

April 29, 2013

Rashida Manjoo
U.N. Special Rapporteur
On Violence Against Women

Dear Madam,

We the representatives of various organisations representing persons with disabilities would like to make the following submission:

During the course of the last couple of years there has been an increase in the number of cases of sexual assault on girls and women with disabilities in India. Despite the increasing number of incidents being reported, sexual assaults and violence against women with disabilities continue to remain underreported.

In the wake of the brutal gangrape of a paramedical student in Delhi in December 2012 the Government of India constituted the Justice J.S. Verma Committee to recommend changes in criminal laws dealing with sexual assaults on women. On behalf of women with disabilities certain suggestions were made to the committee.

Many of these suggestions found reflection in the recommendations made by the Verma Committee. Quite a few of the recommendations of the Committee have been incorporated into law.

These include:

- The disabled may not be required by the Police to go to any place other than their residence or a place where the victim is comfortable in relation to investigation
- Specific provisions for the disabled in Test Identification Parades for identifying the accused
- Assistance to be provided to the disabled while recording statement before the Magistrate and such statement to be considered adequate for the purpose of examination in chief during the trial
- The phrase 'dumb witness' in Section 119 of the Indian Evidence Act has been replaced with 'persons who are unable to communicate verbally'

However, there are certain recommendations of the Committee that have not found place in the amendments to the Criminal Law.

This, in the main, pertains to safety of women within institutions and their abuse. The Justice J.S. Verma Committee affirmed that every citizen has a right to protection against violence and it is the duty of the State to provide safe spaces to all women, including disabled women. The Committee has recommended that such safe spaces should be accessible to the disabled in terms of architectural design, management and provision of services. To address abuse of disabled children within institutions, the Committee has suggested that all such institutions and homes must be registered with the concerned High Court, with the court acting as the guardian of such children. The Committee has recommended that the concerned High Court should act as an oversight mechanism to all the institutions in the state.

Unfortunately, this recommendation of the committee has not found place in the new law. This needs to be pressed for. As most of the abuses and assaults take place within institutions and homes (some case studies attached as Annexure I), there is a need for a strong monitoring mechanism.

We had also pointed out to the Committee that policy and legal measures to prevent and reduce violence against women with disabilities and shield them against such abuses by themselves are not enough. We had sought provision of adequate and appropriate counselling facilities for such victims. We had also stressed on the importance of rehabilitation. These issues have not been addressed either in the Committee's recommendations or the amendments to the law.

Another important issue that we had put up for the Justice Verma committee's consideration pertained to the lack of consolidated figures with regard to violence against women with disabilities. Despite high incidence, no attempt has been made to even map the magnitude of the problem. Consequently, neither the National Crimes Record Bureau nor any other source has authentic figures. We had therefore suggested that when such cases are registered, crimes against women with disabilities be also recorded as a sub-category like in the case of crimes against women from the scheduled castes, scheduled tribes etc.

Though we now have specific provisions in both Protection of Children from Sexual Offences Act 2012 as well as the Criminal Law Amendment Act 2013 addressing issues of disabled children and women, implementation of these provisions would be a real task.

The apprehensions rise from the fact that the disabled have faced hurdles at every stage of the process of the criminal justice system. Appended here are examples of judicial decisions (Annexure II) that are indicative of the judicial attitude towards the disabled prosecutrix, in disregard of the

law. Both the police and the judicial system have failed disabled victims of sexual violence. It is evident from the fact that there are very few convictions. Investigative agencies and the judiciary have to be better equipped to address the needs of disabled victims of violence.

The Protection of Women from Domestic Violence Act 2005 does not have specific provisions for disabled women. The Protection Officers under PWDV Act 2005 need to be sensitized on disability issues. There is also a need for training medical/police/legal officers handling such cases and sensitising them.

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Signatory Organisations:

Signatory organisations, in alphabetical order:

1. **Differently-Abled Welfare Federation, Kerala**
2. **Gujarat Viklang Adhikar Manch, Gujarat**
3. **Haryana Viklang Adhikar Manch, Haryana**
4. **Himachal Viklang Adhikar Manch, Himachal Pradesh**
5. **Janarth, Aurangabad, Maharashtra**
6. **Jharkhand Viklang Morcha, Jharkhand**
7. **Karnataka Rajya Angavikalara Mattu Palakara Okkota**
8. **Lakshwadeep Disabled Association, Lakshwadeep**
9. **Marg, Aurangabad, Maharashtra**
10. **Paschim Banga Rajya Prathibandhi Sammelani, West Bengal**
11. **Platform for Rights of Disabled, Orissa**
12. **Sangarsha Apang Ani Palak Sangh, Aurangabad**
13. **Sruti Disability Rights Centre, Kolkata, West Bengal**
14. **Tamilnadu Assn for the Rights of Differently-Abled & Caregivers, Tamilnadu**
15. **Tripura Prathibandhi Adhikara Manch, Tripura**
16. **Vikalangula Hakkula Jathiya Vedika, Andhra Pradesh**

