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ACCESS TO 'SAFE' SANITATION FOR WOMEN

QUESTIONING A MYOPIC APPROACH

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Conflicts around Domestic Water and Sanitation in India

Cases, Issues and Prospects

Edited by

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Access to 'Safe' Sanitation for Women: Questioning a Myopic Approach

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ABSTRACT

The practice of open defecation is widespread in India. One of the main reasons for this state of affairs is the lack of access to adequate, safe, secure and hygienic sanitation facilities. This practice has an important gender dimension given the incidents of violence against women (including sexual harassment, molestation, rape etc.) while going for/engaging in open defecation. This violates the safety, security and privacy of women, which are integral components of their right to sanitation. Therefore, this issue ought to be a priority in any sanitation-related law, policy or programme.

The existing legal framework partly deals with this issue in the context of criminal laws, which seek to punish the offenders depending on the facts and circumstances of the case and the available evidence. Based on the provisions of criminal laws, a number of cases have been decided by courts. Criminal laws perform a specific function of providing justice to the victim by punishing the offender for a criminal offence. They are not expected to engage with the root cause of the offence, which in this case is physical violence associated with the practice of open defecation.

This case study seeks to document the decisions of the Supreme Court and High Courts in order to highlight the magnitude of the problem and determine the extent to which the existing legal framework provides justice to the victims and deters the commission of such offences in the future. It also examines the extent to which this problem has been addressed under the existing laws and policies concerning sanitation in India. The significance of this case study lies in the fact that although the underlying rationale for several of the existing sanitation policies and programmes is the need to address the issue of women's safety, in most cases, this is merely used as a justification to introduce the policy or programme. The actual implementation often does not result in any significant improvements in the status quo. The number of criminal cases concerning sexual violence where the victim resorted to open defecation in the absence of sanitation facilities is evidence of this failure.

BACKGROUND

There is an increased call for the recognition of sanitation as a basic human right, both internationally as well as domestically. The realisation of a basic

human right to sanitation depends upon the protection (by the government) and the enjoyment (by the citizens) of the right to privacy, dignity and safety/security, among other rights. This is particularly crucial for women and children who are disproportionately affected by the burden of poor sanitation facilities (Gol, 2011a; Massey, 2011).

The inadequacy of the existing sanitation facilities in India is well documented in government statistics. According to the 2011 census, fewer households (53.1 percent compared with 63.6 percent in 2001) lack toilets, but the number is still very high. The percentage of households without toilet facilities is higher in rural areas (69.3 percent compared with 78.1 percent in 2001) than in urban areas (18.6 percent compared with 26.3 percent in 2001) (Gol, 2011b). Women are more acutely affected by this lack of toilets than men. The absence of, or the inadequacy of, existing sanitation facilities compels them to resort to open defecation. This exposes them to the risk of verbal/physical violence, sexual assault as well as various health problems.

Over the past few years, some research has been undertaken to study the link between the lack of safe sanitation facilities and sexual violence against women in developing countries. There are also several studies examining sexual violence from a legal perspective. However, the link between sexual violence and the lack of safe sanitation facilities from a legal perspective has not received much attention. This paper attempts to fill this gap.

This paper is primarily based on a sample study of cases involving the offence of rape or outraging the modesty of a woman, as defined in sections 376 and 354 of the Indian Penal Code respectively. It is an attempt to provide an overview of the nature of issues arising in such cases, generally in the context of the application of the existing criminal law to cases of sexual violence, and specifically cases of sexual violence and its relation to the practice of open defecation. It also aims to highlight the need for more effective implementation of the existing laws and policies concerning sanitation to improve access to toilets for women and reduce the occurrence of such offences. It is not intended to provide an exhaustive account of all the cases involving the offences mentioned above.

The paper is organised as follows: The next section provides a review of the existing literature that examines the link between sexual violence and the lack of sanitation facilities. This is followed by a brief review of the applicable policy framework in the second section. The third section highlights the important features of the criminal law framework. Following this, the findings of the authors based on an examination of selected decisions of the Supreme Court and High Courts are presented. The paper concludes with some recommendations for the way forward.

