

RAPE SHIELD LEGISLATIONS AND THE USE OF EVIDENCE IN INDIAN COURTS

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ABSTRACT

In light of the current rape reforms and insertion of section 53-A and 114-A in the Indian Evidence Act acts as a shield to the rights of women. After, the Nirbhaya Gang Rape case there is a prominence in the shield's provided in the cases of rape. This main premise of this paper is that the use of sexual behavior evidence is in contradiction with the Rape Shield Laws of India. The Supreme Court having laid down that loose character is no basis of consent for rape, has not touched upon the necessity to prevent corroborating evidence through the sexual behavior of the victim as enshrined under the law. Moreover, the use of evidence in rape trials needs to be analyzed in cases the victim is a prostitute. The use of sexual behavior evidence in trials of a prostitute is a major loophole to these shields. Further, even in cases when they are not paid for their services it should be shielded by these laws, and not be exempted due to their sexual behavior in the society. Thus, it is important to bring about focus on the aspect that a profession cannot take away one's right to consent and it should still be a facet under the Indian rape and evidence laws. The researcher will analyze the recent Indian judgments and the current criminal laws that lay down Rape shielding laws in India. Moreover, after depicting the lacuna and also considering the international rape shield laws, bring in a more progressive solution for improving the current legal framework for the offences of rape and effectively using the shields to serve its purpose and protect all sections of the society from the heinous crime of rape.

INTRODUCTION

Rape shield laws limit the introduction of sexual history and such character evidence that can prejudice the rape trials. The rape shield laws in India have undergone various reforms to protect the women with changing trends of the society.ⁱ

Sexual history of women as a piece of evidence in the Indian rape trials has a settled law under Section 53-A of the Indian Evidence Act, 1872ⁱⁱ that states the use of the person's sexual experiences as irrelevant, on the issue of consent of the victim. Further, Section 114-Aⁱⁱⁱ, also provides a shield to the victims by the presumption of consent, which is tilted towards the victim. The Nirbhaya gang rape brought about these crucial changes that were the rape shield's through the Criminal Law Amendment Act, 2013.^{iv} Rape shield laws are implemented in a way to protect the rape victims from the gruesome trials after the ordeal they would have been through.

Rape laws are largely based on social roles and sexual mores^v. The relationship between law and social beliefs is dynamic in nature. Moreover, the courtroom shape, as well as mirror, cultural truths.^{vi} In a country like India with preconceived notions of a woman, having regular sexual intercourse and other sexual activities. It is highly important to emphasize on the need of such rape shields to protect the rape victim. The sexual experiences of women, when taken as evidence would invite moral judgments about victims, with the risk of influencing determinations as to credibility and responsibility of the rape victims. However, the mere enforcement of such a law is not enough, there is need for application of these laws, and only this can solve the larger objective of shielding rape survivors from a traumatic trial.

This paper challenges the efficacy of the reform in evidence laws that are known to be the 'absolute shield' to rape victims.^{vii} The settled law of sexual history of women not being in use is a premise that is not applicable, due to the loopholes within the evidence law in India. Chapter 2 of the paper provides the historical background of the rape laws and an account of the reforms in the current time. Chapter 3 lays down the two strands to disprove the applicability of the rape shields, are the peculiarity of rape trials and their use of sexual history as an evidence to affect the situation and reliability of the prosecutrix testimony. Moreover, the diluted notions of consent, laid down under Section 375 of the Indian Penal Code. Chapter 4 views this aspect of evidentiary laws through the lens of a prostitute. Chapter 5 concludes on how central focus on the limitations of these evidentiary rules and its application that do not

serve the object of protecting the rape victims, suggesting a change for a more efficient redressal system.

RAPE SHIELD LEGISLATION'S IN INDIA AND INDIAN EVIDENCE ACT

There was a settle practice of the character being used as evidence for rape trials, until the Nirbhaya case. After, this case there were certain amendments made in the Indian Evidence Act, 1872.

