



Sachin Kumar @ Sanju vs. State of H.P.

Cr. A. No. 214/2020

11.1.2024 Present: Mr. K. S. Banyal, Sr. Advocate with Mr. Uday Singh Banyal, Advocate, for the appellant.

Mr. I. N. Mehta, Sr. Addl. A.G. with Mr. Navlesh Verma, Ms. Sharmila Patial, Addl. A.G. and Mr. J. S. Guleria, Dy. A.G. for respondent-State.
Ms. M. Sudha, Secretary Health, Dr. Gopal, Director Health Services and Dr. Meenakshi, Medical Superintendent, Civil Hospital, Palampur.

It was during the course of hearing of the instant appeal, wherein appellant had been convicted under Sections 376, 354 of the Indian Penal Code (for short "IPC"), Sections 6 and 14(3) of the Protection of Children from Sexual Offences Act (for short, the "POCSO Act") and Sections 66-E and 67-B of Information and Technology Act (for short, the "I.T. Act) by the learned Special Judge, that we noticed that the Civil Hospital Palampur had issued medico legal certificate (for short, the "MLC"), columns whereof, to say the least, are demeaning and to a certain extent even self incriminating and self inculpatory for the child victim. The gross insensitivity shown by all those, who had designed the MLC and its columns, cannot go unnoticed.

2 For it is settled that "rape" is not only a crime against an individual, but also a crime, which destroys the basic equilibrium of the social atmosphere. "Rape" not only lowers the dignity of a woman, but also mars her reputation.

3 The plight of the woman and shock suffered by the victim can be well visualized. The victim of rape grows with traumatic experience and an unforgettable shame haunted by the memory of the disaster forcing her to a state of terrifying

melancholia. The torment on the victim has the potentiality to corrode the poise and equanimity of any civilized society. It has been rightly said that whereas a murderer destroys the physical frame of a victim, a rapist degrades and defiles the soul of a helpless female.

4 “Rape” is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. “Rape” is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society. It is said that one's physical frame is his or her temple. No one has any right of encroachment.

5 We find columns No. 4 and 5 of the MLC in question not only to be demeaning, but even self incriminating, self inculpatory and hitting directly on the privacy of the child victim as would be evident from these columns, that are reproduced for ready reference:-

4. Whether pregnant: xxx xxx

a) date and time of last coitus: xxx xxx

b) coitus if any, prior to alleged assault: xxx xxx

Date:_____ Time:_____ Condom used or not:_____.

5. Patient's statement, whether is a virgin: xxx xxx

6 If that was not enough, the Doctors issuing the MLC in question have even conducted the “two-finger test” despite the fact that this test has been held to be violative of right of rape survivors to privacy, physical and mental integrity and dignity by

the Hon'ble Supreme Court in **Lilu @ Rajesh vs. State of Haryana, (2013) 14 SCC 643**, wherein the Hon'ble Supreme Court observed as under:-

7. So far as the two finger test is concerned, it requires a serious consideration by the court as there is a demand for sound standard of conducting and interpreting forensic examination of rape survivors.

13. In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.

14. Thus, in view of the above, undoubtedly, the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent.

7 Again in **Assessment of the Criminal Justice System in Response to Sexual Offences, In Re, (2020) 18 SCC 540**, the Hon'ble Supreme Court had called for the status report and question No. 15.5 that was framed is as follows:-

Whether the medical experts have done away with the per-vaginum examination commonly referred to as

“two-finger test” and whether any directions have been issued by the States in this regard?

8 It shall be apt to reproduce the other relevant observations as contained in paras 15 to 17 thereof:-

15. Thus, we consider it appropriate to call for status report with regard to the following:-

(1) whether the Medical Opinion in the cases relating to rape and similar offences is being given in compliance with the mandate of Section 164A of Cr.P.C.?

(2) whether the Medical Opinion in the cases relating to rape and similar offences is being given in tune with definition of rape under Section 375 of IPC as it stands today?

(3) whether the states have adopted the Guidelines & Protocols of The Ministry of Health and Family Welfare, Government of India or have they prepared their own Guidelines & Protocols?

(4) whether requisite Medico-forensic kit are available with all the hospitals/health centres run by the Government or by local authorities?

(5) whether the medical experts have done away with the Per-Vaginum examination commonly referred to as 'Two-finger test' and whether any directions have been issued by the states in this regard?

(6) whether medical experts have done away with the practice of giving opinion on the previous sexual experience of the victim or any directions have been issued by the states in this regard?

(7) whether lady medical practioners, if mandated, are available at all district and sub-divisional headquarters to draw up the medical examination report of the victim?

[16] Forensic examination and report play an important role during the investigation as well as trial for linking the culprit with the crime. With the advancement of the DNA science and its accuracy, the sampling for the purpose of Forensic examination and expeditious reports after due examination are vital to the just adjudication of the case.

The sampling for the purpose of DNA test as well other forensic tests like forensic odontology is essential in cases relating to rape.

[17] In relation to the examination of the accused, Section 53A of Cr.P.C. provides for timely examination and guidance for preparation of medical report.

Thus, we consider it appropriate to call for status report with regard to the following: -

(1) whether there is any Standard Operating Procedure (SOP) or Protocol for taking samples for Forensic DNA, Forensic odontology and other forensics for Medical Practitioners?

(2) whether there are adequate number of equipped Forensic Laboratories at least one at every Division Level to conduct forensic DNA and Forensic odontology analysis regionally?

(3) subject to availability, whether Central Government has notified sufficient number of Government scientific expert other than already specified under Section 293 of Cr.P.C.?