LITERATURE REVIEW

The link between the availability of sanitation facilities and violence against women has formed the subject matter of a few studies/reports concerning poor families in informal settlements, slums and resettlement areas and migrant women. The link forms the exclusive focus of some of the literature, while others consider it a part of a broader discussion on the role of women in water and

sanitation. The former include studies conducted by Women in Cities International and Jagori (Travers, 2011) and WaterAid (Lennon, 2011) focusing on the urban slums in the national capital, New Delhi. The literature in the latter category is more exhaustive. For example, WASH (2006) deals with the issue of gender mainstreaming for the provision of water and sanitation services. WaterAid has conducted a qualitative study involving women from slum communities in Kampala, Uganda (Massey, 2011). A study conducted by Amnesty International (2010) found that a high number of women in slum areas in Kenya are raped when they resort to open defecation because they have no private sanitation facilities at home. UN-HABITAT (2006) examined this link as a part of a larger study about water and sanitation and women in the State of Madhya Pradesh.

The studies identify a number of reasons for the practice of open defecation, some of which relate to the non-existence of toilets. One of the outcomes of the increasing migration from villages to cities for employment opportunities is the creation of slums and informal settlements. In many cases, these slums are not registered or regularised by the government, and essential public services such as water and sanitation are not provided to these areas. The residents do not build private toilets in houses for fear that the government may shift them and hence, money will be wasted (UN-HABITAT, 2006). Another reason is the inadequate housing and limited space available for the construction of a private toilet. A third (controversial) behavioural reason is the culture of not using toilets.

Even where toilet facilities exist, such as public toilets or community toilet complexes, they may not be used because they are inadequate, unsafe, unhygienic or inaccessible. Anecdotal evidence reveals a number of reasons that render such toilet facilities unsuitable for use by women and girls: they are unaffordable (pay-per-use), dirty (due to mismanagement/poor maintenance), the facilities are poor (such as broken doors, absence of latches on doors, broken roofs), and there is lack of sewage, water and/or electricity connections (McFarlane, 2008), as well as facilities (such as dustbins for disposal of menstrual waste) (Travers, 2011). The public/community toilet facilities are also often inadequate because of the high density of population. For example, in 2008, New Delhi had only 132 public toilets for women, while men had 1,534 (Sheikh, 2008: 23). As a result, women and girls have to queue up for long periods of time to gain access and the opportunity cost is very high, for example, children are left unattended, household chores are delayed, etc.

These toilet facilities also suffer from certain design issues. For example, pour flush toilets require women to first fetch water for this purpose, skylights on the roofs of toilets are used by men to peer into women's toilets, or the toilets face the street. This reflects the exclusion of women from the design stage. The fixed opening and closing hours (the toilet facilities are usually open from sunrise to sunset) deprive women of access to these facilities during night-time. The location of public or community toilet facilities also acts as a deterrent. They are usually located at the edge of the colony (rather than in the middle) and women and girls have to walk long distances to reach them. It is particularly dangerous after dark as there is inadequate street lighting and men frequent such locations, especially where liquor stores are also located in such areas. The toilet facilities themselves are considered unsafe for women because in some cases, men use the facilities reserved for women while in other cases, men hide inside the toilets to attack women (Massey, 2011).

The problems with the alternatives including public toilets or community toilet complexes, some of which are highlighted above, have led to the continuance of the practice of open defecation, which does not address the special needs of women and girls insofar as access to sanitation is concerned. Some of the challenges are discussed below.

The issue of safety is a major concern and women are vulnerable while going for, engaging in, and returning from open defecation. As a result women usually go in groups for open defecation or ask male members of the family to accompany them (Amnesty International, 2010). In order to defecate away from their home, they walk long distances to find isolated places (such as open areas and vacant lots). There is an opportunity cost associated with this. The use of isolated places for open defecation also increases their vulnerability to verbal or sexual harassment, non-physical intimidation, threat of violence or actual assault, abduction, theft and/or sexual assault (including rape), loitering gangs of unemployed youth and men, health problems due to the lack of hygiene in areas where open defecation takes place (Wendland et al., 2009), accidents (such as falling into a *nallah*/drain or being hit by a vehicle), and/or animal attacks and insect bites (snakes, scorpions, etc.) (Pardeshi, 2009: 80).

Further, the literature suggests that on account of the immodesty/embarrassment associated with open defecation and the associated risks, women usually go for open defecation early in the morning or late at night, thus becoming 'prisoners of daylight' (UNICEF, 2010). In order to avoid having to go to the toilet during the day, they 'hold out' or reduce their intake of food (especially fibrous foods such as pulses or leafy vegetables) and liquids. This may have a detrimental effect on their health causing problems such as urinary tract infections, chronic constipation and other gastric disorders (Burra et al., 2003; Pardeshi, 2009; Wendland et al., 2009), and an unbalanced diet may result in negative long-term consequences, including various disorders of the bowel, such as constipation, piles, serious inflammation and irritable bowel syndrome (Tearfund, 2008). The practice of open defecation is also likely to cause psychological problems (WASH, 2006; DASRA, 2012). The sanitation needs of women during menstruation, pregnancy and postnatal recovery are different and become problematic where open defecation is the only option (WASH, 2006; DASRA, 2012). The problems associated with open defecation are aggravated during the rainy season and in the winters.

