



## SENTENCING IN RAPE CASES IN INDIA: AN ANALYSIS

By *Samiksha Kandya*  
*Advocate, Art of Living Foundation,*  
*Bangalore*

### INTRODUCTION

Protests for the violence against women have always led to the enactment of new legislations and amendments in the existing laws, but the three pillars of democracy (legislature, executive or judiciary) fail to deal with the issue of unwarranted disparity in sentencing. Such disparity patterns are based on stereotypes and myths that are constructed by the Indian Criminal justice system. As Justice Chinnappa Reddy rightly acknowledges, the Supreme Court of India confines itself to the statutory interpretation and seldom discusses important jurisprudential issues on sentencing<sup>1</sup>.

Over the centuries, various stereotypical notions and rape myths about rapists and rape victims have developed which affects rape prosecution and the shift of such stereotypes from the adjudicatory phase to sentencing phase is one of the causes of unwarranted disparity in rape sentencing. Though there are various national legislations that are adopted and enacted for the rights of women and are amended from time to time, but there is no uniformity in awarding sentences due to the absence of sentencing guidelines which leaves judges with wide discretionary powers based on their own sense of justice which opens the

sentencing process to abuse and allows personal prejudices of the judges to influence their decisions. As few may give more importance to the medical evidence and injuries sustained by women, others may base their judgment on past sexual history of the victim. Where some judges decide on the relationship of the accused and the victim, others may decide on some other basis. Some judges are lenient and some are harsh<sup>2</sup>. Hence there is a need in our country to minimize uncertainty in the matter of awarding sentences, which can be curbed by enacting structured sentencing guidelines as observed by the Supreme Court in the case of *Soman v. State of Kerala*<sup>3</sup>, where it states that- giving punishment to the wrongdoers is at the heart of the criminal justice delivery, but it is the weakest part of the administration of criminal justice in our country as there are no structured guidelines laid down by legislature or judiciary to assist the trial court in awarding the just punishment to the accused.

This research paper puts emphasis on why the current research on rape sentencing in India is relevant and needs academic attention. The discretionary powers of the judiciary can be, in many cases, abusive or arbitrary, as in some cases any length of sentence given to the accused will “never be enough” for the victims, while in other cases, the widely differing sentences given to different individuals have sometimes caused

<sup>1</sup>Chinnappa Reddy, *The court and the Constitution: Summits and Shallows* 280 (1<sup>st</sup> ed., 2<sup>nd</sup> Impression, 2010).

<sup>2</sup>Tariq Ahmad, ‘Sentencing Guidelines: India’, April 2014, <https://www.loc.gov/law/help/sentencing-guidelines/india.php>.

<sup>3</sup>*Soman v. State of Kerala*, (2013) 11 S.C.C. 382.



confusion and outcry among the public<sup>4</sup>. Therefore, there is an urgent need to enact the sentencing guidelines to remove the unwarranted sentencing disparity.

### **Jurisprudential underpinning of sentencing in rape cases in India**

In 1999, Economic and Political Weekly published an Editorial '*Stinking Criminal Justice System*', which highlighted the need to bring drastic reforms in the present Criminal Justice System in India<sup>5</sup>. It has been more than twenty years since the article was published but the condition is still the same and has even become worse. According to the 2019 annual report of National Crime Records Bureau (NCRB), it is reported that in every 16 minutes, a woman is raped in India.

Rape sentencing in India has a fascinating history where the call for rape law reforms started with the unjust and retrograde decision of the Supreme Court in the Mathura rape case<sup>6</sup>, but the amendments did not have major impact on rape sentences as the activists behind the amendments were too determined to get the rapists convicted of the crime and forgot to pay sufficient attention to the sentencing phase. The reforms sought the repeal of Sec. 155(4) of the Indian Evidence Act, 1872 which permitted the defence to challenge the credibility of the character of

the rape victim by asking about her past sexual history<sup>7</sup>.

Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary although many attempts were made. In march 2003, the government of India established a committee on Reforms of Criminal Justice System (The Malimath committee)<sup>8</sup>headed by Justice V.S. Malimath to study the Criminal justice system in India which gave various recommendations. One of the recommendations emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences, and also to establish an expert statutory body to draft such guidelines. But there was no action taken on the recommendations for sentencing guidelines, though other suggestions were enacted into law. In 2008, the Committee on Draft National Policy on Criminal Justice (The Madhava Menon Committee) headed by Prof. N.R. Madhava Menon reasserted the enactment of sentencing guidelines which was again not taken into consideration<sup>9</sup>.

Though in *Santosh Kumar Singh v. State through CBI*<sup>10</sup> (famously known as Priyadarshini Mattoo rape and murder

<sup>4</sup>RASASC (Rape And Sexual Abuse Support Centre),<https://www.rasasc.org/advice-guides/rape-sentencing>.

<sup>5</sup>S. R. Sankaran, Criminal Justice System: A Framework for Reforms, Economic and Political Weekly, Vol. 34, No. 22 (May 29 - Jun. 4, 1999), pp. 1316-1320.

<sup>6</sup>See *Tukaram v. State of Maharashtra*, 1979 AIR 185, (1979) 2 SCC 143.

<sup>7</sup>Sec. 155(4) of the Indian Evidence Act, 1872 was finally repealed in 2003.

<sup>8</sup>Para 14, 'Need for Sentencing guidelines', Committee on Reforms of Criminal Justice System, Report Volume 1, March 2003, established by Government of India, Ministry of Home Affairs, [http://www.mha.nic.in/hindi/sites/upload\\_files/mhahindi/files/pdf/criminal\\_justice\\_system.pdf](http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf).

<sup>9</sup>Mrinal Satish, "Discretion, Discrimination and the Rule of Law; Reforming Rape Sentencing in India", Cambridge University Press, 2017.

<sup>10</sup>*Santosh Kumar Singh v. State through CBI*, (2010)9 SCC 747



incident)<sup>11</sup>, the case gained media attention after the trial court acquitted the accused. The Additional Sessions Judge, G.P. Thareja gave a shocking statement saying “*Though I know he is the man who committed the crime, I acquit him, giving him the benefit of doubt*”. Later the High court imposed death sentence which was again changed to life imprisonment by the Supreme Court. In response to the judgment, the law minister of India promised to enact the sentencing guidelines for not only ‘capital crimes’ but also for other crimes. However, no action has been taken so far<sup>12</sup>.

The Legislature awakened only after the brutal gang rape of a 23 year old girl of Delhi in a moving bus *Mukesh & Anr. v. State for NCT of Delhi & Ors.*<sup>13</sup>, famously known as the ‘Nirbhaya Rape Case’ and brought major and much needed changes through the Criminal Law (Amendment) Act, 2013. However the approach taken to sentencing was to increase the maximum punishment for aggravate rape incidents<sup>14</sup>, introduce death sentence for causing death of the rape victim either during or as a consequence of rape, increase the maximum punishment for gang rape<sup>15</sup>, to curtail the discretionary powers of the judiciary in rape sentencing. The Indian Penal Code was also amended and broadened the definition of Rape. But the question

remains that whether the approach adopted by the Criminal Law (Amendment) Act, 2013 would prove to be an appropriate solution to resolve this problem of unwarranted disparity in rape sentencing in India. As the minimum sentence for committing rape is 7 years of imprisonment and maximum is life imprisonment. And in ‘rarest of rare’ cases even the death penalty can be given to the accused<sup>16</sup>. However, courts had the discretion to sentence an offender to less than the ‘minimum’ term of 7 years of imprisonment if they provided ‘adequate and special reasons for doing so’<sup>17</sup>. This shows that there is a huge difference in the minimum and maximum punishment that is dependent on the discretionary power of the judges where each judge decides the sentence on the basis of their own sense of justice. In the case of *Mohd. Chaman v. State*<sup>18</sup>, the accused brutally raped and then murdered a one and a half-year old girl. The lower court awarded the death sentence to the accused considering this case as one falling under “the rarest of the rare” category. But the Supreme Court, according to their own sense of justice, did not consider this case worthy of death penalty and reduced the sentence to rigorous life imprisonment. They believed that the accused is not a danger to the society and

<sup>11</sup>In this case, the evidence was quite strong that the victim, a young law student was stalked by the defendant who raped and subsequently murdered the victim when she rejected his advances. The defendant was a lawyer and the son of a senior police officer. The acquittal of the defendant was considered unjustified and led to a number of protests and campaigns by the media and the public demanding justice for Priyadarshini.

