
BROKEN GUARDIANS: WHEN THOSE WHO SHOULD PROTECT BECOMES THE THREAT

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ABSTRACT

As long as human beings exist in the universe, the existence of crime will always prevail.

Every human does some wrongs that are minuscule in the eyes of the law and can be ignored, but some wrongs are considered crimes, which cannot be ignored by the law. And some crimes are so heinous which puts a dark mark on the whole society. The authorities who are there to protect us are slowly becoming a threat to society. People themselves are increasingly unsure of whom to trust because those in positions of authority are also the ones who are committing crimes. Custodial rape is one of the most prevalent forms of dehumanizing violence against society. It intends to highlight the current statutory provisions in Indian Penal Code, 1860 (IPC). It provides a contemporary analysis with The Bhartiya Nyaya Sanhita, 2023 (BNS) provisions and talks about the problems because of which such atrocious crime is still prevailing in society.

INTRODUCTION

An outrageous, heinous violence against women, which just in one go shatters the life of the victim. The victim gets the punishment for the crime which they have never committed, their only fault is that they had fallen into the trap of those evil mind criminals. Rape is one of the worst crimes which spoils the whole life of the victim, they even can't move out of their house even when there is no fault of theirs. Some of the cases are not even reported because it will spoil their whole life and society will only curse the women for so-called reasons. In this developing world, people still think that it was her dress, but no it was their evil mind.

“Rape is the sexual violence against women, unlawful sexual activity or sexual intercourse carried out forcibly or under the threat of injury against a person's will or with a person who is beneath a certain age or incapable of giving valid consent because of unsoundness of mind, intoxication, unconsciousness, or deception.” Custodial rape is one of the forms of rape. Generally, the authority who has custody of the other person and the former exploits its powers and applies sexual force to the latter is known as Custodial rape. It generally takes place in detention by the state via the police or any other authorities which are appointed by the state to safeguard the lives, but instead, they misuse their power and outrage the modesty of a woman. The concept of custodial rape not only includes security forces, it also involves hospitals, fiduciary relationships, and women's or children's institutions. Custodial rape can happen in any custody whether it is police or judicial custody. The National Crime Records Bureau (NCRB) released its annual report for 2022, revealing a distressing 4% increase in crimes against women compared to the previous year, with a total of 4,45,256 cases registered.¹ The report recorded a staggering 31,516 rape cases in 2022. Rajasthan reported the highest number, accounting for 5,399 cases, followed by Uttar Pradesh (3,690), and Madhya Pradesh (3,029).² Nearly all of India's custodial rape — 189 of 197 cases — was reported in Uttar Pradesh, which along with Rajasthan and Madhya Pradesh recorded the highest numbers of alleged gang rapes.³ As per the data, year by year the cases of custodial rape are rising, despite having the provisions as a constraint in IPC and Cr. P. C. The arbitrary use of power by authorities and the brutality committed by them to the people in custody are eroding residents' faith. The Three

¹ INDIA TODAY, <https://www.indiatoday.in/law/story/delhi-leads-in-crimes-against-women-rajasthan-in-number-of-rape-cases-in-2022-ncrb-report-2471924-2023-12-04> (last visited Mar. 19, 2024).

² Id.

³ THE HINDU, <http://www.thehindu.com/news/cities/Delhi/delhi-is-now-indias-rape-capital-show-ncrbdata/article7554551.ece> (last visited Mar. 19, 2024).

Criminal Laws have also been passed and approved by the President, replacing the Indian Penal Code, 1860 with the Bhartiya Nyaya Sanhita, 2023 and they will go into effect from 1st July 2024. The provisions regarding custodial rape remain unchanged in Bhartiya Nyaya Sanhita, 2023, indicating that the government ought to give this matter more attention.

OVERVIEW OF THE PROVISIONS OF IPC AND BNS

The Criminal Law Amendment Act of 1983 amended the Indian Penal Code to include provisions for custodial rape. Then another amendment i.e., The Criminal Law Amendment Act, 2013, came post-Nirbhaya case and some changes were made in the provisions of the Indian Penal Code, 1860, Indian Evidence Act, 1872, and Code of Criminal Procedure, 1973. “With this amendment of 2013, Section 376B, and Section 376D gets amalgamated into Section 376C and formed the provision of Custodial Rape”. Any man who is a police officer, medical officer, army personnel, jail officer, public officer, or public servant commits rape may be imprisoned for at least ten years.⁴ It can extend to imprisonment for life and will also be liable to a fine under Section 376(2)⁵. Section 114A was inserted through the 2013 amendment in the Indian Evidence Act, of 1872, which states that when the victim states in her statement before the Court that she did not consent, the Court will presume that she did not consent. The burden of proof will lie upon the accused and then the accused has to prove that there was consent and it was consensual.⁶ Section 228A of IPC was inserted which made the publication of Name of rape victims a criminal offense punishable with up to 2 years of imprisonment.⁷ Section 327(2) was also added which provided that trial of rape cases should be conducted as in-camera proceedings.⁸ In Cr. P. C., certain changes were made through the 2018 amendment in which Section 197 was amended. It was added that no Court will take cognizance of the offences mentioned in the Explanation of Section 197 which also includes Section 376C of IPC. It would not be necessary to seek prior sanction from the Appropriate Government for the prosecution of a public servant.⁹

