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THE HIGH COURT OF ORISSA, CUTTACK

No.X-3/2021/R/ 5305 (45) Date 22.4.2021

From

Shri C.R.Dash,
Registrar General

To

1. **The Principal secretary, Home/ Law Deptt., Govt. of Odisha, Bhubaneswar**
2. **The Director, Odisha Judicial Academy, Cuttack**
3. **The Member-Secretary, Odisha State Legal Services, Authority, Odisha, Cuttack**
4. **The Advocate General, Odisha, Cuttack**
5. **The Dist. & Sessions Judge, (All)**
6. **The Presiding Officer, Industrial Tribunal, Bhubaneswar/ Rourkela**
7. **The Presiding Officer, Cooperative Tribunal, Bhubaneswar**
8. **The Presiding Officer, State Education Tribunal, Bhubaneswar**
9. **The Chairman, Sales Tax Tribunal, Cuttack**
10. **The Member, 2nd MACT, Cuttack/Sambalpur/ Berhampur**
11. **The Chairman, OPSC, Odisha, Cuttack**

Sub: **Hon'ble Apex Court Judgment Dtd.18.03.2021 passed in Criminal Appeal No.329/2021 (Aparna Bhat & Ors. Vrs. State of Madhya Pradesh & Anr.)**

Sir,

I am directed to forward herewith a copy of Judgment Dtd.18.03.2021 passed in Criminal Appeal No.329/2021 (Aparna Bhat & Ors. Vrs. State of Madhya Pradesh & Anr.) for your information and to take necessary steps for strict implementation of the directions issued in the Judgment.

Yours faithfully,

22/4/2021

REGISTRAR GENERAL

REPORTABLE

IN THE SUPREME COURT OF INDIA
(CRIMINAL APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 329 OF 2021

[@ SPECIAL LEAVE PETITION (CRL.) NO. 2531 OF 2021]
(ARISING OUT OF S.L.P. (CRL.) DIARY NO. 20318 OF 2020)

APARNA BHAT & ORS. …APPELLANT (S)

VERSUS

STATE OF MADHYA PRADESH & ANR. ….RESPONDENT(S)

JUDGEMENT

S. RAVINDRA BHAT, J.

A woman cannot be herself in the society of the present day, which is an exclusively masculine society, with laws framed by men and with a judicial system that judges feminine conduct from a masculine point of view."

– Henrik Ibsen

1. Leave granted. The appellants are public-spirited individuals, concerned about the adverse precedent set by the imposition of certain bail conditions in a case involving a sexual offence against a woman; they impugn a part of the judgment of the Madhya Pradesh High Court[1] that imposed these bail conditions. With the consent of counsel for the parties, the appeal was heard finally. The appellants also filed an

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Digitally signed by DEEPAK SINGH
Date: 2021.03.24 16:54:26 IST
Reason:

1 In *Vikram v. The State of Madhya Pradesh* in MCRC 23350/ 2020, dated 30.7.2020

application[2], seeking directions that all the High Courts and trial Courts be directed to refrain from making observations and imposing conditions in rape and sexual assault cases, at any stage of judicial proceedings, that trivialize the trauma undergone by survivors and adversely affect their dignity. Certain intervenors also preferred an application in support of the appeal, seeking clear directions to all Courts to refrain from imposing *"irrelevant, freaky or illegal bail conditions"*.

2. Ibsen, the prescient nineteenth century author, made a powerful statement (quoted as the epigram at the beginning of this judgment); sadly, even today, in the twenty first century, after 70 years as a republic with the goal of equality for all, many courts seem to be oblivious of the problem. In a sense, this judgment is not as much about only the merits of the impugned conditions of the bail order, but is meant to address a wider canvas of (what appears to be) entrenched paternalistic and misogynistic attitudes that are regrettably reflected at times in judicial orders and judgments.

3. The brief facts of the case are that on 20.04.2020 at about 2.30 a.m., the accused-applicant, a neighbour of the complainant, entered her house and caught hold of the complainant's hand, and allegedly attempted to harass her sexually. Accordingly, Crime No. 133/2020 was registered at Police Station, Bhatpachlana, District-Ujjain for the offences punishable under sections 452, 354A[3], 323 and 506 of the Indian Penal Code (IPC). The case was investigated and a charge sheet was filed. The accused filed an application under Section 438 of Code of Criminal Procedure, 1973 (hereafter "CrPC") seeking pre-arrest bail. The High Court, by the impugned

2Crl. M.P No. 102226/2020

3Section 354A reads as follows:

"354A. Sexual harassment and punishment for sexual harassment.—

(1) A man committing any of the following acts—

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

order, even while granting bail to the applicant imposed the following condition which is under challenge in this petition.