Health issues may arise due to open defecation. For example, open defecation contaminates the topsoil with different pathogenic bacteria (such as salmonella and shigella) that are known to cause typhoid, dysentery and several other infectious diseases. In the absence of running water, women use this topsoil to clean hands (and utensils), which exposes them to faeces-borne diseases causing dysentery, which is transmitted to their children (Darapuri, 2012). Women may also have to stand repeatedly while defecating (and hide) because of passing people or vehicles (Pardeshi, 2009: 83), another consequence of development, which has extended the road network, reduced the availability of open spaces and increased human traffic as well.

Women require greater privacy when using toilets and washing themselves. In many cases, the practice of open defecation represents a loss of dignity, particularly when the reduction of vegetation/tree/forest cover and the conversion

of open spaces, especially in urban areas, increase their vulnerability. In rural areas, women may still be able to use bushes for cover but even this modicum of privacy is not usually available to women in urban areas. Further, women may be prevented from defecating by the owners of fields or open spaces. The non-availability of adequate police presence/police protection in slums increases the feeling of insecurity for women.

The literature demonstrates an overwhelming focus on the link between gender violence and the availability of sanitation facilities in an urban milieu, especially in slums and resettlement colonies. Although women in rural areas are equally vulnerable to sexual violence linked to the practice of open defecation (Siddiqui, 2013; Tewary, 2013), rural areas have received disproportionately little attention in the existing literature (Gol, 2011a; Pardeshi, 2009). The traditional *pardah* custom imposes an additional limitation on the ability of women to move freely during the daytime (Gol, 2011a; Pardeshi, 2009).

POLICY FRAMEWORK

The sanitation policy framework has not paid adequate attention to the issue of physical and sexual violence against women while accessing sanitation facilities. The major central government programmes and schemes concerning sanitation mention the issue but they do not specify any operational provisions to prevent it. This section examines some of the existing policies in order to highlight this lacuna.

The first flagship programme on rural sanitation – the Central Rural Sanitation Programme (CRSP) - was launched by the central government in 1986. It highlighted three major objectives – improvement of the quality of rural life, providing privacy to women and protecting the dignity of women (Gol, 2011a: 4). The CRSP was renamed the Total Sanitation Campaign (TSC) in 1999, and this scheme also approached the issue in a peripheral manner without paying adequate attention to it. For instance, the TSC Guidelines 2011 provide that

'Community Sanitary Complex is an important component of the TSC. These Complexes, comprising an appropriate number of toilet seats, bathing cubicles, washing platforms, Wash basins etc., can be set up in a place in the village acceptable to women/men/ landless families and accessible to them' (Gol, 2011a: para 5.7.1).

The recently introduced *Nirmal Bharat Abhiyan* Guidelines, 2012 are no different insofar as they also merely pay lip service to this issue by re-asserting the slogan of the CRSP. These guidelines state that

'the Government started the Central Rural Sanitation Programme (CRSP) in 1986 primarily with the objective of improving the quality of life of the rural people and also to provide privacy and dignity to women' (Gol, 2012: 5). The aim of the Strategic Plan 2011-2020 is the creation of *Nirmal Bharat* but it also adopts a general view by limiting its response to the issue. It merely emphasizes the importance of 'addressing inequalities in access with special attention to vulnerable groups such as women...' (Gol, 2011c: 2).

The policy responses to this issue at the urban level are no different. They fail to address the issue except for a general call to focus on the needs of women. For

example, the National Urban Sanitation Policy 2008 recognises the impacts of poor sanitation on women and emphasises the need for a '...special focus on hygienic and affordable sanitation facilities for the urban poor and women' (Gol, 2008: 7).

SEXUAL VIOLENCE AND OPEN DEFECATION: THROUGH THE LENS OF CRIMINAL LAW

There is a rapid and alarming increase in violence against women in India. The National Crime Records Bureau has reported 24,206 cases of rape in 2011, an increase of 9.2 per cent compared to the year 2010 (Gol, 2011d: 83). But these statistics do not highlight the varied circumstances in which these offences are committed, including the lack of safe sanitation facilities and the practice of open defecation. In order to fill this gap, judicial decisions involving the offence of rape, as defined in sections 376 of the Indian Penal Code (IPC), 1860, were examined.

