

Chapter-11

DEATH PENALTY IN RAPE CASES IN INDIA

Shruti Verma

Assistant Professor ,Kr.Mangalam University, Gurugram

Chapter Id: ASU/NSP/EB/AGRLWC/2022/Ch-11

doi: <https://doi.org/10.52458/9789391842680.nsp2022.eb.asu.ch11>

ABSTRACT:

The author in this Chapter attempts to establish the various perspectives and considerations concerning awarding of death penalty. The study also attempts to depict the grey area i.e., the cases in which death sentence may be awarded. For it is often said and observed that 'it is not the gravity of punishment which may prevent the commission of crime but the consistency & its implementation'. The idea brings us to the perspective that making the punishment harsher & harshest may not be the key to the menace of rape & sexual offences, but the fear of being convicted & punished by the court of law may be more impactful if implemented. But in a country like India, where justice is not merely in the hands of court of law but also depends on the talent & quality of the officers of court i.e., the advocates, it is very difficult to catch hold an offender who is rich or a person in power. In such a case, rewarding of 'death penalty' as a punishment for rape would not just be wrong principally but will also pose many more dangers to the lives of innocent, whereby on the contrary the real offender may stay loose. Moreover, going by the theory of reformative and rehabilitative justice which we follow in India, the purpose of law is not to kill or finish the criminal but the crime. It is in this direction that we will discuss the issue of death penalty in the cases of penetrative sexual assault.

OBJECTIVE:

The objective of the study is to address the existing perspectives on death penalty in rape cases followed by Supreme Court's take on it. The author also purports to share her opinion concerning rewarding of death penalty in cases of penetrative sexual assault in India as sanctioned by the Indian Penal Code, 1860 as well as POCSO, 2019 as amended.

INTRODUCTION:

'Death Penalty' which has always been a debatable issue, because of the impact it is believed to have on society and offenders, specially in rape cases is the centre of discussion in this chapter. Where society is divided on perspectives regarding awarding of death sentence, there are many factors which shall be considered while we even think of demanding for death penalty in rape cases. Times and again various studies and researches have been conducted to find out the deterrent effect of death penalty. But there lacks sufficient evidence to prove that death penalty has more deterrent effect as compared to life imprisonment, it is just to calm the public outrage that in many rape cases, death penalty is awarded discarding various factors. But as far as Supreme Court's opinion is concerned, even till today, there is no strict criteria to award death

sentence but the same still depends upon the discretionary wisdom of the court which is usually based on the facts and circumstances of each individual case.

Existing Legal Position of Death Penalty for Rape Cases in India:

'Rape' is defined under Section 375 of the IPC. So far, there are few categories of rapes/penetrative sexual offences under IPC, for which the maximum punishment provided is 'death penalty' according to Section 376. These categories are exhaustive to the following:

- **Section 376A:** Punishment for causing death/persistent vegetative state of victim- Whoever commits the offence of rape as provided under Section 376, & in such commission causes the death of victim or causes her to be in persistent vegetative state, shall be punished with the rigorous imprisonment of minimum twenty years which may extend to life imprisonment or even death.
- **Section 376AB:** Punishment for rape of women under 12 years of age- Whoever commits the rape of a woman under twelve years of age shall be punished with rigorous imprisonment of minimum twenty years and it may extend to life imprisonment or death along with the payment of fine & medical expenses.
- **Section 376DB:** Punishment on gangrape of women under twelve years of age- An offence of rape is constituted by each of such persons where, a woman of 12 years of age is raped by one or more persons in furtherance of a common intention & each of such persons shall be punished with the life imprisonment i.e., for remainder of a person's natural life & fine & the punishment may extend to death.
- **Section 376E:** Punishment for Repeat Offenders- Whoever is previously convicted under Sections 376/376A/376AB/376D/376DA/376DB & is subsequently convicted for the offence under the aforesaid sub-section, shall be punished with the imprisonment for life or with death.

