



सत्यमेव जयते

LAW COMMISSION OF INDIA

EIGHTY - FOURTH REPORT

ON

**RAPE AND ALLIED OFFENCES: SOME
QUESTIONS OF SUBSTANTIVE LAW,
PROCEDURE AND EVIDENCE**

1980

Justice : P. V. Dixit

No. F2(4)/80 LC/C
New Delhi
Dated the 25th April, 1980.

My dear Minister,

By his letter No. PS/LS/LA-80 dated 27th March, 1980, addressed by the Law Secretary to Shri P. M. Bakshi, Secretary of the Law Commission, the desire of the Government that the Law Commission should make a special study of the law relating to rape and assaults on the modesty of women and related matters was communicated to the Commission.

2. In response to that request I am herewith forwarding the report of the Law Commission, which is the result of careful consideration and deep study of the problem by the Commission.

3. The Commission is indebted to Shri Bakshi for his invaluable assistance in the preparation of the Report in the short time at its disposal. We also thank Mr. Vaze, Additional Secretary, for his help.

With regards,

Yours sincerely,

Sd/-

P. V. DIXIT

Shri P. Shiv Shankar,
Minister of Law, Justice
and Company Affairs,
Government of India,
New Delhi.

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CHAPTER 1

INTRODUCTORY

1.1. During recent years, the impact of the criminal justice system on victims of rape and other sexual offences has received considerable attention, both in legal circles and amongst organisations and individuals connected with the welfare of women. In the field of criminology, an increasing interest is being shown in the victim and his or her position in the criminal justice system. In consequence, greater attention is now being paid to the female victim of a sexual offence. Psychologists have, for some time past, been studying the effects of rape and other sexual offences upon women or girls and their personality.

The criminal justice system and the offence of rape.

1.2. It is often stated that a woman who is raped undergoes two crisis—the rape and the subsequent trial. While the first seriously wounds her dignity, curbs her individual, destroys her sense of security and may often ruin her physically, the second is no less potent of mischief, inasmuch as it not only forces her to re-live through the traumatic experience, but also does so in the glare of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focused upon her.

The crisis of rape.

In particular, it is now well established that sexual activities with young girls of immature age have a traumatic effect which often persists through life, leading subsequently to disorders, unless there are counter-balancing factors in family life and in social attitudes which could act as a cushion against such traumatic effects.

Rape is the 'ultimate violation of the self'.¹ It is a humiliating event in a woman's life which leads to fear for existence and a sense of powerlessness. The victim needs empathy and safety and a sense of re-assurance. In the absence of public sensitivity to these needs, the experience of figuring in a report of the offence may itself become another assault.

Forcible rape is unique among crimes, in the manner in which its victims are dealt with by the criminal justice system. Raped women have to undergo certain tribulations. These begin with their treatment by the police and continue through a male-dominated criminal justice system. Acquittal of many *de facto* guilty rapists adds to the sense of injustice.

In effect, the focus of the law upon corroboration, consent and character of the prosecutrix and a standard of proof of guilt going beyond reasonable doubt have resulted in an increasing alienation of the general public from the legal system, who find the law and legal language difficult to understand and who think that the courts are not run so well as one would expect.

1.3. In view of the recent discussions that have taken place in the press and in other forums regarding the inadequacy of the law to protect women who have been victims of rape or assaults on their modesty, Government has asked the Law Commission² to make a special study of the law relating to rape. Government has also requested the Commission to consider certain material³ relevant to the subject, which was referred to in the letter of reference, and forwarded to the Commission by a supplementary letter. The material so forwarded includes a letter addressed by a lady Member of Parliament, a newspaper cutting containing report of a meeting at which some suggestions for reform were made, extract from the I.P.C. Amendment Bill, as also certain administrative instructions issued by the Government of India in the Ministry of Home Affairs on the subject of arrest and interrogation of women.

Reference by Government.

It has been suggested in the letter of reference that the study should cover not only the substantive law relating to rape, but also the rules of evidence and procedure and other related matters. The Commission has been requested to forward its Report within as short a period as possible.

1. Hilberman, "Rape : The Ultimate Violation of the Self" (1976) Vol. 133, No. 4, Am. J. Psychiatry, pages 436-437.
2. D.O. letter No. PS/LS/LA/80, dated 27th March, 1980, from the Secretary, Department of Legal Affairs, Ministry of Law to the Member-Secretary, Law Commission of India (Letter of reference).
3. D.O. letter No. 1482/80A, dated 31st March, 1980 from Joint Secretary & Legal Adviser, Department of Legal Affairs to the Member-Secretary, Law Commission of India (Supplementary letter).

Later, on 15th April, 1980, certain other materials,¹ namely, copy of a petition addressed to the Lok Sabha by Smt. Lata Mani and a copy of the un-corrected record of the discussion in the Lok Sabha on the 27th and 28th March, 1980 on a motion (relating to rape on women) moved in the Lok Sabha by Smt. Geeta Mukherjee were forwarded to us. We have carefully considered the points made in the petition and in the Lok Sabha Debates.

Suggestions for amendment.

1.4. Besides the reference made by the Government, the Commission has also received a suggestion² for considering certain changes in the law of rape. The points made in the suggestion have been duly considered by the Commission.

The Commission has also made an attempt to ascertain the views of organisations interested in the subject, as also of one of the Members of Parliament who had in a letter addressed to the Government suggested reforms on certain points which we have carefully considered. The Commission is grateful to them for their co-operation.

While our consideration of the question was in full progress, we also received from the Ministry of Law³ a copy of a letter addressed by the Bhagini Samaj, Bombay to the Minister for Law, stating that women in villages and Harijan women were molested and that cases of rape of women were increasing in the country. The Samaj had, in the letter, also made suggestions for amendment of the law on certain points, including a suggestion that women police should interview and interrogate women who were molested, that the trial should be held *in camera* and that well-known women's associations should be selected to "examine and deal with" such cases. The various points made in the letter of the Samaj have been duly taken by us into consideration.

The Ministry of Law has also forwarded to us a letter⁴ of the Maharashtra State Women's Council, enclosing copy of a resolution passed by that body as to the increasing incidence of rape, and making certain suggestions in brief for amendment of the law. The suggestions in the main are that the law should be radically altered, that the burden of proving innocence should be on the accused, and so on.

Certain recent judicial decisions⁵ in India have also provoked a debate as to the deficiencies—real or supposed—of the law relating to rape and allied offences.

Role of the criminal law.

1.5. It is elementary that the criminal law is the chief legal instrument for preventing anti-social acts of a serious character. This object is sought to be achieved, in the first instance, by the legislative command embodying that aspect of punishment which is called "general deterrence". Once a crime—whether sexual or of any other category—has been committed, this aspect is, at least for the time being, exhausted in regard to that particular criminal act. The fact that the particular crime has been committed shows that the object of deterrence has failed to prevent the particular criminal act.

✓ However, one can still expect of the legal system that it should make reasonable provisions to ensure that the criminal act already committed is dealt with adequately—consistently, of course, with the general norms of the judicial process, so that the legislative command is enforced, the object of deterrence is realised and (if the accused is found guilty) the punishment to be imposed is such as to deter others also—thus bringing the aspect of "general deterrence" again in play.

In this field, thus, the main objective of legal reform would be to promote justice after the offence is committed.

It is in this background that reforms in the law have been considered in this Report.

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1. D.O. letter dated 14/15 April, 1980 addressed by Shri P. K. Kartha, Joint Secretary and Legal Adviser to Member-Secretary, Law Commission of India.
 2. Suggestion made by the Lawyers Collective, Bombay, Letter No. IJ/ES/22/80, dated 18th March, 1980.
 3. Endorsement No. 1807/80-Adv. A, dated 16th April, 1980 from Shri P. K. Kartha, Joint Secretary & Legal Adviser, Department of Legal Affairs forwarding a copy of letter dated 7th April, 1980 addressed by the Bhagini Samaj, Bombay to the Minister for Law.
 4. Letter No. 233/80, dated 8th April, 1980 from Maharashtra State Women's Council to the Minister for Law.

Tukaram v. The State of Maharashtra, A.I.R. 1979 S.C. 185 (January).

1.6. At this stage, it is proper to mention that some of the matters that now fall for consideration have been dealt with by the Law Commission in its Report on the Penal Code¹ and in its Report on the Indian Evidence Act,² wherein certain recommendations were made for reform of the law. We shall, at the proper place, make a reference in detail to those recommendations, and also indicate our views as to whether any further changes in the law are needed.

Earlier reports of the Law Commission.

However, it would be appropriate to mention here a very important recommendation made by the Commission in regard to the Penal Code. In order to deal with cases where the circumstances are such that a male may be able to take undue advantage of the situation and seduce the woman to illicit intercourse, the Commission recommended the insertion in the Code of three specific sections, intended respectively to deal with illicit intercourse—

- (i) by a person having custody of a woman, with that woman,
- (ii) by superintendent of an institution, with an inmate of the institution, and
- (iii) by a person in charge of a hospital, with a mentally disordered patient.

These recommendations,³ made after careful consideration and intended to deal with social problems of some seriousness that were anticipated by the Law Commission, have assumed still greater importance during the period of nine years that has elapsed since the Commission forwarded its recommendations. The substantive law relating to the offence of rape and sexual exploitation of women would, to a large extent, be fortified and improved by implementing these recommendations.

1.7. Reverting to the matters that fall to be considered in the present Report, we may state that the reference made by the Government to the Law Commission—and also the suggestions that the Commission has received—raise a variety of questions. It will be convenient to deal with the various questions separately under appropriate headings, so that aspects of the substantive law, of procedure and of the law of evidence, may all be dealt with.

Method adopted.

1.8. It should, however, be pointed out that on several matters the present statutory law is adequate, in so far as the matter could be dealt with by legislation and the need is for effective implementation. Hardship and injustice arise because implementation of the law is desultory.

Desultory implementation.

1.9. In the views expressed by the representatives of several women's organisations with whom we were able to hold discussions, great emphasis has been placed on the need to take adequate precautions for the protection of women who, being the victims of rape, are required to make their statements to the police for the purposes of investigation. There seems to be a strong feeling that the present arrangements are not adequate and do not ensure that no opportunities arise for complaints against male police officers of harassment or molestation of such women. This feeling is universal and intense. We are aware that the matter is primarily one which should be, and can affectively be, dealt with by appropriate executive steps, and it may not be practicable to hedge in the functioning of the police with too many restrictions. Nevertheless, we consider it proper to make certain recommendations for an amendment of the law in order to safeguard the legitimate interests of such women—being amendments which, we hope, will not unduly hamper the efficient functioning of the police force.

Steps to be taken to avoid suspicion of harassment,

1. Law Commission of India, 42nd Report (Indian Penal Code).

2. Law Commission of India, 69th Report (Indian Evidence Act, 1872).

3. Law Commission of India, 42nd Report (Indian Penal Code), pages 275–280, paragraphs 16.113 to 16.123.

CHAPTER 2

RAPE AND INDECENT ASSAULT : THE SUBSTANTIVE LAW

I. Present law as to rape

- Scope. 2.1. We propose to consider in this Chapter the substantive law relating to rape and indecent assault.
- Section 375, Indian Penal Code. 2.2. Section 375 of the Indian Penal Code defines rape as under :
- “375. A man is said to commit ‘rape’ who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions :
- First.*—Against her will.
- Secondly.*—Without her consent.
- Thirdly.*—With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.
- Fourthly.*—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- Fifthly.*—With or without her consent, when she is under sixteen years of age.
- Explanation.*—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
- Exception.*—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

II. Recommendation in 42nd Report

- Earlier Report. 2.3. Here, it would be appropriate to reproduce the re-draft of the relevant sections as recommended in the 42nd Report of the Commission :

Re-draft of sections 375 to 376E as recommended in 42nd Report

“375. Rape.—A man is said to commit rape who has sexual intercourse with a woman, other than his wife—

- (a) against her will; or
- (b) without her consent; or
- (c) with her consent when it has been obtained by putting her in fear of death or of hurt, *either to herself or to anyone else present at the place*; or
- (d) with her consent, knowing that it is given in the belief that he is her husband.

Explanation I.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Explanation II.—A woman living separately from her husband under a decree of judicial separation or by mutual agreement shall be deemed not to be his wife for the purpose of this section.”

"376. *Punishment for rape.*—Whoever commits rape shall be punished with rigorous imprisonment for a term which may extend to *fourteen years*, and shall also be liable to fine."

"376A. *Sexual intercourse with child wife.*—Whoever has sexual intercourse with his wife, the wife being under fifteen years of age, shall be punished—

(a) if she is under twelve years of age, with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine; and

(b) in any other case, with imprisonment of either description for a term which may extend to two years or with fine, or with both."

"376B. *Illicit intercourse with a girl between twelve and sixteen.*—Whoever has illicit intercourse with a girl under sixteen years, but not under twelve years of age, with her consent, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

It shall be a defence to a charge under this section for the accused to prove that he, in good faith, believed the girl to be above sixteen years of age."

"376C. *Illicit intercourse of public servant with woman in his custody.*—Whoever, being a public servant, compels or seduces to illicit intercourse any woman who is in his custody as such public servant shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

"376D. *Illicit intercourse of superintendent etc. with inmate of women's or children's institution.*—Whoever, being the superintendent or manager of a women's or children's institution or holding any other office in such institution by virtue of which he can exercise any authority or control over its inmates, compels or seduces to illicit sexual intercourse any female inmate of the institution shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.—In this section 'women's or children's institution' means an institution whether called an orphanage, home for neglected women or children, widow's home or by any other name, which is established and maintained for the reception and care of women or children, but does not include—

(a) any hostel or boarding house attached to, or controlled or recognised by, an educational institution, or

(b) any reformatory, certified or other school, or any home or workhouse, governed by any enactment for the time being in force."

"376E. *Illicit intercourse of manager etc. of a hospital with mentally disordered patient.*—Whoever, being concerned with the management of a hospital or being on the staff of a hospital, has illicit sexual intercourse with a woman who is receiving treatment for a mental disorder in that hospital, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.—It shall be a defence to a charge under this section for the accused to prove that he did not know, and had no reason to believe, that the woman was a mentally disordered patient."

2.4. It would be noted that these recommendations of the Law Commission in the earlier Report deal with forcible and fraudulent sexual intercourse as well as with illicit sexual intercourse by way of seduction, in all their ramifications. We are, however, for reasons to be stated later,¹ adopting a different and wider scheme.²

Recommendation in earlier Report as dealing with force and fraud.

