

SUPREME COURT OF INDIA

Assessment of the Criminal Justice System in Response to Sexual Offences

Vs.

SMW(CrL.)No.04 of 2019

(S.A.Bobde,CJI., B.R.Gavai and Surya Kant,JJ.,)

18.12.2019

ORDER

1. Post Nirbhaya incident, which shocked the conscience of the nation, many amendments were introduced in criminal law redefining the ambit of offences, providing for effective and speedy investigation and trial. Still, the statistics would reveal that desired results could not be achieved. As per the latest report of National Crime Records Bureau of Crime in India in the year 2017, total 32,559 cases of rape were registered in India.

2. The delay in such matters has, in recent times, created agitation, anxiety and unrest in the minds of the people. The Nirbhaya case is not an isolated case where it has taken so long to reach finality. In fact, it is said that it has been one of the cases where agencies have acted swiftly taking into account the public outrage.

3. We are, therefore, of the view that it is necessary to take stock of the implementation of provisions of criminal law, including the said amendments, relating to rape cases and other sexual offences. It is necessary to call for information with regard to status of affairs at ground level from various dutyholders like investigation agencies, prosecution, medico-forensic agencies, rehabilitation, legal aid agencies and also Courts to get a holistic view to make criminal justice system responsive in the cases of this nature.

4. The criminal law is set into motion by registration of the FIR. Section 154 of the Cr.P.C. provides about the information in cognizable cases and in effect registration of First Information Reports. The first Proviso to the sub-Section (1) of Section 154 inserted by the Amendment Act of 2013 and subsequently amended by the Amendment Act of 2018, provides for registration of First Information Report in cases of rape and sexual offences by a woman police officer or any woman officer. It is further provided that if the victim is temporarily or permanently mentally or physically disabled, the first information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such persons choice, in the presence of a special educator or an interpreter and the recording of such information may be videographed. It is also provided that the police officer shall get the statement of such person recorded by a

Judicial Magistrate under Section 164, as soon as possible.

5. As law laid down in the case of *Lalita Kumari v. Government of U.P.*¹, the police is dutybound to register the offence based upon the information given by the victim/informant in case of cognizable offence. In addition to this, the statements of the victim under Section 161 are required to be recorded by a woman police officer or any woman officer. Thus, we consider it appropriate to call for status report with regard to the following: -

(1) whether all the Police Stations have a woman police officer or woman officer to record the information of the victim?

(2) In case, an information relating to offence of rape received at a Police Station, reveals that the place of commission of the offence is beyond its territorial jurisdiction, whether in such cases FIR without crime number are being recorded?

(3) whether provisions are available for recording of first information by a woman police officer or a woman officer at the residence of the victim or any other place of choice of such person in case the victim is temporarily or permanently mentally or physically disabled?

(4) whether all the District Police Units have the details of special educator or an interpreter in case of a mentally or physically disabled victim?

(5) whether the police department of states or union territories have issued any circulars to make provision of videography of the recording of statements and depository of the same?

(6) whether any state has published guidelines in the shape of Standard Operating Procedure (SOP) to be followed for responding after receipt of the information relating to case of rape and similar offences?

6. By the Amendment Act of 2013, a new provision of Section 166A made the failure of a public servant to record any information of such offences, as prescribed, under sub-Section 1 of Section 154 of the Cr.P.C., a punishable offence, prescribing both rigorous imprisonment and fine for the guilty.

Thus, we consider it appropriate to call for status report with regard to the following:-

(1) whether any case has been registered under the Section 166A of IPC against any public servant?

(2) whether there is any mechanism in place to complain about the non-recording of information by the officer giving cause to offence under Section 166A with any

other institution/office, other than the concerned police station?

7. Medical treatment and examination of the victim is a very important aspect not only for the immediate relief to the victim but also provides intrinsic evidences for the trial. Amendments in this regard have been inserted by the Amendment Acts of 2013 and 2018, whereby the newly introduced Section 357C of Cr.P.C. has sought to fix liability on medical institutions, both public or private to provide medical treatment free of cost to the victims of such offences as prescribed, together with a duty to inform the police of such incident. Failure to comply with the above provision has also been made an offence punishable under Section 166B of IPC. Thus, we consider it appropriate to call for status report with regard to the following:-

(1) whether any advisory or guidelines have been issued by the authorities to all the hospitals and medical centres in this regard?

