

Legal changes towards justice for sexual assault victims

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Abstract

The crime of rape is a major problem in India, evident from the reports in the press as well as official statistics. The accused has often gone free, because the victim did not file a complaint, or because of poor evidence gathering and well as lacunae in the law. This paper presents an overview of the laws applicable to sexual assault cases and amendments in these laws, specifically in terms of the roles and responsibilities of healthcare providers to bridge the gap in providing medical evidence to the courts.

Introduction

The crime of rape is a major problem in India. More than 20,000 rapes were reported in 2008, and it is estimated that only one in 69 cases even gets reported (1). However, the concerted efforts of the courts, the legislature, the Law Commission of India, non-governmental organisations and women's activists have led to important steps forward in the delivery of justice to victims of rape. Amendments in the law have been made in both factual and procedural details. Further, changes have been made regarding the legal obligations of medical personnel and other healthcare providers in response to a case of sexual assault. The milestones discussed in this paper are those achieved by amendments in criminal law: the Criminal Procedure Code (CrPC), the Indian Penal Code (IPC), and the Indian Evidence Act (IEA), in 1983, 2003, 2005, and 2008, along with the judgments of the Supreme Court in 2000 and the Delhi High Court in 2009.

The Criminal Law (Amendment) Act of 1983

The infamous Mathura case (2) called for significant amendments in the Criminal Procedure Code in 1983, particularly regarding what constituted custodial rape, provision for enhanced punishments for offences under section 376(2) IPC and presumption of the absence of consent in cases booked under section 376(2) IPC. This was done by bringing in an amendment in the Indian Evidence Act, section 114(A) IEA. Thus, in cases of custodial rape, rape of a pregnant woman, and gang rape, if it is proved that the accused had sexual intercourse with the woman who is alleged to have been raped, and the question is whether it was without the consent of the woman, and she states before the court that she did not consent, the court shall presume that she did not consent. This amendment tries to overcome the gender inequities which can exist at workplaces, police stations, jails and other such situations, in which the victim is overpowered and a forceful sexual act

committed. In such situations it is extremely difficult to prove that it was a nonconsensual act through the testimonies of other witnesses. By presuming the absence of consent (section 114(A) IEA) and awarding enhanced punishments in custodial rape cases (section 376(2) IPC), the legislature is trying to plug these loopholes. One more dimension to the issue of custodial rape situations is that the examining doctor should also understand that the victim's ability to put up resistance against the accuser's advances is largely dependent on gender-based power relations. There could be situations where a woman is overpowered and subject to sexual intercourse without her consent, but is left with no injuries, or few injuries, that might be seen as evidence of resistance (3).

The Supreme Court judgment in 2000

Prior to this landmark judgment in the year 2000 delivered by the Supreme Court in State of Karnataka V Manjanna (4), doctors would examine victims of rape only after they received a request from the police. For this to happen, the victim had to muster the courage to register a complaint against the accused in a police station of the correct jurisdiction. There could be inordinate delays in this, considering the social obstacles that women face in coming out in the open against the accused. Further, a woman is often ostracised just for being the victim of rape. Yet, society often blames the victim for delays in complaining about the offence, giving less importance to the heinous act of the accused and the mental and physical trauma that the woman has to overcome before registering a complaint. Only after this delayed registering of a complaint against the accused would the police investigation be initiated and a requisition forwarded to a doctor at the government hospital asking for medical examination of the victim of rape. On many occasions if the victim reported directly to the hospital, she would be denied this crucial medicolegal examination and collection of medical evidence because the police had not issued a requisition for it, addressed to the doctor. By the time the police requisition could be arranged there was substantial delay and much of the medical evidence was lost or could not be collected. This would result in acquittal of the accused in many cases, due to the lack of evidence to implicate the accused or link him to the offence. The benefit of doubt was awarded to the accused, denying justice to the already traumatised victim.

