Chapter 6
Chapter - 6

LAW OF EVIDENCE - NEED FOR REFORMATION

6.1 EVIDENCE: DISADVANTAGES TO WOMEN

Generally rules of evidence occupy a subordinate position in legal literature. But this is not so, as far as offences relating to women is concerned. The burden of proof in the accusatorial system lies on the prosecution. So the defence lawyer would rule out the case for the prosecution as a cock and bull story and hence totally unworthy of credence. In cases relating to rape, dowry death, cruelty in marriage, sexual harassment, the law of evidence works to the disadvantage of the women. Though in some areas, the necessary amendments have been made, yet much has to be done if the Criminal Justice System has to work effectively.

Evidence in offences of rape can be broken down into several steps. They can be enumerated as follows:

- Complaint
- Proof of want of consent
- The need for corroboration of the testimony of the victim
- Evidence of the character of the victim and other improper questions.

The Law Commission in its Eighty-fourth Report stated: "First she must convince the police, then be subjected to a medical examination and
finally undergo an embarrassing and humiliating cross examination in court. In rape cases, evidence about the victim’s past sexual or gynaecological experiences is presumed to have a bearing on the outcome of the trial".1

6.1.1 Presumption as to Consent in Rape

From the nature of the offence of rape and the circumstances in which it is committed, it can be inferred that witnesses are not possible and mostly the woman victim is the only witness. The accused person in such cases easily gets an acquittal for want of proof. Therefore the 42nd Law Commission has recommended the insertion of a provision in the Evidence Act with regard to the presumption that such intercourse was without the consent of the woman and she has alleged that she did not consent.2 But the condition is, sexual intercourse has to be established and the question is whether it was without the consent of the woman and then she should allege that she did not consent. The Criminal Laws (Amendment) Act 1983 has partially incorporated this provision with regard to the custodial rape and the presumption is to be raised only when the sexual intercourse has been


2Ibid, p.35.
Presumption as to consent as per the 42nd Report has been suggested and the Commission recommended the new section 111A to be placed below section 111. Section 111 of the Evidence Act deals with proof of good faith in transactions where one party is in relation of active confidence of the other.

The section 111A is as follows:

In a prosecution for rape or attempt to commit rape, where sexual intercourse is proved and the question is whether it was without the consent of the woman and the woman with whom rape is alleged to have been committed or attempted, states in her evidence before the court that she did not consent, the court shall presume that she did not consent.\(^4\)

Having understood the difficulties in establishing the commission of rape because in most cases there may not be eyewitnesses, the evidence has to be circumstantial. If there are injuries or marks on the body of the victim then the presumption is that the offence has been committed and this forms one of the circumstantial evidence. But in all cases there may not be physical injury. The woman or child sometimes may be too week or dazed or shocked to resist. The place or venue where the incident occurs, the

---

\(^3\) The presumption as to consent of custodial rape only is incorporated in criminal Laws (Amendment) Act 1983 by inserting S.111-A in the Indian Evidence Act.

number men surrounding the women are all factors, which make it difficult for her to resist. Seeing that resistance is futile, she makes a passive submission.

Under such circumstances physical injury may not be there on the body of the victim. If in such cases presumption as to want of consent is raised under Section 114 of the Indian Evidence Act, it states as follows:

"Court may presume existence of certain facts: The court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case."

The cases that have developed with regard to the issue of presence or absence of physical injury, the necessity for providing a new section was felt. The Criminal Law Amendment Act has introduced section 114A, which reads as follows:

114A- In a prosecution for rape under Cl(a) or Cl(b) or Cl(c) or Cl(d) or Cl(e)-or Cl(g) of sub section of sec.376 of the Indian Penal Code (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the women alleged to have been raped

---

6 Law Commission of India 172 Report Para 7.4.1.
and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

The presumption under section 114-A is attracted only in cases of rape falling under section 376(2) and not under section 376(1) which is rape by a man with his wife or his wife who is below twelve years of age.

The modification to Sec.114-A has been recommended by the Law Commission of India Report 172. The recommendation is as follows:

Presumption as to absence of consent in certain prosecutions for sexual assault. In a prosecution for sexual assault under (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause of or sub-section (2) of section 376 of the Indian Penal Code (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it is without the consent of the other person alleged to have been sexually assaulted and such other person states in his/her evidence before the court that he/she did not consent, the court shall presume that he/she did not consent.

Sexual assault by the husband who is separated from his wife has also been added raising presumption under Sec.114-A. Difficulties may arise to draw any conclusion because in the eye of law they are husband and wife living for some reasons separately and marital relationship does not come to an end.
6.1.2 Evidentiary value of Medical Examination of the Victim and Accused

The medical report can establish the sexual intercourse but there is no provision in the code of Criminal Procedure 1973 with regard to the medical examination of the victim. The medical examination that is done at present is as per the general provision of Criminal Procedure Code.7

In the case of State of A.P. v. Gangula Satya Murthy8 a girl of sixteen years was raped and throttled to death. Sessions court convicted the accused under Sections 302 and 376 of the Indian Penal Code.9 The High Court on appeal acquitted him. The conclusion drawn by the High court was based on some fragile grounds and it totally upset a well-reasoned judgement of the Sessions Court. The Supreme Court expressed discontent and stated that10 "The High Court committed serious error in skipping the

7Sec.53 Examination of accused by medical practitioner at the request of police officer – (1) when a person on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there were reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose. (2) Whenever the person of a female is to be examined under this section the examination shall be made only by, or under the supervision of or female registered medical practitioner.


