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**CASE COMMENT ON STATE OF JHARKHAND v. SHAILENDRA  
KUMAR RAI**- Ashikha Dileep<sup>1</sup>**ABSTRACT**

This is the case in which the apex court reasserted the ban on the 'Pre-Vaginum examination commonly called 'two-finger test. It involves the examination of the vagina of a rape survivor to check if the hymen is intact or not which is done by a medical professional. Even though the test has no scientific basis it is still practiced in India. Further, this judgment also discusses the admissibility of a dying declaration recorded by a police officer. This judgment is a reflection on outlawing unscientific and derogatory practices like the 'two-finger' test.

**FACTS**

It was alleged by the respondent that he entered the house of the victim and the deceased on the afternoon of 7 November 2004. He pushed her to the ground and committed rape upon her and also threatened to kill her if she sounded an alarm. When the deceased called out for help, he poured kerosene on her and set her on fire. Hearing the cries the victim's mother and grandfather came to help while the man fled away. She was taken to the nearby hospital where she underwent treatment for the injuries sustained by her. The station-in-charge of the respective police station came to the hospital and recorded her statement on the same day. The girl died on 14 December 2004.

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The Sessions Court convicted the respondent and then he was acquitted by the High Court of Jharkhand. The jurisdiction of the Supreme Court was invoked by the appellant under Article 136<sup>2</sup> of the Indian Constitution by which the decision of the High Court was challenged.

### ISSUES<sup>3</sup>

1. Whether the statement of the deceased is relevant under section 32(1) of the Indian Evidence Act, 1872; and
2. Whether the prosecution has proved the charges against the respondent beyond reasonable doubt.

### ARGUMENTS OF APPELLANT

The submissions on behalf of the appellant were that the post-mortem examination of the deceased was taken within the first 12 hours of the time of the death. Further, it was stated in the report that the death was due to septicemia caused by the burn injuries sustained by the victim.

### ARGUMENTS OF THE RESPONDENT<sup>4</sup>

1. Although the dying declaration indicates that the respondent raped the deceased, the Medical Board's report stated that no definite opinion could be given in this regard. There is no evidence other than the dying declaration to show that the respondent raped the deceased.
2. The victim died around a month after the occurrence of the incident. The statement made by the deceased to the IO is therefore not a dying declaration.

### JUDGMENT<sup>5</sup>

The Supreme Court set aside the High Court's decision dated 27 January 2018 and restored the Sessions Court's judgment dated 10 October 2006 convicting the respondent of offenses punishable under Sections 302, 341, 376, and 448 of the IPC, as well as its order dated 11

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<sup>2</sup> INDIA CONSTI. art. 136.

<sup>3</sup>The State of Jharkhand v. Shailendra Kumar Rai @ Pandav Rai, 2022 SCC Online SC 1494

<sup>4</sup>The State of Jharkhand v. Shailendra Kumar Rai @ Pandav Rai, 2022 SCC Online SC 1494

<sup>5</sup>*Supra* note 4

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October 2006 sentencing the respondent to rigorous imprisonment for life for the offense punishable under Section 302 of the IPC and rigorous imprisonment for 10 years for the offense punishable under Section 376 of the IPC. Any person who conducts the “two-finger test” or per vaginum examination (while examining a person alleged to have been subjected to a sexual assault) in contravention of the directions of this Court shall be guilty of misconduct.

#### RATIO DECIDENDI

As per the provisions of Section 32(1) of the Indian Evidence Act, two conditions have to be satisfied to make a statement made by the person relevant when his/her death comes into question. They include:

- a. Cause of death
- b. Circumstances for transactions that resulted in the death

Here the dying declaration satisfies both the conditions mentioned in the provision. The cause of the death as concluded by the post-mortem report is septicemia due to the injuries sustained by the deceased. The victim’s statement also indicated that these burn injuries happened when the respondent set her on fire. In addition to this, the deceased disclosed in her statement that the respondent raped her before setting her on fire which matches the second condition of circumstances for transcription which resulted in death. Hence the statement of the deceased was considered to be a dying declaration by the apex court.

The other issue was regarding the admissibility and probative value of the dying declaration. The court stated that a dying declaration recorded by a police officer cannot be said to be inadmissible for the sole reason that it is not recorded by a Magistrate. If possible the declaration ought to be ideally recorded by the Magistrate. There is no rule to the effect that a dying declaration is inadmissible when it is recorded by a police officer instead of a Magistrate<sup>6</sup>. The court also relied on other judgments like *Khushal Rao v. State of Bombay*<sup>7</sup>, *Ram Bihari Yadav v. State of Bihar*<sup>8</sup> and *Surinder Kumar v. State of Punjab*<sup>9</sup>.

