

INSTITUTION INVOLVED IN ADMINISTRATION OF JUSTICE IN CASES OF SEXUAL VIOLENCE

Dr. Mandeep Kumar

Assistant Professor, Galgotias University, Uttar Pradesh

ABSTRACT

A modern state does not rest content with being merely a “police” or law and order state. It is much more than that. It tends to become a social welfare state. And in order to carry out its activities and function, whatever may be the range, it become necessary for any state to establish certain basic organs or agents or instrumentalities which act on its behalf and through which the State can function and operate. All the people in a state cannot combine and operate all together all the time to achieve the desired goals. Thus certain fundamental organs become necessary.

Traditionally, the structure of the country’s government is divided into three institutional components i.e the legislature, executive and the judiciary. As a matter of fact judiciary alone cannot administer justice unless and until it is backed up by the other two organs. If there is no legislation then what the judiciary will interpret and though one may have legislation but if no one is there to execute or implement then how one will approach the judiciary. Means thereby there is a cycle of interdependence to each other. The various edifices of the state together help in the administration of law and justice.

Keywords: State, Criminal Law, Constitution, legislature, Police, crime, investigation, judiciary, Courts, fundamental rights, sexual violence

INTRODUCTION

Criminal Justice Administration in India, Constitutionally speaking, is the area earmarked for the states.¹ Man being a rational animal, order and peace are his age old aspirations.² The aim of human life is happiness, which is attained through the mechanism of law and justice. Hence, justice as a concept revolves around the ways in which peace and order could be maintained.³ A state is defined in international law as “an independent political entity” “occupying a defined territory” “the members of which are united together for the purpose of resisting external force and preservation of internal order.” A modern state does not rest content with being merely a “police” or law and order state. It is much more than that. It tends to become a social welfare state. And in order to carry out its activities and function, whatever may be the range, it become necessary for any state to establish certain basic organs or agents or instrumentalities which act on its behalf and through which the State can function and operate. All the people in a state cannot combine and operate all together all the time to achieve the desired goals. Thus certain fundamental organs become necessary. This creates the need for constitutional machinery known as the constitutional Law. This lay down the establishment, power, functions, liabilities and mutual relations of those organs so created under the need.

1.0 The Division of Legal System

* Faculty at School of Law, “Galgotias University”, Greater Noida, Uttar Pradesh

¹ R.V Kelkar, “The Supreme Court and Criminal Justice System”,(Eastern Book Company, 5th Edn., 2008)

² B.M.Gandhi, Law of Torts, 1 (Eastern Book Company, 4th Edn., 2011)

³ P. Rajaram, Jurisprudence, 173 (Ashwin Publications, 1st edn., 1997)

The legal system of the country is divided into:-

- I. Law governing State.
- II. Law by which the State governs and regulates the conduct of its members.

Laws like Contracts, Torts, Property, and Criminal Law fall in second category. Laws like Constitutional Law, Administrative Law and Public International Law fall in the first category. These are laws which seek to govern the state, Law governing the state fall in the category of Public Law and the Law governing the affairs of the citizen's fall in the category of private Law.

1.1 The Institutions Involved

Traditionally, the structure of the country's government is divided into three institutional components:-

1. Legislature, to make Laws.
2. Executive , To implement and execute Laws, and
3. Judiciary, to interpret the law and administer the justice.

As a matter of fact judiciary alone cannot administer justice unless and until it is backed up by the other two organs. If there is no legislation then what the judiciary will interpret and though one may have legislation but if no one is there to execute or implement then how one will approach the judiciary. Means thereby there is a cycle of interdependence to each other. But as observed by the Supreme Court in *Jayanti Lal Amratlal vs. F.N. Rana*,¹ that it cannot be assumed that the legislative functions are executively performed by the legislature, executive functions by the executive and judicial functions by the judiciary. There is no implication that the function of the executive are confined exclusively to those of an executive or administrative character.

Today, the executive performs variegated functions viz. to investigate, to prosecute, to prepare and to adopt schemes, to issue and cancel licenses, etc.(administrative); to make rules, regulations and bye – laws, to fix prices, etc. (legislative); to adjudicate on disputes, to impose fine and penalty, etc.(Judicial).

1.1.1 The Legislature

Douglas J. observed that “Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler where discretion is absolute, man has always suffered”.² Mr. Green has defined the legislative power as the power to create rights, powers, privileges, or immunities and there correlatives, as well as status, not dependent upon any previous rights, duties, etc. (or for the first time), that is, apparently, the power of creating antecedent legal capacities and liabilities.³

The Preamble to the Constitution guarantees social, economic and political justice which, include gender justice, liberty of thought, expression, belief, faith and worship; equality of status and opportunity, while fraternity enjoins citizens to treat each other with respect and dignity, regardless of gender.⁴ In *Vishakha vs. State of Rajasthan*,⁵ the Supreme Court has pointed out that the right to be protected from sexual harassment and sexual assault is, guaranteed by the Constitution, and is one of the pillars on which the very construct of gender justice stands.

