

# GENDER NOTIONS IN JUDGMENTS OF RAPE CASES: FACING THE DISTURBING REALITY

G.S. Bajpai\*, Raghav Mendiratta\*\*

## Abstract

Despite legislative reforms, gender stereotypes and myths have been embedded in the charging, trial and sentencing stages of a rape trial. This paper is aimed at studying the impact of judges' pre-conceived notions on gender on the fate of rape cases being decided in the Supreme Court of India. To show the correlation of gender notions and the outcome of the trial, the paper uniquely combines a doctrinal method of research along with Quantitative Data Analysis through the data analysis software Atlas.ti. Factors such as age, sexual history and marital status of the victim were cross analysed with gender insensitive comments to determine their implications on the outcome of the case and tenor of the judgment. The findings in the paper demonstrate the inefficacy of the present legal framework in eliminating preconceived sexist biases while dealing with crimes against women.

## I Introduction

PRECEDENTS CAN be of two types – written and unwritten. Law digests may cite precedents without reference to the surrounding social circumstances, however, as researchers in the field of law – we also ought to look at the unwritten precedent evolved. Despite law reforms, gender stereotypes and myths have been embedded in the charging, trial and sentencing stages of a rape trial.

Gender stereotypes are norms of masculinity and femininity that are “taught” by the society, and through this process of social learning, gendered expectations become fundamental components of our personalities. Rape myths are “prejudicial, stereotyped, or false beliefs about rape, rape victims and rapists”<sup>1</sup>, such as, how a rape survivor would or ought to react<sup>2</sup>, what a perpetrator of rape would do after the rape, how judges perceive rape survivors who had an active sexual history prior to the incident, what effect would the trial have on the psyche of the victim among others<sup>3</sup>, that women always physically resist rape which leads to injuries to their bodies and genitals<sup>4</sup> etc.

---

\* Professor & Chairperson, Centre for Criminology & Victimology, National Law University Delhi &

Chair Professor at K.L. Arora Chair in Criminal Law

\*\* Pursuing B.A.LL.B. (Hons.) at Rajiv Gandhi National University of Law, Punjab.

1 Martha R. Burt, Cultural Myths and Supports for Rape, 38 *J. Pers. Soc. Psychol.* 217, 218 (1980).

2 Jennifer Temkin & Barbara Krahe, *Sexual Assault And The Justice Gap: Question Of Attitude* 32 (Hart Publishers, Oxford, 2013).

3 Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* 5 (Cambridge University Press, Delhi, 2016).

4 Jennifer Temkin, And Always Keep a – Hold of Nurse, For fear of Finding Something Worse: Challenging Rape Myths in the Courtroom, 13 *New Crim. L. Review* 710,715-16 (2010).

This paper is aimed at studying the impact of judges' pre-conceived notions on gender on the fate of rape cases being decided in the Supreme Court. These notions rest on a sexist perspective of gender, on rape stereotypes and on a cemented status quo of sexism in the society. The approach adopted in this paper of analyzing *obiter dicta* is unique as it questions the widely prevalent practice of looking at judgments of the Supreme Court through mere figurative outcomes – through convictions and acquittals, through calculating the number of months taken for completion in the trial, through the number of years a guilty person is imprisoned to, through reducing victims of age to numbers in a statistic etc.

Rape myths may play a role at various stages of a trial, for example, when the need for corroboration arises – judges have been unfortunately relied upon vaginal injuries, injuries on the body of the victim, neighbors hearing the woman's screams for help. The myth that a woman necessarily resisted rape arose from the notions of chastity and honour.<sup>5</sup> Since a woman treasured her chastity, she would resist to the utmost to prevent it from being “stolen”. From this notion also developed another myth – that an unchaste woman could not be trusted. Past sexual history affected the credibility of the woman and consequently meant that not only was her testimony untrustworthy, but that it would also be assumed that she consented to intercourse.<sup>6</sup>