91997 SC 1589.

10Ibid p.1592-1593.
contents of Ext. P.13 letter and also the injury on the right side of the posterior labia minora.... in his extra judicial confession the respondent had said that he took the girl by force and kept her on the cot as he was long nurturing the lust to enjoy her. The doctor found fresh vaginal tear on the right side of the inner vaginal wall posterior. This injury is indicative of forcible sexual intercourse”.

Restoring the conviction and sentence passed by the trial court. Justice Thomas pointed out “that courts are expected to act with great responsibility while trying an accused on a charge of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the witnesses which are not of a fatal nature to throw out allegations of rape. In Madan Lal v. State of Jammu and Kashmir the High Court reversed the order of acquittal of the trial court. The Head Master of a Middle School was convicted for attempt to rape of a minor girl under Section U/375/511 of IPC. The minor girl was his student who had gone to his house to cook food for him. “The prosecutrix had in her statement in the cross examination made against the appellant, alleged penetration but the lady doctor who examined her stated

---

11 Ibid p.1593.

that there was no mark of violence on any part of the body and on local examination there was no mark of violence on her private parts like the vagina, the hymen was intact and on examination of vaginal smear no living or dead sperm was found on the slide and accordingly she opined that no definite opinion could be given regarding the attempt of sexual intercourse. Based on the medical report the appellant contented that prosecution story was not true and that he had not made any penetration into the vagina to a depth of quarter of an inch and the girl being 13 years the hymen was intact. The salwar of the prosecutrix was sent to chemical examiner for analysis and the report of Forensic Science Laboratory revealed the presence of semen/human spermatozoa. This became strong corroborative evidence to the prosecution's version, which Sessions Court overlooked. The conviction made by the High Court was not set aside by the Supreme Court. In the case of State of Karnataka v. Manjanna the offence of rape was established by placing reliance on the medical evidence. The accused contention was that there was enmity between him and the prosecutrix and he was falsely implicated. The evidence given by the prosecutrix was not only corroborated by several prosecution witnesses but also by medical evidence. Prosecutrix stated that she had sustained scratches

13 *Ibid* p.678.

on the right side of her checks, on her chin and on the left side of the hip, which was swollen. Her mother also stated there were some scratches on her body. The medical examiner PW13 in the oral testimony stated that the injuries found on the prosecutrix’s face could be due to the struggle she underwent to extricate herself from the clutches of the person committing rape.

The chemical examiner in his report stated that there were seminal stains on the blue ‘lehanga’ worn by the prosecutrix. However there were not traces of semen stains on the clothes worn by the accused because the medical examination was done after 23 days after the incident. The trial court relied on other evidence submitted by the witnesses without discrepancy and on the testimony of the prosecutrix. The High Court concluded that the doctor PW13 had lied\(^\text{15}\) and set aside the conviction of the trial court. The delay that occurred in the examination of the accused had altered the case. However, the Supreme Court set aside the order of the High Court and restored the conviction and the sentence imposed by the sessions judge. The significance of the medical examination in rape case and how early it has to be done can be understood from the remarks made by the Apex Court before parting with the case.\(^\text{16}\)

\(^{15}\text{Ibid., p.466.}\)

\(^{16}\text{Ibid., P.467.}\)
"... We wish to put on record our disapproval of the refusal of some Government hospital doctors particularly in rural areas, where hospitals are few and far between, to conduct any medical examination of a rape victim unless the case of rape is referred to them by the police. Such a refusal to conduct the medical examination necessarily results in a delay in the ultimate examination of the victim, by which time the evidence of the rape may have been washed away by the complainant herself or be otherwise lost. The Court has directed the state to ensure that such situation does not occur in future."

In Mangilal v State of Rajasthan,17 the trial court failed to appreciate the medical evidence given by the doctor that the substance, which was administered to the victim-wife, was so dangerous to life. The father of the victim deposed that his daughter informed him that her husband had administered the poison to her. In the cross-examination also these facts were not shaken. The Sessions Judge totally ignored this evidence. The reasoning given by the court was highly erroneous and unsustainable. When the order of the Sessions Court came by way of Revision to the High Court, it summarily dismissed the Criminal Revision.

The Supreme Court observed18:

"... through the evidence of these two witnesses the prosecution had also conclusively proved that 2nd respondent had subjected Munki to cruelty. In view of this direct evidence we fail to understand how it could have been concluded that there was no oral, documentary or circumstantial evidence. This finding cannot be sustained

---

17 AIR 2001 S.C. 2937.

18 Ibid., p.2939.
and has to be set aside. The accused – respondent number 2 is held guilty of offences under Sections 307, 324 and 498-A of the I.P.C”.

Therefore the presumption as to consent in the cases of rape in the absence of a proper report of the medical examination of the victim and the accused by the medical examiner is merely notional. Hence it is submitted that provisions in this regard be inserted in the code of Criminal Procedure 1973. Recommendations are made in Law Commission 172nd Report.19

### 6.1.3 Evidence as to Past Sexual History

A glaring piece of injustice in the form of raking the entire past of rape victim continues with unabated vigour by virtue of Sections 14620 and 15521 of the Evidence Act. The accused stands in a better position in this respect as his bad character cannot be questioned by virtue of sections 5322

---

19 See Annexure VI, Para 4.8 and para 7.3.5.

20 Sec.146. Questions lawful in cross examination: When a witness is cross examined, he may in addition to the questions here in before referred to be asked any questions which tend—

   (1) to test his veracity
   (2) to discover who is and what is his position in life or
   (3) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to penalty or forfeiture.