9 Earlier to that the Hon'ble Supreme Court, while dealing with the POCSO Act, in **EERA vs. State (NCT of Delhi), (2017) 15 SCC 133**, observed that the interest of the child both as victim as well as witness needs to be protected. It shall be apt to reproduce relevant observations as contained in para 20 thereof, which reads as under:-

“20. The purpose of referring to the Statement of Objects and Reasons and the Preamble of the Pocso Act is to appreciate that the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the Preamble, it is manifest that it recognises the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving

the child. Best interest and wellbeing are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The Statement of Objects and Reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the PocsO Act.

10 The proforma designed by the Civil Hospital, Palampur is bad in law for another reason also as it completely ignores Section 53A of the Indian Evidence Act as introduced by amendment Act No. 13 of 2013.

11 In addition to above, the proforma also violates guidelines and protocols that have been issued by the Ministry of Health and Family Welfare, Government of India for health professionals for dealing with survivors of sexual violence. Guideline 18-B is relevant to the context and the same is reproduced as under:-

"18. Local examination of genital parts/ other orifices

A.....

B. In case of female survivors, the vulva is inspected systematically for any signs of recent injury such as

bleeding, tears, bruises, abrasions, swelling, or discharge and infection involving urethral meatus & vestibule, labia majora and minora, fourchette, introitus and hymen.

- Examination of the vagina of an adult female is done with the help of a sterile speculum lubricated with warm saline/sterile water. Gentle retraction allows for inspection of the vaginal canal. Look for bruises, redness, bleeding and tears, which may even extend onto the perineum, especially in the case of very young girls. In case injuries are not visible but suspected; look for micro injuries using good light and a magnifying glass/ colposcope whatever is available. If 1% Toluidine blue is available it is sprayed and excess is wiped out. Micro injuries will stand out in blue. Care should be taken that all these tests are done only after swabs for trace evidence are collected.
- Per speculum examination is not a must in the case of children/young girls when there is no history of penetration and no visible injuries. The examination and treatment as needed may have to be performed under general anaesthesia in case of minors and when injuries inflicted are severe. If there is vaginal discharge, note its texture, colour, odour.
- Per-Vaginum examination commonly referred to by lay persons as 'two- finger test', must not be conducted for establishing rape/sexual violence and the size of the vaginal introitus has no bearing on a case of sexual violence. Per vaginum examination can be done only in adult women when medically indicated.
- The status of hymen is irrelevant because the hymen can be torn due to several reasons such as cycling, riding or masturbation among other things. An intact hymen does not rule out sexual violence, and a torn hymen does not prove previous sexual intercourse. Hymen should therefore 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.

- *Genital findings must also be marked on body charts and numbered accordingly."*

12 From the perusal of the aforesaid guidelines, it is clear that "two-finger test, which as per the medical term, is called "per-vaginum examination" has been strictly prohibited under these guidelines and protocols. It is pertinent to mention here that these guidelines stand adopted by the Government of Himachal Pradesh and thus are applicable to the health professionals throughout the State of Himachal Pradesh.

13 In spite of all this, the minor child victim in the instant case has been subjected to "two-finger test", which has violated her privacy, physical and mental integrity and dignity apart from creating fear and trauma to the child victim.

14 What is still worse is that the child victim had to suffer untold miseries, especially when confronted with columns No. 4 and 5 of the MLC (supra), which apart from being humiliating are even self incriminating and in the given facts and circumstances, those irresponsible medical professionals, who designed the proforma and those, who medically examined the child victim, cannot be allowed to go scot-free and the child victim essentially and legally needs to be compensated.

15 We had also called the Secretary (Health) to the Government of Himachal Pradesh to know the stand of the State. She appeared and was not in a position to justify the proforma as issued by the Civil Hospital, Palampur and stated that this was designed by some of the doctors at Civil Hospital, Palampur alone

and such MLCs are not being issued anywhere in the State of Himachal Pradesh and have been withdrawn with immediate effect even from Civil Hospital, Palampur.

16 Since "two-finger test" is violative of right of rape survivors to privacy, physical and mental integrity and dignity, therefore, in the given background, the respondents are directed to pay a sum of Rs.5 lacs, as compensation, to the child victim, for the trauma, embarrassment, humiliation and harassment having been caused to her at the hands of the Doctors in the Civil Hospital Palampur, which shall, at the first instance, be paid by the State and thereafter recovered from the erring medical professional(s), after holding an inquiry. The inquiry shall be held against all those Doctors, who designed the proforma and thereafter responsibility be fixed and the mere fact that some of these Doctors have since retired will not come in the way of the respondent-State in fastening the financial liability on them. Further, inquiry be held against all those Doctors, who medically examined the child victim and issued the MLC in question and thereafter responsibility be fixed and here again, the mere fact that the Doctor(s) has/have retired shall not come in the way to fix both liability as well as responsibility.

17 In the meanwhile, all the health professionals of the State of Himachal Pradesh are directed to strictly desist from undertaking "two-finger test" know as "per-vaginum examination" on the rape survivors or else apart from other action(s) that may

be taken against them, they shall be liable for being prosecuted and punished under the Contempt of Courts Act.

18 Before parting, we are constrained to observe that unfortunately even the learned Special Judge and for that matter, even the learned District Attorney have not been sensitive enough in conducting the case.

19 List on 27.2.2024, when report of inquiry as well as the receipt acknowledging payment of Rs.5 lac to the child victim be placed on record.

(Tarlok Singh Chauhan)
Judge

(Satyen Vaidya)
Judge

11.1.2024
(pankaj)