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# Redefining Justice with the End of the Two-Finger Test

- B Nidhi Rathore<sup>1</sup>

## ABSTRACT

This case comment examines the criminal appeal involving the appellant Rajesh @ Lillu, convicted under Sections 376 (Rape)<sup>2</sup> and 506 (Criminal Intimidation)<sup>3</sup> of the Indian Penal Code (IPC)<sup>4</sup>. The Punjab and Haryana High Court at Chandigarh upheld the conviction and sentence on September 20, 2010. The case stems from an incident on March 6, 2001, in Bandhana village, where Rajesh and others allegedly kidnapped and raped the victim. The trial court's reliance on the victim's school certificate confirmed her age as a minor, rendering consent irrelevant. The appeal raised significant issues, including the validity of the victim's age, the sufficiency of evidence, and the appropriateness of the two-finger test, which the court condemned as violative of the victim's dignity.

This case comment explores the court's abolition of the two-finger test, and brings forth potential loopholes such as incomplete consideration of medical evidence and the necessity for more consistent application of laws. To propel deeper judicial reforms, it is important to shine a light at the adoption of a victim centric approach in judiciary, and the implications of these decisions, as they aid in recognition of the gender stereotypes still prevalent in criminal proceedings.

While abolishing the two-finger test is a notable step forward, facilitation of comprehensive justice for rape survivors needs elimination of discriminatory practices, and a strong support system for victims. A responsive and equitable legal system reserves the duty of protecting the rights of survivors, without applying outdated notions and stereotypes.

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<sup>2</sup> The Indian Penal Code, 1860 (Act No. 45 of 1860), s.376

<sup>3</sup> The Indian Penal Code, 1860 (Act No. 45 of 1860), s.506

<sup>4</sup> The Indian Penal Code, 1860 (Act No. 45 of 1860)

**CASE TITLE:** Lillu @ Rajesh v. State of Haryana

**CITATION:** [2013] 2 S.C.R. 774

**COURT:** Supreme Court of India

**DATE OF JUDGEMENT:** 11 April, 2013

**BENCH:** Justice Fakkir Mohamed, Justice Ibrahim Kalifulla, and Justice B.S. Chauhan

## FACTS

The case involves a criminal appeal against a decision made on September 20, 2010<sup>5</sup>, by the Punjab and Haryana High Court at Chandigarh. This decision upheld the conviction and sentence previously handed down by the Additional Sessions Judge, Jind.

- **Conviction and Sentence:** The appellant, Rajesh @ Lillu, was convicted under Section 376 IPC (rape) and sentenced to seven years of rigorous imprisonment along with a fine of Rs. 5,000/-. In default of payment, he was to undergo an additional two years of rigorous imprisonment. Rajesh was also convicted under Section 506 IPC (criminal intimidation) and sentenced to two years of rigorous imprisonment, to run concurrently with his sentence under Section 376 IPC.
- **Co-accused:** Satish @ Sitta, Manoj, and Kuldeep faced charges for various offenses, including kidnapping and gang rape. Kuldeep received a life sentence under Section 376(2)(g) IPC<sup>6</sup>. Rajesh @ Lillu and another appellant initially appealed, but only Lillu's appeal proceeded after his co-appellant died during the pendency of the appeal.

## INCIDENT DETAILS

- **Date and Place:** The incident occurred on March 6, 2001, in Bandhana village.

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<sup>5</sup> *Lillu alias Rajesh v. State of Haryana* (Criminal Appeal No. 243-DB of 2002)

<sup>6</sup> The Indian Penal Code, 1860 (Act No. 45 of 1860), s.376(2)(g)

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- **Involved Individuals:** The victim, her mother Savitri, Kamlesh's daughter-in-law, and the accused Satish @ Sitta and Rajesh @ Lillu.

## SEQUENCE OF EVENTS

### 1. March 6, 2001

- The victim was at home with her sick mother, Savitri, while Kamlesh's daughter-in-law was out in the field, and her husband was working there alone.
- Kamlesh's daughter-in-law heard the victim calling out, indicating she had been caught by Satish @ Sitta.
- Due to her illness, Savitri was unable to assist.
- Kamlesh's daughter-in-law informed Kamlesh about the incident upon his return.

### 2. March 7, 2001

- Kamlesh and others went to the police station to report the incident.
- An FIR was registered under Section 363 IPC (kidnapping) and Section 366 IPC (abduction to compel marriage, etc.).

### 3. Search and Further Investigation

- The victim was located, but the accused fled when the police searched the fields and Satish @ Sitta's home.
- After taking the victim's statement, the FIR was updated to include Sections 506, 376, and 376(2)(g) IPC.

