

## PRESUMPTION IN CASE OF CUSTODIAL RAPE AN ANALYSIS OF PRESUMPTION MADE BY THE COURT IN CASES OF CUSTODIAL RAPE\*

### INTRODUCTION

A presumption is an acceptance of a fact as true or existent based upon its strong probability evident from the circumstances. The presumption of law may be 'May' provision; 'Shall' provision or 'Conclusive Proof'. The paper seeks to analyse what is custodial rape and the presumption made by courts in Custodial rape after the Criminal Law (Second) Amendment, 1983.

### Presumption

A presumption is an acceptance of a fact as true or existent based upon its strong probability evident from the circumstances<sup>1</sup>. For example, if a man has not been heard from for 7 years by his closest relatives, the court may believe in that the man is dead. This is a presumption. <sup>2</sup>Thus, when the court presumes the existence of a fact because of its strong probability but without a direct or conclusive proof, it is called as presumption.<sup>3</sup> When a court presumes a fact, the party in whose favor the fact is, is relieved of the initial burden of proof. For example, as per Negotiable Instruments Acts, every holder of an instrument is presumed to be a holder for consideration<sup>4</sup>. So if a person A holds a cheque signed by another person B, it is presumed that A has given consideration for the cheque and so A does not have to provide any proof of that consideration. Of course, this presumption only applies at the beginning.<sup>5</sup>

**Presumption of fact** are those presumption about things or events that happen in day to day life, which we accept as true due to inference drawn logically and naturally by our mind. Such as, presumption that a man with blood stained clothes and a knife in his hands is the murderer. Such presumptions are rebuttable from further evidence.<sup>6</sup>

**Presumption of law** are arbitrary consequences that are annexed by law to particular facts. They are legal fiction. <sup>7</sup>They may not be same as the inferences that we may ordinarily draw but the law

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<sup>1</sup> *Ashok Leyland Ltd. Vs. State of T.N.*, AIR 2004 SC 2836

<sup>2</sup> Steve Uglow's Evidence: Text and Materials, 1997, p. 686

<sup>3</sup> Peter Murphy: A practical approach to evidence, 1985, 2<sup>nd</sup> Edition., Page 455.

<sup>4</sup> *Stumpf V. Montgomery*, (1924) 101 OKL 256 Pac 85

<sup>5</sup> Cross and tapper on Evidence, 1995 8<sup>th</sup> Edition., Pg. 965

<sup>6</sup> *P.R.Metrani Vs. Commissioner of Income Tax, Bangalore*, (2007) 1 SCC 789

<sup>7</sup> *Krishna Janardhan Bhat Vs. Dattatraya G. Hedge*, (2008) 4 SCC 54

prescribes that such inference may be drawn.<sup>8</sup> For example, it is a presumption of law that a child below seven years of age is not capable of committing a crime. Or that a person who has not been heard from for seven years is dead. Such presumptions may or may not be rebuttable depending on the law.<sup>9</sup> For example, the presumption that a child below seven years of age is not capable of committing a crime cannot be rebutted.<sup>10</sup> Law presumes the age of the child as a conclusive proof of his innocence. But the presumption that a person is dead when he is not heard from for 7 years is rebuttable by showing evidence.<sup>11</sup>

### **May Presume; Shall Presume and Conclusive Proof**

Provisions of Section 4, in a general sense, correspond to the above classification.

The first part of this section defines "May Presume" as follows - "**May presume**" - Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.<sup>12</sup> It gives the court a discretionary power to presume the existence of a fact.<sup>13</sup> Which means that the court may regard the fact as proved unless and until it is disproved. For example, in the case of *Dr T T Thomas vs Elisa*, where a doctor failed to perform an emergency operation due to lack of consent, the court presumed that the consent was there since the patient was brought to the hospital. It was up to the doctor to prove that the consent was not there. The court may also ask for further proof before making the presumption.<sup>14</sup> All the presumptions given in Section 114 are of this kind, which says that the court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. <sup>15</sup>For example, the court may presume that a man who is in possession of stolen goods soon after theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.<sup>16</sup>

The second part of the section defines "Shall Presume" as follows - "**Shall presume**" - Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. <sup>17</sup>It basically forces the court to presume a fact that is specified by the law unless and until it is disproved.<sup>18</sup> The court cannot ask for any evidence to prove the existence of that fact but it may allow evidence to disprove it.<sup>19</sup> For example, Section 90 provides that where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. Presumption about abetment of suicide of a married woman (S. 113A)<sup>20</sup>

<sup>8</sup> *Kumar Exports Vs. Sharma Carpets*, (200) 2 SCC 513

<sup>9</sup> *People Vs. Carrill*, ILR 54 Cal 63

<sup>10</sup> *Gitika Bagchi Vs. Subhabrota Bagchi*, AIR 1996 Cal 246

<sup>11</sup> *Kamalammal vs. C.K. Mohan*, AIR 2007 (NOC) 2108 (Ker).

