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FORMATIVE CONCEPT OF 'WOMEN CRIMINALITY' IN SEXUAL ASSAULT UNDER IPC AND POCSO: AN INVESTIGATION INTO JUDICIAL DECISIONS AND LEGISLATIVE INITIATIVES

Santosh Kumar Sharma

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Formative Concept of 'Women Criminality' in Sexual Assault under IPC and POCSO: An Investigation into Judicial Decisions and Legislative Initiatives

Introduction

Rising number of sexual offences is unabatedly posing a challenge to the society and the state. Legislative measures taken post *Nirbhaya case*¹ have not been proved effective hitherto. No doubt, it will take time, hope so, to be fructified. But these Legislative efforts through the Criminal Law (Amendment) Act, 2013, have raised many issues. The role of women in rape and sexual assault cases has been drafted with dual mindset. Liability is being fixed by traditional approach while at the same time, is aimed to cover the maximum amplitude of desideratum and in the same vain, her liability as individual and in group is being written with different approaches. It is important to read provisions aimed at imposing liability on a woman, in which case, one and same act in two different circumstances² fix liability on women differently.

One of the important issue, which appears from the definition of 'rape' under section 375 of IPC is, whether a woman can commit rape? My argument in this paper is simple i.e., mere exclusions in headlines may help one in interpreting plainly but a cumulative reading is pregnant with otherwise conclusions too. Later or sooner it would be tough to avoid the liability of a woman offender, particularly in the rapidly changing milieu where similar acts are arranged differently up to eighteen years with almost similar phraseology. I would analyze the applicability of the provisions related to rape and

¹ The Term 'Nirbhaya' was used by the Civil Society to symbolize a protest against the brutal rape of a young girl in a moving bus on 16th Dec., 2012 by five persons, which resulted into her death due to multi-organs failure on 29 Dec., 2012. For her fighting spirit and also for the purpose of not disclosing the identity as per the legal requirement, she was given this name. This incident led to a national hue and cry which paved the way for the constitution of Justice, J. S. Verma committee, on whose recommendation the criminal law (Amendment) Act, 2013 has been passed. This is also called as 'December 16 Rape Case'. The judgment in this case was delivered on 05 May, 2017 by a full Bench of the Supreme court comprising Dipak Mishra, Ashok Bhushan and R Bhanumati JJ. *See* Mukesh. v. State of NCT of Delhi (S.L.P. (Cri.) Nos. 3119-3120 of 2014, Judgement delivered on 05 May, 2017)

² Section 375, Indian Penal Code, 1860, as amended by Criminal Law (Amendment) Act, 2013; Sections 3 & 7 of POCSO, Act, 2012. The usage of different words must also be noted, e.g. Sec. 375 uses the term 'man' while in the provisions relating to gang rape, the word 'person' has been used.

sexual assault in the context of these changing circumstances when woman is placed as an offender especially considering the relevant provisions of recent enactments. This paper would raise questions raised similar to that in the Priya Patel case³, in the light of amended or inserted provisions.

Changed Perspectives of Rape

Rape is horrible. But it is not horrible for all the reasons that have been drilled into the heads of Indian women. It is horrible because you are violated, you are scared, someone else takes control of your body and hurts you in the most intimate way. It is not horrible because you lose your "virtue." It is not horrible because your father and your brother are dishonored. I reject the notion that my virtue is located in my vagina, just as I reject the notion that men's brains are in their genitals.⁴

The traditional approach of rape was confined to 'Peno-vaginal', but technological advancements have changed the world into a global village. Sexual contents in all forms are just a click away. These contents are not confined to peno-vaginal but all the orifices and parts of the body. All these are shown for the purposes of sexual pleasure only. Huge collection of videos and pictures, is forcefully establishing and thereby exposing the fact that other orifices and parts of the body are even more sexually enjoyable. This traditional confined approach of 'peno-vaginal' for sexual pleasure is not, as it used to be, the only orifice or part of the body but others too. So, if, somebody feels a greater pleasure or satisfaction by the act of penetration or *cunnilingus* or *fellatio* etc., may not be just because of his/her lesbian, gay, bisexual or trans-gender experiences but due to his or her quest for more and more pleasure, as he or she thinks, due to his or her adopted or borrowed knowledge from this technologically advanced world. This 'quest for more pleasure' is supposed to be clinched by applying and engaging different parts of the body other than penis and vagina. The Supreme Court of India, in case of Sakshi v. Union of India⁵ declined to issue any writ or any direction with the hope and trust that the issues raised by the petitioner to include all forms of penetration into vagina or anal by penis, finger or object, and child abuse, would be properly legislated by the Parliament. But this trust was breached by the Government, when it kept itself in the 'waiting mode' of let something like 'Nirbhaya' be happened to make the appropriate amendments in Criminal Laws. However, the 16th December incident, had put the government so much in 'active mode' that it appointed a high-power committee and