(2) whether any case has been registered against any person under Section 166B of IPC?

8. The manner in which the medical report of the victim is prepared is also a matter of concern. The Amendment Act of 2013 has inserted a new provision, i.e. Section 164A in this regard, which provides for the manner of medical examination as well as the guidelines for preparation of medical report. Other than the above information, many a times valuable information in consonance with the definition of rape as amended by the Act of 2013 are not supplied.

9. Also, vide the Amendment Act of 2013, Section 53A was inserted in the Evidence Act, 1872. It provides that the evidence of character of the victim and of such person's previous sexual experience with any persons shall not be relevant on the issue of such consent or the quality of consent. The effect of above provision is that previous sexual experience and in effect the habituation to sexual intercourse is now irrelevant for the purpose medical examination. Still, we come across the medical opinion such as "the victim is habitual of sexual intercourse" and the opinion suggesting possibility of consent on the basis of her previous sexual exposure.

10. The Ministry of Health and Family Welfare, Government of India had prepared "Guidelines & Protocols: Medico-legal care for survivors/victims of sexual violence".

11. The Ministry of Women and Child Development has designed a Medical Kit for examination of the victim and the accused in cases of rape. The Union Government and the State Government have not provided this medical kit to all the Primary Health Centers or Community Health Centers. This Medico Forensic Kit is essential for collection of Medical/DNA evidence.

12. Further, Per-Vaginum examination commonly referred to as 'Two-finger test' has been held to be of no consequence

And violative of the dignity of woman. In the case of *Lillu alias Rajesh and Anr. v. State of Haryana*², it was observed as follows:-

"In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not re-traumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender- based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.

Thus, in view of the above, undoubtedly, the two-finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity."

Thus, we consider it appropriate to call for status report with regard to the following:-

(1) whether the Medical Opinion in the cases relating to rape and similar offences is being given in compliance with the mandate of Section 164A of Cr.P.C.?

(2) whether the Medical Opinion in the cases relating to rape and similar offences is being given in tune with definition of rape under Section 375 of IPC as it stands today?

(3) whether the states have adopted the Guidelines & Protocols of The Ministry of Health and Family Welfare, Government of India or have they prepared their own Guidelines & Protocols?

(4) whether requisite Medico-forensic kit are available with all the hospitals/health centres run by the Government or by local authorities?

(5) whether the medical experts have done away with the Per-Vaginum examination commonly referred to as 'Two-finger test' and whether any directions have been issued by the states in this regard?

(6) whether medical experts have done away with the practice of giving opinion on the previous sexual experience of the victim or any directions have been issued by the states in this regard?

(7) whether lady medical practioners, if mandated, are available at all district and

sub-divisional headquarters to draw up the medical examination report of the victim?

13. Forensic examination and report play an important role during the investigation as well as trial for linking the culprit with the crime. With the advancement of the DNA science and its accuracy, the sampling for the purpose of Forensic examination and expeditious reports after due examination are vital to the just adjudication of the case. The sampling for the purpose of DNA test as well other forensic tests like forensic odontology is essential in cases relating to rape.

14. In relation to the examination of the accused, Section 53A of Cr.P.C. provides for timely examination and guidance for preparation of medical report. Thus, we consider it appropriate to call for status report with regard to the following: -

(1) whether there is any Standard Operating Procedure (SOP) or Protocol for taking samples for Forensic DNA, Forensic odontology and other forensics for Medical Practitioners?

(2) whether there are adequate number of equipped Forensic Laboratories at least one at every Division Level to conduct forensic DNA and Forensic odontology analysis regionally?

(3) subject to availability, whether Central Government has notified sufficient number of Government scientific expert other than already specified under Section 293 of Cr.P.C.?