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<sup>6</sup>State of Karnataka v. Shariff (2003) 2 SCC 473; *Bhagirath v. State of Haryana* (1997) 1 SCC 481

<sup>7</sup>*Khushal Rao v. State of Bombay* AIR 1958 SC 22

<sup>8</sup>*Ram Bihari Yadav v. State of Bihar* (1998) 4 SCC 517

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Furthermore, Dr. RK Pandey, who attended the victim, certified that the deceased was physically and mentally fit to make the statement. The victim has affixed her signature to the dying declaration which was made in her own words and the same was read out to her. Hence there was no reason before the court to say that the declaration was made to falsely implicate the respondent.

The dying declaration unequivocally states that the respondent raped her before setting her on fire and there is no rule mandating the corroboration of the dying declaration through medical or other evidence when the dying declaration is not otherwise suspicious<sup>10</sup>. A lack of medical evidence as to the commission of rape cannot be taken to mean that no rape was committed upon the deceased<sup>11</sup>. In *State of Uttar Pradesh v. Ram Sagar Yadav*<sup>12</sup>, this Court held that there is neither a rule of law nor a rule of prudence that a dying declaration cannot be acted upon unless it is corroborated. Hence the prosecution was successful in proving the case beyond reasonable doubt.

#### OBITER DICTA<sup>13</sup>

This Court has time and again deprecated the use of this regressive and invasive test in cases alleging rape and sexual assault. This so-called test has no scientific basis and neither proves nor disproves allegations of rape. It instead re-victimizes and re-traumatizes women who may have been sexually assaulted and is an affront to their dignity. The “two-finger test” or pre-vaginum test must not be conducted. In *Lillu v. State of Haryana*, this Court held that the “two-finger test” violates the right to privacy, integrity, and dignity. Whether a woman is “habituated to sexual intercourse” or “habitual to sexual intercourse” is irrelevant to determining whether the ingredients of Section 375 of the IPC are present in a particular case. The so-called test is based on the incorrect assumption that a sexually active woman cannot be raped. It is patriarchal and sexist to suggest that a woman cannot be believed when she states that she was raped, merely for the reason that she is sexually active.

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<sup>9</sup>*Suriendra Kumar v. State of Punjab* (2012) SCC 120

<sup>10</sup>*The State of Jharkhand v. Shailendra Kumar Rai @ Pandav Rai*, 2022 SCC Online SC 1494

<sup>11</sup>*Supra* note 11

<sup>12</sup>*State of Uttar Pradesh v. Ram Sagar Yadav* (1985) 1 SCC 552

<sup>13</sup>*Supra* note 11

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Guidelines issued by the Supreme Court:

- a. Ensure that the guidelines formulated by the Ministry of Health and Family Welfare are circulated to all government and private hospitals;
- b. Conduct workshops for health providers to communicate the appropriate procedure to be adopted while examining survivors of sexual assault and rape; and
- c. Review the curriculum in medical schools to ensure that the “two-finger test” or per vaginum examination is not prescribed as one of the procedures to be adopted while examining survivors of sexual assault and rape.

### CRITICAL ANALYSIS

This case has provided an opportunity for the legal fraternity to look into the reasons causing the consistent practice of Pre-Vaginum examination which encroach on multiple rights of women under Article 21<sup>14</sup>. The two-finger test and its interpretation violate the right of rape survivors to privacy, physical and mental integrity, and dignity<sup>15</sup>. It is also positive to decide that those who conduct a two-finger test are to be held guilty of ‘misconduct’. Following the Verma Committee report the Ministry of Health and Family Welfare issued guidelines to be followed while examining sexual assault survivors. Section 53A of the Indian Evidence Act, of 1872<sup>16</sup> was also amended to declare that the past sexual character of a woman is immaterial in determining her consent in sexual offenses.

