CHAPTER-III

RAPE AND THE LAW IN INDIA

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An Overview

Rape is the most heinous offence against women. It is an insult to the civility. It is symptomatic of sexually starved society that has injuriously threatened and still threatening the women's very right to liberty and personality. Women are being rapped at work, on the streets, in the field, in the scheduled places, in their homes by men. They are raped by people who are their relatives or neighbours or even by strangers. From lower level to the upper strata women are being raped by men even in this 21st century. Doctors rape their patients and nurses. The employers molest domestic maidservants; factory workers are forced to have sexual relations with their in-charge/Head. Castes Hindus rape Harijans and Adivasi girls.[1] Gang rapes by dacoits, rape during communal riots is quite common. Another horrifying incidence of rape, which the present day Indian society is witnessing, is the rape of minor girls. Again the rape by custodian of law, namely the police are very common. Hardly a day passes a day without report in the newspaper or a magazine of a rape, assault or molestation having taken place both in the rural and urban areas. Every 29 minutes a rape occurs somewhere in India.[2] The present chapter therefore thoroughly focuses on the offence of rape, its kinds, and an attempt to commit the offence and tries to critically study the law relating to rape, its kinds, and the nature of the assault.

It is more saddening that the incidences of rape and its related offences have been found to be increasing at higher rate than any other types of crimes. An attempt therefore has been made in the present study to find out the law, lacunae and loop holes therein. Rape cases have reported mixed trends over last 5 years with a decrease of 2.5 per cent in 2001 over 2000, an increase of 1.8 per cent in 2002 over 2001, a decrease of 3.2 per cent in the year 2003 over 2002 and substantial increase of 15.0 per cent in the year 2004.[3] Madhya Pradesh has reported the highest number of Rape cases (2,875) accounting for 15.8% of total such cases reported in the country. However, Tripura has reported the highest

[1] C.Kapoor. "Raped: Delayed Action". India today. 15.04.1983.p-27.
[2] Crime Clock 2004, Crimes Against Women, National Crime Record Bureau.
[3] Crimes in India, Table 5A, National Crime Record Bureau 2005.

crime rate 4.8 as compared to National average of 1.7 percent.[4] During the year 2004 a total of 18233 rape cases have been reported.[5] However, these figures are only indicative of the tip of the iceberg as a majority of cases remain un-reported for a host of reasons like lack of trust between the law enforcement agencies and the public and attitude towards rapists and the victim. This becomes evident from the data collected by the Ministry of Home affairs which shows that only 10% cases are reported to the police stations and only 1% ends in conviction.[6]The present chapter therefore focuses on the entire area of investigation, trial and victim's evidence. The attitude of the people towards the victim is really frustrating as it results in high social costs for the victim. The attitude of the society is more frustrating as because there are only few people who will oppose in public and take pain to remove this evil and accept the victim into their private as well as family life. The present Chapter would therefore focus on the present laws and flaws in our rape law as well as social immaturity, judicial antipathy at the lower level, and the legislative lag, with which women are confronted and subjected to in our society. Even the Penal Code views rape as an offence which only affects human body ignoring the fact that rape is also a psychological assault.[7]The present chapter makes an effort to find out the nature of assault, and consequent violation of the rights of the victim of rape; the rights to which they are and should be entitled. It is universally accepted that an unmerited acquittal not only erodes the faith of the victim but also destroys the confidence of the society. People loose faith in the criminal justice system. A unique feature of the present domain of study is the sentencing in cases of rape at three levels of the judiciary which reflects that the verdict moves like a pendulum. The present chapter therefore makes a through search to find out whether the defects lies in the sentencing policy or there are other reasons for this.

A) GENERAL MEANING AND KINDS OF RAPE

The word 'rape' is derived from the Latin term 'rapio' which means 'forcible seizure.'[8]Sexual intercourse with a woman by a man without her consent and chiefly by force or deception is generally known as rape. It may also be described

[4] Ibid.
[5] Ibid.
[6] As per Police Research and Development Data (from 1971 to 2003).
[7] Rape under the Penal Code finds a place under Chapter XVI of the Code which deals with offences affecting human body.
[8] K. D. Gaur, "Criminal Law-Cases and Materials," 3rd Edition, (Butterworths, London, 1999), p. 498.

as forcible carnal knowledge of a woman without her consent. Rape is many things. It is an instrument of torture. Rape is the means of proving masculinity.[9] To some feminist rape is a mental perversion,[10] a psychological assault,[11] a symbol of masculine power or dominance, the ultimate violation of women's self. It is also considered as the invasion upon a woman's physical or bodily privacy and outrageous to the dignity of a woman.[12] Some contemporary feminist critiques of law perceive rape as en extension of the patriarchal control over female.[13] Generally rape may be classified in to the following;[14]

a. Statutory Rape or child Rape: Sexual intercourse with a female who is below the statutory age of consent. This is also known as child rape.[15]
b. Stranger Rape: Where the assailant was unknown to the victim.
c. Acquaintance Rape: The victim knows her attacker, although he is not a close friend or family member. In other words it is a rape where the victim and the assailant knew each other casually.[16]
d. Intimate Rape: Where the persons concerned were in a relationship or even married.[17]
e. Date Rape: The victim is dating the person who rapes her.
f. Multiple Rape or Gang rape: The victim is raped by more than one man.
g. Marital Rape: The victim is raped by her husband.[18]
h. Custodial Rape: Where a person commits sexual intercourse with a woman who is under his custody.

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[9] Katharine K. Baker, "Once a Rapist? Motivational Evidence And Relevancy in Rape Law,' Harvard Law Review, vol.110, no.3, (1997) at p.563.
[10] Giriraj Shah, "*Rape: A Mental Perversion*," Encyclopaedia of Crime Police and Judicial System Series, vol.2 1st Edition, (Anmol Publication Pvt Ltd, 2000), p.415.
[11] Meenu, "*Rape-A Psychological Assault*," (2000) 2 SCC (J), at p.46.
[12] Debasree Lahiri, "*Dignity of Women and Offence of Rape-Law and Reality*," in Dr. N.K Chakraborty & Dr.Shachi Chakraborty (ed.) Gender Justice, (R Cambray & Co Pvt Ltd, 2006), at p.31.
[13] K. I. Vibhuti, "*Rape And the Indian Penal Code at the Crossroads of the New Millennium: Between Patriarchiast and Gender Neutralist Approach*," Journal of the Indian Law Institute, vol. 43:1, (2001), pp25-44.
[14] For details pertaining to the kinds of rape see, http://www.healthyplace.com/Cmmunities/Abuse/liski /guilt-sjame.htm.
[15] Out of 18239 rape victims during the year 2004 fifteen percent that is total 1,622 were girls under the age of 15 years. Whereas eleven percent that is 2,004 were teen aged girls between 15-18 years of age.
[16] During the year 2004 out of 18,233 cases of rape the offenders were known to the victims in as many as 15,619 cases. This means 85.6% of rape fell under the category Acquaintance Rape.
[17] Terry Thomas, "*Sex Crime: Sex Offending and Society*," 1st Indian Reprint,(lawman India Ltd,2003) p.57.
[18] In some jurisdiction this is regarded as an offence.

i. Incest Rape: When a person commits sexual intercourse with a woman falling within the prohibited degrees of consanguinity or affinity.[19]

B) RAPE LAWS AND FLAWS

a) Offence of Rape and the Indian Penal Code, 1860

The offence what is known as 'rape' finds a place in **Chapter XVI** of the Indian Penal Code, 1860 which deals with 'offences affecting the human body.' The researcher has a strong objection with this kind of placement of the offence of rape under the said category for many reasons. One of the reasons is that rape is not an offence which only affects human body as perceived by Macaulay but really affects the mind of the victim to such an extent that it can be said that rape is a psychological assault. Rape signifies the 'ravishment of a woman without her consent, by force, fear or fraud' or 'the knowledge of a woman by force against her will.'[20]The Indian Penal Code, 1860 in section 375 defines the offence and in sections 376 and 376A to 376D provides punishment for rape.[21] The Code defines rape in the following words;[22]

"Rape: - 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: -

First: - Against her will.

Secondly: -Without her consent.

Thirdly: - With her consent, when her consent has been obtained by putting her or any person in whom she is interested 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 her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

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[19] As compared to 15.0% increase in overall rape cases, Incest cases have increased by 26.5% from 399 in 2003 to 505 cases in 2004.

[20] K. D. Gaur, "*Criminal Law-Cases and Materials*," 3rd Edition, (Butterworths, London, 1999), p. 498-499.

[21] Sections 375 & section 376, IPC have been substantially changed by the Criminal Law (Amendment) Act, 1983(Act 43 of 1983).

[22] Section 375 of the Indian Penal Code, 1860.

Sixthly: - With or without her consent, when she is under sixteen years of age."

Thus the section requires two things; a) Sexual intercourse by a man with a woman. b) The sexual intercourse must be under the circumstances falling under any of the six clauses.

Sexual intercourse is heterosexual intercourse involving penetration of the vagina by the penis. If the hymen is ruptured by inserting a finger, it would not amount to rape.[23] The meaning of sexual intercourse is confined in narrow terms to include penile/vaginal penetration only and can not be enlarged to include penile/anal, penile/oral, finger/ vaginal, finger/anal or object/vaginal penetration.[24] Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.[25] To constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or an attempt at penetration is quite sufficient for the purpose of law.[26]In other words to constitute the offence of rape, penetration, however slight, is sufficient.[27] Again Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.[28] Intercourse by a man with his wife who is living separately from him under a decree of separation or under any custom or usage without her consent would be an offence of rape.[29]When sexual intercourse by a man with a woman would amount to an offence of rape may be shown in a tabular form. (See- Table 3:1)

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[23] Sakshi v Union of India, (2004) 5 SCC 518: In this case a PIL was filed by an NGO Sakshi for enlarging the meaning and definition of rape. The court held that giving a wider meaning to section 375 will lead to serious confusion in the minds of prosecuting agencies and courts, which instead of achieving the object of expeditiously bringing a criminal to book may unnecessarily prolong the legal proceedings and would have an adverse impact on the society as a whole, and therefore, it will not be in the larger interest of the state or the people to alter the definition of rape by a process of judicial interpretation.

[24] AIR 2004 sc 3566.

[25] Explanation to Section 375 of the Indian Penal Code, 1860.

[26] Madan Gopal Kakkad v Naval Dubey, (1992) 3 SCC 204, at para 37, p.222.

[27] Ranjit Hazarika v State of Assam, (1998) 8 SCC 635.

[28] Exception to Section 375 of the Indian Penal Code, 1860.

[29] Section 376 A of the IPC introduced by the Criminal Law (Amendment) Act, 1983(Act 43 of 1983).

Table-3:1

When Sexual Intercourse Amounts to Rape

Act	Age of the women	Consent	Will	Other reasons	offence
Sexual intercourse by a man with a woman	Of any age		Against her will		Rape
Sexual intercourse by a man with a woman	Of any age	Without her consent	Law is Silent		Rape
Sexual intercourse by a man with a woman		With her consent	Law is silent	i)when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt or ii) 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 iii) when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent, or iv) or when she is under sixteen years of age.	Rape
Sexual intercourse by a man with a woman	Sixteen years of age	With consent	Law is silent		Not rape
Sexual intercourse by a man with his wife	15 years of age		Law is silent		Not Rape
Sexual intercourse by a man with his wife		Without her consent	Law is silent	When she is living separately under a decree of separation or under any custom or usage	Rape

From the above it becomes clear that the present definition of rape is based on penile penetration although there may be other kinds of penetration which are quite harmful and injurious to the victim, especially when they are of tender age. Secondly the definition along with its all the clauses does not cover all the categories of women. Thirdly it assumes that rape is and can be committed only by man. The provision is also not gender neutral. The Law commission of India in its 172nd Report, recommended for substitution of the existing section 375 of the Indian Penal Code, 1860, by the following:[30]

"375. Sexual Assault: Sexual assault means -

(a) Penetrating the vagina (which term shall include the labia majora), the anus or urethra of any person with -

i) any part of the body of another person or

ii) an object manipulated by another person

except where such penetration is carried out for proper hygienic or medical purposes;

(b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the labia majora), the anus or the urethra of the offender by any part of the other person's body;

(c) introducing any part of the penis of a person into the mouth of another person;

(d) engaging in cunnilingus or fellatio; or

(e) continuing sexual assault as defined in clauses (a) to (d) above in circumstances falling under any of the six following descriptions:

First- Against the other person's will.

Secondly- Without the other person's consent.

Thirdly- With the other person's consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or hurt.

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[30] Law Commission of India 172nd Report on Review of Rape Laws, 25th March 2000. D.O. No. 6 (3)(36)/2000_LC(LS)

Fourthly- Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married.

Fifthly- With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent.

Sixthly- With or without the other person's consent, when such other person is under sixteen years of age.

Explanation: Penetration to any extent is penetration for the purposes of this section. Exception: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault."[31]

It is submitted that if the above recommendation is translated in to a law, it would have the effect of widening the scope of the offence in section 375. At the same time this would make it gender neutral. Some of the Western countries have already done this. Under this new definition of sexual assault the inclusion of not only penile penetration but also penetration by any other part of the body like finger or toe or by any other object cover a variety of sexual assault to which victims are often subjected. However, till now there is no response from the government.

b) Custodial Rape

Sexual intercourse by a person with a woman who is under his custody is known as custodial rape. Section 376(2) A to 376(2)D of the Indian Penal Code, 1860 added vide Criminal Law Amendment Act, 1983 provide for punishment of a

[31] Ibid at Para 3.1.2.

person guilty of committing rape on a woman while in his custody. The present law covers following four kinds of custodial rape;

i) Rape by a police officer on a woman in his custody or within the limits of the police station to which he is appointed; or in the premises of any station house whether or not situated in the police station to which he is appointed; or in the custody of a police subordinate to him.[32]

ii) Rape by person being a public servant, by taking advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him.[33]

iii) Rape by a person being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution by taking advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution.[34]

iv)Rape by a person being on the management or on the staff of a hospital, by taking advantage of his official position and commits rape on a woman in that hospital.[35]

In all the above four cases the person guilty of custodial rape shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.[36]

c) Gang Rape

Sexual intercourse by a group of person on a woman is known as gang rape. In other words this is a kind of rape where a woman is raped by one or more in a group of persons acting in furtherance of their common intention. Under the present law each of such persons becomes the guilty of gang rape.[37]

d) Marital Rape

i) What is Marital Rape

Marital rape is one of the most misunderstood crimes. It has received relatively little attention from the criminal justice system and larger society as a

[32] Section 376 (2) (a) of the Indian Penal Code.
[33] Section 376 (2) (b) of the Indian Penal Code.
[34] Section 376 (2) (c) of the Indian Penal Code.
[35] Section 376 (2) (d) of the Indian Penal Code.
[36] See Section 376 (2) of the Indian Penal Code.
[37] See Explanation 1 appended to Section 376 (2) of the Indian Penal Code.

whole.[38]The term 'marital rape' refers to unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give consent. The words 'unwanted intercourse' refers to all sorts of penetration whether anal, vaginal or oral, perpetrated against her will without her consent.[39] The scholars have identified the following three kinds of marital rape;[40]

a) Battering Rape:

In this kind of marital rape women experience both physical and sexual violence in the relationship and they experience this violence in various way. Some are battered during the sexual violence, or the rape may follow a physically violent episode where the husband wants to make up and coerces his wife to have sex against her will. The majority of marital rape victims fall under this category.

b) Force only Rape:

In what is called 'force-only' rape, husband use only the amount of force necessary to coerce their wives; battering may not be characteristic of these relationships. The assaults are typically after the woman has refused sexual intercourse.

c) Sadistic/Obsessive Rape:

These involve torture and/or other perverse sexual acts. Pornography is frequently involved in sadistic forms of rape. In other words in this kind of rape the assaults involve torture and / perverse sexual acts and are often physically violent.[41]

ii) The Law

The Indian Penal Code, 1860 incorporates three different provisions to partially criminalize marital rape. The first provision says that sexual intercourse by a man with his wife, the wife not being under fifteen years of age is not a rape.[42] Secondly it says that if a person rapes his wife who is not under twelve

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[38] Suman Saha. " Sleeping With the Enemy? – Recognizing Marital Rape," Womens Link, vol. 10,no.2 April-June, 2004, pp.2-8 at p.2.

[39] Dipa Dube, "License to Rape." in Dr.N. K. Chakraborty & Dr. Shachi Chakraborty (ed) "Gender Justice,"(R Cambray & Co Pvt Ltd, Kolkata, 2006), at p. 181.

[40] Gosselin D.K. "Heavy Hands- An Introduction to the Crimes of Domestic Violence," 1st Edition. (Prentice-Hall Inc, New Jersey, 2000) pp. 5-99.

[41] For details pertaining to sadistic rape see, http://www.aajmaj.com/maritalrape.htm.

[42] See Exception to Section 375 of the Indian Penal Code, 1860.

years of age, he commits an offence which shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.[43] The third provision says that sexual intercourse by a man with his own wife, who is living separately from him under a decree of separation or under any custom or usage with out her consent would be an offence and such a person can be punished with either description for a term which may extend to two years and shall also be liable to fine.[44] The combined effect of these provisions may be shown in a tabular form. (See Table-3:2)

Table- 3:2

Marital Rape

Act	Her Age	With or without consent	Living together or separately	Offence	Punishment
Sexual intercourse by the husband	Not below fifteen years	Law is silent	Law is silent	No offence	No
Sexual intercourse by the husband	Fifteen or above	Law is silent	Law is silent	No offence	No
Rape by the husband	Not under twelve years of age	Presumably without her consent	Law is silent	Offence	Two years imprisonment or fine or both
Rape by the husband	Between twelve to fifteen years of age	Presumably without her consent	Law is silent	Offence	Two years imprisonment or fine or both
Sexual intercourse by the husband	Law is silent	Without her consent	Living separately under a decree or any custom or usage	Offence	Two years imprisonment and fine
Sexual intercourse by the husband	Below twelve years of age	Presumably with or without consent	Law is silent	Offence	Same as the punishment of rape

[43] See Section 376 (1) of the of the Indian Penal Code, 1860.
[44] Section 376 A of the Indian Penal Code, 1860.

iii) The Lacunae and Contradiction in the Law Relating to Marital Rape

The most frequently cited basis for marital rape exemption is the doctrine of irrevocable implied consent. This theory originated with a seventeenth century declaration by **Sir Matthew Hale** that:[45]

> *"The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."*[46]

The Indian marital rape exemption still reflects the above seventeenth century perception. There are many lacunae and contradiction in the existing law relating to marital rape. Following are some such example;

a) Firstly the Indian Penal Code spells out the offence of marital rape in a very restricted sense.[47] It specifies a statutory age limit of twelve years for married women, beyond which the offence does not extend.[48] In other words, to constitute the offence of rape within the marital bonds, the wife must be less than twelve years. If she is between twelve and fifteen years an offence is committed which is less serious in nature, attracting mild punishment of two years imprisonment. Even then it would be a cognizable, bailable offence triable by a Court of Session.[49]

b) Secondly while the rape of a girl below 12 years of age may be punished with imprisonment for seven to ten years or for life term, the rape of a girl under 15 but not below 12 carries lesser sentence if the rapist is married to the victim. This contradiction in law fails any reason or logic. However, once the age crosses fifteen, the rape legislation affords immunity to the husband to impose himself on his wife and exercise complete sexual control over her body, in direct contravention of human rights of women.

c) Thirdly the law prevents a girl below 18 years from marrying, but on the other hand, it legalizes non consensual sexual intercourse with a wife who is not below 15 years of age.

d) Fourthly the Penal Code states that it is rape if the girl is not the wife of the man involved and is below 16, even if she consents.[50] But if she is a wife, not below 15 and does not consent, it is not a rape.[51]

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[45] Katherine M. Schelong, "*Domestic Violence and The State: Responses to and Rationales for Spousal Battering, Marital Rape and Stalking*," 78 Marq.Law Review, (1994).at pp. 79-86.
[46] Ibid.
[47] See Table 3:1.
[48] Dipa Dube, "*License to Rape*," in Dr.N. K. Chakraborty & Dr. Shachi Chakraborty (ed) "Gender Justice,"(R Cambray & Co Pvt Ltd, Kolkata, 2006), at p. 184.
[49] See Schedule I, of the Code of Criminal Procedure, 1973.
[50] See Clause Sixthly of Section 375 of the Indian Penal Code, 1860.
[51] See Exception to Section 375 of the Indian Penal Code, 1860.

e) Sixthly another paradox is that according to the Indian Penal Code, 1860, non-consensual sexual intercourse by a man with a wife who is living separately under a decree or under any custom or usage would be an offence. However, the punishment may either be a fine or an imprisonment for a period of 2 years or both, which is quite less in comparison to the punishment provided for rape outside the marriage.

f) Seventhly in view of the judicial interpretation of Article 21 of the Constitution which has by leaps and bounds expanded the meaning of right to life and live with human dignity, it can be said that the exception provided in section 375 IPC is clearly violative of the said Article of the Constitution.

g) Eighthly the law contained in the Penal Code does not give the same protection to all the women in matters of rape. The exception to section 375 IPC discriminates with a wife when it comes to protection from rape. The classification of women in this regard clearly unreasonable and therefore violates Article 14 of the Constitution.

h) Ninthly the though the Constitution casts a duty upon every individual 'to renounce practices derogatory to women;[52] the present legal policy in this regard sends a different message that ultimate violation of self like marital rape does not come under the definition of dignity.

i) The existing law relating to marital rape is also violating of the United Nations Convention on the Elimination of All Forms of Discrimination against Women,[53] of which India is a signatory. The said Convention views this sort of discrimination against women as violative of the principles of equality of rights and respect for human dignity.

j) The present legal policy is also neglects the mandate of the Commission of Human Rights which recommended for the criminalization of marital rape.[54]

iv) Efforts of the Law Commission

The fifth Law Commission of India in its 42nd Report put forward the necessity of excluding marital rape from the ambit of Section 375 IPC by observing that:[55]

> *"Naturally the prosecutions for this offence are very rare. We think it would be desirable to take this offence altogether out of the ambit of Section 375 and not to*

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[52] Article 51 A (c) of the Constitution of India.

