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## RESISTING SEXUAL ASSAULTS AND THE EXTENT OF RIGHT OF PRIVATE DEFENCE OF WOMEN

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**RESEARCH ARTICLE**

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### **ABSTRACT**

Fairly good data are available on the prevalence of sexual assault against women, but not much research has been done on the use and effectiveness of various strategies adopted by the victims to resist sexual assaults. In the absence of proper research the evidence of resistance to sexual assaults by women in India seems to be very less. Women are often advised to use non-aggressive strategies against sexual assaults. However, research suggests that this is a poor advice. Forceful physical resistance is an extremely successful strategy. In many western countries school-going children and teenagers are taught self-defense skills applicable in rape resistance. In India, several efforts are being made to prevent sexual assaults on girls and women including amendments in the relevant laws. However, the statistics are showing that instead of decreasing, the problem is always on the rise. While the Indian Penal Code empowers victims of any kind of assaults to use force in defending themselves, there is no much evidence to say that the victim women have been bold enough to resist their assailants with physical force. This could be probably due to lack of proper awareness of their rights or the stereotypical culture of the majority of Indian women hesitating to fight back. In this scenario making women aware of their legitimate right to self defence and encouraging them to make effective use the same assumes great importance. Therefore, this article discusses the desirability of fighting back against sexual assailants and the extent to which a victim could go to defend herself from such attacks.

Key Words: Sexual assaults, resistance, women, private defence, desirability, limitations

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The vigilance of magistrates can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men as the fear of sum total of individual resistance. Take away this right and you can become in so doing the accomplice, of all bad men.”---*Bentham*<sup>1</sup>

### **1. INTRODUCTION**

It has become every day experience for girls and women in India to find themselves in very awkward and vulnerable situations and apprehend immediate assaults on them. Sexual assault is defined as *any unwanted sexual act including forced sexual contact and sexual touching*. Rape is the serious most of the sexual assaults. Like domestic violence, rape and sexual assault are crimes that are far too common. It is disheartening to find thousands of girls and women encountering such tragic incidents every year. At least 34,651 cases of rape were reported across India last

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<sup>1</sup> BENTHAM, PRINCIPLES OF PENAL LAW, 269, as quoted by K.D. GAUR, TEXT BOOK ON THE INDIAN PENAL CODE 178 (4<sup>th</sup> ed. Universal Law Publishing 2009).

year, as per the statistics released by the country's National Crime Records Bureau.<sup>2</sup> In addition, the incidents of sexual assaults on young girls and women, in different states of India, in the last few months are a cause of serious concern.<sup>3</sup> The crime of sexual assault on a child, that is anyone below the age of eighteen, is further outlined and mandatory punishments described in the *The Protection of Children from Sexual Offences Act 2012*. But three years after India passed an enhanced law to combat child sexual abuse, it is said that it has been poorly implemented, often leaving families without support after they report sexual assaults. More than 36,900 rapes were reported in India in 2014. Nearly 14,000 of the victims were children, a 151 percent increase since 2009.<sup>4</sup> The crime was long shrouded in silence, but more families are reporting the sexual assault of children, another societal shift after the fatal gang rape of a young woman in New Delhi in 2012.

"Weak laws, lack of sensitivity in the police, the criminal justice system and the administration, poor infrastructure coupled with political patronage for the perpetrators of such crimes have all led to a poor conviction rate in crimes against women."<sup>5</sup> Among other efforts, which are miserably failing to curb the menace of crimes against women, making women aware of their legitimate right to self defence assumes great importance. Therefore, this article discusses the desirability of fighting back against sexual assailants and the extent to which a victim could go to defend herself from such attacks.

## 2. Sexual Assaults: Amendments to the Indian Penal Code

The Criminal Law (Amendment) Act 2013 came into force incorporating changes in the Indian Penal Code 1860, the Criminal Procedure Code, and the Indian Evidence Act 1872 following the recommendations of the Justice Verma Committee that was appointed subsequent to the *2012 Delhi Gang Rape Case*. Among other things, the new provisions incorporated in the Indian Penal Code that are relevant to the issue of sexual assaults are worth mentioning here. Section 326A has been inserted to penalize *voluntarily causing grievous hurt by use of acid*. Correspondingly, the seventh clause has been inserted in Section 100 where the right of private defence extends to causing the death of an assailant who throws or attempts to throw acid. Section 354A has been added to punish *sexual harassment*. This section spells out the most common acts of sexual harassment and lists: physical contact and advances involving unwelcome and explicit sexual overtures, demand or request for sexual favours, showing pornography against the will of a woman, making sexually coloured remarks, as sexual harassment. This section is gender-specific, being male with respect to perpetrator, and female with regard to victim. Section 354B makes *disrobing a woman* (stripping) punishable. *Voyeurism* is made punishable under Section 354 C. Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image is said to have committed voyeurism. *Stalking* is an offence of following a woman and contacting, or attempting to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman. Stalking also includes monitoring the use by a woman of the internet, email or any other form of electronic communication and is punishable under Section 354 D. Sections 375 and 376 A to 376 G deal with definition and punishments for rape respectively. The 172nd Law Commission report recommended that the word 'Rape' should be replaced by the term 'sexual assault'.