However, only those cases were considered where the offence was committed when the victim went for, was engaged in or was returning from open defecation, answering the call of nature, or relieving/easing herself. This section reproduces the major specific and general findings of the study. Wherever relevant, the specific findings have been compared with the findings of the available literature discussed above. This section also highlights changes in the provisions of the applicable criminal laws resulting from the Criminal Law (Amendment) Act, 2013, which are likely to affect the manner in which similar cases are decided in the future.

SPECIFIC FINDINGS

Geographical distribution of cases

The geographical distribution of the examined cases involving rape where the victim was going for, engaged in or returning from open defecation is skewed towards three states – Jharkhand, Odisha and Bihar – followed by Chhattisgarh, Madhya Pradesh and Uttar Pradesh. This confirms the findings in Census 2011 that 77 percent of homes lack toilet facilities in the State of Jharkhand, followed by 76.6 percent in the State of Odisha and 75.8 percent in the State of Bihar. All three are among India's poorest states with a majority of the population living on less than Rs. 50/- a day (Gol, 2011b). Moreover, while the literature focuses primarily on the issue in the urban context, a majority of the reported cases concerning sexual violence involve open defecation in rural areas. According to Census 2011, the percentage of households without toilet facilities is higher in rural areas (69.3 percent) than in urban areas (18.6 percent) (Gol, 2011b). This may also be explained by the higher prevalence of the practice of open defecation in rural areas than in urban areas, partly due to the greater availability and use of public/community toilet facilities in urban areas where it is not possible to construct private toilets, as well as a greater acceptance of the culture of using toilet facilities in urban areas.

Time of occurrence

Women usually go for open defecation either early in the morning or after sunset for a number of reasons, including the embarrassment of carrying out their 'private' business in public. Courts have also made the observation that women have to go out for open defecation 'before sunrise or after sunset for want of privacy'.¹ A majority of the cases examined also involved attacks on women and minor girls before sunrise or after sunset. However, in the case of *State of Uttar Pradesh v. Shanker*,² the Supreme Court has observed that there can be no generalisation because individual habits, state of health (particularly digestive system), weather etc. may influence the time at which a person goes to relieve herself. In fact, in a number of cases, women were raped when they went to answer the call of nature during the day.³

Similarly, in a number of cases, minor girls were raped when they went to ease themselves during the day.⁴ This may be partly explained by the fact that while women can 'hold out' until after sunset, young children are unable to do. Also, while the parents are busy at work during the day, they cannot keep any eye on their children. In some cases, minor girls were raped during the day when they went to ease themselves in open spaces near their school.⁵ While the judgements are silent, the common reasons for this practice are the absence of toilet facilities in schools or inability to access the available toilet facilities. Therefore, the availability of, and access to, toilet facilities in schools is important to ensure the right to privacy, dignity and safety for girl students.

Is there safety in numbers?

The vulnerability of single women is borne by the fact that in a majority of cases examined, the victim had gone to answer the call of nature alone. The qualitative studies show that women try to go for open defecation in groups to avoid the possibility of physical attacks. The High Court of Patna acknowledged this common practice, especially in rural areas, in the case of *Deva Anand Singh and Others v. State of Bihar*,⁶ where it observed that

'It is seldom that one would find that a lady would travel by herself to ease herself in a village, the reason is that because there is no source of light once it gets dark and there is always danger of snakes and other insects in the field just behind her house.'

But unfortunately, there appears to be no safety in numbers either. In *Praihad Mukinda Kshirsagar v. State of Maharashtra*,⁷ for example, the accused murdered the minor victim when she, along with her two sisters, was sitting on the side of the road to answer the call of nature at the outskirts of the village at about 11.00 am in the morning.

Reporting the offence: Relevance of the victim's age

A majority of the reported cases involved minor girls. One reason may be that in these cases, the decision to approach the police/court is usually in the hands of a single male member (the father of the girl). For example, in *Vishwambhar Malakar and Others v. State of Bihar*,⁸ two minor girls informed one of their mothers about the gang rape but they were afraid to report the incident until the

1. *R. Tamilarasi v. The District Collector*, 2010 (8) MLJ 662; *Tasleem S/o Masoom v. State of Uttar Pradesh*, Jail Appeal Nos. 5728, 5729 and 5730 and Criminal Appeal No. 5844 of 2005, Decided on 10 July 2006 (Uttar Pradesh).

