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## The Language evidence in Rape Trials

Meghana Srinivas<sup>a</sup>

<sup>a</sup>Symbiosis Law School, Hyderabad, India

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*Through the years of sustaining in a patriarchal society, women have always tried to pro-actively fight these societal shackles. The aid provided to women through legal recourse comes with its own issues such as vague definitions that are open to interpretation along with issues of implementation, which often lead to prolonged trials and timely justice not being delivered. This paper analyses not only the existing legislation that ought to help the victims of abuse but also the importance of language evidence, with respect to rape trials. Further, a comparative study is also taken up to provide a broader perspective on legislations around the World, regarding the intricacies of rape laws.*

**Keywords:** *evidence, rape, trial.*

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### INTRODUCTION

Throughout history, every legal conundrum has boiled down to one single aspect - **evidence**. Laws regarding sexual assault have been altered several times to make the criminal courts of our country sensitive to the ordeal of a Prosecutrix<sup>1</sup>. When we take a closer look, the crux of the issue stems not just from a singular source, but multiple sources right from deranging

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<sup>1</sup> Prosecutrix refers to a female victim of a crime on whose behalf the state is prosecuting a suspect

cross-examinations, to the victim's<sup>2</sup> character constantly being put on the stand by lawyers, the general public as well as judges. Having a basic description of what rape<sup>3</sup> entails in the IPC<sup>4</sup> has not sufficed for the sole reason that there are many loopholes to date, which still haven't been addressed. In this article, I will be diving into the amendments and regulations made in various criminal statutes as well as the Indian evidence Act<sup>5</sup>, starting in 1983<sup>6</sup>, as a result of the infamous Mathura Gang rape case in 1972<sup>7</sup>. The most recent amendment made to the Act<sup>8</sup> was in 2013 following the horrific Nirbhaya<sup>9</sup> case.

An important distinction has also been made with reference to *normal* rape and *statutory* rape. While *normal* rape consists of the element of lack of consent, OR consent obtained through force or fraud, *statutory* rape fluctuates in the sense that the consent so obtained, is not considered to be valid.<sup>10</sup> The offense mentioned has been created to prevent the exploitation/usage of minors through trickery or manipulation by the party who's abusing their power. When we talk about Language evidence, primarily we need to understand what it entails. Simple examples could include notes and camera recordings. Secondly, addressing the stakeholders does not simply reflect but helps to construct the narrative of the people and events under investigation. Understanding how we can improve the current system will be of vital importance. Post-2013 India definitely witnessed a paradigm shift with regards to sexual assault laws. In numerous ways, the Capital<sup>11</sup> occupies a distinctive position in the journey of rape law reform. To ensure that the process is less painful on the victim, we have witnessed several amendments take place through the decade but it all comes down to three fundamental questions: have these reforms been beneficial or not? Can we finally credit the system? Are we in a safe society?

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<sup>2</sup> Victims referred to here consist of rape-victims

<sup>3</sup> Indian Penal Code, 1860, s 375

<sup>4</sup> Indian Penal Code, 1860

<sup>5</sup> Indian evidence Act, 1872

<sup>6</sup> Criminal Law (Amendment) Act, 1983

<sup>7</sup> *Tuka Ram And Anr v State Of Maharashtra* AIR 1979 SC 185

<sup>8</sup> Criminal Law (Amendment) Act, 2013

<sup>9</sup> *Mukesh & Anr v State For Nct Of Delhi & Ors* CRI 2017 LJ 4365

<sup>10</sup> 'Laws against Rape and Other Sexual Offences in India' (*HelplineLaw.com*, 2017)

<<https://www.helplineLaw.com/employment-criminal-and-labour/LARO/laws-against-rape-and-other-sexual-offences-in-india.htm>> accessed 23 December 2021

<sup>11</sup> Capital of India : Delhi

## EVOLUTION AND DEVELOPMENT

The two main constituents of rape historically have been the facts of intercourse (sexual) and lack of consent. To verify a standing, facts need to be made legally relevant<sup>12</sup>, and once made relevantly, the corresponding logical relation to the offence is often irrelevant. For instance: after being raped, if the victim files a complaint it might be considered relevant as subsequent conduct under S. 8<sup>13</sup>, even though it has a minute probative value considering victims may react differently to the offences. Now, to address the question of whether or not the act of sexual intercourse was non-consensual, the burden of proof very heavily relies on the prosecution. An exception can arise in the scenario where evidence is required to be cited in the form of lubrication present<sup>14</sup>, or injuries noticeable<sup>15</sup>. One shift in paradigm was seen when a specific<sup>16</sup> instance of character evidence was barred wherein previously the character of the prosecutrix was used by the defence to prove consent by stating that a woman of *loose character* in all probability would have consented to sexual intercourse with the accused.