21 Sec.155. Impeachment credit of witness. The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the court, by the party who calls, or with ... (4) when a man is prosecuted of rape or an attempt to ravish it may be shown that the prosecutrix was of generally immoral character.

22 In criminal cases previous good character relevant. In Criminal proceedings the fact that the person accused is of a good character is relevant.
inquires about his past activities. The sexual history of the victim is invariably dug out or insinuated in cases of rape. While a previous relationship of the victim with the accused could be relevant in determining whether or not this particular instance was rape, the same could not be said of the victim's possible relationships with other men.\textsuperscript{24} If a girl is in love with a person and gives consent to a sexual intercourse with her lover, it does not mean that she would give consent to any other person.

Sexual history evidence was also used to show a propensity for dishonesty.\textsuperscript{25} Whatever statement she made was doubted and the woman with sexual experience outside marriage was considered to be dishonest. When the man’s sexual experience was believed to have no effect on men’s veracity confirms the suspicion with which the male legal system viewed a woman who pointed the finger at their brethren.\textsuperscript{26} It is only questioning the chastity of the woman. Thus incorporating a provision like Sec.155(4) a false presumption is created that women who is of general immoral character might have consented to the sexual act by the accused in a particular case. The provision may also be invoked even in the cases where

\textsuperscript{23}Sec.54. In Criminal proceedings the fact that the accused person has a bad character is relevant unless evidence has been given that he has a good character is which case it becomes relevant.


\textsuperscript{25}Law Commission of India Eighty Fourth Report, \textit{op.cit.}, Par 7.21.

\textsuperscript{26}\textit{Ibid.}
a female is below the statutory age of consent and her consent is irrelevant.27

In a prosecution for rape or attempt to commit rape, where the question of consent to sexual intercourse or attempted sexual intercourse is at issue, evidence of the character of the prosecutrix or of her previous sexual experience with any person other than the accused shall not be relevant on the issue of such consent or the quality of consent.28 However by introducing this section not much change can be brought when the defence lawyers to the utter humiliation of the prosecutrix ask questions in the cross-examination. It has been suggested by the Law commission to hold the trials in camera unless the presiding judge with reasons to be recorded suggests otherwise. This follows that reporting or printing any matter has to be done only after obtaining the previous permission of the court.29

The torture undergone by the prosecutrix at the stage of cross-examination is effectively explained in State of Punjab v. Gurmit Singh.30

“The provisions of Evidence Act regarding relevancy of facts notwithstanding some defence counsel adopt the strategy of continual

28 Law Commission of India 84th Report op.cit., para 7.28.
29 Ibid., par.5.7.
30 AIR 1996 S.C 1395.
questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross examination, the court must also ensure that cross examination is not made to the humiliation of the victim of crime. A victim of rape, it must be remembered has already undergone a traumatic experience and if she is made to repeat again and again in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as 'discrepancies and contradictions' in her evidence.

This observation of the Apex Court is more than a guideline to the defence counsel to cross-examine the prosecutrix in a proper way without causing her mental agony and harassment.

Throughout history, our culture has made certain assumptions regarding the physical characteristics of human being. Based on these
assumptions laws are framed. This is very much true in the case of rape law, which assumes that men act in certain way while women act quite differently. The evidence of the rape victim’s past consensual practices is considered relevant.

In United States the reformers questioned the assumption which is based on common law. Changes were effected in the legal system and one such change was the enactment of rape shielded statutes.

The rape shield laws were enacted to serve five basic purposes.31

(i) To protect the privacy of rape victims.
(ii) To encourage rape victims to come forward.
(iii) To enhance the accuracy of the outcomes in rape trials by excluding irrelevant or prejudicial evidence.
(iv) Deterrence.
(v) Protecting the autonomy of women.

The Federal rule of Evidence 412, the rape shield statute was enacted on October 30, 1978.32 The Rule 412 prohibits the introduction at trial of reputation or opinion evidence of a rape victim’s sexual history subject to three exceptions. Most State statutes follow the basic contours of Federal

---


Rule of Evidence 412. The State of Georgia has revised the rape laws in 1989 with total ban on sexual history evidence.

The rapist may take the defence of mistake of fact. He may state that he believed that the victim consented to sex even if she did not consent. He may offer evidence to show that the victim was 'promiscuous' and this led him mistakenly to believe that she consented. Believing a woman consented because she is promiscuous is going back to the stereotyped thinking. The rape shield law stands as a protective covering to the dignity of the women. Evidence as to what happened during the encounter is of more probative value. Reputation and opinion evidence are to be taken with less probative value "Under a communicative model of sexuality, reputation or opinion evidence that the victim was sexually experienced can never be admissible to show the defendant's mistaken belief in consent... Communicative model requires communication between the two people during the encounter, rather than reliance on stereotypical notions of sexuality."

The Law Commission in its 172nd Report recommended the deletion of clause (4) of Sec.155 of the Evidence Act. The text reads on follows: The past sexual history of the victim is invariably questioned in most of the rape cases. Even when the charge of rape is not based on want of consent but

---

33 Ibid., p.555.
34 Ibid., p.569.
some other ground like the rape of a girl below the age of consent. The
general immoral character of the victim is brought out into question.

When the prosecutrix is examined in court, all types of question
tarnishing her image is put to her in the cross examination by the defence
council in order to establish that she is of generally immoral character. This
provision is a violation the dignity of the women.

