



## Burden of Proof in Anti Rape Laws of Indian Evidence AssCT 1872

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### ABSTRACT

One of the vital trend of the complex Indian Criminal Law framework is the presumption of innocence bestowed upon the accused with the aid of using the concept of the burden of proof conferred upon the prosecution to reveal the accused's guilt. However, currently, there has been a surge in tips imposing a contrary onus clause, by which the burden shifts from the prosecutor to the accused to prove their innocence. For instance, Section 106 of the Indian Evidence Act, 1872 statutorily legitimizes for the set up order of an evidentiary reversal of the burden of proof in conditions wherein the evidence is solely within the knowledge of the accused.

**Keywords:** Anti Rape Laws, Indian Criminal Law, Indian Evidence Act, 1872

### 1 INTRODUCTION

The definition of rape differs from nation to nation and has been interpreted in many ways. It is defined in many dominions as sexual intercourse, or other forms of sexual penetration, initiated by one individual against another individual without the consent of that individual<sup>1</sup>. The United Nations organization on Drugs and Crime terms rape as "sexual intercourse without valid consent," and the World Health Organization on 2002 defined it as "physically forced or otherwise coerced penetration – even if slight – of the vulva or anus, using a penis, other body parts or an object".

The constituents forming the definition of rape in the ICC Statute are that:

- "The offender invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the offender with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."
- "The invasion is achieved by force, or by threat of force or coercion, such as that lead to the fear of violence, duress, detention, psychological oppression or abuse of power, against such individual or another individual, or by taking advantage of a coercive environment, or the invasion was achieved against a person incapable of granting genuine consent."

### CONSENT

In any sexual violence, the absence of consent to sexual intercourse on the part of the victim is vital. In any sexual intercourse consent need not be expressed, and may be derived from the factors and from the relationship of the parties, but the absence of objection does not itself constitute consent. Lack of consent may be due to forcible compulsion by the perpetrator or incapacity to consent on the part of the victim (such as persons who are asleep, intoxicated or otherwise mentally and physically helpless). The law also does not validate consent in the case of sexual intercourse with a person below the age who are legally not competent to give consent to such relations with older individuals.

These instances are known as statutory rape or "unlawful sexual intercourse". Consent can always be withdrawn at any time (any time during the intercourse), and any further sexual activity after that is regarded as rape.

Marital rape / spousal rape, is non-consensual sexual form in which the perpetrator is the victim's spouse, in such instances it is known as partner rape, and sexual abuse. Once ignored by law and society, spousal rape is now repudiated by international conventions and increasingly criminalized. Still, in majority of the nations, spousal rape is legal, or is not legal but still no strict laws exists to stop this rape and considered as a husband's right to do that..<sup>2</sup>

In various nations, the marital rape may or may not be prosecuted under rape laws. In the absence of adequate marital rape law, it may not be possible to bring prosecution for acts of forced sexual intercourse inside marriage.

<sup>1</sup>Mayank Shekhar, *Rape – Meaning, Essentials and Punishment*, available at: <https://www.legalbites.in/law-notes-ipc-rape-> (Visited on April 20, 2021).

<sup>2</sup>Kanti, *Judicial Stand on rape and gang rape – How the quantum of punishment is decided*, available at: <https://blog.ipleaders.in/punishment-gang-rape-india/> (Visited on April 21, 2021)

### The Prosecution Go About Proving This Case

This heinous act- rape generally occurs without a significant number of witnesses, the prosecution may find it difficult to establish it in some circumstances.

Rapes in front of a big crowd in public are uncommon and are less likely to be executed. Instead, it's a case that is more likely to happen in front of few individuals. As a result, the judge or jury go with the difficult task of determining who is the most trustworthy and on whom it he/she should actually rely on.

The person making the complaint will provide evidence to support its case in addition to the sufferer's testimony. The victim in most rape cases is taken to a "SANE" examination as soon as possible after the alleged rape. A nurse who has been trained to recognise and extract evidence of rape from the victim's physical examination does a SANE examination at a hospital or it is done by a medical faculty.

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## EVIDENCE AND WITNESS TESTIMONY IN SEX CRIMES CASES

Physical evidence is usually obtained through the victim's medical checkup, which should be done as soon as possible after the alleged rape. To make its case, the Complainant will depend on specific DNA evidence and will interact to as many people as possible. Almost every rape case is assigned to a detective who has experience with cases similar to the one at hand probably, that detective will be summoned as a witness. Almost always, the victim will testify and remember what happened. In a rape case, the defendant's remarks that demonstrate guilt will be used against him

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## JUDICIARY INTERPRETATION AND APPROACH : 'CONSENT' IN RAPE CASES

Traditional definitions of forcible rape include acts of sexual intercourse performed against the will of a woman who is not his wife. Non-consent is the most important substantive component o In the case of *Bodhisatwa v. Shubhra*,<sup>3</sup> the Supreme Court stated, "The situation has scarcely changed, and rape conviction rates remain lower than any other major crime." The women have been raped, not the rapist, are placed on trial in rape cases, according to the lady.

Due to fear, humiliation, and harsh treatment by physicians and law enforcement, many women are still hesitant to report rape occurrences to authorities. To infer free and voluntary consent, we'll need to add a few additional elements. If the presumption is removed, the law will be forced to look for genuine proof of "no consent.

