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EXPANDING THE SCOPE OF DEFINITION OF RAPE VIS-À-VIS SANHTOSH V. STATE OF KERALA: A CASE ANALYSIS

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Abstract

Sexual violence against women continues to be a global concern with about 35% of women worldwide having experienced sexual harassment in their lifetime. In India itself, on an average 77 rape cases per day were reported in 2020, which amounted to a total of 28,046 cases during the year, as was reported by NCRB's Crime in India Report, 2020. In one such case the Kerala High Court adopted a liberal and unique interpretation of law so as to prevent the accused from getting away with the heinous acts committed by him which prima facie fell under the ambit of the offence of rape. The author, in this case comment, relies upon various case laws, statutory provisions, committee reports and academic papers to make an effective attempt towards breaking down the legal interpretation adopted by the Court, the legal position that existed before and lastly, the future implications of this decision.

FACTUAL BACKGROUND

The case of ***Santhosh v. State of Kerala***[2] deals with various infelicitous and regrettable occasions of sexual assaults of various degrees inflicted on a girl child (11-years), by an adult married man.

The incident of sexual assault of the victim (PW1) first came into light during a medical camp which was being conducted in PW1's School on 14/01/2015. During the examination, she disclosed certain instances wherein the accused had sexually assaulted her. Subsequently, the doctor (PW2) at the medical camp who examined PW1 informed PW1's mother (PW3) about these instances and directed her to file a complaint regarding the same but the F.I.R. was only

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[2] Santhosh v. State of Kerala, Represented by Public Prosecutor High Court of Kerala, 2021 SCC OnLine Ker 2967.

filed 2 months after 14/01/15. Thus, the Police, after recording PW1's F.I.S. on 10/03/15, registered Crime No. 176/2015 against the appellant/accused.

Under the F.I.S. of PW1 (Ext P1), PW1 had stated that the accused often used to come to her house when she was alone and used to exhibit obscene contents on his devices. She also recalled one particular incident wherein the accused had come to her residence and showed her some obscene images. She further stated that the accused took out "the thing for urination" (penis), and tried to put it inside her mouth. He also lifted her skirt and inserted his hand into her undergarments and pressed on her chest. Furthermore, she recalled that the accused took his penis and placed it between her thighs while making a to and fro motion following which she observed a milky-fluid flowing through her thighs. The accused threatened her to not disclose this incident to anyone or else the police would come arrest her. Furthermore, in PW1's statement recorded under Sec. 164 of CrPC (Ext P2), she has disclosed various other incidents wherein she was sexually assaulted by the accused.

The Special Court, after examining the facts and evidences, held that the appellant/accused was guilty for the offences under the provisions of Prevention of Children from Sexual Offences Act, 2012 ('POCSO') and the Indian Penal Code, 1860 ('IPC') and sentenced him to life imprisonment. Aggrieved from the said order, the accused has herein approached this Hon'ble Court in appeal.

ISSUES RAISED BEFORE THE BENCH

1. Whether the term "Rape" as contained in Sec. 375 of IPC, takes in sexual assaults beyond penile penetration into the vagina, urethra, anus and mouth which are the known orifices in the human body and to which such penetration is imaginably possible?
2. Whether the penetration to "any part of the body of such woman" as mentioned in Sec. 375(c) of the IPC, brings within its ambit a penile sexual act committed between the thighs held together; which do not qualify to be called an orifice?

CONTENTIONS PUT FORTH BY THE PARTIES

Contentions made by the Counsel for the Appellant (Accused):

The Counsel on behalf of the Appellant/Accused has contended that the prosecution has failed to establish the alleged offences as firstly, the prosecution has failed to furnish documents with

respect to PW 1's age, which is the most important ingredient to attract the provisions of POCSO Act and S. 376(2)(i) of the IPC, 1860.

Secondly, the prosecution has stated that the sexual offence alleged to have committed by the accused is that of inserting his penis between the victim's thighs, but the counsel for the accused has submitted that the alleged act doesn't amount to rape u/s 375(c) of IPC.

Thirdly, the counsel has contended that the statements made by the victim under the F.I.S. (Ext P1), Ext. P2 and her deposition as PW 1, consists of various irregularities and to add on to that, there exists no corroborative evidence. Thus, the accused's conviction cannot be solely based on PW 1's evidence.