Article 13 of the Constitution of India provides that: (1) all laws in force in the territory of the India immediately before the commencement of this constitution, in so far as they are inconsistent with the

¹ AIR 1964 SC 648

² United States vs. Wanderlick 342 (U.S. 98)

³ Vora Fida Ali vs. State. AIR 1961 Guj 151

⁴ The Constitution of India

⁵ AIR 1997 SC 3011

provision of this part, shall, to the extent of such inconsistency, be void. (2) The state shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void. (3) In this article the context otherwise requires – (a) “law” includes any ordinance, order, bye law, rule, regulation, notification, custom or usage having the force of law in the territory of India. (b) “laws in force” includes laws passed or made by a legislature or other competent authority in the territory of India before the commencement of this constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. (4) Nothing in this article shall apply to any amendment of this constitution under article 368.

The legislature in the country is divided mainly at two levels.

1. The Central level (Law framed by the Union of India).
2. The State Legislature (Laws enacted by the particular state having its territory within the territory of India).

But unfortunately, words and verdict will remain only the words and verdict nothing much was gained out of them. In the present scenario offences against women are on the rise. Hardly is there a day when one does not read various forms of crime against women in the national daily newspapers. Indian law criminalizes sexualized violence as rape or “assault or criminal force to woman with intent to outrage her modesty.” From 1860, when British India’s first criminal code was enacted, until 1983, Indian criminal provisions related to sexual violence remained largely unchanged.¹ In 1983, an acquittal in a highly publicized case of a teenage girl raped by a police constable spurred legal reform.² As in *Tuka Ram vs. Maharashtra*,³ known as the Mathura case, the Supreme Court concluded that the sex was likely a “peaceful affair” because the medical examination showed no injuries on the victim’s body and had reported that she was “habituated to intercourse.”

The 1983 amendments, criminalized rape as penile-vaginal penetration, committed by a man upon a woman, without her consent.⁴ Non-vaginal penetration or penetration with an object or finger did not constitute rape but an “unnatural offence”⁵ or an “assault or criminal force to woman with intent to outrage her modesty.”⁶ Under reforms enacted in 1983, the offense of rape became cognizable, a crime for which police may arrest a suspect without warrant and non bailable.⁷ The 1983 law also criminalized, for the first time, aggravated forms of rape, such as gang rape, rape of a minor and custodial rape.⁸ Additionally, if a victim testified that she did not consent, under the 1983 law, the court must presume a lack of consent.⁹ After 1983, a rape conviction was subject to a mandatory minimum of seven years and the possibility of life imprisonment, and aggravated rape carried a mandatory minimum of ten years. A conviction of “assault or criminal force to woman with intent to outrage her modesty” carried no minimum, and a maximum sentence of two years. The crime of “unnatural offenses” - an anti-sodomy law - carried no minimum sentence, and a maximum of life imprisonment. But the Indian law did not explicitly criminalize attempted rape or marital rape of wives over

¹ Vandana, “Sexual Violence against Women: Penal Law and Human Rights Perspectives”, 95-104 (2009)

² Pratiksha Baxi, Public Secrets of Law: Rape Trials in India, 11-14 (2014)

³ (1979) SCC 143

⁴ Section 375. Indian Penal Code, 1860. (Act 45 of 1860)

⁵ Section 377. Indian Penal Code, 1860. (Act 45 of 1860)

⁶ Section 354. Indian Penal Code, 1860. (Act 45 of 1860)

⁷ Section 4. The Criminal Law (Amendment) Act, No. 46 of 1983, “Amendment of the First Schedule”

⁸ Section 3. The Criminal Law (Amendment) Act, No. 46 of 1983, “Substitution of new sections for sections 375 & 376

⁹ Section 114A. Indian Evidence Act, 1872 (inserted by Act of 1983, S. 6)

fifteen years old.¹ The high profile New Delhi gang rape in 2012 sparked widespread protests and calls for reform which led India to enact the Criminal Law (Amendment) Act, 2013. By amending Indian criminal law and procedure, the Act introduced important reforms to how crimes of sexual violence are investigated and prosecuted by India's criminal justice system. The Act expands the definition of rape to include penetration of the labia majora, urethra, mouth, or anus with any object or body part, including the mouth, or any parts of the victim's body.² It also defines consent as "an unequivocal voluntary agreement" and does not require physical resistance to show lack of consent.³ Additionally, the Act establishes longer and harsher sentences for crimes of sexual violence. The Act only applies to acts of sexual violence by men against women and did not criminalize marital rape. A Part from provisions of Indian Penal Code, there are a number of other enactments which too deals with the sexual offences against the women in the country. Also there are number of international treaties under which the union of India is obliged to safeguard and to protect dignity of women.

