



EFFICACY OF CRIMINAL LAW AMENDMENT 2018 ON THE ANVIL OF PRACTICALITY

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The crime of Sexual Abuse within the realm of crimes against children specifically encompasses various degrees of unpardonable violence. These crimes are apart from being acts considered to be against the State are deep seated psychologically violent crimes ravishing the soul of victim. Certain crimes shock the conscience of the country and pressurize the law makers of the country to enact stricter penal provisions for dealing with such crimes. Public opinion outweighs what one would claim to be a patient legislative law making most of the times. Criminal Law Amendment 2013 was one such result of a huge country wide uproar arising as a result of the brutality with which the gang rape of a girl was committed on a moving bus in the posh area of Delhi. While the biggest takeaway perhaps from the Amendment was that there was large scale reportage of the incidents of sexual assault perpetrated on women yet there was no marked reduction in the crime rate, which makes it a point for consideration, whether there does exist a nexus between aggrandizing stricter penalties and striking at the mounting menace of the horrendous crimes against women and children?

Criminal Law Amendment 2018 was one such enactment in the nature of change to criminal law which was brought as a result of the dire need to address this range of crimes stemming from the plagued roots of the

society. In order to understand the nuances of the Amendment and its working within the framework of the norms of criminal jurisprudence it is essential to understand a criminal trial pertaining to the crime of rape. Judicial Precedents over the years has interpreted and adjudged the evidence of rape victims and has evolved with a broadly two pronged approach, characterized by judicial sensitivity while guarded by cautious prudence at the same time.

To elucidate on this, it was held in the case of *Gugan v. State (Govt. Of NCT Delhi)*¹ “that the conviction of an accused can be founded on testimony of prosecutrix alone unless there are such compelling reasons for seeking corroboration.” The Courts shall not have any difficulty in basing its conviction on the sole testimony of the victim of the sexual assault if it inspires confidence of reliability. Under sparingly given circumstances corroboration is needed to such a testimony and clearly it is not the norm. The Court can overlook minor and unimportant contradictions accruing from the testimony which is not the basis to throw out a legitimate prosecution altogether. However certain cryptic exceptions arise as regard to the judicial reliance on such a testimony that if there are circumstances of doubt and suspicion created around the testimony of the victim during the trial, the Court may form an opinion in discrediting such testimony. However given the rise of horrendous crimes being perpetrated on infants and young children, the Court doesn’t choose to go with the latter approach.

Since the Amendments aims to reduce sexual crimes against children below the age of 16 years it is important to ascertain the evidentiary value accorded to the testimony

¹ 2018 ALLMR (Cri) 92



of a child witness and the rules of evidence surrounding the child witness. A child of tender age is competent to be a witness before a court but it must have intellectually and sufficiently developed to understand what it has seen and also to tell the court about the same. Whether a child is sufficiently developed or not may be tested in examination-in-chief. The child must be capable of giving rational answers. It is left to the discretion of the court to decide the competency of the child. In criminal cases, it has been held, that, the conviction of the accused cannot be based solely on the solitary evidence of a child, due to material discrepancies. They are potentially vulnerable to be greatly influenced by fear of punishment, by hope of reward and by a desire of notoriety.² However Courts do act upon the corroborated testimony of children as a rule of prudence. Courts do accord a lot of legitimacy and relevancy to the testimony of the child witness who understands the crime and its repercussions.

As the golden rule of evidence says that relevancy is the test of admissibility in the trial, in order to make punishment for such heinous crimes as stringent as Death Penalty it is pertinent to revitalize the nuances of the criminal justice system.

In *Sohan Lal v. State of Himachal Pradesh*³ it was held that in a criminal Trial it is well settled that the evidence of the eye witness requires a careful assessment and needs to be evaluated for its credibility. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that

“no man is guilty until proved so”, utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. The Apex Court noted that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. The evidence in criminal cases needs to be evaluated on the touchstone of consistency.

