

Rape a Non Compoundable offence: Crime against Women Compensated by Marriage

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Abstract: Rape is not only a crime against the person of a women, it is a crime against the entire society. It is a crime against basic human rights and is also violative of the victim's fundamental right i.e. right to life guaranteed in article 21 of the constitution of India under which right to live with dignity is implicit. In the case of *State of M.P V Madan Lal*, Justice Deepak Mishra and Prafulla C Panta, the sitting judges of hon'ble SC observed that rape or attempt to rape are offenses against women's body which is her own temple and her dignity is a part of immortal self. On the basis of these observations we can say that rape is the kind of offence which deserves to be punished so as to deter the offender from repeating the same act in future and to serve as a lesson to others that this kind of offence will put the offender in a dark future. This paper aims at analyzing the various recent cases in which the case of rape was quashed because the offender married the victim to escape from the consequential liability and the observation of the other courts on it. In achieving this aim this paper will be focusing on role of Indian Judiciary for the recognition of the rights of the women and the society as well. There are many cases of rape in India which were quashed on the grounds of marriage between the victim and the offender without awarding adequate punishment. Acquitting criminal without punishment just because of marriage will serve as an example that the rape can be compensated by marriage but it cannot be done at all.

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Introduction

The word rape is derived from the Latin term 'rapio' which means to seize. Thus it literally means a forcible seizure and that is the essential characteristic feature of the offence. In common parlance, it means intercourse with a woman without her consent i.e. by force, fear or fraud or with consent obtained under certain unlawful circumstances. So as per the literal meaning of the word i.e. forcible seizure it means the seizure of the dignity of woman which is a part of her non perishable and immortal self. It was well quoted by the Hon'ble SC that this kind of offence are such which suffocate the breath of life and sully the reputation and reputation is the richest jewel one can conceive of in life¹.

1. Punishment: Philosophy And Purpose

Punishment is a means of social control. Basically the concept of punishment is that of inflicting some sort of pain on the offender for his violation of law. This is an instrument of public justice. According to utilitarian philosophy which is basically prevalent in our country, laws should be used to maximize the happiness of society and because crime and punishment are inconsistent with happiness,

they should be kept to a minimum. It endeavors to inflict only as much punishment which is required to prevent future crimes. Further it says that laws that specify criminal conduct should be designed to deter future criminal conduct.

Deterrence operates on a specific and general level. General deterrence is focused on the idea that punishment should prevent others from committing criminal acts and thus it serves as a lesson for the society that criminal behavior is punishable. on the other hand specific deterrence is focused on the wrongdoer himself and it works in two stages. First, the offender is being imprisoned to prevent him from committing crime and second, this incapacitation is designed in such an unpleasant manner which discourages the offender from repeating his criminal behaviour. According to Greenhut, the punishment should act as a reasonable means of checking crime. According to him, three components must be present while punishing the wrongdoer. First "speedy and escapable detection and prosecution must convince the offender that crime does not pay". Second, "after punishment the offender must have a fair chance of a fresh start". And third "the state which claims the right

¹ State of MP v Madanlal : criminal appeal no. 231 of 2015 (@SLP(crl) no. 5273 of 2012)

of punishment must uphold superior values which the offender can reasonably be expected to acknowledge².

So basically punishment is not only focused on the deterrence, but it also aims to teach the offender that crime does not pay and is also aimed to reform the criminal and to make him a good citizen and at the end it restores the social balance disturbed by the offender.

1.1. Punishment In Rape Cases: A Practical Insight *State of MP V Bala @ Balaram*³

The Apex court had held that the long pendency of the criminal trial or offer of the rapists to the marry the victim are no relevant reasons for exercising the discretionary power under the provision of section 376 (2) of IPC. The Apex court further held: “The crime here is rape. It is particularly heinous crime, a crime against society, a crime against human dignity, one that reduces man to an animal. The Penal Statute has prescribed a maximum and a minimum punishment for an offence under section 376 IPC. Such an offence is itself an affront to society. Though the award of maximum punishment generally is imperative. The provisos to section 376 (1) and 376 (2) give the power to the court to award a sentence lesser than the minimum for adequate and special reasons. The power under the proviso is not to be used indiscriminately or routinely. It is to be used sparingly and only in cases where special facts and circumstances justify a reduction. The long pendency of criminal trial or the offer of the rapists to marry the victim is not relevant reasons. The punishments prescribed by the Penal code reflect the legislative recognition of the social needs, the gravity of the concerned offence, its impact on the society and what the legislature considers as a punishment suitable for the particular offence. It is necessary for the courts to imbibe that legislative wisdom and to respect it.”

