and mental trauma. With the added consequence of an increase in murders to silence rape victims, having the same punishment for both crimes would negatively impact the child the amendment seeks to protect.

IMPACT ON TRIAL PROCEDURES

In this section, the author shall attempt to show how the amendment would place additional institutional and procedural hardships on the child victim. According to the NCRB, only 29.6% of reported crimes result in convictions.^{xvi} It further shows that there is a pendency of 89%. Rajya Sabha MP Rajeev Chandrasekhar argued that the death penalty would result in speedier trials, reduce the expose of children to hostile court environments, and reduce this pendency in courts.^{xvii} However, pendency would only rise, and conviction would fall. With the increased sentence, the consequence of a now irreversible wrongful conviction would be that of death. Due to this, trials would become longer and more procedure-oriented. To reduce the possibilities of a wrongful conviction, additional emphasis would be placed on rigorous collection of evidence, cross-examinations, and proof beyond reasonable doubt. Consequently, trial procedures would become harsher for the child victim. Longer court proceedings are also argued to increase the vulnerability of the child victim as a witness and affect their

testimony.^{xviii} The overburdened system would then not be able to take their needs into account or deliver justice promptly.^{xix} Therefore, it is relevant to examine the effect that changes in procedure will have on the child victim.

First, the non-compliance with the child-friendly POCSO standards shall be examined. The author shall aim to examine whether the standards are being complied with, and if not, whether a death penalty for offenders would make the situation worse for victims. *Second*, the impact of the death penalty along with deadlines set for different stages in a trial will be analysed. *Lastly*, the impact of the death penalty on hasty investigations shall be examined.

NON-COMPLIANCE WITH POCSO PROCEDURE

Currently, the POCSO Act provides many child-friendly trial procedures, including the institution of special courts, child-friendly ways of recording victim testimonies, and protection of the identity of the child. However, many procedures have not been complied with in practice. Defence lawyers routinely make victims undergo harsh questioning.^{xx} Child victims are also regularly exposed to their offenders,^{xxi} which goes against Section 36(1) of POCSO act. There is no plywood partition between the victim and offender, and children are exposed to the accused and police personnel outside the courtroom. The CCL Study in Maharashtra has indicated that this confrontation with the offender was the most uncomfortable, difficult, and trauma-inducing experience of the trial procedures.^{xxii} However, with the death penalty being instituted, the kind of questioning and cross-examination that victims would be forced to go through to prove a case that meets up to the standards of 'rarest of the rare' would be more hostile and time-consuming. This would result in protracted direct exposure to the offender, thereby causing negative psychological impacts on the child victim.

Furthermore, there have been no appointments of Special Public Prosecutors specifically focussing only on sexual assaults against children. Most cases that are to be tried by special courts are instead being tried by regular sessions courts.^{xxiii} Many of the special public prosecutors appointed under Section 32 of the POCSO Act simultaneously deal with cases relating not only to sexual assault but drugs and terror-related legislations. Special Public Prosecutors have not even been designated in Special Courts exclusively trying POCSO cases in Maharashtra.^{xxiv} The Public Prosecutors handling these cases are overburdened and rarely inform the child victim beforehand about evidence or court procedures. With trials becoming

longer to prove that an offence comes under the 'rarest of the rare' category, prosecutors would be burdened with an additional workload. The lack of a dedicated public prosecutor ensures that child victims would not be treated with the care and sensitivity that the POSCO Act aims to provide for them.

However, even in an ideal system which complies to this POCSO standard, the death penalty would still make this situation worse off. Without sensitisation and adequate training on how to handle children in such cases, Public Prosecutors would not be able to effectively help children through a rigorous trial entailing capital punishment. Without Public Prosecutors guiding them, the child would then turn to family members. However, family members may be less inclined to help guide the child through the process themselves if the life of a relative or neighbour is at stake. Therefore, not having the death penalty would more likely ensure that the child has an adequate support system while going through harsh trial procedures.

THE PROBLEM WITH PROCEDURAL DEADLINES

To offset the consequence of longer trial procedures, the amendment provided that the investigation is to be completed by the police within two months of the filing of the FIR.^{xxv} FIRs were also to be filed within a certain time. However, considering the sensitive nature of the offence and the fact that the child victim might not know the nature of the crime committed against them, they may not want to or be able to reveal the abuse right away. This would cause delays in the FIR being filed. The child victim then has a bigger burden of proof to show why the FIR was filed late and why the trial was being protracted. Furthermore, only two months were given for investigation into the offence, which is not adequate for an accurate or sure conviction to take place when the penalty is death.