[53] Preamble of the CEDAW 1979.

[54] Commission of Human Rights Resolution entitled "The Elimination of Violence Against Women." Resolution No. 1995/85 of 8th March 1995.

[55] Law Commission of India, 42nd Report, Indian Penal Code, Government of India, Ministry of Law, June 1971.

call it rape even in a technical sense. The punishment for the offence may also be provided in a separate section."[56]

The ninth Law Commission in its 84th Report however showed its disagreement with the restructuring suggested by the former Law Commission.[57] It felt that such an arrangement would "produce uncertainty and distortion" and hence Section 375 should "retain its present logical and coherent structure."[58] With regard to the age, however, they were of the opinion that it should be increased to 18 years. The law Commission therefore, observed that:

"The minimum age of marriage now laid down by law (after 1978) is eighteen years in the case of females and the relevant clause of Section 375 should reflect this changed attitude. Since marriage with a girl below eighteen years is prohibited (though this is not void as a matter of personal law) sexual intercourse with a girl below 18 years should also be prohibited."[59]

The recommended section of the ninth Law Commission thus read as:

Exception: Sexual intercourse by a man with his own wife, the wife not being under 18 years of age is not rape.[60]

The subsequent Law Commission in its 172nd Report[61] has preferred to adhere to its earlier opinion of non-recognition of "rape within the bonds of marriage" as such a provision in this regard "may amount to excessive interference with the marital relationship."[62] The only suggestion is made again with regard to age that may be raised from 15 to 16 years and a slight modification of section 376A with regard to the punishment. It recommended that Sexual assault by the husband upon his wife during separation shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to seven years and shall also be liable to fine.[63]

v) The Clue and Suggestion for Reform

The present law on marital rape which is reflected through the eyes of T.B. Macualay and his colleagues like many other laws indicates the then prevailing sexual mores in India. This law assumes that a woman, through marriage forgoes forever her right to refuse sexual intercourse with her husband and the husband thereby, acquires an unconditional and unqualified licence to force sex upon his

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[56] Ibid at para. 16.115.
[57] Law Commission of India, 84th Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence, April, 1980.
[58] Ibid. at para. 2.21.
[59] Ibid. at para. 2.20.
[60] Ibid.
[61] Law Commission of India 172nd Report on Review of Rape Laws, 25th March 2000, D.O. No. 6 (3)(36)/2000_LC(LS).
[62] Ibid at p. 27.
[63] Ibid at Para 3.3.1.

wife.[64] The policy views marriage as a licence to rape her.[65] This colonial law is still operative in India. But the people who gave it to us have already abolished the marital rape exemption in its entirety in the year 1991.and we can get a clue there from. The house of Lords in **R v R,** [66] held that the rule a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an anachronistic and offensive common law fiction, which no longer represented the position of a wife in present day society, and that it should no longer be applied. This Judgment was also affirmed by the European Court of Human Rights in the decision of **SW v UK.**[67]Corresponding amendment to the statutory law was made through Criminal Justice and Public Order Act, 1994.[68]

Although no surveys have been done on marital rape in India, the prevalence of this violent crime cannot be discounted.[69] Attitudinal invisibility reinforces the statistical invisibility. Overwhelming legal precedent, social custom, religious attitudes and socio-economic structures makes the very concept of marital rape-the act of a husband having forcible sex with his wife-a preposterous proposition.[70]There are no sound and appealing reasons, legal as well as pragmatic, for either the Indian Legislature or the Higher Judiciary for not taking inspiration from the House of Lords to do away with the century-and-a half privilege of a husband to impose on his wife his urge for sexual intercourse in total disregard to her will, desire or consent.[71]We can get a clue from the countries where marital rape exemption has been abolished. Even after conceding the fact that changing the law on sexual offences is a formidable and sensitive task, and more so, in a country like India, where there is a contemporaneous presence of a varied and differentiated system of personal laws that might come into conflict with the new amendments in the statutory criminal law, one must realize that rape is rape irrespective of the fact whether it is occurring within or out side marriage. By permitting marital rape, the law unconstitutionally forces all women to surrender their right to bodily integrity, reproductive freedom and

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[64] K.I.Vibhuti, "*Rape and the Indian Penal Code at the Crossroads of the new Millennium: Between Patriarchiast and Gender Neutralist Approach*," Journal of the Indian Law Institute, vol. 43:1, (2001). pp.25-44. at p.27& 28.

[65] Ibid. at p. 28.

[66] (1992) 1 AC 5999: (1991) \$ All ER 481 (HL).

[67] (1996) 21 EHRR 363.

[68] Section 147 of the Criminal Justice and Public Order Act, 1994.

[69] For details pertaining to marital rape see, http://www.globalforumhealth.org/filesupld/vaw/rapemarriage.html.

[70] Suman Saha, "*Sleeping With the Enemy? – Recognizing Marital Rape.*" Womens Link, vol. 10.no.2 April-June, 2004, pp.2-8 at p.2.

[71] K.I. Vibhuti, "*Rape Within Marriages in India: Revisited.*" Indian Bar Review, vol. 27 (3&4) 2000,pp. 167-186, at p. 183.

personal liberty on marriage.[72] After marriage Indian women suffers legally sanctioned sexual violence in violation of their cherished right to life. They are also denied the right to equality before law and equal protection of laws. It is suggested that marital rape should be criminalized in its entirety to uphold the spirit of the constitution and dignity and respect for human person. The punishment for marital rape should be same as the one prescribed for rape. It should not be made a defence to a charge that the wife did not fight back and resisted forcefully, screamed and shouted. The wife should have an option of getting decree of divorce if the charge of marital rape is proved against her husband. Though a case of marital rape may fall under 'cruelty' or 'rape' as a ground of divorce, it is advisable to have the legal position clarified.[73] Demand for divorce may be an option for the wife, but if the wife does not want to resort to divorce and want to continue with the marriage the marriage should be allowed to continue. Obviously this would require corresponding changes in the matrimonial law.

e) Attempt to Rape

'Attempt to commit rape' has not been specifically incorporated as an offence in our Penal Code. The authority to punish the 'attempt to commit rape' has been derived by the Indian Courts from section 511 of the Indian Penal Code, 1860 which is a general provision to punish all attempts towards offences.[74] However, certain attempts have been specifically incorporated in the Code namely the attempt to commit suicide,[75] attempt to commit murder.[76] What is irony is that while attempt to commit suicide and murder finds a specific mention in the Indian Penal Code but the attempt to commit a grave offence like rape is yet to get a definite and specific birth in the Code. This has led to many problems.

Attempt to commit a crime is punishable by the half of the longest term of imprisonment for that offence, or with such fine as provided for that offence. In a number of cases the issue has arisen whether the sexual assault in question could

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[72] Suman Saha, " *Sleeping With the Enemy? – Recognizing Marital Rape*," Womens Link, vol. 10,no.2 April-June, 2004, pp.2-8 at p.6.

[73] Saurabh Mishra & Sarvesh Singh, " *Marital Rape-Myth, Reality and Need For Criminalization*," (2003) Punjab Law Web Journal 12, SCC Case Finder 2005.

[74] Section 511 of the Code reads: Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment:- Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment , or to cause such an offence to be committed, and in such attempts does any act towards the commission of the offence, shall where no express provision is made by this Code for the punishment of such attempt be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.

[75] See Section 309 of the Indian Penal Code, 1860.

[76] See Section 307 of the Indian Penal Code, 1860.

amount to an attempt to rape, since in a number of these cases it was obvious that the accused had, in fact, been trying to rape. Some courts however relied upon technicalities to rule out attempt, in cases in which the attempt was not at the last stage of the act. The courts have drawn a distinction between preparation to commit rape and attempt to commit rape, and imposed a relatively minor sentence for a conviction under section 354 of the Indian Penal Code.[77] In **Kishore v State of Maharashtra,**[78] the accused entered the room, closed the door and molested the victim by squeezing her breast and tried to open her pants. The Court held that the act was relatable to the stage of preparation not amounting to 'attempt.' The courts have even held that if the accused did not even attempt to expose his private part, his acts could not be considered beyond the stage of preparation, and therefore inadequate to prove attempt to commit rape.[79] In **Jai Chand v State,**[80] the accused a hospital orderly caught hold of a nurse and forcibly laid her down on the bed, broke the string of her trousers and removed her sanitary napkin as well. The lower court convicted him on the ground of attempt to rape. But the High Court however held that no attempt had been proved as the accused had not gone beyond the stage of preparation and there fore it convicted the accused under section 354, IPC and punished him with two years of imprisonment.

In **Madan Lal, Appellant v. State of J. and K., Respondent,** [81] the accused headmaster of School attempted to commit rape on rustic girl in his school. The FIR filed by mother revealed the story of prosecutrix that she was sent to house of accused for cooking and thereafter accused came to house and committed sexual assault. Absence of prosecutrix and accused from school was corroborated by other student witnesses. Presence of semen/Human Spermatozoa on clothes of prosecutrix was also a strong corroborative piece of evidence to prosecutrix version even if it has not been established that Human Spermatozoa was that of accused. The Supreme Court while holding that the charge of attempt to commit rape established beyond all reasonable doubts and setting aside the acquittal of accused observed that:

> *"Evidence establishing that accused has gone beyond the stage of preparation. Mere absence of penetration would not absolve him from offence of attempt to commit rape. It would not be a case of mere assault under S. 354.The difference between preparation and an attempt to commit an offence consists chiefly in the*

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[77] Kirti Singh, " *Law Violence and Women in India*" : A Study Supported by the UNIFEM/UNICEF. New Delhi, at p.9.
[78] 1995 Criminal Law Journal 1765 (Bom).
[79] State of Punjab v Major Singh, AIR 1967 SC 63.
[80] 1996 Criminal Law Journal 2039.
[81] AIR 1998 SC 386.

greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her flat on the ground undresses himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself then it cannot be said that it was a case of merely assault under Section 354, I.P.C. and not an attempt to commit rape under Section 376 read with 511, I.P.C. In the facts and circumstances of the case the offence of an attempt to commit rape by accused has been clearly established and the accused was rightly convicted under Section 376 read with 511, I.P.C."[82]

In **S. I. (Jem) Pramodh Singh, Appellant v. State of J. and K., Respondent,**[83] the prosecutrix used to visit the house of the appellant for purpose of study and had occasionally slept in his house earlier. The fateful night was one such occasion. The appellant on that night slept with her on the same cot. During night he removed her pyjamas as also his. According to the prosecutrix, he inserted his male organ in her vagina to the extent of one inch which caused her pain and bleeding. When she started crying the appellant gave her a slap and told her to be quiet. Her crying attracted the attention of PW's 2 and 3. To this extent she stands corroborated by the evidence of these PW's that they had heard the girl crying. PW's, 2 and 3 are the neighbours living closely to the house of the appellant. The prosecutrix thereafter was kept confined in the house of the appellant for a few hours when at about noon time the next day she was allowed to go to her parent's house where she told about the incident to her parents. It is thereafter that the criminal law was set into motion to prosecute the appellant.

The Apex Court found reasoning from the fact that, the prosecutrix is a child and an inexperienced girl. The particulars of rape were put to her during cross-examination. She seems to have been toyed with by the cross-examiner. It cannot be said that she was fully aware or cognizant of the sex act. She seems to have been led on to speak something about which she was fully not in the know. And on this basis the court upheld the conviction of the accused under section 354 IPC instead of convicting him for an offence of attempt to commit rape. The Court therefore, observed that:[84]

"In this situation, we unhesitatingly come to the view, that the conviction of the appellant under Section 354, I.P.C. was well-based as the prosecution had been able to successfully prove such charge against the appellant."[85]

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[82] Ibid, at Paras 11&12.
[83] Criminal Appeal No. 535 of 1987. D/11-1-1995.
[84] Ibid.
[85] Ibid.

State of Maharashtra, Appellant v. Rajendra Jawanmal Gandhi,[86] shows how judicial reliance moves like a pendulum. Here the prosecutrix a student of 4th class ;when she was going on the colony road at the intersection of this road and a bye-lane, which was a secluded spot, the accused caught-hold of her on the pretext that her assistance was required for pulling either the pipe or the wires in the Maruti car which was standing there. The girl was pushed inside the car. At that time she was wearing a midi-frock and a nicker. The accused pulled down her nicker and laid her on the seat in the car. She did try to resist by saying that she should be allowed to go and that she would be late in reaching home. The accused then opened the zip of his pant and started pressing his penis on her private part. When the girl cried that she would be late in reaching home, the accused said 'wait', 'one second'. According to her, thereafter the accused urinated. She felt wetness on her private part. After the girl was released she came home weeping. She embraced her father and narrated the whole incident to him. Dr. Gunda who was the Medical Officer at Civil Hospital, Kolhapur examined the prosecutrix at 9 P. M. on September 24, 1986 itself. This he did on the basis of police 'yadi'. On examination he found:

"(i) Labia-minora was inflammed and reddened.

(ii) External urethral meatus was reddened and swollen.

(iii) Hymen was intact.

(iv) P. V. examination was not possible. He therefore took the swab from introitus (opening of the vagina) and not from inside the vagina."[87]

He, however, did not issue the medico-legal certificate on the same day. On October 2, 1986, he issued the certificate and under the head "Chief complaints" he had written: "complains of burning micturition since afternoon today". Then on the following day he certified that rape was committed with the following report:

"Conclusion — Committed rape — this conclusion I have drawn after clinical examination of the girl."

Report about the incident appeared in the newspaper of the town on the following day, i.e., September 25, 1986 and there was an immediate outcry in the public and 'morchas' taken out. Dr. Hoshing was the Civil Surgeon, Kolhapur, who, under intense public pressure, formed a panel of three private doctors to again examine the prosecutrix. The panel examined her on September 29, 1986. This panel consisted of Dr. Naganonkar, M.D. in Gynaecologist, Dr. Kudalkar and Mr. Maladkar, both senior doctors and the result of their examination is as under:

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[86] AIR 1997 SC 3986.

[87] Ibid.

"(i) Labia-minora inflammed.

(ii) External urethral meatus inflammed.

(iii) Fourchette showed abrasions with signs of inflammation.

(iv) Infected linear vertichi tear on right para-urethral region, and

(v) Tear of hymen at 3' O'Clock position."[88]

The midi-frock and the nicker of the prosecutrix were taken into possession in the course of investigation and so also the underwear. T-shirt and pant which the accused was wearing at the time he was taken into custody. The semen stain of Blood Group B was found on the nicker of the prosecutrix. The semen stains of blood group B were also found at the spot where the penis of the accused was touching his underwear. The blood group of the accused is of Group B.

The trial court convicted the accused for offences under Section 376, Indian Penal Code (IPC) and Section 57 of the Bombay Children Act, 1948 for having committed rape on a girl of eight years of age and sentenced to undergo rigorous imprisonment for 7 years and to pay fine of Rs. 5,000/- and in default of payment of fine to undergo rigorous imprisonment for six months and for offence under Section 57 of the Bobmay Children Act, he was sentenced to undergo rigorous imprisonment for one year and fine of Rs. 500/- and in default thereof rigorous imprisonment for one month.

The accused appealed to the Bombay High Court against his conviction and sentence. A Division Bench of the High Court by judgment dated October 4, 1994 upheld the conviction of the accused under Section 57 of the Bombay Children Act and upset the conviction under Section 376, IPC and instead convicted him for an offence under Section 354, IPC and sentenced him to suffer rigorous imprisonment which he had already undergone (which was 33 days in all) and to pay fine of Rs. 40,000/-. In default of payment of fine, the accused was sentenced to undergo rigorous imprisonment for three months. It was ordered that out of the fine so realized, a sum of Rs. 25,000/- shall be paid to the complainant who was father of the girl. For an offence under Section 57 of the Bombay Children Act, sentence was reduced to imprisonment already undergone and the accused was not required to undergo any separate imprisonment for this offence. While the State of Maharashtra filed appeal against the conviction and sentence of the accused by the High Court praying for his conviction under Section 376, IPC and for enhancement of his sentence of minimum of 10 years, the accused filed appeal against his very conviction and sentence under Section 354, IPC and 57 of the Bombay Children Act.

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[88] Ibid.

The Supreme Court finally, allowed the appeal of the State to convert the conviction of the accused-respondent from under Section 354, IPC to that under Section 376/511, IPC and sentenced him as aforesaid. The court held that since fine had already been paid, no sentence of imprisonment in lieu of payment thereof was necessary. The conviction and sentence of the accused under Section 57 of the Bombay Children Act as ordered by the High Court should, however, stand. The sentences shall run concurrently.[89]

These decisions therefore shows that the lower courts are not guided by the standard or test which may objectively guide the judicial mind to arrive at a fairly uniform basis of decision. It is to be admitted that attempt to rape and indecent assault which falls within the meaning of section 354, IPC are not the same thing.[90] Even the recent decisions of the Highest Court in **Raju Pandurang Mahale v State of Maharashtra,**[91] and **Aman Kumar v State of Haryana,**[92] shows the reliance of the Higher Judiciary for their interpretation, on cases decided in the late 19th Century. The Judiciary heavily relied on **Rex v James Lloyd,**[93] and on the same line observed "in order to find an accused guilty of an attempt with intent to commit a rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part."[94] Indecent assaults are often magnified into attempts at rape. The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.[95] In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, material must exist. Surrounding circumstances many times throw beacon light on that aspect. Even the Higher Judiciary admits its belief that Indecent assaults are often magnified into attempts at rape.[96] This is also reflective of the similar belief of an eighteenth century Judge namely **Melvill** who made the following observation:[97]

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[89] Ibid at p. 3997.
[90] Raju Pandurang Mahale v State of Maharashtra, (2004) 4 SCC 1259: AIR 2004 SC 1677.
[91] Raju Pandurang Mahale v State of Maharashtra, (2004) 4 SCC 1259: AIR 2004 SC 1677.
[92] Aman Kumar v State of Haryana, (2004) 4 SCC 379: AIR 2004 SC 1497.
[93] (1836) 7 C & P 318: 173 E.R. 141.
[94] In both Raju Pandurang Mahale v State of Maharashtra, (2004) 4 SCC 1259, as well in Aman Kumar v State of Haryana, (2004) 4 SCC 379.
[95] Aman Kumar v State of Haryana, (2004) 4 SCC 379: AIR 2004 SC 1497.
[96] Aman Kumar v State of Haryana, (2004) 4 SCC 379, paras. 11 & 14.
[97] Melvill, J made this observation in Empress v Shankar, (1881-1882) ILR 5 BOM 403.

"We believe that in this country indecent assault are often magnified into attempts at rape, and more often into rape itself; and we think that a conviction of an attempt at rape ought not to be arrived at, unless the court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all event, and in spite of all resistance."[98]

In **Sudesh Jhaku v K.C.J**,[99] one of the issues that have been raised was whether or not the insertion of objects or fingers into the vagina constituted attempt to rape. In our country the same act in various cases has been considered inadequate to prove attempt to commit rape and the accused has only been punished under section 354, IPC.[100]

On the whole it can be said that the reality is that in most of the cases the offender is punished under section 354 IPC which attracts two years imprisonment due to judicial interpretation, reliance in the old decision and adherence to the age old belief. It is only in a very few cases the offender is held guilty of attempt to rape and punished sufficiently.[101]

f) Consent in Rape

Section 375 of the Indian Penal Code, 1860 merely specifies that rape committed when a man commits sexual intercourse 'without her consent', without looking into the definition of consent.[102] Section 90 of the Code merely gives instances of when consent can not be said to have been given, instead of defining what exactly amounts to consent.[103] The result is that the meaning of consent is still left to the judicial interpretation. In its 172nd Report[104] the Law Commission of India did not accept the request of **Sakshi**[105] that the definition of consent be inserted in the Indian Penal Code.[106] One of the most important element of the

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[98] Ibid.

[99] 1996 (2) Delhi Law Times.

[100] State of Punjab v Major Singh, AIR 1967 SC 63. Also see the contrast in an English case namely Reg v Robinson. 1992 1 WLR 168 where the accused had inserted his finger into the vagina of a woman after he had failed to insert his penis because of resistance from the woman , was held guilty of attempt to commit rape.

[101] Also note that in America attempt to commit rape is punishable offence under the Attempted Rapes Act and the maximum punishment is seven years. In England similarly the punishment is equally severe.

[102] See clause Clauses secondly, sixthly of section 375 IPC and also section 376A of the IPC.

[103] Yamini Srivastava, "*Need For Amendment In Rape Law: A Focus On Consent*," Criminal Law Journal, (2003), pp.327-337, at p.328.

[104] 172nd Report of the Law Commission of India on Review of Rape Laws, March, 2000, D.O.No.6 (3) (36)/2000_LC(LS).

[105] An NGO which deals with women's related issues and fights against violence against women.