### 4. March 9, 2001

- All the accused were arrested.

- They were produced before the judge and charged under Sections 363, 366 read with Section 34,<sup>7</sup> 376, 376(2)(g), and 506 IPC.

## **CASE PROCEEDINGS**

- **Trial Court Verdict:** The trial court convicted Rajesh @ Lillu and his co-accused based on the evidence and statements provided.
- **High Court Verdict:** The Punjab and Haryana High Court at Chandigarh upheld the trial court's decision on September 20, 2010

## **ISSUES**

1. Whether the prosecution successfully proved that the prosecutrix was a minor at the time of the incident, making consent irrelevant.
2. Whether the evidence presented, including the prosecutrix's testimony and medical examination, was adequate to uphold the conviction.
3. The appropriateness and impact of using the two-finger test to assess the prosecutrix's sexual history.

## **ARGUMENTS ADVANCED**

The counsel for the appellant submitted that the prosecution had failed to prove the birth date of the victim, asserting she was about 17 to 18 years old at the time of the incident, implying her consent to the sexual intercourse.

The defence objected to the inconsistencies between witness statements and medical evidence, particularly noting the absence of external injury marks on the victim's body as per Dr. Malti Gupta's report, which suggested habitual sexual intercourse.

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<sup>7</sup> The Indian Penal Code, 1860 (Act No. 45 of 1860), ss. 363, 366, 34

The defence argued that the habitual sexual intercourse, as inferred from the two-finger test, should be considered, implying the victim's previous sexual experience might indicate consensual behaviour.

## **LEGAL PROVISIONS**

Section 376 IPC: Rape

Section 506 IPC: Criminal intimidation

Section 366 IPC: Kidnapping, abducting, or inducing a woman to compel her marriage

Section 363 IPC: Kidnapping

## **JUDGEMENT**

The trial court examined the school certificate of the victim, confirming through her birth certificate that she was born on 04/06/1987 and was 13 years, 9 months, and 2 days old at the time of the incident. The court dismissed the appellant's arguments regarding the victim's age and consent. It was held that consent is irrelevant when the victim is a minor.

Regarding the two-finger test, the court noted the evolving legal stance against it. The Supreme Court had condemned the test as unscientific and violative of the victim's dignity and privacy. The court held that a victim's sexual history is irrelevant to the question of rape, and stated that the victim's testimony is the best evidence, and it does not necessarily require corroborative evidence, reinforcing the principle that the victim's experience and trauma should not be doubted based on past sexual history.

## **CONSIDERATIONS AND LOOPHOLES**

In examining the court's handling of this case, several considerations and potential loopholes become evident, some of which bring out the errors and oversights by the court.

## **POSITIVE CONSIDERATIONS**

### **1.1 ABOLISHMENT OF THE TWO-FINGER TEST**

The court's decision to abolish the two-finger test marks a significant advancement in protecting the dignity and privacy of rape survivors. This test was historically used to infer a woman's sexual experience. It was unscientific and perpetuated harmful stereotypes. By disallowing this test, the court that a victim's sexual history is irrelevant to the adjudication of rape.

### **1.2 VICTIM-CENTRIC APPROACH**

The testimony of the victim is the best evidence without necessarily requiring corroboration. This aligns with a more victim-centric approach and recognizes the trauma experienced by the victim. It also seeks to mitigate additional psychological harm caused by the judicial process.

### **1.3 CONSENT AND MINOR VICTIMS**

The court rightly noted that in cases involving minors, consent is irrelevant. This is in consonance with Section 375 of the IPC, which states that sexual intercourse with a girl under the age of sixteen constitutes rape, regardless of consent.

## **POTENTIAL LOOPHOLES AND ERRORS**

### **2.1 INCOMPLETE CONSIDERATION OF MEDICAL EVIDENCE**

The court dismissed the relevance of the two-finger test. However, it did not adequately address other aspects of the medical examination. The defence's argument regarding the lack of external injuries and habitual sexual intercourse was not fully explored or countered with appropriate medical testimony that could clarify the implications of such findings.

### **2.2 DEFICIENT CROSS-EXAMINATION**

Although the court held that the accused can be convicted without the cross-examination of the victim, this raises concerns about the rights of the defence to challenge the evidence against

them. While protecting the victim, the court must also ascertain that the accused's right to a fair trial is not compromised.

### **2.3 INCONSISTENT APPLICATION OF LAW**

The continued use of the two-finger test in some jurisdictions, despite its condemnation, indicates a disparity in the application of the law. The court should have issued clearer directives to ensure uniformity in legal and medical practices across all regions.