> *(i)* "*The applicant along with his wife shall visit the house of the complainant with Rakhi thread/ band on 3rd August, 2020 at 11:00 a.m. with a box of sweets and request the complainant -Sarda Bai to tie the Rakhi band to him with the promise to protect her to the best of his ability for all times to come. He shall also tender Rs. 11,000/- to the complainant as a customary ritual usually offered by the brothers to sisters on such occasion and shall also seek her blessings. The applicant shall also tender Rs. 5,000/- to the son of the complainant – Vishal for purchase of clothes and sweets. The applicant shall obtain photographs and receipts of payment made to the complainant and her son, and the same shall be filed through the counsel for placing the same on record of this case before this Registry. The aforesaid deposit of amount shall not influence the pending trial, but is only for enlargement of the applicant on bail."*

4. The appellants submit that the expressions *"in the interest of justice"*, *"such other conditions court considers necessary"* and *"as it may think fit"* as provided in the bare text of the Section 437(3)(c) as well as Section 438(2)(iv) of the CrPC, give discretion to the Courts to impose such other conditions as may be required in the facts of a particular case, but those conditions have to be in consonance with the other conditions in the provisions, the purpose of granting bail and no other consideration.

5. The appellants cite *Kunal Kumar Tiwari v. State of Bihar*[4] and *Sumit Mehta v. State (NCT of Delhi)*[5] and argue that this court's observations in those decisions must be followed by every court while considering and dealing with bail applications. They also rely on the observations made in para 18 of *State of M.P* v. *Madanlal,*[6] and urge that in cases of sexual offences, the idea of compromise, especially in the form of marriage between the accused and the prosecutrix is abhorrent, and should not be considered a judicial remedy, as it would be antithetical to the woman's honour and dignity. Likewise, reliance was placed on *Ramphal v. State of Haryana*[7], where the

4 (2018) 16 SCC 74
5 (2013) 15 SCC 570
6 (2015) 7 SCC 681
7 Crl. A. No. 438/2011decided on 27.11.2019

court took note of the compromise between the survivor and accused, but found that such compromise is of no relevance when deciding on cases of rape and sexual assault.

6. The appellants brought to the notice of this Court, various decisions and orders where the observations made by the judges in offences against women including cases under the Protection of Children from Sexual Offences Act, 2012 (POCSO) were extraneous. The appellants submitted that the courts, in many cases, especially under the POCSO Act, granted bail on the plea that an agreement to marry had been reached between the accused and prosecutrix. Additionally, they also submitted that while adjudicating matters of sexual harassment and rape, judges have made shocking remarks on the character of the prosecutrix.

7. Reference is made to *Ravi Jatav v. State of M.P*[8], where the High Court of Madhya Pradesh, while granting bail (to an accused of committing offences under Sections 376-D, 366, 506, 34 IPC) imposed conditions that the accused *"shall register himself as a Covid-19 Warrior"* and was to be assigned work of Covid-19 disaster management at the discretion of the District Magistrate. In *Rakesh B. v. State of Karnataka*[9], the Karnataka High Court granted bail to an accused alleged to have committed offences under Sections 376, 420, 506 IPC and Section 66-B of the Information Technology Act, 2000 ("IT Act"), and made remarks on the survivor's conduct. The relevant extract is produced below:

> *"c) nothing is mentioned by the complainant as to why she went to her office at night, that is, at 11 PM; she has also not objected to consuming drinks with the petitioner and allowing him to stay with her till morning; the explanation offered by the complainant that after the perpetration of the act she was tired and fell asleep, is unbecoming of an Indian woman; that is not the way our women react when they are ravished;"*

8. The appellants submit that no observation/condition should be made in any judgment, or orders which reflects bias of the judge or affects the dignity of a woman

8 MCRC No. 13734/2020 order dated 19.05.2020 passed by Madhya Pradesh High Court.
9 Crl. P. No. 2427/2020, order dated 22.06.2020 passed by High Court of Karnataka.

or affects the conduct of the trial in a fair and unbiased manner. They highlight that the impugned order, while granting bail, imposed a condition that the applicant shall visit the house of the complainant. The appellants submit that this is unacceptable and no observation/condition should be made which permits the accused to meet/have access to the survivor and her family members.

9. The appellants also cite *Mohan v. State*[10], where the Madras High Court had referred the case of rape of a minor to mediation and observed that the case was fit for attempting a compromise between the parties. Likewise, *Samuvel* v. *Inspector of Police*[11] is cited, where the High Court of Madras referred to mediation, a case of rape where the prosecutrix was a minor and had become a mother of a child as a consequence of rape, because the accused agreed to marry her. It is urged that no observation/condition should be made which initiates or encourages compromise that disparages and downgrades an otherwise heinous crime thus indicating that such offences are remediable by way of a compromise/ by marriage.

