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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

WHITE BLACK LEGAL: THE LAW JOURNAL

Trial by Media: A Roadblock to Justice?

“It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we were a going direct to Heaven, we were all going direct the other way.”

-Charles Dickens

In most liberal democracies, conflicts arise between the right of the press to comment on pending trials and the right of an accused to a fair trial. In the case of the world's largest democracy, this conflict assumes some interesting dimensions. India's criminal justice system has perpetually been saddled by factors like the inadequate protection of victim's rights and endemic corruption among law enforcement officials, allowing the coercion and bribing of witnesses to go unchecked¹. While India's justice system has been stagnated for many years in our country, another vital democratic institution of the country, the media, has contrastingly witnessed vast structural changes. Following the liberalization of the Indian economy in the 1990s, a vibrant television media landscape, featuring scores of popular and independent news channels, has been created. A consequence of this massive institutional imbalance has been the preemptive media coverage of criminal trials. However, vexed judges have criticised this as an unhealthy trend². The judiciary and the media, besides the civil society, are the best instruments to checkmate power³. Roles of these two institutions are

¹Seema Soni and Harish Sandhu, *KTS Tulsi: If We Do Not Strengthen The Criminal Justice System, Mafias Will Begin To Rule The Country*

²Arpan Banerjee, *Judicial Safeguards against Trial by Media: Should Blasi's Checking Value Theory Apply in India*, 2 *U. Balt. J. Media L. & Ethics* 28 (2010).

³Ashok Malik, *Ethics of Media Reportage*, *India International Centre Quarterly*, Vol. 38, No. 2 (AUTUMN 2011), pp. 38-47

complementary but ironically the two have acquired an adversarial role. Both are required to protect the common man from the onslaught of state as well as individual might and act without fear or favour.

Trial by media has created a “problem” because it involves a tug of war between two conflicting principles – free press and free trial, in both of which the public are vitally interested. The freedom of the press stems from the right of the public in a democracy to be involved on the issues of the day, which affect them. Apart from the suspects and the accused, even victims and witnesses suffer from excessive publicity and invasion of their privacy rights. Unfortunately, in our society, the victim of a sexual offence, especially a victim of rape, is treated worse than the perpetrator of the crime. The victim is innocent. She has been subjected to forcible sexual abuse. However, for no fault of the victim, society instead of empathizing with the victim, starts treating her as an ‘untouchable’. A victim of rape is treated like a “pariah” and ostracised from society. Many times, even her family refuses to accept her back into their fold. The harsh reality is that many times cases of rape do not even get reported because of the false notions of so called ‘honour’ which the family of the victim wants to uphold. The matter does not end here. Even after a case is lodged and FIR recorded, the police, more often than not, question the victim like an accused. If the victim is a young girl who has been dating and going around with a boy, she is asked in intimidating terms as to why she was dating a boy. The victim’s first brush with justice is an unpleasant one where she is made to feel that she is at fault; she is the cause of the crime⁴.

The freedom of the press serves the larger purpose of the right of the people to be informed of a broad spectrum of facts, views and opinions. The Hon’ble Supreme Court in the case of *Rajendra Sail Vs. Madhya Pradesh High Court Bar Association and Others*⁵, observed that for rule of law and orderly society, a free responsible press

⁴*Nipun Saxena and Ors v. Union Of India and Ors, Writ Petition (Civil) No. 565 of 2012*

⁵(2005) 6 SCC 109

and an independent judiciary are both indispensable and both have to be, therefore, protected. The aim and duty of both is to bring out the truth. And it is well known that the truth is often found in shades of grey. Therefore the role of both cannot be but emphasized enough, especially in a “new India”, where the public is becoming more aware and sensitive to its surroundings than ever before.

It is the medium through which people gain access to new information and ideas, an essential component of a functioning democracy. Thus, “*the survival and flowering of Indian democracy owes a great deal to the freedom and vigour of our press*”⁶.

We are aware that in a democratic country like ours, freedom of expression is an important right but such a right is not absolute in as much as the Constitution itself, while it grants the freedom under Article 19(1)(a), permitted the legislature to impose reasonable restriction on the right, in the interests of various matters, one of which is the fair administration of justice as protected by the Contempt of Courts Act, 1971.