These stereotypes are not unique to India and have been documented at courts around the World. Zsuzsanna Adler, in her case study on rape cases at the Old Bailey Courts in London, concluded that a “typical” rape victim – meaning one whom the court would believe – would have been raped by a stranger, resisted the assault and thus incurred injuries, and would have also been sexually inexperienced and would have led a “respectable lifestyle”. If two of these factors were present, the conviction rate was 33%; three factors increased the rate to 72%. Absence of any of the factors resulted in a guaranteed acquittal, whereas there were no acquittals if all the factors were present.<sup>7</sup> In the Indian context, Ratna Kapur has observed that, Courts have viewed the typical rape victim as “chaste, pure, monogamous, honorable, and confined to the private/ domestic sphere”. She would generally be “Hindu, a virgin daughter or [a] loyal wife”.<sup>8</sup> The testimony of such a woman is a lot more likely to be believed by a court in a rape trial. If the woman's sexual behavior is inconsistent with dominant values and norms,

---

5 Marian Duggan, Rethinking Rape Law: International and Comparative Perspectives, 51 *Brit. J. Criminol.*, 616, 619 (2011).

8 Jennifer Temkin, *Rape and the Legal Process* 256 (Oxford University Press, Oxford, 2006).

7 Zsuzsanna Adler, *Rape on Trial* 102 (Routledge & Kegan Paul Publishers, London, 1987).

8 Ratna Kapur, *Erotic Justice: Law and the new politics of Post colonialism* 33 (Routledge-Cavendish Publishers, London, 2005).

her ability to use the law to protect the infringement of her sexual autonomy is weakened, if not completely lost<sup>9</sup>.

## II Analysis of Legal Framework

The ideas of male dominance, female inferiority and sexual morality continued to persist, until 1983, when for the first time, a conscious legislative effort was made to reform the law of rape, in order to protect women and ensure their freedom and liberty in society effectively. The Criminal Law (Amendment) Act, 1983 brought major amendments in the substantive and procedural aspects of rape. To reduce the role played by rape stereotypes, Section 114A was inserted into the Indian Evidence Act, 1872, which imposed the burden of proving “consent” upon the accused in the aforesaid cases of aggravated rape. In other words, a legal presumption was created against the accused in cases of custodial rape, if the woman alleged that the act was without her consent. This was an exception to the general rule of presuming innocence of the accused until proven guilty.

In 2003, the Parliament repealed a provision in the Indian Evidence Act, which permitted the past sexual history of the victim to be admitted in rape trials, conducting and noting the results of the two-finger “test” became a matter of routine during medical examination of a rape victim. This test, propogated by J.P. Modi, arguably the most popular expert on medical jurisprudence in India, was used to determine virginity and consequently, the sexual behavior of the victim.<sup>10</sup> Human Rights Watch, in a report released in 2010 documented the widespread use of the test<sup>11</sup>.

After 2003, the prohibition of admitting past sexual history was subverted by the introduction of a medical examination report. When the prosecution presents the report of the medical examiner at trial, factors deemed to be irrelevant both by the legislature and courts are often introduced into the trial in the name of “expert evidence”.<sup>12</sup> Whereas previously defense counsel could raise the sexual history of the

---

9 *Supra* note 8.

10 Pratiksha Baxi, The Medicalization of Consent and the Falsity: The Figure of the Habita in Indian Rape Law, Kalpana Kannabiran, *The Violence of Normal Times: Essays on Women's Lived Realities* 266-311 (Women Unlimited Publishers, Delhi, 2005); Jaising P. Modi, Modi: A Textbook Of Medical Jurisprudence And Toxicology, Justice K. Kannan 759 (Lexis Nexis Publications, Mew Delhi, 2016); Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* 61-116 (Oxford University Press, New Delhi, 2014).