*Gian Singh V State of Punjab and Another*⁴

The SC had held that heinous and serious offences like rape cannot be quashed notwithstanding the fact that the dispute may have been settled between the offender and the victim or victim’s family. The Apex court has held:

“Heinous and serious offences of mental depravity or offences like murder, rape, dacoity etc. cannot be fittingly quashed even though the victim or victim’s family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. The SC further held that the only category of cases which could be quashed

on the basis of settlement between the victim and the accused were those that involved a civil flavor.

*Shimbhu & Another V State of Haryana*⁵

The hon’ble Supreme Court held as “a compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settled. Since the court cannot be always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance that she might have been pressurized by the convicts or the trauma under room by her all the years might have compelled her to opt for a compromise. In fact, accepting this proposition will put an additional burden on the victim. The accused may use all his influence to pressurize her for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases to be ground for the court to exercise the discretionary power under the proviso of section 376 (2) of IPC.” The bench in the Shimbhu further cautioned lower court not to show misplaced leniency while awarding sentence for a heinous crime as rape.

*State of MP V Madanlal*⁶

The victim aged 7 years was taken away to an isolated place by the accused where he made her sit on her lap after removing her undergarments. The accused was convicted under section 376 (2) (f) read with section 511 and he was sentenced to 5 years rigorous imprisonment. The matter reached to MP HC and it convicted him under section 354 of IPC and restricted the sentence to the period already undergone which was slightly more than one year. The HC had also noted the plea by the accused that the parties had entered into a compromise and a petition seeking leave to compromise. The trial court hadn’t accepted the plea on the grounds that offence was of non-compoundable in nature. The appeal was filed before the Apex court by the state of MP and the court helped that the concept of compromise under no circumstances can really be thought of. The bench of Justice Deepak Mishra and Prafulla C. Pant observed “ these are crimes against the body of a women which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And

² Max Greenhut, penal reform. A comparative study, p.3

³ 2005 (8) SCC 1

⁴ 2012 (10) SCC 303

⁵ Criminal Appeal Nos 1278-1279 of 2013 (Arising out of S.L.P. (cr1) Nos 1011-1012 of 2012)

⁶ Criminal Appeal No 231 of 2015 (@ SLP (cr1) no. 5273 of 2012)

reputation needless to emphasize, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the purest treasure is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honor which matters the most. It is sacrosanct.

V. Mohan v State of Madras⁷

A girl child of 15 years of age was raped in 2008 and she gave birth to a child next year. The accused was found guilty and sentenced to 'seven years imprisonment' by the trial court later he filed an appeal in Madras HC and he was given an opportunity to settle the matter through mediation. P. Devadas J., holding that mediation is now being used in criminal cases also said: In fact, even in Islam, Hinduism and Christianity, there are instances of solving dispute in a non-belligerent manner. The court observed "the victim girl has become mother of a child. But as on date, she is nobody's wife. So, she is an unwed mother. Now there is a big question mark looming large before the girl as well as her child, who is completely innocent. Generally, in this type of cases, the girl concerned is stated to be a victim, but really speaking the child born out of such a physical contact is also a victim. The child is a victim of circumstances. She was born to suffer social stigma for no fault of her."

Devadas J. then referred the matter to the mediation center attached to the HC and asked to deposit a fine of one lac in a fixed deposit in the girl's name. He granted an interim appeal bail to Mohan and said advocates appearing on both sides would assist the mediator and in case of a compromise, arrive at a 'Memorandum of Understanding'. After the judgement delivered by SC in the case of *State of MP v Madanlal*, in which the Apex court said that in case of rape or attempt of rape, the concept of compromise under no circumstances can really be thought of, the Madras HC has recalled its July order through which it had granted interim bail to a rape convict and urged the victim and offender to try a compromise by mediation, the convict has been asked to surrender by July 13th.

Bhagwani v State of MP⁸

A child of 11 years was kidnapped and subsequently raped by two accused. She was also subjected to carnal intercourse and made to suffer untold pain and agony. Later the accused threw her half-naked body near the road, in total disregard of the

decency and respect for a dead female body. The accused were found guilty and was sentenced to death penalty. The MP HC Jabalpur bench had confirmed the death penalty of two accused that the only punishment they deserve for having committed reprehensible and gruesome murder of an innocent child to satisfy their lust, is nothing but death.