So far as sexual incident with the accused is concerned, the
assumption underlying the admissibility of such evidence would appear to
be that once a woman has consented to a sexual relationship with a
particular man, she is unlikely to dissent at a later stage. Every act of
sexual intercourse by a man with the same woman without her consent
amounts to a distinct offence of every time, therefore, such an assumption
may not be realistic in every case, it could occasionally be true. Therefore
it was suggested in the 84th report of the Law Commission to exclude
evidence as to the past sexual experience of the prosecutrix with persons
other than the accused and to exclude evidence as to such experience even
with the accused where she is below the statutory age of consent. The
recommendation was for the deletion of clause (4) of 155 of the Evidence

---

35 Law Commission of India 84th report op.cit., para 7.2.0.
36 Ibid., para 7.20.
37 Ibid., para 7.21.
Act by the Law Commission, in its 172nd Report. Each act of sexual intercourse is distinct one. The issue is whether she consented for that particular case which has been brought for trial. The harassment and humiliation she faces in the trial court will come to an end by removal of this section.

The Law Commission in its 172nd Report, also observed that two other sections of the Evidence Act dealing with prosecutrix caused humiliation and harassment to her and therefore wanted some additions to be made to Sections 53 and 146.

Section 53 deals with the relevancy of the previous good character of the accused. It states 'In criminal proceedings the fact that the person accused is of a good character is relevant'.

Section 54 deals with the previous bad character of the accused, which should not be made relevant unless evidence has been given that he has a good character.

The Law Commissions of 84 and 172 have both recommended a new section to be added to section 53A. The recommendation of the 172nd Report is as follows:

"In a prosecution for an offence under section 376, 376A, 376B, 376C, 376D or 376E or for attempt to commit any such offence, where the

38Law Commission of India 172 Report para op.cit., 7.4.2.
question of consent is in issue, evidence of the character of the victim or of his/her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent”.

It is submitted that this addition of a new section placed below section 53 is not logical. Section 53 deals with the character of the accused when relevant. When there is a proposal to delete Section 155(4), the necessity of introducing Section 53A does not arise.

Again in Section 146 of the evidence, the Law Commission 172nd Report has recommended an addition to be made. The section reads as follows:

"146(3) In a prosecution for an offence under section 376, 376A, 376B, 376C, 376D or 376E or for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross examination of the victim as to his/her general immoral character, or as to his/her previous sexual experience with any person for proving such consent or the quality of consent”.

39 Ibid., para 7.4.3.
40 Ibid, para 7.4.4.
Section 146 reads\textsuperscript{41} when a witness is cross-examined he may in addition to the question herein before referred to, be asked any question, which lend -

(a) To test his veracity

(b) To discover who he is and what is his position in life or

(c) To shake his credit by injuring his character although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Section 146 deals with question, which can be put to a witness with a view to, shake his credit by damaging his character. Therefore, to check the wide powers given to the defence counsel, some protection has to be given to the prosecutrix. So the Section 146(3) has been added. Section 146(3) is a protection or shield to the prosecutrix during the course of cross-examination. Sec.148 to is decide whether the witness is compelled to answer the question or not and can warn the witness that he is not bound to answer. If flagrant misuse is done by the defence lawyer to humiliate the prosecutrix, the matter can be reported to the High Court or other authority to which the lawyer is subject as per section 150 of the Evidence Act.

\textsuperscript{41}Sec.146, Indian Evidence Act.
Maybe if a report is sent to the State Bar Council, they can take necessary action.

6.1.4 Corroboration of the Prosecutrix Testimony

In most of the rape cases there is no direct evidence of the eyewitnesses. Under such circumstances the statement of the victim assumes great importance and should not be discarded till there are overwhelming circumstances to suggest that her statement is false.

There is no provision in the Indian Evidence Act to require corroboration of the statement of the prosecutrix in the prosecution for rape or attempt to ravish Sec.114 illustration (b) of the Evidence Act prescribes a rule of presumption relating to an evidence of accomplice that "an accomplice is unworthy of credit unless corroborated in material particulars." But Sec.133 of the same Act should not lost sight of. This section provides that 'a conviction is not illegal even if it is based on the uncorroborated testimony of an accomplice.' Two questions emerge from the reading of the sections. Firstly whether and under what circumstances the conviction on the uncorroborated evidence of an accomplice is valid in law. Secondly to what extent this rule of corroboration can be applied in the case of the prosecutrix. If the prosecutrix is an accomplice then the rule of

---

42 S.114 (b) of the Indian Evidence Act, 1872.
43 S.133 of the Indian Evidence Act, 1872.
evidence has to be taken into consideration. The word ‘accomplice’ is not defined in the evidence Act and the dictionary meaning of the word is ‘a guilty associates in a crime’. The House of Lords has explained accomplice as follows:

(i) Participants in the crime charged whether as principles or accessories before or after the fact (in the case of felonies) or as persons committing procuring or aiding and abetting a misdemeanours.

(ii) Receivers giving evidence at the trial of those alleged to have stolen the goods received by them; and

(iii) Parties to crimes alleged to have been committed by the accused.

Thus the inference that can be drawn from this ruling is that, the woman who is raped, is not an accomplice but a victim of the crime. In Bhardwaja Bhajani Bhai Hariji Bhai v. State of Gujarat, the Supreme Court asserted that in Indian setting, refusal to act on the testimony of a victim of sexual assault is like adding insult to injury. The rule of corroboration of the evidence of the prosecutrix which has not been enacted by the legislature has been incorporated as a matter of prudence and the judicial decisions has established this fact. ‘A large volume of case law has grown up, which treats the evidence, though often with widely differing

45 Davies v. Director of Public Prosecutions 194 AC 378.
reasons the position now reached is that the rule about corroboration has hardened into one of law.\textsuperscript{47} The Supreme Court explained that the rule of corroboration in rape cases is not a necessity before there can be conviction but is required as a matter of prudence. A conviction can be made without corroboration wherever necessary, but this fact should be present in the mind of the judge before convicting a person without corroboration. Therefore the rule is only a rule of prudence. The decision of Rameshwar's case was approved in \textit{Sidheswar Ganguly v State of West Bengal}.\textsuperscript{48} In \textit{Gurcharan Singh v State of Haryana},\textsuperscript{49} the prosecutrix had complained to Harnam Singh and others and this was taken as a factor to corrobate her evidence.

