



A CRITICAL ANALYSIS OF TWO FINGER TEST DOCTRINE

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ABSTRACT

The Two Finger Test is used to examine whether a survivor of rape or sexual assault is habituated of such sexual intercourse and determine its laxity and whether the hymen is broken which will signify the history of sexual activity of a victim, although the Supreme Court has said that such tests are inhuman and should be banned. Even after the Delhi gang rape case of Dec. 2013, Justice Verma Committee had also recommended the same thing that two finger tests is like another assault to victim and the test should be stopped. The Delhi Government has conceded in its guidelines that two finger test should be banned for the cases of sexual assault and advised doctors to counsel the victims. Two finger test is not the only methods of determining injury to genitalia and signs of penetration but there are other more scientifically accurate methods. Even after passing the guidelines for banning two finger test, on April 20th 2014, just after the Delhi Gang Rape Case a Dalit girl was gang raped and thrown out of a moving bus in Singrauli and having conducted the two finger test, the Madhya Pradesh police arrived at the conclusion and gave the statement in press media that the girl was habituated of sexual activity. This is a general assumption that is the women habituated of sex may also lie about sexual assault. This paper will emphasise the need for uniform nationwide guidelines which must strictly force the State Governments to stop the practice of two finger test for forensic examination and mere two finger test will not declare the women history of sexual life and such kind tests are against the Article 21 that is Right To Privacy of Indian Constitution and must respect the survivors health, dignity, consent and there is a urgent need to change the laws and forensic procedures related to sexual assault.

Keywords : Right to Privacy, Hymen, laxity, Two Finger Test, Forensic

INTRODUCTION

The Virginity Test popularly known as “Two Finger Test” is the practice of ascertaining Whether a victim of sexual assault is a virgin i.e., whether she has ever engaged in sexual intercourse and it is done by the doctor by inserting two fingers to the victim’s vagina which is used to determine its laxity and also about the victim sexual activity like whether she is sexually active or not. This test involves an inspection to determine the laxity and to find that whether hymen is broken? Which will mark the history of sexual activity of victim and also the report submitted by the doctor in such cases are used by defence lawyer to defend his client which somewhere is

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injustice to the victim and ethically it's wrong also. Usually insertion of one finger into the vagina with strain is expounded that the victim was a virgin, whereas easy insertion of two fingers suggests that she is habituated to sexual intercourse.

According to Oxford Dictionary Laxity means "(of the limbs or muscles) relaxed" and Hymen means "A membrane which partially closes the membrane of vagina and whose presence is traditionally taken to be a mark of virginity". This test is widely used in India for determining the sexual history of women but have no scientific base and it has been clearly dumped by ministry of Health and family welfare Government of India in its Guidelines And Protocols Medico-Legal Care For Survivors/Victims Of Sexual Violence that " Per Vaginum examination commonly referred by lay persons as 'two-finger test', must not be conducted for establishing rape/sexual violence and also the size of the vaginal introitus has no bearing in cases 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 etc. 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, oedema etc.) are to be documented.

NOTION OF TWO FINGER TEST

2012 December was the year of shame for India, for the most brutal gang rape happened at Heart of India i.e. Delhi. On the night of 26th December Jyoti Singh was brutally raped and thrown out of the bus and human rights started to strike and taking out processions in the whole country and this matter was discussed around the world and human rights started its role in reformation of new rape laws for women, the movement triggered and catalysed legal amendments in India. The apex court of India i.e. The Supreme Court has held that the two-finger test on a rape victim violates her right to privacy, and asked the government to provide better medical procedures to confirm sexual assault. This is a common mind set of people that if the two finger gets easily inserted into the vagina of a victim which proves that she was habituated of sex and this becomes a very strong defence for respondent side and a general assumption is made that the women may also lie about rape.

The country like India who had so biased procedure for deciding the virginity of the victim, there was time when the Indian women's did very less physical work but at 21st century where a modern women does all kinds of physical work there are high possibilities of breaking of hymen. The Human Rights Watch analysed 160 judgements; of these 153 took a greater emphasis on two finger test while deciding their cases. If the medical report says the two finger test has been passed, the defence can show that the girl or the victim is habituated of sex. The forensics investigation must not be so stereotypic and mere two finger test cannot ascertain the sexual history of the girl.