<sup>12</sup>Mrinal Satish, “Discretion, Discrimination and the Rule of Law, Reforming rape sentencing in India”, Cambridge University Press, published in 2017.

<sup>13</sup>*Mukesh & Anr. v. State for NCT of Delhi & Ors.*, S.L.P. (Criminal) Nos. 3119-3120 of 2014.

<sup>14</sup>See: Sec. 376(2) of IPC, The maximum sentence for aggravated has been increased to imprisonment for the rest of the person’s natural life.

<sup>15</sup>Section 376D of IPC.

<sup>16</sup>*Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

<sup>17</sup>Sec 376(1) of the Criminal Law (Amendment) Act, 2013 removed the “adequate and special reasons” clause; which means the judges now do not have the discretion to reduce below the “minimum” sentence.

<sup>18</sup>*Mohd. Chaman v. State*, 2001 Cri.L.J. 725.



therefore should not be given death penalty<sup>19</sup>. This is the reason why India is in desperate need of sentencing guidelines, because what is threat to society for one court may not be considered as threat by other courts. Therefore, different individuals get different sentences, which makes it arbitrary and unjust. Though the legislature and judiciary have responsibilities to provide justice to the people by awarding severe punishments to the perpetrators, the law however, lacks in sentencing guidelines.

Identifying an appropriate sentencing guideline model is an important step in the process of guideline development. Therefore, it is indispensable to look into the history of sentencing discretion of UK and USA, and to see whether any of these models would be appropriate and work in the Indian context. Over the last several centuries legal systems in both United Kingdom and United States have constantly made effort to resolve the issue whether judges should have discretion in making sentencing decisions. There were 2 statutory models, namely, 'the mandatory model'<sup>20</sup> and 'the discretionary model'<sup>21</sup> to determine sentence on the convicted person.

### *Sentencing of rape cases in England*

English law in pre-nineteenth century did not provide judges with the discretionary power while sentencing and the mandatory penalty for all felonies was death. The only discretion was to postpone the execution. In 1833, A Criminal Law Commission was set up for

drafting the criminal code. They worked for 15 years but it never came into force, as they were not in favor of granting sentencing discretion to judges and suggested that the legislature should retain the power to decide criminal sentences. In 1861, the legislature fixed only the maximum punishment and the judges had discretion only to sentence at or anywhere below the maximum.

The Modern English sentencing law began with the enactment of 1948 legislation, which provided for various custodial and non-custodial forms of punishment, but did not provide a philosophy of sentencing. In 1970s, the Court of Appeal (Criminal Division) under Lord Lawton began delivering 'guideline judgments', which were in the nature of advice to the sentencing judges. Such judgments began the trend of curtailing the discretionary power of individual sentencing judges. Then came the 1991 Act, where the legislation mandated that while determining seriousness, only the circumstances of the offence must be considered and not the offender. The judges could also consider aggravating and mitigating factors in determining sentences.

Then in 1988, the major legislative step was the enactment of the Crime and Disorder Act which empowered the Court of Appeal to frame sentencing guidelines, and at the same time established a 'Sentencing Advisory Panel', with whom the court had to take advices. Though it was successful, but it also

<sup>19</sup> Karan Gehlot and Prem Dhurvey, 'Need for Sentencing Policy in India: Critical Study On "Discipline of Justice"', Universal Multidisciplinary Research Institute Pvt. Ltd, <http://ijlljs.in/wp-content/uploads/2015/03/NEED-FOR-SENTENCING-POLICY-IN-INDIA.pdf>.

<sup>20</sup>The mandatory model did not give judges the discretion to determine sentencing. It was the duty of

the legislature to prescribe the sentence for each offence and the judge was required to impose the prescribed sentence on the convicted person,

<sup>21</sup>Under the discretionary model the judges had the freedom to decide the sentences on the basis of facts and circumstances of individual cases.



created a lot of tension between the legislature and the judiciary. The legislature in response to this, created the Criminal Justice Act of 2003, which instructed the judges to consider the punitive, deterrent, reformative and protective purposes of punishment, but failed to articulate which of these should be the primary purpose of the punishment. This Act also set up a Sentencing Guidelines Council to draft the sentencing guidelines (which issued 20 sets of guidelines). This structure remained in effect for 6 yrs and then the 2009 legislation abolished the Sentencing Advisory Panel and Sentencing Guidelines Council. It established a new body, the Sentencing Council for England and Wales, with the mandate of drafting sentencing guidelines. The need to promote the consistency in sentencing, impact of sentencing on victims of crime, the need to promote public confidence in sentencing, etc. was required to undertake under the law.

The constant changes made in the approach to sentencing in UK indicate uncertainty as to what should be the best method to avoid inconsistency while sentencing. However, the judiciary was always kept in loop and was consulted. This is different from what happened in United States which I am going to discuss below.

### ***Sentencing of rape cases in United States***

American colonists followed the ‘mandatory module’ of sentencing where judges had no discretion. Capital and corporal punishments were the most common forms of punishments. But over the next hundred years when the Union was established, the judges were granted more discretion as more states

adopted the ‘discretionary model’. In most criminal cases, only a maximum punishment was prescribed and the judges had the discretion to decide on the appropriate punishment in each individual case. Also, there was no appellate review of sentencing. The federal system in the early 20th century underwent changes which gave judges the power to determine the range of punishment for an offender. The turning point in the sentencing phase was when Marvin Frankel, a prominent federal judge wrote a book arguing that federal sentencing was in chaos. This led to the establishment of a sentencing commission to draft sentencing guidelines. This became a reality when the Congress enacted the Sentencing Reform Act in 1984 and set up a commission for drafting sentencing guidelines, aiming to reduce the unwarranted sentencing disparity. This act reverted the ‘discretionary model’ to a ‘quasi-mandatory model’ of sentencing. This was followed for the next two decades, until the Supreme Court gave its decision in *United States v. Booker*<sup>22</sup>, wherein it was held that the federal sentencing guidelines violated the Sixth Amendment of the Constitution of the United States and the judges were required to enhance sentences based on the facts that were not submitted to the jury. Then in *Gall v. United States*<sup>23</sup>, the court held that the guidelines should be the starting point when sentencing. The judge had the power to decide the appropriate sentence but was required to state the reasons for that decision. Finally, the Court restored the federal sentencing system nearly back to the fully ‘discretionary model’ of sentencing in the case of *Spears v. United States*<sup>24</sup>.

<sup>22</sup>United States v. Booker, 543 U.S. 220 (2005).

<sup>23</sup>Gall v. United States, 552 U.S. 38 (2007).

<sup>24</sup>Spears v. United States, 555 U.S. 261 (2009).



Now, several states in the United States have introduced guidelines which require judges to give sentences according to the type and seriousness of offence and also on the criminal history of the offender. In order to maintain the consistency in sentencing, there is a permanent Sentencing Commission to monitor sentencing practice and an appellate review is provided<sup>25</sup>.