## 3. Fighting Back against Sexual Assaults

Sexual assaults on women are the most common crimes because assailants assume that women will be more passive and not fight back. Let alone strangers neighbors, colleagues, acquaintances even family members take advantage of the vulnerability of women and do not miss opportunities to abuse her sexually, be it verbal or physical. According to NCRB Report, victims knew their alleged rapists in 33,098 of the 34,651 reported rape cases, i.e. a 95.5 percent of the total cases.<sup>6</sup> Considerable evidence exists for both stranger and acquaintance rape that women who

<sup>2</sup> Figures were released by (NCRB) on August 30, 2016. <http://www.aljazeera.com/news/2016/08/india-34000-cases-rape-reported-2015-160831140518208.html>.

<sup>3</sup> *Women groups condemn recent spate of sexual assault incidents in Maharashtra*, THE INDIAN EXPRESS, Express News Service, October 15, 2016. <http://indianexpress.com/article/india/india-news-india/women-groups-condemn-recent-spate-of-sexual-assault-incidents-in-maharashtra-3083136/>.

<sup>4</sup> Rama Lakshmi, *More Children Are Being Sexually Assaulted In India Despite A New Law*, THE WASHINGTON POST, February 05, 2016 22:40 IST, <http://www.ndtv.com/world-news/more-children-are-being-sexually-assaulted-in-india-despite-a-new-law-1274224>.

<sup>5</sup> *Id.* Kiran Moghe (Akhil Bhartiya Janwadi Mahila Sanghatana).

<sup>6</sup> NCRB, *supra* note 2.

resist by screaming for help, running away or fighting back are more likely to avoid being raped.<sup>7</sup> But, it has been found that knowing, or even living with, their attackers may limit women's self-defence options, and it may not always be appropriate to directly or physically resist rape.<sup>8</sup> A victim woman may use polite or even scornful resistance against an assailant who is known to her but may hesitate to use physical force. Simple resistance either verbal or physical and using physical force that is effective to repel the assault are not one and the same.

Several myths can prevent women from defending themselves effectively against a physical sexual assault. They include the myth that the assailant is invulnerable, that greater physical strength will decide who will prevail, that resistance involves the risk of greater injury, and that they don't know how to defend themselves. Research conducted from the mid-1970s on rape avoidance and resistance patterns suggested, however, that the majority of rape victims/survivors resisted the rape in some way.<sup>9</sup> Researchers suggested that the most effective strategy in avoiding rape was a combination of yelling and physical force.<sup>10</sup> Other researchers found no relationship between verbal and physical resistance and the amount of injury sustained.<sup>11</sup> In a very recent research,<sup>12</sup> the impact of victim resistance on rape completion and injury was examined utilizing a large probability sample of sexual assault incidents.<sup>13</sup> Taking into account whether harm to the victim followed or preceded self-protection actions, it was concluded that, additional injuries besides rape, particularly serious injuries, following victim resistance are rare. Results indicate that most self-protection actions, both forceful and non-forceful, reduce the risk of rape completion, and do not significantly affect the risk of additional injury. Among other things the following are some of the reasons why women don't fight back:

- a. The attacker is in a position of authority (teacher, older or more senior relative, government official, boss, whatever) over the woman, so she fears the long-term consequences of resisting.
- b. She doesn't know the techniques, never having learned them.
- c. The woman wasn't in a position to use "self-defense techniques" because she wasn't aware of the attack until it was too late.
- d. Because even if there is such a possibility, oftentimes, the sheer shock of finding herself assaulted (in any way, including molestation) is so great that the brain freezes and she finds herself unable to act.<sup>14</sup>

Obviously, the diversity of contexts in which a sexual attack may occur makes it difficult to provide a standard set of advice to women. Even if a woman is acquainted with her attacker (as a neighbour or co-worker, for example), how is she to know if he is a serial rapist, a particularly aggressive man, or a potential rapist who will be easily deterred by verbal assertion? Rape situations and the backgrounds of both attacker and victim vary considerably.<sup>15</sup> A strategy that

<sup>7</sup> SANDERS, W.B., *RAPE AND WOMAN'S IDENTITY* 74 (Sage Library of Social Research, Beverly Hills, CA 1980).

