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Women and Criminal Procedure

K.N. Chandrasekharan Pillai

Introduction

It is generally believed that criminal law is gender biased. To a certain extent it is true. In the process of its evolution, it appears that the criminal law system has kept 'reasonable -man' in view as its basic unit. This much is evident from the present practice also. Even today the 'reasonable man' creeps into the mind of the judge while appraising the evidence or while evaluating the conduct of the accused towards the victim. The 'reasonable man' standard came to be accepted as the yardstick by the criminal law, probably in its anxiety to achieve objectivity. But many a time the law is not in a position to achieve objectivity as the objective criteria get submerged by the subjective criteria of individual judges.

The influence of 'reasonable man' is so profound that even while dealing with offences against women, judges are inclined to fall back on this yardstick for evaluating the conduct of the victim and the accused. It becomes clear when one examines the question of determination of 'consent' of a rape victim. The whole question revolves around the issue as to whether the force used by the victim in resisting the assault was sufficient. If, according to the court, sufficient force was not exercised by the victim, the court can conclude that there was no resistance. In other words, in such a situation, the court can decide that there was consent. In several such circumstances, one can see the presence of 'reasonable man', making the law discriminatory. This fundamental defect came to the fore in what is popularly called the *Mathura case* [1] in India. In that case, a-tribal girl who along with her relatives went to a police station to register a complaint was raped by policemen in the police station while her relatives were waiting outside the police station. Indeed, in the circumstances in which she was placed she did not protest. On prosecution the Bombay High Court convicted the policemen. The Supreme Court, however, acquitted them on the ground that there was consent of the girl. In an unprecedented move four legal academics, viz., Dr Upendra Baxi, Dr Lotika Sarkar, Dr Vasudha Dhagamvar and Professor R.V. Kelkar wrote an open letter to the Chief Justice of India to get the judgment reviewed. It was reviewed indeed but the bench reiterated its earlier stand.

These developments generated a debate and amendments to the Indian Penal Code 1860 and Criminal Procedure Code 1973 were introduced with a view to make them more helpful and effective. The hopes raised by these amendments were soon shattered. Consequently we are still in the process of examining the factors which would tone up our legal system and make it more responsive to offences against women. This article discusses some of the proposals aimed to make the criminal law more gender sensitive.

Arrest

The criminal justice process has to deal with the citizen at several stages. Arrest is the first stage. At this stage the freedom of the citizen is restrained to safeguard public interest. Different purposes are served by arresting a person. Sometimes, it saves him from retaliatory assault from the public. Sometimes, he is prevented from committing further crimes. And surely arrest helps him to be presented before the appropriate court to stand trial. It is to serve the third purpose that usually a suspect is arrested by the police. While under arrest, the arrested person loses freedom and his normal life in the family. As a consequence of arrest he is generally accused of having deviated from normal behaviour. So the decision to arrest is a very serious one from the point of view of human rights. And this decision is usually taken by a police officer in the criminal law system. Indeed, his decision to arrest is subject to the offences being cognizable. However, the discretion given to the police under the system is very wide. The police thus wields much power and this position often helps the police to violate women's rights with impunity. Efforts have therefore been made within this sphere to make the criminal law more balanced and just.

Under the Criminal Procedure Code (hereafter CrPC) a woman can be arrested by male constables, though in due regard to decency she may be searched by a female officer only. [2] The anxiety of the CRPC to safeguard the interests of women is reflected in the proviso of Section 47 which requires that if an apartment to be searched by the police is in the occupancy of a woman who according to custom does not appear in public then the police ought to serve her a notice to leave the place during the search. This is to avoid intruding on her privacy and causing any embarrassment to her. Recognizing the importance of arrest of a woman, it has been suggested that a male officer should avoid touching the woman's body while effecting arrest. It has also been suggested that a woman shall not be arrested after sunset and before sunrise. [3] If she is to be arrested, the police officer has to seek prior permission of his seniors. If this is not possible then the arrest can be made but the fact has to be reported to the senior officers with reasons for not taking prior permission. The magistrate is also to be informed of this fact. These safeguards have been suggested to afford maximum protection to the woman accused. These recommendations came to be

incorporated in the CRPC Bill 1994. And the Law Commission on its Report on rape and allied offences [4] had suggested that they can be incorporated in the Code by way of proviso to Section 46(l) CRPC in this manner : "Provided that where a woman is to be arrested then, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation', of arrest shall be presumed and unless the circumstances otherwise require or unless the police officer arresting is a female, the police officer shall not actually touch the person of the woman for making her arrest."