[106] Opinion of the Law Commission: " We are however of the opinion that no such definition is called for at this stage, for reasons that the said expression has already been interpreted and pronounced upon by the Courts in India in a good number of cases. Reference in this behalf may be made to page 700 of the Commentary on IPC by Justice Jaspal Singh (First Edition 1988) where it is stated, on the basis of the decisions of the Madrass, Punjab, and Nagpur High Courts, that "consent implies the exercise of a free and untrammeled right to forbid or withhold what is being consented to; it always is a voluntary and cocious acceptance of what is proposed to be done by another and concurred in by the former."

offence of rape as defined by section 375, IPC is the lack of consent of the victim. This must be proved by the prosecution beyond a reasonable doubt to convict a culprit, consequently a large number of rape cases go unpunished for want of proof.[107] **Tukaram**'s case,[108] commonly known as the Mathura rape case is an example where a constable was accused of raping a girl at the police station, the Supreme Court acquitted the accused on the plea of passive submission. This decision evoked great resentment among the jurists, judges, women organisations, social activists' etc.To remove this infirmity in our substantive and procedural law[109] the Criminal Law (Amendment Act), 1983 introduced a new section namely section 114A[110] in the Indian Evidence Act, 1872 which shifts the burden of proof from the prosecution to the defence.This section presumes the absence of consent of the victim of rape. Once the victim says that she did not consent, the court will presume that sexual intercourse was committed without her consent, and then the accused is required to prove that he committed sexual intercourse with the consent of the woman.[111] This change is hailed by many scholars as a marked departure from the classic principle of criminal jurisprudence that a person is deemed innocent until the contrary is proved, although it goes without saying that the aforesaid presumption is a rebuttable presumption of law (`shall presume') within the meaning of section 4 of the Indian Evidence Act, 1872. However, as a result of the Amendment, the charge that the alleged act of sexual intercourse was without or against the consent of the prosecutrix will be presumed ipso facto unless the contrary is proved.[112] But this removal of infirmity from the evidence of a victim as because its application is limited to the cases of custodial rape, rape of a pregnant woman, rape of a woman when she is less than twelve years of age and gang rape.

Consent in general is no defence to a criminal charge but may be in some cases for example, rape. It is a defence to a charge of rape that the woman consented. Consent as per section 375 IPC may become a good defence when a man commits sexual intercourse with a woman if she is above sixteen years of

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[107] K. D. Gaur, "*Criminal Law-Cases and Materials*," 3rd Edition, (Butterworths, London, 1999), p. 498-502.

[108] Tukaram v State, 1978 Cr LJ 1864: AIR 1979 SC 185.

[109] Note that the Law Commission in 1959 recommended for the insertion of a section in the Indian Evidence Act, 1872 regarding the presumption of absence of consent on the part of the victim.

[110] Section 114 of the Indian Evidence Act, 1872 reads: Presumption as to absence of consent in certain prosecutions for rape- In a prosecution for rape under the clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of subsection (2) of section 376 of the Indian Penal Code, 1860 where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

[111] Batuk Lal, "*The Law of Evidence*," 15th Edition, Reprint,(Central Law Agency, 2003), p.361.

[112] K. D. Gaur, "*Criminal Law-Cases and Materials*," 3rd Edition, (Butterworth's London, 1999), p. 498-502.

age.[113] Consent again plays a vital role for the accused who commits sexual intercourse with his own wife when she is above 15 years of age and is also living separately under a decree of a court of law. This is because of the combined effect of section exception to section 375[114] and section 376A[115] of the IPC. The former makes the husband guilty of rape when the wife is less than fifteen years only. The implication is that a man can not be held guilty of rape on his wife when she is over the age of fifteen years. The latter section makes the husband guilty of rape on his wife who is living separately under a decree of the court, when the husband commits sexual intercourse with her without her consent. The implication is that if the wife gives consent it would not amount to an offence of rape. But it would not be a defence in case of rape of a woman in the following cases:

i) when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt or

ii) 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

iii) when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent, or

iv) when she is under sixteen years of age.

v) sexual intercourse with a mentally defective woman.[116]

On a reading of section 375, IPC it appears that the policy of law is to limit rape to acts done by force or threat for force or fraud or by deception. Yet, there is little difference between sexual access gained through the actual or threatened use of physical violence and that gained through the actual or threatened use of economic organizational , or emotional, or social violence.[117] The Present policy does not protect a victim whose sexual access was gained through the exploitation of emotion or by false promise. This flaw in law was exposed in

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[113] See Table 3:1.

[114] The Exception to Section 375 IPC reads: Sexual intercourse by a man with his own wife, the wife not being under the fifteen years of age, is not rape.

[115] Section 376 IPC reads: Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

[116] As because she can not give a valid consent.

[117] Dr. Subhash Chandra Singh, "*Consent in Rape: A Victim's Perspective*," .Criminal Law Journal. (2001), at pp.40-45.

Uday.v. State of Karnataka,[118] where the complainant was deeply in love with the accused, and on a promise that he would marry her on a later date the prosecutrix gave her consent to sexual intercourse. They continued to meet and often having sexual intercourse and the prosecutrix became pregnant. She then lodged a complaint on failure of the appellant to marry her. The Court held that, the consent cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Penal Code for determining whether consent given by the prosecutrix was voluntary or under a misconception of fact. The Court further observed that:

> *"There is no straitjacket formula and each case has to be decided considering the evidence and surrounding circumstances of that case- where(i) the prosecutrix (aged 19 years on the date of occurrence) had sufficient intelligence to understand the significance and moral quality of the act she was consenting to, (ii) she was conscious of the fact that her marriage with the appellant was difficult on account of caste considerations, (iii) it was difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise, and (iv) there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix,"*[119]

In view of the above the Court then held that the appellant's conviction under section 376 of the IPC was liable to be set aside. As to the question whether in a case of rape the misconception of fact must be confined to the circumstances falling under section 375 IPC fourthly and fifthly, or whether consent given under misconception of fact contemplated by section 90 IPC has a wider application so as to include circumstances not enumerated in section 375 IPC the, Court held it was not necessary to be considered therein.[120]

The Court further explained its opinion in the following words:

> *"The consensus of judicial opinion is in favour of the view that consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as*

[118] (2003) 4 SCC 46.
[119] Ibid.
[120] Ibid.

long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. The circumstances show that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."[121]

This decision makes us believe that voluntary consent under misconception of fact could be used as a defence against a charge of rape. In the similar way the accused obtained the consent to sexual intercourse in **Bodhi Satwa Gautam.v Subhra Chakraborty**,[122] during the pendency of the criminal proceedings the Supreme Court ordered for the payment of compensation to the victim Subhra Chakraborty a sum of Rs. 1,000/ every month as interim compensation.[123]

The legal notion of consent under sections 375 and section 90 of the Penal Code and its embodiment fails to include a consideration for coerced consent or submission other than under physical duress. The present legal policy in this regard focus only on that type of violence which reflects man's physical superiority over females and ignores the other types of violence which reflects man's economic, organizational and social superiority.[124] In doing so the present legal policy excludes an enormous amount of sexual access where the actual or threatened use of violence other than the physical variety is the means of neutralizing the victim's non-consent.[125] Further more the law omits all those instances where the wife is obliged irrespective of her own desire.[126] The legal definition of rape therefore focuses merely on surface appearance of consent rather than considering whether or not the conditions for genuine consent existed.[127] Consent as a defence to a charge of rape requires voluntary participation, not only after the exercise of intelligence based on the knowledge of

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[121] Ibid at paras 21& 23.
[122] (1996) SCC 490.
[123] The Criminal Case No. 1/95 which is pending before the Court of Judicial Magistrate. 1st Class. Kohima, Nagaland.
[124] (1996) SCC 490.
[125] Note that the changes in the society and criminal behaviour has forced the legislature to incorporate provision in the Penal Code namely Section 195 A that acknowledged the fact that the third party can be forced and coerced: Section 195 A as amended by the Criminal Law (Amendment) Act 2005 (Act 2 of 2006) reads as: Threatening or inducing any person to give false evidence- Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to causes that person to give false evidence shall be punished with imprisonment of either description which may extend to seven years, or with fine, or with both; and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced.
[126] Exclusion of Marital rape invariably presumes the consent of the wife.
[127] Dr. Subhash Chandra Singh. "*Consent in Rape: A Victim's Perspective*," 2001.Cr. L.J. at pp.40-45.

the significance and moral quality of the act, but after having freely exercised choice between resistance and assent. Submission of the body of the victim under the influence of fear or terror is no consent.[128]It must be admitted that instead of focusing on the consent of the victim law should focus on the conduct of the offender by eliminating consent as an element in the offence of rape. Truly it is essential to conceptualize rape in broader terms and include every sexual act in which females positive desire is absent. One better way would be to determine this positive desire by relative equality between the parties and absence of coercion instead of consent.

C) INVESTIGATION, TRIAL AND THE VICTIM'S EVIDENCE

a) FIR and Investigation

i) Procedure for Investigation

The investigation of a cognizable offence in India normally commences with lodging a First Information Report with the police, under section 154 of the Code of Criminal Procedure, 1973.[129] After receiving the FIR and noting down the information regarding the offence, the police are required to investigate the crime and send the case to magistrate when evidence is sufficient, and forward the accused under the custody of the magistrate empowered to take the cognizance of the offence.[130] If upon an investigation the officer-in-charge finds that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, he shall, if the accused is in custody release him on his executing a bond, with or without sureties.[131] If the officer finds it necessary, he may direct such person to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and

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[128] In Re Amthony, 1960 Cr.L.J 927: AIR 1960 Madrass 308.

[129] Section 154 Reads : Information in cognizable cases- 1) Every information relating to the commission of a cognizable offence, if given orally to an officer-in-charge of a police station, shall be reduced to writing by him or under his discretion, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the state government may prescribe in this behalf. 2) A copy of the information as recorded under subsection (1) shall be given forthwith, free of cost, to the informant. 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 subsection (1) 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 cognizable offence, shall either investigate the case himself or direct an investigation to be made by any officer subordinate to him, in the manner provided by this code, and such officer shall have all the power of an officer-in-charge of the police station in relation to that offence.

[130] See Section 170 (1)of the Cr.P.C, 1973.

[131] See Section 169 of the Cr.P.C , 1973.

try the accused.[132] A survey of rape and sexual assault cases shows the many reasons why the majorities of the accused persons in a rape or sexual assault trial get acquitted or receive a relatively minor sentence. One of the major obstacles to justice in these cases is the poor quality of police investigation. The reasons behind this inadequacy range from gender bias and corruption to the general inefficiency of the police force.[133]

There are many instances where the court has expressed its unhappiness regarding the role played by the state investigative agency. **Karnel Singh, Appellant v. State of M.P., Respondent,**[134] is one such example which exposed the callousness of the police and their defective investigation. Here the prosecutrix was a poor labourer who was toiling to earn her livelihood to augment the family income. She was working in the factory since the last few days only and the appellant and his companion, taking advantage of the situation, drove away one labourer Charan by asking him to fetch tea and after he left the appellant violated her person. The prosecutrix in her evidence has stated that immediately after she ran from the place of occurrence she met one Reza Multanabai, a co-labourer, and narrated to her the incident before going in search of her husband. Thus, at the earliest point of time she narrated incident to the aforesaid person, but unfortunately that person was not cited and examined as a witness, nor was Charan produced as a witness. Thus, both these witnesses who could have corroborated the prosecutrix were not examined. In the course of investigation the under-garment (Chaddi) of the accused is stated to have been recovered. Dr. R.D. Sharma noted semen like stains on the garment and advised its examination by the Chemical Analyzer. The seizure of the "Chaddi' was, however, held not proved. Surprisingly, the Investigating Officer has not uttered a word about the seizure of this article. Finding all these, Supreme Court observed that:

> *"The Investigation Officer had not taken the care expected of him. He did not record the statements of the two witnesses nor did he refer to the attachment of the 'Chaddi' in his oral evidence. That was a very vital piece of evidence to which little or no attention was paid. If the seizure of that article was properly proved, the article with semen stains would have lent strong corroboration to the evidence of the prosecutrix. There is no doubt that the investigation was casual and defective."*[135]

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[132] Id.
[133] Kirti Singh. "*Law, Violence and Women in India*," A Study Supported by UNIFEM/UNICEF, New Delhi, p.13.
[134] AIR 1995 SC 2427.
[135] Ibid.

After expressing its unhappiness regarding the nature of investigation, the Court observed that:

> *"We have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective. Any Investigating Officer, in fairness to the prosecutrix as well as the accused, would have recorded the statements of the two witnesses and would have drawn up a proper seizure-memo in regard to the 'Chaddi'. That is the reason why we have said that the investigation was slipping shod and defective."*[136]

After a closer scrutiny the Apex Court opined that the loopholes in the investigation were left to help the accused at the cost of the poor prosecutrix, a labourer. To acquit solely on that ground would be adding insult to injury.

In **State of Punjab v Gurmit Singh**, [137] the prosecutrix a young girl below 16 years of age when she was going to the house of her maternal uncle the accused persons namely Gurmit Singh, Jagjit Sing and Ranjit Singh who were in a blue ambassador car, came out of the car and caught hold of her. There after she was pushed inside the car. The accused persons then went with her. She was forcibly raped by the accused persons severally. Next morning at about 6.00 a.m., the same car arrived at the kotha of Ranjit Singh and the three accused made her to sit in that car and left her near the Boys High School, Pakhowal near about the place from where she had been abducted. After a long period of time, and after conducting several raid the accused person were arrested. She stated in her cross-examination that the make of the car was Master. She was pertinently asked whether the make of the car was Ambassador or Fiat. The witness replied that she cannot tell the make of the car. But when she was asked as to the difference between 'Fiat, Ambassador or Master Car, she was unable to explain the difference amongst these vehicles. On this basis the Trial Court came to the conclusion that 'the allegations that she was abducted in a Fiat Car by all the three accused and the driver, is an imaginary story which has been given either by the thanedar or by the father of the prosecutrix.' When the case came before the Supreme Court which observed that:

> *"If the three known accused are in the clutches of the police, it is not difficult for the Investigating Officer to come to know about the car, the name of its driver etc.. but strange enough, Sub Inspector Raghbir Chand has shown pitiable negligence when he could not find out the car driver in spite of the fact that he*

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[136] Ibid at 2474.
[137] AIR 1996 SC 1339

directed the investigation on these lines. He had to admit that he made search for taking the car into possession allegedly used in the occurrence. He could not find out the name of the driver nor could he find out which car was used. In these circumstances, it looks to be improbable that any car was also used in the alleged abduction."[138]

In this case the Supreme Court categorically said that investigating agency not conducting investigation properly or was negligent.[139]This cannot be a ground to discredit testimony of prosecutrix.

ii) Filing and Recording of FIR-Root Problem

The problem in many instances arises at the stage of lodging FIR. Lodging of FIR is important for the initiation of investigation. But it is not sine qua non for the starting of an investigation in our country and it should not be a rule of initiating an inquiry in a country where there are independent bodies to look after the welfare of the state which encompasses the welfare of the people. What happens in our country is that depending upon either the socio/economic/ political status of a person, which has the potency of doing harm not only to the victim but also has the strength of influencing the action of the person conducting inquiry; our legal system actually collapses at the grass root level. This is the reason why various women's organisations in many cases reported that the police have refused to even lodge the First Information Report. Sometimes after lodging the FIR, the police refuse to give a copy of the report of the complainant, even though they are bound to do so under the law. Really what happens is a question of fact. In most of the cases the FIR is lodged in a very haphazard and incomplete manner. Sometimes police record some information leaving some valuable information given to it. Instead of accurately lodging the FIR, explaining it to the woman victim her rights under the law, and taking her for a prompt medical examination, the police make a delay and infact act as a major obstacle to justice.[140] 'The defects in the present system are: firstly, complaints are handled roughly and secondly they are not given such attention as is warranted. The victims, more often than no, are humiliated by the police.'[141]

iii) Delay in Filing FIR

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[138] Ibid at p. 1398.
[139] Ibid at p. 1393.
[140] This was pointed out by seven women's organization in Delhi: See Alternative Report for Beijing by All India Women's Conference, NFIW, Mahila Dakshita Samiti. Joint Women's Programme. YWCA and AIDWA. Delhi, 1993.
[141] This has been observed by the Highest Court of India in Bodhisattwa Gautam v Subhra Chakraborty. AIR 1996 SC 922. at p.928-929.

Mere delay in filing FIR is not and should not be made a ground to doubt the case of the prosecutrix or her version of evidence. There may be delay in filing FIR due to various reasons. In sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. Even if there is some delay in lodging FIR in respect of offence of rape, if it is properly explained and the explanation is natural in the facts and circumstances of the case, such delay would not matter.[142] But there are instances where delay in lodging FIR was considered and viewed in a different manner only to the detriment of the victim. For example in **Anant Bandhu Kundu v State of West Bengal,**[143] delay of six days in telling the incident to the mother and even after the alleged incident, the girl attended a dancing performance, held unsafe to convict the accused.[144] In **Ram Dittu v State of H.P,** [145] a delay of four days in reporting the matter not accounted for and therefore, the accused was acquitted. However there are a series of decisions which proves otherwise. In **State of Punjab v Gurmit Singh,**[146] the trial court found that the testimony of the prosecutrix did not inspire confidence for the reason that there had been delay in lodging the FIR and as such the chances of false implication of the accused could not be ruled out. In **State of Uttar Pradesh v Babul Nath,**[147] the High Court fell in a serious error in taking view that the explanation for the delay in lodging the report was fabricated and that the girl was not subjected to sexual intercourse. This compelled the Supreme Court to opine that 'the High Court appeared to be far away from being sensitive while appreciating the material on record.'

In several cases the Supreme Court made it clear that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. Even if there is some delay in lodging FIR in respect of offence of rape, if it is properly explained and the explanation is natural

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[142] AIR 1996 SC 1339.
[143] 1996, Criminal Law Journal 3449 (Cal).
[144] See also (1995) AIR SCW 3012.
[145] 1989, Criminal Law Journal. 2557. (HP).
[146] State of Punjab v Gurmit Singh. AIR 1996 SC at p.1399.
[147] (1994) SCC (Cr) 1585.

in the facts and circumstances of the case, such delay would not matter.[148] On various occasion the trial courts in India have taken wrong inference in case of delay in lodging FIR in case of rape. It is therefore the Supreme Court of India time and time again held that such delay in sexual offences does not matter and should not be considered as fatal to the case. Thus in **Karnel Singh, Appellant v. State of M.P,**[149] the Apex Court observed that:

> *"Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathize with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false."*[150]

State of Himachal Pradesh v Sree Kant Shekari,[151] is a classical example as to extent up to which a delay in lodging FIR can be justified and should not be considered fatal to the case. In this case the victim was a girl about 14 years, ravished by her teacher in the month of May, and she did not disclose about the incident to anyone due to threat by the accused. Few days after the incident, the accused, again committed sexual intercourse with her. When the victim felt stomach ache her mother took her to a hospital in the month of September. The doctor discovered the fact of pregnancy after investigation. On enquiry by the mother the victim disclosed that her conception was due to sexual intercourse by the accused. FIR was lodged in the month of November. The victim was totally unaware of the catastrophe which had befallen her. The High Court was of the opinion that there was unexplained delay in lodging FIR. But the Supreme Court after holding that such view was not sustainable observed that when accusation of rape involved, said delay per se is not a mitigating circumstance. Such a delay, if satisfactorily explained would not be fatal to the case. If not so explained and there is possibility of embellishment or exaggeration in prosecution version due to such delay then it is a relevant factor. In the present case a delay of 6 months is satisfactorily explained. On the same line a delay of 26 hours was held fully explained and justified by the court in **State of Rajasthan v Om Prakash.**[152]

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[148] State of Punjab v Gurmit Singh, AIR 1996 SC 1339

[149] AIR 1995 SC 2472.

[150] Id at 2475.

[151] (2004) 8 SCC 153.

[152] (2002) 5 SCC 745.

There may be delay if the victim is a married woman. **Sri Narayan Saha v State of Tripura,**[153]involved such a situation where there was a rape of a married woman. The Supreme Court observed that:

> *"In India if the prosecutrix happened to be a married person, she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly, does not raise the question that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women. It casts doubt and shame upon her rather than comfort and sympathize with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false."*[154]

b) Examination of the Victim

In cases of rape or attempted rape medical examination of the victim and the accused soon after the incident often yields a wealth of corroborative evidence. Such an opportunity should not, therefore, be lost on any account. Examination shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case.[155] The examination shall be conducted by a registered medical practitioner. Registered practitioner a medical practitioner who possesses any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.[156]

Regarding examination of the victim the code of Criminal Procedure contains elaborate provisions. First of all 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 women 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 women or of some person competent to give such consent on her behalf and the women shall be forwarded to the registered medical practitioner without delay.[157] It is the duty of the registered medical practitioner to whom such women is forwarded to examine

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[153] (2004) 7 SCC 775.
[154] Ibid at Para 8.
[155] Explanation (a) appended to Section 53 of the CrPC, 1973 as amended by the Code of Criminal Procedure (Amendment) Act, 2005, Act No. 25 of 2005.
[156] Explanation (b) appended to Section 53 of the CrPC, 1973 as amended by the Code of Criminal Procedure (Amendment) Act, 2005: (Act No. 25 of 2005).
[157] Section 164 A (1) inserted by the Code of Criminal Procedure (Amendment) Act, 2005. (Act No. 25 of 2005).

the women without delay, and prepare a report specifically recording the result of his examination.[158] He must also give the following details:

i. The name and address of the women and of the person by whom such women was brought,
ii. The age of the women,
iii. The description of material taken from the person of the woman for DNA profiling
iv. Marks of injuries, if any on the person of the women,
v. General mental condition of the women, and
vi. Other material, particulars, in reasonable details.