<sup>12</sup> *Syed Akbar Vs. State of Karnataka*, AIR 1979 SC 1848

<sup>13</sup> Norton of Evidence, Section 97-98

<sup>14</sup> *Ram Jas Vs. Surendra Nath*, AIR 1980 All 385 (FB)

<sup>15</sup> *Ali Hasan Vs. Matiullah*, AIR 1988 All 57.

<sup>16</sup> *King Vs. Nga Myo*, AIR 1933 Rang 177 (FB)

<sup>17</sup> *Bhanda garh Vs. State of Assam*, 1984 CrLJ 217 (Gou)

<sup>18</sup> *Haradhan Mahatha Vs. Dukh Mahatha*, AIR 1993 Pat 129

<sup>19</sup> *Umashanker Vs. State of Chattisgarh*, 2001 CrLJ 3074

<sup>20</sup> *Union of India Vs. Pramod Gupta*, (2005) 12 SCC 1

Third part of the section defines "Conclusive Proof" as follows - "Conclusive proof" - When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.<sup>21</sup> Justice Venkataramiah, of SC observed the following, in the case of *Sodhi Transport vs State of UP*, 1986 - A presumption is not evidence in itself but only makes a prima facie case for party in whose favor it exists. It indicates the person on whom the burden of proof lies.<sup>22</sup> When the presumption is conclusive, it obviates the production of any evidence, but when it is rebuttable, it only points out the party on whom lies the duty of going forward with evidence on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over.

### **Defining Custodial Rape**

It is an aggravated form of rape calling for a sentence sterner than ordinary rape. It may be committed by a police officer when he commits rape within the jurisdiction of the police station where he has been appointed.<sup>23</sup> Custodial rape is a form of rape which takes place while the victim is "in custody" and constrained from leaving, and the rapist or rapists are an agent of the power that is keeping the victim in custody.<sup>24</sup> When it happens in prison, it is known as prison rape. While some definitions of custodial rape define it as taking place in a state-owned institution, and perpetrated by a state agent, the term more generally refers to any situation where the power of a state agent is used to enable rape; thus, when prisoner-on-prisoner rape happens as a result of neglect by the prison authorities, it may be considered custodial rape.<sup>25</sup>

### **THE MATHURA RAPE CASE**

The Mathura rape case was an incident of custodial rape in India on 26 March 1972, wherein Mathura, a young tribal girl, was allegedly raped by two policemen on the compound of Desai Ganj Police Station in Chandrapur district of Maharashtra. After the Supreme Court acquitted the accused, there was public outcry and protests, which eventually led to amendments in Indian rape law via The Criminal Law (Second Amendment) Act 1983 (No. 46) .

**Facts:-** Mathura was a young orphan tribal girl living with one of her two brothers. She was a dalit (untouchable). The incident is suspected to have taken place on 26 March 1972, she was between 14 to 16 years at that time. Mathura occasionally worked as a domestic help with woman named Nushi. She met Nushi's nephew named Ashok who wanted to marry her, but her brother did not agree to the union and went to the local police station to lodge a complaint claiming that his sister, a minor, was being kidnapped by Ashok and his family members. After receiving the complaint the police authority brought Ashok and his family members to the police station. Following general investigation Mathura, her brother, Ashok and his family members were permitted to go back home. However, as they were leaving, Mathura was asked to stay behind while her relatives were asked to wait outside. Mathura was then raped by the two policemen.<sup>26</sup>

When her relatives and the assembled crowd threatened to burn down the police chowky, the two accused policemen, Ganpat and Tukaram, reluctantly agreed to file a panchnama (legal recording of evidence).

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<sup>21</sup> *Izhar Ahmed Khan Vs. Union*, AIR 1962 SC 1052.

<sup>22</sup> *Dindyal vs. State*, AIR 1956 All 520

<sup>23</sup> *Rakesh vs. State*, 2006 CrLJ 844 (Del.)