\textbf{In \textit{Rafiq v. State}}\textsuperscript{50} the Court held that conviction will not be illegal even if it is on the sole testimony of the prosecutrix. In \textit{State of Maharashtra and Siree Atyachar Virodhi Parishad v Chandra Prakash Jain}\textsuperscript{51} the Apex Court held that if the testimony of the prosecutrix remains unpunctured and unimpaired and there is no evidence of her enemity with the accused, then the conviction of the accused can be sustained on her

\begin{itemize}
\item \textsuperscript{47} A.I.R. 1952 SC 54, 56.
\item \textsuperscript{48} 1958 SCR 749, 759.
\item \textsuperscript{49} (1972) 2 SCC 749.
\item \textsuperscript{50} AIR 1981 S.C. 559.
\item \textsuperscript{51} 1990 Cr.LJ SC.889.
\end{itemize}
evidence without any corroboration. She is, after all, not an accomplice, but an unfortunate victim.

In *State of Maharashtra v. C.K. Jain*\(^{52}\) the Supreme Court said

"We think it proper having regard to the number of sex violation cases in recent past particularly, molestation and rape in custody to remove the notion that persists that the testimony must be corroborated. If the evidence is worthy of credit it must be relied upon without corroboration."

In one of the very early case *Bechu v. King*,\(^{53}\) former Chief Justice of the Calcutta High Court observed:

"Personally I think there is little danger of false charge of rape being made by parents of any little girl. The consequences of such a charge are disastrous. In many cases, the little girl becomes an outcast and her chances of ultimate marriage are either completely ruined or very seriously affected. I must confess that after sitting on the bench for nearly fifteen years in five provinces I have yet to come across a case where a false charge of this nature was made and the falsity thereof clearly established."

This case being a path finder judgement in many cases, which came later on the judges have not laid much stress on corroboration of the testimony of the victim of rape.

\(^{52}\) ibid.

\(^{53}\) (1950) 51 Cr. LJ 153(56).
In principle, the evidence of a victim of sexual assault stands on par with evidence of an injured witness.\textsuperscript{54} The victim of an injury stands as the best witness for the injury inflicted on him. In the case of rape victim, the best evidence can come from the prosecutrix. Hence evidence of a victim of a sex offence is entitled to great weight absence of corroboration notwithstanding.

In the case of \textit{State of Punjab v. Gurmit Singh},\textsuperscript{55} the Supreme Court has held that the evidentiary value of the testimony of the prosecutrix is vital and only when there is some compelling reasons, the necessity of corroboration of her statement is required. It stated:\textsuperscript{56}

"...seeking corroboration of her statement before relying upon the same, as a rule in such cases amount to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault, stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding.

\textsuperscript{54} Deb. R. \textit{Criminal Justice}. The Law Book Company (P) Ltd. 1998, p.262
\textsuperscript{55} \textit{Ibid.}, p.1393.
\textsuperscript{56} \textit{Ibid.}, para 7.
Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime, but is a victim of another person’s lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

The lacuna in the law has been removed by inserting a new section in the Criminal Law Amendment Act of 1983 (Act 43 of 1983). The Act has inserted section 114(A) to the Indian Evidence Act which states that in an offence of custodial or gang rape excepting rape on one’s own wife when she is under twelve year of age, if the prosecutrix deposes in the court to say that she did not consent to the sex act by the accused, the court shall presume that she did not consent. The ball lies in the court of the Public Prosecutor to utilise the section and be benefited.

6.2. DOWRY DEATH CASES - QUIBLING WITH MURDER OR SUICIDE

The Dowry Prohibition Act 1986 as a social legislation proved to be toothless in eradicating the evil of dowry in the society in view of the
absence of any stringent provisions.\textsuperscript{57} Along with the Indian Penal Code and the Criminal Procedure Code, the Evidence Act\textsuperscript{58} has been amended. Under Sec.113-A the court will presume that the accused is guilty of abetment of suicide if, his wife died within seven years of their marriage and if it is shown that she was being treated with cruelty by the husband or his relatives. A presumption has also been incorporated in the Indian Evidence Act to enable the court to draw an inference of abetment of suicide when the question is whether the commission of suicide by a woman was abetted by her husband or any relative, the complainant has been freed from that onus to prove that the accused has indeed abetted the offence. The following cases show how the law works.

In \textit{Subedar Tewari v State of Uttar Pradesh}\textsuperscript{59} the trial court thought that the unnatural death was not suicide. The High court took a different view. After going through the evidence, the Supreme Court concluded that the bride was murdered and awarded life sentence for the husband. The judgement is mainly a reappraisal of evidence in the case, which showed that she was optimistically looking for a new life and the prospects of separation from her husband did not bother her.


\textsuperscript{58} Indian Evidence Act, Section 113-A.