³ (2006) 6 SCC 263

⁴ Sohaila Adhulali, *I Fought For My Life And Won*, NEY YORK TIMES, available at <http://www.nytimes.com/2013/01/08/opinion/after-being-raped-i-was-wounded-my-honor-wasnt.html>

⁵ (2004) 5 SCC518

sought its report with recommendations for the amendment in criminal laws of the country mainly relating to the crime of rape, in 30 days.⁶

Keeping in mind the recommendations of the Committee, the Criminal Law (Amendment) Act, 2013 was passed and the same came into effect on 3rd of February, 2013. Various provisions of the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872, were amended by way of inserting, substituting new provisions and amending existing ones.⁷ The main concern of the committee was to consider the law relating to rape and punishment therefor. First time, by this Amendment, rape was defined in the Penal Code. Prior to this definition, the provision dealing with the offence of rape was descriptive of the circumstances with a specific emphasis on peno-vaginal penetration. If there was no penetration, there was no rape. However, with a constructive interpretation by the courts in India, this traditional approach was held irrelevant.

Fixing the Liability of the Offender in Rape Matters

Law relating to rape can be seen classifying the age of the victim. If the rape is committed against a child⁸, offender would be liable under section 3 of Prevention of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act') under the name of "penetrative sexual assault" and if the victim is not a child the offender would be liable for the offence of rape defined under section 375 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC'). For a holistic understanding, it is imperative to look into a both these provisions through a comparative lens. The following table elucidates the comparison:

Penetrative Sexual Assault (Section 3 of the POCSO Act, 2012)	Rape (Section 375 of IPC, 1860)
(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or	(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or	(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
(c) he manipulates any part of the body of the child so as to cause penetration into the	(c) manipulates any part of the body of a woman so as to cause penetration into the

⁶ Justice Verma Committee on Amendments to Criminal Law, Comprising Justice J. S. Verma, Chairman, Justice (Smt.) Leila Seth and Mr. Gopal Subramaniam. This was constituted by GOI Notification No. SO (3003) E on 23rd Dec, 2012 and accordingly report was submitted on 23rd Jan., 2013.

⁷ See Criminal Law (Amendment) Act, 2013.

⁸ See Sec. 2(d) of the POCSO, Act, 2012; 'Child' means any person below the age of eighteen years.

Penetrative Sexual Assault (Section 3 of the POCSO Act, 2012)	Rape (Section 375 of IPC,1860)
vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or	vagina, urethra, anus or any part of the body of such woman or makes her to do so with him or any other person; or
(d) he applies his mouth to the penis , vagina, anus, urethra of the child or makes the child to do so to such person or any other person.	(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

Liability of a Woman Offender under the POCSO Act

The objective of this Act is to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of special court for trial of such offences. Parliament exercising the power given under Article 15(3) of the Constitution of India, passed the Act to give effect to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations⁹, which has prescribed a set of standards to be followed by all states parties in securing the best interest of the child.¹⁰

This law is made for the protection of children from sexual offences. This is the first law which has considered the changed perception of sexual desire, sexual abuse and sexual harassment.¹¹ It has also given heed to this well-established fact that even 'other orifices and parts' of the human body apart from the 'peno-vaginal' sexual relationships have also attained a pedestal of equal and wider consideration to cap the sexual offence provisions.

Before going through the differences highlighted in the above comparative view of the two provisions covering almost the same act but with the difference of age and other intelligible differentia,¹² as named differently, we must keep in mind that Sec.3 of POCSO Act starts by "**a person**" is said to commit penetrative sexual assault while Sec. 375 of IPC starts by "**a man**" is said to commit rape. However, if we have a close look on the clauses from the point of view of victim, orifices have been included now, and not only vagina, but also mouth, anus, urethra and penis. Gender neutral orifices, anus and mouth, are included in the definition. If anus is penetrated by penis or any part of the body or any object is inserted in it, it is amounting to the defined offence. But any object inserted in the mouth is not covered under the definition for some very usual reasons. Mouth to be subject of the said provisions must be penetrated by penis.