The report of the registered medical practitioner shall state precisely the reasons for each conclusion arrived at.[159] It shall also specifically record that the consent of the women or some person competent to give such consent on her behalf to such examination had been obtained.[160] The report should also note the exact time of the commencement and completion of the examination.[161] The registered medical practitioner is also under a duty to forward the report to the investigating officer without any delay, 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.[162] However no examination shall be conducted without the consent of the victim or of any person competent to give such consent on her behalf.[163]

There are instances where medical practitioners have refused to examine the victim unless the case is referred to them by the police. In **state of Karnataka v Manjanna**,[164] the Supreme Court there fore observed that:

> *"We wish to put on record our disapproval of the refusal of some government hospital doctors, particularly in rural areas where hospitals are few and far between, to conduct any medical examination of a rape victim unless the case of rape is referred to them by the police. Such a refusal to conduct the medical examination necessarily results in a delay in the ultimate examination of the victim, by which time the evidence of the rape may have been washed away by the*

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[158] Section 164 A (2) inserted by the Code of Criminal Procedure (Amendment) Act, 2005. (Act No. 25 of 2005).
[159] Section 164 A (3) inserted by the Code of Criminal Procedure (Amendment) Act, 2005. (Act No. 25 of 2005).
[160] Section 164 A (4) inserted by the Code of Criminal Procedure (Amendment) Act, 2005. (Act No. 25 of 2005).
[161] Section 164 A (5) inserted by the Code of Criminal Procedure (Amendment) Act, 2005. (Act No. 25 of 2005).
[162] Section 164 A (6) inserted by the Code of Criminal Procedure (Amendment) Act, 2005. (Act No. 25 of 2005).
[163] Section 164 A (7) inserted by the Code of Criminal Procedure (Amendment) Act, 2005. (Act No. 25 of 2005).
[164] (2000) 6 SCC 188.

complainant herself or be otherwise lost. It is expected that the appellant state will ensure that such a situation does not recur in future."[165]

c) Examination of the Accused

Though the prosecutrix can be examined only with her consent, the accused can be subjected to such an examination by virtue of section 53 of the Criminal Procedure Code, 1973.It has also to be remembered that the accused too can demand such an examination under section 54 of the Cr.P.C, especially when he feels that such an examination will disprove the charge brought against him.

When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometres from the place where the offence has been committed, by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.[166] It is the duty of the registered medical practitioner to examine such person without making any delay, and prepare a report of his examination.[167] His report should contain 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,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

The report of the medical practitioner should state precisely the reasons for each conclusion arrived at.[168] The exact time of commencement and

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[165] Ibid.

[166] Section 53 A (1) inserted by the the Code of Criminal Procedure (Amendment) Act, 2005, Act No. 25 of 2005.

[167] Section 53 A (2) inserted by the the Code of Criminal Procedure (Amendment) Act, 2005, Act No. 25 of 2005.

[168] Section 53 A (3) inserted by the the Code of Criminal Procedure (Amendment) Act, 2005, Act No. 25 of 2005.

completion of the examination shall also be noted in the report.[169] 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.[170]

d) Medical Evidence and Forensic Test

i) Importance of Medical Evidence

It is always desirable to have the accused medically examined as soon as possible. The same is required for the victim. In other words once an incident of rape is reported it is utmost necessary to medically examine both the parties' i.e., the complainant and the accused. The medical examination then can give authentic and vital clue.[171] It is also necessary on the part of the investigative agency to collect all relevant material including the dresses used by both the victim and the accused. It is only when the investigative agency act promptly and get hold of the accused and sends both the parties without any delay for examination, medical examination can yield good and true result from the point of view of investigation and ascertainment of the fact of rape. The examination of blood, blood stains, semen, swabs, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case, may give very important clue regarding the commission of a sexual offence like rape or attempt to rape. What is unfortunate is that the courts in general fail to appreciate medical evidence in case of rape and acquit the accused on the basis of their appreciation of the evidence. The courts fail to recognize the fact that under Indian condition where complaints are handled roughly and are not given such attention as is warranted; where the police and investigative agency acts like a callous man; where they often fail to act promptly to arrest the accused and collect relevant material including the clothes used by the accused; where they fail to collect the sample properly and send it without any delay for examination, medical evidence can not bear the truth. In all such cases the benefit of doubt goes to the accused. A series of cases would lend support to this fact.

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[169] Section 53 A (4) inserted by the Code of Criminal Procedure (Amendment) Act, 2005, Act No. 25 of 2005.

[170] Section 53 A (5) inserted by the Code of Criminal Procedure (Amendment) Act, 2005; (Act No. 25 of 2005).

[171] Subject to the limitation that samples were collected or the subjects were examined at a relevant point of time and properly and without any temperament.

In **State of Punjab v. Gurmit Singh and others,**[172] during her cross-examination, the lady doctor admitted that "she had not inserted her finger inside the vagina of the prosecutrix during the medico-legal examination but that she had put a vaginal speculum for taking the swabs from the posterior vaginal fornix's for preparing the slides. She disclosed that the size of the speculum was about two fingers and agreed with the suggestion made to her during her cross-examination that "if the hymen of a girl admits two fingers easily, the possibility that such a girl was habitual to sexual inter-course cannot be ruled out." The trial Court totally ignored the report of the Chemical Examiner Ex. PM according to which semen had been found on the slides which had been prepared by the lady doctor from the vaginal secretions from the posterior of the vaginal fornix's of the prosecutrix and came to the conclusion that "if the hymen of a girl admits two fingers easily, the possibility that such a girl was habitual to sexual inter-course cannot be ruled out." Therefore the victim was a girl of loose character.

In **State of H.P. v Mango Ram**, [173] the doctor found no marks of violence over the breast, nipple, cheeks and lips and on the external genitals, perineum, abdomen, chest, back, limbs, neck and face. The doctor also found no marks of injury over vulva, hymen was found intact with a small laceration at 6 o' clock position. Clotted blood was seen at vaginal orifice, which admitted tip of the finger with great difficulty. The Doctor observed "it was difficult to say whether intercourse has taken place or not. Vaginal swab slide was prepared and got examined microscopically.....under which no dead or alive sperms were seen." The session court therefore acquitted the accused. The High Court did not interfere with the finding of the Sessions Court. So both the court failed to appreciate that the medical certificate indicated that there was laceration of the hymen at 6 0' clock position and clotting of blood was seen at the vaginal orifice.

In **State of Maharashtra v Chandraprakas Kewalchand Jain,**[174] the evidence of the doctor who examined the respondent revealed that he had noticed i) absence of smegma around the glans penis and ii) the frenum tortuous and edematous, indicative of the respondent having had sexual intercourse within the preceding 24 hours, although the witness could not hazard opinion. The trial court therefore acquitted the accused. The court failed to realize the fact that the doctor had the vaginal smear and the slides almost 24 hours. The Supreme Court while pointing to this fact observed

> *"In the circumstances the absence of semen or spermatozoa in the vaginal smear and slides, cannot cast doubts on the creditworthiness of the prosecutrix.It*

[172] AIR 1996 SC 1393.
[173] (2000) 7 SCC 224.
[174] (1990) 1 SCC 550.

spermatozoa can be found if the woman is examined within 12 hours after intercourse, thereafter they may be found between 48 and 72 hours but in dead form. The prosecutrix may have washed herself by then. Therefore absence of spermatozoa cannot discredit her evidence."[175]

ii) Forensic Test

It is true that our criminal justice system works on the principle that it is better to let hundreds guilty escape than to punish an innocent. Benefit of doubt is always given to an accused and to a victim. The circumstantial evidence must form a chain pointing towards the guilt of the accused and the same should be so complete that there is no escape from conclusion that within all human probability the crime was committed by him and none else. If any link in the chain is missing, the guilt of the accused cannot be established.[176] If we are to still follow this policy in the Indian society only scientific techniques and tools can help us.

Before science put it under the microscope, sex was a simple, uncomplicated thing. One may ask a pertinent question if kissing is nothing more than a way of sniffing out compatible genes, what is point of sex- and will it ever be the same again?[177] Truly kissing or sexual intercourse or any physical advance is not prohibited but when they are used as a weapon of forced or unwanted or unwilling sex or sexual satisfaction gained through illegal means, they become sexual offence and deserved to be punished. In sexual offences like rape and other sexual assaults, forensic science can help the investigative agencies to a great extent in getting the clue about the offender and in proving his guilt beyond reasonable doubt. DNA testing if properly conducted may conclusively bring out many hidden fact and dark side of the offender and clearly establish his guilt. DNA or deoxyribonucleic acid is contained in all the body cells. It carries the genetic code that is believed to control the human beings physical traits, such as race, sex, hair and eye colour. Scientists believe that not two people other than identical twins have identical DNA. The criminal justice system could be a major beneficiary of the DNA printings, sperm, blood, skin, and bone marrow cells are particularly rich in DNA making it a useful tool in murder and rape cases. Apart from this, DNA mapping could be helpful to study criminal behaviour. As DNA testing becomes more sophisticated; it could be used to solve wider range of crime. In Britain police use of DNA is most advanced. Authorities there use saliva recovered from hoods, masks and cigarette butts to solve crime.[178] It would not be wrong to predict that a country which has in its possession the whole DNA

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[175] Ibid.
[176] Pratap Kumar, "*Probing Rape Genetically*," (2001) Criminal Law Journal p. 8.
[177] The Telegraph, Thrusday 15th June 2006 at p.2.
[178] Supra note 176 at p.9.

profile of its population, can be a better place of inhabitants with peace. But till then the criminal justice system in a country has to find out some solution in matters of proving offences, irrespective of the fact whether it requires medical evidence or not to fully establish the guilt of the offender.

iii) Applicability of Medical Evidence and Forensic Evidence

It has been earlier observed and maintained that medical evidence is important and can establish the guilt of the offender. But in a country like us where not only women issues but any issue involving legal liabilities is though not seen lightly at least on paper yet in practice have different history and tendency to affect the testimony of the victim irrespective of the fact whether he/she is a victim of a civil wrong or criminal wrong. Feminist often argue that; is offences against women receives less attention from the administrative and investigative agency of the state.

But the facts still haunts everyone's mind whether the whole system is operative to upheld truth and deliver justice for every wrong suffered by the innocent or protect the corrupt and powerful people? With this one must add the wilful limitation of the investigative agency arising not only due to the ignorance of law, but tendency to corruption, short time benefit, political or other influence, and all together the impersonal nature of the bureaucracy which most of the times acts as if every thing comes within the duty of the Government but not his or her. In other words the perception is that 'every bodies work is no bodies work' i.e. 'government's works' and not one's own work. Applicability of forensic or medical evidence in sexual offence is not without limitation. These limitations range from the handling of the complainant to the final examination and making of report. The problems may be summarized as follows;

a) Complainants in sexual offences are handled carelessly.

b) In most of the cases police acts as a late starter.

c) Delay in arresting the accused.

d) Delay in sending the accused as well as the victim for medical examination.

e) Failure or delay in collecting material like clothes used by the victim and accused.

f) Ignorance of the victim who may report the incident after the expiry of certain time beyond which it becomes impossible to medically find out the presence of semen or other element.

g) Ignorance of the victim especially when she washes herself before being medically examined.

h) Wrong handling of the sample, or its improper collection.

i) Incomplete report of the medical examiner or forensic expert.

All this may lead to a wrong conclusion. The conclusions in such cases either negate the incidence of sexual intercourse or may leave it open to both interpretation. If the findings leave it open to both interpretations the benefit of doubt is raised and the accused is acquitted. This is what happened at the lower judicial level in **State of Punjab v. Gurmit Singh**[179] and in **State of H.P. v Mango Ram**,[180] and in **Maharashtra v Chandraprakas Kewalchand Jain**.[181] This resulted in the acquittal of the accused in the first cast at the hand of the trial court, in the second case at the hand of the firstly at the hand of the session Court and secondly the High Court, and in the third case at the hand of the trial Court. Thus it becomes clear that medical or forensic evidence is desirable and should be made admissible but absence of it should not imply that there has been no sexual offence. The judiciary may rely on medical or forensic evidence after considering the whole process starting from the reporting of the incident to that of the making of a definite conclusive report. Other wise blind reliance on medical or forensic evidence would surely jeopardize interest of the victim, consequently by taking the benefit of doubt the accused would get the acquittal.

iv) The Way Out- Recognition of Rape as a Psychological Assault

It has been earlier pointed out that the offence what is known as 'rape' finds a place in Chapter XVI of the Indian Penal Code, 1860 which deals with 'offences affecting the human body.' The researcher has a strong objection with this kind of placement of the offence of rape under the said category for many reasons. One of the reasons in the opinion of the researcher is that rape is not an offence which only affects human body as perceived by Macaulay. Secondly any sexual offence/activity would not leave marks on the body of the victim in the present day world, where the accused is more informed than the victim and where the element of consent can be neutralized by so many things.[182] In these circumstances to consider rape only as a violation affecting human body would be a fallacy in the present day context.

We must accept the fact that rape violates not only the physical person but also the mind of the victim and really affects the mind of the victim to such an extent that it can be said that rape is a psychological assault. It must be admitted that in a country like India there are various inherent limitation of medical or forensic evidence. It is also an admitted fact that in our country rape is considered as a sexual offence and viewed as a physical violence. It has been

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[179] AIR 1996 SC 1393.
[180] (2000) 7 SCC 224.
[181] (1990) 1 SCC 550.
[182] Which the law does not recognize: For example sexual access gained through promise to marry or look after throughout life.

seen in the preceding paragraph and elsewhere in the present study that a great number of acquittals of the accused in sexual offence of rape were only due to wrong appreciation of medical evidence. This is bound to happen for various reasons. One such reason is that the courts in India generally take the position that if there were no proof of physical assault this implies that there was no rape. This presumption that if no physical injury is evident on the victim, no sexual intercourse has taken place or rape has not been committed ignores the fact that rape is not only an offence involving physical violence, but also psychological violence.[183] The victim of rape besides being physically ravished is psychologically wounded. This was recognized in **Rafiq v State of U.P,**[184] where Justice Krishna Iyer had observed that:

> *"When no woman of honour will accuse another of rape since she sacrifices thereby what is dearest to her, we cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken by the victim strikes a judicial mind as probable.....When a woman is ravished what is inflicted is not merely physical injury, but 'the deep sense of some deathless shame'.....Judicial response to human rights cannot be blunted by legal bigotry."*[185]

In most of the cases the lower court fails to recognize the above fact. In the light of the precedent medical evidence in cases of rape has grown in importance, so much so that sometimes the accused tries to use it to his advantage. The question thus arises whether giving disproportionate importance to medical evidence amounts to bringing back the rule of corroboration? Though the right trend has been set up by the Apex court in **Madan Gopal Kakad v Naval Dubey,**[186] where it had observed that:

> *"To constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rapture of hymen. Partial penetration of the penis within the labia majora of the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of law.....In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of*

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[183] Meenu, *"Rape- A Psychological Assault?,"* (2000) 2 SCC Journal 46.
[184] (1980) 4 SCC 262.
[185] Ibid. paras 6 & 7 at p.265.
[186] (1992) 3 SCC 204.

recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."[187]

Thus what follows from this judgment is that although medical evidence is relevant to establish the factum of occurrence of sexual intercourse, it is to remain restricted only to the factual aspect of the offence. The legal aspect whether rape was committed has to be established in the light of testimonial evidence, including the statement of the victim.[188] Medical officers often in their report give their comment that "no rape appears to have been committed." Their findings may be true due the inherent limitation of medical or forensic examination i.e whether it was conducted in its ideal condition, from the collection of sample to the recording of report and also whether examination was conducted at a proper time in a proper manner. Their report does not indicate all such things. Therefore the Apex Court in **Ranjit Hazarika v State of Assam,**[189] categorically observed:

"Neither the non rapture of the hymen not the absence of injuries on her private part, therefore, belies the testimony of the prosecutrix.....The opinion of the doctor that no rape appears to have been committed was based only on the absence of rapture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on 'no reasons'."[190]

These decisions show that when the victim says she has been raped, she will be believed. Whatever the technicalities of medical science indicate, the fact remains that the victim in her own perception and more so in the perception of society has been raped. They also recognize the fact that rape is psychological assault that may not always inflict any physical injury; the victim may not always bear the evidence of physical injury to be examined medically.

e) Corroboration of the Prosecutrix Testimony

i) The Rule of Corroboration

The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.[191] The Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.[192] This particular

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[187] Ibid, para 37 at p.222.
[188] Meenu, "*Rape- A Psychological Assault?*." (2000) 2 SCC Journal 46.
[189] (1998) 8 SCC 635.
[190] Ibid at p.636-637, para 4.
[191] Section 114 of the Indian Evidence Act, 1872.
[192] Illustration (b) of Section 114 of the Indian Evidence Act, 1872.

provision which speaks for corroboration has helped many accused in getting out of the jaws of laws relating to rape as our judges had in the past refused to convict the accused unless the prosecutrix testimony had received corroboration from other sources.[193] In **Rameshwar v State of Rajasthan,**[194]the court even went on to assert that rule of corroboration is now a rule of law. The Court then laid down the following rule of corroboration:

> *"Firstly, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice. All that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those, who committed the offence. Thirdly the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another."*[195]

In various cases the court looks for corroboration of the victim's evidence and the accused takes this as an opportunity to get him acquitted.

In State of Maharashtra v. Chandraprakash Kewalchand Jain, [196] a police officer raped the victim several times and booked her husband on false charges. The trial court convicted the accused but the accused appealed to the High Court. The High Court then took the view that except in the 'rarest of the rare cases' where the testimony of the prosecutrix is found to be so trustworthy, truthful and reliable that no corroboration is necessary, the Court should ordinarily look for corroboration. According to it, as Exhibit 50 did not unfold two successive acts of rape, this was not a case where it would be safe to base a conviction on the sole testimony of the prosecutrix, more so because both the girl and the boy had reason to entertain a grudge against the respondent who had booked the latter. Lastly the High Court pointed out that the version of the prosecutrix is full of contradictions and is not corroborated by medical evidence, in that, the medical evidence regarding the examination of the prosecutrix is negative and does not show marks of violence.[197].The High Court, therefore, concluded that the prosecution had miserably failed to prove the guilt of the

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[193] Gurucharan Singh .v. State of Haryana, AIR1972, SC2661.
[194] AIR 1952 SC 54.
[195] Ibid.
[196] AIR 1990 SC 658.
[197] See Paras, 24 & 31 of the judgment.

accused and accordingly acquitted him. On an appeal by the State however; the judgment was reversed by the Supreme Court.

The Supreme Court in a number of cases has held that a woman who has been raped is not an accomplice. If she was raped she is the victim of an outrage. It would be wrong to induct in this country the so-called rule of English law that a prosecutrix in a sexual offence is unworthy of credence unless corroborated from unprecedented courses. This rule of English law is not suitable under the Indian condition. Thus the Supreme Court has held that one should not reject the testimony of a rape victim unless there are very strong circumstances mitigating its veracity. Corroboration as condition for judicial reliance on the testimony of a prosecutrix is not a matter of law but a guidance of prudence under given circumstances.[198]

Similarly, in **Bhoginbhai v State of Gujrat,**[199] Justice Thaker observed with some anguish;

> *"In the Indian setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule is adding insult to injury.....A girl or a women in the tradition bound non-permissive society of India would be extremely reluctant to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society.....And when in the face of these factors the crime is brought to light, there is built-in assurance that the charge is genuine rather than fabricated .....Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight absence of corroboration notwithstanding"*[200]

The curt further observed that:

> *"Rarely will a girl or woman in India make false allegations of sexual assault ..... The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because: (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness*

[198] Rafique v State of U.P.(SCR) 1 1981, pp.401-404.
[199] AIR 1983 SC 753.
[200] Ibid. Para 9.

being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, act as deterrent."[201]

It is heartening that the Apex Court in **State of Karnataka v Mahabaleshwar Gourya Naik,**[202] very rightly went on to the extent of laying down that even if the victim of rape is not available to give evidence on account of her having committed suicide, the prosecution case cannot be thrown away over board. In such a case, the non-availability of the victim will not be fatal and the Court can record a conviction on the basis of the available evidence brought on record by prosecution.

The rule is therefore, well settled that corroboration as condition for judicial reliance on the testimony of a prosecutrix is not a matter of law but a guidance of prudence under given circumstances. But corroboration can be dispensed with by the judge if in the particular circumstances of the case before him he himself is satisfied that it would be prudent to do so keeping in mind the attitude of the tradition bound non-permissive Indian society under which women of this country is still subjected to many exploitation from every corner. Very recently the Apex Court made it clear that corroboration is not a sine qua non for conviction in rape cases.[203] In **State of Himachal Pradesh v. Raghubir Singh,**[204] the Court made it clear that there is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be

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[201] Ibid, Para 10.
[202] State of Karnataka v Mahabaleshwar Gourya Naik, AIR 1992 SC 2043.
[203] Bhupinder Sharma v State of H.P. (2003) 8 SCC 551.
[204] (1993) 2SCC 622.

recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate her veracity. In the present case the evidence of the prosecutrix is found to be reliable and trustworthy. No corroboration was required to be looked for, though enough was available on the record. The medical evidence provided sufficient corroboration. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole; the case spoken to by the victim strikes the judicial mind as probable.

ii) Whether Victim of Rape is an Accomplice

It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the valuation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her.[205] At several occasion the Highest Court making it clear that the victim of rape is not an accomplice raised a question it self 'why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion?

