



# Research Inspiration

An International Multidisciplinary-Journal

ISSN: 2455-443X Journal home page: [www.researchinspiration.com](http://www.researchinspiration.com)

Vol. 07, Issue-I, Dec. 2021



## Practical Approach towards Law Relating to Sexual Offences in perspective view of the Criminal Law (Amendment) Act, 2013

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### KEYWORDS

Sexual offences, Presumption of consent, Presumption of innocent, Potency test, Live in-relationship & co-habitation, Fair investigation, Fair trial, Previous sexual character, Previous sexual experience.

### ABSTRACT

Law relating to sexual offences inserted and amended by the attribute of the Criminal Law (Amendment) Act 2013 (in short the Act, 2013). Sec 166A neglecting the law by the person who is the State within the meaning of Article 12 of the Constitution, sec 166B castigation for denial to treat to the victim, Sec. 375 definitions of rape have, Sec. 354A, 354 B sexual harassment, sec. 354C voyeurism, sec. 354D stalking has been inserted in IPC. Sec 154, sec 161, sec. 164 have been amended in Cr.P.C. and sec. 53A irrelevancy of the previous sexual character and previous sexual experience of the victim, Sec 114A presumption of consent, sec. 146 bans to raise questions relating to previous sexual experience during cross-examination have been substituted and amended in the Indian Evidence Act, 1872. The study has explored the perspective view of- the need for a potency test, the impact on live in-relationship and cohabitation, fair investigation, fair trial, and the impact of presumption of consent and presumption of innocence. These aspects have been observed and experienced by the researcher during the course of advocacy; therefore practical approach toward law relating to sexual offences as amended, inserted, and substituted by the Act.

The concluding statements of the research paper include suggestions on various aspects as mentioned hereinabove have been categorically elaborated on the basis of doctrines of Criminal Jurisprudence and views of various jurisdictions of High Courts and Apex Court.

### Scope and Objective of Research

- 1.1 The objective of the instant research is to trace the practical problems of the victim and accused during course of trial due to insertion and amendment in the Criminal Law (Amendment) Act, 2013. Apart from 1.1. To find out the efficacy of the Act, 2013 prior and subsequent its enactment on the rate of reporting & rate of conviction of offences relating to women.
- 1.2 To study on need of potency test, impact on live in-relationship and co-habitation
- 1.3 To explore the effect of the Act, 2013 on elemental and Human rights of the accused with respect of the fair investigation &, fair trial.
- 1.4 To discuss the impact of presumption of consent sec., 53A and sec 114A of Evidence Act on presumption of innocent.

### 2. Research Methodology

The doctrinal and descriptive method has been adopted in the present research paper. The Text books, Journals, Articles, Research papers and online data base, Data pertaining to women relating cases from NCRB & SCRB as well as views of High Courts & Apex Court have been relied.

### 3. Research Questions

- 3.1 Whether inserting of Sec. 166A in IPC by the enforcement of the Act, 2013 is affecting the rate of reporting & rate of conviction of the sexual offence?
- 3.2 What is the need of potency test of the accused in the light of definition of rape as amended in sec 375 of IPC by virtue of the enactment of the Act, 2013?
- 3.3 Whether sec 53A and sec 114A of Indian Evidence Act, satisfy the fundamental right of fair trial as flows from Article 21 of the Constitution of India.

- 3.4 What efficacious remedy under the Act, 2013, where report of sexual offence has been registered due to Malafide, ulterior and for the counter blast of the purpose.

### Hypothesis

The researcher assumes that-

- H<sub>0</sub>1 There is no association between S. 166A of IPC, s. 53A & Sec 114A of Indian Evidence Act and rate of reporting, rate of conviction and on rights of accused of the sexual offences.
- H<sub>a</sub>1 There is an association between S. 166A of IPC, s. 53A & Sec 114A of Indian Evidence Act and rate of reporting, rate of conviction and on rights of accused of the sexual offences.
- H<sub>0</sub>2 There is no association between need of potency test of accused and fair investigation under the Act, 2013
- H<sub>a</sub>2 There is an association between need of potency test of accused and fair investigation under the Act, 2013
- H<sub>0</sub>3 There is an association between prohibition to raise questions from the victim with respect of her previous sexual character and previous sexual experience and right of accused relating to fair trial as flow from Art. 21 of the Constitution of India.
- H<sub>a</sub>3 There is no association between prohibition to raise questions from the victim with respect of her previous sexual character and previous sexual experience and right of accused relating to fair trial as flow from Art. 21 of the Constitution of India.

### Mode of Citation

Uniform code of citations have been relied by the researcher in the present study.

### 1. Introduction

The Act, 2013 was enacted by way of notification of India, 3rd February, 2013. By which, numerous reclamations relating to genital

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DOI: <https://doi.org/10.53724/inspiration/v7n1.06>

Received 19<sup>th</sup> Dec. 2021; Accepted 26<sup>th</sup> Dec. 2021

Available online 30<sup>th</sup> Dec. 2021

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offences against women have been made. The cause of enforcing of the Act, 2013 is vernacular wise exploitation relating to mafia rape. By decorum of Act, 2013, disobey the law by the public servant (Sec. 166A), denial to treat the victim (Sec. 166B), spontaneously acid attack (Sec. 326A), attempt of acid attack (Sec. 326B), sexual persecution to dismantle (Sec. 354A, 354B), voyeurism (Sec. 354C), stalking (Sec. 354D), have included. The trafficking (Sec.370), rape (Sec. 375), rape punishment of (Sec. 376) replaced in IPC. The registration of FIR (Sec. 154), statement of victim by the police officer (Sec. 161), Magisterial statement (Sec. 164), prior permission from government (Sec. 197), to facilitate liberated first aid or medical to victim (Sec 375C have included in Cr.P.C. There Sec. 53A of Evidence Act is included by which prior sexual character and prior sexual experience of victim has become irrelevant. Presumption of absence of consent of victim (Sec. 114A), have included in Indian Evidence Act, 1872.

Thus, the purpose of the present discipline is to focus on the practical problems due to inclusion and substitution of the law provisions by the efficacy of the Act, 2013. Effect of the Act, 2013 on various aspects and dimensions including - rate of reporting & rate of conviction of sexual offences, previous sexual character & previous sexual experience of victim; consent of minor and major victim, value of medical examination of the victim, value of potential test of the accused and DNA test, effect on cohabitation, threatening, compelling, solicitation, black mailing; malicious prosecution and ulterior motive; freely movement of victim with accused, intercourse promising to solemnise marriage has also been analysed on the basis of primary data secondary data of NCRB and SCRB as well as views of Apex Court and territorial jurisdiction of all High Courts.

## 2. Sexual Offences

For the present study sexual harassment, sexual assault with criminal force on victim women, voyeurism, stalking and rape has been considered. The comparative study with respect of provisions of such sexual offences as included and substituted by the Act and same has been defined analytically and categorically in perspective view of before and after amendment.

### 2.1 Sexual Harassments:

Prior Amendment: Sec. 354 of IPC was in trend. Before the amendment, the maximum sentence under the said section was of a maximum of 2 years, or with fine, or both. Subsequent Amendment the ingredients of the section have not been revised but only the period of punishment has been amended. Before the reclamation, the regulation of the castigation was of two years or with fine or with both but prior amendment, sentence has been replaced with a minimum of one year and a maximum of 5 years and fine.

