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Two-Finger Test for Sexual Assault and Rape victims

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This paper traces the concept and validity of the “two-finger test” for sexual assault and rape victims. The concept of the “Two-finger test” has been practicing since ancient times to determine the virginity of women as well as whether the rape has been committed or not. This test involves the insertion of two fingers by the medical practitioner into the vagina of a female to determine whether her hymen is broken. As this test violates the rights of the female and re-subjects them to go through their body again by insertion raises questions of integrity, dignity, and the concept of consent which recreates the emotional trauma for the victim. Though this test has been declared invalid by the Supreme Court due to the continuous practice and well-settled test in the minds of medical practitioners from ancient times it persists in society.

Keywords: *two-finger test, hymen, sexual assault, persists, rape victims.*

INTRODUCTION

Firstly, to understand the concept of the two-finger test or which is also called as pre vaginal or virginity test one must know the definition of those terms. The term vagina¹ means the part of

¹ ‘Vagina’ (Cambridge Dictionary) <<https://dictionary.cambridge.org/dictionary/english/vagina>> accessed 07 January 2023

the body of a woman or other female mammal that connects the outer sex organs to the uterus whereas the term hymen² means a thin piece of skin that often partly covers the opening to a person's vagina. The "two-finger test" was first used in the year 1800s. if one finger is getting into the vagina of the woman then it is deemed that woman is not involved in sexual intercourse but if the two fingers are getting into the vagina of the woman it is deemed that the woman is involved in sexual intercourse the second implication is used for the rape survivors. Despite being in the 21st century where people adopted westernization and there is rapid growth in modernization certain people or communities have a patriarchal feeling and still demand women shall be virgins at the time of marriage to test their virginity the process of two finger test has been adopted.

It is wrong to presume that a break of the hymen is conclusive proof of the women's virginity or to determine whether women were previously involved in sexual intercourse³. Because not every woman born will have a hymen some women may have very small tissue and many other factors lead to the break of the hymen like women involved in sports, usage of tampons, masturbation, etc. It is also wrong to presume the survivors of rape victims gave consent if they qualify by the two-finger test. Two-finger test has no scientific basis or medical value⁴. It will not give the accurate results which are ought to be needed because if the woman is previously involved in sexual intercourse the laxity of the vagina will be there. If the rape has been committed to a woman who is already involved in sexual intercourse previously the tests of two-finger insertion will not be accurate because the passing of two-finger into the vagina of the rape survivors will be easy.

² 'Hymen' (*Cambridge Dictionary*) <<https://dictionary.cambridge.org/dictionary/english/hymen>> accessed 07 January 2023

³ Kanu Sarda, 'Why the SC slammed the two-finger test on rape and sexual assault victims | Explained' (*India Today*, 31 October 2022) <<https://www.indiatoday.in/law/story/why-sc-slammed-two-finger-test-rape-and-sexual-assault-victims-explained-2291634-2022-10-31>> accessed 16 January 2023

⁴ 'Those using two-finger test for rape survivors should be prosecuted: SC' (*Hindustan Times*, 31 October 2022) <<https://www.hindustantimes.com/india-news/twofinger-test-for-rape-survivors-unscientific-those-who-supreme-court-101667193983868.html>> accessed 11 January 2023

BANNING OF THE 'TWO-FINGER' TEST IN INDIA

In the year 2013, the *Lillu v State of Haryana*⁵ case was referred to the honorable supreme court of India in which a 14-year girl was raped at the police station by two police officers, the lower court and high court of Punjab and Haryana were convicted both the accused number one and two. Aggrieved by the decision made by the lower court and high court accused number one and two approached the Hon'ble Supreme Court. The issue, in this case, was whether habituation to sexual intercourse was a relevant question for a rape trial and whether the "Two-finger test" was violative of the rights of rape survivors under article 21 of the Indian constitution. Supreme court referred to the *Narayanamma v The State of Karnataka*⁶ and others in which it is held that admission of the "Two-finger and hymen rupture does not give the clear conclusion of the fact that the victim was habituated of sexual intercourse and the factum of the "Two-finger test "is not sufficient to determine the past sexual intercourse of the victim. Supreme Court also referred to the *State of Uttar Pradesh v Munshi*⁷ in which it is held that even if the victim is involved in previous sexual intercourse activities it is not sufficient ground to determine that the consent has been adopted automatically. It is the accused who was on trial, not the victim. It is also said that according to sections 53 and 54 of the Indian Evidence act if the character of the victim is in the issue only the victim's character is relevant to decide the matter.

The court also relied on its opinion in the *State of Punjab v Ramdev Singh*⁸ in which it is said that sexual violence is a dehumanizing act that infringes on the right to privacy and sanctity of women. Rape is a violation of the fundamental rights of the victim under article 21 of the Indian constitution therefore when the courts are dealing with such matters the courts shall not harm the privacy, dignity, or sanctity, or make the victim go through again emotional trauma. Rape is not only against the victim but against the whole society so the courts shall deal with the matter by considering the fundamental rights and human rights of the victim while proceedings are going on. Supreme court also relied on International Covenant on Economic, Social, and

⁵ *Lillu v State of Haryana* (2013) 14 SCC 643

⁶ *Narayanamma v State of Karnataka* (1994) 5 SCC 728

⁷ *State of Uttar Pradesh v Munshi* AIR (2009) SC 370

⁸ *State of Punjab v Ramdev Singh* AIR (2004) SC 1290

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 remedies but that does not mean they have to go through again with the same emotional trauma or violate their physical or mental integrity and dignity. They are also entitled to medical procedures which are giving utmost importance to the consent. Thus, the honorable Supreme Court decided that the “Two-finger test” is violative and shall not be practiced.

A short time ago Supreme court of India in the case of the *State of Jharkhand v Shailendra Kumar Rai @ Pandav Rai*⁹ decided that the “Two-finger test” has no scientific or medical value it is regrettable to see that though after the ban on the test, it is still pertaining in the society. The previous history of a rape survivor is not relevant to the present case and it does not imply that woman gave her consent for sex because the previous history of the victim is not one of the ingredients required in section 375. Hymen shall not be considered as evidence in the matter of rape cases. When the legislature enacted the criminal amendment act 2013 it inserted section 53A of the Indian evidence act which states that a woman's character not relevant to the issue of consent or her previous sexual experience with any person is not relevant to the issue of consent¹⁰. Supreme Court also directed the union government and state government to ensure that the guidelines formulated by the ministry of health and family welfare are circulated to all government and private hospitals

CONCLUSION

The crux of all religions is to give utmost importance to humanity, the two-finger test is a dehumanizing act that infringes on the right to privacy and sanctity of women. The name “two-finger test” is pejorative, so we should prefer “Per vaginal inspection” which is more scientific. Despite the international recommendations and court orders given the “two-finger test” still pertains in society, is it because the “two-finger test” is a running practice from ancient times?

⁹ *State of Jharkhand v Shailendra Kumar Rai @ Pandav Rai* (2022) LiveLaw SC 890

¹⁰ Krishnadas Rajagopal, ‘Anyone conducting ‘two-finger’ test on sexual assault survivors will be held guilty of misconduct: Supreme Court’ (*The Hindu*, 31 October 2022)

<<https://www.thehindu.com/news/national/anyone-conducting-two-finger-test-on-sexual-assault-survivors-will-be-held-guilty-of-misconduct-supreme-court/article66076364.ece>> accessed 14 January 2023

Or is it because of the belief of the people in the accuracy of the two-finger test? Whatever it might be but we the people must understand that the two-finger test is violative and infringes on the fundamental rights and human rights of the victims. Government shall ensure that guidelines formed by the ministry of health and family welfare are followed and circulated to all government and private hospitals¹¹.

SUGGESTIONS

- All medical colleges should teach their students about the ban on the two-finger test.
- Strict action shall be taken against the doctors who conduct two-finger tests on rape survivors.
- All hospitals whether government or private shall maintain rape kits, consisting of all the instruments required.
- A forensic examination shall only be conducted by the sexual assault examiners or the specialized professionals who are well-versed in the matters related to the examination.
- A female gynecologist must be present if the male doctor is performing the examination.
- The past sexual history of the victim shall not be considered.
- Before beginning, the examiner must ask permission and obtain consent from the victim.
- The examiner must not examine in a hurry. The examination should be explained before each step.
- Psychological symptoms must be noted down and effective steps shall be taken.
- Genital injury, extra genital injuries, pregnancy, and human papillomavirus are the basic symptoms for rape survivors which shall be diagnosed properly¹².
- Steps shall be taken to avoid pregnancy and infections which may occur for the rape survivors.

¹¹ 'GUIDELINES & PROTOCOLS Medico-legal care for survivors/victims of Sexual Violence' (*Ministry of Health & Family Welfare*) <<https://main.mohfw.gov.in/sites/default/files/953522324.pdf>> accessed 15 January 2023

¹² Erin G. Clifton, 'Medical Examination of the Rape Victim' (*MSD*, September 2022) <<https://www.msmanuals.com/en-in/professional/gynecology-and-obstetrics/domestic-violence-and-sexual-assault/medical-examination-of-the-rape-victim>> accessed 15 January 2023

- The license of doctors shall be canceled for those who conduct the two-finger test.

No doubt the two-finger test is a privacy invasion and has no medical and scientific value. Supreme Court decisions in this matter are landmark judgments by which we can conclude that the two-finger test shall be banned and that it is invalid to practice such a test. In the author's view, there must be separate law dealing with the concept ban of the "two-finger test" so that effective steps will be taken by the administrative bodies and strict actions will be taken on those who violate the law.