

The Death Penalty in Rape cases in India- Human Rights Perspective

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Abstract— Rape is undoubtedly one of the most heinous crimes. It not only causes physical scars to the victims but also perpetrates huge psychological trauma to the victim. To reflect the public abhorrence to the heinous crime of rape, many jurisdictions of the world prescribe death penalty in their penal statute to punish the rape offenders, India is no exception to this general rule. In this research article, the author attempts to analyze the various facets of death penalty jurisprudence in rape cases in the light of decided case laws. More significantly, the author endeavours to analyze the concept of death penalty in rape cases from the lens of human rights of the convicts.

Index Terms—Rape sentencing, death penalty, human rights.

I. INTRODUCTION Death penalty has evoked the interest of both common man as well as legal scholars since time immemorial. The infamous *Nirbhaya* incident of New Delhi had renewed the debate for even more stringent punishment for crimes against women in general and for offence of rape in particular. The Criminal Law (Amendment) Act, 2018 was subsequently enacted by the Parliament which introduced several significant changes in both the substantive as well as procedural laws relating to crimes against women. On a careful survey of the provisions of the Indian Penal Code, 1860 it emerges that there are four specific penal provisions on the strength of which death penalty can be imposed on a convict by the Court in a rape case. These provisions are Section 376A, Section 376AB, Section 376DB and Section 376E of the Indian Penal Code, 1860. It is pertinent to mention here that all these provisions were inserted into the statute book by the Criminal Law (Amendment) Act, 2018. Section 376A of Indian Penal Code, 1860 stipulates, punishment for causing death or resulting in persistent vegetative state of victim while Section 376AB of the Indian Penal Code, 1860 provides for the punishment for rape on a woman under twelve years of age. Similarly, Section 376DB of the Indian Penal Code, 1860 provides for the punishment for gang rape on a woman less than twelve years of age while Section 376E of the Indian Penal Code, 1860 stipulates the punishment for repeat offenders. In the light of these penal provisions, death penalty in rape cases are awarded by the trial courts in rape cases by following the dictum of the “*rarest of the rare doctrine*” which was expounded by the Apex Court in the case of *Bachan Singh Vs State of Punjab* reported in AIR 1980 SC 898. However in the legal discourse relating to the utility and desirability of imposing death penalty in rape cases, the question whether it offends the most basic human right of right to live of the convict often escapes attention of the trial judges. In this paper, the author would endeavour to analyze the various statutory provisions as well as the judgments of the Honourable Apex Court relating to the imposition of death penalty in rape cases in India and would attempt to dissect whether death penalty in rape cases in India is violative of the human rights of the convict. Whether the imposition of death penalty in rape cases deters prospective criminals and whether such deterrence outweighs the potential risk of executing innocent accused persons is the moot question which would be attempted to be answered in this paper in the backdrop of the basic human rights which every individual is entitled to enjoy. The author would also attempt to answer whether the universal abolitionist trend of death penalty advocated by the Human Rights activists and scholars is justified in our country as well.

II STATUTORY PROVISIONS FOR DEATH PENALTY FOR THE OFFENCE OF RAPE IN INDIA

On perusal of the provisions of the Indian Penal Code, 1860 it emerges that there are four specific penal provisions on the strength of which death penalty can be imposed on a convict by the Court in a rape case. These provisions are Section 376A, Section 376AB, Section 376DB and Section 376E of the Indian Penal Code, 1860. It is pertinent to mention here that all these provisions were inserted into the statute book by the Criminal Law Amendment Act, 2018 which was triggered by the horrific rape incident in Delhi on 16th December, 2012 known as the *Nirbhaya* case. Let us now survey each of the four penal provisions which stipulate the punishment of Death penalty under the Indian Penal Code, 1860.

Section 376A of the Indian Penal Code, 1860 which stipulates the punishment for causing death or resulting in persistent vegetative state of the rape victim reads as follows:

“376A. Punishment for causing death or resulting in persistent vegetative state of victim.— Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, **or with death.**”

Section 376AB of the Indian Penal Code, 1860 which provides for the punishment for rape on a woman under twelve years of age runs as follows:

“376AB. Punishment for rape on woman under twelve years of age.— Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine **or with death:**

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this section shall be paid to the victim.”

Section 376DB of the Indian Penal Code, 1860 which provides for the punishment for gang rape on a woman under twelve years of age runs as follows:

“376DB. Punishment for gang rape on woman under twelve years of age.—Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, **or with death**: Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this section shall be paid to the victim.”

Section 376E of the Indian Penal Code, 1860 which stipulates the punishment for repeat offenders runs as follows:

“376E. Punishment for repeat offenders.—Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376AB or section 376D or section 376DA or section 376DB, and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.”