### **DISPARITY IN RAPE SENTENCING (FACTORS IRRELEVANT IN DETERMINING SENTENCES)**

This chapter focuses on whether disparity<sup>26</sup> exists in sentencing by the Indian courts, and if such disparity does exist then would constructing sentencing guidelines be an appropriate solution to reduce such disparity. Since my fundamental concern is with the existence of unwarranted disparity and sentencing, it is essential that I define the term 'unwanted disparity'.

The term disparity is derived from the Latin words *dis* and *paritas*, which means inequality. In the context of sentencing there should be equality in imposing sentences on convicted offenders who are similarly situated. Unwarranted disparity results when there is a deviation from an established norm or set of values. For instance, sentencing disparity would be considered unwarranted if the judges take into consideration those factors which are legally irrelevant, which could include the victim's past sexual history, her chastity and virginity.

<sup>25</sup>Uday B. Shukla, Workshop paper on 'Sentencing Policy, Victimology and compensation to the victims', [www.mja.gov.in](http://www.mja.gov.in).

<sup>26</sup>The term 'disparity' is derived from two Latin words, *dis* and *paritas*, which means inequality or great difference.

<sup>27</sup>This case led to India's sexual harassment law; where the matter reached the supreme court of India

Factors may also be considered legally irrelevant if they are not in consonance with the constitutional values, statutory rules or with common law. For instance, consideration of race or caste while imposing sentences is unconstitutional. In Bhanwari Devi rape case<sup>27</sup>, 1992, Bhanwari Devi who was a saathin working in the women's development project of the Rajasthan govt., raised her voice against the evil practice of child-marriage where the villagers were marrying a nine month old child. For preventing this marriage, she was gang raped by the upper caste men of her village in front of her husband. The district court acquitted all five men involved in this heinous crime on the reason that the 4 men were Gujjars and one was a Brahmin and therefore the rape was impossible. The court refused to believe that the upper caste men can go to such an extent and lose all sense of caste and class and commit such a crime. But if India's National Crime Records Bureau is considered, then more than 4 Dalit women are raped everyday and with 2014 statistics saying crime against Dalit women rose 19% and in most of the cases, it is done by the men from the upper caste.

The Supreme Court of India has noted that there are major inconsistencies in

via a PIL filed by a group of NGOs by the name of 'Vishakha', in which the petitioners urged the court to intervene on the very important issue of sexual harassment at work place, wherein, the Supreme Court laid down the binding guidelines as the Vishakha case. Vishakha and others v. State of Rajasthan and ors, AIR 1997 SC 3011.



sentencing<sup>28</sup> and that extra-legal factors are taken into consideration while sentencing<sup>29</sup>.

### **PROVING THE OFFENCE OF RAPE IN COURT:**

Proving rape factually is a challenge for prosecutors as Courts mainly rely on the testimony of the alleged rape victim if she consented for the intercourse or not. Courts have a tendency to construct a stereo-typical rape victim and then test the behavior of the alleged victim against that of the stereo-typical victim. Certain procedures which are followed during the trial of a rape case also has an impact on sentencing.

#### *Testimony of the victim*

The testimony of the victim is the most crucial piece of evidence in a rape trial. In rape cases, consent of the victim plays an important role in deciding the matter but due to the lack of evidence claiming that the victim did not consent for the sexual intercourse, the court on many occasions becomes insensitive towards women victims since all the crimes against them must be proved beyond reasonable doubts<sup>30</sup> and the offender either goes scot-free or his sentence is reduced. The most shocking and heart breaking case is the Mathura Rape Case<sup>31</sup>, where the victim was raped by the police constables in the police station. The Sessions

Court held the police constables to be not guilty and acquitted them. The sad part is the reason which the court gave behind its judgment, that ‘Mathura was habituated to sexual intercourse’ and she is of loose morals, and therefore clearly implied that the sexual act that happened in the police station was consensual. It also went further to say that if the girl is not screaming, then it was assumed that she has given her consent. The High Court reversed the judgment and gave 1 and 5 years of rigorous imprisonment to Tukaram and Ganpat. But when the case again went in Appeal to the Supreme Court, the High Court verdict was reversed and the accused were once again acquitted by the Lordships. They ignored the difference between ‘Submission’ and ‘Consent’. If a girl of 16 years of age is asked to remain in police station for further questioning and the lights are put off, then what type of consent can be assumed? Consent involves submission but not the other way round. Consent of a woman is very important<sup>32</sup>. When she says NO, then it does not remain just a word but it is a complete sentence in itself that says no don’t do this, or don’t touch me, or respect your boundaries. This small word means that you do not have a right to do anything which is unacceptable and which is against the dignity and against her consent, even if the other person is her husband. The Supreme Court cited that “Mathura did not raise an alarm and

<sup>28</sup>See *Sangeet v. State of Haryana*, (2013) 2 S. C. C. 452; *Santosh Kumar Satishbhusan Bariyar v. State of Maharashtra*, (2009) 6 S. C. C. 498; *State of Punjab v. Prem Sagar*, (2008) 7 S. C. C. 550

<sup>29</sup>See for instance, *Ruli Ram v. State of Haryana*, (2002) 7 S. C. C. 691, 703.

<sup>30</sup>Dr. Kamalaveni and Dr. Rupa Gunaseelan, “Loopholes in judicial system – Paves way to violence against women, IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 18, Issue 3 (Nov. - Dec. 2013), PP 55-56, [www.iosrjournals.org](http://www.iosrjournals.org).

<sup>31</sup>*Tuka Ram and Anr vs State Of Maharashtra*, 1979 AIR 185, (1979) 2 SCC 143.

<sup>32</sup>Section 375 of the IPC prior to its amendment in 2013 defines ‘Rape’ as - a man committed rape if he had sexual intercourse with a woman under six circumstances, where in 5 cases the consent is considered as important Only in the sixth case, the consent of the victim is of no relevance when the girl is under 16 years of age (statutory rape). This section was also not gender-neutral and only man could commit rape and woman could only be raped.



has no visible marks or injury on her body” which shows that she did not resist the advances.

UpendraBaxi raised few important and eye opening questions in writing an open letter to the Chief Justice of India- as why she was asked to remain in the police station when they have already recorded her statement? What was the need to put off the lights and shut the door when the girl was inside? Why Tukaram did not do anything to rescue the girl from Ganpat? This was an extraordinary decision sacrificing the human rights of women under the law and Constitution<sup>33</sup>. The Supreme Court did not even pay heed to the precedent in *Nandini Satpathy case*<sup>34</sup>, where Justice Krishna Iyer condemned the practice of calling women to the police station, and said that it is a gross violation of Section 160(1)<sup>35</sup> of the Criminal Procedure Code.

It is very difficult for the victim to prove absence of consent especially in custodial rape. The burden of proof is on the victim to show that rape has been committed against her will. But then a major reform took place in the law, by inserting Section 114 A in the Indian Evidence Act, which states that in cases of custodial rape, gang rape and rape of a pregnant woman, if the victim states in a court that she did not consent, then the court

shall presume that she did not consent and the burden of proof will shift to the accused<sup>36</sup>.

### *Significance of the Medical Evidence*

Medical evidence is admitted into a trial under Sec. 45 of the Indian Evidence Act, which makes the opinion of the medical experts relevant in legal proceedings. But since this is a form of ‘opinion evidence’, the Supreme Court held that such opinion should be considered as a ‘weak type of evidence’. However, medical evidence has played a crucial role in criminal prosecutions. It tried to prove either the accused was guilty of committing rape or such evidence could be used to infer that the testimony by the victim was false, proving that the victim has immoral character. This in turn, reduces the sentence of the rape accused. Along with the consent, the immoral character of the victim was seen as the defence in a rape crime under Sec. 155(4) of the Indian Evidence Act which was finally repealed<sup>37</sup>. But the bad character of the accused is of no relevance in the court of law<sup>38</sup>.