In its 2000 judgment, the Supreme Court recognised that the

rape victim's need for a medical examination constituted a "medicolegal emergency." Second, it was also the right of the victim of rape to approach medical services first before legally registering a complaint in a police station. The hospital was obliged to examine her right away; they could always subsequently initiate a police complaint on the request of the victim. As a result of this landmark judgment, the doctor or hospital is now required to examine a victim of rape if she reports to the hospital directly, and voluntarily, without a police requisition. The judgment recognises the three ways by which a hospital may receive a victim of rape: voluntary reporting by the victim; reporting on requisition by the police, and reporting on requisition by the Court. Unfortunately this information has not been disseminated to all doctors, and the majority of them still insist on a police requisition before examining a rape victim.

The Indian Evidence (Amendment) Act of 2002

Section 155(4) IEA earlier allowed the defence lawyer to discredit the victim's testimony by arguing that she was of "immoral character." This attack on her in the name of a legally allowed cross examination, questioning her past sexual acts, her personal life and other private matters, deterred many victims of rape from registering complaints. The Indian Evidence (Amendment) Act of 2002, (5) which came into force on January 1, 2003, deleted section 155(4) IEA and added a provision, section 146 IEA. According to the new provision, it is not be permissible to put questions in cross examination of the prosecutrix about her general moral character. This paved the way for an end to unwarranted attacks on the past sexual acts of the victim of rape.

However, a medical practitioner conducting an examination of a victim of rape often requires information about her past sexual acts, intercourse and sexual practices. This is to correctly interpret the physical and genital findings on the victim: the findings (injuries sustained) of a forceful sexual act in a virgin person (who has not experienced sexual intercourse) differ from those on a person who has experienced sexual intercourse in the past. Before this information is collected, the doctor must properly explain to the victim the purpose of collecting this information and how it would help her in her case to obtain justice by properly interpreting the physical and genital findings (the injuries sustained). She must also be explained the amendments of section 155(4) IEA. Otherwise the victim of rape may be hesitant to part with this crucial information, as she will believe that this information, once given in the medical records, may be used against her by the defence lawyer.

The Code of Criminal Procedure (Amendment) Act of 2005

Due to the liberal interpretation of section 53(2) CrPC by some high courts (Punjab & Haryana, Andhra Pradesh), it became a mandatory practice for a rape victim to be examined by a woman doctor only (wherever woman doctors were available). This was meant to make the victim more comfortable in the hands of a woman doctor. But the small number of woman

doctors (especially in rural hospitals), and their workload with maternity services, often resulted in delays in the medical examination of a victim of rape. Even when a doctor eventually became available, his/her busy schedule often meant that only a cursory examination was performed and the collection of evidence was inadequate or improper. As there was no explicit law dealing with these issues, there was much confusion regarding who (male or female doctor) should examine victims of rape and the extent of such examinations (documentation of injuries and evidence / collection of evidence).

The Criminal Procedure Code (Amendment) Act of 2005 (6) introduced specific sections for medical examination of victims of rape (section 164(A) CrPC), medical examination of those accused of rape (section 53 (A) CrPC) and investigation by judicial magistrates of custodial rape and deaths (section 176(1A)(a)(b)CrPC).

Section 164(A) CrPC explains the legal requirements for medical examination of a victim of rape. One of the main elements of this is that the consent of the victim is mandatory and should be part of the report. Only with the consent of the victim (and in the case of a minor by the parent or guardian) may the examination be conducted by any registered medical practitioner (only allopathic doctors registered under the Medical Council of India (MCI)) employed in a hospital run by the government or a local authority, and, in the absence of such a practitioner, by any other registered medical practitioner. Thus this explicit provision mandates that any registered medical practitioner with the consent of the victim may do the examination, solving the difficulties caused by the requirement that only government doctors should do this examination. It also provides that when no woman doctor is available, there is no bar against a male doctor carrying out the examination, if the victim consents. Though getting the examination done by a woman doctor is ideal, the law does not mandate it, keeping in mind that a medical examination should not be postponed because of an extreme situation such as the want of a lady doctor. The same section mandates that a medical examination must be carried out within 24 hours of the police receiving information, thus recognising this as a medicolegal emergency and putting a timeframe for the investigating officer. The medical examination should be carried out without any delay and a "reasoned" report be prepared, recording the consent of the victim, her name and address, the person by whom she was brought, her age, a description of the materials collected from the victim for DNA profiling, marks of injury if any, her general mental condition other material particulars in reasonable detail, and the exact time of commencement and completion of the examination. The law mandates that the report should state precisely the reasons for each conclusion made. Also, it should be forwarded without delay to the investigating officer who, in turn, shall forward it to the magistrate concerned.

