

## ARTICLE

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### The Identity Dilemma

*The instant article is an endeavor to highlight the overhauling issue associated with laws prohibiting disclosure of identity of victim of sexual offences writes **Shreya Singh** and **Apoorv Pandey**.*



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**IT IS NOT THE IDENTITY BUT THE STRUGGLE OF THE VICTIM THAT SHOULD ENCOURAGE INVOLVEMENT OF SOCIETY.**

The recent order dated 13.04.2018 passed in a suo moto matter taken up by the Hon'ble Delhi High Court comprising of acting Chief Justice Gita Mittal and Justice C Hari Shankar has again sparked the controversy regarding "identity disclosure of victim involved in certain offences." The terrible tragedy of the Kathua Rape & Murder Case (name and identity of the victim not being disclosed as per S.228A of Indian Penal Code & Section 23 of the POCSO) where a minor girl was allegedly kidnapped and continuously surrendered to the humanity shaming brutality was taken up by the Hon'ble Delhi High Court on account of breach of identity disclosure norms. The bench categorically stated that:

"Unfortunately the nature and manner of reporting of the alleged offence is being effected in absolute violation of specific prohibition of law disrespecting the privacy of victim which is required to be maintained in respect of the identify of a victim."<sup>1</sup>

Shocked by the role of media houses and news reporting agencies, the bench issued notice to 12 media houses including The Times of India, The Hindustan Times, The Indian Express, The Hindu, NDTV, Republic TV, and Firstpost.

#### LAWS COVERING THE TOPIC-

- **Article 19 of the Indian Constitution**
- **Indian Penal Code, 1860**
- **Protection of Children From Sexual Offences Act 2012**
- **Information and Technology Act, 2000**
- **Indian Evidence Act, 1872**
- **Juvenile Justice (Care and Protection of Children) Act, 2000**

1. [www.newindianexpress.com/nation/2018/apr/13/delhi-high-court-raps-media-houses-for-disclosing-kathua-rape-murder-victims-identity-1801019.html](http://www.newindianexpress.com/nation/2018/apr/13/delhi-high-court-raps-media-houses-for-disclosing-kathua-rape-murder-victims-identity-1801019.html) ([www.newindianexpress.com/nation/2018/apr/13/delhi-high-court-raps-media-houses-for-disclosing-kathua-rape-murder-victims-identity-1801019.html](http://www.newindianexpress.com/nation/2018/apr/13/delhi-high-court-raps-media-houses-for-disclosing-kathua-rape-murder-victims-identity-1801019.html)) as visited on 15.04.18

#### PROHIBITION OF LAW AND PRIVILEGE OF MEDIA

It has remained a sour bone of contention for many that the roots of S.228A of Indian Penal Code stems out of the orthodox thinking promoting counterproductive social stigma that a victim of sexual offence is equally at fault. However it has been argued by the other side S.228A is rather a protective statute and we are still not ready to wind it up for good on account of social standard. The question of “marriage prospects” and “degradation of respect” in society are some of the common arguments that are advanced against it.

Identical provision exist under Section 23 of the Protection of Children from Sexual Offences Act 2012 (POCSO) which prohibits disclosure of name, address, photographs, family details, school, neighborhood or any other particulars which may lead to disclosure of identity of a victim of sexual offences. However the sentence in two sections varies. While contravention of S.23 leads to upto 1 year contravention of S.228A may lead to imprisonment up to 2 years.

It may be pertinent to mention that it is not just the category of victims that have been granted protection under law. Section 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000, also protects the identity of alleged rapists who are juveniles.

#### DISCLOSURE CHALLENGING SOCIAL STIGMA

Similar dispute arose in the Delhi Gang Rape Case where the parents of the deceased victim openly came forward and disclosed the name of the victim. They remarked that "Our daughter was not at fault. If anyone should hide their identities, it should be the perpetrators." This statement encouraged a radical and long awaited stand that should have been taken by the society. It has been plight of most of the people and NGO's that our approach towards the sexual offences and assistance to victim has been ironically misconceived. The old and orthodox model of society which needs drastic makeover in the form of abolition of prohibition on disclosure of identity of the victim was taken head to head by the family of victim here. While the agenda behind such enactment predominantly sounds like a rude mock up towards assisting the victim it has been approved and enforced despite of its subsisting grotesque moral deformities.

The actual root of the problem is that our society has been largely unable to decide as to whether they should support disclosure of identity of victim or keep her identity in solitude. While the first promotes a good thinking of evolving society, the later has been as per government instrumental in protecting victim from post offence atrocities and vicious ridicule.

