Role of Indian judiciary in protecting the rights of the victim of Rape: An Overview

Aarti Sharma
Assistant Professor
Law Department, University of Jammu, Jammu.
Email id: aartisharmalaw@gmail.com

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General Introduction

Rape is unique among all crimes due to the treatment meted out to the victims of rape.[1] They pay a double price, where they suffer the terrible toll of physical and psychological injury and they also suffer the burden of defending the legitimacy of their suffering.[2] The criminal justice system moves with the attitude of disbelief and hostility and treats the victim with suspicion instead of sympathy. Judgments in cases of sexual violence relating to women reveal a deep rooted gender bias in the judiciary which has found expressions in many ways, with judges making harsh, disparaging and unwarranted remarks against women, believing the accused while disbelieving the victim and at times being more sympathetic to the accused than the victim.[3] The biased judicial approach is reflected in the tendency of the courts in according to undue benefit of doubt to the accused while overly scrutinizing the conduct and character of the victim. Barring a few decisions, generally undue sympathy is exhibited by the judges to the accused, while imposing the sentence. Many a times, very vague reasons have been considered by the courts, e.g., young or old age of the accused, the time lapse between the date of commission of crime and the award of sentence by the courts etc, for providing lenient and lesser punishment to the accused.[4]

It is true that judges are not free from human frailties and are subject to prejudices, hostilities and other human problems that may colour their interpretations. Hence, sentencing differentials do exist and manifest themselves as various patriarchal biases, eg, believing in false accusations by the victims, insistence on presence of injuries or other corroborative evidence, judging the probability of commission of the offence in the light of past sexual history of the victim, etc. Consequently consent, virginity, etc, of the victim become important issues which conclusively determine the occurrence of the offence while the character, conduct and history of the accused are disregarded, resulting in very nominal sentences to the accused despite the very loud legislative mandate for mandatory minimum punishments. Lighter sentences in sexual violence cases not only trivialize the experience of the individual victim but also carry the wider implication that female victimization is trivial or unimportant.[5]

The biased judicial approaches not only reinforce the secondary status of women in the society but also raise a very pertinent question whether women can get justice from a patriarchal set up of justice administration which proceeds on the presumption of women's inequality vis-à-vis men. Considering that judgments have a far reaching impact on society and set a precedent, the damage done by sexist rulings can hardly be over emphasized.[6]

Victims get subjected to an institutionalized sexism that begins with their treatment by the police, continues with a male dominated system influenced by the notions of victims precipitation and ends with the systemic acquittal of many defacto guilty rapists.[7] Rape is unique in that distinctly human factors have established the legal elements of the crime, which must be proved beyond reasonable doubt.[8] These human factors discourage victims from reporting the crime to police and make conviction difficult. They include a sexiest society, the historical role of women as 'property', obsolete rape laws, stereotyped legal notions of how women should act when they are forcibly being attacked and an unreasonable concern for the rights of the accused.[9]Thus the law reflects and shapes cultural and moral values prevalent in the society. The societal attitudes mirror broad societal myths and stereotypes about nature of the offence and must be challenged as a matter of great urgency.[10]

According to Burgess and Holmstrom, 'going to the Court, for the victim, is much of a crisis as the actual rape itself'.[11] At every step in a rape trial, there are systematic obstacles and discriminatory attitudes for the victim, which result in complete negation of her human rights. When a victim reports the case to police, she sets in motion a complex and lengthy process involving legal system and its techanicalities.[12] It does little to help the woman to recover from the ordeal of rape and much to compound the initial trauma she experienced at the hands of the offenders.[13] The victim has to prove that she was raped. Her prior life style and sexual conduct are laid before the court and her consent or lack of it is judged by her reputation. Only a

fraction of all cases are reported, only a fraction of reported cases are investigated and lead to trial in the courts and a very miniscule fraction of accused are convicted. The double victimization, which is thrust upon the rape victim by the criminal justice system, is the mockery of all notions of justice in a civilized society.

The judiciary is the sentinel of justice. It has to eke out justice to every individual whenever it has been breached and thereby correct the wrong which has been perpetrated. Impartiality and neutrality are the hallmark of the judiciary system. If we analyze the judicial discourse on rape laws since independence, we may find that immediately after independence there was a constricted judicial approach which was followed by a blend of conservatism and pragmatism and in the nineties, there is the beginning of judicial activism and dynamism.

Before Mathura

Immediately after independence, the socio-economic condition of India was poor and very much underdeveloped.

The entire nation was under still in colonial hangover and industrial and scientific developments had not gained momentum. Poverty, illiteracy, unemployment, superstition, etc., were the marked features of this era. It was but natural that the impact of such an environment was reflected prominently in the decisions of the court also. A glance at the case law on rape decided during the period 1950 to 1978 clearly reveals a restrictive interpretation, whereby the rape of minor girls only resulted in the conviction of the accused; but as the victim crossed the specified age limit of 16 years, as laid down in section 375 of the IPC, the courts gave a suspicious look, as if to signify that it was with her consent that the act of sexual intercourse had been affected. In Siddheswar Ganguly v State of West Bengal[15] where the accused was charged with rape of two minor girls Sudharani and Narmaya. The former was found to be below 16 years of age and the accused found guilty of statutory rape. But with respect to Narmaya, the court observed that since she is above 16 therefore the accused could not be convicted for rape on her. In A W Khan v State.[16] where medical evidence established the age of the victim to be below 16 years and the chemical examiner's report showed presence of spermatozoa in her vaginal canal, rape was held to have been clearly proved and the accused was sentenced to five years of rigorous imprisonment.

There is another peculiar judgment of the supreme court of India, wherein a girl of 17 years was held to be a consenting party to the offence of rape merely on the ground that she was found to have been used to sexual intercourse and the rupture of the hymen was old.[17] In this case a girl, a student of ninth standard was induced by her classmate to go to the accused's house, who was a medical practitioner and a teacher of the school, to know the marks secured by her. He took advantage of the situation and raped her. There after she was threatened and taken to several places, confined therein and subjected to physical assault by numerous men, including the accused. The Supreme Court concluded that in such type of cases the age of the prosecutrix, was of utmost importance, more so the medical evidence showed that she had been used to sexual intercourse. It was not proper to accept her statement without any corroboration on material particulars. It was true that the accused had exploited his position, but since, she was 'used to sexual intercourse' and her age was above 16, it could not be believed that there was any inducement, threat or compulsion on the part of the accused towards the prosecutrix. She had willingly accompanied him and enjoyed carnal relations with different men; this was the analogy which the court arrived at. The only reason behind this seems to be that she had a sexual history. Her virginity was not intact and in a tradition bound orthodox Indian society, a non- virgin, unmarried girl cannot expect any sympathy. It is sad to disclose here that independent India tries to equate its judgment with the laws of ancient Babylon wherein a maiden only and not a married woman could seek the protection of the laws for invasion of her bodily integrity. The laws of a country, neither its judiciary, can stand so, then it is nothing, but the signs of ancient barbarism and brutalism once again rejuvenating itself in the laws of the civilized world.

Rahim Beg's case[17] is also an illustration of the judiciary's deliberate attempt to rescue the accused from the clutches of penal provisions. A village girl of about 12 years old was subjected to rape and thereafter murdered for her silver ornaments. The accused confessed their guilt to one Nasim Khan and the ornaments were recovered from their houses. Rape was said to have been proved but the court refused to connect it with the accused persons on the ground that there was no history of their previous association. Furthermore the accused had tried to run away on seeing the police and received grievous injuries in the process, wherein the court went forward with its own justification and put the blame upon the police that they had resorted to third degree methods. The accused after that was set free by the Supreme Court by one stroke of the pen.

In Joginder Singh v State of Haryana[19] the rape was committed upon a lady suffering from chronic schizophrenia whereby she had no reasoning power and could not understand the consequences of the acts. The act of the rape has been witnessed by her husband and two other persons. Without even making an attempt to come to the rescue of the deranged woman, the court, while refusing to accept the testimony of the eyewitness stated that the victim was the best witness to prove whether the accused committed the sexual intercourse with her without her consent and against her will, but since she had been produced, nothing could be established with firmness. Furthermore, the witnesses had stated that the woman was moving her hands and feet and thereby offering resistance. But the simple fact that no injuries were found on her person negated their evidence. The court concluded that while the prosecution story may be true, it could not be said to be absolutely true and accordingly the accused was given the benefit of doubt.