<sup>8</sup> Gail Reekie and Paul Wilson, *Rape, Resistance and Women's Rights Of Self-Defence.*, Queensland University of Technology., [http://www.aic.gov.au/media\\_library/publications/proceedings/20/reekie.pdf](http://www.aic.gov.au/media_library/publications/proceedings/20/reekie.pdf).

<sup>9</sup> KATZ, S. & MAZUR, M. A. *UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS*, (John Wiley, New York 1979); WILSON, P.R. *THE OTHER SIDE OF RAPE*, (University of Queensland Press, St Lucia 1978).

<sup>10</sup> Bart, P. *A study of women who both were raped and avoided Rape*, 37-4 *Journal of Social Issues*. 123-37 (1981); BART, P. B. & O'BRIEN, P. H., *STOPPING RAPE: SUCCESSFUL SURVIVAL STRATEGIES*, (Pergamon Press, Oxford 1985).

<sup>11</sup> Hazlewood, R.R., Reboussin, R. & Warren, J.I., *Serial rape: correlates of increased aggression and the relationship of offender pleasure to victim resistance*, 4-1 *Journal of Interpersonal Violence*, 65-78 (1989).

<sup>12</sup> Tark J, Kleck G., *Resisting rape: the effects of victim self-protection on rape completion and injury*, NCBI Resources, US National Library of Medicine National Institutes of Health, Violence Against Women. March 20, 2014 (3):270-92. doi: 10.1177/1077801214526050. Epub March 30, 2014. <https://www.ncbi.nlm.nih.gov/pubmed/24686123>; See also Zoncha-Jensen, J. M. & Coyne, A. *The effect of resistance strategies on rape*. *American Journal of Public Health*, 83(11), 1633-1634. (1993); Quinsey, V. L. & Upfold, D. *Rape completion and victim injury as a function of female resistance strategy*. *Canadian Journal of Behavior Science*, 17(1), 41-50. (1985).

<sup>13</sup> Derived from the National Crime Victimization Survey (1992-2002).

<sup>14</sup> James W. Hopper, *Why many rape victims don't fight or yell*, THE WASHINGTON POST (June 23, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell/> Dr. James W. Hopper, PhD, instructor at Department of Psychiatry of Harvard Medical School further explains that, in the midst of sexual assault, the brain's fear circuitry dominates. The prefrontal cortex can be severely impaired and all that's left may be reflexes and habits. Freezing occurs when the *amygdala* – a crucial structure in the brain's fear circuitry – detects an attack and signals the brainstem to inhibit movement. It happens in a flash, automatically and beyond conscious control. It's a brain response that rapidly shifts the organism into a state of vigilance for incoming attacks and avenues of escape. Eyes widen, pupils dilate. Hearing becomes more acute. The body is primed for fight or flight. But, neither fight nor flight necessarily follows.

<sup>15</sup> WILSON, P.R., *THE OTHER SIDE OF RAPE*, 32, 45 (University of Queensland Press, St Lucia 1978); Hazelwood, *supra* note 11.

works in one situation will not necessarily work in another, and that adopted by one woman may not be appropriate for another.<sup>16</sup>

There is no universal agreement on how a woman should respond during an attack. Some experts suggest a woman should resist, fighting back with every imaginable resource. They cite statistics showing that if women fight back, their odds of being raped are cut in half, while their odds of being injured are raised by 10 percent.<sup>17</sup> Most experts caution that there is no one correct response. The important thing is to live through the assault. The promotion of active resistance strategies has been considered to place women centrally as decision-makers and actors in cases of sexual violence, and to view women as survivors rather than victims of rape and sexual assault.<sup>18</sup>

Different forms of sexual assaults take place at any place i.e. in the female victim's home, work place, in the street, in buses, trains etc. The best way for women to fight back against crime is to prevent it from happening by avoiding being alone or being in badly lit areas. However, getting into such situations is sometimes inevitable. In the event that sexual assault prevention fails—such as by avoiding problem areas or making sure a woman is never alone—the best chance for survival is to fight back. Fighting back is not just necessary, but it is a moral right because protecting one's self is paramount.

Nevertheless, simply saying to women that the answer is to fight back ignores the complicated meanings our culture gives to rape, resistance and consent, and the problems posed by the systemic nature of women's low self-esteem, vulnerability and often daily experiences of male abuse. It is important, therefore, that women know they have the right not to be abused and that they deserve and have the right to resist. However, a woman's choice not to resist is equally valid.

