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The Mohit Subhas Judgment: Sentencing Remarks and Victimisation

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Abstract

Sexual violence against women in India is on the rise. Every year, the NCRB Statistics reveal new data on the increasing number of such cases. In this instance, the Judiciary is considered the organ responsible for upholding constitutional values of gender equality. However, time and again, it has been observed that the judiciary has engaged in such 'sentencing remarks' that have further subjected the victims of sexual abuse to victimization and social stigma at the hands of the pillars of justice. This paper thus aims to analyze whether the use of judicial discretion in sentencing remarks to victims of sexual violence aligns with the tenets of constitutional morality or not. Whether such remarks lead to further discrimination and victimization or not?

Keywords: *Feminist Jurisprudence, Gender Discrimination, Judicial Discretion, Sentencing Remarks, Sexual Abuse, Victimisation*

1.0 Introduction

"*I measure the progress of a community by the degree of progress which women have achieved*" - *Babasaheb Bhim Rao Ambedkar*

Gender Justice and Gender Equality are crucial factors for the inclusive growth of any society. Today, we belong to the 21st century and are still grappling with the question of "whether gender equality exists in practice or only in the letters and spirit of the law." As per National Crime Records Bureau Statistics, sexual violence against women in India occurs every sixteen minutes." (Explainers, 2024) While the data shocks the conscience of every citizen of this country, what is further appalling to witness is the trend in sentencing remarks by the judiciary in dealing with cases of sexual violence, the organ responsible for ensuring miscarriage of justice. Such remarks not only lead to further victimization but also reinstate the centuries of oppression faced by women under patriarchal dominance.

2.0 Evolution of Feminist Jurisprudence in India

The growth of feminist jurisprudence in India cannot be studied without referring to the history of oppression and discrimination fought by women in India. During the Vedic times, women enjoyed high status. They had access to educational opportunities, the right to participate in religious ceremonies, and the right to choose their life partners and their societal position was honoured and revered. (Upadhyay, 2022) However, the position of women in colonial India was subjected to patriarchal domination. Their role was mainly confined to the domestic household; they were deprived of economic liberty and subjected to cultural and religious restrictions. (Dey, 2021) However, the British legacy did have some positive impact by revoking discriminatory practices like 'Sati' and 'Widow Remarriage' followed in the name of religious autonomy. (Nandwani & Roychowdhury, 2023) The Independence movement also empowered women on

many fronts. During the 1920s, women's participation in the freedom struggle marked a major step towards the demand for equal rights and opportunities for both men and women in independent India. (Dubey, 2016) In the 1930s, women's participation in the civil disobedience movement under the leadership of Mahatma Gandhi was one such crucial event. (Dubey, 2016) This was coupled with forming associations of women freedom fighters at both local and national levels with organizations such as the All India Women Conference of Indian National Congress. (Lodhia, 2009). However, with the nationalist movement and the bigger challenge being the rise of colonialism, the issues involving discrimination faced by women in colonial India took a back seat. Though during the partition, writings of scholars like 'Veena Das, Urvashi Butalia, Ritu Menon, and Kamla Bhasin on 'Sexual violence faced by women during partition' gained prominence (Menon, 1998), it was only after independence through cases like Mathura Gang Rape (Supreme Court, 1979), *Vishaka and Ors. v. The State of Rajasthan* (Supreme Court, 1997), the discourse on sexual violence against women in India, issues such as the conduct of a victim in rape cases and the prejudices applied when determining the issue of consent, became a part of judicial scrutiny and made reformative changes in the legislature through major criminal law amendments like the Criminal Law Amendment Act, 1982 (Criminal Law Amendment Act, 1983), 2005 Criminal Law Amendment Act, 2005), 2008 (Criminal Law Amendment Act, 2008), 2013 (Criminal Law Amendment Act, 2013) and 2018 (Criminal Law Amendment Act, 2018).

