
THE BROKEN SILENCE

RUBANY ANANDA

Abstract: It is often said that law is a field which portrays male chauvinism. In simpler terms it is termed as a “man’s dominion” in this diversifying and ever changing field. Many argue that the criminal law is gender biased. To a certain extent it is rebuttable but it also has a tinge of truth in it. In relation to this issue, the paper analyses the intricacies of the sections in CrPC which are relevant to the issues of women. The portrayal of the fairer sex in the cold provisions of the criminal law has been an evasive subject in many debates. Thus this paper intricately deals with the subject of women and criminal law. What are the strategies adopted during the arrest and the trial of women? Is it different than the rules and norms applicable to men? How are the procedures handled while dealing with the offences committed by and on women? Does the investigation, trial, and the detention of the rape cases need more major changes? The issue of woman and law is a sensitive one and this paper aims to provide reasonable justice to this issue by discussing some of the proposals, the recent criminal law amendment 2013 which are aimed to make the criminal justice system more gender sensitive.

Keywords: Provisions Criminal law CrPc Women Offences Arrest Trial Justice Proposals

Introduction: *She carries in her lap the foolish and wise. She bears the death of wicked as well as the go. She lives in friendly collaboration with bore, and offering herself sanctuary to the wild pig.*

The above excerpt very glibly describes the benevolent nature of women and the capability of the women to go through all the hostile situations. The Vedic vision of femininity is one in harmony with the cosmic order that is against any kind of discrimination on the ground of sex. The Vedas promulgate the equality of men and women. But in the contemporary era the discrimination still exists. This is the harsh reality. Women are subjected to prejudices and unequal treatment throughout their lifetime. Even in the field of law, these types of prejudices seem to erupt time and again. This is more prominent in the field of criminal law. Even today ‘reasonable man’ creeps into the mind of a contemporary judge while appraising evidence or while evaluating the conduct of the accused. The test of a reasonable man forms an integral part in the analyzing and implementing the facets of the criminal law. The influence of this “test of reasonable man” is so widespread and vivid that even in the case of the heinous offences against women; the judges are inclined to fall back on this yardstick for evaluating the conduct of the victim and the accused. In numerable cases the inclusion of the concept of a “reasonable man” makes the law discriminatory. This came to light in the Mathura Case where the Supreme Court acquitted the accused on the grounds that the victim gave her “consent”. Keeping these types of related issues in the background, the paper intricately discusses the arrest, investigation, trial and detention and the various other provisions in details in CrPc which focuses on the women detainees as well as the women victims.

Descriptions:

Arrest against Complaint: The prime aim of arresting a person for committing an offence is to restrain that person from mingling in the public for the safeguard of the society. It restricts the freedom of the accused so that he/she is prevented from committing offences in the future. Many purposes are fulfilled by arresting. It acts as a mode of justice even for the offender as he gets a chance to present his case in the appropriate court. But the accused loses his freedom to sustain a normal life. The decision for the arrest of a person is generally taken by a police officer. Thus the discretion and the ambit of the police officer w.r.t the arrest of a person is very wide. The offender is accused of having a derogatory behavior. Thus the issue of Human rights comes into the scope of arrest. This implies that the arresting of a person is a very serious one in the context of the human rights. Often the police officer exploits the power given to him and touches upon the vulnerability of the woman offender during the process of arrest. Section 46(1) of the CrPC deals with the procedure of making an arrest. It states that the male police officer won’t touch a woman offender while making an arrest. Only a woman police officer can touch the woman accused; otherwise the oral submission to arrest is sufficient. Similarly sec 51(2) deals with the search of woman offender. But this decency aspect is often overlooked by the police officer. In the case of *Kamalabhai Jethamal versus State of Maharashtra*, the contention was raised that the accused was physically searched in the presence of male police officers leading to a lot of embarrassment for her. But the Supreme Court overlooked this contention and dismissed the appeal. But later in the Code of criminal procedure (amendment) Act, 2008, it was