The abovementioned few provisions for death penalty in certain forms of sexual offences have been added by the Criminal Law amendment Act, 2013, passed after the recommendations of J.S. Verma Committee. Recently, **Section 6**, has been added by way of **POCSO Amendment Act, 2019** which has extended the maximum punishment of aggravated penetrative sexual assault to death penalty.

Although, the committee did not refrain from expressing its views that they do not recommend death penalty keeping in account the room for sentencing arbitrariness,

for the larger interests of society and also that the death penalty did not really act as a deterrence to the serious crimes.

Determining Elements for Capital Punishment:

- **Socio-Economic Background:** The statistics reveal a very vital information regarding the socio-economic status of the prisoners of death row which brings us to the conviction that socio-economic background of the convicts plays a very important role. In a country where, approximately 35.2% of population is still living in slums & fighting for their livelihood and have not been given the equal opportunities as a matter of fact, devoid and deprived of the appropriate grooming, life values, atmosphere, social and ethical values, we cannot really make the deterrent punishment like death penalty/capital punishment as a general rule or shall not adopt this punishment frequently for that may again not only amount to the injustice and gross violation of human rights this population is already facing but any misuse of the provision of death penalty by the rich may cause apparent injustice to the lives of already downtrodden. Supreme Court in a case recently commuted death penalty into life imprisonment giving regards to the fact that trial court while awarding death sentence to the convict should have also considered the poor socio-economic background and conditions of the convict rather than just the mitigating circumstances of the case.
- **Reformative & Rehabilitative Perspective:** Reformative and rehabilitative theory of punishment may not always hold an essential value and may not always be adopted in case of every nature but, the same should indeed be kept in mind while delivering the most stringent punishment i.e., 'capital punishment'. It is in this perspective that the court intends to resort to the medium of reformative and rehabilitative justice for which, they even consider the facts like poor socio-economic conditions of an offender and his potential & room for rehabilitation & reformation along with the other mitigating circumstances surrounding the case while awarding the death sentence to him. The basic idea behind reformation and rehabilitation of an offender is to train and treat an offender in such a way that he becomes capable of returning back in the society and to also inculcate in him, the sense of self-realization which may thereby prevent the commission of crime. Although in the heinous and brutally committed offences of rape/sexual offences, this reformation may give them an opportunity to at least stay alive and not to be hanged. This is the reason why 'capital punishment' is practiced as a 'rarest of rare' rule and as the punishment of last resort, when there seems no room for rehabilitation and reformation of the offender and where offender becomes so

imminently dangerous for the society. One such example is the case of Nithari, where the Supreme Court upheld the sentence of death to Surendra Kohli considering the case as rarest of rare. In India, it is this theory of rehabilitation and reformatory justice which we follow in India, which is contrary to the Retributive theory. The rehabilitation and reformation of the offenders is also an ultimate objective of the prison authorities, which is also considered by the Supreme Court while commuting the sentence of death into life imprisonment.

- **Death Penalty-An Exception:** It has been time and again reiterated that 'death penalty' is an exception but not the general rule. So principally, as debated, if 'death penalty' is fixed as a punishment for any sorts of rape, making it as a general punishment or rule for an offence, or is awarded without considering the criteria for making the case fall in the category of rarest of rare, it may not just be inappropriate principally but the same may also pose great danger to the lives of victims of sexual assault. It has also been affirmed that even if the cases reduced due to the fear of capital punishment, the offenders did not leave the victim alive due to the fear of punishment after being caught hold. Supreme Court has also held its view, that while awarding death penalty in any case, the court shall record special reasons. This itself means that even the court is of the view that it has to be used exceptionally and only as the means of last resort.
- **Impact on the family and children:** Moreover, being the part of a society, a person can not stay devoid of its consciousness. In India, we even have the provision recognizing 'attempt to suicide' as an offence under the IPC. The idea behind the same is that, a person's life is not just his life, but includes all those who are affected by it. Similarly, when there are offences committed like rape, murder or any other such offence which even if visibly and physically committed on one but has the potential to impact the conscience of many, the sentiments of all those people shall be taken into consideration. It is for this reason that the offences like these are considered as not 'crime against an individual' but 'crime against the State' and therefore, in such cases, prosecution is filed on the name of 'State' and not the victim. On one hand, there has been cases like 'nirbhaya' rape case, which shook the conscience of whole nation and thereafter the public outrage led to the passing of Criminal Law amendment Act, 2013 which added many offences to it which were not previously defined under IPC, 1860. Similarly, when the punishment of any sorts is inflicted on a person, it is not just that person who suffers always. A family including the parents, spouse or children of an offender may not suffer so much from his absence but the psychological trauma they will have to go through after the offender is inflicted with the capital