1.1.2 The Executive

As it is well know that the prime function of executive in administration is the implementation and execution of the intent of legislature. Though executive performs variegated functions today viz. to investigate, to prosecute, to prepare and to adopt schemes, to issue and cancel licenses, to make rules, regulations and bye – laws, to fix prices, to adjudicate on disputes, to impose fine and penalty, etc. one can understand that the performance of all these functions by the executive is the method by which the executive attains its prime function. In criminal justice administration there are various organs of the state constituted under the spirit of legislation which enable the state executive to achieve its goals. Out of various organs of the executive of the state there are the three prime organs of the executive on which the responsibility of fulfilling the prime function of executive lies. Specially when the legislature is concern to protect society from criminals. These organs are follows as under:-

1. The Police

A police force is an instrument for prevention and detection of crime.⁴ Every State Governments establishes its own police force which is formally enrolled. The force consists of such number of officers and men and is constituted in such a manner as the state government may decide from time to time. The overall administration of the police in the entire state is vested in the Director General of the police. The administration of police in every district vests in the District Superintendent of police under the general direction of the District magistrate who is usually the collector of the district.⁵ Every officer appointed to the police other than the inspector – General of Police (or Deputy or Assistant District Superintendent of police) receives a certificate in to prescribed form by virtue of which he is vested with the powers, functions and privileges of a police officer. The certificate when cease to be effective then it shall be returned forthwith when the police officer ceases to be a police officer.⁶ A criminal investigation in India begins with the filing of a police report, called the First Information Report (FIR), or by a complaint directly to the court.⁷ In *Arjun Marik vs. State of Bihar.*,⁸ it was observed and held by the Supreme Court that the duty of the investigating Agency is to act honestly and fairly and not to restore to fabricating evidence with a view to secure conviction." The Criminal Procedure Code confers specific powers, e.g. Power to make arrest,

¹ Section 375. Indian Penal Code, 1860. (Act 45 of 1860). (Exception)

² Section 9. The Criminal Law (Amendment) Act, No. 13 of 2013, "Substitution of new sections for sections 375, 376, 376A, 376B, 376C and 376D

³ Section 9. The Criminal Law (Amendment) Act, No. 13 of 2013, "Explanation 2"

⁴ The Police Act, 1861, Preamble

⁵ Section 4 The Police Act, 1861

⁶ Section 8 The Police Act, 1861

⁷ Section 154, 156(3), 190 & 200. The Code of Criminal Procedure 1973

⁸ 1994 SCC (Cri) 1551

search, etc., on the members of the police force who are enrolled as police officers. Wider powers have been given to the police officers who are in charge of the police stations.

Such station – house officers are also required to discharge onerous duties in relation to the detection, investigation and prevention of offences. Therefore any officer who receives information about a cognizable offense, such as rape or crimes against modesty, is required to document the information in writing and file the FIR with the competent court. Police officers are required to promptly investigate cognizable offenses or document the reasons the investigation was not undertaken. Following the investigation, the judge considers the record and the prosecution's opening statements. If the judge decides that trial should continue, the judge "frames the charge" and the defendant enters a plea. If the defendant pleads not guilty, the judge hears evidence from the prosecution and the defense and then renders a judgment of guilty or innocent. The police role, duties, powers and responsibilities have been spelt out in the Police Act of 1861. According to Section 23 of the Police Act, police are required to:-¹

- i) Prevent the commission of offences and public nuisances ;
- ii) Detect and bring offenders to justice ;
- iii) Apprehend all persons whom the police are legally authorized to apprehend ;
- iv) Collect and communicate intelligence affecting the public peace ;
- v) Obey and execute all orders and warrants lawfully issued to them by any competent authority ;
- vi) Take charge of unclaimed property and furnish an inventory thereof to the Magistrate of the District, and be guided by his orders regarding their disposal ;keep order on the public roads, thoroughfares, ghats, landing places and at all other places of public resort ; and
- vii) Prevent obstructions on the occasions of assemblies and processions on the public roads.

In theory all is good, but in reality things go haywire as pointed in a study conducted by the Indian Institute of Public Opinion, New Delhi, regarding "Image of the Police in India"² it found that over 50% of the respondents have mentioned "non-registration of complaints", as a common malpractice in police stations. Among the several malpractices it is ranked third, the first two places being taken by:-

- I. Showing partiality towards rich or influential people in cases involving them or reported by them, and
- II. Shielding goondas and other criminal elements concerned in gambling dens, illicit distillation, etc.