implemented that unless there is a presence of a female police officer, the police officer shall not touch the person or any part of the body of the female offender for making an arrest. This provided a sigh of relief to the feminists and the lawyers working for the rights of the women. This new introduction to the law was welcomed by both the academicians and the general public. The law commission had suggested that a woman shall not be arrested after sunset and before sunrise. But in the case of *State of Maharashtra versus Christian Community Welfare Council of India and Another*, it was held that the arresting authority in the case of arresting a woman offender should be made to keep a lady constable, but in circumstances where arresting officers is reasonably satisfied that such presence of a lady constable is not available or possible and/or delay in arresting caused by securing presence of a lady constable would impede course of investigation, such arresting officer for reasons to be recorded either before arrest or immediately after arrest be permitted to arrest a female person for lawful reasons at any time of day or night depending on circumstances of case even without presence of a lady constable. This was received negatively by the National Commission for Women as this gives the opportunity for the male police authorities to exploit the decency of women offenders. After this decision of the Bombay High Court, A new sub section was added to the particular section to prohibit the arrest of a woman after sunset and before the sunrise except in unavoidable circumstances. It was further mentioned that the female police officer has to obtain the permission of the judicial magistrate in the case of exceptional circumstances.

Investigation, trial and detention: In the case of *Sheela Barse vs. State of Maharashtra*, the Supreme Court held that the women offender must be kept in separate lock-ups in the police stations. They should not be kept in the same place where the male accused is detained. The apex court further ordered the State governments to improve the conditions of the jails so as not to violate the basic human rights of the detainees. This was a welcome approach to safeguard the rights of the female accused as they were protected from the hostile conditions of a police lock-up. The issue of the women accomplice in the offence of a rape has been dealt in the case of *State of Maharashtra v. Chandra Keval Chand Jain* where the defendant was a police officer charged with the rape of a woman in his custody. The Supreme Court rejecting the decision of the lower court held that the lower court erred in not considering the testimony of the woman. It was not corroborated. It ruled that the standard of the degree of proof required with respect to the testimony of a woman in a rape case should not be any higher than that required of a woman in a case involving violent crime. It also took the occasion

to condemn the way in which rape victims were often treated as sinners and accomplices to the crime and concluded that, in judging the evidence of a woman in a rape case, a court should take into consideration the emotional turmoil and psychological injury suffered by her, as well as the situation in which she has been placed. This judgment of the apex court gives some ray of hope to the rape victims. The rape victims are often prejudiced and are subjected to lots of trauma. The judiciary should ensure the protection and safeguard of all the victims of sexual offence of such kind. The National Commission for Women has also suggested the trial of an offence under sec 376 of IPC should be dealt with in a court presided by a woman. It believes that the women adjudicators would be more sensitive and concerned about the interests of the women. This is again subjected to lots of debates. Many academicians and eminent jurists argue that the commission is prejudicing all the men. They hold these arguments as dubious as they consider crimes to essentially a social problem. They contend that the implementation of the aforementioned suggestion would affect the achieving of the ends of justice. But the suggestion would be a good initiative as there is an increase in the number of sexual offences committed against women. Most of these incidents go unreported as there is lot of social stigma associated with a rape victim. If the trial court would be presided over by a female, then the rape victim would be at ease in answering the questions and cooperating with the trial. This would further help in achieving the ends of the justice. After the Criminal Law Amendment Act, 2013 there was a new sub clause added to the section 309(1) of the CrPC which states that in relation of the trial to an offence under section 376, section 376(A), 376B ,376 D of the Indian Penal Code, the enquiry or trial of the same would be conducted within a maximum of two months of the time. This amendment in the section ensures the speedy trial and quick dispersal of the justice for the rape victims. This is a very positive approach to a better society.