Before enactment: There was an entity of s. 354A in IPC before the enactment of the Act. This section is inserted in IPC by way of amendment. The term sexual harassment was not allocated in IPC. The ingredients of section 354 of IPC were not specified in the Code and thus, before the amendment Act, to frame and prove the charges against the perpetrator within the periphery of section 354 of IPC was difficult. To overcome this difficulty and ambiguity, the legislature incorporated this section of law where clause 1 of section 354A provides that if any person touch and make sexual demands or requests for genital fortnight or shows pornography to the woman against her will or makes sexually coloured remarks, and then it would be guilty of genital harassment. Clauses 1, 2, and 3 of subsection 1 of section 354A provides for a minimum punishment of 3 years/with fine/with both. Clause 3 of section 354A provides punishment for such offence as defined under clause 4 of subsection 1 of section 354A of imprisonment may extend for one year, or with fine, or with both.

Though reviewing the elements relating to genital harassment, the legislature has specified and fixed the criteria of the punishment. It is apparently embark that the views of the society has been examined by the legislature and considered the esteems of the judiciary to resolve the

problems regarding sexual harassment of women.

### 2.2 Assault or exploitation of criminal potency with intent to denude:

Before enactment: There was no s. 354 in IPC prior enactment of the Act but after enactment of the Act 2013, s. 354B has been included in IPC. This section specifies the minimum punishment of 3 years and maximum of 7 years to the crime doors who either disrobes or compels any woman to be naked at any public place intentionally. On persuasion, it is apparently clear that the law makers have experienced genital offences are increasing in the society. Prior introducing the said Act, the genital crime are being increased rapidly by hanging them nakedly due to the solemnization of inter-caste love marriage. There, no particular law in IPC to command this offence. Thus, immediate need was to change the law. Therefore, the government amended this section.

The legislature's intention behind amending such provision is to save the fundamental powers of the victims which guarantee is given by the Constitution, flowing from Art. 21. The dignity and reputation are essential under Article 21. The motive of exploitation or denude the woman protect the right of female. Article 21 has a wide designation and not differentiate person to person on the basis of richness, poorness and caste. It does not remark gender discrimination. The researcher has experienced that the law makers have missed to protect the right of such person who solemnises inter-caste consensual marriage with major woman and without consent of lady' parent because numerous incidents have occurred that such person either is ousted or is forcefully walked in a village in naked form and is beaten. Beating to such person is of simple injury and denudation is losing his/her dignity and reputation. It should be safe by law.

### 2.3 Voyeurism

Prior the act, s. 354C was not in IPC but subsequent voyeurism has introduced by the Act. It facilitates minimum 3 years punishment and maximum of 7 years and with fine for voyeurism. The advanced criminal activities of society have examined by the legislature. The voyeurism is introduced in 2013 first time by the Act, 2013.

### 2.4 Stalking

Prior enactment of s. 354D was not in incorporated in IPC but after enforcement of the Act, 2013 this section came into force. The ingredients of this section are specifying that the purpose of stalking of any woman is to make contact, attempt to make contact, or interact with her repeatedly despite her objection. The minimum punishment for stalking is 1 year and the maximum 5 years and with fine. To follow the child is punishable under stalking under IPC and POCSO as held in State v/s Harkesh<sup>1</sup>, by the Court.

### 2.5 Rape

By seeing the gravity of Nirbhaya Case, the central government took decision to change the definition of rape as defined u/s 375 of IPC which is based on Justice Verma Committee. The rape was made for giving broader meaning. This section specified the constitution of rape-under any one following situation - any kind of penetration in any body part of the lady, or insertion of any object in any intrinsically part of the female, or applying mouth on any genital part of female without her consent, or on obtaining consent is of fear of death; or of hurt; or believing that he is her husband, or taking consent in unsound mind, or intoxicating; without consent from any woman below of 16 years age or such woman is unable to communicate consent.

### The term Sexual Intercourse and Penetration

Prior the Act 2013, sexual intercourse was considered in the sense of penetration of genital organ of male into female genital organ only. In Madan Gopal Dhakad v. Naval Dubey<sup>2</sup>, the term sexual intercourse has been interpreted as bare scant or unaccomplished entrance of the male genre either in labia majora, or the vulva, or pudenda, constitutes the sexual intercourse. In Wahid Khann. State of MP<sup>3</sup>, the court expressed that the depth of the penetration is immaterial. In Fateh Chand v. State of Haryana<sup>4</sup>, the SC held no need of injuries on the intrinsically part of the female. In Guddu v. State of MP<sup>5</sup>, has held that the rupturing of the

private part of the victim is not an essential element for rape. In *Re Ramkripal Shyamal Charkar v. State of MP*<sup>6</sup>, held that ejaculation without penetration will not be a rape and it will be attempted to commit rape. In *Smt. Sudesh Jhaku v. KCJ*<sup>7</sup>, the Apex Court held that any bodily penetration would constitute rape.

**For this section, the legislature has provided two explanations**

Under with the first explanation, the term Vagina has been included in Labia Majora and under the second explanation, the term consent has been defined as glaring voluntary consent when a woman gives by words, gestures, or by any types of verbal, or non-verbal communication communicates her desire for participation in the sexual act. A proviso has been inserted in the section which states if a female is not physically oppose the act of penetration, and then the only way of such fact she could not be said that she is consenting for the sexual act. Sec. 375 provides two exceptions- first exception- medical procedure and sexual intercourse is done by the husband of his 15 years woman shall be no rape.

**Punishment of Rape**

**Before enactment of the Act, 2013**

Prior amendment, punishment of rape was minimum 7 years and a maximum of L.I. or of 10 years and with fine. From the earlier provision if the husband commits rape with his wife, under aged of 12 years then the punishment of rape by such husband was of a maximum of two years or with fine, or with both. Sub-section 2 of section 376 of I.P.C. provides rigorously imprisonment of 10 years and of L.I. and also the fine, if the offender belongs to the police officials and such police officer commits the offence inside the territory of a P.S. where he is appointed or commits rape with such victim who is either in his custody; or custody of his subordinate, or by a public servant; or being in the management, or by the staff of jail, remand room, or by a member of management, or staff of the hospital, or if the perpetrator knowingly commits rape on a pregnant woman, or commits an offence of rape of woman of below the age of 12 years, or commits gang rape. The legislation was given a third explanation in sec 376 IPC prior amendment of the Act, 2013.

Under Explanation 1, it was provided that if any woman is raped by any member of a group of person in carrying out their same intention then every person of group shall be assumed to have committed gang rape. Explanation 2 of s. 376 of IPC expressed the situation where rape is committed in a woman's; or children's institution which may be an orphanage; or a home for the neglected woman; or children; or home of the widow; or any other shelter of women; or children. Under Explanation 3 the term hospital was defined in which hospital and its boundary and reception had been defined. It was cognizable, non-bailable, non-compoundable, and triable by the Court of Session but if rape is committed by a male with his own wife who was not under the age of 12 years was the nature of cognizable, bailable, non-compoundable, and triable by the Session Court.