3.0 Legal Safeguards for Violence Against Women in India

The constitution of India, through Articles such as Article 14 (equality before the law and equal protection of the law), Article 15 (prohibition of discrimination on grounds of sex), Article 16 (equality of opportunity in matters of public employment), Article 39A (decent standard of living for all including women), Article 243D and 243T (ensuring special status through the reservation of one-third seats for women in Panchayat and Municipality Level), Article 51A (e) (enshrines a moral duty on the citizens of India to denounce practices derogatory to Indian women) formulates the foreground for the development of women-centric legislation in India and thus represents India's commitment in promoting gender equality. On these lines, our criminal laws provide various rights to women during arrest and interrogation. (Goyal, 2020) Concerning laws against domestic violence, which is one of the gravest forms of peril faced by women in India, there are special legislation like the Protection of Women from Domestic Violence Act, 2005 (Acts of Parliament, 2006) and provisions under Bharatiya Sakshya Adhiniyam, 2023 (Acts of Parliament, 2023) and Bharatiya Nyay Sanhita, 2023 (Acts of Parliament, 2023) related to cruelty, dowry death, presumption of suicide within seven years of marriage and irrelevancy of character in determining question of consent. (Acts of Parliament, 2013) Apart from laws on Rape and Sexual Assault under the Bharatiya Nyaya Sanhita, (Acts of Parliament, 2023), there are special enactments like the Prevention of Sexual Harassment of Women at Workplace, Act 2013 (Acts of Parliament, 2013), Indecent Representation of Women (Prohibition) Act, India, 1986 (Acts of Parliament, 1986); Immoral Traffic (Prevention) Act, 1956 (Acts of Parliament, 1956), The Medical Termination of Pregnancy Act, India 1971 (Acts of Parliament, 1971); The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, India 1994 (Acts of Parliament, 1994) which aim to prevent all forms of violence against women in India.

While the legislature is ardent on its promise to ensure the prevention of discrimination and violence against women in India, the judiciary also, time and again, has kept its promise of fair treatment of victims of sexual assault and prevent their further victimization through reformative precedents like *Sheikh Zakir v. State of Bihar, (Supreme Court,1983), State of Haryana v. Premchand & others, State of Maharashtra & others v. Madhukar Narayan Mardikar, (Supreme Court, 1991),* wherein it was held that the conduct of the victim of rape is irrelevant. Further, to ensure that the victim is not subjected to further character assassination through cross-examinations, landmark precedents like the *State of Punjab v. Gurmit Singh, (Supreme Court, 1996)* were promulgated. The judiciary also upheld the right to compensation for victims of sexual abuse through precedents like *P Rathinam v. Union of India*. Thus, it is paradoxical to observe that a judiciary that is committed to the purpose of upholding the values of constitutional morality in terms of providing equal treatment to men and women, in many instances, has engaged in sexist remarks, stereotypical biases, and

preconceived notions of gender roles while dealing with victims of sexual offences. Thus, taking the progress on gender equality one step ahead and two steps backwards. One such instance was when the 47th CJI of India, Justice SA Bobde while hearing an anticipatory bail application of an accused of rape, proposed a marriage proposal for the victim.

4.0 CJI's Remarks: A Step Backwards in Justice for Rape Victims

4.1 Facts of the Case: Mohit Subhash Chavan v. the State of Maharashtra (Will You Marry Her, 2021)

In the present case, the petitioner Mohit Subhash Chavan a 23-year-old government servant in the state of Maharashtra was accused of raping a 16-year-old minor girl. The incident dates back to 2014-15 when the victim was in the ninth standard. The accused was a distant known relative of the victim and, on many occasions, used to visit the house of the victim and used to stalk her consistently. Thereafter the accused one day entered through the backdoor of the house and raped the victim. The accused, after committing the said act, threatened the victim with ill consequences for not lodging an FIR. "Thereafter on many occasions the accused visited the house of the victim and raped her. The victim then tried to complain with the help of a social worker. However, the accused and his mother dissuaded the victim and promised her to marry her son. However, the accused later married someone else."

Thus, an FIR was filed in 2019 under sections 376, 417 and 506 of the Indian Penal Code, 1860 and sections 4 and 12 of the Protection of Children from Sexual Offences Act, 2012 (POCSO). The learned Session Court granted bail to the accused, presuming it to be consensual sexual intercourse between the accused and the victim, and considered the victim to have sufficient maturity to understand the consequences of such an act. However, the Bombay High Court (Aurangabad Bench) criticized the lack of a sensitive approach adopted by the trial court in such a case and rejected the grant of Anticipatory Bail. (Will You Marry Her, 2021)

Thus, the petitioner filed a Special Leave Petition (SLP) before the Supreme Court and the matter came for hearing before a three-judge bench compromising of the then Chief Justice of India (CJI) SA Bobde and Justices AS Bopanna and V Ramasubramanian on 1st of March 2021. (Will You Marry Her, 2021)

4.2 Decision of the Apex Court

While hearing the matter, the three-judge bench of the Apex Court granted protection of arrest to the accused for four weeks and dismissed his petition granting permission to seek regular bail. However, in pursuance of the same what garnered much criticism was the question asked by former CJI SA Bobde. The CJI asked the petitioner, *"Will you marry her?" He further went on to ask, "We are not forcing you to marry. Let us know if you will. Otherwise, you will say we are forcing you to marry."*(Will You Marry Her, 2021)

This comment by the Chief Justice of India himself became the subject of huge criticism from the advocates of feminist jurisprudence. It raised questions as to whether such proposals of marriage given by the apex court and the subordinate courts in many instances to sexual assault victims lead to further victimization of the already victimized and whether it is also a violation of the basic tenants of the 'right to choose a life partner' as enshrined under Article 21 of the constitution of India.