10. *Sopikul Sk. @ Safikul Islam* v. *State,*[12] an order of the High Court of Calcutta in a POCSO case granting bail is cited; here, relief was given to the accused since the prosecutrix had attained majority and the accused intended to marry her. Further, in the case of *Gyanaranjan Behera* v. *State of Odisha,*[13] the Orissa High Court in a POCSO case granted interim bail to the accused for the purpose of marrying the prosecutrix. In *Suraj Kushwah* v. *State of M.P,*[14] the Madhya Pradesh High Court granted temporary bail to the accused for a crime under sections 376 (2)(n), 506 IPC read with Sections 3(1) (W-II), 3(2)(V), 3(2)(v-a) of the SC/ST (Prevention of Atrocities) Act, 1989 for the purpose of solemnizing marriage with the prosecutrix. The appellants submit that in POCSO and rape cases, no observation/condition

10 M.P No. 2/2014 in Crl. A No. 402/2014 order dated 18.06.2015
11 Crl. O.P. No. 1881/2015.
12 CRM No. 2961/2020 Order dated 16.04.2020 of the Calcutta High Court
13 BLAPL No. 2596/2020 Order dated 02.06.2020, passed by Orissa High Court.
14 CRA No. 3353/2020 Order dated 02.09.2020 passed by the Madhya Pradesh High Court

should be made, which takes note of the fact that the survivor has attained majority and that the accused has offered to marry her.

11. *Vikas Garg* v. *State of Haryana*[15], by the High Court of Punjab is cited, where the court granted bail to three persons accused of committing offences under Sections 376D, 376(2)(n), 376, 292, 120-B, 506 IPC and Section 67 of the IT Act, and made observations regarding the prosecutrix's *"casual relationships","promiscuous attitude"*, *"voyeuristic mind",* etc. The appellants submit that no observation/condition should be made which grants bail on the ground that the victim is of "loose character" or is "habituated to sexual intercourse."

12. Counsel for the Intervenors submitted that under sections 437(2) and 438, the power to impose conditions have been expressed in very wide terms by using the phrase "any condition." Recently, High Courts while granting bail under these sections have started imposing irrelevant conditions. The Intervenors have annexed around twenty-three orders in which such conditions for bail were imposed. They argue that the conditions that can be imposed under the law are clearly laid down by the Supreme Court in the case of *Munish Bhasin* v. *State*[16] and reiterated in *Parvez Noordin Lokhandwalla v. State of Maharashtra*.[17] Accordingly, it is clear that imposing conditions like rendering community service in COVID hospitals or in any other institution, plantation of trees, contributing to any particular charity relief fund, etc. is impermissible in law. The Intervenors further submit that the accused, during pendency of the trial are presumed innocent and their guilt is as yet to be adjudicated by the Court. Imposition of conditions like compulsive community service, etc. is violative of the right to equality and personal liberty, including procedure established by law in the Indian Constitution.

13. The Intervenors also submit that the Court while deciding a bail application, cannot assume the role of a social reformer or fund raiser for charities and impose

15 Cr. M. No. 23962/2017, order dated 13.09.2017 passed by the Punjab and Haryana High Court
16 (2009) 4 SCC 45
17 (2020) 10 SCC 77

conditions which have no nexus with the offense or relevance with the object of the bail provisions.

14. It was submitted that in IA No. 102226/2020, the appellants have brought to the notice of this Court, several other instances in which similar directions have been made by High Courts and Trial Courts across the country. Such wide prevalence necessitates the urgent intervention of this Court to *firstly,* declare that such remarks are unacceptable and have the potential to cause grave harm to the prosecutrix and the society at large, *secondly*, reiterate that judicial orders have to conform to certain judicial standards, and *thirdly*, take necessary steps to ensure that this does not happen in the future.

15. It was further submitted that this Court should intervene and issue directions or guidelines on bail and anticipatory bail to ensure that courts impose only those conditions as are permissible in law. Further, this Court was urged to issue directions on gender sensitization of the bar and the bench, particularly with regard to judicial empathy for the prosecutrix.

16. The learned Attorney General, who had been issued notice in this matter, made his submissions in support of the appeal; he also filed a detailed note suggesting the steps that should be taken to sensitize all stakeholders, especially courts, while dealing with offences against women. Highlighting the observations made in *Kunal Kumar (supra), Sumit Mehta (supra), State of Punjab* v. *Gurmit Singh*[18] and *Sakshi* v. *State*[19], the learned Attorney General submitted that while relying upon the observations made in the above-mentioned cases, the court may highlight that in cases of crimes against women, the following additional considerations may be kept in mind:

i. Bail conditions should not mandate or even permit contact between the accused and the victim.

18 (1996) 2 SCC 384
19 (2004) 5 SCC 518

ii. Bail conditions must seek to protect the complainant from any harassment by the accused.
iii. Where considered necessary, the complainant/prosecutrix may be heard on whether there is any peculiar circumstance which may require additional conditions for her protection.
iv. Wherever bail is granted, the complainant may immediately be informed that the accused has been granted bail.
v. Bail conditions must be free from stereotypical or patriarchal notions on women and their place in society, and must strictly be in accordance with the requirements of the CrPC.
vi. The Courts while adjudicating a case, should not suggest or entertain any notions (or encourage any step) towards compromises between the prosecutrix and the accused to get married, as it is beyond their powers and jurisdiction.

17. On gender equality and gender sensitization, the Attorney General argued that to achieve the goal of gender justice, it is imperative that judicial officers, judges, and members of the bar are made aware of gender prejudices that hinder justice. Accordingly, he submitted that the foremost aspect to facilitate a gender sensitive approach, is to train judges to exercise their discretion and avoid the use of gender-based stereotypes while deciding cases pertaining to sexual offences. *Secondly,* judges should have sensitivity to the concerns of the survivor of sexual offences.

