

Violation of Innocence: Child Sexual Abuse and the Law

Surekha Raman

A society is judged by the way it treats its women and children. So is a judicial system. Nothing is more horrifying than the sexual abuse of a child: nothing more reprehensible than a judicial system that subsequently victimises the victim, police behaviour that adds terror to agony. Surekha Raman examines the legal provisions that apply to sexually abused children and underscores the need for a sympathetic judiciary and special legal provisions that would give succour to the victim. The law itself, coupled with the methods of investigation and cross-examined need to be overhauled, she argues, if we are to take even one small step in aiding an abused child's process of recovery.

"Rashid was a regular visitor to our house and used to call my father Mamu. He used to do 'galat kaam' with me during the night in his jhuggi cluster." "What do you mean by 'galat kaam'? Can you tell us in detail what Rashid did to you?"

Twelve-year-old Hamida from Bangladesh, who had been allegedly raped two years ago, for a period of four months by eight persons, including five policemen, was asked such questions repeatedly by the city court, thereby reducing her to tears. In cases of child rape such proceedings have become the norm and in almost all such cases a victim has to re-live her ordeal in the full glare of publicity.

Child sexual abuse is the physical or mental violation of a child, coupled with sexual intent, usually by an older person who is in some position of trust or power vis-a-vis the child. Even though both men and women can sexually abuse a child, most abusers are male. Because of the more powerful position held by males in society, one generally refers to rape of females rather than of males.

Child abuse has been known through the ages. In a social environment like ours, fear of being maligned, forces the victim to keep silent. In a culture which places too much importance on female sanctity, where women are meant to portray Sati, Savitri and Lakshmi rolled in one, the despair and trauma of an abused child is a harsh reality.

"My father and four of his colleagues had been taking me to a restaurant in Connaught Place for over a year, watching pornography, and forcing me to indulge in sexual acts with them." This was the complaint of an eight-year-old

girl whose father was the abuser and instigator to further abuse by his friends. When the mother came to know of the abuse, she wrote to the Ministry and Crime against Women Cell, but no action was taken by the ministry officials as it was thought to be a 'family problem'.

When we find news items regarding rape of a daughter by the father, most of the time it might seem that such things happen only in poor, disorganised and unstable families, but that is mainly because these families are the ones which come to the attention of social services. Child abusers come from all strata of society. Apart from this there is a general belief that child abuse is blatantly rampant only in European countries. The reality is that all over South Asia, the phenomenon exists, the magnitude of the problem in India now assuming serious proportions.

Indian law with respect to child abuse is still in its developing stage. Unlike other European countries where laws exist for the crime, in the Indian context, child abuse is treated as rape. Several new sections have been introduced under the Indian Penal Code (IPC), Criminal Procedure Code (CrPC) and Indian Evidence Act (IEA).

Sections dealing with child abuse :

- Section 375 & 376,
- IPC Section 228 (A), IPC
- Section 164, CrPC
- Section 327, CrPC
- Section 114A, IEA

However, none of these provisions specifically address the question of child abuse. Section 114A of IEA, by raising a presumption as to the absence of consent in cases of custodial rape, rape of a pregnant woman and gang rape as in clauses (a) to (g) of sub section 2 of Section 376 IPC, merely on the evidence of the woman, has at least removed the infirmity from the evidence of a victim of rape that was hitherto unjustly attached to the testimony, without taking note of the fact that in India, a disclosure of this nature is likely to ruin the prospects of the girl's rehabilitation in society.

As a general rule the courts insist on corroboration of the evidence of the victim. But sexual abuse occurs behind closed doors and it is almost impossible to get an

independent witness. Where a young girl of tender age has been raped and she discloses the fact, there is no need for corroboration by independent testimony connecting the accused with the crime. In Bhognobhai's case (1983 Cr. LJ 1096), Thakkar J. observed, "in the Indian setting, refusal to act on the testimony of the victim of sexual assault, in the absence of corroboration, as a rule is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracised by society." Even if corroboration is insisted upon in a particular case, in view of its peculiar facts and circumstances, such corroboration can come from the previous statement of the prosecutrix.