15. Section 173 (1A) Cr.P.C. provides that the investigation in relation to an offence under Section 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376Db or 376 E of the Indian Penal Code (45 of 1860) shall be completed within two months from the date on which the information was recorded by the police officer in charge of the Police Station. Thus, we consider it appropriate to call for status report with regard to the following:-

(1) whether police is completing the investigation and submitting the final report within a period of two months from the date of recording of information of the offence and if no, reasons for delay?

(2) whether sufficient number of women police officers are available to conduct investigation into the offences relating to rape and other sexual offences?

16. Sub-Section (5A) of Section 164, Cr.P.C. provides for recording of statement of the victim by the Court. Other than recording of statements under Section 164, for the purpose of recording of statements during the trial, Section 119 of Evidence Act provides for assistance of an interpreter or a special educator in recording the statement of the witness unable to speak but capable to give evidence in any other manner. It further provides that such statement shall be video graphed.

Thus, we consider it appropriate to call for status report with regard to the following:-

(1) whether the police is taking the victim for recording of the statements as soon as the commission of the offence is brought to the notice of police?

(2) whether the Magistrate Courts or the trial courts have the availability of the interpreter or special educator in each Districts?

(3) whether the Magistrate Courts or the trial Courts have the facility of videography of the statements and depository of the same in the Courts?

17. Section 26 clause (a)(iii) of Cr.P.C. provides for trial of such offences to be conducted by a Court presided over by a woman judge, as far as practicable. Further, Second proviso to sub-Section 327(2) of Cr.P.C. also mandates that in camera trial shall be conducted, as far as practicable, by a woman Judge or Magistrate. It must be noted that the insertion of the above proviso has a very important object and the rider of "as far as practicable" cannot be used to overcome the mandate in ordinary manner.

18. The need for speedy trial of the cases relating to offence of rape has been emphasized again and again this Court. The proviso to sub-Section (1) of Section 309 mandates that the inquiry of trial shall, as far as possible, be completed within a period of two months from the date of filing of the charge-sheet. Thus, we consider it appropriate to call for status report with regard to the following: -

(1) whether trial of cases relating to rape are being conducted by Courts presided over by a woman?

(2) whether sufficient number of lady judges are available to preside over the Courts dealing with sexual offences and rape?

(3) whether all courtsholding trial of cases relating to offence of rape have requisite infrastructure and are conducting in camera trial?

(4) whether the trial relating to cases of rape is being completed within a period of two months from the date of filing of charge-sheet, if not, the reasons for the delay?

(5) whether sufficient number of special Courts have been established to deal exclusively with the cases of rape and other sexual offences?

19. Under Section 230 of Cr.P.C., a trial program is generally prepared on the application of the prosecution. This Court in the case of State of Kerala v. Rasheed, AIR 2019 SC 721 has held as followings:-

"The following practice guidelines should be followed by trial courts in the conduct

of a criminal trial, as far as possible:

i. a detailed case-calendar must be prepared at the commencement of the trial after framing of charges;

ii. the case-calendar must specify the dates on which the examination-in-chief and cross-examination (if required) of witnesses is to be conducted;

iii. the case-calendar must keep in view the proposed order of production of witnesses by parties, expected time required for examination of witnesses, availability of witnesses at the relevant time, and convenience of both the prosecution as well as the defence, as far as possible;

iv. testimony of witnesses deposing on the same subject matter must be proximately scheduled;

v. the request for deferral under Section 231(2) of the Cr.P.C. must be preferably made before the preparation of the case calendar;

vi. the grant for request of deferral must be premised on sufficient reasons justifying the deferral of cross-examination of each witness, or set of witnesses;

vii. while granting a request for deferral of cross-examination of any witness, the trial courts must specify a proximate date for the cross-examination of that witness, after the examination- in-chief of such witness(es) as has been prayed for;

viii. the case-calendar, prepared in accordance with the above guidelines, must be followed strictly, unless departure from the same becomes absolutely necessary;

ix. in cases where trial courts have granted a request for deferral, necessary steps must be taken to safeguard witnesses from being subjected to undue influence, harassment or intimidation." Thus, we consider it appropriate to call for status report with regard to the following: -

(1)whether case-calendar as envisaged in the Rasheed case is being prepared by the Trial Courts keeping in mind the time line of two months mandated by Section 309 of Cr.P.C.?