**After enactment of the Act, 2013**

The Act 2013, the punishment of rape has become rigorous imprisonment of a minimum of 7 years and maximum imprisonment of L.I. and with a fine. Sub-section 2 of s. 376 of IPC states that if rape is committed by the police officer with a lady in the limit of police station where he is posted; or woman is in custody; or of his subordinate police officer; or commits rape during course of discharging duty; or such offender is a member of armed force; or staff of jail member; or a staff of hospital; or relative of the woman; or a guardian; or a teacher; or any person knowingly commits rape of the pregnant woman; or on a woman below aged of 16 years; or with a woman unable to give consent; or by any person who is position of control; or dominance over the woman; or play off rape with mental disordered woman; or physical disabled; or during rape caused grievous hurt; maims, disfigures the woman's life, or repeatedly rapes the same woman, then under the aforesaid conditions the punishment is rigorous imprisonment of minimum 10 years and

maximum imprisonment of L.I. The meaning of such life imprisonment is a person's natural life. Sub-section 2 of sec. 376 of IPC where the terms armed force, hospital, police officer; women's or children's institutions have been defined. The legislature has incorporated various situations where the play of rape can be committed and divers aspects and dimensions of rape have been considered where usually the offence can be seen to be perpetrated in the society. This offence is cognizable, non-bailable, and triable by the Session Court.

**Section 376A of IPC-** Before Amendment: Prior enactment of the said Act, 2013, this section having no entity in I.P.C. After Amendment: Provision of this section provides R.I. of 20 years and provision to extend to LI. It is cognizable, non-bailable and triable by Court of Session.

**Section 376B of IPC-** Before Amendment: Sec. 376B having no inherency in IPC prior the enactment but it is inserted in 2013 first time in IPC by efficacy of the Act, 2013. Subsequently, law relating punishment has been added. If the husband intercourses with his wife without her consent and such wife is living separate in the light of decree of judicial separation. It made punishable of 10 years minimum and maximum of 7 years and with fine. As per its explanation, the term sexual intercourse has been defined as mentioned in clause A to D of section 375 of IPC. It is cognizable, bailable and triable by Court of Session.

**Section 376C of IPC-** Before Amendment: Sexual intercourse by a person who is an authority has been codified in section 376 C, it was not in trend prior its enactment. After Amendment: After enactment of Act 2013, this section has been inserted which provides that the person who is an authority, committed any offence of sexual intercourse with a woman shall be punished with a RI up to 5 years, which may extend up to 10 years, and also be liable to fine. This offence is cognizable in nature, non-bailable and triable by Court of Session.

**Section 376 D of IPC –** Before & After Amendment: Only gang rape was govern by law prior amendment but after amendment, RI for 20 years minimum and LI maximum and with fine has been inserted. Nature of this offence is cognizable, non-bailable and triable by Court of Session.

**Section 376 E of IPC-** Before Amendment: No provision for punishment of repeated rape was in IPC earlier 2013 and after 2013, S. 376 E is added by the Act, 2013, by which punishment increased by LI. Purpose for adding is to control the offence. Its nature is cognizable, non-bailable and triable by Court of Session.

**3. Fair Investigation and Fair Trial**

Right to fair search and fair monitoring both are the fundamental rights of the accused and victim as enshrined under Article 21 of our Constitution. The remedy of fair investigation is started from the date of registering of FIR to submitting the challan thereafter right to fair trial has been started in trial and after trial it extended up to appeal or revision. The Cr.P.C. gives procedure. Motto of implementation of procedural law is to maintain fairness. From FIR to conviction or acquittal, process of procedural law has to be followed. In *Hema v/s State Inspector of Madras*<sup>8</sup>, court held in that fair inquiry and fair trial is ambit of the Constitutional. Investigation should be non-biased, transparent and judicious as basic requirement of the rules of law. In *Re: Babubhai v/s State of Gujarat*<sup>9</sup>, SC held that biased investigation is not permitted under the law. If tented and biased investigation is not interfere by the Court then certainly it would be failure of Justice. In *Shri Muniyappan v/s State of Tamil Nadu*<sup>10</sup>, SC observed in Para 55- if there is defective investigation in criminal case then either this may be lapsed by the investigation officer or is made for given the illegal benefit to the accused. Further observed that the defective investigation cannot be a ground of acquittal. investigation due to cause by police then benefits of doubt goes to accused person.

It was reiterated in *Re: Karnal Sing v/s MP State*<sup>11</sup>, that in defective investigation, the court has to evaluate evidence face on record and has

to adopt an active role to pick up truth. The court is justice oriented mission so that defective investigation should be recalled if inquiry is based on negligence or omissions which cannot be effectively rectified. In *Re: Zahira Habibulla H. Sheikh v/s State of Gujrat*.<sup>12</sup>, held that it is ensuring duty of the court with respect of remedying on deficiencies and defaults of the investigation to maintain fairness and to prevent the miscarriage of justice. Further held that ill investigation be considered by the court with iron hand under the law even after charge- sheet has been filed. It was open to High Court to direct the investigation in the case of CBI or other agency or to direct denovo investigation to secure the justice. At the time of persuasion charge sheet, the court recall its observation as held in *Re: Babubhai v/s State of Gujrat & Ors.*<sup>13</sup>, in para 32, responsibility of fair investigation is not only duty of the inquiring agency but also of the court to ensure that fair investigation is the individual right as held in *Munna Sharma v/s State of (NCT of Delhi)*<sup>14</sup>. Speedy trial & fair trial are also basic elements of the fundamental right. Fair trial and speedy trial both are alienable rights of the accused person as embodied in Articles 21 of the Constitution of India. Justice not only has to be done but also must appear to have been done, therefore it is conation of judiciary otherwise decision would be fair. To exercise the jurisdiction of judicial review is a dynamic component of the court to direct further investigation or reinvestigation which is basic feature of the Constitution. In *Re: Vinay Tyagi v/s Irshad Ali@Deepak*<sup>15</sup>, SC held that under the albeit of fair and proper investigation, therefore there are two imperatives- i. investigation should be fair, ii. to bring out the truth. To detect truthness and genuineness accordance with law is the basic purpose of investigation as held by SC during course of hearing the case *Samaj Parivartan Samudaya v/s Karnataka State*.<sup>16</sup>

In *Menka Gandhi (Supra)*, it is held that procedure should be followed. According to landmark judgement of *ADM Jabalpur v/s S.S. Shukla*<sup>17</sup>, the right as guaranteed under article 21 cannot be suspended in any manner again in *Menka Gandhi (Supra)* case by over ruling the *A.K. Gopalan v/s Madras State*<sup>18</sup>, held that the procedure should be followed and complied with mandate with Article 21 of Constitution of India, it should not be fanciful; oppressive, arbitrary

### 3.1 Duty of Court: trial must be fair

It is the basic duty of the court that trial must be fair under the civilised criminal justice system as well as, it is basic requirement to recognise human rights and values such as freedom, rules of law, democracy and transparency. In *Re: Suresh Chandra Jana v/s West Bengal*<sup>19</sup> Apex Court held that whole purpose of the court is to convict guilty and at the same time to protect innocent.

### 3.2 Fair investigation and its concept

Fair investigation is the essential element under the democratic form of Government. It flows from Article 21 of our Constitution. It facilitates not only the accused but also to the victims. It is the soul of criminal justice. Ill investigation has no place in the criminal justice system. The nature of Article 21 is very widened. By efficacy of the judiciary verdicts, authoritatively held that fair investigation is the fundamental right. Only procedure provided by the Cr.P.C. not fair investigation. Mostly fair investigation is not conducted by the investigation agencies as observed by judiciary reason thereby the benefit of doubt is given to the culprit. Reseltantly, the victim suffers.