The most infamous case of this period is undoubtedly the one delivered in Pratap Mishra's case.[20] Herein a pregnant woman of 23 years was raped by some NCC cadets. The offence of rape was upheld by the session court and high court, the Hon'ble Supreme Court of the country negated it. According to the court, the offence of rape had been committed by the consent of the woman and with the connivance of her husband. The reasons laid down by Fazal Ali J. may sound peculiar and unacceptable to the common man but they bear the weightage with the apex court. Firstly it was stressed by the court that the woman was a fully grownup lady and habituated to sexual intercourse. Hence it was rather impossible for any person to rape such a woman single handedly without meeting any stiffest possible resistance from her side. Further the absence of marks of any injuries on her body as well as the body of the accused indicated nonresistance, meaning thereby, sexual intercourse with consent. The court, at this juncture, was not ignorant of the fact that the victim was five months pregnant; a physical condition which renders even the strongest woman week and fragile, and it might have been dangerous for her to use force without risking the loss of the unborn baby.

Secondly the court reasoned out that the accused persons had raped the woman one after the other. The lady, after the first brutal attack could have closed the doors to prevent the entry of the others. Omission on her part to do that demonstrated that the whole incident was a pre-arranged show.

Thirdly, the fact that the husband, Batakrishana, had not made any complaint to the chowkidar when asked as to what was transpiring, reassured the court that the accused were acting with the consent of the man.

Lastly, the inability of the woman to identify the clothes of the accused worn at the time of the fateful incident established innocence of the accused and the notoriety of the poor husband and wife. Apart from the above line of reasoning an additional aspect which made the difference to the court was the fact that Batakrishana was cohabiting with the victim and she was just a concubine of the former, as the court felt that it was the so called husband who had willingly given consent to her being ravished by other men.

On this point some focus can be put on the serious discrepancies and illogical reasoning forwarded by the apex court in arriving at the decision. The judiciary seems to have a fantastic idea of the strength of the Indian woman. No doubt, Hindu mythology symbolises her as Kali or Durga, the goddess of Shakti, who can fight off any evil force, but in reality, it is not so. A woman is weak and vulnerable and can be easily preyed upon. In the instant case the accused were NCC cadets and sturdy persons who could successfully put up a fight against another man; then how did the judiciary expect a woman in her advanced stage of pregnancy to put up effective resistance and ward off the attack? It is highly probable that such a woman in order to save her child would submit to the inevitable rather than display her strength and courage to protect her honour. Even though she has experience of sexual intercourse and the art of midwifery but she can be raped, as instances are not rare when even 50 years old women have been raped. Then, what prompted the court to reach to such a conclusion that an experienced cannot be raped is really a mystery.

Thereafter, the victim suffered an abortion within four or five days after the incident. The learned Sessions Judge had reasoned that it was the logical result of the rape committed on her. Surprisingly, the apex court refused to co-relate the two events, relying purely on the opinion of medical experts who conceded that it was the result of the shock. Another aspect which strikes the rational mind is that the court expected Pramila to have acted promptly and closed the doors to protect herself against further attack. Rape is a horrendous crime which subjects a woman to inhuman physical and emotional torture. It disturbs the entire mental faculty of a woman and leaves her in a disheveled and disbalanced condition. Any person undergoing such a trauma cannot be expected to behave like a normal human being.

It may also be possible that her poor physical condition did not permit her to act instantly, in the spur of the moment, and she became the victim of further outrage, that does not characterize her as a consenting party

to sexual intercourse as the court interpreted it to be. When the victim failed to recognize the clothes the accused were wearing at the time of occurrence, the court branded it was 'another important circumstance which proves the theory of consent. Vasudha Dhagamwar, in this connection, has very aptly said,[21] "We find that in rape trials the woman's evidence is invariably dismissed and she herself found to be a consenting party, if she waves from her initial statement even by a hair's bread. From one day to the next, in ordinary circumstances, it is difficult to remember what one was wearing and yet when a woman undergoes so great a trauma as rape she's expected to remember every detail, every moment with photographic precision and clarity. It is almost as if the minute something so unspeakably terrifying and so totally unexpected as rape begins to happen to her she's expected to switch on a mental video tape. She's also expected to find unusual mental and physical reserves to fight the rapist and have sufficient initiative to other wise save herself. If a woman suffers from any other non-sexual trauma, the court would expect her to be dazed, even catatonic. But not when she's raped. Not even when it is a case of multiple rapes".

The last point to be highlighted is that since the husband had failed to complaint to the chowkidar about the incident, the court felt that he was a consenting party to the disgrace suffered by his wife at the hands of certain strangers. Whatever maybe our logical deduction, the court summoned thus: 'such a conspiracy of silence could only be consistent with the theory that appellants were committing sexual intercourse with tacit consent of the woman and with the connivance of her husband'.

The accused were absolved of their penal liabilities and freed. Another grave and serious injustice had thereby been perpetuated by the Supreme Court. The decision not only retracted the faith of the people in the judicial system but it also made evident that justice was for a particular section of the society, the privileged class - the men; it was gender biased .

However, even during the dark period of Indian judiciary, some judgments had been delivered which sought to lay down the law and its proper perspective. The most prominent among them was the case of Rao Harnarain Singh v The State.[22] It was the alleged case of the multiple rape by the petitioner, an advocate and additional public prosecutor and few others on a married woman of 19 years named Surti. Where KaluRam, the husband of the victim, who was a very humble man, was induced by Rao Harnarain Singh to provide his wife to sleep with Rao Harnarain and his guests.

The girl protested vehemently against this outrageous demand, but under pressure of her husband, she was induced to surrender her chastity. The three accused persons Rao Harnarain Singh, Mauji Ram and Balbir Singh ravished her during the night and she died almost immediately. The court refused to suspect the integrity and modesty of the woman who had been the victim of lust of three so-called respectable persons. It vehemently criticized the conduct of the petitioners and held that:' [T]he orgy of lust and debauchery to which the accused are said to have abandoned themselves was an act of unmitigated reprobates rather than of the so called respectable persons'.[23]

With regard to consent, the most important element in the offence of rape, the court clarified[24]: A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by the fear or vitiated by duress, cannot be deemed to be "consent" as understood in Law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberations, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure.

A woman is said to consent, only when she freely agrees to submit to herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.

This eloquent exposition of the Court deserves wide applause. It specified in clear and precise terms that consent should be free and active; it should not be vitiated by fear, force or fraud. Furthermore, a mere

submission on the part of the woman, often evident in the form of absence of marks of injury on the body, does not imply consent. It merely connotes that the woman bowed down to the inevitable.

With regard to the quantum of punishment for the offence of rape, this period revealed an extremely lenient attitude of the judiciary with punishments generally ranging from one to five years imprisonment.[25] There were, however, few decisions which emphasized the need of deterrence and reformation through stricter penalties.

In Yadu Ram v State[26], where the appellant, a religious leader, indulged in antisocial acts of ravishing and raping young girls, the court opined: 'In fact such persons do not deserve any sympathy or consideration from the court on any ground whatsoever and the sentence imposed on such persons should be so deterrent as to serve a living example for others to prevent them from being a grave menace to the society'. The punishment was enhanced from seven years of simple imprisonment to ten years of rigorous imprisonment.

The decision of learned judge, Krishna Iyer J., was along similar lines in R K Aggarwal v State of Orissa.[27] An old man of 65 years satisfied his lascivious propensities by raping a six-year-old child. The Sessions Judge sentenced him to six months imprisonment and a fine of Rs 500 keeping in view his advanced age. The appellant, however, moved to the Supreme Court to seek further reduction in the period of incarceration. The court refused to attenuate the punishment having regard to the beastliness of the crime and the short term of imprisonment imposed. Justice Krishna Iyer added:[28] 'Who knows this jail life of an old man by a process beyond our ken kindle in him a new flame and make him a finer person, inside and outside?'

A critical retrospection of the entire period depicts a very gloomy picture of the level of justice. While rape of minor girls resulted in conviction, in case of major or married women, the judiciary evolved a two-fold formula:

(i) It was essential to put up stiff resistance against the assailant in order to negate element of consent in rape.

(ii) Corroboration of the testimony of the victim was necessary, both from medical evidence, as well as, from other independent witnesses.