18. Reliance was placed on the Bangkok General Guidance for Judges on Applying a Gender Perspective in South East Asia, by the International Commission of Jurists. It was pointed out that the following stereotypes are often encountered in the course of judicial decision-making and should be avoided: -

i. Women are physically weak;
ii. Women cannot make decisions on their own;
iii. Men are the head of the household and must make all the decisions related to family;
iv. Women should be submissive and obedient;
v. Good women are sexually chaste;
vi. Every woman wants to be a mother;

vii. Women should be the ones in charge of their children;
viii. Being alone at night or wearing certain clothes make women responsible for being attacked;
ix. Women are emotional and often overreact or dramatize hence it is necessary to corroborate their testimony;
x. Testimonial evidence provided by women who are sexually active may be suspected when assessing "consent" in sexual offence cases; and
xi. Lack of evidence of physical harm in sexual offense case means consent was given.

19. The Attorney General submitted that training for gender sensitization for judges at all levels of the judiciary should mandatorily be conducted at regular intervals by the National Judicial Academy and State Judicial Academies. He emphasized that any directions towards gender sensitization should include judges of all levels of the judiciary. Further, the counsel urged that courses on gender sensitization should be included in the curriculum of law schools, and the All-India Bar Exam should include questions on gender sensitization as well. In addition to this, he recommended that a detailed curriculum may be prepared with the help of subject matter experts by each High Court, to be a part of the syllabus for the Judicial Services Exams and training for inducted judges.

Nature of the beast[20]: the problem

20. Women often experience obstacles in gaining access to mechanisms of redress, including legal aid, counselling services and shelters. They are re-victimized and exposed to further risk of violence through the denial of redress in the context of informal trials or negotiations between families and community leaders. The payment of financial compensation by the perpetrator or his family for acts of violence against women, in lieu of legal remedies, was a recurrent concern *vis-à-vis* the formal and informal justice systems. Violence against women in India is systematic and occurs in

20 A phrase that means the traits inherent to a thing or situation, especially a negative or difficult one (See https://idioms.thefreedictionary.com/the+nature+of+the+beast)

the public and private spheres. It is underpinned by the persistence of patriarchal social norms and inter- and intra-gender hierarchies. Women are discriminated against and subordinated not only on the basis of sex, but on other grounds too, such as caste, class, ability, sexual orientation, tradition and other realities.[21]

21. Gender violence is most often unseen and is shrouded in a culture of silence. The causes and factors of violence against women include entrenched unequal power equations between men and women that foster violence and its acceptability, aggravated by cultural and social norms, economic dependence, poverty and alcohol consumption, etc. In India, the culprits are often known to the woman; the social and economic "costs" of reporting such crimes are high. General economic dependence on family and fear of social ostracization act as significant disincentives for women to report any kind of sexual violence, abuse or abhorrent behaviour. Therefore, the actual incidence of violence against women in India is probably much higher than the data suggests, and women may continue to face hostility and have to remain in environments where they are subject to violence. This silence needs to be broken. In doing so, men, perhaps more than women have a duty and role to play in averting and combating violence against women.

22. Unlike many other victims of interpersonal crimes such as theft, robbery or muggings, survivors of sexual assault are vulnerable to being blamed for their attack, and thus victim-blaming (overtly or in more subtle forms) in sexual assault cases has been the focus of several writings. Myths and stereotypes *"underlie and fuel sexual violence against women and inform negative societal reactions"*.[22] Joanne Conaghan points out pertinently that *"removing the doctrinal debris of a legally instituted gendered hierarchical order does not necessarily get rid of deeply ingrained social*

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21 Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, on her Mission to India (22 April to 1 May, 2013) A/HRC/26/38/Add.1 (accessible at www.ohchr.org › Documents › A-HRC-26-38-Add1_en)

22 Shannon Sampert, *"Let Me Tell You a Story: English-Canadian Newspapers and Sexual Assault Myths"* (2010) 22:2 Canadian Journal of Women and the Law 301 at 304; also Janice Du Mont, and Deborah Parmis*; "Judging Women: The Pernicious Effects of Rape Mythology"* (1999) 19:1-2 Canadian Woman Studies 102 at 102

and cultural attitudes which law has long endorsed and which continue to infuse the criminal justice process, albeit in more covert, less accessible forms."[23]

23. Sexual violence is varied in degree. At the highest (or, rather most aggravated) level, is rape with or without attendant violence. However, there are a substantial number of incidents which fall within the rubric of sexual violence, that amount to offences under various penal enactments. These outlaw behaviours such as stalking, eve-teasing, shades of verbal and physical assault, and harassment. Social attitudes typically characterize this latter category of crimes as "minor" offences. Such "minor" crimes are, regrettably not only trivialised or normalized, rather they are even romanticized and therefore, invigorated in popular lore such as cinema. These attitudes – which indulgently view the crime through prisms such as "boys will be boys" and condone them, nevertheless have a lasting and pernicious effect on the survivors.