The case of *The Public Prosecutor v Yejjala, in* which the offender was acquitted, exemplifies this tendency. According to the medico-legal certificate, the accused raped a pregnant midwife in her house, and the vagina retrieved two fingers, confirmed the presence of spermatozoa, and certified that the victim was five months pregnant at the time. The victim had a history of sexual intercourse, according to the publication. According to the court, medical evidence revealed no damage to the victim's private parts or major injuries to her body, indicating resistance during the alleged act of sexual intercourse. The court upheld the verdicts in *Tukaram v State of Maharashtra and Pratap Mishra v State of Orissa*<sup>4</sup>, that if the females had refused to agree, there should have been proof of damage.<sup>5</sup>

In *TulsidasKhanolkar v. State of Goa*, Justice ArijitPasayat held that "The spirit of a vulnerable girl is harmed and defiled by a rapist, whereas the physical body of a victim is destroyed by a murderer.

In Shakespeare's tragedy "Titus Andronicus," Lavinia is raped and has her tongue and hands cut out. Both exposing the truth and keeping it hidden come with a hefty price tag. According to a review of documented rapes in Delhi, parents who discovered their daughters having consensual sex with their loves rushed to court to teach their daughters a lesson, and their lovers were responsible for 40% of the rape claims

### Principles of Burden of Proof

The ideas of onus probandi (burden of evidence) and factum probans are used to determine the burden of proof (proving a fact).

Despite the fact that the burden of proof has been shifted from one side to the other, the subject of burden of proof has not changed. It is necessary to establish facts that are not self-evident in nature. The court decided in *Jarnail Sen v. State of Punjab*<sup>6</sup> that the defence cannot rely on the accused's testimony if the prosecution fails to meet its burden of proof from the beginning, the plaintiff bears the burden of proof. The prosecution bears the first burden of demonstrating the accused guilty in criminal proceedings The accused is entitled to an acquittal if the prosecution fails to prove his or her guilt beyond a reasonable doubt.

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<sup>3</sup>(1996) 1 SCC 490.

<sup>4</sup> (2014) 4 SCC 257 .

<sup>5</sup>Michael Kimmel, *The Gendered Society* 112 (Oxford University Press, Chicago, 5<sup>th</sup>edn., 2000).

<sup>6</sup>1986 SCR (2)1022.

### Section 102

In the absence of evidence, the burden of proof is placed on the side whose point of view would be contradicted, and on the side whose point of view would be refused. The side that believes in the truth bears the burden of proof, not the side that believes in falsehoods. In situations of insanity or unsoundness of mind, the law presumes sanity unless it is shown otherwise. In the matter of **Ram Raja Ram v. DhrubaCharan Jena**<sup>7</sup>, the party claiming no consideration under Section 118 of the Negotiable Instruments Act must show it.<sup>8</sup>

### Section 103

Under this paragraph, the party who wants the Court to believe and act on the existence of a fact carries the burden of proof. Whether a statement is favourable or negative has no bearing on this concept.

### Section 10

If the existence and admissibility of one fact is contingent on the presence and admission of another, the party attempting to establish it will rely on the fact that allows the latter truth to be accepted.

### Section 105

The wide exceptions or specific sections of the Indian Penal Code that are available to the accused are discussed in this section. The fundamental premise is that an accused person is presumed innocent until proven guilty, with the prosecution bearing the burden of proof. When guilt is proven, the burden of proof shifts to the accused, who can defend themselves using the I.P.C. general exception.

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## INDIAN PENAL CODE ON RAPE

The Indian penal code now recognises rape as a form of sexual assault, with the following definition: A person is regarded as having committed "sexual assault" if he – (a) places his penis, to any extent, in the vagina, mouth, urethra, or anus of another person, or forces the other person to do so with him. , he manipulates any part of another's body to cause penetration into the vagina, urethra, anus, or any other part of that person's body, or causes someone else to do so with him or anyone else; or he applies his mouth to another's penis, vagina, anus, or urethra, or causes someone else to do so with him or anyone else; or he touches the individual's vagina, penis, or anus,

- **First.** — Against the other person's will.
- **Secondly.** — Without the other person's consent.
- **Thirdly.** — With the other person's consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or of hurt.
- **Fourthly.** — a woman who is aware that the offender is not her husband consents because she believes he is another guy to whom she is legally married or believes she is.
- Fifthly, if the other person, due to insanity or inebriation, is unable to comprehend the nature and consequences of the behaviour to which he or she consents, or if that person or another has supplied any stupefying or unwholesome medicine at the time of consent.
- **Sixthly.** — With or without the permission of the other person, if the other person is under the age of sixteen

Marital rape is not a crime in India, even after the 2013 change. Despite this, it is described as a type of prosecutable domestic violence in various parts of Indian penal law, including Section 498(A) and the provision -of Domestic Violence Act, 2005.

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## CONCLUSION

The paper attempts a broad assessment of the vital component of evidence act burden of proof related to the rape in India and its provisions. The dynamic nature of the concept has been analysed and role of consent which is now getting recognition in india has been discussed, consent has been interpreted in many cases in many ways the approach of judicial system has shown. Though witnesses are hard to locate in rape cases but other factors and testimonies which helps in the prosecution has been elaborated. At last structural provision of the Indian Penal Code has been portrayed.

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<sup>7</sup>AIR 1982 Ori 264.

<sup>8</sup>Madhu Kishwar& Ruth Vanita, *Using Women as a Pretext for Repression—The Indecent Representation of Women (Prohibition) Bill 78* (Sage Publications, New Delhi, 3<sup>rd</sup> edn., 1987).

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