### **2.4 AGE VERIFICATION STANDARDS**

The court accepted the school certificate and birth certificate as proof of the victim's age without critically examining the possibility of discrepancies or the authenticity of these documents. In cases where the age of the victim is pivotal, a more thorough verification process should be implemented.

### **2.5 GOVERNMENT REPRESENTATION**

The absence of government representation potentially undermined the prosecution's case. Effective representation is crucial to present a good argument and make sure that all aspects of the case are thoroughly examined.

### **2.6 PSYCHOLOGICAL IMPACT CONSIDERATION**

The court did not sufficiently consider the psychological impact of both the rape and the judicial process on the victim. An approach that includes psychological evaluations and support for the victim was necessary and could have provided a better understanding of the case.

### **2.7 DELAYED JUSTICE**

The significant time lapse between the incident (2001) and the final verdict (2010) reflects systemic delays that can affect the legitimacy of the evidence and the well-being of the victim. The court should have addressed the need for expeditious handling of such sensitive cases to prevent prolonged trauma for the victim.

## **FINDINGS FROM ANALYSIS OF OTHER RAPE CASES**

The per vaginum examination, commonly known as the two-finger test, has historically been used in rape cases to check for signs of sexual intercourse and determine if the victim is 'habituated' to it. On October 31, 2022, in *State of Jharkhand v. Shailendra Kumar Rai*, the Supreme<sup>8</sup> Court reiterated its ban on the two-finger test, reinforcing previous similar judgments. The court declared the test scientifically inaccurate, patriarchal, and a violation of the dignity of sexually assaulted women. The court also directed the Union and state governments to hold medical professionals who continue to perform the test accountable for misconduct. However, even today, there are persistent issues with how rape survivors' testimonies are treated

### **1. CHARACTER ASSASSINATION**

Courts often question the rape survivor's character if the two-finger test wasn't conducted. If a survivor was found to be sexually active or had consensual sex after the alleged rape, her testimony was frequently doubted.

### **2. MISINTERPRETATION OF CONSENT**

In cases where there was a romantic relationship between the survivor and the perpetrator, courts often assumed consent. In many cases, the judiciary fails to differentiate between consent to a relationship and consent to sexual intercourse, leading to wrongful acquittals.

### **3. IDEAL VICTIM SYNDROME**

The judiciary often looked for characteristics of an "ideal victim" – someone who reported the crime immediately, was visibly distressed, and had clear and consistent testimony. Any deviation from this ideal often led to the survivor's testimony being deemed unreliable. For instance, in a case where the victim's father was the accused, the court doubted her testimony due to a three-month delay in lodging a complaint.

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<sup>8</sup> (2022 SCC ONLINE 1494)

These findings suggest that the judiciary's approach to rape cases is still marred by deep-seated biases and stereotypes. Even though the two-finger test has been banned, other discriminatory practices persist. The courts need to adopt a more nuanced and empathetic approach, by recognizing the gravity of sexual violence and the varied responses of survivors. It is crucial to tackle all stereotypes and make sure that survivors are treated with respect and dignity throughout the judicial process.

#### **4. PERSISTENCE OF THE TEST**

Despite the Supreme Court's progressive stance against the two-finger test, its implementation remains inconsistent. The court's order cracks down on medical professionals who conduct the test but fails to address the courts that continue to rely on it in certain sexual violence cases. Some courts still reference medical jurisprudence textbooks that link a woman's genital attributes, such as vaginal elasticity and hymen condition, to her sexual history. For example, the 27th edition of Modi's textbook on medical jurisprudence<sup>9</sup>, though retracting previous support for the two-finger test, still discusses 'possible signs of virginity.' Courts have extensively relied on earlier editions of this textbook in sexual violence verdicts, as noted by Mrinal Satish in his book "Discretion, Discrimination and the Rule of Law." Revising medical textbooks and curricula is crucial, but equally important is for courts to reconsider their reliance on medical jurisprudence that perpetuates harmful stereotypes.

#### **5. INCONSISTENT JUDICIAL PROCEDURES**

The Supreme Court's order did not include directions to prevent the subordinate judiciary from asking women to undergo the two-finger test during legal trials. This oversight allows the practice to continue in some jurisdictions, reflecting a disparity in the application of the law. The order only penalizes practitioners when the test is administered to survivors of sexual violence, thus neglecting its use in other legal proceedings, such as matrimonial disputes. This limited scope fails to address the broader implications of the test's usage.