(2)whether the attendance of the witnesses is being ensured by the Prosecution to ensure the examination of witnesses on the fixed dates?

(3)whether any guidelines have been issued by Bar Councils or Associations urging the Advocates to assist the Court in completion of trial within the stipulated period?

(4)whether special exclusive permanent trial courts have been created in the state to

deal with cases relating to rape and sexual assaults?

(5) whether any High Court has constituted Special Bench for expeditious hearing of appeal in these cases?

20. The protection of witness during the investigation and trial is essential in cases of this sensitive nature. Many a times the accused live in proximity of the victim. The possibility of tampering with evidence and pressurizing the witness affects fair trial.

Thus, we consider it appropriate to call for status report with regard to the following:-

(1) whether any policy of victim/witness protection in the cases relating to rape is framed and implemented?

(2) whether police protection is being provided to the victim during investigation and trial of the offence?

(3) whether there are special waiting room in the Court premises for victim/witnesses of cases relating to offence rape?

(4) whether the trial Courts have taken appropriate measures to ensure that victim woman is not confronted by the accused during the trial as mandated by Section 273 Cr.P.C.?

21. Section 357A(2) Cr.P.C. provides for award of compensation to the victims. The District Legal Service Authority or the State Legal Service Authority are bound to decide as to the quantum of compensation to the victim on the recommendation of the Court. By the order of this Court in W.P. (C) 565/2012 titled Nipun Saxena v. Union of India, the National Legal Services Authority, New Delhi had prepared a Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes - 2018. This scheme has been circulated among all states for necessary actions. The Scheme comprehensively provides for the rehabilitation and compensation for the victims of Rape.

22. As the victim goes through a mental trauma and requires immediate counselling, legal aid and medical, social and in some cases, economic rehabilitation.

Thus, we consider it appropriate to call for status report with regard to the following: -

(1) whether Courts are recommending the District Legal Service Authority or the State Legal Service Authority for compensation in appropriate cases?

(2) whether the amount of interim or final compensation is being provided to the victims in time bound manner?

(3) whether the above-mentioned Scheme of 2018 or suitably amended Scheme, has been implemented by the states for rehabilitation of victims of rape?

(4) whether the SLSA or NLSA has formulated any scheme for social, medical and economic rehabilitation of the victim?

(5) whether any state has prepared a policy with regard to the counselling of the victim and medical, social and in some cases, economic rehabilitation of the victim?

(6) whether there are any counselling/rehabilitation centres in existence for the victims of rape?

23. In the year 2013, a separate fund namely Nirbhaya Fund for projects of women safety to support initiatives by government and NGOs was created, and it is important to inform ourselves how far has the purpose of setting up the fund been achieved. Thus, we consider it appropriate to call for status report with regard to the following: - (1) Utilization of the Nirbhaya Fund by Central or State Government(s) for the purposes envisioned?

24. Let the matter be registered as Suo Motu Writ Petition Criminal with the caption "Assessment of the Criminal Justice System in response to Sexual Offences".

25. In order to collate all the information and status and provide a holistic view of implementation of provisions of law and to suggest measures for making the criminal justice system more efficacious and responsive towards the offence of rape and other sexual offences, we request Shri Sidharth Luthra, Senior Advocate to assist the Court as Amicus Curiae in the matter.

26. The learned Solicitor General is requested to extend all co-operation to the Amicus Curiae in this regard.

27. The Secretary General, Supreme Court of India shall also extend co-operation in respect of calling for information and status reports from the Chief Secretary and the Director General of Police of all the States, the Registrar General of all the High Courts and other functionaries, as may be required.

Let the matter be listed on 07.02.2020.

Judgment Referred.

¹(2014) 2 SCC 0001

²(2013) 14 SCC 0643