Lastly, the counsel has contended that there was a delay of more than 6 months in reporting the alleged incidents and filing the complaint and that PW1 was never subjected to any examination at any medical camp and all of it was merely a story devised by the prosecution.

Contentions made by the Counsel for the Respondent (Prosecution):

The Counsel for the Respondent has vehemently opposed the submissions made by the counsel for the appellant by contending that firstly, there exists no controversy w.r.t the victim's age as she has expressly stated in her deposition, that she is 11 years old and further, the same has been admitted by the accused under Ext. P2.

Secondly, countering the 2nd contention of the appellant, the counsel for the respondent has contended that the offence of rape as provided under the amended provision of S. 375 vide the Criminal Law Amendment Act, 2013, is not limited to penile penetration of the vagina and it also includes penile penetration into the urethra, anus or any other part of a woman's body. Reliance has also been placed on ***State of Kerala v. Kundumkara Govindan***[3] to make out a case u/s 377 of IPC.

Thirdly, it has been submitted that the evidence put forth by PW 1 is credible and trustworthy and the discrepancies pointed out by the appellant's counsel are immaterial. Thus, it has been pointed out that the position of law with regards to this is clear that where the prosecutrix's evidence is credible/consistent and is otherwise dependable, no corroboration is required.

[3] State of Kerala v. Kundumkara Govindan, 1969 Cri LJ 818.

ANALYZING THE COURT'S DECISION

The Court speaking through Hon'ble Justice Z. Rahman A.A., while penning down this historic judgment accepted that there were some irregularities in the statements made by PW1 however, it was not ready to ignore that fact that PW1 in Ext.P1, Ext.P2 and her deposition had vividly described one particular incident wherein the accused had shown her some obscene images and had subsequently, molested her and inserted his penis in between her thighs. Further, numerous instances wherein she was forced to hold his penis has also been mentioned. The irregularities pointed out by the appellant's counsel were only w.r.t the irrelevant details of the events such as who was or wasn't present at the said time or the number of times when she was assaulted, etc. Moreover, the language used by PW1 to describe the sexual organs demonstrates her unfamiliarity with the same and it cannot be assumed that an 11-year-old would have the ability to describe the particulars of such sexual acts solely from her imagination.

With regards to availability of corroborative evidence, the Court stated that, the medical evidence (Ext.P11) indicates the accused's capability to commit the alleged acts. Further, since, the present case dealt with commission of sexual assault by penile penetration between PW1's thighs instead of penetration into PW1's natural orifices, even her medical examination would have borne no evidence. Here, it is to be noted that, corroboration is not *sine qua non* for conviction in a rape case.[4] Therefore, the Court acting in accordance with the precedents laid down, held that the accused can be convicted based upon the prosecutrix's testimony and no corroboration is required if the prosecutrix's evidence is found to be credible[5] and inspires the Court's confidence[6].

The Court further rejected the appellant's fifth contention and rightly stated that the delay of 6 months in disclosure of the alleged incidents by PW1 is wholly natural considering that in lieu of PW1's age, the alleged sexual acts would certainly have left a scar in her mind and to add on to that the threat made by the accused, would've made it very difficult for her to reveal the said events.

[4] Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217; Ganesan v. State, (2020) 10 SCC 573; State (NCT of Delhi) v. Pankaj Chaudhary, (2019) 11 SCC 575; Sham Singh v. State of Haryana, (2018) 18 SCC 34; Phool Singh v. State of Madhya Pradesh, LL 2021 SC 696.
[5] Vijay @ Chinee v. State of Madhya Pradesh, (2010) 8 SCC 191; State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550; State of U.P. v. Pappu @ Yunus, (2005) 3 SCC 594; State of Punjab v. Gurmit Singh, (1996) 2 SCC 384; State of Orissa v. Thakara Besra, (2002) 9 SCC 86.
[6] State of Himachal Pradesh v. Raghubir Singh, (1993) 2 SCC 622.

