



THE ROLE OF LAW OF EVIDENCE IN PROVING SEXUAL OFFENCE CASES IN THE COURT OF LAW: AN ANALYSIS

AUTHOR: J GOWRI, STUDENT AT SYMBIOSIS LAW SCHOOL, HYDERABAD

BEST CITATION – J GOWRI, THE ROLE OF LAW OF EVIDENCE IN PROVING SEXUAL OFFENCE CASES IN THE COURT OF LAW: AN ANALYSIS, *ILEX SPECULUM (ILE LS)*, 1 (1) OF 2023, PG. 192-198, APIS – 3920 – 0036 | ISBN – 978-81-964391-3-2.

Abstract

The issue of sexual offenses is a prevalent concern in India, with an increasing number of cases being reported each year. Due to the numerous legal, social, and cultural considerations that must be taken into account, proving such matters in a court of law is complex. This paper will look at the obstacles prosecutors experience in proving sexual crime cases as well as the difficulties victims have in getting justice in India. The research draws on a combination of legal and social science literature, as well as a case study of recent sexual offense cases in India. The analysis highlights several key challenges, including inadequate legal frameworks, victim blaming, lack of forensic evidence, and societal attitudes towards sexual offenses. This paper concludes by outlining potential solutions to these issues, such as amendments in existing legislations, enhanced victim assistance programmes, and public awareness efforts to combat prevailing perceptions of sexual offences.

Keywords: evidence, sexual offences, justice, rule of law, victim assistance, rape.

Introduction

Sexual offences are a serious problem in India, with many cases of rape, sexual assault, and harassment reported every year. Despite the legal framework in place to address such crimes, proving these cases remains a significant challenge. Sexual offences are often underreported due to the social stigma attached to the victim and fear of retaliation. Moreover, the burden of proof in such cases falls on the victim, which can make it challenging to establish guilt beyond a reasonable doubt. The legal process can also be slow and cumbersome, further discouraging victims from coming forward. In this context, it is essential to understand the challenges in proving sexual offence cases and the steps that can be taken to address them. Although though over a quarter of all rape cases filed and taken to trial result in convictions, rape and the fear of rape remain problems for many Indian women. Many statutes, including the Criminal Law (Amendment) Act of 2013 and the Protection of Children from Sexual Offences (POCSO) Act,

establish the legal framework for sexual offences in India. These laws outline sexual offences, specify penalties for perpetrators, and offer victim protection. Nonetheless, despite these legislative restrictions, sexual offences are still a major issue in the nation. The burden of proof is one of the main obstacles to proving sexual assault allegations in India. In criminal trials, it is the responsibility of the prosecution to establish the guilt of the defendant beyond a reasonable doubt. Yet, the victim frequently bears the burden of proof in sexual crime prosecutions, making it challenging to prove guilt beyond a reasonable doubt. This study aims to identify the challenges faced in prosecuting sexual offence cases in India, including inadequate legal frameworks, victim blaming, lack of forensic evidence, and societal attitudes towards sexual offenses.

I. Sexual Offences: Meaning and definition

The Law Reform Commission (1978) defined a sexual offence as intentional sexual contact with another person without that person's

implied or expressed consent. Sexual assault is classified as a subcategory of gender-based violence and is characterised as "any form of sexual attempt or unwanted advances, employing coercion, threat, or physical force." Sex crimes against women include sexual assault, molesting, rape, and abduction for sexual exploitation.

Women are typically pressured or dissuaded from reporting such sexual actions by the community. Insufficient faith in the legal system or law enforcement also serves as a deterrent. Reforms in law and policy are urgently needed to address the prevalent and deplorable rape-related conventional wisdom. The creation of the International Criminal Court (ICC) has improved the community's capacity to prosecute cases of sexual assault violence in courts and raise awareness of it. The way sexual assault is conceptualized and prosecuted legally typically determines its scope, magnitude, and shape. Rape is regarded as the most offensive and serious type of human rights violation out of the offenses mentioned³²⁹ The World Health Organization (WHO) has come up with an "integrated model" for medico-legal support for victims of sexual violence, considering that sexual assault has a considerable impact on the victim's physical as well as emotional well-being.

