

H.C.P.No.2182 of 2022

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N. ANAND VENKATESH, J.

and

SUNDER MOHAN, J.

[Order of the Court was made by N. ANAND VENKATESH, J.]

In continuation to the earlier order passed by this Court on 07.07.2023, the matter was posted for hearing today.

2.In our earlier order, we had issued certain directions at Paragraph No.19 of the order. We are inclined to deal with each of those directions given by us in seriatim.

Direction 19(c)

3.We directed the Director General of Police to identify cases involving consensual relationship from among the 1274 pending cases and prepare a separate list to be placed before this Court. Accordingly, 111 cases have been identified



H.C.P.No.2182 of 2022

from four Zones, nine Cities and two cases registered by the Railway Police. These

are cases which are either at the stage of investigation or where the investigation

has been completed and final report has been filed and the same is yet to be taken

on file by the concerned jurisdictional Court. We have been provided with five

volumes of materials pertaining to those 111 cases containing the FIR, gist of the

case, 164 statement recorded, medical reports of the victim and the child in conflict

and also their age proof.

4.The learned Additional Public Prosecutor submitted that they are in the process of collecting the details of those cases which are at the stage of trial pending before the concerned Courts across Tamil Nadu. The learned Additional Public Prosecutor sought for some time to gather relevant details and file it before the Court.

5.At the outset, we have to place on record our appreciation for the task undertaken by the Crime against Women and Children team consisting of nearly thirty Police Officers under the leadership of the Director General of Police, Tamil Nadu, who have collected all the particulars sought for by this Court in 111 cases



H.C.P.No.2182 of 2022

and have presented it before this Court in five volumes. This task undertaken, will

enable the Court quickly to take a decision from among the 111 cases that have been identified and in deserving cases we will exercise our jurisdiction which will ultimately benefit the child involved and they can be relieved from the trauma of facing a criminal trial before the Court.

6.The learned Additional Public Prosecutor submitted that the concerned Police Officers will get in touch with the complainant/parent of the victim girl and get their consent and it will be submitted before this Court. If the consent is obtained from the parent of the victim girl, this Court can proceed to pass orders quashing the concerned proceedings. It will suffice if the parent appears at the time of hearing through video conferencing mode.

Direction 19(f)

7.In our earlier order, we had taken note of the judgment of the Apex Court in *State of Jharkhand vs. Shailendra Kumar Rai*, where the Apex Court has come down heavily on the two finger test and had gone to the extent of issuing a warning that any person who conducts such two finger test will be proceeded against for



H.C.P.No.2182 of 2022

misconduct. Accordingly, we directed the Director General of Police to get a report

of cases starting from 01.01.2023 involving sexual offence and see if any medical report makes reference to the two finger test.

8.The status report that has been filed before this Court by the Additional Director General of Police, Crime against Women and Children, states that datas were collected from 36 units and it is yet to be collected from ten more units and all these datas will be collated and a report will be filed before this Court.

9.We wanted to understand this issue from a medical perspective and hence, Dr.A.Nagendra Kumar, Associate Professor, Institute of Forensic Medicine was requested to give an explanation regarding two finger test.

10.He stated that the two finger test is obsolete and there is a confusion in understanding the difference between two finger test and per-vaginal examination. He stated that in both these tests, fingers are inserted into the vagina. Insofar as the per-vaginal examination is concerned, it is done to examine the vagina and find out if the victim has sustained any injury. He further stated that the same examination can be done through an instrument and this process is called as a Colposcopy. This



H.C.P.No.2182 of 2022

is done again to see if any injury has been sustained in the hymen and if required to give treatment.

11.The Associate Professor categorically stated that the routine findings given to the effect that a victim is a virgin or not a virgin or that the hymen is intact or not intact, are all findings which are not at all required in a case involving sexual offence. He clarified that such expressions are used in the medical report only because of the insistence of the Investigation Officer. The Doctor stated that when an expression hymen is not intact is used, it only means that no injuries have been sustained in the hymen. The Doctor stated that instead of using such expressions, proper/appropriate expressions describing the injury can be made in the report, if such injuries are found.