There are many other reasons for the breaking of the hymen like cycling, horse riding or penetrative masturbation, some women have such wide openings that their hymen remains intact even after becoming pregnant under such circumstances mere Two Finger Test will not declare the virginity of women and such kind of tests is mental as well as physical stress for the women which is legally and ethically wrong. The second objective of enquiry is laxity of vaginal walls which proves whether the women is habituated of sex or not,

usually married women”s and women who have a lot of sex have loose vaginas so in this way a mere insertion of two finger will not prove the habituation of sexual intercourse of a victim.

A. Justice Verma’s Report

There was a huge outcry of students and people of country after the brutal Delhi Gang rape and murder of Jyoti Singh therefore a panel was setup by Government of India headed by former Chief Justice of India J.S.Verma and the panel took 50 days to send its report on 23rd January 2013 for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women. The other members were of the committee were Justice Leila Seth, former judge of the High Court and Gopal Subhramaniam, former solicitor general of India. The committee made necessary recommendations on various topics like Rape, Sexual Assault, Verbal Sexual Assault, Sexual Harassment, Acid Attack, Offences Against women in Conflicted Area, Trafficking, Child Sexual Abuse, and punishment for crime against women, Medical Examination of a Rape Victim, Police Reforms, and Reforms for Management in Cases related to crime against women, Electoral Reforms and lastly Educational Reforms.

For the medical examination of rape The Committee has directed the discontinuation of the Two Finger Test to find out whether the hymen is distensible because the process is hampering the right to privacy of the victim. The Delhi government then initiated on the process of law making, titled “charter of women rights bill” and said that the two finger test must be taken while taking the consent of the victim, but such kind of test hinders the privacy and dignity of the women and which is ethically wrong. The two finger test is just one of the problems that afflict services for women who have been raped and change must be accompanied by systematic reforms throughout the health system policy and practice. The common use of finger test shows that many doctors, police officers, lawyers, judges and others do not understand what constitutes rape. Overall the Justice Verma committee stated “The twofinger test which is conducted to determine the laxity of the vaginal muscles. The Supreme Court has through various judgments held that the two-finger test must not be conducted and that the previous sexual experience of the victim should not be relied upon for determining the consent or quality of consent given by the victim.”

B. Right To Privacy

A bench of *Justice B S Chauhan* and *F M I Kalifulla* was hearing an appeal of an accused who was convicted by the trial court on the rape of a girl of class IV in Haryana in the year 2002 and the high court too agreed on the decision of the trial court and upheld the conviction The counsel of the accused claimed that there was no proof of birth year by the girl and she looked about 17-18 years of age and thus there was clear cut case of consent on the sexual activity happened, the doctor who examined her medically wrote in the report that the girl had no external injury on her body. The apex court referred various cases and judgements and dismissed the petition of the accused on the ground that Two Finger Test which was happened to the Girl violates her right to privacy, physical and mental integrity and dignity on the basis of a simple test the honourable court cannot decide whether the consent of the girl was there or not.

Now what does Right to Privacy says? As observed by *Khanna J* former Supreme Court judge, “Article 21 is not the sole repository of the right to personal liberty...no one shall be deprived of his life and personal liberty without the authority of laws follows not merely from common law, it flows equally from statutory law like the penal law in force in India.”

According to Article 12 of United Nations Declaration of Human Rights “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation”. Privacy is civil liberty of the individual and tests like Two Finger Test violates the victims right to privacy and it is also viewed by the doctors that insertion of two fingers into the vagina of the victim will damage the evidences that could be collected around the vaginal hole due to rubber gloves.

According to one of the leading medical jurisprudence i.e. Modi’s Medical Jurisprudence it has been stated that if a woman has an intact hymen, yet one, two or more fingers pass easily into her vagina, leaving the hymen intact, then she is a false virgin. He argues that if fingers can pass, then “a body of the size of a penis in erection could perfectly well pass through the hymeneal orifice”. When the hymen is intact, Modi asserts that the finger test becomes crucial to assessing a woman’s virginity.