In *Pratap Misra v. State of Orissa*<sup>39</sup>, the Court termed the victim a ‘concubine’ since she was in a relationship with a married man and had subsequently entered into a bigamous marriage with him. On a pleasure

<sup>33</sup>Upendra Baxi, Vasudha Dhagamwar, Raghunath Kelkar & Lotika Sarkar, An open letter to the Chief Justice of India, 16/09/1979

<sup>34</sup>*Nandini Satpathy v. P.L. Dani and Anr.*, (1978) 2 SCC 424.

<sup>35</sup>Provides that no woman shall be required to attend at any place other than the place in which such woman resides.

<sup>36</sup>“Rape laws of India”, published by MyNation Foundation, [www.mynation.net/rapelaw.htm](http://www.mynation.net/rapelaw.htm).

<sup>37</sup>“Section 155 – Impeaching credit of witness – The credit of the witness may be impeached in the

following ways by an adverse party, or with the consent of the court, by the party who call him :- .... (4) when a man is prosecuted for rape or attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.”

<sup>38</sup>Section 54 of the Evidence Act says that – “In criminal proceedings (including rape), the fact that the accused person has bad character is irrelevant unless evidence has been given by him that he has a good character in which case it becomes relevant.”

<sup>39</sup> (1977) 3 S.C.C. 41, 46-47.



trip with her husband, she was raped by three men. But the court acquitted all three on the ground that the victim did not have injuries on her body and therefore she must have consented for it. Moreover, she had only sobbed and not screamed during intercourse. The victim due to gang rape miscarried after few days and the court opined that if the intercourse were by force, then she would have immediately miscarried and not after few days.

The Supreme Court in *Bharwada*<sup>40</sup> and other cases describes that how a woman treasures her chastity and virginity and experiences a sense of 'deathless shame' if she is raped. If the woman is perceived as unchaste, then it has been seen through various judgments that it impacts sentencing. In cases where the sexual history of the victim is considered and it is shown that the victim was sexually active outside marriage, then the trial courts and High Courts imposes a lower sentence on the defendant. But in case where the doctors at the time of medical evidence are not able to insert two fingers into the hymen orifice of the women (the 'two finger' test)<sup>41</sup>, then the courts tend to impose a higher sentence on the defendant. As Ratna Kapur rightly says that the Indian courts have viewed the typical rape victim as 'chaste, pure, monogamous, honourable and confined to the private

domestic sphere'<sup>42</sup>. She would generally be 'a Hindu, a virgin daughter or [a] loyal wife'. And such testimony would be considered as true by the court, and any inconsistent sexual behaviour of women with the dominant values and norms, would weaken her case<sup>43</sup>.

### Some Tests applied by the Courts

#### a). The 'Two Finger' test

In order to prove rape, the prosecution has to first establish that the defendant had sexual intercourse with/or penetrated the victim<sup>44</sup>. According to Modi, and other medical jurists, rupturing of the hymen is one of the indicators of penetration. Therefore, examination on the state of the hymen is considered an important step in the medical examination of the victim. Though, he also mentions instances where married women, pregnant women, prostitutes had intact hymen. Consequently, he distinguished between 'true virgins' and 'false virgins'. He says that the hymen of true virgins only permits the insertion of the phalanx of a finger but if the hymeneal orifice permits one, two or more fingers to pass through, it might indicate that the woman's vagina could have been penetrated once or several times rupturing the hymen. Although, in 2003, the Parliament repealed a provision in the Indian Evidence Act, which permitted the admission

penetration is still crucial in rape cases. But this further aggravates the trauma and suffering of the rape victims. However the Parliament in 2003 repealed the provision in the Indian Evidence Act which permitted the past sexual history of the rape victims.

<sup>42</sup>RatnaKapur, *Erotic Justice: Law and the new politics of post colonialism* 34 (2005).

<sup>43</sup>See *Rameshwar v. State of Rajasthan*, A.I.R 1952 S.C. 54.

<sup>44</sup>Prior to the 2013 amendment, the prosecution had to prove that sexual intercourse had occurred but after the amendment, the prosecution has to prove that penetration has occurred.

<sup>40</sup>*Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, (1983) 3 S.C.C. 217, 226. In this case the Supreme Court opined that any unmarried woman would not falsely allege rape as that would hamper her prospects of finding a match in 'a respectable or acceptable' family.

<sup>41</sup>Earlier the Criminal Justice System devises such ways like "Two-finger test" in order to prove rape, where the prosecution first has to establish that the defendant had sexual intercourse with the victim. That was done by the medical practitioners by inserting two fingers in order to determine the virginity of the victim during medical examinations, as medical evidence of



of the past sexual history in rape trials<sup>45</sup>. In cases where the evidence shows that the victim was sexually active outside of marriage, the trial courts and High Courts imposed lower sentences of the defendant<sup>46</sup>. In cases of unmarried women, if the doctor was unable to insert two fingers, then the sentence is increased in High Courts.

#### **b). Presence or absence of injuries**

Until recently, Supreme Court of India emphasized that the presence of injuries on victim's body was critical to proving that she did not consent for the intercourse. Although, this did not mean that if woman did not have injuries on her body then the court had to acquit the accused. But the presence of such injuries was powerful evidence that she resisted or struggled during intercourse. In the context of sentencing, since the presence of injuries indicates violence, it could be considered as an aggravating factor. Therefore, the courts tend to give higher sentences than average in order to justify violence. The courts also pay attention to injuries to the private parts of the victim which includes the state of the hymen. However, it would not justify reduction in the sentence of the accused on the basis of absence of injuries. But the data interpretation on the presence or absence of injuries, done by Prof. Mrinal Satish, indicates that if the courts are unable to

appreciate the injury sustained by the rape victim, then the judges can be expected to give reduced sentences to the accused. This reveals the myth regarding rape that if the rape is not injurious then it is not 'really' a violent crime.

#### **c). Marital Status of the Victim**

In India, the over emphasis given to virginity can also be seen as one of the important factors in rape sentencing as the courts give higher sentence to the defendant for 'taking away' the virginity of a chaste woman<sup>47</sup>. If the woman is married, then the courts generally award lesser sentence to the accused though it does not cause less trauma or lesser 'loss of value' to the victim. But being an unmarried woman the courts tend to award higher sentences as the unmarried victim's prospect of getting married are reduced because of her being raped<sup>48</sup>. The intangible loss suffered by the unmarried woman appears to get added to the sentence imposed on the defendant and is higher than those imposed on defendants convicted of raping married women<sup>49</sup>.

Similarly, if the victim gets married after rape (not to the defendant) then it is considered as a mitigating factor by the courts while sentencing. The understanding of the court here appears to be that the 'value' of the victim was not reduced because of the rape,

<sup>45</sup>Sec. C 155(4) of the Indian Evidence Act, prior to its repeal in 2003, stated: "The credit of a witness maybe impeached in the following ways by the adverse party, or with the consent of the Court, by the party who calls [her] :- When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecuterix was of generally immoral character."

<sup>46</sup>See *Sudhansu Sekhar Sahoo v. State of Orissa*, 2003 Cri. L. J. 4920 (SC).

<sup>47</sup>See For instance, *Vinayak Bihari v. State*, 2005 Cri. L. J. 2452 (UK); *Surendra Singh v. State of U. P.*, 2006

*Cri. L. J. 700 (All); Suresh Kumar v. State of Chhattisgarh*, 2008 Cri. L. J. 244 (CG); *Sukhdev Singh v. State of Punjab*, 2008 Cri. L. J. 3836 (P&H).