### 4. Previous Sexual Experience and Character

Section 53A of Evidence - Prior Amendment: Before enactment of the Act 2013, this section was not in existence in Evidence Act. That it has been inserted in the Evidence Act after enforcement of the Act, 2013.

By the Act, 2013 the parliament has inserted a new law with respect of the evidence of character or previous sexual experience. By which, it has made that evidence of the previous sexual character and sexual experience of the victim is immaterial, meaning thereby both the evidence of previous sexual character and previous sexual experience is prohibited for raising questions with the victim woman during course of cross examination of the trial of sexual offences.

Sec 228A of IPC was introduced vide Amendment Act 43 of 1983 w.e.f. 25/12/1983 by which, the amendment to disclose of the identity of the victim of certain offences like sec 376, sec 376 A, sec 376 AB, sec 376B, sec 376C, sec 376D, sec 376DA, sec 376DB or sec 376E was punishable for a period of two years and shall also be liable to fine. Sub sec. 2 of sec 228A of IPC provides whoever published the court proceedings of these offences without due permission of the court, shall be punished up to two years.

In *Nipun Saxena v/s UOI*<sup>20</sup>, it is held in para 12 – “A victim of rape will face hostile discrimination and social ostracisation in society. Such victim will find it difficult to get a job, will find it difficult to get married and will also find it difficult to get integrated in society like a normal human being. Our criminal jurisprudence does not provide for an adequate witness protection programme and, therefore, the need is much greater to protect the victim and hide her identify. In this regard, we may make reference to some ways and means where the identity is disclosed without naming the victim. In one case, which made the headlines recently, though the name of the victim was not given, it was stated that she had topped the State Board Examination and the same of the State was given. It would not require rocket science to find out and establish her identity. In another instance, footage is shown on the electronic media where the face of the victim is blurred but the face of her relatives, her neighbour, the name of the village etc. is clearly visible. This also amounts to disclosing the identity of the victim. We, therefore, hold that no person can print or publish the name of the victim or disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large”.

But, sub-section 2 of sec 228A of IPC does not define anywhere the exception to the police officials where true identity, name of the prosecutrix has been recorded during course of FIR & investigation. It is pertinent to note that school record, DNA profile test, medical test; statements are the record of challan where the name and identity of the prosecutrix was there. Another aspect is that FIR is the public document; anybody can obtain the certified copy from the court.

In *Nipun Sexana (Supra)*, it is held that trial for sexual offences be commenced in camera proceedings before the presiding officer, court staff, accused, his counsel, public prosecutor and the victim and it is the duty of all of these to insure that what happens in the court be not disclosed outside. It is also held that the victim can move application to the court to permit her to file a petition under pseudonymous name e.g. X or Y or any other identity of code as may choice similarly name of the prosecutrix should be shown in appeal from her pseudonymous name. Since under the Constitution, every person has right to maintain his dignity and privacy. Previous sexual offence and character is the personal privacy and closer of that privacy by others is the infringement of the Fundamental Rights of the victim.

### 5. Presumption of Consent

**5.1** Before enactment of the Act, 2013: This section was not in existence in the Evidence Act before the enactment of the Act 2013. After enactment of the Act: By decorum of the Act 2013, Sec. 114(A) of Evidence Act is substituted. By this provision, victim's consent in rape as defined under clause (a); or (b); or (c); or (d); or (e); or (g) of sub section 2 of s.376 of IPC shall be presumed absent if victim woman states during the trial that the act was committed without her consent.

In *Re of State of Tripura v. Sri Dipak Das@Kudu*<sup>21</sup>; an observation regarding delay in lodging FIR did not inspire confidence of the court from the examination of the facts and circumstances, therefore sec. 114A of Evidence Act cannot be invoked. The accused of rape was slightly acquitted. In *Mohan Lal v. State of Haryana*<sup>22</sup>, where it is held by the SC that where the relationship between alleged person and the victim is a teacher-student then the provision of s. 114A of Evidence Act is attracted. In *Kailash v. State of UP*<sup>23</sup>, it is observed that the prosecutrix is 16 years of age and her resistance against offender is absent further increasing the probability of non-commission of an

offence against her as the alleged gang rape, hold to be committed at her house situated along the roadside which was crowded due to of Holi festival. Thus, her contention of receiving an injury in her private part and blood spots on her clothes which she bore but not corroborated from medical examination; therefore, provision of sec. 114A of Evidence Act, with respect of consent is not attracted. In *Re Dhanraj Singh and Ors. v. State of MP*<sup>24</sup>, observed that prosecutrix's statement is contrary to the medical evidence as no injury was found in her private parts and body while she deposed the same fact, therefore presumption under section 114A of Evidence Act cannot be drawn.

#### History of Consent in Law

There numerous times the concept of consent has been changed in our country. As per IPC, 1860 consent provided in clause 5 of sec 375 which was 10 years for the rape and as it was in exception of s. 375 of IPC of child marriage. In 1891, by efficacy of the amendment of IPC, the consent of 10 years replaced with 12 years by considering the Calcutta case- *Queen Empress v. Hurre Mohan Mythee*.<sup>25</sup> In 1929, the age of consent 12 years replaced with 14 years by amending in the Child Marriage Restraint Act. In 1940, amendment made in IPC and age of consent 14 years replaced with 15 years. In 1978 again the consensual age 15 years replaced with 16 years and in 2013 by efficacy of the Act, 2013 the consensual age of 16 years replaced with 18 years.

#### 5.2 Conclusion of consent from the act of victim:

Before the enforcement of the Act, 2013, the Court generally used to detect the gist of the consent of victim woman from her act by appreciating the evidence. In 1972, a tribal minor lady was raped by constables in the police station. In trial the accused were acquitted by the Supreme Court by holding that the girl Mathura was of bad conduct and she did not cry for help and no marks of injury on her body, meaning thereby no sign of struggle was present as held in the matter of *Tuka Ram v. State of Maharashtra*.<sup>26</sup>

After enactment of the Act 2013, the victim's consent is voluntarily before the court. In the matter of *Ram Krishna Ganesh Wagh v. State of Maharashtra*<sup>27</sup> it is observed that there was a plea of the accused that there the victim did not sustained injury, no definite opinion of sexual intercourse on which the court has convicted the accused. It was observed by the court that even if the prosecutrix is assumed to be of bad character, not to be said that the appellant had a right to rape her or to have the right to sexual intercourses with her by interpreting clause sixth of sec 375 of IPC.