¹. See paragraphs 2.17 to 2.20, *infra*.

². See para 2.21, *infra*.

III. Consent : its significance

Absence of consent.

2.5. The statutory definition¹ of rape in India emphasises the element of absence of consent. In fact, absence of consent is an important aspect of the *actus reus* of the offence. Barring cases where consent is irrelevant and the age of the girl is the only crucial factor (because of the statutory requirement of minimum age), want of consent becomes, in practice, a determining factor in most prosecutions for rape. It is also the factor to which the law has devoted the most detailed attention,—as is manifest from the elaborate rules and refinements that are to be met with in various clauses of the statutory definition of rape, and from the richness of material to be found in case law and lengthy discussion on the subject to be found in academic writings.

2.6. Consent is the antithesis of rape. Even if some may find any discussion on consent as too complicated, the matter cannot, consistently with the needs of the subject, be put in simple one-phrase formulation. When circumstances in life present an infinite variety, the law must be well-equipped to deal with them. Nuances of consent are therefore, unavoidable.

IV. Reality of consent : section 90

The concept of free consent—section 375, 3rd clause and section 90.

2.7. The most important question of substantive law relates, then, to the concept of consent in the context of the offence of rape. Consent must be real. Often, it is vitiated by circumstances that take away the freedom of choice. Taking note of this aspect, the third clause of section 375 (definition of “rape”) provides that sexual intercourse with a woman amounts to rape if it is “with her consent, when her consent has been obtained by putting her in fear of death or of hurt”. The vitiating factor here is duress or coercion, but only one specific aspect of it is dealt with. In contrast, the matter is dealt with more comprehensively in section 90, which is too often overlooked by courts. The section reads as under :—

Consent known to be given under fear or misconception.

“90. A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.

If the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.

unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”²

V. Free and voluntary consent

Effect of recommended amendment.

2.8. We shall indicate later the changes that we are recommending to section 375, particularly those on the issue of consent. It will be seen that the amendments recommended by us in the second and third circumstances enumerated in section 375 considerably widen their scope. The substitution of the expression “free and voluntary consent” for the word “consent” in the second clause makes it clear that the consent should be active consent, as distinguished from that consent which is said to be implied by silence.

Under the amendment as recommended, it would not be open to the Court to draw an inference of consent on the part of the woman from her silence due to timidity or meekness or from such circumstances without any more,—as that the girl meekly followed the offender when he pulled her, catching hold of her hand, or that the woman kept silent and did not shout or protest or cry out for help.

Effect of modifications recommended as to fear of injury and criminal intimidation.

2.9. The modifications recommended by us in the third clause vitiate consent not only when a woman is put in fear of death or hurt, but also when she is put in fear of any “injury” being caused to any person (including herself) in body, mind, reputation or property and also when her consent is obtained by criminal intimidation,³ that is to say, by any words or acts intended or calculated to put her in fear of any injury or danger to herself or to any person in whom she is interested or when she is threatened with any injury to her reputation or property or to the reputation of any one in whom she is interested. Thus, if the consent is obtained after giving the woman a threat of spreading false and scandalous rumours about her character or destruction of her property or injury to her children or parents or by holding out other threats of injury to her person, reputation or property, that consent will also not be consent under the third clause as recommended to be amended.

1. Para 2.2, *supra*.

2. See also section 7, Indian Penal Code.

3. Cf. section 503, Indian Penal Code.

VI. Use of intoxicants and stupefying substances

2.10. We may now mention one situation which should also, in our view, be dealt with in section 375. Medico-legal literature furnishes cases of intercourse being attempted or consummated not only with the help of intoxicants—a situation covered by section 90, though not expressly by section 375, Indian Penal Code—but also by the use of stupefying substances. It is obvious that consent to intercourse given in such cases is not real consent. Such intercourse would possibly constitute rape if the requirement of “free and voluntary” consent is introduced—as is going to be our recommendation. However, it may be desirable to cover it specifically in section 375.

Drugs, intoxicants and anaesthetics.

VII. Violence not necessary

2.11. While these are the main amendments on the point of consent, we may also mention a few points that have been raised during the suggestions made to us, concerning the concept of consent. There is a suggestion that the definition of “rape” should make it clear that the crime can take place without overt violence. We have given careful thought to this aspect, but we do not think that the law needs any clarification in this regard. Overt violence, or, for that matter, *violence* of any particular category, is not a necessary element of rape as defined in section 375. The cardinal fact is absence of consent on the part of the woman.¹

Overt violence, if necessary.

There can be cases of consent even when there is no violence. Violence—or, for that matter, marks of resistance—are not conclusive of consent. In any case, after a clarification is made in section 375 on the lines recommended by us, this point would lose much of its practical importance.²

2.12. It would, of course, be realistic to state that most women in our society are not equipped to repel an attempt at rape, even in self-defence. When attacked, they might submit in terror and are unable to muster enough physical strength for offering effective resistance. We have no doubt that courts will continue to attach due weight to this consideration and we hope that the amendment recommended by us in section 375 will be a reminder to all concerned of the true position.

The proof of violence.

VIII. Submission not amounting to consent

2.13. It has been represented to us during our oral discussions with women's organisations that the law should enact that submission does not amount to consent, in the context of offence of rape. We are recommending changes in section 375, particularly in relation to the requirement of “free and voluntary” consent.³ In view of these changes which define the legal quantity of consent, we do not propose to make any such clarification as has been suggested.

Submission and consent.

2.14. In the course of the oral discussions which we held with the representatives of the women's organisations, it has been suggested that in order to cover cases of submission to intercourse, there should be added below section 375 of the Indian Penal Code a suitable Explanation on the following lines:—

Cases of helpless resignation.

“A mere act of helpless resignation in the face of inevitable compulsion, acquiescence, non-resistance and passive giving in when volitional faculty is either clouded by fear or vitiated by duress cannot be deemed to be consent.”

One can have no objection to the principle underlying the suggestion. However, two observations may be made on the subject. In the first place, the requirement of “free and voluntary” consent which we are going to add in section 375 implies an active mental participation of the woman in the transaction and a qualification of the nature suggested would not be required. In the second place, it would not be correct to deal with only *certain aspects of submission* or certain varieties thereof, because then there is the risk that other situations to which the qualifying epithets do not apply would be left out. It is better to have a simpler but more comprehensive provision. Our recommendation to cover fear of “injury” or use of criminal intimidation meets the point.

IX. Recklessness

2.15. It has further been suggested that it should be provided in section 375 that rape can take place when the man does not care whether the woman consented or not. It is difficult

Recklessness.

1. See also para 7.8, *infra*.

2. See discussion as to “free and voluntary” consent, *supra*.

3. See discussion as to “free and voluntary” consent, *supra*.

to see how the incorporation of this suggestion in section 375 will improve the present legal position. It must be remembered that a person out to commit rape is motivated by a strong uncontrollable passion or the lust of a savage. He will have his desire satisfied at any cost, no matter whether the woman consents or not, or whether or not he is being reckless in committing the act or in assuming consent. His approach to the act of rape is mechanical, non-emotional one. A rapist cannot be likened to a person wooing a lady with boastful phrases like "I came, I saw and I conquered" or by saying "you may strive, you may struggle for a while, but you too will ultimately fall like the lady in Don Juan". The crucial question is of consent; and on this question, the feelings of recklessness of a person about to commit rape have no bearing whatsoever.

X. Other suggestions relevant to consent

Suggestion to add cases of reprisal by person in authority. 2.16. It has been suggested¹ that the following amendment should be made to clause thirdly of section 375 of the Indian Penal Code :—

Add after "or of hurt", the words "or of any reprisal by any authority or person who may have authority over her".

A second Explanation to section 375, which would read thus, has also been suggested—

"'authority' here would mean and include any police official, village kotwal, village panch, or landlord or employer."

In view of the wider amendment that we are recommending in section 375—in particular, the amendment covering fear of any "injury"—this point is substantially met.

Fear of agony. 2.17. With reference to section 375, third clause of the Indian Penal Code, a suggestion has been made to add the following words :—

"or of physical or mental agony to herself or to her nearest blood relations, including her husband if she is married."

We are of the view that the expansion of the third clause which we contemplate, namely, its extension to cover any "injury", amply takes care of the type of cases for which this suggestion is intended. "Injury" as defined in section 44 includes, *inter alia*, harm, illegally cause in body or mind.

XI. Rape of girls below minimum age

Section 375, fifth clause. 2.18. The discussion in the few preceding paragraphs was concerned with rape constituted by sexual intercourse *without consent*. The fifth clause of section 375 may now be considered. It is concerned with sexual intercourse with a woman under 16 years of age. Such sexual intercourse is an offence irrespective of the consent of the woman.

History. 2.19. The age of consent has been subjected to increase more than once in India. The historical development may, for convenience, be indicated in the form of a chart as follows² :—

CHART

| Year | Age of consent under s. 375, 5th clause, I.P.C. | Age mentioned in the Exception to s. 375, I.P.C. | Minimum age of marriage under the Child Marriage Restraint Act, 1929 |
|---|---|--|--|
| 1860 | 10 years | 10 years | — |
| 1891 (Act 10 of 1891) (after the amendment of I.P.C. ³) | 12 years | 12 years | — |
| 1925 (after the amendment of I.P.C.) | 14 years | 13 years | — |
| 1929 (after the passing of the Child Marriage Act) | 14 years | 13 years | 14 years |
| 1940 (after the amendment of the Penal Code and the Child Marriage Act) | 16 years | 15 years | 15 years |
| 1978 | 16 years | 15 years | 18 years |

1. Mrs. Sushila Adivarekar, M.P. (Rajya Sabha).

2. Position as on 31st March, 1980.

3. Amendment Act 10 of 1891 amending the I.P.C. was the result of the Calcutta case of *Queen Empress v. Hurree Mohan Mythee* (1890), I.L.R. Cal. 49, in which the accused caused the death of his child wife, aged about 11 years and 3 months, by having sexual intercourse with her. The accused was convicted under section 338, I.P.C. (causing grievous hurt by act endangering life etc.), since the law of rape as it stood then was inapplicable to intercourse with a girl above the age of 10 years.

2.20. The question to be considered is whether the age should be increased to 18 years. The minimum age of marriage now laid down by law (after 1978) is 18 years in the case of females and the relevant clause of section 375 should reflect this changed attitude. Since marriage with a girl below 18 years is prohibited (though it is not void as a matter of personal law), sexual intercourse with a girl below 18 years should also be prohibited.

Increase in minimum age.

XII. Comments on earlier Report

2.21. Here it would be pertinent to refer to the recommendation that the Commission, in its 42nd Report on the Indian Penal Code, had made for re-structuring section 375, I.P.C. by splitting it up into three categories, namely,¹—

Earlier Report.

- (a) rape proper,
- (b) rape with a child wife, and
- (c) statutory rape.

It is not necessary to repeat here the reasons which the Commission gave to support this recommendation. Suffice to say that the Commission now feels that such a re-structuring would be out of tune with the current thinking on the question of trial of offenders for rape and, therefore, the structure of section 375 should not be altered. Since the making of the recommendation by the Commission in its earlier Report, there has been a radical and revolutionary change in the approach to the offence of rape; its enormity is frequently brought into prominence and heightened by the revolting and gruesome circumstances in which the crime is committed; the case law has blurred the essential ingredients of the offence and introduced instability into the previously well established law bearing on the offence of rape. The Commission feels that re-structuring will produce uncertainty and distortion in section 375, which should, in its opinion, retain its present logical and coherent structure.

2.22. As to the relationship between section 90 of the Code (which lays down what is not consent for the purposes of the code) and the specific factors vitiating consent in relation to the offence of rape which are to be considered as relevant under section 375, the Commission, in its earlier Report, as already stated,² considered the position at some length and also made recommendations for specifically adding certain situations in section 375. Since this aspect of the matter has, during the last few years, assumed even greater importance, we are not only incorporating whatever was recommended in the earlier Report, but, pursuing the same approach, we are suggesting amendments which³ would fortify the concept of "free consent" for the purposes of section 375 and spell it out more clearly in its application to several conceivable situations that represent the variety of flaws in consent.

Freedom of consent as dealt with in earlier Report.

2.23. In its earlier Report, the Commission also recommended the inclusion (in the Chapter on "Offences against the body") of three other sexual offences—(i) A public servant compelling or seducing to illicit intercourse any woman who is in his custody as such public servant, (ii) a superintendent or manager of a women's or children's institution compelling or seducing to illicit intercourse any female inmate of the institution, and (iii) a person on the management or staff of a mental hospital having illicit intercourse with a woman who is receiving treatment for a mental disorder in that hospital, should be punishable.^{4,5}

Sexual offences besides rape.

We endorse⁶ and adopt those recommendations.

1. Law Commission of India, 42nd Report (Indian Penal Code), pages 275-280, paragraphs 16.113 to 16.123.

2. See para 2.3, *supra*.

3. Para 2.24, *infra*.

4. Law Commission of India, 42nd Report (Indian Penal Code), pages 359, proposed sections 376C, 376D 376E.

5. Para 2.3, *supra*.

6. The numbering of sections, however, differs.

XIII. Recommendation

Recommendation as to section 375. 2.24. In the light of the above discussion, we recommend that section 375 of the Penal Code should be revised as under :—

Revised section 375, Indian Penal Code

Rape.

“375. A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :—

[Ex. s. 375, first clause]

First.—Against her will.

[Ex s. 375, second clause amplified]

Secondly.—Without her *free and voluntary* consent.

[Ex s. 375, third clause amplified]

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death or of hurt or of any injury either to herself or to any other person or by criminal intimidation as defined in section 503.

[Ex. s. 375, fourth clause amplified]

Fourthly.—With her consent,

(a) when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married, or

(b) when her consent is given under a misconception of fact, when the man knows or has reason to believe that the consent was given in consequence of such misconception.

[New]

Fifthly.—With her consent, if the consent is given by a woman who, from unsoundness of mind or intoxication or by reason of the consumption or administration of any stupefying¹ or unwholesome substance, is unable to understand the nature and consequences of that to which she gives consent, or is unable to offer effective resistance.

[Ex s. 375, fifth clause modified]

Sixthly.—With or without her consent, when she is under *eighteen* years of age.

[Ex s. 375, exception modified]

Exception.—Sexual intercourse by a man with his own wife, the wife not being under *eighteen* years of age, is not rape.

