

## 2 RMLNLUJ (2010) 135

“They Also Serve Who Only Stand and Wait” : A Critique of *Priya Patel v. State of M.P.* and anr. AIR 2006 SC 2639

by

**Kumar Askand Pandey\*\***

### Factual Background

The *Priya Patel v. State of M.P.* (“*Priya Patel*”), a two-judge Division Bench<sup>1</sup> decision seeks to answer an interesting question : Can a woman be punished for gang rape? By implication, this case throws open an important question of gender bias in Indian law relating to rape.

In brief, the facts of *Priya Patel* are that, complaint was lodged by the prosecutrix stating that she was returning by Utkal Express after attending a sports meet. When she reached her destination at Sagar, accused Bhanu Pratap Patel (husband of the appellant-accused *Priya Patel*) met her at the railway station and told her that her father had asked him to pick her up from the railway station. Since the prosecutrix was suffering from fever, she accompanied accused Bhanu Pratap Patel to his house. He committed rape on her. When commission of rape was going on, the appellant reached there. The prosecutrix requested the appellant to save her. Instead of saving her, the appellant slapped her, closed the door of the house and left the place of incident. On the basis of the complaint lodged, investigation was undertaken and charge-sheet was filed. While accused Bhanu Pratap Patel was charged for offences punishable under Section 323 and 376 of Penal Code, 1860 (“IPC”)<sup>2</sup>, the appellant was charged for commission of offences punishable under Sections 323 and 376(2)(g) of IPC<sup>3</sup>.



Page: 136

Revision was filed before the M.P. High Court questioning the legality of the charge framed against the appellant under Section 376(2)(g) of IPC. The High Court did not find any fault with the charge and ruled that though a woman can not commit rape, but if a woman facilitates the act of rape, Explanation I<sup>4</sup> to Section 376(2) IPC, comes into operation and such woman can be prosecuted for gang rape.

Before the Supreme Court it was contended by the appellant's counsel that as a woman can not commit rape, she can not certainly be convicted for commission of gang rape. On the other hand, the respondent's counsel supported the High Court order and further contended that even if it is inconceivable to convict a woman for gang rape, she can certainly be punished as an abettor<sup>5</sup> on the basis of the facts presented before the Court. The Supreme Court after revisiting the bare provisions relating to rape under IPC came to the conclusion that it is conceptually inconceivable that a woman can commit rape under the existing laws.

The Court further held that the expression “in furtherance of their common intention” as appearing in the Explanation I to Section 376(2) IPC, relates to intention to commit rape. A woman cannot be said to have an intention to commit rape. And therefore, a prosecution can not be launched against a woman for gang rape<sup>6</sup>.

As far as the residual question of liability of a woman as abettor of the offence of

rape is concerned, the Supreme Court kept the door ajar holding that “if in law it is permissible and the facts warrant such a course to be adopted, it is for the concerned court to act in accordance with law” and expressed no opinion on the issue.<sup>7</sup>

Let us now, examine the latent and patent issues raised, argued, answered and avoided in this case.



Page: 137

### Is Rape Essentially a “Man on Woman” Act?

*Priya Patel* makes no reference to any other decision on the issues involved. However, in *Sakshi v. Union of India* (“*Sakshi*”)<sup>8</sup>, the Supreme Court was called upon to decide whether, the phrase “penetration” occurring in the definition of rape under Section 375 IPC<sup>9</sup>, means only “penile penetration” or it also means penetration by an object or by any other part of the body including finger, etc.<sup>10</sup>

The Petitioners drew the attention of the Supreme Court to the observations of a feminist writer-activist Susan Brownmiller (*Against Our Will*, 1986) that “...in rape...the intent is not merely to “take” but to humiliate and degrade.....Sexual assault in our day and age is hardly restricted to forced genital copulation, nor is it exclusively a male on female offence”.<sup>11</sup>

Though the petitioners in *Sakshi* prayed for issuance of a writ in the nature of a declaration or any other appropriate writ or direction declaring, inter alia, that “sexual intercourse” as contained in Section 375 of IPC shall include all forms of penetration such as penile/vaginal penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration<sup>12</sup>, the prayer, in effect, was to degender the offence of rape.

It was argued by the petitioner that the narrow understanding and application of rape under Section 375/376 of IPC only to the cases of penile/vaginal penetration runs contrary to the existing contemporary understanding of rape as an intent to humiliate, violate and degrade a woman or child sexually and therefore, adversely affects the sexual integrity and autonomy of women and children in violation of Article 21 of the Constitution.