Russel⁴ stated that in all cases of rape actual violence need to be proved. The case of *Rv. Hallett*⁵ at stretch dealt with the situational aspect of the crime of rape of a juvenile under the age of 16 years holding that if non-resistance on the part of a prosecutrix proceeds merely from her being overpowered by actual force, or from her not being able from want of strength to resist any longer, or from the number of persons attacking her she considered resistance dangerous and absolutely useless, the crime is complete. Even if the woman succumbed to violence the offence of rape is said to be committed if her consent is procured by instilling in her fear of death or assault. Since the Amendment of 2018 specifically mentions about children below the age of 16, it is pertinent to add a pivotal dimension that the person assaulted may be too young to comprehend the nature of the act, hence the Court can cast a doubt on the testimony of the child. Hence submission by the child to an elder and naturally stronger person under the influence of fear or of a sense of harshly enforcing authority is not tantamount to giving consent. Prior to the amendments

² Indian Evidence Act

³ 2017 Cri Lj 4088

⁴ Russel on Crime Volume 1st 12th Edition Universal Law Publishing Co.Pvt.Ltd pg no 706

⁵ (1841) 9 C&P 748



section 375 in its clause six (6) accords specific penal emphasis on sexual intercourse with a girl the wife below the age of sixteen years is rape regardless of whether the girl consented or not to the sexual intercourse. The consent of the girl below sixteen becomes immaterial. Several cases decided by the High Court and Apex Court, even without having accurate physical evidence at the trial, convictions have been upheld. It reflects the judicial approach in dealing with crimes as horrendous as child rapes. However the Amendment deals with aggravated forms of sexual assault making it unpardonable as an offence met with death penalty. After analyzing the Amendment in relation to the rules of Evidence, the procedural aspect in sync with the mandate of the Law is also crucial to be examined.

Recently the Supreme Court ordered the Central Government to set up Child exclusive courts under the POCSO Act all over India and has given the Centre 60 days time to develop infrastructure and funds in that regard.⁶ Recently in the Rajya Sabha, the Minister of Woman and Child Development announced in the House that the Court proposes a designated one thousand and twenty three fast track courts exclusively trying child sexual abuse cases in a fast track manner.⁷ The policy is to invest in the infrastructure which is child friendly as the crude legal system of the country comes across as hostile and un-conducive for a child to adduce evidence in the form of testimony and then be cross examined is nothing but a ruthless manner to establish the veracity of the testimony as well as the evidence.

⁶ <https://www.livemint.com/news/india/supreme-court-directs-centre-to-set-up-exclusive-courts-for-pocso-cases-1564048108067.html>

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India's NCRB report which was last and latest published in the year 2016, 'Crime in India 2016', states that in over 94% of such cases the perpetrators of child sexual abuse were known to the victim, including the father, grandfather, relative or neighbor. The hidden and systematic abuse of children largely goes unreported as the victims and their family members are, for incomprehensible reasons, hesitant to report against their own⁸ In Indian society and general terminology of sociology, Family as a tight knit institution adherent to values are the first and worst oppressors towards its members. Prestige determines position in the society and a society which holds values flowing from the institution of family and bonds within in such high esteem; the crime meets with inexplicable stigma and social abandonment at the same time of the victim.

While death penalty has been made as a plausible solution to confront the crimes, the ground level problems remain unaddressed. The pillars of the Amendment mainly speedy trial, timely investigation and disposal of appeals need to work in consonance. In order to unerroneously afflict death penalty there has to be full and seamless appreciation of evidence for which a huge burden lies on the prosecution.

The current state of the working of our courts and law enforcement agencies are deplorably reflected in the India Justice Report 2019⁹ which points out that India ranks at 77th position on the index of rule of law vis-a-vis Criminal Justice delivery system. The report implores on the lack of court infrastructure

⁸ <https://www.project39a.com/blog/2018/5/7/the-union-government-of-india-introduces-the-death-penalty-for-child-rape>

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and pendency in disposal of cases across the states. Furthermore, in the NCRB Data of 2016, the conviction rate in POCSO cases is at a meagre rate of 29.6% while pendency peaks at 89%.¹⁰ This clearly shows that the ground level working of legal system is not in sync with the requirement of the law.

The reflections on inculcating of the pillars of criminal justice system in the Amendment can be understood by with the case law in which “Judicial response to human rights cannot be blunted by Legal Bigotry” was the remark given by Justice Krishna Iyer in the case of Rafiq vs State of U.P¹¹. The finding manifested into conclusions that rape laws in order to be of great deterrence must have a cooperative victim, professional investigation, diligent prosecution and an expeditious trial. While the Amendment envisages a framework for timely completion of investigation and disposal of trial it cannot be said that all the considerations shall be working in full compliance¹².