⁴ LAWCTOPUS, <https://www.lawctopus.com/academike/criminal-law-amendment/> (last visited Mar. 19, 2024).

⁵ The Indian Penal Code, 1860, § 376(2), No. 45, Acts of Parliament, 1860 (India).

⁶ The Indian Evidence Act, 1872, § 114A, No. 1, Acts of Parliament, 1872 (India).

⁷ Suryansh Shukla, Critical Analysis of Provision Relating to Rape in India, Vol.2 International Journal of Legal Science and Innovation 13, 15(2020), <https://www.ijlsi.com/wp-content/uploads/Critical-Analysis-of-Provision-Relating-to-Rape-in-India.pdf>.

⁸ Id.

⁹ Indian Penal Code, 1860, § 197, No. 45, Acts of Parliament, 1860 (India).

The Bhartiya Nyaya Sanhita (BNS), 2023 is ready to replace The Indian Penal Code from 1st July 2024. The provisions for custodial rape in BNS are very same as in IPC, but with different numbering. In Bhartiya Nyaya Sanhita, Section 64(2) talks about the punishment of custodial rape, and Section 68 states about Sexual intercourse by a person in authority. The punishment and phrasing of the provisions about custodial rape remain unchanged.

The Bhartiya Nagarik Suraksha Sanhita, 2023 (BNSS) is the new procedural law that is replacing the Code of Criminal Procedure from 1st July 2024. In Section 196 of Bhartiya Nagarik Suraksha Sanhita, there is the power given to the police officer, the Judicial Magistrate, and the Executive Magistrate to hold an inquiry or investigation in the case of custodial death or rape within 24 hours of the death of the person and to forward the body for the examination to the nearest Civil Surgeon or the other qualified medical person appointed by the State Government and it should be recorded in writing. The custody includes both police and judicial custody. After the investigation is done by the police officer, the power of investigation is also given to the Magistrate to hold an inquiry in BNSS. In Cr.P.C., this provision was added through the 2005 Amendment in Section 176. This power given to the Magistrate acts like the litmus paper for the investigation of custodial rape, which is done by the police officer, as it keeps check on them. If the police officer is guilty, then there can be mala fide intention of hampering the evidence by the police officer during the investigation, so to balance out such a situation the investigation done by the Magistrate will be the fruit of an investigation, as there is no involvement of police in the investigation done by the Judicial Magistrate.

SCRUTINY OF SEC. 376C OF IPC AND OTHER RELEVANT PROVISIONS

The origin of custodial rape is from the late 1970s and the beginning of the 1980s, during this time there was an uproar of Emergency, which was put down by Indira Gandhi, the then Prime Minister of India. All the powers were vested in the State, and because of this the officials started abusing their powers and they were not scared of any repercussions as there was no one to check upon them. During this time, the fundamental rights of citizens were breached but at the same time, the shameful act by the authority was also at its zenith. The very landmark case that came to light at this time was of *Tuka Ram and Anr. v. State of Maharashtra*¹⁰ famously known as Mathura rape case. On medical examination, it was found that the girl had no injury on her person and the hymen revealed old ruptures. The trial Court held that the prosecution

¹⁰ Tuka Ram and Anr. v. State of Maharashtra, 1979 AIR 185, 1979 SCR (1) 810.

failed to prove its case. The High Court, however, holding that it was a case of "passive submission" relied upon the circumstances that at the relevant time the girl was in the police station where she felt helpless in the presence of the persons in authority and whose advances she could hardly repel all by herself and inferred that her submission to the act of sexual intercourse must be regarded as the result of fear and therefore no consent in the eye of law. In the appeal to the Supreme Court, the Court held that no marks of injury were found on the person of the girl after the incident and their absence goes a long way to indicate that the alleged intercourse was a peaceful affair. Thus, the sexual intercourse in question is not proved to amount to rape and no offense is brought home to the appellant.¹¹ After this judgment of the Supreme Court, there was public outcry and protests, which in due course led to The Criminal Amendment Act, of 1983. And the specific section for Custodial rape was added i.e., Section 376C, and it was further amended in 2013 after the Nirbhaya rape case.