⁹ United Nations General Assembly, Convention on the Rights of the Child, 20 November 1989, U. N. T. S. No. 1577.

¹⁰ See, Aims and objectives, Prevention of Children from sexual Offences Act, 2012.

¹¹ This Act is also redressing most of the points raised in case of Sakshi v. Union of India.

¹² Art. 14 of the Constitution of India, mandates the equality before law and equal protection of laws, inherently requires that only equals be treated equally. Children are forming a separate 'class' in themselves and having nexus with such classification, so fulfills the test of intelligible differentia and just, fair and reasonable as demanded by Maneka Gandhi case.

If, we go through the plain reading of the first line of Section 3 of the POCSO Act, it makes it quite clear that a person, i.e., the offender, can be any person, man or woman. It is a gender-neutral provision. One circumstance which is prevalent in all the four clauses of the section, is where, a woman can be held liable to commit the said offence irrespective of the fact whether naturally she herself can do that act or not, is that when and if she makes a child to do the mentioned act under the clause with any other person. Otherwise, if, she does the act herself in that case, this gender neutrality is applicable against a woman only in clause (b) and (d) of the section. Whereas in clause (c), insertion into any orifice is not necessary by penis and can be by way of any object or any part of the body and in clause (d), applying mouth to the penis, vagina, anus or urethra, can be done by a woman also, but in clause (a) and (c) penetration by penis, is must, which she naturally cannot do.

Sexual Assault has been differently dealt by the Act. IPC does not define the term 'sexual assault' but often courts have used this term not only for rape but also for other sexual abuses. Assault is defined under section 351 of IPC. Sexual Assault was one of the proposed term to be used for section 375 to 375 D. by the Criminal Law Amendment Bill, 2012. The UN Handbook recommends that 'sexual assault' be used in wider term to include the offence of rape and indecent abuse¹³. This is in line with the Canadian approach, where there is no separate definition of 'rape'. The view of the committee to keep a separate term for rape is because this is widely understood in our society and also expresses strong moral condemnation for the act. So, the amended provision kept the term 'rape' and found it reasonable to term it sexual assault with its specific and aggravated form. The protection to a child under POCSO Act is wider in section 7 of the Act,¹⁴ which says even touch with sexual intent without penetration is said to commit sexual assault.

Liability of a Woman Offender Under the Indian Penal Code

Section 375 says 'a man' is said to commit "rape". Phraseology of the clauses is almost same for both of the laws and the meaning, interpretation and application of the clauses given above is equally applicable on these clauses too, except the fact that a woman under this section cannot commit rape and that is what the legislature intended by using the word "man". Why? First of all, this phrase "makes ... to do so with ... or any other person" is available in all the four clauses (a) to (d) of Section 375. It means that, though for some of the acts she may not be naturally capable i.e. to penetrate, when the penetration means by the penis, but she can fulfill this clause by making anyone to do the defined act with anyone else. But why a woman is not capable to subject anus, which

¹³ UNITED NATIONS HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN (2009), available at <http://www.un.org/womenwatch/daw/vaw/handbook/Handbok%20for%20legislation%20on%20violence%20against%20women.pdf>

¹⁴ Section 7 of POCSO Act, defines Sexual Assault as- "*Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.*"

is gender neutral orifice of rape, be inserted or penetrated, not necessarily by penis but by any object, or part of the body, i.e. hand, finger or by applying her mouth?

However, to fix the liability of a woman for the act falling in the common clauses available in (a) to (d) of sec. 375, 'to make her to do so with him or any other person', it must be understood that this role of her can be either as a participant acting in furtherance of the common intention of someone else or doing the role of abettor. As per section 107 of the IPC, a person can abet the doing of a thing by instigation, conspiracy¹⁵ or by aiding¹⁶. In the case of Priya Patel, Justice Arijit Pasayat left the issue of woman's role in abetting the same, to be decided by the courts dealing with such cases. So, whosoever abets, is called abettor¹⁷ and if, a woman instigates, aids or engages herself to make a woman or man to do any of the mentioned act in four clauses of sec. 375, with any other man or woman, can she be seen only as an abettor? Or can she, by just doing so, also be brought under the purview of gang rape as given in the code? This is another grey area which needs to be dealt with.

