

# EFFECT OF ALCOHOL IN OFFENCE OF RAPE: THE JUDICIAL RESPONSE

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## Abstract

Under certain circumstances intoxication on the part of the accused may be pleaded as a defence against criminal liability. The intoxicated condition of the victim usually does not affect the liability of the victim. In cases of sexual assault against women, the intoxication of the accused and the intoxicated state of victim both are pleaded as a defence. While intoxicated women are regarded as available women and expressed her volition by consuming intoxicating substance, intoxicated accused is, on the other hand, is treated as if he was prone to commit mistake due to intoxication.

Key words: *Rape – Intoxication – of accused – of victim - Feminism*

The reaction of law and societal attitude in cases of sexual assault involving alcohol is viewed in such a way that puts women in disadvantageous position. Intoxication on the one hand excuses man but an intoxicated woman at the time of rape is received with greater responsibility for the offence committed upon her. Culture confirms that the society views woman who has taken alcohol as sexually promiscuous and a target of sexual assault. In other words, where the prosecutrix is in habit of consuming liquor, such a habit may go against her in cases of rape. It is based on the myth that a woman signals her sexual availability by a holding drink in her hand, particularly in acquaintance<sup>1</sup> and date rape. Such a myth is prevalent.

The legal feminists claim that the modern jurisprudence is masculine. The values, the dangers and the fundamental contradiction that characterizes women's live are not reflected at any level whatsoever. The feminism aims at bringing change so as to transform the relation between women and men and also to provide autonomy on their body. Unfortunately, the institutions created and constructed by man have put the women as body for terrorization, sexualization

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<sup>1</sup> Acquaintance rape is sexual by an assailant known to the victim and the date rape is where there has been a social connection between the parties but never a sexual one it is a situation where the victim and the assailant are acquainted but just barely.

and maternalization.<sup>2</sup> In this paper an attempt has been made to highlight the contradiction in law in relation to sexual assault against women.

The law of rape stands diluted where the assailant is acquainted and alcohol is a factor. In *Kamaraju Patro v. State of Orissa*,<sup>3</sup> the prosecutrix in her evidence had stated that she was administered liquor by the petitioner and she voluntarily took liquor where after she was raped. It was also admitted by the prosecutrix that she was used to take liquor regularly. The prosecutrix was mother of three or four children and was suffering from venereal disease. The medical report revealed the presence of contusion and abrasion on the back and other part of prosecutrix's body. The court while holding that the prosecutrix had agreed to become partner in the act of sexual intercourse, observed that:

The facts and circumstances and broad probabilities of the case, would go to indicate that...the prosecutrix herself of her own volition accompanied the petitioner and others to take liquor as also to be raped by them. Nowhere in her evidence she had stated that she struggled to get rid of the accused person. She did not even breathe a word that before the attempted commission of rape she started to run away or that she struggled to get rid of the petitioner....<sup>4</sup>

This case suggested that consumption of liquor with the petitioner and other accused was tantamount to giving consent. It is quite understandable that to give consent for taking liquor by no imagination could be stretched to consent for being sexually assaulted also. Moreover, the expectation of law that a woman in state her soberness and while drunk will react and response similarly does not appear to be a sound proposition.

In *Gaurish v. State of Goa*,<sup>5</sup> the prosecutrix had come to the accused on her own accord and she deposed that the accused offered her cold drink and after having that she became giddy. She fell down on a cot and lost her senses. When she returned to her senses, she found herself naked. She inquired the accused as

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<sup>2</sup> See, Mary Joe Frug, A Postmodern Feminist Legal Manifesto (Unfinished Draft) (1992) 105 Harv L Rev 1045

<sup>3</sup> 1991 Cri LJ 2009 (Ori.)

<sup>4</sup> Id. at 2011

<sup>5</sup> 1997 Cri LJ 1018 (Bom)

to what he did to her. The accused replied “not be worried, he would marry her”. She had also deposed she did not know what the accused did to her. The accused, however, told to her that he committed mistake. On the basis of this evidence, the court failed to infer that any offence under section 376 of the Indian Penal Code, 1860 was made out. The Public Prosecutor argued that this evidence of the prosecutrix made out the guilt of the accused for having committed an offence but rejecting the argument, the court observed:

She did not say whether the accused had committed a rape on her. She says that she did not know anything what had happened to her.<sup>6</sup>

The presumption of the court that because the prosecutrix did not say anything about the act done by the accused, though the fact of sexual intercourse was established by the medical report, therefore no offence was committed appears to be quite peculiar in view of the fact that in other kind of offences the victim is not required to tell what offence against him was committed. The expectation of the court and the law that a person in state of intoxication would depose that the accused committed rape upon her does not appear to be sound. It may be suggested that in such situations the court should rely upon the circumstantial evidence in order to arrive at a conclusion.

The approach of the courts and the law in other jurisdictions are also not appreciable. In *State v. Oltarsh*<sup>7</sup> (1989), *State v. Draghi, Garbrinowicitz and Grandinetti*<sup>8</sup> (1991) the accused and the victims were known to each other. The accused got the victim intoxicated on friendly terms and then sexually assaulted. In Oltarsh case, the defence counsel advanced the theory of consent. It was argued that as the victim had affinity for group sex and had consented to have sex. The counsel tried to establish the fact of consent by equating the woman’s intoxication with consent despite the fact that an unconscious victim cannot give consent. The judge however did not accept the argument forwarded by the

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<sup>6</sup> Id. at 1021

<sup>7</sup> See, Karem M. Kramer, Rule by Myth: A Social and Legal Dynamics Governing Alcohol Related Acquaintance Rape (1994) Stanford L R 115

<sup>8</sup> Id.

counsel. The counsel then sought to mitigate the sentence on the ground of intoxication of the accused at the time of commission of offence. It was held that the fact that both the accused and the victim were intoxicated will not diminish the responsibility. The court thus confirmed that intoxication is not a defence to a charge of rape. None the less, the court declined to label the offence as sexual assault instead convicted the accused for battery. This view of the court did not ventilate the cause of victim as the judge did not acknowledge the offence committed by the accused involved her right to sexual autonomy.

In *State v. Draghi, Garbrinowicitz and Grandinetti*<sup>9</sup>, both the prosecution and the defence focused on the complainant's intoxication. While the prosecution emphasized that the victim because of intoxication was incapable of giving consent, the defence used her intoxication to suggest that the victim consented to the activity and also questioned her credibility. The defence took the stand that women need alcohol to express their true sexual desires. It was also argued that the victim was not too drunk to consent. The victim in this case therefore, according to defence, took alcohol because she wanted to participate in group sex but she needed alcohol to convey. The defence thus wanted to prove either she was sober enough to have effectively resisted had she so wished or that she was so drunk that her testimony lacked credibility. The behaviour of the accused were found to be 'obnoxious' but were acquitted on the ground of minor contradiction and infirmities. Such an approach of the court suggests that women do not enjoy their sexual autonomy in state of intoxication. It sounds quite strange that intoxication of the accused at the time of offence may be argued for mitigation of sentences, same intoxication on the part of the victim of sexual assault is pleaded as if there were consent on her part.

Under existing law, a man or woman under state of intoxication cannot give valid consent but whenever the issue of non consent in offence of rape due to intoxicated state of the victim has arisen, the court has leaned in favour of the accused and did not treat the autonomy of women body. It may be thus suggested that in such circumstances the court should not presume the consent of the victim instead it may be deemed to prove the non consent on the part of the victim.

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<sup>9</sup> Supra