11 Human Rights Watch, Report on Dignity on Trial: India's need for Sound Standards for Conducting and Interpreting Forensic Science Examinations for Rape Survivors (October, 2010); Kalpana Kannabirna and Ritu Menon, *From Mathura to Manorma: Resisting Violence Against Women in India* 14 (Women Unlimited Publishers, New Delhi, 2007).

12 *Supra* note 3.

woman during cross-examination, the very nature of the medical tests used in India introduces gender stereotypes around women's honour and chastity into the trial as "objective" scientific and expert evidence.

Against the backdrop of the nation-wide outrage over the tragic and fatal Delhi gang-rape of Nirbhaya on the night of December 16, 2012, the Government of India was propelled to drive the issue of violence against women to the center-stage of legislative discourse and passed the Criminal Law (Amendment) Act, 2013.

The new law aims to create deterrence over the act of rape and contains harsher punishments for rapists, including the death penalty, for rapes that cause death or leave the victim in a vegetative state. The definition of rape has also been amended to given a broader meaning that includes any kind of penetration, in any body part of the woman. However, the Act has also been strongly criticized for not including certain suggestions recommended by the Verma Committee Report like, criminalizing marital rape, amending the provisions of the Armed Forces (Special Powers) Act that mandate the obtainment of sanction to prosecute an armed forces personnel accused of rape, not including a sexual penetration of a man and other suggestions.

### III Judicial Attitude in Rape Trials

Rape sentencing in India has seen a drastic transformation over the years. While the period immediately after independence, up to the seventies witnessed a conservative and narrow-minded judicial system, the late eighties and nineties have seen the emergence of judicial activism that reached its heights in *Saksbi v. Union of India*.<sup>13</sup>

Although the Supreme Court had ruled as early as in 1952 that conviction could be based solely on the testimony of the victim, it felt the need to devise methods to test whether she was reliable<sup>14</sup>. This was in part promoted by Section 155(4) of the Indian Evidence Act, 1872 that, until its repeal in 2003, permitted the defence in a rape trial to adduce evidence to show that the victim was generally of "immoral character". Such character evidence could be used to infer that her testimony was false.

Up until the case of *Tukaram v. State of Maharashtra*<sup>15</sup>, the judiciary had interpreted the substantive law of rape to the advantage of the accused. The strict rules of corroboration, past sexual history of the victim and "consent", were all read in a manner so as to inflict utmost disgrace and ignominy of the womenfolk of the country.<sup>16</sup> Traditionally, rape laws required 'resistance to the utmost'. This concept signals to

---

13 AIR 2004 SC 3566.

14 *Supra* note 3.

15 (1979) 2 SCC 143.

16 Dipa Dubey, *Rape Laws in India*<sup>162</sup> (Lexis Nexis Publications, New Delhi, 2008).

judges and prosecutors that any indication of consent – even consent to casual companionship – would preclude the required level of resistance from being met. Thus, generally rape law required harsh standard of lack of consent. The elements establishing an act of sexual intercourse as rape – lack of consent and use of force – must have occurred *before* the act.

Despite various progressive judgments by the Supreme Court, the conventional notions of morality continued to affect the conviction or acquittal of the accused. The judiciary continuously reinforced the old stereotypes of women and placed a premium on the notion of “honor and chastity”. Even today, a woman’s chastity is considered to be her honor – something for which she lives for, and rape snatches away that honour from her, this perception of rape that is reinforced in criminal justice system makes it most difficult for women to obtain justice through the law.<sup>17</sup>

**On the basis of the remarks in the judgments, the following judicial trends were observed:**

- *Rigid Image of a Stereotypical Rape Victim*

Judges, owing to their personal notions and biases, created a stereotype of a rape victim. Consequently, court compared victims in individual cases against these stereotypes and rejected the testimony of victims who did not adhere to such stereotypes.<sup>18</sup> A striking phenomenon in the judicial attitude in Rape trials is the need for visible signs of agony and emotional trauma on account of rape. This need has to be understood in the context of Section 280 of the Cr.P.C. This section requires the presiding judge to make a note in the court transcript, on the demeanour of the witness while under examination. This is exhibited in the judgment of the Supreme Court in the case *Kamalanathba v. State of Tamil Nadu*<sup>19</sup> where the judge emphasized on the fact that the testimony inspires his confidence as the Trial Court had noted that the victim’s testimony was emotional and she had broken down several times:

*“While recalling the forcible act of rape, the [trial] court noticed torrential flow of tears from the eyes of P.W.8 with all pain and conscience shocked, the court listened to the most startling and saddening story of P.W.8 who is yet to attain mental maturity.”*

In addition to the burden of fitting the profile of a stereotypical rape victim, the Court appears to expect a certain behavior from the rape victim, both during the act of rape itself and subsequently, when she is testifying in court.<sup>20</sup> Hence, in addition to

---

17 UNIFM/UNICEF, Kirti Singh’s Report on Law, Violence and Women in India (2002).

18 *Supra* note 3.

19 (2005) 5 SCC 194.

20 *Supra* note 3.

the burden of proof already on the prosecution, there is an additional “burden of performance”<sup>21</sup> on the victim to convince the court that her behavior conformed to sex stereotypes, her testimony is viewed through the prism of rape myths and cultural stereotypes. Thus, the decision on whether to believe the victim is determined by the judge’s own perception of the behavior of the victim both during rape and the trial.<sup>22</sup> The problem here, therefore, is that the Court expects a “typical” reaction from a woman who has been raped, although studies indicate that though there are common patterns, there are no “typical” reactions.<sup>23</sup>

This was observed in a recent case of *Raja v. State of Karnataka*<sup>24</sup>, where Justice Amitava Roy, while acquitting the appellants in a case of gang rape, held that:

*“Her post-incident conduct and movements are also noticeably unusual. Instead of hurrying back home in a distressed, humiliated and a devastated state, she stayed back in and around the place of occurrence, enquired about the same from persons whom she claims to have met in the late hours of night, returned to the spot to identify the garage and even look at the broken glass bangles, discarded litter etc... Her avengeful attitude in the facts and circumstances, as disclosed by her, if true, demonstrably evinces a conduct manifested by a feeling of frustration stoked by an intense feeling of deprivation of something expected, desired or promised. Her confident movements alone past midnight, in that state are also out of the ordinary... The medical opinion that she was accustomed to sexual intercourse when admittedly she was living separately from her husband for 1 and 1/2 years before the incident also has its own implication.”*

It was noticed that even when judges are seemingly try to empower women by directing the judiciary to be sensitive to their needs, their personal notions of sexism become evident. By reaffirming notions of character and victim blaming, the collateral damage of the “empowerment” is greater than the good. For example, in the case of *Bharwada v. State of Gujarat*<sup>25</sup>, in a case where man violated his daughter’s minor friends, Justice A.P. Sen and Justice M.P. Thakkar were under an impression that they was delivering a ‘gender-sensitive’ and a “victim-friendly” decision. It felt the need to justify the basis for its trust in the testimony of Indian women and constructed the stereotype of a

---

21 Corey Rayburn, To Catch A Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials, 15 *Colum. K. Gender and L.* 437, 460 (2006).

22 Andrew E. Taslitz, *Rape and the culture of the courtroom* 6 (NYU Press, New York, 1999).

23 Sue Lees, *Ruling Passions: Sexual Violence, Reputation and the law* 85 (Open University Press, Buckingham, 1997).

24 (2016) 10 SCC 506.