#### 4. The Right of Private Defence

If a woman does choose to defend herself against a sexual attack, she is protected by the law. Apart from the general right of private defence of her body, the special clauses mentioned in section 100 of the Indian Penal Code, 1860 empowers her to go to the extent of causing death of her assailant in specific circumstances mentioned therein.

##### a. Foundations of Right of Private Defence

The right of private defence is based on the cardinal principle that, '*it is the first duty of a man to protect himself*'.<sup>19</sup> The police or the other state law enforcement agencies cannot be expected to be present everywhere. Therefore, at such times of emergency a person may strike out for himself or for another. In a classic exposition, the Lahore High Court in *Mahandi v. Emperor* noted that:

"...the law does not require a citizen, however law-abiding he may be, to behave like a rank coward on any occasion...if a man is attacked he need not run away and he would be perfectly justified in the eye of law if he holds his ground and deliver, a counter attack to his assailants provided always, that the injury which he inflicts in self defence is not out of proportion to the injury which he was threatened."<sup>20</sup>

The Supreme Court, in the case of *Munshi Ram and others v. Delhi Administration*, has also held that there is nothing more degrading to the human spirit than to run away in the face of a peril.<sup>21</sup>

Right of self-defence existed during ancient India and self-help was the first rule of criminal law. It still remains a rule under the criminal law of India. Explaining the genesis of the rule, the Supreme Court observed:

"It is important to bear in mind that self-preservation of one's life is the necessary concomitant of the right to life enshrined in article 21 of the Constitution of India, fundamental in nature, sacred, precious and inviolable. The importance and validity of the duty and right to self-preservation has a species in the right of self-defence in criminal law. Centuries ago thinkers of this great land conceived of such right and recognized it."

The right of private defence serves a social purpose.<sup>22</sup> In as much as a person who unlawfully attacks another is in the wrong, he who repels the attack contributes to ensuring that wrong should not prevail; by restoring the order which the attack has disturbed, he performs a function which is all the more useful to the community since his act may at the

<sup>16</sup> Bart & O'Brien *supra* note 10 at 34.

<sup>17</sup> Tark J. *supra* note 12.

<sup>18</sup> Sanders *supra* note 7 at 74; HER WITS ABOUT HER: SELF-DEFENCE SUCCESS STORIES BY WOMEN, xxvi (Caignon, D. & Groves, G. eds., Women's Press, London 1989).

<sup>19</sup> DALBIR BHARTI, WOMEN AND LAW 259 (APH Publishing, 2008).

<sup>20</sup> A.I.R. 1930 Lah. 93, at para [7].

<sup>21</sup> A.I.R. 1968 S.C.702.

<sup>22</sup> Darshan Singh Vs State of Punjab / Criminal Appeal 1057 of 2002.

same time deter prospective aggressor. Furthermore, the doer is justified in resisting the attack not only morally and socially, but also legally; the defence is lawful since, in the terms of Hegel, *it negates the negation of the law*.

#### **b. Scope and Limitations of the Right of Private Defence**

In order to have a proper understanding of the scope and limitations of the right of private defence, all the sections 96 to 106 of IPC have to be read together.<sup>23</sup> According to section 96, '*nothing is an offence which is done in the exercise of the right of private defence.*' Under section 97, subject to restrictions contained in section 99, every person has a right to defend:

- a. His<sup>24</sup> own body and the body of any other person against any act which is an offence affecting the human body and
- b. The property whether moveable or immovable of himself or any other person against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or which is an attempt to commit these offences.

Section 99 indicates the limits within which the right of private defence should be exercised. According to this provision there is no right of private defence against an act which does not reasonably cause the apprehension of death or grievous hurt, if done, or attempted to be done, *by or by the direction of a public servant* acting in good faith under the colour of his office, though that act may not be strictly justifiable by law. Further, there is no right of private defence in cases in which *there is time to have recourse to the protection of the public authorities*. Finally, the right of private defence in no case extends to the inflicting of more harm than is necessary to inflict for the purpose of defence.