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<sup>9</sup> K. Kannan, *Modi: A Textbook of Medical Jurisprudence and Toxicology*, (LexisNexis, 27th Edition 2021)

## THE SUSTAINED PRESENCE OF GENDER STEREOTYPES IN JUDICIARY

The judiciary has long questioned the use of the two-finger test, and recognized it as an invasive procedure. Notably, in *Lillu @ Rajesh & Anr. v. State of Haryana*, the Supreme Court observed that “the two-finger test and its interpretation violate the right of rape survivors to privacy, physical and mental integrity, and dignity.”

Similarly, in *State of Gujarat v. Rameshchandra Ramabhai Panchal*<sup>10</sup>, the Gujarat High Court ruled the test as unscientific.

Despite these progressive judgments, a troubling contradiction persists. Courts often rely on outdated notions of morality and gender stereotypes even while disallowing the two-finger test. In the past, courts have perpetuated harmful stereotypes in cases meant to protect survivors, by referring to them as “women of easy virtue” or of “promiscuous character.” Such language reinforces negative societal stereotypes and insults the dignity of the survivors.

The judiciary's mixed approach has at times cast a cloud of doubt. Protection of the victim's rights by disallowing practices like the two-finger test shouldn't go hand in hand with reinforcing patriarchal views about women's sexuality. These stereotypes can profoundly influence the perception of the victim's credibility and the outcome of rape trials.

As a ray of hope, the Supreme Court's recent launch of a handbook to combat gender stereotypes<sup>11</sup> marks a significant step towards gender sensitization in legal proceedings. Chief Justice DY Chandrachud highlighted the inadvertent perpetuation of gender stereotypes in past court judgments and emphasised the need to identify and eliminate such language. The handbook aims to define and raise awareness about gender stereotypes, while empowering judges to avoid using language that reinforces harmful stereotypes against women. This

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<sup>10</sup> 2020 SCC OnLine Guj 114

<sup>11</sup> Supreme Court of India, *Handbook on Combating Gender Stereotypes*, available at: [https://main.sci.gov.in/pdf/LU/04092023\\_070741.pdf](https://main.sci.gov.in/pdf/LU/04092023_070741.pdf) (last modified- August 22, 2023)

progressive move depicts the Supreme Court's commitment to fostering a more inclusive and equitable judicial system.

In the context of these issues, the Sikkim High Court addressed an appeal<sup>12</sup> involving Sections 376 and 354 of the IPC and Section 6 of the POCSO Act<sup>13</sup>. The court directed doctors to avoid the two-finger test, emphasizing its traumatizing effect on rape survivors. This decision aligns with the Supreme Court's stance that the test violates victims' dignity. The Division Bench, comprising Justices Meenakshi Madan Rai and Bhaskar Raj Pradhan, cited the Supreme Court's ruling in *Lillu alias Rajesh and Another v. State of Haryana*, affirming the prohibition of the test. They upheld a 10-year sentence for the appellant under Section 376 IPC and an additional two-year sentence under Section 354 IPC, to run concurrently.

The appellant was convicted for sexually assaulting two minors in 2021. While reviewing the evidence, the High Court found one victim's testimony consistent and the other's embellished, upholding the penetrative sexual assault conviction for one victim and downgrading the charge for the other due to inconsistent testimony.

Advocate Gita Bista represented the appellant, and Additional Public Prosecutor S.K. Chettri represented the State. This ruling underscores the judiciary's ongoing struggle with gender biases and the need for comprehensive judicial reform.

## FINAL ANALYSIS AND CONCLUSION

The abolishment of the two-finger test was a significant step toward protecting the dignity and rights of rape survivors. This invasive procedure violated privacy and reinforced harmful stereotypes about women's sexuality. The law should prioritise consent over the victim's sexual history. However, gender stereotypes persist in rape trials, necessitating deeper judicial reforms. The case of *Lillu @ Rajesh v. State of Haryana* shows that legal reforms alone are insufficient to address rape in India. Effective implementation of laws, proper investigations, and increased

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<sup>12</sup> *Thutop Namgyal Bhutia @ Aku Namgyal v. State Of Sikkim* (AIR 2022 SLJ 76)

<sup>13</sup> Protection of Children from Sexual Offences Act, 2012 (Act No.32 of 2012), s.6

participation of women in lawmaking are essential. Building confidence in the judiciary and ensuring timely justice are crucial. Addressing all manifestations of gender stereotypes in rape trials is important for comprehensive justice.

Legal reforms must protect rape survivors by eliminating outdated examination practices. Public awareness about the irrelevance of a victim's sexual history in rape cases is vital. Strengthening support systems, including legal aid, counselling, and medical care, is essential. Gender sensitization programs are crucial to educate society about the impact of sexual violence and the importance of consent and bodily autonomy.