

Lillu @ Rajesh and Anr. v. State of Haryana: The judgement that abolished the Two-finger Test

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Introduction

In recent times, we have seen a drastic change in the interpretation of the principle of evidence in rape cases. The courts held that the accused can't take the defence of the victim being minor and unsound and the accused can be convicted without any cross-examination of the victim or rape survivor. Two Finger test in which doctors and nurses would examine the rape survivor vagina, using the finding to comment on their sexual experience has been abolished. The courts held that the accused can be held liable even without the cross-examination of the victim being raped. Under Section 375 of the Indian Penal Code, rape is said to be committed when it is done without women's consent, against her will, and with or without the consent of the victim, when she is under sixteen years of age.¹ This is clear from the section that there is no need for the tests like Two Finger test when it comes to the evidence from the rape. If rape is committed by the accused against the will of the victim then there is no need to check whether the victim had any experience of sexual intercourse or not. Every day, a new horrific Nirbhaya rape makes headlines in India. So what has changed since the Nirbhaya case?

The one big change was the ban on the traumatic practice of the Two-finger test which has been abolished in some parts of India or made inadmissible in rape trials, as this test can violate the right of privacy of rape survivor and also affect the physical as well as mental integrity and dignity. But even after the ban on this practice, there are still several cases in which this test is admissible in some courts and this allows the accused to walk free. Just because, someone had past experience of sexual intercourse, doesn't simply mean, she has consented the accused to rape her.² The case comment discusses the landmark judgement which abolished two- finger tests. The case was a criminal appeal in Punjab and Haryana High Court which affirmed the judgement passed by Additional Sessions Judge.

¹ The Indian Penal Code, 1860, Act No. 45 of 1860, § 375.

² Anuj Agrawal, *Supreme Court says Two-Finger Test Violates Victim's Privacy and Dignity*, BAR AND BENCH (May 20, 2013), <https://www.barandbench.com/news/supreme-court-says-two-finger-test-violates-victims-privacy-and-dignity>).

Facts

- The victim was inside her home, along with her mother (Savitri) on 6th March 2001. Her home was in a village called Bandhana. Savitri's husband was working in the field, while her daughter-in-law (Kamlesh) went to answer nature's call in the field. She heard the voice of the victim that she was caught hold of by Satish along with Sitta. The victim's mother's health was in such a condition that she could not even stand, and hence she was unable to help. When Kamlesh came back, she came to know that the victim was kidnapped by Satish and Sitta. They went to the police station on 7th March, 2001 and explained this happening to them. The police lodged an FIR (First Information Register) under Section 363 (Kidnapping any person)³ and Section 366 (Abducting, kidnapping any woman to compel her marriage, etc.).⁴
- When police searched the fields and home of Satish's alias Sitta, they found the victim there and the accused fled away from the spot. Later they took statements of the victim and added Sections 506, 376, 376(2) (g) in the FIR.
- All the accused were arrested on 9th March 2001 and were presented before the court under the charges of Section 363, 366 read with Section 34, 376 (Punishment for rape), 376 (2) (g) and 506 (criminal intimidating) of Indian Penal Code.⁵

Arguments Advanced

- The counsel for the appellant, submitted before the court that prosecution has been unable to prove the birth date of the victim as on the date of the incident she was about 17 to 18 years of age. As she was around 18 years of age, this directly means that she had given her consent for sexual intercourse.
- The statement of witnesses and the medical evidence of Doctors do not validate the statements made by the victim.
- Petitioner's counsel argued that according to the medical report presented by Dr. Malti Gupta, there were no external injury marks on the victim's body. There was no bleeding so habitual sexual intercourse by the victim, may be taken into consideration. As after the Two-finger test, it was found that she had intercourse earlier also, so the fact that she never had sexual intercourse or she is under the age of 16 years can be relied upon.

³ The Indian Penal Code, 1860, Act No. 45 of 1860, § 363.

⁴ The Indian Penal Code, 1860, Act No. 45 of 1860, § 366.

⁵ The Indian Penal Code, 1860, Act No. 45 of 1860, § 376, § 376 cl. (2) (g), § 506.

- To not become a burden on public exchequer, the government of Haryana remains unrepresented, as government counsel took it as a privilege to not appear in court.

Laws Discussed

- The accused were charged under Section 363, 366, 376 (Punishment for rape), 376 (2) (g), and 506 (criminal intimidating) of the Indian Penal Code.
- Rape survivors have the right to have legal recourse so that they do not face any trauma and to prevent any harm to physical or mental integrity and dignity abuse in the future. This is mentioned in the International Covenant on Economic, Social, and Cultural Rights 1966; the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985.
- Two-finger Test violates the right to privacy as well as physical and mental dignity and integrity.

Judgement

- The trial court has duly examined the school certificate of the victim and it was further confirmed by the birth certificate that she was born on 04/06/1987 and on the date of the incident she was of the age of 13 years 9 months and 2 days. Further, the appellant has not given any evidence to refute this certificate, so the court came to the conclusion that she was a minor at the time of the incident. And the court also rejected the argument that whether she consented for the rape or not, as it is totally immaterial that she has consented or not.
- As far as the Two- finger Test is concerned, it requires consideration by the court as there is demand or sound standard of interpretation and conducting a forensic examination of the victim.
- A victim's testimony is the best evidence, and it does not require corroborative evidence. It is because the victim suffered much more than the injured witness. This was held in State U.P v. Pappu @Yunus and Anr., AIR 2005 SC 1248.⁶
- Even if the victim had any history of sexual intercourse, this cannot give a license to anyone to rape her. The question remains the same in the case of rape that whether the victim consented for the same or not. It is the accused, who has to prove his innocence not the victim. This was held in the State of Uttar Pradesh V. Munshi, AIR 2009 SC 370. ⁷

⁶ State of Uttar Pradesh v. Pappu @Yunus & Anr., (2005) AIR 1248 (India).