There is primarily a greater need to strike a right balance between freedom of speech and expression of the media on the one hand and the due process rights of the suspect and accused. Art 19(1)(a), 19(2), Art 21 and Art 14 of the Constitution play a very important role in striking an even balance. As we shall be showing in the ensuing chapters, the present Contempt of Court Act, 1971 requires some changes in view of the law that has been declared by the Supreme Court at least in two leading cases, one is *A.K. Gopalan vs. Noordeen*⁷ and the other is *Maneka Gandhi vs. Union of India*⁸. These judgments have struck a balance between competing fundamental rights which were not noticed or available at the time when the Joint Parliament Committee (1969) made some drastic changes in the Bill prepared by the Sanyal Committee (1963)⁹.

FREE AND FAIR TRIAL: A MYTH?

⁶Amartya Sen, “The glory and the blemishes of the Indian news media”, *The Hindu*, April 25, 2012

⁷1969 (2) SCC 734

⁸AIR 1978 SC 597

⁹TRIAL BY MEDIA: FREE SPEECH AND FAIR TRIAL UNDER CRIMINAL PROCEDURE CODE, 1973, 200th Report, Law Commission of India, 2006

It is pertinent to note that any victim of rape in India is treated worse than the perpetrator of the very same crime. Thus, the society fails to take into consideration that the victim is innocent and the orthodox society that we live in sometimes, equates rape as the fault of women who are the very victims, criticising their dressing style and accusing them of enthralling men into such kinds of act. In *State of Punjab v. Gurmit Singh*¹⁰, the court emphasises on non-disclosure of identity of rape victims so they are not subjected to public humiliation and furthermore, such non-disclosure not only aids the victim to come forth before the court to provide the best evidence which she may not be able provide if the victim is subjected to public or media trial. Worse, is the case of any minor as the perpetrator of such crimes are family members or close friends. The protection of the minor's identity in such cases is much more crucial for the very reason that they are not only more vulnerable to societal pressures but may be unable to overcome such social obstacles or the mental trauma in the way an adult may do so¹¹. To substantiate the same, it is pertinent take into consideration the remedies that can be availed by a woman. Section 228A¹² of Indian Penal Code, 1860 states that any person or whomsoever publishes the identity of a victim or any matter which discloses the identity of victim against whom an offence under Section 376, 376A, 376B, 376C, 376D, 376E is alleged or has been committed shall be punished with imprisonment up to 2 years and shall be liable for fine also. The *non obstante* clause is an exception to this particular aforesaid section which provides that a publication can be made when in good faith for the purpose of investigation, with the approval of officer-in-charge or the Investigating officer of the concerned police station; with consent and approval of the victim; and with authorisation of next of kin to the victim who is dead or minor or of unsound mind (chairman clause). The object of this section is to prevent social ostracism of the victim of a sexual offence. It is pertinent to note that disclosure of identity of the victim in material or in any form such as photographs, journals and magazines attracts penal sanctions under these provisions. The same was held in the case of

¹⁰MANU/SC/0366/1996

¹¹*Supra*, note 4

¹²inserted vide Amendment act no. 43 of 1983 w.e.f 25.12.1983

*National Federation of Indian Women v. Government of Tamil Nadu*¹³.

Furthermore, it is also emphasised that the court must refrain from disclosing the identity of the victim in its judgements and should instead use the term ‘victim’¹⁴ although the section exempts the High Court or the Supreme Court as per the explanation under this section. A trial media is an antithesis to the rule of law which only paves way towards miscarriage of justice¹⁵. It is presumed that any interview or publication can be considered as contempt because such publication may lead to a prejudiced notion in sub-conscious mind of the judge or the public. If the media in the process of reporting adds anything in excess to the actual proceedings in the Court, its prima facie amounts to interference with justice as per the Contempt of Court Act, 1971¹⁶. Section 327 Of Code of Criminal Procedure, 1973¹⁷ sub section(2) also prohibits such disclosure of identity as court conducts such proceedings in camera which prohibits the general public and the media to enter the same court room under which trial is conducted for offences under Section 376, 376A, 376B, 376C, 376D, 376E of the Indian Penal Code 1860. The case of *Zahira Habibullah Sheikh v. State of Gujarat*¹⁸, is an illustration of how a judicial trial is conducted. One can notice the nexus behind conducting a fair trial and the investigation which any media houses conduct which affects the judge and the public at large, the Supreme Court stated that “...*The failure to hear material witnesses is certainly denial of fair trial. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused...*”. Thus, if the identity of any rape victim is disclosed the media tends to interview its family members, friend, colleagues or any person related to the victim which leads either sometimes empathise or criticise the victim in the way she has led her life. A more serious concern emerges when such interviews tend to demean the victim’s character,