The Law Commission has made several suggestions for the reform of criminal law. The Commission desired that the police officer making the arrest should satisfy himself about the need for arrest.[5] It further suggested that upon arrest the police officer should inform a relative or friend of the arrested person about the arrest either by telegram or by telephone.[6] The police officer should be asked to prepare a custody memo containing all possible information on the person arrested. The lawyer of the accused should be permitted to be present during interrogation. The obligation to oversee the compliance of these procedures by the police or other authorities has been placed on magistrates by the Commission. The acceptance of this suggestion may have far-reaching consequences.

The Commission has also suggested the incorporation of a new section (S. 41-A) whereby the police officer may, if satisfied that immediate arrest of the person concerned is not necessary, issue to him a notice requiring him to appear before the police officer at a specified time and place for further investigation and it shall be the duty of that person to comply with the terms of the notice. If such person fails to comply with the terms of the notice, it shall be lawful for the police officer to arrest him for the offences mentioned therein.

This provision may be of great use to women who are not assertive enough in their interaction with the police. If the suspects themselves provide assurance of their availability, police interference with the day-to- day life of people can be minimised. The reputation of-the person under a cloud of suspicion can also be protected because he or she may not be needlessly deprived of their freedom.

The provisions suggested for safeguarding the security of women may also help ensure accountability of the police. Of course the police can still flout these provisions, in as much as they are in a position to find reasons to justify the arrest of women after sunset without the prior permission of a senior police officer or magistrate. Practising lawyers very well know that senior police officers usually try to justify the acts of their subordinates as institutional interests so demand. Magistrate's intervention in this area also may not be that feasible.

The provision which suggests the involvement of the arrestee's advocate, friend or relation at the investigation stage itself may go a long way in ensuring security for women even as the effect of the advocates' presence on the progress of interrogation may have to be examined closely. The effectiveness of this provision is dependent on the rapport the lawyers can develop in their relations with the police.

It seems that the CRF'C takes special care to see that adequate precautions are taken. before the body search of a woman is allowed. This attitude is signified in many provisions. In the case of medical examination of a woman under arrest, it is stipulated that this examination has to be done by a female registered medical practitioner. In this context, it is worthwhile to note that the National Commission for Women has endorsed a recommendation made by the Law Commission to the effect that if the accused desires a medical examination in order to prove her innocence, she should insist that in due regard to decency such an examination be done by a female registered medical practitioner. It has recommended enactment of a proviso to Section 54 CRPC to this effect. It appears the central government did not approve of it as the Criminal Procedure Bill 1994 did not contain such a provision. Now the Law Commission has reiterated its stand and asked for the inclusion of the proviso. This is a welcome step. However, compliance with this provision may become difficult in areas where women medical practitioners are not available.

The need for keeping away women and children from the police to the extent possible is felt by all the bodies concerned with law reform. To that end curtailment of the general power of the police to summon witnesses has been proposed. The National Commission for Women has suggested the inclusion of a proviso to Section 160(l) whereby the police should not be allowed to question any male person under the age of eighteen years or a woman at any place other than the place in which such male person or woman resides. The Law Commission has supported the incorporation of this proviso in the CRPC.

Investigation, Trial and Detention

The investigation and trial of rape cases received serious consideration at the hands of the National Commission for Women and the Law Commission. It has been recommended that in rape cases the report under Section 177 should include the medical examination report.

It is also suggested that this report should be ready within three months. Both Commissions preferred the investigation including the collection of evidence and trial of these cases to be conducted by women police officers. It has also been

suggested that if the victim happens to be a child under 18 years, she should be questioned only in the presence of her parents. All the investigative work such as preparation of statements of witnesses, medical examination of the victim etc., should be done by women officers. Though the Women's Commission insists on only women personnel, the Law Commission has suggested that in the absence of women police officers the victim's examination could be conducted by other police officers with the consent of the victim or person who has the authority to give permission on her behalf. The National Commission also recommended the inclusion of a new section which will make it obligatory to get the victim examined by a female medical practitioner.