A bench of S K Seth J. & Nandita Dubey J. had also observe that it is immensely appalled by the alarming increase in the recent incidents of child rapes and also being aware of rising anger of the society over rape of minor across the country, therefore, considers death sentence as a measure of social necessity and also a means of deterring other potential offenders. The matter now reached before the hon'ble SC and it has stayed the execution of death sentence. A bench of A.M Khanwilkar J. and Indu Malhotra J. on the SLP filed by one of the accused viz. Bhagwani, issued notice and called for original records from the HC.

1.1.2. POST Rape Marriages: A Unique and Emerging Trend

Jahirul Maulana V State of Assam⁹

In 2011, the mother of the 'victim' (a minor aged 16) had filed complaint against the accused alleging that he entered into her house during her absence and had sexual intercourse with her minor daughter against her will. Before the police filed the charge sheet in 2012, the accused married the victim. The accused moved HC praying for quashing of charge sheet against him. The court observed "the victim was 16 years old at the time the offence was allegedly committed. The perpetrator of the alleged offence and the victim both profess the faith of Islam and under such circumstances, at that stage the victim was legally of marriageable age in terms of Mohamadan law." Referring to Apex court dictum in *Madhavrao Jiwaji Rao Scindia and another V Sambhajirao Chandrojirao Angre*¹⁰ that a proceeding may be quashed if the chances of an ultimate conviction is bleak and therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court said: this is because otherwise the parties and witnesses will be dragged to court and process of the court will be abused for no purpose.

The court further observed "the victim has become an adult in the meantime. She has been happily residing with the petitioner as his legally married wife with her child in her lap. Under the given circumstances the ends of justice will demand that they should be left at their will and there otherwise happy marital life should not be disturbed by

⁷M.P.no 2 of 2014 in crl. A. no.402 of 2014

⁸ SLP (crl.) 4821-4822/2018

⁹Crl. Pet. 234/2016

¹⁰ AIR 1988 SC 709

interfering clouds of litigation looming over their heads. Since chances of conviction in the case is bleak in view of the compromise between the parties and marriage between the petitioner and the opposite party no. 3, no useful purpose shall be served by dragging them to court anymore and to compelled the witness to come at the expenses of the valuable judicial time.

Lovely V State of Punjab and Another¹¹

The girl (complainant) aged 23 years had gone to her cousin sister's marriage along with her family where the petitioner Lovely was also present. She fell in love with him and they promised to marry each other. After 4-5 months petitioner called her at his home and made physical relation with her forcibly. The FIR was registered instantly. Later on the dispute has been settled and they have entered into a compromise and both married and were residing together. The parties were directed to appear before the trial court so that their statement could be recorded regarding genuineness of the compromise. The parties appeared before the CJM at Ludhiana. In pursuance of the direction a report has been received from CJM at Ludhiana, stating that the compromise has been done without any pressure or coercion. Relying on the judgment rendered by SC in Madan Mohan Abbot V State of Punjab¹² and referring to the principles laid down by SC in the case of Narinder Singh and others V State of Punjab and another¹³ which should be kept in mind while quashing FIRs pertaining to non-compoundable offences, the HC allowed the petition and FIR and all subsequent proceedings arising out of the same was quashed.

Dalbir Singh & Others V State of Punjab & another¹⁴

The Punjab and Haryana HC quashed the FIR under section 376/506/120B of IPC, against the 5 accused persons on the ground that one of them has married the victim and all 5 accused had entered into a compromise with her.

Habibur Rahman V State of WB¹⁵

In a judgment pronounced by Calcutta HC on 26th July 2018 it has reduced the sentence awarded to a rape accused 'to the period already undergone' taking into account the fact that the prosecutrix and the accused are married and have settled in life.

2. Outcome of Marriage & Punishment: A Comparative Analysis

We are living in a society where a still a rape victim does not gets that much respect which an ordinary women should have, the society feels very difficult to accept such lady as a normal human being and she is being looked as impure and etc. etc. as per different views. Hence the rehabilitation of her is a matter of great concern. In some cases accused marries with the victim, and the victim becomes ready to compromise which is somewhere under pressure given by her parents in order to secure their impression in the eyes of society, or due to procedural process, or by trauma undergone by her after suffering the pain of such incident or by the convicts. Under such compulsion victim agrees to compromise but is it fruitful for victim is an unanswered question and the answer may be different depending on the circumstances of the case and on the mentality of the convict. Now let's come to marriage, if we are not supporting the marriage of convict and the victim then a question comes to our mind who will be ready to accept her as a wife, as a daughter-in-law, as a sister-in-law or in any other relationship, will a reasonable man be ready to accept her as family member, as much I know there are very few people who have the guts to accept her. When a girl is being raped we use to launch candle march, strikes, violence and make responsible to government for it and ask the authorities to answer us but unfortunately very few of that crowd have the understanding about the sufferings of that victim and has the mentality to help her in rehabilitation.