The legislative intent is to deal with crimes against children with an iron hand and annihilate all possible reasons which give rise to crimes against children as horrendous as brutal rapes and grievous assaults. But the true test lies in assessing its efficacy on the anvil of the practicality of death penalty as an actual deterrent. To quote from the case of State of M.P v. Munna Chaubey¹³ the concept of punishments offers a pragmatic view as it was held that in case of rape of small children the punishment should be so severe and stern that no leniency shall be shown but in some rare cases lesser sentenced can be imposed by

a reasoned judgment. Hence the sense of reasoning in choosing punishment over death penalty cannot be evaded notwithstanding the Amendment. The point is not the quantum of punishment but its practicality in putting an end to the menace of crime. Such a judicial precedence is in sync with the reasoning behind awarding a punishment which is proportionate with the gravity and magnitude of the offence and its impact on the society as well as ensuring a stable social order by not conforming to “an eye for an eye and a tooth for a tooth”. Sexual crimes are possibly the most dehumanizing crimes that there are leaving scars on the victim. Owing to this the Courts have undertaken the approach of severe punishments rather than the reformatory approach to meet the ends of justice. There are catena of decisions which have upheld the death penalty expounding conscience of the society being shaken as justified to

The Amendment cements the negation of consent as in the previous Criminal Amendment of 2013, that is the case of a victim below the age of twelve years, as the rationale behind this is that giving consent means applying mental faculties of reasoning, intelligence, judgment and entire knowledge which is totally absent in the situation when a child below a certain age is involved. An impetus was given in the matters of child sexual abuse in the case of Shankar Kisanrao Khade v. State of Maharashtra¹⁴ wherein it was held that the non reporting of the crime by anyone who knows that a minor child below the age of 18

¹⁰ A point to ponder over in the POCSO Bill, The Hindu <https://www.thehindu.com/opinion/op-ed/a-point-to-ponder-over-in-the-pocso-bill/article28984831.ece>

¹¹ 1981 AIR 559

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<https://tripurainfo.com/pgDetailSpecialArticle.aspx?WhatId=6872>

¹³ 2005, CrLj 913 SC

¹⁴ (2013) 5 SCC 546



years was subjected to any form of sexual assault and wilfully conceals that fact from the Law enforcement agencies is guilty of the crime of protecting the offender from Legal punishment. The Criminal Law Amendment 2018 states about fast tracking the process of trying offenders accused of sexual crimes committed against children. Reporting of such crimes spins the wheels of the whole Act and the sustainability of the Act rests on this.

Section 42 of the POCSO Act¹⁵ which states that “Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree” was amended to include section 376A, 376B, 376C and section 376D shall be removed. Meaning thereby it has overridden provisions of the POCSO Act by means of more stringency. The POCSO Amendment Act 2019 lends further legislative credence to the Criminal Law Amendment Act.

There are ample of counter theories of punishment in the form of alternatives which exist. The plausibility of Death Penalty is challenged on several legal and social grounds. Recently the Chairperson, Centre for Criminology and Victimology, NLUD¹⁶

at length writes and examines the possibility of deploying restorative justice in dealing with cases of crimes under the POCSO Law. One of the pivotal points he bases his argument is that Punishment is actually an idea of state and does not resonate with the idea of justice. The entire purpose of criminal justice system is frustrated if the offender is not likely to experience remorse or a sense of guilt for the crime committed. The victims are made to endure an altogether persistent system of pain and trauma by the unjust criminal justice system. The harsh procedure of cross examination does more harm to the victim than to anyone else. It generates the fear of not reporting. This approach may appear as an offense to the sentiments of the victims and may seem as a form of disgust to the roar of people fighting against such crimes. However this theory finds its traces in some of the mitigating factors which may be relied upon by the Courts in awarding punishment. The Justice Malimath Committee Report which is a monumental work on the study of criminal justice system argues in favour of not employing Death Penalty on the grounds of certainty of punishment being more effective¹⁷. The combined reading of the report as well as the reasoning provided by the Stockholm Declaration¹⁸ which implores that it is a brutalizing process for the whole trial not having an impact on existence of crimes in huge numbers. This brings us to a critical observation made by the Apex Court in Delhi Domestic Women’s Forum v. Union of

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<https://wcd.nic.in/sites/default/files/childprotection31072012.pdf>

¹⁶ Indian Express, Justice that Heals, 15th June 2019

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https://mha.gov.in/sites/default/files/criminal_justice_system.pdf

