(1979) 4 SCC (Jour) 17

An Open Letter to the Chief Justice of India

Open letter to focus judicial attention and public debate over the Supreme Court decision in ***Tukaram*** *V* ***State of Maharashtra (1979)-*** *Facts of the case in brief-Case of rape in police station- Acquittal of accused persons by trial court- Reversal of acquittal by the High Court- Reversal of High Court's verdict stated- Decision severely criticised with detailed reasonings- Second and Third components of S. 375 IPC discussed-* ***Nandini Satpathy's case (1978)*** *relied on- Plight of poor girls and women of India- Submission made - Appeal to the CJI to have the case re-heard by a Larger Bench or by a full court.*

Your Lordship,

We, as Indian citizens and teachers of law, take the liberty of writing this open letter to focus judicial attention and public debate over a decision rendered by the Supreme Court on September 15, 1978 which has been recently reported. The decision was rendered by Justice Jaswant Singh, Kailasam and Koshal in *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143.

The facts of the case briefly are as follows. Mathura, a young girl of the age 14-16, was an orphan who lived with her brother, Gama, both of them labourers. Mathura developed a relationship with Ashok, the cousin of Nushi at whose house she used to work, and they decided to get married. On March 26, 1972, Gama lodged a report that she was kidnapped by Nushi, her husband and Ashok. They were all brought to the police station at 9 p.m. when their statements were recorded. When everyone started to leave the police station, around 10.30 p.m., Tukaram, the head constable and Ganpat, a constable, directed that Mathura remain at the police station. What happened thereafter is best described in the words of Justice Koshal, who wrote the decision of the Court:

"Immediately thereafter Ganpat… took Mathura…into latrine at the rear of the main building, loosened her underwear, lit a torch and stared at her private parts. He then dragged her to a chhapri…In the chhapri he felled her to the ground and raped her in spite of her protests and stiff resistence on her part. He departed after satisfying his lust and then Tukaram….who was seated in the cot nearby, came to the place where Mathura…was and fondled her private parts. He also wanted to rape her but was unable to do so for the reason that he was in a highly intoxicated condition."

There was natural anxiety outside the police station as the lights were put off and doors bolted. They shouted for Mathura but to no avail. A crowd collected; shortly after, Tukaram emerged to announce that Mathura had already left. Mathura then emerged and announced that she had been raped by Ganpat. The doctor to whom people approached advised them to file a report with the police. Head Constable Baburao was brought from his home to the station, by the fear of the restive crowd, and first information report was lodged.

Mathura was examined by the doctor on March 27. She had no injury. Her hymen revealed old ruptures. Other aspects of physical examination revealed that she had had

intercourses in the past. Presence of semen was detected on her clothes and the pyjama of Ganpat.

The sessions Judge found this evidence insufficient to convict the accused. The farthest he would go was to hold that Mathura had sexual intercourse with Ganpat! But sexual intercourse cannot be equated with rape; there was "a world of difference", in law, between the two. He feared that Mathura had cried 'rape' in order to prove herself 'virtuous' before the crowd which included her lover. He was also not sure that the semen on her clothes was from intercourse with Ganpat; and although he was disinclined to accept Ganpat's claim that semen on his trousers was due to habitual nocturnal discharges, he entertained the possibility that the semen stains on his clothes may well be due to the possibility of his having intercourse "with persons other than Mathura".

The Bombay High Court (Nagpur Bench) reversed the filing and sentenced Tukaram to rigorous imprisonment for one year and Ganpat for five years. Its grounds for reversal were that since both these 'gentlemen' were perfect strangers to Mathura, it was highly unlikely that "she would make any overtunes or invite the accused to satisfy her sexual desires". Nor could she have resisted her assailants. The High Court came to the conclusion that the policemen had "taken advantage of the fact that Mathura was involved in a complaint filed by her brother, and she was alone in the dead hour of the night" in a police station. This proved that she could not, in any probability, have consented to intercourse.

Your Court, Your Lordship, *reversed* the High Court verdict. The reasons given by justice Koshal are as follows. First, Justice Koshal held that as there were no injuries shown by the medical report, the story of "stiff resistence having been put up by the girl is all false " and the "alleged intercourse was a peaceful affair". Second, the Court disbelieves the testimony of the girl that she shouted "immediately after her hand was caught by Ganpat"; that she was not allowed to shout when she was taken to latrine and "that she had raised the alarm even when the underwear was loosened and Ganpat was looking at her private parts with the aid of a torch".