¹³2007 CrLJ 3385 (Mad)

¹⁴*S. Ramakrishna v. State*; (2009) 1 SCC 133

¹⁵*State of Maharashtra v. Rajendra Jawanmal Gandhi*, (1997) S.C.C. 386.

¹⁶Section 3 and 4 subjected to Section 7 of the Contempt of Court Act, 1971

¹⁷Act no. 2 of 1974

¹⁸(2004) 4 SCC 158

which makes her position in the society a lot more vulnerable, which leads to the victim being treated as an ‘untouchable’ in the society which not only affects her public life to a great extent, but also undermines her self-confidence. It must also be noted that such disclosure also affects the psychology of the survivor of such heinous crimes as the society continues to undermine her character, as well as the so called “honour” of the family of the victim is also lost in the society, which leads to forcibly marrying the victim to her very perpetrators by her own family. In most cases, there is no disclosure of such crime as it may tarnish the image of the family and the media plays a key role to disseminate such information.

On the other hand, emphasis must be given to the laws in existence on protection and non-disclosure of identity of any child. Since, any child lacks awareness of any such laws it becomes much more crucial to protect them from all the social stigmas which an adult may overcome. Section 35 of the Children Act, 1960¹⁹, states that the reports of the probation officer or any authority under section 33 of the aforesaid shall be confidential. Section 33 of the said act states that any order to be made by the authority should take certain circumstance into consideration²⁰. The Protection of Children Act from Sexual Offences act, 2012²¹ various sections extensively deals with the protection of identity of the child. Section 23 of the aforesaid act lays down the procedure for media under which any form of publication is prohibited which discloses the identity of the child which includes information related to name, address,

¹⁹Act No. 60 of 1960 dated 26th. December, 1960

²⁰In making any order in respect of a child under this Act, a competent authority shall take into consideration the following circumstances, namely: -

(a) the age of the child;

(b) the circumstances in which the child is living;

(c) the reports made by the probation officer;

(d) the religious persuasion of the child;

(e) such other circumstances as may, in the opinion of the competent authority, require to be taken into consideration in the interests of the child:

Provided that in the case of a delinquent child, the above circumstances shall be taken into consideration after the children’s court has recorded a finding against the child that he has committed the offence:

Provided further that if no report of the probation officer is received within ten weeks of his being informed under section 19, it shall be open to the children’s court to proceed without it.

²¹Act No. 32 of 2012

photographs or family details or any information which may lead to disclosure of identity of the child. Furthermore, it also holds the publisher of the media house jointly and severally liable for the acts of his/her employees and also imposes a punishment of imprisonment which shall not be less than 6 months and fine or both. Similarly, section 24 of the aforesaid act sub section (5) imposes the duty upon the police officer to safeguard the identity of the child. Section 33 sub section (7) of the aforesaid also ensures that the special court shall also ensure the protection of the identity of the child during the ongoing investigation or trial. However, it may also disclose such information in interest of the child. The protection of child's identity is not only restricted to protection under the Protection Of Children Act from Sexual Offences act, 2012 but such provisions are also elucidated in the Juvenile Justice(Care and Protection of Children) Act, 2015²² under section 74 of the act which prohibits disclosure of identity of children imposing punishment up to 6 months or fine up to two lakh rupees or both.

The above-mentioned scenarios highlight the importance of protection of a child as well as a woman's dignity in such sensitive cases. Now, the paper aims to establish that such media trial tends to affect the judges and the public which forms a biased opinion in their mind. An example of the same is the 'encounter' killing of the four men accused in the rape and murder of a woman veterinarian in Hyderabad touched a deep chord on Friday with 400,000 tweets and counting in just a few hours, some cheering and others concerned at what they saw as one more instance of vigilantism.