The issue of Dowry Death: The issue of dowry death or the homicidal burning of married woman is a very sensitive one. These type of cases are reported even in the contemporary times. The number of dowry death cases reported in the country has seen a considerable growth in the past few years. Sub section (3) of s. 174 was added by the criminal amendment Act, 1983. This was done to deal with the increasing cases of dowry deaths or cases of cruelty to married women by their in-laws. Certain provisions were made by the inclusion and the authority given to the Executive Magistrate to look into the matter of post-mortem in all cases where a woman has, within seven years of her marriage committed suicide or died under mysterious circumstances which indicates

that some other person has committed the offence u/s 498A of the Indian Penal Code. Post-mortem is also provided for all the cases where a married woman has died within seven years of her marriage and a relative of such woman has made a request in this behalf.

Marital Rapes:- Marriage is considered as a sacrament in India. The basic outlining of the society depends upon the institution of marriage. A husband superimposing his will upon his wife to satisfy his own sexual desires doesn't come into the ambit of this institution. This amounts marital rape (the rape caused within the bond of marriage). But sadly marital rape is very much prevalent in the Indian society. The 2nd article of the Declaration of the elimination of violence against women explicitly states that and includes the issue of marital rapes in its definition of violence. But unfortunately there is no prominent provision in India that talks about the protection of women against marital rapes. Even the Criminal law amendment Act, 2013 failed to cohesively address the issue of "Marital Rape". It has been deemed illegal in many countries like the US, Australia, Norway etc. Rape in any form is a heinous crime. The importance of the "consent" is often over-emphasized by the courts. It is presumed that the woman gives her consent by entering into the institution of marriage. But this is not the case. There should be proper provisions in the CrPC and other codes that emphasizes on the protection of married women from the marital rape. The married women are at times forced to be submissive in order to protect their marriage. They should be encouraged to be open about their problems so that their trauma can be lessened. For that we need a major amendment in the prevalent Criminal law acts.

Maintenance of Wife: CrPC has tried to safeguard the interests of the married women and the females by including section 125 in it. The section 125 to 128 of the CrPC deals with the protection of women from destitution and to ensure financial security to them. The explanation to this section (125) states that "wife" also includes a woman who has been divorced by, or divorced from her husband and has not remarried. This has led to a rise of lots of heated discussions and the debates throughout the legal structure in the country. The inference and interpretation of a wife as a "legally wedded" wife has created a hue and cry in the context of the Indian society as there are a number of personal laws involved in this issue. The insistence that the marriage should be legally valid under the personal laws applicable to the parties as an essential pre condition for the applicability of the code 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 instance, in the case of

Yamunabai Adhav vs. Anantrao Adhav, the second marriage of a Hindu male with a Hindu female was held to be void and that second wife was not given an entitlement under the section 125 of the CrPC. The second wife raised the contention that she was ignorant about the 1st marriage of her husband. The court however ruled that it is the interpretation of the relevant statutes, not the given attitude of a party which is important. This raises a question regarding the accurate applicability of this section. The nonperformance of the essential ceremonies of the marriage makes it *void ab initio*. Thus inclusion of only the legally wedded wife is unjust as it prevents the wife from the 2nd marriage who is unaware of the previous subsisting marriage to gain benefits from this provision. The difficulties created by the strict insistence of marriages to be absolutely lawful under the personal laws have to be solved in a comprehensive manner. The marriage can also be conducted by the mere exchange of the rings also or the garlands. Infact a number of judicial decisions have actually 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. This was prominently held in the case of *Boli Narayan Pawye v. Siddheswari Morani*. There have also been certain discrepancies in the CrPC relating to the providing of the maintenance of the wife w.r.t to the tribal laws. It doesn't cover the cases arising out of the customary or the tribal laws. This can be implied from the case of *Ratan Devi vs Padam Singh*. The High Court held that though the Section 2(2) of the Hindu Marriage Act 1955 gives validity to the second marriage even in the case of living 1st spouse in the case of the tribals, but in this particular case court didn't grant maintenance to the tribal woman on the ground that the provision only attracts when both the parties belong to the tribal community. The specific provisions has been on scanner many times as this is a comprehensive one and it is often involved in loggerheads with the provisions of the personal laws of different religions. This came up to the limelight in the *Shah Bano Case and Daniel Latiffi* where the issue of the granting of the maintenance to the Muslim wives came into focus. In *Shah Bano*, the court upheld the wife's right to maintenance and imposed costs at Rs 10,000 on the husband. It held that the provisions of the maintenance under section 125 of the CrPC, 1973 is not dependent on the religion of any spouse. According to Chief Justice Chandrachud:- The liability imposed by section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be dubbed with religion. Similarly in the *Bai Tahira* case, the court held that the husband