The Court holds that the "cries and alarms are, of course, a concoction on her part". This is said because when she was leaving the police station with her brother, Ganpat had caught her by the arm and she made no attempt to resist it then. The Court says , "if that be so, it would be preposterous to suggest that although she was in the company of her brother…she would be so overawed by the fact of appellants being persons in authority or the circumstance that she was just emerging from a police station that she would make no attempt at all to resist". Third, the Court holds that under Section 375 of the Penal Code, only the "fear of death or hurt" can vitiate consent for sexual intercourse. There was no such finding recorded. The circumstantial evidence must be such also as to lead to "reasonable evidence of guilt". While the High Court thought there was such reasonable evidence, the Supreme Court did not. Tukaram too was held not guilty because Mathura had in her deposition attributed far more serious things to him and later attributed these acts to Ganpat instead. The fact that Tukaram was present when the incident took place and that he left soon after the incident, says the Court, is "not inculpatory and is capable

of more explanations than one". But these other explanations are not all indicated by Justice Koshal in his judgment.

Your Lordship, this is an extraordinary decision sacrificing human rights of women under the law and the Constitution. The Court has provided no cogent analysis as to why the factors which weighed with the High Court were insufficient to justify conviction for rape. She was in the police station in the "dead hour of night". The High Court found it impossible to believe that she might have taken initiative for intercourse. The fact remains that she was asked to remain in the police station even after her statement was recorded and her friends and relations were asked to leave. Why? The fact remains that Tukaram did nothing whatsoever to rescue the girl from Ganpat. Why? The Court says in its narration of facts, presumably based on the trial Court records, that Tukaram was intoxicated. But this is not considered material either. Why? Why were the lights put off and doors shut?

Your Lordship, does the Indian Supreme Court expect a young girl 14-16 years old, when trapped by two policemen inside the police station, to successfully raise alarm for help? Does it seriously expect the girl, a labourer, to put up such stiff resistence against well-built policemen so as to have substantial marks of physical injury? Does the absence of such marks necessarily imply absence of stiff resistance? If anything it is Ganpat's body which would have disclosed marks of such resistance by Mathura, like clawing and biting.

Maybe, the evidence of shouts for help and 'stiff resistance' is all "a tissue of lies". But does the absence of shouts justify an easy inference of consensual intercourse in a police station? (Incidentally, what would be the Court's reaction if the victim was dumb or gagged?) In any event, how could the fact of shouting within closed doors of a police station be established in such cases?

In restoring the decision of the Sessions Judge, does the Supreme Court of India really believe with him that Mathura had "invented" the story of rape, and even the confinement in the police station, in order to sound "virtuous" before Ashok? Does the court believe that Mathura was so flirtatious that even when her brother, her employer and her lover were waiting outside the police station, she could not let go the opportunity of having fun with two policemen and that too in the area adjoining a police station latrine? Does it believe with the Sessions Judge that Mathura was "habituated to sexual intercourse" to such an extent? And therefore further think that the semen marks on Mathura's clothing could have come from further sexual activities between the police incident and the next morning when she was medically examined? What about semen marks on Ganpat's trousers? Why these double standards? Ganpat's sexual habits give him the benefit of doubt of having 'raped' Mathura; her sexual habits make the Court disbelieve the story of the rape altogether!

We also find it surprising that the Supreme Court should have only focused on the third component of Section 375 of the Indian Penal Code, which applies when rape is committed with the woman's consent, when "her consent has been obtained by putting

her in fear of death or hurt". But the second component of Section 375 is when rape occurs without her consent. There is a clear difference in law, and common sense, between 'submission' and 'consent'. Consent involves submission; but the converse is not necessarily true. Nor is absence of resistance necessarily indicative of consent. It appears from the facts as stated by the Court and its holdings that there was submission on the part of Mathura. But where was the finding on the crucial element of consent?

It may be that in strict law Ganpat was charged with rape on the third component of description of rape. In that case, the issue before the Court was simply whether the act was committed with her consent, under fear of death or hurt. But still the question whether there was 'consent' was quite relevant; indeed it was crucial. From the facts of the case, all that is established is *submission,* and not consent. Could not their Lordships have extended their analysis of 'consent' in a manner truly protective of the dignity and right of Mathura? One suspects that the Court gathered an impression from Mathura's liaison with her lover that she was a person of easy virtue. Is the taboo against pre-marital sex so strong as to provide a license to Indian police to rape young girls? Or to make them submit to their desires in police station?

