

ABETMENT TO COMMIT RAPE: LIABILITY OF A WOMAN

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ABSTRACT

Rape, sexual assault, eve-teasing and stalking are matters of serious concern – not only because of the physical, emotional and psychological trauma which they engender in the victim, but also because these are practices which are being tolerated by a society ostensibly wedded to the rule of law. ¹: In this paper we offer an overview of the offence, whether a woman is liable for abetment to commit rape or not? Gender is still a most powerful predictor of rape. In India, under IPC, 1860, rape is a crime against women that is perpetrated by man.

Introduction: Incest, rape and abuse is rampant everywhere, even in our churches, but society is silent. It is a silent epidemic. One in three women will experience a sexual assault in her lifetime and one in six males, yet we don't speak of it, even in our churches"² Rape is an horrendous crime, ravishing other being's body for for one's own harmonal pleasure without consent is strongly unwanted, unwelcomed, uncalled for. The four corners of this crime must be so wide as to accommodate every perpetrator of this crime. Here salvage is possible only if its instigating elements are grabbed at its nascent stage.

¹ Justice Verma Committee Report, 2013, P. 1

² Diane Chamberlain, *Conduct Unbecoming: Rape, Torture, and Post Traumatic Stress Disorder from Military Commanders*

Rape.

'375. 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 ~ 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.

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.

Explanation I— For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2— Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception I— A medical procedure or intervention shall not constitute rape.

Exception 2— Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.'

Punishment for rape.

376.

1. Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.
2. Whoever,
 - a. Being a police officer, commits rape—
 - i. within the limits of the police station to which such police officer is appointed; or
 - ii. in the premises of any station house; or
 - iii. on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or
 - b. Being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

- c. Being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or
- d. 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, commits rape on any inmate of such jail, remand home, place or institution; or
- e. Being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or
- f. Being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or
- g. Commits rape during communal or sectarian violence; or
- h. Commits rape on a woman knowing her to be pregnant; or
- i. Commits rape on a woman when she is under sixteen years of age; or
- j. Commits rape, on a woman incapable of giving consent; or
- k. Being in a position of control or dominance over a woman, commits rape on such woman; or
- l. Commits rape on a woman suffering from mental or physical disability; or
- m. While committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or
- n. Commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation— For the purposes of this sub-section,—

- a. "Armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any Jaw for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government!, or the State Government;
- b. "Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;
- c. "Police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861;
- d. "Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

Punishment for causing death or resulting in persistent vegetative state of victim.

376A. Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

Sexual intercourse by husband upon his wife during separation

376B. Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation— In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Sexual intercourse by person in authority.

376C. Whoever, being—

- a. in a position of authority or in a fiduciary relationship; or
- b. a public servant; or
- c. superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or
- d. on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1— In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Explanation 2— For the purposes of this section, Explanation I to section 375 shall also be applicable.

Explanation 3— "Superintendent", in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4— The expressions "hospital" and "women's or children's institution" shall respectively have the same meaning as in Explanation to sub-section (2) of section 376.

Gang rape.

376D. Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be

less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

Punishment for repeat offenders.

376E. Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376B and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.'

The person who don't fall expressly under the ambit of the offence of rape, are constructively dealt with under the principle of abetment and that becomes a process to stretch the tentacles of law in order to deal with the notorious hidden elements of crime and to obtain the process which would turn law to futility and would make mockery out of it and woman is not an exception to this. So, Liability of woman in abetment of rape is discussed further.

Section 107 in The Indian Penal Code, 1860

107. Abetment of a thing.-- A person abets the doing of a thing, who- First.- Instigates any person to do that thing; or Secondly.- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that thing. Explanation 1.- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing. Illustration A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z, B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2- Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Section 108 in The Indian Penal Code, 1860

108. Abettor- A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor. Explanation

1- The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act. Explanation 2.- To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused. Illustrations

(a) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

(b) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder. Explanation 3.- It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Illustrations

(a) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

(b) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act in the absence of A and thereby causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(c) A instigates B to set fire to a dwelling- house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling- house, and is liable to the punishment provided for that offence.

(d) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession, in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft. Explanation 4.- The abetment of an offence being an offence, the abetment of such an abetment is also an offence. Illustration A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and, as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5.- It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. Illustration A concerts with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this section and is liable to the punishment for murder.

Section 109 in The Indian Penal Code, 1860

109. Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.-- Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence. Explanation.- An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment. Illustrations

(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in section 161.

(b) A instigates B to give false evidence. B, in consequence of the instigation, commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(c) A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

Supreme Court adopted the rule of literal interpretation and fairly overlooked the mischief concealed within the dark and deep folds of a barbarous crime and kept itself away from answering this question.