The evidence of a victim of sexual assault stands almost at par with the evidence on an injured witness and to an extent which is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a

[205] State of Maharashtra v Chandraprakash Kewalchand Jain, (1990) 1 SCC 550.

certain amount of suspicion, treating her as if she were an accomplice.[206] Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty.[207] Evidence of prosecutrix need not be tested with same amount of suspicion as that of accomplice. Rule of prudence that her evidence must be corroborated in material particulars has no application. At the most the Court may look for some evidence which lends assurance.[208] The prosecutrix cannot be an accomplice for the simple reason that she is not a willing party and never helps in the commission of crime. It is the offender, who authors the crime of rape. Therefore, a suitable amendment should be done in the IPC to interpret the consent of the prosecutrix.[209]

f) Disclosure of the Identity of the Victim

Disclosure of the identity of the rape victim is an offence punishable under the Penal Code. Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B section 376C or section 376D is alleged or found to have been committed shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.[210] This provision, which seeks to protect the identity of the victim of rape, has adverse effects for; the legislature forgot that it was only due to enormous publicity in the ***Mathura's***[211] case, which led to changing of the rape laws. It would have been enough to state in the amended law that only victims name should not be published.[212] Similarly section 327 of the Code of Criminal Procedure 1973 has been suitably amended to safeguard the rape victim from being exposed to unnecessary adverse publicity. However, in many cases the trial court either forgets this. In some cases it appears that the courts are not aware of the amendment, and therefore they even used the real name of the victim. The Supreme Court in **State of Punjab v Gurmit Singh and others**,[213] after expressing its displeasure observed the following:

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[206] State of Punjab v Gurmit Singh and others, AIR1996 SC 1393 at para 7.
[207] Ibid.
[208] Kamel Singh v State of M.P: Criminal Appeal No. 877 of 1995 (arising out of S.L.P.(Cri).No: 2166 of 1994, D/-11-8-1995.
[209] Sheik Jakir v State of Haryana, AIR 2004 SC 1497.
[210] Section 228A of the IPC.
[211] Tukaram v State of Maharashtra, AIR 1979 SC 185.
[212] Pawan Sharma, "*Women and Rape Laws: Pressing Need for Amendments*," in Shamsuddin Shams,(ed.) "Women Law and Social Change," (Ashih Publishing House,New Delhi,1991) pp-147-169. at p.163.
[213] AIR1996 SC 1393.

"These two provisions are in the nature of exception to the general rule of an open trial. In spite of the amendment, however, it is seen that the trial Courts either are not conscious of the amendment or do not realize its importance for hardly does one come across a case where the enquiry and trial of a rape case has been conducted by the Court in camera. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case the trial Court repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial Courts would take recourse to the provisions of Section 327 (2) and (3) Cr. P. C. Trial of rape cases in camera should be the rule, and open trial in such cases an exception."[214]

The court therefore explained the importance of the provision of the criminal law. It said that the expression that the inquiry into and trial of rape "shall be conducted in camera" as occurring in sub-section (2) of Section 327 Cr. P. C. is not only significant but very important. It casts a duty on the Court to conduct the trial of rape cases etc, invariably "in camera". The Courts are obliged to act in furtherance of the intention expressed by the Legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327 (2) and (3) Cr. P.C. and hold the trial of rape cases in camera. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar surroundings.[215] Trial in camera would not only be in keeping with the self respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open Court, under the gaze of public. The improved quality of her evidence would assist the Courts in arriving at the truth and sifting truth from falsehood. The High Courts would therefore be well advised to draw the attention of the trial Courts to the amended provisions of Section 327 Cr. P.C. and to impress upon the presiding Officers to invariably hold the trial of rape cases in camera, rather than in the open Court as envisaged by Section 327 (2) Cr. P. C. When trials are held in camera, it would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the Court as envisaged by Section 327 (3) Cr. P.C. This would save any further embarrassment being caused to the victim of sex crime. Wherever possible it may also be worth considering whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady judges, wherever available, so that the prosecutrix can make her statement with

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[214] Ibid at p.1406.
[215] Ibid.

greater ease and assist the Courts to properly discharge their duties, without allowing the truth to be sacrificed at the alter of rigid technicalities while appreciating evidence in such cases. The Courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime.[216]

Recording of evidence by way of video-conferencing vis-à-vis section 273 Cr.P.C has been held to be permissible by the Supreme Court in **Shakshi v U.O.I.**[217] In this case the court gave the following direction which are required to be followed while holding trial of child sex abuse or rape:

i) A screen or some such arrangements may be made where the victim or witness (who may be equally vulnerable like the victim)

ii) The questions put in cross examination on behalf of the accused in so far as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witness in a language which is clear and not embarrassing;

iii) The victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.[218]

The trial of rape case shall be conducted in camera. The presiding officer, however, may on the request of either party to the proceeding, allows any person to be in the court. This amendment alone is not enough. The women should have a legal representative in the court to protect her interests. A trial of rape case should be presented before a jury completely comprising of women judges, Women lawyers and women court officials. Case ordeal should be conducted under the supervision of women police maintaining full privacy of the case. Victims should have the rights to explain her every distress and trauma and the court should give due weight to the women's plea.[219] An amendment is necessary whereby the prosecution can be instructed not to insist on the victim's re-narrating the whole episode but to confine itself to producing evidences contrary to rape. This would lessen the mental torture to which every rape victim is subjected in the hands of the prosecution lawyers. Another important aspect here is the time taken by the court to dispose of the case. It may therefore be recommended that the Court should take up the rape cases on priority and the entire process should not extend beyond the period of sixty days.

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[216] Ibid.
[217] (2004) 5 SCC 518.
[218] Ibid at Para 34.
[219] Pawan Sharma, "*Women and Rape Laws: Pressing Need for Amendments*," in Shamsuddin Shams.(ed.) "Women Law and Social Change," (Ashih Publishing House.New Delhi.1991) pp-147-169. at p.163.

g) Question as to the chastity of the women victim

One common accusation flung around the rape victim is the easy virtue of the women. It suits the accused to transfer the blame for his crime squarely to the shoulder of the victim and go scot-free. This also adds insult to the injury and because of this reason many rape cases go unreported.[220] In regard to the law of evidence which is as much a part of adjective law as the law of procedure proper, it is necessary to refer to one unsatisfactory aspect, concerned with the past sexual history victim of rape or other sexual offence. In general Indian Evidence Act does not permit the bad character of the victim of an offence as such, to be given in evidence—except to the extent to which it may affect the credibility of the victim as a witness in court. Contrary to this general notion of law, section 155(4) of the Indian Evidence Act,1872 contained a provision by virtue of which in a prosecution for rape or attempt to ravish, evidence could be given of the 'general immoral character' of the prosecutrix. This provision was not confined to past sexual familiarity only with the accused. It was wide enough to cover sexual immorality in relation of others. Matters, in which the accused was not at all concerned, could also be brought on record under the head of "general immoral character." by virtue of section155 (4).[221] This meant that even if the charge is one of sexual intercourse with a girl below the age of sixteen years - section 375, clause fifthly, IPC-which is punishable irrespective of the girl's consent, evidence could be given of her "general immoral character." This sounds unjust. The law seems to have erred in assuming that a female witness is less likely to tell the truth when she has a "generally immoral character."[222]

The provision in section 155(4) is unsatisfactory to the extent to which it enables evidence to be given of the complainant's previous sexual relations or intimacy with persons other than the accused. Such evidence cannot have a vital relevance to prove the likelihood of the women having consented to the particular act. In other words it cannot have a probative value regarding the offence charged. In several other countries the earlier law giving such a categorical permission to give evidence of general immoral character of the victim of rape, has been modified, either by removing this provision or by prohibiting as asking of such question except with the permission of the court. That apart, for the

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[220] Pawan Sharma, *"Women and Rape Laws: Pressing Need for Amendments,"* in Shamsuddin Shams,(ed.) "Women Law and Social Change," (Ashih Publishing House.New Delhi,1991) pp-147-169. at p.166.

[221] Section 155 of the Indian Evidence Act, 1872 dealt with Impeaching the Credit of Witness. Clause (4) of the Section Reads: When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral Character.

[222] P.M.Bakshi, *"Women and the Law of procedure"*, in Shamsuddin Shams.(ed.), "Women Law and Social Change."(1991) p-136.

reasons mentioned above, the law also requires modification, so as to exclude the victim's alleged sexual relations with persons other than the accused. The law Commission of India in its 84th Report made two recommendations relevant to the subject may be noted here. The first was that in section 146 of the Evidence Act, the following new sub-section should be inserted:[223]

> *"In a prosecution for rape or attempt to commit rape, where the question of consent to sexual intercourse is at issue, it shall not be permissible to adduce or to put question 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."*[224]

The second recommendation of the Law Commission was to insert a new section in the Evidence Act as under:[225]

> *"53A. In a prosecution for rape or attempt to commit rape, where the question of consent to 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."*[226]

The basic rule of evidence is that a case can not be proved against a person on the basis of his character or general deposition. However, the rule is different in the case of a witness, not only evidence as to his character may be given, but also he can be cross examined as to the same. The Indian Evidence Act, 1872 itself makes a way for impeaching the credit of a witness by proving one's character. The purpose of proving one's character is to impeach his credit or to show that he is an unreliable witness. Hence, the character sought to be proved must have a direct bearing upon one's character as to the truthfulness. This point gains support from the wordings of sections 146,148, 149, 151, and 155 of the Indian Evidence Act, 1872. From these provisions the following rules emerge:

i) When a witness is cross-examined, he may, be asked any question which tend- a) to test his veracity, b) to discover who he is and what is his position in life, or c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose him to a penalty or forfeiture.[227]

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[223] See, Law Commission of India, 84th Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence, April, 1980.
[224] Ibid.
[225] Ibid.
[226] This was also recommended by the Law Commission of India in its 172nd Report on Review of Rape Laws, 25th March 2000, D.O. No. 6 (3)(36)/2000_LC(LS).
[227] Section 146 of the Indian Evidence Act, 1872.

ii) When character is relevant to the issue witness has to answer it; but if the character is relevant only to shake the credit of the witness it shall be in the discretion of the court to allow or disallow the question.[228]

iii) Such question which generally can not be asked under the former clause; can be asked if the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.[229]

iv) Indecent and scandalous questions may be asked if they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.[230]

v) When a man is prosecuted for rape or ant attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.[231]

So far as the first four clauses are concerned there is no controversy as they have direct relation with the object. But the last clause namely 155 (4) is very much objectionable and has no relevance to the object of proving the truthfulness of the prosecutrix.[232] The clause also violates our social and Constitutional norms in particular Article 14 of the Constitution. Questions have been raised from various quarters including women's organisations and human rights groups that a) if the sole purpose of proving a witness's character is to test his/ her veracity, does the immoral character of a woman have any bearing upon her telling the truth? If the legislature has made an exception against a prosecutrix's character then what is the rationale behind it? Can it be argued that woman against whom a sexual assault has been made, by themselves fall into a separate category so as to be treated differently? Whether it has any rational relationship to the object sought to be achieved by means of such classification as required by Article 14 of the Constitution? In view of this hue and cry Section 155 (4) has been repealed by the Government very recently.

Section 155(4) of the Indian Evidence Act, 1872 is a clear derogation from the rule of a civilized society which the courts in India had consistently followed till recently. In **State of Punjab.v.Gurmit Singh**,[233] the trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably even characterized her as a "girl of loose morals' or "such type of girl." The Supreme Court while expressing its unhappiness over the role of the trial court, observed that:

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[228] Section 148 of the Indian Evidence Act.1872.
[229] Section 149 of the Indian Evidence Act. 1872.
[230] See. Section 151 of the Indian Evidence Act. 1872.
[231] Section 155 (4) of the Indian Evidence Act. 1872.
[232] Dr. D. Singh. "*Human Rights Women & Law*," 1st Edition . (Allahabad Law Agency. 2005). pp. 182-183.
[233] AIR 1996 SC 1393.

"We must express our strong disapproval of the approach of the trial Court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a Judge. Such like stigmas have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth complaint for trial of criminals, thereby making the society to suffer by letting the criminal escape even a trial." [234]

The Apex Court then reminded the duty of the judiciary and said that the Courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole - where the victim of crime is discouraged - the criminal encouraged and in turn crime gets rewarded. Even in cases, unlike the present case, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by any one and everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the Courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court.[235]

The rule is therefore, well settled now that evidence as to the past character of the victim of rape is not relevant. Whether the prosecutrix was an unchaste woman has nothing to do with the veracity of her testimony. The protectional right against rape is available even to a woman of an easy virtue when she is a victim. Court should not even allow scandalous imputations on the moral character of the witness.[236]

h) Rape of Women of Easy Virtue

There is no difference between rape of a woman of good character and rape of a woman of easy virtue. In either case the offence remains the same i.e., rape of a woman. Even in a case where there is some material to show that the victim was habituated to sexual intercourse, no inference like the victim being a woman of 'loose or moral character' is permissible to be drawn from that

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[234] Ibid at p.1404.

[235] Ibid.

[236] In State of U.P v Raghubir Singh. (1997) 3 SCC 775 where the Apex Court observed that courts should not allow indecent and scandalous question on the moral character of the witness in a case where the fact in issue was whether the accused had kidnapped and murdered her son. Law does not permit even the child of a prostitute to be murdered. The contention of the immoral character was quite unnecessary and irrelevant.

circumstances alone.[237] The Supreme Court in **Gurmit Singh's** case[238] held that even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by any one and everyone.[239]

Even before this the same court in **State v Madhukar Narayan Mardikar,**[240] have held that factors like character or reputation of victim are wholly alien to the very scope and object of section 376 of IPC. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one likes. So also it is not open to any and every person to violate her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law.

i) Duty of the Court

It is often stated that a woman who is raped undergoes two crises 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.[241] 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.[242]

A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a greater responsibility while trying an accused on charges of rape.[243]In **State of Punjab v Gurmit Singh,**[244] the court observed that:

> *"Rape is not merely a physical assault it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The Courts, therefore,*

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[237] Dr. D. Singh, "*Human Rights: Women and Law*," 1st Edition, (Allahabad Law Agnecy, Faridabad. 2005), P.150.
[238] State of Punjab v Gurmit Singh, AIR 1996 SC 1393
[239] Ibid at p.1404.
[240] AIR 1991 SC 207.
[241] 84th Report of the Law Commission of India, submitted to the Government in 25th April 1980.
[242] State of Maharashtra v Rajendra Jawanmal Gandhi, AIR 1997 SC 3986 at p. 3994.
[243] Ibid at p. 3995.
[244] AIR 1996 SC 1393.

shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case."[245]

Even before this the Supreme Court in **Krishan Lal v State,**[246] said that in rape cases, courts must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's version. The inherent bashfulness, the innocent naiveté and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilities the hypothesis of false implication. To forsake these vital considerations and go by obsolescent demands for substantial corroboration is to sacrifice common sense in favour of an artificial concoction called 'judicial probability.'[247]

It is the duty of the Courts' to see that prosecutrix is not unnecessarily harassed and humiliated. It must effectively control the recording of evidence in the Court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the Court must also ensure that cross-examination is not made a means of harassment for causing humiliation to the victim of crime.[248] In **Visveswaran v State,**[249] the Supreme Court again restated that the approach required to be adopted by courts in rape cases has to be different. The Court therefore observed that:

"The cases are required to be dealt with utmost sensitivity. Courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view."[250]

As to the question what should be the duty of the court in case of defective investigation the court further observed that:

"In case of defective investigation, the only requirement is of extra caution by the courts while evaluating evidence.....Any deficiency or irregularity

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[245] Ibid . Para 20. p.1395.
[246] AIR 1980 SC 1252.
[247] Ibid.
[248] State of Punjab v Gurmit Singh. AIR 1996 SC 1393. at para 21.
[249] (2003) 6 SCC 73: AIR 2003 SC 2471.
[250] (2003) 6 SCC 73 at para 12.

in investigation need not necessarily lead to the rejection of the case of prosecution when it is otherwise proved."[251]

D) RIGHTS OF THE VICTIM OF RAPE

a) Victimology

The term 'victimology' appears to have been coined in 1949 by the American psychiatrist, Frederick Wertham, who called for a science of victimology which would address to the sociology of the victim.[252] It is, however, the work of his contemporary Hans Von Hentig, 'The Criminal and his Victim (Hentig, 1948),' which is now widely regarded as the seminal text in developing victim studies. Highly critical of the traditional offender-oriented nature of criminology, Von Hentig proposed a dynamic, interactionist approach which challenged the conception of the victim as a passive actor. He argued that law makes a clear cut distinction between the one who does and the one who suffers. The role of the victim within the criminal justice system attracts interesting attention amongst criminologists and policy makers alike. Without the co-operation of the victim in reporting the crime, in furnishing evidence, in identifying the offender, and acting as a witness in court, most crime would remain unknown and unpunished.[253] Victim surveys have revealed that the public are not so punitive as had been expected and that many victims would welcome the opportunity to seek some reparation or even reconciliation in place of traditional punishment.[254]

b) Right to Life and Personal Liberty

Unfortunately, a woman, in our country, belongs to a class or group of society, who is in a disadvantageous position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. They are Mother, Daughter, Sister and Wife and not play things for centre spreads in various

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[251] Ibid.

[252] Lucia Zedner. "*Victim's*," in Mike Maguire, Rod Morgan, Robert Reiner,(etal). " The Oxford Hand Book of Criminology," 2nd Edition (Clarendon Press, Oxford, 1997), pp. 577-612, p. 607.

[253] Ibid.

[254] Ibid: Various surveys i.e., Hough and Moxon, 1985, Barnett, 1977; Braithwaite, 1990; Wright, 1982, 1991, 1995, which were conducted in UK indicates that victim's recourse to criminal injuries compensation scheme has increased dramatically. The number of applications rose from 22,000 in 1979-1980 to 65,977 in 1992-1993. (Barclay, 1995:17).

magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by Nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world. Recognizing the above facts the Supreme Court in **Bodhisattwa Gautam v. Miss Subhra Chakraborty**[255] held that Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushed her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.

c) The Right to Compensation

The principle of compensating victims of crime has for long been recognized by the law though it is recognized more as a token relief rather than part of a punishment or substantial remedy.[256] In our country there is neither a comprehensive legislation nor a statutory scheme to provide compensation to rape victims either by the offender or the state.[257] The state makes to the rape victim at times under the direction of the Supreme Court, ex-gratia payment which is not only ad hoc and discretionary but also in adequate. Even the Law Commission of India did not favour the payment of compensation to the victim of the crime as an additional punishment.[258]There is an international obligation on the country under the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the United Nations General Assembly in 1985, to ensure that victims of crime get compensation. The Declaration also says that when compensation is not fully available from the offender or other sources, State should provide financial compensation at least in violent crimes, resulting in bodily injury for which national funds should be established.

With regard to the compensation to the victim of crimes, we have provisions like section 357 of the Cr.P.C, 1973, section 5 of the Probation of offenders Act, 1958, and Article 21 of the Constitution of India. These provisions however, have their shortcomings. Firstly the Constitution of India provides compensation if the fundamental right is violated by the state. Secondly

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[255] AIR 1996 SC 922.

[256] Report of the Committee on Reforms of Criminal Justice System. Government of India. Ministry of Home Affairs, vol.1, March 2003, Para 6.8.1.

[257] Delhi Domestic Working Women's Forum v Union of India & others, (1995) 1 SCC 14 at pp.18-19.

[258] Law Commission of India, 42nd Report: Indian Penal Code 52 (1971).

provisions under the statutory laws are very narrow. They can hardly provide adequate compensation to the women victims of rape. Section 357 of the Criminal Procedure Code, 1973 is not a complete and substantive provision by which every victim may get compensation. The provision of sub-section (1) of section 357 is subject to some inherent limitations.[259] Firstly compensation to victims can be awarded only when substantive sentence is imposed and not in cases of acquittal. Secondly quantum of compensation is limited to the fine levied and not in addition to it. Thirdly compensation can be ordered only out of the fine realized and if no fine is realized compensation to the victim cannot be directed to be realized. Fourthly in very rare cases under the Indian Penal Code, 1860 the maximum amount of fine is imposed. Moreover, the maximum fine stipulated in the IPC were prescribed about hundred forty five years back which are now inadequate in terms of present day real losses to victims. Again compensation under the above section can be allowed by the court if it is of the opinion that the compensation is recoverable by such person in a civil court. Finally compensation to the victim under section 357 Cr.P.C is at the discretion of the court and not compulsory. A victim is awarded compensation on proof of loss and injury. The loss or injury must be of such a magnitude to justify a civil action.[260]

It is rather unfortunate that in recent times, there has been an increase, in violence against women causing serious concern. Rape does indeed pose series of problems for the criminal justice system. There are cries for harshest penalties, by often times such crimes eclipse the real plight of the victim. Rape is an experience which sakes the foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour values and generating and less fears. In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings.[261] Having recognized this and having regard to the facts and circumstances of the case that came before it the Supreme Court in **Bodhisattwa Gautam v Subhra Chakraborty**,[262] awarded interim compensation to the tune of Rs. 1000/- per month to the victim during the pendency of the criminal case holding that if the Court has jurisdiction to award compensation at the final stage, similarly it has also power to award interim compensation. In the instant case there was a serious allegation that Bodhisattwa Gautam had married Subhra Chakraborty before the God he worshipped by

[259] Dr. D. Singh, "*Human Rights: Women and Law*," 1st Edition, (Allahabad Law Agnecy, Faridabad. 2005), P.190.
[260] Jogindra Patjoshi, "*Rape Victim and Compensation Law*," Vol. 24(3&4), Indian Bar Review, (1997) at p.54.
[261] Delhi Domestic Working Women v Union of India, (1995) 1 SCC 14.
[262] AIR 1996 SC 922.

putting Vermilion on her forehead and accepting her as his wife and also impregnated her twice resulting in abortion on both the occasion. But the wicked accused forgetting the consequences of his all fraudulent activities in total disregards of their marriage and their relationship refused to accept the complainant as his wife and abandoned the complainant asking her to forget all her dream. The complaint was registered as Criminal Case No. 1/95 under Sections 312/420/493/496/498-A, Indian Penal Code and Bodhisattwa Gautam was summoned but he in the meantime, filed a petition in the Gauhati High Court under Section 482 of the Code of Criminal Procedure for quashing of the complaint and proceedings initiated on its basis, on the ground that the allegations, taken at their face-value, do not make out any case against him. But the High Court by its Judgment and order dated May 12, 1995, dismissed the petition compelling Bodhisattwa Gautam to approach the Supreme Court by way of Special Leave Petition (Criminal) No. 2675/95 was filed. As the Court did not see any ground to interfere with the impugned Judgment of the High Court, it dismissed the special leave petition.