<sup>24</sup> *Guljar Muhammad Vs. State*, 2008 CrLJ 1350 (HP)

<sup>25</sup> *State of Maharashtra Vs. Chandraprakash Kewlchand*, AIR 1950 SC 658

<sup>26</sup> 'The girl whose rape changed the country', CNN, <http://edition.cnn.com/interactive/2013/11/world/india-rape/> (Accessed on 22<sup>nd</sup> April, 2015)

**Judgement:-** The case came for hearing on 1 June 1974 in the sessions court. The judgment returned found the defendants not guilty. It was stated that because Mathura was 'habituated to sexual intercourse,' her consent was voluntary; under the circumstances only sexual intercourse could be proved and not rape.

On appeal the Nagpur bench of the Bombay High Court set aside the judgment of the Sessions Court, and sentenced the accused to one and five years imprisonment respectively. The Court held that passive submission due to fear induced by serious threats could not be construed as consent or willing sexual intercourse.

However, in September 1979 the Supreme Court of India justices Jaswant Singh, Kailasam and Koshal in their judgement on *Tukaram vs. State of Maharashtra*<sup>27</sup> reversed the High Court ruling and again acquitted the accused policemen. The Supreme Court held that Mathura had raised no alarm; and also that there were no visible marks of injury on her person thereby suggesting no struggle and therefore no rape. The judge noted, "Because she was used to sex, she might have incited the cops (they were drunk on duty) to have intercourse with her".<sup>28</sup>

### Aftermath

The judgement went largely unnoticed until September 1979, when law professors Upendra Baxi, Raghunath Kelkar and Lotika Sarkar of Delhi University and Vasudha Dhagamwar of Pune wrote an open letter to the Supreme Court, protesting the concept of consent in the judgment. "Consent involves submission, but the converse is not necessarily true...From the facts of case, all that is established is submission, and not consent...Is the taboo against pre-marital sex so strong as to provide a license to Indian police to rape young girls." Spontaneous widespread protests and demonstrations followed by women's organisations who demanded a review of judgement, receiving extensive media coverage.

A number of women's group were formed as a direct response to the judgment, including Saheli in Delhi, and prior to that in January 1980, Lotika Sarkar, was also involved in the formation of the first feminist group in India against rape, "Forum Against Rape", later renamed "Forum Against Oppression of Women" (FAOW). A national conference was organised by FAOW which started the debate for legal reforms. Issues of violence against women and the difficulty of seeking judicial help in sexual crimes was highlighted by the women's movement. Following the same tradition, on the International Women's day women from various states including Delhi, Mumbai, Hyderabad and Nagpur took to the streets. Seema Sakhare, the founder of the first organizations in India that worked on the issue of violence against women.

However, the courts ruled that there was no locus standi (legal standing) in the case to rule in favour to Mathura. Eventually this led to Government of India amending the rape law.<sup>29</sup>

### Legal Reform

The Criminal Law (Second Amendment) Act 1983 (No. 46) made a statutory provision in the face of Section 114 (A) of the Evidence Act made 25 December 1983, which states that if the victim says that she did not consent to the sexual intercourse, the Court shall presume that she did not consent as a rebuttable presumption. New laws were also enacted following the incident. The Section 376 (punishment for rape) of the Indian Penal Code underwent a change with the enactment and addition of Section 376(A), Section 376(B), Section 376(C), Section 376(D), which made custodial rape punishable. Besides defining custodial rape, the amendment shifted

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<sup>27</sup> AIR 1979 SC 185

<sup>28</sup> 'Slamming the doors of Justice on Women', Indira Jaising, Indian Express, <http://www.indianexpress.com/Storyold/74290/> (Accessed on 22nd April, 2015)

<sup>29</sup> 'Rape Laws- A double edge Sword in India', CNN IBN, <http://ibnlive.in.com/news/face-the-nation-rape-law-a-doubleedged-sword/95126-3-single.html> (Accessed on 23rd April, 2015)

the burden of proof from the accuser to the accused once intercourse was established; it also added provisions for in-camera trials, the prohibition on the victim identity disclosure, and tougher sentences.

The case is seen as turning point in women right's movement in India, as it led to just greater awareness of women's legal rights issue, oppression, and patriarchal mindsets. A number of women's organisations soon came forth across India. Previously, rape misjudgments or acquittals would go unnoticed, but in the following years, women's movement against rape gathered force and organisation supporting rape victims and women's rights advocates came to the fore.

