Two Fingers Too Much: Revisiting the 'Per Vaginal test' in State of Gujarat v. Rameshchandra

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Case Review

Abstract

State of Gujarat v. *Rameshchandra Ramabhai Panchal*, as rightly pointed out by Justice Pardiwala, is a case of a 'unique acquittal'. The Trial Court acquits the accused on the charges of rape but convicts them for kidnapping under the false impression that the victim was a major. Realising the mistake at the point of sentencing, there was nothing that the trial court could have done. The case involves a recurring theme of revisiting the dignity, first as a woman and then as a rape victim. The medical examiner conducts the "two-finger test" and some remarkable observations are made in this regard. This paper deals with two aspects of the judgment; the validity and the history of two-finger test in India and the observations made about why the testimony of the victim should be believed. The court states that the victim should be believed because women face considerable consequences in the society after coming forward with a sexual assault allegation such as, inter alia, difficulty in marriage with 'adverse publicity' and victim blaming. The scope of this paper is to show that the judgment ultimately sides with the narrative of the women not because of the weight of the crime and trauma of the victim but because of prevalent societal conditions. This line of reasoning opens the courts to multiple false allegations and reinforces the taboo around rape victims instead of making the society more victim-friendly. The courts should rather strive to ensure sexual autonomy and dignity of a woman as an individual.

Keywords: Rape, Sexual Assault, Two-Finger Test, Dignity, Society, Sexual Autonomy

"Prejudice, it's like a hair across your cheek. You can't see it, you can't find it with your fingers, but you keep brushing at it because the feel of it is irritating."

\- Marian Anderson

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1. Introduction

A two-judge bench comprising of Justices B.D Karia and J.B. Pardiwala at the Gujarat High Court delivered a judgment[2] on 17th January 2020, declaring the "Two-Finger test" (hereinafter as "the test") as unconstitutional. The case was about a victim who was kidnapped from her village in Ahmedabad district and forcibly taken on 26th March 1994 to another village called Kadi. She was kept against her will for over a month and in her cross-examination stated that she was forced to have sexual intercourse 4 to 5 times. The charges framed against the accused were under Section 363[3] and Section 366[4] of the Indian Penal Code, 1860. For these charges he was convicted but the Trial Court acquitted him under the charge of Section 376. The Court points out that the decision of the High Court was passed under an "erroneous assumption" that the victim had attained majority. The Trial Court also accepted its error, but refused to interfere as the order of acquittal on the charge of Section 376 was already pronounced. Subsequently, the High Court corrects this mistake and frames the charge under the sixth clause of Section 375.[5]

The judgment can be divided into three parts; Firstly, justifying the conviction on the charges of kidnapping. Secondly, the observations made about the medical examination of the victim, particularly the two-finger test. Lastly, reasoning provided by the court to believe the testimony of the victim in sexual assault cases. The scope of this comment is to examine the history of the test and draw attention to the erroneous line of reasoning applied by the judge to decide the case. Even though the judgment pronounced the accused guilty, a critical analysis of the reasons behind it will be supplied.

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[2] *State of Gujarat* v. *Rameshchandra Ramabhai Panchal*, R/Criminal Appeal No. 122 and 25 of 1996.

[3] Punishment for kidnapping –Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[4] Kidnapping, abducting or inducing woman to compel her marriage, etc – Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

[5] Rape – A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :... ... ...
Sixthly – with or without her consent, when she is under sixteen years of age

2. An Overview of the Judgment

Apart from the facts laid out above, the judgement also addresses the question of consent in cases of sexual assault when the victim is a minor. It, categorically, rules out the defence that the victim was a "consenting party" on the grounds that the act falls directly under clause sixthly of Section 375 of the Indian Penal Code. Since the accused was also charged for kidnapping, the court answered the question if ingredients of Section 363 and Section 366 are fulfilled. Reading Section 361 of IPC, it came to the conclusion that "the consent of the minor who is taken or enticed (out of legal guardianship) is wholly immaterial" and upheld the conviction under Section 366 of IPC. The Court then goes on to analyse the practice of the two-finger test.