In Hyderabad gangrape and murder case, police arrested four persons saying they committed the crime on the night of November 26-27. However, what is important to note is that the case was still under investigation. The charge sheet had not been filed. Trial had not begun. The court was yet to hear the accused and the prosecution. It was not yet proven that the accused who were shot dead were the actual culprits of the gangrape and murder. And, even if they were the culprits, the police were not authorised to take their lives. However, this so called judgement pronounced by the

²²Act No. 2 of 2016

media not only blatantly revealed the identity of the victim but also put the four accused's lives in danger.

The Law Commission of India in its 200th report²³ under chapter III extensively dealt with the question that “*whether publications in the media subconsciously affect the Judges?*” The commission worked extensively in this field for a few years and considered the findings of various international and national reports written by eminent writers. Furthermore, in its concluding remark the commission report stated that judges do get influenced by such media trial or media investigation. To overcome such prejudiced and biased opinions there are general provisions which can be considered as an alternative remedy towards such issues that aids in protection of identity of any child or a woman. The section 7 of the Press & Registration of Books Act, 1867²⁴, assumes that the editor, which has been defined in the Act as “a person who controls the selection of the matter that is published in a newspaper whose name is printed in the newspaper” shall be held to be the Editor in any civil or criminal proceedings in respect of that publication and the production of a copy of the newspaper containing his name printed thereon as Editor and it is sufficient evidence to prove this fact. Section 7 only enables the court to draw a presumption that the person whose name was printed as Editor was the Editor of such newspaper, if the publication produced in the court shows to that effect²⁵.

Moreover, the Contempt of Court Act, 1971²⁶ also enumerates on the point that any bonafide or innocent publication shall not be considered as contempt of the court²⁷. It is also pertinent to know that matters which are *sub judice* and openly discussed in media will also amounts to contempt of the court. Furthermore, it is the duty of the media to allow the course of law to take place²⁸. The Supreme Court in **Rajendra Sail**

²³Supra, note 9

²⁴Act no. 25 of 1867

²⁵*K.M.Mathew Vs. K.A. Abraham &Ors.*, reported in 2002 AIR SCW 3500.

²⁶Act no. 70 of 1971

²⁷Section 3 of the Contempt of Court Act, 1971

²⁸*GiftyOomen, PRIVACY AS A HUMAN RIGHT AND MEDIA TRIAL IN INDIA, The Age Of Human Rights Journal, 3 (December 2014) pp. 102-121, ISSN:2340-9592*

*v. M.P. High Court Bar Association*²⁹ stated that the reach of the media is very large and large numbers of people believe its reporting to be true therefore such Fair and accurate report of judicial proceeding not contempt as per section 4 of the aforesaid act.

CONCLUSION

While a media shackled by government regulations is unhealthy for democracy, the implications of continued unaccountability are even more damaging. And thus, the need for a media intervention cannot be ruled out completely. However, the extent of such intervention is what must be closely monitored and governed. We, as a country, will now be told that "justice" has been done, the victim avenged, but this justice is counterfeit. Heinous crimes directly affect the very foundations of the society and force us to feel guilt of failing the victim and fear all at once. A system that offers murder as "justice" is a system that is telling women - we can't ensure the streets are safe, can't investigate crimes against women to ensure there's enough evidence to prove guilt, can't protect rape survivors, can't ensure that survivors get respectfulness in Court. After all, liberty does corrupt into license and is prone to be abused. Every institution is liable to be abused, and every liberty, if left unbridled, has the tendency to become a license which would lead to disorder and anarchy. It has to be remembered that freedom of expression is not absolute, unlimited or unfettered and in all circumstances, as giving on an unrestricted freedom of the speech and expression, would amount to uncontrolled license. 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. 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

²⁹(2005) 6 S.C.C. 109.

existing laws. Moreover, merely enacting laws cannot be the solution to this widespread problem and thus, attention must be paid to the implementation of the existing laws that aim to protect the dignity of such victims of heinous crimes.

