JOURNAL OF THE INDIAN LAW INSTITUTE

VOLUME 59 JANUARY-MARCH 2017 NUMBER 1

SENTENCING IN RAPE CASES: A CRITICAL APPRAISAL OF JUDICIAL DECISIONS IN INDIA

*Ved Kumari**

*Ravinder Barn***

Abstract

This paper seeks to explore high court judges' accounts and perceptions of rape and sentencing in India. Located within a mixed-methods approach, the study aims to contribute to theoretical and empirical understandings into gender, sexual violence, patriarchy and the criminal justice system. With the continuous focus on rape laws and the legislature prescribing harsher punishments for rape and aggravated rape, all rape cases concluded in the year 2012 (n=55) were subjected to scrutiny. Incidentally, this also marked 20 years of the introduction of mandatory minimum sentences for rape and aggravated rape, first introduced in 1983. In-depth semi-structured interviews with high court judges (n=10), and survey data from 261 criminal justice professionals further contributed to the academic inquiry. The findings document a mechanistic approach in judicial decision-making with little or no regard to aggravating circumstances, and indicate a mismatch between the legislative framework of harsh punishment and the actual reality of sentencing decision-making. The focus on the high courts also provided a sense of trial court decision-making and the likely differences in the approach between the two courts. Study findings point to an urgent need for training of criminal justice professionals in the area of sentencing, in both the trial courts and the high courts in India.

I Introduction

RAPE LAWS have been introduced and strengthened over the last several decades in many countries around the world.[1] The personal and social consequences of rape for the victim have been given recognition and stressed in judicial decisions, time and again in the Indian context. For example, the Law Commission of India noted that rape was the ultimate violation of the self.[2] The Supreme Court in *Rafiq* v. *State of UP* [3] stated that "[w]hen a

* Professor, Faculty of Law, University of Delhi, India.

** Professor of Social Policy, School of Law, Royal Holloway University of London, UK.

1 C. McGlynn, & V. E. Munro (Eds.), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010).

2 Law Commission of India, 84th Report on Rape and Allied Offences 4 (1980).

3 AIR 1981 SC 559.

woman is ravished what is inflicted is not merely physical injury but the deep sense of some deathless shame." In *State of Maharashtra* v. *Rajendra Jawanmal Gandhi*,[4] the Supreme Court asserted that the crime of rape was a "crime not only against the victim it is against the whole society".[5] In similar vein, the Supreme Court in *Jugendra Singh* v. *State of UP*[6] reiterated thus:[7]

> Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment.

While condemning the December 16, 2012 gang-rape in Delhi and demanding speedy justice and hanging for the accused, the then leader of the opposition in the Lok Sabha, Sushma Swaraj said that even if the 23-year-old survived she would be a "zinda laash (living dead)", traumatised for life.[8] As all such statements represent the abhorrence towards the offence and keep the victimhood of the women alive for the rest of their lives, it is important to examine how and to what extent this abhorrence is translated in the sentencing pattern prescribed by the legislature and implemented by the judiciary in actual cases before it.

II Legislative background

The punishment prescribed in the Indian Penal Code, 1860 (IPC) for this heinous offence prior to 1983 was imprisonment up to seven years, which could be for life or 10 years. The need for change in the laws relating to rape gained momentum after the 'Open Letter to the Chief Justice"[9] which had brought to the fore the judicial bias against rape victim in *Tukaram* v. *State*.[10] The Law Commission of India also recommended changes in rape laws.[11]

---

4 (1997) 8 SCC 386.

5 *Id.* at 403.

6 (2012) 6 SCC 297.

7 *Id.* at 311.

8 *Hindustan Times*, Dec. 14, 2014, *available at:* http://www.hindustantimes.com/photos/india/delhiprotest/article4-974637.aspx (last visited on Feb. 14 2016).

9 (1979) 4 SCC 1.

10 AIR 1979 SC 185

11 *Supra* note 2.

Wide ranging amendments were introduced in the substantive, procedural and evidentiary provisions relating to rape by the Criminal Law (Amendment) Act, 1983. It introduced the concept of aggravated rape in the IPC which included custodial rape,[12] rape of a woman knowing her to be pregnant, rape of a child below the age of 12 years, and gang rape.[13] Contrary to the opinion of the Law Commission of India,[14] mandatory minimum sentences were introduced in the IPC for the offence of rape. Mandatory minimum imprisonment of seven years which could extend to life or 10 years and fine was provided for rape. For aggravated rape, the mandatory minimum sentence of ten years or life and fine was provided. Less than the mandatory minimum could be given for adequate and sufficient reasons to be recorded in the judgment in either case. No lower limit was provided if the judge chose to give less than the mandatory minimum prescribed for the offence.

The Code of Criminal Procedure, 1973 (CrPC) laid down that rape trials should be held in camera[15] and identity of the victim must not be revealed.[16] In the Evidence Act, 1872 (IEA), it was provided that in case of aggravated rape, if the sexual intercourse is proved and the question is whether the woman consented and the woman said that she did not consent, it shall be presumed

---

12 IPC, s.376 (2) relating to custodial rape read: "Whoever,-

(a) being a police officer commits rape-

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes 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; or

(c) 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 women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital;"

13 Expl. 1 of s.376(2) read, "Where a women's is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section."

14 *Supra* note 2.