II. The Criminal Amendment Act, 2013

The "Criminal Amendment Act 2013" (Nirbhaya Act), which was developed by the Parliament on the recommendation of the "Justice J.S. Verma Committee," was created in the wake of the horrifying and inhumane gang rape of a young lady in Delhi in 2012, which shocked the collective mind of the society at large. Five months after the horrific tragedy that sparked widespread protests and the desire for progressive laws, a revised bill was put forward in the Lok Sabha and passed. The amendment made significant procedural and substantive modifications to the existing laws in the areas of

the "Indian Evidence Act, 1872," "Indian Penal Code, 1861," and "The Code of Criminal Procedure, 1973" regarding sexual offences in response to the rising crime rate and the promotion of women's safety. The "Hon'ble Supreme Court" in *Sakshi v. Union of India*³³⁰ noted that the "U.N. Convention on the Elimination of All Forms of Discrimination Against Women" is violated by the current meaning of rape in accordance with section 375 of the IPC, 1860. (CEDAW).

A) Recommendations

In its 172nd report, the Law Commission of India suggested substituting the term "sexual assault" for the word "rape." The Verma committee suggested changing "outraging the modesty of a woman" to "Sexual assault" since the word "rape" carries a considerable societal stigma³³¹. Additionally, the group placed a strong emphasis on broadening the definition of rape by designating the crime as "Gender Neutral." Numerous progressive suggestions made by the Verma Committee were only partially followed by the Parliament.

B) Enlarging the Purview of Actus Reus

In addition to putting an important focus on infringements on "bodily and sexual integrity," the Verma Committee also placed a heavy emphasis on expanding the definition of rape to include non-penetrative activities. For instance, in the United Kingdom, penetration or even mere contact with a female is regarded as sexual assault for as long as the accused person intended to harm the victim³³². The definition of rape in India places less stress on the victim's integrity and more attention on the male victim's understanding of sex due to its focus on penetration. Expanding the scope of the crime above penetrative offences will help achieve a worthy goal, place a strong emphasis

³²⁹ Hetu, Vibha, Human Rights Violations of Rape Victims: A Sociological Study in Delhi City, University School of Law and Legal Studies, February, 2011.

³³⁰ *Sakshi v. Union of India*, AIR 2004 SC 3566

³³¹ Satish, Laws Relating to Sexual Violence in India: Constitutional and Human Rights dimensions, Journal of the National Human Rights Commission, Vol 15, 2016, pp 225-226.

³³² Section 3, (UK) Sexual Offences Act, 2003.

on women's "sexual and bodily integrity," and provide victims a voice and legal recourse³³³.

C) Consent

The Amendment Act of 2013 included a definition of "consent" in relation to the crime of rape for the first time. The definition of consent used by The Courts of Law before to the Amendment Act was found in the ruling in the case "Rao Harnarain Singh v. State of Punjab"³³⁴. A woman could consent to a "non-penetrative" act without it necessarily implying that she has consented to a "penetrative act," which would then constitute an offence. This is because the definition's primary focus was on the "communication of consent in compliance to a particular sexual occurrence," for example. Consent may be expressed through words, gestures, as well as other verbal and nonverbal communication techniques. Lack of resistance is not the same as consent, according to the Amendment Act. The decision of the "age of sexual consent" was one of the main points of contention amongst the committee headed by Verma and the Parliament. According to "The Protection of Children from Sexual Offences Act, 2012" (POCSO)³³⁵, a person must be eighteen years old before giving their "sexual consent." For example, following the Criminal Amendment Act, engaging in consenting sexual intercourse with a woman under the age of 18 will now constitute rape.

D) Marital Rape

Marital rape is one of the remorseless acts of abuse against women that has a severe impact on a victim's "bodily and sexual integrity" as well as mental health. To preserve the "sanctity of the institution of marriage," the Verma Committee suggested that marital rape be made a crime. However, the parliament rejected the recommendations and instead

chose to pursue alternative measures, such as categorising marital rape as significant injury³³⁶.

III. Section 53 of the Indian Evidence Act 1872 and character of the victim

The idea that an accused person is presumed innocent until proven guilty as well as that the burden of proof lies with the prosecution to prove the accused person's guilt beyond a reasonable doubt using the common law rules of procedure as well as proof accepted by the Indian Evidence Act has come to be widely accepted³³⁷. The Indian Law Commission proposed that Section 53A of the Indian Evidence Act, 1872 be used in place of Section 155(4). To protect the basic rights of sexual assault victims as well as the ideals the rule of law and natural justice, this was done.