<sup>48</sup>See *Kunhimon v. State of Kerala*, 1988 Cri. L. J. 493 (Ker), the court in this case held that the possibility of a rape victim getting married thereafter is remote.

<sup>49</sup>For case studies, see *State of Himachal Pradesh v. Asha Ram*, 2005 Cri. L. J. 139 (SC), *Malkhan Singh v. State of Madhya Pradesh*, 2003 Cri. L. J. 3535 (SC), *State of Rajasthan v. N.K.*, 2000 Cri. L. J. 2205 (SC).



since she was able to get married after all. Hence the harm caused by rape is not as serious as in the case where the victim remains unmarried.

#### **d). Relationship between Accused and Victim**

Literature on rape suggests that the judges consider rape by a stranger as being the most traumatic form of rape which demands higher sentencing. The following two scenarios would be able to indicate where discretion of the judges would be applied while sentencing:

**Scenario A:** The victim (V) was waiting at a bus stop when the offender (O) approached her, covered V's mouth, produced a knife and threatened to kill her if she screamed. O punched her face and dragged into a park and then raped her vaginally. O made her adopt various humiliating positions and ejaculated over V, and told her that she would be dead if she reported the incident. O then left and V managed to crawl to a road where she got help from a passerby.

This case involves element of abduction, humiliation, violence and a sustained attack which would make this case more serious and grave, attracting a higher punishment.

**Scenario B:** The Victim (V) became friend with the Offender (O) and agreed to meet up for dinner. O persuaded V to come to his house so he could get changed and leave together for dinner. Once inside the flat O raped V vaginally and said that if she reports

the incident then he will harm her. Due to the threats given by O, V stayed in the flat until he had changed and went to dinner with him. After sometime, she found an opportunity to escape.

This case, although it contains elements of detention, but would be considered as less extreme, which call for lower sentencing<sup>50</sup>.

#### **e). Ends of Justice**

Courts have cited 'ends of justice' as a justification for lowering sentences below the statutory 'minimum' in the following cases:

1). Where the parties had reached a compromise and desired to drop legal proceedings (This is the case which the law does not permit).

These days the courts have started awarding lower sentences to the rape convict, if the woman enters into a compromise with him through mediation, or accepts to get married to the convict. Rape cases are sexual offences and are non-compoundable. Any compromise between the victim and the convict is 'illegal' and should not be encouraged by the court as it happened in the following cases:

#### *State of Madhya Pradesh v. Madan Lal*<sup>51</sup>

In the present case, the victim was a minor girl of 7 years of age who was going in search of her mother when the accused took the undue advantage and raped her. Listening to the screams, the mother of the girl reached at the spot and thereby filed an FIR against Madan Lal and the criminal investigating

<sup>50</sup>Sec. Four: Rape and assault offences, [https://consult.justice.gov.uk/sentencing-council/rape-sexual-assault/supporting\\_documents/sexual%20offences\\_Rape%20and%20assault%20offences.pdf](https://consult.justice.gov.uk/sentencing-council/rape-sexual-assault/supporting_documents/sexual%20offences_Rape%20and%20assault%20offences.pdf).

<sup>51</sup>State of Madhya Pradesh v. Madan Lal, SLP (Crl) No. 5273 of 2012, [http://supremecourtindia.nic.in/FileServer/2015-07-01\\_1435727878.pdf](http://supremecourtindia.nic.in/FileServer/2015-07-01_1435727878.pdf).



process began. The Trial Court of Guna, Madhya Pradesh looking at the evidence convicted the accused under section 376(2)(f) read with section 511 of the Indian Penal Code and sentenced him to 5 years of rigorous imprisonment.

But the case went for Appeal in the High Court, where the learned judge pointed out that the Sessions court failed to appreciate the evidence in proper perspective and the alternative submission stating that the parties had entered into a compromise was filed which was ignored by the Trial court. And therefore, on this basis the High court converted the offence to one under Section 354 of IPC<sup>52</sup> and confined the sentence to the period of custody already undergone, which was slightly more than one year.

Fortunately, the matter reached Supreme Court, where Justice Dipak Misra held that in a case of rape or attempt to rape, the conception of compromise under no circumstances can be thought of. And the apex court ordered the Madhya Pradesh high court to consider the evidence afresh and directed the accused to be taken back into the custody.

#### *V. Mohan v. Cuddalore District*<sup>53</sup>

In 2008, V Mohan was found guilty by the Mahila Court of committing rape of a minor girl and sentenced him to 7 years of imprisonment and slapped 2 lakh rupees fine. The matter went in Appeal to the Madras High Court in July 2015, where he

challenged his conviction and sentence. The Court referred the matter to mediation and said that Alternative Dispute Resolution is now used in Criminal cases also and it is the best method to resolve any matter as there is 'no victor, no vanquished'. However, the victim rejected the offer to marry her rapist. This is a disturbing trend which has become a routine in our Indian courts, where so many women end up marrying their rapists or otherwise chose to end their life.

But fortunately, the case reached Supreme where the bench headed by Justice Dipak Misra held that any compromise promising wedlock between a rape victim and accused is against the 'dignity of a woman'. Even Justice SN Dhingra termed the judgment of the Madras High Court to settle the matter as 'illegal', 'unwarranted' and 'unethical'<sup>54</sup>.

2). Where the defendants were young  
The age of the defendant has also been considered as a mitigating factor by courts. For instance, in the Nirbhaya gang-rape and murder case one of the convict was a juvenile who was just a few months away from turning 18. He was the main offender but was sent to a juvenile home because of his age, while others were given death penalty<sup>55</sup>.

### **EXISTING SENTENCING FRAMEWORK IN INDIA**

This chapter tries to analyze whether the existing sentencing framework, passes the constitutionality test. I argue that, the present

<sup>52</sup>Section 354 of IPC – Assault or criminal force to woman with intent to outrage her modesty – Whoever assaults or uses criminal force to any women, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

<sup>53</sup>According to the Zee News report, 1st July 2015, www.firstpost.com.

<sup>54</sup>V. Mohan v. Cuddalore District, CrI.A. No.402 of 2014.

<sup>55</sup>Mukesh & Anr. v. State for NCT of Delhi & Ors., S.L.P. (Criminal) Nos. 3119-3120 of 2014, the juvenile now is working as a cook at a roadside eatery in South India.



sentencing practices by Indian courts often constitute an inappropriate exercise of discretion leading to arbitrariness and abuse of judicial discretion, therefore, I would analyze the rulings of the Supreme Court of India by interpreting article 14 of the Constitution of India, which talks about the equality before law and equal protection of the laws. I further argue that, by not framing the sentencing guidelines, it violates the due process protection guaranteed by Art.21 of the Constitution of India.

The rape sentencing by Indian courts is not based on consistent principals and the reasons provided for reducing sentences are usually not rational, but are solely based on the unbridled discretion of the judges. The lack of rules and principals has led the Indian courts to consider irrelevant mitigating factors while sentencing. The Supreme Court of India in *Union of India v. Kuldeep Singh*<sup>56</sup> held that discretion implies 'know [ing] through law what is just'. The court observed that judicial discretion signifies discretion regulated by rules and law. It brings responsibility on the person using discretionary power to give relevant reasons and to arrive at a decision based on 'judicial thinking'. But, if there is any danger that the judges might abuse the discretionary powers

then it makes it mandatory for the legislature to bring sentencing guidelines. As, in *Gurbaksh Singh Sibbia v. State of Punjab*<sup>57</sup>, which is the most important Indian case on judicial discretion which was decided by a Constitutional Bench of the Supreme Court of India overruling the decision of Punjab and Haryana High Court by laying down guidelines for granting anticipatory bail<sup>58</sup>, which curtailed the discretion of courts in setting bail<sup>59</sup>.