## **RESUMPTION AS TO THE ABSENCE OF CONSENT IN CERTAIN PROSECUTION OF RAPE**

**Principle:-** In cases of rape, rarely there can be direct evidence as the rapist always perpetrates the offence of rape on the victim at a scheduled place. The statement made by the victim of the rape alone can be offered as material evidence.<sup>30</sup> The courts have always been treating the evidence of statements made by the victim of rape as that of an accomplice. The evidence of the victim of rape therefore requires to be corroborated by other independent evidence like that of an accomplice. In *Krishna Lal v. State of Haryana*<sup>31</sup>, Krishna Iyer, J. referring to the significance of corroboration observed:

“To forsake these vital considerations and go by adolescent demands for subsequent collaboration is to sacrifice common sense in favour of an artificial concoction called judicial probability. A socially sensitised judge is a better armour against gender outrage than long clauses of a complex section with all the protection writ into it.”

In most of the cases, the rapist earn their acquittal in view of the defence of consent raised. This amended provision provides that where rape is alleged the court must presume that no consent was given by the alleged victim.<sup>32</sup> Prior to the amendment it was necessary for the prosecution to prove the fact of committing rape and absence of consent of the victim, but now where sexual intercourse by the accused is proved the burden of proving consent of the victim is shifted to the accused. If the accused on whom the onus of proving the consent fails, he is liable to be held guilty. It is not for the victim of the rape to prove that there was no consent and the question of the consent is really a matter of defence by the accused and it is for him to place material to show that there was consent.

Where the accused alleged to have committed an offence of rape, the fact that whether the prosecutrix was more than sixteen years of age would not be relevant especially when the prosecutrix in her testimony deposed that she had not consented, which testimony was found to be reliable and corroborated by medical evidence.<sup>33</sup>

When sexual intercourse by the accused with the prosecutrix is proved to have taken place and the prosecutrix in such a case, claimed in her evidence before the court, that she had not consented to sexual act, the court shall draw a presumption that she had not consented to the sexual act and the burden, would then shift to the accused to prove that his sexual act with the prosecutrix was with her consent.

The following conditions have to be satisfied in order to raise an adverse presumption against the accused for rape as to the absence of consent:

1. The fact of sexual intercourse between the accused and the victim must be proved.

<sup>30</sup> *Nain Singh Vs. State of Himmachal Pradesh*, 1995 CrLJ 3621 (SC)

<sup>31</sup> AIR 1980 SC 1252

<sup>32</sup> *AnilSarkar VS. State*, 2006 CrLJ 3868 (Gau)

<sup>33</sup> *Vijay Kumar Vs. State*, 2006 CrLJ 112 (HP)

2. The question must be before the court whether such intercourse was with or without the consent of the alleged victim.
3. The statement of the victim before the court that she had not consented.

In the case *of Shatrugan v. State of Madhya Pradesh*<sup>34</sup>, where two accused alleged to have committed gang rape on girl, the facts that the victim admitted that she unwillingly made report on being pressurised by her parents and also the unexhibited report of chemical examiner nullified the story of prosecution about any sexual intercourse render the statutory presumption under Section 114 A.

Where the accused teachers have been alleged to have raped their student, the Supreme Court held that in view of judiciary relationship between the accused and the prosecutrix being in their custody and they were trustee, it becoming a case of fence itself eating the crop and therefore the presumption under Section 114 A of Evidence Act is attracted particularly when the appellants have made no attempt to rebut the said presumption.

### **THE LAW COMMISSION REPORT**

The Mathura rape case galvanised the women's movement into asking for reforms of the criminal law that dealt with rape. In 1983, the government passed the Criminal Law Amendment Act, which created a rebuttal presumption in cases related to custodial rape. The government also made amendments stipulating that the penalty for custodial rape should not be less than seven years' imprisonment; and it provided for in camera proceedings and made the disclosure of the victim's identity a punishable offence.

These amendments were not enough to stem the rise in the number of cases of sexual violence against women. One crucial defect in the law was the definition of rape under Section 375 of the Indian Penal Code (IPC), which took into account only penile-vaginal penetration. Other physical and mental injuries were left to be dealt with under Sections 354 and 509 of the IPC as 'outraging the modesty of a woman'.<sup>35</sup>

In 1997, Sakshi, an organisation involved in issues on women and children, approached the Supreme Court through a writ petition asking for directions concerning the definition of rape in the IPC. The Supreme Court then directed the Law Commission of India to respond to the issues raised in the petition. The Law Commission, under the chairmanship of Justice P. Jeevan Reddy, responded by saying that the 156th Law Commission Report had dealt with these issues. The Supreme Court, however, agreed with Sakshi that the 156th Report did not deal with the precise issues raised in the writ petition. In August 1999, it directed the Law Commission to look into these issues afresh. After detailed consultations the Law Commission released its 172nd Report on the Review of Rape Laws, in 2000.