The belief that women adjudicators would more sensitively safeguard the interests of women causes the National Commission for Women to suggest that by proviso to Section 26(a) CRPC it should be provided that trial of an offence under Section 376 of the Indian Penal Code be only tried by a court presided over by a woman.

In my opinion these suggestions are rather unfortunate. Their makers seem not to have looked at the problem from the standpoint of the court. Are these Commissions working on the assumption that all men are prejudiced? Or, alternatively, do they think that all women are pro-women? One takes a dim view of these recommendations because they reflect a total lack of faith or confidence in our system. They also suggest that all police officers and judges allow themselves to be guided by their personal attitude towards certain issues. One should not forget that the rulings both in *Tukaram* [7] and *Kewal Chand* [8] were given by the very same system. The view that the problems of women are better understood by women lends support to the argument of exclusive adjudication by women.

These arguments however are dubious as crimes are essentially social problems. When we deal with an offence like rape, we are dealing with a social problem. It no doubt affects women more. But a court whether functioning through a woman or man should develop sympathetic detachment, appreciate the special nature of the offence and decide accordingly. In examination of the victim, it may be, the presence of a woman police officer facilitates collection of information. All the same it is my strong view that there should not be an all-woman machinery for the investigation and trial of rape cases. The argument for an all-woman court is also flawed because if women judges are there because of their empathy to the victim it can easily be argued that the male accused is not being judged by an impartial judicial system. If both the victim and the accused should have the confidence that the system would be fair and impartial, we should not have the system envisaged by the National Commission for Women.

In order to avoid the woman arrestee's contact with police-controlled institutions, it has been recommended that a woman below 18 years should be detained in a remand home or such other institution. To this end the amendment of sub-section (2) of Section 168 has been recommended. This is a salutary recommendation because it would help avoid the harassment of women by the police. It is however important that the government should have proper control over these remand homes, otherwise they may in the peculiar Indian context become breeding centres for women criminals. The need for speedy trial in rape cases, seems to have been properly appreciated by the Law Commission. It has thus proposed that trials of rape cases should be completed within a period of two months from the commencement of the examination of the witness. A proviso to Section 309(l) has been accordingly recommended.

Dowry Deaths and Marital Rape

The frequent occurrence of what are called dowry deaths and the not so prompt action by the police has caused lawmakers to prescribe that dead bodies of such women should be sent to a government doctor. Section 174(2) now requires that in cases of death of a woman within seven years of her marriage, the police has to send the dead body to a civil surgeon for examination. [9] The idea behind this provision is that the law shall treat such a death as a death in suspicious circumstances and as far as possible conduct an impartial investigation rather than allow the individual police officer the discretion to decide.

It is now argued that marital rape should be a crime and that the guilty husbands should be punished. Theoretically, this argument appears to be sound but in this vast country where child marriages are being conducted in contravention of the law, if marital rape is punished it will result in injustice all round. With regard to marital rape, the CRPC at present stipulates that if it has taken place and acquiesced in by the wife, who is under 15 years, for more than one year no prosecution should be launched. [10] This provision appears to have been enacted to save a marriage from being broken up. This cautious and balanced approach is reflected in the language of the section.

Section 198-A requires that the court should not take *suo motu* action in the case of domestic quarrels. This provision is also enacted with a view to helping the woman to save her marriage. Section 199 takes care of women who by reason of customary practices do not appear before the court or the police. In cases affecting such women, others have been permitted to complain on their behalf.

The concern of the CRPC for the woman goes to the extent of incorporating a proviso in Section 416 whereby when a woman sentenced to death is found to be pregnant, the High Court can postpone the execution of the sentence and, if it

thinks fit, commute the sentence to imprisonment for life. Obviously this provision indicates the value accorded to motherhood by the criminal justice system. It also shows a legal unwillingness to kill a to-be-born child in the womb of a convicted woman since it has not committed any crime. It is now proposed that the proviso to Section 416 may be so amended as to make it mandatory on the High Court to order commutation when a woman sentenced to death is found pregnant.