[Ex s. 375, Explanation]

Explanation 1.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

[New]

Explanation 2.—A woman living separately from her husband under a decree of judicial separation or by mutual agreement shall be deemed not to be his wife for the purposes of this section.”

[As to the second Explanation, see the earlier Report²].

XIV. Punishment for rape

Section 376—Minimum punishment for rape by more than one person—Suggestion not accepted.

2.25. It has been suggested that in section 376 of the Penal Code, which deals with the punishment for rape, the situation where more than one person join in the act should be dealt with by stringent provisions, by providing, say, a minimum punishment of 10 years’ rigorous imprisonment.

Aspect of group liability considered.

2.26. The offence of rape is, in law, a single act of sexual intercourse. That being so, if more than one person rape a woman one after another, each one of them would be punishable under section 376, I.P.C. When one person commits rape and others abet the act by instigation or aid, the principal would be guilty of rape, and others would be punishable for abetment under section 109, Indian Penal Code. It is, however, doubtful whether, when the members of an unlawful assembly³ attacking a village or a section of people rape several women during the course of the raid or attack, they can be punished under section 376 with the aid of section 149, Indian Penal Code.

1. Cf. section 328, Indian Penal Code.

2. Law Commission of India, 42nd Report (Indian Penal Code), pages 277–278.

3. Section 141, Indian Penal Code.

2.27. Be that as it may, it should be noted that a rule prescribing a certain minimum punishment would not be in consonance with the "modern penology" which has been of late expounded in many cases by the Supreme Court. The circumstances in which the offence of rape is committed differ from case to case. Section 376, Indian Penal Code permits the Court to award life imprisonment or imprisonment upto ten years. The discretion of the Court in the matter of punishment should not be fettered by prescribing a certain minimum sentence. If the sentence awarded is heavy or light, it can always be corrected by the appellate or revisional court.

Minimum punishment not favoured.

XV. Assaults, outraging modesty of women and indecent assaults

2.28. We have so far discussed the offence of rape. We now deal with a few allied but less heinous offences. What is generally known as the offence of indecent assault is dealt with in section 354 of the Penal Code. This section punishes a person who assaults or uses criminal force to a woman with intent to outrage her "modesty". The Law Commission,¹ in its Report on the Penal Code, had occasion to refer to a judgment of the Supreme Court² in which it was held that even a baby of seven and a half months old has "modesty" that can be "outraged" by the use of criminal force within the meaning of this section.

Section 354 and proposed section 354A.

The Commission was of the opinion that (apart from assault to outrage "modesty"), acts of indecency with children should be made specifically punishable by a new section, reading as follows :—

"354A. *Indecent assault on a minor.*—Whoever assaults any minor under sixteen years of age in an indecent, lascivious or obscene manner, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

We agree with the recommendation quoted above from the earlier Report, in so far as it goes.

2.29. However, we would like to make one addition. An indecent assault otherwise punishable under section 354 would presumably escape punishment if the assault is committed on the girl with her consent. The reason is, that if a girl consents, her "modesty" cannot be outraged, and one of the essential requirements of the section would not then be satisfied. This, at least, has been the judicial construction³ of the section.

Consent not to be a defence.

Moreover, an act done with consent may not fall within "assault", unless the law, in a particular case, provides expressly to the contrary.

2.30. We are of the opinion that the law should expressly so provide in the case of indecent conduct with girls below 16 years. Having regard to the current thinking on the subject, it appears to be desirable to deal specifically with such indecency (with girls below 16, even with their consent).

Need for change.

In our opinion, besides incorporating section 354A in the Indian Penal Code, it is also necessary to further ensure by an express provision that the section will apply even where there is consent. In other words, consent of the woman should not prevent an act from being an assault for the purposes of this section and should not be a defence to a charge under this section.

2.31. Accordingly, we would recommend that, while incorporating section 354A in the Indian Penal Code, after the words "obscene manner", the words "*with or without the consent of the minor*" should also be added.

Recommendation as to section 354A, Indian Penal Code.

XVI. Indecent gestures

2.32. We may mention here that acts which do not amount to an "assault"—acts such as indecent gestures and acts that have come to be known as "eve teasing"—are amply covered by section 509 of the Indian Penal Code.⁴ The matter strictly does not fall within the purview of rape or assault, but we refer to it because one of the women's organisations with whom we held discussions was anxious that the law should penalise such behaviour in public places or on public transport vehicles particularly.

Section 509, I.P.C.

1. Law Commission of India, 42nd Report (Indian Penal Code), pages 264-265, paragraphs 16.85 to 16.87.

2. *State of Punjab v. Major Singh*, A.I.R. 1967 S.C. 63, 65, 67, Cr. L.J.I.; (1966) Suppl. S.C.R. 286.

3. *Sadananda Borgohin v. The State*, (1972) Cr. L. J. 658 (Assam).

4. Section 509, Indian Penal Code.

Where there is physical contact or threat of physical contact, the offender can be charged under section 354 of the same Code, punishing a person who "assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty". The punishment is imprisonment of either description upto two years or fine or both. Both the offences are, as the law now stands, cognizable.

Eve teasing in Delhi and charges under the Police Act.

2.33. We should now deal with one point concerning the mischief of what has popularly come to be known as "eve teasing". We have been given to understand¹ that practice of the Delhi Police is to take or suggest action under sections 91 and 92, read with section 97 of the Delhi Police Act² for such mischief. These provisions, so far as they are material to the point under discussion, punish indecent exposure, indecent and obscene conduct and the like in a public place.

Recommendation as to police practice.

2.34. Unfortunately, the provisions of section 509, Indian Penal Code have been lost sight of by the police in almost all the States. The attention of the police should be drawn³ to that section and they should be asked to proceed under section 50³ or section 354, Indian Penal Code, as the case may be, whenever an incident of "eve teasing" is reported or takes place.

The offences under sections 509 and 354, Indian Penal Code are cognizable, as already stated above.

XVII. *Obscene telephone calls*

Section 294, I.P.C.—Obscene telephone calls.

2.35. In the context of offences against the modesty of women, a suggestion has been made that the making of obscene telephone calls should be made an offence. We have examined the relevant statutory provisions (including the Indian Penal Code and the Indian Telegraphs Act) in this connection.

Although section 509 may cover it, it is desirable to make an express provision. We find that section 20 of the Indian Post-office Act, 1898 punishes the sending of postal communications bearing on the cover indecent, obscene, seditious scurrilous, threatening or offensive matter.⁴ There is no corresponding provision in the Indian Telegraphs Act with reference to the sending of such messages on telephone. It is for this reason that a specific provision on the subject appears to be needed.

Recommendation to amend section 294.

2.36. We would, therefore, recommend the insertion of the following clause in the Indian Penal Code under section 294 to deal with the mischief of obscene telephone calls :—

“(c) *sings, recites or utters on the telephone any obscene song, ballad or words or any abusive words.*”

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1. Discussions with the representatives of the National Federation of Women Lawyers (15th April, 1980).
 2. Delhi Police Act, 1978 (34 of 1978).
 3. Matter may kindly be looked into by Government of India, Ministry of Home Affairs.
 4. Section 20, Post-office Act, 1898.

CHAPTER 3

ARREST AND INVESTIGATION

I. Introductory

3.1. We propose to deal in this Chapter with the provisions as to arrest of women and certain aspects of investigation into offences. We also propose to consider the question how far workers of social organisations should be associated with the process of investigation. Scope.

As to arrest, our discussion will cover certain matters concerning the arrest of women and their detention--these would apply to arrest and detention for any offence.¹

As regards investigation, some of the matters to be discussed in this Chapter are confined to rape and allied offences.²

Some of them would, however, be applicable to the interrogation of women in general.³

Some⁴ have a still wider application, concerned as they are with the duties of police officers concerning the recording of information relating to offences in general or charges against police officers.

3.2. The letter of reference⁵ requests us to go through the instructions issued by the Government of India in the Ministry of Home Affairs on the subject of arrest and interrogation of women and to consider the question whether any of them could be placed on a statutory footing. Instructions issued by Ministry of Home Affairs.

We have carefully gone through all the instructions, and we feel that while some of them can appropriately and conveniently be in the form of executive and administrative directions, the others should be placed on a statutory footing as rules and regulations under the Police Act.

3.3. It has been strongly impressed upon us by all the women's organisations, and also by those who sent us suggestions in writing, that whenever a woman is called to a police station for interrogation or when she is arrested or detained in a police station, she feels insecure and always apprehends that the police will subject her to bodily pain, suffering and harassment and may even rape her. The feeling is held too strongly not to have some basis of fact. In any case, the very fact that such a feeling exists is, in itself, a sad commentary on the uprightness and credit of the police. It is not one born of the events in the comparatively recent past, but is one which has grown up over the years on account of the conduct and attitude of the police towards the women with whom they come in contact during the course of investigation of offences. Feeling of insecurity.

In our view, as criminal activities involving women grow, the need for an elimination of this feeling of apprehension and of giving adequate protection against police misdeeds to women, whenever they are called to police stations, becomes far more insistent.

3.4. Elimination of this apprehension, so far as possible, may be achieved by remedies both administrative and legal. Under the former, we recommend that it should be strongly impressed on the police that their attitude and outlook towards women at the time of interrogation and investigation is entirely wrong and contrary to the traditions of the service. It should be impressed upon them that their behaviour towards women should be one of civility and courtesy and not one of harassment; with every desire to help in the detection of crime. The necessity for cultivating such an attitude should form part of their training. Need for change in attitudes of the police.

1. Paragraphs 3.33 and 3.34, *infra*.

2. E.g. paragraphs 3.5 to 3.10, *infra*.

3. E.g. paragraphs 3.11 to 3.15, *infra* and paragraphs 3.26 and 3.27, *infra*.

4. E.g. paragraphs 3.16 to 3.25, *infra* and paragraphs 3.34 and 3.35, *infra*.

5. E.g. paragraphs 3.28 to 3.32, *infra*.

6. Chapter I, *supra*.

So far as the law and legal processes are concerned, certain amendments, to be stated presently, should be carried out in the Code of Criminal Procedure.

II. Arrest of women

Arrest—Section 46, Code of Criminal procedure.

3.5. Taking, first, the subject of arrest, the material provision of the Code of Criminal Procedure is contained in section 46, which reads as under :—

“46. (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.”

The section requires a police officer making an arrest to actually touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action. We are of the view that a provision should be added to the effect that in the case of women, their submission to custody shall be presumed unless proved otherwise, and that unless the circumstances otherwise require or unless the officer arresting is a female, the police officer should not actually touch the person of the woman for making an arrest.

Recommendation as to section 46(1), Cr. P.C., 1973.

3.6. Accordingly, we recommend that the following proviso should be added to section 46(1) of the Code of Criminal Procedure, 1973 :—

“Provided that where a woman is to be arrested, then, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed, and unless the circumstances otherwise require or unless the police officer arresting is a female, the police officer shall not actually touch the person of the woman for making her arrest.”

Section 46—Time of arrest.

3.7. With reference to this provision [section 46(1)] of the Code of Criminal Procedure, 1973, we are further of the view that a provision should be inserted to the effect that, except in unavoidable circumstances, no woman should be arrested after sunset and before sunrise. Where such unavoidable circumstances exist, the police officer must, by making a written report, obtain the prior permission of his superior officer, or, if the case is one of urgency, he must, after making the arrest, report the matter in writing to his immediate superior officer without delay with the reasons for arrest and reasons for not taking prior permission.

Recommendation to amend section 46.

3.8. Accordingly, we recommend that the following new sub-section should be inserted in section 46 of the Code of Criminal Procedure, 1973 :—

“(4) Except in unavoidable circumstances, no woman shall be arrested after sunset and before sunrise, and where such unavoidable circumstances exist, the police officer shall, by making a written report, obtain the prior permission of his immediate superior officer for effecting such arrest or, if the case is one of extreme urgency, he shall, after making the arrest, forthwith report the matter in writing to his immediate superior officer with the reasons for arrest and the reasons for not taking prior permission as aforesaid.”

III. Detention of women

Section 417A, Cr. P.C. (Proposed)—Detention in women's institutions.

3.9. There are certain matters concerned with detention of women which require discussion. Where a woman is arrested and there are no suitable arrangements in the locality for keeping her in custody in a place of detention exclusively meant for women, it is, in our view, desirable to send her to an institution established and maintained for the reception, care, protection and welfare of women or children, licensed under the Women's and Children's Institutions (Licensing) Act, 1956 or an institution recognised by the State Government. In cases where any special Act (such as the Suppression of Immoral Traffic in Women and Girls Act, 1956) requires that she should be sent to a protective home or other place of detention authorised for the purposes of such special Act, this will not apply. It is desirable that the law should be amended for the

1. Para 3.5 et seq., infra.

purpose by inserting a new section—say, section 417A—in the Code of Criminal Procedure. The following is a very rough draft:—

✓ [417A. Where a woman is arrested and there are no suitable arrangements in the locality for keeping her in custody in a place of detention exclusively meant for women, she shall be sent to an institution established and maintained for the reception, care, protection and welfare of women or children, licensed under the Women's and Children's Institutions (Licensing) Act, 1956 or an institution recognised by the State Government, except in cases where any special law requires that she should be sent to a protective home or other place of detention authorised for the purposes of such special law.]

3.10. During our oral discussions with various women's organisations,¹ it has been suggested that when women are detained in police custody or in judicial lock up, a male relative of the woman should be allowed to remain at a place close to the lock up, so that he may be able to keep vigilance over what is happening in the lock up to the female inmate.

Suggestions regarding presence of male relative near the lock up.

While we do not consider it practicable to make it a mandatory statutory requirement, we do recommend that it should be included in the executive instructions on the subject. The reason why we do not, at the moment, feel inclined to suggest a statutory provision is that we are not sure if such arrangements can be made at every police station. The shape and size of a police station and its precincts would vary from area to area; so would the facilities that could be provided for the purpose.

IV. Interrogation of female victims of sexual offences

3.11. These matters concern the arrest and detention of women in general. We now deal with certain matters peculiar to women who are victims of sexual offences. Women who have been raped are reluctant to report it, partly because of the embarrassment of discussing the details with male policemen, and partly because of the very fear of the even more painful humiliation of being a witness in Court.

Reporting and investigation.

They get scared and become confused when, in the strange environment of the Courtroom, they have to conduct themselves in a manner foreign to their custom and under a restraint not conducive to clear coherent thought or to free expression.