2. AIR 1981 SC 897; 1980 Supp (1) SCC 489.

3. See *Satya Vir v. State*, Criminal Appeal No. 89 of 2004, Decided on 17 September 2009 (Uttarakhand); *Md. Raja Khan v. State of Bihar*, Decided on 1 June 2007 (Bihar); *Shamshuddin and Another v. State of Haryana*, Criminal Appeal No. 1163-SB of 2002, Decided on 1 April 2010 (Punjab & Haryana); *Karuppan Alias Karuppusamy v. State*, CrI. Appeal No. 368 of 2003, Decided on 29 October 2004 (Tamil Nadu).

4. See, for example, *Devalla Raghavulu v. State of Andhra Pradesh*, 2005 CrIj 1041 (Andhra Pradesh); *Sargun Kapri v. State of Bihar*, 2006 CrIj 471 (Bihar); *Balwant Singh v. State (Govt. of NCT of Delhi)*, Criminal Appeal No. 113 of 2005, Decided on 16 November 2010 (Delhi).

5. See *Harish Ram Alias Rangila v. State of Uttaranchal*, 2005 CrIj 1596; *Thoththan Alias Periyakaruppan v. State*, Criminal Appeal No. 70 of 2008, Decided on 22 April 2010 (Tamil Nadu).

6. 2010 CrIj 1839.

7. (2002)104 Bom LR 602. See also *Vishwambhar Malakar and Others v. State of Bihar*, Criminal Appeal No. 295 of 1996 (S.J.), Decided on 17 May 2011 (Bihar); *Tasleem*, *supra* note 1.

8. *Vishwambhar*, *supra* note 7.

male members of the family returned. However, in the case of a married woman or a woman of marriageable age, the decision rests with several male relatives including the husband and his family, as well as her father, etc.

Another possible reason is the readiness of the police to register a First Information Report (FIR) in cases involving minor girls.⁹ In India, great importance is attached to the chastity of a woman and the stigma of rape is an important consideration. Courts have also highlighted the link between a woman's chastity and 'her own future chances of getting married and settling down in a respectable or acceptable family'.¹⁰ A minor girl (usually) does not have a sexual history, which can become the basis of social disapproval in cases of rape. However, following the Criminal Law (Amendment) Act, 2013, section 53A of the Indian Evidence Act, 1872 now provides that evidence of the victim's character or her past sexual history is irrelevant on the issue of consent or its quality. Section 146 further provides that a woman cannot be cross-examined about her 'general immoral character' or past sexual history.

GENERAL FINDINGS

Consent and absence of physical injuries

Courts have repeatedly held that the absence of physical injuries does not mean that the woman consented to the sexual act.¹¹ In the case of *Satbeer Singh v. State*,¹² for example, the Delhi High Court observed that

'Every female reacts differently when sexually assaulted, some just freeze, some get hysterical, some fight it out, some submit weakly. The court is not to infer anything adverse from any or absence of these factors.'

Nevertheless, in a number of examined cases, the absence of injuries or the failure to raise an alarm has led to an adverse inference that the prosecutrix had in fact given her consent for the sexual act. In such situations, the benefit of doubt has been given to the accused.¹³ A review of cases confirms the widely prevailing fear of reprisal. In some cases, the accused has/have threatened to kill the victim and then committed rape.¹⁴ This may lead to the absence of struggle/resistance (and therefore no injuries on the victim's person) and/or the failure to make noise to attract attention¹⁵. In other cases, the perpetrators make death threats to victims¹⁶ and their families¹⁷ if the fact of the incident is disclosed by the victim to her family or reported to the police. Other possibilities include where the victim is tied up or drugged and raped. However, the proviso to Explanation 2 in the amended section 375 of the IPC now provides that the fact that a woman did not physically resist penetration cannot be regarded as suggesting that she consented to the sexual activity.

Defences

The most common reasons that are relied on by the accused to plead that the prosecution's case alleging rape is a case of false allegation are prior enmity,¹⁸ non-payment of a debt amount, a love affair between the accused and the prosecutrix, political rivalry, etc. However, the determination whether or not it is a case of false implication will depend on the facts and circumstance of each case. For example, in *Md. Raja Khan v. State of Bihar*,¹⁹ the Patna High Court

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Personal communication with Dr. Mrinal Satish, Associate Professor, National Law University, Delhi, 15 April 2013

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See *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, AIR 1983 SC 753. See also *Dinesh alias Buddha v. State of Rajasthan*, (2006) 2 SCC (Cri) 1; *Dildar Singh v. State of Punjab*, AIR 2006 SC 3084; *State of Himachal Pradesh v. Raghubir Singh*, 1993 (1) SCALE 708 (SC).