#### ***Testing the constitutionality current sentencing framework under Article 14***

Unbridled discretion in the absence of standards or rules leads to arbitrariness. Since arbitrariness is antithetical to the right to equality guaranteed by Article 14<sup>60</sup> of the Constitution of India, such exercise of unbridled discretion is unconstitutional, as held in *E.P. Royappa*<sup>61</sup> case. This principal was subsequently approved by a seven-judge Bench of the Supreme Court in *Maneka Gandhi v. Union of India*<sup>62</sup>, and by constitution Bench in *Ajay Hasia v. Khalid Mujib*<sup>63</sup>. This expanded interpretation of Article 14 has been used regularly in assessing the constitutional vires of state action.

<sup>56</sup>*Union of India v. Kuldeep Singh*, (2004) 2 S.C.C. 590.

<sup>57</sup>*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 S.C.C. 565.

<sup>58</sup> Section 438 of the Cr. P.C. deals with anticipatory bail, where it empowers a court to grant bail to a person in anticipation of arrest. Any person who anticipates that he/she might be arrested by the police may approach the court seeking such bail.

<sup>59</sup> A.I.R. 1978 P&H 1.

<sup>60</sup>Article 14 of the Constitution of India states that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The fundamental right to equality

has been recognized by the Supreme Court as the embodiment of the principle of the Rule of Law; an essence of democracy; and most importantly, it is the basic structure of the Constitution.

<sup>61</sup>*E.P. Royappa v. State of Tamil Nadu*, (1974) 4 S.C.C.3, where Justice Bhagwati along with Justices Y.V. Chandrachud and V.R. Krishna Iyer, ruled that Article 14 also embodied a guarantee against arbitrary action (referred to as the *Royappa* doctrine).

<sup>62</sup>*Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248.

<sup>63</sup>*Ajay Hasia v. Khalid Mujib*, (1981)1 S.C.C. 722. See also : *Ramana v. Dayarama Shetty v. Airport Authority of India*, (1979) 3 S.C.C. 489.



Around the same time as the *Royappa* case, the Supreme Court was given the responsibility to rule on the constitutionality of the death penalty. The first notable case on the constitutionality of death penalty was challenged in *Jagmohan Singh v. State of Uttar Pradesh*<sup>64</sup>, where the Court held that the judiciary had been granted ‘wide discretion’ by the legislature and therefore, it is impossible to lay down comprehensive guidelines for the exercise of such discretion. It was also held that judicial discretion was not arbitrary since each case was unique and therefore any argument based on discrimination would be unacceptable.

The next challenge to the death penalty arose post *Royappa*, where the Court held that in the absence of principles, the capital sentencing discretion of the courts would be unconstitutional<sup>65</sup>. The unbridled discretion of the judges was the basis for challenge in this particular case. But since *Jagmohan* case decision was given by Constitution Bench, it could not be overruled by the decision in *Rajendra Prasad* which was delivered by the three-judge Bench of the Supreme Court. *Rajendra Prasad* case was followed by *Bachan Singh*, where the Court held that sentencing discretion is not unguided in the context of the death penalty. Pointing to Sec. 354(3) of the Cr. P. C. the Court held that in its earlier decisions it had laid down various ‘well-recognized’ principles for imposition of the death penalty. The constitutionality of death penalty has not been adjudicated by the Supreme Court since *Bachan Singh*. However, over the last decade, the Court has felt the need to issue the guidelines for death

penalty. This arose when the Court recognized that it was not applying the ‘rarest of the rare case’ doctrine consistently. The Supreme Court in *Bariyar v. State of Maharashtra* re opened the issue of whether the *Royappa* doctrine applies to judicial discretion. Holding that equal protection under Article 14 applies to sentencing, it suggested that the arbitrariness in the imposition of death penalty might render the system unconstitutional. The Supreme Court recognized the *Royappa* doctrine as a method to test whether the state action is arbitrary, and hence unconstitutional. The lack of principles and the unbridled discretion of the judges lead to arbitrariness, violating the *Royappa* doctrine and consequently Article 14 of the Constitution of India. Hence, the current sentencing framework in India is unconstitutional.

#### ***Testing the constitutionality of sentencing under Article 21:***

The main issue is whether sentencing in the absence of sentencing guidelines and principles violate Article 21 as well? For this, we need to understand what Article 21 of the Constitution of India is. Article 21 states that “No person shall be deprived of his life or personal liberty except according to the procedure established by law.” In the landmark decision of *Maneka Gandhi v. Union of India*<sup>66</sup>, the Supreme Court held that the term ‘procedure established by law’ means a procedure that is ‘just, fair and reasonable’. If the procedure is arbitrary, then it will be unconstitutional.

<sup>64</sup>*Jagmohan Singh v. State of Uttar Pradesh*, (1973) 1 S.C.C. 20.

<sup>65</sup>*Rajendra Prasad v. State of Uttar Pradesh*, (1979) 3 S.C.C. 646

<sup>66</sup>*Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248.



- Hence, the lack of principles and sentencing guidelines for the exercise of discretion, not only violates Article 14, but also violates Article 21 of the Constitution of India. Therefore, there is an urgent need to frame the sentencing guidelines, so that nothing leads to arbitrariness and the procedure is just, fair and reasonable. Also, Art. 21 gives every individual the right to life and personal liberty where nobody can be forced to have sexual intercourse by another person just because they are married. The Indian Constitution recognizes every individual, and their individuality does not end with marriage. So before constructing sentencing guidelines, India should recognize marital rape as an offence and then only justice in the true sense could be achieved.
- The representatives of Sakshi demanded the deletion of exception to rape in IPC. Because even if the woman is married, the force used by her husband without her consent for sexual intercourse should not be allowed and encouraged. But the 172nd Law Commission Report did not agree and said that marital rape cannot be made an offence as that would be unnecessary interference in the marital relationships<sup>67</sup>. If this remains a situation then in the long run, India would never be able to deliver justice in a fair and impartial manner if it continues to consider women as a men's property and not an individual having rights and freedoms over her own body.

### SENTENCING GUIDELINES

*“Everything has been said already, but as no one listens, we must always begin again.”*

<sup>67</sup>Law Commission of India, One Hundred and Seventy Second Report: on Reviews of Rape Laws, March 2000, <http://www.lawcommissionofindia.nic.in/rapelaws.htm>.

*By Andre Gide, French Thinker & Writer*

In the previous Chapter IV, I argued that the current sentencing in India is unconstitutional, as the absence of penological theory and clear principles leads to arbitrariness and discrimination, violating Article 14 of the constitution of India. It was also argued that, as per the current sentencing framework, a person is deprived of his liberty while giving punishment, and by not providing a just, fair and reasonable procedure would violate Article 21 as well. Therefore, the unwarranted disparity in sentencing justifies the need for the enactment of sentencing guidelines. Hence, it is proposed that there should be a setting up of sentencing commission which would draft the sentencing guidelines. And in all cases the aggravating and mitigating relevant factors must be considered by the commission. Also, the sentencing commission must differentiate between the relevant factors that the judges should consider and the irrelevant factors that should necessarily be not relied on. The Law Commission of India in its 47th Report also states that a proper sentence is a composite of many factors, such as the nature of the offence, aggravating & mitigating factors, age of the offender, past criminal record of the offender, education, social background of the offender, mental & emotional condition of the offender, etc<sup>68</sup>. A sentencing commission would be an appropriate and helpful institution to make these judgments, subject to legislative approval. The Sentencing Commission should adopt the

<sup>68</sup>Uday B. Shukla, 'Sentencing Policy, Victimology and compensation to the victims', Pg 13, [http://mja.gov.in/Site/Upload/GR/Workshop%20Paper\\_sentencing%20victimology%20-%20uday%20b%20shukla.pdf](http://mja.gov.in/Site/Upload/GR/Workshop%20Paper_sentencing%20victimology%20-%20uday%20b%20shukla.pdf).



following guidelines while sentencing the rape offender. I have also explained the points for better understanding.