3.12. A woman is often discouraged from pressing a charge of rape or other sexual offence by the fact that she usually encounters only male police and prosecution officers. It is presumably for this reason that it has been suggested that the investigation of such offences should be done by women police officers only.

Investigation by female police—No statutory change recommended.

We would be happy if the questioning of female victims of sexual offences would be done by women police officers only. We are not, however, inclined to recommend a statutory provision in this regard. A mandatory provision to that effect may prove to be unworkable. The number of women police officers in rural areas is very small. Even in urban areas, unless a centralised cell (with the status of a police station) is created for investigation into sexual offences against women, such a provision may not be practicable.

We regard this difficulty as a transient one. An all-out effort for the recruitment of sufficient number of women police officers, who could be drafted for the police duties of interrogation and investigation, should be made.

3.13. Till then, in metropolitan cities or big cities where there are sufficient number of women police officers, a practice should be established that women police officers alone investigate sexual offences and interrogate the victim.

Practice to be adopted in metropolitan cities.

We are, therefore, not in favour of any statutory provision being made in this respect, subject to what we are recommending in the next paragraph.

3.14. The practice as suggested above² could be adopted in metropolitan areas and big cities. But there is one matter which is of importance for the whole country. It is necessary that in the case of girls below a certain age—say, below twelve years—who are victims of rape, there should be a statutory provision to ensure that the girl must be interrogated only by a woman. A woman police officer would be preferable. But, if a woman police officer is not available, an alternate procedure as detailed below should be followed.

Interrogation of child victim of rape—Statutory provision recommended.

1. Discussions held on the 15th April, 1980.

2. Para 3.13, *supra*.

The alternate procedure that we contemplate is this. Where a woman police officer is not available, the officer in charge of the police station should forward a list of questions to a qualified female (we shall suggest details later) who would, after recording the information as ascertained from the child victim, return the papers to the officer in charge of the police station. If necessary, further questions to be put to the child may be sent by the police to the interrogator.

For the present, this procedure may be applied to female victims of offences below 12 years. It could later be utilised for child witnesses in general, if found practicable.

The "qualified female" whom we have in mind should be one who is a social worker belonging to a recognised social organisation. If she possesses some knowledge of law and procedure, it would be all the more useful, but that need not be a statutory requirement.

3.15. In view of what is stated above, we would recommend the addition of the following provision—say, as new sub-sections—in section 160 of the Code of Criminal Procedure, 1973 :—

(3) Where, under this Chapter, the statement of a girl under the age of twelve years is to be recorded, either as first information of an offence or in the course of an investigation into an offence, and the girl is a person against whom an offence under section 354, 354A or 375 of the Indian Penal Code¹ is alleged to have been committed or attempted, the statement shall be recorded either by a female police officer or by a person authorised by such organisation interested in the welfare of women or children as is recognised in this behalf by the State Government by notification in the official gazette.

(4) Where the case is one to which the provisions of sub-section (3) apply, and a female police officer is not available, the officer in charge of the police station shall, in order to facilitate the recording of the statement, forward to the person referred to in that sub-section a written request setting out the points on which information is required to be elicited from the girl.

(5) The person to whom such a written request is forwarded shall, after recording the statement of the girl, transmit the record to the officer in charge of the police station.

(6) Where the statement recorded by such person as forwarded under sub-section (5) appears in any respect to require clarification or amplification, the officer in charge of the police station shall return the papers to the person by whom it was forwarded, with a request for clarification or amplification on specified matters; and such person shall thereupon record the further statement of the girl in conformity with the request and return the papers to the officer in charge of the police station.

(7) The statement of the girl recorded and forwarded under sub-sections (3) to (6) shall, for the purpose of the law relating to the admissibility in evidence of statements made by any person, be deemed to be a statement recorded by a police officer.²

V. Interrogation of women at the place of residence

Section 160(1),
Proviso, Cr. P.C.

3.16. There is another aspect of investigation which is in need of reform. Under section 160(1) of the Code of Criminal Procedure, 1973 a police officer making an investigation under Chapter 14 of the Code may, by order in writing, require the attendance before himself of any person "being within the limits of his own or any adjoining station" (for the purposes of investigation). The proviso to this sub-section provides that "no male person under the age of fifteen or woman shall be required to attend at any place other than the place in which such male person or woman resides".

The proviso has been taken over by the present Code from the earlier Code of 1898. In that Code, it was inserted by an amending Act of 1955 in response to the observations made in a number of earlier judicial decisions, suggesting that women should not ordinarily be called to the police station.³

¹. Proposed sections 376A, 373B and 376C, Indian Penal Code could also be added.

². See further *infra*.

³. Compare the observations made in *Haldar v. Sub Inspector of Police*, 9 C.W.N. 199, 201, 1st Column. See also (1905), 2 Cr. L. J. 51, 53.

Amendment of section 160 recommended by insertion of sub-sections (3) to (7).

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3.17. Though it is clearly the policy of the law to ensure that the interrogation of the persons in question (women and young boys) should be done at *their residence*, the object is not, at present, fully reflected in the words employed for the purpose in section 160(1), proviso. The expression "place" is a wide one. Its definition¹ in the Code is also an inclusive one, and in any case, does not indicate very clearly that in the context of section 160(1), proviso, "place" means a place *where the person resides*.

Defect in drafting.

It is a mistake to think that section 160(1), proviso enjoins the police officer to interrogate a woman at the place where the woman *resides*. This is not so. "Place" means the locality in which the woman resides and over which the police officer has jurisdiction.

In order to reflect the legislative policy more fully and to fortify the protection sought to be enacted in the proviso, the phraseology, in our opinion, requires a slight alteration.

3.18. Accordingly, we recommend that section 160(1), proviso of the Code of Criminal Procedure, should be revised as under :—

Recommendation to revise section 160(1), proviso, Cr. P.C.

To be substituted for section 160(1), proviso, Code of Criminal Procedure.

"Provided that no male person under the age of fifteen years or woman shall be required to attend at any place *other than his or her dwelling place*."

3.19. Another point arising out of section 160(1), proviso of the Code of Criminal Procedure may now be discussed, namely, penalty for violation thereof. The position in this regard is not satisfactory. At present, the mere summoning of a person in violation of the statutory mandate² would presumably be punishable as wrongful restraint under section 341, Indian Penal Code³ (imprisonment upto one month or fine upto five hundred rupees).

Punishment for violation of section 160(1) not adequate.

In our view, the punishment under section 341, I.P.C. is, inadequate for an offence of this nature. Perhaps, a charge of an offence under section 166, Indian Penal Code (public servant disobeying direction of law with intent to cause injury to any person) could be made for the violation of the prohibition in question. But, in our opinion, it would be better to have a specific provision—say, as section 166A—in the Indian Penal Code to cover such violations. The provision could be appropriately placed in the Chapter on "Offences by or against public servants". The proposed offence should be cognisable, bailable and triable by any Magistrate.

3.20. The following is a rough draft of the provision that we would recommend to be inserted in the Indian Penal Code on the subject mentioned above :—

Section 166A, I.P.C. recommended.

(To be inserted in the Indian Penal Code)

"166A. *Whoever, being a public servant—*

(a) *knowingly disobeys any direction of the law prohibiting him from requiring the attendance at any place of any person for the purpose of investigation into an offence or other matter, or*

(b) *knowingly disobeys any other direction of the law regulating the manner in which he shall conduct such investigation, to the prejudice of any person, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.*"

VI. Interrogation of women—time of

3.21. The last few paragraphs were concerned with the *place* of interrogation of women. We should now deal with the *time* of interrogation. In the views expressed before us by a

Interrogation of women after sunset and before sunrise.

1. Section 2(p), Code of Criminal Procedure, 1973.

2. Section 160(1), proviso, Code of Criminal Procedure, 1973.

3. *Raja Ram v. State of Haryana*, (1971) 3 S.C.C., 945, 949.

4. Cf. sections 162(1), 163, 171, Code of Criminal Procedure, 1973.

5. Consequential amendment to be made in the Schedule to the Code of Criminal Procedure, 1973, so as to provide that the proposed offence shall be cognisable, bailable and triable by any Magistrate.

representative of one of the women's organisations, it was suggested that women, even when they are not the persons accused or victims of the offence and are merely witnesses to the crime, should not be interrogated by the police after sunset and before sunrise. It seems to us that if the statutory provision for interrogating women at their residence,³ as proposed to be clarified by us,² is properly and adequately implemented, there should be no need for a further and additional provision totally barring the interrogation of women after sunset and before sunrise.

After all, the principal object sought to be achieved by such restrictions is to ensure that no opportunity arises for the molestation of women. That object is, in a large measure, achieved by the statutory provision referred to above.

VII. Social workers

Association of women social workers with investigation.

3.22. Another aspect of investigation on which emphasis has been placed by one of the women's organisations during our oral discussions with them is the need to associate women social workers with investigation into cases relating to rape and allied offences. After giving the matter deep thought, we find it difficult to accede to the suggestion.

Under our system of procedure, investigation is primarily in the hands of the police officer. Cognisance of offences can, no doubt, be taken by the competent Magistrate directly on a complaint⁴ made by any person (generally speaking, that person need not even be the victim of the offence). But even the Magistrate to whom such a complaint is made would not have adequate investigative machinery at his disposal. He will also have to depend generally on the police for the purpose, the only difference being that an investigation so directed by the Magistrate who has taken cognisance on a complaint remains—in certain respects—subject to the orders of that Magistrate.

Investigation an arduous task.

3.23. That apart, investigation of an offence is not a light duty. We have the highest opinion and respect for women's intelligence, ability and competence, yet we feel that they may not be able to cope with the arduous duties which an investigating police officer is required to discharge. There is also the danger of a male police officer completely abdicating his duties if a social worker is associated on an equal footing with him for investigation of an offence. If the investigation is successful and fruitful, then the male police officer will take all the credit for it, but if it fails, he will try to escape the liability for the failure by throwing the entire blame on the female associate.

This being the position, it may not be practicable to confer on women social workers any specific legal status.⁵

Recommendation to amend Section 160, Cr. P.C.

3.24. However, in our view, it would be useful to provide that a female social worker should be allowed to be present whenever the victim of rape is interrogated by the police. We recommend that in section 160 of the Code of Criminal Procedure, 1973, a suitable amendment should be made for the purpose. The social worker must belong to an organisation recognised by the State Government.

Amendment of section 160 recommended by insertion of sub-section (8).

3.25. In view of what is stated above, we would recommend the insertion of the following provision—say, as a new sub-section—in section 160 of the Code of Criminal Procedure, 1973 :—

“(8) Where, under this Chapter, the statement of a male person under the age of fifteen years or of a woman is recorded by a male police officer, either as first information of an offence or in the course of an investigation into an offence, a relative or friend of such male person or woman, and also a person authorised by such organisation interested in the welfare of women or children as is recognised in this behalf by the State Government by notification in the official gazette, shall be allowed to remain present throughout the period during which the statement is being recorded.”⁶

1. Section 160(1), Proviso, Cr. P.C., 1973.

2. Para 3.18, *supra*.

3. Section 190(1), Code of Criminal Procedure, 1973.

4. Section 202(1), Code of Criminal Procedure, 1973.

5. See also para 3.34, *infra*.

6. For sub-sections (3) to (7) to be inserted in section 160, see para 3.15, *supra*.

VIII. *Police report to be accompanied by medical reports*

3.26. The process of investigation generally culminates in the report of a police officer. The report of a police officer on which a Magistrate usually takes cognisance is the subject matter of section 173 of the Code of Criminal Procedure. Alongwith such report, certain documents are to be forwarded as provided in sub-section (5) of that section, quoted below :—

Section 173(5), Cr. P.C.—Report of a police officer to be accompanied with certain documents.

“173. (5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report—

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.”¹

3.27. Our recommendations relating to medical reports to be made in a later Chapter² contemplate the forwarding of the medical reports to the police officer investigating the offence. As a consequence of those amendments, it is necessary to amplify sub-section (5) of section 173.

Section 173(5), Cr. P.C.—Amendment recommended as to medical reports.

Accordingly, we recommend that in section 173(5) of the Code of Criminal Procedure, 1973, after the words “on which the prosecution proposes to rely”, the following words, figures and marks should be inserted :—

“including the report of medical examination of the arrested person accused of rape or attempt to commit rape forwarded to the police officer under section 53, and the report of medical examination of the victim of such an offence forwarded to the police officer under section 164A.”

IX. *Investigation where police officer is the accused*

3.28. We may note that during the debates on a motion in the Lok Sabha on the subject of rape of women,³ it was suggested that where a police officer is the accused, the investigation into the offence alleged to have been committed by the police officer should be by some other agency, as otherwise it would be well-nigh impossible to convict the accused.

Investigation into cases where a police officer is an accused.

It is not clear what is meant by ‘some other agency’. Perhaps the idea is that where a police officer is involved in rape, then the investigation should be by a police officer of the district or area other than the district or area where the culprit officer was posted at the time of the crime. We commend the suggestion for the consideration of Government.

X. *Non-recording of information relating to cognisable offences*

3.29. We now come to another matter concerning the stage of investigation. During our oral discussions with the representatives of women’s organisations, it was stated that in some cases the police fail to register a case of rape reported to them even when the full facts are communicated to them. We have not been able to gather statistics of the number of such cases, as the collection of the relevant figures would take considerable time and the present Report⁴ deals with a matter of urgency. We hope that the percentage of such cases would not be high. Nevertheless, we do take the view that in principle, the law should contain a specific provision dealing with refusal (or failure without sufficient cause) to register such cases. The offence of rape is a cognisable offence and if the police fail to register it, it is a clear violation of the provisions of the Code of Criminal Procedure, 1973 in this regard.⁵ Cognisable offences reported to the police are “registered”—as the popular usage goes—under section 154(1) of the Code of Criminal Procedure. If the officer in charge of a police station refuses to record the information reported relating to a cognisable offence, there is a remedy already provided⁶ in the Code of Criminal Procedure, the relevant provision being in the following terms :—

Section 167A, I.P.C.—Refusal to register case of rape.

“(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1)

1. For other points concerned with medical reports, see Chapter 4, *infra*.

2. Chapter 4, *infra*, para 4.7 and 4.10.

3. Lok Sabha Debates, 27th March, 1980, column 8349.

4. See Chapter 1, *supra*.

5. Cf. *Kumukshetra University v. State of Haryana*, A.I.R. 1977 S.C. 2220.

6. Section 154(3), Code of Criminal Procedure, 1973.

[of section 154] may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognisable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

Penal sanctions needed.