12.It is seen from the Circular issued by the National Health Mission-Tamil Nadu, dated 08.11.2022 that per-vaginum or colposcopy examination should not be done unless it is required for the detection of injuries or for medical treatment. When such a specific guideline is given, the Doctor who examines the victim should not conduct per-vaginal or colposcopy examination as a matter of routine.



We also find in some of the reports expressions/findings like “there are no signs suggestive of sexual intercourse”. These type of findings are completely irrelevant

in a case of sexual assault on a girl/woman and it should be completely avoided.

13. We also take note of the findings rendered by the Apex Court with respect to the per-vaginal examination in ***Shailendra Kumar Rai*** case referred *supra* and it was held as follows”:

64. The Ministry of Health and Family Welfare issued guidelines for health providers in cases of sexual violence. These guidelines prescribe the application of the "two-finger test":

"Per-Vaginum examination commonly referred to by lay persons as 'two-finger test', must not be conducted for establishing rape/sexual violence and the size of the vaginal introitus has no bearing on a case of sexual violence. Per vaginum examination can be done only in adult women when medically indicated.

The status of hymen is irrelevant because the hymen can be torn due to several reasons such as cycling, riding or masturbation among other things. An intact hymen does not rule out sexual violence, and a torn hymen does not prove



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H.C.P.No.2182 of 2022

previous sexual intercourse. Hymen should therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual violence. Only those that are relevant to the episode of assault (findings such as fresh tears, bleeding, edema etc.) are to be documented."

65. Although the "two-finger test" in this case was conducted over a decade ago, it is a regrettable fact that it continues to be conducted even today.

66. We direct the Union Government as well as the State Governments to:

- a. Ensure that the guidelines formulated by the Ministry of Health and Family Welfare are circulated to all government and private hospitals.*
- b. Conduct workshops for health providers to communicate the appropriate procedure to be adopted while examining survivors of sexual assault and rape; and*
- c. Review the curriculum in medical schools with a view to ensuring that the "two-finger test" or per vaginum examination is not prescribed as one of the procedures to be adopted while examining survivors of sexual assault and rape.*



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H.C.P.No.2182 of 2022

67. *A copy of this judgment shall be shared with the Secretary, Ministry of Health and Family Welfare, Government of India. The Secretary, Ministry of Health and Family Welfare, Government of India shall transmit copies of this judgment to the Principal Secretary (Department of Public Health) of each state. The Principal Secretaries in the Departments of Health of each state shall also be responsible for ensuring the implementation of the directions issued in Part E of this judgment. The Secretaries in the Departments of Home of each state shall in addition issue directions to the Directors General of Police in this regard. The Directors General of Police shall, in turn, communicate these directions to the Superintendents of Police.*

68. *Any person who conducts the "two-finger test" or per vaginum examination (while examining a person alleged to have been subjected to a sexual assault) in contravention of the directions of this Court shall be guilty of misconduct.*

14. It is clear from the above that the Apex Court has almost equated two finger test and the per-vaginum examination and therefore, both those test/examination are now completely barred by virtue of the judgment of the Apex Court. If at all, the Doctor needs to find out if there is any injury to the hymen, it



H.C.P.No.2182 of 2022

can be done only with an instrument and while doing so, the Circular issued by the

National Health Mission should be kept in mind which in clear terms states that such examination should not be done unless required for detection of injuries or for medical treatment.

15.The above observations made by us shall be taken into consideration while preparing the Standard Operating Procedure with regard to the medical test to be conducted on the victim girl.

16.The other issue that was flagged in our earlier order pertains to the Archaic Potency Test that is done on a routine basis in all cases involving sexual offence. We were given to understand that the normal practice that is followed to determine the potency of a man involves masturbation test where the man is made to ejaculate in order to confirm whether he is sexually potent. We got an impression that this procedure is rather boorish and may not be required to be undertaken in all cases involving sexual violence. In view of the same, we had sought for opinion.