History

The evidence regarding the character of the prosecutrix was often used in rape trials especially when the question of consent was a relevant fact in the trial proceedings. In order to establish the presence of consent or to overall discredit the victim's testimony, the accused often adduced evidence about the immoral character of the prosecutrix or evidence regarding her past sexual history to show the presence of consent.^{viii}

Section 146 (3) and S 155 (4) were the two provisions under the Indian Evidence Act 1872, which were widely used to lead evidence regarding the character of a rape victims and how it affected her credibility and were relevant in rape trials. Section 146, which dealt with questions which may be put to a witness in the course of cross examination, it is permissible to ask any question which tends to "shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture".^{ix} Also, section 155 (4), prior to amendment in 2003, stated as follows: "when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character".^x

These provisions were used extensively by the accused to suggest that the act was consensual and to demonstrate that the prosecutrix was an unchaste woman with loose morals and the veracity of her statements could not be determined. In 1980 the Law Commission of India in its 84th Report recommended amendments to make evidence regarding the character and past sexual history of the prosecutrix irrelevant in rape trials. The Criminal Law Amendment Act 2003, brought in some changes in favor of the rape victims acting on these recommendations.

The commission noted that there was absolutely no justification to retain the provision at least with respect to past sexual relations with other persons and stated that even a “harlot or a prostitute is raped, her consent at the time of commission of the crime must be proved by evidence aliunde”.^{xi} The commission further recommended that evidence regarding past sexual history and character cannot be adduced in cases where consent is not in issue. It’s stated that when consent is not in issue, evidence regarding the immoral character of the victim cannot be adduced to discredit her testimony. It noted that “it is wrong to assume that a female witness is less likely to tell the truth when she has a generally immoral character”.^{xii}

Reforms

The amendment Act of 2013 is the most recent legislation towards this cause, prompted by the Delhi gang-rape case^{xiii}, famously known as the Nirbhaya case. The two of the reforms brought about as part of these rape shield legislations included mandating in camera trials and reforming the evidentiary rules to make character evidence adduced with respect to the sexual history of the victim, irrelevant in any manner.

There was an introduction of the in-camera rape trials, to maintain the privacy and protect the victims of any more mental suffering. The introduction of the evidentiary rules is of utmost importance. Section 53A was inserted, which made character evidence irrelevant on the issue of consent or the quality of consent. Also, at the same time, an amendment was brought to section 146, substituting the earlier proviso. The new proviso read, questions as to the general immoral character of the victim cannot be put to her when consent is in issue.^{xiv}

Section 114-A^{xv} also was inserted through this amendment gave the statutory presumption as to absence of consent in certain prosecutions for rape. These two sections were intended to provide absolute protection. The intent was to keep out statements like chastity, dignity, and morals of the woman. These rape shields intended to completely leave out any kind of adducing character evidence and past sexual activities of women in determining their credibility in rape trials.

EVIDENCE OF SEXUAL EXPERIENCES OF WOMEN AND RAPE SHIELD LEGISLATIONS IN INDIA

Settled provisions to bar the use of sexual behavior evidence are provided under the legislations. However, the problem lies about how such a legislation is interpreted and implemented by the courts in India. The interpretation of consent by the courts has led to the rape victims shielding legislations ineffective. Moreover, even the explicit bar of use of character evidence is seen to be abused by the indirect application of such evidence in the courts.

Notions of Consent is diluted in Rape Trials

The notion of consent of the women turns sexual intercourse into rape and is vital in determining rape trials. Section 375^{xvi} defines consent as

“Consent is an unequivocal voluntary agreement when the woman by words, gestures, or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.

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

This being the objective standard that must be read with the evidentiary rule of Section 53-A, that prevents any sexual experience to affect the consent or quality of consent. The recent case of Mahmood Farooqui v. State of NCT of Delhi^{xvii}, was a blow to these rules where the court held that in the circumstances of the victim even a feeble “no” is considered to be a “yes”. This sets a dangerous precedent, as the case did not pay heed to the reform laws and rather understood consent from an objective standpoint.^{xviii} This case is a clear example of the misuse of the rape shield’s set forth for women. This is a dangerous precedent set by the court wherein the heterosexual ties of the society are portrayed. It encourages the thought that the male can assume that a female has consented unless she resists strongly, and this defeats the whole purpose of the rape shields and various reforms brought about for women.^{xix}

Moreover, rape cases have a presumption of absence of consent under Section 114-A of the Indian Evidence Act, 1872. This statutory presumption, which is highly important in cases of rape, has a loophole that could defeat the whole purpose of providing relief to rape victims. The law commission while suggesting this amendment also considered specifically in cases of

gang rape that involved pressure and fear that silence women and this in no way amounts to consent.^{xx} However, one must focus on the poor drafting of section 114-A that does not include gang rape cases that is provided under section 376-D of the Indian Penal Code.^{xxi} Therefore, the application of this presumption cannot be extended to gang rape cases. This statutory presumption being quintessential to the rape victims and their shields, this is a loophole that could lead to misusing notions of consent in rape trials.

