



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Custodial Rapes in India

Soumya Ranjan^a

^aSiksha 'O' Anusandhan, Bhubaneswar, India

Received 17 July 2022; Accepted 13 August 2022; Published 16 August 2022

Crimes related to women are quite prevalent in our country. Almost every person is aware of the term rape. But, most of them are unaware of a kind of rape that is committed under the custody of an authoritative body and it is known as custodial rape. It was given recognition after 1983 and was penalised. The 84th law commission report made major changes to rape laws in India. However, the position of conviction in terms of custodial rape is not satisfying. This article sheds light on the term custodial rape its recognition and the need for more reforms and robust laws to help innocent victims to raise their voices fearlessly.

Keywords: *custodial rape, rape, custody, police.*

INTRODUCTION

Rape is an ineluctable word these days, once you google the word rape, there will be cases coming in space. In India, on one hand, we portray women as Goddess Durga and on the other hand call them 'lustrous and seductive' due to which men are unable to control their biological instincts. A girl from her childhood is taught to be courteous but we forget to teach our boys to be chivalrous. In India, a woman's so-called 'izzat' is sacrosanct for the whole family but the irony is, according to the Women's Peace and Security Index 2021, India placed 148th out of 170

nations.¹ The position of India deteriorated as India ranked 133rd out of 167 countries in the year 2019.² From this, it can be easily determined the duality that exists in our country: the highest rates of crime against women are found there. When the final judgement to execute all the four rapists of Nirbhaya was given by the apex court, it was applauded by the whole nation. Although it was given after halting the decision three times and after 7 years it was a welcome step. The facts were clear and the nation knew the culprit but what about such incidents which take place in confined areas guarded by the law enforcement body itself?

There are zillions of Nirbhayas in India who will never get justice there are many reasons but for brevity, I would like to dwell upon a few- being raped brings spoils the reputation of the whole family, and the social outcast of such families, no one believes that the consent of the girl was not present, people questions the character, appearance, clothing of the girl instead of questioning the brutal act done by the rapist. She was in the custody of a man who raped her and had a higher degree of control over her, moreover, the person is powerful to an extent that stops her from taking any action against him. We will examine a specific type of rape in which a woman is in the care of an authority figure and is meant to be kept safe in order to acquire a better understanding of how pervasive this treatment of women in society is, but instead is sexually assaulted, making that ostensibly protected place the most dangerous and exploitative place for her.

The Criminal Law Amendment Act of 1983 amended the Indian Penal Code to include provisions for custodial rape.³ The Criminal Law Amendment Act of 2013, made certain reforms in sections 376B, 376C, and 376D⁴ for 'Custodial Rape'. The provisions present in sections 376B

¹ Georgetown Institute for Women, Peace and Security, *Women, Peace, and Security Index 2021/22: Tracking sustainable peace through inclusion, justice, and security for women* (Report 2020-21, 2021) <<https://giwps.georgetown.edu/wp-content/uploads/2021/11/WPS-Index-2021.pdf>> accessed 13 July 2022

² Georgetown Institute for Women, Peace and Security, *Women, Peace, and Security Index 2019/20* Tracking sustainable peace through inclusion, justice, and security for women (Report 2019-20, 2019) <<https://giwps.georgetown.edu/wp-content/uploads/2019/12/WPS-Index-2019-20-Report.pdf>> accessed 13 July 2022

³ Geetanjali Gangoli & Martin Rew, 'Continuities and Change: The Law Commission and Sexual Violence' (2018) 6 (3) JILS, 118

⁴ Criminal Law (Amendment) Act, 2013, s 376B, 376C, 376D

and 376D were inserted in Section 376C and the punishment was increased from five years of imprisonment and fine to ten years of imprisonment and fine.⁵

In the legal sense, custody refers to being detained or imprisoned, typically while awaiting to appear in court for an ongoing trial. In general, custody refers to the legal right to look after something or someone, especially children. The person who is given the custody is called the custodian and he has control over the liberty, food, water, movement, etc. of the person, under his custody that means he has absolute control over the person. Some examples of custody are detention by a state authority, police officers, army, etc. in police stations, prison or interrogation centres. In such circumstances, if a woman is raped it is the most heinous of all the other crimes and it is a grave violation of his duty and considered a serious crime. Before discussing further, let us dwell upon the history of custodial rapes in India.