Another topic subject to moot would be the male perspective. Often lawyers have claimed that the consent of a woman, and consequently her pleasure, can be expected to clash with the male definition of pleasure. Meaning: her actions before, during, and after the offence is relevant going by the patriarchal logic of rationality. Allowing an argument like this not only destroys years of progress made by women in society, for their fight against the system, but it also drives the narrative of misogynistic patriarchal men still having the option to dominate the story with their outdated rationale. Alongside this narrative, consent can most definitely be inferred from the *absence* of marks of struggle. Pertinent aspects such as what the victim should do, how she must feel, and whether the offence committed was justified are all dictated by this side of the party making it extremely oppressive. When said aspects are made to be legally relevant, the complicity of the prosecutrix and the guilt carried by the accused are both on the line, being judged solely on the basis of a fixed patriarchal rationale.

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<sup>12</sup> Indian Evidence Act, 1872, s 5

<sup>13</sup> Refer to *State of Rajasthan v Munshi* (2007) 12 SCC. 759

<sup>14</sup> *State of Rajasthan v Hemraj* AIR 2009 SC 2644

<sup>15</sup> *Sadashiv Ramrao Hadbe v State of Maharashtra* (2007) 1 SCC (Cri) 161

<sup>16</sup> Indian Evidence Act, 1872, s 154(4)

The contemporary scenario is such that we decipher how exactly language is important and the power it holds. In rape trials, the bulk of the evidence is not introduced via “real evidence” but verbally – through the use of language used in cross-examinations and testimonies. It is primal to understand how raw data assumes legal significance, which is through courtroom engagement. A major structural flaw we can infer from the *In-camera*<sup>17</sup> procedure is the lack of sensitivity shown towards women. The prosecutrix is made to relive her trauma by describing the methodological way in which she was violated, the body parts harmed, whether she found the experience pleasurable and whether the accused ejaculated to name a few. All of these questions are asked to not just determine consistency in stories, but to also segregate the important facts. Alongside this, when the prosecutrix is made to verbalize her trauma, if she is not able to recollect the ordeal with all its dehumanizing details, the statement isn’t taken into account- the rationale being that she might be lying.

To take this a step further, it ultimately turns into a pornographic spectacle, wherein the woman, her body, and her character are constantly objectified and put on the line. The language of evidence focuses on parts of the woman’s body and is used in a way that transforms the accused into a subject while making the prosecutrix someone who is acted upon. More often than not, the language suggests that the sexual availability of the prosecutrix is the characteristic by which she is defined. The contemporary position can be understood as women not wanting to be subjected to such harassment, not just during court proceedings but also during the process of cross-examinations, wherein the defending lawyer rips her character into shreds and in essence puts her credibility on the line which they get away with, owing to the fact that the Indian society has its beliefs heavily rooted in *cultural properness*, lawyers often try to discredit the entire story presented by the prosecutrix by belittling her and finding inconsistencies with the story.

## COMPARATIVE ANALYSIS WITH OTHER COUNTRIES

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<sup>17</sup> Sonakshi Awasthi, ‘What Are In-Camera Proceedings?’ (*The Indian Express*, 22 November 2017) <<https://indianexpress.com/article/what-is/what-are-in-camera-proceedings-4949186/>> accessed 23 December 2021

To understand rape laws better and how language evidence could make or break a case, I will be doing a brief analysis of the linguistic approach as followed in two countries: the United States of America and India. In India, the IPC has exempted husbands from prosecution for raping their wives ever since the statutes have been established. When we take a look at S. 498 of the IPC<sup>18</sup>, although the main intent is to protect women from cruelty and harassment from their husbands, there is no set standard or definition of cruelty that is followed by courts. The uniformity does not exist. As mentioned by the honorable high courts, there has been a huge misuse of the existing rape laws for example fabrication of evidence, rendering it difficult to impose harsher rules and punishments. Another shocking reality is that India is one out of forty-nine nations that does not criminalize marital rape. According to the Hindu Marriage Act 1955, forcing conjugal relations is not a crime in a marriage unless the lady is less than fifteen years of age. This in essence is problematic considering the legal age to get married for a woman in India is eighteen. The trauma that the woman is made to endure, regardless of her age, is still of a great magnitude, even if there exists a three-year difference between legality and illegality.