3. The Two-Finger Test

Sexual assault is a violation of right to dignified life under Article 21 of the Constitution of India.[6] Further, the medical examination of the victim is termed as a "medico-legal emergency".[7] The victims are entitled to a procedure that does not infringe their privacy and the procedure must not be inhuman, cruel or degrading in nature and paramount importance should be given to health in such cases involving gender-based violence. Due to the stigma around rape victims and the prevalent rape myths, it is the duty of the State to ensure that such services should be available to the victims of sexual violence.[8]

In the judgment, the two-finger test, also known as the Per Vaginal test (PV) is defined as follows:

"The Test is an intrusive physical examination of a woman's vagina to figure out the laxity of vaginal muscles and whether the hymen is distensible or not. In this, the doctor puts two fingers inside the woman's vagina and the ease with which the fingers penetrate her are assumed to be in direct proportion to her sexual experience. Thus, if the fingers slide in easily, the woman is presumed to be sexually active and if the fingers fail to penetrate or find difficulty in penetrating, then it is presumed that she has her hymen intact, which is a proof of her being a virgin."

[6] *Bodhisattwa Gautam* v. *Subhra Chakraborty*, AIR 1996 SC 922.
[7] *State of Karnataka* v. *Manjanna*, 2000 SC (Crl.) 1031.
[8] *Lillu* v. *State of Haryana*, AIR 2013 SC 1784 at 12 (hereinafter "*Lillu*").

The test, apart from being unscientific, is also subjective based on the thickness of the fingers of the examining doctor and their opinion.

Justice Pardiwala does well to acknowledge the unscientific nature of the test while additionally stating that it has "no forensic value". It is the first judgment which explicitly states that two-finger test is unconstitutional furthering the Supreme Court's view in *Lillu*[9], where the Supreme Court held that the test has "no consequence" and is "violative of the dignity of women". The judgment further cites the reports of the Planning Commission Working Group of 2012 headed by the Secretary of Women and Child Development Ministry. The Report recommended the abolition of this test and changes in the Code of Criminal Procedure to "make procedures more women and child friendly." The judgment does well to capture the collective anguish of the society against the method and reinforces the fact that sexual intercourse prior to assault has absolutely no bearing on the consent of the victim. It also mentions the step taken by Maharashtra Government to do away with the finger test through a Government Resolution in 2013.

The Courts in a series of judgments have developed the jurisprudence against the two-finger test. In 1994,[10] they said that "the test and a hymen rupture do not give a clear indication that the victim is habitual to sexual intercourse. Even if the victim of rape was previously accustomed to sexual intercourse, it cannot be the determinative question".[11] In the case of *State of Uttar Pradesh* v. *Munshi*[12], the court most infamously held, "Even a woman of *easy virtue* has a right to refuse to submit herself to sexual intercourse to anyone and everyone, because *she is not a vulnerable object or prey for being sexually assaulted* by anyone and everyone." Finally, in the case of *Lillu* v. *State of Haryana,*[13] the apex Court declared that the "finger test" and its interpretation "violate the rape victim's right to privacy, physical and mental integrity, and dignity". Even if sexual history is constructed through the test, it shall not give a presumption of consent. However, the court failed to issue any guidelines to prohibit the use of the practice. Post the Amendment Act of 2013 in the criminal law,[14] the offence of rape and its definition has been widened considerably to include all kinds of penetrative violations to a female's body "including insertion, to any extent, any object or a part of the body, other

[9] *Ibid*.
[10] *Narayanamma (Kum)* v. *State of Karnataka*, (1994) 5 SCC 728 at 4.
[11] *State of Uttar Pradesh* v. *Munshi*, AIR 2009 SC 370.
[12] *Id.* at 8.
[13] AIR 2013 SC 1784 at 13.
[14] Criminal Law (Amendment) Act, 2013 (Act 13 of 2013).

than the penis."[15] Although medical procedures have been given protection by virtue of their inclusion under Exception 1 of Section 375 of the Indian Penal Code, the test has been declared invasive, unscientific and would thus, not come under the definition of a medical procedure.

The J.S. Verma Committee Report in 2013[16] clearly stated that "*vaginal introitus"* (The opening that leads to the vaginal canal) has no impact on a case of sexual assault and recommends that the "two-finger test should not be conducted." It also states that hymen can be torn due to several reasons and its presence does not rule out the possibility of rape. Further, Ministry of Health and Family Welfare, Government of India in May, 2014 also published the Guidelines and Protocols for Medico-legal Care for Survivors/Victims of Sexual Violence.[17] It went one step further and stated that "the Hymen should be treated like any other part of the genitals while documenting examination findings in cases of sexual violence. Only those that are relevant to the episode of assault (findings such as fresh tears, bleeding, edema etc.) are to be documented." The guidelines also amplified the prior recommendation and declared the quashing of the two-finger test.

