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CASE COMMENTARY NIPUN SAXENA & ANR. V. UNION OF INDIA & ORS.

AUTHORED BY - SANJANA MOSES

Citation: (2019) 2 SCC 703

MATERIAL FACTS OF THE CASE

This writ petition was filed in response to an increase in the number of cases of sexual assault against adult rape victims as well as minors who have been sexually assaulted. Victims of sexual assault, such as rape, are treated as "untouchables" and treated as outcasts by society. Her family, for the most part, will not recognize her going into their home. The harsh reality is that countless cases of assault go unreported owing to fictitious notions of purported "honor" that the group of the unlucky casualty must preserve. The problem is not over yet. The police, in general, interview the unfortunate victim like a criminal once a case is held up and an FIR is filed. The unlucky victim's first encounter with justice is an unpleasant one in which she is made to believe that she is to blame, that she is the source of the transgression, that she is the one who is to blame¹.

The identity of a rape victim cannot be revealed under section 228 of the IPC. However, several times this provision is not implemented. Some news organizations, media houses, etc., do not respect the law and instead disclose victims' identities. In *Bhupinder Sharma v. State of Himachal Pradesh*², it was also decided that to uphold the spirit of Section 228, the identities of the rape victims should not be revealed. The petition was filed to hide their identities so that they may be served with justice.

¹ Nipun Saxena & Anr. v. Union of India & Ors., (2019) 2 SCC 703

² Bhupinder Sharma v. State of Himachal Pradesh, 2003 (8) SCC 551.

Issues

- How and in what method the identity of an adult rape victim and children of sexual abuse should be protected so they do not have to face social ridicule and harassment?
- Under what circumstances or conditions, if any, allow it to be revealed?
- Does the victim's non-disclosure of identity cover the POCSO Act preview?

Judgement

In this case, the court stressed the need to protect the identity of victims of sexual offences and held the following:

- The court clarified that the first section of the judgment dealt with victims of rape under the Indian Penal Code, 1860, while the second portion dealt with victims of crimes under the Protection of Children from Sexual Offences Act, 2012.

Also, the term "media" will be used throughout the current judgment to refer to all sorts of media, including print, electronic, and social media.

*"Unfortunately, in our society, the victim of a sexual offence, especially a victim of rape, is treated worse than the perpetrator of the crime. society, instead of emphasizing with the victim, starts treating her as untouchable."*³

- The court discussed section 228 of IPC and clarified that making known the victim's identity by printing or publication is permissible under sub-section (2) of Section 228A IPC⁴ in specific situations stated therein. Without the Court's approval, anybody who publishes any matter in reference to the proceedings before a Court with respect to such an infraction commits a crime. On the other hand, the Explanation states that printing or publishing a judgment of the High Courts or the Supreme Court does not constitute a crime under the IPC.
- The terms "identify of any person" are not defined in the IPC or the CrPC. The printing or publication of "the name or any matter which may make known the individual's identity" is expressly prohibited by Section 228A IPC. It is illegal to publish the victim's name and reveal any other information that might reveal its identity. For this, the court held that "matter that

³ *Supra Note 1, Para 4.*

⁴ The Indian Penal Code 1860.

may reveal the person's identity" indicates that the victim's name should not be revealed and that the victim's identity should not be detectable from any matter published in the media.⁵

- In society, a rape survivor would endure hostile prejudice and social exclusion. Such a victim will have a tough time finding work, getting married, and integrating into society as a regular human being. Because our criminal justice system lacks an appropriate witness protection program, the necessity to shield the victim and conceal her identity is considerably higher. This court ruled that no one can print or publish the victim's identity or reveal any information that may lead to the victim's identification.
- Section 228A IPC, subsection (2) establishes an exemption for police officers who may be required to report the victim's genuine identity at the police station or in the inquiry file. The court further added that the court is aware that the victim's name will have to be published in the first information report (abbreviated as "FIR"). The court, however, ruled that this information should not be made public, particularly to the media.⁶

The court stressed that police personnel investigating such situations and offences should, if at all feasible, adopt a pseudonym when describing the victim unless it is necessary to write down her identity.

The court clarified that the authorities to whom the victim's name is revealed when such samples are provided are likewise obligated to keep the victim's name and identity private. It is not to disclose it in any way except in the report, which should only be submitted in a sealed envelope to the investigating agency or the court. There is no hard and fast rule in this regard. However, the police should make certain that any communication or memoranda exchanged or issued in which the victim's identity is divulged kept in a sealed cover and not made public. They should not be made public, and they should not be made available to anybody under the Right to Information Act.

- Court when on to explain that suppose an adult victim has no problem with her name being published, or her identity is revealed. In that case, she can plainly authorize anybody in

⁵ *Supra Note 1*, Para 11.