#### **c. Proportionality of the Force Used in Private defence**

The concept of 'necessary force' under Section 99 para 4 of I.P.C. lays down the requirement of 'proportionality' and limits the amount of defensive force which may be used. While interpreting this provision, the courts have consistently held that the 'necessity' of such force is to be generously assessed on the basis of a standard of reasonableness. Individuals exercising the right of private defence are usually under significant pressure and are, therefore, unable to judge the amount of defensive force necessary with exact certainty.<sup>25</sup> If private defence is intended to protect the rights of individuals, as opposed to furthering the state's 'law and order' objectives, consideration should be given to the pressures faced by individuals in such circumstances.<sup>26</sup> Case law underscores that '[i]n adjudging the question as to whether more force than was necessary was used...it would be inappropriate...to adopt tests by detached objectivity which would be so natural in a Court room, or that which would seem absolutely necessary to perfectly cool bystander.<sup>27</sup> The individual is not expected 'to modulate his defence step by step' or to respond 'in the thinking of a man in ordinary times or under normal circumstances'.<sup>28</sup>

#### **5. Right of Private Defence Extends to Causing Death of the Assailant**

Section 100 shows that the criminal law of our country recognises the fact that there can be certain situations wherein a person may have no other way-out except to cause even death while exercising right of private defence of body. These situations have been identified as follows:

First- Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly-Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly- An assault with the intention of committing rape;

Fourthly- An assault with the intention of gratifying unnatural lust;

Fifthly- An assault with the intention of kidnapping or abducting;

Sixthly- An assault with the intention of wrongfully confining a person, under circumstances that may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

<sup>23</sup> Munney Khan V. State Of Madhya Pradesh 1971 AIR 1491, 1971 SCR (1) 943

<sup>24</sup> I.P.C Section 8. Gender: The pronoun " he" and its derivatives are used of any person, whether male or female.

<sup>25</sup> Common law courts have also generally taken this approach. For example, Holmes J. stated in the US case of Brown v. United States that 'Detached reflection cannot be demanded in the presence of an uplifted knife': 256 US 335 (1921), at 343. As quoted by Barry Wright, CODIFICATION, MACAULAY AND THE INDIAN PENAL CODE:THE LEGACIES OF MODERN CHALLENGES OF CRIMINAL LAW REFORM, 199 (Rutledge, 2011)

<sup>26</sup> Barry Wright, *supra* note 25.

<sup>27</sup> Ranveer Singh v. State of Madhya Pradesh A.I.R. 2009 SC 1658, at para. [13].

<sup>28</sup> *Id.*

Seventhly – an act of throwing acid or attempting to throw acid.<sup>29</sup>

A woman confronting a sexual assault may stand the risk of suffering any one or more injuries listed above. Threatening a woman with death or grievous hurt, kidnapping girls<sup>30</sup> and abducting adult women, wrongfully confining them to make them surrender to demands for sexual favours and even throwing acid on women<sup>31</sup> where they consistently refuse to surrender have become very common in Indian society. Therefore, if a sexual assault occasions any of the above mentioned circumstances a woman can use force even to cause the death of her assailant and invoke the provisions of Section 100 of I.P.C., by establishing that:

- She is free from fault in bringing about the encounter,
- There was an impending peril to life or of great bodily harm,
- There was no safe or reasonable mode of escape by retreat,
- There was a necessity for taking life.

In *State v. Nirupama Panda*,<sup>32</sup> the Orissa High Court held that the extra-judicial confession of the accused that she had stabbed the deceased because he outraged her modesty cannot be used as an incriminating piece of evidence against her because *she had every right to save her honour even by causing death of the person who either committed rape on her or attempted to commit the same*. The Court went on to emphasise that after her widowhood the accused led an immoral life by living as a mistress of someone is of little consequence because even a whore is entitled under law to protect herself from attack of intending rapist. The Court acquitted her on the ground of private defence.

**a. Reasonable Apprehension of Danger**

A woman need not be in actual imminent peril of her life or great bodily harm before she may attack her assailant. It is sufficient if in good faith she has a reasonable belief from the facts as they appear to her at the time when she is in such imminent peril. If she is threatened with death or some great bodily harm and has reasonable ground to believe and does believe that her life is about to be taken or such great bodily injury to be inflicted she may act safely upon appearances and kill her assailant if that be necessary to avoid the apprehended danger. Such killing will be justifiable, though it may afterwards turn out that there was in fact neither design to cause to her injury nor danger that would be done. The law of self defence justifies an act done in honest and reasonable belief of immediate danger.

As a general rule, it is immaterial to the right of private defence whether the person exercising it knew the dangerous character and disposition of his assailant. The apprehension of death or serious bodily injury to justify taking life must be such as arising out of acts and conduct of deceased at the time of killing. A requested instruction that the “appearance” of the peril justifying the taking of life need not be real is faulty, as the appearance must be real, though the peril need not be so.<sup>33</sup> Indeed there need not be an actual continuance of the danger but a reasonable apprehension of such danger at the time of the exercise of the right of private defence.