Thus, the finger test, passing one, two, or even three fingers into the vagina to test its elasticity, becomes the scientific assessment of a woman’s virginity. Despite the fact that a woman’s virginity is irrelevant to the question of consent and should not be questioned in the medical assessment of the act of rape, the finger test and the medical assessment of the hymen remain common practice across India today. Even the latest edition of Modi mandates conducting the finger test in all rape cases.

Even the leading medical books have not edited the process of Two Finger Test from their editions, it has to be understood that in ancient India women was considered as a sacred lady of God and was respected and protected and such heinous crime against women like rape, molestation and other are shameful for a country like India and after such brutal act of any criminal the victim must be protected, respected and rehabilitated instead conducting a test like Two Finger will be like Re- Rape for the victim which will harm her Right To Privacy.

INDIAN JUDICIAL APPROACH

The Two Finger Test is one of the problems that distress the services which are available for the women so raped. This is one of the major problems which India is dealing with, It was earlier alleged in colonial times i.e. according to French and British jurisdiction classified women into “true virgin” and “false virgin” in cases of rape.

Now what Supreme Court’s view on Two Finger Test:- In *Lillu @ Rajesh & Anr v. State of Haryana*, A Division Bench of the Supreme Court comprising of Justices B.S.Chauhan, Fakkir Mohamed Kalifulla on April 9, 2013 held that undoubtedly that the two finger test and its interpretation violate the right of rape survivors to privacy, physical and mental integrity and dignity. Thus this test even if the report is affirmative it cannot raise the presumption of consent given to the accused.

In *Narayanamma (Kum) v. State of Karnataka & Ors.*, Supreme Court held that fact of admission of two fingers and the hymen rupture does not give a clear indication that prosecutrix is habitual to sexual intercourse. The doctor has to find out that the tear of hymen is earlier or an old tear. These were some of the views of Supreme Court on the matter of Two Finger Test, apart from a dehumanizing act this act is an unlawful intrusion into a women’s right to privacy and sanctity of a women. It is a severe blow to her selfesteem and dignity and a kind of a Re-Rape to the women.

The apex court in the case of the *State of Jharkhand v. Shailendar Kumar Rai@Pandav Rai* observed that “a woman’s past sexual behavior has no bearing on the reliability to her testimonial. It is oppressive and

discriminatory to insinuate that a woman can't be trusted when she claims she suffered sexual assault due to the fact that she is sexually promiscuous.”

CONCLUSION

After my research in this area I came to the conclusion that Rape is heinous inhuman act which condemns the purity of Indian society and a Test like Two Finger Test is another inhuman and unscientific process attacking the right to privacy and it is a severe blow to her mental, physical and ethical status and such tests should be condemned, strictly prohibited by enacting amended laws which are uniformly applied over the country.

It is the most important responsibility of Government of India as it is party to several International Treaties that bind the Government to follow all the procedures and forensic procedures and criminal justice processes must respect survivors dignity, integrity, physical and mental aspects.

- Hospitals must use rape kits for a sexual assault forensic exam which includes bags and paper sheet for evidence collection, comb, documentation forms, envelopes, instructions, materials for blood samples, swabs.
- Every police station must include a sexual assault cell taking into consideration about the increasing rate of sexual crimes and a special team must be appointed including female doctors, attendants and police officers.
- Forensic examination should only be done by SANE- sexual assault nurse examiners and by SAFE AND SAE – sexual assault forensic examiners and sexual assault examiners and by not any other category of examiners.
- Doctors must not comment or report on whether the victim was habituated to sexual activity or comment upon the sexual history of girl.
- Trial and Appellate courts must not accept any medical opinion about whether the victim is habituated to sex or not.
- The forensic Tests must be conducted by Gynaecologist lady doctor and if the male doctor performs it then it should be done with the help of Lady Nurse.
- In India only Delhi and few other states have amended the procedures and rest of the state still uses old technique for the examination, so there must be a uniform law strictly applied in all over the country regarding the examination.
- There must be strict implementation of the recommendation of Justice Verma committee about Two Finger Test and regarding collection of evidence.
- There must be proper counselling of the victim who so suffered from such brutal act and her future behaviour and activities should be recorded so as to give her better consultation for improving her health and mental status. Rehabilitation is one of the important process for improving the condition of the victim so as to take her out from the mental trauma she suffered.

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