The Indian Evidence Act's Section 53A³³⁸ was included to emphasise the idea that the victim's "promiscuous character" or previous sexual history will not be considered in the decision about assent or a medical examination. In the past, Section 155(4) allowed the victim to be subjected to most of the mental abuse and humiliation in court while evidence was produced regarding the victim's overall immoral character. Additionally, the Indian Evidence Act, 1872³³⁹ was changed by adding a proviso to Section 146(3) that specifically made it unlawful to examine the prosecutrix about her integrity. The "Hon'ble Supreme Court" instructed the lower court in the case of "State of Punjab v. Gurmit Singh"³⁴⁰ that if a woman's prior sexual history is established, the court cannot deem her to be of loose character.

Furthermore, citing "Section 2 of the Sexual Offences (Amendment) Act, 1976," it was made clear that no questions or statements regarding the complainant's sexual history could be made

³³³ Chaudhary, Reconceptualizing Rape in Law Reform, 13 Socio-Legal Rev, 2017.

³³⁴ Rao Harnarain Singh v. State of Punjab, AIR 1958 PH 123.

³³⁵ The Protection of Children from Sexual Offences Act, 2012.

³³⁶ Ravenna Rao, Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact, 11 NUJS Law Review, 2018.

³³⁷ Padma, Evidence as to Immortal Character of Rape Victim, Supreme Court Journal, April 20, 2022.

³³⁸ Article 53(A) of Indian Evidence Act, 1872.

³³⁹ Section 146(3) of Indian Evidence Act, 1872.

³⁴⁰ State of Punjab v. Gurmit Singh 1996 AIR 1393.

during cross-examination³⁴¹. Rape is therefore not merely a crime against women; it is also a crime towards society as a whole, and as such, should be punished severely by the law.

IV. The importance of DNA and circumstantial evidence

A) Importance of DNA Evidence

Deoxyribonucleic acid (DNA), the most reliable form of identification evidence, has developed into a crucial tool for determining culpability in rape cases. DNA offers the identification of the criminals, and thus, DNA fingerprinting test serves a significant role in improving the likelihood of prosecution. Considering the simple fact that in our "Criminal Justice System" guaranteeing conviction in a rape case is regarded as of paramount challenge, DNA offers an identification of the perpetrators³⁴². DNA evidence provides the court with a type of corroborative evidence that helps the accused be found guilty of rape. DNA encourages decision-making while enabling verification with the other evidentiary and extra-legal factors. Although no special DNA legislation has been passed in India, Sections 53³⁴³ and 54³⁴⁴ of the Code of Criminal Procedure, 1973 are regularly used in criminal cases. The Criminal Amendment Act of 2005 changed the "Code of Criminal Procedure, 1973" to add Section 53, which demanded that a medical practitioner evaluate the criminal upon a police officer's request. Apart from human fluids, hair samples and fingerprints are the most often examined tangible evidence. Additionally, in accordance with Section 53A, the scope of the Section was expanded to encompass the investigation of blood, fingernail and hair specimens using current methods in cases of sexual offences .

B) Admissibility of DNA Evidence in the Court of Law

The exact and convincing putting together, conservation, and authentication of DNA evidence are major determinants of its admissibility before the Hon'ble court, which may convince the court that it can be regarded as reliable evidence. The fact that DNA technology violates two fundamental rights, the right to privacy (Article 21 of the Constitution) and the right against self-incrimination (Article 20(3)), is one of the main arguments against its admissibility.

In the case of "Schmerber v. California,"³⁴⁵ it was decided that while collecting DNA evidence is permissible, ordering an accused person to submit to a DNA test goes against their right not to incriminate themselves. A compelling DNA test, however, operates in the fundamental interest of society and consequently surpasses the significance of the defendant's right against self-incrimination given the burdensome nature of rape prosecution. The victim may experience psychological and traumatic effects as a result of the difficult work of apprehending and accurately identifying the accused. Like this, the "Hon'ble Supreme Court" ruled in the case of "Govind Singh v. State of Madhya Pradesh"³⁴⁶ that rights which are basic in nature are not unalienable and must be controlled by limitations based on compelling public interest. Additionally, the Constitutional bench stated in the case of "Selvi v. State of Karnataka"³⁴⁷ that "the comparison of DNA samples has begun to develop as an essential instrument for connecting individuals to specific criminal acts."

