A troubling precedent for rape cases

In a controversial judgement recently, the Delhi high court acquitted *Peepli Live* director Mahmood Farooqui, who was accused of committing an offence of rape. One of the grounds for acquittal was that the negation of consent was not clear enough under the circumstances and that the complainant merely resisted “feebly”. This has sparked a debate on the whether the act of saying no in a hesitant manner is insufficient to constitute consent.

Consent is what distinguishes sexual intercourse from rape. However, consent is also something that is difficult to determine and prove, especially in rape cases where more often than not, there are no eyewitnesses. Section 375 of the Indian Penal Code mandates that to constitute an offence of rape, consent must be absent and if consent has been obtained by putting the person in fear of death or hurt, it would also constitute an offence of rape. The explanation appended to Section 375—which talks about rape—categorically states that consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in a specific sexual act. Simply put, consent must be voluntary, verbal or non-verbal and the person giving consent must be capable of giving the consent.

This explanation was added pursuant to the Justice Verma Committee’s Report on Amendments to Criminal Law, submitted shortly after the December 2012 Delhi gang rape. Besides this, to prove an offence of rape, a woman is not required to prove that there was active resistance on her part during the commission of the act of rape. Absence of these factors does not indicate that a woman has given consent. This has been stated in various Supreme Court judgements in the past as well. The provision stating that it is not necessary for the victim to resist a rape attempt was inserted especially for situations where the victim may fear further wrath of the perpetrator or even death.

The concept of “consent” is more or less the same internationally as well. The Canadian Criminal Code as well as the UK’s Sexual Offences Act, 2003, specifically define consent. The Canadian Criminal Code states that consent has to be categorically given and nothing short of voluntary consent/agreement would suffice (Section 273). The burden is on the accused to prove that he took steps to ascertain that the victim was consenting. Similar is the case in the UK’s Sexual Offences Act. In Australia too, there has been an increasing focus on consent as a determinative factor while deciding on sexual assault offences and the burden is on the accused to prove that he took the consent of the victim. However, there are some countries where the definition of rape mentions the presence of “coercive circumstances” instead of focusing on lack of consent (Namibia for example).

This is the mode of ascertaining consent in every civilized legal system, and India is no exception. Under the Indian Evidence Act (section 114A), a compulsory statutory presumption has been created that requires the courts to presume that consent is absent if such a claim is made by the victim. Interestingly, this section was only inserted in the aftermath of the 1978 Supreme Court judgement in the Mathura rape case (Tukaram vs State of Maharashtra), where the accused were acquitted because the victim did not raise any alarm and there were no visible marks of resistance—meaning thereby that she had consented to the act of sexual intercourse. This resulted in massive outrage across the country and ultimately led to an amendment in the Evidence Act; Section 114A was inserted in 1983.

Once the victim alleges absence of consent, then the onus is on the accused and he must dispel the statutory presumption raised against him. No further burden lies upon the victim to establish absence of consent. Under the Evidence Act, a presumption is vested in favour of the victim on

the aspect of consent. Even the Supreme Court, in a number of judgements, has time and again held that the burden of proving that there was consent is on the accused and not on the victim. However, in such a case also, conviction in court of law will not be solely on the basis of the victim's testimony. Other factors laid down in the Evidence Act, such as consistency in victim's statements, amongst other things, also need to be considered.

Given this context, the judgement in the Farooqui case has made several observations that are bound to have ramifications in cases of rape pending before the courts. It requires some clarification from the apex court at the earliest. In the judgement, the connotation of the word 'consent' has been diluted, indicating that a woman while being subjected to sexual assault has to say no in clear words and any hesitation on that front would result in her consenting to the act.

The observation could, in practical terms, transfer the burden of proof of consent on the victim. This could be disastrous, especially for weaker groups of victims who may be particularly disadvantaged in such situations. As it is, a rape trial already causes much harassment to a victim (this is called secondary victimization); to add to this, shifting the onus to the victim, especially in a society like India where rape is considered stigmatic, would result in more women becoming hesitant in filing a complaint. Instead of providing a stronger defence to the victims of a tragic and yet common crime, this may create a chink in their already weak armour.

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