



NEED FOR UNIFORM SENTENCING POLICY FOR RAPE

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ABSTRACT

From ancient times, human civilization has been maintaining the social order in society by developing rules and regulations which are ideally followed by the people. In the case of its breach, he/she is punished for the same in the ordinary course of justice. Earlier, the main focus of the punishment was to have a deterrent effect by giving brutal punishment. However, with the human development and social change punishment became more rational and its focus tilted towards the reformatory approach. Despite such an encouraging approach a major lacuna exists in the Indian Criminal Law system which hampers the very purpose of the criminal justice system.¹ One of the major stages of a criminal Justice System is Sentencing. However, in India, neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have suggested adopting such guidelines in order to minimize uncertainty in awarding sentences. However, the judiciary has provided judicial guidelines in the form of principles and factors that courts must take into account while exercising jurisdiction in sentencing.² This paper intends to discuss

what exactly is Uniform Sentencing Policy? Whether there is a need for uniform sentencing policy in case of rape and its viability.

INTRODUCTION

Rape is one of the most heinous offences against women. It is not just a crime against a private individual but against the society. The sexually starved society has threatened and is still threatening the very right to liberty of women. According to recent government data released in September 2020, around 4,05,861 cases of crime against women were recorded during the year, out of which 32,033 cases of rape were reported.³

The statistics also reveal that about 94% of the reported rapes were committed by a person who shared a close relationship with the victim. It is pertinent to note that, in India, the crime of rape is associated with the notion of shame, honour and grace of the family, which means that once a woman is raped, she is considered as impure and if the victim was sexually active before marriage, is considered to be at fault and is deemed to have invited the 'rape'. Her character is questioned based on her dressing and sexual activities.

Under the present criminal justice system, wide discretionary powers have been vested with the judges, which sometimes results into

¹ Shivan Mishra, Dharmesh Basedia [hereinafter Mishra & Basedia], The Sentencing Policy of India: A critical Analysis and Suggestions, The Criminal Law Blog, <https://criminallawstudiesnluj.wordpress.com/2020/05/08/the-sentencing-policy-of-india-a-critical-analysis-and-suggestions-part-i/>

² Tariq Ahmad, [hereinafter Ahmad] Sentencing Guidelines: India,

<https://www.loc.gov/law/help/sentencing-guidelines/india.php>

³ Average 87 Rape Cases Daily, Over 7% Rise in Crimes Against Women in 2019: NCRB Data, The Wire <https://thewire.in/women/average-87-rape-cases-daily-over-7-rise-in-crimes-against-women-in-2019-ncrb-data>



lopsided, unfair judgments. It has been observed that the basic principle of proportionality, fairness and deterrence is not being properly followed.

UNIFORM SENTENCING POLICY

“If the criminal law as a whole is the Cinderella of Jurisprudence, then the law of sentencing is Cinderella’s illegitimate baby”⁴

A sentence is a decree of punishment and it forms the final explicit act of a judge ruled process, and also the symbolic principal act connected to his judicial function.⁵ Sentencing guidelines provide structure at the criminal sentencing stage by specifically defining offense and offender elements that should be considered in each case. After considering these elements using a grid or worksheet scoring system, the guidelines recommend a sentence or sentence range. The options usually include some period of incarceration, probation, or an alternative sanction. Goals of guidelines vary, but an underlying theme is that offenders with similar offenses and criminal histories be treated alike.⁶

The Indian penal Code prescribed offences and punishment for the same. For many offences only the maximum punishment is prescribed and for some offences the

minimum may be prescribed. The Judges have a wide discretion in awarding the sentence within the statutory limits. There is no guidance to the judge in regard to selecting the most appropriate sentences in a given circumstance of the case. There exists no uniformity in sentencing as some judges are lenient and some judges are harsh.⁷ In the year 2010, the then Law Minister, M. Veerappa Moily stated that – “We are working on the uniform sentencing policy which is on the lines in place in the United States and the United Kingdom”. The statement was made following the infamous case of *Priyadarshini Madoo rape and murder case*⁸ after which there was debate over various courts handing down different sentences for the same crime.