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Kapoor Alias Raj Kapoor v. State of Madhya Pradesh, Criminal Appeal No 813 of 1990, Decided on 2 March 2009 (Chhattisgarh).

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i i + (2004) DLT 487.

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Devs Anand, *supra* note 6.

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Satya Vir, *supra* note 3; *Md. Raja Khan*, *supra* note 3; *Satish Kumar Sahu v. State of Chhattisgarh*, 2006 CrLJ 1467.

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In some cases, the victim's attempt to raise an alarm/cry for help was stopped by a threat to kill her by firearm or at gunpoint. See *Md. Khalil v. State*, Criminal Appeal (SJ) No 81 of 1995, Decided on 23 June 2011 (Bihar); *Rajiv S/o Naresh Chand Prajapati v. State of Uttar Pradesh*, MANU/UP/0485/2007.

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See *Kabhairbhai Deshaibhai Rathod v. State of Gujarat*, MANU/GJ/7011/2007; *Md. Raja Khan*, *supra* note 3.

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See, for example, *Sanjay Kumar v. State (NCT of Delhi)*, Criminal Appeal No 20 of 2004, Decided on 8 February 2010; *Satya Vir*, *supra* note 3; *Harishchandra Sah and Another v. State of Bihar*, 2005 (3) BLJR 1886.

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Rajiv, *supra* note 15; *Harishchandra*, *supra* note 17; *Kapoor*, *supra* note 11.

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Supra note 3.

refused to accept the defence plea that the informant's husband had filed a false case to humiliate the appellant as he had been fined for theft of mangoes from the appellant's orchard. The court observed that the informant's husband would not put his wife's social image and prestige at stake for the levy of such a small fine. In another case where the victim was a minor girl, the High Court held that the father of the victim would not falsely implicate the accused and 'put most blasphemous allegation on his own unmarried daughter aged about 13 years to ruin her whole life' because he had not paid a credit amount of Rs. 3000/-.

A delay in lodging the First Information Report (FIR) is the other plea resorted to by the accused to show that it is a case of false allegation. However, courts have held on several occasions that mere delay in lodging the FIR is not necessarily, as a matter of law, fatal to the prosecution.²⁰ In fact, courts have consistently taken the view that there can be several genuine reasons for a delay in filing an FIR, and have condoned such delays. In *State of Punjab v. Gurmit Singh and others*,²¹ the Apex Court identified the reluctance of the prosecutrix or her family members to go to the police and complain about an incident which concerns her reputation and her family's honour as one of the main reasons for the delay in lodging of the FIR. This well settled principle of law relating to sexual offences has been applied in a number of cases where women were sexually assaulted when they went to answer the call of nature.²² The fear of reprisal may also result in delay in lodging the FIR.

Another reason for delay in lodging the FIR is that after the commission of the offence of rape, first an attempt is made to 'settle' the case in panchayats. Although it is a well-established rule that there can be no settlement of statutory offences such as rape, this is a fairly common practice in some parts of rural India. The accused may confess his crime and offer to marry the victim, or the panchayat may persuade the accused to do so, or the matter may be settled through monetary payment. In many cases, the victim's family prefers to follow this approach to 'protect the victim's honour' without seeking the victim's opinion. Courts have also acknowledged the existence of this practice and condoned the resulting delay in lodging a complaint.²³

Sentencing

The Indian Penal Code generally prescribes the maximum punishment for a majority of the offences included therein. The trial court has the discretion to determine the nature and extent of punishment after considering the nature of the offence, the manner in which the offence was carried out, the previous conduct of the accused and other mitigating factors as well as aggravating factors such as deliberate violence, use of lethal weapon, deliberate cruelty, nature of injury etc. (Vibhute, 2008: 393, 398-99). Before the recent amendment, the proviso to Section 376(2) (g), IPC permitted the court to impose a lesser sentence for adequate and special reasons. The reasons included the age of the accused at the time of commission of the crime²⁴, that he is married and/or with children, that he is the sole earning member/bread winner of his family,²⁵ or passage of considerable time since the occurrence of the crime²⁶.

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State of Himachal Pradesh v. Gian Chand, 2001 CrLJ 2548.

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JT 1996 (1) SC 298; 1992 (2) SCC 338.

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See, for example, *Vijay Kumar v. State of Punjab*, Criminal Appeal No. 1152-SB of 1999, Decided on 16 March 2010; *Thofithan*, supra note 5.