15 Cr PC, s.327(2).

16 *Id.*, s. 327(3).

that she did not consent.[17] However, section 155(4) IEA was left untouched which provided that "when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character", this evidence was admissible for impeaching the creditworthiness of a witness.[18]

In 2012, a new legislation, namely, Protection of Children against Sexual Offences Act (POCSO Act) was passed which focused on five categories of offences against children, namely, penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault, and use of children for pornography. In 2004, the Supreme Court of India had refused to grant the plea for expansion of the definition of rape by judicial order saying that it was appropriate for the legislature to do so.[19] The POCSO Act substituted the word rape with penetrative sexual assault and made penetration of vagina, urethra, anus, or mouth of the child by penis, body parts or objects punishable.[20] All the offences under the POCSO Act are gender neutral and when committed by men or women against children below the age of 18 years, attract a range of mandatory minimum imprisonment from three to 10 years. Another important change introduced by the POCSO Act is that it raised the age of consent for sexual intercourse from 16 years to 18 years for girls, bringing consensual sexual intercourse with a girl below the age of 18 years within the ambit of penetrative sexual assault. The instances of aggravated sexual assault under POCSO Act are much wider[21] than those of aggravated rape as introduced in the IPC by

---

17 IEA, s.114A.

18 This was later repealed by the Indian Evidence (Amendment) Act, 2002.

19 *Sakshi* v. *Union of India*, AIR 2004 SC 3566.

20 S.3 of POCSO Act reads "A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

21 S. 5 of the POCSO Act includes penetrative assault committed by certain persons like police, members of armed forces, public servants, officials of jails or other custodial institutions, hospital staff, staff of educational institutions, service provider or a person in trust in a child are institution, relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent

the Criminal Law Amendment Act, 1983 but it followed the mandatory minimum sentences of seven years for penetrative sexual assault and 10 years for aggravated sexual assault on the lines of the Criminal Law (Amendment) Act,1983. The judges face the dilemmas of not wanting to punish the accused in such cases and their legal obligation to impose the minimum mandatory punishment of seven years. If the girl is below the age of 16 years, the mandatory minimum imprisonment is ten years under the POCSO Act. The problem has been exacerbated due to absence of any discretion given to the judges to give less than the mandatory minimum sentence, even if it is proved to be a consensual affair between a child on the verge of majority and a person above the age of 18 years. Complaints in most instances in these cases are initiated by the parents of those girls who have defied the societal boundaries of community, caste and class set by them for choosing a suitable man for marrying their daughters.

On December 16, 2012, India was shaken by the brutal gang rape of a young woman, named Nirbhaya by the media, in a moving bus in Delhi. She later died due to the injuries caused by her rape. The national level demonstration against rape made the government react quickly and it appointed a committee under the chairmanship of J.S. Verma J to suggest amendments to criminal laws. It submitted a voluminous report within a record period of 30 days[22] suggesting widening of the definition of rape, making the offence gender neutral. It extensively quoted from various judgments of the Supreme Court emphasizing that punishment should be proportionate to the gravity of offences. In *Mahesh* v. *State of MP*,[23] the Supreme Court, while refusing to give the lesser punishment to the accused, held thus:[24]

---

of the child or who is living in the same or shared household with the child. It also includes circumstances of gang rape, repeat sexual offence, use of deadly weapons, fire, heated substance or corrosive substance or taking advantage of a child's mental or physical disability, the child being below twelve years or known to be pregnant, commission during communal or sectarian violence, and stripping or parading the child naked in public. If the result of penetrative sexual assault is grievous hurt or bodily harm and injury or injury to the sexual organs of the child, physical incapacitation of the child or causing the child to become mentally ill or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently, or makes the child pregnant; inflicts the child with HIV or any other life threatening disease or infection, or attempts to murder the child.

22 Report of the Committee on Amendments to Criminal Law, chaired by J.S. Verma, Leila Seth JJ and Gopal Subramanium as members, submitted to Government of India on Jan. 23, 2013.

23 (1987) 3 SCC 80.

24 *Id.* at 82.

> To give the lesser punishment for the accused would be to render the justice system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon.

It recommended mandatory minimum imprisonment of 10 years which may be for life for the offence of rape.[25] It further recommended that the legislature should clarify that the imprisonment for life should mean "the entire natural life of the convict".[26] In case rape is committed in such violent manner that it results in death or leaves the victim in vegetative state, it recommended life imprisonment. As one of the accused in the Nirbhaya case was a juvenile, it specifically examined the question of children committing such serious offences and recommended against exclusion of any children from the juvenile justice system. The government moved swiftly and immediately afterwards, promulgated the Criminal Law Ordinance 2013 incorporating the suggestions of Justice Verma Committee. This ordinance was replaced by the Criminal Law (Amendment) Act, 2013 expanding the definition of rape and prescribing for harsher punishments.

While the Criminal Law (Amendment) Act, 2013 expanded the definition of rape on similar lines as the POCSO Act but retained the term rape.[27]

---

25 *Supra* note 22 at 239.

26 *Ibid.*

27 IPC, s. 375 reads: Rape — A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven 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.

In comparison to the ordinance which had made the offence of rape gender neutral, it reverted to the traditional gendered definition of rape as an offence committed by a man on a woman. However, the use of the word 'person' among the victim may result in conviction of a man for committing rape on a man or other persons. It has also introduced the harsher punishments of life imprisonment without the possibility of release for aggravated rape.[28] Mandatory minimum imprisonment of twenty years, or life imprisonment without the possibility of release till death or death penalty may be given if rape results in death or leaves the victim in a vegetative state.[29] For gang rape the mandatory minimum sentence is twenty years and it may extend to life imprisonment till the natural life of the person.[30] Mandatory minimum sentence of life imprisonment without the possibility of release till death or death penalty have been provided for repeat offenders.[31] No discretion has been given to the judges to give less than the mandatory minimum sentence in any of these cases. However, no sexual intercourse by the husband with his wife above the age of 15 years is an offence.

While all these legislative changes were being made, the five adult accused and one juvenile in the Nirbhaya case were tried under the Indian Penal Code and the Juvenile Justice Act, 2000 (JJ Act 2000) as applicable on the date of offence. The adults were given death penalty by the sessions court and the juvenile who was just a few month short of 18 years, was sent to a place of safety for three years by the juvenile justice board (JJB). The stark contrast between the two sets of offenders brought the focus on juvenile justice system

---

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.