Section 164A (7) CrPC explicitly states that nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or any person competent to give such consent on her behalf. This makes it clear that

consent is essential and nobody can force a victim to undergo a medical examination without her consent, not even the Court. If we read the same section closely, we find that it also recognises her right to consent for partial examination. That means she may also decide on whether she wants to undergo a physical examination and / or genital examination and allow the collection of bodily evidence. She may also separately decide on whether to file a police complaint and initiate criminal proceedings against the accused. So in those cases in which a victim of rape voluntarily reports to the hospital, she has a final say in whether she wants the hospital to initiate a police complaint by recording her case as a medicolegal case and sending an intimation of this fact to the police. However, many hospitals argue that they are dutybound to notify the police of all medicolegal cases, even though there is no legal provision explicitly stating which cases must be recorded as medicolegal cases. Even section 39 CrPC (allowing the public to give information in certain offences) does not enumerate section 375 IPC or 376 IPC. Doctors and hospitals argue that they prefer to inform the police right away as they do not want to get into legal problems later on for treating these cases without informing the police. These doctors argue that the victim of rape is always free to explain to the police that she does not want to initiate criminal proceedings. Though this may look like a solution that meets both the hospital's duty and the victim's rights, in reality the police have often booked cases and started a criminal investigation on the hospital's medicolegal case intimation alone. In such cases, the victim of rape has had to undergo an unnecessary ordeal for which she has not consented at all, for an act initiated by the hospital, apparently in its own defence. The law must be clear on this issue, because there is confusion in those cases where the victim consents to have medical evidence collected from her body but does not want to initiate criminal proceedings for the time being, as she requires time to make up her mind on this. In such cases the period for which hospitals must safeguard the collected evidence must be made clear, and we must also confirm that our hospitals are equipped for such work.

Section 53(A) CrPC sets down the requirements of medical examination of a person accused of rape. Prior to this amendment there was no explicit law defining the details of medical examination. There were no guidelines on whether age estimation had to be done, whether a potency examination was sufficient, whether evidence of injuries, stains, trace evidence or DNA evidence was required to be collected, etc. So there was confusion on whether to take samples of blood, hair, stains, nail clippings, etc. The explanation to this section now clearly states what must be included in this medical examination. A detailed medical examination is to be carried out by a registered medical practitioner (only allopathic doctors registered under the MCI) employed in a hospital run by government or local authority – and in the absence of such a practitioner within the radius of 16 km from the place where the offence has been committed, by any registered medical practitioner acting on the request of a police officer not below the rank of a sub inspector. By this it is clear that the law recognises the need for

an immediate medical examination of the person accused of rape. The medical examination should be carried out without any delay and a "reasoned" report be prepared recording the name and address of the accused, the person by whom he was brought, the age of the accused, marks of injury if any, a description of materials collected from the accused for DNA profiling, other material particulars in reasonable detail, and the exact time of commencement and completion of examination. The law mandates that the report should state the reasons for each conclusion arrived and this report should be forwarded without any delay to the investigating officer who in turn shall forward it to the magistrate concerned.

Amendments are also made to section 176 CrPC regarding an inquiry by a magistrate into the cause of death, by adding section (1A) by which if "(a) any person dies or disappears, or (b) rape is alleged to have been committed on any woman, while such person or woman is in the custody of police or in any other custody authorized by the Magistrate or the Court under this Code, in addition to the inquiry or investigation held by the police, an inquiry shall be held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offence has been committed." This amendment now mandates that a judicial magistrate must investigate all cases of custodial rape and deaths in custody.