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<https://www.amnesty.org/download/Documents/204000/act500011977en.pdf>



India¹⁹ in which court noted that “Rape is an experience which shakes the foundations of the lives of the victims. It has a lasting effect on the capacity of the victim to negotiate personal relationships and altering behaviour in many senses. The agony suffered by the prolonged and harsh legal proceedings adds to the suffering of the victim of the crime. Although the amendment adds the new substantive provisions of severe punishments and sets time limits for completion of proceedings in a trial within a period of two months from the date of filing of the charge sheet under section 309 of the Crpc and as per the mandate of section 173 investigation into the offences committed under section 376, 376A, 376AB, 37B, 376C, 376D, 376DA, 376DB or 376E IPC, shall be completed within two months from the commission of the crime.²⁰ Not only in pre-trial and during the trial elaborate provisions have been made but also under section 377 crpc which deals with the appeals by the state government against sentence on grounds of inadequacy, pertaining to cases under the above mentioned sections shall be disposed off within a period of six months from filing of the appeal. The bail provision as defined in section 438 crpc has been amended by adding an exception in the form of sub section (4) that the section of evoking the bail provision on being arrested for a non bailable offence placing some amount of reliance on the accused person’s previous criminal record cannot be availed by a person involved in the arrest of commission of offence under the above stated provisions. Similarly under section 439 crpc which gives special power to the High Court as well as the Court of Sessions in matters of bail. The Amendment states that a proviso fixing a

time limit as to the notice of the application for bail to the Public prosecutor within a period of fifteen days from the date of receipt of the notice of such application as well as the presence of the informant authorized by the accused shall be obligatory at the time of hearing the application of the person accused or convicted under the provisions namely section 376AB or section 376DA or section 376DB IPC. Taking a cue from all the amendments made in the various provisions, the idea is to fast track the procedures in case of sexual crimes against children. However specifically in the aspect of appeals same amount of adjudication is fixed for offences punishable differently. Taking a cue from the judgement in Shri Ram Krishna Dalmia vs Shri Justice S. R. Tendolkar²¹ in which it was held that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on various kinds of bases. The pertinent point is that there has to be a nexus between the basis of classification and the object which the legislation purports to achieve. Article 14 of the Constitution was further interpreted and it was stated that it strikes at the discrimination in substantive as well as procedural laws. One of the observations made by the Court was that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are

¹⁹ (1995) 1 SCC 14

²⁰ Amendment 2018

²¹ 1958 AIR 538



directed to problems made manifest by experience and that its discriminations are based on adequate grounds and that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest. The underlying policy and object of the Act is the primary approach in considering the act as a whole. Reasonableness of a classification made by a statute has to be adjudged in light of the realities of law as the effect of the law is considered to be decisive than the phraseology of the statute. With the adding of provisions which define offences and are punishable differently as well as giving them the same span of time of six months for the appeal to be disposed off strikes at the consistent and coherent policy which is the need to adjudge on a case pertaining to awarding a death penalty. There is an altogether difference between the differentia forming the basis of classification and the inherent object of the Act. If the classification works out to be discriminatory cannot advance the contention of having achieved the lawful objective of the Act. The edifice of the Law is to curb the crimes against children. The Courts have adopted the 'rarest of rare doctrine' over the years as defined in the case of *Bachan Singh vs State of Punjab*²² in which the Court held that the instrumentality of Law shall be resistant on taking life of a person and if to do so it has to be in the rarest of rare cases, based on the absolute impossibility of any other form of punishment or solution which is foreseeable. A principled and consistent rule shall be applied while deciding on death penalty. However the Judiciary itself has stated that

the judicial principles for imposition of death penalty cannot be said to be uniform.²³ A sound sentencing policy is an essential facet of social justice. To accentuate it as in the case of *Dhananjay Chatterjee v, state of W.B*²⁴ it was held that the imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice as against the criminals. The demands of justice are so that the punishment so inflicted shall display public abhorrence and condemnation of the crime. The Courts have to strike a correct balance between the rights of the criminal as well as the rights of the victim of the crime as crimes are committed not just against an individual but the whole society at large. Commenting on the modes operandi of death penalty in the case of *Deena v. Union of India*²⁵ it was held that death penalty is the least painful of all the state sanctioned modes of taking a citizen's life away. And it was not violative procedurally or reasonably on account of its execution. It is awarded in exceptional circumstances. The golden thread of reasonableness which runs through the fundamental rights of our venerated Constitution as laid down in the case of *Maenka Gandhi vs Union of India*²⁶ which mentions about the arbitrariness at which Article 14 strikes, reasonableness in Article 19 and fairness of procedure in Article 21. On these three grounds and the most fundamental requirement of Article 14 which is the intelligible differentia which the Amendment has applied in adding a provision into Section 377 crpc contradicts the principles enshrined and laid down by the Article. In the amended provision aggravated penetrative sexual assault has been made