Though this suggestion stems from humanitarian motivations, it may be argued that if it is made obligatory on the High Court to commute the death sentence, it may at least in certain cases afford an inducement to women prisoners to become pregnant while awaiting execution. This argument is unnecessary as becoming pregnant is not within one's control. Further medical and scientific investigations establish that pregnancy depends on many other factors besides sexual intercourse.

The attitude of the special concern the criminal justice system adopts in dealing with women can also be gleaned from various provisions like the proviso to Section 437 CRPC. As a general rule Section 437 lays down that persons accused of offences carrying heavy punishments should not be released on bail. The proviso makes the above rule inapplicable to cases of children below 16 years, sick or infirm persons and women. In other words, even in serious cases, women and children would be granted bail. This, it appears, is to ensure that women and children are not held in prison for long periods as such confinement may have other more harmful consequences.

It has been suggested by the Law Commission that women prisoners should be exempted from the rigours of Section 433-A. In other words, in the case of women convicted of serious offences and serving life sentence the obligation to serve 14 years need not be insisted upon. This would mean that a life sentence in the case of a woman would not have to be 14 years of imprisonment.
This suggestion, however, may not be easily adopted by Parliament. When this provision was originally enacted no distinction was envisaged between various convicted persons. The Supreme Court reversed an order of the Madhya Pradesh High Court which granted release to Section 433-A lifers based on a state law extending remission to lifers belonging to Scheduled Castes and Scheduled Tribes only because it violated the right of equality. [11]

Maintenance of Wife

An effort to provide protection to women is also made by Sections 124 to 128 of the CrPC. Every action under this chapter is full of questions which are relevant

not only for the prevention of vagrancy but also for determining the status of Indian women.

The Explanation to Section 125 states that 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. This Explanation has raised a lot of heat and dust and provoked extensive discussions in the country.

The interpretation of the word 'wife' as legally wedded wife has created many problems in the context of different personal laws applicable to various communities in India. The insistence that the marriage should be legally valid under the personal law applicable to the parties as a precondition for the applicability of the CRPC has made many a woman lose her right to maintenance. Such an interpretation has thus prevented the CRPC from fulfilling its primary aim of preventing vagrancy.

For example, in *Ananta Rao's* case [12], the second marriage of a Hindu male with a Hindu female was held to be void and the second wife found not entitled to maintenance under Section 125 CRPC. The second wife pleaded ignorance of the first marriage of her husband. The court however ruled that for the interpretation of statutes it is the intention of the legislature and not the attitude of the party which is relevant. This kind of reasoning tempts one to ask, whether it could be the intention of the legislature whilst enacting Section 125 that a woman who was trapped into marriage by a man having a living spouse should be made to suffer for no fault of her own? Section 125 is defective in that it does not recognise the right of a woman who happens to contract a null and void marriage to claim maintenance. The non-performance of essential ceremonies also will have the effect of rendering a marriage void *ab initio*. Under the Indian conditions it is likely that many women will have no awareness about the essential ceremonies of marriage. They may not know the rule that if such ceremonies are not performed, the marriage would not be valid. Having regard to the philosophy underlying Section 125 it is absolutely unjust to hold that only legally wedded wives are entitled to maintenance under that provision.

The difficulties created by the insistence of marriages to be lawful under the personal laws have to be solved. In this vast country, people conduct marriages by mere exchange of rings or garlands. [13] A number of judicial decisions have held a couple to be man and wife when they lived in such manner and were recognized as husband and wife by the community in which they were living. [14] It is imperative that courts should recognize such marriages as valid for the application of Section 125. Such an interpretation would be in consonance with the objective of the provision of preventing vagrancy.

Section 125 is also inadequate to cover cases arising under customary or tribal law. This is evident from the judgment of the Himachal Pradesh High Court in *Ratan Devi v. Padam Singh.* [15] In this case, Ratan Devi belonging to a Scheduled Tribe got married to Padam Singh a non-tribal person according to tribal rites. Later on Padam Singh repudiated the marriage on the ground that he was already married under the Hindu Marriage Act 1955 and the wife of that marriage was living. The High Court held the second marriage to be invalid. It reasoned that though Section 2(2) of the Hindu Marriage Act 1955 excludes tribal marriages from its scope, the provision is only attracted when both parties are tribal persons. This decision detrimental to the interests of the tribal people seems in opposition to the duty of the state under Article 46 of the Constitution to protect the rights of tribal people. The state is duty bound to protect the rights of tribal peoples under Article 46 of the Constitution. By this decision the rights of women whose marriages were not in conformity with the requirements of the law were subordinated to legal technicalities.