At one side the National Police Commission pointed that having regard to the objectives mentioned in the Preamble, we would hold that law enforcement by police should cover the following two basic functions:-³

- i) Upholding the dignity of the individual safeguarding his constitutional and legal rights. Police secure this objective by enforcing laws relating to the protection of life, liberty and property of the people.
- ii) Safeguarding the fabric of society and the unity and integrity of the nation. Police

On the other hand it of the view that apart from investigating the facts of a crime after it has occurred police have, according to normal public expectation, a responsibility for preventing the very occurrence of crime. Investigation may be deemed as an expert professional responsibility that has to be squarely borne by the police, and their success in this regard depends mostly on their own training, equipment and competence, aided by public cooperation wherever possible. But in regard to prevention of crime, police cannot do very much by themselves, since quite many among the factors that cause crime are beyond their control In fact several of these factors transcend the criminal justice system itself.

¹ Section 23 The police Act, 1861

² Indian Institute of Public Opinion, "Image of the Police in India".(MHA, 1978 , New Delhi)

³ The National Police Commission of India, 2th Report, 1979

The standard of police investigation in India remains poor. In the first place, there is inadequacy of the investigating staff. The police officers are hard pressed for time with multifarious commitments and, thus, not able to devote adequate time for investigational work. A sample survey done at the instance of the National Police Commission in six States of the country revealed that on an average, the investigating officer is able to devote only 27% of his time on investigational work, while the rest of the time is taken by other duties connected with the maintenance of law and order, VIP bandobust, petition enquiries, court attendance, collection of intelligence and other administrative work. The Committee on Internal Security constituted by the group of Ministers (GOI) in the wake of Kargil conflict in 2000 was informed by the DGP, Uttar Pradesh, of the startling fact that the police could devote only 13% of its time on investigations. Similarly, a random survey done at the instance of Second West Bengal Police Commission revealed that a Sub-Inspector of an urban police station in West Bengal, on an average, spent 20-25% of his time on investigational work; a Sub-Inspector in Calcutta City spent about 41% his time on it and a Sub Inspector in rural areas spent 16 to 18% of time in investigative work due to long distances involved. Inadequate number of I.Os. Coupled with low percentage of their time being devoted to investigational work, resulting in perfunctory¹

Also it is unfortunate that the investigation carried out by the police it is not trusted by the laws and the courts. Sections 161 and 162 of the Code provide that the statements of the witnesses examined during investigation are not admissible and that they can only be used by the defence to contradict the maker of the statement. The confession made by accused is also not admissible in evidence. The statements recorded at the earliest stage normally have greater probative value but can't be used in evidence. The observations of the courts in several criminal cases show that the Judges are reluctant to accept the testimony of police officers. Such is not the position in other countries. This is a historical legacy of the colonial rulers. It is common knowledge that police often use third degree methods during investigation. There are also allegations that in some cases they try to suppress truth and put forward falsehood before court for reasons such as corruption or extraneous influences political or otherwise. Therefore unless the basic problem of strengthening the foundation is solved the guilty continue to escape conviction and sometimes even innocent persons may get implicated and punished. It is therefore necessary to address ourselves to the problems and strengthen the investigation agency.

2. The Medical Authorities

The Supreme Court in *Solanki Chimabhai Ukabhai vs. State of Gujarat*.², observed that:-

“Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use, which the defence can make of the medical evidence, is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. Unless, however, the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence”.

The prime object of the medical profession is to render service to humanity; reward or financial gain is a subordinate consideration. Who - so - ever chooses his profession, assumes the obligation to conduct himself in accordance with its ideals. A physician should be an upright man, instructed in the art of healings. He shall keep himself pure in character and be diligent in caring for the sick; he should be modest, sober, patient, prompt in discharging his duty without anxiety; conducting himself with propriety in his profession and in all the actions of his life. Also the physician, engaged in the practice of medicine shall give priority to the interests of patients. The personal financial interests of a physician should not conflict with the medical interests of patients.³

¹ Justice V.S. Malimath Committee Report on, “Reforms of Criminal Justice System”, Vol – 1, March 2003, New Delhi

² AIR 1983 SC 484

³ Indian Medical Council, “Professional Conduct, Etiquette and Ethics” Regulations, 2002, New Delhi

The Indian medical Council: Code of ethic provides that the physician shall observe the laws of the country in regulating the practice of medicine and shall also not assist others to evade such laws. He should be cooperative in observance and enforcement of sanitary laws and regulations in the interest of public health. A physician should observe the provisions of the State Acts like Drugs and Cosmetics Act, 1940; Pharmacy Act, 1948; Narcotic Drugs and Psychotropic substances Act, 1985; Medical Termination of Pregnancy Act, 1971; Transplantation of Human Organ Act, 1994; Mental Health Act, 1987; Environmental Protection Act, 1986; Pre - natal Sex Determination Test Act, 1994; Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954; Persons with Disabilities (Equal Opportunities and Full Participation) Act, 1995 and Bio-Medical Waste (Management and Handling) Rules, 1998 and such other Acts, Rules, Regulations made by the Central/State Governments or local Administrative Bodies or any other relevant Act relating to the protection and promotion of public health.