The ordinance further proposed a reduction in the time allocated to the police to file a charge-sheet and in allowing the court to decide appeals against sentences.^{xxvi} However, only around 20% of cases are disposed of within a year, with around a quarter of the cases taking more than 2-3 years to be disposed of.^{xxvii} Functionaries in the criminal justice system, like the police, judges, and prosecutors, did not adhere to deadlines for completion of investigations due to the high workload, overburdening of courts, and inadequate facilities. The timeline is only adhered to in cases where the victim and other witnesses turning hostile led to the acquittal of the offender. The conviction rates were also highest in cases that took more than 2 years to be

completed.^{xxviii} With the death penalty, all these procedural barriers are intensified, which would most likely result in hasty, harsh, and irreversible convictions of innocent persons if the deadline was to be met. This ensures that the real offender would still be free and that the child victim continues to be affected by their unrestrained presence.

Therefore, while there should be an emphasis on speedy trials, it should not take precedence over the need for a more sensitive and appropriate appreciation of the testimonies of the child victim and witness protection programs that are made available after an FIR has been filed. The proposition in the ordinance, therefore, shows a disregard for the victims and the root of the problem.

LAPSES IN INVESTIGATION

The death penalty was instituted for aggravated sexual assaults that occurred against children under 12 years of age. Previously, the crime of sexual assault against a child under 12 years of age used to be classified as “aggravated sexual assault” under Section 5 of the POCSO Act. However, a closer analysis of the charges revealed that the crime was aggravated in 603 out of all cases studied (45.33%), but the factors that would make a charge aggravated (such as the offence being committed by the father, by relatives, by a member of an educational institution, etc.) were not mentioned in the charge-sheet in 309 cases, which was almost a staggering 52% of the cases.^{xxix} This may be due to the personal prejudice relating to caste, class, gender, etc. of the police officers or due to their moral beliefs. Where the stakes or punishments are higher for the offender, such as a death sentence, it can reasonably be inferred that the police officers would be even more reluctant to include details that would aggravate the offence.

Furthermore, the police generally caused delays in registering complaints of survivors. This delay would amount to an obstruction of justice by allowing the offenders to temper with crucial evidence and witnesses. Especially in cases where the punishment is death and the offender is known to the victim, this delay would provide ample time for the victim to be murdered to dispose of medical evidence, convinced to withdraw charges, or turn hostile.

Therefore, there exists a need to have intensive training and awareness programmes on elements of sexual offences. This is because the act of selective filing of FIRs or framing of charges, either due to oversight, bias, or inability to appreciate the nature of the offence, would deprive the child of the rights and protections afforded to them by law. It would also prevent

the accused from being held fully accountable by the judiciary for the crimes committed. Consequently, the victim would face additional burdens by not being able to get justice through the futile system and by being exposed to a hostile environment that does not comply with the child-friendly POCSO standards.

SUGGESTIONS

Since this amendment neither serves the purpose of deterrence nor helps either the victim or the offender, other alternatives should be looked at to ensure that the child is protected from any lasting psychological or physical harm. Instead of instituting a death penalty for such crimes, changes must be made to existing laws as well as the justice system. Therefore, in this section, the author has laid out some suggestions that may help bring relief to child victims.

Firstly, better compliance with the established procedure. As seen above, exposure to hostile court procedures, defence witnesses, defence lawyers, etc. are against procedure established by the POCSO Act. Once trial procedures and medical examinations are bolstered and higher convictions ensured, only then will operational and institutional gaps be better addressed.^{xxx}

Secondly, there must be sensitization towards sexism and self-defence taught. Furthermore, there must be comprehensive sex-education in schools to bring about a greater awareness amongst children as to the offence being committed against them. Awareness must also be brought about as to how family members ought to respond in such situations, to ensure that the child is not censored. This would create an environment in which children are encouraged to disclose abuse to their family or authorities.^{xxxii}

Lastly, resources need to be allocated by the state to set up fast-track courts, to provide greater compensation to victims,^{xxxiii} and to sensitize authorities such as the police, judges, and lawyers to better be able to ensure that the victim is protected in criminal trials. Rehabilitation of victims should also be given precedence.

CONCLUSION

In this paper, the author has attempted to look at the effects of the death penalty from the perspective of the victim. It has been shown that a child is negatively impacted by the imposition of the death penalty because of family pressures in ensuring lower rates of reporting

and conviction, institutional and procedural hardships, and further non-compliance with already existing POCSO standards. Due to these reasons, this amendment would indeed indirectly place additional burdens on the child victim of a sexual offence within the criminal justice system.

If the main demographic the amendment seeks to protect, i.e. the child, is being negatively affected to a large extent, its intended purpose is nullified to a large extent. This shows that the demand for death penalty arises only to satiate the society's need for revenge, and not out of a need to protect the child.^{xxxiii} Instead, a holistic view of the situation needs to be taken, and changes made from the grass-root level to bring about changes in society, norms, and behaviours. Only then will the goal of justice for these child victims finally be achieved.

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