Apart from these factors, the judiciary laid great emphasis upon any inconsistency in the prosecution story. That means any negligent omission or intentional exaggeration by the woman, in narrating the horrifying incident of rape, was seriously frowned on by the courts, and in most instances, discarded as false and untrustworthy. It may, thus be contended that the judiciary treated rape as well as its victims unsympathetically, rather ruthlessly. Societal conservation and its narrow outlook had a definite impact upon the judicial decisions, as is apparent from cases discussed above. There was no evidence in this period of payment of compensation to the victims for the physical or emotional trauma undergone by them, nor the infliction of severe punishments to deter the offenders bent upon exploiting the womenfolk. On the contrary, the entire force was on safeguarding the accused who had mistakenly fallen into the evil clutches of the fairer sex.

This trend continued for few more years and reached its pinnacle in the Mathura rape case[29] wherein all norms of morality and decency were thrown into the winds and the worst possible efforts were made by the Indian judiciary to acquit the accused, two police constables, alleged to have committed the heinous offence of rape.

Mathura Rape Case and After

The trend of judicial indifference evident in the earlier period attained its heights in the Mathura Rape Case. In the absence of definite and adequate legislative guidelines to meet the offence of rape in the changed socio-economic circumstances, the judiciary had begun to evolve its own hypothesis.

The facts of this case are, Mathura, a tribal girl, had eloped with her lover, Ashok. On a complaint lodged by her brother, she was brought to the police station and her statements were recorded. At about 10.30 pm, they were about to leave, Ganpat and Tukaram, two police constables asked Mathura to wait and directed the others to move out. Immediately thereafter, she was taken into the rearside of the police station and raped by Ganpat. Tukaram, too, would have raped her but in an inebriated condition, he contended himself by merely molesting her. Meanwhile, her relatives began to grow suspicious. They went to the rear side of the building and started shouting for Mathura. Tukaram informed them that the girl had already left a few minutes later; Mathura emerged and stated that she had been raped. Mathura was examined 20 hours after the incident. The medical report revealed no marks of injury on her body and no trace of semen in her vagina and that she was habituated to sexual intercourse. Her age was estimated to be between 14 and 16 years. The learned Sessions Judge found that there was no satisfactory evidence to prove that Mathura was

below 16 years, an age which renders consent immaterial to the offence of rape. He admitted that the girl may have had sexual intercourse but it could not be equated with rape. In fact, according to the court, the girl willingly had sexual intercourse with the accused and in order to sound virtuous before her relatives, especially her lover, she cooked up the story of rape. The judiciary, therefore, branded her as a 'shocking liar' whose testimony 'is riddled with falsehood and improbabilities'.

After examining the same facts, the Nagpur Bench of the Bombay High Court, reversed the order of acquittal and convicted Tukaram under section 354, IPC, which deals with indecent assault, to rigorous imprisonment for one year and Ganpat under section 376, IPC, to rigorous imprisonment for five years. The high court accepted the lower court's contention that there was a world of difference between consent and submission. The court said [30]:

Mere passive or helpless surrender of the body and its resignation to the other's lust induced by threats or fear cannot be equated with the desire or will, nor can furnish an answer by the mere fact that the sexual act was not in opposition to such desire or volition.

Mathura was alone in the police station in the dead of the night. A complaint had been lodged against her lover in the place by her brother. Being in a strange atmosphere in the company of strangers, it would be highly improbable that she would make any gesture to attract the attention of the police constables. On the contrary, it was possible that the latter might try to take advantage of the helpless condition of the tribal girl, who would surrender due to awe and fear. But such helpless surrender, the court felt, could not be equated with 'consent'. Moreover, the girl's subsequent conduct in making a statement immediately, not only to her relatives, but also to the members of the crowd, convinced the high court that the offence committed was rape and not mere sexual intercourse. The high court, by adhering to the established legal and judicial propositions, tried to do away with the gross injustice perpetrated by the lower court, but this was not to be, for soon thereafter, the highest court set aside the conviction and acquitted the accused constables.

The Supreme Court of India held that since Mathura had not raised any alarm, her allegations of rape were untrue. Her conduct in meekly following Ganpat and allowing him to have his way with her indicated that the 'consent' in question was not a consent which could be brushed aside as 'passive submission'. The Supreme Court said that the high court had not given a finding that the fear was shown to be of death or hurt as it is required under section 376, IPC and in the absence of such finding, the alleged fear would not vitiate the consent. So the court concluded that the sexual intercourse was not proved to amount to rape.[31]

The apex court throughout disbelieved the story of the victim. However her previous conduct of eloping with her lover and being habituated to the act of sexual intercourse might have influenced the mind of the judges, so much so, that though these facts had no bearing on the case in issue, they declined to accept the veracity of the statements put forward by the ravished, devastated victim.

But the questions which keep lingering in the rational mind are: Does association with any male, either before or after marriage, make a woman so dissolute that she can be invaded by anybody? Society, as well as its culture, has marched ahead and in the modern era it is wrong to conceive of a woman as property rights of males. She enjoys her freedom at par with the opposite sex and her rights and liberties are to be accepted and respected by the entire mankind. Just as a man, who has deviated from the path of morality, is not considered a liar or scoundrel; so also a woman having a past history is not to be regarded as prostitute who will willingly have carnal relations with stranger.

The notion that an easy-going woman is accessible to all or will make herself accessible for all is wholly wrong. It is only a patriarchal way of viewing femininity, as the entire stress is upon the chastity of the woman. Such an ideology must be changed, rather discarded, like age-old formula, which no longer serves any purpose. If we look at the decision given by the apex court in this case, we find that the judges rejected the story of the poor girl, as a 'concoction on her part'; they found no fault with the activities of the constables. The fact that she was detained in the police station in the late hours of the night, the fact that one constable remained a mere spectator to the act of intercourse being done by the other, as if it were a pornographic theatre being staged, the fact that the constable falsely informed the anxious relatives that the girl has left the place and the fact that they were heavily drunk while on duty, were all immaterial to the cause of justice. What was material were the facts that the girl did not offer adequate resistance so as to have severe injuries on her body, she did not raise alarm to draw the attention of her relatives and lastly, that she was habituated to sexual intercourse. The conclusion one can draw without much hesitation is that the judges were gender-biased, they were prejudiced against victim, but were inclined to favor of their male counterparts.

This decision sparked off serious protests from every section of the society and a nation-wide struggle was launched to undo the wrong which had been done to the entire womenfolk of the country. Accordingly, a review petition was filed by the Bhartiya Mahila Federation and the Women Lawyer's council. The petition came up before a bench headed by the chief justice, who directed into the same bench which had delivered the judgment. Justice Untwalia held that women's organization had no locus standing to file a review petition. He strongly criticized the demonstration and categorically state that the courts would not be 'crowded down by rallies and slogan shouting'.

Howsoever, stern and rigid might have been the attitude of the judiciary in the Mathura episode, it certainly realized its follies and sought to rectify them in some later day judgments. Thus, in Rajiq v State of UttarPradesh,[32] the court clarified that the absence of injuries on the person of the girl may not be fatal to the prosecution and corroborative evidence may not be an imperative component of judicial credence in rape cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life styles and behavioral complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity, but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed. The court cannot cling to a fossil formula and insist on corroborative testimony, even if, taken as a whole the case spoken of by the victim strikes a judicial mind as probable.

Again in the case of Krishan Lal v State of Haryana, [33] Hon'ble Krishna Iyer J, speaking for the court observed:

We must bear in mind human psychology and behavioral probability when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarkable set of facts or clearest motives were made out? The inherent bashfulness, the innocent naiveté and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbalise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value. Her complaint to her parents and the presence of blood on her clothes are also testimony which warrants credence. More than all, it baffles belief in human nature that a girl sleeping with her mother and other children in the open will come by blood in her private parts unless she has been subjected to the torture or rape. And if rape has been committed, as counsel more or less conceded, why, of all persons in the world, should the victim hunt up the petitioner and point at him the accusing figure? To forsake these vital considerations and go by obsolescent demands for substantial corroboration is to sacrifice common sense in favour of an artificial concoction called 'judicial probability'. Indeed, the Court loses its credibility if it rebels against realism. The Law Court is not an unnatural world.[34]

Keeping pace with the changing times and its changing requirements, the Supreme Court of the country changed its attitude towards the offence of rape, as well as, its helpless victims. It realized that: 'rape is violation, with violence, of the private person of a woman- an outrage by all canons.'[35] It is an act of violence that uses sex as a weapon. Such a crime often has a devastating effect on the survivor, described as 'beginning of a nightmare'. The after-shocks include depression, fear, guilt-complex, suicidal action, social ostracism. For an unmarried girl, such an ignominy shatters her chances of ever getting married.[36] Hence the crime should not be viewed lightly but combated with severity and determination. In Bijoy Kumar Mohapatra v The State, the Orissa High Court reacted by saying that such heinous acts do deserve severe condemnation. The appellants must be visited with appropriate and deserving sentences. The court further observed that the court has a duty towards the society and social justice should be done within, of course, the legally permissible limits. Saying so, it sentenced to 10 years imprisonment.[37]

With regard to 'consent', the court once again reaffirmed the positive attitude with regard to 'consent' in rape, by pointing out: [38]

In a case of rape, if any, given by the victim must be voluntary. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either crowded by fear or vitiated by duress, cannot be deemed to be consent. Consent on the part of a woman, as a defense to an allegation of rape, requires voluntary participation after having fully exercised the choice between resistance and assent. The question of consent or compulsion is to be judged on a careful consideration and scrutiny of the evidence of the victim and from other corroborative evidence, if available and the attending circumstances preceding, accompanying or following the acts of sexual intercourse.