It is evident that even after issuing stringent guidelines and amending laws the failure lies in executing the provisions. Due to a lack of implementation society is still facing the sexiest practice of the two-finger test. Social activists term such tests as the re-rape of a woman. We could have derived an example from that of the UK government which imposes a 5-year custodial sentence with an unlimited fine on performing a two-finger test. The bench could have used the opportunity to tighten the loose thread. The court merely addressed the issue in its

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<sup>14</sup>INDIA CONSTI .art. 21

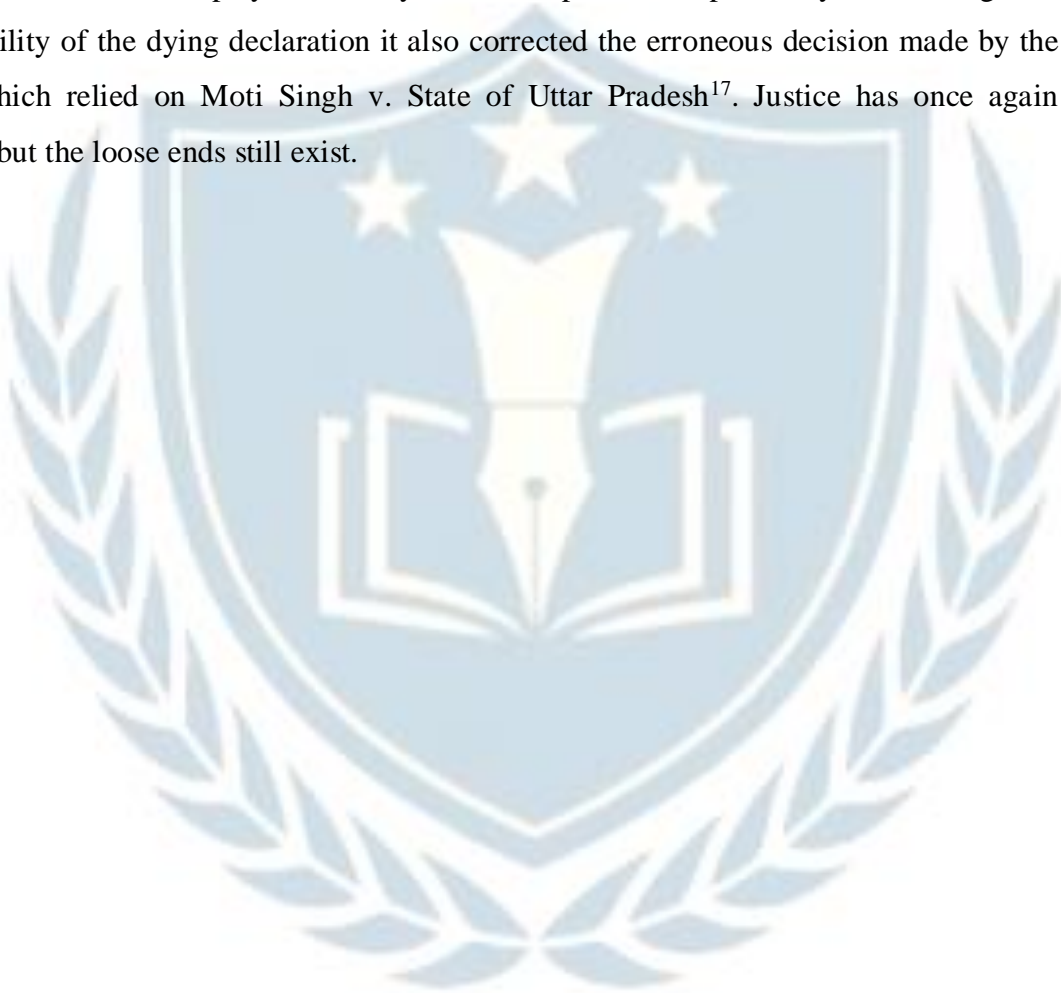
<sup>15</sup>Lillu v. State of Haryana (2013) 14 SCC 643

<sup>16</sup>Indian Evidence Act,1872,No.1,Acts of Parliament,1872

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parking remarks of the judgment rather than transverse an extra mile regarding its implementation.

The court also discussed the admissibility of the dying declaration. When every hope in the world is gone one's mind is intended to say the truth. Cases of rape will be there but sometimes there will not be sufficient evidence to prove it. This is where evidence in the form of a dying declaration comes into play. Not only did the apex court positively decide regarding the admissibility of the dying declaration it also corrected the erroneous decision made by the High Court which relied on *Moti Singh v. State of Uttar Pradesh*<sup>17</sup>. Justice has once again been restored but the loose ends still exist.



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<sup>17</sup> *Moti Singh v. State of Uttar Pradesh* AIR 1964 SC 900

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