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Dissecting the *Obiter Dicta* of Judicial Authority and Institutionalization of Secondary Victimization in Indian Judiciary: Case Analysis of Vikas Garg v. State of Haryana

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Abstract

The article will scrutinize sentencing remarks by courts while pronouncing judgments, hearing bail petitions or other applications in the criminal justice system. Any remarks by any court designated by the constitution have a deep-rooted ramification on the society and its people. It will delve into the question of how the court must utilize appropriate language while dealing with the crime against women, especially in cases of sexual assault, without revealing their personal bias or abstaining from expressing unwarranted opinions. After perusing the case of Vikas Garg v. State of Haryana, it will highlight various concerns surrounding the approaches and dimensions that were adopted by the judges to substantiate their rationale for suspending the sentence. The article is a critical examination of sentencing remarks or other remarks in general that have the potential of secondary victimization in the criminal justice system and the probable methods of overcoming it, including gender sensitivity and training.

Keywords: *Character Assassination, Gender-sensitivity, Misogyny, Rape, Secondary Victimization*

1.0 Introduction

The case of *Vikas Garg and Ors v. State of Haryana* is also known as the OP Jindal rape case. The reason for this case concentrating the attention of the masses was the stereotypical and discriminatory approach adopted by the presiding judges of the Punjab and Haryana High Court. The order was passed by Justices Mahesh Grover and Raj Shekhar Attri when the three accused applied for bail and suspension of sentence under section 389 of Cr.P.C. The court, while allowing their prayer, made certain comments which were unsolicited for the case, wherein the Court expressed that the testimony of the prosecutrix in the case of sexual assault illustrated "*the immature but nefarious world of youngsters unable to comprehend the worth of a relationship based on respect and understanding*". Therefore, the point of contention is whether judges should form opinions based on their personal bias filled with patriarchal notions or should only stick to the merits of the case while indulging in legal intricacies and what should be the standard judicial attitude while passing sentencing remark, orders or any judicial decisions keeping up with a gender-sensitive approach.

2.0 Theoretical Background

Every crime can be mapped to a criminological theory and explained through its lens. Thus, whenever there is any instance of sexual assault, feminist criminology is usually

the foundational criminological theory, which recognizes women as victims of crime as well as perpetrators. Since law has been mostly developed by men and centred on them, the perspective and experience of women were ignored until recently. Now, there is a shift as radical feminists started questioning the patriarchal values deeply rooted in our society and opposing the repression of women and stereotypes levelled against them to act and behave in a certain way. Thus, the long-established traditional gender roles and beliefs were challenged by them.

Since the present case revolves around the sexual assault of a woman by three perpetrators, gang theories can be applied. The theories of subcultural criminology often attribute the characteristics of gangs, their formation and leniency towards delinquent behaviour as major reasons for the existence of crimes, and it is executed through interactions in the groups. Frederic Thrasher's (The Gang 1936), Cohen's (1955) "delinquent sub-culture", Cloward and Ohlin's theory of differential opportunity (1960) etc. are examples of delinquent gangs, however, it is dependent on juvenility, financial background, status etc.

3.0 Factual Matrix of the Case

In this case, the victim is a student of Jindal University, where she gets acquainted with the first accused Hardik. They became friends over one month during which he coaxed her to be in a physical relationship with him. Thereafter she cut off her relations with him, but Hardik continued to force himself upon her and even forced her to send her nude pictures. These pictures were, later on, utilized as a medium of blackmailing to comply with his licentious sexual demands. He even pressured her to buy sex toys, or otherwise, he would publish her pictures in the college. The prosecutrix further alleged that he even coerced her to have illicit sexual relations with his friends named Karan Chhabra and Vikas Garg, the second and third accused, who committed similar acts on several occasions with her even sometimes at the college lounge. This continued for 2 years when she finally contemplated filing a criminal case against the three accused dated 11.4.2015. Subsequently, the three accused applied for bail and suspension of sentence under Section 389 CrPC in 2017 in the High Court of Punjab and Haryana. The court allowed the same based on fallacious reasoning and indecent remarks on the conduct of the victim.

4.0 Rationale Behind Granting Bail and Suspension of Sentence

The courts of India are often duty-bound to explain their reasoning whenever they are passing orders or bail applications, which is known as a speaking order. While hearing the application under section 389 of CRPC in the case of *Vikas Garg v. State of Haryana*, the judges after perusing the case concluded that the testimony of the victim was not gut wrenching as other cases of sexual assault and instead offers an alternate story of casual relationship with her friends with a tendency of sexual adventurism and experimentation and the victim had promiscuous attitude and a voyeuristic mind. Thus, it gives compelling reason to consider the application of the accused to suspend the sentence and grant them bail during the pendency of appeal.

The court emphasized that during the search of her room, a condom was found by her warden, to which she also admitted in her cross-examination. The reason for disbelieving the testimony of the victim was that she possesses a perverse mindset, as that of the accused for agreeing with the accused to buy a sex toy, which according to the victim was due to the fear of the threats received from Hardik. Also, her recorded statement and cross-examination reveal that she was in a habit of smoking, drinking and even consuming drugs on several occasions, though the latter was not by her choice.

Besides, the court went on to question the delay in informing the university or her parents regarding the incidents surrounding her as she had visited them several times with ample opportunity to inform them of the happenings. Moreover, the claim of the victim that the accused forced themselves upon her in the college premises after 10 p.m. one by one is debatable as it was not convincing that it might happen in a place surrounded by people till late at night.

While contemplating on the application, Another reason for granting bail was the education and young age of the accused "*It would be a travesty if these young minds are confined to jail for an inordinate long period which would deprive them of their education opportunity to redeem themselves and be a part of the society as normal beings*". Since the appeal was not supposed to be disposed off shortly, the court deemed it fit to release them on bail while suspending the sentence.

Therefore, the court while granting bail to the three accused underscored that a balance has to be maintained

between retributive, reformative and rehabilitative justice for both the victim and accused in the interest of justice.

5.0 Dissecting the Remarks of Promiscuous Attitude and a Voyeuristic Mind

Criminal law has often witnessed the tendency to blame the victim to substantiate their rationale. In the case, the presiding judge called the victim a person of promiscuous virtues when she was forced into sexual relations by three men against her consent on several occasions, though the court agreed that the allegation of the victim being blackmailed and threatened into submission, imparts ample diabolism to the offence. (News18, 2017) Yet, her testimony was of no credence in the eyes of the court as it reflected an alternate conclusion of misadventure stemming from a promiscuous attitude and voyeuristic mind. In this context, it becomes imperative to analyze who creates the criteria to label a victim of gang rape as a promiscuous person and how it is even prudent to address a victim of sexual violence with an indecent term based on societal stereotypes and norms. It creates the uncertainty of whether courts are sound in making statements expressing moral values that are not even recognized as a crime yet or instead a legally recognized crime with a punitive sentence should be given importance. (Emmanuel, 2017)

6.0 The Character and Conduct of Victim: A Determinant to Decide a Case of Sexual Assault?

The character shaming of a victim is not a new phenomenon based on her conduct or life choices. In the present case, the reasoning behind abashing the victim was that she met the accused in college and developed proximity with him over one month during which he started forcing her against her will. The court illustrated "*The entire crass sequence actually is reflective of a degenerative mindset of the youth breeding denigrating relationships mired in drugs, alcohol, casual sexual escapades and a promiscuous and voyeuristic world.*" The court tried to establish a correlation between her habits of smoking and drinking alcohol or admitting drugs with that of the offence committed. Here, the high court has created a flawed distinction between alcoholic women and non-alcoholic women which violates the principle stipulated under Article 14 of the constitution. Under no circumstances, does the consent of a woman who consumes alcohol stand on a lower footing than those who do not.

Besides, the possession of a condom or drinking alcohol does not imply her consent and has no bearing on a person being a victim of forcible sexual intercourse. (Uniyal, 2020) In the legal framework, any act of non-consensual sexual acts against the victim is a crime of rape. The section does not take into account the personal life choices of the victim her previous sexual encounters or her lifestyle in evaluating her lack of consent.

A perusal of the legislative Acts indicates whether proving the victim is immoral is permissible or not. The Indian Evidence Act, 1872 (hereinafter referred to as "IEA") through the (amendment) Act of 2005 brought two changes, it omitted Section 155(4) which had a provision that stipulated -if a man is prosecuted for rape or attempt to rape, evidence may be adduced to prove that the prosecutrix was generally immoral. Additionally, proviso (2) was added in Section 146(3) of IEA, 1872 prohibiting the imposition of questions that may injure or cast doubt on the character of the prosecutrix to verify their credibility in cross-examination to prove her of immoral character. The Supreme Court in Re: Assessment of the Criminal Justice System in Response to Sexual Offences reaffirmed the principle of Sec. 53A of the Evidence Act that previous sexual history cannot be used to determine the quality of consent. These developments draw an inference that the legal system intends to move towards a victim-sensitive dialogue. However, there is no standard mandate for presiding judges to adhere to such principles.

7.0 The Notion of "Gut-Wrenching Violence" in Cases of Sexual Assault and Rape

Society has a pre-conceived notion lens through which it assesses the conduct and behaviour of a woman wherein she must fit the traditional image of an Indian woman and act in a certain way only, to be an ideal rape victim. (Rawat, 2020) As in the present case the court cited that

the narrative of the victim does not exhibit *"gut-wrenching violence, that normally precede or accompany such incidents"*. Therefore the stance of the victim did not shake the court's conscience and hence, was untrustworthy and less reliable.

The Supreme Court made a similar observation in the case of *Raja v. State of Karnataka* that it was unusual that the victim was not distressed, humiliated and devastated which casts doubt on the veracity of her testimony. For a victim to possess credibility she has to be an inconsolable and crying victim. (All India Reporter, 2020)

All of these assumptions denote certain characteristics of a victim as they should be helpless, crying and bearing a victim complex to justify the gut-wrenching violence of sexual assault or rape. Perhaps the society and court continue to recognize women as the "victim" but never as a "survivor". The psychological impact of a rape victim can never be assessed by her actions in the aftermath of the crime. However, legal precedents demonstrate contrary beliefs.

8.0 Inordinate Delay in Communicating to Family Members or College Authorities

Generally, it is expected that the victim should be vigilant in informing the incident without unnecessary delay followed by filing a complaint. However, this rule has its exceptions especially in cases involving sexual violence and assaults as there is a reasonable explanation for not filing the case immediately due to the mental trauma, as reiterated by many judgments of apex court.

The remarks of the judges that the survivor should have reported the accused to the college authorities or her parents in the first instance are absurd. It is not obvious that the victim shall disclose everything to her parents while negating the fact that the psychological dilemma and trauma probably might have prevented her from reporting to her parents. (Uniyal, 2020)

It is very plausible that the victims may take time to assess and evaluate things especially if it is committed during a period. Many survivors carry deep shame for what happened to them and struggle to disclose it to anyone. We should not undermine the fact that every victim reacts differently and one mould of a victim cannot fit all of them.

9.0 Secondary Victimization of Victim

The incidence of victim blaming and character assassination by various courts and administrative bodies has always been a hindrance in achieving the goals of justice besides the stigmatization and isolation of the victim already done by society. These things culminate into secondary victimization after the crime i.e. primary victimization that has happened. Such incidents often deter a victim of sexual assault from lodging their complaints and seek legal recourse.

The Bench, in the present case of Vikas Garg, blamed the victim for the crime to the extent of equating the conduct of the victim same as that of the accused by putting them on the same pedestal of "perverse streak" to indicate culpability of both. (Rawat, 2020) The order remarked that such people (both the victim and accused) bring shame to their parents. Such opinion discourages a victim from seeking legal action against the abusers due to the humiliation faced at the hands of the judges leading to disbelieving the victim's narrative.

Additionally, the court failed to weigh the gravity of the offence where the victim was also subjected to consistent blackmailing and threats for two years enduring unreal mental trauma as she was made to leave her classes to sexually gratify the accused persons as per their whims and fancies. Yet, the accused were granted bail based on their ongoing education and young age despite the seriousness of the offence.

Therefore, the rationale of the Punjab and Haryana High Court had revealed the narrow and erroneous reasoning with disturbing and unsolicited comments on the victim adding to the trauma undergone by her leading to secondary victimization. Therefore, careful observation and pronouncement is indispensable, substantially in cases of rape or other forms of sexual assault.

10.0 Indian Judicial Attitudes: Misogynistic with Patriarchal Notions?

Though the Indian judiciary has progressed in recent years while dealing with cases related to women, yet on

several instances it has been criticized for manifestation of patriarchal notions in its judgment. Thus, the judgments of various courts have frequently come under the scrutiny of scholars, social workers and other reformers leading to public outcry. (Erinjingat, 2020) Perhaps the reasons for such backlash are not unreasonable at all. The attitude of the judiciary towards rape survivors oscillates between unsympathetic and heedless responses full of patriarchal beliefs and chauvinism. (Solanki & Rai, 2020) The legal interpretations are sometimes discriminatory against women as legal agents interpret laws in patriarchal ways. (Menon, 2004) Thus, such beliefs stemming from patriarchal structures which hinder the path of gender equality, create encumbrances in the dispensation of gender justice.

In the same context, Supreme Court advocate Aparna Bhat **had** penned down a letter to the Apex Court to issue an advisory to all High Courts and subordinate courts to abstain from commenting on the conduct of victims of sexual violence. (Roy, 2020) She stated in the letter that the Indian judicial attitudes are beset by misogyny and sexism. She further questioned whether there is any protocol for rape victims to follow post the incident prescribed under any law. Hence, any such remarks by legal bodies and courts are uncalled for under any circumstances

11.0 Gender Sensitive Approach

To prevent the institutionalization of gender stereotyping reflected by the judicial pronouncement of the court or other legal bodies peremptory measures must be taken. Against this backdrop, the need for a gender-sensitive approach is a valid point of discourse and needs to be analyzed to endorse gender justice in the legal fraternity.

The objective of such sensitization is to foster the principles of a feminist outlook in dealing with sexual assault cases to minimize the ostracization of the victim. Moreover, it should be the bounden duty of the court as well, to refrain from making unmerited remarks with utmost utilization of appropriate language. As rightly observed, "A socially sensitized judge is better armour in cases of crime against women than long clauses of penal provisions containing complex exceptions and complicated provisions". (All India Reporter, 2008)

For, this purpose the Supreme Court of India published "The Handbook on Combating Gender Stereotypes" which strives to assist judges and the legal fraternity in identifying, acknowledging and countering stereotypes regarding women. (Supreme Court of India, 2023) If a judge depends on preconceived assumptions regarding women of sexual assault when contemplating cases or writing judgments, the harm caused can be immeasurable.

Thus, as the law contemplates fairness and justice are the goals of the judiciary, therefore it is the dire need of society to decentralize the authoritative and capacious structures within patriarchy, particularly in cases related to women's sexual abuse. (Tannvi & Narayana, 2022) Therefore, a paradigm shift in the judicial perspective can secure the effectiveness of the enforcement of various laws that are formulated, to protect a woman's dignity, integrity and rights.

12.0 Concluding Remarks

The discourse on the issue of the intellectual use of remarks by judicial officers has always been a pressing problem. Such debates highlight the exigency for a victim-sensitive approach in the dispensation of justice. This urgency of this approach has arisen from the frequent humiliation and character assassination of the victim and the critiques surrounding it. Any person who is in charge of fostering legal principles should be cautious of their response and words. If the court continues to utilize such words, they are unbecoming of judicial officers. Many scholars believe that, perhaps, one of the biggest incompetencies of the Indian judiciary is the dearth of female presiding judges to adjudicate matters concerning women and this lack of representation perpetuates biased opinions towards the victims and how the presence of women judges can reduce such secondary victimization and stereotyping. Therefore, subconscious or conscious bias and stereotyping must be eliminated by prompt actions and implementation of adequate policies and training. The mandates of Articles 14, 15 and 15(3) of the Indian constitution shall be achieved in its true aspects to secure the rights of women not recognized merely as black letters of law to give meaning to the constitutional morality and duty. The judiciary has already taken positive steps in this direction, as reflected in many recent cases of supreme and high courts and even numerous subordinate courts. Thus, all these developments positively contribute to the jurisprudence of feminism in

India. To achieve this purpose there should be cumulative efforts of all stakeholders to foster gender justice in the legal community.

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