

Submissions to Justice Verma Committee by Alternative Law Forum, Bangalore

Suggestions to the Justice Verma Committee on proposed changes in the law on Sexual Assault

Introduction

The horrific sexual assault which has shocked the nation has drawn attention to the prevalence of the crime of sexual assault. What have also emerged into the limelight are the huge gaps in the legal framework which allows for these forms of violent crime to continue unchecked. It is only when the victims of these violent crimes get a measure of justice through a concerted effort at ensuring conviction for heinous crimes that we can send out a message that Indian society does treat sexual assault as a grave and heinous offence and does not condone violence against women. It is the sending out of this message which can delegitimize the powerful social structures which condone, legitimize and even celebrate this heinous crime.

Based on its engagement on issues relating to social justice issues over the last twelve years, the Alternative Law Forum seeks to place the following submissions before the J. Verma Committee. The Alternative Law Forum is convinced that effective justice can not only bring some measure of justice to the victim but also decrease the shockingly high incidence of this crime. With this objective in mind our submissions are structured along five broad lines: substantive law, procedural law, mechanisms relating to witness protection, victim assistance and expansion of FSL Labs.

I. Substantive Law

In spite of various amendments the substance of the offence of rape has not changed much since it was defined by Lord Macaulay in the Indian Penal Code. There are five changes in the substantive definition of the offence itself which we propose.

1) Broadening the definition of sexual assault.

As noted above, the substantive definition of rape has not changed since the very drafting of the Indian Penal Code. As such the law on rape dates back to Victorian conceptions of what the offence of rape means. The offence of rape as it presently stands conceptualizes rape as a form of sexual intercourse without consent of the victim. The sexual intercourse as per the statute as well as the Supreme Court is restricted to penile vaginal intercourse. *Sakshi v. Union of India*, [AIR 2004 SC 3566]

The reality of the offence of sexual assault is that it is not restricted only to acts of non – consensual sex but also includes acts of brutal violence. Further the forms of humiliation practiced go beyond penile vaginal intercourse to include all forms of penetrative intercourse including insertion of objects into the body. As such the offence is not only an offence against chastity (rape) but is actually an offence against the human body.

(Sexual assault)

The very definition of rape should be expanded to cover a range of sexual acts to which the body is subjected, given that the current definition under the Indian Penal Code is restricted to penile-vaginal acts. This new definition should include all forms of forcible penetration by a male person of another person including the use of objects.

2) Creating a graded spectrum of offences relating to sexual assault.

Sexual assault ought to encompass a range of offences, at the lowest end of which ought to be sexual harassment, and the highest level of which should be penetrative sexual assault.

Definitions under Section 354 and Section 509 should be deleted and replaced with a new definition which does not rest on outdated notions of “modesty” of a woman.

3) Making marital rape a punishable offence.

The exception under Section 375 of the Indian Penal Code relating to sexual intercourse by a man with his wife ought to be deleted. Given that sexual violence within intimate relationships like marriage is recognized by the Prevention of Women from Domestic Violence Act, it is time that criminal law is amended to reflect this new understanding. It is widely known that sexual assault is often perpetrated by a person known to the victim and in this context, the guise of marriage ought not to be a shield under which sexual assault continues to be perpetrated.

4) Gender Neutrality for Victims.

It is proposed that the conceptualization of victim broaden from ‘woman’ to ‘person’ so as to also protecting all those who are assaulted on grounds of their gender identity. Our conceptual understanding is that sexual violence is always gendered and that it is perpetrated on account of one’s gender. Thus it is not only women, but all those who are perceived to be transgressing the boundaries of gender who are subject to sexual assault. This includes female to male transsexuals, hijras, kothis, effeminate gay men and all those who violate the social codes of gender. Our proposal is rooted in the concrete history of discrimination and seeks to extend protection to vulnerable groups.

5) Broadening the understanding of custodial sexual assault.

Currently the notion of custody is restricted to police officer, public servant, management or staff of a jail or women’s or children’s institutions. The understanding of custody should be widened to include paramilitary forces, armed forces, and Special Forces that may be constituted under special laws, given the prevalence of reported instances of sexual violence being committed by such forces. The requirement of sanction under Section 197 for prosecution of public servants for sexual assault should be done away with as sexual assault can never be a part of the duty of public servants.