25 (1983) 3 SCC 217.

rape victim, one whose testimony could be believed and acted upon without corroboration.<sup>26</sup>

*“Even at the age of 10 or 12 a girl in India can be trusted to be aware of the fact that the reputation of the entire family would be jeopardized, upon such a story being spread. She can be trusted to know that in the Indian Society her own future chances of getting married and settling down in a respectable or acceptable family would be greatly marred if any such story calling into question her chastity were to gain circulation in the Society. It is also unthinkable that the parents would tutor their minor daughter to invent such a story in order to wreak vengeance on someone. They would not do so for the simple reason that it would bring down their own social status in the Society apart from ruining the future prospects of their own child. They would also be expected to be conscious of the traumatic effect on the psychology of the child and the disastrous consequences likely to ensue when she grows up. She herself would prefer to suffer the injury and the harassment, rather than to undergo the harrowing experience of lodging a complaint in regard to a charge reflecting on her own chastity.”*<sup>27</sup>

Veena Das has argued that Indian judges perceive sexual offences as offences against marriage and thus make a distinction between an unmarried virgin and a sexually experienced married woman. If a virgin is raped, her marriage prospects are diminished and hence, the legal system readily considers it as a sexual offence. On the other hand, women who have sexual relations with men other than their husbands are treated differently, since their value in the matrimonial “market” is already diminished.<sup>28</sup> This is visible in the case *Madan Kakkad v. Naval Dubey*<sup>29</sup>, where the court held that:

*“...after having lost her virginity still remains unmarried undergoing the untold agony of the traumatic experience and the deathless shame suffered by her. Evidently, the victim is under the impression that there is no monsoon season in her life and that her future chances for getting married and settling down in a respectable family are completely marred.”* And:

These stereotypes are especially damaging when the need for corroboration arises and judges tend to believe or disbelieve the victim’s version on the basis of their pre-existing stereotypical image of a rape survivor. In the case of *Pratap Mishra v. State of Orissa*<sup>30</sup>, while disbelieving the version of a woman who living as a concubine with a

---

<sup>26</sup> *Supra* note 3.

<sup>27</sup> *Supra* note 25.

<sup>28</sup> Veena Das, Sexual Violence, Discursive Formations and the State, *Economic and Political Weekly*, Sept. 14, 1996

<sup>29</sup> (1992) 3 SCC 204.

<sup>30</sup> (1977) 3 SCC 41.



married man, the Supreme Court set aside the conviction of gang rape against three N.C.C. students and held that:

*“We should have expected the stiffest possible resistance from her resulting in injury over the penis or scrotum of the accused or abrasions over other parts of the body caused by the nails of the prosecutrix...If the story of the prosecutrix was true, then we should have expected an injury or bruise-mark on the breasts or chest or on the thighs or other part of the body.*

A stereotype of this nature that expects physical signs of a struggle ignores the distinction between passive submission and consent is founded on the abject fact of being raped to death.<sup>31</sup>

These stereotypes may even be prescriptive, for instance, where they mandate how a woman *ought to react* to rape.<sup>32</sup> or suggestive, that a woman with an active sexual history may have consented or ‘enjoyed’ to the act of forced intercourse, such as:

*“Her conduct during the alleged ordeal is also unlike a victim of forcible rape and betrays somewhat submissive and consensual disposition. From the nature of the exchanges between her and the accused persons as narrated by her, the same are not at all consistent with those of an unwilling, terrified and anguished victim of forcible intercourse, if judged by the normal human conduct.”<sup>33</sup>*

There is no typical “rape victim” or conversely, every woman is a potential rape victim,<sup>34</sup> old women, little girls, women in wheelchairs, lesbians, virgins, women of every race and class, are raped.<sup>35</sup>

- ***Deep Rooted Sexist***

The sexist notions of judges are evident in their judgmental statements that commoditize women, equate them to possessions or as liabilities looking to attach themselves to men who are superior to them in various capacities. In the case of *Jagannivasan v. State of Kerala*<sup>36</sup>, while deciding whether the forced sexual act alleged by the prosecutrix was consensual or not, a bench of Justice M Punchhi and Justice K J Reddy wrote:

31 Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* 14 (Oxford University Press, New Delhi, 2014).

32 Jennifer Temkin & Barbara Krahe, *Sexual Assault And The Justice Gap: Question Of Attitude* 32 (Hart Publishers, Oxford, 2013).