On the question that will that victim feel safe after marrying the convict, let us take an example of a boy and girl who loves each other and promised to marry with each other, one day the boy calls the girl on his home and makes sexual intercourse with her forcibly without her consent. The girl files an FIR alleging rape, after getting frightened about the conviction the accused offers to marry her and to settle the matter by compromised. The victim's parents agrees to marry their daughter and the victim consents for the marriage. But in this case it is under doubt that will that girl feels safe with a person who has broken her trust and used her to satisfy his lust. There is no doubt that the accused married her to escape from the consequential liability for the wrong committed by him. But then also the victim agrees to compromise and to live with him happily and if the case is being quashed on such grounds that now victim has got her justice, this is in fact the failure of judiciary to provide the remedy to her, and the success for the wrong doer by using this technique. Hence the purpose of punishment which is to deter the criminal from repeating the same act in future and for the other

¹¹ CRM-M- 3577-2018

¹² 2008 (4) SCC 582

¹³ 2014 (6) SCC 466

¹⁴ Criminal Misc. no. M-27509 of 2015

¹⁵ C.R.A. 730 of 2008

individuals to learn a lesson that criminal behavior will be punished, will not be fulfilled and the social order disturbed by the wrong doer will not be restored. It cannot be denied that if the offender has realized his mistake and as a consequence of the same resided to marry with the victim in good faith and to provide her a good status in the eyes of society, he should be given an opportunity for the same, but as it is difficult to find out the mentality of the accused and is a very rare case there should be a hard punishment for such type of offences.

2.1. Rehabilitation Of The Rape Victim

Rape changes a women's life in the most hideous way possible, stigmatizing through no fault of her and that's when life becomes a constant challenge. The real battle of the victim starts when the courtroom procedure comes to an end and the judgment is delivered. The victim feels a sense of aimlessness and which might transform into suicidal tendencies.

2.2. Victim's Identity:

Indian law prohibits a rape victim's identity from the being revealed¹⁶ but that does not save her from disapproval and disgrace in the eyes of society. For the first day of lodging FIR to the final decision of court, she had to pass through different aspersions relating to the character questioned about her dressing sense, her style of talking, her personal appearance, if she was knowing the perpetrators or has instigated them to attack. Although her name is not published in newspaper, but anyhow her neighbours and relatives get to know about the incident and as a result she has to deal with their stares and sniggers as well. An act of rape finishes a women's chance to be happy forever, sometime its consequences can be overwhelming. Lets take the story of Suzette Jordan¹⁷:

On the night of February 5, 2012, a gang of men raped Suzette in her hometown, Kolkata and she was thrown out of the moving car. Later she filed a complaint in spite of the people's advice to forget about it and be quiet. While filing the FIR each and every police man came and asked that is she sure that she was raped actually. Even the chief minister Mamata Banerjee insinuated that her story had been cooked up to malign her government. Then came death threat from her attackers but she never headed back and the case was investigated and found to be truth. It was strange to see that how she celebrated her life. There were many terrible days in court and she found it hard to get a job, but pursued happiness with determination. In a conversation with the Indian

express reporter Swati Chakravarti she said "just because I have been raped, people feel I have no right to be happy. I feel as if I am being blamed for being alive. But why shouldn't I enjoy life?"¹⁸

Her life turn to a constant battle for survival and social acceptance. She was asked to leave her rented home, she never got a proper job and once she was even asked to leave a restaurant because they didn't want her on the premises. She was died due to encephalitis, but three of the perpetrators were sentenced by Kolkata court.

In India, also we have rape rehabilitation and this work has been done by various NGOs and government is also waking up to the necessity of having separate centres to help the women in dealing with the trauma of rape.

Under the Nirbhaya fund established in 2013, the ministry of women and child development has formulated a scheme for setting up one stop centers (OSC). These centers are intended to support women affected by violence in private and public spaces, within the family, community and at the workplace. Women facing physical, sexual, emotional, psychological, abuse will get support and redress. Aggrieved women facing violence such as sexual harassment, sexual assault, domestic violence, trafficking, honor-related crimes, acid attacks and who have referred to the OSC will receive specialized services.