Gang Rape

Gang rape¹⁸ is symbol of human bestiality. The unceasing number of gang rape is chief concern for all the institutions of the State. If, half of the society is subjected to the fear of such a ghastly crime, the primary objective of the State seems to be desuetude. To make the provision related to gang rape more effective, this amendment has inserted the term 'constituting' in the earlier explanation 1 of Sec. 376(2)(g) which was reading 'as one or more in a group'.

In the case of Bhupinder Sharma v. State of Himachal Pradesh,¹⁹ the Supreme Court, held that it is not necessary for the prosecution in a gang rape case to adduce clinching proof of a completed act of rape by each one of the accused on the victim if it can be shown that every member of such a group acts in furtherance of common intention of committing rape. However, the Verma Committee wanted to keep the definition of gang rape as-"Where a person is raped by one or more in a group of persons acting in

¹⁵ Sec.107, Secondly of the IPC says- "*Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing.*"

¹⁶ Sec. 107, Thirdly of the IPC says- "*intentionally aids by any act or illegal omission, the doing of that thing.*"

¹⁷ See Sec. 108 of the IPC.

¹⁸ Sec. 376 D of the IPC (Provision on Gang rape)- "*Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape. Prior to the said Amendment, the explanation regarding gang rape was read as- "where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the person shall be deemed to have committed gang rape."*

¹⁹ AIR 2003 SC 4684; In this case, one of the accomplices held guilty for gang rape though unlike others, he could not sexually assault the victim as she escaped from the place of incident before he could perpetrate the act. So, he challenged his conviction.

furtherance of a common intention, each of these persons shall be deemed to have committed the offence of gang rape, *regardless of their gender*, and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life and shall also be liable to pay compensation to the victim which shall be adequate to meet at least the medical expenses incurred by the victim.”

So, the Verma committee thought to impose the liability on all persons involved in gang rape on the basis of joint liability given under section 34 of the code. But the legislature, though kept the phraseology to match with section 34²⁰ excluded the “regardless of their gender”. However, by putting the word “constituting a group” makes it clearly a gender neutral one. To be liable under section 34 of IPC; two elements must be fulfilled. Firstly, sharing of common intention and secondly, participation. For sharing of common intention, pre-meeting of mind is necessary, and pre-meeting must precede the commission of offence. For the participation, it need not be the overt act, it may be covertly done and may not necessary be the penultimate one but the one done at prior stage, though it must be done in furtherance of the common intention. Hence, common intention denotes action in concert and necessarily postulates a pre-arranged plan and pre-meeting of mind and an action in participation. The act may be different and vary in character but must be actuated by the same common intention, which is different from same and similar intention.²¹

In case of *Priya Patel v. State of Madhya Pradesh*²², the principal issue before the Supreme Court was, whether a lady can be prosecuted for gang rape? But before investigating this question, the Court inquired into-whether a woman can commit rape at all? This was the question when section 375 was not amended and it was as- ‘A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six circumstances mentioned therein. So as per that provision, which was actually not the definition but merely the description of the circumstances, it catered to situations explaining when the consent of the woman could not be deemed to be her free consent and not against her will rather than going into the fact, what act except consent and penile vaginal penetration could amount the ravishing of the conscience as happens in peno-vaginal. And Supreme Court was mainly concerned with the question that, if a woman is naturally incapable of doing the act in individual capacity, how could she become capable of doing the same merely by sharing the common intention with the person who commits rape. But as plain reading of Sec. 375 says, a man is said to commit rape means, a woman can not commit rape, equally she cannot have common intention to commit rape.

²⁰ Sec. 34 of IPC- “When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

²¹ (2006) 6 SCC 263

²² (2006) 6 SCC 263-265; In this case, appellant was charged by the complainant that when the rape was being committed on her by the husband of appellant, she cried for help but instead of helping her, appellant slapped her and closed the door. The appellant was charged by the HC, under section 376 (2) (g) for gang rape.