Sexual Assaults Within Institutions

A young girl with intellectual disability was repeatedly raped and abused within Ashreya, a government residential institute in Chandigarh. The girl was an orphan who was raised by the Missionaries of Charity and later shifted to this home. She did not complain at any point of time. The abuse came to light when she was found to be pregnant.

The Supreme Court Judgement CIVIL APPEAL NO.5845 OF 2009 (Arising out of S.L.P. (C) No. 17985 of 2009) Suchita Srivastava & Anr. ...Versus Chandigarh Administration ... observed:

“On 16.5.2009, a medical social worker and a staff nurse working at ‘Ashreya’ observed that the victim was showing signs of nausea and had complained about pain in her lower abdomen in addition to disclosing the fact that she had missed her last two menstrual periods. Acting on their own initiative, the medical social worker and the staff nurse conducted a pregnancy test with a urine sample and found it to be positive. Following this development, a medical board consisting of two gynaecologists and a radiologist was constituted on 18.5.2009. The gynaecologists then examined the victim in a clinical environment and concluded that she had been pregnant for 8-10 weeks at the time. The radiologist also confirmed the fact of pregnancy on the basis of an ultrasound examination and recorded a gestation of approximately 9 weeks on the same day.”

The girl was unable to comprehend that she was being assaulted. Secondly, she was also unable to identify the perpetrators. This case is being cited to underline that in cases where women with mental illness or intellectual disability are assaulted they are often not able to complain and even their care-givers in some cases are unaware of the abuse they are subjected to.

The Case of Dulal Smriti Samsad (Hooghly, West Bengal)

A young woman’s body was found buried within the compound of a NGO run home, Dulal Smriti Samsad, in July 2012. Investigations found out that Guriya, a destitute woman who was mentally ill and brought to this home by the West Bengal police was subjected to sexual abuse regularly and later killed.

The incident came to light after one of the villagers staying nearby got wind of it. He informed others and later on the story was picked up by the media.

It was found that despite the home being registered under the Persons with Disabilities Act, National Trust Act as well as Juvenile Justice Act, there was no monitoring by any government agency. During investigations it also came to light that several other inmates (most of them were destitute mentally ill or women with intellectual disability) were routinely sexually abused. Men from outside the home, with connivance of officials of the home committed the crime after dusk. Some of the women when interrogated were also able to give names of men who exploited them. Medical examination of some of the victims also revealed signs of regular sexual intercourse. Copper-T was found inserted in the bodies of a few inmates.

It is obvious that this abuse and exploitation of these women was happening over a period of time, as the victims were unable to express themselves or those who were hearing them did not believe their versions. Even during questioning after the first death was reported, the women were unable to narrate their experience, given their mental condition.

Incident of Rape of Within Hospital Premises

Several cases of rape/assault on women with hearing/speech impairment have been reported during 2012.

In one such case in February 2012 a hearing impaired girl was raped by a doctor inside the premises of the Bankura Medical College in West Bengal. According to the complaint lodged by the victim's mother, the resident doctor of the hospital took the victim for medical examination inside his room and raped her. She could not identify the accused in the identification parade as she later told her mother that she was not informed by police or any concerned person what to do when she was taken inside for the same. As she was hearing & speech impaired and illiterate as well, the authorities did not know how to communicate with her.

Judicial Attitudes Towards Testimony of the Disabled Prosecutrix

As per Sections 118 and 119 of the Indian evidence Act, the disabled are capable of testifying in court and the court is authorised to record the testimony of such persons with the help of an interpreter, if he/she is unable to write. In a recent judgment, *State of Rajasthan v Darshan Singh*¹, the Supreme Court of India has reiterated that there is nothing, in law or otherwise, that prevents a deaf and speech impaired person from being a competent and credible witness. A survey of judicial decisions however shows that in most cases disabled victims of sexual abuse are either not examined in court and their testimony recorded. Or even if recorded, it is not done in the legally relevant manner, thus making it redundant.

