

# Reflections on the High Court's dismissal of the 'TISS rape case'

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The Bombay High Court's dismissal (1) of the appeal in the TISS rape case is extremely distressing to us. As an organisation that works on a routine basis with survivors of sexual assault, as well as doctors who record and collect the relevant medical evidence and provide treatment to these survivors, we are familiar with these medico-legal processes, the limitations of medical evidence, the various circumstances under which sexual assaults occur, as well as the trauma that survivors go through. The High Court has rejected the appeal in the case, on the ground that "There is no evidence to prove the offence." Qualifying this further, it has said that "in case of absence of direct evidence in the form of the victim stating that she had been raped, there has to be some indirect evidence in the form of medical evidence to prove the offence." There are two points to keep in mind here:

- 1) Regarding the "lack of direct evidence in the form of the victim stating that she had been raped": One may recall that in this case, the survivor stated that she fell unconscious at the house of one of the suspects. When she woke up, she had no clothes on, her tampon was dislodged and she felt pain in her vagina. Obviously, given the circumstances in which the assault occurred, she would not be able to recall the incident of assault and so, expecting that there should be "direct evidence in the form of the victim stating that she had been raped" is ludicrous. What she does provide in her testimony is: the fact that she woke up in the suspect's house, naked and in pain, and that the suspects insisted she take an emergency contraception pill. No other reasonable explanation can be provided for this, apart from a possible sexual assault.
- 2) On the "lack of indirect evidence in the form of medical evidence to prove the offence": much is being said about the fact that medical evidence did not adequately "prove rape". The processes and the existing system of collecting medical evidence need to be put into context before such a conclusion is drawn. Consider, for instance, the following:
  - The survivor was menstruating at the time of the assault, and had already had a bath. She had also voided urine before the medical evidence was collected. All these factors have resulted in loss of evidence.
  - It is possible that a condom may have been used during the assault and that might explain the absence of semen. The nature of sexual assault may have been one other than peno-vaginal penetrative intercourse, which too would explain the absence of semen in the samples.
  - The fact that she was unconscious means that that she could offer no resistance and so the possibility of there

being injuries is almost zero. It also renders consent irrelevant.

When the sessions court had passed judgment, in October last year, acquitting the six accused in the case, there was much speculation about the veracity of the survivor's complaint, because she had not immediately filed the first information report (FIR). The fact that the survivor initiated a medico-legal examination within 24 hours by reporting to Rajawadi Hospital - a municipal hospital authorised to conduct medico-legal examinations - was not given due importance in either the proceedings of the case or in the media coverage. The whole issue of lodging an FIR after three days was used against her. Indeed, the supposed delay had been held up as evidence of a disinterest in reporting the case. In this respect, consider the following:

- The fact that she reported to a public hospital and underwent a thorough medical and forensic examination within 24 hours is in fact evidence of her resolve to report sexual assault.
- There were further questions raised about why the survivor reported to the hospital and not the police. It is incorrect to assert, even in passing, that a police complaint is the only way that a survivor of sexual assault may report the assault. Such misinformation will only cause confusion in the minds of survivors, who often hesitate to approach the police in the first instance. That they may rightfully approach the medical system is a fact that needs to be highlighted. The courts have, time and again, clarified that a victim of sexual assault can choose to report to a hospital or the police, and the respective system then is charged with the responsibility of taking further action.
- It must be remembered that it takes a lot of courage to report a case of sexual assault due to the stigma attached to it and the repercussions on the survivor, who, in this case, was especially vulnerable being a foreign national. In our experience, survivors need time to comprehend the situation before they can make a decision about lodging an FIR.
- In this case too, the survivor said that she had wanted to consult with her mother before filing a case. Medical evidence needs to be collected immediately as it is lost rapidly with time, and the survivor took steps to ensure that the evidence was indeed collected.

Taking a step back from this case, as a team that routinely provides support to sexual assault survivors, we find the implications of this dismissal even more troubling in the larger context of prosecution in cases of sexual assault. If

being unable to provide "direct evidence" of rape by reason of unconsciousness can be used against women, there is a great cause for worry. In seven of out 55 cases that we have seen so far, the women have been intoxicated or made unconscious during the assault. None of these would have been able to provide such testimony as the High Court seems to find essential. Second, medical evidence is merely supportive evidence in cases of sexual assault. The presence or absence of medical evidence is dictated by several factors: the nature of assault, if there was ejaculation, if a condom was used, if the survivor voided urine, bathed or washed herself, if she was menstruating at the time of the assault and how long she took to report the assault. Semen and spermatozoa are lost rapidly

after the assault and are rarely found. Taking into account all of these "ifs", one finds that a majority of cases do not fall into the bracket where having reliable medical evidence is a certainty. How, then, does a court reject an appeal for "lack of indirect evidence in the form of medical evidence"?

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**Reference**

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