#### SECTION 228A : INCEPTION & INTENT

Section 228A was inserted in the Indian Penal Code by the Criminal Law Amendment Act, 1983 to prevent social victimization or ostracism of the victim of a sexual offence. The proposed idea behind this was to save the victim from the post offence atrocities of society which came in the form of ridicule and deterioration of marriage prospects. Rape and sexual assault victims were commonly targeted as one who was abetting the crime. Surrendering to the social stigma of victimization after crime, the legislature came up with S.228A prohibiting anyone

from making identity of victim of such offence known. While it cannot be denied that the media houses and news reporting agencies are cautious about such law, still there have been instances where there have been willful or negligent breaches.

Currently S.228A provides exceptions to non-disclosure requirements under the law: These are:

- a)** by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or
- b)** by, or with the authorization in writing of, the victim; or
- c)** where the victim is dead or minor or of unsound mind, by, or with the authorization in writing of, the next of kin of the victim:

Provided that no such authorization shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognized welfare institution or organization.

In the case of *R. Lakshmipahri v. Ramalingam*<sup>2</sup>, a newspaper was allegedly found to have involved in disclosure of identity of the victim. However on careful perusal of the case, the court found that the publication was made at the instance of a recognized welfare association. And accordingly it did not attract the provisions of S.228A.

2. *R. Lakshmipahri v. Ramalingam* 1998 CrLJ 3683 (Mad)

Going by the Section it is ample clear that the legislature was suspicious about the involvement of private parties not being a welfare institution trying to profit out of the tragic story of the victim. Hence this section was cautiously closed with the proviso clause expressly granting such exception to welfare institutions. However going by the greedy nature and ulterior motives of less ethical news agencies, there always remains a tendency of welfare institution being a hand in glove with the news houses. Since the probability of such union cannot be entirely ruled out, it would be unjust to allow such publication.

#### IRONY AND APATHY

However it must also be noticed that despite of exhaustive standard of caution preached by the courts, there have been instances of disclosure of name of victim by the judgment of very courts. Several benches of Higher and Lower Judiciary have rashly disclosed the name of victims of sexual offences in their judgment. To the agony of the victims, these judgments were widely circulated and reported by websites, magazines and other printed material.

However the courts have conveniently ruled that the provisions of S.228A of the Indian Penal Code are not applicable on Judicial Servants who are acting in a bona fide manner while pronouncing the judgments.

The Hon'ble Supreme Court in the case of State of Karnataka v. Puttaraja <sup>3</sup> categorically stated that the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of the Supreme Court, High Court or lower Court, the name of the victim should not be indicated we have chosen to describe her as 'victim' in the judgment. A similar finding was made by the Apex court in the case of Om Prakash v. State of UP <sup>4</sup> wherein the court emphasized on the rule of caution and not disclosing the identity of victim in judgments.

3. R. Lakshmipahri v. Ramalingam 1998 CrLJ 3683 (Mad)

4. Om Prakash v. State of UP 2006 CrLJ 2913 (SC)

## MEDIA PRIVILEGE

Generally the media houses claim defence of "media privilege" in cases of tortuous liability arising out of defamation done because of incorrect news. This defense largely cites the need of urgent reporting which often is done without proper verification. However these defences desperately fail to shield the media houses against charges under S.228A. Criminal liability under this section provides limited exceptions.

While the judicial wisdom prohibits media houses from venturing into the dangerous domains of victim protective laws, yet the same requires continuous vigil. Once the disclosure is done there is hardly any damage control expedition that can be undertaken by media houses or

the government to undo the same. Publication of apologies by media houses would more or less be a bandage on an organ failure. Though the Hon'ble Delhi High Court has initiated damage control over the Kathua Rape Case, there is hardly anything that can be done as the identity of victim and accused is widely known.

While Gag Orders are effective tools to prohibit news houses from reporting a certain issue, the same are to be cautiously adopted and enforced. Where the gag orders become too tight it will result in distortion of channel between the media and the public. And certainly this will create issue of violation of Freedom of Speech and Expression. Currently there is a mutually existing pair of right that works between the media houses and the viewers. Right to Freedom of Speech and Right to Information is interlinked in such cases. Incomplete information does not invite public comments and discussion. Keeping the public uninformed, mis-informed or deficiently informed is an equal violation of Right to correct information. The extent and necessity of judicial intervention in such cases require cautious approach. Therefore the connectivity gap has to be reasonable enough to protect identity of the victim and relaxed enough so that people know what is happening in the society. Sometimes general public at large is capable of extending financial and emotional support to the victim, hence these points can be considered by the Courts while deciding the intensity of gag orders.

#### OBJECT OF DISCLOSURE

The true object of disclosure of identity of victim should be in interest of both victim and public. While the struggle of victim should encourage the society in recalibrating the legal regime and our social standards, it is also the obligation of the society who knows the identity of the victim to come up with financial and emotional assistance for her rehabilitation. NGO's and social activists would be in a better position to assist the victims if their identities are in their knowledge. Contrary to popular public opinion it is not the solitude but helping shoulder that would give way to better future.