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

Seventhly.-When she is unable to communicate consent.

28 The categories included in the new s. 376(2) IPC in 2013 are much wider than those provided in 1983. In addition to custodial rape and rape of a pregnant woman, it includes rape of a woman by a relative, guardian or teacher of, or a person in a position of trust or authority towards such woman; during communal or sectarian violence; under sixteen years of age; incapable of giving consent; being in a position of control or dominance over such woman; suffering from mental or physical disability; causing grievous bodily harm or maims or disfigures or endangers the life of a woman while committing rape; repeated rape of the same woman.

29 IPC, s.376A.

30 *Id.*, s.376D.

31 *Id.*, s. 376E.

and media created a public opinion against applicability of juvenile justice in such serious offences by presenting the three years 'sentence' given to the juvenile for such a brutal offence as grossly disproportionate. It wrongly presented the juvenile as the most brutal (despite the press release by the JJB to the contrary), claimed sudden and high increase in serious offending by children without any factual basis, and created an emotional pressure by constantly using the grieving parents of Nirbhaya.

In October 2015, the Madras High Court stirred the hornet's nest by suggesting castration for sex offenders abusing children while acknowledging that "'castration' would be surely condemned, censured and criticized a barbaric, punitive, draconian, cruel, retrograde, stone aged, cannibalistic, inhuman, etc." But it thought this punishment necessary in view of the increase of child sexual abuse cases from 38172 in 2012 to 58224 in 2013 and 89423 cases in 2014 despite severe punishments provided in POCSO Act. According to the court,[32]

> When law is ineffective and incapable of addressing the menace, this Court cannot keep its hands folded and remain a silent spectator, unmoved and oblivious to the recent happenings of horrible blood curdling gang rapes of children in various parts of India. It would not only be injustice done to the child abuse victims, but would also amount to violation of the oath taken by this Court. This Court is sure that additional punishment of castration of child rapists would fetch magical results in preventing and containing child abuses.

Finally, the Juvenile Justice (Care and Protection of Children) Act, 2015(JJA 2015) was passed by Parliament on December 22, 2015 and has been enforced from January 12, 2016. The JJA 2015 provides for selective transfer of 16-18 years old children committing offences punishable with minimum imprisonment of seven years to be tried as adults and to be punished with adult punishment. Rape is included among such offences.

A request for castration for sexual offences has again been made before the Supreme Court of India in a public interest litigation filed by Supreme Court Women Lawyers Association and the Supreme Court has asked the government to respond.[33]

---

32 (*Name withheld*) v. *State represented by Inspector of Police and others*, Crl.O.P.(MD)No. 11735 of 2014 and MP(MD) Nos.1 to 8 of 2014, *available at*: http://indiankanoon.org/doc/154136594/ (last visited on Jan 22, 2016).

33 *Supreme Court Women Lawyers Association* (SCWLA) v. *Union of India*, Writ Petition (Civil) No. 4 of 2016, *available at* : http://courtnic.nic.in/supremecourt/qrydisp.asp (last visited on Jan 22, 2016).

All these legislative and judicial developments have their basis in the deterrence theory of punishment, that is, harsher punishment deters, even though in penological thinking it has always remained questionable if harsher punishments deter. India, despite the introduction of harsher punishment, has registered no decrease in rape cases since 1983. The phenomenal increase in the reported rape cases does not show many persons were deterred. On the other hand, the miniscule number of cases disposed off, and even smaller number of convictions in India over these years proves the adage that mere increase in the quantum of punishment does not deter unless there is also certainty of punishment. While 14893 cases of rape were pending for trial before the courts in 1984, this number increased phenomenally to 150,771 in 2013 and to 167271 in 2014. Trial was completed in 26.6% cases in 1984 and 16.8% cases in 2013 and 13.9% cases in 2014. The conviction rate plummeted from 39.9% in 1984[34] to a mere 24% in 2012.[35] It slightly improved to 27.1% in 2013[36] and 28% in 2014.[37] Conviction in custodial rape showed even worse results. In 2013, trial was completed in case of only four men and all the four were acquitted.[38] In 2014, trial for gang rape in custody was completed against only six out of 241 men. Only one of them was convicted. In other gang rape cases also a mere 4.4% of persons (including one woman) were convicted.[39]

III Aims and methods of study

With the continuous focus on rape laws and the legislature prescribing harsher punishments for rape and aggravated rape, all the rape cases decided in the year 2012 at the high court level in one jurisdiction were chosen for detailed analysis as it marked 20 years of major amendments in rape laws in India introducing the concept of aggravated rape and mandatory minimum sentences for rape and aggravated rape in 1983. Manupatra was used as the data source for searching the cases using the word 'rape'. A total of 55 cases in which the accused were charged with rape were included in the analysis. In-depth individual interviews with the high court judges were also conducted to get their perspectives on the subject. The paper by the authors containing the

---

34 Table 13,*Crime in India* 1984.

35 "Figures at a Glance" *Crime in India Compendium* 2012.

36 "Figures at a Glance" *Crime in India Compendium,* 2013.

37 "Figures at a Glance" *Crime in India Compendium,* 2014.

38 Table 12.12, *Crime in India Statistics,* 2013.

39 Table 12.4, *Crime in India Statistics,* 2014.

analysis regarding construction of consent has already been published.[40] In the present paper, the authors analyse the sentencing pattern in these rape cases decided in 2012 to find out how the legislative policy of imposing mandatory minimum sentence with fine has played out in the actual cases. Out of the 55 cases studied for the published paper, 13 cases were writ petitions, miscellaneous interim applications seeking bail, cancellation of bail, challenging the charges framed; and another 15 cases were of double acquittals having no bearing on sentencing. Three cases were still pending final disposal. In the remaining 24 cases, 22 cases were the dismissed appeals by the convicts leading to double conviction by the sessions judge as well as by the high court. The state succeeded in getting enhancement of sentence in one appeal and getting an acquittal order reversed in another. Notably, for this paper the authors have analyzed only these 24 cases from the perspective of punishment for rape.