3.30. The provision of the Code of Criminal Procedure quoted above, however, is not of a penal character, though, no doubt, when the matter is reported to the Superintendent of Police thereunder, a departmental action can be taken. We have, therefore, examined the question whether there is need for any penal sanction and, if so, whether the present law is adequate in this regard. In our opinion, and having particular regard to the fact that we have been given to understand during our oral discussions that administrative action does not prove very effective, *prima facie* there is need for a suitable penalty.

Present law.

3.31. As to the present law on the subject, it would appear that the matter is not very specifically covered by the substantive criminal law. No doubt, there are provisions in the Indian Penal Code punishing public servants for the malicious exercise of their powers in certain cases, which it is unnecessary to discuss for the present purpose. Many Police Acts also contain provisions punishing a police officer for "violation of his duty" or provisions similarly worded. The punishment laid down is, however, usually mild; for example, in the Delhi Police Act it is imprisonment upto three months or fine upto Rs. 100. The punishment is mild presumably because such provisions are of a general character, embracing "violations of duty" of various degrees and shades.

Insertion of section 167A, Indian Penal Code recommended.

3.32. Having regard to what we have stated above, we would recommend the insertion of a specific penal provision, say, as section 167A, in the Indian Penal Code on the subject. In view of the general scheme adopted in that Code, the proposed provision would not be confined to refusal to register the offence of rape and would cover other cognisable offences as well. The following is a rough draft of the provision that we recommend :—

*"167A.—Whoever, being an officer-in-charge of a police station and required by law to record any information relating to the commission of a cognisable offence reported to him, refuses or without reasonable cause fails to record such information shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."*²

XI. Other points concerning investigation

Other points made in suggestions.

3.33. At this stage, we may also note a few other points concerned with investigation on which improvements have been suggested in the views expressed orally before us or in written points handed over to us. These may be enumerated briefly—

First, offences of rape etc. should be promptly registered.

Secondly, in such cases the officer-in-charge of a Police Station must proceed to investigate the offence in person and shall not depute any subordinate of his to make the investigation.

Thirdly, a copy of the information lodged must forthwith be forwarded to the nearest Magistrate whether such Magistrate is empowered to take cognisance or not.

Fourthly, such Magistrate on receiving the information should be empowered to issue directions regarding investigation of the case until cognisance is taken by a Magistrate who is empowered to take cognisance of the offence.

1. Compare section 122(f) (iv). Delhi Police Act, 1978.

2. The proposed offence should be cognisable, bailable and triable by any Magistrate. Complaint of any particular police officer should not be required for taking cognisance.

Fifthly, in Presidency towns and district towns or Sub-Divisions, investigation should be made by an officer not below the rank of a Deputy Superintendent of Police.

Some of these points have been already dealt with.¹ The rest seem to be concerned with matters proper for administrative action, rather than for legal amendment.

3.34. It has also been suggested that certain Magisterial powers and limited police powers may be conferred on educated and respected ladies in villages nearby, like social workers or school teachers. It has been suggested² that suitable amendments may be made in the Code of Criminal Procedure in this behalf.

Conferment of
Magisterial and
Police powers on
women.

We would leave this matter for appropriate action by the authorities competent to appoint Magistrates. Conferment of police powers on ladies, however, does not appear to be practicable.

The question of associating social workers with investigation has already been dealt with.³

3.35. An important part of investigation into cases of rape is in the shape of physical examination of the accused and the victim by medical experts. This topic deserves separate treatment, and will accordingly be discussed later.⁴ We may, however, mention that one of the amendments that we have recommended in the present Chapter (documents to be forwarded with a police report) is concerned with medical reports.⁵

Questions relating to medical
examination.

¹. E.g. para 3.28, *supra*.

². See also paragraphs 3.22 and 3.23., *supra*.

³. Paragraphs 3.25, *supra*.

⁴. See Chapter 4, *infra*.

⁵. Para, 326, *supra*.

CHAPTER 4

MEDICAL EXAMINATION OF THE ACCUSED AND THE VICTIM

I. Importance of Medical Examination

Scope. 4.1. We propose to deal in this Chapter with the medical examination (of the accused and the victim) in cases relating to rape. The medical report in such cases is a document of vital importance. The matter has both medical and legal aspects, deserving of attention.

Position of examining doctor. 4.2. An eminent writer on legal medicine¹ has observed that the situations in which the practising clinician may find himself involved in the examination of either the alleged victim or the alleged assailant in sexual offences are unique in regard to the degree of emotional tension that may be generated in all the persons involved in the situation. "Here, possibly more than in any other medico-legal situation, it behoves a clinician to remember the general principles of *detail, suspicion, impartiality and observation*".

He has pointed out that many of the examinations required in such cases will take place late at night, or in the early hours of the morning when the doctor himself is likely to be tired, and the value and importance of a set routine becomes very important indeed.

Importance from the legal point of view. 4.3. From the legal point of view also, it is well recognised that the medical examination report of the accused in a case of rape or attempt to commit rape is a very important document. Of that part of the *actus reus* of the offence which consists of sexual intercourse by the accused, there cannot ordinarily be a better evidence than the medical report, so far as the male party is concerned.

Proper examination—conditions for. 4.4. It has been pointed out that the proper and thorough investigation of an alleged rape depends on :²

Early notification to the police;

Full co-operation between the victim and the various investigating agencies;

An experienced and understanding police officer in charge.

Any delay in reporting an alleged rape will result in delay in the commencement of the investigation, with the loss of trace evidence on the victim, the accused and the scene. It is for these reasons that the victim must be interviewed at some length as soon after the offence has taken place as is possible, and before she has had a chance to wash, clean or repair her clothing, or change her clothing.

The medical examination must be a complete one, and must include the complete medical history of the victim, a detailed history of the alleged assault, a complete body examination and the taking of all relevant biological samples.

II Examination of the accused

Provision in the Code—Need for timely examination. 4.5. The Code of Criminal Procedure has, in section 53, a general provision on the subject of medical examination of the accused in all cases where such examination would afford evidence of commission of offence.³

1. David M. Paul, Department of Forensic Medicine, Guy's Hospital, London : "The Medical Examination in Sexual Offences" (1978 July), Vol. 15, No. 3, *Medicine, Science and the Law*, pages 154—162.

2. British Academy of Forensic Sciences, Memorandum on rape (July 1976), Vol. 16, *Medicine, Science and the Law*, pages 154, 156, 157.

3. Section 53, Cr. P.C. 1973.

It is, however, seen that the report of the medical examination is often cursory, or is not sent in time, in cases of rape or attempt to commit rape.

In a recent Calcutta case,¹ the High Court was constrained to observe—

"It is also striking that the appellant, though arrested on that very night (9th May) was not produced before Dr. Pal (P.W. 11) who examined P.Ws. 1 and 10 on 10-5-1970."

4.6. It is also desirable that the report should (besides containing the usual formal particulars) deal specifically with—(i) the age of the accused, (ii) injuries to the body of the accused, and (iii) other material particulars in reasonable detail. It should also note the precise time of examination. It should be sent without delay by the registered medical practitioner to the investigating officer and the latter should file it before the Magistrate empowered to take cognisance along with the documents sent with the challan under section 173(5) of the Code.²

Particulars to be entered and reasons to be given.

4.7. It is very important that reasons should be given for the opinion expressed in the report. Accordingly, we recommend the insertion in section 53 of the Code of Criminal Procedure, of the following sub-sections :—

Recommendation as to section 53, Cr. P.C.

"Section 53(1A), (1B), (1C) and (1D), Code of Criminal Procedure, 1973 to be inserted.

[(1A) When a person accused of rape or an attempt to commit rape is arrested and an examination of his person is to be made under this section, he shall be forwarded without delay to the registered medical practitioner by whom he is to be examined.

(1B) The registered medical practitioner conducting such examination shall without delay examine such person and prepare a report specifically recording the result of his examination and giving the following particulars :

- (i) the name and address of the accused and of the person by whom he was brought,*
- (ii) the age of the accused,*
- (iii) marks of injury, if any, on the person of the accused, and*
- (iv) other material particulars in reasonable detail.*

(1C) The report shall state precisely the reasons for each conclusion arrived at.

(1D) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 1973 as part of the documents referred to in clause (a) of sub-section (5) of that section."

III. Examination of the victim

4.8. We next deal with the victim. In many cases, the report of the medical examiner as to the examination of the female victim is also found to be somewhat cursory and does not give adequate information about the material particulars which are necessary for an adjudication as to the various ingredients of section 375. Further, it is sometimes noticed that the medical examination report is not sent promptly to the investigating officer. As a result, the possibility of tampering with the report remains.

Section 164A, Cr. P.C. (To be added).

¹. *Narayan Datta v. State* (1980), Cr. L. J. 264, paragraphs 1-2 (March 1980) (Calcutta).

². See Chapter 3, *supra*.

In our opinion, the report of the examination of the victim in a case of rape should (besides containing the usual formal particulars) deal specifically with--

- (i) the age of the victim,
- (ii) the question whether the victim was previously used to sexual intercourse,
- (iii) injuries to the body of the victim,
- (iv) general mental condition of the victim, and
- (v) other material particulars in reasonable detail.

It is also necessary that the report should note the time of examination and be sent without delay to the investigating officer. It is very important that the report should state reasons for the conclusions recorded.

Need for legislative provisions.

4.9. Ordinarily, such matters are left to be dealt with by executive instructions. However, having regard to the importance of the subject, it would be proper to insert in the Code of Criminal Procedure, at an appropriate place, a provision incorporating the guidelines that we have suggested above. In the light of practical working of the provision, further improvements could be made in the relevant provisions.

Section 164A, Cr. P.C. recommended.

4.10. Accordingly, we recommend that the following new section should be inserted in the Code of Criminal Procedure, 1973 :

164A. (1) *Where, during the stage when an offence of rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner, with the consent of the woman or of some person competent to give such consent on her behalf and the woman shall be forwarded to the registered medical practitioner without delay.*

(2) *The registered medical practitioner to whom such woman is forwarded shall without delay examine her person and prepare a report specifically recording the result of his examination and giving the following detail :*

- (i) *the name and address of the woman and of the person by whom she was brought,*
- (ii) *the age of the woman,*
- (iii) *whether the victim was previously used to sexual intercourse,*
- (iv) *marks of injuries, if any, on the person of the woman,*
- (v) *general mental condition of the woman, and*
- (vi) *other material particulars, in reasonable detail.*

(3) *The report shall state precisely the reasons for each conclusion arrived at.*

(4) *The report shall specifically record that the consent of the woman or of some person competent to give such consent on her behalf to such examination had been obtained.*

(5) *The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.*

(6) *Nothing in this section shall be construed as rendering lawful any examination without the consent of the victim or of any person competent to give such consent on her behalf."*

4.11. In regard to the examination of the person of the accused, section 53(2) of the Code of Criminal Procedure provides that whenever the person of a female is to be examined under that section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Medical examination of the victim of rape.

The question whether a provision should be inserted to the effect that *where a female victim of a sexual offence is to be examined, the medical examination shall be conducted only by a female medical practitioner* has been carefully considered by us. We think that a statutory provision is not necessary, for two reasons. In the first place, this is almost the invariable practice in India and a statutory mandate is not needed. In the second place, if a female victim does not wish to submit to examination by a male doctor, there is no legal obligation on her part to do so. For that reason also, a statutory provision is not necessary. It may be mentioned that such medical examination cannot be lawfully made without the consent of the woman or of some person competent to give consent.¹

IV. Chronology and modes

4.12. We have so far dealt with matters on which legislative provisions have been suggested by others or recommended by us, on the subject of medical examination. It would be useful now to refer to certain other aspects.

Chronology and modes of examination.

As to the chronological stages of the examination and the mode of conducting it, there is interesting material available.

A distinguished writer suggests² that date, time and place of examination should be noted at the commencement of the examination and the time at which the examination terminated should also be noted.

Further, he adds, history of the person examined is important. Full general history must be taken and this must include all previous illness, operation and accident. It should also include the time and nature of the last meal eaten, the amount and nature of the alcoholic drink consumed and the time it was consumed and the amount, nature and time of any medication taken.

Specific history should be taken, preferably from the complainant and before any account is heard from the police authority, instructing solicitor or parent. This history is an essential part of the clinical examination and full notes must be made of it because one of the essentials of physical examination is to decide if the physical findings are compatible with the history taken.

4.13. Each system of body should be examined and "all the examination findings should be noted even if they are normal findings". Skeletal deformity or injury, he points out, may reduce the effectiveness of any resistance; intoxication may reduce the power to resist or the ability to form an intention. Natural disease may affect the behaviour. The general examination must, therefore, include the skin, teeth, finger, nails, cardio-vascular system, respiratory system, abdomen, skeletal system and central nervous system, for only in this way can the examining doctor be sure that he has not missed any relevant feature.

Examination of various body sheets.

4.14. As to injuries, the description must include an accurate description of the site of the injury with special reference to fixed body points, a measurement of the size of the injury; a general description of the type of the injury; a detailed description of its shape; and a description of the colour of any bruising or exudate present.

Injuries.

V. Rapid reference sheets

4.15. The distinguished expert in legal medicine³ (to whose writing we have already referred) has prepared the following "rapid reference sheet" for the examination of the person accused and the victim of rape:

Rapid reference sheets.

Accused

(1) Consent to examination.⁴

¹. Para 4.10, *supra*.

². David M. Paul, "The Medical Examination in Sexual Offences" (1975 July), Vol. 15, No. 3, *Medicine, Science & Law*, pages 154, 162.

³. David M. Paul, "The Medical Examination in Sexual Offences" (1975 July), Vol. 15, No. 3, *Medicine, Science and the Law*, 154, 158, 159.

⁴. In India, this is governed by a statutory provision in section 53, *Code of Criminal Procedure*, 1973.

(2) Detailed general history : past illness, surgery, accident, food, drink and drugs.

(3) Observe : manner, clothing.

(4) Examine all clothing : remove in presence of doctor; inspect each item separately; retain each item in a clean bag; ultra-violet light on trouser-shirt, vest, under pants.

(5) Full general clinical examination : examine the whole body; record all findings; record all injuries, old, new, location, size and description.