6) Defining Consent

The core of the offence of sexual assault remains sexual intercourse without consent. The term consent has itself been subjected to numerous interpretations. Most infamously in the case of *Tuka Ram v. State of Maharashtra* (AIR 1979 SC 185) the Supreme Court observed that, 'no marks of injury were found on the person of the girl after the incident and their absence goes a long way to indicate that the alleged intercourse was a peaceful affair, and that the story of a stiff resistance having been put up by the girl is all false.' Though *Tuka Ram* has not been expressly overruled, the Court in other cases has not equated the presence of injury marks to the proof of consent. However there is a need for clarifying what exactly is meant by consent. It is proposed that a proviso be added to Section 375 which specifically states that

- (i) A person who does not offer actual physical resistance to sexual activity is not, by reason only of that fact, to be regarded as consenting to the sexual activity.
- (ii) The use of a condom or insistence on the use of a condom and/or the use of contraceptive medication or other prophylactic medication to prevent sexually transmitted diseases shall not be taken to mean consent.

II. Procedural Law

In order to ensure convictions, it is essential to ensure that the process of investigation is conducted by the police in an efficient and time-bound manner. It is often seen that most cases suffer from improper and delayed investigation which compromises on its eventual result.

1. Complaint and FIR – As provided under Section 154 of the Code of Criminal Procedure, it is necessary that the Police shall register every complaint of rape as soon as they become aware of the same, without any delay. The substance of the allegation shall be reduced to writing and be read over to the informant. A copy of the complaint and First Information Report shall be handed over to the Complainant immediately on registration.

2. Legal representation for the victim – The law as laid down in *Delhi Domestic Working Womens Forum vs Union Of India And Others* [1995 SCC (1) 14] must be complied with which includes the following:

(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well acquainted with 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 counseling 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 the victim 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.

(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 moment, 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.

3. Medical examination – The medical examination prescribed under Section 164 -A of the Code of Criminal Procedure shall be complied with. Section 164 – A may be amended to include the following aspects

- The registered medical practitioner examining the victim shall as far as possible be a woman medical practitioner.
- It shall be the duty of the police to explain to the victim the need and usefulness of such examination and collection of such evidence, and the consequences of the failure to do so.
- The registered medical practitioner shall also inform the victim of avenues of counselling.

4. Information to be given to the Sexual Assault Victims Medical and Legal Assistance Board (“SAV-ME-LAB”) and the Magistrate.

5. The Station House Officer shall, without unnecessary delay, but within a period of twenty four hours, report the matter to the Sexual Assault Victims Medical and Legal Assistance Board (“SAV-ME-LAB”). The Station House Officer shall, without unnecessary delay, but within a period of twenty four hours, report the matter to the concerned Magistrate. The Magistrate shall without delay record the statement of the victim under Section 164 of the Code of Criminal Procedure.

6. Investigation shall be conducted in a time- bound manner. It is also essential to ensure that all medical reports, including forensic and DNA reports in cases of rape are made ready and available in a time bound manner. It is also necessary to place a time- limit on the procedure of investigation before the filing of the final report by the police.

7. Appointment of amicus curiae – The trial court should have the power to appoint amicus curiae in all cases of rape to ensure that investigation and prosecution is conducted in the proper manner. This is vital as very often the case falls due to the compromised and hence shoddy nature of the investigation. It is essential that there be a person who can assess the investigation and file a report on that basis before the Court. The amicus should be chosen from a panel of lawyers who have registered themselves to be called upon by the court in matters relating to sexual assault.

8. Action against erring police – Punishment should be provided for neglect of duties as provided under Section 4 of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. It should be an offence for any public servant, including police officials and medical professionals to willfully neglect their duty. This would include, but not be limited to the refusal or delay in registering the FIR, the failure to ensure conducting of medical examination, etc. In particular the requirement of sanction before prosecuting public servants for offences as serious as sexual assault under Section 197 of the Cr.P.C. should be done away with.

9. Appointment of special public prosecutors and enhancing their role in investigation–

The State Government shall appoint special public prosecutors for conducting cases of rape under Section 376 of the Indian Penal Code. A person shall be eligible to be appointed as a special public prosecutor only if he has been in practice for not less than seven years as an advocate. It may be necessary to look at the role of the public prosecutor, beyond that of the prosecutor to conduct the trial, but to also look at the possibility of him acting as a legal adviser to the police at the time of investigation, in order to ensure that investigation is being conducted in the appropriate manner.

10. Period for recording of evidence and disposal of case – A provision similar to Section 35 provided in the Protection of Children from Sexual Offences Act, 2012. The evidence of the victim shall be recorded within a period of thirty days of the Court taking cognizance of the offence and reasons for delay, if any shall be recorded. The Court shall complete the trial as far as possible within a period of six months from the date of taking cognizance of the offence.