33 *Raja v. State of Karnataka*, (2016) 10 SCC 506.

34 *Supra* note 31 at 67.

35 Connie Guberman & Margie Wolfe, *No Safe Place – Violence against women and children* 62 (The Women’s Press, Toronto, 1985)

36 (1995) Supp 3 SCC 204.



*“There is evidence on the record that the appellant had been employed in Dubai and presumably had mastered a handsome income when compared to persons working in his homestate. He was a bachelor and obviously an attractive catch for girls in his brotherhood to be bonded in matrimony...It would rather be safe to lean in favour of the appellant and accord him the benefit of doubt.”*

In the case of *Sudhanshu Sekhar v. State of Orissa*<sup>37</sup>, the judges disbelieved the victim and acquitted the accused by holding:

*“Though the past conduct of the prosecutrix is an irrelevant matter, in the instant case, Ms. X asserted that she was a virgin till the alleged incident, but the medical evidence supported by her physical features revealed that she was habituated to sex. All these factors cast a serious doubt on the prosecution case. Though there is no apparent motive for Ms. X to falsely implicate the appellant, it may be that Ms. X must have changed her mind when she came to know that others must have come to know of her conduct.”*

Other examples of observations made in the sample of judgments studied were:

*“The Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family...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;”*<sup>38</sup>

*“The High Court observes that since Banubi is an unchaste woman it would be extremely unsafe to allow the fortune and career of a Government Official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes...therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard ;”*<sup>39</sup>

*“...the High Court has rightly observe that the appellants, who are debtors, had a common interest to bring disrepute to Dalip Singh, their creditor, by committing rape on his daughter”*<sup>40</sup>

- ***Tendency to use Improper Language***

In a recent judgment from 2015 in a case involving the rape of a 7-year old victim, Justice Dipak Misra (currently Chief Justice of India) held that:

37 (2002) 10 SCC 743.

38 *Om Prakash v. State of Uttar Pradesh*, (2006) 9 SCC 787.

39 *State of Maharashtra v. Madbukar Mardikar*, (1991) 1 SCC 57.

40 *Balwant Singh v. State of Punjab*, (1987) 2 SCC 27.

*“These are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the “purest treasure”, is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay.”<sup>41</sup>*

Similarly, Justice V.K. Krishna Iyer, hailed as a “Super Judge”<sup>42</sup> by many and known for his “eloquence” had held that:

*“When rapists are revelling in their promiscuous pursuits and half of humankind-womankind- is protesting against its hapless lot, 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 testimony...When a woman is ravished what is inflicted is not merely physical injury. but ‘the deep sense of some deathless shame.’”<sup>43</sup>*

Further, he quoted 16<sup>th</sup> Century English writer John Webster said, and wrote that, “*A rape! a rape! .... Yes, you have ravish'd justice; Forced her to do your pleasure.*”.

In this case, the Court observed that a rape victim feels ‘a deep sense of deathless shame’. This was used a justification not only to assert that women generally do not lie about being raped, but also justify harsher sentences.<sup>44</sup> This stereotype has been regularly mentioned by the Supreme Court.<sup>45</sup>

Consider the case of *Kamalanatha & Ors. v. State of Tamil Nadu*<sup>46</sup> where a self-proclaimed godman repeatedly raped sadhvis in his ashram, the Court held that:

*“The facts of the case also illustrate a classic example as to how a game-keeper has become a poacher or a treasury guard has become a robber. From the facts as disclosed by the prosecution, some of the victim girls were ... were reared to be butchered later when they attained the age.”*

41 *State of M.P. v. Madanlal*, (2015) 7 SCC 681.

42 Justice VR Krishna Iyer: India's Super Judge, Even After Retirement, *available at*: <http://www.livelaw.in/justice-vr-krishna-iyer-indias-super-judge-even-retirement/> (last visited April 18, 2018).

43 *Rafiq v. State of UP*, (1980) 4 SCC 262.