The Indian Evidence (Amendment) Act, 2002 removed Section 155(4) which allowed the defence counsel to discredit a person based on her "general immoral character." The same amendment added a proviso under Section 146(3) of the Evidence Act stating that in a cross-examination, it is not permissible to question the 'general immoral character' of the victim. Mr. K. Jana Krishnamurthy while introducing the Bill in the lower house stated that "it is not the character of the woman but the act of the accused must be questioned." He points out that raising a finger on her character adds on to "further humiliation."[18] An important point was raised by one of the female members of the house, Dr Beatrix D'Souza that this amendment, even though was welcome, it had taken a too much time to come since the recommendation was first made by the 84th Report of the Law Commission in 1980 and a complete overhaul of rape laws was needed. As we stand to witness, since then very little has changed.[19] The Law Commission report in 2000 had echoed the same suggestion to the lawmakers.[20] Another important aspect that goes beyond the scope of this paper, however is imperative to state, is the

[15] The Indian Penal Code, 1860 (Act 45 of 1860), s. 375(d).
[16] Government of India, Report of the Committee on Amendments to Criminal Law (January, 2013).
[17] Government of India, Guidelines and Protocols for Medico-Legal Care for Survivors/Victims of Sexual Violence, (Ministry of Health and Family Welfare, 2014), *available at*: https://main.mohfw.gov.in/sites/default/files/953522324.pdf (Last visited on May 5, 2020).
[18] Lok Sabha Debates on December 9, 2002, *available at*: http://164.100.47.194/Loksabha/Debates/Result13.aspx?dbsl=4846 (Last visited on May 4, 2020).
[19] *Ibid*.
[20] Law Commission of India, "172th Report on Review of Rape Laws" (March, 2000).

unawareness about informed consent in the Indian society. More importantly, the false notion that consent for a sexual act and character of a person are two exceedingly interdependent aspects. The obsession that the society puts on establishing the character of the victim, which ideally should be immaterial, can be a reason for the mistrust in the judicial system.

Commenting upon the state of the hymen of a victim invariably prejudices the minds of the decision makers regarding their character. The Supreme Court in *Madan Gopal Kakkad* v. *Naval Dubey*[21] ruled that "rupture of the hymen is not a prerequisite for proving rape." However, in a case,[22] the High Court acquitted an accused stating that forcible sexual intercourse was not proven based on "medical evidence" that the "hymen was found intact." The courts are easily prejudiced when it comes to sexual histories of the victim and when the medical examination report supports these prejudices, it invariably influences their decision.[23] The unscientific method has been conducted for women who are not only suspected of being sexually active but married women[24] as well pregnant women.[25]

The reason for the persistent use of the finger test, as established, has been to make clear the sexual history of the victim. Time and again, it has been reiterated that consent is not one-time pass to recurring sexual activity, not to mention it can be redacted at any point in the act. The basis of past sexual behaviour should not be a matter of concern either for the judge or for the society. Durba Mitra and Mrinal Satish[26] while analysing the influence of medical jurisprudence textbooks on rape trial adjudication pertinently concluded their research that "the finger test is but one feature of a broader logic that pervades medical manuals, premised on prejudicial rape myths and stereotypes about women's behaviour and character."

4. Sexual Autonomy of Women

Globally, throughout history, the concept of dignity in rape discourse has primarily reflected the notion of "sexual morals", as rape was regarded as an attack on honour (initially, of the man and family and, then, of the woman). However, with the rise of the human rights

[21] (1992) 3 SCC 204.
[22] *State of Uttar Pradesh* v. *Sabir*, MANU/UP/0964/201.
[23] See, for instance, *Raj Kumar @ Raju* v. *State of Himachal Pradesh*, 2007 CriLJ 1916 (HP); *Virender Singh* v. *State of Haryana*, 2007 Cri LJ 2459 (P&H); *Ram Lal* v. *State of Rajasthan*, 2006 Cri LJ 2530 (Raj)."
[24] *Reddy* v. *State of Andhra Pradesh*, 2005 Cri L J 220; *Subtakum Ansari* v. *State of Bihar* (now Jharkhand), 2004 Cri L J 2137 (Jhar).
[25] *Raj Kumar @ Raju* v. *State of Himachal Pradesh*, 2007 Cri L J 1916 (HP).
[26] Durba Mitra & Mrinal Satish, "Testing Chastity, Evidencing Rape", 49 *Economics and Political Weekly* 8 (2014).