The said reasoning of the Supreme Court, may sound good in respect of the law which was existing at the time of deciding the impugned question but as of now, law related to rape has been completely overhauled. As discussed above, for the first time, we have tried to not only illustrate the circumstances but what must actually take place in those illustrated circumstances as well. So, I think, the opinion of the Supreme Court in Priya Patel case is not equally applicable now in the light of changed circumstances and approach. But in a recent effort²³ the Supreme Court has rejected a PIL which sought direction from the Court to declare the offences of rape, sexual harassment, stalking, voyeurism, outraging the modesty of a woman and adultery as gender neutral. The Apex Court termed this PIL as imaginative. Chief Justice Deepak Mishra added that these are based on the affirmative action by the state. On the argument submitted by the Petitioner that the crime has no gender and there should not be discriminative treatment on the basis of gender, the Chief Justice of India and Justice D.Y. Chandrachud replied that this is Parliament's job to consider it and amend accordingly. CJI said that he is not saying that woman can not commit rape but it comes under different sections of IPC.

If, we have plain reading then, despite of having detailed acts, which are amounting as rape, a woman still cannot be held liable to commit rape because starting line still says, "a man is said to commit rape". It means, this is man and only man who can commit rape if a victim is not a child. So, now, a woman cannot be held liable to commit rape is quite different from saying that a woman can not commit rape because as per the starting line of sec. 375, this is the first thing which is established not the second, if we go by the detail and as I have explained in the previous paras. Here, a woman is not guilty of committing rape, is what the legislature intended to say but as of now we cannot say, by going through the clauses of section, 375, that a woman cannot commit rape at all.

Meaning of 'Makes her to do so with him or any other person'

However, if the same question which was decided by the Supreme Court in Priya Patel case, is raised again, it will be very different now to draw the same conclusion because of detailed definition of 'rape', and that line in every clause, "makes her to do so with him or any other person". Except in clause (a), if a man compels a woman or man to so with another woman, any act which is falling in any of the remaining clauses, and if she applies her mouth to the given orifices, or inserts any part of the body or any object, whether this bisexual act of a woman with another woman fulfill the requirements of the said clauses of section 375? Also, whether the act of a woman with the so compelled man by another man fulfills the requisites of these clauses of section 375? I think she very much fulfills them. In the definition of gang rape also, the term used is 'a person' and not 'a man'. Though in the earlier explanation also, the same term was used and keeping in mind the plain meaning of section 375, that interpretation was given in Priya

²³ SC Dismisses PIL To Make Rape, Sexual Harassment, Stalking, Outraging Modesty Gender-Neutral, LIVE LAW NEWS, <http://www.livelaw.in/sc-dismisses-pil-make-rape-sexual-harassment-stalking-outraging-modesty-gender-neutral/>; This PIL was filed by advocate Rishi Malhotra to seek the Court's directives to declare the impugned offences as gender neutral offences.

Patel case. So, if we go by the plain reading only, the same explanation may still be continued but elaboration of the clauses speaks otherwise. On the question of role of a woman as abettor, the Supreme Court in that case, left the option open to be decided in a specific context.

Conclusion

In sum and substance, the times have changed and the legislature has appreciated the same by making such an inclusive law for the protection of children from sexual offences acts but writing the same for the rest of the matter is either a problem of copying and pasting or something done in haste without applying the mind. If the law of rape in India is read as a whole, the conclusion cannot be discarded that a woman can also do those acts for which a man can be said to commit rape under section 375 of IPC except penetration by penis. This is really reprehensible to see the rising number of rape and gang rape incidents and particularly the ghastly ways in which it is committed. So, in the present scenario, it is not proper to say that woman should also be held equally liable to commit rape because that would reverse the course of prosecution, and in fact in many cases, counter cases would be filed and it would then be very tough situation to deal with.

Though the number of cases of rape by a woman upon a man might be negligible now, but cannot be out rightly rejected particularly the way society is advancing. So, uncontrolled committing of rape is displaying this fact more forcefully, that our mindset is still very much driven by old mindset where woman is a source of satisfying the lust. From this point of view, the opinion of Supreme Court in Priya Patel still holds the solid ground (though I am of the opinion that the facts of the case helped to hold so because the accused engagement was not active but was of a very passive nature as when victim cried for help she closed the door and did not come forward to help her. Here, this is to be kept in mind that not helping somebody is a different issue but not doing so and rather extending help to the accused may attract the reading of gang rape subject to satisfaction of the clause). Therefore, despite having different connotations from the reading of the clauses of Section 375, the intention of the Legislature to not hold the woman liable to commit the offence may quite seems appropriate on the justification that she cannot penetrate, but having a cumulative reading of the clauses, this justification loses its substance.

*- Santosh Kumar Sharma**

* Assistant Professor of Law, Himachal Pradesh National Law University, Shimla. Email: adv.santoshkumarsharma@gmail.com