\textsuperscript{59} AIR 1989 S.C. 733.
In *Atula Ravinder v State of Andhra Pradesh*, it was proved that the accused was harassing the deceased and making demand for dowry and was subjected to cruelty within the meaning of Section 498-A IPC. The trial court and the High Court convicted and sentenced the accused for cruelty and homicide but the Apex Court convicted only for cruelty. According to the Supreme Court, the prosecution had miserably failed to establish that the death was otherwise than in normal circumstances. This decision of the Apex Court is not in keeping with the spirit of Section 304-B. There was evidence to show that she was treated cruelly and the court itself upheld the conviction under Section 498-A IPC for harassment but acquitted the accused on the charge under Section 304-B. The presumption under 113-B was totally ignored. If enactments specially passed to protect women are not interpreted in the spirit in which they are enacted, then a very bleak future awaits the dowry victims.

Abetment of suicide by the relatives of the husband and the husband himself is taken as evidence in cases where the woman is forced to put an end to her life. In *Vazier Chand v. State of Haryana* within a year of Veena’s marriage with Kanwar Singh, she died of burns. The sessions judge sentenced both the husband and his father for abetment of suicide and

---

60 AIR 1991 S.C. 1142.
cruelty. The High Court confirmed the conviction but reduced the sentence on the father but the Supreme Court acquitted both on the charge of abetment of suicide. Regarding the death there was contradictory evidence. From the marriage upto the time of the death there were demands made and the woman was harassed. But the Supreme Court failed to appreciate these evidences.

In *Brij Lal v. Premchand*\(^6\) the husband, an advocate harassed his educated wife. It led to physical and verbal assaults resulting in the wife’s suicide. The Supreme Court went through the massive evidence against the husband including the letters written by the wife to her relatives and witness’s statement. It remarked: ‘The High court has failed to comprehend the evidence in its full context and instead has whittled down the evidence by special reasoning’. The court further remarked that the High court’s judgement suffered from serious set back and it was manifestly unsustainable. The accused led a settled life after acquittal for eleven years. Under such circumstances the Supreme Court felt that he should not be sent back to jail but enhanced the fine imposed on the husband.

In *State of Punjab v Iqbal Singh*\(^6\) the Supreme Court decided the dowry death case in the light of the new provisions of Sec.304-B & 498-A IPC and Sections 113-A and 113-B of the Indian Evidence Act. The sole

\(^{63}\) AIR 1989 S.C. 1661.
\(^{64}\) AIR 1991 S.C. 1532.
intention of adding these sections was to curb dowry deaths with a firm hand. The husband in this case harassed his wife for dowry along with his mother and sister. The wife, an employed woman could not bear the torture. Her efforts to get a transfer to some other place also failed. Finally she found the only solution was to end her life. But before dying she left enough evidence to establish her death was due to ill treatment. The trial court convicted the husband but the High court came to the conclusion that there was no evidence of abetment to commit suicide. The Supreme Court observed that the offences dealing with dowry death was not prevailing at the time of the offence, but stated that intention of the law makers was to curb such crime in the context of rising number of dowry deaths.

The effect of the new provisions of dowry was however not appreciated in Soni Babubhai v State of Gujarat.\textsuperscript{65} Ironically, this judgement takes a strict view of the procedure, while the earlier case decided that dowry death case in the light of the new provision. The father of the victim had not made any charge of abetment of suicide though torture for dowry was alleged. The judgement also does not deal with the evidence in detail, confining itself to procedural law.

\textsuperscript{65}AIR 1991 S.C. 2173.
In *Balram Prasad Agarwal v. State of Bihar*, the police charge sheeted the accused under Section 300 and also alternatively under Section 498-A Penal Code. The Trial Court framed the charge under Section 300 of IPC and did not frame any charge under Section 498-A of IPC. The evidence recorded clearly established the offence under Section 498-A IPC. The Supreme Court exercising its power under Article 142 of the Constitution examined the culpability of the accused instead of remanding the matter to Trial court.

In this case, a tragic fate visited a young married woman of aged 28 years. She is alleged to have been forced to commit suicide by falling in a well situated on the backside of the house of the accused.

Evidence given by the father of the deceased woman stated that her neighbours told him about sounds of quarrels, coming from house of deceased on the night previous to her death. The neighbours later on turned hostile and deposed in the Court that they heard sound of woman but they could not identify the voice. The information given by them to the father of the deceased forced him to rush to the police station and the neighbours did not deny about some information they had given to him. The court allowed it as hearsay evidence. The neighbours had turned hostile. Relying on Section 114 of the Evidence act the court stated:

---

66 AIR 1997 S.C. 1831.
"It can, therefore be safely be presumed under Section 114 of the Evidence Act that the cruel treatment meted out to the deceased by the accused earlier had continued unabated till the very last, when she was forced to commit suicide on that fateful night. Such a presumption of continuance of cruel treatment which is established on record necessarily points an accusing finger to the accused”.

The Apex Court did not raise a presumption as to dowry death in *Sham Lal v. State of Haryana*. There was a dispute between two parties to the marriage regarding dowry. The wife was sent back to her parent's home and was again taken back to nuptial home after ‘panchayat’ which was held to settle their dispute. After this event she lived for ten to fifteen days and finally died. There was no evidence whether she was cruelly treated or harassed with demand for dowry during the fifteen days period.

The Court did not raise the legal presumption under Section 113B of Indian Evidence Act. It tried to give an interpretation to ‘soon before her death’. The prosecution did not bring any evidence to show what happened during the fifteen days after the compromise. The Court observed:

“In the absence of any such evidence it is not permissible to take recourse to the legal presumption envisaged in Section 113-B of the Evidence Act. That rule of evidence is prescribed in law to obviate the prosecution of the difficulty to further prove that the offence was perpetrated by the husband, as then it would be the burden of the accused to rebut the presumption”.