(6) Examine the affected portions : injury to various parts (details are given).

(7) Specimens of substances from the body : Blood; urine; saliva; avulsed hair; loose hairs, avulsed pubic hair; matted pubic hair; finger nail scrappings; clippings; areas of soiling; pubic hair combings; swabs from urethral orifice; prepuce etc.

(8) Equipment : sterile swabs; sellotape; glass slides; syringe; large bore needles, tape measures; clean paper bags; labels.

Victim

(1) Consent to examination.

(2) Detailed general history : past illness, accident, operation, food, drink and drugs.

(3) Detailed specific history : obstetric; menstrual etc.; past sexual experience; details of present incident.

(4) Observe : manner, dress; make-up.

(5) Examination of clothing : remove in presence of doctor, inspect each item separately, retain each item in a clean bag; damage, staining, soiling; ultra-violet light on pants, tights, pantrageirdle.

(6) Full general clinical examination : examine the whole body; record all findings; record all injuries; old, new, location, size, description.

(7) Examine the affected parts (details given).

(8) Specimens (details given).

(9) Equipment : Sterile swabs; hypodermic syringe; needles, gloves, slides; labels, speculum; tape measure, sello tape; clean paper bags.

VI. Conditions in which examination is conducted

4.16. We have so far discussed the contents of medical reports. Certain matters concerning the conditions for physical examination are also of interest. Justice cannot be done to either parties (the prosecution or the defence) or to the doctor, if adequate conditions for examination of the victim are not available. It is, therefore, necessary that the equipment and environment of the examination should be adequate; in particular, the premises should be well-lit.

In order to put the victim at ease, it would be desirable (unless the victim is an adult woman of mature years), to examine orally first the mother or other older relative by whom she is accompanied. The circumstances in which the offence is alleged to have been committed should be first ascertained from such relative.

4.17. As regards the actual examination of the victim, the general physical examination should be first commenced, in order to induce a feeling of relaxation in the victim. The parts of the body more directly affected could be examined later on.

4.18. There have been many learned discussions as to the conditions in which such examination should be made and as to the equipment that may be used. For example, one expert in legal medicine has stated his experience thus¹—

1. K.F.M. Pole, Letter in (January 1970) *Medicine, Science and the Law*, page 73.

"Examination with an ultra-violet lamp I consider to be very useful and the police put a mains' model at my disposal whenever I need it—that is, in every reasonably recent case. Details depend on the history of baths and ablutions since the incident, but I would rather err on the side of using it too often than too rarely."

VII. *Colour photographs*

4.19. It is also desirable to take colour photographs of injuries, for these are the only photographs that give a true picture of the age and extent of many significant injuries, such as bruises and abrasions. It is these comparatively minor injuries that are often of the greatest importance in reaching a medical diagnosis in a case of alleged rape.¹

Colour photo-
graphs.

¹. British Academy of Forensic Sciences, Memorandum on law regarding rape (July 1976), *Medicine, Science and the Law*, pages 154, 158.

CHAPTER 5
PROCEDURE FOR TRIAL, TRIAL IN CAMERA
AND PUBLICATION OF PROCEEDINGS

I. Cognisance of offences

Scope of Chapter 5.1. We propose to deal in this Chapter with certain aspects of procedure relating to the trial of rape and allied offences.

Section 198(6), Cr. P.C., 1973—Amendment recommended. 5.2. We first deal with the cognisance of offences. Section 198(6) of the Code of Criminal Procedure, 1973 requires a complaint to be filed within one year in case of rape constituted by sexual intercourse by husband with a wife under 15 years. The portion referring to “wife under 15 years” should be deleted from this sub-section. The reason is that under the amendments recommended in the 42nd Report¹ to the Indian Penal Code, the scope of section 375, I.P.C. would be expanded, so as to cover not only intercourse with a child wife, but also, in certain circumstances, intercourse with the wife (irrespective of her age) if the wife is living separately.

Accordingly, we recommend that section 198(6) of the Code of Criminal Procedure, 1973 should be revised as under:—

Revised section 198(6), Code of Criminal Procedure, 1973

“(6) No Court shall take cognisance of an offence under section 376 of the Indian Penal Code, where such offence consists of sexual intercourse by a man with his own wife,.....if more than one year has elapsed from the date of the commission of the offence.”

Court competent to try. 5.3. The offence of rape can be tried only by the Court of Session. The position in this regard needs no change.

II. Stages of trial

Procedure for trial—the chronology. 5.4. Under the Code of Criminal Procedure, 1973, the procedure for trial in Courts of Session is governed by provisions contained in a separate Chapter devoted to such trials, which does not seem to need any change so far as the various stages of trial in regard to the offences dealt with in this Report are concerned.

III. Trial in camera

Trial in camera—Section 327, Cr. P.C. 5.5. There is, however, one matter of procedure in regard to which there is scope for reform. A trial for rape, like other criminal trials, is, in general, conducted in public. This is in accordance with the statutory provision in the Code of Criminal Procedure on the subject.²

The reasons why trials are held in public (subject to specific statutory exceptions) have been discussed judicially³ and otherwise, more than once, and we need not set them out. However, in the case of sexual offences, there is an overriding consideration which justifies an exception being made to the general rule of public trial. Certain details of an intimate character may have to be narrated in court in such trials. It is not only embarrassing for the victim to narrate them in the full glare of publicity. Often, by reason of such embarrassment, she may not be able to give all the factual details, and the cause of justice may ultimately suffer. It is, therefore, on the wider ground of interests of justice, that we would recommend that in the absence of special reasons to be recorded by the Court, a trial for rape or allied offences must be held *in camera*.

1. See para 2.24, *supra*.

2. Section 327, Cr. P.C., 1973.

3. *Naresh v. State of Maharashtra*, A.I.R. 1967, S.C. 1.

5.6. We may state that the broad principle of publicity can be modified where the Court thinks that justice could not be done at all if it had to be done in public.¹ Need to modify general rule.

The proposition that 'where secrecy begins justice ends' is one held by most lawyers as sacred. However, in the area of rape, and indeed of all the serious sexual offences, there is a particular burden on the complainant and on the accused with the real risk of courtroom defamation repeated in the press, which may subsequently be found by the Court to be totally unjustifiable.²

It is for this reason that in England, the National Council for Civil Liberties³ in their pamphlet on *The Rape Controversy*, said—

"The law should recognise the fact that there is still a stigma attached to rape from which the victims may suffer for years afterwards."

We would wish to extend this view to include the stigma that may attach itself to the accused for years afterwards even following an acquittal. In this context, it should be remembered that the making of an allegation of rape against any man imposes upon him an equally unpleasant, humiliating and embarrassing experience in respect of which he should be entitled to the same protection as may be accorded to the alleged victim.

5.7. ✓ In the light of the above discussion, a specific proviso should be added to section 327 of the Code of Criminal Procedure, as under :— Recommendation to amend section 327, Cr. P.C.

Proviso to be added to section 327 of the Code of Criminal Procedure, 1973.

"Provided further that unless the presiding judge or magistrate, for reasons to be recorded, directs otherwise, the inquiry into and trial of rape or allied offence shall be conducted in camera.

Explanation.—In this sub-section, the expression 'rape or allied offence' applies to—

(a) *an offence punishable under section 354 or section 354A of the Indian Penal Code;*⁵

(b) *an offence punishable under section 376, section 376A, section 376B or section 376C of that Code;*⁶

(c) *an attempt to commit, abetment of or conspiracy to commit any such offence as is mentioned in clause (a) or (b) of this Explanation."*

Further, the following sub-section should be added to section 327 :—

Sub-section to be added to section 327, Code of Criminal Procedure, 1973 after re-numbering present section as sub-section (1).

"(2) Where any proceedings are held in camera, it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except with the previous permission of the Court."

1. *Scott v. Scott*, (1913) A.C. 417, 437.

2. British Academy of Forensic Sciences, Memorandum on rape (July 1976), *Medicine, Science and the Law* 154, 155.

3. National Council for Civil Liberties, *The Rape Controversy* (1975).

4. Section 327, Code of Criminal Procedure, 1973.

5. Section 354A was recommended to be inserted by the Law Commission in the 42nd Report (Indian Penal Code).

6. The section references are according to the proposals made in this Report.

7. For violation, penalty may be introduced as section 228A, I.P.C. (fine upto Rs. 1000). para 5.13, *infra*.

8. Jurisdiction of the High Court under contempt of court is already saved by the Code.

IV. *Publication of proceedings*

Publication of names of parties. 5.8. Connected with the question of holding the proceedings *in camera* is that of publication of the names of the victim and the accused in cases of charges of rape.

As the law stands at present, the names and details of the victim as well as the accused as disclosed at a trial for a sexual offence can be legally published in the press, unless the proceedings were held *in camera*.¹ This is in view of the general rule about the reporting of judicial proceedings. What takes place in the Court is public, and the publication of proceedings merely enlarges the area of the Court and gives to the trial that added publicity which is favoured by the rule that the trial should be open and public. It is only when the public is excluded from audience that the privilege of publication also goes, "because then the public would have no right to obtain at the second hand what it cannot obtain at first hand".²

Special provisions 5.9. This general rule, however, sometimes causes embarrassment. Realising the need for modification of the general position, the legislature has enacted, in regard to proceedings of a special nature, special rules on the subject. We need not enumerate here Central Acts and a few State Acts that contain such provisions.

Preserving anonymity of complainant and accused in sexual offences. 5.10. On a careful consideration, we are of the opinion that there is need for legislation to preserve the anonymity of the complainant and the accused in the case of rape and allied offences (subject to exceptions in regard to certain specified cases).

The principal object of the amendment would be to save avoidable embarrassment to the victim and to the accused. The justification for such a provision need not be spelt out. Restrictions on the reporting of judicial proceedings are not unknown to our law,³ though such restrictions should be imposed only for the weightiest reasons. The present seems to be such a case.

Anonymity at the stage of investigation. 5.11. We have considered the question of anonymity under two heads—

(i) anonymity of the victim and the accused at the stage of investigation and before the trial commences;

(ii) anonymity of the victim and the accused as regards proceedings in Court at the trial stage.

As regards the stage of investigation, we do not propose to make any recommendations for statutory amendment or for the enactment of separate legislation. Though we do appreciate that the victim and the members of her family find it embarrassing that the name of the victim is given publicity, we would leave the matter to the good sense of the journalistic profession—and to such provisions of the existing law as may be applicable.

Publicity at the stage of trial—Trial *in camera* and penalty for illegal publicity to court proceedings. 5.12. As regards anonymity at the stage of trial, some special provisions are, in our view, called for. Here again, we do not propose the enactment of separate legislation. We have recommended⁴ that the trial of cases relating to rape (and allied offences) should be held *in camera*. On the enactment of such a provision, the publication (without permission of the Court) of proceedings so held *in camera* would be a contempt of Court,⁵ for which the High Court can take appropriate action.

Section 228A, I.P.C. (New)—Recommended. 5.13. However, to fortify the present law, we recommend that there should be inserted, in the Indian Penal Code, a new section⁶—say, as section 228A—in the following terms :—

Section 228A, I.P.C.

(To be inserted)

"228A. Where, by any enactment for the time being in force, the printing or publication of any matter in relation to a proceeding held in a Court *in camera* is declared to be unlawful, any person who prints or publishes any matter in violation of such prohibition shall be punished with fine which may extend to rupees one thousand."

1. *Naresh v. State of Maharashtra*, A.I.R. 1967 S.C. 1.

2. *Naresh v. State of Maharashtra*, A.I.R. 1967 S.C. 1, 27, para 97; (1966) 3 S.C.R. 744.

3. See para 5.9, *supra*.

4. See para 5.27, *supra*.

5. *Naresh v. State of Maharashtra*, A.I.R. 1967 S.C. 1.

6. Section 228A, Indian Penal Code (proposed).

7. Proposed offence to be non-cognisable, bailable and triable by any magistrate. Complaint of the Court holding the proceeding or its superior Court to be required.

5.14. The proposed provision will cover every case of violation of any statutory provision which declares unlawful the printing or publication of such matter. If our recommendation is accepted, it will be possible to delete, at a convenient time, similar provisions in special enactments¹ so as to prevent duplication. **Consequential amendment of other laws.**

5.15. We may make it clear that publication of the name of the convict *as a punishment* is a matter which will be dealt with later.² **Publication after conviction.**

V. Examination on commission

5.16. A suggestion was made by some of the representatives of women's organisations (during our oral discussions with them) that women should be examined on commission and should not be made to come to Court (in criminal cases). We have carefully considered the matter, but we do not consider any such statutory provision to be practicable. **Examination on commission.**

In important cases, so many persons (and not merely the Judge) have to take part in the trial. Moreover, the accused may have to be identified, or the property in dispute may have to be shown to the witness. All these arrangements cannot, in many cases, be made when the examination is on commission.

5.17. The issue of a commission is generally a time-consuming process. Save in exceptional cases of hardship and the like, the procedure of examination on commission may, if made mandatory by law, be productive of injustice in most cases.

If the object is to save embarrassment, that object would amply be secured by holding the trial *in camera*, as recommended by us.³

We are not, therefore, in a position to accept the suggestion.

VI. Participation in trial

5.18. It has been suggested by one of the women's organisations with whom we had oral discussions that there should be a provision entitling an organisation interested in criminal matters to intervene in a criminal trial, so as to enable it to put forth its point of view. The suggestion was made without elaborating the value, object and purpose of the intervention of 'interested parties' in the trial of the person alleged to be the offender. On the face of it, the suggestion appears to us as one having dangerous potentialities and implications. **Participation by organisations & suggestion considered.**

5.19. It may be that the idea behind the suggestion is to keep a watch on the working of the courts, the judges and the lawyers and to prevent them from straying away from the path of justice. If that be so, the suggestion is one down-grading the present judicial system, the judges and lawyers and expressing a lack of faith and confidence in them. It is not known whether the suggestion has been made with the ideology of a judiciary under 'popular control'. It is all right to say that the intervention of third parties is necessary in the public interest. This sounds good so far as the words go. **Risks attendant on acceptance of the suggestion.**

The interests of the prosecution and the accused in a criminal case are well protected by their relations, lawyers and the court. But an utter stranger seeking intervention in a criminal trial cannot have any joint or common interest with the accused or the person aggrieved in a criminal case. A body of persons cannot claim to have this joint or common interest merely because it is an organised body interested in criminal matters.