24. The United Nations Organisation has defined "violence against women" as *"any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."*[24] The effect of offensive behaviour against women, which laws criminalize-

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23 Joanne Conaghan, Law and Gender (Oxford: Oxford University Press, 2013) at 113

24 The Declaration on the Elimination of Violence Against Women (also 'DEVAW). Articles 1 and 2 read as follows:

"Article One:

For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article Two:

Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

physical, verbal, or other acts which threaten or give them acute discomfort, undermining their dignity, self-worth and respect, is to silence or subdue the survivor.

25. In *The Standard of Social Justice as a Research Process*[25] two scholars of psychology made a strong indictment of the (contextually, Canadian) criminal justice process:

> *"The more general indictment of the current criminal justice process is that the law and legal doctrines concerning sexual assault have acted as the principle [sic] systemic mechanisms for invalidating the experiences of women and children. Given this state of affairs, the traditional view of the legal system as neutral, objective and gender-blind is not defensible. Since the system is ineffective in protecting the rights of women and children, it is necessary to re-examine the existing doctrines which reflect the cultural and social limitations that have preserved dominant male interests at the expense of women and children."*

Previous rulings

26. In *Kunal Kumar Tiwari v. State of Bihar (supra),* this court while dealing with Section 437(3)(c), Cr. PC (general conditions of bail) observed as follows:

> *"9. There is no dispute that Sub-clause (c) of Section 437(3) allows Courts to impose such conditions in the interest of justice. We are aware that palpably such wordings are capable of accepting broader meaning. But such conditions cannot be arbitrary, fanciful or extend beyond the ends of the provision. The phrase 'interest of justice' as used under the Sub-clause (c) of Section 437(3) means "good administration of justice" or "advancing the trial process" and inclusion of broader meaning should be shunned because of purposive interpretation."*

27. In *Sumit Mehta* v. *State (NCT of Delhi) (supra)* this court, with respect to the conditions that can be imposed validly under section 438(2) of the CrPC, observed that:

> *"11. While exercising power under Section 438 of the Code, the Court is duty bound to strike a balance between the individual's right to*

25(1997), 38 *Can. Psychology* 91, K. E. Renner, C. Alksnis and L. Park at p. 100

> *personal freedom and the right of investigation of the police. For the same, while granting relief Under Section 438(1), appropriate conditions can be imposed Under Section 438(2) so as to ensure an uninterrupted investigation. The object of putting such conditions should be to avoid the possibility of the person hampering the investigation. Thus, any condition, which has no reference to the fairness or propriety of the investigation or trial, cannot be countenanced as permissible under the law. So, the discretion of the Court while imposing conditions must be exercised with utmost restraint."*

28. It was urged that the observations made in *Kunal Kumar* and *Sumit Mehta* ought to be followed while imposing bail conditions. The appellants relying upon the observations made in para 18 of *State of M.P* v. *Madanlal,*[26] submit that in cases of sexual offences, the concept of compromise, especially in the form of marriage between the accused and the prosecutrix shall not be thought of, as any such attempt would be offensive to the woman's dignity.

> *"18. ...We would like to clearly state that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the "purest treasure", is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error."*

26 (2015) 7 SCC 681

29. The decision in *Ramphal v. State of Haryana*[27] by order dated 27.11.2019, took note of the compromise between the survivor and accused persons but found that such compromise is of no relevance when deciding on rape and cases of sexual assault.

> *"It is brought to our notice that during the pendency of the appeals, both the appellants have paid Rs. 1.5 lakhs each in favor of the prosecutrix and she has accepted the same willingly for getting the matter compromised. However, it is imperative to emphasize that we do not accept such compromise in matters relating to the offence of rape and similar cases of sexual assault. Hence, the aforesaid compromise is of no relevance in deciding this matter. On merits, we do not find any ground to interfere in as much as the evidence of the prosecutrix is coupled with the medical evidence which clearly proves that the offence of rape has been committed. Therefore, the Trial Court and the High Court have rightly convicted the accused/appellants."*

30. Empirically, the statistics regarding certain kinds of crimes against women have not shown any significant decline. In states and union territories, 32033 rape cases (under Section 376 IPC) were registered in 2019; 4038 cases of attempt to rape were registered the same year (under Section 376 read with Section 511, IPC). As many as 88,387 cases under Section 354 IPC were registered the same year, whereas 6939 cases were registered under Section 509 (outraging the modesty of a woman) in 2019. In all, a total of 4, 05,861 crimes against women were reported in 2019 (as against 359849 in 2017 and 378236 in 2018). The statistic for a relatively new *species* of offensive activities, cybercrimes that are women-centric, such as Transmitting of Sexually Explicit Material (Sec. 67A/67B, Information Technology Act), Blackmailing Defamation/Morphing/creating Fake Profile etc) registered in 2019, were 1645. POCSO offences, where girl children were victims, reported in 2019 were 46,005.[28]

The role of the courts and law enforcement agencies as neutral authorities, under a duty to ensure fairness