The notions of consent have been diluted to a larger extent as being only considered to have a strong physical resistance. The whole purpose of the law reforms to consist of a presumption to no consent of a woman is to overcome the misuse of silence and weakness of the rape victim under certain inevitable circumstances. The implementation of the laws by the court and their reasoning's an essential factor that could lead to the actual implementation of the rape shields.

The notions of society and its inevitable effect on the judges and their minds, could lead to prejudicing the interests of the rape victims. The very notion of consent, only if manipulated and not adjudged in the right way, could not lead to the effective application of Rape shields in the Indian legislation that prevent sexual experiences. There is no direct strike on sexual experiences, but the circumstances and consent when understood in the objective sense, would become a challenge to unbiased rape trials in India.

Limitation's on Barring of Character Evidence in Rape Trials

In rape trials, the character of the witness is often used by the defense. There may be two uses of this evidence. First, when consent is in question, the past sexual history of the prosecutrix may be used to suggest that she consented to sexual intercourse with the accused as she generally consents to it with other men as well. In effect, this use suggests that women habituated to sexual intercourse are likely to consent to sexual intercourse. Second, character evidence may also be used during cross-examination to suggest that a woman habituated to sexual intercourse is of immoral character and thus, will not have any moral inhibitions to lying. The second use of character evidence threatens the entire testimony of the prosecutrix^{xxii}

The direct applications of this evidence being barred by repealing Section 155(4) of the Indian Evidence Act, 1872. Further, the all-encompassing Section 53-A of the act, bars any use of character evidence in determining consent in cases of rape trials. The intent of these amendments being that there is no probative link between evidence of a woman's past sexual

history and her rape, rather this just increases the mental stress and pressure on rape victims that already suffer due to the strict society norms in India.

The problematic area is the indirect application of the character of the victim, which is brought about in the cases, during rape trials. The inferences drawn and supported by the character of the victim inevitably affect the rape trials. This is evident by reasoning of courts in judgments, a rape trial wherein the victim was an adult lady, who when was informed by the accused that her brother met with an accident, went with him. However, ended up getting raped and was later found in the jungle away from the village.^{xxiii} The court relied on the poor socio-economic background to test the veracity of the victim's statements. Moreover, stated that "Testimony of a woman having attained majority and who is habitual to sexual intercourse may require corroboration depending on facts of a particular case as there is likelihood of levelling accusation of rape on account of instinct of self-preservation".^{xxiv} These aspects will have to be kept in mind in order to appreciate evidence adduced by the prosecution in the instant case and for concluding as to the truthfulness of evidence of the prosecutrix."

This is not a one of cases where such inferences are drawn by the court in the controversial JGU rape case when the High Court had granted bail on the disturbing grounds that the woman's statement merely stemmed from a "promiscuous attitude and a voyeuristic mind".^{xxv} The court relied heavily upon evidence of sexting amongst other activities such as drinking, smoking, consuming drugs and possessing condoms to grant bail to the accused.^{xxvi} The court having given such an explanation, has led to a stir in the society on how a High court could dismiss the entire notion of consent that a woman is privy to and also by using such demeaning statements that could only increase a victim's turmoil and trauma. However, the Supreme Court did overturn the case by placing reliance on section 53-A, but there was no emphasis on the blatant disregard of the high court and the usage of its words while describing the victim.^{xxvii} Further, the Supreme Court made no comment on prevention of using sexting, as a piece of evidence. This in turn still leaves a lot of scope for the court to use and reason on evidence of this nature.