Where Testimony Is Not Recorded

In *Suresh vs. State of Maharashtra*², a twenty-year-old woman who was deaf, speech impaired and 'mentally retarded', was alleged to have been raped by the accused. The only person who had seen Suresh committing the rape was the prosecutrix's grandfather. The grandfather died before the trial could begin, and hence his evidence could not be recorded by the court. The prosecution did not examine the woman, and the trial court did not insist on the same either, on the ground that her non-examination 'did not adversely affect the prosecution case because [the prosecutrix] was a retarded girl'. But the accused was convicted on the basis of other sources of evidence, including medical evidence. When the case went before the High Court on appeal, one of the primary arguments of the defence was that the prosecutrix had not been examined. The High Court accepted this contention, stating that a person does not become an 'incompetent witness' simply because of the presence of disability. It further held that since the prosecutrix was not produced in court, the defence had not been given the opportunity to cross-examine her. Owing to this oversight on the part of the prosecution, the benefit of doubt had to be given to the accused. The accused was thus acquitted of the charge of rape, owing to the non-examination of the prosecutrix and non-observance of the legal procedure by the trial court.

¹ (2012) 5 SCC 789

² MANU/MH/0660/2003.

In the case of *State of Rajasthan vs. Balram*³, two persons were alleged to have raped the prosecutrix, who was deaf and speech impaired. Following the arrest of the accused persons, a Test Identification (TI) Parade was held, for the prosecutrix to identify the rapists. The Judicial Magistrate, in his report of the TI Parade, noted that

[t]he prosecutrix was not able to understand anything and her mental state was not sound. Neither she was able [sic] to speak nor hear anything and she being not of healthy mind did not identify any accused.

The inability to articulate could have been due to the trauma of the sexual assault or the prospect of facing and identifying the alleged rapists. For the Magistrate reporting on the outcome of the TI Parade however, her inability to respond to his questions was a sign of her unsound, unhealthy mind. Eventually, it was understood that her disabilities had led to the judge's conclusion, although no medical opinion was cited in the judgment that the prosecutrix was of 'unsound mind'. We further learn from the judgment of the High Court that the

[p]rosecution endeavoured to examine her but since she was not able to understand anything nor able to express the incident tangibly, her statement was not recorded by the court.

The High Court judgment does not tell us if the help of sign language interpreters was sought at the time of the TI Parade or at any other point during the trial. Most likely, it was not. The other source of evidence was the account of an eye-witness, which was discounted by the court as that of an 'interested witness'. Indeed, the testimony of the eye-witness was riddled with inconsistencies and hence not strong enough to convict the accused. Evidence from the forensic examination was not of any help either as the clothes of the prosecutrix and the accused persons were collected and examined several days after the incident. In the absence of any strong evidence, the trial court acquitted the two accused persons. On appeal against the acquittal, the High Court affirmed the relevance of the testimony of the prosecutrix and noted that it was a settled position of law that conviction could be based solely on the testimony of the prosecutrix 'if it is found trustworthy and worthy of credence'. But the testimony of the prosecutrix had not been recorded in this case. The acquittal by the trial court was therefore confirmed by the High Court.

³ MANU/RH/0502/2009.

Where The Testimony Is Not Recorded In The Legally Valid Manner

The case of *Dilawarsab Alisab Jakati vs. State of Karnataka*⁴, presents a slight variation to the situations encountered in the above cases. Here, the prosecutrix was indeed examined by the trial court. However, it was not done as per the procedure laid down in law, which rendered the testimony legally redundant. The prosecutrix was speech impaired and a minor, who was alleged to have been raped by her cousin, Dilawarsab. The accused was caught in the act by the father of the prosecutrix, based on whose account, the trial court convicted the accused. The conviction was challenged in the High Court, which sought to examine the manner in which the lower court had recorded and assessed the evidence presented before it. There were three sets of evidence before the court: first, the account of the father of the prosecutrix, which was supported by the accounts of her mother and brother, who were present in the vicinity; second, the evidence from the medical examination of the prosecutrix; and third, the account of the prosecutrix herself, who was examined with the help of an interpreter. The injuries sustained by the prosecutrix had been tended to at home using household remedies and she was medically examined after more than 24 hours, due to delay in reporting to the police. As a result, the medical examination did not record any of the tell-tale signs of forced sexual intercourse, such as inflammation or abrasions in/around the genitalia. Instead, the medical report recorded that the hymen was not ruptured, thus leading the court to be more cautious about the allegation of rape. The High Court therefore held that the evidence from the medical examination could not be used to support the finding of rape, as had been done by the trial court. Regarding the evidence gathered from the account of the prosecutrix, the High Court pointed out that the trial court had erred in not recording her evidence as per the procedure laid down in the Indian Evidence Act. The Court held:

The questions put to deaf and dumb [sic] witnesses have to be recorded by signs and the answers so given by signs have to be interpreted and answers have to be recorded. But, that is not so in the case on hand. It is such evidence given by signs [that] is admissible and is to be taken as oral evidence. In the present case, as the procedure laid down under Section 119 of the Indian Evidence Act is not followed, such evidence recorded by the Court, without recording the signs is no evidence.