5.0 Judicial Discourse on Sexual Assault Victims

According to Austin, "*Judicial Words bear illocutionary Force as acts or mandates for deeds.* (Austin & Sakamoto, 1975). Thus, legal language has a significant impact on the growth and progress of society. CJI DY Chandrachud, while delivering his concurring opinion in *Navtej Singh Johar v. Union of India* (Supreme Court, 2018), held that legal language used by judges must reflect constitutional values. When the use of legal language reflects, perpetuated stereotypes about a class or sex, the same must be held in violation of Article 15(1) of the constitution of India. However, time and again, the judicial attitude while dealing with cases of sexual assault and sentencing remarks used by the learned judges in many instances reflect an inherent stereotypical attitude about the conduct of women in society and the gender roles assigned to them, thus reflecting a patriarchal mindset. For instance, the Karnataka High Court in the

case of *SRI Rakesh B v. State of Karnataka (Karnatka High Court,2020)* commented on the conduct of victims of rape by stating that it is "*Unbecoming of Indian Women to go to sleep after being raped.*" Similarly, the High Court of Jammu and Kashmir, in the case of *M.I. Shahdad v. Mohd. Abdullah Mir* (All India Reporter, 1967) dealing with the issue of whether serving summons only on the adult male member of the family is discriminatory or not, held that the provision was justified as women, according to social standards and conditions of the society, are deemed to be functioning mostly as housewives and are illiterate and some of them '*parda nashin.*' The Kerela High Court *in V.V. Prabhakaran v. T. Chandramathi* (Nair, 2020) also stereotyped the role of an 'ideal woman' and commented, "*A wife should be minister in purpose, slave in duty, Lakshmi in appearance, Earth in patience, mother in love and prostitute in bed.*" (Nair, 2020) Thereafter, the same Kerela High Court, in the famous 'Hadiya Case,' remarked that a "*girl aged 24 years is weak and vulnerable and capable of being exploited in many ways and marriage being the most important decision of her life must be taken only with the consultation of his parents.*" (All India Reporter, 2018) The Delhi Court further, in one instance, in complete disregard with the position of law as to the irrelevancy of the previous sexual relationship of a rape victim in determining the question of consent, in the case of "*Mahmood Farooqui v. State (NCT Delhi)" (Delhi High Court, 2017)*" commented that, "*the supposed feebleness with which she said 'no' to the sexual act*" is questionable. Recently, the Supreme Court took suo-moto cognizance of a similar instance in which the Calcutta High Court made controversial remarks as to how adolescents are supposed to conduct themselves concerning controlling sexual urges and prevent themselves from giving in to "two-minute pleasure" and overturned the judgment of the High Court. (Sarda, 2024) Further, the Apex Court laid guidelines for the judges to write judgments in cases dealing with adolescents and the sensitivity involved. (In Re: Right to Privacy of Adolescents, 2024)[1] In a similar instance, the Apex court also took Suo moto cognizance of a case involving the Allahabad High Court's direction to examine whether the victim who alleged rape on the promise of marriage was "*mangalik*" and stayed the order.

All these instances highlight that promoting standards of equal treatment between men and women cannot be achieved only by promulgating reformative legislation. The need of the hour at present is to liberate our minds from the pre-existing prejudiced societal norms and centuries of assigned gender roles that prevent the overall growth and progress of society at large. The discourse on sentencing remarks towards sexual assault victims by the judiciary time and again highlights the lack of judicial mindfulness and sensitivity in dealing with victims of sexual assault and that the 'judiciary' is also not aloof from such stereotypical prejudices. Further remarks where the High Courts are directing the victims to attend mediation with the accused reflects the 'soft approach' adopted by the courts in such cases, wherein the apex court has condemned such an approach and has held in cases like the *State of Madhya Pradesh v. Madanlal*' (Pathak, 2015), *'Shimbhu & Anr v. State Of Haryana*' (All India Reporter, 2014) that it is a 'Spectacular error,' and the 'courts are to commensurate the gravity of the offence with the punishment, and offer of marriage to the victim cannot be a ground for reducing the sentence." Further, such an offer of marriage can also be considered a form of compromise between the victim and the accused, which is in direct violation of the Principles laid down in *'Parbatbhai Aahir v. State of Gujarat*' (Supreme Court Cases, 2017), *Anita Maria Dias v. State of Maharashtra,* (Supreme Court Cases, 2018) *Sebastian @ Solly v. State of Kerala* (Kerala Law Journal, 2015), wherein it was held that proceedings of the grave and serious offences such as rape could not be quashed based on a compromise between the accused and the victim.