---

67 AIR 1997 S.C .1873.
Having said that the prosecution is relieved of the burden of proving and it is for the accused to rebut the presumption the court in its earlier statement states that there was nothing in record to show that she was treated with cruelty or harassed.\textsuperscript{69} Both statements made by the court are contradictory. The case could have been easily brought within the preview of Section 304B of the IPC by taking recourse to legal presumption envisaged in Section 113-B of the Evidence Act.

6.2.1 Burden of Proof in Dowry Death

With introduction of Sec.304-B in IPC and Sec.113-B in the Evidence Act has shifted the burden of proving the innocence on the person against whom there is an allegation of causing dowry death. This was to combat the difficulty in adducing evidence for the crime of dowry death and to overcome the legal hassles.

In \textit{Ashok Kumar v State of Rajasthan}\textsuperscript{70} the Supreme Court corrected the errors of the subordinate court though they said that they should be cautious in reassessing evidence.

Though there was no dying declaration as such in this case, entries in the injury report and the bed ticket made while the woman was brought conscious could be taken as dying declaration, in which it was recorded that

\textsuperscript{69} \textit{Ibid} p.,1875.
\textsuperscript{70} AIR 1990 S.C.2134.
her brother-in-law set her on fire. The entry in the bed ticket and the injury report made by doctor on duty corroborated each other, so the declaration was authentic, said the Supreme Court.

Here the significance of Sec.113-B of the Evidence Act can be understood. Had this section not been incorporated, the accused would have been acquitted.

*Brijlal v. Premchand* is a case where our Supreme Court had rendered a judgement acquitting the accused on the ground that more than 11 years had elapsed since the High Court had acquitted the accused. The court observed:

‘.... alarming number of suicide and dowry deaths by women has shocked the legislative conscience to such an extent that the legislature has deemed it necessary to provide additional provisions of law, procedural as well as substantive to combat the evil and has consequently introduced Sections 113A and 113B in the Indian Evidence Act and Section 498A and Section 304B in the Penal Code”.

It is submitted that the above observation of the court is mere verbosity considering the fact of the acquittal of the accused.

In *Vadde Rama Rao v State of Andhra Pradesh*, the court acquitted the accused on the ground that there was possibility of accidental death by falling into a well.

---

72 Id. at p.1669 per Natarajan, J.
73 1990 Cr.L.J. 1666.
In this case there was clear evidence of dowry harassment and the dead body of deceased was found in the well of a temple. The appellants contented that for a conviction under Section 304-B of I.P.C., the death must have been a result of the act of the husband. Though the trial court convicted them, the High Court acquitted them of the charge under Section 304-B but directed that from the fine of Rs.20,000/- a sum of Rs.15,000/- was to be paid to the father of the deceased. The court observed:

"The husband or the relative need not be the actual or direct participants in the commission of the offence of dowry death. For those that are direct participants in the commission of the offence of death, there are already provisions in Sections 300, 302 and 304 of the Penal code... What the legislation brought is to curb the social evil i.e. demand for dowry, the interpretations of the provisions must be in consonance with modern needs".\(^7^4\)

Though the court pointed out that the main object of Dowry Prohibition (Amendment) Act of 1984 and 1986 is to curb the evil of dowry and to make it severely punitive in nature and not to extricate husbands from the clutches of Section 302 of the Penal Code, the decision seems to protect the persons who are involved in the heinous crime of dowry death. The court here seems to have mistaken the real meaning of Sections 304-B and 113-B of the Evidence Act.

\(^7^4\) Id. at p.1672, per Bhaskara Rao, J.
The hard view of the judiciary is also reflected in the case of *Omprakash v. State of Punjab* where the court observed:

'It is the duty of the court in a case of death because of torture and demand for dowry to examine the circumstances of each case and evidence adduced on behalf of the parties for recording a finding on the question as to how the death has taken place. While judging the evidence and the circumstances of the case the court has to be conscious of the fact that a death connected with dowry takes place inside the house, where outsiders who can be said to be independent witnesses in the traditional sense are not expected to be present.76

Thus the courts seem to have not fully utilised the Sec.113-B which has been exclusively incorporated in the Evidence Act to trap the culprits involved in the cases.

6.2.2 Application of Expost Facto Law

The general rule is that the presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence, on the contrary, provisions of that nature are to be construed as

---

75 AIR 1993 S.C .9138. A similar view was also adopted in *Kishore Kumar v. State*, 1993 Cr.LJ 253.

76 Id.at p.141 per N.P.Singh, J.
retrospective unless there is a clear indication that such was not the intention of Parliament.\textsuperscript{77}

In Romesh Kumar \textit{v} State of Punjab,\textsuperscript{78} the important issue that arose was with regard to the applicability of the presumption arising in Sec.113-A of the Evidence Act to a crime which was committed prior to its insertion in the said Act. The deceased unable to bear torture for dowry committed suicide on 9.5.1983 and Section 113-A was inserted in the Evidence Act with effect from 25.12.83. The court observed:\textsuperscript{79}

"It is universally recognised as a principle of law that procedure of a trial, civil or criminal is governed by the rules of the forum and the law of evidence is part of the Law of Procedure. Taking it to be law of procedure, it results in practical convenience. It has been taken as established that the Law of Evidence is a branch of adjective law and therefore, all questions of evidence must be decided, according to the law of the forum in which the action is tried. And being part of the law of Procedure changes, in Evidence Act like changes in other rules of procedure are retrospective in nature..., even without raising the presumption in the pre-amendment period, the court was not absolved in putting parties to proof and arrive at a conclusion that a woman committed suicide which was abetted by her husband or her relatives. By introducing the aforesaid section, the court has been facilitated to raise a presumption though rebuttable. Raising of presumption at a trial is not part of the substantive law and hence question of restropsectivity in this regard does not arise".\textsuperscript{79}