The explanation of the term wife under Section 125 in the background of the Supreme Court ruling has also played havoc in the lives of many a Muslim woman in India. The Supreme Court in *Mohammed Ahmed Khan v. Shah Batzo Begum* [l6]ruled that Section 125 is applicable to a Muslim husband notwithstanding his capacity to effect easy divorce and contract subsequent marriages under Muslim law. The controversy generated by the Supreme Court ruling paved the way for a retrograde legislation like the Muslim Women (Protection of Rights on Divorce) Act 1986. Along with providing for the maintenance rights of Muslim women by this Act, the legislature excluded the Muslim community from the purview of the general provisions in Section 125. The functioning of Muslim Women (Protection of Rights on Divorce) Act 1986, the child of post-*Shah Bano* circumstances, has not been smooth. While some High Courts have held that it is this Act alone which is applicable to all divorced Muslim women, others have found the Act to be only an addition to the provisions contained in the CRPC. The CRPC maintenance provisions are thus still held applicable to divorced Muslim women. [17]

The Muslim Women (Protection of Rights on Divorce) Act 1986 does not afford adequate protection to needy divorced Muslim women. At present, even young girls are being given in marriage sometimes to aged foreigners who after the birth of a child, or even before, abandon them and leave the country. Though the Act envisages maintenance of these divorced women by Wakf Boards as the last resort, the women are in very difficult circumstances and it takes a lot of time and effort for these young women to get maintenance.

Generally speaking, these provisions have been interpreted to fulfill the avowed object of prevention of vagrancy of women and children. It has been held that

these provisions can be invoked by the woman wherever she resides. In *Vijay Manohar Arbat* [18] the Supreme Court had ruled that the CRPC maintenance provisions are equally applicable to women. Thus women are also liable to maintain certain specified kin.

In this case, an aged father claimed maintenance from his employed daughter. She argued that as a woman by the terms of the statute, she was not obliged to maintain her father. The Supreme Court ruled that 'he' in Section 125 included 'she' and as such female children are also obliged to maintain their aged parents. Insofar as the decision upholds gender neutrality it is welcome. This objective has been attained by some straining of the language. Yet, in the specific social context of India this decision is incongruous.

With regard to the enforcement of the maintenance order, it has been ruled by the Supreme Court in *Kuldip Kaur v. Surinder Singh* [19] that imprisonment was not a substitute for payment of maintenance. Imprisonment is only a coercive measure which has to be used to compel a person to pay up the amount. In other words, the person will be imprisoned till he makes the payment. It is not known how far this arrangement has proven effective in ensuring prompt payment.

This chapter of the CRPC needs to be urgently reviewed. It ought to be recast to meet the pressing needs of women in India. The law reformers need to think of an alternative machinery for the prevention of vagrancy of women and children. When the provisions are so reviewed, it would be useful to also examine the statutes whereby the National Commission for Women and the National Human Rights Commission have been established.

Then and then alone shall we have an integrated system which effectively deals with violation of rights of women under the criminal justice system with required enthusiasm and vigour.

References

1. Tukaram v. State of Maharashtra (1979) 2 SCC 143: 1979 SCC (Cri) 381.

2. See Section 51, CrPC 1975 and the observations in Kamalabhai v. State of Maharasthra AIR 1962 Sc 1189.

3. The proposed provision runs as follows:

   Except in unavoidable circumstances, no woman shall be arrested after sunset and before sunrise, and where such unavoidable circumstances exist, the police officer shall by making a written report, obtain the prior

permission of his immediate superior officer not below the rank of an Inspector for effecting such arrest, or if the case is one of extreme urgency and such prior permission cannot be obtained before making such arrest, he shall after making the arrest, forthwith report the matter in writing to his immediate superior officer with the reasons for arrest and the reasons for not taking prior permission as aforesaid and shall also make a report o the magistrate within whose local jurisdiction the arrest had been made, " Lae Commission of India, 135 the Report on Women in Custody, Controller of Publications, Delhi, 1989, p.33.