Section 164 - A Criminal Procedure Code which deals with Medical examination of the victim of rape says that medical examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf.¹ The Supreme Court in the case of *Pt. Parmanand Katara vs. Union of India*,² has emphasized the paramount, absolute and total obligation of doctors, whether in private or government service to extend his/her services with due expertise for protecting the life of the victim without interference from laws of procedure. This duty needs no support from any code of ethics or rule of law.

The instruction manual of forensic medical examination of sexual assault a case, prepared by the ministry of health and family welfare, Government of Maharashtra, 2013 provides that it must be understood by doctors that Forensic Medical examination of victim is a “medico-legal emergency” as per Supreme Court directives issued in the year 2000. Hence, such cases must be examined without delay. No such case should be refused for examination for the reasons of non-availability of lady medical officer, because as per 164 A Criminal Procedure Code (Cr. PC), any registered medical practitioner (allopathic) can examine victim in presence of other woman with the consent of the patient or guardian. In hospitals, where services of specialists from Forensic Medicine and Gynecology are available (for example medical colleges/ institutes), this examination should be jointly conducted by them. The doctor from the forensic department must take the responsibility of all medico legal part (i.e., forensic medical examination, sample/ forensic evidence collection, medico – legal report preparation etc) and the doctor from the gynecology department must take the responsibility of treatment or medical management part. The doctors from the forensic department should remain on call 24 X 7 for this purpose. Immediate intervention or referral to higher centers in cases of medical and/or surgical emergencies arising from sexual assault. Under the circumstances life saving procedures can be done even without the consent. Collection of evidence and other necessities can be done simultaneously while dealing with emergency. Whenever cases of sexual assault comes on her own to the hospital or are brought by the police, it shall be registered as MLC (medico-legal case).

Despite above all Professional ethics, Judicial and legislative guidelines from time to time it was noticed that: - Trainee doctors in public hospitals, who are generally on duty at night when cases are brought in, sign the medical reports. Also there is insufficient number of female doctors to conduct the medical examinations. The public and private hospitals are lacking modern equipments of medical examinations. The victim of sexual assault not provided treatment till the FIR is logged. It was observed by the Justice Verma Committee, 2013. That the directions provided have not been adequately complied with and doctors, especially in private hospitals, are extremely wary to deal with cases of this nature. And the committee opined that, the medico-legal examination report should note the date and time of examination and be sent without delay to the concerned investigating officer. To avoid unnecessary delays, the report must be transmitted to the IO by way of email (as a secure PDF file - digitally signed where possible), in addition to sending by way of regular government post. Also the duty of the medical profession to extend unqualified services to victims

¹ Section 164 A. Cr.PC, 1973

² (1989) 4 SCC 286

of such heinous offences should be duly publicised and medical professionals and hospitals who abstain from performing the same ought to be punished in accordance with law. The committee recommended that the issue of whether sexual assault occurred is a legal issue and not a medical diagnosis. Consequently, doctors should not, on the basis of the medical examination conclude whether rape had occurred or not. Only findings in relation to medical findings should be recorded in the medical report.¹

3. Forensic Science Department

The term forensic is derived from the latin word 'forensis' which mean related to court of law. Forensic science can be defined as the method of science applied to public matters. Today the term is use to mean the application of all basics science to criminal justice system. The basic sciences like Physic, Chemistry, Mathematics, Biology etc. are utilized to identify and compare physical evidence in the investigation of crime. Forensic sciences use the basic principles of all physical and natural science and have evolved many domain of its own, like: Anthropometry, Fingerprint, Footprint, Ballistics, Documentation, Forensic Biology, and Serology, Forensic Chemistry, Forensic Physic, Toxicology, Odontology, Forensic DNA, Cyber Forensic, Forensic psychology, Forensic Engineering which provides fool prove scientific aid to criminal justice system.²

The 1st forensic science laboratory was established in Calcutta in 1952 followed by another in Bombay in 1958. Today there are 28 State Forensic Science Laboratories and today and large number of Regional Forensic Science Laboratories in addition to four Central Forensic Science Laboratories, three governments Examiner of Questioned Document Laboratories and a CBI Forensic Science Laboratory under the Central Government. National Institute of Criminology and Forensic Science, New Delhi caters the need of in service tanning of Forensic scientists, police officers and judiciary in India. The total Forensic Science activity in the country is co-ordinated by the bureau of police Research and Development (BPR&D), Ministry of Home Affairs, New Delhi.³