For the reasonable apprehension of danger to the person or property the threat must be real and immediate. If it is so, he is entitled to exercise his right of private defence. It is the accused’s apprehension of immediate threat which is important and not the injuries suffered by him. The test of the immediate threat is belief in imminence of danger and is based on some reasonable ground. Justification for culpable homicide in right of private defence exists when there is imminence of danger, the apprehension of danger is immediate and is only against actual assailants and not against possible assailants in future.<sup>34</sup>

<sup>29</sup> Inserted by the Criminal Law (Amendment) Act, 2013.

<sup>30</sup> Kuljeet Singh @ Ranga v. Union Of India & Another 1981 AIR 1572, 1981 SCR (3) 512; Abhishek Angad, *Delhi: Kidnapped and raped, missing girl returns home after 10 years*, INDIAN EXPRESS, New Delhi, August 3, 2016 4:59 am. <http://indianexpress.com/article/cities/delhi/delhi-kidnapped-and-raped-missing-girl-returns-home-after-10-years-2950686/>; *India arrests five for kidnap and rape of Japanese woman*, BBC NEWS, 3 January 2015 <http://www.bbc.com/news/world-asia-india-30665581>; *2013 Kamduni gangrape-murder: 3 get death sentence, life term for 3 others*, INDIAN EXPRESS, Kolkata, [Updated: January 31, 2016 2:14 am. <http://indianexpress.com/article/india/india-news-india/2013-kamduni-rape-case-three-convicts-sentenced-to-death-others-get-life-in-prison/>

<sup>31</sup> Historically, acid attacks have been acts of revenge over perceived rejection by a woman. It remains a highly gendered form of violence, however, with perpetrators almost always male, and victims primarily female. ACID ATTACKS, *Indian acid attack victims share their stories*, ALJAZEERA, March 10, 2016 <http://www.aljazeera.com/indepth/features/2016/03/indian-acid-attack-victims-share-stories-160309074926141.html>

<sup>32</sup> 1989 Cri LJ 621

<sup>33</sup> *Id.* at 169.

<sup>34</sup> Bishan Singh v. Emperor I.L.R. 1924 51 CAL 573; Mohd. Rafi v. Emperor A.I.R. 1947 Lah. 375; George Dominic Varkey v. State of Kerala A.I.R. 1971 SC 1208; Neelambaran v. State of Kerala, A.I.R. 1960 Ker 258.

In order to create reasonable apprehension in the mind of the accused, the nature of assault is taken into consideration. The assault must be dangerous, so that it could produce apprehension of death or serious bodily harm. Dangerous, grievous and serious bodily harm or injury must be distinguished from slight or even moderate harm or injury; a mere touching of body, a blow with the fists, even knocking down cannot give rise to reasonable apprehension of death or grievous hurt to the person or property.

Mere use of words, howsoever provocative, will not justify even a simple assault. But the mere belief in the impending harm or knowledge that the assailant has the means ready to inflict it, or the fact that he really has such means not known to the defendant, without some hostile overt act, movement or demonstration of evil purpose to use them are not generally sufficient to justify the necessity upon which the right to kill in private defence is based. There must be an impending peril of great bodily harm in order to create honest belief of an existing necessity.<sup>35</sup>

**b. Time of Apprehension**

Time of apprehension is an essential element to determine the reasonable apprehension of danger for the purposes of right of private defence. The Supreme Court in *Jai Dev v. State*<sup>36</sup> emphasized that the right must exist at the relevant time. In the words of the Court, *"as soon as the cause for the reasonable apprehension has disappeared and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence."* There is no right of private defence if at the relevant time there was no threat either to the person or to the persons and property of their companions. Therefore, the Courts emphasise the 'time element' in assessing apprehension in the mind of the accused.

**c. Temperament of the Assailant**

The temperament of the assailant is one of the prime considerations of the reasonable apprehension. It should be judged from all the surrounding circumstances, such as the reputation of the deceased for a violent, dangerous or turbulent disposition and the existence of tension of feeling and initial malice at the time of occurrence.<sup>37</sup> Therefore, if a woman knows that her assailant is of violent temperament or has the history of assaulting women sexually and thereby apprehends serious bodily injury or rape or death to herself she is perfectly justified in using force that might even cause his death.