It is evident that *Sakshi* did not directly deal with the central issue raised in *Priya Patel* and only obliquely touched upon it. However, the legal and sociological developments in contemporary debate on rape reflect on the fact that rape is no more a “man on woman” offence. Although the majority of rapes are committed by men, women can and do rape.<sup>13</sup>



Page: 138

It would be wrong therefore to stick to the age old concept of rape as a “man on woman” sexual offence where penile penetration of vagina, howsoever slight, is a necessary ingredient of the offence under Section 375 IPC.

In *Priya Patel*, as has been observed earlier, the Supreme Court stuck to the literal interpretation of the relevant Sections 375 and 376 IPC, concluding that only a male can commit rape and therefore, gang rape as well. The plea to enlarge the meaning of “sexual intercourse” and “penetration” was rejected by the Supreme Court in *Sakshi*,

on the ground that radically enlarged meanings of Section 375 IPC i.e. by including all forms of penetration violate the guarantee enshrined in Article 20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

The Supreme Court appears to have erred in understanding the prohibition against *ex post facto* law under the aforementioned provision of the Constitution. This prohibition is meant to apply to laws enacted by the legislature and can not prevent the courts from interpreting a law even if it amounts to enlarging the definition of an offence. In fact, the Supreme Court has never shied away from filling the lacuna in those circumstances where the legislature was found indifferent or lacking in making certain act punishable. The law relating to sexual harassment of women at work places is a product of such judicial legislation.<sup>14</sup>

The Supreme Court also underlined the importance of the doctrine of *stare decisis* and refused to toe a line different from its earlier decisions on the ground that certainty in criminal law should be given precedence over other consideration affecting the approach of the Court in contemporary times.<sup>15</sup> However, it must be noted that the Supreme Court recognised the importance of the issues raised by the petitioner in *Sakshi case* and hoped that Parliament would promptly enact laws to deal with the issues highlighted in this case.<sup>16</sup>

#### Recent Efforts on Degendering Rape Laws

Almost seven years after *Sakshi*, a Bill<sup>17</sup> prepared by the National



Commission for Women, was moved in the Upper House of the Parliament on 20-12-2008, to amend laws relating to rape and related provisions. The Bill acknowledges that it has drawn heavily upon the 172nd Report of the Law Commission of India, which recommended amendment in laws relating to sexual assault in Sections 375, 376, 354 and 509 of IPC and the relevant Sections of the Code of Criminal Procedure, 1973, and the Indian Evidence Act, 1872.

The Bill, *inter alia*, seeks to change the definition of rape (it even changes the name of the offence from rape to sexual assault) under Section 375 IPC, redefining it as sexual contact with slightest penetration, whether penile or otherwise, in vagina (including labia majora), anus, or utera or mouth of a woman or a child.<sup>18</sup> Whereas, it is still a requirement under the Bill that the accused should be a male if the offence of sexual assault (the existing offence of rape) is committed against a woman, the Bill does away with the requirement of "penile penetration" as an essential element of this offence, where it is committed against a child victim<sup>19</sup>.

The Bill raises the age of consent from sixteen years to eighteen years and therefore it can be inferred that for the purposes of this Bill, a child is anyone under the age of eighteen<sup>20</sup>.

The proposed changes aim at making the rape laws gender neutral to some extent and more responsive to the changing morality of the times. If and when it happens, it would dilute the so called conceptual impossibility as regards capacity of a woman to commit the offence of rape.

#### Making a Woman Liable for Complicity in Rape : A Lower Court Shows the Way

As noted earlier, in *Priya Patel*, the Supreme Court refused to answer the question of a woman's guilt as an abettor in a rape committed by a man where the woman has

"intentionally aided"<sup>21</sup> the man in the ghastly offence. It left the question of woman's guilt as an abettor to be decided by the trial court.

Almost one and half years after *Priya Patel*, a trial court in New Delhi



Page: 140

was again seized with this issue in the trial case *State v. Meena Devi ("Meena Devi")*<sup>22</sup>.

The facts of this case are that on 8-9-2003, the prosecutrix was present at home. Her father had gone for duty and her mother had gone to their village in Bihar. Accused Meena Devi went to her house to call her. Prosecutrix went to the house of accused. She found that Sanjay was sitting in the room and husband of Meena Devi was also there Meena Devi pushed the prosecutrix in the room where her nephew Sanjay was sitting and bolted the door from outside. Sanjay raped her against her wishes. She raised alarm on which her brother Kanhaiya came there and rescued her. He brought her back. When her father came back from his job, she narrated the whole story to her father. Her father took her to Tilak Nagar. When mother of the prosecutrix returned from Bihar she told the entire facts to her mother on which she was taken to the police station on 20-9-2003. An FIR was lodged against three persons, Meena Devi, Shiv Nath (Meena Devi's husband) and Sanjay, who committed rape. The male accused persons were arrested and as Meena Devi could not be arrested, she was declared proclaimed offender. Both the male accused were convicted for the offences punishable under Section 376(2)(g) IPC for gang rape and also under Section 342 IPC<sup>23</sup>.