Following are the Duties of a forensic Scientist:-⁴

- i) To carry out analysis of crime articles and issue analytical reports.
- ii) To visit crime scene for proper collection of scientific evidence (proper samples)
- iii) To give evidence in the court of law whenever is summoned.
- iv) To train police investigating officers to modernize investigating methods.
- v) To co-ordinate judicial officers awareness of forensic science services.
- vi) To develop research and development in crime related case.
- vii) To prepare national level work Manuals to bring uniformity in working procedures of national wide Forensic Science Laboratories.
- viii) To conduct regular technical sessions and trainings to scientists to upgrade the scientific knowledge.
- ix) To prepare regular instruction to investigation officers and medical officers.

Tandoor Murder Case, Delhi,⁵ was the first criminal case in India solved by the help of forensics. In this case Shusil Sharma murdered his wife at home by firing three bullets in to his wife Naina Sahni's body. He killed

¹Ravji vs. State of Rajasthan., (1996) 2 SCC 175

² Dr. Rukmani Krishnamurty, Forensic Science in Crime Investigation, 30, (S & S Books,1st edn, 2011, New Delhi)

³ RK. Tewari and KV Ravikumar, Development of Forensic Science in India: A historical account. (Indian Academy of Forensic Sciences, 1999)

⁴ Dr. Rukmani Krishnamurty, "Information Booklet of Maharashtra Directorate of Forensic Laboratories". 2006

⁵ 1996 Cri.LJ 3944

his wife believing that she had her love affair with her classmate and fellow congress worker Matloob Karim. After murdering his wife Sharma took her body in his car to the Bagiya restaurant, where he and restaurant manager Keshav Kumar attempted to burn her in a tandoor there. Police recovered Sharma's revolver and blood-stained clothes and sent them to Lodhi Road forensic laboratory. They also took blood sample of Sahni's parents, Harbhajan Singh and Jaswant Kaur and sent them to Hyderabad for a DNA test. According to the lab report, "Blood sample preserved by the doctor while conducting the post mortem and the blood stains on two leads recovered from the skull and the neck of the body of deceased Naina are of 'B' blood group." Confirming that the body was that of Sahni, the DNA report said, "The tests prove beyond any reasonable doubt that the charred body is that of Naina Sahni who is the biological offspring of Mr. Harbhajan Singh and Jaswant Kaur." And finally Mr. Shusil Sharma was found guilty with the help of forensic evidences.

In the case of *Raghuvir Dessai vs. State*,¹ the Bombay High Court observed that the Clinching evidence confirmed that the accused is the contributor of the semen which was collected by Dr. Sapeco in the form of vaginal swab. DNA (Deoxyribonucleic acid) is found specially in cell nuclei which are the foundation of heredity. DNA is the genetic blue print for life and is virtually contained in every cell. No two person, except identical twins have ever had identical DNA. DNA testing can make a virtually positive identification when the two samples match. It exonerates the innocent and helps to convict the guilty (see page 249 of Jhala and Rajus Medical Jurisprudence sixth edition). The DNA testing hits the nail on the head of the accused and is the last and clinching piece of evidence which shows that it is the accused and accused alone who commits the rape of the victim/PW11. In the case of *Thogorani vs. State of Orissa*,² a Division Bench of Orissa High Court observed that: the DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at scene of crime. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict but also serves to exonerate. The Sophisticated technology makes it possible to obtain conclusive results in cases in which the previous testing had been inconclusive. Moreover, DNA Sampling may also impinge on familial privacy where information obtained from one person sample provides information regarding his or her relatives. Though Section 164 - A Criminal Procedure Code which deals with Medical examination of the victim of rape. There are guidelines provided by the Delhi High Court in W.P.(CRL) 696/2008, *Delhi women Commission vs. Delhi Police*,³ for the preservation of Forensic Evidence of rape Survivor by the hospital authorities. Which are as under:-

II) Doctors/ Hospitals/ Health Department

- a. Special rooms to be set up in all government hospitals for victims to be examined and questioned in privacy.
- b. A sexual assault evidence collection kit or sexual assault forensic evidence (SAFE) kit consisting of a set of items used by medical personnel for gathering and preserving physical evidence following a sexual assault should be available with all the Government Hospitals. A sexual assault evidence collection kit should contain commonly available examination tools such as:
 - Detailed instructions for the examiner
 - Forms for documentation
 - Tube for blood sample
 - Urine sample container
 - Paper bags for clothing collection