The Code of Criminal Procedure (Amendment) Act of 2008

Many victims of rape do not want to register a police complaint due to the cumbersome procedures that it involves, and the unsupportive atmosphere at police stations. Further, they must narrate their ordeal to male police officers. Even if a woman musters up the courage to initiate criminal proceedings, there are inordinate delays in the trial of the case, with needless adjournments. She is always psychologically harassed in open courts, undergoes long trials and is forced to repeatedly describe her traumatic experiences in front of people who view her testimony with suspicion. It has also been found that in most cases the accused gets acquitted for lack of evidence. The courts have also failed to provide immediate and long term relief to the victim, let alone punishment to the accused. All these issues were looked at when the CrPC was amended in 2008 (7). These amendments came into effect in 2009.

A provision has been added to section 157 CrPC dealing with the procedure of investigation in relation to the offence of rape. The recording of the statement of the victim shall be conducted at the residence of the victim or in the place of her choice and, as far as practicable, by a woman police officer in the presence of her parents or guardians or near relatives or social worker of the locality.

The amendment to section 173 CrPC (7) now mandates that investigation in relation to rape of a child must be completed within three months of the date on which the information was recorded by the officer in charge of the police station. Also, when the report is forwarded to a magistrate it should contain the report of the medical examination of the woman where an

investigation relates to an offence under sections 376, 376A, 376B, 376C, and 376D IPC.

The amendment to section 309 CrPC has the additional proviso that when the inquiry or trial relates to an offence under sections 376 to 376D IPC, the inquiry or trial shall, as far as possible, be completed within a period of two months (7) from the date of commencement of the examination of witnesses.

Though the CrPC amendment of 1983 to section 327CrPC itself mandated *in camera* inquiry and trial for rape of an offence under section 376, 376A, 376B, 376C or 376D IPC, victims of rape were still not comfortable in court proceedings. The 2008 amendment to section 327CrPC allows an *in camera* trial be conducted, as far as is practicable, by a woman judge or magistrate. It also partially lifts the ban on printing or publishing trial proceedings in relation to an offence of rape, subject to maintaining confidentiality of the names and addresses of the parties.

The amendment of the CrPC in 2008 has brought in progressive legislation by inserting a new section 357(A) CrPC, the victim compensation scheme. All state governments in consultation with the central government are to prepare a scheme for victim compensation. On recommendation by the court for compensation, the district legal service authority or state legal service authority must decide on the quantum of compensation. There is also a provision for relief after inquiry by the state or district legal service authority in those cases where no trial takes place because the offender cannot be traced or identified.

Though the procedural formalities (quantum and disbursement procedure of compensation) have yet to be worked out, this is indeed a progressive development. It has identified the need for monetary support towards the immediate and long term rehabilitation of the already shattered victim of rape.

The Delhi High court judgment in 2009

A landmark judgment by the Delhi High Court in *Delhi Commission for Women v. Delhi Police* (8) mandated certain changes in the police system, health services, child welfare committees, legal services and support services in order to give justice to victims of rape. These changes were to be completed within a time frame.

Looking at the dismal conviction rates in sexual offences, complaints about the insensitive police (investigative) system and an insensitive society, the fact that medical opinions often lack in clarity and completion, and much medical evidence is not collected at all, the Delhi High Court pronounced its judgment specifically mandating that a SAFE Kit (Sexual Assault Forensic Evidence collection kit) be used by all medical personnel for gathering and preserving physical evidence following sexual assault. It explicitly mentions the contents of the kit: detailed instructions for the examiner, forms for documentation, a tube for the blood sample, a urine sample container, paper bags for clothing collection, a large sheet of paper for the patient to undress over, cotton swabs for