Since, the legislature hasn’t provided any sentencing guidelines, judiciary came forward and enunciated certain principle to bring uniformity in sentencing. In *Soman v. Kerala*⁹ the court observed that principles such as deterrence, proportionality (the aggravating and mitigating circumstance), and rehabilitation must be taken into account while sentencing. However, the imposition of these principles depends upon the facts and circumstances of each case¹⁰. Moreover, in *Rajendra Pralhadrao Wasnik v. the State of Maharashtra*, the court held that the judiciary cannot be fettered into these principles since

⁴ Dr. Mrinal Satish, Seminar on Sentencing Criminal Cases for High Court Justices heading Criminal Division, http://www.nja.nic.in/Concluded_Programes_2015-16/P-976%20Intern's%20Report.pdf

⁵ Prof. Dr. K. Chockalingam, [hereinafter Chockalingam] Seminar on Sentencing Criminal Cases for High Court Justices heading Criminal Division, http://www.nja.nic.in/Concluded_Programes_2015-16/P-976%20Intern's%20Report.pdf (17/10/20 21:42)

⁶ Neal B. Kauder, Brian J. Ostrom [hereinafter Kauder & Ostrom] State Sentencing Guidelines, NCSC, https://www.ncsc.org/__data/assets/pdf_file/0022/25474/state_sentencing_guidelines.pdf

⁷ Government of India, Ministry of Home Affairs, Committee on Reforms of criminal Justice System Report, 170, (March 2003)

⁸ (2010) 9 SCC 747

⁹ Cri appeal No 1533 -1535 of 2005

¹⁰ State of M.P. v. Bablu Natt (2009) 2 SCC 272



they are not absolute rules.¹¹ The court even considered that these principles are an obstruction to fair justice.¹²

Although the judiciary has developed some principles for uniformity in sentencing, the implementation of these principles is not possible as the principles are way too generalised which again leaves a lot of discretion with the judges. Even the judges are human beings and there is a small element of biasedness in all human beings by which they can be affected. Moreover, each case differs in facts and circumstances, and the principles laid down are not sufficient, therefore there is a need for a detailed guidelines on sentencing.

NEED FOR A UNIFORM SENTENCING POLICY

“Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges”¹³ - S.C

Whether a particular offence should be punished with the minimum or maximum punishment prescribed for it, or somewhere from between the gap, depends solely on the judge’s discretion. Although the Section 354(1)(B) provides for the judges to provide for the reasons behind awarding punishment, there is still a lot of discretion in the hands of

the judges. Ideally, while granting punishment, the general factors like the severity of the offence, the intention and the liability must be taken into account. However, in reality the final sentence is majorly based on a judge’s personal experience, prejudice and considerations¹⁴ which has been time again evident through their judgement. It has been observed that the offenders belonging from higher social status receive less punishment as compared to the offender belonging from a lower social strata for the same offence.

In the year 2000, the Malimath Committee was established by the Ministry of Home Affairs to suggest an overhaul of the century-old criminal justice system. The committee made several recommendations out of which one issue on which the committee made recommendation was the discretionary powers of the judges while sentencing, the committee in its report recommended for the statutory guidelines for the sentencing policy. In the year 2008, the Madhav Menon Committee also reiterated the need for the sentencing policy in India.

In a number of cases, the great disparity in sentencing policy between the lower and higher courts have been observed. In 2010, the *Priyadarshini Mattoo Case*¹⁵ became an eye-opener for the whole criminal justice system of our country. In the Trial Court, the Add. Sessions Judge – G.P. Thareja said – “Though I know he is the man who committed the crime, I acquit him, giving him the benefit of doubt”. However, the High Court in the year 2007 overturned the Trial

¹¹ Cri. Appeal no – 145 -146 of 2011

¹² State of Maadhya Pradesh v. Mehtab

¹³ Soman v. State of Kerala, (2013) 11 S.C.C. 382, <http://judis.nic.in/supremecourt/imgs1.aspx?file name=39837>

¹⁴ Aastha Sahay [hereinafter Sahay] Sentencing and Punishment Policy in India, Pro-Bono India, <http://www.probono-india.in/blog-detail.php?id=152>

¹⁵ Santosh kumar singh v. State through CBI (2010) 9SCC 747



Court's verdict and sentenced him (Santosh) to death. Later, on an appeal to the SC, the Bench upheld the conviction, but reduced the punishment to life imprisonment stating that certain things were in favour of the appellant.¹⁶ This case is a classic example of disparity in the sentencing policy of our criminal justice system. But the important question here is why there is a disparity in sentencing?

It is an admitted fact that judges do get influenced by several factors during the proceedings of the case. The two major factors in the eyes of the author are the social background of the offender and the victim and the media trials.

