

A 'Code of Conduct' for 'Genuine' Victims of Rape?

A Critical Discourse Analysis of Judicial Pronouncements of
Rape delivered by the Superior Courts of Sri Lanka

Sandani N. Yapa Abeywardena

Social and Legal Context

- A national discussion regarding streamlining and fast-tracking the legal response to facilitate justice, in the wake of several incidents of rape that garnered national attention.
 - The focus is primarily on conducting effective rape trials and delivering retributive justice.
 - There is a necessity to use evidence to inform locally relevant legal and judicial response strategies.
 - Section 363; Section 364(2)(g): Penal Code, 1883
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*Why the
Rape Trial?:
Situating the
Present
Study*

- The rape trial encapsulates:
 - the link between language and the law
 - the dynamics of power in the courtroom
 - politics of gender.
 - In Sri Lanka, prior research and commentary on rape as reflected in judgements but no analysis from the perspective of language use.
 - Findings have implications for policy changes, highlighting judicial approaches to the offence, and identifying strengths and weakness of such approaches.
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Scope and Focus of Study

- Examines judicial pronouncements by the Supreme Court and Court of Appeal of Sri Lanka
 - published in the Sri Lanka Law Reports
 - during 1995-2013
 - through a Critical Discourse Analysis approach.
 - Excludes statutory rape and war-time rape.
 - Focus is on whether the Courts are guided by 'extra-legal' i.e. external socio-cultural factors when adjudicating cases of rape, and if so, its impact.
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Methodology: Primary Data

Sri Lanka Law Reports (SLRs)						
Year	No.	Range of Pages	No. of Words	Reference	Name of Case	Court
2010	1	32-40	2661	1 SLR 32	Savinda v. Republic of Sri Lanka	Court of Appeal
2009	2	23-30	2546	1 SLR 23	Ajith v. Attorney General	Court of Appeal
	3	144-50	2066	1 SLR 144	Chaminda v. Republic of Sri Lanka	Court of Appeal
	4	18-22	1347	1 SLR 18	Saman Kumara v. Republic of Sri Lanka	Court of Appeal
2004	5	288-312	9141	1 SLR 288	Ajith Fernando alias Konda Ajith and Others v. Attorney General	Supreme Court
	6	413-416	975	1 SLR 413	Nishantha Janaka v. Attorney General	Court of Appeal
2002	7	307-315	2859	1 SLR 307	Inoka Gallage v. Kamal Addararachchi and Another	Supreme Court
2001	8	161-171	3413	2 SLR 161	Rajapakshe v. The State	Court of Appeal
2000	9	245-276	10700	2 SLR 245	Keerthi Bandara v. Attorney General	Court of Appeal
	10	393-420	9625	3 SLR 393	Kamal Addaraarachchi v. The State	Court of Appeal
1997	11	309-336	11432	1 SLR 309	Jayasinghege Wimalaratne Alias Wimale Mudalali v. Attorney General	Court of Appeal
Total			56765			



Methodology: Linguistic Model

- Examines linguistic features present in the description of the victim of rape, her actions, and the significance of such features through a **Critical Discourse Analysis (CDA)** Approach
- Why CDA?
 - ❖ CDA reveals ideological assumptions and power dynamics that shape the creation of a text.
- Three Dimensional Model (Fairclough, 1992):
 - i. As a text
 - ii. As a discursive practice
 - iii. As a social practice



Credibility of the Complainant

A declarative sentence



‘A woman with whose consent the act of sexual intercourse was performed can later claim that it was done against her will or without her consent. This can be due to failure on the part of the man to fulfil what had been promised at the time or before the act of intercourse and/or she consented to an act which she is now ashamed of ‘

Ajith v. Attorney General

Causal semantic relations (and epistemic modality) draws a link between retraction of consent and failure to fulfil promises or shame.



Also indicates that retraction could be for multiple reasons.

Findings in Brief

Delineation of an expected code of conduct by a genuine victim of rape:

- Prompt complaint, aggressive resistance, crying out for help.