movement, rape has starting being considered as a violation of dignity, primarily, of women, in terms of her equality and autonomy.[27] Even the Justice Verma Committee – while recommending the removal of the marital rape exception – stated that "the exemption for marital rape stems from a long outdated notion of marriage which regarded wives as no more than the property of their husbands."[28]

Justice Pardiwala in paragraph 47 of the judgment explains with considerable emphasis why the testimony of the victim should be believed. He correctly acknowledges that our society is "tradition-bound" and "non-permissive." A young-woman would naturally feel threatened to come forward with a sexual abuse allegation as in the present case. But it is important to realise that the whole paragraph and the reasoning thereon is based upon what might be the consequences of coming forward with rape allegation and not on what the victim had to suffer. The reasoning is erroneous on two grounds; *one*, it fails to acknowledge the many other reasons why rape cases do not get reported and *two*, it reinforces the ideals of the patriarchal society where women are always considered a property to give and not as an individual. A large section of the society has been constantly fighting for the equal rights of not just women but also all genders. There is a very resounding call for vetting rape laws to make them gender neutral, equal punishment for atrocities against transgender persons, and acknowledging the existence of marital rape are few to mention. A judge being a constitutional authority has duty not only to state the present circumstances prevalent in a society but also what it ought to be.

As per the Indian criminal law, a conviction for rape can be secured, solely, on the basis on the testimony of the rape survivor, provided it is consistent, cogent and inspires confidence. No corroboration is required by forensic evidence to secure a conviction.[29] The society needs to understand the difference between the accuser and the accused. The accuser is a victim of the crime and not an accomplice, their testimony is expected to receive the same weight as what is attached to a victim in cases of physical violence.[30] It is important we understand why so much

[27] Radaˇcíc, Ivana, and Ksenija Turkovíc, "Rethinking Croatian Rape Laws: Force, Consent and The Contribution of the Victim" in Clare McGlynn and Vanessa Munro, *Rethinking Rape Law: International and Comparative Perspectives* 169–183 (Oxon: Routledge, 1st edn., 2010).
[28] *Supra* note 16.
[29] See for example, *State of Punjab* v. *Gurmeet Singh*, 1996 Cri LJ 1728; *State of Maharashtra* v. *Chandraprakash Kewalchand Jain*, 1990 Cri LJ 889 and *State of H.P.* v. *Asha Ram*, (2005) 13 SCC 766
[30] *State of Maharashtra* v. *Chandraprakash Kewalchand Jain*, (1990 (1) SCC.
In *State of H.P.* v. *Asha Ram*, (2005) 13 SCC 766, Justice H.K. Sema further states that "The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.

weight has been given to the word of the victim in sexual assault cases. The demand for shifting the 'burden of proof' on the accused initially started after the gruesome Mathura rape case. It was made to protect the victims and encourage victims to come forward with their narrative.[31] Even though the criminal justice system was plagued with other problems, this remarkable change was done because of increasing cases and realising the trauma that a person had to go through after the crime.

There have been countless researches on finding the cause of sexual assault. Dr Vibha Hetu lists three of them in a paper[32] examining why rapes are not disclosed among South Asian Communities. She observes that the initial factor is that woman often feels "betrayed" by the male perpetrators as many a times she is well acquainted with the victims as members of the same community.[33] The next factor for not reporting abuse may be that woman may feel that the abuse faced by her is not "violent enough" to be constituted as rape. Rape myth acceptance influences the victim's responses to rape and determines whether she will even label what has happened to her as rape. This again goes to show the ostensible unawareness about consent highlighted earlier. Another key factor is that woman often fears that she will not be believed, especially, since the criminal justice system does not usually prosecute in cases where the only evidence is the victim's testimony. Justice S. Saghir Ahmad in a case,[34] as a part of the obiter while commenting on the low conviction and reporting of rape cases, observed that the reason why most of the woman does not report rapes to the police is because they have a fear of embarrassment and insensitive treatment by the law enforcement personnel, doctors or the cross-examining defence attorneys."

Unawareness and misinformation are one of the major causes of not reporting of sexual violence. A research by Laura C. Wilson and Katherine E. Mille coins the term "unacknowledged rape", which defines a sexual assault that most women might categorize as "bad sex" or "miscommunication" but falls into the definition of rape. They found that on an average 60.4% of the women facing sexual violence might not know that they have been sexually violated. Our country suffers from widespread taboo of reporting sexual violence because there is a notion that the dignity of the family is at stake. The National Crime Records

[31] Flavia Agnes, "Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law", 37 *Economic and Political Weekly* 844 (2002).
[32] Vibha Hetu, "Reflections on the Society's Reaction towards Rape Victims in Delhi City" 17 Temida 3 (2014) *available at*: http://www.doiserbia.nb.rs/Article.aspx?ID=1450-66371403003H (Last visited on May 4, 2020).
[33] Patricia Uberoi, *Social Reform, Sexuality, and The State* (Sage, New Delhi, 1996).
[34] *Bodhisattwa Gautam* v. *Miss Subhra Chakraborty*, 1996 AIR 922 at 16.