In Sheikh Zakir v State of Bihar[39] the question which arose before the court was, whether the conviction of the accused, in the absence of a medical examination report from a doctor, legally correct. The Supreme Court, while acceding to the stand taken by the trial court as well as high court observed:

[T]he complainant being a woman who had given birth to four children, it was likely that there would not have been any injuries on her private parts. The complainant and her husband being persons belonging to a backward community like the santhal tribe living in a remote area could not be expected to know that they should rush to a doctor. In fact the complainant had deposed that she had taken bath and washed her clothes after the incident. The absence of injuries on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serious physical resistance she cannot be disbelieved. In this situation the non-production of a medical report would not be of much consequence if the other evidence on record is believable.

BB Hirjibhai v State of Gujarat[40] is another case which depicted a socially sensitive and responsive judiciary moulding and evolving the laws, so as to meet the demands of time. In the words of the court, 'And whilst the sands were running out in the time-glass, the crime graph of offence against women in India has been scaling new peaks from day to day. That is why an elaborate rescanning of the jurisprudential sky through the lenses of 'logos' and 'ethos' has been necessitated.[41]

At last, we may say the judiciary had realized the ground realities and acknowledged them heartedly. After almost three decades, the judicial branch could come out of its patriarchal attitudes; the shell with which it had enshrouded itself, and could reach out to masses through its decisions. Its pronouncements were no longer artificial or unnatural; they were enmeshed in the hard realism of the prevalent social environment. On the whole, we find that while the second phase started with a sad note, with the apex court deciding the Mathura rape case in a draconian manner, denying women their basic human rights under the law, it ended with a ray of hope that everything was not over.

Women could still have their rights and freedom before the same judiciary which had once denied them their dues. The trends which were noticeable in the latter part of this period were:

(1) Consent on the part of a woman, as a defense to an allegation of rape, must be free and voluntary. It must involve active participation of the woman in the act of sexual intercourse.

(2) Absence of marks of injury on the body of the victim does not signify consent.

(3) Corroboration is not essential to uphold a conviction of rape. If the evidence of the victim is worthy of acceptance and does not suffer from major discrepancies, it may be accepted as sufficient to warrant an accused guilty of the offence.

(4) In the Indian, traditional society, no woman would ordinarily make a false accusation of rape. Hence unless the circumstances otherwise suggest, no aspersions should be cast on her character or her behavior at the time of occurrence of the incident.

While the above trend reflects a remarkable changed attitude of the Indian judiciary, two aspects went neglected even in this period one is the question of severity of sentence and another is the compensation to the victims.[42]

The Position after The Criminal Law (Amendment) Act, 1983

The Criminal Law (Amendment) Act 1983[43] was a step to modernize the law to meet the demands of the changed socio-economic circumstances of the country and the increase in the complexities of crime. Two important amendments were incorporated in the definition of the term 'Rape', which were the concept of custodial rape and enhancement of severity of sentence. It was left to the judiciary to put life into the dead words of the statute. The judiciary onwards emerged as a sensitive and sympathetic judicial institution, endeavoring to wipe out every tear from the eyes of the victims. Judiciary changed its perception with respect to the meaning of the term 'Consent'. It recognized that non-resistance on the part of the victim signified only passive submission but it does not mean the free consent. Further judiciary established that the promiscuous character on the part of the victim did not indicate that she consented to an alleged forcible sexual intercourse. Her past sexual history was not sole factor for determining whether the offence had been committed or not. The judiciary also accepted the view of the legislators that the crime of rape was heinous and degrading and the accused deserved no pity or sympathy. But the courts failed to inflict the prescribed minimum sentence for the offence.

An important case appeared before the court in the year 1987[44] whereby the most significant feature of the case was the 'past sexual history' of the victim, an aspect which had, till then, proved to be a powerful sword in the hands of the accused. In this case, the medical evidence showed that she was willing to the act of sexual intercourse because she had been used to sexual intercourse. The court answered by saying:[45]

The argument has its roots in the notions prevailing in male dominated society having feudalistic traits. It is not understood how it can be suggested that on the basis of the circumstances that a woman, used to sexual

intercourse, would be a consenting party ' to a forcible sexual assault and intercourse.' This argument may be tested by counterposing a question: If an accused, a male able-bodied person, is used to sexual intercourse, he must have committed sexual assault or intercourse against the will of the girl or woman. If this circumstance cannot be taken against a male person, then it is not understood, how a similar circumstances can be advanced as an argument to show that the girl must be a consenting party to the forcible sexual intercourse. Therefore, the circumstances that as per the medical evidence the girl was used to sexual intercourse, by itself does not carry the matter either way. A girl or a woman, either married or unmarried, may be promiscuous in her sexual behavior and relations. Even so, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone. Once a girl or woman is used to sexual intercourse, she does not become a vulnerable object or prey for being sexually assaulted. Because she is promiscuous, it cannot be inferred that she must have given consent to the alleged forcible sexual intercourse. At the most it is a relevant circumstance which has to be taken into consideration by the court.
The accused was sentenced to seven years of rigorous imprisonment under section 376, IPC.
The judgment of the court is praiseworthy. There was an effort on the part of the court to break the age-old shakels of patriarchal attitudes. In this case the court emphasised that all are equal in the eyes of law and a person belonging to the upper strata cannot escape his guilt by stating that his victim was a person of the backward class. The concept of equality preached by our Constitution must be adhered to strictly.
On the same framework another case of Vinod Kumar v State of Madhaya Pradesh[46] appeared before the court wherein the medical expert stated that there was no external injury on the girl's person which pointed to consent to sexual intercourse. The Madhaya Pradesh High Court criticized the medical opinion and said: As far as medical evidence is concerned, it was never been adhered to be substantive evidence the charge but has been accepted as corroborative the charge…Courts have treated expert medical opinion with respect.
In spite of it, a medical man cannot be allowed to give his opinion on matters which are within the province of the courts to decide. Indeed it is expected of law courts that they would not surrender their will, independence or judgment to an expert and would in all cases in which expert evidence is adduced before it, after giving it such weight as they think it deserves, make up their own mind upon an issue in respect of which the expert testimony has been given. Furthermore, her subsequent behaviour of weeping and reporting the matter to her brother gave proof of her innocence. As regards the absence of injury marks on her body, the court explained:
Absence of injury may or may not indicate absence of physical violence and absence of physical violence, by itself, does not mean that sexual intercourse has not been committed forcibly….A force need not be actual physical force. A threat of violence may, at times, prompt submission of the prosecutrix to sexual act and may not cause any physical injury. In spite of it, it will not be possible to hold that sexual intercourse was not committed forcibly. Similarly, the prosecutrix, because of age, physical capacity or other circumstances, may not be in a position to offer resistance or struggle and therefore, may not suffer any bodily injury. That again would not prove that sexual intercourse was not by force. Even in cases where the prosecutrix may struggle and resist, she may not suffer actual bodily injury because of other circumstances like the place where the act is committed and her own condition including the manner in which it had been committed.[47]
Thus, there may be ample reasons for absence of marks of injury on the body of the victim but they are not sufficient to falsify an alleged case of rape. When the testimony of the victim herself is worthy of acceptance and threatening circumstances strengthen its credibility, the court must act upon it and order a conviction for the offence of rape.[48] Accordingly, the accused were held guilty but were punished with a sentence of three years only on the ground of their young age and that they were misguided. While such a lenient view was acceptable in this particular case but such leniency became the trend of the judiciary during the coming years.
In another case of rape popularly named as Suman Rani case[49] where the prosecutrix eloped with her lover and on being caught, was brought to the police station by two police officials. They were put in two different rooms and the latter committed rape on Suman Rani, one after the other. The Punjab High court found the police officials guilty 'beyond the shadow of doubt' and sentenced them to undergo rigorous imprisonment for a period of 10 years as provided under sub section (2) of section 376, IPC, with an observation that ' there is no reason for awarding less than the minimum sentence prescribed'.[50]
On appeal before the Supreme Court, it was contended on behalf of the appellants that Suman Rani was used to sexual intercourse and there was no mark of violence of sexual assault on any part of her body, she could be labled as a 'woman of questionable character and easy virtue with lewd and lascivious behaviour'.[51]