When we bring in language evidence to a court proceeding, it becomes evident as to how painful the experience is for the prosecutrix. A noteworthy instance would be as such: in a trial court, situated in Jaipur, during the cross-examination the prosecutrix was asked to lie down on an empty bench present in the court and depict the positions in which she was raped.<sup>19</sup> The entire courtroom was a mute spectator to this. This may be true for all trials and not just rape trials, but the importance of language cannot be overlooked. It is a narrative that is fed to us, and it isn't fair to dismiss it, regardless of how long the prosecutrix might take to string the events together. Subtle language hints can also go a long way when deciphered right. In cases of marital rape, often women are subjected to societal pressure, pressure from their in-laws as well as the abuser to not tarnish their reputation. In this scenario, while the prosecutrix takes the stand, it is important to understand her body language, her fears, and

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<sup>18</sup> Indian Penal Code, 1860, s 498

<sup>19</sup> *Yad Ram v State of Rajasthan* (2008) 2 RLW 1659 (Raj)

what she's trying to communicate by either staying silent or speaking up when posed with a question. This system needs to break for women to have a safe space to address their concerns.

Before we draw a parallel with the United States of America<sup>20</sup>, it's important to understand the structure of the country. The country has a constitutional federal republic meaning that it favors a rigid interpretation of the constitution to restrict powers of the federal government. During the early 1980s, about 10 states had an absolute exemption for marital rape wherein the husband could never be prosecuted for raping his wife as long as they were legally married. Rape was not seen as a crime against women, but rather a violation of a man's property interest. As times have changed, so has the law. As observed in a landmark judgment<sup>21</sup>, a married woman has the same right to control her own body as does an unmarried woman. Taking into account Susan Ehrlich's book - *Representing Rape*, she describes a trial, where when the underwear of the victim was taken for examination to analyze blood stains and tears, the defending lawyer found it pertinent to point out that the underwear was from *Victoria's Secret*<sup>22</sup> implying that her character was to be determined based off of it. While there are differences between USA and India, they are not of an extreme measure. An important narrative that drives any society is cultural relativism<sup>23</sup>. The cultural norm of India is such that women are expected to remain conservative and not take risks, whereas American culture is based on the fundamentals of liberty and breaking systems of oppression.

One similarity we can notice from both countries is that women who "cry rape" aren't believed. They're disbelieved if they report the assault late, but at the same time, they're disbelieved if they report the crime immediately making them look delusional. At the end of the day, no matter which country is put under the spotlight, women around the world bemoan the ineffectiveness of the legal procedures, the argument being such that social attitudes must change before any significant difference can occur.

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<sup>20</sup> Hereby referred to as USA

<sup>21</sup> *People v Liberta* 64 [N.Y.2d] 152

<sup>22</sup> An American lingerie, clothing, and beauty retailer known for high visibility marketing and branding, starting with a popular catalogue followed by an annual fashion show with supermodels dubbed Angels

<sup>23</sup> A scenario wherein society's individual culture governs the rights and rules that society follows

## CONCLUSION

In the context of rape trials, language evidence plays a pivotal role. It determines the legitimacy, the truth, and the unknown. India has a long way to go before concrete punishments are set and justice is delivered immediately. Justice, in the horrific *Nirbhaya* rape case, took 7 years and 3 months to be delivered, which is extremely problematic on many levels. Given that social attitudes influence the decision to report, investigate and decide verdicts, a shift in societal ideology needs to take place. The humiliation experienced by the prosecutrix is beyond explanation. The innuendos as far as the woman is concerned inflict immense psychological disturbance. Along with accepting evidentiary rules, it is important to take language evidence into consideration for rape reforms to have an impact. On a similar note is it important for lawyers to strike the ideal balance between defending their clients and acting as officers of the Courtroom. Finally, at the end of the day sensitizing and trusting a Judge to do their job right is within the ambit of expectation as a citizen. Our judicial system has been the backbone of our constitution and it is with hopeful eyes and heavy hearts, that women all over the country implore the protectors of our law to ensure justice is served in a timely manner and on a silver platter.

## SUGGESTION

In our society, when we talk about a crime like rape, it comes with its own set of prejudices and notions which women have the burden to disprove. A traumatic incident taking place is one thing, but to make the victim relive it, multiple times is dehumanizing. Women have built society as we know it today through years of hard work, consistently, while being in a patriarchal setting, only for society to let them down in return. I would personally reject the evidentiary technique which uses *character evidence*<sup>24</sup> of the prosecutrix or the abuser to match the rape paradigm. It ultimately is a mistake for the prosecutor to portray the victim as

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<sup>24</sup>Character Evidence' (*Law Indiana.edu*) <<https://law.indiana.edu/instruction/tanford/b723/06char/T06.pdf>> accessed 22 December 2021

virginal or to highlight her dress. The huge stigma and notion attached to rape need to disappear because it correlates with willingness to commit the act and the tolerance of it. A systematic cleanse is of dire need considering how the prosecutrix is the one seeking justice and yet lawyers put her on the line and imply a general mistrust towards her story, thereby discrediting it.