### 6. Requirement of Expert Opinion

#### 6.1 Medical Examination of Victim

In *PP Countroy v/s Emperor*<sup>28</sup>, it is always required in the rape case that the accused should be medically examined as soon as possible. In *Manga v/s State of Haryana*<sup>29</sup>, held that it is difficult to the doctor who medically examined to the prosecutrix to give exact duration of time with respect of commission of rape. In *S.P. Kohali v/s State of Punjab (P&H)*<sup>30</sup>, held that the test of smegma losses after a period of 24 hours from the time of commission of rape. In *Dukaram Mandal v/s State of Jharkhand*<sup>31</sup> and in *Neelanchal Panigrahi v/s State of Orissa*<sup>32</sup>, observed that the absence of smegma is very weak type of evidence and conclusive finding cannot be given that rape has been committed, no report of forensic laboratory has brought while petticoat and full pant sent to forensic laboratory for examination. The defence version is that the appellant has been falsely implicated with this case due to quarrel on money; this fact appears material and probable in the case. Hence appellant was acquitted. In *Re: Narayan Iranna Potkanthi v/s State of Maharashtra*<sup>33</sup>, held that absence of semen stains on private part cannot be read in favour of the accuse, In *Harbans Singh v/s State of Punjab*<sup>34</sup>, held that the prosecutrix was nourished and of well physique was raped on rough surface at about 15 to 16 minutes even her legs were lifted and put on the shoulders of the accused and no injury was found on her back, it shows that she was consenting party. In *Chander Bahadur v/s State*<sup>35</sup>, held that doctor who examined to the prosecutrix did not found any

mark of injury on her body. There was neither a bruise nor an abrasion on the body of the prosecutrix, meaning thereby the prosecutrix did not resist, it amount to consenting party. Non production of doctor who examined to the prosecutrix is not fatal to the prosecution evidence of victim is reliable<sup>36</sup>

**Sec 90 of IPC:** Sec. 90 of IPC states obtaining consent under fear or misconception- 'A Consent is not such a consent as intended by any person of this code, if the consent is given by a person under fear of injury, or under a misconception of fact and if the person doing the act knows, or has reason to believe that the consent was given in consequence of such fear or misconception'. On bare observation of the provision of sec 90 of IPC that this section does not define the term consent; but specified & described that what is not within consent. Consent may be in expressed or implied and may be obtained by putting under fear of terror, coercion or through deceit. For the purpose of section 375 of IPC, consent of voluntarily participation is required.

In *Uday v/s State of Karnataka*<sup>37</sup>, the SC observed that the prosecutrix was aged of 19 years and consent was given for genital intercourse because she was deeply in love. Both were started to meet and often had sexual intercourse, resulting to the she become pregnant. On denial of marriage, the complaint v/s 376 of IPC was lodge. The Apex Court held that consent under misconception of fact is irrelevant. *State v/s Brij Dev Tiwani@Pandit*<sup>38</sup>, during course of cross examination, the prosecutrix had admitted to coach and tutor before recording her statement. No support of medical to be committed rape. Delay in FIR that has not explained, acquittal by enhancing presumption of innocent of accused. *State of H.P. v/s Munilal*.<sup>39</sup> As per medical report of the prosecutrix, she was habitual of sexual intercourse. There is day delay in reporting the crime which is not explained. Accused was acquitted.

#### 6.2 Potential Test of Accused

The *Mense rea* to commit offence is basic need. *Md. Shadab Rasheel, (2016)*<sup>40</sup> studied on requirement of potency test report of accused in genital offences after enactment of the Act, 2013. It has been discussed that medical test of the accused has narrowed down after the Act, 2013. S. 375 states no need of penetration. In conclusion, it is suggested that the accused should be exempted from the potency test if he is alleged from sec. 375 B, C, and D of IPC.

#### 6.3 DNA Test:

The abbreviation of term DNA is Deoxyribo Nucleic Acid. Actually DNA is inherited matter of human body cells. Red Blood Corpuscles do not contain DNA. White Blood Corpuscles contains DNA and reflects inherited code and its anatomy, human character, behaviours, body symptoms. DNA is a complex molecule. In *Raghuvir Desai v/s State*<sup>41</sup>, it is observed that the DNA test is clinching piece of evidence even though eye witness of rape case is turned hostile. Similarly, it has reiterated that the DNA test of vaginal swab and blood of accused confirmed by the DNA test then conviction is proper as held in *State v/s Santosh Kumar Singh*<sup>42</sup>.

**DNA Test:** The accused of a rape case filed an application for DNA test before the learned magistrate and same had been rejected on the ground that the case has not been committed to the competent court. After committal the case to the learned session court, accused again filed an application that he is innocent from the rape case and prayed that IO may be directed to obtain DNA test of the accused but application has been rejected. The accused approached to the High Court, Gwalior where he sought that he may be referred for DNA test because he is innocent and due to previous enmity, he has been falsely implicated. This aspect has been discussed by the High Court in the case of *Mulayam Singh (Supra)*. The definitions of Sec. 375 of IPC has discussed and after discussion, it is held that is not necessary for rape that semen is found at the internal garments or on part of prosecutrix. Similarly, DNA test and absence of semen over the prosecutrix is not necessary for rape. The accused can convicted on the evidence of other independent witness. The said view is fortified by the SC in *Krishna*

Kumar Malik v/s State of Harayana<sup>43</sup>, the court further held that if positive result of DNA would be a clinching evidence against the accused and negative result would be constituted favour of the accused. Further court held by considering the provision of sec. 53A of Cr.P.C. that if the investing authority found semen over the garments or prosecutrix then authority must have resort to sec. 53A of Cr.P.C. and accused must be sent for DNA test. It is equally applicable over the case where false implication is apparently seen. It is basic need for fair trial. The Court further stated that in a case of previous enmity, where a woman has been raped by using condom in this situation neither the semen nor any injuries would be sustained over the prosecutrix where evidence and witness may implicate the accused. It is further held that if the petitioner/ accused himself asking for DNA test then prayer should be allowed in the interest of justice and for fair trial.

In Dharm Deo Yadav v/s State of U.P.<sup>44</sup>, SC held that DNA test is the biological plan of life, which performs a significance role to detect the blood relations of paternity, maternity, brother etc. which can be detected from body material such as blood, semen, saliva, hair, skin, bones, etc. In State of Gujrat v/s Kishanbhai<sup>45</sup>, it is discussed the need of DNA test in investigation and held that the investigation agency must be sought DNA test report of blood sample for matching the blood of the victim's clothes. In Dharm Deo Yadav (Supra) held that many times reliable, trustworthy, credible witness of the crimes are out of law and material witnesses turn hostile. There may be several reason of such hostility, therefore improvement of investigation is required and it can only be improve with help of scientific evidence. The court has further held that oral evidence depends on several facts like power of observation, humiliation, external influence, forgetfulness etc. while the forensic evidence is free from those infirmities. In Anil alias Anthony Arikswamy Joseph v/s State of Maharastra<sup>46</sup>, where importance of DNA test has been discussed.

#### 7. Amended Provisions of IPC & Evidence Act and its effect on rate of reporting and rate of conviction

Sec. 166A of IPC, Sec. 53A & Sec. 114A of Evidence Act were not incorporated prior effect of the Act, 2013. By Sec. 166A of IPC, not registration of FIR of sexual offence made punishable. If the concerning I.O. does not register the FIR on receiving the information then it would be assumed that he had disobey the law. Sec. 166A, in first time, has been inserted by the Parliament in IPC by this provision, the public servant is under obligation to follow the law and on violation of law with respect of not writing F.I.R. on receiving complaint of commission of any offence of sec. 326(A), 326 (B), 354, 354(A), 354(B), 354(C), 354(D), 370, 370(A), 376, 376(A), 376(B), 376(C), 376(D), 376(E), or 509 of IPC, is punishable of minimum 6 months and maximum of 2 years. It is cognizable, triable by magistrate, and bailable.

**Sec. 166 B of IPC** - In first time, this provision has been interested by the parliament in IPC, by which provision, punishment due to not attend the victim for the treatment by any person of a hospital whether it may be of public or a private, whether run by the Central Govt. or by the State Govt., or run by the local body or run by any other person, Sec 166A of IPC provides shall be punished with impressments. It is bailable and triable by magistrate by first class but nature is non-cognizable but nowhere in law that who will pay the charges of treatment. It is pertinent to submit on making complained of the sexual offence against accused and accused is between either by the victim or by the crowd and accused person in consensual of the registering of F.I.R., then no provision has been codified in neither procedure Law nor in Criminal Law amendment Act, 2013 with respect of denied of treatment or non-availability of the Govt. Hospital within territory of the 16 km. From the place of the incident.