44 *Supra* note 3.

45 *State of M.P. v. Basodi*, (2009) 12 S.C.C. 318, 320; *State of M.P. v. Sheikh Shahid*, (2009) 12 S.C.C. 715,717; *State of M.P. v. Bablu Natt*, (2009) 2 S.C.C. 272,277; *Madan Gopal Kakkad v. Nanal Dubey*, (1992) 3 S.C.C. 204, 225.

46 (2005) 5 SCC 194.

In the previously discussed case of *Jagannivasan v. State of Kerala*<sup>47</sup>, while deciding on the question of fine to the victim, the Court held it as a “presumptuous gift” and held that:

*“If the fine has not been paid so far, he no longer is required to pay that fine. But, in case he has paid that fine and the same lies deposited in the Court, a sum of Rs. 4,000/-, as ordered, shall all the same be paid to the prosecutrix as a presumptive gift of the appellant to her.”*

- ***Tendency to undermine the gravity of the Incident***

Judges tended to make comments that undermined the trauma undergone by the victim and went about the process of writing the judgment in a mechanical manner. This is evident in the case of *Baldev Singh v. State of Punjab*<sup>48</sup>, while compounding a 14-year old case of gang rape, a bench of Justice Marakanday Katju and Justice Gyan Sudha Mishra termed the offence a “dispute” and held that:

*“An application and affidavit has been filed before us stating that the parties want to finish the dispute, have entered into a compromise on 1-9-2007, and that the accused may be acquitted and now there is no misunderstanding between them.”*

Or, in the previously discussed case of *Bharnwada v. State of Gujarat*<sup>49</sup>, the court reduced the sentence of the convict from 24 years rigorous imprisonment to the already served 15 months rigorous imprisonment on the ground that the perpetrator had lost his job, had suffered humiliation in the society and the prospects of him finding a suitable match for his own daughter were marred in view of the stigma in the wake of the finding of guilt recorded against him. Such an attitude that undermines the gravity of the offence is even more surprising when one considers that it was believed that the man raped multiple girls who were not more than 10 – 12 years old.

In the recent case of *Vinod Kumar v. State of Kerala*<sup>50</sup>, the Court overturned the conviction of a man who was convicted of rape and then made an observation stating that it hoped that “his wife would find in herself the fortitude to forgive so that their family may be united again and may rediscover happiness, as avowedly the prosecutrix has found.” Such comments imaginably traumatize the victims who had approached the court in the process of securing ‘justice’ and respect.

---

47 (1995) Supp 3 SCC 204.

48 (2011) 13 SCC 705.

49 *Supra* note 25.

50 2014 (4) SCALE 537.

- *Sensitive Comments, though few and Far Apart*

The picture isn't all gloomy and some judgments do have comments that are sensitive to unorthodox gender roles and break rape stereotypes. These sensitive comments, though few and far apart, empower their victims and are well received. In the case of *State of Uttar Pradesh v. Pappu*<sup>51</sup>, the Court remarked:

*“Even assuming that the victim was previously accustomed sexual intercourse, that is not a determinative question... Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to rape her. It is the accused who was on trial and not the victim. Even if the victim 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 anyone and everyone... The prosecutrix stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional.”*

In the previously discussed case of *Madan Kakkad v. Naval Dubey*<sup>52</sup>, the judge concluded the verdict by discussing the problem of child abuse and the society's ignorance of it:

*“Before parting with the judgment, with deep concern, we may point out that though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls.”*

In a relatively recent case<sup>53</sup>, with Justice T.S. Thakur and Justice Gyan Sudha Misra on the bench, the court remarked that:

*“It is equally not possible to overlook or ignore the trauma that the victim girl must have suffered for 22 days after the sexual assault/rape committed on her specially when she could not divulge the incident to anyone... it would be a travesty of justice if we were to disbelieve her version which would render the amendment and incorporation of Section 114A into the Indian Evidence Act as a futile exercise on the part of the Legislature which in its wisdom has incorporated the amendment in the Indian Evidence Act clearly implying and expecting the Court to give utmost weightage to the version of the victim of the offence of rape which definition includes also the attempt to rape.”*

---

51 (2005) 3 SCC 594.