**6. Commencement, Continuance and Termination of the Right**

The right of private defence of body or property commences only on reasonable apprehension of danger. This reasonable apprehension of danger to either body or property arises from an attempt or threat to commit the offence. The apprehension should be such as would be entertained by a reasonable person at the crucial time. It would, however, not extend to superstitious fears.<sup>38</sup> For the exercise of the right of private defence of the body it is necessary that the reasonable apprehension of danger must continue at the time when the impugned injury is caused.<sup>39</sup> Thus, it is necessary to prove not only that the right has commenced, but also that it has not come to an end.<sup>40</sup>

**7. Right of Private Defence of another and Duty to Defend Others**

The Indian Penal Code not only recognizes the right of private defence of every person but also imposes a duty on him to defend the body and property of others. A mere glance at section 97 shows that the right of private defence includes a duty. The very purpose of authorizing a man under section 97 to defend the body and property of others is to cast a legal duty on him.<sup>41</sup> However, the duty imposed by section 97 is voluntary and not obligatory attracting penalties. Many incidents of sexual assaults are happening in broad day light and even in public places. Nearly four out of five women (79 per cent) in India have experienced some form of harassment or violence in public.<sup>42</sup> When verbal

<sup>35</sup> Balbir Singh Balwant Singh v. State A.I.R. 1959 P H 332.

<sup>36</sup> A.I.R. 1963 SC 612.

<sup>37</sup> Kanbi Chhagan v. State A.I.R. 1954 Sau. 34; Karamat Husain v. Emperor A.I.R. 1938 Lah. 269.

<sup>38</sup> State v. Dhiria Bhavji, AIR 1963 Guj. 78.

<sup>39</sup> Ram Lal Singh v. Emperor 22 W.R. (Cr.) 51.

<sup>40</sup> U.P. v. Ram Swarup 1975 S.C.R. (1) 409.

<sup>41</sup> DALBIR BHARTI, POLICE AND PEOPLE ROLE AND RESPONSIBILITIES 140 (APH Publishing, 2006).

<sup>42</sup> Four out of 5 Indian women are sexually harassed in public places: Action Aid UK survey, Express News Service, THE INDIAN EXPRESS, May 31, 2016., indianexpress.com/article/india/india-news-india/four-out-of-5-indian-women-are-sexually-harassed-in-public-places-action



harassment or groping do occur in public areas, bystanders frequently look the other way rather than intervene, both to avoid a conflict and because they -- on some level -- blame the victim.<sup>43</sup>

In ancient India, the law not only prescribed the duty of man to defend others but also imposed punishment on those who failed to discharge their duty of defending others.<sup>44</sup> It was provided that any person who failed to render assistance according to his ability (in prevention of crime) when a village was being plundered, a dike was being destroyed or a highway robbery was being committed, should be banished with all his goods and chattel.<sup>45</sup> Double punishment was prescribed for those who failed to give assistance to one calling for help though they happen to be on the spot or who run away after being approached for help.<sup>46</sup> The onlookers of sexual assaults must feel the responsibility to intervene and help the woman out of the attack. They must know their duty to protect their fellow human being and the right to use force, if necessary, in exercise of right of private defence of another.

Right of Private defence extends to the extent of causing death when daughter was being sexually assaulted. In **Yeshwant Rao v. State of Madhya Pradesh**,<sup>47</sup> the deceased, Lakhan Singh was engaged in a sexual intercourse with the daughter of the appellant. On witnessing the same, the appellant assaulted the deceased on the head with a spade. This resulted in his death due to rupture of liver which could be either by falling on a hard object, or as result of the blow given by the appellant.

The trial court convicted the appellant under section 325, I.P.C for causing hurt and the High Court confirmed the conviction. In appeal, the supreme Court set aside the conviction and held that the right of private defence was fully applicable to the facts of the case vide sections 96, 97 read with section 100 clause (3) of I.P.C. whether it was case of sexual intercourse with or without consent, the fact remains that the daughter was of fifteen years of age and, therefore the act of the deceased would amount to rape within the meaning of section 375, clause (6) of the I.P.C. In **Vishwanath v. State**<sup>48</sup> a married woman whose relations with her husband were strained was residing with her brother, the accused. The requests of the husband that the wife must return to him were not complied with. On the day of the incident the husband along with some other, persons went to the home of the accused to bring back his wife. While his other companions waited outside, he went inside and started dragging his unwilling wife by hand. The accused, who at that time was standing outside with the husband's companions, became agitated. He pulled out a small knife from his pocket and inflicted one blow by it which fell on his heart as a result of which he died. It was held by the Supreme Court that since the deceased husband had committed an assault with the intention of abducting her, clause 5 of section 100 of the Code gave a right of private defence to the accused even to the extent of causing his death.

The Court was satisfied that since only one blow was inflicted, the condition under section 99 that no more harm than necessary for the purpose of defence should be caused was adhered to even though that single blow by falling on the heart caused the death.

While in the above discussed case a brother used force to prevent his sister from being abducted, in **Nankau v. State**, a paramour of a married woman, who left her husband and came to reside with him voluntarily, and his brother used force against her husband who assaulted her with a view to compel her by force to leave her paramour's house and come with him. It was held by the Allahabad High Court that since section 97 of the Code gave the right of private defence to everyone to intervene on anyone else's behalf, the paramour and his brother were protected under clause 5 of section 100 for causing death of even the husband of the woman.