couldn't be absolved of his obligation under s. 125 of the CrPC, 1973 towards the wife 'except on proof of payment of a sum stipulated by customary or personal law, whose quantum is more or less sufficient to do duty for maintenance allowance. In the case of Shamshad Begum, an order granting maintenance to a divorced Muslim woman before the coming into force of the Muslim Women protection of rights on Divorce Act, 1986 was held to be enforceable even after the coming of the Act. It stated that: "There is no provision in the Muslim Women Divorce Act, with respect to enforcement of the order of maintenance, which has already become final under the CrPC which shows that final order holds good even after Muslim Women (Protection of Rights on Divorce) Act, 1986 came into force."

Conclusion: The code of the criminal procedure though is a very cohesive code with respect to the laying down of the criminal procedures but still some substantial changes have to take place in the same. It needs to be subjected to slight as well as major

changes in order to meet the pressing needs of the women. The code not only contributes towards the material development of the women, but is involved in the protection of the rights of the fairer sex. It should be further construed as the overall development of their faculty of self realization, self image and identity and the economic development which holds the key to their real development. The actual legal enforcement comes into account only when the legal protection is available to women belonging to all the classes, background, creed and religion. The lawmakers should take these diverse connotations into the account and in lieu of that make appropriate laws that provide the rightful justice to the womenfolk. The new provisions so implemented should be gender sensitive and more comprehensive. The paper tried to analyze the procedural aspect of the criminal law to bring out the facets related to law and women. As the law should be inclusive of all the things, the issue of the women should also be given a serious consideration.

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3. *3 Pillai Chandrasekharan K.N., "Engendering Law", Eastern Book Company, Paperback Edition, 2007, New Delhi*
4. 4 *ibid*
5. *5 Tuka Ram And Anr vs State Of Maharashtra, 1979 AIR 185, 1979 SCR (1) 810-In that case, a tribal who along with her relatives went to a police station to a register a complaint was raped by the policemen in the police station while while her relatives were waiting outside the police station. On prosecution the Bombay High Court convicted the policemen. But they were acquitted later.*
6. 6 *In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.*
7. *Aishvarya Gupta and Vishal Awtani, Domestic Violence: A Never-Ending Saga of Torture; Human Rights International Research Journal : ISSN 2320-6942 Volume 1 Issue 1 (2013), Pg 49-56*
Provided that where a woman is to be arrested, 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 is a female, the police officer shall not touch the person of the woman for making her arrest.
8. 7 *Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.*
9. 8 AIR 1962 SC 1189
10. 9 *Law Commission of India, 135th Report on Women in custody, Controller of publication, Delhi, p. 33*
11. 10 2003 Indlaw SC 851
12. 11 *Full judgment available at:- <http://www.lawyersclubindia.com/articles/Women-and-Human-Rights-5303.asp>, last accessed 17:10 IST*
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14. 12 *Save in exceptional circumstances, no woman shall be arrested after sunrise and before sunset, and, where such exceptional circumstances exist, the woman police officer shall, by making a report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.*
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19. 16 Section 482 of the Code of Criminal Procedure
 elucidates the power of the High Court by stating
 that:-Nothing in this code shall be deemed to
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 prevent abuse of the process of any Court or
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29. 25 *Bai Tahira vs Ali Hussain*, AIR 1979 SC 362:1979
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Rubanya Nanda
 Damodaram Sanjivayya National Law University,
 Visakhapatnam.