The Hon'ble Supreme Court reacted sharply by saying that :[52] 'No doubt an offence of this nature has to be viewed very seriously and has to be dealt with condign punishment'. However, the sharpness of its statement faded away when it added:[53] 'But the peculiar facts and circumstances of this coupled with the conduct of the victim girl, in our view do not call for the minimum sentence prescribed under section 376 subsection (2). It reversed the sentence from 10 years to five years rigorous imprisonment. The legislature, no doubt, empowers the court to prescribe less than the minimum sentence, but only after assigning reasons for the same. Here, again in this case the Supreme Court instead of enumerating the reasons to lower the quantum of punishment merely referred to the peculiar circumstances and conduct of the victim. Again, it may be pointed out that while the conduct of the victim is significant in determining, whether the offence had been perpetrated or not, it is nowhere relevant in determining the quantum of sentence.

A review petition was filed before the same bench,[54] wherein the apex court explained that it had not used the word 'conduct' with reference to the character or reputation of the victim, but used it merely in the lexi graphical meaning of the term. Whatever may be the connotation, the fact remains that the judiciary was showing a very soft attitude towards the rapists, an aspect which could have a detrimental effect on the society at large.

Judicial Approach during Nineties

The era of nineties witnessed the emergence of a new era of judicial activism and dynamism as it witnessed the rekindling of hearts of the Indian judges towards the cause of justice. The modern scientific and technological developments taking place in the society, as well as the enlightenment of the inner conscience of the people at large, no doubt, had its effect on the judicial process, and it revived its energies to forge new tools and devise new remedies for the purpose of safeguarding the rights and liberties of the people, especially women.[55]

As Supreme Court has described it rightly: Of late crime against, in general and rape in particular, is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour'[56] 'Women also have the right to life and liberty. Their honour and dignity cannot be touched and violated. They also have the right to lead an honorable and peaceful life. Women, in them, have many personalities combined. They are mother, Daughter, Sister and Wife and not play things. They must have the liberty, the freedom and, of course, independence, to live the roles assigned to them by nature so that the society must flourish.'[57]

Rape, in particular, is not only a crime against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of the woman and pushes her into deep emotional crises.

It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. The Court, therefore, shoulders a great responsibility while trying an accused on charges of rape. It must be alive to its responsibility and be sensitive while dealing with cases of sexual molestation.[58]

This unfailing determination and unflinching resolution of the judiciary supports the cause of women especially that of victims of rape. Since rape unveils the traumatic experience of a woman at the hands of the aggressor, who has dared to disgrace her body and soul in clear defiance of the laws of the land. Therefore, the rapist deserves no sympathy and should be dealt with strictly. On the other hand, the victim, who suffers the pangs of agony, every minute and every day, of her life must not be ill treated or man handled by the state machineries; her cries for help should be heard and responded to, she should be allowed to tell her tale of woe, not at the insistence of the defense attorney, but on her own accord, and she should be believed to the fullest extent. Moreover, the state shoulders the responsibility of rehabilitation of these helpless victims by compensating them or otherwise, not for the scar inflicted, but for enabling them to bear their medical expenses and re-establishing their lives in a normal, peaceful manner. This has been the core of the judicial opinion throughout this period and which shall be seen in the different cases decided by the judges in this era.[59]

State of Maharashtra v Chandraprakesh Kewalchand Jain,[60] where a young married couple was staying in a hotel in Nagpur when the police in the midnight visited the hotel and captured them and took them to the police station, where she was sexually assaulted by the police sub-inspector many times and her husband was beaten up and charged falsely under Bombay Police Act and was put in the custody. The accused pleaded not guilty to the charge and denied the accusations made against him. The trial court found that the accused had indeed visited the hotel at an odd hour and booked the boy on the false charges. These facts along with the firm and convincing evidence of the prosecutrix, established the guilt of the police sub-inspector. Accordingly, on appeal the high court altered the order of conviction to one of acquittal, with its

view that the absence of marks of injuries on her body and infirmities and discrepancies in her evidence clearly established that the prosecutrix was a liar disclosing a new story altogether to serve her interest.[61]

The Supreme Court moved to altogether different direction from the findings of the high court. It was held that an Indian woman attaches maximum importance to her chastity and would not do anything to jeopardize her reputation. The couple had reasons to be annoyed with the police official who had booked the husband wrongly for an offence but was not reasoned enough to level a false accusation of rape involving her own reputation. On the degree of corroboration required to establish the offence, the Supreme Court stated: [62]

To insist on corroboration except in the rarest of the rare case is to equate a woman who is a victim of hurt of another with an accomplice to a crime and thereby insult women hood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars…

Hence in this case the evidence of Shamima Banun suffered from certain discrepancies, but they were negligible when compared to her sufferings. Since the accused was a strong and well built man and also a man in authority, she must have realised the futility of resistance and thereby suffered the humiliation silently. So, absence of marks of violence on her body could further only a theory of helplessness and passive submission. In the end the court remarked: '[W]hen a person in uniform commits such a serious crime of rape on a young girl in her late teens, there is no room for sympathy or pity. The punishment must in such cases be exemplary'. The accused was sentenced to five years rigorous imprisonment and a fine of Rs 1000.

Another very important case of this period was of State of Punjab v Gurmit Singh.[63] The prosecutrix, a student of 10th standard and below 16 years of age, was returning after giving her examination in Geography. On the way, three persons abducted her in a car and took her to a lonely place. Where they raped her several times throughout the night. The next day the accused left her at the same place from where they had abducted her. She, after appearing in the examination, returned home and narrated the entire story to her mother. When her father arrived, the entire episode was narrated to him and he rushed to the sarpanch to get justice, but as nothing materialised, a report was lodged with the police. The prosecutrix was examined almost after 48 hours after the incident. The medical report found that she had sexual relations earlier also. The Additional Judge, Special Court, Ludhiana, acquitted the respondents of the charge of abduction and rape. The ignorance of the girl about the make of the car in which she had been abducted, the delay in filing of the FIR, the absence of any independent evidence to corroborate her testimony and the medical report that she might have had physical contacts earlier, assured the court that she was a girl of loose character who wanted to dupe her parents that she resided one night with her maternal uncle, when actually she was giving the company to persons and for reasons best known to her, she changed her stand and made a false accusation of rape. The Supreme Court came down heavily on the findings of the trial court. It said:[64]

The findings recorded by the trial court rebel against realism and lose their sanctity and credibility. They demonstrate lack of sensitivity on the part of the court by casting unjustified stigmas on a girl below 16 years of age, overlooking human psychology and behavioral probability.

The court, in its turn, pointed to certain glaring aspects:

(1) There was no delay in the lodging of the FIR and, even if any delay had been caused, the same had been properly explained by the circumstances. It must be remembered that in sexual offences, there is often reluctance on the part of the family to go to the police and complain about the incident as it concerns the reputation of the prosecutrix and the honour of the family. Therefore, much importance should not be attached to it.[65] The prosecutrix was a truthful and reliable witness. Her testimony suffered from no infirmity or blemish whatsoever, and there was no need to look for further corroboration. The court added: 'The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook'. The testimony of the victim is vital and unless there are compelling circumstances, the courts should not hesitate to act on the testimony of the victim and convict the accused. However, ample corroboration was available to lend further credence to the testimony of the girl. The medical evidence and the chemical examiner's report proved the presence of semen in her vaginal canal and the swelling of the hymen region. Besides, her statement had also been fully supported by her parents.