27 Crl. A. No. 438/2011
28 https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf

31. The role of all courts is to make sure that the survivor can rely on their impartiality and neutrality, at every stage in a criminal proceeding, where she is the survivor and an aggrieved party. Even an indirect undermining of this responsibility cast upon the court, by permitting discursive formations on behalf of the accused, that seek to diminish his agency, or underplay his role as an active participant (or perpetrator) of the crime, could in many cases, shake the confidence of the rape survivor (or accuser of the crime) in the impartiality of the court. The current attitude regarding crimes against women typically is that "grave" offences like rape are not tolerable and offenders must be punished. This, however, only takes into consideration rape and other serious forms of gender-based *physical* violence. The challenges Indian women face are formidable: they include a misogynistic society with entrenched cultural values and beliefs, bias (often sub-conscious) about the stereotypical role of women, social and political structures that are heavily male-centric, most often legal enforcement structures that either cannot cope with, or are unwilling to take strict and timely measures. Therefore, reinforcement of this stereotype, in court utterances or orders, through considerations which are extraneous to the case, would impact fairness.

32. Academic writings highlight that a judgment at all levels has a number of distinct audiences, each of which engages with it in a different way. The parties to the case and their counsel will be interested in how the judge resolves their specific dispute - what the law gives to or requires of them. At the same time, in a legal system where judgments of courts set precedents, and in particular within a common law system, judgments have significance beyond their authoritative resolution of a specific dispute—particularly in the Supreme Court. Thus, the judge is not only communicating to the parties their rights and liabilities in the context of the specific dispute being litigated; *the judge is also addressing the broader legal community—*

other lawyers, judges, legal academics, law students—and indeed the public at large.[29]

33. Using *rakhi* tying as a condition for bail, transforms a molester into a brother, by a judicial mandate. This is wholly unacceptable, and has the effect of diluting and eroding the offence of sexual harassment. The act perpetrated on the survivor constitutes an offence in law, and is not a minor transgression that can be remedied by way of an apology, rendering community service, tying a *rakhi* or presenting a gift to the survivor, or even promising to marry her, as the case may be. The law criminalizes outraging the modesty of a woman. Granting bail, subject to such conditions, renders the court susceptible to the charge of re-negotiating and mediating justice between confronting parties in a criminal offence and perpetuating gender stereotypes.

34. The Inter-American Commission on Human Rights has noted that judicial stereotyping *"is a common and pernicious barrier to justice, particularly for women victims and survivors of violence. Such stereotyping causes judges to reach a view about cases based on preconceived beliefs, rather than relevant facts and actual enquiry."*[30] Furthering of rape myths and stereotypes by the judiciary, limits the emancipatory potential of the law.

35. 'Judicial stereotyping' refers to the practice of judges ascribing to an individual specific attributes, characteristics or roles by reason only of her or his membership in a particular social group (e.g. women). It is used, also, to refer to the practice of judges perpetuating harmful stereotypes through their failure to challenge them, for example by lower courts or parties to legal proceedings.[31] Stereotyping

29 Erica Rackley, *The Art and Craft of Writing Judgements* in Hunter, Rosemary and McGlynn, Clare and Rackley, Erika, eds. FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE, Hart Publishing, Oxford.

30 Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Sexual Violence: Education and Health*, OEA/Ser.L/V/II. Doc. 65 (2011) ; Simone Cusack, *Eliminating Judicial Stereotyping*, Paper submitted to the Office of the High Commissioner for Human Rights (2014).

31 Simone Cusack, *Eliminating Judicial Stereotyping*, Paper submitted to the Office of the High Commissioner for Human Rights (2014), p. 2.

excludes any individualized consideration of, or investigation into, a person's actual circumstances and their needs or abilities.[32]

36. There have been notable rulings by the CEDAW[33] Committee in this regard. In *V.K. v. Bulgaria*[34], the Committee observed that:

> '*stereotyping affects women's right to a fair trial and that the judiciary must be careful not to create inflexible standards based on preconceived notions of what constitutes domestic or gender-based violence*'.

37. In *Karen Tayag Vertido v. The Philippines*[35], the CEDAW Committee stressed that court should not create *"inflexible standards"* of what women should be or have done, when confronted with a situation of rape.

38. Judges can play a significant role in ridding the justice system of harmful stereotypes. They have an important responsibility to base their decisions on law and facts in evidence, and not engage in gender stereotyping. This requires judges to identify gender stereotyping, and identify how the application, enforcement or perpetuation of these stereotypes discriminates against women or denies them equal access to justice. Stereotyping might compromise the impartiality of a judge's decision and affect his or her views about witness credibility or the culpability of the accused person.[36]As a judge of the Canadian Supreme Court remarked:

> *"Myths and stereotypes are a form of bias because they impair the individual judge's ability to assess the facts in a particular case in an open-minded fashion. In fact, judging based on myths and stereotypes is entirely incompatible with keeping an open mind, because myths*

32 *Supra,* p. 17.
33 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), was adopted in 1979 by the UN General Assembly; it is sometimes described as an international bill of rights for women. The CEDAW Committee is set up under Article 17 of CEDAW.
34 *V.K. v. Bulgaria*, Communication No. 20/2008, UN Doc. CEDAW/C/49/D/20/2008 (2011) (CEDAW)
35 *Karen Tayag Vertido v. The Philippines*, Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010) (CEDAW), para. 8.4.
36 Simone Cusack, *Eliminating Judicial Stereotyping*, Paper submitted to the Office of the High Commissioner for Human Rights (2014), p. 22.

