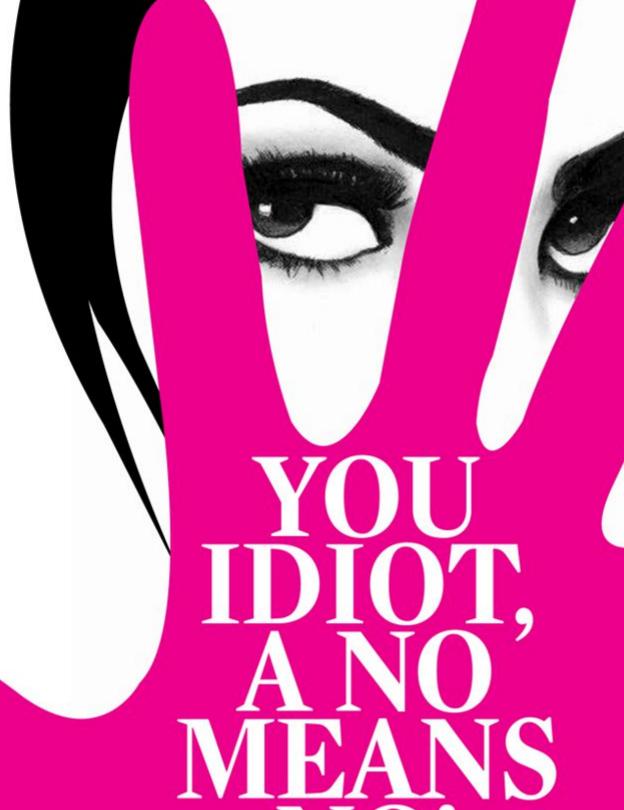
As if battling value judgements was not enough, activists, feminists and concerned citizens are deeply disturbed by recent court verdicts and orders on the interpretation of "consent" in rape cases. Some court rulings read more like a bigoted personal viewpoint without any reference to previous cases or precedence. One wonders how insensitive and out of tune the judicial system is with current social reality.





GOURI AGTEY ATHALE

ape is the only crime where the victim is blamed. Take the most recent example of the student who filed a complaint with the police about rape allied with other crimes like stalking and blackmail on campus in dent who filed the complaint and the three men who violated her personal space, were students of different disciplines at the Jindal University in Sonepat.

The initial verdict by the Additional District and Sessions Court upheld the victim's cry by sentencing two of the three young men to 20-year prison sentences while the third got seven years. The accused filed a plea in the Punjab and Haryana High Court asking to be released during the pendency of their appeal. All three walked out. The reasoning of the judges incredibly - was that the studies of the three men would be interrupted due to the incarceration while their appeal was pending!

Before we get to rape, there is another crime, euphemistically called "eve-teasing", that we should look at because this is where the problem starts. "Teasing" makes it seem a light-hearted leg pull, a kind of a joke between friends or even acquaintances so it is almost harmless. It is when we come to the first part of the phrase that hackles rise: Eve, after all, tempted Adam to taste the forbidden fruit. He, poor chap, willy-nilly gave in to her urging and tasted the forbidden fruit. The blame is all hers. It is this kind of thinking that probably prompted the court to be indulgent and allow the three accused to walk out during the pendency of their appeal.

In today's India the perception, voiced often enough in the highest quarters, is of this same Eve who tantalises, titillates and leads on guys with her clothes, her make-up, her lifestyle choices, her needs name it, and she's to blame - all the while overlooking the fact that it is the man who is the perpetrator of the crime. Sometimes the victim is chosen at random, sometimes she is in a subordinate position, as in the case of the magazine staffer whose editor tried to force her to submit to his demands in Goa.

The case that caught everyone's attention was the December 2012 rape in Delhi where the victim died from injuries caused by the gangrape (again it's the victim's name that is often used — one hardly remembers the names of her killers). This led to the setting up of a three-member committee, the Justice Verma committee, which submitted its report in December 2013. Among the many pertinent issues it raised, the report stated that the criminal laws governing

sexual attack must be interpreted from the per-spective of the

In light of that rec-

ommendation, look at

the Punjab and Harya-na High Court ruling: they not only ignored that recommendation but also several sections of the Indian Penal Code (IPC) regarding the primary question of law when statements are made about the victim's personal lifestyle choices (having a beer, smoking, staying out late with boys, drug taking, etc.), blackmail, which was inherent in the threat held over the victim's head that unless she complied they would send out nude pic-

tures of her.... The two-member bench of the High Court did note that there was attempted blackmail and it needed to be investigated. So much for the reason the victim submitted to the trauma of repeated rape and humiliation, all noted in her statements in court. Instead, the concern seems to have been that the accused should not be deprived of their education and be given an "opportunity to redeem themselves and be a part of society as normal beings" rather than with upholding relevant sections of the IPC (gangrape, criminal intimidation) or with the section of the Information Technology Act on the publishing of obscene information in electron-

Has any thought been spared for what it took for the victim in this case to register the case? What she must have dreaded when the accused threatened to send out nude pictures has now come to pass with this double trauma, of her personal choices being broadcast everywhere. The very issues that forced her to submit to the blackmailing by her assailants have now gone public. Sure, those pictures weren't sent but barring that everything else has.