(2) The Supreme Court criticized the trial court at its efforts on stigmatizing the girl. It said that the observation of the lower court, with reference to the character of the victim, 'lack the sobriety expected of a judge… The courts are expected to use self- restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and

wider implication on the society as a whole…'.[66] It held that, even if a woman had been promiscuous in her sexual behaviour, she has the right to refuse herself to anyone and no stigma can be cast on her. To put in other words:[67] Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish, she is equally entitled to the protection of law. The accused were held guilty and accordingly sentenced to five years rigorous imprisonment and a fine of Rs 5000.

Further the Supreme Court made some important observations with regard to the manner in which the judiciary should deal with victim of sexual offences. It stressed that the court should not be a silent spectator, when the victim is cross examined. The court has the right to interfere as and when necessity arises, that is, when cross-examination becomes a means of harassment or causing humiliation to the victim of crime. Moreover, trials of rape cases should be held in-camera.[68] It would enable the victim to answer the questions comfortably and at ease. Lastly, it was observed by the court that, as far, as possible, the cases of sexual assaults should be tried by lady judges, who could feel the grief and agony of the victim and deliver judgments in the correct perspective, without undue harshness and insensitivity.[69]

Judicial Activism in the present Millennium

In the beginning of the new millennium, although the law remains the same but it is expected that there is the initiation of a better and brighter tomorrow, where all pains and miseries disband. Till the beginning of this millennium, the doctors would examine victims of rape only after they received a request from the police. For this to happen, the victim had to muster the courage to register a complaint against the accused in a police station of the correct jurisdiction. There could be inordinate delays in this, considering the social obstacles that women face in coming out in the open against the accused. Further, a woman is often ostracised just for being the victim of rape. Yet, society often blames the victim for delays in complaining about the offence, giving less importance to the heinous act of the accused and the mental and physical trauma that the woman has to overcome before registering a complaint. Only after registering of a complaint against the accused, the police investigation be initiated and a requisition be forwarded to a doctor at the government hospital asking for medical examination of the victim of rape. On many occasions if the victim reported directly to the hospital, she would be denied this crucial medico legal examination and collection of medical evidence because the police had not issued a requisition for it, addressed to the doctor. By the time the police requisition could be arranged, there was substantial delay and much of the medical evidence was lost or could not be collected. This would result in acquittal of the accused in many cases, due to the lack of evidence to implicate the accused or link him to the offence. The benefit of doubt was awarded to the accused, denying justice to the already traumatised victim.

A landmark judgement was delivered by the Supreme Court in Karnataka v Manjanna, [70] where it was recognised by the court that the rape victim's need for a medical examination constitute a "medico legal emergency". Second, it was also the right of the victim of rape to approach medical services first before legally registering a complaint in a police station. The hospital was obliged to examine her right away; they could always subsequently initiate a police complaint on the request of the victim. As a result of this landmark judgment, the doctor or hospital is now required to examine a victim of rape if she reports to the hospital directly, and voluntarily, without a police requisition. The judgment recognises the three ways by which a hospital may receive a victim of rape: voluntary reporting by the victim; reporting on requisition by the police, and reporting on requisition by the Court. Unfortunately this information has not been disseminated to all doctors, and the majority of them still insist on a police requisition before examining a rape victim.

Another landmark judgment by the Delhi High Court in Delhi Commission for Women v. Delhi Police[71] mandated certain changes in the police system, health services, child welfare committees, legal services and support services in order to give justice to victims of rape. These changes were to be completed within a time frame.

Looking at the dismal conviction rates in sexual offences, complaints about the insensitive police investigative system and an insensitive society, the fact that medical opinions often lack in clarity and completion, and much medical evidence is not collected at all, the Delhi High Court pronounced its judgment specifically mandating that a SAFE Kit (Sexual Assault Forensic Evidence collection kit) be used by all medical personnel for gathering and preserving physical evidence following sexual assault. The kit contains: detailed instructions for the examiner, forms for documentation, a tube for the blood sample, a urine sample

container, paper bags for clothing collection, a large sheet of paper for the patient to undress over, cotton swabs for biological evidence collection, sterile water, glass slides, unwaxed dental floss, a wooden stick for fingernail scrapings, envelopes or boxes for individual evidence samples, and labels. The following items could also be part of the kit - a woods lamp, Toluidine blue dye, a drying rack for wet swabs and/or clothing, a patient gown, a cover sheet, a blanket, a pillow, needles and syringes for blood drawing, speculums, "post-it" notes used to collect trace evidence, a camera (35mm, digital, or polaroid), batteries, a medscope and/or colposcope, a microscope, surgilube, acetic acid diluted spray, medications, clean clothing and shower/hygiene items for the victim's use after the examination. This is the first time that the court has mandated the requisite infrastructure for a proper examination and also the extent of examination, insisting on detailed documentation of history and findings. Special rooms are to be set up for rape victims to be examined in privacy at every hospital where such cases are received. All hospitals are required to cooperate with the police and preserve the samples in refrigerators or cold chambers till such time that the police are able to complete their paperwork for dispatch to a forensic laboratory for tests, including DNA. This is to ensure proper and safe storage of evidence.

This judgment also mandates that all police stations have a woman police official round the clock to comfort the victim and her family while registering a complaint. There should be adequate privacy for recording the statement of the victim. All complaints of rape are referred immediately to rape crisis cells and child welfare committees, depending on the need. Dedicated help lines, speedy investigation, immediate medical examination, and training modules for all police staff are also mandated. Help from psychologists, psychiatrists and sign language experts should be sought depending on the need. The judgment also asks for payment of compensation to victims of rape as per the Supreme Court order in the Delhi Domestic Working Women's Forum v Union of India.[72] At present, this judgment is applicable to the State of Delhi. Such progressive judgments and laws are required at the national level to streamline the process of getting justice for all victims of rape.

In 2012, a case of rape occurred that made international headlines and stirred an unprecedented uprising in the entire nation.

At around 8:30 pm on December 16, 2012 a twenty three year old female college student named Jyoti Singh, i.e. Nirbhaya,[73] and her friend were waiting for a public bus in South Delhi after attending a viewing of Life of Pi. A bus with tinted windows eventually stopped, whereupon a young boy persuaded the pair to board the bus with the promise of transportation home. At that fateful moment, Nirbhaya was violently assaulted and raped by six men; these perpetrators were Ram Singh, the main accused bus driver (age 35); his brother, Mukesh Singh (age 29); Vinay Sharma, an assistant gym instructor (age 18); Pawan Gupta, a fruit seller (age 19); Akshay Thakur, unemployed (age 28), and Mohammed Afroz, a juvenile at the time of the crime who was called “Raju” for anonymity (age 17). In an attempt to defend Nirbhaya, her male companion was severely beaten up by the assailants, as well. Three hours later, a Police Control Room (PCR) van picked up Nirbhaya’s naked body and her injured friend lying under a flyover, and immediately rushed them to a hospital. While Nirbhaya and her friend were in the hospital, three of the accused, including the principal suspect Ram Singh, were arrested on December 17th. On 18th, a fourth arrest was made. It took three more days to arrest the juvenile and the final perpetrator, on December 21st. It became known that the boy who had persuaded Nirbhaya to enter the bus was the one who suggested to the others that they throw her and her friend’s naked bodies onto the street and run them over. The male friend was given treatment and Nirbhaya underwent emergency surgery after not only getting raped, but also having her intestines pulled out of her body. She was put on a ventilator and was labeled as being in critical, but stable condition. However, her health drastically worsened; Nirbhaya suffered from internal bleeding and cardiac arrest, thus prompting her transportation to Mount Elizabeth Hospital in Singapore on December 26th. Physicians confirmed further internal bleeding and multiple-organ failure. Finally, in the early hours of December 29th, Nirbhaya was pronounced dead as a result of multiple-organ failure. Would her death and suffering go in vain? Based on the immediate response, there seemed to be a hope and will to change the violent culture in India and bring the issue of crimes against women in India to the forefront of national political and social agendas, but the long-term effects appear to be less apparent.

Considering the inhuman and ghastly acts of the convicts shocked the collective conscience of the nation and deserve exemplary punishment, which was pronounced nine months after an agonising wait, the court said, "Accordingly, the convicts be hanged by neck till they are dead,".