HISTORY OF CUSTODIAL RAPE IN INDIA

In the latter half of the 1970s and the beginning of 1980, the first concrete proof supporting the necessity of taking action against custodial rape appeared. The incidents related to the women in police custody came in quick succession which made the women in India aware of this new and brutal power of men above women. This also highlighted how blatantly the uniformed authority used its power against the ordinary citizen, particularly the women. During 1975-1977, when India was under national emergency the state acted arbitrarily with unfettered powers. The civil liberties of the people were exploited and after this experience, the civil society and the judiciary became conscious of the dangers of uncontrolled state power. Amidst such a situation the incidents of Mathura in Maharashtra (1974), the Rameeza Bee case, and Maya tyagi case added fuel to the fire and the women's movement revolved around the issue of custodial rapes in India.⁶ It was after this brutal incident where the police authority acted contrary to their duty and this connoted the institutional bias by police forces, that the anti-rape campaign gained momentum. There was huge outrage among people who demanded to recognize custodial rape as a distinct offense in law. The law reform movements demanded women-friendly institutional

⁵ Criminal Law (Amendment) Act, 2013, s 376

⁶ Geetanjali Gangoli & Martin Rew (n 3)

spaces and dedicated mechanisms to impart justice, moreover the movements focus on the criminal law remedies which should be provided to the victims of custodial rape.

*Tuka Ram and Anr v State Of Maharashtra (Mathura Case)*⁷

Mathura was a young woman who resided with her brother Gama and was employed as a labourer at Nushi's home. Following a sexual encounter with Ashok, the brother of Nushi's sister, Mathura chose to wed him. On March 26, 1976, Gama reported that Mathura had been abducted. On the basis of this information, the police station received calls from Nushi, Ashok, and other worried relatives. Around 10:30 p.m., after the investigation was finished and everyone was leaving, Ganpat, the first appellant, begged Mathura to wait inside the police station. After Ganpat had raped her, the second appellant, Tukaram, arrived and attempted to rape her after he had shut the doors and turned out the lights.

Observations:

As per the medical examination report, her hymen of Mathura had old ruptures and the traces of semen weren't found in the pubic hair but in the clothes. The session judge by undertaking the medical report into consideration found that there was no evidence of rape, he further added that as she was habituated to sexual intercourse, she wanted to fulfill her sexual desires. Just to sound virtuous in front of her lover and others she concocted this story of being raped. The High Court in this case observed that the situation in which Mathura was should also be considered and it is possible that she surrendered her body due to threats from the accused and the authoritative position they held. The court further added that it is highly improbable to equate helpless surrender of the body with desire or will. However, after a long battle, The Supreme Court in agreement with the session judge's observation acquitted the convicts. Major vehemence for the protection of the authority was seen in the Supreme Court Stance.

⁷ *Tuka Ram and Anrs. v State of Maharashtra* (1979), AIR 185

A woman may only be questioned as a witness at her home, per section 160⁸ of the Criminal Procedure Code of 1973, and not even in a police station. There is a famous case known as the 'Rameeza Bee case' of 1978⁹, where the police alleged of rape of Rameeza Bee and the brutal murder of her husband Ahmad Hussain. The police officer in defence incriminated Rameeza Bee a prostitute and her husband as a pimp. A commission was made for the inquiry, the commission held the police liable for both of the alleged crimes and denied the allegations made by the police concerning Bee and her husband. Even after the unbiased and unambiguous findings of the commission the case was transferred to Karnataka so that the policemen get a fair trial.

The law commission in the year 1980 was requested to study the matter and give recommendations in its 84th report¹⁰ and the bill was introduced in the parliament in the year 1982. After many iterations certain reforms were made:

1. The Criminal Law (Amendment) Act of 1983 amended the Indian penal law in response to the Mathura case, where Section 376 sub-section (2)¹¹ was inserted. The sections legalised rape while under the custody of the police, being a public servant and abusing his position, and working in a jail, remand house, or hospital. The penalty was made more severe than the rape offence.
2. In criminal law, the onus of proof lies with the prosecution (state) which means the state has the liability to prove the crime committed by the accused and this was blatantly misused as already mentioned that the public servants can easily destroy the evidence. As a result, an exception was made in the Evidence Act. Section 114A¹² of the Evidence Act of 1872 was added by the Criminal Law (Amendment) Act of 1983. According to this section, if the sexual intercourse is proven but the victim claims there was no consent, the