In nutshell to make compulsory to register the FIR pertaining to the commission of the sexual offences is affecting bad impact of rate of registering the cases. Now, it has to be examined that what impact of the Act 2013, on rate of reporting the sexual offences. As and when the

police officer receives the complaint relating to the sexual offences, and then he has registered the complaint whether it seems prima facie false or is based on blackmailing, counterblast, malafide, enmity, or complaint of cohabitation. This provision is mandatory in nature, meaning thereby under this provision, the concerning station house officer is duty bound to register the FIR of rape relating and sexual harassment relating offence.

Sec. 53 of Cr.P.C states medical test of accused on request of the police officer which shall be examined by the expert doctor, Sec.53A of Cr.P.C. states medical test of accused of rape by the doctor, Sec. 164(5A) of Cr.P.C reveals compulsory Magisterial statement. In the section 54, 54A of Cr.P.C does not provide that accused shall be examined of his DNA profile.

It has apparently seen that due to that provision, the police authority is duty bound to comply with, resultantly false cases of sexual harassment and sexual intercourse cases are being registered mechanically in manner. As per Delhi Commission of women Report, 53.2% rape cases have found false during period of April 2013 to July 2014. Report of Jaipur police, 2016 says there are numbers of false cases of rape have been registered and recorded 330 total numbers of rape cases and out of them, 276 cases of rape solved, and 43% rape cases found fake. Police told to the media that extort money or ulterior motive is behind the registration of false rape cases. Advocate Vinay Sharma<sup>47</sup> who was the advocate of the accused made interview to *See the people TV* that there 30%-40% cases of rape are being fled before the court and said that the most of them handled those are between girl and boy who has consensual relationship but when boy fails to fulfill the promise of marriage then the girl files complaint against him under Sec. 376 of IPC<sup>48</sup> where a woman told that she had been raped by a cab-driver and to associates while she was returning her home. On that police lodges an FIR and starts to investigate into the matter. Police asked to the woman on August 4, 2018 for medical test but she refused. The police asked the detail of driver on that she told that her mobile phone was not working at the booking time so she has booked cab by a passerby. Police Scanned CCTV footage near the airport where no evidence found of abduction, therefore, the police traced the mobile location of the woman then the fact came into knowledge to the police that she was not at the spot as told by her. Thereafter, considering the suspicious circumstances, the police scanned her call detail records where it has found that she booked cab on her mobile phone thereafter car's GPS was traced and it has found that she was dropped at her route. On interrogation to the woman, she admitted that she has developed relationship with her friend and she was upset so she made false complaint of rape.

Conviction rate of rape cases in India is higher than the other developed Countries of the World like United Kingdom, Sweden, and France. The conviction rate of rape case in India was 24.2% but conviction rate of United Kingdom was 7% and 7% of Sweden, 25% of France in 2011 to 2012, Sethi, Abhit Singh (19 March 2015). Conviction rate of rape case has been shown in table No. 1.

**Table No. 1**  
**Conviction rate of rape Case of India, 2007-2016**

Years	Conviction Rate %
2007	26.4
2008	26.6
2009	26.9
2010	26.6
2011	26.4
2012	24.2
2013	27.1
2014	28.0
2015	29.4
2016	25.5

**Sources:** National Crime Records Bureau, Lok Sabha NOTE: Data for 2016 are provisional.

From the table No. 2, it is apparently clear that the conviction rate of rape case of India in 2007 was 26.4%, 2008 was 26.6%, 2009 was 26.9%, 2010 was 26.6%, 2011 was 26.4%, 2012 was 24.2%, 2013 was 27.1%, 2014 was 28.0%, 2015 was 29.4%, 2016 was 25.5%.

## 8. Various Factors against Rape Cases

### 8.1 Intercourse during course of Live-in-Relationship:

Major male and major female have right to live together without marriage. The cohabitation in India is not offence. It protected by the law. But, there is no protection to the male from FIR of rape if major female of cohabitation is lodged. D.D. Basu (2009)<sup>49</sup> author interpreted and stated that the right to privacy is a Constitutional ambit. Accused was alleged to commit offence of rape with a prosecutrix against her wish and by taking illegal benefit of her loneliness. Not explained unordinary delay to lodge FIR, not disclosed to her family members about the incident immediately, absent of external and internal injuries on the part of prosecutrix of resistance, no prima facie case is made out as held in Sher Singh v/s State of H.P.<sup>50</sup>, and FIR has been quashed.

The prosecutrix was aged 32 years and she was having two children. Her husband had died. The statement of the prosecutrix reveals that she voluntarily used to reside with the accused since last three years. Allegation against the accused of u/s 376 (2) G. of IPC, it is held in Ajay Singh & v/s State of M.P.<sup>51</sup>, that the prosecutrix was a consenting party because she became pregnant and her abortion was carried out with the consent of the accused. In Dolgobinda Rath v/s State<sup>52</sup>, it is held that where the age of prosecutrix is below the age of 16 years, consent is immaterial but the act of cohabitation would be constituted. In Shivshankar@Shiva v/s State of Karnataka<sup>53</sup>, disposed on April 6, 2018, the Apex Court held that it is difficult to hold that to continue sexual intercourse for the last eight years is a rape where the complainant herself stated that the accused and she herself lived together as husband and wife.

### 8.2 Malicious prosecution and ulterior motive:

It is observed that several complaints of sexual harassments are being registered against innocent persons and there is no specific provision in the Act, 2013 to take immediate steps against prosecutrix for registering a feck FIR. In Re: Smt. Golmati Bai V/S Kapil Prajapati<sup>54</sup>, Hon'ble M.P. High Court observed that a petition u/s 200 of Cr.P.C. has been filed by the aggrieved person against the respondent that complainant is minor and she called to the accused and forced to develop sexual relation and when the accused denied to come to the home then she threatened to prosecute with the false report of sexual harassment. The High Court held that the facts do not constitute the case of sexual harassment.

In Re Pradeep@Balli v/s State of Nct of Delhi<sup>55</sup>: it is observed that the previous conduct of prosecutrix is unnatural and unacceptable. Prosecution did not prove his case beyond reasonable doubt. The prosecutrix took pills for preventing of pregnancy court held that the prosecutrix is a consenting party. The appellant/accused acquitted. In Re Jagwati v/s State of Haryana<sup>56</sup>: it is observed that as per prosecution story, the allegation against accused that sexual intercourse has been done by putting under fear of terror and forced her in furtherance of committing of rape. It is held by the court that there is no evidence to prove this allegation except the bald statement to the prosecutrix. Considering the said facts and circumstances, the accused acquitted from rape case.

### 8.3 Consensual matters

In Jindu v/s State of Punjab<sup>57</sup>, it is evidence that the prosecutrix was taken away inside the room and door was not bolted from inside. The prosecutrix did not assault and aside from preventing him for offence. It is held that inference could be drawn that the sexual intercourse is by the consent of the prosecutrix. In Bankey v/s State of UP<sup>58</sup>, observed that the age of prosecutrix is above of 18 years, therefore she was consenting party. In Addepallis Settibabu v/s State of AP<sup>59</sup>, held that consent obtained with misrepresenting for a rape, it means offence of rape committed without consent. The term consent is without suppression or

misappropriation and would be well sound mind not a guilty mind. The consent of women for intercourse may be hesitate, reluctant or grudging but if she consciously permits it than there would be consent as held in the case of State of U.P. v/s Chhotelal<sup>60</sup>.