\textsuperscript{78}1986, Cri.L.J.2087.
\textsuperscript{79}Id. at p.2090 per M.M. Punchhi. J.
The case of Vasanth also involves the above similar issue. Here the body of the deceased who had been the victim of dowry harassment was found in the well on 14.2.1984. The counsel for the appellants contended that Section 498-A of the Penal Code and Section 113-A of the Evidence Act was operative from 25th December, 1983, they were prospective in nature and any instances of cruelty prior to the commencement of the above said amendments could not be taken into consideration to establish the guilt of the appellant.

The counsel for the State contended that if the instances of cruelty are drawn from the period prior to the commencement date of the Amended Act, it does not make the aforesaid provisions retrospective. While deciding the case the Court observed:

'The combined effect of the language of Section 498-A, IPC read with the legal presumption provided under Section 113-A of Evidence Act, makes it clear that the statutes permit to draw past instances of cruelty by necessary implication. There is clear intendment by providing presumption as to abetment of suicide by a married woman. Thus when a period of seven years from the date of marriage is to be considered to raise a legal presumption it cannot be done without drawing the past instances from the commencement date of the aforesaid persons. To my mind failure to ignore the past instances of cruelty to consider an offence under Section 306 and


330
Section 498A IPC, which takes place after the amended date, i.e. 25.12.1983 would mean to make these provisions nugatory. Thus the Section 498-A IPC and Section 113-A Evidence Act include in its amplitude the past events prior to the date of amendment i.e. 25th December' 1983.  

The court observed that the legal presumption provided under this provision clearly included the past instances of cruelty spread over a period of seven years from the date of marriage of the victim. The act of suicide or causing grave injury or danger to her life was meant as a result of the past events. The court concluded that the period of cruelty was immaterial for the purposes of the proof of offence under Section 498A IPC whether it was prior to amended date or subsequent to that date, it did not make any difference.

The court in these cases has appreciated the purpose behind the incorporation of the amended provisions. These offences occur within the four walls of the family and it is difficult to collect evidence. It is a tough task to get direct evidence or any eyewitnesses. The conduct of the accused and the circumstantial evidence is there for adjudicating about the truthfulness or otherwise of the prosecution case. The responsibility lies on

---

81 Id. at p.905 per. G.G.Loney. J.
82 Id. at p.906.
83 Ibid.
the judges to appreciate the circumstantial evidence and the purpose for which the provision in the Indian Evidence Act has been incorporated.

6.3 EVIDENCE IN SEXUAL HARASSMENT CASES

Like rape offences the most distressing aspect of the sexual harassment cases is that when the matter is reported to the police, the personal life of the woman is looked into. The inquiry, the criminal justice agency, the police, make, is to probe into 'character' of the woman. Sec.155 of the Evidence Act bears proof, for the Act permits the police to make inquiries about the prosecutrix with her friends, neighbours and parents. The issue finally revolves around the immoral character of the prosecutrix. Women activists wanted the deletion or at least appropriate amendment in the Sec.155 of the Evidence Act so as to protect the victim of sexual misconduct’s from undergoing past incidence trauma.84

In *Vishaka v State of Rajasthan*85 the Supreme Court laid down several guidelines for the security of women at the workplace. The definition of sexual harassment under the Guideline 2 of the guideline lines and norms86 as laid down by the Supreme Court with the assistance of the

---

84 Singh Subash Chandra, Sexual Harassment of Women in Work Place – Need for a Comprehensive Legislation, *Cr.L.J., March 1998, p.33-37 (Journal Section).*


solicitor general of India, gave a broader meaning to the phrase sexual harassment.

This broader meaning was referred to by the two judges of the Supreme Court Dr. Anand, C.J. and V.N. Khare J in the case of Apparel Export Promotion Council V.A.K. Chopra. The court stated:

"...in a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of the case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression 'molestation'." 

The penalty imposed by the Disciplinary Committee was set aside by the rulings of the High Court. The Apex Court took a departure from the narrow meaning given to sexual harassment and adopted the broader meaning to it. Therefore it confirmed the penalty imposed by the Disciplinary Committee.

Another issue involved in the case was whether physical contact with the female employee an essential ingredient to the charge of sexual harassment. The Supreme Court ruling is that there could be sexual harassment sans physical contact.

---

87 JT 1999 (1) SC 61.

88 Ibid., p.74.
The wider meaning given to the term harassment has made it possible for the court to extend protection to employed women who were neglected from such protection.

During the course of the trial, the women are subjected to rigorous of examinations and cross-examinations in which they are required to recall the incident in detail. Defence counsel takes advantage of the situation and tries to discredit her testimony. So for want of adequate evidence, the case is lost. There are very few convictions in sexual harassment cases and the horror the trial creates, discourages many victims of the crime to knock the doors of the court.

From the cases discussed, in all these crimes the various agencies involved in handling the crime have to understand the purpose of the amendment made in the criminal law. The legislature has responded by bringing amendment to the provisions relating to the offences in the existing three major criminal laws. But they are found to be inadequate with the changing role of women and their future demands. The apathy seems to be the patriarchal attitude of the police, prosecution and courts. The traditional role of the woman is undergoing change. The law enforcement agencies should keep this in mind.