



THE HINDU CENTRE

for

Politics and Public Policy



Rape, Compromise, and the Problematic Idea of Consent

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Jul 20, 2015



The Madras High Court, Chennai.

[The Hindu](#)

*Why do rape victims turn hostile witnesses in court or settle for mediation with the perpetrators? **Nithya Nagarathinam** suggests that mediation is far more common in cases of rape than is known because of the particular nature of the crime and the problematic idea of consent. Inadequate criminal justice systems that do not offer protection to witnesses result in situations where mediation is sometimes preferable to fighting it out in court. This article discusses the complicated nature of rape and how easy it is for victims to turn hostile under multiple pressures.*

A judge of the Madras High Court was recently in the news for ordering mediation between parties in a rape case. Soon after, the Supreme Court of India, while hearing a different case, ruled against any type of compromise in cases pertaining to rape or attempt of rape.

“In a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of. These are offences which suffocate the breath of life and sully the reputation. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct,” the Supreme Court said in its order on July 1, 2015. Subsequently, the Madras High Court judge recalled his interim order.

While the Supreme Court’s pronouncement related to a case of sexual assault and rape of a seven-year-old in Madhya Pradesh in 2008, the case in Tamil Nadu involved a woman who was raped as a minor, making it a case of statutory rape. It was also clear that the survivor in question was not open to mediation or marriage to the perpetrator. The Madras High Court judge’s order to initiate mediation is an indicator of a larger tradition where female victims are often asked to not see a crime as a crime, but as an incident that can be somehow “resolved” through mediation. *Khap* panchayats often resort to such practices as an alternative justice delivery mechanism.

During my recent research on rape in India at The Hindu Centre for Politics and Public Policy, I found that mediation and compromise are nothing new, particularly in cases involving consensual sex based on the promise of marriage. Sometimes, such cases are also considered as “false cases of rape” by some men’s rights groups when women who feel deceived under such false promises file complaints against individual men under Section 376 and 417 of the Indian Penal Code (IPC), which deal with rape and cheating respectively.

According to data from the National Crime Records Bureau (NCRB), there were 10,475 acquittals in rape trials in the year 2010 and 13,732 acquittals in 2013. According to legal experts and advocates dealing with rape cases, victims turning hostile from their statements given to the police accounts for over 80 per cent of the total acquittals. On top of this, some cases never make it to trial. In 2012, 1,833 cases of rape were closed even before being charge-sheeted. These constituted 7.4 per cent of the total number of registered rape cases. A year later in 2013, 2,375 cases were similarly closed before reaching the charge-sheet stage and these constituted seven per cent of registered rape cases that year ¹. Unlike other crimes under the Indian Penal Code (IPC), such as murder, a rape trial does not require an eyewitness or circumstantial evidence. The victim herself is the centrepiece of the case and the trial. So, when she climbs the stand and retracts her statement or refutes the occurrence of the crime, the case falls apart. Such a witness is termed “hostile”. Many rape victims, who are also almost always the only witnesses to the crime committed on their person, turn hostile, say experts ². Therefore, the courts have no option but to acquit the accused or dismiss the case. The Prevention of Child Sexual Offences Act, 2012 (POCSO) allows the courts to convict — even if the child turns hostile — provided there is sufficient evidence that rape has occurred, but there is no such provision under IPC Section 376 that deals with adult rape. Perhaps the state can consider extending a similar provision to Section 376 so that the prosecution of a crime does not fall through the cracks in a broken legal floor.

These findings raise a number of questions. What are false cases of rape? Why do victims of rape turn into hostile witnesses and should they be penalised for perjury?

How is a rape case handled?

When the police receive a rape complaint, a First Information Report (FIR) is filed and the victim is sent for medical examination. The immediacy with which the medical examination may occur varies by case. This is followed by a police investigation and the filing of a charge-sheet. The investigating officer collects material from all sides and prepares a report, which she/he files in the court as the charge-sheet. A charge-sheet is the final report of the police prepared under a format specified by Section 173(2) of the Criminal Procedure Code (CrPC). This report informs the district magistrate that an investigation has led to the acquisition of evidence that may be sufficient for the

courts to initiate a trial. A charge-sheet also contains information on relevant IPC sections under which the accused is charged and lists the witnesses to the case. The charge-sheet is submitted to the Public Prosecutor for his/her approval and is then forwarded to the court system for trial.

The phenomenon of victims turning hostile in court is not limited to rape cases. My research suggests that victims recant for two broad sets of reasons. The first cluster of reasons are linked to institutional responses — lack of witness protection, inordinate delay in legal proceedings, and institutional corruption in the police and judiciary that isolates and alienates the victim. Second, many victims face persistent threats from the accused. For a victim of rape, the experience of appearing in court is even more harrowing because it subjects her body to public examination in a way that no other crime does.