WEB COPY 17. In the status report that has been filed today, it has been mentioned that potency test is done in all cases involving sexual offense and it involves a mechanism of collecting sperm from the offender and thereafter, it is sent to the Institute of Forensic Medicine for getting the report.

18. Dr. A. Nagendra Kumar stated that impotency is a legal word which is synonymous with the medical condition called as the erectile dysfunction. He categorically stated that a male is potent from his intrauterine stage till his death and impotency is only as exception. He further stated that a man must be considered to be potent, unless the contrary is proved and the burden of proof must only be on the accused person to prove when he takes a stand that he is impotent.

19. The Doctor further clarified that in the process of erection, the penis not only receives nerve signals but also sends them through the spinal cord to the brain. He further clarified that it also involves psychological factors. In short, we understood that male sexual arousal is a complex process that involves the brain, hormones, emotions, nerves, muscles and blood vessels. In view of the same, the

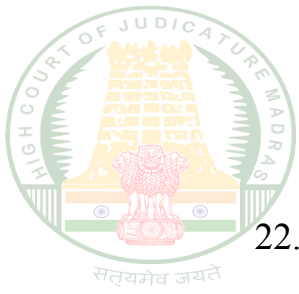


H.C.P.No.2182 of 2022

Doctor categorically stated that a potency test is not at all required in a case of sexual violence. Even insofar as the semen that may be traced in the victim or in her under garments etc., it is enough if the blood sample of the offender is taken and the DNA is matched. Hence, even in such a case, it is not necessary to draw the semen from the accused person.

20.The Doctor also brought to our attention yet another scenario where a person may be impotent, but however, he may consume aphrodisiac pill or other medication and thereby will be capable of committing a penetrative sexual assault. Such person can always come to the Court and say that he is impotent and if such a stand is taken, the Doctor must also in rare cases adopt invasive methods to find if the man had consumed any pill or other medications and committed penetrative sexual violence, where otherwise he is impotent.

21.The above clarification given by the Doctor is also evident from the note submitted by him to the learned Additional Public Prosecutor dated 09.08.2023, where all these issues have been dealt with in detail.

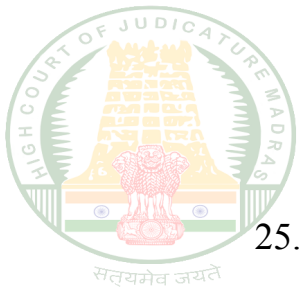


22. It is quite evident from the statement made by the Doctor and also the written note submitted by the Doctor that potency test need not be undertaken in a routine manner in all cases involving sexual offence. The Court has to proceed with the presumption that the man is potent. If the accused person raises impotency as a defense, the burden of proof will be upon the accused person to prove that he is impotent. Only in such instances, there is a requirement for conducting the potency test. We make it abundantly clear that potency test must not be confused with the general examination of the accused person that is carried out as a part of the normal procedure.

23. The above observations made by this Court shall be kept in mind while preparing the Standard Operating Procedure.

Direction 19(a)

24. We had directed the reports submitted by the learned Amicus Curiae and others to be taken into account and we asked the respondents to come up with a plan of action to deal with each issue that has been flagged in the reports filed before this Court.



H.C.P.No.2182 of 2022

25.The learned Additional Advocate General submitted that meetings were conducted by the State Level Committee and Regional Level Committee on all the issues that were raised. Further discussion is going on in order to come up with an answer for each of the issue that was raised. The learned Additional Advocate General sought for some time in this regard.

Direction 19(d)

26.This Court directed the Director General of Police, Puducherry to give the particulars regarding 29 pending cases. The learned Public Prosecutor (Puducherry) appearing on behalf of the Director General of Police, Puducherry sought for some time. We passed the earlier order on 07.07.2023 and it is more than a month, since the order was passed. This is a Special Bench constituted for dealing with POCSO cases and hence, adjournments cannot be sought for as a matter of routine. Not even a status report has been filed before this Court. We make it abundantly clear that the particulars sought for by us regarding the 29 pending cases shall be furnished before the next date of hearing, failing which, the Director General of Police, Pudhucherry shall be present before this Court during the next date of hearing.