5.20. It must be remembered that in cases relating to rape, where the raped woman belongs to one caste or community or group and the accused belongs to any other caste or community, the feelings between the two parties run high. It is easy to see that if, in such cases, third parties claiming to be interested in the woman raped or in the accused are allowed to intervene, the proceedings in the Court will be reduced to a trial of the accused by the public and the Court will be turned into a forum for a class or caste or communal warfare. The trial will thus become a farcical one, prejudicing one party or the other. We have, therefore, no hesitation in refusing to accept the suggestion. **Peculiar features of a case relating to rape.**

1. E.g. section 23, Hindu Marriage Act, 1955.

2. See Chapter 6, *infra*.

3. See para 5.7, *supra*.

CHAPTER 6

PUBLICITY ON CONVICTION

Suggestion to give publicity.

6.1. In the course of our oral discussions, a suggestion has been made that in cases of conviction of murder and other serious offences, suitable publicity in newspapers and other media should be given, so that the public may come to know of the state of crime in the country and it might also act as a deterrent. While we appreciate the object underlying the suggestion, we should point out that there are certain other countervailing considerations that might require to be taken note of. It is true that the object of deterrence may, to some extent, be achieved by such publicity; but, as against that, it should not be overlooked that modern penological theory places emphasis on the rehabilitation of the criminal as well. Where there is no possibility of a repetition of the offence by the convicted person, such publicity might have no utility from the point of view of deterrence of *that particular individual*, and might come in the way of full rehabilitation being achieved.

Discussion in earlier Report.

6.2. In this context, we may also note that the question of giving publicity to convictions was considered at some length when the Law Commission dealt with the Indian Penal Code.¹ After an examination of the pros and cons of the matter the Commission recommended the introduction of publicity as a type of punishment in certain cases—mainly those were cases of anti-social offences which are indulged in persistently by “white-collar criminals” and in regard to which publicity might act as a real deterrent. Likelihood of repetition of such offences is very high, having regard to the nature of the activity. The same may not necessarily be true of rape.

Suggestion not accepted.

6.3. We are not, therefore, inclined to accept the suggestion which, in any case, is concerned with serious offences in general and is not confined to sexual offences.

¹. Law Commission of India, 42nd Report (Indian Penal Code), pages 55—57, Paras 3.21 to 3.25.

CHAPTER 7

EVIDENCE

I. Introductory

7.1. We propose to consider in this Chapter certain matters pertaining to the law of evidence in so far as its provisions or rules are relevant to the offences with which this Report is concerned. Although, in general, rules of evidence occupy a subordinate position in legal literature, in this particular case, they seem to have a very important bearing on the subject of this Report. Scope.

7.2. When one views the matter exclusively from the point of view of the victim, the difficulties which confront a woman who alleges she has been raped, become apparent. First, she must convince the police, then be subjected to a medical examination and finally undergo an embarrassing and humiliating cross-examination in Court. In rape cases, evidence about the victim's past sexual or gynaecological experiences is presumed to have a bearing on the outcome of the trial. Disadvantageous position of the victim.

7.3. In the field of evidence as relevant to the offence of rape, the main issues that are usually discussed are complaint,¹ proof of want of consent,² the need for corroboration of the testimony of the victim,³ and evidence of character of the victim,⁴ and other improper questions.⁵ Besides these, we shall also deal with one suggestion as to evidence of character of the accused.⁶ Issues in the field of evidence.

7.4. The Law Commission, when it examined the Indian Evidence Act some time ago, had occasion to consider the difficulties faced by a witness who has to undergo cross-examination as to character, and made certain recommendations on the subject.⁷ Earlier Report on Evidence Act.

However, these recommendations were concerned with witnesses in general. As regards a woman who is a victim of a sexual offence, no change of substance was considered. In section 155(4) of the Evidence Act—which permits evidence of 'general immoral character' of the prosecutrix—a verbal change was recommended.

This being the position, a few aspects relevant to evidence of character of the victim which did not then come up before the Commission⁸ will have to be gone into, in the present Report.

II. Complaints

7.5. On the subject of evidence, we may first mention a rule which is of special relevance to the offence of rape—the rule governing the admissibility of a complaint made by the female soon after an alleged sexual offence. This is based on the principle that the complaint is a part of the same transaction, and also on the reasoning that the law considers a complaint as a natural expression of the feelings of the victim, thereby lending credibility. While, on the one hand, long delay or failure in making the complaint is regarded as a suspicious circumstance, on the other hand, a prompt complaint is regarded as evidence confirming or corroborating the allegation of the victim, and repels any possible doubt that the story was a mere fabrication. Complaint (section 8) and the doctrine of "hue and cry".

It may be that the rule permitting evidence of complaint is a survival of the ancient requirement that the injured woman should make a "hue and cry"⁹ as a preliminary to her "appeal of felony".¹⁰ But the rule, in its present form, does not operate to the detriment of the

1. Paragraphs 7.5 and 7.6, *infra*.

2. Paragraphs 7.7 to 7.13, *infra*.

3. Para 7.14, *infra*.

4. Paragraphs 7.15 to 7.28, *infra*.

5. Para 7.29, *infra*.

6. Para 7.30, *infra*.

7. Law Commission of India, 69th Report (Indian Evidence Act, 1872) (May 1977), pages 826-834, Chapter 87.

8. Law Commission of India, 69th Report (Indian Evidence Act, 1872), pages 831-832, paragraphs 87.18 to 87.24.

9. See Black, Law Dictionary (1979), page 667, Left-hand column and Stroud, Judicial Dictionary (1972), Vol. 2, page 1270.

10. As to "appeal of felony", see Stephen, History of Criminal Law, Vol. 1, page 244.

female. The rule enables evidence to be given to confirm her credibility, and operates as an exception to the rule against hearsay as incorporated in section 60 of the Evidence Act.

Matter needing change.

7.6. There are, however, certain other matters in regard to which there is need for change in the law of evidence. We shall address ourselves, in particular, to certain questions concerning the past character of the woman. The law on the subject is unduly harsh against women who are victims of sexual offences.

III. Want of consent—how proved

Burden of proof of want of consent.

7.7. Want of consent being a cardinal element of rape under section 375, second clause of the Indian Penal Code, it is for the prosecution to prove it. Now, it is common experience that many prosecutions for rape fail for want of such proof. There often arise situations where the probability is that the woman did not consent, but sufficient legal proof of want of consent is not forthcoming.

For example, the woman may be physically too weak or mentally too dazed to resist (so that no marks of violence could come into existence). Or, the venue of the offence—e.g. the secluded place in which rape is committed,—may totally take away the inclination to resist, even if there is a physical capacity to do so, because resistance in such circumstances would be futile. Same would be the case where the woman about to be attacked knows that the offender is well armed, or where what has come to be known as “gang rape” is committed. In such cases also, resistance would be futile, and may even cause more harm than passive submission. In such situations, marks of resistance or other visible signs of “no consent” cannot be insisted upon.

In our opinion, it should be obligatory for the Court to draw *prima facie* inference of want of consent, once the woman who is alleged to be the victim states in the witness box before the Court in her evidence that she did not consent.¹

Section 114, Evidence Act.

7.8. Even now, if due regard be had to the provisions of section 114 of the Indian Evidence Act, the Court is competent to presume want of consent in such special circumstances as are mentioned above²—provided, of course, the other circumstances are consistent with want of consent.

The extent to which the victim may resist is for her to determine, and there are naturally no minima or maxima in this regard. The woman is required to go no further than is necessary to make manifest her unwillingness to yield to the attack. The amount of visible resistance, if any, must depend on the facts. Resistance is important only as evidence of non-consent. The crime does not hinge upon the woman's exertion.³

Signs of violence.

7.9. It is a peculiarity of the offence of rape that usually there are no witnesses excepting the victim herself. Proof of the offence, therefore, primarily depends on the credibility of the allegations of the victim. It is mainly for this reason that a statement of the woman that there was intercourse *without her consent* is often not accepted unless there is some overt evidence of want of consent. Bruises, scratches or other marks of struggle may constitute such evidence, but that would, at best, be a feeble evidence of want of consent.

Unfortunately, such marks of struggle are sometimes regarded as constituting the only evidence of want of consent. Such an attitude, though deeply regrettable, has no basis in the statutory provisions constituting the law of evidence in India. In fact, the Indian law of evidence does not, in general, lay down that a particular species of evidence should be insisted upon in proof or disproof of a particular fact. The Evidence Act lays down certain general rules which indicate the nature of facts that can be proved. If a fact to be proved is a fact in issue, its consequences (effects) are, no doubt, relevant. But proof of those consequences or effects is not limited to particular species of evidence. Thus, if want of consent is the fact in issue, its consequence—the physical resistance or struggle—is, no doubt, relevant; and so is the consequence of that physical struggle, namely, marks on the body. But the law does not lay down that only that piece of evidence can be given.

The point, in fact, need not be laboured further.

¹. For draft see para 7.11. *infra*.

². Para 7.7, *supra*.

³. See also para 2.11, *supra*.

7.10. We would have left the matter at that. However, having regard to the *modus operandi* of committing rape that has become more frequent during recent years, it would be useful if, by a specific statutory provision, the statement made in evidence by the prosecutrix is regarded as raising a presumption of want of consent. As life becomes more complex and the ways of criminals more sophisticated, situations of the nature that we have mentioned above might become more frequent, and the necessity of invoking some such presumption as is suggested above may become more apparent. We are, therefore, of the view that where rape is alleged to have been constituted by sexual intercourse without the consent of the woman—*i.e.*, in the case contemplated by section 375, second clause—the court shall presume that there was want of consent, provided the prosecutrix has stated so in her evidence.

Need to **change** the law.

It may be mentioned that under the Evidence Act, the use of the expression “shall presume” does not bar rebutting evidence in regard to the fact about which a presumption is made.

7.11. In the light of the above discussion, we recommend the insertion of the following new section in the Indian Evidence Act, 1872 :—

Recommendation to add section 111A in the Evidence Act.

“111A. In a prosecution for rape or attempt to commit rape, where sexual intercourse is proved and the question is whether it was without the consent of the woman and the woman with whom rape is alleged to have been committed or attempted states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.”

7.12. One of the points made in the Debates on the motion in the Lok Sabha¹ on the subject of rape of women was that if intercourse is proved, it should be presumed that it was an act of rape against the consent of the girl.

Presumption of want of consent.

7.13. In the course of our oral discussions² with women's organisations, it was stated that in the case of a person *in authority* who has sexual intercourse with a woman under his authority, the burden of proof of consent should be placed on the accused.

Burden of proof in case of a person in authority.

The amendment just now recommended by us³ would, in substance, achieve the object underlying these suggestions.

IV. Corroboration

7.14. During the debates⁴ on the motion in the Lok Sabha on the subject of rape, it was also pointed out that for a crime committed some time in the dark hours of night or in the dark corner of a house, it was impossible to get corroboration. It was also suggested that it was time to change the practice in this regard. We have taken note of this aspect, and hope that the amendments recommended by us in the law of evidence, together with the law as expounded by the Supreme Court on the subject of corroboration in two important judgments,^{5,6} will serve the purpose and advance the cause of justice. The judgments were pronounced in 1952 and 1958, and were followed in later judgments^{7,8} of 1972 and 1973.

Corroboration.

V. Past sexual history

7.15. We now deal with a very vital question of evidence related to prosecutions for rape. The question is this—how far should the past sexual history of the victim of rape be allowed to be given in evidence in Court on behalf of the accused? More than any other point of evidence, this has been the source of the very grave dissatisfaction with the legal system and of the feeling of alienation of the general public from the law and its processes, to which we have made a reference in the introductory⁹ Chapter.

Past character as a relevant fact—Sections, 8, 9, 11 and 14, Evidence Act.

1. Lok Sabha Debates, 28th March, 1980, column 8975.

2. Oral discussions held on 15th April, 1980.

3. Para 7.11, *supra*.

4. Lok Sabha Debates, 28th March, 1980, column 8972.

5. *Rameshwar v. State of Rajasthan*, A.I.R. 1952, S.C., 54; (1952), S.C.R. 377; (1952), Cr. L.J., 547.

6. *Sidheswar Ganguly v. State of West Bengal*, A.I.R. 1958 S.C. 143; (1958) S.C.R. 749; (1958) Cr. L.J. 273.

7. *Gurcharan Singh v. State of Haryana*, A.I.R. 1972 S.C. 2661.

8. *Madho Ram v. The State of U.P.*, A.I.R. 1973, S.C. 469.

9. Chapter 1, *supra*.

In the first place, where the issue is one of consent, evidence of past intercourse with the accused may become relevant under the omnibus provision in section 11 of the Evidence Act, under which a fact is relevant if it renders highly probable or improbable the existence of another fact in issue or relevant fact.

Secondly, evidence of past acts of intercourse with the accused may become admissible as showing passion (a "state of mind"—section 14).

Thirdly, sections 8 and 9 of the Evidence Act could arguably be invoked to render past acts of sexual intercourse relevant as showing conduct influenced by a fact in issue or a relevant fact.

7.16. Of course, the sections¹ of the Evidence Act referred to above² would be material only on the issue of consent, and the evidence that can be permitted thereunder must also relate to specific acts of sexual intercourse with the accused (or undue sexual familiarity with the accused).

Section 155(4),
Evidence Act.

7.17. Besides these sections, however, there is a more specific provision in section 155(4) of the Evidence Act, under which, in a prosecution for rape or attempt to ravish, evidence can be given of the "general immoral character" of the "prosecutrix". This provision, it will be noticed, is not confined to past sexual familiarity *only with the accused*. It is wide enough to cover sexual immorality in relation to others. We need not, at the moment, concern ourselves with the question whether *particular sexual episodes* can be given in evidence under this provision. What needs to be emphasised is that matters in which the accused is not at all concerned can also be brought on the record under the head of "general immoral character" by virtue of section 155(4). This means that even if the charge is one of sexual intercourse with a girl below the age of sixteen years—section 375, clause fifthly, Indian Penal Code—which is punishable irrespective of the girl's consent, evidence can be given of her "general immoral" character.

Section 146,
Evidence Act.

7.18. Finally, there is the general provision as to impeaching the credit of witnesses by "injuring their character", and other modes of impeaching credit mentioned in section 146 of the Evidence Act. Of course, this section is not confined to sexual offences or to the "prosecutrix". It is a general provision applicable to all trials. But, since this Report is concerned with sexual offences and since the present discussion is concerned with the position of women who are the victims of such offences, it is proper to mention that under this section, questions are, in practice, often put relating to the past character of the prosecutrix in sexual offences.