C) Value of Circumstantial Evidence

The widespread consensus is that while rendering a verdict, the jurist overvalues direct evidence like eyewitness testimony and confessions and undervalues indirect evidence

³⁴¹ McGlynn C. Rape Trials and Sexual History Evidence : Reforming the Law on Third-Party Evidence, The Journal of Criminal Law, 81(5), 2017, 367-392.

³⁴² Bahubalendra, Relevancy of Character under the Indian Evidence Act, 1872, Into Legal World, ed August 15, 2020.

³⁴³ Section 53 of Code of Criminal Procedure 1973.

³⁴⁴ Section 54 of Code of Criminal Procedure 1973.

³⁴⁵ Schmerber v. California 384 U.S. 757 (1966).

³⁴⁶ Govind Singh v. State of Madhya Pradesh 1975 AIR 1378.

³⁴⁷ Selvi v. State of Karnataka (2010) 7 SCC 263.

like DNA and forensic evidence³⁴⁸. It is a legal reality that no amount of circumstantial evidence, no matter how powerful, will be able to establish the defendant's culpability beyond a reasonable doubt. This is because circumstantial evidence is probabilistic³⁴⁹. According to Edmund Burke, "Concurrence of thoroughly verified circumstances compose an additional ground of assurance, occurrences cannot lie."^[40] The appraisal of circumstantial forensic evidence's probative rather than reliability value is one of the key issues with this type of evidence. The "Last Seen" theory is crucial in establishing the defendant's conviction. The court may condemn the accused based on the theory alongside to the circumstantial evidence and the case's facts. The burden of proof shifts to the defendant, and the evidence must also be relevant and consistent³⁵⁰. In the case of "Reena Hazarika v. State of Assam"³⁵¹, where the Hon'ble Supreme Court established a chain of circumstances resulting to the inescapable conclusion, the idea of the Last Seen theory was essentially defined. Additionally, the "Supreme Court" upheld the judgement of the trial judge and the High Court in the historic case of "Machhi Singh v. State of Punjab"³⁵² where the idea of a "balance between aggravating factors and mitigating circumstances" was utilized to determine the guilt of the accused in connection with the sexual assault and cold-blooded murder of a young girl. A set of rules for determining whether to impose the death penalty were also established in the case.

V.The complexities involved during investigation

A) Best Evidence Rule (Section 60 of the Indian Evidence Act, 1872)

³⁴⁸Miranda, Sexual Violence perpetrated against women in India: Role of Forensic Evidence, International Journal of Comparative and Applied Criminal Justice, Vol 41, Issue 1, 2017.

³⁴⁹ Jon Keller, The Cognitive Psychology of Circumstantial Evidence, Michigan Law Review, Vol. 15, Issue 2, 2016.

³⁵⁰ Supra Note 16.

³⁵¹ Reena Hazarika v. State of Assam SLP(CRL) No. 2440 of 2018.

³⁵² Machhi Singh v. State of Punjab 1983 AIR 957.

The police investigation into a sexual offence begins with both legal and extra-legal considerations. First, legal considerations refer to the evidence that must be presented in accordance with the law, whereas extra-legal factors refer to the suspect and victim's qualities, the harm they sustained, the weapon used, etc., all of which have a significant impact on the decision-making process. A significant influence is played by elements including the authenticity of the evidence gathered, its potency and dependability, and the number of witnesses (if any). Considering the Best testimony Rule outlined in Section 60 of the Indian Evidence Act³⁵³, which highlights the importance of oral testimony as a primary and direct kind of evidence. If the witness has first-hand knowledge of the events, oral testimony is regarded as corroborating proof and is therefore admissible in a court of law. The Rule emphasises the idea that secondary evidence is not admissible in the presence of primary evidence. Additionally, it was decided that the court should rely on the victim's statement in the matter of Sandeep alias Deepu v. NCT Delhi (Nirbhaya case)³⁵⁴ if there is no chain of custody and the narrative is consistent throughout the investigation. Therefore, the likelihood of witnesses being at the scene of the crime is extremely unlikely, particularly in cases involving sexual assault, and the victim's story needs to be given more weight.