**1) Gravity of the offence or harm caused— Higher sentence for grave offences and also if there is much harm caused to the victim mentally or physically. Also higher sentences for those who commits rape on dead bodies.**

The gravity of the offence judged by the harm caused to the victim is an important factor that the judges must consider while deciding the sentence. The court generally considers that the gravity of the harm can be seen by looking at various factors, where the loss of the chastity is considered as the primary factor. Indian courts look into the fact that if the victim is unmarried and is raped, then her chance of getting married reduces. Therefore, the courts believe that the victim's loss of virginity has actually affected her adversely and hence imposes a higher sentence on the accused for the violation of the dignity of woman. But at the same time, the sentence must not be mitigated on the basis of the past sexual history or her being already married. Moreover, if the woman after rape gets married then also the courts tend to reduce the sentence of the accused, since they believe that the victim has not suffered much harm due to rape. Therefore, there must be a set of norms which expressly considers rape as the gravest offence and hence in no case the sentences should be reduced.

There are also cases where the rape is degrading and inhuman, that the accused after forcing himself on the victim, if causes her death as a consequence of force, then also rapes the dead body. This should be considered as gravest offence and must lead to a higher sentence<sup>69</sup>.

The issue of injuries is also an important factor where the presence of injuries on the body of the victim leads to higher sentence, which is non-controversially a relevant factor. But again, the absence of injuries on the body of the victim must not lead to the decrease in the sentence. The court also looks into the injuries sustained by the accused to see if the victim resisted when rape was being committed. But there may be absence of injuries where the victim does not resist out of fear, coercion or even shock. This also opens up the issue of psychological injuries, which the court must take into consideration. For instance, England and Wales have guidelines which take into account fear, humiliation, degradation, shame, inability to for personal relationships, embarrassment, and suicidal thoughts<sup>70</sup>.

**2) Relationship between the defendant and the victim – Higher sentence must be given to the acquaintance ignoring the rape myth attached to it that rape is less traumatic or not grave when committed by the acquaintance.**

One of the most prevalent rape myths considered by the courts is that the rape by a stranger is more traumatic to the victim than by an acquaintance. The court tends to

<sup>69</sup>In a recent case of December 2017, a 28 year old necrophiliac man was found raping a woman's dead body in Delhi. He has been arrested and such cases demand higher sentence for such gruesome act of raping a dead person,

<http://indiatoday.intoday.in/story/rape-dead-body-delhi-necrophilia/1/828622.html>.

<sup>70</sup>Sentencing Guidelines Council, Sexual Offences Act 2003, Definitive Guidelines 6 (2007), [www.sentencingcouncil.gov.uk/docs/web-\\_SexualOffencesAct\\_2003.pdf](http://www.sentencingcouncil.gov.uk/docs/web-_SexualOffencesAct_2003.pdf).



impose lower sentences on the defendant where the he is already known<sup>71</sup> to the victim. This should not be acceptable as the issue of breach of trust is considered an aggravating factor in most offences. Since rape by an acquaintance exemplifies breach of trust, therefore there is no reason that could justify the lowering of the sentences. In such cases, the victim not only suffers physical pain but also the mental trauma which is more traumatic as she would not be able to believe on anybody in future. In many cases, courts are reluctant to impose higher sentences considering the relationship between parties. In some of the cases where the defendants were relatives or neighbors, courts assumed that there must have been a romantic relationship between the accused and victim, even if the victim testified that there was no such relationship, hence, they got lower sentences.

**3) Age of the defendant– Minors brutally committing rape must not be given lower sentence as they can be a threat to the society in future also and must be dealt strictly by giving higher sentences.**

The age of the defendant, as we have witnessed in many cases, is certainly a relevant factor in sentencing. Where the defendant is a minor, even though has committed a gruesome act, then also the courts recommend lower sentences for young defendants, for instance, in the infamous Nirbhaya rape case, the minor in spite of being the most cruel one, was sent to the juvenile home considering his age as a relevant factor, while the other defendants

were given capital punishment. As the main aim of the judiciary is reformation of the minor, therefore no strict actions are to be taken against him, which poses a constant threat to the society. Therefore, the theory which should be adopted and applied by our Indian Legal System must not be the reformatory theory in such heinous crimes, but deterrent theory must be taken into consideration therefore, the minor age of the youth should not be considered as a mitigating factor.

Another situation is when there is a wide age difference between the defendant and the victim, especially when the victim is in her teen age. Such case justifies a higher sentence, due to the vulnerability of the victim. Such vulnerability could be considered as an aggravating factor. To sum up, the age of the offender should not be considered as a mitigating factor, though; old age and illness might fall in exceptions. As we have already seen cases where Indian courts had reduced sentences on the ground of the old age of the offender<sup>72</sup>, such factors or disability should be placed on a list of permissible mitigating factors, subject to logical and adequate reasoning being provided by the court. Hence, these should be considered as exceptions.

**4) Personal mitigation– Socio-economic status, education, and employment must not be considered as mitigating factor and judges must sentence the offenders for the crime they have committed. That will be justice to the victim and society.**

<sup>71</sup>See *Sujit v. State of West Bengal*, 2009 Cri.L.J. 1021 (Cal); *Chander Dev Rai v. State (N.C.T. of Delhi)*, 2009 Cri.L.J. 1931 (Del); *Bhupinder v. State of Haryana*, 2002 Cri.L.J. 1286 (P&H).

<sup>72</sup>See for instance *Safi Mohamad v. State of Himachal Pradesh*, 2007 Cri.L.J. 4546 (H.P.); *State of Orissa v. Gangadhar*, 1992 Cri.L.J. 3814 (Ori).



Indian courts while deciding the sentence include the offender's education, employment, economic status and other socioeconomic factors which are referred as 'personal mitigation'. These factors are generally relevant when the primary theory or justification for the punishment is rehabilitation, but what if the primary justification is deterrence? The courts fail to appreciate the fact that the crime will still be a crime whether it is committed by a rich or a poor, employed or unemployed, literate or illiterate. The defendant has committed the offence, knowing all the consequences that he might suffer, therefore these factors should not be considered as mitigating and should be given just and fair sentence. Even in case of *State of Karnataka v. Raju*<sup>73</sup>, The Trial court imposed custodial sentence of seven years to the offender for committing rape of a minor under section 376 of IPC. On Appeal, the High Court reduced the sentence to three and a half years. The Hon'ble Supreme Court held that in case where rape is committed on a child below 12 years of age, then the normal sentence is not less than 10 yrs of rigorous imprisonment, though in exceptional cases "for special and adequate reasons", reduced sentence can also be awarded. It was thus held that socio-economic status, religion, race, caste or creed of the accused or victim are irrelevant considerations while sentencing.

These factors are in a default position which neither can be considered as aggravating or mitigation nor therefore, needs to be ignored

<sup>73</sup> *State of Karnataka v. Raju*, 2007 (11) SCALE 114, 'Latest view of sentencing policy with reference to the judgment of the Hon'ble Supreme Court & High Court', <http://mja.gov.in/Site/Upload/GR/Criminal%20Summary%20of%20Workshop%20dt.%2022.3.2015%20n%20Chandrapur%20District.pdf>.

while deciding the sentence. The judges should only focus on the crime and the gravity of the harm caused to the victim.