III VIEWS OF HONOURABLE SUPREME COURT REGARDING DEATH PENALTY

Death penalty is the most stringent punishment that can be awarded to a convict post-conviction. The most worrisome aspect of this punishment is that it is irreversible in the sense that once the convict is executed in compliance of the judgment of the court, such execution and extinguishment of life cannot be reversed by the State.

In **Bachan Singh Vs State of Punjab** reported in AIR 1980 SC 898 the Honourable Supreme Court of India evolved the theory of “**rarest of rare cases**” to lay down a principle where Death penalty could be imposed by the Court.

The guidelines laid down in Bachan Singh cases were approved by the Apex Court later in **Machhi Singh & ors. Vs State of Punjab** reported in 1983 SCC (3) 470 wherein the Apex Court inter alia observed as follows:

“In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:

- (i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
- (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
- (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
- (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In order to apply these guidelines inter-alia the following questions may be asked and answered:

- (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
- (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.”

IV VIEWS OF THE HONOURABLE SUPREME COURT ON DEATH PENALTY IN RAPE CASES

The Honourable Supreme Court of India in a catena of decisions has consistently held that stringent punishment should be awarded to the convicts in rape cases so that a deterrent effect is created in the society.

In **Moti Lal Vs State of MP** reported in (2008) 11 SCC 20, the Honourable Apex Court was pleased to make the following insightful observation regarding sentencing in rape cases in India:

“The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, married women and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There are no extenuating or mitigating circumstances available on the record which may justify.”

No discussion on sentencing in rape cases in India can be complete without alluding to the infamous and horrific incident of gang rape and murder of a young victim in New Delhi that occurred on the night of 16th December, 2012 which is commonly known as the Nirbhaya case. The said incident sent shock waves throughout the entire nation and brought about radical changes in the criminal law of our country. In fact, the said incident, shameful as it was, can be considered as one of the turning points in the criminal justice administration of our country as the public unrest which followed the incident jolted the lawmakers to introduce radical changes in the rape law of our country and culminated into the enactment of the Criminal Law (Amendment) Act, 2018.

The facts of the said case was that on the night of 16th December, 2012 the young victim was brutally raped and seriously assaulted by a group of men resulting in grievous injuries to the victim to which she ultimately succumbed on 29th December, 2012.

In the said case, the four adult convicts namely Mukesh Singh, Akshay Thakur, Vinay Sharma and Pawan Gupta were sentenced to death by the Trial Court for the offence of gang-rape and murder of the victim. The said conviction was upheld by the Honourable High Court of Delhi. The matter ultimately reached the Apex Court. The Apex Court in its judgment was confronted with the moot question that whether the convicts deserve the death penalty or not.

In the said judgment, the Honourable Apex Court inter alia noted the following aggravating circumstances:

- a) Diabolic nature of the crime.
- b) The manner of committing the crime.
- c) Act of the convicts in throwing the victim naked on the road and attempt to run the bus over her and
- d) Brazeness and coldness with which the acts were committed.

The Apex Court weighed the above aggravating circumstances with the mitigating circumstances of the said case which were as follows:

- a) Poor family background of the convicts.
- b) Rural background of the convicts.
- c) Young age of the convicts.
- d) Ill health of the family members of the convicts.
- e) No criminal antecedents of the convicts.
- f) Good conduct of the convicts in jail and
- g) Chance of reformation of the convicts.

After carefully examining the facts of the Nirbhaya case and after evaluating the aggravating and mitigating circumstances, the Honourable Supreme Court confirmed the Death penalty of all the four adult convicts while observing as follows:

“Society’s reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal justice system. As held in Om Prakash v. State of Haryana (1999) 3 SCC 19, the Court must respond to the cry of the society and to settle what would be a deterrent punishment for what was an apparently abominable crime.

145. Bearing in mind the above principles governing the sentencing policy, I have considered all the aggravating and mitigating circumstances in the present case. Imposition of appropriate punishment is the manner in which the courts respond to the society’s cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime. Crimes like the one before us cannot be looked with magnanimity. Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post-crime remorse and post-crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of “rarest of rare cases”. The circumstances stated by the accused in their affidavits are too slender to be treated as mitigating circumstances.

146. In the present case, there is not even a hint of hesitation in my mind with respect to the aggravating circumstances outweighing the mitigating circumstances and I do not find any justification to convert the death sentence imposed by the courts below to ‘life imprisonment for the rest of the life’. The gruesome offences were committed with highest viciousness. Human lust was allowed to take such a demonic form. The accused may not be hardened criminals; but the cruel manner in which the gang-rape was committed in the moving bus; iron rods were inserted in the private parts of the victim; and the coldness with which both the victims were thrown naked in cold wintery night of December, shocks the collective conscience of the society. The present case clearly comes within the category of ‘rarest of rare case’ where the question of any other punishment is ‘unquestionably foreclosed’. If at all there is a case warranting award of death sentence, it is the present case. If the dreadfulness displayed by the accused in committing the gang-rape, unnatural sex, insertion of iron rod in the private parts of the victim does not fall in the ‘rarest of rare category’, then one may wonder what else would fall in that category. On these reasoning recorded by me, I concur with the majority in affirming the death sentence awarded to the accused persons.