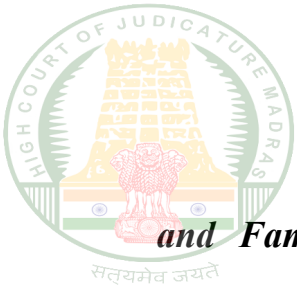
H.C.P.No.2182 of 2022

WEB COP Direction 19(e)

27.The learned Amicus Curiae submitted that regular sessions were conducted both for Child Welfare Committee Members and the Members of the Juvenile Justice Board by UNICEF, Social defense and Tamil Nadu State Judicial Academy and they were sensitized to deal with cases involving child and juveniles. The learned Amicus Curiae submitted that last such programme took place six months back.

28.The learned Additional Advocate General requested this Court to grant some time to enable the 6th and 7th respondents to file a report before this Court on the follow up to the directions issued in Paragraph 19(a) and 19(e) of the earlier order passed on 07.07.2023.

29.Before concluding today's proceedings, we also want to add one more issue that requires immediate consideration and follow up action. In some cases involving sexual offence, it leads to pregnancy and the termination of pregnancy every time becomes an issue. The Apex Court in *X vs. Principal Secretary, Health*

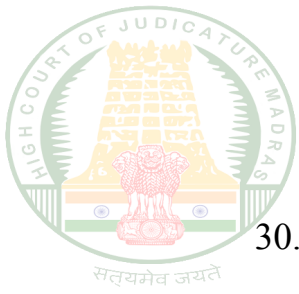


H.C.P.No.2182 of 2022

and Family Welfare Department in Civil Appeal No.5802 of 2022, dated 29.09.2022 has rendered findings specifically touching upon minors. For proper

appreciation, the relevant portion is extracted hereunder:

80. When a minor approaches an RMP for a medical termination of pregnancy arising out of consensual sexual activity, an RMP is obliged under Section 19(1) of the POCSO Act to provide information pertaining to the offense committed, to the concerned authorities. An adolescent and her guardian may be wary of the mandatory reporting requirement as they may not want to entangle themselves with the legal process. Minors and their guardians are likely faced with two options – one, approach an RMP and possibly be involved in criminal proceedings under the POCSO Act, or two, approach an unqualified doctor for a medical termination of the pregnancy. If there is an insistence on the disclosure of the name of the minor in the report under Section 19(1) of POCSO, minors may be less likely to seek out RMPs for safe termination of their pregnancies under the MTP Act.

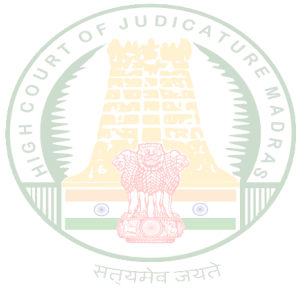


H.C.P.No.2182 of 2022

30.It is clear from the above that where a minor approaches a registered medical practitioner for medical termination of pregnancy arising out of a consensual sexual activity, it is not necessary to insist for the disclosure of the name of the minor in the report that is normally given under Section 19(1) of the POCSO Act. This procedure has to be followed, since there are instances where minor and their guardian may not be interested in proceeding further with the case and to entangle themselves with a legal process. In such instances, such termination of pregnancy can be made without the disclosure of the name of the minor. This issue has to be specifically addressed by the 6th respondent and a procedure must be evolved to strictly comply with the judgment of the Apex Court referred *supra*.

31.The Chief Secretary, Government of Puducherry and the Director General of Police, Puducherry are *suo motu* added as the 8th and 9th respondents. The Registry is directed to carry out the necessary amendment in the cause title.

32.A copy of this order shall be marked to the Bar Associations both in the Principal Bench as well as in the Madurai Bench.



H.C.P.No.2182 of 2022

WEB COPY 33. Post this case on 25.09.2023 at 2.15 p.m.

[N.A.V., J.] [S.M., J.]
14.08.2023

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H.C.P.No.2182 of 2022

N. ANAND VENKATESH, J.
and
SUNDER MOHAN, J.

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H.C.P.No.2182 of 2022

14.08.2023