²² AIR 1980 SC 898

²³ O.P. Srivastava's Principles of Criminal Law K.A. Pandey 7th edition EBC PAGE NO 129

²⁴ (1994) 2 scc 220

²⁵ (1983) 4 SCC 645

²⁶ 1978 SCR (2) 621



punishable with death if committed on a woman who is under twelve years of age with not less than twenty years extending to life imprisonment and punishable with death as defined under section 376AB. Further section 376DB defines the offence of gang rape committed against a woman below twelve years of age and each one of them will be liable for the crime with either imprisonment for life or death. The Amendment makes a clear distinction between the victims aged below 12 and 16 years of age. When of 16 years of age under section 376 DA, the offence of gang rape is punishable with life imprisonment as well as under section 376(3) offence of rape punishable with imprisonment of life. The awarding of death penalty is an inherently complex procedure and to club with other forms of sexual assault and forms of rape punishable differently, in the appeal provision fixing the same span of six months to decide on the appeal comes across as a procedure bypassing the mandate of Article 14 which stands for a clear nexus between the basis of classification and objects of the Act. Such a scenario is the one in which it gives ample of space for manifest arbitrariness by Law enforcement agencies. As noted by the Justice Verma Committee formed in the year 2013²⁷ in which it was stated that uncertainty in law prevails when approaches as to death penalty dwindle in the ambiguity of varying culpabilities and circumstances. The making of the amendment had also dejected the death penalty as a purpose entirely opposed to the purpose of criminal justice as well as the varied natures of crime like sexual offences, penetrative sexual assaults and aggravated forms of penetrative sexual assaults, which

the Amendment 2018 precisely seeks to define and punish accordingly.

The practicality of the Amendment is fraught with a combination of legal and social problems as awarding death penalties not only because of its lack of uniform consistent policy but also the tardiness in the legal system. Recently across the nation so many High Courts have awarded death penalty for example the Indore Bench of the Madhya Pradesh High Court the decision of which was stayed by the Apex Court. However the question of accessibility to justice, giving a fair trial to both the sides, witness protection, sensitive evidence tampering are the important facets which the amendment does not address. What was needed was to revitalize the criminal justice system in order to improve its efficacy in curbing such crimes. While the difference in the principles behind doctrine of rarest of rare cases as applicable on murder cases and considerations revolving around the imposition of death penalty in cases of rape on child and minor are notably distinct, the issue of deterrence of the heinous crime and substantiation perhaps remains the same.

Children are the most vulnerable after the infliction of crime for if death penalty is the punishment the offender is most likely to wipe away the trace of his offence in order to be safe. The chances of vulnerability increases by leaps and bounds when in the case of a known offender who happens to be a relative or a kin of the victim. The desired outcome of the Amendment and the nexus between the differentia, as far as the purpose of distinguishing various essentials of crimes

²⁷<https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>



with different punishments is concerned with the object of the act is not possible without our institutions undergoing a reform. In a country as diverse and hierarchies prevalent within society on lines of caste specifically, death penalty does not fit into the narrative of true justice delivery mechanism.

The pertinent question which needs to be addressed is whether our social institutions are inherently built up in such a manner to enable a child to be forthright about narrating sexual violence which has been perpetrated against them. The paper does not argue the abolition of death penalty rather it examines the practical problems underlying it by a multifaceted approach rummaging through the Trial. The Amendment can potentially serve as a twin pronged attack which has implications on a Fair Trial which is the ultimate purpose of criminal law as well as lowering down the conviction rates. In the context of the amendment to POCSO and bringing in colossal changes to the criminal statues pertaining to child rapes, the questionability of death penalty arises more from the procedural point of view than the aggravating circumstances in calculating imposition of death penalty, which weigh against the culprit in inexplicably spine chilling cases.