4. Law Commission of India, 84th Report Rape and Allied Offences: Some Questions of Substantive Law Procedure and Evidence, Controller of Publications, New Delhi, 1980, p.14. The Law Commission in its report, Supra n.3 at p.33 has reiterated this suggestions.

5. Law Commission has recommended insertion of a new sub-section to S.41 as follows: "S.41(1A), A Police officer arresting a person under clause (a) of subsection(1) of this section must be reasonably satisfaction [in respect of certain matters]" Law Commission of India, 154th Report on Code of Criminal Procedure 1973, Controller of Publications, New Delhi, 1996, p.15.

6. In fact, this suggestion has its original i the recommendation of the Royal Commission on Criminal Procedure in England as noted by the Supreme Court in Joginder Kumar v. State of U.P. (1994) 4 SCC 260. Even before this decision was given by the Supreme Court, the Kerala High Court in Poovan v. S I of Aroor 1993 Cri LJ 2183 adverted to the need for having transparency in this are. How the present system enables the police to manipulate is made abundantly clear in this decision. It was ruled that the magistrate should over see these procedures to prevent violation of constitutional rights. It is a very welcome suggestion that these requirements should be spelt out in the provisions of the CrPC, Supra n.5 at p.17

7. Supra no.1

8. State of Mahrashtra v. Chandra Prakash Kewal Chand Jain (1990) 1 SCC 550. It was a case where the police officer raped a woman in his custody. Rejecting the plea that her evidence needed corroboration the Supreme Court ruled that she cannot be put on par with accomplice. She is the victim of rape. The Evidence Act 1872 does not say that her evidence cannot be accepted unless corroborated in material particulars.

9. See Section 174(1) which lays down thus: The report shall be signed by such police officers and another person, or by so many of them as concur therein, and shall be forthwith forwarded to District Magistrate or Sub-Divisional Magistrate (i) when the case involves suicide by a women within 7 years of her marriage; or (ii) the case relates to the death of a woman within 7 years of her marriage in nay circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or (iii) the case relates to the death of a woman within seven years of her marriage an any relative of the woman has made a request in this behalf.

10. Section 198(6) enacts: No court shall take cognisance of an offence under Section 376, IPC where such offence consists of sexual intercourse by a man with his own wife, the wife being under 15 years of age, if more than one year has elapsed from the date of the commission of the offence. It is being proposed that the age of fifteen be raised to eighteen years.

11. See State of Madhya Pradesh v. Mohan Singh (1995). 6 SCC 321. The Madhya Pradesh State legislature granted special remission to the lifers belonging to Scheduled Castes and Scheduled Tribes. The High Court extended the benefit to all lifers. The Supreme Court struck it down but allowed those who were already released to remain at liberty.

12. Yamunabai Adhav v. Anantrao Adhav (1988) 1 SCC 530. Earlier, in Sumitra Devi v. Bhikan Chaudhry (1985) 1 SCC 637, the court seemed to have accepted the view that a man and woman if living together for a long time and accepted by the community as husband and wife, could, in law, be treated as husband and wife. Also See infra n. 19.

13. Rattan Devi v. Padam Singh Kapoor 1981 Cri LJ 1422.

14. Boli Narayan Pawye v. Shiddheswari Morani 9181 Cri LJ 674. Also See supra n.12.

15. See Ali v. Sufaire 1988 (2) KLT 94; Abdul Khadar v. Razia Begum 1991 Cri LJ 247; M.A. Hameed v. Arif Jan 1990 Cri LJ 96. In this connection, the plight of a Hindu Woman who converts to Islam to contract a Muslim marriage with a converted Muslim might be noted in Sarla Mudgal v. Union of India (1995) 3 SCC 635 wherein on the man's reconversion to Hinduism, after contracting the marriage with the woman who was converted to Islam, the woman was left with no remedy either in Hindu law or in Muslim law. Nor could the general law be application in her case.

16. (1987) 1 SCC 405.

17. Supra n.15.

18. V.M. Arbat v. K.R. Sawati (1987) 2 SCC 278.

19. (1989) 1 SCC 405 and Naresh Chandra v. Reshma Bai 1992 Cri LJ 579.