In *Shakti Mill Rape Case*¹⁷ five men including two juveniles raped a girl. The three accused were granted death penalty under Sec 376E of IPC. All the convicts hailed from lower socio economic background and had a history of juvenile delinquency. However, in 2006 Khairlanji massacre, where a mob stripped the mother and daughter naked in the market and sexually assaulted them, inserted objects in their private parts and then murdered them, but the accused were only given a life sentence as they belonged from a higher class and the victims belonged from lower social background. Similarly, in *Bhanwari Devi Case*¹⁸ which led to the

formation of Vishakha guidelines, the five accused were acquitted in trial court, unsurprisingly the accused belonged from higher social class and the victim belonged from lower social background. One recent example is the *Unnao Rape Case* where the accused was an ex BJP MLA, was awarded only life sentence.¹⁹

The other factor responsible for the sentencing disparity is the media trials. Media is considered as one of the pillars of democracy. Media has the power to influence the opinion of the people. Media coverage of crimes helps to set the agenda for the criminal justice system and reinforce support for punitive policies.²⁰ In some cases, media trials have been proved to be effective, some famous criminal cases would have gone unpunished but for the intervention of media are Priyadarshini Mattoo case, Jessica Lal Case, Bhanwari Devi case, Bijal Joshi rape case, Nitish katara murder case etc. However, there are always two sides of a coin; the Media drew flak in the reporting of murder of Aarushi Talwar's case. On the other hand, the media trial affect the case negatively, in the court of law, the accused are considered innocent until proven guilty but the media often in the name of Freedom of speech and expression go ahead and declare the accused guilty or innocent in the court of public opinion, whilst the case is pending before the

¹⁶ Richa Srivastav [hereinafter Srivastav], Case comment on Priyadarshini Mattoo Case, Legal Services India, <http://www.legalservicesindia.com/article/644/Case-Comment-on-Priyadarshini-Mattoo-case.html>

¹⁷ The State of Maharashtra v. Vijay Mohan Jadhav and ors, 2013

¹⁸ Smt. Bhanwari Devi v. The State of Rajasthan, 1997 (1) WLC 52

¹⁹ Mishra & Basedia, *Supra* 1

²⁰ Arulselvan S, Reporting on Actor Salman Khans Acquittal in a Murder Case, Global Media Journal,

<https://www.globalmediajournal.com/open-access/role-of-media-in-making-public-policy-on-indias-criminal-justice-system-a-study-of-news-reporting-on-actor-salman-khans-acquittal-in-a-murder-case.php?aid=76373#:~:text=It%20is%20widely%20assumed%20that,a%20forum%20for%20public%20discussion.&text=Media%20coverage%20of%20crime%20helps,reinforce%20support%20for%20punitive%20policies.>



court. It creates a prejudice in the minds of the people, to which even the judges fall prey. At the end of the day the judges are also human beings and everyone have biases. In high profile cases, they tend to be bias and give the verdict according to the media reports. Sometimes, the media also creates an unconscious pressure upon the judges in the high profile cases.

There is an urgent need for uniform sentencing policy especially with respect to Rape cases because it has been observed that although, rape is not a compoundable offence u/s – 320 of Code of Criminal Procedure (Cr. P.C) courts' have exercised their discretion and allowed for a compromise between the victim and her offender. In *Hari Mohapatra v. State of Orissa*²¹ the court held that non-compoundable offences can be compounded at the discretion of the court in order to meet the ends of justice. In cases where the victim pardons the accused, the punishment may either be decreased or the accused may be acquitted if the court reduces the sentence to the period actually undergone during the judicial incarceration. In 2011, the SC in *Baldev Singh v. State of Punjab*²², considered compromise as one of the factors contributing to the reduction of sentence, however, the court subsequently rejected this view in *Gian Singh v. State of Punjab*²³ and held that compounding of offences which are

non-compoundable in nature cannot be permitted because something which cannot be done directly cannot be done indirectly. Until the 2015 SC judgement of *State of Madhya Pradesh v. Madanlal*,²⁴ no settled principle with regard to the permissibility of compounding in rape cases existed²⁵. The SC concluded that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasize, is the richest jewel one can conceive of in life. No one would allow it to be extinguished.²⁶

Due to disparity in sentencing, public will slowly start losing faith in the judiciary, as has been observed in numerous cases where the victims were denied justice merely because they belonged to poor background and the offender was from upper socio-economic background. The Malimath Committee, 2000 also noted that– “*the existing system weighed in favour of the accused and did not adequately focus on the Justice to the victims of the crime*”.²⁷ The Supreme Court has acknowledged that the superior court often comes across a large number of cases that shows anomalies regarding the sentencing policies.²⁸ It is also