The centers provide:

- i) Emergency response and rescue services – The women is rescued from the location and referred to the nearest medical facility or shelter home.
- ii) Medical assistance – Victim would be referred to the nearest hospital for medical aid undertaken as per the guidelines given by the ministry of health family welfare.
- iii) Assistance to victim in lodging complaints – OSC assists the victim while filing complaint for rape or sexual assault so that she will not be discouraged by the police.
- iv) Psycho-social support – The counselling process by an skilled counsellor to give the confidence to victim and to raise her voice for justice.
- v) Legal aid and counselling – To facilitate access to justice for victim is provided at OSC through lawyers or the national/state/district legal services authority.
- vi) Shelter – The OSC provides temporary shelter to aggrieved women. woman along with their children (girls of all age and boys up to 8 years) can get temporary shelter at the OSC for five days. Long

¹⁶ Section 228 A of IPC 1860

¹⁷ A prominent women's rights activists and anti-rape campaigner from Kolkata,

¹⁸ Suzette's story | the Indian express- <https://indianexpress.com/article/opinion/columns/suzettes-story/>

term shelter requirement, arrangements will be made with Swadhar Greh/short stay homes (managed/affiliated with govt or NGO).

vii) Video conferencing facility – OSC will provide video conferencing facility to facilitate speedy and hassle-free police and court proceedings. The aggrieved can record her statement for police courts from OSC using audio-video electronics.

Steps towards better future

One stop centers have opened in Andhra Pradesh, Andaman & Nicobar Islands, Chandigarh, Chhattisgarh, Tripura, Sikkim, Punjab, Uttarakhand and in so on states and there plans to have more than 100 OSCs all over India and it emphasizes that the Indian govt has taken a positive step for the rehabilitation of rape victims.¹⁹

Now the material thing is that when the government is trying to help the victims to rehabilitate in the society, don't we have also some duties towards the victim, whom we consider as a guilty for the wrong happened with her on the grounds of our so called perceptions, why our society can't accept her with open arms and open heart. Are such victims actually wrong on their part for the harm caused to her, no!not at all. There is a need to change our mentality and attitude towards the victims which will help us to create a friendly and comfortable environment for them and she will get the respect what a women deserves. "Since crimes against women are partly the result of social system and partly the outcome of individual pathologies, a reformatory attitude towards female victims may be helpful in achieving the desired results. The rehabilitation has to be four fold viz. physical, mental psychological and social. Physical rehabilitation involves creating proper living and working conditions to victimized female. Mentally, she needs help to restore her lost esteem. Psychologically, she needs help to overcome her depression and insecurity; and socially she needs to be accepted back in the social fold".²⁰

In order to do this, Gender- sensitization workshops are needed in colleges, universities, and work places where people will be told how as a community, they can help sexual abuse survivors heal. Some institutions already have moved in this direction, but governmental initiatives and support are needed spearhead gender sensitivity in India.

¹⁹ www.atimes.com/rape-rehabilitation-need-hour-india/

²⁰ Dr. PuranBatria: sex & crime in India (1st Ed.1992) p.171

Conclusion & Suggestion

After analyzing these cases, we came to the conclusion that the offer to marry given by accused in such cases are commonly practiced in the present time which is nothing but an effort to escape from the consequential liability of the heinous offence like rape. It also cannot be denied that in every cases the accused has same intention behind marrying i.e. to escape from the punishment. However, there may be some case in which the perpetrator really wants to give respect to the victim in the eyes of society, but it solely depends upon his mentality which is too difficult to analyze by an ordinary man. His intention can either be checked by psychiatric test or can be determined by the judges as they are expected to have such capability on basis of their professional experiences. The SC in the case of *State of Himachal Pradesh v Asha Ram*²¹ observed: "Rape is not merely a physical assault, it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, rapist degrades the very soul of helpless female. The court should therefore, shoulder greater responsibility while trying an accused on charges of rape and sexual molestations".

Regarding the cases of post rape marriage between the victim and accused, the Apex court in the case of *State of MP v Madanlal* said "sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner, and we say with emphasis that the courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in spectacular error or to put it differently it would be in the realm of the sanctuary of error. We are compelled to say so as such an attitude reflects lack of sensibility towards the dignity, the elan vital of a woman. Any kind of liberal approach or thought of mediation in this regard is thoroughly and completely sans legal permissibility".

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²¹ AIR 2006 SC 381

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