⁶ *Id.* Para13.

writing to disclose her name under clause (b) of sub-section (2) of Section 228A IPC. When it comes to clause (c) of sub-section (2) of Section 228A IPC, we believe that because of the implementation of POCSO, which deals mainly with children, Section 228A will no longer apply if the victim is a kid. In reality, the words "or minor" should be omitted from clause (c) of sub-section (2) of Section 228A IPC.⁷

- The court also ruled that disclosing the victim's identity is not required to raise public opinion and sympathy. This is a serious matter involving victims of horrible sexual offences, and it must be handled delicately. Furthermore, we are all well aware that, without revealing her genuine name, 'Nirbhaya' became the most potent symbol of resistance the country has ever seen. If a campaign to safeguard the victim's rights and mobilize public opinion has to be launched, it can be done without revealing her identity⁸.
- The court further stated that if the government wishes to act under Section 228A(2)(c)⁹ IPC, it must first establish some clear guidelines or criteria in this respect before naming any social welfare institution or organization. A precise method must be established.
- The court concluded that subsection (3) of Section 228A IPC plainly states that no content regarding any proceedings coming within the ambit of Section 228A and in terms of Section 327(2) CrPC can be printed or published. Nobody saves the presiding officer, the court personnel, the accused, his attorney, the public prosecutor, the victim, or if she wishes to be there. The witness shall be present during these in-camera sessions. All of them have a legal obligation to guarantee that what happens in court is not made public. This is not to suggest that such incidents cannot be reported.

It can report why the case was listed, but it cannot report what happened within the courtroom or what the victim or witnesses said. The evidence will not be made public. The court cited **Nivedita Jha v. State of Bihar**, SLP(C) No. 24978 of 2018¹⁰, in which it was stated that no one could be allowed to violate Section 327(3) CrPC, which has exceptionally plain and

⁷ *Id.* Para14.

⁸ *Id.* Para 17.

⁹ Section 228A(2)(c), The Indian Penal code 1860.

¹⁰ *Nivedita Jha v. State of Bihar*, 2019 (6) SCJ 605.

explicit wording¹¹.

- The Supreme Court ruled that cross-examination of rape victims "shall be done with a certain amount of civility and respect to women in general." The wording "matter which may make known the identity of the person" in Section 228A IPC "does not merely indicate that just the victim's name should not be divulged, but it also indicates that the victim's identity should not be identifiable from any matter published in the media," it was held the Court stated that "there may be circumstances when the victims identify, if not her name, maybe given," but that "the fact that such victim has been subjected to a sexual offence must not be divulged."
- Furthermore, it was decided that "there may be additional scenarios where the next of kin may be justified in exposing the victim's identity," and that in such cases, "an application to authorize revelation of identity should be submitted solely to the Sessions Judge/magistrate involved, and the said Sessions Judge/magistrate shall consider the application based on the law" established by this Court.
- The POCSO Act was the subject of the second portion of the ruling. The court clarified that the first part of the ruling, which dealt with adult victims, applies much more forcefully to child victims. It was acknowledged that a minor who is the victim of sexual abuse needs further protection than an adult victim. **The Special Court has the responsibility under Section 33 of POCSO to guarantee that the child's identity is not revealed at any point throughout the inquiry or trial.**¹²

Section 23¹³ of the POCSO provides requirements relating to the media process. The court also cited Section 74¹⁴ of the Juvenile Justice (Care and Protection of Children) Act 2015, which prohibits children's identities from being revealed.

¹¹ *Supra Note 1*, Para 22.

¹² *Id.* Para 29.

¹³ Section 33, The Protection of Children from Sexual Offences Act, 2012.

¹⁴ Section 74, the Juvenile Justice (Care and Protection of Children) Act 2015.

"India is a signatory to the United Nations Convention on the Rights of Child, 1989 and Parliament thought it fit to enact POCSO in the year 2012, which specifically deals with sexual offences against all children."

The Court held that it is neither practical nor appropriate to explicitly set out the meaning of the phrase "interest of the child" since each case must be dealt with in its unique factual setting.

- The Bench went on to say that the **media must not only be cautious but that it also has a responsibility to guarantee that it does nothing and discloses no information that may lead to the child's name being revealed, either directly or indirectly.** "Media should be cautious not to sensationalize the same."

Sensationalizing such situations may gain television Rating Points (TRPs). However, it does not reflect well on the media's reputation.¹⁵

- The court decided that the child's name, address, school, or any other information that may lead to his or her identity violate the law could not be released to the media. It is forbidden to publish a photograph of such a minor. **A minor who is not in violation of the law but is the victim of an offence, particularly a sexual offence, needs even more excellent protection¹⁶.**
- The Court stated that it was **"exercising power under Article 142 of the Constitution in this respect because the Government has not selected any social or welfare institution/organization and the legislation as put down cannot be administered," and that the "directions shall prevail" until the Government establishes clear criteria and procedures in this respect.**

¹⁵ *Supra Note 1*, Para 31.