The Law Commission recommended changing the focus from rape to 'sexual assault', the definition of which goes beyond penile penetration to include penetration by any part of the body and objects, taking into account cunnilingus and fellatio.

The report recommended the deletion of Section 155(4) of the Indian Evidence Act, which would prevent a victim of rape from being cross-examined about her 'general immoral character' and sexual history. It suggested graded sentences, with higher punishment for rape committed by the relatives and persons in 'trust or authority', public servants, and superintendents, management and

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<sup>34</sup> 1993 CrIj 120

<sup>35</sup> 'For an effective Law on rape', Frontline, Volume 20 Issue 23, <http://www.frontline.in/static/html/fl2023/stories/20031121003109700.htm> (Accessed on 25th April, 2015)

staff of hospitals. It introduced a new Section 376(E), which would include sexual harassment at the workplace.<sup>36</sup>

The commission recommended shifting the burden of proof of consent to the accused. It suggested specific provisions that would deal with the medical examination of the victim as well as the accused by a registered medical practitioner. It said that girls who are victims of rape should be questioned only by a female police officer, in the absence of whom a qualified woman from a recognised social organisation should do the questioning.

The commission suggested that the law relating to sexual assault be made gender neutral, that is, men and women can be charged with the rape of men, women and children. This meant that for the first time the sexual assault of minor boys was made prosecutable under the law. It asked for Section 377 of the IPC to be dropped, thus decriminalising sodomy.<sup>37</sup>

However, the recommendations did not take into account marital rape. It raised the age of consent of the wife from 15 to 16 years, after which the woman is not protected from rape by the husband. It also continues to provide a window for Judges to reduce the sentence in case of convictions below the minimum sentence specified, as suggested by the commission which states: "Any number of situations may arise, which the Commission cannot foresee that may necessitate the awarding of a lesser punishment."<sup>38</sup>

Many women's rights, child rights and sexual minority groups, which were unhappy with the Law Commission's recommendations, met in Mumbai in 2001. Though they welcomed the expansion of the definition of sexual assault, the recognition of child sexual abuse, and the modifications to the Indian Evidence Act, they felt that the process involved was not consultative enough and that making rape laws gender neutral would lead to the misuse of the law, as rape was a gender-based crime. They also disapproved the fact that the recommendations did not take into account marital rape.<sup>39</sup>

Based on the Law Commission's recommendations, the government enacted an amendment in the winter session of Parliament in 2002, which deleted Section 155(4) and inserted a proviso to Section 146 of the Indian Evidence Act, which means that a victim of rape can no longer be questioned about her past sexual conduct and her 'general immoral character'. There has been no sign of the government implementing the rest of the Law Commission's recommendations.<sup>40</sup>

## CONCLUSION

The Mathura Rape Case was indeed a landmark judgement which brought a lot of change in the Rape laws of the country.

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<sup>36</sup> 'Rape Laws in India', Dr. Anil Aggarwal, <http://www.doccentre.net/docsweb/RAPE/Mathura-case.htm> (Accessed on 25th April, 2015)

<sup>37</sup> 'A look back at Mathura: Another incident that changed rape laws', International Business Times, <http://www.ibtimes.com/young-indian-rape-victim-dies-look-back-mathura-another-incident-changed-rape-laws-1227193> (Accessed on 25th April, 2015)

<sup>38</sup> 'From Mathura Rape case to Delhi 2012, The pain of ineffective laws and dignity on trial', Hindustan Times, <http://feminisminindia.com/from-mathura-rape-case-to-delhi-2012/> (Accessed on 26<sup>th</sup> April, 2015)

<sup>39</sup> 'Remember Mathura' Hindustan Times, <http://www.hindustantimes.com/sujataanandan/remember-mathura/article1-981083.aspx> (Accessed on 24th April, 2015)

<sup>40</sup> 'From Mathura to Bhanwari', Economic and Politic Weekly, Vol XLVIII No. 23, <http://www.thesundayindian.com/en/story/mathura-rape-case/7/6489/> Accessed on 25<sup>th</sup> April, 2015



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