⁸ Code of Criminal Procedure, 1860, s 160

⁹ Vasanth Kannabiran, 'Rameeza Bee Rape Case : A brutal orientation to the patriarchal nature of the law' (*Indian Cultural Forum*, 27 June 2020) <<https://indianculturalforum.in/2020/06/27/rameeza-bee-rape-case-a-brutal-orientation-to-the-patriarchal-nature-of-the-law/>> accessed 13 July 2022

¹⁰ Law Commission of India, *Rape and allied offences: Some questions of Substantive Law, Procedures and Evidence* (Law Com. 84 1983) <<https://lawcommissionofindia.nic.in/51-100/report84.pdf>> accessed 13 July 2022

¹¹ Criminal Law (Amendment) Act, 2013, s 376(2)

¹² Indian Evidence Act, 1872, s 114A

court must infer it. The accused then bears the burden of proving that sexual intercourse occurred with the woman's consent. *Nawab Khan and the state* 1990¹³, In this case, the prosecution was raped by the accused and his friends. The court, in this case, held that if the person with whom sexual intercourse occurred claims that it was consensual, the court must accept her claim, and the burden of proof will fall on the accused to prove that the intercourse was consensual.

3. One of the major problems was the reluctance shown by the police officers to register the FIR of the rape victims, so this failure in the duty by the police officers was also made a punishable offence by the Criminal Amendment Act 2013, under the Indian Penal Code, 1860. 1860 Indian Penal Code. Section 166-A¹⁴ of the IPC, 1860, introduced penalties for such crimes, including six months of rigorous imprisonment that may last up to two years, as well as being subject to a fine in the event that they fail to file an FIR or cooperate with investigators in such circumstances.

RECOMMENDATION BY THE 113TH LAW COMMISSION

The report recommended amendment in the Indian Evidence Act 1872, It recommended the insertion of Section 114-B¹⁵ according to which *“in the prosecution of a police officer for an alleged offence of having caused bodily injuries to a person while in police custody if there is evidence that the injury was caused during the period when the person was in the police custody, the Court may presume that the injury was caused by the police officer having the custody of that person during that period unless the police officer proves to the contrary. The burden of proof lies on the police officer to prove the contrary.”*¹⁶ It was recommended by the law commission in the year 1995, but unfortunately, until now, it has not seen the light of the day. However, the amendment if it happens may be prone to misuse. It will give unfettered powers to the convicts, who can make false accusations against the police.

¹³ *Nawab Khan and Ors. v The State* (1989) CriLJ 1179

¹⁴ Indian Penal Code, 1860, s 166A

¹⁵ Indian Evidence Act, 1872, s 114B

¹⁶ *Shri D.K. Basu, Ashok K. Johri v State Of West Bengal, State Of U.P.*, (1996) Writ Petition (CRL) No. 592/1987

OBSERVATIONS

In both of the above cases (*Mathura and Rameeza Bee case*) the judicial, as well as the statutory authorities, tried to defend the police officers by questioning the character of the women, and even if the acts were eerie the policemen were acquitted. These incidents reflected the major fallacies of the system and a demand to recognize 'custodial rape' as a separate and serious offence was a demand in the right direction.

It is often problematic to prove custodial rape because the rape usually takes place in an area that is under the control of the government like a police station and the evidence can be easily destroyed by them so to solve this, the women's movement urged that the burden of proof for custodial rape accusations be transferred from the prosecution to the defendants. Many problems were encountered by the woman to register FIRs as the police servants refused to register the complaint of the victim, and there was political pressure to reduce the crime statistics which also included custodial rape statistics. A public servant cannot be prosecuted for any actions taken while performing official duties, per Section 197 of the Criminal Procedure Code, without the state's prior approval.¹⁷ So this can be said to be an immunity against being prosecuted and is prone to be misused by the public servants and in the meanwhile, it is even easier if they are successful in tampering with the shreds of evidence of their sinful act.