11. As detailed by a Human Rights Watch report, the two finger test that is widely used by medical practitioners in India as part of their examination of victims of sexual violence should be explicitly banned. To quote from the report:

Contrary to common misconceptions, the hymen is a flexible membrane that partly covers the vaginal opening and does not seal it like a door. Hence the notion that there was no rape if there is no “broken” hymen is false. Conversely, a hymen can have an “old tear” and its orifice may vary in size for many reasons unrelated to sex, so examining it provides no evidence for drawing conclusions about “habituation to sexual intercourse.” Furthermore, the question of whether a woman has had any previous sexual experience has no bearing on whether she consented to the sexual act under consideration. And the finger test itself can result in further trauma to the

survivor, whose dignity is generally ignored. In effect, it is a procedure that without informed consent would amount to sexual assault.

12. There is no standardized template for medical practitioners to conduct forensic examination of victims of sexual violence. This has led to a range of outdated tests being conducted on victims, of which the afore-mentioned two-finger test is only one of the most notorious. There is an urgent need for a standardized rape kit to be used across the country that is based on the latest international standards.

13. At the time of examination by a medical practitioner, the victim should be provided information and advice about the following:

- a) Risk of Contacting Sexually Transmitted Diseases, and possible symptoms
- b) HIV Prevention Medication
- c) Where the victim is a woman, emergency contraception for prevention of pregnancy.

Apart from being orally advised, the victim should be given a booklet relaying this information so that they might be able to access it at a later stage.

14. In camera proceedings

Section 327 (2) of the Code of Criminal Procedure requires that the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code shall be conducted in camera. As held in *State Of Punjab vs Gurmit Singh & Ors* [1996 AIR 1393]

“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.” This aspect is required to be mandatorily enforced in all trials of rape cases. However the victim shall have the right to request that any number of persons of the victim’s choice be present during the trial process.

15. Additionally it would be essential to enforce the guidelines imposed in *Sakshi vs Union Of India (Uoi) And Ors.* [AIR 2004 SC 3566]

“In holding trial of child sex abuse or rape:

- (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(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 witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.”

16. Further, if the witness/victim expresses apprehension or fear in appearing in person before the court to give her evidence the same shall be recorded through the use of video conference of the witness/victim including the examination in chief and cross examination. (State of Maharashtra vs. Dr. Praful B. Desai (2003) 4 SCC 601)

III. Witness Protection

In many cases of sexual assault, particularly when the accused is in a position of power, securing a conviction becomes almost impossible due to the fact that survivors are subject to intimidation, threats and harassment to withdraw from the case, or to turn hostile. As such, a programme of witness/ victim protection for the victim of sexual assault must be put in place. A witness protection regime should be developed in accordance with the guidelines of the Supreme Court as well as the 198th Law Commission’s Report focusing on victim and witness protection.

In particular, the witness protection regime should focus on giving magistrates and sessions courts judges the power to pass restraining orders preventing the accused from contacting the victim or witnesses by any means whether electronic or otherwise. The victims or witnesses should not be required to establish or prove any threat from the accused while seeking such restraining orders. A violation of such restraining orders should be made an offence punishable with imprisonment for the duration of the trial.

Further, the victims or witnesses should be provided with police protection on their apprehension of a significant threat to their life. This will require amendments to be made to the Code of Criminal Procedure and Indian Penal Code.

IV. Creation of a Victims Assistance Board

The government may consider the establishment of a medico legal board Sexual Assault Victims Medical and Legal Assistance Board (“SAV-ME-LAB”) consisting of mental health professionals trained in criminal procedure and especially in the procedure to be followed for rape cases. While lawyers as such can play a crucial role in assisting with the procedure to be followed, they may not be equipped to deal with the mental state of the victim which may require the active assistance of a psychiatrist/ trained mental health professional. The Boards should have a 24 hour helpline, be established at the taluk level, and the Government should make sustained efforts to disseminate information about the Board throughout the country.

The Board should when it comes to know of an incident through its helpline play an active role in assisting the victim through the process of filing an FIR as well as following up on the legal process.

The Board should be informed by the concerned Police Station about the registration of every FIR under Section 154 of the CrPC or by the Magistrate upon examination of every complaint under Section 200 of the CrPC which relates to sexual assault.

Further, where a victim seeks the assistance of a medical establishment/ hospital before approaching the police, it shall be duty of the doctor to inform the Board.

Further, to keep from risks of tampering, a report of the examination by the medical practitioner as conducted under Section 53 A of the Code of Criminal Procedure should be forwarded to the Board. The report must be forwarded as expeditiously as possible, and not later than 2 business days following its completion. Similarly, a report of the examination by the medical practitioner as conducted under Section 164 A of the Code of Criminal Procedure should be forwarded to the Board with the same standard of expediency.

V. Expansion of FSL Labs

Given the woeful shortage of Forensic laboratories when it comes to examination of evidence, these should be established in every state. This administrative measure will ensure that rape trials are not held up due to the failure of the Forensic Laboratories to do their work in a time bound manner.