Significantly, during the analysis, one of the decisions of the high court was found to be quite problematic from the sentencing perspective and the authors extended their methodology to probe further the 'sentencing understanding' among the various legal personnel involved in trial in criminal cases. The facts and the sentence given in that case were then used as a survey questionnaire during five trainings organized by the high court between January 2014 and April 2015 for higher judicial officers (200), judicial officers (100), public prosecutors (64), legal aid lawyers (123), and police officers (103). Here, the authors sought to elicit their responses for the appropriate sentence in the said case. This questionnaire was sent to all the participants along with other training materials few days prior to the scheduled training and they were asked to submit the filled questionnaire on the first day of the training while registering for the training. A total of 261 written responses were received - higher judicial officers (n=41), judicial officers (n=42), legal aid lawyers (n=23), public prosecutors (n=5), police officers (n=9) - regarding appropriate sentence in that case under the IPC prior to 2013, under the POCSO Act and after the amendment of the IPC in 2013. As the number of responses from different strata was not very significant, the responses have not been presented strata-wise.

---

40 Ravinder Barn and Ved Kumari, "Understanding Complainant Credibility in Rape Appeals: A Case Study of High Court Judgments and Judges' Perspectives in India" *British Journal of Criminology*, published on Feb. 9, 2015, *available at*: https://doi:10.1093/bjc/azu112.

The sentencing in the judicial decision of the high court and the responses to the survey questionnaire were analyzed to find out sentencing pattern and reasoning for the sentences. It was explored whether the mandatory minimum sentences were the 'mechanical norm' in rape cases or whether the quantum of sentence varied by reference to aggravating and mitigating factors. If so, what factors weigh with the judges in determining the quantum of sentence? Was there any difference in sentencing by the district level judicial officers and the high court? Whether the quantum of fine had a rational basis? Was it in tune with the gravity of the offence as was it reflected in the harsher punishments introduced by the legislature in the IPC by its amendment in 1983? The findings from these analysis are presented in the next section.

IV Findings

The first part in this section presents the findings from the analysis of the high court decisions and the second part notes the finding from the analysis of the answers in the questionnaire.

Sentencing in high court decisions

The table below shows the quantum of imprisonment given in the 24 rape cases that resulted in conviction by the high court :-

Table 1: Quantum of imprisonment

Offence (No. of Cases)	Prescribed mandatory minimum sentence	Less	More	Not mentioned
Rape and murder (3)	3 -imprisonment for life and fine			
Rape (9)	7-imprisonment for seven years and fine	1		1
Attempt to rape (1)	no mandatory minimum prescribed			
Gang rape (4)	3 –imprisonment for 10 years and fine		1	
Child u/12 (7)	4 – imprisonment for 10 years and fine	1	2	
Total (24)	18	3	3	

Out of the three cases of rape and murder, two involved rape and murder of girls below the age of 10 years and one was a case of double murder of children. In each of these cases, the mandatory minimum sentence of imprisonment for life was given. Out of nine cases of rape, mandatory minimum

sentence of seven years was given in six cases, less than that in two cases while in one case the period of sentence was not mentioned. In four of these cases the court mentioned that victims were children between the ages of 13-18 years old, but it made no reference to this fact when deciding the quantum of imprisonment. In none of the cases the age of accused was mentioned in any of the judgments. In the case in which imprisonment for a period less than the mandatory minimum was given, the reason was that it was a case of statutory rape resulting from romance between the parties. In the attempt to rape case the sessions court had imposed the maximum possible imprisonment of five years and a fine of Rs.50000 to be paid to the victim. He further directed that the state should pay this amount as compensation to the victim and recover it from the estate of the convict later. On appeal, the high court reduced the imprisonment to four and a half years already undergone and waived the fine as convict was too poor to pay. Out of the four cases of gang rape, mandatory minimum imprisonment of 10 years was given in three cases. In one of these cases, the victim of gang rape was a child of just 7-8 years of age but it had no bearing on the quantum of sentence chosen by the court. In the third case of gang rape, more than the mandatory minimum sentence was given for the reason that the accused were policemen having the obligation to protect general public.

In the remaining seven cases of rape of girls below the age of 12 years, the accused were convicted for aggravated rape punishable with mandatory minimum sentence of 10 years. The high court gave the mandatory minimum imprisonment in four cases, more than that in two cases and less than that in one case. In one of the two cases in which more than the mandatory minimum sentence was given, it involved rape of a six year old daughter by her father. The sentence of life imprisonment given by the sessions court was simply confirmed by the high court without any discussion about the quantum of sentence. Similarly, in the other case of rape of a small girl of 3-4 years by a neighbourhood *rikshawala,* the sessions judge had imposed life imprisonment and the same was affirmed by the high court without any discussion about the quantum of sentence. Reasons for the period of imprisonment or quantum of fine were conspicuous by their absence.

The most problematic sentencing among all the cases was in the case victim where was the 11 year old daughter of the accused. She was repeatedly raped by him in the year 2002. On one occasion, he had brought his friend who also raped her. Both of them were convicted of rape by the sessions court under section 376 and sentenced to seven years imprisonment and fine of Rs.1000, in default of which they were to undergo an additional imprisonment of one month. Both the accused challenged their conviction.