PRESENT SITUATION

*P. Rajakumar v The Additional Director General*¹⁸

Facts: A writ petition was filed by the daughter of Chandra who was brutally tortured by 7 male police officers while in custody. Chandra hailed from the economically weaker section of society and washed dishes in a hotel. She was living in a rented house that belonged to Leelavathi. Chandra was arrested for the alleged murder of Leelavathi by the police of Udumalpet Police Station, Tiruppur District, When after her arrest her daughter visited her she was shocked to see the condition of her mother; use of third degree by the police, the 7 police officer tortured her

¹⁷ Code of Criminal Procedure, 1973, s 197

¹⁸ *P. Rajakumari v The Additional Director General* (2014) Writ Petition No. 23320/2014

mother by injecting needles in her nails and fingers, inserting lathis in her private parts, hanging her upside down, she was beaten by lathis. After a lot of investigations or inquiries by the Judicial Magistrate Udumalaipettai, the investigations were not in favour of the victim. Hence a writ of mandamus was filed under article 32 in the Supreme Court to transfer the investigation procedure to any other judicial magistrate.

In this case, the court determined that the case falls under the Supreme Court's exception, and thus after reviewing all the facts and investigation reports, the court ordered the Central Bureau of Investigation to lead the investigation. The state must also give the mother of the petitioner an interim settlement of Rs 2 lakh, the court ruled. There are not too many cases present in the public domain related to custodial rape. The reason for this may be many but are predictable. There were 45 custodial rape cases were registered between 2002-2010 with the National Human Rights Commission.¹⁹ However, there is no such data present to indicate the number of permissions granted to the prosecution. According to a report from 2015 out of 34,651 rape cases, 95 cases were of custodial rape. Uttar Pradesh recorded the highest number of custodial rape cases (91) followed by 2 cases in Uttarakhand, and one case in Andhra Pradesh and West Bengal each.²⁰ According to the recent data by NCRB, there was a rise of 7% in crime against women where the number of cases of rape was 7.9%.²¹ The data released was for the year 2019, after the coronavirus engulfed the whole nation, it worked well in shaking off the stigma faced by the women last year. The horrific case of a girl who was savagely raped in Hathras but whose body was never found.

As per a report by the UN, there was an increase in the violence against women during the lockdown and called it a shadow pandemic growing, of violence against women. There were fewer reports registered especially in developing countries because of the ill system, lockdown, disturbing police services, judiciary, etc. In such a situation there must be several custodial rapes that would have taken place but went unreported, also on the internet separate reports of custodial rape are not ubiquitous, which makes it a little difficult to trace the present

¹⁹ Aarti Dhar, '45 custodial rapes in nine years, says rights forum' (*The Hindu*) (27 December 2012)

²⁰ KD Gaur, *Criminal Law-Cases and Materials* (9th Edition, LexisNexis 2019) 3

²¹ Dipankar Ghose, 'NCRB data: 7% rise in crimes against women' (*The Indian Express*) (30 September 2020) 08

development. For now, custodial rape is punishable by at least 10 years in prison, with the possibility of life in prison, as well as a fine.²² The major drawback even after such reforms is there is no such data on the internet of how many police officials have been prosecuted for the same.

PATH AHEAD: CONCLUDING REMARKS

The nature of custodial rape is quite authoritative, hence there is a smaller possibility that the offenders of such acts are punished. There is a need for stronger legislation that can ensure that position does not matter when it comes to sexual violence. This will help the victims to complain fearlessly against the echelons. The second step should be to ensure the placement of female constables in all police stations for making a safe and comfortable environment. Women made up only 12% of Indian police officers in 2020. An internal complaints committee should be formulated in every police station for all the women working there and the Rapid response desk should also include complaints for custodial rape.

We are already aware of the caseload and slow conviction rate in our country. To assist the judiciary in such cases Human rights courts should be settled in every district. Section 30 of the Human Rights Act of 1993 mandates that the state government, in coordination with the Chief Justice of the High Court, designate each district's session court as a court of human rights for the swift adjudication of rights violations. It is quite unfortunate that there is no Human rights court in India. The creation of a human rights court will facilitate the prosecution and conviction of those who violate fundamental rights as well as those enshrined in the Covenants to which India is a party and signatory and the Universal Declaration of Human Rights (UDHR). Law changes as society changes and for making such changes observation is important which can only be done when we are aware of the real scenario, lack of information is a kind of barrier to positive amendments which may be required. A step towards such an amendment will be

²² Indian Penal Code, 1860, s 376

transparent data which gives us an idea of to what extent the reformed laws are being implemented.