The accused Meena Devi was arrested on 21-12-2005, and the supplementary charge-sheet was filed against her, consequently, she was charged under Section 342 IPC and Section 376 read with Section 109 IPC<sup>24</sup>. She pleaded not guilty on all the counts.

However, the learned Sessions Judge, after carefully perusing all the materials placed before him on record, convicted Meena Devi under the aforementioned sections holding her guilty for abetting the offence of rape. The learned Judge held that by bolting the door from outside the accused did not allow the prosecutrix to leave the room and confine her in the room thus facilitated the abetment of commission of crime of rape.

It is interesting to note that Meena Devi does not make any reference to *Priya Patel*. It is uncertain what the learned Sessions Judge would have decided, had *Priya Patel* been brought to his notice or arguments were based on this Supreme Court decision.



Page: 141

However, it must be submitted that despite *Priya Patel* standing in the way of convicting a woman for gang rape under Section 376(2)(g) IPC, it appears that there is no legal bar to convict a woman under Section 376 read with Section 109 IPC.

**Why *Priya Patel* Is Not a Good Law**

*Priya Patel* should not be treated as a good law on the subject of woman's liability in those rape cases where a woman has aided, abetted, joined and participated in some manner or other, in the commission of the offence, along with one or more men.

A careful perusal of *Priya Patel* reveals a few basic reasons why it should not make a

good law on the subject.

Firstly, the decision of the Supreme Court in *Priya Patel* is disappointing in as much as it merited deeper discussions on the issues of a women's liability as an accomplice in rape. Notably, on the same issue the M.P. High Court had opined that though a woman can not commit rape, but if a woman facilitates the act of rape, Explanation I to Section 376(2) IPC, comes into operation and she can be prosecuted for gang rape.

Secondly, the decision is not based on any sound legal reasoning. The decision proceeds on the basic premise that a woman can not hold the intention of committing rape and therefore there is no question of her sharing that intention (to commit rape) with others, so as to make her liable for gang rape under Section 376(2)(g) IPC.

In this regard it is important to note that Explanation I to Section 376(2) IPC, is gender-neutral in nature and the situation which arose in *Priya Patel* must have been envisaged by the law makers while they included<sup>25</sup> this explanation in the scheme of IPC.

As observed earlier, Explanation-I to Section 376(2) is in *pari materia* with Section 34 IPC, which lays down a general rule of liability where two or more persons have joined together to commit an offence "in furtherance of common intention of them all". Therefore, the interpretations of Section 34 IPC put forth by the Supreme Court may be taken into consideration for understanding the scope and ambit of Explanation-I to Section 376(2) IPC.

The landmark cases which beautifully interpret Section 34 IPC, are *Barendra Kumar Ghosh v. King Emperor*<sup>26</sup>, and *Mahbub Shah v. King Emperor*<sup>27</sup>. Without



going into the details of these two cases, it must be submitted that it is well settled since long that even though participation in action is required for making one constructively liable for the criminal acts of other, this requirement is not limited to participation in actual criminal act in as much as it would suffice for the purposes of Section 34 IPC that two or more persons joined together in a criminal enterprise with a common intention to bring out a result which is punishable by law. Thus, even physical incapacity is in no way an impediment to fixing liability with the aid of Section 34 IPC, if the requirements of the provision are met with.

Let us take up a hypothetical situation where a person A approaches his friend B and tells him about his intentions of killing C, who lives alone in a room. B initially objects to the idea of killing anyone. A pleads with B and makes him agree to help him execute his plans of killing C. B is still not convinced but for friendship sake he agrees to join A in his plans of killing C; but tells him that he will only stand outside the room where A plans to kill C and his job would be confined to raising an alarm if police or other people are seen to be approaching that room. B makes it very clear that in no case he will participate in actual killing. It so happens that A kills C when he is fast asleep in his room while B stood guard outside the room. As far as liability is concerned, by virtue of Section 34 IPC, both A and B would be equally liable for the murder of C and it would be immaterial if B participated in the actual killing or not. It is also immaterial if B specifically had an intention to kill C provided that the prosecution is able to prove that B had knowledge of A's intentions of killing C and B joined A with this knowledge on A's part.