Repercussions of non-conformity to code:

- Shift of the blame and responsibility for the rape onto the victim (victim blaming).

Consequences for Justice and Fairness:

- Reinforces stereotypes and vests them with the authority of the law.
 - Violates principles of fairness, objectivity and impartiality and further violates the rights of the victim of rape.
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Prompt Complaint by Victim

Court imposes what is 'natural' without any empirical evidence to support it.

Cohesion;
contrastive
sentences

'No one can expect her to divulge the incident to Chaminda (husband's co-worker) **but it was natural for her to send a message to her husband.** Following day she went to the Grama Sevaka's (village headman) house **but she did not complain about the incident...** She went and slept with her sister on the following day **but she did not tell her about the incident'...**

Textual
structure

Her subsequent conduct raises a reasonable doubt whether there was consent to the sexual intercourse. **In fact** her subsequent conduct indicates that sexual intercourse was performed with her consent'

High affinity
modal adverb

Presence of Physical Injuries

Grammatical mood: Declarative

Causal Link between absence of injuries and consent.

'Absence of such tell-tale marks is a circumstance that was **strongly supportive of the sexual act having taken place with her consent**...there being no injuries either on the prosecutrix or on the accused-appellant there appears to be no independent corroboration relating the act of sexual intercourse having been committed on the prosecutrix against her will or without her consent'

[Kamal Addararachchi v. The State]

Crying out for Help

*'Human conduct is such that, when there is danger it is **natural** for a human being to cry for help whether there were people around or not... Common sense will tell us that the prosecutrix did not shout or cry as she was a willing party to the sexual conduct...*



Presupposition and generalisation: What is 'natural' about 'human conduct' is presumed and considered 'common sense' thereby imbuing the statement with a hue of universality.

If the accused-appellant attempted to ravish her for the second time, prosecutrix would have yelled and cried for help'



'would' – modal marker

The epistemic modality of the marker expresses a prediction.

The marker is instrument in constructing an expected behaviour of a victim.

First Rhetorical
Question →

'If her intention was...to go to Katunayake why didn't she get off from the passenger door?...if...she was not permitted to get off the bus... why couldn't she jump over

Second Rhetorical
Question →

the iron fence when the passengers were getting off at Pettah? She could have easily done this since...her seat was behind the driver's seat... she could have easily got the

Third Rhetorical
Question →

help of the passengers to jump over the fence...Was it natural for this woman to remain in the bus with two men (the driver and the conductor) when she had the

Semantic relations:
causal link →

*opportunity of getting off...? I think not. **This shows that she was willing to enjoy the company of the appellant'***

Modal Marker

*'By this time she **should** know that something serious was going to happen to her. Then why didn't she jump over the iron fence...?'*

Fourth Rhetorical
Question →

Repercussions of Non-Conformity

[Savinda v. Republic of Sri Lanka].

Impact of the delineation of 'expected behaviour'

- Does not account for
 - ❖ realities and complexities surrounding rape and the rape trial.
 - ❖ behavioural responses can differ from one person to another.
 - Presupposes that the Prosecutrix would have behaved otherwise if complaint was truthful; constructs certain behavioural responses as 'innate'.
 - However, such 'innate' responses:
 - ❖ Are not supported by empirical evidence;
 - ❖ Fail to account for psychological trauma;
 - ❖ Fail to consider stigma, societal pressures and negative association of a crime which, though committed by a male, is often attached to the raped female.
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Overall Implications of Findings

- Rape Victim assigned a gendered subject position.
 - Gender-based stereotypes and social norms are invoked in judicial decisions as a discursive practice.
 - Affects apportioning of blame and responsibility for rape.
 - Court is seen disciplining females for violation of the 'normal conduct' of Sri Lankan women i.e. policing and controlling female behaviour.
 - Reinforces stereotypes and vests them with the authority of the law.
 - Violates principles of fairness, objectivity and impartiality and further violates the rights of the victim of rape.
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