¹ 2007 Cri. LJ 829

² 2004 Cr. LJ 4003

³ W.P.(CRL) 696/2008, order dated 23.04.2009 (Delhi High Court)

- Large sheet of paper for patient to undress over
- Cotton swabs for biological evidence collection
- Sterile water
- Glass slides
- Unwaxed dental floss
- Wooden stick for fingernail scrapings
- Envelopes or boxes for individual evidence samples
- Labels

Other items needed for a forensic/ medical exam and treatments that may be included in the rape kit are:-

- Woods lamp
 - Toluidine blue dye
 - Drying rack for wet swabs and/or clothing
 - Patient gown, cover sheet, blanket, pillow
 - Needles/ syringes for blood drawing
 - Speculums
 - Post-it Notes used to collect trace evidence
 - Camera (35 mm, digital, or Polaroid) film, batteries.
 - Medscope and/ or colcoscope
 - Microscope
 - Surgilube
 - Acetic acid diluted spray
 - Medications
 - Clean clothing and shower/ hygiene items for the victims use after the examination
- c. A detailed description of “Assault/ Abuse History” be mentioned by the attending doctor on the MLC of the victim; The doctor must ensure that the complete narration of the history of the case detailed by the victim and her escort is recorded.
- d. After the examination is complete the victim should be permitted to wash up using toiletries provided by the hospital. The hospital should also have clothing to put on if her own clothing is taken as evidence.
- e. All hospitals should co-operate with the police and preserve the samples likely to putrefy in their pathological facility till such time the police are able to complete their paper work for dispatch to forensic lab test including DNA.

4. Legal Aid Authorities

The expression “legal aid” has not been defined anywhere in Legal Services Authorities Act, 1987. However it is generally defined as:-

“Legal aid is the provision of assistance to people otherwise unable to afford legal representation and access to the court system. Legal aid is regarded as central in providing access to justice by ensuring equality before the law, the right to counsel and the right to fair trial.

The phrase “Legal Service” has been defined under Section 2(c) of the Legal Services Authority Act, 1978. As per to the Act, Legal Service includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and giving of advice on the legal matter. Whenever the phraseology namely “equal justice and free legal aid” comes to the mind of court, in so far our Indian System of Administration of Justice is Concerned Article 39-A of constitution of India will take its magnitude. Article 39 – A has been inserted by the constitution of india (42nd Amendment) Act, 1976, Section 8 (w.e.f. 03.01.1977) Article 39 – A enacts as under:-

“The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities”.

The Right to legal aid was examined by the Supreme Court in Detail in *Hussainara Kahaton vs. State of Bihar*,¹ where prisoners were kept in Bihar jails without a trial for a longer period than that to which they would have been sentenced, if convicted. P.N Bhagwati, J., in this case opined that a procedure which did not make available the legal services to an accused, who was too poor to afford a lawyer, could not be regarded as 'reasonable, fair and just.' Thus, the fundamental right of legal aid was held to be implicit in the procedural requirement of Article 21 of the Constitution Article 22(1) of the Constitution directs that no person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of his choice. This legal right is also available in the Code of Criminal Procedure, under Section 303. The Courts have held that from the time of arrest, this right accrues to the arrested person and he has the right of choice of a lawyer. The accused may refuse to have a lawyer but the Court has to provide a *micus curie* to defend him in serious cases. The Courts have also held that the indigent accused have a right to legal aid. This requirement is to ensure that. Poverty does not come in the way of any accused getting a fair trial.² In *Bihar Legal Support Society vs. The Chief Justice of India and Anr*,³ Chief Justice of India (as he then was) has observed that In fact, this court has always regarded the poor and the disadvantaged as entitled to preferential consideration than the rich and the affluent, the businessmen and the industrialists. The reason is that the weaker sections of Indian humanity have been deprived of justice on account of their poverty, ignorance and illiteracy. They are not aware of the fights and benefits conferred upon them by the constitution and the law. On account of their socially and economically disadvantage position they lack the capacity to assert their fights and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice. The majority of the people of our country are subjected to this denial of justice and, overtaken by despair and helplessness, they continue to remain victims of an exploitative society where economic power is concerned in the hands of a few and is used for perpetuation of domination over masses of human beings. This court has always, therefore regarded it as its duty to come to the rescue of these deprived and vulnerable section of Indian humanity in order to help them realize their economic and social entitlements and to bring to an end their oppressions and exploitation. But, it is unfortunate that the programme of free legal services is not successful to the extent to what it should have been because of the noncooperative attitude of the members of the Bar. The judicial officers are also equally responsible for the non-availability of these benefits to this class of litigants. In each case where a woman or child is a party, it is equally a duty of the judicial officer concerned to let them know that they are entitled for free legal aid.⁴

In *Mohd. Hussain @ Julfikar Ali vs. The State (Govt. of NCT) Delh.*,⁵ it was held that every person has a right to have a fair trial. A person accused of serious charges must not be denied of this valuable right.