The appeal of the other accused had already been dismissed upholding his conviction and sentence of seven years. The high court dismissed the appeal of the father too, stating that it found no reason for reducing the sentence of seven years of imprisonment in the facts and circumstances of the case. While dismissing the appeal, it noted that rape is a very serious offence, and the "Supreme Court has time and again emphasized the importance of dealing with such matters sternly and severely and it is only when adequate and special reasons are shown that the court may reduce the sentence. The high court further noted that "in the present case, what makes this heinous crime even more shocking is the fact that the person accused of raping an innocent 11 year old girl is none other than her own father." In order to emphasize that less than the mandatory minimum cannot be given in this case, the court referred to many judgments of the Supreme Court and even quoted the following paragraph from one such judgment:[41]

> The father is supposed to protect the dignity and honour of his daughter. This is a fundamental facet of human life. If the protector becomes the violator, the offence assumes a greater degree of vulnerability. The sanctity of father and daughter relationship gets polluted. It becomes an unpardonable act. It is not only a loathsome sin, but also abhorrent. The case at hand is a sad reflection on the present day society where a most platonic relationship has been soiled by the pervert and degrading act of the father.

Rejecting the plea for reduction in the sentence, the court held thus:

> In the present case, the trial court had sentenced the appellant to rigorous imprisonment of seven years, which is the minimum prescribed punishment. Moreover, the counsel has failed to show any such adequate and special reasons which may justify reducing the sentence.

What is shocking in this judgment is that the conviction of the accused under section 376 of the IPC prescribing mandatory minimum sentence was questioned even though the case squarely fell under section 376(2)(f) of the IPC which prescribed 10 years of mandatory minimum imprisonment as the victim was a girl below the age of 12 years. It is true that a court could give less than the mandatory minimum sentence of 10 years but it could do so only for special reasons to be given in writing in the judgment. As the accused were

---

41 *Siriya @ Shri Lal* v. *State of Madhya Pradesh*, AIR 2008 SC 2314.

convicted under section 376 and given the mandatory minimum sentence of seven years, special reasons were not required to be given about why more stringent punishment was not given. The sessions judge, the public prosecutor, the high court judge and the state counsel – all seem to be oblivious of the fact that the case fell under section 376(2)(f) and not under section 376(1) of the IPC. Even under section 376, it was a fit case for imposing more than the mandatory minimum sentence on the convict as so many aggravating factors were there making the offence more heinous. The high court itself had noted that the victim was just 11 years old; she was his own daughter; he had raped her repeatedly; and he even allowed his friend to rape his own daughter. Despite noting these facts, the high court did not question why imprisonment of seven years was given. If these facts are not enough to give more than the mandatory minimum sentence, then there can be hardly any other case demanding more than the mandatory minimum sentence in a rape case. The high court appears to have misdirected itself by focusing on why less than the mandatory minimum imprisonment of seven years cannot be given instead of asking why he was not convicted for aggravated rape and why more than the mandatory minimum of 10 years of imprisonment was not given in this case. There is also no justification why the pittance fine of Rs.1000/- was imposed in the case. Understandably, without an appeal from the state against the conviction under section 376 and the quantum of sentence, the high court could not have changed the conviction for a more serious offence or enhanced the punishment, but it certainly was required to question the appropriateness of the conviction and sentence under section 376.

It is apparent from table 1 that mandatory minimum imprisonment was given routinely even though there were many aggravating circumstances in these cases asking for more than the mandatory minimum sentences. While fine is compulsory to be imposed in all cases of conviction, reference to it was not found in all cases. The amount of fine imposed was mentioned in 19 cases and it ranged between 10000/- to one lakh. In three cases there was complete silence about fine or its quantum; in one case it was waived. However, none of the cases had any reasoning to support the quantum of fine and it seemed to have been imposed on the whim of the judge. None of the cases provided any guidelines either for determining quantum of fine in rape or aggravating rape cases in that case or in general.

In none of the cases compensation to the victim was provided either from fine or otherwise even though section 357 of the CrPc provides for compensation to victims since 1973.

Another aspect relating to sentencing policy brought to fore by various writ petitions filed before the high court was the constitutional validity of clause 26.4 of the Parole/Furlough Guidelines, 2010. While prisoners were entitled to furlough and parole as per rules contained in these guidelines, clause 26.4 prohibited it completely for prisoner convicted of robbery, dacoity, arson, kidnapping, abduction, rape and extortion irrespective of their conduct in prison. The petitioners were undergoing imprisonment for varying lengths of time for various offences covered under this clause. Each one of them had applied for furlough or parole but it was denied to them because of this clause. It was argued on behalf of the petitioners that the clause violated the fundamental right to freedom and liberty and was unreasonable and discriminatory. The sole purpose of furlough / parole was the unification of the prisoner with his family, members, friends and society and that is denied to prisoners undergoing long imprisonments for the specified offences. It was submitted on their behalf that the conduct of prisoner during imprisonment should be the sole criteria for determining application for furlough and parole. On behalf of the state it was argued that these guidelines were framed in consultation with the Delhi Legal Services authority pursuant to the court order and had been approved by the high court and were based on reasonable criteria to exclude offenders committing serious offences.

The court considered the challenge, as on earlier occasion individual clauses were not considered. It examined closely the judgment of Gujarat High Court[42] (which had upheld a similar clause applicable in Gujarat excluding the offences of robbery and dacoity from the scope of furlough) and disagreed with it. The court referred to the landmark judgment of Delhi High Court in *Charanjit Lal* v. *State* [43] to point out that punishment has four fold function – deterrence, prevention, retribution and reformation. However, now there is more emphasize on reformation and furlough provides an opportunity to the convict to maintain links with society; to solve personal and family problems; breathe fresh air for at least some time. Furlough is an important tool for reintegration of the long term prisoner and is a substantive right, and distinct from parole which is given to short term prisoners for specified purposes. It held that there were enough safeguards available to balance the right of the prisoner to release and safety of society. By removal of this clause, each prisoner committing these serious offences need not be released as they will have to still apply for furlough and fulfill other conditions like not being a habitual offender, not likely to commit any crime during release, not showing

---

42 *Juvan Singh Lakhubhai Jadeja* v. *State of Gujarat* (1973) 14 GLR 104.