In **Prakash Chandra v. State**<sup>49</sup> some persons went into the house of the appellants in the night and started dragging out a married woman of about 25 years of age and causing her injuries with the intention of having sexual intercourse with her. The husband of the lady and other in-laws inflicted injuries on them by using force resulting into death of one of them. The Rajasthan High Court held that the appellants were entitled to the benefit of section 100 of the Indian Penal Code as they were exercising their right of private defence. The Court observed that, persons going at

<sup>43</sup> Olga Khazan and Rama Lakshmi, 10 reasons why India has a sexual violence problem, THE WASHINGTON POST, December 29, 2012, <https://www.washingtonpost.com/news/worldviews/wp/2012/12/29/india-rape-victim-dies-sexual-violence-proble/>

<sup>44</sup> *Id.*,

<sup>45</sup> Rama Jois, Mandagadde, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA 380 (Universal Law Publishing, 1984).

<sup>46</sup> Dalbir, *supra* note 41 at 9.

<sup>47</sup> A.I.R. 1992 S.C. 1683.

<sup>48</sup> 1960 A.I.R. 67.

<sup>49</sup> 1991 Cri. L.J 2566

the odd hour of night to the house and dragging a married woman out are sufficient circumstances for her husband and other in-laws to have used reasonable force. Since the dragging was done with the intention of seducing her to sexual intercourse, it was clearly a case of atrocity on the weaker sex of the society.

In *Badan Nath v. State*,<sup>50</sup> the deceased committed assault on the daughter of the accused with the intention of raping her. The Rajasthan High Court held that the accused was entitled to the benefit of right of private defence of the person of his daughter. Therefore, when a girl or a woman appears to be in risk of being molested, sexually assaulted, kidnapped or abducted any person can without any hesitations help her out of such a situation. Such a helper is completely protected under the law for using such physical force as might be necessary in rescuing her, even to the extent of causing the death of the wrong-doer.

#### 8. Right of Private Defence can be Established Even without the Accused Pleading It

The fact that the plea of self defence is not raised by an accused and that he on the contrary pleads an alibi, does not preclude the court from giving to him the benefit of the right of private defence, if, on proper appraisal of the evidence and other relevant material on the record, the court concludes that the circumstances in which the accused finds himself at the relevant time gives him the right to use a genuine exercise of this right.<sup>51</sup>

The authors of the Code have very nicely explained the object of the provisions relating to the right of private defence, in the following words:

“It may be thought that we have allowed too great a latitude to the exercise of this right; and we are ourselves of the opinion that if we had been framing laws for a bold and high-spirited people, accustomed to take the law into their own hand, and to go beyond the line of moderation in repelling injury, it would have been fit to provide additional restrictions. In this country the danger is on the other side; the people are too little disposed to help themselves; the patience with which they submit to the cruel depredations of gang robbers, and trespass and mischief committed in the most outrageous manner by bands of ruffians, is one of the most...discouraging symptoms which the state of society in India present to us. Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence.”<sup>52</sup>

#### 9. Conclusion

Having regard to the alarming rate of incidence of sexual assaults on women and girls it is clear that self-defence and self-protection have become an important priority for women. The legislature has created certain rights and privileges for women keeping in view the vulnerable position of women in society. However, the experience shows that generally women remain ignorant of such rights or hesitate to make use of them.

Most of the sexual attacks are made on woman when she is alone and there is no body to save her or rescue her from the clutches of the offender. In such situations the law empowers her to defend herself. Women should learn to use their right of private defence for the following important reasons:

Firstly, in a recent review of research on strategies that are effective at stopping rape, *self-defence* was identified as one of the most promising practices. Women who forcefully resist attempted rapes can stop them effectively and can do so without increasing their risk of injury. Secondly, the ability to protect their bodily integrity gives women and girls targeted by their assailants *opportunity to oppose an injustice* right then while it is happening. It means not having to depend on others (men) to keep women safe. “Women's right to defend themselves against assaults on bodily integrity may best be protected by programs which challenge the masculinist perception that women's bodies constitute the primary site of consent.”<sup>53</sup>

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<sup>50</sup> 1999 Cri.L.J 2268

<sup>51</sup> Gottipilla Venkatasiva v. state of Andhra Pradesh, AIR 1970 SC 1079: 1 SCC 235.

<sup>52</sup> Draft Penal Code, Note p. 110.

<sup>53</sup> REEKIE, *supra* note 8, at 350.

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