Delivering his 20-page order in a packed courtroom, the judge noted that the "ghastly acts" of Mukesh (26), Akshay Thakur (28), Pawan Gupta (19) and Vinay Sharma (20) require withdrawal of the "protective arm of the community from around them".

"The crime of such nature against a helpless woman, per se, requires exemplary punishment. I may leave

here while saying the gravity of the incident depicts the hair-raising beastly and unparalleled behaviour. "Subjecting of the prosecutrix to inhuman acts of torture before her death had not only shocked the collective conscience but calls for withdrawal of the protective arm of the community from around the convicts. This ghastly act of the convicts definitely fits this case in the bracket of rarest of rare cases," the judge said. It was further said by the court that the aggravating circumstances outweigh the mitigating circumstances in the case. The "severity" of the injuries and the "unprovoked" suffering inflicted upon the "defenceless" victim were relied upon by the court while handing down the capital punishment. The Court said that the convicts in pursuance of their conspiracy lured the victims into the bus, brutally gang raped the prosecutrix, inflicted inhuman torture and threw the defense less victims out of the moving bus in naked condition, profusely bleeding in a cold winter night; their unprovoked crime demonstrated exceptional depravity of mind. Her intestines were so severely damaged and the suffering inflicted on the prosecutrix was unparalleled. The brutality caused to her internal organs is extreme as is evident from the medical evidence on record and hence the act of convicts calls for extreme penalty.

Weighing the factors against and in favour of the convicts in deciding the punishment, the court said the aggravating circumstances are that the offence was committed in an extremely brutal, grotesque, diabolical, revolting and thus dastardly manner so as to arouse intense and extreme indignation of society. He said the manner of crime demonstrated exceptional depravity and extreme brutality by which extreme misery was inflicted upon the girl before her death leading to grave impact on social order.

The mitigating circumstances noted by the judge included the young age of the convicts, their socio economic status, citing which they had sought a chance for reformation, and their clean antecedents. The court concluded that the aggravating circumstances outweigh the mitigating circumstances. While applying the test of rarest of rare, the court said, "The facts show that entire intestine of the prosecutrix was perforated, splayed and cut open due to repeated insertions of rods and hands. The convicts, in the most barbaric manner, pulled out her internal organs with their bare hands as well as by the rods and caused her irreparable injuries, thus exhibiting extreme mental perversion not worthy of human condonation."

"It rather shows the beastly behaviour of convicts. Further, the convicts did not stop after pulling out her internal organs after the crime of gang rape/unnatural sex but then had dragged the victims to the rear door of the bus to be thrown out and when the rear door was found jammed, the victims were dragged by their hair to the front door and thrown out of the moving bus," the judge said.

The court also observed that with the rise in offences against women, the judiciary cannot turn a blind eye to the need to send a strong deterrent message to the perpetrators of such crimes and that there will be no tolerance of any form of deviance against women. These are the times when gruesome crimes against women have become rampant and courts cannot turn a blind eye to the need to send a strong deterrent message to the perpetrators of such crimes.

"The increasing trend of crimes against women can be arrested only once the society realize that there will be no tolerance from any form of deviance against women and more so in extreme cases of brutality such as the present one and hence the criminal justice system must instill confidence in the minds of people especially the women," it said. The court said that the four men are not convicted only on account of conspiracy but also for their "overt" acts.

We conclude by stating the obvious that a strong message needs to be sent to the perpetrators of grotesque and ghastly crimes against women that such crimes shall not be countenanced, though we confess that we are not aware of any case in which a crime of such dimensions has been committed hitherto before. We cannot also but be conscious of the fact that the gruesome manner of the execution of the crime in the instant case is in a sense unparalled in the history of criminal jurisprudence and that if the rising trend towards such crime is not nipped in the bud and arrested at its inception, the poison is likely to spread like wild fire through the social order, rendering it hapless and defunct. Exemplary punishment is, therefore, the need of *the hour, for, if this is not the rarest of rare cases there is likely to be none.*

The volcano that erupted in the form of protest in Delhi dispelled above notion. On the public outcry, a Judicial Committee headed by Justice J.S.Verma was set up by the Government to suggest amendment to Criminal Law to deal with sexual assault cases. Need of the hour was to satisfy the rage of the society so that people continue to have faith in the Judicial System and are dissuaded to take law in their hands in an anxiety to deliver quick and instant justice. The Criminal Law Amendment Act, 2013 was passed amending Indian Penal Code to provide death penalty in rape cases that lead to death of the victim or leave her in a vegetative state. Seldom does a crime lead to far reaching changes in law as was notified and affected in rape laws in the aftermath of infamous December, 2012 gang rape case. Within days of incident, Fast Track Courts were ordered to be set up in all part of the Country to deal with the cases relating to sexual assault

against women. Overnight, safety of women became a cause of concern for all, as irrespective of age, sex, caste and creed.

On behalf of all the convicts, it has been submitted by the court that even after 16th December gang rape case and the amendment in Penal Law, the crime rate against women has not decreased. Thus, awarding death penalty to the convicts may not have any deterrent effect on potential offenders. In this regard, suffice it to note that it is the duty of the Court to impose appropriate sentence having regard to the nature of the crime and the pre-planned manner in which atrocities were committed on the hapless victim, having due regard not only the rights of criminal but also that of the victim. The cruel acts committed by the convicts are such that if appropriate sentence is not awarded, rage of the society would not be satisfied and our justice system would be rendered suspect. This would be having devastating effect as common man will lose faith in the Courts. Any leniency shown in the matter would not only be misplaced but would give rise to a feeling of private revenge among the people leading to lawlessness in the society. The Court would not like such a situation to prevail.

In a recent decision in Kunal Majumdar v. State of Rajasthan,[74] a coordinate Bench of this Court has held that it is a special and onerous duty of the High Court to examine the nature and the manner in which the offence was committed, the mens rea if any, of the culprit, the plight of the victim as noted by the trial Court, the diabolic manner in which the offence was alleged to have been performed, the ill-effects it had on the victim as well as the society at large, the mindset of the culprit vis-à-vis the public interest, the conduct of the convict immediately after the commission of the offence and thereafter, the past history of the culprit, the magnitude of the crime and also the consequences it had on the dependants or the custodians of the victim. There should be very wide range of consideration to be made by the High Court dealing with the reference in order to ensure that the ultimate outcome of the reference would instill confidence in the minds of peace-loving citizens and also achieve the object of acting as a deterrent for others from indulging in such crimes.

In Sandesh alias Sainath Kailash Abhang vs. State of Maharashtra,[75] the Supreme Court reiterated, " it is not only the crime and its various facets which are the foundation for formation of special reasons as contemplated under Section 354 (3) Cr P C for imposing death penalty but it is also the criminal, his background, the manner in which the crime was committed and his mental condition at the relevant time, the motive of the offence and brutality with which the crime was committed are also to be examined. The doctrine of rehabilitation and doctrine of prudence are the other two guiding principles for proper exercise of judicial discretion.

In another recent decision rendered in the case of Sunder vs. State,76 the Supreme Court while dismissing the appeal by the convict and affirming the award of death sentence, culled out the following factors which it considered as aggravating circumstances:

a) The accused had been held guilty of two heinous offences, which independently of one another, provide for the death penalty under Section 364-A and Section 302 of the Penal Code.

(b) The facts and circumstances of the case did not depict any previous enmity between the parties. There was no grave and sudden provocation which had compelled the accused to take the life of the prosecutrix, an innocent child of seven years.

(c) On account of non- payment of ransom, a minor child's murder was committed. This circumstance demonstrated extreme mental perversion not worthy of human condonation.

(d) The manner in which the victim was murdered and the approach and method adopted by the accused, disclosed the traits of outrageous criminality in the behaviour of the accused. It was a well thought out and well-planned murder. The approach of the accused revealed a brutal mind set of the highest order.

(e) Murder was committed not of a stranger, but of a child with whom the accused was acquainted.

(f) Extreme misery caused to the aggrieved party to be regarded as an add on to the aggravating circumstances.

In Deepak Rai v State of Bihar,[77] the court while noting the penological shift in the present code legislated in 1973 making imprisonment for life a rule and death sentence an exception, dwelt upon the words " special reasons" for award of sentence of death mandated by the provisions of section 354(3) of the Code.