43 1985 CriLJ 1541 (Del).

any violent traits. As furlough is to be applied only after the prisoner has spent considerable time in prison and the prison is supposed to undertake reformation programmes during that time, the prison authorities would have sufficient knowledge about the prisoner by that time to determine the suitability of the offender for release on furlough. Clause 26.4 makes convicts of certain offences *per se* ineligible for furlough on the basis of far fetched and illogical presumption that they have become "habitual offenders" and are incapable of being reformed. The court specifically noted that this reasoning "applies with much force where conviction is for offence of rape as in such a case by no means there can be a presumption that in all circumstance, the convict would repeat this crime." The court held that "the authorities may be extra cautious in granting a furlough to an inmate convicted of a serious crime against the person and/or whose presence in the community could attract undue public attention, create unusual concern, or depreciate the seriousness of the offense…. However, their exclusion per se making them ineligible at the outset even from consideration to obtain furlough becomes discriminatory and arbitrary and it cannot have any rational nexus."

Findings regarding sentencing from the survey questionnaire

The findings from the questionnaire during five training programmes for district level judicial officers, public prosecutors, lawyers and police officers[44] show that training in sentencing is required of all these stakeholders and not only the judicial officers. The questionnaire contained the following fact scenario based on the actual case decided by the high court:

> The case against the accused 'A' resulted from a complaint made by Smt. 'W', wife of the accused. The complaint is that 'A' repeatedly raped their daughter Miss 'G', aged about 11 years. 'A' allowed their daughter to be raped by the co-accused 'F', who is A's friend.
>
> The prosecution proved that on 27th September Year -2, Smt. W, wife of the accused, along with her daughter Ms. G , aged about

44 A series of trainings were conducted by the High Court of Delhi for "Making Courtroom Practices Responsive Towards the victims of Sexual Offences" at Saket Courts by the Committee "to monitor proper implementation of several guidelines laid down by the Hon'ble Supreme Court as well as Hon'ble High Court of Delhi for dealing with matters pertaining to sexual offences and child witnesses", chaired by Gita Mittal J, Judge High Court of Delhi. Ved Kumari carried out the exercise during the trainings held on Jan 11-12, 2014, Feb 8-9, 2014, July 12-13, 2014, Nov 8-9, 2014 and April 11-12, 2015.

> 11 years, went to the Police Station and informed that her husband, the accused, and his friend F, the co-accused, had raped her minor daughter. The police thereafter recorded the statement of the prosecutrix/victim, Ms. G, to the effect that her father was a habitual drunkard and 3-4 months earlier her father had consumed liquor and had raped her. She further stated that a week later her father again raped her and this time his friend F also raped her. The victim also stated that about 10-12 days prior to the complaint, she was once again raped by her father. However, it was only on 26th September Year -2 when the victim's mother had come to attend the shradh of her grandfather that she disclosed these facts to her mother. It was then that the victim, accompanied by her mother, came to the police station to make a complaint against her father and his friend. On the statement of the victim, FIR No. 670/Year -2 was registered at police station u/s 376/34 IPC. In support of its case, the prosecution examined 14 witnesses in all, including the wife of the accused who is also the mother of the victim.
>
> After the trial, the accused, A, as well the co-accused F were convicted u/s 376 IPC vide judgment dated 11th May, Year -3.
>
> The defence counsel for A pleaded for reduction of sentence from the mandatory minimum. In support of its submission for reduction of the sentence, counsel for A relied on a copy of the order of the High Court … giving less than the mandatory minimum sentence in a case in which the accused had a family comprising of his wife, children and aged parents who were totally dependent upon him. In the present case, the estranged wife of the appellant along with her other children had been living with her brother even prior to the commission of the offence and the appellant's widowed mother had also expired.
>
> The session judge sentenced both the accused to rigorous imprisonment for seven years along with a fine of Rs.1,000/-, in default of which they were to undergo further rigorous imprisonment for one month vide order dated 17th May, Year -3.

It also included the following brief about the punishments under the IPC prior to 2013, under the POCSO Act 2012 and IPC after its amendment in 2013:

Punishments prescribed under-

POCSO 2012	IPC prior to 2013	IPC after 2013
• Rape: Mandatory Minimum of 7 Yrs – 10 yrs + fine	• Rape: Mandatory Minimum of 7 Yrs- 10 yrs + fine	• Rape: Mandatory Minimum of 7 Yrs – 10 yrs + fine
• Child below 12 years / gang rape: Mandatory Minimum of 10 yrs – life +fine • Less for Spl	• Child below 12 years / gang rape: Mandatory Minimum of 10 yrs – life +fine	• Child below 12 years / gang rape: Mandatory Minimum of 10 yrs – life +fine
reasons	• Less for Spl reasons	

On the basis of this information, they were asked to fill the following questionnaire:

Please tick whether you agree or disagree with the sentence given by the Session Judge to A in this case under -

1. The IPC prior to amendment in 2013?

Agree / Disagree

2. The POCSO Act 2012?

Agree / Disagree

3. The IPC as amended by the Criminal Law Amendment Act 2013?

Agree / Disagree

If you agree with the punishment given, kindly give reasons for supporting the punishment.

If you disagree, kindly write down the appropriate sentence and give reasons for the same.

a. Punishment under the IPC prior to 2013?

b. Punishment under the POCSO Act 2012?

c. Punishment under the IPC after Criminal Law Amendment Act, 2013?

Each training was attended by about 150 officials, *i.e.*, about 750 persons involved in implementation of criminal law. Even though they were all directed to hand over the filled questionnaire to the nodal officer on arrival, only 261 officials did so. This in itself is a big indicator of the lack of interest or motivation in learning and actively participating in the training. Their responses to this short questionnaire are even

more revealing of lack of even the knowledge of the basic provisions of law, apart from routine manner in which punishment is chosen and lack of understanding about penological approaches to sentencing.