biological evidence collection, sterile water, glass slides, unwaxed dental floss, a wooden stick for fingernail scrapings, envelopes or boxes for individual evidence samples, and labels. The following items could also be part of the kit – a Woods lamp, Toluidine blue dye, a drying rack for wet swabs and/or clothing, a patient gown, a cover sheet, a blanket, a pillow, needles and syringes for blood drawing, speculums, “post-it” notes used to collect trace evidence, a camera (35mm, digital, or polaroid), batteries, a medscope and/or colposcope, a microscope, surgilube, acetic acid diluted spray, medications, clean clothing and shower/hygiene items for the victim’s use after the examination. This is the first time that the court has mandated the requisite infrastructure for a proper examination and also the extent of examination, insisting on detailed documentation of history and findings. Special rooms are to be set up for rape victims to be examined in privacy at every hospital where such cases are received. All hospitals are required to cooperate with the police and preserve the samples (that are otherwise likely to putrefy) in refrigerators or cold chambers till such time that the police are able to complete their paperwork for dispatch to a forensic laboratory for tests, including DNA. This is to ensure proper and safe storage of evidence.

This judgment also mandates that all police stations have a woman police official round the clock to comfort the victim and her family while registering a complaint. There should be adequate privacy for recording the statement of the victim. All complaints of rape are referred immediately to rape crisis cells and child welfare committees, depending on the need. Dedicated helplines, speedy investigation, immediate medical examination, and training modules for all police staff are also mandated. Help from psychologists, psychiatrists and sign language experts should be sought depending on the need. The judgment also asks for payment of compensation to victims of rape as per the Supreme Court order in the *Delhi Domestic Working Women’s Forum v Union of India* (9). At present, this judgment is applicable to the State of Delhi. Such progressive judgments and laws are required at the national level to streamline the process of getting justice for all victims of rape.

Expectations

When a sexual assault victim or an accused is brought to a doctor or hospital, only evidence is collected. It is not realised by the majority of doctors and hospitals (unless there are obvious and large visible injuries) that the treatment of hidden (not obviously visible) injuries, prophylaxis for and treatment of sexually transmitted diseases, advice on pregnancy and contraception, and psychological assessment and counselling are part of their medical role apart from evidence collection. Perhaps we require an explicit law in this regard.

Even though the 172nd report of the Law Commission (10) in 2000 has recommended widening the scope of section 375 IPC by including anal sex, oral sex and digital sexual assault (fingering) as offences, the insertion of a new section 376(E) IPC

on unlawful sexual contact and even the deletion of 377 IPC; nothing has been done by the legislature in the last decade. The Delhi High Court's observation decriminalising male homosexuality created a stormy debate, only to end with the Supreme Court referring the case back to the legislature to make the necessary amendments. Many of the accused in sexual assault cases do not get convicted as anal sex, oral sex and digital sexual assault do not figure in section 375 IPC. The argument that these cases can still be booked under section 377 IPC or section 354 IPC has no meaning. When it is difficult to prove the offence of section 375 IPC in the courts (given constraints such as the lack of evidence) it is obviously more difficult to prove the offences of section 377 IPC or section 354 IPC.

The recent amendments in the CrPC to help speed up trials in sexual assault cases may not have an impact due to the existing backlog of cases in our courts. Though the union law minister has issued a public statement about the government's commitment to establish separate courts to examine sexual assault/harassment cases (11), the time has come to ask when such separate courts will actually start functioning.

A PIL filed in the Nagpur bench of the Bombay High Court (12) has succeeded in obtaining directions (similar to those given in the Delhi High Court judgment) mandating the central and state governments to form committees to look into the formation of uniform guidelines to examine victims of sexual assault. The final judgment is awaited. Such progressive moves will gain momentum in mandating every state to accept positive changes towards providing justice to victims of sexual assault.

Conclusion

Though much needs to be done to provide justice to all victims of sexual assault, various changes, spread across three decades, have brought some hope for justice. Due to active legislative and judicial actions, major changes have been made in the approach to be taken by investigative officers and healthcare

providers, and in the process of trial or rehabilitation, in a case of sexual assault.

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