It summed up with great perspicacity the objects and purpose of the legislative mandate of assigning special reasons and the judicial approach to be adopted in assigning such reasons as follows:

"The aforesaid would reflect that under this provision the legislature casts a statutory duty on the court to state reasons for choice of the sterner sentence to be awarded in exceptional cases as against the rule of life imprisonment and by necessary implication, a legal obligation to explain them as distinguished from the expression —reasons follow. The legislative mandate of assigning —special reasons assures that the imposition of the capital punishment is well considered by the court and that only upon categorization of

the case as the ―rarest of rare, thus leaving no room for imposition of a less harsh sentence, should the court sentence the accused person to death.

Incontrovertibly, the judicial approach towards sentencing has to be cautious, circumspect and careful. The courts at all stages, trial and appellate, must therefore pursue and analyse the facts of the case in hand and reach an independent conclusion which must be appropriately and cogently justified in the reasons or special reasons recorded by them for imposition of life imprisonment or death penalty. The length of the discussion would not be a touchstone for determining correctness of a decision. The test would be that reasons must be lucid and satisfy the appellate court that the court below has considered the case in toto and thereafter, upon balancing all the mitigating and aggravating factors, recorded the sentence.

This Court has consistently held that only in those exceptional cases where the crime is so brutal, diabolical and revolting so as to shock the collective conscience of the community, would it be appropriate to award death sentence. Since such circumstances cannot be laid down as a strait jacket formula but must be ascertained from case to case, the legislature has left it open for the courts to examine the facts of the case and appropriately decide upon the sentence proportional to the gravity of the offence."

On the whole, we may say that the judiciary has done a commendable job. It has well responded to the needs of the society and fulfilled its basic requirements. It has shelved the age old societal values attached to rape and its victims and adopted a complete gender neutral approach. The relaxation of the rules regarding the consent, corroboration, character in rape laws and the recognition of the rights of rape victims have enabled women to secure their dignity and honour.78

Considering the severity of sexual violence against women and the detrimental consequences it generates for whole of the society, there is a dire need to sentence the offenders and provide deterrent models of behavior to people in society. The social expectation is that the judicial pronouncements must not only punish the offenders but also look to the interests of victims. Nevertheless instances, though rare, of injustices perpetrated by way of judicial dictum, do continue. Whether it is the lack of evidence in a particular case, or laxity on part of the prosecution or the judge's conservative outlook, decisions do come wherein the victim is left to fend for herself. That should be minimized, if not obliterated, for that would help us to achieve the international call for a violence free society.

Foot Notes:

1. Law Commission of India, 84th report, Government of India, Ministry of Law, Justice and Company Affairs, 1980, p 1.
2. '*The Response to Rape: Detours on the Road to Equal Justice*', prepared by the Majority Staff of the Senate Judiciary Committee, May, 1993, p 2.
3. Saroj Iyer, *The Struggle To be Human – Women's Human Rights,* 1999, p 75. Saroj Iyerhas observed through the primary role of the judiciary is to bring about social justice by making people accountable for their wrongful conducts through sentencing but the judiciary itself remains unaccountable to people for the judgments it delivers.
4. Ibid, page 77.
5. 'Preliminary Report submitted by the UN Special Rapporteur on Violence Against Women, Its Causes and Consequences', Ms Radhika Coomaraswamy, 1994, para188.
6. Saroj Iyer, *The Struggle To be Human – Women's Human Rights,* 1999, p 75.
7. Gerald D Robin, '*Forcible Rape: Institutionalised Sexism in the Criminal Justice System' in The Criminal Justice System and Women_ Offenders, Victims, Workers,* Barbara Raffel Price and Natalie J Sokoloff (eds),1982, p 241.
8. Ibid, pp 241-243.
9. Ibid.
10. Zsuzsanna Adler*, Rape on trial*, 1987, p 151.
11. Ann Wolbert Burgess and Lynda Lytle Holmstrom, *Rape: Victims of crises,* 1974, p 197, quotes in Dianne Herman, '*The Rape Culture', in Women_ A Feminist Perspective*, Jo Freeman (ed), third edition, 1984, p 20, at p 30.
12. Zsuzsanna Adler*, Rape on trial*, 1987, p 14.
13. Ibid, p 151.
14. AIR 1958 SC 143.
15. AIR 1967 Cal 641.
16. *Ram Murli v State of Orissa* AIR SC 1929.
17. *Rahim Beig v State of U P1972* Cr L J 1260.
18. (1974) Cr L J 1117.
19. *Pratap Mishra v State of Orissa* AIR 1977 SC 1307.
20. Vasudha Dhagamwar, *Law Power and Justice: The Protection of Personal Rights in the Indian Penal Code,* Sage Publications, second edn , p 251
21. AIR Punjab 123.
22. Ibid, p 126.
23. Ibid.

24. See Gopi *Shanker v State of Rajasthan* (1967) CrLJ 922; *Kartick Kundu v State* (1967) CrLJ 1141; *Harpal Singh v State Himachal Pradesh* (1976) CrLJ 162.
25. 1972 Cr L J 1464.
26. 1972 Cr L J 1376.
27. Ibid, p 1378.
28. *Tukaram v State of Maharashtra* AIR1979 SC 185.
29. Ibid, p 187.
30. Ibid, p 189.
31. 1980, 4 SCC 262.
32. AIR 1980 SC 1252.
33. Ibid, para 4.
34. *Phul Singh v State of Haryana* (1980) Cr LJ 8, per Krishna Iyer and Singhal JJ.
35. Shanker Sen, *Human Rights in a developing Society*, APH Pub, 1998, p 120.
36. Ibid, p 2177.
37. Ibid, p 2169.
38. AIR1960 SC 911.
39. AIR 1983 SC 753.
40. Ibid, p 755.
41. Dipa Dube, *Rape laws in India*, Laxis Nexis Butterworths publication, 2008, p 97.
42. Act 43 of 1983.
43. *Gajanand Maganlal Mehta v State of Gujarat* (1987) Cr LJ 374.
44. Ibid, p 383.
45. 1987 Cr L J 1541.
46. 1987 Cr L J 1541, p 1543.
47. See *Balwant Singh v State of Punjab* (1987) Cr L J 971.
48. *Prem Shanker v State of Haryana* AIR 1989 SC 937.
49. Ibid, p 938.
50. Ibid.
51. Ibid, p 939.
52. Ibid.
53. *State of Harayana v Prem Chand* (1990) 1 SCC 249.
54. Dipa Dube, *Rape laws in India*, Laxis Nexis Butterworths publication, 2008, p 105.
55. *State of Punjab v Gurmit Singh* AIR 1996 SC 1393.
56. *Bodhi Sattwa v Subhra Chakaraborty* AIR 1996 SC 922.
57. State of Punjab v Gurmit Singh AIR 1996 SC 1393, p 1404.
58. Dipa Dube, *Rape laws in India*, Laxis Nexis Butterworths publication, 2008, p 106.
59. 1990 Cr L J 889.
60. Ibid, p 898.
61. 1990 Cr L J 889, p 895.
62. AIR 1996 SC 1393.
63. Ibid, p 1399.
64. See *Mangi Lal v State of Madhya Pradesh* (1998) Cr L J 234; *Kernal Singh v State of Madhya Pradesh* AIR 1995 SC 2472.
65. AIR 1996 SC 1393, p 1403.
66. *State of Maharashtra v Madhulkar Narayan Mardikar* AIR 1991 SC 207.
67. Code of Criminal Procedure 1973, ss 327(2) and (3).
68. See also *State of Andhra Pradesh v Gangula Sathya Murthy* (1997)1 SCC 272.
69. *State of Karnataka v. Manjanna (2000) SCC 188.*
70. High Court of Delhi. *Delhi Commission for Women v. Delhi Police,* W.P (CRL) 696/2008 [Internet]. 2009 Apr 23 [cited 2010 Mar 15]. Available from:http://www.ncw.nic.in/PDFFILES/Delhi_High_Court_judgement_on_guidelines_for_dealing_rape_cases_by_various_authorities.pdf
71. 72. (1995) 1 SCC 14.
    73. Nirbhaya, meaning "fearless," was the pseudonym given to Pandey by the media and public before her father revealed her true identity because India's rape laws protect the identity of the victim. This particular name was chosen due to the victim's background and willingness to live; the public also gave her the titles of "Damini" ("lightning"), "Amanat" ("treasure"), and others.
74. (2012) 9 SCC 320.
75. (2013) 2 SCC 479.
76. (2013) 3 SCC 215.
77. (2013) 10 SCC 42.
78. *Vishnu v State of Maharashtra* (2006) Cr L J 303.