Table 2: Do you agree or disagree that the punishment given in this fact scenario is satisfactory?

	Prior to 2013 amendment in IPC	u/ POCSO Act	Post amendment of IPC in 2013
Agree	52	14	15
Disagree	207	217	225
Not applicable	1	22	16
Not answered	1	8	5
Total	261	261	261

As per the sentences prescribed under the three Acts given in the questionnaire, the offender in this case should have been given the mandatory minimum sentence of 10 years which could have been imprisonment for life too. Less than the mandatory minimum could be given for special reasons only under the IPC as it existed prior to 2013 but not under the law as it applies under the POCSO Act or under the IPC since 2013. Fine has been the additional compulsory punishment in all the three Acts. The table above shows that 53 participants said that seven years imprisonment with Rs.1000 fine was appropriate in this case. It implies that either they did not apply their mind appropriately or they believed that there were adequate mitigating circumstances to impose less than the mandatory minimum sentence. Agreeing with the imprisonment of seven years in this fact scenario as appropriate is a clear sign of either ignorance of law or non-application of mind while answering the questionnaire as the law neither POCSO Act nor IPC post-2013 gives the court any discretion to give less than the mandatory minimum sentence of 10 years. A small number of participants did not tick either of the options. Not applicable was written by those who believed that the incident happened during the subsistence of a particular law and hence, earlier or subsequent changes in the law will not affect the outcome of the case.

Further tabulation of the appropriate punishment for the offence under the three laws brought out a wide range in the number of years for which the offender should be imprisoned in this case.

Table 3 – List of appropriate punishment in this case

amendment in IPC	Prior to 2013	u/ POCSO Act IPC in 2013	After amendment of
Death Penalty	1	0	1
Remainder of life	0	20	2
Life Imprisonment	86	90	90
20 years	0	0	36
10 years	90	40	32
12 years	1	1	2
14 years	6	8	6
7 years	29	9	9
7 years u/s.377	1	0	0
8 years	1	0	0
Not applicable	11	28	22
Not answered	35	65	61
Total	261	261	261

It must be noted that death penalty is not permissible for the offence in question under any of the three laws but two different participants specified the death penalty as the appropriate sentence in this case.

The Criminal Law Amendment Act, 2013 had substituted section 42 of the POCSO Act to provide for imposition of greater punishment prescribed under any other law for an offence under the POCSO Act.[45] Hence, it was possible to impose life imprisonment for the remainder of the life or imprisonment for 20 years under both the Acts. However, the two participants who opted for life imprisonment for the remainder of the life under the IPC post-2013 did not opt for it under the POCSO Act. The other 22 who opted

45 The substituted s.42 of the POCSO Act 2012 reads: " Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender guilty of such offence shall be liable to punishment under this Act or under the India Penal Code as provides for punishment which is greater in degree.

for it under the POCSO Act did not opt for it under the IPC. Similarly, none of the 36 participants who opted for 20 years imprisonment under the IPC post-2013 opted for it under the POCSO Act. This indicates that all these participants were not aware of the greater punishment principle introduced in the POCSO Act by the Criminal Law Amendment Act 2013.

Life imprisonment was the most chosen punishment by 86, 90 and 90 participants respectively under the three Acts. These participants mentioned the relationship between the victim and offender, gang rape, and young age of the victim as the aggravating circumstances for the punishment.

The mandatory minimum imprisonment of 20 years was chosen by all those who believed that it was a case of gang rape or rape by the father was violation of his fiduciary responsibility towards his daughter. While six of these respondents did not provide any reason for the sentence, majority chose it mechanically for being the mandatory minimum sentence. Others mistakenly believed life imprisonment for the remainder of the life to be the mandatory minimum sentence for rape by father who is in a fiduciary relation to the daughter and hence, chose it. The fact that it was the father of the girl who had committed the offence, had done so repeatedly, had permitted a friend also to rape, and that the daughter was just 11 years old, did not lead the participants to impose more than the mandatory minimum sentence prescribed for the offence they thought had been committed.

Four of the participants chose 14 years imprisonment under all the three Acts but all those who chose this punishment mentioned the aggravating circumstances. One of them, however, specifically mentioned that life imprisonment should not be given "as that should be reserved for cases involving use of weapons, injury caused, pregnancy, harmful chemicals, narcotics etc."

Two participants chose 12 years as the sentence under the three Acts. One of them chose to impose 12 years in the pre and post 2013 IPC as 10 years was the mandatory minimum imprisonment and the cut off age for child rape was raised to 16 years. Even though no additional reasons were mentioned, this participant seems to imply that more than mandatory minimum was required to be given in the case. S/he did not spell out the punishment under the POCSO Act. The other participant chose eight years imprisonment under the pre-2013 IPC mentioning the relationship between the victim and the accused as the reason for the same. It seems that this participant believed that the mandatory minimum sentence under the three Acts were seven years, 10 years and 10 years respectively as s/he chose nine years, 12 years and 12 years respectively under the three Acts. However, s/he has not mentioned why s/he chose to impose the fine of Rs.20000/-, Rs.30000/- , and Rs.50000/- respectively under the three Acts.

A total of 90, 40, and 32 participants opted for 10 years imprisonment as the appropriate sentence under the three Acts respectively because it was the mandatory minimum sentence for the offence of rape of the girl of 11 years. Many of them mentioned that the facts of the father raping the daughter, allowing a friend to rape her, that he was in a fiduciary relationship, *etc.*, left no room for giving less than the mandatory minimum imprisonment of 10 years. As the law required them to give reasons for giving less than the mandatory sentence, these reasons suggest that they felt that they need to justify also why they were not giving less than the mandatory minimum sentence.