The Court, while adopting a liberal view also held that the further delay in filing the complaint was also justifiable, keeping in mind that a neighbour raping an eleven-year-old child deeply disturbs the mental state of the victim and her family and it's only natural that they go into denial and not report such an incident. In the instant case as well, the scenario was the same and the official complaint was filed only after the family was persuaded by Child Line Authorities. Thus, a two-month delay in filing the complaint after 14/01/15 cannot be taken into account to suspect the veracity of statements made by PW1. In my opinion, the Court has rightly rejected this contention and to back my opinion, reliance can be placed on ***State of H.P. v. Gian Chand***[7] wherein it was held that delay in filing a complaint or lodging FIR cannot be used as a conventional mechanism for doubting/disposing the prosecution's case. Further, it has been held by the Apex Court in a catena of judgments that, a delay in filing the F.I.R. can be condoned by Courts provided it is evident prima facie that the complainant has no motive for falsely implicating the accused.[8]

Furthermore, the Court rightly stated that it cannot be said that there was no medical camp organized as there exists six witnesses – PW1, PW2, PW3, the nursing staff (PW4), School's Headmistress (PW5) and the victim's class teacher (PW6), who have expressly mentioned about the medical camp and the victim's examination therein.

W.r.t the accused's conviction under the POCSO Act and under S. 376(2)(i), the Court upheld the accused's contention that the prosecution had failed to prove the victim's age which is a pre-requisite to attract the said provisions. Even though PW1 in the *voir dire* stated that she was 11-years-old, but apart from that, the prosecution has not furnished any school certificate which may suggest PW1's age, even PW3, PW5 or PW6 have not made any comments about PW1's age. Thus, the Court while addressing the serious blunder on part of the prosecution, regretfully held that the accused was not guilty under the said provisions.

Lastly, to address the two main issues at hand (Page 2), it is essential to delve into the legislative history of the definition of the offence of rape so as to examine its evolution vide judicial pronouncements and statutory amendments, as discussed below:

[7] State of H.P. v. Gian Chand, (2001) 6 SCC 71.
[8] Palani v. State of Tamil Nadu, Criminal Appeal No. 1100/2009; P. Rajagopal & Ors. Etc. v. The State of Tamil Nadu, Criminal Appeals No. 820-821/2009.

Discussion Regarding Legislative Bills, Legislative intent & Committee Reports

The Law Reform Commission of Canada in its Report published in 1978 defined the term "sexual offence" as "sexual-contact with another person (including touching of the sexual organs of another) or touching of another with one's sexual organs without that person's consent".[9] Now in the present case, the Court first referred to S. 375 of IPC before it had been amended, wherein the Court noted that in order to establish a case for rape, the only pre-requisite is "sexual intercourse" which when r/w the Explanation, makes it clear that penetration of any degree is sufficient to constitute the offence of rape.[10] Further, by relying upon ***Chenthamara v. State of Kerala***[11], it's to be noted that even the act of "penile accessing" was enough to constitute the offence of rape. Subsequently, the Court observed that the offence of rape was being widely interpretated to include the actual act or an attempt of penile-vaginal penetration.

The Court then discussed about the recommendations proposed by the Law Commission of India in its One-Hundred-Seventy-Second Report on ***"Review of Rape Laws"*** and the recommendations put forth by the National Commission for Women. Based upon the same, Criminal Law (Amendment) Bill, 2012 was introduced which sought to replace the word rape with the term "sexual assault" to make the offence gender neutral thereby, widening the its scope.[12] W.r.t the present case, there are two points incorporated under the 2012 Bill that need to be focused upon. Firstly, under this proposed definition, a person would have been said to commit the offence not only for penile penetration but also penetration by any other body part or an object. Secondly, the Bill proposed that penetration to any extent whatsoever, would be deemed to be penetration for the purposes of S. 375. This again highlights the efforts made to widen the scope of the offence.

Furthermore, reference has to be made to the recommendations proposed by the Justice Verma Committee which was constituted in the aftermath of the Nirbhaya Case. The Committee reported that Rape must be retained as a separate offence which should not be limited to penetration of the natural orifices such as vagina, mouth or anus. It is to be noted that the

[9] Dr. Barindra N. Chattoraj, *Sex Related Measures and their Prevention and Control Measures*, 72 INTERNATIONAL TRAINING COURSE VISITING EXPERTS' PAPERS 82, 82 (2007).
[10] State of U.P. v. Babulnath, (1994) 6 SCC 29.
[11] Chenthamara v. State of Kerala, (2008) 4 KLT 290.
[12] LAW COMMISSION OF INDIA, https://lawcommissionofindia.nic.in/rapelaws.htm (last visited Sept. 14, 2021).