Section 376C sets the provision for Custodial rape- Sexual Intercourse by a person in authority. This section can be dissected into the following parts –

- “Sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of 375. i.e., to penetration, insertion, manipulation, or application of his body part to her or makes her do so.
- “Fiduciary Relationship” means a relationship in which one party places special trust, confidence, and reliance in and is influenced by another who has a fiduciary duty to act for the benefit of the party. [10] It is not explicitly defined under any single act, but its principles are derived through various legal statutes.
- Vagina will also include “labia majora”.
- “Public Servant” is defined under Section 21 of IPC.
- “Superintendent”, will include the person who is in authority or can exercise the powers over its inmates in connection to jail, remand home, or other place of custody or women’s or children’s institution.

¹¹ Id.

- “Women's or children's institution” means an institution, for an orphanage or a home for neglected women or children, a widow's home, or any other institution with a different name that is established and maintained for the reception and care of women or children.

After analyzing the case of *Tuka Ram and Anr v. State of Maharashtra*¹² and knowing the provisions for curbing custodial rape, it is very evident that the crime occurs on the premises where the authority has absolute authority and control over the area. As the power is in their hands, if any evidence is found at the crime scene the police authorities can easily destroy or hamper the evidence which will ultimately result in the acquittal of the accused as happened in the above case. There are many landmark cases after the Mathura rape case in which such incidents have happened. Another, landmark case is the *Rameeza Bee case of 1978* in which she was raped by three police personnel and her husband was beaten to death. The court found the accused police personnel guilty of rape and murder. The same incident happened in *Maya Tyagi case*¹³ in which the victim Maya Tyagi was marched naked to the police and was raped brutally. In 2013, too, in *Lillu v. State of Haryana*,¹⁴ the Supreme Court had held that the two-finger test violates the right of rape survivors. the Supreme Court declared that any person conducting the ‘two-finger test’ on rape or sexual assault survivors will be found guilty of misconduct. The court said that the test is “regressive and invasive” and has “no scientific basis as it neither proves nor disapproves allegations of rape”. It instead “re-victimizes and re-traumatizes women who may have been sexually assaulted.” Section 53A of the Evidence Act states that previous sexual experience shall not be relevant to the issue of consent or the quality of consent” in prosecutions of sexual offenses.¹⁵

The 113th Law Commission was headed by Hon’ble Justice J.S. Verma, former Chief Justice of the Hon’ble Supreme Court. It was constituted to recommend amendments in the criminal laws for speedy trial and increment of punishment for crimes related to sexual offenses against women. After reporting on amendments in 2013, the Union Health Ministry issued some guidelines and protocols for the medical examination of victims of sexual assault in 2014.

¹² SUPRA NOTE 11.

¹³ Sheo Kumar Gupta v. State of U.P., 1988 SCC OnLine All 679.

¹⁴ Lillu v. State of Haryana, CRIMINAL APPEAL NO. 1226 OF 2011.

¹⁵ THE HINDU, <https://www.thehindu.com/opinion/op-ed/enforcing-the-ban-on-the-two-finger-test/article66115405.ece> (last visited Mar. 19, 2024).

CONCLUSION

Initially, India's substantive and procedural law was not sufficient to tackle these atrocious crimes. But gradually as time passed and with the increment of such crimes the need for change emerged and several committees were instituted, and reports came out with several changes and suggestions. The definition of rape had widened its scope, the provision for custodial rape is also specifically mentioned in our criminal laws and so on. The legislature has made multiple amendments to criminal laws and the judicial body has also given various judgements and guidelines. By measuring every aspect of relevant provisions of custodial rape, despite questioning the legislative provisions, we need to question the implementing authority of the same. The legislative provision to its extent is trying to curb custodial rape or violence, but the question is whether the executives are doing their jobs to their full capacity?

Firstly, the executive fails while doing custodial violence. Secondly, they fail when after doing the crime, they try to curb the right of the victim i.e., their right to get justice while hampering the evidence. The job of the executive authority is to give security and protection to the people or to the people who are in custody specifically. The failure in their work leads to the custodial violence or rape or death. If they have done their duty properly, then this crime has not been generated. The execution of the provisions is the sacrosanct problem that is in question. Better laws to curb such inhumane practices by those who hold power should be introduced and strict compliance of the same must be ensured.¹⁶

¹⁶ Shrenitha Anantula, *Custodial Rape: A Dehumanizing Violence Against Society*, Vol. 5 *Indian Journal of Law and Legal Research* 1, 6 (2023).