Supreme Court of India in 'Priya Patel vs State Of M.P. & Anr'³ through Justice A Pasayat said, "A bare reading of Section 375 makes the position clear that rape can be committed only by a man. The section itself provides as to when a man can be said to have committed rape. Section 376(2) makes certain categories of serious cases of rape as enumerated therein attract more severe punishment. One of them relates to "gang rape". The language of sub-section(2)(g) provides that "whoever commits 'gang rape' shall be punished etc. The Explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape within this sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The Explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. "Common intention" is dealt with in Section 34 IPC and provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. "Common intention" denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character, but must be actuated by the same common intention, which is different from

³ Appeal (crl.) 754 of 2006 on 12 July, 2006

same intention or similar intention. The sine qua non for bringing in application of Section 34 IPC that the act must be done in furtherance of the common intention to do a criminal act. The expression "in furtherance of their common intention" as appearing in the Explanation to Section 376(2) relates to intention to commit rape. A woman cannot be said to have an intention to commit rape.”

But SC remain silent on the issue of ‘whether a woman can abet for rape or not?’ In this case SC further said, “The residual question is whether she can be charged for abetment. This is an aspect which has not been dealt with by the Trial Court or the High Court. If in law, it is permissible and the facts warrant such a course to be adopted, it is for the concerned court to act in accordance with law. We express no opinion in that regard.”

Supreme Court adopted the rule of literal interpretation and fairly overlooked the mischief concealed with in the dark and deep folds of a barbarous crime and kept itself away from answering this question.

In India, rape is not a gender neutral crime but it is a man specific crime which only a man can commit it. It is very pertinent here to discuss here that abetment to commit rape is not specifically a crime like abetment to commit suicide,⁴ which is enumerated in Indian Penal Code, 1860. But here the general principle of Abetment is applied in the criminal jurisprudence. H S Gour remarked that the object of the abetment is, “to punish all such as may have lent their assistance to the commission of a crime.”⁵ Further he delineate, “the definition of ‘abetment’ here given is general. It is not even the definition of the abetment of an offence but of thing which may or may not be an offence.”⁶

Bentham also observed, “Those acts which have a connexion with a pernicious event as its cause, may be considered as *accessory* offences in relation to the *principal* offence.

The principal offence being well determined, there may be distinguished as many accessory offences as there are acts which may serve either to prepare or to manifest a projected crime.

⁴ Section 306 IPC

⁵ H S Gour, Indian Penal Code, P. 970

⁶ *ibid*

Now, the more these preparatory acts are distinguished, for the purpose of prohibiting them, the greater the chance of preventing the execution of the principal crime itself. If the criminal be not stopped at the first step of his career, he may be at the second, or the third. It is thus that a prudent legislator, like a skilful general, reconnoitres all the external posts of the enemy, with the intention of stopping his enterprises. He places, in all the defiles, in all the windings of his route, a chain of works, diversified according to circumstances, but connected among themselves, in such manner that the enemy finds in each, new dangers and new obstacles.”⁷

This pertinent question was decided IN THE COURT OF SH. VIRENDER BHAT, A.S.J. (SPECIAL FAST TRACK COURT), DWARKA COURTS, NEW DELHI in State Vs. Monika @ Rita Singh & others⁸ on dated 16 december 2013. The court ordered in Para 8 . “Convict Monika is hereby sentenced to rigorous imprisonment for a period of seven years alongwith fine of Rs. 20,000/- for the offence punishable u/s.109/376 IPC. She shall suffer further imprisonment for a period of nine months in case of default in payment of fine.”

Venturing further into the details, we reach a conclusion that woman’s liability for abetment to rape is inevitable, on the harmonious construction of section 375 IPC and 107 IPC , which has been taken up by ASJ Virendra Bhat to the level which was voiced .by justice since so long

Though the woman has the right to protect her honor, yet she has no right to invite others to ravish other women body. She is under duty to protect the dignity of other women because there is no right without duty. And if she abet, aid or instigate others, she should be liable for abetment as any other person i.e. man as well as woman.

If our criminal justice system ignore the principle of abetment then the whole criminal law is reduced to a mockery and justice becomes a casualty if a woman is remained free from the crime of abetment of rape. If Section 107 IPC and 375 IPC read separately and construed Section 375 in letters then it defeats the very purpose of this section. We should harmoniously construct the both sections and give their proper spirit to both sections.

⁷ Bentham, Principles of penal laws. Pt. 3, Ch. 15, P. 560

⁸ SC No. 75/13. Unique Case ID No.02405R0152062012.

If we cant send the women behind the bar for abetting the man for committing rape then it goes against the basic tenets of justice.

Conclusion: In the interest of justice, it becomes pertinent to inflict liability upon every person who plays the role of carrier of a crime from its very conception to finality. It becomes incumbent upon the guardians of justice to give full effect to all the contours of justice in true sense, whilst or while the innocent eyes gaze upon it in the hope of justice to be delivered. Addl session judge Virendra Bhatt has ventured upon to fill the gap that was left void and has constructively widened the concept of abetment to commit rape, the question pertaining to which was left open by the apex court in Priya Patel v State of Madhya Pradesh.

This decision is a pioneer in itself and is deeply welcomed by the prevalent conditions of society. This has embarked a journey which will altogether give a new vortex to the criminal justice system. It is highly appreciated step and has sent a new volumes of vibrations in the whole state.

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