False cases and compromises

A witness turning hostile in rape trials is more common in, though not limited to, cases of exacted-consent, where a woman is coaxed and coerced into sexual intercourse with a promise of marriage. These are the so-called “false” cases of rape. In order to understand why I term this consent as “exacted” and how it is different from informed consent of an adult, it is essential to understand what sexual freedom means to men and women in the patriarchal culture of rural as well as a large section of urban India.

Polygamy, though illegal as per the Hindu Marriage Act, is still not an uncommon or an unacceptable social norm. In villages, it is seen as proof of a man’s potency. A woman, on the other hand, is not allowed to have sexual desires openly, even after she is married. A woman’s consent, hence, is an elusive concept, even in a marriage. Further, a marriage is still a decision made by the family for a majority of Indians. It is common practice to marry a girl to her maternal uncle or to her paternal cousins in some places in India. Except in such cases, love is a secret affair because it hints at the woman’s (and not the man’s) promiscuity, her preference for a sexual partner that was not imposed on her by elders. It demonstrates choice and independence. So sex itself, leave alone sex before marriage, is considered unthinkable for a woman with “good character”.

The vocabulary of rape in Indian languages bears testimony to the misogynistic vein in our socio-cultural norms. For example, in Tamil, rape is called *karpazhippu*, meaning “destruction of chastity”. I looked at rape-related FIRs filed in police stations in Coimbatore, Dindigul, Madurai, Virudhunagar, and Ramanathapuram districts in Tamil Nadu, and found that many of the FIRs contained this term. So, essentially, FIRs written in Tamil read that the victim has been “contaminated” by the accused, making it clear that even in the legal system the culturally produced notion of sexual violence holds sway. This victim-centric vocabulary of rape simultaneously objectifies a woman’s body as something that can be contaminated by an act of sex, unlike a man’s body, and accords her the status of “damaged goods”.

In fact, a 17-year-old survivor of a gang rape that I interviewed last month said in Tamil, “*Avanga enna keduthutaanga*”, which literally means “they contaminated me” or “they polluted me” or “they ruined me” ³.

Social imperatives require that a woman can never consent to sex outside marriage without risking her place in the community, along with her very identity. A promise of marriage is, therefore, necessary for obtaining her consent. A man exacts her consent not through seduction but by staking his claim to her consent upon their impending marriage and, therefore, exercising a de facto entitlement over her body. Her consent in this case is seen as a token of her trust in her partner, which he demands that she proves. It is under this sense of duty that a woman agrees to have sex with her partner. Her consent, therefore, is to his entitlement to her body, and not to the act of

sex. A consent for sex is not hers to give, because she has no right to sexual freedom. This is different from informed consent of an adult, where she agrees to the act of sex, either out of desire or out of trust. Therefore, consensual sex does not preclude rape and a rape case involving consensual sex does not automatically constitute a “false case”.

Caste Hindu men in rural Tamil Nadu are known to have affairs with young Dalit women on the promise of marriage and later, refuse to marry them because of their lower caste status. The Dalit woman is then accused of attempting to use sex to upgrade her caste status through marriage with an upper caste man. Construing love as a secret affair works in favour of sexually exploitative males. A woman so abandoned is relegated to a state of life where she is seen as undeserving of another man’s love or marriage.

It is in this context that a victim of exacted consent seeks legal recourse to reclaim her dignity and place in society. So often, when the accused offers marriage, she is compelled to turn hostile in court. In many cases, the victim is pregnant and when the accused agrees to marry her, she is forced to settle for practical considerations. But there are also cases when the caste panchayat intervenes and mediates a marriage settlement even in cases of violent rape where a legal trial is on-going. While judicial conviction certifies the prosecutrix as a hapless victim to a heinous crime, it offers little else to her social status as “damaged goods”. Therefore, she is forced to choose marriage to her rapist in order to reclaim her dignity in the society or accept monetary compensation from the accused. So she turns hostile in the trial.

It has to be noted that acquittal is a very real possibility in every rape trial, irrespective of the truth, because the strength of the case depends on too many external variables such as a police efficiency in investigation, skill and efficiency of doctors in the government hospitals, timely access to forensic labs, skill and compassion of the public prosecutor relative to those of the defence counsel, level of institutional corruption, and the compassion and efficiency of the court itself. I found cases where the investigating officer built a weak case and the victim was forced to resort to an out of court settlement and compromise.

Our criminal justice system has an isolated view of justice delivery to mean conviction or acquittal. It fails to go beyond that to include victim rehabilitation and witness protection, without which justice is not comprehensive. As a result, the victim is subjected to intimidation and compulsions that eventually hinder the effective functioning of the criminal justice system.

References:

1.^ Data compiled by the research scholar from the National Crime Records Bureau. Available online at <http://ncrb.gov.in/>. Last accessed July 5, 2015

2.^ Based on interviews conducted by the author

3.^ Interview conducted in Dindigul district of Tamil Nadu in June 2015. Name withheld to protect identity.

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