²¹ 1996 I OLR 488

²² (2011) 13 SCC 705

²³ (2012) 10 SCC 303

²⁴ (2015) 7 SCC 681

²⁵ Tweisha Mishra, Shantanu Pachauri [hereinafter Mishra & Pachauri] Developing A Uniform Sentencing Policy For Rape With Special Reference To The Issue of Compromise, NUJS Criminal Law Review,

<https://nujssacj.files.wordpress.com/2018/08/sacj-criminal-law-review-article-1.pdf> (19/10/20 18:00)

²⁶ Jismin Jose, *State of M.P. vs. Madanlal* (2015) 7 SCC 681, Law Times Journal, <http://lawtimesjournal.in/state-of-m-p-vs-madanlal-2015-7-scc-681/> (19/10/20 18:07)

²⁷ Aalok Chauhan, Rise of Instant Justice as faith in Justice Delivery System fades away, The Leaflet, <https://www.theleaflet.in/rise-of-instant-justice-as-faith-in-justice-delivery-system-fades-away/#>

²⁸ *State of Punjab v. Prem Sagar & ors.*



reported 90% of the trial courts' decision are overturned by the higher courts²⁹ which results in the absence of a consistent approach while sentencing. To illustrate, in *Mohd. Chaman v. State (N.C.T. of Delhi)*³⁰ the accused brutally raped and killed a one year old girl. The trial court found this under the rarest of the rare category and sentenced him to the death penalty which was later overturned by the High Court on ground that the accused didn't pose any threat to the society.³¹ Thus, the structured guidelines or statutory provisions wherein a range of punishment is explicitly mentioned is the ideal choice for India rather than depending upon the judicial principles.

Sentencing guidelines will, not only provide for rational basis for sentencing, but it will bring uniformity in sentencing, increase judicial accountability, reduce prison overcrowding, encourage the use of particular sanctions for particular categories of offenders, make the sentencing process more transparent and understandable.

SUGGESTIONS & CONCLUSION

Thus, from the above discussions it has been established that there is a need for a uniform sentencing policy with regard to the rape cases. However, while following the policy certain principles must be taken into account.

- Punishing a sex offender involves various aspects, i.e., retributive, punitive, deterrent and reformative. The sentencing policy must be able to balance these considerations

against each other and impose a punishment suitable for the offence committed.³²

- The penalty imposed must be proportional to the degree of violence used by the offender.
- If the offender is a sexual deviant, higher penalty must be imposed so as to keep the offender at a distance from the general public and to incapacitate him so that he does not repeat the offence.³³
- The sentencing policy should consider that the offenders with similar situations are sentenced similarly.³⁴
- In order to introduce rationality into sentencing, aggravating and mitigating factors should accordingly be determined.³⁵
- The factors that should not be considered in sentencing rape offenders should be specifically recognised and recorded. Such factors could include the victim's dressing sense, sexual history and number of sexual partners, marital status, socio economic background. The sentence should be purely based on the facts and circumstances of the case.³⁶

Thus, from the above mentioned data, cases and various governmental committee reports it has been clearly established that there is need for uniform sentencing guidelines. In the developed countries like USA, UK sentencing guidelines already exists, in America the sentencing guidelines have existed for a quarter of a century now and it has proven to be more than just a fad. In this research paper, we saw how in the absence of appropriate sentencing guidelines various factors are affecting our criminal justice

²⁹ Swati Deshpande, Trial Court orders are overturned by High Court in 90% of Cases, Times of India <https://timesofindia.indiatimes.com/india/Trial-court-orders-are-overturned-by-high-court-in-90-of-cases-Lawyers/articleshow/50156974.cms> (19/10/20 21:46)

³⁰ Cri. Ap[peal 68 -69, 1999

³¹ Mishra & Basedia, *supra* 1

³² Mishra & Pachauri, *Supra* 25

³³ Adu Ram v. Mukna, AIR 2004 SC 5604

³⁴ Mishra & Pachauri, *Supra* 25

³⁵ Mishra & Pachauri, *Supra* 25

³⁶ Mishra & Pachauri, *Supra* 25



system. Time and again, recommendations have been made for establishment of a statutory committee to form a uniform sentencing policy, but to no avail. This lack of immediacy and inconsistency in the punishment encourage the offenders as it gives them a thought of escape which might lead to an offence in the future as well.

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