In the instant case the Court had taken suo motu notice to the facts of this case as narrated in the complain which has been read before it and issued notice to the petitioner as to way he should not be asked to pay reasonable maintenance per month to the respondent during the pendency of the prosecution proceedings against him. The court finally observed that:

> *"The jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offences of rape which is an offence against basic human rights as also the Fundamental Rights of Personal Liberty and life."*[263]

The above trend set by the Apex Court is a welcome step towards the recognition of the victim's agony in a practical way. Compensation to the victim in the Indian criminal justice system, it is submitted, would help the women victims of rape. The compensation to the victims of rapes either from the person who committed the crime or the state would provide them economic stability and they would be in a better position to respond to the legal proceedings. Compensation which is to be given to the victim of rape should include both, interim as well as final compensation. Giving adequate statutory power to the courts to pay compensation to the victims of crime would therefore be a good measure in this regard. Towards this end introduction of a new chapter under the head 'Compensation to the victims of crime' in the Code of Criminal Procedure, 1973 is therefore, suggested. The Apex Court in a number of cases has held that rape is a

[263] Ibid para 18.

violation of fundamental right contained in Article 21 of the Constitution. In spite of these no reprieve in the form of legislation awarding compensation to the victims of rape is coming from the government.

d) Right to Assistance

Under the international framework victim of crime have the right to access to justice and fair treatment, restitution and assistance. These rights of the victim of crime have been recognized by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the United Nations General Assembly in 1985.[264] The Declaration specially asks States to provide by law the above rights for victims of crime. Illustrative of this legislative trend are the Criminal Injuries Compensation Act, 1995 of the United Kingdom, The Victims of Crime Assistance Act, 1996 of Victoria, The Victims and Witnesses Protection Act, 1982 of U.S.A., The Victims Rights and Restitution Act, 1999 of U.S.A. etc. However the Indian scenario reflects a gloomy picture of legislative lagging in this respect. There is an urgent need for a radical change in the attitude of defence counsel and judges to sexual assault. This was felt by the Apex Court in **Delhi in Domestic Working Women's Forum v. Union of India**,[265] in which the Court thought it was necessary to set the broad parameter in assisting the victims of rape. The Court therefore, laid down the following parameters;

(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have some one who is well-acquainted which the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in Court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example mind counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represents her till the end of the case.

(2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

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[264] In Europe, the Convention on the Compensation of Victims of Violent Crimes (1983) also incorporate the essential rights of victims as stipulated in the U. N. Declaration.

[265] (1995) 1 SCC 14.

(3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the Court, upon application by the police at the earliest convenient movement, but in order to ensure that victims were questioned without undue delay, advocates would be authorized to act at the police station before leave of the Court was sought or obtained.

(6) In all rape trials anonymity of the victims must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatized to continue in employment they should be provided with financial help.

(8) Compensation for victims shall be awarded by the Court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shocks as will as loss of earnings due to pregnancy and the expenses of the child but if this occurred as a result of the rape.

(9) The National Commission for Women be asked to frame schemes for compensation and rehabilitation to ensure justice to victims of such crimes. The Union of India shall then examine and take necessary steps to implement them at the earliest.

This decision recognizes the right of the victim for compensation by providing that it shall be awarded by the Court on conviction of the offender subject to the finalization of Scheme by the Central Government. The decision is also a pointer to the fact that in cases of rape our criminal jurisprudence should be made victim friendly. It is true rape does indeed pose series of problems for the criminal justice system. There are cries for harshest penalties, by often times such crimes eclipse the real plight of the victim. Rape is an experience which sakes the foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour values and generating and less fears. In addition to the trauma of the rape itself, victim suffers further agony during legal proceedings. It is to be admitted that after rape the victim becomes the most helpless person in the

society, therefore, if some compensation is given to her then she would be able to rehabilitate herself in the society. It is submitted that criminal justice system of every civilized country must put the needs of victims and witnesses at the heart of the Criminal Justice System and ensure they see justice done more often and more quickly. The whole system should support and inform them, and empower them to give them best evidence in the most secure environment possible. In the present Indian system the rights of the accused of a crime take precedence over the rights of the victims which, is more saddening part of the system. It is the duty of the state to see that victim receives the necessary material, medical, psychological and social assistance through governmental, voluntary and community-based means. Police, justice, health and social service personnel should receive training in this regard.

e) The Draft Scheme for Relief and Rehabilitation of Victims of Rape, 2005.

Even ten years after the Supreme Courts direction to evolve 'a scheme so as to wipe out the tears of unfortunate victims of rape' no effective legislation was passed by the Government. It is only in 2005 the National Commission for Women came out with a draft scheme entitled 'Scheme for relief and Rehabilitation of Victims of Rape, 2005.' The scheme proposes for the constitution of Criminal Injuries Relief and Rehabilitation Board (CIRRB) at the central, state and district level.[266] The district board shall be headed by the Collector or the District Magistrate.[267] The Board shall consider the claims and award financial relief/ rehabilitation as the case may be in all cases of rape in accordance with the procedure prescribed under the scheme. The Board shall coordinate and monitor the activities of the District Monitoring Committee (DMC), as provided under the Scheme, and/or with the Governmental and non – Government organizations for rendering assistance to the victim, in the form of any legal, medical, psychological or any other form of aid/ assistance. The board shall also implement any scheme for rehabilitation of rape victims framed by the State or

[266] See, Clauses 6, 15 and 17 of the 'Scheme for relief and rehabilitation of victims of rape, 2005', Prepared by the NCW; Note that the State board shall consist of , secretary of the department of women and child/department of social welfare, joint secretary of department of home, the member secretary or any member of the state women commission, an officer of the law department of the state, three representatives from amongst women activists and eminent lawyers working in the field of empowerment of women. The central board shall consist of, the chairperson of the national commission for women, an officer not below the rank of joint secretary of the central government in the department of women and child development, one woman member having knowledge or practical experience in matters relating to criminal law, two women representatives of NGOs or women activists working in the field of empowerment of women, member secretary of the NCW.

[267] Ibid Clause 6.

National Criminal Injuries Relief and Rehabilitation Board(NCIRRB).[268]The scheme also proposes for the establishment of a district monitoring Committee (DMC), headed by the by the Superintendent of Police of the District. The committee shall comprise of the following other members, whom the District Collector/District Magistrate would nominate:[269]

(i) A police officer, preferably a woman

(ii) A woman social activist or a counsellor;

(iii) A Lawyer

(v) A Medical doctor;

(vi) A representative of the Panchayati Raj Institution or

Under the 'Scheme' the District Monitoring committee shall perform the following functions;[270]

(a) To arrange for psychological and medical aid and counselling to the victim.

(b) To arrange for legal aid to the victim in filing the FIR till the conclusion of the trial;

(c) To initiate suitable measures to ensure the protection of the victim and witnesses till the conclusion of the trial.

(d) Monitor and expedite the progress of the investigation.

(e) To aid and assist in opposing bails, filing appeals and making application for protection of the victim.

(f) In cases of young victims, to see that they receive education or professional training or training for self-employment.

(g) To assist them in securing employment.

(h) To provide the required psychiatric treatment/counselling

(j) To facilitate the victims' rehabilitation.

(k) Initiate action so as to ensure Anonymity of the victims.

(l) Ensure that Interrogations of the victim be conducted by female police officers. During all stages of interrogation and examination of the victim or the applicant, at least one member of the DMC is present.

(m) To arrange shelter to the victim, for such period as the circumstances warrant.

(n) And such other functions as may be deemed expedient and necessary by the committee given the peculiar facts and circumstances of each case.

The 'Scheme' also lays down the following parameters by which the board shall be guided while determining the compensation:[271]

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[268] Ibid Clause 7.
[269] Ibid Clause 9.
[270] Ibid Clause 10.

(i) Where Death results as a consequence of rape:

(a) Non-earning member of the family - Rs 1, 00,000/- (one lakh) towards relief after the post mortem report establishes a prima facie case.

(b) Earning member of the family- Rs 2, 00,000/- (two lakh) payment after the post mortem report establishes a prima facie case.

(ii) In other cases:

(a) Type and severity of the bodily injury suffered by the victim and expenditure incurred or likely to be incurred on medical treatment and psychological counselling to the victim.

(b) Expenditure consequential on pregnancy, if resulting from rape including expenses connected with abortion, if it is resorted to, in consequence to rape.

(c) Expenses incurred or likely to be incurred in connection with any education or professional or vocational training or training for self employment to the victim.

(d) Loss caused to the victim by cessation or interruption of gainful activity or employment on the basis of an assessment made by the Board and /or the district monitoring committee.

(e) Non pecuniary loss or damage for pain, suffering mental or emotional trauma, humiliation or inconvenience.

(f) Expenses incurred in connection with provision of any alternate accommodation in cases where the victim belongs to any other place other then the place where the offence took place.

(g) Expenses likely to be incurred in connection with the court trial- the Board and DMC shall arrange for legal aid under the Legal Services Authorities Act 1987 and may if so considered necessary, engage any other lawyer to assist the victim and pay honorarium and travelling allowance as may be determined by the state Board.

(h) While determining the financial and other relief, the Board shall have due regard to the victim being a child or mentally challenged and may consider higher financial relief and special relief measures to be provided.

(i) The Board shall not be guided by the outcome of the trial in allowing the application for relief and rehabilitation;

(j) Relief and rehabilitation shall not be granted under this Scheme in the following circumstances:

- Where the applicant has previously lodged any claim in respect of the same criminal injury under this scheme for the relief and rehabilitation of the victim of crime; or

- Where the incident is so belated that no evidence would be forthcoming;

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[271] Ibid Clause 14.

- Where the applicant after having filed the complaint deliberately turned hostile in the trial and has not supported the case of the prosecution;

The 'Scheme', if implemented it is submitted would do great justice to the victims of rape. The 'Scheme' however fails to address the issue of a child born to illegal intercourse. It only speaks of incurring the expenditure on pregnancy, or expanses connected with abortion.

f) Right to Maintenance to the Child Born to the Illegal Intercourse

Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock shall enjoy the same protection.[272] The Indian scenario however, tells a different story even in the case of a woman who is not a victim of rape. The sad plight of a ravished girl and the child born as a result of the offence of rape is far too well-known in our conservative society.[273] In the Indian society for no fault of their own both the mother and the child become social outcaste. In such a case to completely wipe out the stigma of illegitimacy sticking on to the forehead of an unfortunate child an appropriate legislation on the line of section 16 of the Hindu Marriage Act, 1955 is a must and mostly required.[274] In this regard provision should be made to confer on the mother as well as the child the right to get maintenance from the offender where he is identified, and convicted. Where the accused remains untraced or where the accused could not be convicted the state must take up the responsibility of their maintenance and upbringing till they stand on their own feet.

E) SENTENCING IN SEXUAL OFFENCE OF RAPE

a) Recent Trend as to the Approaches to Punishment

In the matter of punishment for offence committed by a person, there are many approaches to the problem. Firstly the traditional approach which is termed as punitive approach. It regards the criminal as a notoriously dangerous person who must be inflicted severe punishment to protect the society from his criminal assaults. The other approach is the theraptic approach which regards the criminal as a sick person requiring treatment, while the third is the preventive approach which seeks to eliminate those conditions from the society which were responsible for crime causation.[275] Under the punitive approach, the rationalization of

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[272] Aricle 25(2) of the Universal Declaration of Human Rights 1948.

[273] Dr. D. Singh. "*Human Rights: Women And Law*." 1st Edition. (Allahabad Law Agency. Faridabad. 2005). p.147.

[274] Section 16 of the said Act gives justice to the child of a bigamous marriage by declaring him to be legitimate even when the marriage proves to be a nullity in law.

[275] T. K Gopal v State of Karnataka (2000) 6 SCC 168 at Para 13.

punishment is based on retributive and utilitarian theories. Deterrent theory which is also part of the punitive approach proceeds on the basis that the punishment should act as a deterrent not only to the offender but also to others in the community.[276] The theraptic approach aims at curing the criminal tendencies which were the product of deceased psychology. There may be many factors, including family problems. Therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirement of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, may be a heinous nature, he should be treated as a human being entitled to al the basic human rights, human dignity and human sympathy.[277]

In **Phul Singh case**,[278] the Supreme Court observed that in case of long incarceration often the remedy aggravates the malady. In the instant case it was found that appellant was a young man of 22 years with no criminal antecedents save the offence of rape committed by him. The court thought that given the correctional courses through meditational therapy and other measures, his erotic aberrations may wither away, particularly as the appellant had a reasonable prospect of shaping into a balanced person. But this theory was not followed in the later decisions as it was found that in spite of devices having been employed and adopted within the jail premises so as to reform the offender, there was negligible improvement in the commission of crime. Crime instead of declining had increased and, assumed dangerous proportions. While one person is reformed and moved out of jail, another offender is born.[279] Consequently in recent decisions in **State of Karnataka v Krishnappa**,[280] and in **State of Rajasthan v N.K**[281] the order of the acquittal passed by the High Court was set aside by an order of conviction by the Supreme Court. In **Krishnappa**,[282] the court observed that:

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[276] Ibid, at Para 14.
[277] Ibid, See para 15: It was under this theory that the Supreme Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner after being lodged in jail , does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy.
[278] (1979) 4 SCC 413.
[279] T. K Gopal v State of Karnataka (2000) 6 SCC 168 at Para 19.
[280] (2000) 4 SCC 75.
[281] (2000) 5 SCC 30.
[282] (2000) 4 SCC 75.

"Court should impose sentence commensurate with the gravity of the offence having regard to facts and circumstances of the case. Courts should not show any leniency or mercy to persons committing heinous crime of rape on innocent helpless girls. Socioeconomic status, race, caste, creed etc. of the accused or victim are irrelevant considerations in awarding sentence. Crimes of violence on women should be severely dealt with. Sentence should serve as a deterrent for commission of like offences by others."[283]

The Court further went on to assert that:

"Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence..... Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent girls of tender years, as in this case, and respond by imposition of appropriate sentence by the court. To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge is better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos." [284]

State of Rajasthan v N.K, [285] brought forward the fact that unmerited acquittal does no good to the society. It leads to more attacks on women and demand for harsher sentence. In **State of M.P v Balu,**[286] the carried forward this trend and observed that:

"Courts are expected to properly operate the sentencing system to impose such sentence for a proved offence, as may serve as a deterrent for commission of like offences by others."[287]

However in a very recent case in **State of U.P v Satish,** [288] the Apex Court slightly departed from the above view and emphasized on the principle of proportion between crime and punishment and observed that:

"The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable....Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations.

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[283] Ibid.
[284] Ibid , Paras 13,15, 16, 18.
[285] (2000) 5 SCC 30.
[286] (2005) 1 SCC 108.
[287] Ibid, Paras 19-20.
[288] (2005) 3 SCC 114.

Sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But infact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, unfortunately disproportionate punishment has some very undesirable practical consequences."[289]

Thus the recent approach of the judiciary to the punishment of offender of sexual offences is reflective of deterrent nature. While following deterrent theory the judiciary is also expected to follow the principle of proportion between crime and punishment and it generally follows. This principle of proportion between crime and punishment is also a principle of just deserts that serves as the foundation of every criminal sentence that is justifiable. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It allows some significant discretion to the judges in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case.

b) Sentencing Disparity: An Introspection of Cases

In general terms, the principles of sentencing require a balance between the need for retribution and just deserts against the need for reform and reduction of future crime. Unless the criminal law specifies certain sentence, the autonomy of the courts in passing sentence means there is no such thing as a correct sentence for a given offence. The principle of sentencing that we have is based on the precedent of previous court judgments. Our sentencing policy to a great extent rests on the discretion of the judiciary which interprets and applies the relevant law. It has been seen that our judiciary allowed 'benefit of doubt' to be operated in favour of the offender.[290] Leaving the offence of rape, there is no prescription as to the minimum punishment for other sexual offences. The policy of awarding death penalty to the offender of certain offence is riddled with controversy.

The Indian Penal Code prescribes offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some

[289] Ibid, Paras 28-30.

[290] See State of Rajashtan v Om Prakash, (2002) 5 SCC 745 where the the High Court gave the benefit of doubt to the accused and acquitted him: See also Sudhansu Sekhar Sahoo v State of Orissa, (2002) 10 SCC 743.

offences the minimum may be prescribed.[291] The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore, no uniformity with regard to the sentencing in sexual offence of rape. Some Judges are lenient and some Judges are harsh.[292] Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option is given in the Penal Code and sentencing guideline laws. There is need for such law in our country to minimize uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.[293]

The seriousness with which a judge views a crime is reflected in the sentence he awards to the offender. The amendments to the rape laws in 1983 increased the punishment to a minimum of 7 years in ordinary rape cases and 10 years in cases of custodial rape.[294] Even then most of the punishments meted out were less than the statutory minimum. Cases in which life sentences were awarded were cases which involved sexual assault and murder of young victim. The amendment gave the court the discretion to lower the sentences for adequate and special reasons to be given in writing.[295] Often the reasons cited for giving a relatively shorter sentence of imprisonment show that popular feudal and patriarchal myths about the rapist and the reason why he committed the crime influenced the judges' reasoning.[296] Since the courts have been authorized to award lesser sentence by the legislature, the sentencing pattern presents a varied picture.[297] In practice, in almost every rape case, a less than minimum sentence is awarded. Even if the victim of rape is a child, the attitude of the courts has not been quite different and the following bears witnesses to this fact.

In Ram **Krishan Agarwala v State of Orissa,**[298] the accused a sixty five year old businessman was charged with the offence of committing rape on a six years old girl. The trial court convicted him of rape and sentenced him to 3 years rigorous imprisonment and Rs. 5000 as fine. The Session Judge on an appeal

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[291] Malimath Committee Report. Volume 1. Chapter 14.4. Need for Sentencing Guidelines.March 2003.
[292] Ibid.
[293] Ibid.
[294] The Criminal Law (Amendments) Act. 1943. (Act 43 of 1983): See section 376 (1) and 376 (2).
[295] Proviso 1 to section 376 (1) of the Indian Penal Code 1860.
[296] Kirti Singh, " *Law, Violence and Women in India,*" study supported by UNIFEM/UNICEF. at 24.
[297] Dr. G. Kameshwari, " *Child as a Victim of Rape,*" (2001) 2 SCC (Jour) 27.
[298] (1976) 2 SCC 177.

upheld the conviction but reduced the sentence to six months rigorous imprisonment and Rs. 500 as fine taking into the consideration the old age of the convict. The High Court of Orissa and the Supreme Court upheld the conviction and sentence. In **Satto v State of U.P**,[299] three boys aged between 10-14 years were convicted of raping an eleven year old girl and were sentenced to 2 years rigorous imprisonment by the trial court. The High Court of U.P upheld the conviction and sentence of the accused. The Supreme Court ordered the release of the appellants on probation of good conduct and they were committed to the care of their respective parents. In **Phul Singh v State of Haryana**,[300] the accused a youth of 22 years of age, was charged of committing rape on a deaf and dumb girl of 12-13 years of age. The trial court convicted the accused of the offence of rape and sentenced him to 4 years rigorous imprisonment. The High Court confirmed it in appeal. The Supreme Court however, reduced the sentence to 2 years rigorous imprisonment on the ground that the accused was a youth with no criminal antecedents and that he had a young wife and firm to look after. In **State of Rajashtan.v. Ram Narain**,[301] the accused abducted and raped an innocent village girl aged 15-17 years. The trial court convicted him for the offence of rape, abduction and wrongful confinement and sentenced him to undergo imprisonment for 7 years, 5 years and 1 year respectively and also imposed a fine of Rs. 200. On appeal the High Court confirmed the conviction but reduced the sentence to one and half months of imprisonment, which he had already undergone on the ground that the accused was just 18 years of age. The Supreme Court on an appeal held that the High Court had committed a grave error of law in reducing the sentence. The conviction was upheld and the sentence was altered to one of 5 years rigorous imprisonment under section 376 of the Indian Penal Code. In **Bharwada Bhoginbhai Hirjibhai v State of Gujrat**,[302] the accused, a government servant was charged with the offence of assaulting two girls aged around 10-12 years. The trial court convicted the accused for offences of wrongful confinement and outraging the modesty of the girls and sentenced him to two and half year's rigourous imprisonment. The High Court, on an appeal, altered the conviction to one under section 376 read with section 511 of the Indian Penal Code for attempting to commit rape on the girls.

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[299] (1979) 2 SCC 628.
[300] (1979) 4 SCC 413.
[301] (1996) 8 SCC 64.
[302] (1983) 3 SCC 217.

The Supreme Court on an appeal however, upheld the conviction but altered the sentence to 15 months rigorous imprisonment for certain irrelevant reasons.[303]

In **Narayanamma (Kum) .v. State of Karnataka & others**[304] a 14 year girl who was under the age of legal consent working as an agricultural labourer in a village and was raped by two men while a third immobilized her. The Supreme Court while convicting the rapists allowed the sentence of 3 years rigorous imprisonment given by the trial court to remain, even though it held that sentence was inadequate.[305]In fact the sentencing in sexual offences in our country at various levels, have been different though the law was same. More over this variation of sentencing at various judicial forums is really confusing in view of the fact that our Penal Code has already incorporated provision as to the extent of minimum punishment in case of certain offences.[306]

A complete **U** turn of the sentencing at various level of the judiciary has become the characteristic feature of sexual offences and the following decisions would lend support to this view. In **State of Maharashtra v Chandraprakash Kewalchand Jain**,[307] there was a rape of a married teen aged girl by a police officer. The trial court convicted him for 5 years rigorous imprisonment, the High Court ordered for his acquittal but the Supreme Court upheld the order of trial court. In **State of Rajasthan v. Shri Narayan,** [308] there was a rape of a married woman by her relative. The trial court a sentence of rigorous imprisonment for 2 years and a fine of Rs. 1000; the High Court acquitted the accused but the acquittal was set aside by the Supreme Court which ordered for the restoration of the trial court's award. Seeing the awarding of punishments as stated above no one would agree that the punishments in these cases had been adequate.