In a recent Supreme Court judgment, *State of Himachal Pradesh v/s. Madan Mohan* (1995 Cr. R. 65 HP) the court took a commendable stand by confirming the decision of the High Court by convicting the accused even though the prosecutrix could not be examined as she did not understand the sanctity of oath and affirmation and she was not in a position to explain the sequence of events.

Section 228(A) of the IPC, not only protects the honour of sexually victimised women, but also makes it impossible for them to depose in court without any fear of social ostracism. Though the section has been introduced to prevent embarrassment to the victim of a sexual offence, the explanation to the section, waters down the effect by giving the power to the High Court and the Supreme Court to print or publish the victim's name in the judgement. What then is the significance of holding an in-camera trial under Section 327(2) of the CrPC when eventually, the name has to be revealed? This is a significant deterrent when it comes to willingness to make a complaint of rape or other kind of sexual abuse. In this respect the recent judgement of the Bombay High Court which allowed pseudonyms to be used to file a petition in an AIDS case can have great bearing. Perhaps in the light of that judgement, the court could, in future, conceal the identity of the rape victim in the judgement.

Section 375, IPC defines rape and Section 376 IPC provides for the punishment for rape which shall not be less than seven years but which may be for a term that may extend to ten years; and the offender shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or both.

The proviso to this section is very dilutory as it gives the discretion to the court to decrease the sentence. Thus the penal provision with respect to such serious crimes is too low, allowing the accused to get away due to the inherent loopholes in the Act. In *Narayanamma v/s. State of Karnataka*, [1995 (5) SCC 728] a minor

girl aged 14 years was raped, the sentence of three years' rigorous imprisonment passed by the trial court, though inadequate, was not enhanced by the Supreme Court. In *Raju vs. State of Karnataka*, [1991 (1) SCC 453], considering the very young age of the accused person, the circumstances in which the offence was committed, the long lapse of time during which he suffered disrepute and mental agony, the sentence was reduced from seven years' rigorous imprisonment to three.

A majority of sexual offences committed against children are not even reported, let alone prosecuted. If any individual is brought to trial, conviction is unlikely as cases are very difficult to prove. Moreover, sexual abuse cases are usually tried in criminal courts where defence counsel tactics include postponements or adjournments and cross-examination techniques are designed to confuse and discredit the child. As a result, offences of such type go unreported and even if they are reported the lengthy and cumbersome court procedures give enough time to the offender to pressurise the child to retract the statement.

In *Praful Kumar Sinha vs. State of Orissa* [1989 (Suppl. II) SCC 426], an advocate from Nadia in West Bengal brought to the notice of the court, in the form of a letter, the news item published in the Calcutta edition of the newspaper, *Amrita Bazar Patrika*, containing allegations of sexual exploitation of blind girl students in a school located at Behrampur in Ganjam district, Orissa. The same was registered as, a writ petition under Article 32 of the Constitution. An inquiry made by the Chief Judicial Magistrate said Ranjana Dalai, who as per the news report was sexually exploited, was admittedly a student of the school. According to Sai Ram she fell a victim to the lust of Satya Prasad Rath (peon and cousin of senior blind teacher) conceived through him and had to undergo an illegal abortion, with the help of Saroja Mohanty (Hindi teacher of the school).

Consequently, the Marilac Mercy Home which provides accommodation for the blind students of the school, refused to accept her any longer. But the Sister Superior refuted the allegations and said that, as Ranjana was not interested in education and was a quarrelsome girl, she was removed from the school. Ranjana herself has stated that in her community grown-up girls are not allowed to pursue studies away from home and as such her parents took her away from the Marilac Mercy Home as well as from the blind school. Such is the state of a reported case.

In most of the cases it is observed that a statement made before a magistrate is later retracted at the evidence stage. Once this is done, the offender in most cases is set free, without actually probing into the matter. Children are naturally afraid of their abusers.

In cases of rape and other criminal offences the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. However great the suspicion against the accused and however strong the moral belief and conviction of the judge, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on record, the offender cannot be convicted.

