

What did the HC rule about arresting women at night? | Explained

Is the provision which restricts the arrest of women after sunset and before sunrise absolute? What did the 135th report of the Law Commission of India on Women in Custody recommend?

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A police patrol vehicle parked on the main road near Jubilee hills check post in Hyderabad in 2019. | Photo Credit: NAGARA GOPAL

The story so far: The Madurai Bench of the Madras High Court in *Deepa versus S. Vijayalakshmi and Others* ruled that the legal provision in the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, which restricts the arrest of a woman after sunset and before sunrise, is directory and not mandatory. In this case, a woman was arrested at 8pm. A single Judge of the High Court held that the arrest was in breach of Section 46(4) of the Code of Criminal Procedure (CrPC). However, a two-Judge Bench of the High Court, in an appeal, held that Section 46(4) of the CrPC was directory and not mandatory.

What are the safeguards?

Two safeguards are provided under Section 43(5) of BNSS (which corresponds to Section 46(4) of CrPC) for the arrest of a woman by the police. First, no arrest of a woman shall be made after sunset and before sunrise except in exceptional circumstances. Second, even in exceptional circumstances, the prior permission of the jurisdictional magistrate must be sought by a woman police officer by making a written report. Section 46(4) of the CrPC is a beneficial provision incorporated to ensure the safety of women. However, the provision does not explain what would constitute an exceptional situation. In addition, the proviso to Section 46(1) states that the arresting police officer should not touch the person of the woman, unless it is a woman police officer or if the circumstances otherwise require it.

What did the Madras HC rule?

The Madras High Court said that Section 46(4) of CrPC does not spell out the consequence of non-compliance of the provision. If the provision was intended to be mandatory, the legislature would definitely have provided for the consequences of non-compliance. A police officer who effects arrest, carries out a public duty. The Court underlined that there could be a situation where a heinous offence is committed by a woman in the night and the magistrate may not be available for obtaining permission. Under such a situation, the accused woman may escape. Therefore, such mechanical adherence to procedure can injure public interest.

What is history of Section 46(4) CrPC?

The 135th report of the Law Commission of India on Women in Custody (1989) recommended that ordinarily no women shall be arrested after sunset and before sunrise. If there are exceptional cases, prior permission of the immediate superior officer shall be obtained, or if the case was of extreme urgency, then an arrest report with reasons shall be made to the immediate superior officer and to the magistrate. Similar recommendations were made in the 154th report of the Law Commission in 1996, and Section 46(4) of CrPC was inserted with some changes in 2005.

What has the Supreme Court said?

In a case, the Nagpur Bench of the Bombay High Court directed the State to issue directions to all police officials that no female persons shall be detained without the presence of a lady constable, and in no case after sunset and before sunrise. Here, the Supreme Court observed that a strict compliance with the said directive in a given circumstance would cause practical difficulties.

Will the ruling dilute the provision?

The Court has clearly said that despite holding Section 46(4) of CrPC/43(5) as directory and not mandatory, the provision cannot be rendered futile by the police. While failure to adhere to the statutory requirement may not lead to the arrest being declared illegal, the officer may have to offer explanation for the inability to comply with the provision. The Court also directed the police to issue guidelines, clarifying as to what constitute exceptional circumstances.

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