23
Rajiv, supra note 15; *Shyam Nayak v. State of Jharkhand*, MANU/JH/0661/2007.

24
Shafi v. State, AIR 1953 All 502; *Vishwambhar*, supra note 7. But in *Atul S/o Baburao Mandale v. State of Maharashtra*, 2010 (112) Bom LR 4148, the High Court observed that the young age of the appellant cannot be considered as special and adequate reason to award a lesser sentence.

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Devalla, supra note 4.

26
Vishwambhar, supra note 7.

CONCLUSION: THE WAY FORWARD

'Safe' sanitation facilities do not merely signify better health and better environment for women. They are also essential factors that make dignity, privacy and safety meaningful. The high incidence of physical and sexual offences against women while going for open defecation demands that the issue of lack of sanitation facilities is addressed as a top priority. In this context, the role of criminal law and the sanitation law and policy framework is different.

The criminal justice system provides *post facto* justice to the victim of a sexual offence by punishing the offender and arguably results in a deterrent effect. The conviction of an accused can be based on the sole testimony of the prosecutrix so long as there is some corroborating evidence, such as medical evidence. Prompt lodging of an FIR or an adequate explanation for the delay in lodging of FIR, immediate medical examination of the victim, which can establish rape and determine the presence of injuries (which is relevant in certain cases), etc. can strengthen the prosecution's case.

It is important to note, however, that most cases are not open and shut cases. In a number of cases, the delay in lodging the FIR may be genuine but may not be satisfactorily explained; the investigating officer, the medical examiner and/or the lawyers may fail to discharge their obligation to ensure that due process is followed in the collection, storage and examination of the available evidence; etc. Further, the restrictive definition of rape under the Indian Penal Code sent a negative signal to the victim that the criminal justice system had failed to appreciate the gravity of the crime that has been committed against her person. This is due to the fact that penile penetration was an essential pre-requisite for the commission of a rape as defined under the IPC. Anything short of that would at best fell within the purview of outraging the modesty of a woman under section 354 of the IPC, for which the maximum sentence was two years. However, the amended IPC expands the list of circumstances in which a man is said to have committed rape under section 375.

In most cases of violence linked to the practice of open defecation, women and girls prefer to suffer in silence rather than inform the authorities or their family members. There are several reasons for this. First, there is the fear/risk of reprisal attacks by the perpetrators. Second, the importance of chastity in a country like India means that the stigma of rape deters women from reporting such incidents. Third, there is a pervasive lack of public confidence and trust/faith in the law enforcement machinery. The police may not recognise the violence suffered by women as a crime, and even if they do, they may refuse to take action and prosecute the accused. A connected reason is the lack of protection for victims and witnesses. Fourth, widespread ignorance of the law and how the judicial system works is a major obstacle in access to justice in such cases. Fifth, the process of lodging the FIR, which is the first step to initiate legal proceedings against the accused, is time consuming and jurisdictional issues may result in delay. Finally, a large number of women still fail to report rapes to the police because they fear embarrassing and insensitive treatment by the medical examiners, the law enforcement personnel and/or the cross-examining defence lawyers (Chandrachud & Manohar, 2012: 1921). As a result, acts of violence against women and girls go unpunished and the perpetrators continue to act with impunity.

Therefore, in order to ensure that criminal acts that deny women's rights to privacy, dignity and safety are not committed in the first place, the solution needs to be found elsewhere. The practice of open defecation provides perpetrators with the opportunity to attack women; in other words, it increases women's vulnerability to such attacks. The effective implementation of existing sanitation-related laws and policies that impose an obligation on local authorities to provide toilet facilities and recognise the need to improve access to toilets for women respectively, can go a long way in reducing the occurrence of such incidents.

REFERENCES

Amnesty International, 2010, *Risking Rape to Reach a Toilet: Women's Experiences in the Slums of Nairobi, Kenya*, London, UK: Amnesty International.

Burra, S., S. Patel and T. Kerr, 2003, Community-Designed, Built and Managed Toilet Blocks in Indian Cities, *Environment & Urbanization*, Vol. 15, No. 2, pp.11-32.

Chandrachud, Y.V. and V.R. Manohar (ed.), 2012, *Ratanlal & Dhirajlal: The Indian Penal Code*, New Delhi: Lexis Nexis India.

Darapuri, S., 2012, Bill Gates: From Toilets to Dignified and Healthy Living, Available at: <http://www.countercurrents.org/darapuri120712.htm> (Last accessed on 12 November 2012).