The Justice Verma Committee report has some pointed remarks on how and why what happens does in fact happen. The report notes: 'The failure of good governance is the obvious root cause of the current unsafe environment eroding the rule of law and not for want of needed legislation. If there was a felt need for more laws, there are many recommendations of expert bodies and judicial decisions that remain unimplemented.

The order of the High Court makes no reference to any previous case or precedent. Most of the order reads like a personal viewpoint, which appears to be out of sync with the current social environment. This is not to make a case for rampant smoking, drinking, drug taking or casual sex. No, it is about the right to choose to say no and mean it. A no by a girl is not a

(The author is a Pune-based columnist and a senior freelance journalist)

FEEBLE OR STRONG, NO HAS JUST ONE MEANING

The recent Farooqui case has skewered the ground for women particularly sex workers ever hoping to get justice in rape cases with its shoddy interpretation of the law.

RAPE WITHOUT

OBVIOUS

PHYSICAL

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It is all about the right to

chose to say no and mean it

MEENA SARASWATHI SESHU & AARTHI PAI

an an adult sex worker, who has consented to providing a sexual service for an agreed sum of money, be raped? Can a sex worker who is in sex work of her own volition be raped? Does she have a chance to say "no" to a client... the police... or the antisocial elements, who believe in force as a way of life?

If the defining criterion of rape is "lack of consent", then yes, there is a real possibility that sex workers may face this kind of violence in their work space. What then can the sex worker do? Go to the police, who have always viewed sex workers as criminals, and thus persons who have relinquished the right to say "no"? The lived experience of sex workers from Veshya Anyay Mukti Parishad (VAMP) in Sangli district of Maharashtra shows that most women are reluctant to report rape, unless the violence involves grave physical injury. The physical injury is assessed in the police station by the constable on duty, who then takes the crucial decision to either send her to the civil hospital for a medical examination or simply reject her complaint.

Unfortunately, rape without obvious physical injury is not taken as a reason for registering a complaint. The police ask uncomfortable questions and demand that she prove that the man "forced" sex on her

without her consent. Her argument that she was violated sexually without her consent during the sexual act is neither taken seriously nor even recorded by the police. Her argument that the pre-agreed terms of the sexual act were violated is also not given any credence by the police. Such cases never reach the courts, as the police have already interpreted the law and given their verdict.

A value judgement has also been made: the sex worker, who is supposed to be the eternal victim of male lust, forfeits her right to be

has already given to provide sexual service makes her case questionable in the eyes of law enforcers. Is it possible to prove rape in such cases? Is it possible that a court will listen to a sex worker fight for her right to establish consent or its lack, especially when the consent is linked to money exchanged in advance for a sexual

The central question is: Does the sex worker have the ficult to decipher whether little or right to say "no" to a sexual partner after consenting to have sex? Will it be considered legally valid even if her "no" is resounding and emphatic enough to establish absence of consent? If recent court judgements are any indication, then the answer to these questions is an emphatic "no".

The September 13, 2017, bail order of the Punjab & Haryana High Court cites the victim's "experimentation in sexual encounters", attitude "promiscuous voyeuristic mind" as part of its legal reasoning for granting bail to the three men convicted in the Jindal Law School gangrape case. Sex workers could easily be accused of "promiscuous attitude and voyeuristic mind".

The recent judgement in the Mahmood Farooqui case states, "Instances of woman behaviour are not unknown that a feeble 'no' may mean a 'yes'. If the parties are strangers, the same theory may not be applied. If the parties are in some kind of prohibited relationship, then also it would be difficult to lay down a general principle that an emphatic 'no' would only communicate the intention of the other victimised by rape. The consent she party. If one of the parties to the act

is a conservative person and is not exposed to the various ways and systems of the world, reluctance mere would also amount to negation of any consent. But the same would not be the situation when parties are known to each other [...] and if, in the past, there have been physical contacts. In such cases, it

would be really difno resistance and a feeble 'no', was

actually a denial of consent. Every notion in this paragraph pushes women in sex work out of the ambit of the interpretation of consent. They are not technically "strangers" to their clients once they agree to provide the sexual service. Morally, they are in a "prohibited relationship" and so cannot plead that they are "conservative persons not exposed to the ways of the world". Further, the judicial reasoning in the Farooqui case. where the man is the initiator of sexual interaction, simply does not apply in the case of sex workers

who solicit for clients. Would this mean that their consent must never

REMEMBER THIS

DRUNK IS

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be considered? The past histories of sex workers are not to be discussed in any case of rape. But will society, police and the courts follow these guidelines in cases relating to sex workers, whose past sexual behaviour will be scrutinised? We already know that if there is no evidence of "grievous hurt", the police do not even record a first information report (FIR), or apply the Indian Penal Code sections relating to rape or gangrape.

If the Farooqui judgement is any indication, they will not stand a chance of due process of law. Two kisses exchanged on earlier occasions made both Mahmood Farooqui and the court believe that the consent of the prosecutrix could be assumed and that her repeated "no" was not emphatic enough. This dangerous assumption is the root cause of impunity for rapists and denial of recourse to women who are raped.

The Farooqui judgement takes us down another slippery slope regarding the conduct of a woman subjected to rape. It argues that a woman needs to communicate her fear to the rapist. Does that mean that if there is absence of fear or if the perpetrator does not take on board her fear, that ergo, she has not been raped? From the perspective of many women in sex work, who have learnt to survive rape ordeals by being submissive, this order is a death knell to their hopes of ever finding justice

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