In State of Karnataka v/s Shankarappa<sup>61</sup>, held that the girl went at tea shop where she was raped consecutively three times, as per evidence after raping first time, the accused had gone out for two hours outside leaving to the girls in tea shop but she did not try to run away, thereafter the prosecutrix stay whole night where she was raped two times again. She did not take permission to go outside from hostel, held that the prosecutrix was a consenting party. When a sex organ of the accused is fully evolved and normal and as per prosecution story it is of fully and completes sexual intercourse, no mark of injuries on genital parts of the prosecutrix reveals that she was a consenting party as held in Jagmal Singh v/s State of Rajasthan<sup>62</sup>. In gang rape, seven rapists rubbished to the prosecutrix but there is no corroboration to her testimony and absence of her injuries on vulva and vagina, as held in Chosa Ban Singh v/s State<sup>63</sup>,

Prosecutrix and accused both were working as cleaning staff in a Hotel. Accused was alleged for committing rape. As per prosecution story, the accused carried to the prosecutrix in a room of Hotel where the prosecutrix was no alarm or no struggle and no try to run away from the accused. No injuries in medical test and no external injuries. No independent witness has been produced as held in Surendra Sharma alias Diliwala Surendra Sharma v/s State of Uttranchal<sup>64</sup>. That the prosecutrix is consenting party.

In Re Tilak Raj v/s State of Himachal<sup>65</sup>, Supreme Court observed that the prosecutrix is matured lady of 40 years at the time of incident where she frequently admitted sexual relationship with the appellant/accused since two years prior to incident and also admitted that she used to stay overnight at the residence of accused. False pretext of marriage is not believable. Sexual relationship between prosecutrix and accused are consensual in nature. Appellant/accused acquitted 27/09/18. In Raghvinder Khurana v/s State of NCT of Delhi<sup>66</sup>, Court held that there is physical relationship between accused and the prosecutrix that would be outcome of free consent of appellant and prosecutrix and held that the prosecutrix is a consenting party, therefore provisions of rape is not attract.

### 8.4 Freely movement of victim with accused:

As per prosecution story that the prosecutrix has been taken away one place to another on false pretext that her mother was serious ill and she was raped. During course of travelling in public bus, opportunity was to run away but the prosecutrix did not run away and did not shout for help from the passenger. These circumstances reveal that the prosecutrix was a consenting party as held in the case of Ashok Kumar Thakur v/s State<sup>67</sup>.

In Rajak mohmad v/s Himachal Pradesh<sup>68</sup>, Hon'ble Apex Court observed that according to evidence of (PW7) the prosecutrix stay 2 days in Kullu in the house of (PW7) where 60-70 houses were around her house and prosecutrix remained in company of the accused for 12 days till the date of her recovery and held that she was freely moved around with the appellant but she did not make complaint. It is held that she is consenting party and order of conviction has been set-aside In Malti Chauhan v/s State of government of NCT of New Delhi<sup>69</sup>, prosecutrix used to travel with the accused even outside Delhi. In defence co-accused stated that he has seen to the prosecutrix and accused in wrong position and on account of made objection, the FIR has been registered falsely. Testimony of the prosecution is full of inherent contradiction. MLC of victim and FSL report do not support in version of the prosecution. Accused has acquitted.

### 8.5 Intercourse promising to solemnise marriage

Rape on false promise of marriage by the accused and the prosecutrix was in house and giving false promise of marriage, repeated offence of rape had been committed, resultantly, she gave a birth to a child, thus

promise of marriage not a sole reason for having sexual offence, as held that the prosecutrix was a consenting party in the case of Pradip alias Babudas v/s State of West-Bengal<sup>70</sup>.

Accused was alleged to commit offence of rape with a prosecutrix against her wish and by taking illegal benefit of her loneliness. Not explained unordinary delay to lodge FIR, not disclosed to her family members about the incident immediately, absent of external and internal injuries on the part of prosecutrix of resistance, no prima facie case is made out as held in Sher Singh v/s State of H.P.<sup>71</sup>, and FIR has been quashed.

In Dr. Dhruvram Murlidhar Sonar v/s The State of Maharashtra<sup>72</sup>, the court clearly made distinction in rape and consensual sex. It is the matter of carefully examination of fact of rape on proposal of marriage or had malafide intention or had made false promise to marry only to satisfy his lust. The court has further observed that there is also distinction between mere breaches of a promise of marriage and not fulfilling a false promise. If there is no promise made to marriage by the accused with intention to seduce the prosecutrix then court held that such act is not come under the provision of rape.

In Re Kapil Dev v/s State of H.P.<sup>73</sup>, as per prosecution story the prosecutrix was abducted and raped. Sexual intercourse was made on pretext of solemnize marriage and when refuse to marriage by accused then FIR was made which is delay in lodging. Accused acquitted. State of H.P. v/s Pawan Kumar<sup>74</sup>, On account of denial of marriage to the prosecutrix, the FIR has been lodge, therefore on ground of bitterness in relation and mere denial of marriage is not constitute rape offence. Testimony of prosecutrix was also unbelievable. It is held that the prosecution did not prove his case beyond the reasonable doubts. In Gaurav Maggo v/s State of NCT of Delhi<sup>75</sup>, it is held that the physical relationship between accused and prosecutrix with consent on account of promise to marry, therefore appellant's conduct is unfair or unreasonable but not come within the periphery of commit rape.

## 9. Discussion, Conclusion, and Suggestions

**Discussion and conclusion of first hypothesis-** Section 166A of IPC of IPC, Sec. 53A and Sec. 114A of Indian Evidence Act are giving bad effects on rate of reporting and rate of conviction on the sexual offences. The data has been collected by the researcher from NCRB since 2007 to 2016 with respect of conviction where rate of conviction has been gradually decreased since 2007 to 2012 and since 2013 to 2015 the conviction rate has been increase and in 2016 conviction rate has been decreased by 4% to 2015 (**Table No. 1**). In 2013, the Act, 2013 has been introduced where sec 166A of IPC has been inserted, by which the registration of the sexual offences have been become mandatory and disobey of this provision is punishable, reason thereby concerning police officials have to registered the case even the case is false from the prudent from very outset. On account of that the rate of reporting is being increased.

The impact of sec. 53A and sec. 114A of Indian Evidence Act, both have prohibit to raise question pertaining to sexual character and sexual experience to the victim, reason thereby at the time of appreciation of evidence the previous character and experience has been over looked. Similarly sec. 114A of Evidence Act is bonded the criteria of the accused on the point of consent of victim because of the provision of this section does not help to the accused if statement of the victim before the court does not clear cut disclose her consent, reason thereby once the victim discloses not consent even though she was spend her time with accused with live- in- relationship or sexual intercourse has been committed earlier in many occasions, reason thereby rate of conviction has been increased since 2013 gradually (**Table No.1**). Apart from that it is also experienced by the researcher during course of the advocacy of more than 28 years that seeing to the narrow down the right of accused by changing the definition of sec. 375 of IPC and inserting presumption of consent u/s 114 A of Indian Evidence Act, the increasing probability of conviction, the accused approaches to the victim and make

compromise outside the court. The another aspects has also been experienced by the researcher that due to insertion of sec 166A of IPC, several reports with respect of sexual offences have been made by the victim on malafide intention, ulterior motive, due to taking revenge, due to pressure of the parents, therefore such matters generally settled down by the both parties from the outside of the court, resultantly the prosecutrix become hostile in the court, reason thereby conviction rate of sexual offences is being low.