My Lord, the ink is hardly dried on the decision in *Nandini Satpathy* (1978) 2 SCC 424 when the Supreme Court, speaking through Justice Krishna Iyer, condemned the practice of calling women to police stations in gross violation of Section 160(1) of the Criminal Procedure Code. Under that provision, a woman shall not be required to attend the police investigation at any other place than her place of residence. The Court stated in *Nandini* that it "is quite probable that the very act of directing a woman to come to the police station in violation of Section 160(1) CrPC may make for tension and negate "voluntariness". This observation was made in the context of the right against self-incrimination; is it any the less relevant to situations of 'rape' or, as the Court wishes to put it, 'intercourse' in a police station.

Certainly, the hope expressed by Justice Krishna Iyer that "when the big fight forensic battles the small gain by victory" has been belied. The law made for Nandini Satpathy does not, after all, apply to the helpless Mathuras of India.

There is not a single word condemning the very act of calling Mathura, and detaining her at the police station in gross violation of the law of the land made by Parliament and so recently reiterated by the Supreme Court. Nor is there a single word in the judgment condemning the use of the police station as a theatre of rape or submission to sexual intercourse. There is no direction to the administration to follow the law. There are no strictures of any kind.

The Court gives no consideration whatsoever to the socio-economic status, the lack of knowledge of legal rights, the age of the victim, lack of access to legal services, and the fear complex which haunts the poor and the exploited in Indian police stations. May we respectfully suggest that yourself and your distinguished colleagues visit incognito, wearing the visage of poverty, some police stations in villages adjoining Delhi?

My Lord, your distinguished colleagues and yourself have earned a well-merited place in contemporary Indian history for making preservation of democracy and human rights a principle theme of your judicial and extra-judicial utterances, especially after March, 1977. But a case like this with its cold-blooded legalism snuffs out all aspirations for the protection of human rights of millions of Mathura's in the Indian countryside. Why so?

No one can seriously suggest that all policemen are rapists. Despite massive evidence of police maltreatment of women in custody which rocked the state of Madhya Pradesh in 1977-78 and Andhra Pradesh in *Rameeza Bee case* not too long ago, we would agree with the Court were it to say it explicitly that the doctrine of judicial notice cannot be used to negate the presumption of innocence, even in such type of cases. But must presumption of innocence be carried so far as to negative all reasonable inference from circumstantial evidence?

Mathura, with all her predicaments, has been fortunate that her problem reached the High Court and your Court. But there are millions of Mathura's in whose situations even the first information reports are not filed, medical investigations are not made in time, who have no access to legal services at any level and who rarely have the privilege of vocal community support for their plight.

The Court, under your leadership, has taken great strides for civil liberties in cases involving affluent urban women (e.g. Mrs. Maneka Gandhi and Mrs. Nandini Satpathy). Must illiterate, labouring, politically mute Mathura's of India be continually condemned to their pre-constitutional Indian fate?

What more can we say? We can only appeal, in conclusion, to have the case reheard, as an unusual situation, by a larger bench, and if necessary by even the full Court. This may appear to your Lordship as a startlingly unconventional, and even a naïve suggestion. But nothing short of protection of human rights and constitutionalism is at stake. Surely, the plight of millions of Mathura's in this country is as important as that of Golak Nath, and his Holiness Keshavananda Bharti challenging the validity of restriction on the right to property as a fundamental right, whose cases were heard by a full court.

Maybe on re-examination Ganpat and Tukaram may stand acquitted for better reasons than those now available. But what matters is a search for liberation from the colonial and male-dominated notions of what may constitute the element of consent, and the burden of proof, for rape which affect many Mathura's on the Indian countryside.

You will no doubt forgive us for this impertinence of writing an open letter to you. But the future of judicial protection of human rights at grassroots level in India at the turn of the century, a concern we all share as citizens and as lawmen, leaves us with no other and better alternative.

With best regards and greetings, we remain

Sincerely yours,

Upendra Baxi

Vasudha Dhagamwar

Raghunath Kelkar
Lotika Sarkar
Delhi,
September 16, 1979.