#### *NON-COMPOUNDING NATURE OF OFFENCE*

The offence under S.228A cognizable, bailable and non-compoundable. The offence has been kept non-compoundable so that powerful media houses do not buy victims approval out of the very money which is made from selling the news. The profits generated by viewer attracting news are undisputedly remarkable. If the sanctity of this Section and corresponding provisions is to be kept, it would require the non-compounding nature of the offence to continue.

## CONCLUSION

To conclude I would like to draw readers attention towards the underutilized legal regime available under the Information and Technology Act 2000. As of now the courts are concerned towards the continuously increasing involvement of news reporting organizations resulting in disclosure of identity of victims and media trial of accused persons. Sometimes the news is also forwarded by innocent citizens by social media such as Facebook, Whatsapp, Twitter etc. Criminal violations of such nature are mostly innocent and often people are unaware that their actions will result in wide circulation of identity of the victims. Virtual medium dominates and moulds the life of common man and can often be a platform of violation by mass. It is the beauty and burden of law to segregate willful violations and innocent breach.

Mass violation can be curbed by a simple and mandatory disclaimer that the news reporting organization should give below the photograph of the victim stating that they have acquired permission from the victim or her next kin allowing them bonafide disclosure of materials/photographs/documents that have tendency to make known the name/address/family of victim. This kind of mandatory requirement will impose positive liability on media and people in possession of information with the obligation to show that they had prior approval of concerned person before making identity of victim known. The new amendment should also protect individuals against "innocent breach" where the information was circulated by any person believing that approval from proper authority has been taken.



While it cannot be denied that media has Right to Freedom of Speech and the general public have Right to receive such Information, we still have a legal obligation which is subject to waiver of victim. While we are still trying to shape the social stigma of the society from “victimizing and ridiculing” to being “supportive and helpful” it might be worthwhile to safeguard innocent public who might unknowingly perpetuate criminal violation.

It would be further interesting as to how the Hon’ble Delhi High Court decides on the issue of “Principal Perpetrator” as there are several news houses involved in the instant matter and all of them may plead that their publication was made after the identity of victim became public knowledge by earlier publication of some other news house. Hence it can become a game of blame shifting. The Hon’ble High Court may allow or reject such defences depending upon the gravity of offence.

#### RECOMMENDATIONS

The road forward entirely depends on the path which we choose. While the constitutional validity of S.228A on account of drastic change in social stigma is yet to be taken up by the competent court, it may be wise to introduce certain safeguards by virtue of Amendments in existing laws.

#### PROPOSED AMENDMENT IN INFORMATION AND TECHNOLOGY ACT, 2000

S. 67 D Preservation of identity of victims of certain offences:

**(1)** No person in possession of any information having tendency to disclose name, address, identity victim or his/her family or any such information prohibited under S.228A of the Indian Penal Code 1860 shall make any disclosure by means of any computer resource without prior approval of the victim or his/her next kin in writing.

**(2)** Notwithstanding anything contained in sub clause (1) of this section, the person in possession of such information shall be obligated to insert a mandatory disclaimer below such information in visible fonts stating the date, time and manner in which approval of victim or his/her



next kin has been obtained and that mere insertion of disclaimer without proper approval shall equally amount to contravention of sub-section (1).

**(3)** Provided that no person receiving such information and forwarding the same shall be held guilty of contravention of sub-section 1 if he had reason to believe that the disclaimer inserted by the person forwarding such information has been obtained as per law.

**(4)** Where there is any contravention with respect to clause (1) or (2) of this Section, the person so involved in the breach shall be liable to imprisonment which may extend to two years but not less than six months and may also be liable to pay fine up to one thousand rupees.

#### PROPOSED AMENDMENT IN THE INDIAN EVIDENCE ACT, 1872

In order to expedite the trials initiated under the relevant Acts it would be advisable to insert provision regarding burden of proof in the Indian Evidence Act.

S.113C. Presumption as to willful disclosure of identity of Victim.

Where any prosecution is initiated against the accused under S.228A of the Indian Penal Code or 67 D of the Information and Technology Act, 2000 or both, the court shall draw the presumption that such information was disclosed without proper approval and it shall be burden of the accused to prove that his case falls within the exceptions provided under the relevant sub-clauses of sections 228A of Indian Penal Code and 67 D of the Information and Technology Act, 2000.


To conclude the recommendation, the provisions expressed under the relevant Acts might also be required for the sake of clarity to avoid undue delay in achieving justice. Until the government policies regarding disclosure of identity of victim is re-analyzed and modified the above amendments can drastically reduce the number of violations and trials that go to court.

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