Hence, the only source of evidence that the court could rely upon was the account of the father of the prosecutrix. This, the High Court held, could

⁴ MANU/KA/0159/2005.

only prove that the accused had made an 'attempt' to commit rape, but was not sufficient to prove that the prosecutrix had been raped, especially when there was no supportive medical evidence. The accused was hence convicted only of an 'attempt to rape'.

The same pattern is found in *Vinod vs State of Madhya Pradesh*⁵ and *Mohan Singh vs State of Himachal Pradesh*⁶, where the accused was acquitted due to the non recording of testimony of the prosecutrix in the legally valid manner and the lack of any supportive evidence from medical examination.

Where Testimony Given Through Sign Language Is Devalued

In *The Public Prosecutor, High Court of Andhra Pradesh vs Lingisetty Sreenu*⁷, the accused was charged with rape, but the trial court convicted him only of outraging the modesty of the prosecutrix, which is a less serious offence than rape. The State went on appeal against this, arguing that the accused should have been convicted for rape and not merely of outraging the modesty of the prosecutrix. Here the prosecutrix was a minor girl, who was speech impaired but not deaf. The eye witness account of her brother, who caught the accused lying on top of the prosecutrix, was deemed insufficient to prove rape. Hence in order to determine what the offence committed was, the High Court turned to the testimony of the prosecutrix that was recorded by the trial court with the help of a sign language expert. Her testimony was recorded in the High Court judgment, thus:

To the question whether the accused was known to her this witness knodded [sic] her head 'vertically' and the interpreter stated that her answer was 'yes'. As to the question, what happened to her in the past the witness stated that the accused slightly lifted her petty coat (lenga). To the question what else was done to her the witness pointing her private parts (vagina), with her right hand, stated that something was done on her vagina, and to a further question whether the same thing was done in a sitting position or in a lying position, she stated with signs that it was in a lying position. To a further question what the accused did exactly, she stated that her petty coat was lifted and also her jacket and at this point of time she started weeping. But, she was consoled by the interpreter. To the question whether she agreed or objected to such an act she

⁵ MANU/MP/0556/2009.

⁶ MANU/HP/0148/2001.

⁷ MANU/AP/0188/1997.

replied by nodding [sic] her head horizontally indicating that she did not agree for the act done by the accused.

Here, the testimony of the prosecutrix was found to be unclear regarding the exact nature of the sexual act committed by the accused, the knowledge of which was essential to determine the offence. Evidence from the medical examination also could not be pressed into service to bring clarity, for it recorded that there was no tear in the hymen and no injury around the vagina of the prosecutrix. The testimony of the prosecutrix was therefore found to be incomplete evidence. The judge went on to observe:

It is not in evidence of P.W. 4 [the prosecutrix] that there was any penetration of the penis in the vagina and there is also no further evidence that at least accused put his penis on her private part. With the help of the signs dumb [sic] girl only indicated that the accused did something in her private part. Having regard to this evidence on record, in my considered opinion it cannot be said that the prosecution has brought home the guilt of the accused under S. 376 of IPC.

The High Court however did not agree with the conclusion reached by the trial court. While the High Court was not convinced that the alleged act committed on the prosecutrix was 'rape', it did not agree with the finding of the trial court either, which had convicted the accused for 'outraging the modesty' of the prosecutrix.

From this evidence it is clear that the accused not only intended to rape her, he made all the preparations by lifting her lenga or jacket and was doing something in her vagina. What was that "something done" the girl did not disclose and she started crying. Unfortunately she is a dumb [sic] girl, otherwise she would have narrated the entire sexual act. Her weeping itself indicates that she was not ready to disclose those acts before the Court. May be out of shy [sic]. Thus, morally I am convinced that in fact, there was an actual intercourse but since there is no legal evidence on record regarding the actual sexual act, in my humble opinion, at least there is sufficient legal evidence to hold that the accused attempted to commit rape on P.W. 4[the prosecutrix].