Moreover, the recent case of Farooqui^{xxviii} is a blow to section 114-A and the presumption it provides for. The reasoning of the court to provide benefit of doubt included circumstances like having previous flirtations and playful banter; this is a clear strike on the character of the victim. Also, these are also classified under the sexual experiences as per section 53-A, that

prevent any such experience affect the consent or quality of consent in rape trials. In the context of a rape trial, the relationship between law and society is first and more fundamentally embodied in the indirect usage to certain pre-conceived notions that exist.^{xxix}

Indirect references to character defeat the purpose of rape shield, and the uncontrolled humiliation and objectification of the victim have frightening implications for the rape victim as well as society. While it is degrading to the victim and deters women from reporting rape,^{xxx} such language use also clouds the understanding of rape and prevents us from getting to the root of the problem. This prevents the focus on the victims of rape, rather question their likelihood to get raped that are induced by such sexual experiences and backgrounds that these women come from.

PROSTITUTES AND THEIR RIGHTS IN RAPE TRIALS

Prostitution in India being not criminalized, but regulated mainly through the Immoral Traffic Protection Act, 1956. It prevents third parties from carrying on activities aiding prostitution in any manner. In such cases it is important to discuss the rights of prostitutes in rape trials considering the recent reforms in law.^{xxxii}

Supreme Court held a landmark ruling by recognizing the 'right to refuse', for even women who are habituated to sexual intercourse or have an immoral character.^{xxxiii} This came as a welcoming judgment for the prostitutes, who were considered immoral woman and suffered during rape trials. However due to the diluted notions of consent and peculiarity of trials still using character through the indirect application is still a challenge while considering prostitutes. Moreover, the societal notions playing an even heavier weapon on the prostitutes to attain their legal rights and remedies in cases of sexual assault and rape offences especially.

Prostitutes have sexual intercourse as a part of their profession, in return for money. This kind of voluntary sex is not under the ambit of rape. However, an important challenge one must look at is the misuse of the legal status of prostitutes while exploiting their services. Rape does not extend its ambit to the prostitutes who are conned and not paid for their services.

The notion of consent is extremely important to understand here, Section 90^{xxxiiii} specifically states that

“Consent known to be given under fear or misconception -A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”

It is necessary to highlight the consent being given under the misconception of a fact. The fact that the prostitutes are being conned and not provided with the money that was a fact due to which they had sexual intercourse, should lead to the conclusion of this being no consent and therefore covered under the ambit of rape.^{xxxiv} Moreover, the fact that such an activity is not per se illegal, also following the section 53-A of Indian Evidence Act, 1872 sexual experiences should be no means of affecting the consent or quality of consent. In the case of *Vinod Vijay Bhagubhai Patel v. State of Gujarat*^{xxxv}, for the first time it was acknowledged that though the services provided by the prostitute are voluntary, there should be some rights even for them to execute against the customers. However, the court failed to further elucidate on what rights and which situation it would pertain to and rather this remained as a mere opinion. It is discriminatory for the customers not being made liable under any law; this is in clear detriment to prostitute.

If prostitution was a legally upheld right, such discriminatory practices would not occur. However, even today, if the sexual experiences, of even indulging in such a profession is not to be considered. Moreover, there being no law that punishes prostitutes to privately indulge in these activities, and then they also should have the equal legal remedies, that are provided to anyone else in the society.

CONCLUSION

The rape trials still have such inherent discriminations and use of sexual experiences still being rampant in rape trials, is something that is burdensome and leads to a lot of stress and pressures on the rape victim, that already face a lot of challenges in the society that they live in. The societal ties and notions in India are such that affect the peculiarity of trials and prejudice the rights of victims, who should be protected and not judged due to their past experiences and conduct. The important factor to deal with is to provide a more definite understanding of “consent” under criminal law. The law commission recommendation to add the words of “free and voluntary consent”, in cases of rape should be added while defining the offence of rape. This would provide a better ground for the victims and prevent their case to be weakened on the grounds of no actual resistance. Moreover, there already being various reforms present in the legal system and the evidentiary rules that prevent harm to victim’s reputation during the trials, should be effectively used. The judges have a greater role to play in these matters, it is highly important to sensitize the judges about the great responsibility they hold and how the reasoning they held through judgments, further interests of the victims through the law. It is important for them to set progressive judgments that abide by the reforms and the intent for which such reforms were made. There is a need to change the attitude of the society, towards certain elements. Judicial activism to rightly protect the victims irrespective of them being prostitutes or unchaste woman, will lead to a change in the society. Legal reforms merely don’t lead to changes, it is the correct execution and application of these rights, to protect and further the interests of the people and society at large.

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