A significant number of participants chose to give seven years of imprisonment under all the Acts. All those who chose to give seven years under the POCSO Act or the IPC post 2013, clearly were not aware that there was no discretion to choose this sentence. Less than the mandatory minimum could have been given for special reasons under the IPC pre-2013. However, 10 out of 29 did not provide any reason for the same. Majority of the remaining specifically noted that it was the mandatory minimum sentence for the offence in the case. Some of them gave very questionable reasons for fixing this quantum. One noted, "[t]he judge has balanced aggravating and mitigating circumstances in the case and has accordingly given the punishment" without specifying which facts constituted mitigating circumstances in this case. Another thought seven years is a long time for teaching him a lesson and observed that he "being the father and the bread earner, the family had need for him." While one participant believed that "prior to 2012 maximum sentence for the offence was 7 years", another wrote that "prior to 2012 it was not settled what should be the minimum punishment." One participant chose to give seven years imprisonment under section 377 dealing with unnatural sexual intercourse but mentioned no reason either for the choice of offence or the quantum of sentence. The one who chose to give eight years of imprisonment did so because of the relation between the accused and the victim. S/he also imposed a fine of Rs.20000.

Sentencing was even more problematic when it came to the quantum of fine. Even though the questionnaire sheet had specifically included fine as the additional punishment to be given in all cases under all the three Acts, it was not mentioned in three out of every four responses. Even when it was mentioned, a significant number of the participant did not specify the quantum of fine. Among those who specified the quantum, the range varied from Rs.10,000/- to Rs. five lakhs. The table below presents the range of responses regarding fine.

Table 4: Range of fine

Range of fine	Prior to 2013 amendment in IPC	u/ POCSO Act	After amendment of IPC in 2013
Not specified	33	20	34
Rs. 10,000	17	10	17
Rs. 15,000	0	0	1
Rs. 20,000	8	10	1
Rs. 25,000	3	2	1
Rs. 30,000	0	1	0
Rs. 50,000	7	3	4
Rs. 100,000	6	5	8
Rs. 200,000	2	1	1
Rs. 500,000	0	1	1

Compensation to the victim fared even worse which occurred barely 30 times among the total of 783 (261 participants x three Acts) occasions for choosing the appropriate sentence under the three Acts. Even so, the range varied from Rs. 5000/- to Rs. five lakhs. One of the participants imposed the punishment of 14 years imprisonment and fine of Rs. 10,000 out of which Rs. 5,000 was be paid to the victim as compensation and 20 years imprisonment and fine of Rs. 50,000 under section 376 D for gang rape. Four participants just stated fine or compensation enough to meet the medical expenses of the child or for her rehabilitation. They did not specify the amount required for either. Compensation to the victim of offences either from the fine or independently of any fine has been provided for by section 357 of the CrPc since 1973. Only six participants referred to this section but did not specify the amount of compensation or if it was to be paid out of fine or otherwise. Two participants just mentioned compensation to the victim without specifying any amount.

Table 5 – Compensation amounts

Rs. 5,000	0	1	0
Rs. 10,000	1	0	0
Rs. 20,000	0	0	2
Rs. 50,000	0	0	2
Rs. 90,000	1	0	0
Rs. 100,000	2	0	2
Rs. 200,000	4	0	0
Rs. 500,000	0	0	2
Compensation to meet the medical expenses but not specified	0	0	3
Compensation for rehabilitation Compensation	0	0	1
u/S.357 CrPC Compensation (without specifying anything further)	0	0	6
	0	0	2

No participant mentioned any reason for the amount of fine or compensation. Most of them did mention the period of imprisonment in case of default of payment of fine. They did so rarely in case of default of compensation. None of the participants made any mention of the capacity of the offender to pay the fine or compensation. None of them directed compensation to be paid under the scheme for compensation under the POCSO Act providing for interim and final compensation to be paid to victims by the state legal services authority.

V Conclusion

It is apparent from the above analysis that there is limited understanding of sentencing among the judges and legal fraternity involved in prosecution of offenders. There was little coherence in the sentences given by the judges at the trial as well as the high court level. The age of the victim, relation of trust between the victim and offender, serious injuries caused to the victim, gang rape, incestuous rape were not considered as aggravating circumstances needing more than the mandatory minimum sentence.

Out of the 24 cases studied for this paper, seven involved child victims below the age of 12 years but the fact that victim was a child of such tender age has been noticed as an aggravating factor only exceptionally. None of the judicial decisions mentioned the age, religion, social and economic background of the accused. It was not much different in case of the victims either, except that in some cases the age of the victim was mentioned. Age of the victim certainly has an important role as even consensual intercourse with a girl below the specified age would result in conviction being statutory rape. In 'love and elopement cases' age difference between the victim and the accused may also be a relevant factor but none of the decisions mentioned it.

Responses to the questionnaire clearly show that ignorance of the applicable range of punishments under the three Acts was not uncommon. It is also found most of the time mandatory minimum sentence was chosen mechanically without considering the aggravated or extenuating circumstances in the case. Inclusion of fine as compulsory component of the sentence was not routine. Order of compensation to the victim was rare and order of compensation by the state, either interim or final, was completely missing. There was no clear understanding whether the facts in the case - father repeatedly raped his daughter, allowed his friend to rape her, and that the daughter was just 11 years old – justified imposition of seven, eight, 10, 12, 14, 20 years or life imprisonment. The same facts were mentioned while imposing any of these punishments.

The analysis of sentencing in the cases of rape for this study clearly show that there is an urgent need for training in sentencing of judges at all levels as well as the other legal fraternity involved in prosecution of offenders. It may also be necessary to evolve some standards for determining the amount of fine in rape cases. It needs to be highlighted that justice to the victim of rape requires not only sending offenders to mandatory minimum imprisonment but also sufficient amount of compensation to the victim for her medical expenses and her rehabilitation. Assessing the economic capacity of the offender to pay compensation must be integral to decision making process at the sentencing stage and when appropriate, the state must be directed to give interim and final compensation to the victim to ensure her treatment and rehabilitation.