**5) Delay in judicial process and Dying Declaration— Delay caused by the defendant must not be taken as a mitigating factor, but treated strictly as the defendant is trying to make the mockery of the judicial process.**

Judiciary protects the rights of the citizens and acts as the interpreter and guardian of the Constitution. Its purpose is to administer justice to the people in a fair and impartial manner<sup>74</sup> and within a reasonable period of time. Though the legislature has made various laws to protect women, but the delay to deliver judgment on the part of the judiciary slower the court proceeding and denies justice to the victims by giving lower sentences to the offender<sup>75</sup>.

In the case of *Mohd. Yaseen v. State*<sup>76</sup>, the rape victim was a minor girl of 9 years of age and an acquaintance. The rape was brutal then also the defendant was given a 'minimum' of seven years of imprisonment. On appeal, the High Court was of the opinion that there were enough aggravating circumstances to enhance the prescribed punishment. However, since the judicial decision already took 19 years, the court reasoned that the victim must have settled down in life and therefore the delay was considered as a mitigating factor, destroying the essence of justice.

<sup>74</sup> KamalRana, Role and Functions of Judiciary in India, 07/03/2014.

<sup>75</sup> Dr.Kamalaveni&Dr.RupaGunaseelan, "Loopholes in Judicial System-Paves way to Violence against Women", (IOSR-JHSS) Volume 18, Issue 3 (Nov. - Dec. 2013), PP 55-56.

<sup>76</sup> *Mohd. Yaseen v. State*, 2005 Cri.L.J. 307 (J&K)



Similarly, in *Nehru v. State of Madhya Pradesh*<sup>77</sup>, the defendant was an ‘affluent’ goldsmith who raped a 16 year old girl for sexual pleasure treating her as an object. It was observed by the court that the rape survivor has ‘suffered a permanent scar on her life’, but since the offence had taken place 13 years earlier, therefore now the monetary compensation ‘would do justice’. Here due to the delay in deciding the case, the court like the goldsmith treated the justice on monetary terms. The court also treated the victim as a commodity exchanging Justice for money compensation.

#### *Dying Declaration*

Dying Declaration of the victim is an important part of the Evidence Act, and such declarations can be considered as the sole basis of conviction if it is proved that it was voluntary and not a result of tutoring, imagination or prompting<sup>78</sup>. Even Justice Dipak Misra in the *Nirbhaya* Judgment noted in this case that it is not necessary that the dying declarations must be made under an oath or recorded specifically by the Magistrate. The only essential requirement is that the one who is recording the dying declaration must be satisfied that the victim was in a fit mental state to make such declaration and that the declaration was voluntary. And if there is more than one dying declarations then that would not make all the declarations incompatible. Delaying the procedure by not believing in the dying declaration will delay or even deny the delivery of justice to the victim and as we know that Justice delayed is justice denied which has been witnessed in a number of

cases and the law enforcement agencies needs to realize that people are no longer in a mood to tolerate injustice or in action on the part of the authorities.

Delay in judicial process is often decided as a mitigating factor by the courts. Clearly, if the defendant himself had contributed to the delay then he should not be provided a leniency or discount for the same. The Code of Criminal Procedure mandates courts to deduct the sentencing period of the offender undergone by him during the investigation, enquiry or trial shall be set off against the term of imprisonment ultimately imposed<sup>79</sup>. However, it does not provide for discount for sentence on this ground.

#### **To sum up:**

**Permissible Mitigating Factors (subject to rational reasons and justifications provided by court, based on evidence led by the defence and the prosecution)**

1. Old age of the defendant;
2. Defendant suffering from serious illness;
3. Defendant being disabled;
4. Delay in Judicial process (provided that an unnecessary delay should not be caused by the defendant).

#### **Impermissible Mitigating Factors:**

1. Social and economic status of the defendant;
2. Education of the defendant;
3. Defendant losing employment because of conviction when he is the sole earning member of the family;
4. Mental agony suffered by the defendant;
5. Pre-trial/under-trial detention;

<sup>77</sup> *Nehru v. State of Madhya Pradesh*, 2001 Cri.L.J. 1118 (M.P.).

<sup>78</sup> *Panneerselvam v. State of Tamil Nadu*, (2008) 17 SCC 190. This case exclusively laid down the

important guidelines with respect to the admissibility of dying declaration.

<sup>79</sup> Section 428, the Code of Criminal Procedure, 1973.



6. Impact of sentence on the dependents of the defendant- financial, emotional or if the defendant has daughters of marriageable age;
7. Withdrawal of complaint;
8. Compensation given by the defendant;
9. Victim-related factors – victims past sexual history, victim's conduct in court, marital status of the victim or if she got married after the incident, victim's virginity, victim's choice of dresses.
10. Absence of injuries on the body of the victim.

### CONCLUSION

Rape is one of the most heinous crimes that are committed against women. It does not only exploit her body sexually, but leaves a permanent scar on the image of the victim. Therefore, the women have now started showing their resistance towards sexual violence and agitate for changing the social-cultural and political practices in India by indulging in ways like sit-down protest, candle light marches, ad-campaigns, freeze mob, rallies etc to bring to the knowledge of the general public about these inhuman and degrading crimes. They are hence, trying to wake up the sleeping law enforcement authorities.

As rightly observed by Justice Chettur Sankaran Nair of the Kerala High Court, Criminal justice machinery is evolved so that the injured/ aggrieved do not take law in to their own hands. But undue leniency in sentences to the offender could provoke the aggrieved to wreak vengeance<sup>80</sup>. Therefore, I have proposed the establishment of a sentencing Commission which would draft the sentencing guidelines in order to avoid any unwarranted disparity. This would

involve identifying a primary theory of punishment in cases of rape, which I suggest to be deterrent theory and not reformatory or rehabilitative. Because the offence of rape, even if committed by a minor is grave and the most heinous kind of offence and therefore any leniency in punishment for rape offenders should not be welcomed. This also sets as an example for the whole society. I also suggested the factors that should be considered as relevant while sentencing and those which should be strictly considered as irrelevant by the courts.

When the current sentencing regime was tested against the foundational principles in Articles 14 and 21 of the Constitution of India, the present regime did not pass the test of constitutionality. The legislature can restore constitutionality by enacting sentencing guidelines which can be helpful to provide guidance to courts while sentencing. Whether the judges should be given unbridled discretion in the name of individualized justice is the core issue. As every judge has their own sense of justice according to which they decide each case, therefore, it would be dangerous to leave the judges with such wide discretionary powers to decide the punishment for the offenders; otherwise it leads to discrimination and arbitrariness. Moreover, even the minimum sentence for the offence of rape can be reduced by the courts by giving "adequate and special reasons". However undue sympathy to impose inadequate sentence would do more harm to the justice system and the public would lose its confidence in the efficacy of the law. It is therefore, the duty of every court to give proper and adequate

<sup>80</sup> Nana v. State of Kerala, 1988 (1) K.L.T. 37 at 39, K. N. Chandrasekharan Pillai, 'The Sentencing Dilemma', Cochin University Law Review, 1989,

<http://dspace.cusat.ac.in/jspui/bitstream/123456789/10845/1/The%20Sentencing%20Dilemma.PDF>.



---

sentence having regard to the nature of the offence and the manner in which it is committed<sup>81</sup>. Such unwarranted disparity in sentencing will be considerably reduced if the proposed guidelines are followed.

There is an urgent need to take a fresh look at the position in which the women as a victim of crime is placed in our criminal justice system. Victims should be able to rely on the judiciary which is not biased and is free from myths and stereotypes, and whose impartiality is not compromised in any situation. As we know that Justice is not a means but it is an end in itself and everyone who is right on their part must deserve.

\*\*\*\*\*

---

<sup>81</sup>This position was stated by the Supreme Court of India in *Sevaka Perumal etc. v. State of Tamil Nadu*, AIR 1991 SC 1463.