Committee recommended that any non-consensual penetration of a sexual nature should be brought under the definition of rape. It also recommended that all non-penetrative forms of sexual activities which is presently dealt with u/s 354 should be regarded as sexual assault and should be dealt with under a separate enactment.[13] In all of the above-mentioned recommendations, in order to constitute rape, penetration was restricted to the natural orifices only and thus, they still fell short of including under its ambit penetration into orifices other than vagina, urethra or anus.

However, in 2013, the Parliamentary Standing Committee reviewed the 2012 Bill and submitted its recommendations. Subsequently, the Govt. in furtherance of the all the above-mentioned proposed recommendations, drafted the Criminal Law (Amendment) Bill, 2013. Firstly, reference has to be made to its Statement of Objects and Reasons which provides for widening the definition of rape, broadening the ambit of aggravated rape and enhancing the punishment for the same. Secondly, it is to be noted that the 2013 law, provides that penetration by penis, any other body part or object into the vagina, urethra, anus or any other body part of a woman including oral sex would amount to rape.[14] With this, the legislative intent is clear that penetration is no more confined to natural orifices and now penetration into any other body part of a woman would attract S. 375.

It is now important to note that the Court while being extremely cautious, adopted a very unique and liberal approach and considered that S. 375(c) starts with the words, "manipulates any part of the body of a woman so as to cause penetration". The Court also extracted and referred to the dictionary meanings of the term manipulate ("control or influence cleverly or unscrupulously"), and the term penetration ("the act or process of making way into or through something"). Thus, in lieu of the legislature's intent, enactment of 2013 Amendment Act, the gradual evolution of the definition of rape and keeping in mind the words used in S. 375(c) and the dictionary meaning of the terms manipulate and penetration, the Court rightly interpreted that when the victim's body is manipulated so as to hold her legs together in order to simulate a sexual gratification, the said provision will be attracted. Further, in such cases, the consent is

[13] PRS LEGISLATIVE RESEARCH, https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary (last visited Sept. 14, 2021).
[14] Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India).

also immaterial as the victim was below the age of 16 years.[15] Therefore, the Court held that the accused was guilty of the offence of rape u/s 375(c) r/w S. 376(1) of the IPC.

Furthermore, despite the fact that the prosecution has contended that it has been held that "when the penis is inserted or thrusted in between the thighs of a woman, there is penetration to constitute an unnatural offence u/s 377"[16], the Court opined that the present case can be aptly dealt with u/s 375 because of the widened definition of rape and thus, S. 377 will not be attracted.

CONCLUSION

To conclude, I would like to draw a parallel between the present case and the U.S. case of ***State of Tennessee v. Christopher Scottie Itzol-Deleon***[17]. In this case, similar to the facts of the present case, the victim (12 years old) had testified that the accused had sexually assaulted her by taking his penis out and rubbing it against her buttocks, inserting it between her thighs and then moving it up and down. Soon thereafter, the victim felt something watery flowing down between her legs. The Supreme Court of Tennessee while deciding this appeal, affirmed the Court of Appeals' decision and convicted the accused for the offences of attempt to commit aggravated sexual battery and the rape of a child. Therefore, we see that even the U.S. Courts have interpreted sexual act of inserting penis in between the victim's thighs as an act amounting to the offence of rape and sexual assault.

Thus, in my humbled opinion, keeping in mind the increased number of sexual assault cases in India, the present case provides for a novel and liberal view on interpreting the provisions of IPC. The Court while declaring the accused as not guilty under the POCSO Act and S. 376(2)(i) of the IPC, held that the accused was instead liable under S. 375(c) r/w S. 376(1) for the offence of rape and under S. 354 and S. 354A(1)(i) of the IPC for sexual assault and harassment and accordingly, sentenced him to life imprisonment. The decision of the Court is a definitely a step in the right direction as such broad interpretation of law would inspire other Courts to uphold the spirit of laws enacted for the protection of women thereby, creating an effective deterrence for sexual offenders. The Court is therefore, right in holding that *"penile penetration*

[15] Amirul Gazi v. State of West Bengal, 2022 LiveLaw (Cal) 17.
[16] State of Kerala v. Kudumkara Govindan, 1969 Cri LJ 818.
[17] State of Tennessee v. Christopher Scottie Itzol-Deleon, M2014-02380-SC-R11-CD.

into any body part of a woman which is manipulated to feel like an orifice would constitute the offence of rape u/s 375(c) of IPC".