¹⁶ *Id* Para 36.

- The Supreme court also held that "**the entire aim of the Protection of Children from Sexual Offences Act, 2012 (POCSO)¹⁷ is to guarantee that the identity of the child is not divulged unless the Special Court for reasons to be stated in writing approves such disclosure.**"

Section 74 of the act prohibits on disclosure of the identity of children.

The Court held - This information can only be shared if it is in the best interests of the child."

The Court reasoned that "the media is not only compelled not to reveal the identity of the kid but is also required by law not to divulge any material that may lead to the exposure of the kid's identity."

It was noted that courts are expressly built to be Child-friendly, and those that suit minor victims' needs and are needed. Also, "these tribunals need not just be utilized for considering cases under the POCSO but may also be utilized as trial courts for hearing cases of rape against women."

- The court further held that it is NALSA should constitute a committee of 4-5 members who would have the duty to proper model rules for victim compensation for victims of sexual crimes.. assistance by the learned solicitor General and the Amicus can be sought as and when required. Also the chairperson of national commission for women should also be involved in the process.

IN THE END, THE SUPREME COURT ISSUED VARIOUS DIRECTIONS TO PROTECT THE PRIVACY AND REPUTATION OF VICTIMS OF SEXUAL CRIMES AS FOLLOWS:

I. No one may print or broadcast the victim's name in print, electronic, or social media, or even in a distant manner divulge any details that might lead to the victim's identification and make her identity known to the general public.

II. In situations where the victim is deceased or mentally ill, the victim's name or identity should not be revealed, even with the consent of the next of kin, unless conditions justifying the

¹⁷ The Protection of Children from Sexual Offences Act, 2012.

publication of her identity exist, as determined by the competent authority, which is now the Sessions Judge.

III. FIRs related to offences under Sections 376, 376A, 376AB, 376B, 376C, 376D of the Indian Penal Code, and crimes under the Protection of Children from Sexual Offences Act, 2012 (POCSO), would not be made public.

IV. If a victim files an appeal under Section 372 CrPC, the victim must not reveal his or her identity, and the appeal will be handled according to the law.

V. Police officers should maintain any papers in which the victim's identity is revealed in a sealed cover as much as feasible and replace these documents with similar documents in which the victim's identity is erased from all records that may be scrutinized in the public domain.

VI. All authorities to whom the investigating agency or the court provides the victim's name are likewise obligated to keep the victim's name and identity secret and not to divulge it in any way except in the report, which should be delivered to the investigating agency or the court in a sealed envelope.

VII. In the instance of minor victims under POCSO, the Special Court can only allow their identity to be revealed if it is in the child's best interests.

VIII. Within one year from today, all states and union territories must establish at least one "one-stop center" in each district.

IX. "Until the Government acts under Section 228A (1)(c) and puts down a criterion as per our directions for identifying such social welfare institutions or organizations, an application by the next of kin to permit the revelation of the name of a deceased victim or a victim of unsound mind under Section 228A(2)(c) of the IPC shall be submitted exclusively to the Sessions Judge concerned."¹⁸

FUTURE PROSPECTS & CONCLUSION

Under the Indian Criminal justice system, the identity of victims of sexual crimes, especially the children, must be preserved as they are often subjected to societal shame and ostracism without having any fault of their own. Though it is claimed that we are moving ahead and progressing,

¹⁸ *Supra Note 1*, Para 43

our society looks down upon the victim of such crimes even in today's time. There is a social stigma present as A women's dignity is linked with her sexuality. Victims of sexual assault, such as rape, are treated as "untouchables" and are treated as marginalized by society. Her family, for the most part, will not recognize her going into their home. The harsh reality is that countless cases of assault go unreported owing to fictitious notions of purported "respect" that the group of the unlucky casualty must preserve. The problem is not over yet. The police, in general, interrogate the victim like a criminal once an FIR is filed. All this leads to the victim's first encounter with justice, being an unpleasant one in which she is made to believe that she is to blame, that the victim is the source of the transgression, that she is the one who is to blame. The identity of a rape victim cannot be revealed under section 228 of the IPC. Despite the fact that legal provisions prohibit the revelation of rape victims' identities, this prohibition has not been fully applied further. Some news organizations and media houses do not respect the law and instead disclose the identities of victims.

Further, there is no institutional framework in place in India to give psychological counseling to rape victims. The majority of Indian statutes, such as the Indian Penal Code, the POCSO Act, the Protection of Women from Domestic Violence Act, the Sexual Harassment of Women at Workplace Act, and others, only provide monetary compensation to victim's criminal offenses. If the state fails to defend its people's basic rights, it is obligated to compensate them. In order to fulfill this obligation, the state must provide survivors with institutional assistance and counselling in order to assure real recovery. The Criminal justice system should strive to give maximum protection to an individual's human rights.