A survey conducted by 'Saakshi' and 'Samvad' reveals that children are raped, sodomised and sexually exploited in different ways. According to a study conducted by the International Statistics on Child Sexual Abuse, at least two out of four girls and one out of six boys are victims of sexual abuse. According to Saakshi the law does not really provide relief for a child who has been sexually abused because of its in-built problems of a limited perspective and insensitive procedures. It also makes convictions very difficult and makes the child re-live the experience over and over again. Since we cannot totally reject the law we must strive to change it to combat this rampant crime.

A survey conducted by Samvad among 348 girls students on the issue reveals the following:

- 83% of the respondents had experienced physical eve teasing, 13% of them when they were less than 10 years old.
- 47% of the respondents had been molested/experienced sexual overtures and 15% of them were less than 10 years old.
- 15% of the respondents had experienced serious forms of sexual abuse including rape, and 31% of them were less than 10 years old.
- Disclosures had been made by 86% of those eve teased, 67% of those molested and 61% of those seriously abused.

As the seriousness of abuse increases the tendency to self-blame also increases. 22% of those eve teased, 37% of those molested and 50% of those seriously abused felt self-blame. The tendency to blame oneself increases as we go down the social ladder and move from urban to rural representation. The preponderant effects are sadness, depression, anger, helplessness and distrust of men.

The National Commission for Women has recognised the unique character of the offence of sexual abuse. According to them, the existing law does not address the increasingly visible offence of child sexual abuse and contains serious contradictions that inhibit women as well as children from reporting crimes of sexual abuse. The existing definitions of 'rape' 'molestation' and the like do not

adequately address the various types of sexual assaults in terms of women's experience nor do they sufficiently recognise the gender specific nature of such crime.

The commission therefore, has prepared a draft bill to provide a comprehensive definition of 'sexual assault' to specifically bring minor children within the purview of the law of sexual assault. Rape has been redefined and expanded to cover the broader experiences of sexual assault under Section 375(1) and (2) of the proposed draft. The important feature of this expanded definition is that it recognises the right to one's bodily integrity. Further, the mandatory minimum sentence for every kind of sexual offence has been laid down. A provision has been made to enable judges, in some instances, to reduce the mandatory minimum sentence but not below the number of years stipulated. Different punishment have been laid down based on the age of the minor. A proposal to delete Section 155(4) which allows the accused to introduce into the trial, evidence of the general immoral character or sexual history of the person sexually assault has been made. Additions have also been made to Section 146 and Section 54 of the Indian Evidence Act.

Whether such a draft will see the light of day is a debatable question. Even if it does, it will still be a long uphill task to change the focus of the judicial system, to ensure that the victim is treated with the care and kindness due to her rather than as a case, a file, a number.

Supreme Court Judgements

Dhananjaya, Chatterjee vs. State of W.B. [1994(2) SCC 220]

Rape and murder of a helpless and defenceless school girl of eight years by a security guard. Death sentence imposed by the trial court subsequently confirmed by the High Court. Held that the offence was not only inhuman and barbaric but a totally ruthless crime of rape followed by cold-blooded murder and affront to human dignity.

Yashwant Rao vs. State of M.P. [1993 (Suppl. I) SCC 520].

Rape of minor girl aged seven to eight years. Held there is not legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighted and not counted. Convictions can be recorded on the sole testimony of prosecutrix if her evidence inspires confidence and there is absence of circumstances which mitigate her veracity.

Narayanamma vs. State of Karnataka [1994(1) SCC 728]

Rape of a minor girl aged 14 years. The Supreme Court did not enhance the sentence

Madan Gopal Kakkad vs. Nawal Dubey [1992 (3) SCC 204].

Rape of minor girl aged eight, by a medical graduate without rupturing her hymen. Victim

of three years' rigorous imprisonment passed now 19 years old is still unmarried and by the trial court. Held, merely because the suffering the agony of the traumatic experience prosecutrix was simple enough to repose and is under an impression that her future confidence in the accused persons and stayed chances of getting married and settling down in with them in a room in a hotel, it cannot be a respectable family are completely lost. In this held that she was a consenting party.

case the High Court convicted the accused under Section 354 erroneously. Having regard to the seriousness and gravity of the repugnant offence committed by the accused under Section 376, held, justice demands, award of sentence of seven years' rigorous imprisonment and fine of Rs.25,000/-.