¹ AIR 1979 SC 1360

² AIR Journal , 183 at p .142 , 2001.

³ AIR 1978 SC 38

⁴ Kalaben Kalabhai Desai v. Alabhai Karamshibhai Desai, AIR 2000 Guj 232

⁵ (2012) 9 SCC 408

Appellant was provided with legal aid/counsel at the last stage which amounted to denial of effective and substantial aid. Dattu, J., matter remanded back with instructions that State counsel will be provided before the commencement of trial and till its conclusion, if the accused is unable to employ a counsel of his choice at his expense. C.K. Prasad, J. concurring with the view that the sentence and conviction of appellant should be set aside as he was not given legal aid to defend his case, but not agreeing with the view that case should be remanded to trial court for fresh trial.

1.1.3 The Judiciary

The Indian judiciary, a single integrated system, has three main hierarchical levels:

1. The Subordinate Courts,
2. High Courts with jurisdiction over one or more states, and
3. The Supreme Court, which is the court of last resort in constitutional, civil, and criminal matters.¹

Although primarily a court of appeals, the Supreme Court also has original jurisdiction over writs alleging violations of fundamental rights.² Supreme Court decisions are binding on India's lower courts.³ Decisions by High Courts - the head of judicial administration for states - are binding in the respective state jurisdictions, but not on other High Courts.⁴ India's district courts adjudicate civil and criminal cases.⁵ The jurisdiction on criminal matters of district courts, referred to as Sessions Courts, depends upon the severity of the crime and punishment. Sessions courts usually have jurisdiction over rape and forced sodomy cases. The state government may also direct a Sessions Court to function as a human rights court for the purpose of trying offenses arising out of violations of human rights.⁶ Subordinate courts of Judicial Magistrates have jurisdiction over "crimes against modesty." The jurisdiction on civil matters of the district courts depends upon territorial limitations and the matter's pecuniary value. Victims of violations of fundamental rights may seek redress through India's system of Public Interest Litigation (PIL) and writs. Though the Conviction rate in offences against women is still very low in the country but it is also true despite the odds the Judiciary in India plays a significant role in protecting human rights. The Courts have now become the courts of the poor and the struggling masses and left open their portals to the poor, the ignorant, the illiterates, the downtrodden, the have-nots, the handicapped and the half-hungry, half-naked countrymen. Of the three organs of Government, the judiciary has become a vanguard of public life. It performs this function mainly by innovative interpretation and application of the legislative provisions and of the Constitution. The Supreme Court of India has in the case *Ajay Hasia vs. Khalid mujid*,⁷ declared that it has a special responsibility, "to enlarge the range and meaning of the fundamental rights and to advance the human rights jurisprudence." In *Vishakha's case*⁸, referring the principles of independence of the judiciary the objective and function of the judiciary was stated as follows:-

- a) To ensure that all persons are able to live securely under the rule of law;

¹ Jurisdiction of the Supreme Court, Supreme Court of India; Available at <http://supremecourtfindia.nic.in/jurisdiction.htm> (Last Retrieved on 25 Sep 2016)

² Article 32. The Constitution of India

³ Article 136. The Constitution of India

⁴ Mohd. Hussain @ Julfikar Ali vs. The State (Govt. of NCT) Delhi. (2012) 9 SCC 408

⁵ District Courts, Indian Courts. Available at <http://indiancourts.nic.in/districtcourt.html> (Last Retrieved on 15 Sep 2016)

⁶The Protection of Human Rights Act, 1993, No. 10 of 1994, available at http://nhrc.nic.in/documents/Publications/TheProtectionofHumanRightsAct1993_Eng.pdf. (Last Retrieved on 1 Oct 2016)

⁷ 1981 SCR (2) 79

⁸ AIR 1997 SC 3011

- b) To promote within the proper limits of the judicial function, the observance and attainment of human rights; to administer the law impartially among persons and between persons and the State.

Also in *Sheela Barse vs. State of Maharashtra*,¹ the Supreme Court observed that usually the most important encounter which the citizen has with the law is at the primary level. This level, in fact, frightens many citizens, and has given a feeling of helplessness that the administration of law does not necessarily lead to justice in the predominance of Truth. Even the secondary and the Tertiary level courts i.e. the High Court and the Supreme Court to function, they too depend upon the impressions of the primary level courts. Thus, if an error creeps in there, it becomes an error which may not be perceptible of correction by the secondary and the tertiary levels.”

¹ JT 1988 (3) 15 J