Applying the same logic and reasoning, in *Priya Patel*, it is immaterial whether the accused specifically had the intention to rape. The fact that she acted in a manner which facilitated the commission of offence of rape is the only requirement to bring her

case under Section 376(2)(g) IPC. Explanation-I to this section can not be and should not be understood to intend something different.

It has been very aptly observed by the Supreme Court in *Ghanshyam v. State of U.P.*<sup>28</sup> that what is meant by "common intention" is the "community of purpose or common design or common intent" and therefore, it would not be wrong to interpret the words "common intention" to mean "community of purpose, common design or common enterprise". If we apply this explanation, there is no legal impediment in holding the accused Priya Patel guilty under Section 376(2)(g) IPC, as there was clearly a "community of purpose" between herself and her husband that the victim be raped. In order to achieve that purpose, both Priya Patel and her husband acted in a

---



Page: 143

manner which resulted in the offence of rape. Even if we agree with the Supreme Court's reasoning that the accused, being a woman, can not be said to hold an intention to rape, there is nothing in law to exempt her from liability for gang rape as there was an all evident "community of purpose" or "common design" in what both the accused persons did.

In fact, the Supreme Court has appreciated the fact that Explanation-I to Section 376(2)(g) and Section 34 IPC are in pari materia but fails to apply the rule of constructive joint liability as envisaged by the latter section to the problem in hand.

The Supreme Court's rationale for not holding a woman guilty of gang rape stems from the premise that a "woman-on-woman" rape is conceptually inconceivable.

Interestingly, on conceptual impossibility grounds, once it was presumed in England that a man can not commit rape on his own wife. However, with changing times and changing social ethos, the House of Lords accepted the fact that marital rape is a harsh reality of the society and accordingly abolished the marital rape exception in *R. v. R.*<sup>29</sup>, even before Parliament enacted a suitable law punishing marital rape<sup>30</sup>.

The Ghost of *Priya Patel* Keeps Haunting

*Priya Patel* has probably not caused much damage to the criminal jurisprudence because although female criminality is on the rise; incidence of sex offences by women is still very low in India. However, its ghost keeps haunting the criminal jurisprudence and recently in *State of Rajasthan v. Hemraj*. ("*Hemraj*")<sup>31</sup>, a division Bench of the Supreme Court<sup>32</sup> has reiterated the *Priya Patel* principle, holding the Respondent No. 2 (Smt. Kamla) not guilty only because she is a woman. It is not desirable to discuss this case in detail as the reasons given by the Supreme Court in *Hemraj* are identical to the reasons given by it in *Priya Patel*<sup>33</sup>.

Conclusion

The times are changing and the notions of crime are changing accordingly. The legal instruments defining crime and mentioning its elements

---



Page: 144

must be read in the societal context in which they are to be applied. It is a common knowledge that female criminality is on rise. The age old notions about female criminality should give way to the social reality. While it is true that legislation falls in the domain of legislature and the doctrine of separation of power seeks to separate legislative functions from judicial functions, it is a trite knowledge that the judiciary,



as interpreter of law, is duty bound to see that the laws are not only implemented in letter but in spirit also.

The suggestions made by the National Commission for Women to overhaul the rape laws and make them gender-neutral are laudable and in keeping with the times. Comprehensive amendments are required in the rape laws in India on the suggested lines. The sooner, the better and till then, Priya Patel should be treated as an aberration.

It is also hoped that the lower judiciary shall not get swayed by the shallow analysis of law in this case and it shall tread a path making the rape law more responsive to the changing times where it is best suited to the societal interest which lies in checking the rising graph of female criminality in India.

\* Observations of Lord Sumner in *Barendra Kumar Ghosh v. King Emperor*, AIR 1925 PC 1, at para 30. Interestingly, Lord Sumner appears to be reproducing from John Milton's famous sonnet "On His Blindness" without acknowledging the same.

\*\* Asstt. Professor of Law, Dr. RML National Law University, Lucknow. The author may be reached at [ka.pandey@rmlnlulaw.ac.in](mailto:ka.pandey@rmlnlulaw.ac.in).

<sup>1</sup> Arijit Pasayat and S.H. Kapadia, JJ.

<sup>2</sup> Section 323 provides for punishment for voluntarily causing hurt and Section 376 provides for punishment for rape.

<sup>3</sup> Section 376(2)(g) provides for punishment for gang rape. It is important to note that the charges against the accused couple should not have been different. The Supreme Court missed the fact that if two persons are accused of jointly committing the offence of rape, both must face the charges of gang rape. A single person can not be charged for gang rape. The couple must have been charged under Section 376(2)(g).