The accused was therefore convicted of 'attempt to rape'. The testimony of the disabled prosecutrix, though recorded in the legally valid manner, was not regarded as 'legal evidence' for its lack of descriptive precision.

Where Testimony Is Dismissed Because Of Inconsistency With Medical Evidence

In *Abimannan vs. State by Inspector of Police*⁸, the conviction of the accused for committing rape of the prosecutrix, who was deaf and speech impaired, was challenged before the High Court. The High Court judgment records that the prosecutrix 'could not speak coherently but she could speak one or two words' and that she was a 'spinster'. She was examined with the help of the Headmaster of a school for the deaf and speech impaired, who deposed that the prosecutrix 'is partially impaired of hearing and was able to speak 'father' and 'mother' only.' The substance of her testimony, however, is not recorded in the judgment. In addition there was the testimony of the father of the prosecutrix, who had caught the accused coming out of the house immediately after the incident. The medical examination stated that the hymen was found ruptured and concluded that the prosecutrix had had sexual intercourse previously. At the appellate stage, the High Court looked at the evidence from the medical examination alone, and observed:

If the victim girl would have resisted the accused from committing the offence certainly, she would have sustained minor injuries on her hands, neck or on other parts. But according to the doctor, she had not seen any external injuries on the person of the victim girl. But she had deposed to the fact that the hymen of the victim girl was found ruptured.

Based on this, the judge stated that it could not be inferred that the prosecutrix did not consent to sexual intercourse. However upon insistence by the Public Prosecutor, the judge concluded that the only offence that could be made out from the evidence on record was that the accused had 'outraged the modesty' of the prosecutrix. Hence the accused was sentenced under Section 354 of the Indian Penal Code instead of 376, and ordered to pay compensation of Rs. 5000/- to the prosecutrix.

In *Gopal Bhowmik vs. State of West Bengal*⁹, the prosecutrix was deaf and speech impaired, and she was examined in court with the help of a sign language expert. Based on her testimony and other evidence, the accused was convicted of rape by the trial court. On appeal before the Calcutta High Court, the accused argued that since the allegation of rape was not confirmed by medical examination, it was not prudent to convict the accused simply on the basis of the prosecutrix' testimony. The judge quoted various Supreme Court judgments that held that corroboration of

⁸ MANU/TN/8613/2007.

⁹ MANU/WB/0224/2006

the prosecutrix' testimony was not required if it 'inspired confidence'. However, after noting that the testimony of the prosecutrix was recorded in a legally valid manner with the help of a competent person, the judge went about poking holes in the prosecution case. In the course of cross examination of a neighbour of the prosecutrix, the neighbour had deposed that though the prosecutrix could not speak, she could 'make sound loudly'. This revelation left the judge surprised that 'strangely none heard the cries of the prosecutrix although she could make loud sound'. The improbability of the allegation of rape was further bolstered by the medical examinations of the prosecutrix and the accused, which did not find any injury, bleeding or abrasion on the bodies of the prosecutrix or the accused.¹⁰ The accused was therefore acquitted.

In *Mafijuddin Sheikh vs State of West Bengal*¹¹, the allegation against the accused was that he lured the prosecutrix, who was deaf and speech impaired, with the promise of ornaments and marriage, and had sexual intercourse with her on several occasions. It was also alleged that subsequently, she was threatened with reprisals in case she disclosed the incidents to anybody. On appeal against the conviction awarded by the lower court, the Calcutta High Court stated:

According to the learned Sessions Judge, the victim girl could not raise any protest due to her physical handicapness [sic]. But I regret, I cannot agree with this observation of the learned Sessions Judge. Certainly, the victim girl has the physical handicapness [sic], being a deaf and dumb person and we have got full sympathy for her. But, that does not mean, that only for that reason, whatever the victim girl had stated in her evidence, should be accepted as gospel truth in order to convict a person for the offence under Section 376 of the IPC. Even if there is a forcible sexual intercourse of the victim girl by the accused/appellant, then I fail to understand as to what prevented the victim girl to make a sound of protest at the time of the incident particularly when the other family members were present in the house [sic]. There is no explanation for that.

¹⁰ The examination of the prosecutrix recorded that she 'was found to be non-co-operative and resistible (sic) while she was being examined' and that no injury to the vagina or bleeding was noted. The doctor examining the accused noted that 'if a penis is put on the vagina there is possibility of abrasion on the penis'. However no such marks of injury was found on the penis of the accused MANU/WB/0224/2006.

¹¹ MANU/WB/0628/2005.