> *and stereotypes are based on irrational predisposition and generalization, rather than fact."*[37]

39. The stereotype of the ideal sexual assault victim disqualifies several accounts of lived experiences of sexual assault. Rape myths[38] undermine the credibility of those women who are seen to deviate too far from stereotyped notions of chastity, resistance to rape, having visible physical injuries, behaving a certain way, reporting the offence immediately, etc. In the words of the Supreme Court of Canada, in *R v. Seaboyer*,[39]

> *"The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies, i.e., who she should be in order to be recognized as having been, in the eyes of the law, raped; who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed."*

40. The Bangalore Principles of Judicial Conduct, 2002, were from a meeting of Chief Justices of Asian and African countries, and endorsed by the UN Commission on Human Rights, the ECOSOC and the Commission on Crime Prevention and Criminal Justice. The Bangalore Principles provide that:

> *"2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.*
>
> ********
>
> *5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age,*

37 The Honourable Madame Justice Claire L'Heureux-Dubé, 'Beyond the Myths: Equality, Impartiality, and Justice' (2001) 10(1) *Journal of Social Distress and the Homeless* 87, 88.

38 Explained in *R. v. Osolin*, [1993] 4 S.C.R. 595 (a Canadian case) as opinions improperly forming the background for considering evidentiary issues in sexual assault trials. These include the false concepts that: women cannot be raped against their will; only "bad girls" are raped; anyone not clearly of "good character" is more likely to have consented.

39 *R v. Seaboyer*, [1991] 2 S.C.R. 577, 650 (L'Heureux-Dubé & Gonthier JJ, dissenting in part) (Canada, Supreme Court).

marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds."

41. This court held, in *State of Punjab v. Gurmit Singh & Ors*.[40] that:

"The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterised her as a girl "of loose morals" or "such type of a girl". ... We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a judge. ... The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole – where the victim of crime is discouraged – the criminal encouraged and in turn crime gets rewarded!'

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"Language is 'a medium of social action' not 'merely a vehicle of communication' and the written judicial opinion is the primary, if not the sole, medium in which judges within our judicial system execute language."[41]

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...the text of judicial decisions and opinions constitutes the law by which our common law system abides and the basis on which judges, lawyers, and citizens make reasoned legal judgments about future action."[42]

42. This Court therefore holds that the use of reasoning/language which diminishes the offence and tends to trivialize the survivor, is especially to be avoided under all circumstances. Thus, the following conduct, actions or situations are hereby deemed irrelevant, e.g. - to say that the survivor had in the past consented to such or similar acts or that she behaved promiscuously, or by her acts or clothing, provoked the alleged action of the accused, that she behaved in a manner unbecoming of chaste or

40 *State of Punjab v. Gurmit Singh & Ors*., 1996 SCC (2) 384.
41 Rachael K. Hinkle et al., A Positive Theory and Empirical Analysis of Strategic Word Choice in District Court Opinions, 4 J. OF LEGAL ANALYSIS 407, 408 (2012).
42 Ibid, at p. 409.

"Indian" women, or that she had called upon the situation by her behavior, etc. These instances are only illustrations of an attitude which should never enter judicial verdicts or orders or be considered relevant while making a judicial decision; they cannot be reasons for granting bail or other such relief. Similarly, imposing conditions that implicitly tend to condone or diminish the harm caused by the accused and have the effect of potentially exposing the survivor to secondary trauma, such as mandating mediation processes in non-compoundable offences, mandating as part of bail conditions, community service (in a manner of speaking with the so-called reformative approach towards the perpetrator of sexual offence) or requiring tendering of apology once or repeatedly, or in any manner getting or being in touch with the survivor, is especially forbidden. The law does not permit or countenance such conduct, where the survivor can potentially be traumatized many times over or be led into some kind of non-voluntary acceptance, or be compelled by the circumstances to accept and condone behavior what is a serious offence.

43. The instances spelt out in the present judgment are only illustrations; the idea is that the greatest extent of sensitivity is to be displayed in the judicial approach, language and reasoning adopted by the judge. Even a solitary instance of such order or utterance in court, reflects adversely on the entire judicial system of the country, undermining the guarantee to fair justice to all, and especially to victims of sexual violence (of any kind from the most aggravated to the so-called minor offences).