<sup>4</sup> It reads, "Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section". This Explanation is in pari materia with Section 34 IPC, which provides for the rule of constructive criminal liability in cases where a criminal act is done by one or more in a group in "furtherance of the common intention of them all".

<sup>5</sup> Section 107 IPC defines abetment thus : "A person abets doing of a thing who:

xx xx xx xx xx xx xx

Thirdly : Intentionally aids, by act or illegal omission, the doing of that thing".

<sup>6</sup> *Priya Patel case*, (2006) 6 SCC 263 : AIR 2006 SC 2639, 2641, 267, Para 9.

<sup>7</sup> *Priya Patel case*, (2006) 6 SCC 263 : AIR 2006 SC 2639, 2641, 267, Para 9.

<sup>8</sup> (2004) 5 SCC 518 : 2004 Cri LJ 2881.

<sup>9</sup> Section 375 IPC defines the offence of rape.

<sup>10</sup> By implication it required addressing the issue of gender bias in rape laws in India in so far as the requirement of penile penetration means rape is a man on woman act.

<sup>11</sup> (2004) 5 SCC 518, 526 Para 6 : 2004 Cri LJ 2881, 2885, Para 6.

<sup>12</sup> (2004) 5 SCC 518 : 2004 Cri LJ 2881, 2885.

<sup>13</sup> Girshick Lori B. and Berning Shannon, *Woman—Woman Rape*, available on [www.ourbodiesourselves.org/book/companion.asp?id=8&compID=95](http://www.ourbodiesourselves.org/book/companion.asp?id=8&compID=95) (last visited on 15-9-2009). See also Girshick Lori B., *Woman-to-Woman Sexual Violence : Does She Call It Rape?* Boston : Northeastern University Press, 2002.

<sup>14</sup> See *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 : AIR 1997 SC 3011.

<sup>15</sup> (2004) 5 SCC 518, 541 Para 26 : 2004 Cri LJ 2881, 2895, Para 26 at 2895.

<sup>16</sup> (2004) 5 SCC 518, 541 Para 26 : 2004 Cri LJ 2881, 2895, Para 26.

<sup>17</sup> Available at <<http://ncw.nic.in/Amendments%20to%201aws%20relating%20to%20 women.pdf>> (last accessed on 16-10-2009).

<sup>18</sup> Available at <<http://ncw.nic.in/Amendments%20to%201aws%20relating%20to%20 women.pdf>> (last accessed on 16-10-2009) Section II 1.

<sup>19</sup> Available at <<http://ncw.nic.in/Amendments%20to%201aws%20relating%20to%20 women.pdf>> (last accessed on 16-10-2009) Section II 1(C)(D).

<sup>20</sup> Available at <<http://ncw.nic.in/Amendments%20to%201aws%20relating%20to%20 women.pdf>> (last accessed on 16-10-2009) Section II 1 Sixthly.

<sup>21</sup> See Section 107 IPC. Accordingly, abetment consists of instigation, conspiracy and intentional aiding in the commission of crime.

<sup>22</sup> Sessions Case No. 87 of 2006, decided by V.K. Bansal, Addl. Sessions Judge, New Delhi, on 5-12-2007. Priya Patel was decided on 12-7-2006.

<sup>23</sup> Section 342 provides for punishment for wrongful confinement.

<sup>24</sup> Section 109 provides for punishment for abetment and in those cases where offence has been committed pursuant to the abetment, abettor is liable for same punishment as the actual perpetrator of the offence.

<sup>25</sup> Through Criminal Law (Amendment) Act, 1983.

<sup>26</sup> (1924-25) 52 IA 40 : AIR 1925 PC 1.

<sup>27</sup> (1944-45) 72 IA 148 : AIR 1945 PC 118.

<sup>28</sup> (1982) 2 SCC 400 : AIR 1983 SC 293.

<sup>29</sup> [1992] 1 A.C. 599 : [1991] 2 WLR 1065 : (1991) 2 All ER 257.

<sup>30</sup> Sexual Offences Act of 1994. The Sexual Offences Act of 2003, which replaced the earlier statute, retains this change in law.

<sup>31</sup> (2009) 12 SCC 403.

<sup>32</sup> Arijit Pasayat and Ashok Kumar Ganguly, JJ.

<sup>33</sup> See para 7 of *Hemraj* which is exact reproduction of para 6 of *Priya Patel*. Interestingly, *Hemraj* does not make any reference to *Priya Patel*.

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.