⁷ State of Uttar Pradesh v. Munshi, (2008) 12 SCR 897 (India).

- In **State of Punjab v. Ramdev Singh**, AIR 2004 SC 1290, it was held by the court that rape violates the fundamental right of the victim under Article 21 of the Indian Constitution. Sexual violence directly infringes the right of sanctity and privacy of the victim and also it is a dehumanizing act in the cases of rape with a minor, it totally destroys the life of the victim and leaves behind a traumatic experience.
- The Two-finger Test undoubtedly violates the right to privacy of the rape survivor along with causing harm to the mental and physical dignity and integrity of the victim. Any past experience of sexual intercourse does not give rise to the presumption of consent in the present case.
- As the evidence and facts cannot prove that the accused has not committed the heinous crime of rape, the court dismissed the appeal.⁸

Case Analysis

The cruel, inhumane medical procedure should not be carried out for the evidence of the rape case, because it further puts the victim in trauma and violates her dignity and integrity. The Government should take proper measures; so that the victims do not face any problem and gender inequality laws do not come up to make the victim side weaker. The Two-finger Test violates the privacy rights of the victim, along with that it violates physical, mental dignity and integrity. So this type of test, even if proves something affirmative cannot be considered as valid, because rape definition only covers the consent of the sufferer, not whether, the victim had a history of any sexual intercourse earlier or not. Two-finger Test was banned to prevent the victim from further violation of dignity and harassment. This test was banned because not only, it violates the privacy rights of the rape survivor, but also because it is unscientific. As, this test checks the sexual intercourse history of the victim, by examining the laxity of the vaginal muscles.

The history of the victim's sexual intercourse is considered while deciding the rape case.⁹ However, this goes against the law, because rape case is decided on the consent of the victim, whether she consented for the rape or not, not by taking into consideration the sexual intercourse history of victim.¹⁰ In this case the Supreme Court dismissed the Two Finger Test as it was not

⁸ Lillu @ Rajesh and others v. State of Haryana, (2013) 14 SCC 643 (India).

⁹ Vageshwari Deswal, *Virginity Test: Why the Two Finger Test is Unscientific, Illogical and Illegal*, THE TIMES OF INDIA (May 9, 2019), <https://timesofindia.indiatimes.com/blogs/legally-speaking/virginity-test-why-the-two-finger-test-is-unscientific-illogical-and-illegal/>.

¹⁰ Divika, *Guj HC- Two Finger Test Violates the Right of Victim to Privacy, Physical and Mental Integrity and Dignity; held Unconstitutional*, SCC ONLINE (Jan. 30, 2020), <https://www.sconline.com/blog/post/2020/01/30/guj-hc-two-finger-test-violates-the-right-of-victim-to-privacy-physical-and-mental-integrity-and-dignity-held-unconstitutional/>.

even necessary in the rape case. Court only considers the consent of the victim. After the Nirbhaya judgment in 2013 by the Supreme Court of India, the government passed the Criminal Amendment Act, 2013, and removed this test from official law. Two Finger tests adds misery to the life of a survivor. First sexually violated, then the harassment they face after the reveal of the Two- finger test, which further diminishes their image in society and keeps on torturing them their whole life. The first virtue demanded in the Indian society is virginity from unmarried women. So far, the rape cases in India are dealt in a duo of virgin or non-virgin to punish the accused and for the evidence of the case. But it doesn't even think of the trauma faced by the victim after the rape and other problems like paralytic disorder. If a victim has had any sexual intercourse, it doesn't change the circumstances of the rape.¹¹

Conclusion:

The rape cases are still increasing in India, even after a total reform in the rape laws. Making changes in certain laws will not curb the crime of rape in a country like India. When it comes to the law for women, India has much favourable laws than other countries, but when it comes to the implementation of these laws, India lacks much behind. We need a different and more robust method to control this type of crime. By supporting the participation of women in the lawmaking process, it will certainly help us in changing the mind-set of society. We need a proper investigation process, so that the accused doesn't get a chance to run away from the hands of law. If more convicts will get punished, this will build confidence in rape survivors in our judiciary and law, and this will lead to the filing of more cases, which were earlier not even filed.

As the Two Finger Test is a direct manifestation of the Indian culture that any unmarried women should not have premarital sex, which makes this test more controversial, as we are living in the 21st century and the thinking of people has changed now. India took a very good step for the betterment of the rape survivor by banning the Two Finger Test, but still, it has a long to cover, as this test is still adding misery to the life of the victims, who have already faced a horrific incident in their life.⁽¹²⁾ In the Aruna Shanbaug case, the victim suffered paralytic disorder along with some grave brain injuries and was bed ridden for 49 years. The intensity of Aruna Shanbaug was decided from the penetration instead of the social construct that allowed this type of act to happen. If our

¹¹ Agarwal, *supra* note 2.

¹² *Id.*

judiciary would be a little quick in deciding the rape cases, we could have saved the life of Aruna Shanbaug, who didn't get justice because of the corrupt government at that time.