Sec. 228A of IPC states the disclosure of the identity of victim in offences like sec. 376, sec. 376A, sec. 376AB, sec. 376B, sec. 376C, sec. 376D, sec. 376DA, sec. 376DB or sec. 376E is punishable. Sec. 327 of Cr.P.C. states that the courts that offence relating to sexual offences shall be tried under camera proceeding. S. 153 of Evidence Act reveals that when witness answered any question which is relevant to the inquiry and answer has been given then no further evidence can be given to contradict, but it is pertinent to submit that this section further provides that if such witness answered false then he may be charged with given false evidence and exceptions 1 of this section provides if such witness denies the answer of his previous conviction then evidence may be given of his previous conviction. Meaning thereby the intention of this exception is that if any woman found that she had falsely initiated the proceeding of sexual offences by previous verdict of the court and subsequently she had alleged then her previous act regarding court verdict can be asked and if she denied then evidence may be given.

### Conclusion

The first alternate hypothesis is partly accepted. There is scope to do further study.

**Discussion and conclusion of second hypothesis-** There is no need of potency test of accused under newly amended definition of rape. Generally, law with respect of medical examination of accused in the sexual offences is conducted to corroborate the incident. Before amendment in the Act, 2013 there was need of insertion & penetration of the penis in private part of the victim woman but after amendment no need of insertion and penetration. In furtherance of this several aspects may be existed-

- i. Rape with married woman and report lodged after several days later & matter of no pregnancy.
- ii. Rape with married woman immediately FIR is lodged and accused arrested on spot and matter of pregnancy may be or not.
- iii. Rape with unmarried girl and FIR is lodged immediately and accused arrested on spot & matter of pregnancy may be or not.
- iv. Rape with unmarried girls and delay in FIR and accused arrested later and matter of pregnancy.

Aspect of (i) & (iv), there is no need of medical examination & DNA profile test of the accused but in aspect of (ii) & (iii), there is need of medical examination & DNA test of he accused.

**Conclusion:** The second alternate hypothesis is partly accepted. There is scope to do further study.

**Discussion and conclusion or third hypothesis-** To ban to raise questions from the victim with respect of her previous sexual character and previous experience is badly affecting to the fair trial as flows from Article 21 of the Constitution of India.

Fair investigation and fair trial both are fundamental right of both victim & accused as guaranteed by the Constitution as held in the matter of Hema (Supra), Babu Bhai (Supra) and in other cases. In the matter of Menka Gandhi (Supra), it is held that life and personal liberty must be just, fair and reasonable as well as it must satisfy the requirement of natural justice. Article-14, 19 & 21. Constitution makers said that the Article 14, 19 & 21 are the Golden triangle. Article 21 guaranteed that- no person shall be deprived from his life and liberty, except according to the procedure established by law. In Menka Gandhi (Supra) it is held that procedure should be followed the principle of Natural Justice. According to landmark judgment of ADM Jabalpur v/s S.S. Shukla<sup>76</sup> the right as guaranteed under Article 21 cannot be suspended in any manner.



Again in case of Menka Gandhi (Supra) by overruling the case of A.K. Gopalan (Supra), it is held that the procedure should be followed and complied with mandate with Article 21 of Constitution of India, it should not be fanciful; oppressive and arbitrary. But due to enactment of Act, 2013 to raise question from the victim of sexual offence has been banned with respect of her previous sexual character and her previous sexual experience, which is prima-facie. It is experienced that the procedure as incorporated by the parliament is making narrow down the fundamental right with respect to raise question with the victim of sexual offence during course of cross examination because sec 114A of Evi. Act states that if there is consent of the victim in sexual intercourse then no offence is made out as held in the landmark judgement as sited hereinabove in consensual matter.

In the aforesaid facts and circumstances if both victim and accused were living in live in relationship as a wife and husband, victim travelled with accused for a long time one place to another place, complained by major victim due to becoming pregnant are necessary facts and circumstances to determine the consent of major victim woman because of presumption of sec. 114 A of Indian Evidence Act is refutable and procedure as incorporated by virtue of Act, 2013 is struck down the right of the accused to prove himself innocent. Since procedure of Cr.P.C. provides camera proceeding to save and protect the identity of the victim therefore, under the camera proceeding the right to raise question with the major victim of sexual offence is to be reopened to protect the fundamental rights of the accused because of this rights of accused is agitate as and when allegation of sexual offence is imposed against him.

#### Conclusion:

The third alternate hypothesis is partly accepted. There is scope to do further study.

#### Suggestions:

Having considered the discussion and conclusion of by summarizing to the research questions & hypothesis, the researcher suggests the following suggestion-

1. The following provision be incorporated by inserting the proviso in sec 166 A of Indian Penal Code, 1960-

Provided that if the complaint with respect of commission of offence is mentioned in sub-section C (sec 326 A, 326 B, 354, 354 A, 354 B, 354 C, 354 D, 370, 370 A, 376, 376 A, 376 B, 376 C, 376 D, 376 E, or 509 of IPC) of the section 166 A of IPC found false after completion of investigation then the complaint shall be punished for half period of the provision of maximum punishment of the relevant offence as implicated by the victim and for that the concerning investigation officer should take legal step before the competent court of law by way of initiating the proceeding under criminal Act.

2. The following provision be incorporated by inserting the sub s. 4 of sec 327 of Code of Criminal Procedure, 1973-

Notwithstanding anything contained in sub sections 2 and 3, the major victim woman alleged prior with sexual offences (sec 326 A, 326 B, 354, 354 A, 354 B, 354 C, 354 D, 370, 370 A, 376, 376 A, 376 B, 376 C, 376 D, 376 E, or 509 of IPC) and by verdict of court or in investigation found false then in subsequent allegation of sexual offences if she denies it, evidence may be given of her previous falsification.

1. **The following provision be incorporated by inserting in sub section 6 of sec 53A of Code of Criminal Procedure, 1973-**

The police officer shall send to the accused of rape for DNA profile test within a period of 24 hours from his arrest.

2. The following provision be incorporated by inserting exception of section 114A of Indian Evidence Act, 1872-

Exception 1- If the complaint of rape (sec 326 A, 326 B, 354, 354 A, 354 B, 354 C, 354 D, 370, 370 A, 376, 376 A, 376 B, 376 C, 376 D, 376 E, or 509 of IPC) is registered delay without sufficient cause, or matter is related to live in relationship, or FIR is registered due to denied of

marriage, or proceedings were initiated before marriage of registrar or court or any tribunal and prima-facie appears that the minor victim woman is consenting party then court shall presume during course of granting bail.

#### References

- <sup>1</sup> SC No. 63/13.
- <sup>2</sup> (1992) 3 SCC 204.
- <sup>3</sup> (2010) 2 SCC 9.
- <sup>4</sup> (2009) 15 SCC 543.
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- <sup>6</sup> (2007) 11 SCC 265.
- <sup>7</sup> (1998) 6 SCC 29.
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- <sup>9</sup> 2010 (12) SCC 254.
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- <sup>13</sup> 2010 (12) SCC 254.
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