In **State of Andhra Pradesh v. Gangula Satya Murthy,**[309] a girl of sixteen (Satya Vani) was raped and throttled to death. This was the gravest of the charge put against respondent Gangula Satya Murthy alias Babu. Sessions Court convicted him under Section 302 and 376 of the Indian Penal Code and

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[303] Ibid: The reasons were a) the appellant had lost his job in view of the conviction recorded by the High Court: b) he must have suffered great humiliation in the society; c) the prospect of getting a suitable match for his own daughter have perhaps been marred in the wake of the finding of guilt recorded against him in the context of such offence; d) the incident occurred some seven years back and about six and a half years elapsed since the dismissal of appeal by the High Court.

[304] 1994 SCC (Cri) 1573.

[305] Note that in **Chitrnjan Das v. State of UP**, (1974) 4 SCC 454, the offender committed unnatural offence, the trial court convicted him but the sentence was reduced to the period already undergone by the Supreme Court. In **Fazal Rab Choudhary v. State of Bihar**, (1982) 3 SCC 9, the offender was convicted for committing unnatural offences, but his sentence was reduced from 3 years to 6 months rigorous imprisonment.

[306] See The Criminal Law (Amendment) Act, 1943, (Act 43 of 1983): See section 376 (1) and 376 (2).

[307] (1990) 1 SCC 550.

[308] (1992) 3 SCC 615.

[309] AIR 1997 SC 1588.

sentenced him to imprisonment for life and rigorous imprisonment for 7 years respectively under the two counts. But on appeal, a Division Bench of the High Court of Andhra Pradesh acquitted him. The Supreme Court while expressing its strong disapproval of the approach of the High Court and its casting a stigma on the character of the deceased prosecutrix reversed the order of the High Court. In **State of Maharashtra v. Rajendra Jawanmal Gandhi,**[310] Rajendra Jawanmal Gandhi (the accused) was convicted by the Sessions Judge, Satara for offences under Section 376, Indian Penal Code (IPC) and Section 57 of the Bombay Children Act, 1948 for having committed rape on a girl of eight years of age and sentenced to undergo rigorous imprisonment for 7 years and to pay fine of Rs. 5,000/- and in default of payment of fine to undergo rigorous imprisonment for six months and for offence under Section 57 of the Bobmay Children Act, he was sentenced to undergo rigorous imprisonment for one year and fine of Rs. 500/- and in default thereof rigorous imprisonment for one month. The substantive sentences were ordered to run concurrently. Maruti car in which the offence of rape was committed was ordered to be forfeited and confiscated to the State. The accused appealed to the Bombay High Court against his conviction and sentence. A Division Bench of the High Court by judgment dated October 4, 1994 upheld the conviction of the accused under Section 57 of the Bombay Children Act and upset the conviction under Section 376, IPC and instead convicted him for an offence under Section 354, IPC and sentenced him to suffer rigorous imprisonment which he had already undergone (which was 33 days in all) and to pay fine of Rs. 40,000/-. In default of payment of fine, the accused was sentenced to undergo rigorous imprisonment for three months. It was ordered that out of the fine so realized, a sum of Rs. 25,000/- shall be paid to the complainant who was father of the girl. For an offence under Section 57 of the Bombay Children Act, sentence was reduced to imprisonment already undergone and the accused was not required to undergo any separate imprisonment for this offence. The Maruti Car was ordered to be returned to the accused and the order of forfeiture and confiscation was set aside. On an appeal the Supreme Court restricted itself and ordered for the imposition of sentence as awarded by the trial court and observed that:[311]

> *"We may emphasize that though for such an offence a more severe sentence would have been desirable but we have restricted ourselves to the maintenance of the sentence as imposed by the learned Sessions Judge for the reason that the State did not seek any enhancement of the sentence by filing an appropriate petition in the High Court or in this Court and for over a period of seven years,*

[310] AIR 1997 SC 3986.
[311] Ibid at p. 3994.

while the case has remained pending here, no notice had been issued to the acquitted respondent to show cause as to why in the event of his acquittal being set aside, a more deterrent sentence, than the one imposed by the Sessions Judge be not imposed upon him and without putting him on such a notice, the Court cannot enhance the sentence."[312]

In **State of Himachal Pradesh v. Raghubir Singh,**[313] the trial court convicted the accused for the commission of rape but the High Court acquitted the accused the and ultimately the Supreme Court set aside the acquittal of the respondent by the High Court holding him guilty of an offence under Section 376, IPC for having committed rape on the prosecutrix. In **State of U. P. v. Babul Nath,**[314] the Sessions Judge convicted the respondent for offence under Section 376, IPC for having committed rape on a minor girl aged about 5 years and sentenced him to suffer imprisonment for five years. On appeal by the respondent, the High Court, however, acquitted him of the charge of rape. The Supreme Court set aside the acquittal and held respondent guilty of an offence punishable under Section 376 IPC and restored the sentence imposed by the Sessions Judge.

In **Madan Gopal Kakkad v. Naval Dubey,**[315] the trial Court acquitted the respondent for an offence under Section 376, IPC for having committed rape on a girl child of 8 years of age. Aggrieved by the judgment of the trial Court the State filed an appeal before the High Court challenging the order of acquittal. Father of the child also filed a criminal revision in the High Court questioning the legality of the order of acquittal. It appeared that one Jay Rao of New York (U.S.A.) wrote the report of this incident in a German Magazine called "Der Spiegel" and after visiting Jabalpur sent a petition of grievance addressed to the Chief Justice of India with a copy to the Chief Justice of Madhya Pradesh. On the basis of this petition another criminal revision was also registered. The High Court disposed of the appeal and two criminal revision by a common judgment, whereby it allowed

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[312] It may be noted that in this case,(1) that the High Court after having come to the conclusion that the accused was guilty of an offence under section 376/ 511 of the IPC could not have convicted the accused for an offence under section 354 IPC. (2) Section 511, IPC provides punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment. In this case since the girl was under 12 years of age and the Session Judge having found that offence of rape had been committed could not have awarded sentence of 7 years when the law prescribes minimum sentence of rigorous imprisonment for a term not less than 10 years, unless exceptional circumstances existed. (3) The state or the complainant did not come up in appeal in the High Court for enhancement of the sentence.(4) Though there was no charge under section 376 read with section 511,IPC. under section 222 of the Code of Criminal Procedure when a person is charged for an offence he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

[313] (1993) 2 SCC 622.

[314] (1994) 6 SCC 29; It may be noted that the offence was committed in March 1977 and the appeal was decide by the court in August 1994.

[315] (1992) 3 SCC 204: 1992 AIR SCW 1480.

the State appeal, held respondent guilty of an offence under Section 354, IPC and sentenced him to pay a fine of Rs. 3,000/- and in default to suffer simple imprisonment for six months. The High Court also directed that a sum of Rs. 2,000/- out of the fine amount if realised be paid over as compensation to father of the child who was petitioner in the criminal revision. No separate orders were passed in the two criminal revisions. The State did not prefer any further appeal before this Court. However, the father of the victim girl, who was the complainant and also petitioner in the criminal revision before the High Court, filed criminal appeal in this Court. He felt aggrieved by the judgment of the High Court on the ground that the High Court had erred in finding the respondent guilty of a minor offence under Section 354 IPC when all the necessary ingredients to constitute an offence punishable under Section 376 IPC had been satisfactorily established and that the sentence of mere fine under Section 354, IPC for such a serious offence was grossly inadequate and was not commensurate with the gravity of the offence committed by the respondent. This Court after examining the whole evidence and law on the subject held the respondent guilty of an offence under Section 376, IPC and set aside his conviction under Section 354, IPC. The Court then addressed itself to the quantum of punishment which would meet the ends of justice in the facts and circumstances of the case. The Court having regard to the seriousness and gravity of the repugnant crime of rape perpetrated on a girl child of 8 years of age sentenced the respondent to rigorous imprisonment for a period of seven years and to pay a fine of Rs. 25,000/- and in default to suffer rigorous imprisonment for 1-1/2 years. It was further directed that the amount of fine of Rs. 25,000/- if realised shall be paid to the victim girl who was now a major.[316]

In **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat**,[317] the accused had been convicted for the offence under Section 376 read with Section 511, IPC and was sentenced to two and a half years rigorous imprisonment. He was accused of having committed the offence against girls of 10 to 12 years of age. The Supreme Court said that the accused had behaved in a shockingly and indecent manner. The magnitude of his offence cannot be over-emphasised. The Supreme Court further noticed that the incident occurred some seven years back and the appellant had lost its job in view of the conviction recorded by the High Court. The accused was also having a daughter of the same age at the time he committed the crime. This Court was of the view that the accused must have

[316] Id at SC3996: The offence in this case was committed in September 1982 and the judgment was delivered in April, 1992 by the Supreme Court.
[317] 1983 Criminal Law Journal 1096: AIR 1983 SC 753.

suffered great humiliation in the society. The prospects of getting a suitable match of his own daughter had perhaps been marred in view of the stigma in the wake of the finding of guilt recorded against him in the context of such an offence. Taking into account the cumulative effect of these circumstances, and an overall view of the matter, the Court said that the ends of justice would be satisfied if the substantive sentence imposed by the High Court for the offence under Section 376 read with Section 511, IPC was reduced from one of two and a half years to one of 15 months' rigorous imprisonment.[318]

In **State of Maharashtra v. Prakash,**[319] the Court set aside the acquittal by the High court of the respondents for offence under Section 376 read with Section 34, IPC as well as under Section 342 read with Section 34, IPC. The Extra Additional Sessions Judge, Amravati had, however, convicted the respondents and sentenced them to rigorous imprisonment for three years on the first count and for two months on the second count. After having set aside the acquittal of the respondents the Court on the question of sentence said as under :

> *"We are aware that the offence had taken place in the year 1978 and that they were acquitted by the High Court as far back as August, 1981 and we are reversing the acquittal after a lapse of more than 10 years but having regard to the nature of the offence and the circumstances in which it was perpetrated, we are of the opinion that the respondents deserve no mercy. They should suffer for their deed."*[320]

In **Madan Lal v. State of J. & K.,** [321] the accused-Headmaster of a School sent the prosecutrix a rustic girl of his school, to his house for cooking; thereafter accused came to house and committed sexual assault. Absence of prosecutrix and accused from school was corroborated by other student witnesses. The learned Sessions Judge found out some contradictions between her statements to the police under Section 161, Cr. P.C. and ultimately came to the conclusion that the statement of the prosecutrix does not inspire any confidence and the said statement is unworthy of acceptance. With these findings the learned Sessions Judge acquitted the accused of the charge levelled against him. On an appeal being carried by the State against the said order of acquittal, the Division Bench of the High Court by the impugned judgment reversed the order of acquittal and came to hold that the charge against the accused under Section 376 read with 511, I.P.C. has been proved beyond reasonable doubt and accordingly the accused has been convicted there under and has been sentenced to undergo

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[318] Ibid.
[319] AIR 1992 SC 1275; AIR 1992 SCW 1240.
[320] Ibid.
[321] AIR 1998 SC 386.

rigorous imprisonment for a period of 5 years with a fine of Rs. 2,000/-, in default, a further period of 6 months' imprisonment as already stated.[322]

In **State of Punjab v. Gurmit Singh and others,** [323] the prosecutrix a school girl below the age of 16 years was abducted and forcibly subjected to sexual intercourse by the three respondents without her consent and against her will. The trial Court not only fell in error in acquitting them of the charges levelled against them but also erroneously disbelieved the prosecutrix.It also quite uncharitably and unjustifiably even characterized her as a girl "of loose morals" or "such type of a girl". Ultimately the Supreme Court set aside the judgment of the trial Court and convicted all the three respondents for offences under Section 363/366/368 and 376 I. P. C. But on the question of sentencing the court took a balancing approach and imposed 5 years rigorous imprisonment and a fine of Rs. 5000 on each of the accused. The court did not impose the minimum sentence prescribed in section 376 of the Indian Penal Code on the ground that:

> *"In this case the occurrence took place on 30-3-1984 (more than 11 years ago). The respondents were aged between 21-24 years of age at the time when the offence was committed. We are informed that the respondents have not been involved in any other offence after they were acquitted by the trial Court on 1-6-85, more than a decade ago. All the respondents as well as the prosecutrix must have by now got married and settled down in life. These are some of the factors which we need to take into consideration while imposing an appropriate sentence on the respondents."*[324]

In **State of Maharashtra v. Priya Sharan Maharaj and others,** [325] the accused, a spiritual teacher committed rape on 3 girls at different times. The additional Session Judge charged him under the relevant provisions of the Penal Code. But the High Court discharged the accused merely on the ground that the accused was a sanity old man who had thousands millions of disciples all over India. In **Kumudi Lal v State of U.P,** [326] the victim aged about 14 years, had gone to ease herself in a field near her house and while she was doing so the accused pounced upon her, pinned her down on the ground, committed rape when she started resisting and raising shouts, strangulated her and killed her by tying her salwar around her neck. The trial court imposed death sentence which was confirmed by the High Court. But the Supreme Court on an appeal reduced the sentence to life imprisonment on the ground that circumstances indicate that

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[322] In setting aside the order of acquittal the High Court came to the conclusion that the entire approach of the trial court in the matter of appreciation of evidence lacked objectivity.
[323] AIR 1996 SC 3986.
[324] Ibid at p.3995.
[325] AIR 1997 SC 2041.
[326] (1999) 4 SCC 108.

probably the prosecutrix was not unwilling initially to allow the appellant to have some liberty with her.[327] This type of reasoning by the apex court seems to give the benefit of doubt to the accused of sexual offences is against the policy of law which does not cast any doubt on the character of the victim of sexual offences. More over the use of the words, "probably the prosecutrix was not unwilling initially to allow the appellant to have some liberty with her" exposes the uncertainty in the minds of the court.

In **State of Karnataka v Krishnappa,**[328] there was a rape of a 8 years old minor girl by a 49 years old married man. The accused first went to the mother of the prosecutrix to get his sexual lust satisfied and on failure dragged the minor prosecutrix to a room and committed rape inflicting various injuries on the prosecutrix. The trial court convicted the accused under section 376 IPC, and sentenced him to 10 years rigorous imprisonment and a fine of Rs. 3000. But the High Court on an appeal reduced the sentence to 4 years rigorous imprisonment on some irrelevant ground.[329]On an appeal the Supreme Court enhanced the sentence to 10 years rigorous imprisonment.

In **State of H.P v Mango Ram,**[330] the accused aged 17 years was the brother in law of the prosecutrix's father committed rape on the prosecutrix who was 2-3 years younger than the accused. The Session Court acquitted the accused taking the view that the prosecutrix must have been above the age of 16 years and the evidence as a whole indicated that there was consent on the part of the prosecutrix to have the sexual act. The High Court did not interfere with the findings of the Session Court. On an appeal the Supreme Court held the accused liable for the offence under section 376 IPC.

Again in **State of Maharashtra v Suresh,**[331] there was a rape and murder of four years old girl. The trial court awarded death sentence. But the accused was acquitted by the High Court. Since the accused respondent was acquitted by the High Court, the Supreme Court held that the lesser option is not foreclosed and hence sentence of death awarded by the trial court altered to sentence of life imprisonment. In **Kamal Kishore v State of U.P,** [332] the accused 25 years old raped a girl aged about 12-13 years minor girl. The Session Judge acquitted the accused. On an appeal the High Court reversed the acquittal and

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[327] Ibid.
[328] (2000) 4 SCC 75.
[329] The ground considered by the High Court were that; the accused was an illiterate person belonging to SC, was also a chronic addict to drinking and had committed rape in a state of intoxication and had an old mother, wife and children as his dependants.
[330] (2000) 7 SCC 224.
[331] (2000) 1 SCC 471.
[332] (2000) 4 SCC 502.

convicted him under section 376 IPC. Using its discretion under the proviso, however the High Court did not impose minimum seven years sentence and instead awarded 3 years rigorous imprisonment and a fine of Rs. 10,000. The High Court found that since the offence took place 10 years ago, the accused "might have settled in life". The Supreme Court held that the high court had rightly convicted the accused. But the reasoning of the high court with regard to the "adequate and special reasons" which is requirement of proviso to section 376 IPC was found to be in adequate and not special in the instant case.

State of Maharashtra v Bharat Fakira Dhiwar,[333] is a classic example which exposes the lacunae of sentencing policy in relation to sexual offences. Here the accused raped and murdered a 3 year old girl. The trial court imposed the sentence of death but the High Court acquitted the respondent. The Supreme Court found the case to be perilously near the region of "rarest of the rare case". But as the accused was once acquitted by the High Court, the extreme penalty need not be imposed. Accordingly the death sentence was altered to life imprisonment. This reasoning of the apex court is bound to confuse the sentencing policy in sexual offences.

Even undue benefit of doubt was given in favour of the accused in some cases. **State of Rajasthan v Om Prakash,**[334] is one of such example where a 8 year old girl was raped and made unconscious by the accused. The Session Judge found the respondent guilty for an offence under section 376, I.P.C and imposed rigorous imprisonment for 7 years and a fine of Rs. 1000. The High Court gave the benefit of doubt to the respondent and acquitted him.[335] However, the Supreme Court reversed the judgment of the High Court and awarded 7 years rigorous imprisonment. Similar principle of benefit of doubt operated in the mind of the court in **Sudhansu Sekhar Sahoo v State of Orissa.**[336] Here the prosecutrix's asserted that she was a virgin till the alleged incident of sexual intercourse. But the medical evidence supported by her physical features revealed that she was habituated to sex. There was also delay in filing FIR. The prosecutrix who was a Malaria Inspector also failed to naturally foresee the impropriety of travelling along with other males in a jeep for such a long distance during the night. All these led the court to hold that in view of the broad probabilities of the case, the appellant is certainly entitled to the benefit of doubt.

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[333] (2002) 1 SCC 622: AIR 2002 SC 16.
[334] (2002) 5 SCC 745.
[335] The main reasons which prevailed with the high court was first the non examination of the other independent witnesses and second, the rejection of medical evidence i.e. testimony of the doctor.
[336] (2002) 10 SCC 743.

What is interesting to see that while holding the above view the court had departed to some extent from its earlier observation in another case where it had observed that:[337]

> *"It will be appropriate at this stage to bear in mind that in assessing the testimonial potency of the victim's version, the human psychology and behavioural probability must be looked into. The inherent bashfulness and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication."*[338]

The same court realized the fact in **State of H.P v Gian Chand,**[339] where it observed that:

> *"Courts should examine broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statements of the prosecutrix, which are of not fatal nature, to throw out an otherwise reliable prosecution case."*[340]

One may aptly question the standing of the court seeing the contrast in **Bhupinder Sharma v State of U.P,** [341] where the apex court held that:

> *"Reason that appellant had not actually committed rape, could not be a ground to warrant a lesser sentence. Not only was the accused present, but he was also waiting for his turn. "*[342]

The rationale of the Supreme Court was that:[343]

> *"In the case in hand, the only reason which seems to have weighed with the trial court is that the present accused-appellant had not actually committed the rape. That can not be a ground to warrant a lesser sentence; more so, in view of Explanation 1 to sub section (2) of section 376 IPC. By operation of a deeming provision a member of a group of persons who have acted in furtherance of their common intention per se attracts the minimum sentence. Section 34 IPC have been applied by both the trial and the high court to conclude that rape was committed in furtherance of common intention. Not only the accused- appellant was present, but he was waiting for his turn, as is evident from the fact that he was in the process of undressing."*[344]

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[337] (1980) 3 SCC 159.
[338] Ibid.
[339] (2001) 6SCC 71.
[340] Ibid.
[341] Ibid, Para 17.
[342] Ibid: See, Para 16: This was a case of gang rape and in the opinion of the Supreme Court the only reason which seems to have weighed with the trial court was that the present accused-appellant had not actually committed rape and therefore warranted a lesser sentence. Ultimately the Supreme Court held that the High Court had rightly enhanced the sentence from 4 years to the prescribed minimum 10 years imprisonment. The Apex Courts reasoning conforms the famous utterances of Rabindranath Tagore, which equates the people who commits crime (sin) with those who tolerate it.
[343] Id Para 14: The court also held that in case of gang rape clinching proof of completed act of rape is not essential.
[344] Id at para 16:

Unmerited acquittal whether at the district level or at the High Court level or at the National level of the judiciary is another area which is also reflective inter alia of the defective sentencing policy. The judicial discretion has to be exercised judicially. In most of the cases involving sexual offences it can be seen either the lower court[345] or the high court[346] have acquitted the accused and ultimately at the hand of the highest court the accused was found guilty. Not only unmerited acquittal but a variation as to the quantum of sentence is clearly discernible.[347] Further the judicial discretion allowed the courts to exercise some liberty in reducing and increasing the quantum of sentence on the pretext of "adequate and special reasons". This has also given the courts a freedom as to not awarding the minimum sentence prescribed by the law, in the pretext of 'adequate and special reasons'.

One must understand that an unmerited acquittal does do no good to the society. If the prosecution has succeeded in making out a conviction case for recording a finding as to the accused being guilty, the court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt as understood in criminal jurisprudence has to be a reasonable doubt and not an excuse for a finding in favour of acquittal.[348] An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists.

It may be submitted that the sentencing policy and the decisions of courts in various level of our country is bound to misled one, specially in view of the fact

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[345] See: State of Punjab, Appellant v Gurmit Singh and others, Respondent AIR 1996 SC 3986: State of U.P v Mango Ram (2000) 7 SCC 224: Madan Gopal Kakkad v Naval Dubey (1992) 3 SCC 204: 1992 AIR (SCW) 1480: In all these cases the accused was acquitted by the lower court.