Conclusion

A sexual offence is viewed as a savage, immoral conduct that not only has a significant negative impact on the victim's physical and mental health but also rattles the civil society. A deterrent is the combination of community pressure, discouragement, and lack of trust in police enforcement. Reforms in law and policy are urgently needed to address the prevalent and deplorable rape-related conventional wisdom. In order to promote and safeguard women's safety, "The Criminal Amendment Act,

³⁵³ Section 60, Indian Evidence Act, 1872- Oral Evidence Must be direct.

³⁵⁴ Sandeep alia Deepu v. NCT of Delhi, A. I. R. 2012, SC 3157.

2013" made a significant contribution by revising the pre-existing legal framework and establishing progressive laws. According to the Law Commission Report (172nd), Section 53A was added to the Indian Evidence Act, emphasising that the victim's "promiscuous character" or before sexual history will not be considered in the decision regarding consent or medical examination. This safeguarded the victim's right to avoid the agonizing experience of being interrogated about her beforehand sexual history in a court of law. Particularly in cases of sexual offence where the likelihood of other types of evidence being present is low, DNA evidence is said to be one of the most technologically sophisticated pieces of evidence that offers an exact and precise image of the culprit. Furthermore, circumstantial evidence can be supported by other types of evidence and simplifies applying an instruction to the case. Striking an equilibrium between the upholding of basic freedoms and social justice ideals is primitive. The figures alone show the difficulties in investigating and bringing charges for a sexual offence. It is also essential to enforce a stern and severe punishment, such as the death penalty, which will in turn instil terror in the hearts of the perpetrators, given the shocking rise in criminal activity and the declining conviction rate. While fast-track courts have recently been established, it is crucial to set a reasonable deadline for case resolution and to investigate under court supervision.

References

- 1) Bahubalendra, Relevancy of Character under the Indian Evidence Act, 1872, Into Legal World, ed August 15, 2020.
- 2) Govind Singh v. State of Madhya Pradesh 1975 AIR 1378.
- 3) Miranda, Sexual Violence perpetrated against women in India: Role of Forensic Evidence, International Journal of Comparative and Applied Criminal Justice, Vol 41, Issue 1, 2017.
- 4) Jon Keller, The Cognitive Psychology of Circumstantial Evidence, Michigan Law Review, Vol. 15, Issue 2, 2016.
- 5) Reena Hazarika v. State of Assam SLP(CRL) No. 2440 of 2018.
- 6) Machhi Singh v. State of Punjab 1983 AIR 957.
- 7) The Code of Criminal Procedure, 1973
- 8) The Indian Evidence Act, 1872
- 9) Padma, Evidence as to Immortal Character of Rape Victim, Supreme Court Journal, April 20, 2022.
- 10) State of Punjab v. Gurmit Singh 1996 AIR 1393.
- 11) McGlynn C. Rape Trials and Sexual History Evidence : Reforming the Law on Third-Party Evidence, The Journal of Criminal Law, 81(5), 2017, 367-392.
- 12) Ravinder & Kumari, Understanding Complainant Credibility in Rape Appeals: A Case Study of High Court Judgments and Judges' Perspectives in India"1 by Ravinder and Kumari, The British Journal of Criminology, Vol 55, Issue 3, May 2015, pg. 435-453.
- 13) Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.
- 14) Selvi v. State of Karnataka (2010) 7 SCC 263.
- 15) Sandeep alia Deepu v. NCT of Delhi, A. I. R. 2012, SC 3157.
- 16) Schmerber v. California 384 U.S. 757 (1966).
- 17) Vishaka & Ors. V. State of Rajasthan (1997) 6 SCC 241.
- 18) Chaudhary, Reconceptualizing Rape in Law Reform, 13 Socio-Legal Rev, 2017
- 19) Rao Harnarain Singh v. State of Punjab, AIR 1958 PH 123.
- 20) The Protection of Children from Sexual Offences Act, 2012.
- 21) Ravenna Rao, Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact, 11 NUJS Law Review,



2018.

22) Sakshi v. Union of India, AIR 2004 SC 3566

23) Satish, Laws Relating to Sexual Violence in India: Constitutional and Human Rights dimensions, Journal of the National Human Rights Commission, Vol 15, 2016, pp 225-226.

24) Hetu, Vibha, Human Rights Violations of Rape Victims: A Sociological Study in Delhi City, University School of Law and Legal Studies, February, 2011.