44. Having regard to the foregoing discussion, it is hereby directed that henceforth:

(a) Bail conditions should not mandate, require or permit contact between the accused and the victim. Such conditions should seek to protect the complainant from any further harassment by the accused;

(b) Where circumstances exist for the court to believe that there might be a potential threat of harassment of the victim, or upon apprehension expressed, after calling for reports from the police, the nature of protection shall be separately

considered and appropriate order made, in addition to a direction to the accused not to make any contact with the victim;

(c) In all cases where bail is granted, the complainant should immediately be informed that the accused has been granted bail and copy of the bail order made over to him/her within two days;

(d) Bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in society, and must strictly be in accordance with the requirements of the Cr. PC. In other words, discussion about the dress, behavior, or past "conduct" or "morals" of the prosecutrix, should not enter the verdict granting bail;

(e) The courts while adjudicating cases involving gender related crimes, should not suggest or entertain any notions (or encourage any steps) towards compromises between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as it is beyond their powers and jurisdiction;

(f) Sensitivity should be displayed at all times by judges, who should ensure that there is no traumatization of the prosecutrix, during the proceedings, or anything said during the arguments, and

(g) Judges especially should not use any words, spoken or written, that would undermine or shake the confidence of the survivor in the fairness or impartiality of the court.

45. Further, courts should desist from expressing any stereotype opinion, in words spoken during proceedings, or in the course of a judicial order, to the effect that (i) women are physically weak and need protection; (ii) women are incapable of or cannot take decisions on their own; (iii) men are the "head" of the household and should take all the decisions relating to family; (iv) women should be submissive and

obedient according to our culture; (v) "*good*" women are sexually chaste; (vi) motherhood is the duty and role of every woman, and assumptions to the effect that she wants to be a mother; (vii) women should be the ones in charge of their children, their upbringing and care; (viii) being alone at night or wearing certain clothes make women responsible for being attacked; (ix) a woman consuming alcohol, smoking, etc. may justify unwelcome advances by men or "has asked for it"; (x) women are emotional and often overreact or dramatize events, hence it is necessary to corroborate their testimony; (xi) testimonial evidence provided by women who are sexually active may be suspected when assessing "consent" in sexual offence cases; and (xii) lack of evidence of physical harm in sexual offence case leads to an inference of consent by the woman.

46. As far as the training and sensitization of judges and lawyers, including public prosecutors goes, this court hereby mandates that a module on gender sensitization be included, as part of the foundational training of every judge. This module must aim at imparting techniques for judges to be more sensitive in hearing and deciding cases of sexual assault, and eliminating entrenched social bias, especially misogyny. The module should also emphasize the prominent role that judges are expected to play in society, as role models and thought leaders, in promoting equality and ensuring fairness, safety and security to all women who allege the perpetration of sexual offences against them. Equally, the use of language and appropriate words and phrases should be emphasized as part of this training.

47. The National Judicial Academy is hereby requested to devise, speedily, the necessary inputs which have to be made part of the training of young judges, as well as form part of judges' continuing education with respect to gender sensitization, with adequate awareness programs regarding stereotyping and unconscious biases that can creep into judicial reasoning. The syllabi and content of such courses shall be framed after necessary consultation with sociologists and teachers in psychology, gender studies or other relevant fields, preferably within three months. The course should

emphasize upon the relevant factors to be considered, and importantly, what should be avoided during court hearings and never enter judicial reasoning. Public Prosecutors and Standing Counsel too should undergo mandatory training in this regard. The training program, its content and duration shall be developed by the National Judicial Academy, in consultation with State academies. The course should contain topics such as appropriate court-examination and conduct and what is to be avoided.

48. Likewise, the Bar Council of India (BCI) should also consult subject experts and circulate a paper for discussion with law faculties and colleges/universities in regard to courses that should be taught at the undergraduate level, in the LL.B program. The BCI shall also require topics on sexual offences and gender sensitization to be mandatorily included in the syllabus for the All India Bar Examination.

49. Before parting, this Court expresses its gratitude for the valuable suggestions and the assistance rendered by the learned Attorney General pursuant to the notice issued. We also appreciate the submissions made on behalf of the appellant(s) and the intervenor(s).

50. Each High Court should, with the help of relevant experts, formulate a module on judicial sensitivity to sexual offences, to be tested in the Judicial Services Examination.

51. In the light of the above, the bail conditions in the impugned judgment, extracted at para 3 above, are set aside, and expunged from the record.

52. Before concluding, it would be appropriate to quote certain excerpts from the Canadian *Commentaries on Judicial Conduct:*[43]

43 Les Éditions Yvon Blais Inc, 1991, quoted by Rt. Hon'ble Beverley Mclachlin, former Chief Justice of Canada, in her Speech *Judging in a Democratic State* https://www.scc-csc.ca/judges-juges/spe-dis/bm-2004-06-03-eng.aspx#fnb10

> *"[T]he wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.*
>
> *True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."*

53. Judges play – at all levels – a vital role as teachers and thought leaders. It is their role to be impartial in words and action, at all times. If they falter, especially in gender related crimes, they imperil fairness and inflict great cruelty in the casual blindness to the despair of the survivors.

54. The appeal is disposed of in the above terms; there shall be no order on costs.

.....J
[A. M. KHANWILKAR]

.....J
[S. RAVINDRA BHAT]

New Delhi,
March 18, 2021.