General approach
adopted.

7.19. We shall indicate, in due course,³ our precise recommendations on the relevant provisions mentioned above.

But it would be appropriate to mention at this stage that these recommendations are all connected by a common thread. The connecting guideline is this—in a case of rape or attempted rape, even if past immoral character of the "prosecutrix" is technically permissible as substantive evidence or in cross-examination under the present law, that position needs to be modified and such evidence or cross-examination should be prohibited except as regards sexual relations with the accused.

The reasons for such an approach may be thus stated :

(a) in so far as such evidence relates to the *issue of consent*, there are social evils resulting from the tendering of such evidence and those evils counter-balance the possible probative value of the evidence,

(b) in so far as such evidence does not relate to the issue of consent and is offered merely to injure the character or shake the credit of the woman, it is not proper for the law to countenance it—when such evidence cannot be given against men who are victims of sexual offences.

We are happy to mention here that the general approach that we have adopted in regard to the purposes for which, and the extent to which, the past sexual history of the "prosecutrix" may be permitted to be raised as substantive evidence (or in cross-examination) is in broad and

1. Sections 8, 9, 11 and 14, Evidence Act.

2. Para 7.15, *supra*.

3. See *infra*.

substantial harmony with the views expressed during our oral discussions by some social organisations, including an organisation of women lawyers.¹

7.20. Having indicated the connecting guideline that constitutes the common thread underlying our approach to various provisions under which the question of the sexual history of the prosecutrix may be raised, we now proceed to indicate more concretely, and in regard to each section of the Evidence Act, the amendment that we have in mind so as to carry out the general approach mentioned above.

Sections 155(4), 146 and 53A (proposed), Evidence Act—Recommendation.

With reference to section 155(4) of the Evidence Act, it is pertinent to point out that the rule which permits evidence of previous sexual history of the complainant should be considered under two headings, namely, (i) previous sexual relations with the accused, and (ii) such relations with other persons.

So far as sexual relations with the accused are concerned, the assumption underlying the admissibility of such evidence would appear to be that once a woman has consented to a sexual relationship with a particular man, she is unlikely to dissent at a later stage. Though such an assumption may not be necessarily realistic in every case, it could occasionally be true. There is, therefore, justification for retaining it.

7.21. So far as previous sexual relations with other persons are concerned, there is, in our opinion, strong justification for change in section 155(4). The case for admitting such evidence is totally weak, if not completely without foundation. Such an evidence is not permissible as regards male victims,² or even in the generality of cases not involving sexual offences. It seems, therefore, hardly defensible, at least at the present day, to continue a legal provision whereunder the character of a female witness can be impeached merely because she happens to be a "prosecutrix" in an offence of rape or attempt to commit rape.

Section 155(4) and sexual relations with other persons.

Evidence of acts of intercourse with persons other than the accused indicates a remote or faint likelihood of the woman having consented to the particular act. Even when a harlot or a prostitute is raped, her consent at the time of the commission of the crime must be proved by evidence *aliunde*.

For all these reasons, section 155(4) requires modification so as to *exclude evidence of sexual relations with persons other than the accused*.

7.22. We find that another aspect of section 155(4) also requires to be looked into. Section 155(4) is, at present, applicable even where consent is not material. The section is wide enough to apply not only where rape is charged under the category of "want of consent", but also where it is charged under some other head,—for example,—where the offence is committed in respect of a girl below the statutory age. The fact that the prosecutrix is a person of "general immoral character" cannot have significance whatsoever where the prosecution is not based on the want of consent. As regards the credibility of the girl as a witness, that is to say, leaving aside the issue of consent, there does not seem to be any reason why the law should contain a rule discriminating against women. If "general immoral character" is regarded as shaking the credit of the female, it can as well be regarded as shaking the character of a male witness. But there is no corresponding provision applicable to a male "prosecutor".

Section 155(4)—another point for amendment.

It is wrong to assume that a *female witness* is less likely to tell the truth when she has a generally immoral character. Evidence of sexual immorality cannot be admitted in other cases as substantive evidence.

7.23. These are not merely theoretical arguments. The provision in section 155(4) sometimes causes serious hardship. The victim of rape, questioned at length, very often feels humiliated, particularly at home or amongst neighbours or at work or at school. Self-consciousness and shame, resulting from queries and adverse comments, might even result in a permanent scar on her peace of mind and psychic well-being. In this respect, the provision in section 155(4) may be regarded as deserving of serious re-consideration.

Difficulties caused by section 155(4).

7.24. There can hardly be any doubt that an unrestrained questioning on such matters can amount to a destruction of the reputation and self-respect of the woman. There must be struck a balance between the demands of fair trial and the dignity of the woman. The law should reflect an approach which protects her interests, without compromising those of fair trial.

Harm to reputation—danger of.

¹. Discussions from 9th to 15th April, 1980.

². See *supra*.

Amendment of section 155(4). recommendation. 7.25. On a careful consideration of the matter, we have come to the conclusion that section 155(4) of the Evidence Act should be amended as suggested above.¹ In brief, it should be confined to sexual relations with the accused and that too only where consent is in issue.

Section 146, Evidence Act. 7.26. But this amendment of section 155(4) of the Evidence Act would not be an adequate measure for reforming the law. Theoretically, it would still continue to be permissible to give evidence about the "character" of the female prosecutrix under the general provision in section 146 of the Evidence Act. The possibility of such an alternative being open to the accused in cross-examination of the female prosecutrix in a prosecution of rape or attempt to commit rape ought, in our view, to be totally eliminated, for the reasons stated above.

One effective method of doing so would be to insert a provision in the Act by way of addition to section 146, to the effect that in a prosecution for rape or attempt to commit rape, where the question at issue is the consent of the woman, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the prosecutrix as to her general immoral character, or as to her prior sexual experience with any person other than the accused.

Amendment of section 146. 7.27. Accordingly, we recommend that the following sub-section should be added to section 146 of the Evidence Act :—

"(4) In a prosecution for rape or attempt to commit rape, where the question of consent to sexual intercourse or attempted sexual intercourse is at issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the prosecutrix as to her general immoral character, or as to her previous sexual experience with any person other than the accused for proving such consent or the quality of consent."

Section 53A (proposed) to exclude evidence as to character. 7.28. Even this amendment of the law, however, would not be enough. In our opinion, it is also necessary to exclude the possibility of evidence of general immoral character being tendered under the sections² of the Act which relate to substantive evidence.³

Accordingly, we recommend that the following new section should be inserted, in the Evidence Act, say—as section 53A :—

"53A. In a prosecution for rape or attempt to commit rape, where the question of consent to sexual intercourse or attempted sexual intercourse is at issue, evidence of the character of the prosecutrix or of her previous sexual experience with any person other than the accused shall not be relevant on the issue of such consent or the quality of consent."

VI. Improper questions

Section 150, Evidence Act—Amendment recommended. 7.29. So much as regards evidence of sexual history. We now deal with the position as to improper questions in general. The Evidence Act has a catenna of provisions whose object is to ensure that questions intended to shake the credit of witnesses by injuring their character are kept within legitimate bounds. Nevertheless, it is sometimes seen that such questions are put indiscriminately in the lower courts. It then becomes the duty, though unpleasant, of the presiding officer of the court to report the matter to the appropriate authority for action, if the question is put by a legal practitioner. The Evidence Act has a specific provision in this regard, to be found in section 150. The object of the provision is that the authority to which the matter is reported may take suitable action. With this end in view, the section provides that "if the court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession".

Various amendments suggested in section 150. 7.30. So far as the words referring to the various categories of "legal practitioners" are concerned, they should now be replaced by the word "advocate", and such a recommendation was, in fact, made by the Law Commission, in its Report on the Evidence Act.⁴

1. Para 7.21 and 7.22, *supra*.

2. Sections 8, 9, 11 and 14, Evidence Act.

3. See paragraph 7.15, *supra*.

4. Law Commission of India, 69th Report (Indian Evidence Act, 1872), page 814, para 84.33 and footnote 3.

The Law Commission, in its Report on the Act, also recommended deletion of the words "or other authority" from this section. This would mean that the matter would be reported to the High Court. We would, however, recommend that instead of the matter being reported to the High Court, it should be reported to the State Bar Council, which (under the present statutory set up) is empowered to take appropriate disciplinary action in such cases. We, therefore, recommend that section 150 of the Evidence Act should be revised so as to read as under :—

Revised section 150, Evidence Act

"150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any *advocate*, report the circumstances of the case to the *State Bar Council*."

VII. *Character of the accused*

7.31. One of the women's organisations with whom we have held oral discussions has suggested that the Evidence Act should be amended suitably by providing that evidence of character of the accused shall be relevant in all cases of rape and molestation of women. Since we are recommending¹ amendment of the provision in section 155(4) of the Evidence Act which at present permits evidence of the "general immoral character" of the prosecutrix, we do not propose to recommend the change contemplated in the suggestion.

Character of the accused.

1. See recommendation as to section 155(4), Evidence Act, para 7.25, *supra*.

CHAPTER 8

CONCLUSION

- Effect of our proposals. 8.1. We have come to the end of the task committed to us. We believe that we have made proposals to secure that no person who has committed rape escapes punishment, that women who become victims of rape are not harassed during the course of investigation and trial in the Court and that the trial of persons charged with rape is speeded up, to ensure that the police discharge efficiently and promptly the manifold and complex problems that confront them in rape cases, and to assure the free movement of women by giving them protection when they move out, as also to the inmates of women's lodgings and hostels.
- Changes whether going for enough or too far. 8.2. There may be some who feel that the changes recommended by us are likely to be for the worse. Such persons are too complacent for our taste. There may be still others, who may regard our recommendations as nothing more than an attempt to patch-up the system of criminal justice, which, according to them, is so defective as to be beyond redemption. We do not delude ourselves into thinking that our proposals will bring into the investigation and trial of cases of rape a state of perfection. Sometimes one's best endeavours go awry. What we have attempted is to strike a balance between the interests of the accused and those of the victim in a case relating to rape, and thus to protect the interests of the society.
- Effect of films and the real challenge. 8.3. During the course of discussion with us, a lady Member of Parliament¹ pointed out the pernicious influence of Indian films highlighting rape and its attendant violence. The real challenge, therefore, in dealing with the problems of rape and its horrors lies in rousing public consciousness against it, and in preventing the publication and exhibition in any form of that trash material, which only corrupts the minds of the youth and of the deprived. To this problem we commend Government's earnest and immediate attention.

P. V. Dixit Chairman

S. N. Shankar Member

Gangeshwar Prasad Member

P. M. Bakshi Member-Secretary

25th April, 1980.

¹ Mrs. Sushila Adivarekar, M. P. (Rajya Sabha).

APPENDIX 1

Copy of Letter No. PS/LS/LA/80, dated 27th March, 1980 from the Secretary, Department of Legal Affairs to the Member-Secretary, Law Commission of India.

P. B. VENKATASUBRAMANIAN
SECRETARY

D.O. No. PS/LS/LA/80

Government of India
Ministry of Law, Justice & Co. Affairs,
Department of Legal Affairs.

New Delhi, the 27th March, 1980

My dear Bakshi,

You would be aware that recently there has been a considerable amount of discussion in the Press and in other Forums regarding the inadequacy of the law to protect women who have been victims of rape or assaults on their modesty. There has also been a certain amount of criticism that the law does not contain enough safeguards to protect the women who might be summoned to police stations or other like places for the purposes of interrogation or investigation, or who might be taken and kept in custody.

2. In view of the strong public opinion on this point, Government desires that the Law Commission should make a special study of the subject. The study should cover not only the substantive law relating to rape, but also the rules of evidence and the procedure followed in criminal trials wherein a person is charged with the offence of rape or for assault on the modesty of a woman and other related matters. The existing practice and the administrative instructions with regard to interrogation and arrest of women might also be gone into.

3. Government would like the Commission to give the top most priority to this work and to submit an urgent report within as short a period as possible.

4. In this connection, a copy of a letter addressed to the Prime Minister by Shrimati Sushila Adivarekar, M.P. and the recent instructions issued by the Ministry of Home Affairs which might be of use to you are being sent separately.

With kind regards,

Yours sincerely,

Sd/-

(P. B. VENKATASUBRAMANIAN)

Shri P. M. Bakshi.
Secretary
Law Commission,
Government of India,
New Delhi.

APPENDIX 2

List of persons and bodies with whom discussions were held

9th April, 1980.

1. All India Women's Conference, New Delhi.
Represented by :
 - (a) Mrs. Raksha Saran,
Patron.
 - (b) Mrs. Urmila Kapoor,
Member-in-charge of Legislation.
 - (c) Mrs. Padma Seth,
Member-in-charge of Publicity & Public Relations.
2. Young Women's Association, New Delhi.
Represented by :
 - (a) Mrs. Prem Wati Thaper,
Vice-Chairman.
 - (b) Mrs. Nirmal Malhotra,
Secretary,
 - (c) Mrs. Promila Gupta,
Member, Executive Council.

10th April, 1980.

3. Young Women's Welfare Association of India, New Delhi.
Represented by :
 - (a) Mrs. Raj Usha Chopra,
President.
 - (b) Mrs. S. Nagia,
Secretary (Social Welfare) of the Association.
4. National Federation of Indian Women, New Delhi.
Represented by :
 - (a) Mrs. Vimla Farooqi,
General Secretary.
 - (b) Mrs. Manmohini Sehgal,
Secretary
 - (c) Miss Anima Chatterji,
Treasurer.

11th April, 1980.

5. Nari Raksha Samiti, Delhi.
Represented by :
 - (a) Mrs. Sarla Mudgal
President.
 - (b) Mrs. Krishna Kumari Sharma,
Secretary.

14th April, 1980

6. Stri Sangharsh, New Delhi.
Represented by :
 - (a) Mrs. Subhadra Butalia.

15th April, 1980

7. Mrs. Sushila Adivarekar,
Member of Parliament (Rajya Sabha).
8. National Council of Women in India, New Delhi.
Represented by :
 - (a) Mrs. Vimla Virmani,
Convenor.
 - (b) Mrs. S. Dhawan,
Secretary (Delhi Branch).
9. National Federation of Indian Women Lawyers (Delhi Branch).
Represented by :
 - (a) Miss Scita Vaidyalingam,
Advocate, Supreme Court.