6.0 The Way Forward

Indian society, over the years, has strived on different forms of discrimination. Be it discrimination based on caste, sex, or religion. The Constitution, which prevents discrimination on all these grounds, has entrusted the 'three organs' to promote the same. Time and again, the three organs have effectively discharged their roles. However, there have been instances as highlighted above, where it has been observed that the judiciary, whose primary duty is to prevent all forms of discrimination and ensure that there is no miscarriage of justice, is not free from centuries of biases and stereotypical prejudices towards women.

Pratiksha Bakshi, in her book '*Public Secrets of Law*', (Bakshi, 2014) has highlighted one of the primary reasons why such prejudices still seem to exist in the modern

[1] In Re: Right to Privacy of Adolescents, 2024 LiveLaw (SC) 587

21st century. According to the author, it is believed that 'sexual violence against women in India is considered as a public secret.' (Bakshi, 2014) Probable reasons why the judiciary in the case of "*Md. Ali @ Guddu v. State of U.P.*" (Latest Case Law, 2015) has held that delay in lodging of FIR in rape cases is not fatal to the prosecution case if given appropriate reasons, as sexual assault victims often face victimization and social stigma. Also, in the case of the *State of Madhya Pradesh v. Babulal*, (Madhya Pradesh High Court, 2024) it was highlighted that Sexual abuse is the "ultimate violation of the self. It is a humiliating event in a woman's life." Victims of sexual assault in India find shame in naming their sexual parts (Bakshi, 2014) while reporting an offence or deposing their statements as primary witnesses in the court. Thus, defence lawyers' success in the courtroom is determined by how dexterously they can craft a humiliating cross-examination, which is strictly prohibited in law. (Bakshi, 2014) This social stigma around women's bodies being considered a symbol of honour and prestige, in the absence of lack of public sensitization and awareness of the actual needs and concerns of women, promotes further discrimination. Instead of considering women as 'sacred,' the need of the hour is to consider them equals. Male myth about women being considered as a weaker sex has been time and again disproved by women through their achievements. Reflection of such biases on the part of judges, especially concerning marriage proposals being given to sexual assault victims, belittles the achievements of women towards society and their value and respect in the community being dependent only on the institution of marriage and 'marriageability.' Thus, the need of the hour is to exercise 'judicial mindfulness' and formulate guidelines for dealing with victims of sexual abuse for the judiciary.

In these instances, cases like *Aparna Bhat v. State of Madhya Pradesh* (Supreme Court Cases, 2021) are instances where the judiciary can be observed to have attempted to pave a path to prevent the victimization of victims of sexual abuse victims. In this case, the apex court struck down the order for the victim to tie Rakhi to the accused as a condition for bail and upheld that imposing conditions for bail that diminish the harm caused by the offence cannot be permitted. Use of language that engages in victim blaming, questions the character or previous sexual relationship of the victim, or comments on the victim's manner of lifestyle for determining the question of consent is condemned. This is a reformative precedent and must be adhered to. Further, the recent initiative taken by the apex court, which published the "*Supreme Court Handbook on Combating Gender Stereotype*," (Mihir, 2023) was the need of the hour and a sacrosanct step towards understanding the impact of legal language in promoting the growth of feminist jurisprudence in India.

The judiciary, amongst the three organs, is trusted by the citizens of India to uphold the rule of law and prevent miscarriage of justice. Considering the same, even the constitution of India has entrusted our Apex court to do 'Complete Justice' under Article 142 of the Constitution of India. In pursuing this, it is of sacrosanct concern to understand the importance of a precedent-based system of governance. Even though such remarks form part of the 'obiter dicta', they greatly impact the victim's faith in the justice institutions. Thus, the need is to better judicial training on approaches used by judges in dealing with victims of sexual abuse coupled with guidelines on the sentencing of rape cases. The use of sensitivity, understanding of the societal prejudices and assigned gender roles, and use of judicial discretion considering these factors while delivering judgments can help impact a positive change in society and promote 'Justice for Her', a long-fought dream of a democratic society as that of India.

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