Bureau in 2017 reported that a total of 32,559 cases of rape were registered in India. However, only a third (32.2%) of these cases ended in a conviction.[35] In 2018, there were a total of 33,977 rape cases and the conviction rate was 27.2%.[36] Clearly, our justice system faces a massive problem of delay and low conviction rates and it becomes difficult for a victim to put their trust in the judicial system to get justice.

A Human Rights Watch report in 2017 cites a study done of 45 High Court judgments across the country that noted, "Many judges were continuing to describe rape as a crime that "dehumanizes" the woman, kills her personality, or ruins her marriage prospects."[37] The study remarks that the tone, language and interpretation of these judgments provides justice on the lines of what the society thinks instead of keeping in mind the sexual autonomy and bodily integrity of the women.[38]

The Supreme Court has on occasions observed that sexual violence apart from being a "dehumanizing" act was an "unlawful intrusion on the right of privacy and sanctity of a female."[39] The problem with seeing rape not as an offence against the body but against the society is that we then reinforce the patriarchal notion that the women are the symbols of honour and dignity of the families and by relation of men, since in most families they are the de facto heads. The judges do have a duty to protect the victim from apparent ostracism that rape victims have to face, but putting reliance solely on the fact that it will be "difficult for [the family] to find a suitable match" gives in to the line of thought that women are the property of the family to give away. Rather, the reasoning needs to be more sensitive as what the society needs instead of what the society already thinks. As a part of the obiter, Justice Pardiwala states that a 'respectable family' would not report such an incident because "their family honour is brought under disrepute on account of an adverse publicity." This glaring remark terming reporting of rape cases as an "adverse publicity" makes a direct correlation that women are generally treated as a commodity owned by families or other members.

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[35] National Crime Records Bureau (2017): "Crime in India 2017", Ministry of Home Affairs, Government of India, available at: https://ncrb.gov.in/crime-india-2017-0 (Last visited on May 5, 2020).
[36] National Crime Records Bureau (2018): "Crime in India 2018", Ministry of Home Affairs, Government of India, and Available at: https://ncrb.gov.in/crime-india-2018 (Last visited on May 5, 2020).
[37] Human Rights Watch, "Everyone Blames Me" (8 November, 2017) https://www.hrw.org/report/2017/11/08/everyone-blames-me/barriers-justice-and-support-services-sexual-assault-survivors (Last visited on May 5, 2020).
[38] Aradhana CV, "We Went Through 45 High Court Judgments of Rape Cases in 2016, So You Don't Have To. Really, You Don't Want To" (The Ladies Finger, 4 January 2017) http://theladiesfinger.com/high-court-judgments-2016-in-rape-cases/ (Last visited on May 5, 2020).
[39] *Dinesh* v. *State of Rajasthan*, (2006) 3 SCC 771 at 6.

5. Conclusion

The two-finger test has long been in discussion. It is abominable to say the least that it is still practiced. It has found mention in the J S Verma Committee report, a Ministry of Health and Family Welfare guideline and a Supreme Court judgment. Not to miss, the countless other judgments where it goes either unreported or is willfully condoned. It is an obligation on the centre to ensure such degrading practices should not be followed and uniform policy of sexual assault victims must be in place to not let these practices continue.

In the present case, the judges did well to lay down the considerable consequences of coming forward with a rape allegation. However, they fail when it comes to changing the prevailing notions of the society. Sexual assault is an affront to the dignity of a woman not because she losses her honour and standing in a society but because the act is an assault to her physical integrity and right to live as a person. This goes to say we should respect women not because they are mothers, sisters or daughters but because they are human and most importantly, independent individuals. An aforementioned study on the High Court judgments very accurately captures the reasoning and concludes, "The judges' preoccupation with a victim's marriage prospects being ruined begs a discussion about whether an Indian court interprets rape as a question of consent in the first place, as the judiciary is bent on protecting the notion of the 'virgin daughter' or the 'helpless female' or the 'man's wife', rather than a woman whose rights to sexual autonomy have been violated."

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