147. The incident of gang-rape on the night of 16.12.2012 in the capital sparked public protest not only in Delhi but nationwide. We live in a civilized society where law and order is supreme and the citizens enjoy inviolable fundamental human rights. But when the incident of gang-rape like the present one surfaces, it causes ripples in the conscience of society and serious doubts are raised as to whether we really live in a civilized society and whether both men and women feel the same sense of liberty and freedom which they should have felt in the ordinary course of a civilized society, driven by rule of law. Certainly, whenever such grave violations of human dignity come to fore, an unknown sense of insecurity and helplessness grabs the entire society, women in particular, and the only succour people look for, is the State to take command of the situation and remedy it effectively.”

V DEATH PENALTY AND HUMAN RIGHTS

The Universal Declaration of Human Rights (UDHR) which enjoys the approval of United Nations General Assembly is arguably one of the most important documents in connection with Human Rights. Article 3 of the Universal Declaration of Human Rights clearly states that everyone has the right to life, liberty and security of person. In fact there is near unanimity among legal scholars that right to life is the most sacred of all Human Rights as without it, all other Human Rights become meaningless. Death Penalty in general and more particularly Death Penalty in rape cases is prima facie violative of the most sacred Human Right i.e. the Right to Life as the said penalty extinguishes the life of the convict. The fact that Death Penalty in rape cases is violative of the Human Rights of the convict can also be viewed from another angle. In rape cases as in other criminal cases it is well settled that the prosecution is duty bound to prove the case against the accused beyond the shadow of reasonable doubt. However, in many cases particularly in incidents of rape, it is virtually impossible to prove a case against the accused beyond the shadow of alldoubts and therefore the scope that an innocent person is convicted and subsequently sentenced to death cannot be ruled out. Moreover, in case of Death Penalty, the said sentence is by its very nature irrevocable which further accentuates the situation. Article 5 of the Universal Declaration of Human Rights stipulates that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The legal scholars and human rights activists who support the abolition of death penalty assert that the

most inhuman form of punishment is to authorize the killing of a person through the sanction of law which is exactly what Death Penalty postulates. It is also noteworthy to mention here that Death Penalty in Indian context in rape cases offends the Human Rights of the convict as the said punishment becomes more inhuman as the convict on death row has to wait with uncertainty during the various stages of appeal, review and clemency petitions which remain pending indefinitely.

Moreover, in various countries the following means are used for executing the convicts:

- (a) Hanging.
- (b) Electrocutation.
- (c) Gas Chamber.
- (d) Firing Squad. &
- (e) Lethal Injection.

All these modes of execution are inhuman and violative of Human Rights of the convict as pain is suffered by the convict in each of the modes. The most popular argument against the proposition that Death Penalty offends Human Rights is that the Death Penalty in criminal cases in general and rape cases in particular are pronounced after affording the accused a free and fair trial as guaranteed under Article 11 of the Universal Declaration of Human Rights which states that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. The second most popular argument against the proposition that Death Penalty offends Human Rights is that in rape cases the convict offends and violates the inherent dignity of the victim and since the convict violates the Human Right of the victim by raping her, the question of the convict's Human Right does not arise at all.

VI CONCLUSION In conclusion it can be stated that Death Penalty in rape cases in India is governed by the various statutory provisions of the Indian Penal Code as well as the judgments of the Honourable Apex Court which guide the judges regarding the factors to be considered while pronouncing Death Penalty in rape cases. However, it is disconcerting to note that Death Penalty in rape cases in India offend the basic Human Right of Right to Life of the accused and the risk that an innocent person can be convicted and sentenced to death can never be overlooked or ignored. There is also no concrete evidence or statistics on record to suggest that Death Penalty is deterrent and decreases the crime rates. At present almost 55 countries including our country India has retained capital punishment and almost 109 countries have completely abolished the same. Since the Death Penalty offends the Human Rights of the convict by extinguishing his life under the apparent sanction of law, there is increasing merit in the clamour for abolishing the death penalty in our country India. In conclusion it can be stated that the Preamble of the Universal Declaration of Human Rights clearly mandates that recognition of the inherent dignity and of the equal and inalienable right of all members of the human family is the foundation of freedom, justice and peace in the world. Viewed from this perspective, Death Penalty is the worst form of violation of the inherent dignity of every accused

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