punishment is also a vital factor. The same idea is also shared by the Law Commission of India in its report on death penalty.

- **Applicability of Rule of 'Rarest of Rare':** There are presently the two schools of thoughts as far as death penalty in grievous offences is concerned. On one hand, the parliamentarians and a major population of general public is of the view that for heinous offences committed grievously, death penalty shall be awarded and shall be adopted as a general rule in rape cases to give it a deterrent effect. This means that the basis of capital punishment here is the 'gravity of an offence'. Supreme Court has discarded the circumstances of the criminal while awarding death penalty which is contrary to the decision of court in *Bachan Singh v. State of Punjab*. On the contrary, Supreme Court in its catena of judgments has held that 'gravity of an offence' cannot be sole the criteria to award capital punishment. Circumstances of the criminal shall also be given due weightage. Recently, Supreme Court while deciding a case held that although the heinous crime of brutal rape and murder of a 7 year old girl shocks our conscience, but convict's poor socio-economic background, impeccable conduct in jail, his family, no antecedent criminal history shows the room for reformation and rehabilitation which rules out the necessity to categorize this case as 'rarest of rare' and award him death penalty. The trends of Supreme Court judgments reveal that till date as such there is no straight jacket criterion for the award of death penalty but the same is dependant on the court's discretion which again depends upon the wisdom of court and it deciding the case on the basis of facts and circumstances of an individual case. But if we see the court's practice while awarding death sentence, it still follows the idea that death penalty shall be resorted only as a last resort and only in the 'rarest of rare' cases which again shall be based not on an individual condition but on all the mitigating and antecedent conditions.

The court has also evidently recognized various factors including these which shall be considered while rewarding death sentence and the court has also commuted the sentence into life imprisonment when the trial court failed to regard the following pertinent "factors-

- i) Age;
- ii) Early family background (siblings, protection of parents, any history of violence or neglect);
- iii) Present family background (surviving family members, whether married, has children, etc.);

- iv) Type and level of education;
- v) Socio-economic background (including conditions of poverty and deprivation, if any);
- vi) Criminal Antecedents (details of offence and whether convicted, sentence served, if any);
- vii) Income and kind of employment;
- viii) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any), etc.”

The court also considered the fact that this list is not exhaustive but inclusive and illustrative. Further, these details shall be made available to the trial court at early stage itself and the accused shall be given an opportunity to establish all these mitigating circumstances in his rebuttal.

CONCLUSION:

So far it is evident as to how different perspectives exist as regards awarding of capital punishment in death cases. But there still lack the proper guidelines and criteria as to what situations may make an offence or case to be suitable for death sentence. The jurisprudence on this issue is still evolving including the idea as to the criterion to decide the cases of rarest of rare. The position is still undecided as to when a case would fall in an exception and out of general rule. There is also lack of clarity on the part of Supreme Court which lays down diverse criteria in every case which sometimes may be biased by the Court's own experience or at times by the public outrage and these days, media trial as well. It is not wrong that few kinds of cases are left to the discretion and wisdom of court. But again, to avoid unprecedented error, it is necessary that some common criteria or guidelines are adopted and laid down to determine the nature of offences and justiciability of capital punishment thereto. It is not just the right to life of the victim which our Constitution guarantees, but one of the constitutional values of our Constitution is also – social justice, which is available to both the victim as well as an offender and so the right to life.