[346] See State of Maharashtra v Chandraprakash Kewal Chand Jani (1994) SCC (Cri) 1573: State of A.P, Appellant v Satya Murthy, Respondent AIR 1997 SC 1588: State of Rajasthan, Appellant v Shri Narayan , Respondent (1992) 3 SCC 615: State of Himachal Pradesh v Raghubir Singh (1993) 2 SCC 622: State of Maharashtra v Prakas AIR 1992 SC 1275: State of Maharashtra, Appellant v Pria Sharan Maharaj and Others, Respondent AIR 1997 SC 2041: State of Maharashtra v Suresh (2000) 1 SCC 471: State of Maharashtra v Bharat Fakira Dhiwar (2002) 1 SCC 622: AIR 2002 SC 16: In all these cases the accused was acquitted by the High Court but was held guilty by the Supreme Court.

[347] See: : State of Punjab, Appellant v Gurmit Singh and others, Respondent AIR 1996 SC 3986: State of U.P v Mango Ram (2000) 7 SCC 224: Madan Gopal Kakkad v Naval Dubey (1992) 3 SCC 204: 1992 AIR (SCW) 1480: State of Maharashtra v Chandraprakash Kewal Chand Jani (1994) SCC (Cri) 1573: State of A.P, Appellant v Satya Murthy, Respondent AIR 1997 SC 1588: State of Rajasthan, Appellant v Shri Narayan , Respondent (1992) 3 SCC 615: State of Himachal Pradesh v Raghubir Singh (1993) 2 SCC 622: State of Maharashtra v Prakas AIR 1992 SC 1275: State of Maharashtra, v Pria Sharan Maharaj and Others, AIR 1997 SC 2041: State of Maharashtra v Suresh (2000) 1 SCC 471: State of Maharashtra v Bharat Fakira Dhiwar (2002) 1 SCC 622: AIR 2002 SC 16

[348] State of Rajasthan .v. N. K (2000) 5 SCC 30.

that, in most of the cases there has been a complete 'U Turn" of the decision starting from the lower trial court to the highest court of the respective state[349] and ultimately at the hands of the Apex Court of the country which delivered a judgment, open to criticism. Though some mitigating steps have been taken by the legislature by introducing Criminal Law amendments Act 1983 which prescribes for the imposition of minimum sentence prescribed by the Act, yet a lot is to be done in this respect. Moreover the lower judiciary, the higher judiciary including the Supreme Court has been in a dilemma as to the exact punishment which is necessary in relation to any offence including sexual offences against women, can not be denied from the facts available at hands. One way to solve the problem in sentencing sexual offences could be the prescription of minimum sentence for each sexual offence by the legislature and strict adherence to the prescribed punishment by the judiciary at all levels of the country. It is true that the seriousness and sensitivity with which a judge views a crime is reflective of the sentence he awards to the offender. The variation of the quantum of sentence in sexual offences at different levels of the judiciary is bound to mislead one when he sees that same laws were applied by all. Here it may be submitted that sensitivity of the judges at different level (which differs from man to man); determination of sentence largely by other consideration; judicial discretion; failure of the legislature to prescribe mandatory minimum sentence for sexual offence; and to some extent failure to impose prescribed minimum sentence has led to the variance of the quantum of sentence at various level of our judiciary. This is also reflective of the lacunae of our laws relating to sexual offences. The need of the hour is to bring about certain regulation and predictability in the matter of sentencing.[350]

c) Imposition of Death Penalty in Sexual Offences Falling in the 'Rarest of the Rare' Category

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[349] See State of Maharashtra v Chandraprakash Kewal Chand Jani (1994) SCC (Cri) 1573: State of A.P. Appellant v Satya Murthy. Respondent AIR 1997 SC 1588: State of Rajasthan. Appellant v Shri Narayan . Respondent (1992) 3 SCC 615: State of Himachal Pradesh v Raghubir Singh (1993) 2 SCC 622: State of Maharashtra v Prakas AIR 1992 SC 1275: State of Maharashtra v Pryia Sharan Maharaj and Others. AIR 1997 SC 2041: State of Maharashtra v Suresh (2000) 1 SCC 471: State of Maharashtra v Bharat Fakira Dhiwar (2002) 1 SCC 622: AIR 2002 SC 16: : State of Punjab v Gurmit Singh and others. AIR 1996 SC 3986: State of U.P v Mango Ram (2000) 7 SCC 224: Madan Gopal Kakkad v Naval Dubey (1992) 3 SCC 204: 1992 AIR (SCW) 1480:

[350] The Malimath Committee in its Report, March 2003 expressed the similar need and recommended a statutory Committee to lay down guidelines on sentencing under the chairmanship of a former judge or a former Chief Justice of the Supreme Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative: See The Malimath Committee Report. Volume 1, Chapter 14.4.5, Need for Sentencing Guidelines. March 2003.

The steady increase in the number of rape and sexual assault coupled with brutal murder of female person ranging from 8 months[351] old to the age of majority and above and the spurt in the number of unmerited acquittals recorded by criminal courts gave rise to the demand for death sentence to the rapists.[352] It is only in the case of sexual offence of rape the judiciary followed the deterrent theory in some cases and imposed death sentence.[353] Even then the assertion is partially right as because in most of the cases where the judiciary had imposed death penalties were the cases of brutal rape coupled with murder. Broadly two different trends are clearly discernible; first where the case in the opinion of the court fell in the "rarest of the rare" category and consequently the court has taken strong deterrent view and consequently awarded or confirmed death penalty; second where the case in the opinion of the court did not fall in the "rarest of the rare" category and the court has taken only a deterrent view and consequently awarded life imprisonment or reduced the death penalty to the life imprisonment.

The extreme penalty can be inflicted only in gravest cases of extreme culpability and in making choice of the sentence, in addition to the circumstances of the offender also. Having regard to these principles with regard to the imposition of the extreme penalty the court must notice that there are absolutely no mitigating circumstances. **Laxman Naik.v. State of Orissa,**[354] is an illustrative case in this regard. Here there was a calculated, cold-blooded and brutal murder of a seven years old girl by her own uncle after committing rape on her. The court upheld the death sentence awarded by the High Court and the Trial Court. The court was moved by the hard facts of the present case; that the appellant was the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently the victim who was aged about 7 years old must have reposed complete confidence in the appellant. It was on account of such a faith and belief that she acted upon the command of the appellant in accompanying him under the impression that she was being taken to her village

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[351] See: State of Punjab v Major Singh AIR 1967 SC 63 where the accused caused injury to the private part of a 8 months old female child giving vent to his unnatural lust: See also State of Rajasthan v Om Prakash, (2002) 5 SCC 745 involving rape of 8year old girl: State of Maharashtra v Bharat Fakira Dhiwar (2002) 1 SCC 622 involving rape and murder of 3 years old girl: State of U.P v Satish (2005) 3 SCC 114, involving rape and murder of less than 6 year old girl; Bantu v State of M.P, (2001) 2 SCC 28, involving rape and murder of 6 year old girl; Mohd. Chaman v State (NCT of Delhi),(2000) 4 SCC 502,involving rape and resulting murder of a one and half year old girl; State of Maharashtra v Suresh(2000) 1 SCC 471 involving a rape and murder of 4 year old girl; Kumudi Lal v State of U.P(1999) 4 SCC 108,involving rape and murder of 14 years old girl; the court did not consider the case to be falling within the rarest of rare category.

[352] State of Rajasthan v N. K (2000) 5 SCC 30.

[353] The Apex Court imposed death sentence only where there was brutal rape.

[354] (1994) 3 SCC 381.

unmindful of the pre-planned unholy designs of the appellant. The court was also moved by the fact that the victim was a totally helpless child there being no one to protect her in the desert where she was taken by the appellant misusing her confidence to fulfil his lust. Thus the court while justifying death penalty observed that:

> *"The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare cases attracting no punishment other than capital punishment and consequently the sentence of death imposed upon the appellant for the offence under section 302 must be confirmed."*[355]

In **Dhananjay Chatterjee.v. State of West Bengal**,[356], there was a rape and murder of a helpless and defence less school going girl. Upholding the imposition of death sentence awarded by the trial court and the High Court, the Supreme Court observed that:

> *"The sordid episode of the security guard, whose sacred duty was to ensure the protection and welfare of the inhabitants of the flats in the apartment, should have subjected the deceased, a resident of one of the flats, to gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime more heinous. Keeping in view the medical evidence and the state in which the body of the deceased was found, it is obvious that a most heinous type of barbaric rape and murder was committed on a helpless and defenceless school-going girl of 18 years. The faith of the society by such a barbaric act of the guard, gets totally shaken and its cry for justice becomes loud and clear....A real and abiding concern for the dignity of human life is required to be kept in mind by the courts while considering the confirmation of the sentence of death but a cold blooded pre-planned brutal murder, without any provocation, after committing rape on an innocent and defenceless young girl of 18 years, by the security guard certainly makes this case a rarest of the rare cases which calls for no punishment other than the capital punishment."*[357]

In **Kamta Tiwari.v. State of M.P,**[358] the accused kidnapped a 7 years innocent girl committed rape on her and then after murdering her threw the dead body in a well. The Supreme Court while upholding the conviction and death penalty observed that:

> *"When an innocent helpless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of ther trust his culpability assumes*

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[355] Ibid.
[356] (1994) 2 SCC 220.
[357] Ibid.
[358] (1996) 6 SCC 250.

the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a rarest of the rare case where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes."[359]

Molai.v. State of M.P,[360] both, the accused, a guard and a prisoner committed rape on a 16 years old daughter of an officer, they also killed her and threw the dead body in a septic tank. The Supreme Court held that sentence of death was the only proper punishment. In **State of U.P.v. Satish**,[361] there was rape and murder of minor less than 6 years old the Apex Court followed deterrent theory and confirmed death sentence. The court observed that:

"The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable....Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But infact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, unfortunately disproportionate punishment has some very undesirable practical consequences."[362]

In **Mohd Chaman.v. State** (NCT of Delhi)[363], falls under the second category. Here the accused a 30 years old man raped a child of one and half year old. In the process of committing rape, injuries inflicted on liver, apart from other injuries which resulted in the death of the child. In the opinion of the Apex Court the case did not fall within the rarest of the rare category and therefore it held that death sentence not warranted. The Court further observed that:

"In the present case the crime committed is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. But treating the case on the touchstone of the guidelines laid down in Bachan Singh, Machhi Singh and

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[359] AIR 1996 SC 2800.
[360] (1999) 9 SCC 581.
[361] (2005) 3 SCC 114.
[362] Ibid: See. Paras 28-30.
[363] (2001) 2 SCC 28.

other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, the case can not be appropriately called one of the rarest of the rare cases. The appellant can not be said to be such a dangerous person that to spare his life will endanger the community. It cannot be held that the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. The case is one in which a humanist approach should be taken in the matter of awarding punishment. Accordingly the capital sentence imposed against the appellant by the courts below is set aside. Instead the appellant shall suffer rigourous imprisonment for life."[364]

The decision is bound to be criticized on many grounds. First, the court had overlooked the fact that the victim was a helpless child of one and half years old. There was no one to protect her. Secondly the accused seems to have acted in a beastly manner as in the process of committing rape, injuries were inflicted on liver, apart from other injuries which resulted in the death of the child. These makes the offence a rarest of the rare category but the court thought it otherwise. Similar was the decision of the Apex Court in **State of Maharashtra.v. Bharat Fakira Dhiwar,**[365] there was rape and murder of a 3 years old girl, the trial courts award of death sentence was altered by the Supreme Court to that of life imprisonment. Although the court found the case to be perilously near the region of 'rarest of the rare', but as the accused was once acquitted by the High Court, extreme penalty was not warranted. Here also the court failed to realize the helplessness of a child who was subjected to barbaric treatment.

Amit.v. State of Maharastra,[366] is another example where there was rape and murder of the victim, the Supreme Court altered the death sentence to life imprisonment. In **Kumudi Lal.v. State of U.P,**[367], there was a rape and murder of a 14 years old girl the Supreme Court reduced the death penalty imposed by the trial court, into life imprisonment. In **Bantu v State of M.P,**[368] there was rape and murder of six year old girl. The Supreme Court did not consider it to be a case of the rarest of the rare category and hence sentence of death commuted to that of life imprisonment. Same view was taken by the court in **Raju v State of Haryana,**[369] where there was rape and murder of 11 year old girl, and the court altered the death penalty into life imprisonment and in **State**

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[364] Ibid, Paras 25-26.
[365] (2002) 1 SCC 622.
[366] (2003) 8 SCC 93.
[367] (1999) 4 SCC 108.
[368] (2001) 9 SCC 615.
[369] (2001) 9 SCC 50.

of Maharashtra v Suresh,[370] where the accused raped and murdered a four year old girl.

Whether we should retain death sentence or not is a different matter. But going by the Supreme Courts own logic which it applied to consider whether a case falls within the 'rarest of the rare' category it may be submitted that the court has failed to consider the vulnerability of the victim and enormity of the crime in many cases. For example in **Mohd Chaman.v. State,**[371] (NCT of Delhi), in **State of Maharashtra.v. Bharat Fakira Dhiwar,**[372] in **Bantu v State of M.P,**[373] and in **State of Maharashtra v Suresh.**[374] In all these cases[375] the victims were more helpless than the victim in **Dhananjay Chatterjee's**[376] case. It has also failed to properly consider the motivation of the perpetrator and the execution in State **of Maharashtra.v. Bharat Fakira Dhiwar,**[377] in **Bantu v State of M.P,**[378] in **Raju v State of Haryana.**[379] It must be submitted that child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of sexual pleasure. It is a crime against humanity. Where the case is one of rape of a child coupled with murder or one rape of women coupled with murder the responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to future generation of children by punishing the offender sufficiently. In many cases the Highest Court had altered the death sentence imposed by the courts below it, and imposed only life imprisonment which in the opinion of the researcher was not proper. This is not going to suggest that the court should have imposed death penalty. Whether the case falls in the 'rarest of the rare' category or is one perilously near the same; the victim's agony is same. Therefore the court could have opted for the imposition of rigorous life imprisonment in view of the admitted fact that anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. It is also submitted that some times the judicial behaviour have been harsh, sometimes they have been liberal. As to what are the rarest of the rare cases for imposing death sentence the decisions lacks uniformity. In certain rape cases acquittals gave rise to public

[370] (2000) 1 SCC 471.
[371] (2001) 2 SCC 28.
[372] (2002) 1 SCC 622.
[373] (2001) 9 SCC 615.
[374] (2000) 1 SCC 471.
[375] Specially when we consider the age of the victim in all these cases ranging from one and half years to 14 years of age.
[376] (1994) 2 SCC 220: Here the victim was 18 years old school going girl.
[377] (2002) 1 SCC 622.
[378] (2001) 9 SCC 615.
[379] (2001) 9 SCC 50.

protests. Therefore our legal policy fails to bring about certain regulation and predictability in the matter of sentencing in this regard. In order to bring about certain regulation and predictability in the matter of sentencing, a statutory committee is therefore recommended to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative.

F) A Sum Up

1. The criminal law has failed to realize the true nature of the offence of rape by merely recognizing it only as an offence affecting human body. It is still to recognize the trauma which the victim of rape suffers and the pain which it feels.
2. The law stresses on the element of consent, however it has no definite definition in the armoury of law. It appears that the policy of law is to limit rape to acts done by force or threat for force or fraud or by deception, although, there is little difference between sexual access gained through the actual or threatened use of physical violence and that gained through the actual or threatened use of economic organizational , or emotional, or social violence.
3. The law lays stress on penetration which is required to constitute sexual intercourse. The meaning of sexual intercourse is confined in narrow terms to include penile/vaginal penetration only and can not be enlarged to include penile/anal, penile/oral, finger/ vaginal, finger/anal or object/vaginal penetration. It also leaves penetration through some object. The law therefore leaves a vast majority of child sexual abuse cases where the penetration is other than penile/vaginal. The present legal policy seems to give an impression that 'the neutral hazard of life meant that children are always at risk from illness and disease, as well as injury from accident and drug abuse. Risk from adult offenders outside and inside the family seems to have been relatively rare,' whereas the reality is otherwise. The problem of adult court hearing evidence from a child victim is another area that needs to be sorted out immediately.
4. The present law does not even cover all kinds of rape. Further more the law omits all those instances where the wife is obliged irrespective of her own desire. Marital rape therefore, finds partial recognition in the criminal

law. But this recognition does not extend its protection to women of all the ages.

5. Attempt to commit rape' has not been specifically incorporated as an offence in our Penal Code. The authority to punish the 'attempt to commit rape' has been derived by the Indian Courts from section 511 of the Indian Penal Code, 1860 which is a general provision to punish all attempts towards offences. The present legal policy and judicial behaviour gives an impression that attempt to rape and indecent assault which falls within the meaning of section 354, IPC are the same thing, although in reality they are not. On the whole it can be said that the reality is that in most of the cases the offender is punished under section 354 IPC which attracts two years imprisonment due to judicial interpretation, reliance in the old decision and adherence to the age old belief. It is only in a very few cases the offender is held guilty of attempt to rape and punished sufficiently.
6. It is true that a woman, who is raped, undergoes two crises 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.
7. There are many defects in the criminal law which prescribes procedure for investigation, trial and the victim's evidence. Firstly, complaints are handled roughly and are not given such attention as is warranted. The victims, more often than no, are humiliated by the police. The victim invariably finds rape trials a traumatic experience. The experience of giving evidence in Court is negative and destructive. The victims often considers the ordeal to be even worse than the rape it self. Undoubtedly, the Court proceeding adds to and prolongs the psychological stress the victim had had to suffer as a result of the rape itself. 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 results 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.
8. The trial courts and in some cases the High Courts forgets the well settled rule that corroboration as condition for judicial reliance on the testimony of

a prosecutrix is not a matter of law but a guidance of prudence under given circumstances and acquits the accused when there is no corroborative evidence. Some times they test the evidence of prosecutrix with same amount of suspicion as that of accomplice. They even do not follow the guidance given by the Apex Court that although medical evidence is relevant to establish the factum of occurrence of sexual intercourse, it is to remain restricted only to the factual aspect of the offence. The legal aspect whether rape was committed has to be established in the light of testimonial evidence, including the statement of the victim. Sometimes the Trial Court searches for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version.

9. On the whole it may be submitted that the defective and callous investigation, improper collection of evidence and samples, delayed medical examination, inconclusive report, and wrong appreciation of the evidence by the courts altogether helps the accused which in turn acts like an insult to an injury that the victim has already suffered. The confidence of the victim erodes simply because the whole criminal justice system operates against the interest of the victim of rape.

10. The present criminal justice system is accused centric. The policy of law as it appears that the duty of the state ends with the trial and where possible with the conviction of the accused. The accused has been convicted so justice is done to the victim. This policy it is submitted fails respond to the cries of the victim and hesitates to adopt and accommodate the compensatory jurisprudence which is being followed by most of the advanced jurisdictions. Under the present system the victim has the right to be medically examined, judicially heard, and her right to demand conviction for the accused. It is submitted that only one or two judicial pronouncement entitling her to a meagre interim compensation can not console the victim of rape. A separate fund and machinery for victim's rights to assistance therefore, is the need of the hour, which cannot be and should not be neglected by a country that has a constitution which proclaims justice for all and declares it a democratic, socialist, republic and vouchsafes to protect its entire citizen. The sad plight of a ravished girl and the child born as a result of the offence of rape is far too well-known in our conservative society. In the Indian society for no fault of their own both the mother and the child become social outcaste. In such a case to completely wipe out the stigma of illegitimacy sticking on to the forehead

of an unfortunate child an appropriate legislation on the line of section 16 of the Hindu Marriage Act, 1955 is a must and mostly required.[380] In this regard provision should be made to confer on the mother as well as the child the right to get maintenance from the offender where he is identified, and convicted. Where the accused remains untraced or where the accused could not be convicted the state must take up the responsibility of their maintenance and upbringing till they stand on their own feet.

11. Victims attract an unprecedented level of interest, both as a subject of criminological enquiry and focus of criminal justice policy only at the academic level and to some extent at the judicial level. So far as the implementation of the science of victimology is concerned western countries had been the first to implement it. The academics first, the judiciary second to raise the voices for and on behalf of victims and the policy makers(legislature) were the last to respond, in our country. The whole polity although silent seems to be confused including the judiciary which is an organ of the state. The judiciary which has and had tried to raise the victims profile, ensured victims needs and the importance of the victim right to assistance and services, has been sceptical by pronouncing ' it is the duty of the legislature'. At a time when the impulse to punish dominates, it remains doubtful whether reorientation towards the victim will in fact foster reintegrative or reparative ends. However there is one danger that concerns for the victim may be used to justify the pursuit of punitivisim in their name and the promotion of victim's interest over those of the offender.

12. Our sentencing policy and the decisions of courts in various level of the country is bound to misled one, specially in view of the fact that, in most of the cases there has been a complete 'U Turn" of the decision starting from the lower trial court to the highest court of the state. Moreover the lower judiciary, the higher judiciary including the Supreme Court has been in a dilemma as to the exact punishment which is necessary in relation to any offence including sexual offences against women. One way to solve the problem in sentencing sexual offences could be the prescription of minimum sentence for each sexual offence by the legislature and strict adherence to the prescribed punishment by the judiciary at all levels of the country. Our legal policy has failed to bring about certain regulation and predictability in the matter of sentencing in this regard. In order to bring

[380] Section 16 of the said Act gives justice to the child of a bigamous marriage by declaring him to be legitimate even when the marriage proves to be a nullity in law.

about certain regulation and predictability in the matter of sentencing, a statutory committee is therefore required to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative.