24.08.23. 24.08.23. 24.08.23. 24.08.23. 24.08.23

In the Supreme Court of Bangladesh
High Court Division
(Special Original Jurisdiction)

Writ Petition No. 10663 of 2013

Bangladesh Legal Aid and Services Trust (BLAST) and others
.... Petitioners
-Versus-
The Government of Bangladesh, represented by the Secretary, Ministry of Health and Family Welfare and others
.... Respondents
Mrs Sara Hossain with
Ms Sharmin Akter, Advocate
.............for the petitioners
Mr A.S.M. Nazmul Haque, D.A.G.
........for respondent No.1

Present:
Mr Justice Gobinda Chandra Tagore
and
Mr Justice A.K.M. Shahidul Huq

Heard on: 06.11.17, 21.11.17, 15.01.18, 18.03.18 and 10.04.18, and
Judgment on: 12.04.2018.

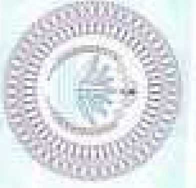
Gobinda Chandra Tagore, J:

1. On an application under Article 102(1), (2)(a) of the Constitution of the People's Republic of Bangladesh, the *Rule Nisi* was issued in the following terms:

   "Let a Rule Nisi be issued calling upon respondents to show cause as to why the so-called 'two-finger test' undertaken upon the raped women and girls shall not be declared to have been undertaken without lawful authority and of no legal effect as the same being violative of fundamental rights under Articles 28(1), 28(2), 31, 32 and 35(5)of the Constitution; and further to show cause as to why the respondents shall not be directed to

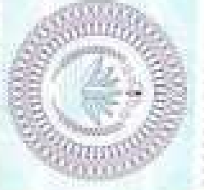
1/4

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



take effective measures to prohibit the use of the so-called 'two-finger test' during the medical examinations of the victims, raped women and girls; and also why they shall not be directed to take all steps for such purpose by developing and instituting in consultation with concerned experts a protocol for the therapeutic treatment and gender-sensitive examination of the aforesaid victims and also by devising guidelines for the examination of women child survivors of sexual abuse or violence to minimize invasive procedures and further by ensuring that any test is only carried out with the fully informed consent of the victims to the extent that is possible and also with the full informed consent of the victim's parent or guardian, where necessary; and further why they shall not be directed to provide funds for the training and monitoring of all concerned forensics personnel regarding the use of such a protocol or such guideline in sexual violence cases and also why the respondents shall not be directed to instruct the doctors not to comment on whether they believe the patient is "habituated to sexual intercourse" based on medical findings and also instruct all senior police officials to ensure that police requisition letters for medical examinations do not ask doctors to comment on whether any person is 'habituated to sexual intercourse' and for that, why they shall not be directed to ensure that judicial education courses make clear that the so called 'two-finger test' results and medical opinions about whether any person is 'habituated to sexual intercourse' are unscientific, degrading and legally irrelevant and as such shall not be presented in Court proceedings related to sexual offences and also by discontinuing the use in medical schools and courtrooms of medico legal textbooks

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



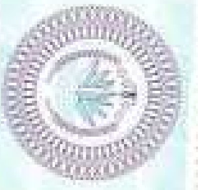
that perpetuate gender bias against victims women and girls and/or pass such other or further order or orders as to this Court may seem fit and proper."

Pending hearing of the Rule, respondent No.1 was directed to set up a Committee including experts in forensics, criminal justice, public health and experience in providing support to women and girls survivors of violence, to develop a comprehensive guideline for police, physicians and Judges of Nari-O-Shishu Nirjaton Daman Tribunal on examination and treatment of women and girls subjected to rape and sexual violence and to submit a detailed report thereof to this Court within 03 (three) months from the date of receipt of that order, for dealing with the same in accordance with the law.

2. As shortly stated, the relevant facts necessary for the disposal of the *Rule Nisi* are as follows:

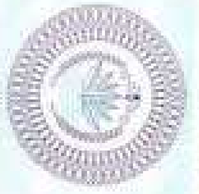
Six organizations namely, (1)Bangladesh Legal Aid and Services Trust (BLAST), (2) Ain O Salish Kendra, (3) Bangladesh Mahila Parishad, (4) BRAC, (5) Manusher Jonya Foundation and (6) Naripaksha represented by their concerned representatives respectively and two physicians namely, (7) Dr Ruchira Tabassum Naved and (8) Dr Mobarak Hossain Khan, have filed the instant Writ Petition. Petitioner Nos.1-6 are all registered non-governmental organizations that have been working for, amongst others, ensuring the protection of women's and girls' human rights, while petitioner Nos.7 and 8 are researchers and trained medical doctors. They have filed the Writ Petition in the public interest to ensure that proper

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



action will be taken to secure the fundamental rights to equality and to be treated in accordance with the law and to protection from the cruel, inhuman or degrading treatment of women and girls, who are victims or victim-complainants in the cases of rape. In the Writ Petition, the petitioners are aggrieved by the practice of "Two-Finger Tests", hereinafter to be referred to as the 'TFT', whereby invasive examinations on the women and girls, who are victims of rapeare conducted by physicians in hospitals or medical colleges across the country. In many cases, such examinations are conducted even without the consent of such women or girls. By such examinations, they are subjected to further trauma by violating their fundamental rights guaranteed under Articles 27, 28, 31, 32 and 35(5) of the Constitution. Rape is the second most reported form of violence against women and girls in Bangladesh and reportedly constituted about 20-25% of all cases of violence against women and girls filed with the police in the years 2001-2010. After lodging a First Information Report (F.I.R.) with the police or making a complaint before any Nari-O-Shishu Nirjaton Damon Tribunal on the allegations of rape, the victim is required by law to undergo a medico-legal examination. In such cases, physicians have duties not only to provide the victim with the necessary medical treatment and care but also to assist in collecting evidence through examination of the victim and documentation of their findings. While some

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



Guidelines have been laid down by the respondents in this regard, there is no comprehensive protocol in place to ensure effective examination, documentation and treatment of women and girls subjected to rape and other sexual violence. In addition, there are no specific training courses in place to ensure that special provision is made, and care is taken to address the particular need that arises in the case of treatment and examination of women and girls subjected to rape and other forms of sexual violence. The guidelines regarding such medical examinations have already been laid down by respondent No.1 i.e., the Ministry of Health and Family Welfare vide a Circular bearing Memo No. স্বাপকম/জিআইএ/-১৯/৯৭/৯৩ dated 16.09.2002, Annexure-A. Clause (a) of the said Circular provides that a woman or a child victim of rape or any other form of violence who approaches, even without any police reference, a physician on duty at a government medical hospital or establishment or a government-recognized healthcare centre run by any voluntary organization, shall be examined by the physician and shall be entitled to a copy of the medical certificate to be issued by the said physician following such examination. However, the Guidelines do not detail the duties of the physicians in providing emergency medical aid or comprehensive health care in such cases. A prescribed form titled "ভিকটিমের আইনানুগ মেডিক্যাল পরীক্ষার প্রতিবেদন" (Report of Medico-Legal Examination of Victim) issued by respondent

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

No.1 further requires, amongst others, the following information to be recorded in the course of any medico-legal examination of a woman or girl, complainant of rape: victim's personal details; details of the person accompanying or identifying the victim; consent of the victim to the medical examination; the name of female attendant present during the examination; a complete description of the incident; signs of injuries and use of force; the age of the injury; type of injury; victim's mental state; details of menstruation, marital status, age of last born child, description of hair, breast, abdomen, genital area including vulva, hymen, vaginal canal, fourchette, cervix, rectum; other examinations such as X-Ray, ultrasonography, pathology, DNA etc; medical treatment and other opinions. Some of this information is obtained by conducting a physical examination of the persons of the woman or girl concerned. The relevant laws governing the definition of rape are contained in Sections 375 and 376 of the Penal Code, 1860and Section 9 of the Nari-O-Shishu Nirjaton Damon Ain, 2000 (as amended in 2003). Regarding the evidence required, Section 155 of the Evidence Act, 1872 is particularly relevant. Although it has been repeatedly held that the conviction is possible only on the sole evidence of the prosecutrix [*Al-Amin and Others vs. The State 19 BLD (1999) 307; Abdus Sobhan Biswas vs. The State 22 BLD (2002) 575;*and *Manirul Islam (Md.) v The State 8 MLR (2003) 27*], there is considerable

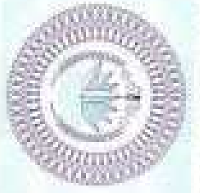
"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

reliance by the Trial Court in particular, by the Nari-O-Shishu Nirjaton Damon Tribunal on medical evidence in cases of sexual violence, and in particular on proof of injuries, even though in practice there may not be very visible injuries because the victim is unconscious, under restraint or too frightened to resist. Despite increasing understanding among medical experts and researchers of these issues, the Trial Courts continue to require signs of genital injuries to determine whether rape has taken place. In practice, the medical examinations carried out on women and girls, who are subjected to rape currently require the recording of details that are irrelevant and do not provide a clear basis for determining if rape has occurred. Specifically, the TFT [the findings of which are recorded in Clause 16 (Chha) (2) and (3) of the prescribed form for the Report of Medico-Legal Examination of Victim, Annexure-B] requires medical examiners to make observations with respect to the hymen and vaginal canal of the victim. The test is used to determine first the status of the hymen and then to check whether it is intact or torn and if it is torn the degree thereof. This emphasis on the status of the hymen restates the well-known 'rape myth' that such information can determine the virginity of the victim, even though a tear of the hymen may occur because of other activities such as exercise. The test is also used to identify whether a woman or girl subjected to rape is "habituated to

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

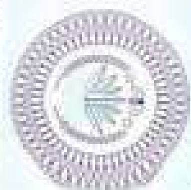
sexual intercourse" by determining whether the vaginal opening is broad or narrow. This is highly unscientific and has no forensic value or relevance to the question of whether the victim consented to the act of sexual intercourse. The basis of the test can be traced back to a leading medical jurisprudence book from 1920, *Modi's Medical Jurisprudence and Toxicology*, 23rd Edition, Mathiharan K and Patnaik, Amrit K, Edition, 2010 reprint,LexisNexis in Butterworths Wadhwa,Nagpur, Delhi, Section 1, p 928, which is still in print and used in forensics courses across the country, which provides for TFT to infer the possibility of sexual intercourse, even whenthe hymen is not ruptured, but the vaginal orifice is big enough to admit easily the passage of two fingers. However, the same test is now used to prove that a woman is habituated to sex and hence, could not have been raped. Petitioner No.1 has conducted research on the issue of medico-legal examinations based on reviewing the case records of over 61 cases under section 9 of the Nari-O-Shishu Nirjaton Damon Tribunal Act, 2000 (as amended) from across 15 districts. The findings of this research indicate that the TFT is widely prevalent and was conducted in all but nine cases with the findings recorded as "admits two fingers", "admits two fingers easily", "admits two fingers loosely", "admits two fingers tightly", "admits three fingers easily", "healthy" and "admits one finger loosely". In twelve cases, the TFT was conducted even on the minor/child

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



victims. In one case, it was also conducted on a woman with 26-27 weeks of pregnancy. But the findings based on this test could have clearly no relevance whatsoever to establishing rape in such cases. Such a test was also conducted in cases where there had been significant delays in reporting the incident. In three of the nine cases in which the TFT was not conducted, the concerned examining officer found signs of forceful sexual intercourse as well as signs of physical injuries indicating that although such tests are routinely conducted, they are not necessarily required by medical examiners to arrive at a finding of forceful sexual intercourse. But the defence counsels regularly invoke this provision when reports prepared following the medico-legal examination of rape victims and refer to the findings of her being 'habituated' to show that the prosecutrix is of 'generally immoral character'. Forensic medical practitioners in many cases endorse the view in their findings that a woman is 'habituated' to sexual intercourse, as in the case of a married woman, indicating that she had impliedly consented to every act of sexual intercourse and so would not establish rape. Petitioner Nos.1-6 have learnt from those victims about the distress and trauma they faced when undergoing the TFT. However, there is also a widespread realisation among medical professionals, law enforcement agencies and women's rights Advocates as well as government officials of the need to abolish the TFT practice. In

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



a national conference held in Dhaka in February 2013 on the issue of the collection of medical evidence in rape cases, the experts expressed their concern and opined that the TFT has no evidential value or scientific meritand recommended changing the practices for the collection of medical evidence. There has also been increasing public concern regarding the continued use of the TFT and its effect on women and girls, who are victims of rape. Media reports have documented that the TFT yields no medical or legal benefit for the rapevictims; rather, it can, on the other hand, emotionally re-traumatise and prevent the victims from accessing the legal system. One such report published in the Dhaka Tribune on 01.09.2013, quoted a rapevictim from Tangail stating thather father was not ready to file any case as they had come to learn that doctors use their fingers to confirm sexual assault. On 07.03.2013, several of the petitioners submitted a memorandum to the National Human Rights Commission (NHRC) calling for the prohibition of the so-called TFT, with recommendations that the medical examination of the victim of sexual violence should be done in a way, which does not retraumatize and humiliate the victim. On 11.09.2013, several of the petitioners along with others submitted a similar memorandum to respondent No.1, the Ministry of Health, and Family Welfare. The so-called TFT is no longer used in many jurisdictions. The World Health Organisation (WHO) issued

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

'Guidelines for Medico-legal Care for Victims of Sexual Violence' in 2003 which specifically provides "When caring for victims of sexual violence, the overriding priority must always be the health and welfare of the patient" and further refers to the 'virginity tests' as a form of sexual violence in and of themselves. The said Guidelines further provide that a victim of sexual assault must be treated with respect and compassion throughout the examination to help her recovery, that all parts of the examination should be explained in advance; during the examination, the victim should be informed when and where touching will occur and should be given ample opportunity to ask questions; the victim's wishes must be upheld at all times; that all findings must be documented carefully; to help ensure that no important details are omitted and the use of standard examination form is recommended. In *Modi's 'A Text of Medical Jurisprudence and Toxicology'*, 25th Edition, (edited by Justice K Kannan)2016, LexisNexis, it has been opined that per-vaginum examination commonly referred to by laypersons as the 'two-finger test' must not be conducted for establishing rape/ sexual violence and size of vaginal introitus has no bearing on a case of sexual violence; an intact hymen does not rule out sexual violence, and torn hymen does not prove previous sexual intercourse, examination of the vaginal canal of an adult female can be done with the help of a sterile speculum lubricated with warm

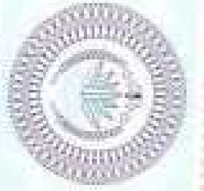
"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

saline/sterile water to look for bruises, redness, bleeding and tears, while the TFT is used just to see the distensibility of the vagina, but it is not possible to opine about the forceful sex by inserting one or two fingers. In the facts and circumstances, a notice demanding justice was issued to the respondents on behalf of the petitioners calling upon them to take urgent action to prohibit the so-called TFT but no response to the same was received. Accordingly, the petitioners having no other equally efficacious remedy filed the instant Writ Petition and obtained the Rule and the interim directions.

3. In compliance with the interim directions, on 16.01.2014, respondent No.1 constituted a committee comprised of Forensic Experts, Gynaecologists, Representatives of the Ministry of Home Affairs, Ministry of Law, Justice and Parliamentary Affairs, Ministry of Women and Children Affairs, Ministry of Health and Family Welfare Affairs, and Rights Activists. The committee prepared a Guideline namely "ধর্ষণ ও যৌন সহিংসতার শিকার নারী ও মেয়ে শিশুদের ডাক্তারী পরীক্ষা (মেডিকেল) দিক-নির্দেশনা". On 12.08.2015, respondent No-1 submitted the said Guideline before this Court through an Affidavit-in-Compliance. The main points of the Guideline are, amongst others, (i) if circumstantial evidence is available, the doctor will make an opinion on whether TFT is required or not and TFT only can be done when there is no alternative, (ii) Doctors will issue Medical Certificates only about the examination of rape and will not

12/৫

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



use degrading words like "Habitual", and (iii) No question should be asked to the victim about her sexual experience.

4. Subsequently, on 07.08 2016 upon an application filed by the petitioners, this Court issued an order requiring the opinion of five Forensic Experts namely, i) Dr Habibuzzaman Chowdhury, former Head of the Department, Department of Forensics, Dhaka Medical College Hospital, ii) Dr Sharif Akhteruzzaman, Head of Department, National Forensic DNA Profile Laboratory, Dhaka Medical College Hospital, iii) Dr Zahidul Karim Ahmed, Medico-Legal Expert, Principal, Delta Medical College, Mirpur, Dhaka, iv) Dr Gulshan Ara Akhter, Professor of Forensic Medicine, BIRDEM General Hospital, Dhaka and v) Prof. Muzaherul Huq, Medico-Legal Expert, Vice President, Indo-Pacific Association of Law, Medicine and Science, (INPALMS) and Forensic Scientist. On 18.07.2017, the opinion of the said five Forensic Experts was submitted before this Court by the petitioners through a Supplementary Affidavit and the main points of the opinion are, amongst others, (1) TFT is not scientific, reliable, valid and practised anywhere else in the world, (2) In the case of sex workers, married women, sexually habitual women TFT is not reliable and valid, (3) TFT is not necessary for seeing the hymen, and (4) The speculum can be used for examining vaginal internal injury.

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

5. The petitioners also organized several consultation meetings with Forensic Experts, representatives of the Victim Support Centre, members of the National Human Rights Commission, Judges of the Nari-O-Shishu Tribunal, and Public Prosecutors to review the draft guideline prepared by respondent No-1. The petitioners also submitted the said reviewed Guideline before this Court on 18.07.2017 through a Supplementary Affidavit. The main points of the reviewed guideline, amongst others, are (a) Female police should be sent with the victim for medical examination, (b) Government should appoint trained Doctors and Nurses for medical examination of rape victims, (c) Confidentiality of victims and necessary equipment for the medical examination should be ensured, (d) No question relating to the dignity should be asked to the victim during investigation or trial, and (e) Medical examination should be done in the following steps- (i) Physical examination, (ii) Microbiological examination, (iii) Radiological examination for determining the age, and (iv) DNA examination.

6. On 22.10.2017, respondent No-1 filed an application for a direction to call other six Forensic Experts *(other than the petitioners called)* to give their opinion about the use of TFT which was allowed. On 11.12. 2017, the written opinion of four Forensic Experts was placed before this Court by respondent No.1 through an Affidavit-in-Compliance. The main points of the opinion, amongst others, are that TFT is necessary to see a

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

vaginal injury like a bruise, laceration, tenderness, deep-seated injury to the cervix, perennial tear, hymen rupture, the position of hymen etc to make an opinion as to whether a female has been raped or not.

7. On 15.01.2018, the petitioners filed an Affidavit-in-Reply to the Affidavit-in-Compliance containing the said opinion of four Forensic Experts upon refereeing to *"Modi- A Textbook of Medical Jurisdiction and Toxicology"* by *Joysing P Modi (25th Edition)*, which opines, amongst others, that (i) TFT must not be conducted for establishing rape/sexual violence and the size of vaginal introitus and hymen has no bearing on a case of sexual violence, (ii) Hymen can be torn due to several reasons like cycling, riding or masturbation etc, (iii) Examination of the vagina of an adult female can be done with sterile speculum lubricated with warm saline/sterile water to look for bruise, redness, bleeding and tears, and (iv) TFT is used just to see the distensibility of the vagina, through which it is not possible to make any opinion on forceful sex.

8. Respondent No.1 initially filed an Affidavit-in-Opposition to the Writ Petition by denying all the material statements and allegations made therein. But subsequently, he filed another Affidavit-in-Opposition contending, inter alia, that he would not press the earlier Affidavit-in-Opposition but thereby evasively put the petitioners to strict proof of the material statements and allegations made in the Writ Petition. Thus, by

15/৫

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

the subsequent Affidavit-in-Opposition, respondent No.1 has not materially and substantively denied the statements and allegations made in the Writ Petition; rather, in furtherance thereof, he has also stated that Gender-Based Violence (GBV) exists as a social problem. GBV especially affects women and children in their physical and psychological health, sexuality, security, social life, and ability to acquire justice, including overall development. As it is crucial to develop a system to provide emergency services to the survivors of GBV, the Government in the Ministry of Health and Family Welfare made and circulated a protocol namely, ***"Health Response to Gender Based Violence, Protocol for Health Care Providers".*** The Protocol has been developed as per the *Gender Equity Strategy, 2014* of the Ministry of Health and Family Welfare and the *Gender Equity Action Plan, 2014-2024.* Accordingly, the Rule issued in the instant Writ Petition should be disposed of with necessary observations for the ends of justice. Therefore, the subsequent Affidavit-in-Opposition contemplates that the medical examination of the raped victims should be done in accordance with the process and procedure contained in the said Protocol.

9. Having placed the Writ Petition, Ms Sara Hossain along with Ms Sharmin Akter, the learned Advocate submits that the impugned 'two-finger tests' (TFT) conducted on the women and girls, who are the victims of rape, even in many cases without

16/4

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

their consent and subjecting them to further trauma, being violative of their fundamental rights guaranteed under Articles 27, 28, 31, 32 and 35(5) of the Constitution is liable to be declared to have been practised without lawful authority, is of no legal effect, and not permitted by law to be practised and hence, should be prohibited. The learned Advocate details her submission that as per Clause 16 (Chha) (2) and (3) of the prescribed form for the Report of the Medico-Legal Examination of Victim (ভিকটিমের আইনানুগ মেডিক্যাল পরীক্ষার প্রতিবেদন), the TFT is used to determine the status of the hymen and the vaginal canal that whether the hymen is intact or torn and whether the vaginal canal is broad or narrow, which restates the well-known 'rape myth' that such information can determine the 'virginity' of the rape victim or whether she is 'habituated' to sexual intercourse, while the hymen may be torn and the vaginal canal may be broad for various reasons other than sexual intercourse. The learned Advocate continues her submission that mere habituation to sexual intercourse cannot lead to the inference of "loose moral character". Even, if a woman has previously lost her virginity, been promiscuous, loose moral character, of easy virtue or to the least, a sex worker, she has the right to refuse sexual intercourse and nobody in law gets a license to rape her. Thus, if the result of the TFT is affirmative, it does not construe the consent of the victim to sexual intercourse. The *25th Edition of Modi's 'A*

17/এ

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

Textbook of Medical Jurisprudence and Toxicology', the World Health Organisation (WHO)'s *'Guidelines for Medico-Legal Care for Victims of Sexual Violence-2003'* and *'Health Care for Women Subjected to Intimate Partner Violence or Sexual Violence – A Clinical Handbook'* not only disapprove the TFT but also term it as a form of sexual violence or as a means of increasing the distress of the victims of rape. Then, she also submits that the test, as per the documented media reports, also does not yield any medical or legal benefit for the victim while, on the contrary, the test may physically and emotionally re-traumatise and prevent the victim from accessing the legal system. But the legally essential purpose of examinations of the vagina of an adult rape victim can be served with sterile speculums lubricated with warm saline/sterile water or with the assistance of specialist lighting, magnification or colposcopes to look for bruises, redness, bleedings, and tears. Therefore, the TFT is highly unscientific and has no forensic value or relevance to the question of whether the victim has consented to the act of sexual intercourse. In these regards, the learned Advocate lastly submits that respondent No.1, Ministry of Health and Family Welfare made a protocol namely, *"Health Response To Gender-Based Violence- Protocol For Health Care Providers"* in September 2017 which specifies the procedure for medico-legal examination of a rape victim and the same does not provide for TFT for genital examination

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

of the rape victim and as such, the health care providers, including the forensic experts are not authorized by the same Protocol to practice TFT on the victims of gender-based violence, including rape and hence, the Rule should be made absolute prohibiting the TFT for genital examinations of the victims of rape. In this connection, the learned Advocate also submits that even such examination prescribed in the said Protocol should be done preferably by a lady doctor in the presence of a female attendant of the victim, a female police officer and a nurse upon maintaining her privacy. The learned Advocate further submits that during the trial the concerned Court or Tribunal should ensure that no one would ask any question to the victim which is degrading to her privacy, integrity, prestige and dignity. The learned Advocate concludes with the submission that in view of the premises stated, grounds taken, and submissions made, the *Rule Nisi* should be made absolute.

10. On the other hand, Mr A.S.M. Nazmul Haque, learned Deputy Attorney General appearing on behalf of respondent No.1 submits that since the Government has already made the said Protocol for Health Care Providers, which does not provide for the TFT and thereby, the Government has excluded such practice from the examination of the rape victims, the cause of action of the Writ Petition has already been satisfied and accordingly, the Rule should be disposed of instead of making

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

it absolute. Having echoed the submissions of the learned Advocate for the petitioners he also submits that since the Government has made the said protocol, the same is binding upon all the Government servants including the Medical Officers who conduct the medical examination of the rape victim and as such, they should strictly follow the said protocol and not to take any recourse to the said invalid TFT on any rape victim and hence, the Rule may be disposed of with the necessary directions.

11. We have perused the Writ Petition and the Affidavit-in-Opposition filed thereto along with the Annexures thereto and heard the learned Advocate for the petitioners as well as the learned Deputy Attorney General for respondent No.1.

12. In the Writ Petition, the petitioners have challenged the practice of the 'Two Finger-Test (TFT)' or 'Per Vaginal Test', which is also well known as the 'Virginity Test' on rape survivors/victims. TFT is explicitly an intrusive physical examination wherein a doctor inserts two fingers inside the vagina of a rape survivor/victim to check whether her hymen is intact as well as the laxity and distensibility of her vaginal wall, muscles or orifice and thereupon to opine whether she is virgin or sexually habituated on the assumption that a sexually habituated woman is less likely to have been sexually assaulted or raped as if such a woman is in a state of constant consent to sexual activities.

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

13. From the definition and construal of the TFT, it appears that it is to be decided in this Writ Petition that (i) whether the status of the hymen of the woman/girl alone can decide whether she has been raped, (ii) whether through the TFT it can be opined whether the rape survivor/victim is a virgin or sexually habituated (iii) whether it is a correct assumption that a sexually habituated woman is less likely sexually assaulted (iv) whether the TFT has any scientific and forensic value, (v) whether there is any scientific and reliable method and means to examine the hymen in an appropriate case, and (vi) whether TFT is authorised by law to be practised on the rape survivors/victims.

14. Deciding on the above issues requires examining what constitutes rape. Rape has been basically defined in section 375 of the Penal Code, 1860, which runs as follows:

"**375. Rape:** A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

Firstly. Against her will.

Secondly. Without her consent.

Thirdly. With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. With or without her consent, when she is under fourteen years of age.

2/8

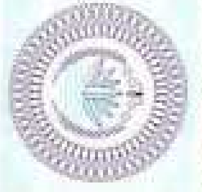
"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape."

The above clause *Firstly* of section 375 of the Penal Code stipulates that a man is said to commit rape if he has sexual intercourse with a woman "Against her will". "Will" means wish, desire, choice or pleasure. But such wish, desire, choice or pleasure is to be expressed by the woman by words or gesture. Therefore, sexual intercourse against the expressed will of the woman is rape. Clauses *Secondly* to *Fifthly* of section 375 deal with consent. "Consent" means voluntary acquiescence or agreement, approval, permission or assent to a proposal of another or concurrence of minds. Thus, Clauses *Secondly* to *Fifthly* contemplate that a man is said to commit rape if he proposes to a woman but has sexual intercourse with the woman without her consent or with her consent when her consent is obtained by putting her in fear of death, or of hurt, or with her consent when the man knows that he is not her husband but she believes that he is another man to whom she is or believes herself to be lawfully married, or with or without her consent when she is under fourteen years of age. Thus, the consent of a woman/girl under fourteen years of age, as per section 375 of the Penal Code, is not legally valid. Therefore, consent to sex must be prior, free, voluntary, conscious, and valid. Accordingly, section 375 of the Penal Code stipulates

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



that a man is said to commit rape if has sexual intercourse with a woman/girl against her expressed will or without her prior, free, voluntary, conscious, and valid consent.

15. Rape has also been defined in section 2(Uma) of the Nari O Shishu Nirjaton Damon Ain, 2000 as "(ঙ" (ধর্ষণ" অর্থ ধারা ৯ এর বিধান সাপেক্ষে, Penal Code, 1860 (Act XLV of 1860) এর Section 375 এ সংজ্ঞায়িত" rape" i.e., "rape' means rape as has been defined in section 375 of the Penal Code, 1860 subject to the provisions of section 9 of the Nari O Shishu Nirjaton Damon Ain, 2000. Rape has been explained in the Explanation under section 9(1) of the Nari O Shishu Nirjaton Damon Ain, 2000. Section 9 along with the said Explanation of rape runs as follows.

"৯। ধর্ষণ, ধর্ষণজনিত কারণে মৃত্যু, ইত্যাদির শাস্তি-(১) যদি কোন পুরুষ কোন নারী বা শিশুকে ধর্ষণ করেন, তাহা হইলে তিনি মৃত্যুদণ্ডে বা যাবজ্জীবন সশ্রম কারাদণ্ডে দণ্ডনীয় হইবেন এবং ইহার অতিরিক্ত অর্থদণ্ডেও দণ্ডনীয় হইবেন।

ব্যাখ্যা।- যদি কোন পুরুষ বিবাহ বন্ধন ব্যতীত ষোল বৎসরের অধিক বয়সের কোন নারীর সহিত তাহার সম্মতি ব্যতিরেকে বা ভীতি প্রদর্শন বা প্রতারণামূলকভাবে তাহার সম্মতি আদায় করিয়া, অথবা ষোল বৎসরের কম বয়সের কোন নারীর সহিত তাহার সম্মতিসহ বা সম্মতি ব্যতিরেকে যৌন সঙ্গম করেন, তাহা হইলে তিনি উক্ত নারীকে ধর্ষণ করিয়াছেন বলিয়া গণ্য হইবেন।

(২) যদি কোন ব্যক্তি কর্তৃক ধর্ষণ বা উক্ত ধর্ষণ পরবর্তী তাহার অন্যবিধ কার্যকলাপের ফলে ধর্ষণের শিকার নারী বা শিশুর মৃত্যু ঘটে, তাহা হইলে উক্ত ব্যক্তি মৃত্যুদণ্ডে বা যাবজ্জীবন সশ্রম কারাদণ্ডে দণ্ডনীয় হইবেন এবং ইহার অতিরিক্ত অন্যূন এক লক্ষ টাকা অর্থদণ্ডেও দণ্ডনীয় হইবেন।

(৩) যদি একাধিক ব্যক্তি দলবদ্ধভাবে কোন নারী বা শিশুকে ধর্ষণ করেন এবং ধর্ষণের ফলে উক্ত নারী বা শিশুর মৃত্যু ঘটে বা তিনি আহত হন, তাহা হইলে ঐ দলের প্রত্যেক ব্যক্তি মৃত্যুদণ্ডে বা যাবজ্জীবন সশ্রম কারাদণ্ডে দণ্ডনীয় হইবেন এবং ইহার অতিরিক্ত অন্যূন এক লক্ষ টাকা অর্থদণ্ডেও দণ্ডনীয় হইবেন।

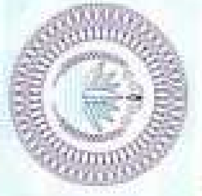
(৪) যদি কোন ব্যক্তি কোন নারী বা শিশুকে-

(ক) ধর্ষণ করিয়া মৃত্যু ঘটানোর বা আহত করার চেষ্টা করেন, তাহা হইলে উক্ত ব্যক্তি মৃত্যুদণ্ডে বা যাবজ্জীবন সশ্রম কারাদণ্ডে দণ্ডনীয় হইবেন এবং ইহার অতিরিক্ত অর্থদণ্ডেও দণ্ডনীয় হইবেন;

(খ) ধর্ষণের চেষ্টা করেন, তাহা হইলে উক্ত ব্যক্তি অনধিক দশ বৎসর কিন্তু অন্যূন পাঁচ বৎসর সশ্রম কারাদণ্ডে দণ্ডনীয় হইবেন এবং ইহার অতিরিক্ত অর্থদণ্ডেও দণ্ডনীয় হইবেন।

(৫) যদি পুলিশ হেফাজতে থাকাকালীন সময়ে কোন নারী ধর্ষণের শিকার হন, তাহা হইলে যাহাদের হেফাজতে থাকাকালীন উক্তরূপ ধর্ষণ সংঘটিত হইয়াছে, সেই ব্যক্তি বা ব্যক্তিগণ ধর্ষণের

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



শিকার নারীর হেফাজতের জন্য সরাসরিভাবে দায়িত্বপ্রাপ্ত ছিলেন, তিনি বা তাহারা প্রত্যেকে, ভিন্নরূপ প্রমাণিত না হইলে, হেফাজতের ব্যর্থতার জন্য, অনধিক দশ বৎসর কিন্তু অন্যূন পাঁচ বৎসর সশ্রম কারাদণ্ডে দণ্ডনীয় হইবেন এবং ইহার অতিরিক্ত অন্যূন দশ হাজার টাকা অর্থদণ্ডেও দণ্ডনীয় হইবেন।"

It appears from the provisions of section 9 of the Nari O Shishu Nirjaton Damon Ain, 2000 that except for the Explanation under section 9(1), the other provisions of section 9 provide for penalties for rape, attempt to rape and other offences along with or relating to rape in different situations. The above Explanation under section 9(1) stipulates that a man is said to commit rape if he has sexual intercourse beyond marriage with a woman above sixteen years of age without her consent or with her consent obtained by putting her in fear or fraudulently, or with or without her consent when she is under sixteen years of age. By the Explanation, the minimum age of the woman enabling her to express her valid will for or give her valid consent to sexual intercourse has been extended to sixteen years from fourteen years and "fear" (ভীতি) has been barely used in the place of "fear of death, or of hurt" provided by section 375 of the Penal Code. "Fear" (ভীতি) being not qualified otherwise in the said Explanation includes any sort of fear or threat. According to the said Explanation, consent to sexual intercourse also may be obtained "fraudulently" (প্রতারণামূলকভাবে). But, as per the definition of rape under section 2(Uma) of the Nari O Shishu Nirjaton Damon Ain, 2000, the definition of rape under section 375 of the Penal is subject to the provisions of section 9 of the said Ain. Therefore, the

24/৫

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

provisions of section 9 of the Nari O Shishu Nirjaton Damon Ain, 2000, shall prevail over the corresponding but contrary provisions of section 375 of the Penal Code. Thus, the definition of rape under section 375 of the Penal Code is to be read with the provisions of section 9 of the Nari O Shishu Nirjaton Damon Ain, 2000 upon reading down the corresponding but contrary provisions of section 375. Therefore, as per the provisions of section 375 of the Penal Code read with the provisions of sections 2(Uma) and Explanation under section 9(1) of the Nari O Shishu Nirjaton Damon Ain, 2000, a man is said to commit rape if he has sexual intercourse beyond marriage with a woman above sixteen years of age against her will, or without her consent, or with her consent when her consent is obtained by putting her in fear or fraudulently or when the man knows that he is not her husband but she believes that he is another man to whom she is or believes herself to be lawfully married or with or without her consent when she is under sixteen years of age. So, the will or consent of the woman is the crux of any rape case.

16. In the case of the *State of Maharashtra and another vs Madhukar Narayan Mardikar, AIR 1991 SC 207*, it was held that even a woman of easy virtue is entitled to privacy, and no one can invade her privacy as and when he likes. So, it is also not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

an attempt to violate it against her wish. She is equally entitled to the protection of the law. In the case of *The State of Punjab vs Gurmit Singh & Ors, AIR 1996 SC 1393*, it was also held that even in cases where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim is a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse with anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. A similar view was taken in the case of *the State Of Andhra Pradesh vs Gangula Satya Murthy, 1997 (1) SCC 272* wherein it was observed that even if the Court formed an opinion, from the absence of hymen, that the victim had sexual intercourse prior to the time when she was subjected to rape by the appellant, she had every right to refuse to submit herself to sexual intercourse by the appellant, as she certainly was not a vulnerable object or prey for being sexually assaulted by anyone. In the case of the *State of Punjab vs Ramdev Singh, AIR 2004 SC 1290*, it was held that even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to rape her. A similar view was taken in a subsequent case, *State of U.P vs*

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

Munshi, AIR 2009 SC 372. Having relied on the cases of *the State of Maharashtra & Anr. v. Madhukar Narayan Mardikar, AIR 1991 SC 207; State of Punjab v. Gurmit Singh & Ors., AIR 1996 SC 1393;* and *State of U.P. v. Pappu @ Yunus & Anr., AIR 2005 SC 1248*, it was also subsequently held in the case of *Narender Kumar v. State (NCT of Delhi), AIR 2012 SC 2281* that even in cases where there is some material to show that the victim was habituated to sexual intercourse, no such inference on the victim can be drawn that she is a woman of "easy virtues" or "loose moral character". Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse with anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone.

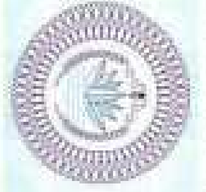
17. Moreover, neither section 375 of the Penal Code nor does section 9 of the Nari O Shishu Nirjaton Damon Ain, 2000 qualify any woman/girl as a virgin, unmarried, married, or sexually habituated or a woman of easy virtue or promiscuous in her sexual behaviour or even as a sex worker or 'prostitute'. Therefore, if the woman is married or habituated to sexual intercourse or lost her virginity earlier or has no hymen, or even if she is promiscuous in her sexual behaviour or she is a woman of easy virtue or she is a sex worker or 'prostitute', no man is authorized by law to have sexual intercourse with her

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

against her expressed will or without her prior, free, voluntary, conscious, and valid consent. Consequently, such sexual intercourse shall attract rape contemplated under section 375 of the Penal Code read with section 9 of the Nari O Shishu Nirjaton Damon Ain, 2000. Nevertheless, whatever might be the sexual character, conduct or behaviour of a woman, no law of this land authorises or gives any person any licence to rape her. Consent of such a woman is as much necessary as in the case of any other woman including a virgin woman. She is equally entitled to her privacy and legal protection as any other woman.

18. Circumstances are where a woman submits her body through force, fear, unlawful detention, feelings of overpowering or helplessness or fraud and where she is intoxicated, unconscious, incapable of understanding or mistaken about the sexual nature of the act or identity of the man or mistakes about the medical or hygienic purpose of such sexual acts or unsound state of mind. Moreover, there is a difference between 'consent' and 'submission of the body' to sexual acts. Every such 'consent' involves a 'submission' while every such 'submission' may not involve any 'consent'. Therefore, the submission of the body by any woman in any of such circumstances is no consent. Accordingly, if the woman is habituated to sexual intercourse or lost her virginity earlier or has no hymen, or even if she is promiscuous in her sexual

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

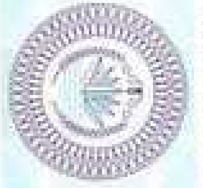


behaviour or she is a woman of easy virtue or she is a sex worker or 'prostitute', it does not obviate the necessity of her expressed will for or obtaining her prior, free, voluntary, conscious and valid consent to sexual intercourse.

19. *In R. v. Seaboyer (1991) 2 SCR 577* the Supreme Court of Canada held that rape trials must focus on the violent acts of the accused rather than the behaviour of the woman who has been raped. In *R. v. M. (M.L.) (1994) 2 SCR 3*, the same Court dealt with the definition of consent in criminal law. The Court stated that a victim of sexual assault is not required to offer some minimal word or gesture of objection and that a lack of resistance must not be equated with consent. In the case of *R. v. Ewancuk, (1991) 1 SCR 330* a 17-year-old girl said 'No' to the sexual touching by her prospective employer- a 49-year-old man, but the trial Court held that she had "implied consent" as she did not resist him strongly. The said Supreme Court held that the trial Court's conclusion was a fundamental error and observed that this error does not derive from the findings of fact but from mythical assumptions about the conduct of the rape victim. It denies women's sexual autonomy and implies that women are in a state of constant consent to sexual activities. The Court further observed that complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by those biased assumptions. It was unanimously

29/4

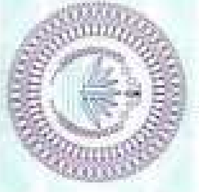
"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



reaffirmed that "no means no" in the sexual assault case and that when a woman says "No" to sex she must be respected. The decision upholds that no one has the right to sexually touch another unless that person clearly communicates consent. Consent must be established by words or actions: silence, inaction or ambiguous conduct is not consent. Physically inactivity or passive acquiescence now means non-consent rather than the opposite. The Court held that this approach is necessary to protect everyone's personal autonomy and bodily integrity. Where the sexual relationship between the employer/supervisor and the employee/subordinate is at issue, the consent of the latter is seldom free and voluntary. Because such a relationship may often attract *'Quid pro quo sexual harassment'* whereby the employer/supervisor wants sexual favours from the employee/subordinate in return for some type of tangible benefits — such as hiring, raise, better hours, promotion, etc. or to avoid some type of detriment like firing, pay cut, demotion, poor performance review, etc. Thus, the employee/subordinate is compelled to give her consent to the sexual proposal of the employer/supervisor where there is no fair, impartial and congenial working or service condition and atmosphere. Consent, as per *JOWITT'S Dictionary of English Law*, means an act of reasons accompanied by deliberation, the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things – a physical

30/৫

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



power, a mental power and a free and serious use of them. Hence, if consent is obtained by intimidation, force, mediated imposition, circumvention, surprise or undue influence it is to be treated as a delusion and not as a deliberate and free act of the mind. So, it is no consent.

20. Given the above discussions, in a rape case, the fact whether or not the rape survivor/victim was habituated to sexual intercourse or lost her virginity earlier or has no hymen, or even if she is promiscuous in her sexual behaviour or she is a woman of easy virtue or she is a sex worker or 'prostitute', is not the determinative and adjudicative factor. On the contrary, the point which requires to be adjudicated is whether or not the accused has had sexual intercourse with the rape survivor/victim against her expressed will or without her prior, free, voluntary, conscious, valid, communicative and explicit consent. Therefore, in a rape case, if it is proved that the accused has had sexual intercourse with the rape survivor/victim against her expressed will or without her prior, free, voluntary, conscious, valid, communicative, explicit consent, the status of her hymen does not matter for safe and except that the recently ruptured, injured or tender hymen is a piece of evidence of recent sexual intercourse only. Accordingly, even if the result of the TFT is positive it does not equate with nor does it obviate the necessity of such will or obtaining such consent of the rape survivor/victim. Consequently, the TFT is

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

irrelevant and unnecessary where the sexual intercourse took place against the expressed will or without the prior, free, voluntary, conscious, valid, communicative and explicit consent of the women/girls.

21. It has already been scientifically and judiciously established that some hymens may remain intact even after repeated sexual intercourse and the same may be torn only upon giving birth to a child while some may be torn at the first intercourse. The hymen is a thin, membranous fold of highly variable appearance that partly or completely occludes the ostium of the vagina i.e., the vaginal orifice/opening before its rupture for a variety of reasons. Thus, a hymen is a fold of skin stretching across the two walls of the vagina. However, it is frequently absent even in virgins, although remnants are commonly present as hymenal caruncula tags. The shape of the hymen, the situation of the hymen, the situation of attachment and the space of the vaginal canal whether bridged by the hymen or left open are important points to be considered in examining a rape survivor/victim.

22. In *HWV Cox Medical Jurisprudence and Toxicology, Seventh Edition,* edited by PC Dikshit, LexisNexis, Butterworths, it has been opined that there are over one hundred variations of the hymeneal anatomy but usually, only three basic types are encountered, those are the annular, the marginal and the imperforate types of hymens. The annular type of hymen

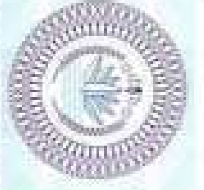
32/৪

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

consists of a central opening within the fleshy thick and folded hymen. These folds or notches do not extend entirely to the vaginal wall. Consequently, this type of hymen is raptured even at the first intercourse. If the tear is fresh, less difficulty will be experienced, because of the formation of swelling, bleeding, and possibly a localised thrombus at the site of rupture. In an imperforate hymen, the membrane has no opening and completely occludes the vagina. Menstruation occurs, but the blood cannot escape from the vagina because of the obstruction of the hymen. The treatment is a surgical incision of such a hymen. Sexual intercourse causes serious injuries to such a hymen.

23. The marginal types of hymens such as crescentic hymen, circular hymen or hymen only partially attached to the whole circumference are those which are not materially affected by intercourse. The thin structure of such a hymen permits displacement, distortion and stretching without rupture because of its elasticity and distensibility. These types of hymens are very important since full intercourse is possible without rupture thereof. Cases of such types of hymens have been known to exist in married women and even pregnant women and the hymen is ruptured only during childbirth. Where a marginal hymen is found at an examination, the medical examiner is not entitled to express an opinion as to whether intercourse has taken place or not, unless there are

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

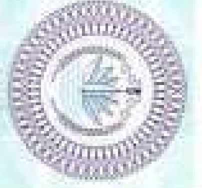


signs of local recent injuries, such as brushing, scratching or bleeding. In the adult virgin, the vaginal orifice/the hymeneal orifice can usually be stretched. Even, in the rape of small girls, intercourse can occur without rupturing the hymen because of the extreme posterior and very high position of the hymen. However, in these cases injuries to the labia are invariable. Therefore, in a good number of cases, sexual intercourse or rape can take place without rupturing the hymen.

24. Moreover, the hymen may be torn or ruptured for various reasons other than sexual intercourse, such as sports, vigorous exercise, high jumps, long jumps, climbing, cycling, Ulceration due to Diphtheriae and fungal infection, accidental fall, scratching due to uncleanliness of the part, masturbation, surgical operation, gynaecological operation, the physical introduction of a foreign body, insertion of sanitary tampons etc. Therefore, merely a torn or ruptured hymen cannot lead to a conclusion that the victim is sexually active.

25. Because of the above discussions, sexual intercourse or rape may take place without rupturing the hymen. So, the intactness of the hymen is not absolute proof of virginity. Simultaneously, the hymen may be torn or ruptured for various reasons other than sexual intercourse or rape. Therefore, the mere status of the hymen cannot determine whether the woman has been raped or not. Similarly, the TFT

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



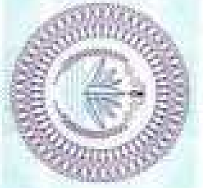
also cannot always determine whether the woman is habituated to sexual intercourse or has had recent sexual intercourse or is a virgin.

26. The Explanation under Clause *Fifthly* of Section 375 of the Penal Code stipulates that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. As per the definition of rape read with the Explanation in section 375 of the Penal Code the words "sexual intercourse" and "penetration" mean the act of inserting the penis into the vagina. The definition of the vagina includes the vulva. Labia majora is the outer folds of skin (outer lips) of the vulva. In this Clause *Fifthly*, penetration has not been qualified as partial or complete nor has any degree thereof been specified to constitute the offence of rape. So, any degree, even the slightest degree of penetration is sufficient to constitute the offence of rape.

27. In the case of *Natha v. The Crown, AIR 1923 Lah 536*, it was held that to constitute penetration it must be proved that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. In this regard, it has been opined in *Modi's Medical Jurisprudence and Toxicology, 21st Edition* as well as *23rd Edition* as below:

> *"To constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the*

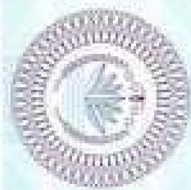
"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



vulva or pudenda, with or without emission of semen, or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally, the offence of rape without producing any injury to the genital or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report but should not give his opinion that no rape had been committed".

In *Parikh's Textbook of Medical Jurisprudence and Toxicology* referred to the 2005 Criminal Law Journal, Journal Section, on page 244, it was opined "Sexual intercourse- In law, this term is held to mean the slightest degree of penetration of the vulva of the penis with or without emission of semen. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genital or leaving any seminal stain.". In *American Jurisprudence*, referred to the 2005 Criminal Law Journal, on the same page, it was also stated that slight penetration is sufficient to complete the crime of rape. Any sexual penetration, however slight, is sufficient to complete the crime. In *Halsbury's Statutes of England and Wales, Fourth Edition, Volume R* referred to the same page of the Law Journal and it was further stated therein that even the slightest degree of penetration is sufficient to prove sexual intercourse. Neither complete penetration of the penis nor rupture of the hymen nor emission of semen is necessary to constitute the offence of rape. All that is necessary to amount to rape is penetration within the vulva,

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



however slight it may be. Vulval penetration is as much rape as vaginal penetration. It has been stated that, legally, if the penis touches the vulva, it is enough to constitute the offence of rape. It will, therefore, be evident that rape can be committed without causing any injury to the genitals, including the hymen or without having any seminal emission. Thus, in such cases of penetration, the TFT is irrelevant, and unnecessary as well as has no manner of application to recording a finding if the hymen was ruptured to find out whether or not the woman is habituated to sex nor to the finding whether she has had any recent sexual intercourse either consensual or forceful. But if TFT is done in such cases that would obviously be resulted in the negative ruling out the probability of being raped and thereby the same would be violative of the rape survivors'/victims' fundamental rights to equal protection of the law and to be treated in accordance with the law as well as enjoyment of protection of the law against the actions detrimental to the life, liberty, body and reputation as guaranteed respectively under Articles 27, 28 and 31 of the Constitution.

28. Initially, the purpose of TFT was to examine the possibility of sexual intercourse or rape without rupturing the hymen. In this regard, *Modi's Medical Jurisprudence and Toxicology*, 21st as well as *23rd Edition* stated as under-

37/৩

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

"In cases where the hymen is intact and not lacerated, it is absolutely necessary to note the distensibility of the vaginal orifice in the number of fingers passing into vagina without any difficulty. The possibility of sexual intercourse having taken place without rupturing the hymen may be inferred if the vaginal orifice is capacious enough to admit easily the passage of two fingers.".

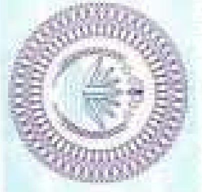
But subsequently, the TFT has been being abused as a counter and opposite productive means. Now, it is done to check whether the hymen is intact as well as the laxity and distensibility of her vaginal wall, muscles or orifice and thereupon to decide whether a girl or woman is a virgin or sexually habituated. In undertaking the TFT, the doctor puts two fingers inside the woman's vagina and the ease with which the fingers penetrate her is assumed to be in direct proportion to her sexual experience on the flawed assumption that the hymen can only be torn as a result of sexual intercourse as well as on the patriarchal assumption that sexually active women are less likely to have been sexually assaulted or raped indicating that such women are in a state of constant consent to sexual activities with anyone and everyone and so would not establish rape. But it has already been found that the will or consent of the woman or girl is the crux of any rape case; in the cases of slightest or slight penetration, rape may take place without causing any injury to the genitals or emission of semen; even frequent sexual intercourse is possible without rupturing the marginal type of hymens; similarly, the vaginal

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

orifice/hymeneal orifice of an adult virgin can usually be stretched, and in the rape of small girls, intercourse can occur without rupturing the hymen because of the extreme posterior and very high position of the hymen; on the contrary, hymens may be ruptured for many reasons other than sexual intercourse; and accordingly, 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 examining the rape survivors/victims. Thus, the TFT is irrelevant, unnecessary and has no manner of application, whatever might be the purpose thereof, to determining whether the woman/girl has been raped or not.

29. Moreover, upon inserting two fingers inside the vagina the hymen neither can be seen nor can it be inspected and thus, no injury, let alone any micro-injury, can be inspected. On the contrary, if there is any vaginal internal injury the process of the TFT will cause pain and may also cause bleeding and thereupon the victim would be further traumatised. In the case of *Narayanamma (Kum) vs State of Karnataka and Ors, (1994) 5 SCC 728,* the forensic Doctor said in her deposition that the hymen of the prosecutrix was ruptured, admitted two fingers, bled on touch, was reddish in colour, and was painful and tender. On this basis, the Doctor opined that these were signs of rape. Referring to the said case, in the case of *Lillu*

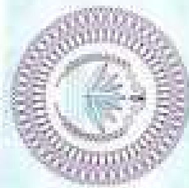
"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



alias Rajesh and another v. State of Haryana, AIR 2013 SC 1784, it was held that the doctor must give his clear opinion as to whether it was painful and bleeding on touch, for the reason that such conditions obviously relate to the hymen. Thus, upon undertaking TFT the Doctor is to opine whether or not the hymen of the prosecutrix is ruptured, admits two fingers, bleeds on touch or is reddish in colour, painful or tender. Therefore, in such cases, because of the forceful and violent acts of the rapists, injuries are caused to the persons of rape survivors/victims and thereby they become traumatised both physically and mentally. Even after it appears to bleed on touch or to be reddish in colour, painful or tender, the insertion of two fingers in the course of TFT must further cause bleeding from and pain to the persons of rape survivors/victims and thus, the TFT is not only unnecessary but also a cruel, inhuman, traumatic and degrading test or treatment and accordingly, is violative of the fundamental right of the rape survivors/victims guaranteed under Article 35(5) of the Constitution.

30. Now it is to be examined whether there is any scientific, forensically valuable and congenially alternative method and means to examine the hymen in a case of rape where it is inevitably necessary. Apart from the examination of the external genital area and perineum for the collection of evidence of injuries, seminal stains and stray pubic hair, the

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



examination of the vulva consisting of labia majora, labia minora, clitoris, vaginal opening including the hymen, and the opening to the urethra is very important in any case of sexual assault including rape. The vulva is examined for evidence of signs of recent injuries such as tears, bruises, abrasions, swelling, bleeding or discharge, and infection. *'Health Care for Women Subjected to Intimate Partner Violence or Sexual Violence- A Clinical Handbook'* published by World Health *Organisation (WHO)* in collaboration with *UN WOMEN* and *UNFPA* recommends internal genital examination by using a speculum for looking for active bleeding, bruising, redness or swelling, cuts or abrasions and foreign body presence.

31. In this regard, *Simpson's Forensic Medicine, 13th Edition* edited by *Jason Payne-James and three others* stated that the Genito-anal examination may be undertaken by the naked eye, or with the assistance of specialist light, magnification or colposcopes.

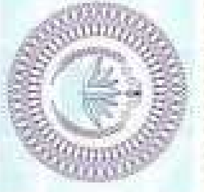
32. *Modi's 'A Text of Medical Jurisprudence and Toxicology', 25th Edition, (edited by Justice K Kannan) 2016, LexisNexis* provides that the vulva of a rape survivor/victim is to be inspected systematically for any signs of recent injury such as bleeding, tears, bruises, abrasions, swelling, or discharge and infection involving urethral meatus and vestibule, labia majora and labia minora, fourchette, introitus and hymen. The examination of the vagina of an adult woman is to be done with

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

the help of a sterile speculum lubricated with warm saline/ sterile water. Gentle retraction of the speculum allows for inspection of the vaginal canal to find out the bruises, redness, bleeding and tears, which may even extend onto the perineum, especially in the case of very young girls. In case injuries are not visible but suspected, micro-injuries are to be looked for using good light and a magnifying glass/colposcope whatever is available. For the same purpose, if 1% Toluidine blue is available it is sprayed and the excess is wiped out, the micro-injuries will stand out in blue. But care should be taken that all these tests are done only after swabs for tracing evidence are collected. The per-speculum examination is not a must in the case of children/young girls when there are no history of penetration and visible injuries. DNA tests of nail clippings and scrapings should be done, if there is a struggle during sexual violence, with the accused and survivor/victim scratching each other, then epithelial cells of one may be present under the nails of the other.

33. Having referred to, amongst others, *UNAIDS Inter-Agency Task Team on Gender and HIV/AIDS, gender and sex work, 2002; UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, 17 November 2011; Joint United Nations Programme on HIV/AIDS, UNAIDS*

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

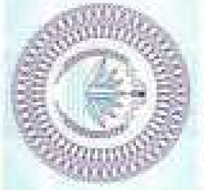


Terminology Guidelines, October 2011; World Health Organization "Disability and Health"; Guidelines for medicolegal care for victims of sexual violence, WHO, 2003; and *Responding to intimate partner violence and sexual violence against women, WHO clinical and policy guidelines, 2013,* in 2014 the Ministry of Health & Family Welfare, Government of India made the *'GUIDELINES & PROTOCOLS -Medico-legal Care for Survivors/Victims of Sexual Violence'.* The said Guidelines and Protocols exactly contain the same methods and means for the examination of the vulva/vagina of any survivors/victims of sexual violence as provided in *Modi's 'A Text of Medical Jurisprudence and Toxicology, 25th Edition, (edited by Justice K Kannan) 2016, LexisNexis'.*

34. From the discussions made above it appears that there are scientific, forensically valuable and congenially alternative methods and means to examine the vulva consisting of labia majora, labia minora, clitoris, vaginal opening including the hymen, and the opening to the urethra for inspecting for any signs of recent injury such as bleeding, tears, bruises, abrasions, swelling, or discharge and infection. Even, where injuries are not visible but suspected, there are also scientific methods and means to look for internal micro-injuries.

35. In such situations, *Modi's 'A Text of Medical Jurisprudence and Toxicology', 25th Edition, (edited by Justice K Kannan) 2016, LexisNexis* prohibits that Per-Vaginum examination

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



commonly referred to by laypersons as a 'two-finger test', must not be conducted for establishing rape/sexual violence, because - the size of the vaginal introitus has no bearing on a case of sexual violence. The Per-vaginum examination can be done only in adult women when medically indicated. It was also opined that the definition of rape has undergone a sea of change that leaves no scope for mindless invasion to the privacy of the victim. Rape need not involve any penetration and if it so involves, since the definition of vagina includes labia majora, there is no need to carry out 'the two-finger test' or record a finding if the hymen was ruptured to find out whether the woman is habituated to sex. Hitherto, the preoccupation of the medical community was to examine the hymenal status of the victim and determination of vaginal laxity to give an opinion on the past sexual history. It is time to get past the assessment of virginity and focus attention on appropriate medical care and psychological counselling. It will be illegal, irrelevant and wholly inappropriate to record a finding whether the victim was sexually active or not before and after the incident. Rape is a crime and not a medical diagnosis to be made by the medical officer treating the victim. Therefore, the issue of whether rape has occurred or not is a legal conclusion, not a medical one. It is a charge made by the investigating officer on a complaint by the victim. The only statement that can be made by the medical officer is whether

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

there is evidence of recent sexual activity and about injuries noticed in and around the private parts or bite marks noticed in any part of the body. His or her duty extends principally to provide adequate healthcare and comfort to the victim and secondarily to assist the prosecution with appropriate medical evidence.

36. The said *'Health Care for Women Subjected to Intimate Partner Violence or Sexual Violence- A Clinical Handbook'* published by *World Health Organisation (WHO)* in collaboration with *UN WOMEN and UNFPA* also recommends that there is no place for virginity (or two-finger) testing; it has no scientific validity. It reminds the healthcare providers that being sexually assaulted is a traumatic event. Women may be very sensitive to being examined or touched, particularly by a male healthcare provider. It also advises them to proceed slowly and to ask often if she is okay and if they can proceed. It further advises the healthcare providers to be very careful not to increase her distress.

37. Given the discussions made above, the TFT or 'Virginity Test' is medically and forensically unnecessary, unscientific and regressive, often painful, traumatic, humiliating and degrading practice. Moreover, it does not yield either any medical or legal assistance to the survivors/victims of rape; rather, in some cases, the TFT emotionally retraumatises and prevents the victims from accessing the legal system. Thus, the TFT is

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

violative of the rape survivors'/victims' fundamental rights to equal protection of the law and to be treated in accordance with the law as well as enjoyment of protection of the law against actions detrimental to the life, liberty, body and reputation, and cruel, inhuman or degrading treatment as guaranteed respectively under Articles 27, 28, 31 and 35(5) of the Constitution.

38. It has already been found that petitioners upon collecting data found that TFT is practised recklessly even on minor/child victims, pregnant women and in the cases where there had been significant delays in reporting the incidents. Moreover, in some cases, TFT was practised even without the consent of the victims. These material facts have not been materially denied by the respondents. Thus, the TFT is a mindless and reckless invasion of the fundamental rights to freedom of thought and conscience, and privacy of the rape survivors/victims as guaranteed under Articles 39(1) and 43(b) of the Constitution.

39. Article 11 of the Constitution guarantees fundamental human rights and freedoms and respect for the dignity and worth of the human person. Article 39(1) guarantees freedom of thought and conscience. Subject to any reasonable restrictions imposed by law, Article 43(b) guarantees the fundamental right to the privacy of correspondence and other means of communication. As per Article 15(a) of the Constitution it is the fundamental

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

responsibility of the State to secure to its citizens the provision of, amongst others, medical care.

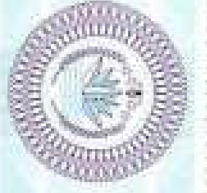
40. The right to privacy is enshrined in Article 12 of the *Universal Declaration of Human Rights* and Article 17 of the *International Covenant on Civil and Political Rights*, which state that no one should be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence". In its general comment No. 16, the *Human Rights Committee* confirmed that any interference with privacy, even if provided for by law, "should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. Under Article 3 of the *Universal Declaration of Human Rights*, "everyone has the right to life, liberty and the security of person". *International Covenant on Economic, Social and Cultural Rights, 1966* provides that recognition of the inherent dignity and the equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world and that these rights derive from the inherent dignity of the human person. It also recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Article 4 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985* provides that victims should be treated with compassion and respect for their dignity. They are entitled to access to the

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

mechanism of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. Articles 6 (c) and (d) stipulate that the responsiveness of judicial and administrative processes to the needs of the victims should be facilitated by providing proper assistance throughout the legal process and taking measures to minimize inconvenience to the victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation. Article 14 stipulates that victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means. Article 16 provides that police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of the victims, and guidelines to ensure proper and prompt aid for the victims.

41. In view of the constitutional provisions, and the provisions of the international covenants, guidelines made by the United Nations Organisations and modern medical and forensic science discussed above, the State and the Government thereof are under constitutional and legal obligations to stop and prohibit the TFT henceforth; ensure the rape survivors'/victims' right to privacy, respect for their personal autonomy, bodily integrity, worth of their persons and inherent dignity, and accordingly, no medical examination of the rape

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



survivors/victims can be done without their consent or without the consent of their legal guardian if they are minor; ensure the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; provide necessary material, medical, psychological and social assistance; ensure treatment with compassion, provide adequate healthcare and comfort to the victims and respect for their physical and mental integrity and dignity so that they are not subjected to cruel, inhuman or degrading treatment which would retraumatise them, increase their distresses and prevent them from the access to the legal system; ensure that medical examinations are done by the female physicians with the assistance of nurses in the presence of female attendants of the victims and female police officers or constables whoever are available; provide congenial judicial and administrative processes facilitating proper assistance throughout the legal process and measures to minimise inconvenience to the victims; ensure their safety as well as that of their families and witnesses on their behalf from intimidation and retaliation; and also ensure training to police, justice, health, social service and other personnel concerned to sensitise them to the needs of the victims, and provide guidelines to ensure proper and prompt medical and legal procedure and aid for the victims.

42. During the hearing of the Writ Petition, in compliance with the interim direction, respondent No.1, the Government in the

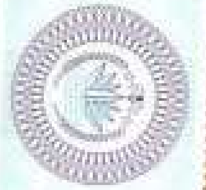
"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

Ministry of Health and Family Welfare set up a Committee including experts in forensics, criminal justice, public health and experience in providing support to women and girls survivors of gender-based violence and the said Committee developed a guideline namely *"Health Response to Gender-Based Violence – Protocol for Health Care Providers"*, hereinafter referred to as the said Protocol. On 10.04.2018, respondent No.1 submitted the said Protocol before this Court as Annexure-11 to the Affidavit-in-Opposition. Though the said Protocol deals with sexual, physical and psychological violence including emotional abuse against women, men and children, its primary focus is on violence against women, the most common form of Gender-Based Violence. The Protocol provides that the examination should be performed in the presence of an attendant of the same sex of the examinee in a confidential and comfortable environment. As per the Protocol, standard positioning and technique must always be used in the external and internal examination of genitalia and rectum. The technique used must not cause undue pain, or physical and mental discomfort to the examinee and the examiner must always select an 'examinee-friendly' technique. In the female genital examination, the survivor should be kept in a supine position on the examination table. The external areas of the genital region should be examined, as well as any marks on the thighs and buttocks. The vaginal vestibule should be examined

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

paying special attention to the labia majora, labia minora, clitoris, hymen or hymenal remnants, posterior fourchette and perineum. A swab of the external genitalia should be taken before any digital exploration or a speculum examination is attempted. A gentle stretch at the posterior fourchette area may reveal abrasions that are otherwise difficult to see, particularly if they are hidden within slight swelling or the folds of the mucosal tissue. Gently pulling the labia (towards the examiner) will improve the visualization of the hymen. Asking the patient to bear down may assist in visualizing the introitus. In most cases, a speculum examination should be performed as a matter of course. It is particularly relevant if there is significant vaginal or uterine pain post-assault, vaginal bleeding or suspicion of a foreign body in the vagina. Furthermore, in assaults that occurred more than 24 hours but less than 96 hours (approximately) prior to the physical examination, a speculum examination should be performed in order to collect an endocervical canal swap for the detection of semen. If a speculum examination is not conducted (e.g., because of patient refusal) it may still be possible to collect a blind vaginal swab. The said Protocol also recommends noting the appearance of the labia majora, labia minora, posterior fourchette, and fossa navicularis; observing for the presence of bleeding, discharge, presence of foreign materials, etc; recording the presence of recent injuries, such as abrasions,

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



contusions and lacerations according to the position of the clock; observing for signs of swelling, tenderness and redness to indicate a fresh injury or whether the injury is healing or completely healed; and when describing hymenal injuries, specifying the timing of the injury going through the features like redness, swelling, bleeds on touch scarified.

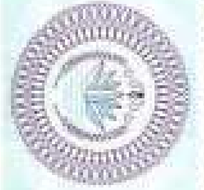
43. With reference to the CEHAT Manual for Medical Examination of Sexual Assault, 2010, the said Protocol provides that the 'Purpose of Medical and Forensic Examination' of the survivors of Gender-Based Violence is to establish (i) Whether a sexual act has been attempted or completed. A sexual act may not only be penetration by the penis but also the slightest penetration of the vulva by the penis, such as the minimal passage of the glans between the labia with or without emission of semen or rupture of the hymen. Sexual acts include genital, anal or oral penetration by the penis, fingers, or other objects as well as any form of non-consensual sexual touching; (ii) Whether such a sexual act is recent; (iii) Whether such an act was forceful. Signs of resistance to the assault are documented through examination. The history of resistance and/or evidence of struggle and injuries inflicted on the survivor by the accused and the survivor on the accused provide evidence that the act was against her will. However, the absence of signs of struggle does not imply consent; (iv) If the validity of consent is questionable,

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

verifying the age of the patient in the case of pre-pubertal/adolescent girls/boys. Ascertaining the influence of alcohol or drugs administered to the survivor; and (v) Providing treatment for sequelae of the assault and appropriate referrals for the patient.

44. From the provisions of 'Female Genital Examination' of the survivors of the Gender Based Violence including rape contained in the said Protocol it appears that the said Protocol only provides for (i) examination of the external areas of the genital region, markings on the thighs and buttocks, and the mons pubis; (ii) collection and examination of swab of the external genitalia; (iii) examination of the vaginal vestibule paying special attention to the labia majora, labia minora, clitoris, hymen or hymenal remnants, posterior fourchette and perineum by (a) gently stretching at the posterior fourchette area to find out abrasions hidden within slight swelling or within the folds of the mucosal tissue, (b) gently pulling the labia (towards the examiner) to improve the visualization of the hymen, (c) digital exploration or speculum; (iv) speculum examination for collecting an endocervical canal swab to find semen if the sexual assaults occurred more than 24 hours but less than 96 hours before the examination; and (v) collection and examination of a blind vaginal swab if the speculum examination is not conducted because of the patient's refusal. It also appears from the said Protocol that the 'Purpose of

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



Medical and Forensic Examination' of the survivors of Gender-Based Violence including rape is to establish (a) whether a sexual act has been attempted or completed; (b) whether such a sexual act is recent; (c) whether the sexual act was forceful; (d) whether the consent was valid and the influence of any toxication on the survivor; and (e) providing treatment for sequelae of the assault and appropriate referrals for the survivor. Therefore, the said Protocol does not provide for TFT in the process and procedure of examination of the female genitalia of the survivor/victim of rape. As per the said Protocol, it is also not a purpose of medical and forensic examination of the survivor/victim of rape to ascertain the intactness of her hymen, and the laxity and distensibility of her vaginal wall, muscles or orifice and thereupon to opine whether she is a virgin or sexually habituated on the assumption that a sexually habituated woman is less likely to have been sexually assaulted or raped.

45. In such facts and circumstances, it would be worthy to refer to three Legal Maxims on the interpretation of statutes or documents- (i) '*Expressio unius est exclusio alterius*'- the mention of one is the exclusion of another, which is not mentioned (ii) '*Inclusio unius est exclusio alterius*'- the inclusion of certain items on a list should be presumed to mean that any excluded items are intentionally kept outside the definition, and (iii) '*Expressum facit cessare tacitum*'- what is

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

expressed, makes what is silent to cease to exist. Since the said Protocol does not expressly provide for or include the TFT in the process and procedure of examination of the survivor/victim of rape, the TFT has been intentionally excluded from or kept outside the process and procedure of such an examination. Moreover, in this Writ Petition, the *Rule Nisi* as well as the interim directions were issued on 10.10.2013 and the said Protocol was made in September 2017. In addition, as per the petitioners' submission, they also participated in developing the said Protocol, which has not been materially denied by respondent No.1. Therefore, the said protocol has been developed upon consideration of various representations submitted by the petitioners and also upon compliance with the interim directions. So, the TFT has been excluded from the said Protocol consciously, intentionally and purposefully. Thus, to say that though the said Protocol does not provide for the TFT, the same does not prohibit the TFT would be contrary to the intention and purpose of the said Protocol. Accordingly, the medical and forensic examiners are not permitted by the said Protocol to practise TFT in the process and procedure of examination of the survivors/victims of rape. Moreover, it has already been found that TFT is violative of the fundamental rights of the survivors/victims of rape guaranteed under Articles 27, 28, 31, 35(5), 39(1) and 43(b) of the Constitution and as such, the TFT is not permitted

55/৫৫

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

by the Constitution and law to be practised. Hence, the same is liable to be refrained or prohibited from being practised in the examination of the survivors/victims of rape.

46. Clause 2.6 of Annex 4.A of the said Protocol i.e., the form of Report of Medical Examination of Female Survivor in Sexual GBV provides information as to whether she is married/cohabiting. The information as to whether she is married may be obtained or given usually. But the information as to whether she is cohabiting i.e., whether she is habituated to sex beyond marriage certainly falls within the domain of her privacy which she is not bound to disclose.

47. Similarly, as per the petitioners' case, upon survey, they came to know that during the investigation the investigating officer and during the trial, the defence lawyer generally ask questions to the survivors/victims of rape which are degrading to their privacy, modesty, integrity, prestige and dignity. But it has already been found that in a rape case, it is not the determinative and adjudicative factor whether or not the rape survivor/victim was habituated to sexual intercourse or lost her virginity earlier or has no hymen, or even if she is promiscuous in her sexual behaviour or she is a woman of easy virtue or she is a sex worker or 'prostitute'. But in such a case, it is the determinative and adjudicative factor whether the accused has had sexual intercourse with the rape survivor/victim against her expressed will or without her prior, free, voluntary,

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

conscious, valid, communicative and explicit consent. Therefore, such questioning is not relevant to and necessary for the investigation and trial in a rape case. Moreover, such indecent and offensive questioning not only embarrasses the survivors/victims of rape but also discourages and prevents them from taking recourse to law and consequently, is violative of their fundamental rights guaranteed under Articles 27, 28, 31 and 43(b) of the Constitution. So, the police authority and concerned Court or Tribunal are to ensure that the investigating officers and defence lawyers do not ask such questions to the survivors/victims of rape. In *State of Punjab v Gurmit Singh, AIR 1996 SC 1393,* the Supreme Court of India also held that the Court shall not be a silent spectator to offensive questions in cross-examination of victims of rape. For the same reasons, Forensic Experts shall not opine as to whether the survivor/victim of rape is habituated to sexual intercourse as it is not a determinative and adjudicative factor in a rape case. The said Protocol also does not authorise the Investigation Officers and Forensic Experts/Physicians to make such a comment or an opinion.

48. As per the said Protocol the Ministry of Health and Family Welfare at its policy level is to coordinate and collaborate with relevant ministries and stakeholders (CSO, NGOs and Development partners) for budget allocation, advocacy and implementation of laws pertaining to Gender-Based Violence.

57/ৰ

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

So, the Government as a whole should cooperate with the Ministry of Health and Family Welfare by, amongst others, allocating a sufficient budget for imparting training to the concerned healthcare providers, Forensic Experts/Physicians, nurses, and Investigation Officers of Police.

49. The said Protocol further, amongst others, provides for maintaining privacy and confidentiality of the Gender-Based Violence survivors/victims as well as their right to information. It specifically advises and ordains that the health care providers should obtain fully informed consent of the survivors/victims or guardians in case of minors for conducting examinations and collecting information. The survivors/victims should have access to this information, including their medical records.

50. But from the face of the said Protocol, it appears that it was made in September 2017. But on 22.10.2017, respondent No.1 filed an application for calling opinion on the TFT from six Forensic Experts of Bangabandhu Sheikh Mujib Medical University, Dhaka Medical College and Hospital, Sir Salimullah Medical College and Hospital, Shorawardi Medical College and Hospital, Chittagong Medical College and Hospital, and Mymensingh Medical College and Hospital. On 11.12.2017, the said Experts submitted their written opinions. Then, on 11.02.2018, respondent No.1 filed an Affidavit-in-Opposition supporting the TFT. From the said opinions of six

58/৫৮

Forensic Experts and the earlier Affidavit-in-Opposition filed by respondent No.1, it appears that even they were not aware of the said Protocol. Therefore, the said Protocol was not widely published and circulated, and distributed even among the Forensic Experts and as such, the same is not available for the concerned bodies, authorities, Courts or Tribunals as well as for the lawyers. That being so, the said Protocol is not being followed by the Forensic Experts and others concerned.

51. Apart from the provisions discussed above, from the other provisions of the said Protocol it appears that most of the causes of actions of the Writ Petition and grievances of the petitioners reduced to various clauses of the *Rule Nisi* have been met up and satisfied by developing and publishing the said Protocol, but the implementation thereof has yet not been started.

52. Since the said Protocol has been developed and published by the Government in the Ministry of Health and Family Welfare, all the Forensic Experts/Physicians examining the survivors/victims of rape and the Investigations Officers in rape cases are legally bound to follow and comply with the provisions of the said Protocol without any excuse.

53. Given the discussions, findings and observations made above, the causes of justice would be satisfied if the *Rule Nisi* is disposed of along with the following directions:

59/৫

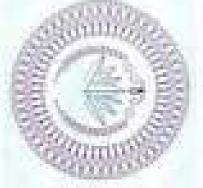
"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

(1) The 'Two-Finger Test' (TFT) is not scientific, reliable and valid rather violative of the fundamental rights of the survivors/victims of rape guaranteed under Articles 27, 28, 31, 35(5), 39(1) and 43(b) of the Constitution, and not permitted by various Conventions of the United Nations Organisation referred to in this judgment and the 'Health Response of Gender Based Violence- Protocol for Health Care Providers' developed and published by the Government in the Ministry of Health and Family Welfare in 2017 and hence, the same is hereby prohibited in any examination of the survivors/victims of rape.

(2) The respondents shall make available the said 'Health Response to Gender-Based Violence- Protocol for Health Care Providers' to and to be followed and complied with by the Forensic Experts/Physicians, who conduct medical examinations of the survivors/victims of rape; Police Officers, who investigate in the rape cases; Public Prosecutors appointed in Nari O Shishu Nirjaton Damon Tribunals, interested Defence Lawyers and others concerned.

(3) The Forensic Experts/Physicians while examining the survivors/victims of rape and the Investigation Officers while investigating the rape cases shall not ask any questions about their previous sexual experience and accordingly, shall not opine as to or use the degrading

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"



words "habituated to sexual intercourse" in the medical certificates/reports and the police reports respectively.

(4) In case of examination of deep-seated intra-vaginal injuries, the matter shall be referred to a Gynaecologist for an expert opinion to identify the injuries or for medical reasons.

(5) The Per speculum examination shall not be compulsorily done in the case of children/young girls when there is no history of penetration and visible injuries.

(6) The Bimanual Test being not related to TFT but to Obstetric Gynaecological Examination only, the same shall not be done in the examination of the survivors/victims of rape.

(7) The Government shall, if necessary, appoint adequate numbers of trained female Forensic Experts/Physicians and nurses for the medical examination of the survivors/victims of rape. Such examination shall be conducted in the presence of a female Police Officer, a female relative of the survivor/victim and a Nurse preferably by female Forensic Experts/Physicians with the fully informed consent of the survivors/victims or the guardians in the cases of minors while the Forensic Experts/Physicians, nurse, Police and others concerned shall strictly maintain the privacy, bodily integrity, and confidentiality of the survivors/victims.

"দেশপ্রেমের শপথ নিন, দুর্নীতিকে বিদায় দিন"

(8) The Nari O Shishu Nirjaton Damon Tribunals shall ensure that no lawyer generally asks any question to the survivors/victims of rape, which is degrading to their privacy, bodily integrity, modesty, prestige and dignity and not relevant to the determination of the fact of rape.

Accordingly, the *Rule Nisi* is disposed of with the findings, observations and directions given above.

However, there would be no order as to costs.

54. The office is directed to communicate a copy of this judgment to each of (1) the Secretary, Ministry of Health and Family Welfare, (2) the Secretary, Ministry of Home Affairs, (3) the Secretary, Ministry of Law, Justice and Parliamentary Affairs, (4) the Secretary, Ministry of Women and Children Affairs, (5) the Registrar General, Supreme Court of Bangladesh, (6) Inspector General of Police, and (7) the Director General (Health) of the Directorate General of Health Services for information and necessary actions in the lines of the findings, observations and directions given herein above.

Gobinda Chandra Tagore.

A.K.M. Shahidul Huq, J:

I agree.

A.K.M. Shahidul Huq.

প্রত্যায়িত অবিকল প্রতিলিপি

24.08.23

সহকারী রেজিস্ট্রার
বাংলাদেশ সুপ্রীম কোর্ট, হাইকোর্ট বিভাগ
(১৮৭২ ইং সনের ১নং আইনের ৭৬ ধারামতে ক্ষমতা প্রাপ্ত)

Typed by: Altaf:24.08.2023.
Read by: 24.08.23
Exam. by:
Readied by: 24.08.23

24.08.23

প্রশাসনিক কর্মকর্তা

24.08.23

Md. Shariful Alam
Superintendent

62/4