52 (1992) 3 SCC 204.

53 *Puran Chand v. State of HP*, (2014) 5 SCC 689.

#### IV Conclusion

The aim of this project was to analyze the role played by judges' pre-conceived notions on gender on the fate of rape cases being decided in the Supreme Court. There is a legislative mechanism in place to deal with eliminating judges' biases and prejudices towards rape such as provisions regarding shifting the burden upon the accused in case of rape, regarding presumption of absence of consent, disregarding past sexual history of the victim. However, the role of the judiciary in enforcing the legal framework is as important as the laws themselves. Whenever legislative enactments strike off one way to remove prejudices, judicial and advocacy creativity finds another way for it to creep in.

It was observed that judges created a rigid image of a stereotypical rape victim, exhibited deep rooted sexism, showed a tendency to use improper and verbose language, made comments which undermined the gravity of the incident and some learned judges, occasionally made gendered sensitive comments, though such comments were few and far apart. Even in the cases where the judiciary attempts to take a victim sensitive approach, their basic misunderstanding of the notions of gender leads them to further stereotype the image of a perpetrator and a victim and reiterate gender stereotypes.

In conclusion, the social attitudes towards rape and the rape victim are diametrically opposite.<sup>54</sup> While condemning rape, the society condemns the rape victim too. Shockingly, rape is sometimes deemed to be precipitated by the victim, through her words, conduct or mere existence.<sup>55</sup> Rape victims pay a double price – like other victims of violent crimes, rape victims suffer the terrible toll of physical and psychological injury, but unlike other crime victims, they also suffer the burden of defending the legitimacy of their suffering.<sup>56</sup> Raped women are subjected to an institutional sexism that begins with their treatment by the police, continues through a male dominated system influenced by the notions of victim precipitation and ends in the systematic acquittal of many de facto guilty rapists.<sup>57</sup> The cacophony of cross – examinations that divide the body into sexual parts, calibrate duration, map ejaculations, chart marks of resistance, and choreograph postures resounds in our courtrooms. The judicial gavel is not always raised to regulate those ways of taking to rape survivors.<sup>58</sup>

---

54 Lorenne Clark & Debra Lewis, *Rape - The Price Of Coercive Sexuality* 24 (Women's Press, Toronto, 1977).

55 *Supra* note 31.

56 Majority Staff of the Senate Judiciary Committee, *The Response to Rape: Detours on the Road to Equal Justice* (May 1993).

57 Gerald D Robin, *Forcible Rape: Institutionalized Sexism In The Criminal Justice System*, 23 *C.A.D.* 136-153 (1977).

58 *Supra* note 31.

The role of a judge in a rape trial is of significance.<sup>59</sup> The social expectation is that the judicial pronouncements must not only punish the offenders but also look to the interests of victims.<sup>60</sup> The Indian judiciary is a male-dominated club and the chauvinistic views of many of its members make it a difficult and daunting task for women who are victims of sex crimes to get justice.<sup>61</sup> The biased judicial approaches not only reinforce the secondary status of women in the society but also raise a very pertinent question whether women can get justice from a patriarchal set up of justice administration, which proceeds, on the presumption of women's inequality vis-à-vis men. Considering that judgments have a far-reaching impact on society and set a precedent, the damage done by sexist rulings can hardly be over emphasized. The continuing influence of rape stereotypes and myths, as argued by Mrinal Satish, is also one of the reasons for unwarranted disparity in sentencing and hence needs to be addressed in any attempt to rationalize rape sentencing in India.

---

59 *Supra* note 16.

60 Ram Ahuja, *Violence against Women* 250 (Rawat Publications, Jaipur, 1987).

61 *Supra* note 16.