DASRA, 2012, *Squatting Rights – Access to Toilets in Urban India*, Available at: http://www.dasra.org/pdf/SquattingRights_Report.pdf (Last accessed on 15 November 2012).

Gol, 2008, *National Urban Sanitation Policy 2008*, New Delhi: Ministry of Urban Development, Government of India.

Gol, 2011a, *Total Sanitation Campaign – Sanitation for All*, New Delhi: Department for Drinking Water and Sanitation, Government of India.

Gol, 2011b, *Houses, Household Amenities and Assets in Census of India 2011*, New Delhi: Office of the Registrar General and Census Commissioner, Ministry of Home Affairs, Government of India.

Gol, 2011c, *Rural Sanitation and Hygiene Strategy 2012-2022*, New Delhi: Ministry of Rural Development, Government of India.

Gol, 2011d, *Crime in India 2011 Statistics*, New Delhi: National Crime Records Bureau, Government of India.

Gol, 2012, *Nirmal Bharat Abhiyan Guidelines 2012*, New Delhi: Ministry of Drinking Water and Sanitation, Government of India.

Lennon, S., 2011, *Fear and Anger: Perceptions of Risks Related to Sexual Violence Against Women Linked to Water and Sanitation in Delhi, India*, SHARE Briefing Note, London, UK.

Massey, K., 2011, *Insecurity and Shame: Exploration of the Impact of the Lack of Sanitation on Women in the Slums of Kampala, Uganda*, SHARE Briefing Note, London, UK.

McFarlane, C., 2008, *Sanitation in Mumbai's informal settlements: governance, infrastructure and cost-recovery*, IrmgardConinxStiftung, Available at: http://www.irmgard-coninx-stiftung.de/fileadmin/user_upload/pdf/urbanplanet/identities/ws1/074%20%20McFarlane.pdf (Last accessed on 1 December 2012).

Pardeshi, G., 2009, *Women in Total Sanitation Campaign: A Case Study from Yavatmal District, Maharashtra, India*, *Journal of Human Ecology*, Vol. 25, No. 2, 79-85.

Sheikh, S., 2008, *Public Toilets in Delhi: An Emphasis on the Facilities for Women in Slum/Resettlement Areas*, CCS Working Paper No. 92, New Delhi: Centre for Civil Society.

Tearfund, 2008, Gender and Sanitation: Breaking Taboos, Improving Lives. Available at: http://tilz.tearfund.org/webdocs/Tilz/Topics/C9113_SanGender_WEB.pdf (Last accessed on 10 November 2012).

Tewary, A., 2013, 'India – Bihar rapes 'Caused by Lack of Toilets'', *BBC News India*, published on 9 May 2013

Travers, K., P. Khosla and S. Dhar (ed.), 2011, Gender and Essential Services in Low-income Communities: Report on the Findings of the Action Research Project Women's Rights and Access to Water and Sanitation in Asian Cities, Montreal, Canada: Women in Cities International.

Siddiqui, Faiz Rahman, 2013 'Shortage of Toilets in Rural Areas Brings Trouble for Women', *Times of India* (Kanpur), 6 July 2013.

UN-HABITAT, United Nations Centre for Human Settlements Programme and *Mahila Chetna Manch*, 2006, Navigating Gender in Development of Water and Sanitation in Urban Areas – A Rapid Gender Assessment of the Cities of Bhopal, Gwalior, Indore and Jabalpur in Madhya Pradesh, India, Nairobi, Kenya: UN-HABITAT, United Nations Centre for Human Settlements.

UNICEF, 2010, Gender and Water, Sanitation and Hygiene (WASH), Available at: http://www.unicef.org/esaro/7310_Gender_and_WASH.html (Last accessed on 1 November 2012)

Vibhute, K.I., 2008, *PSA Pillai's Criminal Law*, Gurgaon: Lexis Nexis.

WASH, 2006, For Her It's The Big Issue – Putting Women at the Centre of Water Supply, Sanitation and Hygiene, Evidence Report, Available at: http://www.wsscc.org/sites/default/files/publications/wsscc_for_her_its_the_big_issue_evidence_report_2006_en.pdf (Last accessed on 15 December 2012).

Wendland, C., I. Dankelman and M. Samwel, 2009, Gender Aspects of Sustainable Sanitation Based on Experiences and Literature Research, Available at: http://huussi.net/tapahtumat/DT2009/pdf/Claudia_Wendland.pdf (Last accessed on 15 December 2012).