

# JUDICIAL NARRATIVE AND RAPE MYTHS: THE FAROOQUI CASE

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*A criminal trial is constructed around various narratives put forward by the prosecution and by the defence, which then crystallize in the narrative established by the judgment. All these narratives rely on background narrative scripts and cultural assumptions that provide stock character roles and interpretations. This paper examines the High Court's and the Supreme Court's treatment of the high-profile Mahmood Farooqui rape case, as an illustration of how prevalent rape myths inform judicial discourse in rape cases and colour the judicial narrative reconstruction of events. Both appellate Courts operate in the discursive register typically used by the defence in rape trials, where the facts of the case are presented in a manner that portrays the complainant as active and the accused as passive, while also evoking tropes of male rationality and female irrationality in the performance of consent, communication, and desire. These grammatical and rhetorical techniques are employed with respect to the prior interaction between complainant and accused, and to the complainant's post facto conduct. Together, these elements operate to reproduce the mythical constructs of 'real' rape and of the 'bad' rape victim.*

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## INTRODUCTION

It is a Saturday evening in March 2015, and noted director and *dstan-goī* performer Mahmood Farooqui is at home in his South Delhi residence with his wife Anusha and a guest,<sup>1</sup> a visiting research scholar from Columbia University. The visitor is interested in acquiring tickets to Farooqui's next performance of the traditional oral story-telling art form. Farooqui has invited her over for dinner, and there has been some talk of her joining them to attend a wedding later that evening. There is some conversation and some alcohol. She has been out smoking a cigarette on the porch. There had already been some form of gathering earlier in the day, as when she reached at 9 p.m., she had met two other acquaintances who were just leaving, and a third friend, Ashish, was also present. He has now briefly stepped out of the house. Farooqui's collaborator Danish Hussaini has just been spoken to on the phone and has said that he will not be joining them.

Now multiple narratives emerge. Farooqui is drunk, or is not. Anusha is in the next room, and the visitor finds herself alone with Farooqui for a while, or only for a minute, or not at all. Something happens between her and Farooqui, or doesn't. The narratives come closer to each other after this central moment: Ashish returns with another friend; the visitor messages Hussaini; she tries to book a cab, fails, then succeeds. Over the next few days she exchanges emails with Farooqui and with Anusha, discussing what did or did not happen.

The story now becomes a legal one. A few months after the incident, the visitor files a police complaint stating that when she was alone with Farooqui, he forcibly pulled her underwear down and performed oral sex on her despite her repeatedly saying 'no' and trying to push him away. In the trial, Farooqui argued that no such incident had happened, and that indeed it could not have happened since the two could not have been alone together for more than a minute, if at all. In August 2016, the trial court finds Farooqui guilty of rape under Section 375 of the Indian Penal Code and sentences him to seven years in prison. Farooqui files an appeal in the Delhi High Court that ultimately leads to his acquittal in a decision pronounced in September, 2017. The Supreme Court brings legal closure to the matter in March, 2018 when it rejects the Special Leave Petition (SLP) filed to appeal the High Court's decision.

The case received widespread attention in the media at every stage. The point of law at issue was the extent to which there is a *mens rea* requirement for the offence of rape under Section 375; both the High Court and the

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<sup>1</sup> I will return to the question of naming later. However, the guest's identity is not a secret as she has herself revealed it publicly: U. Butalia, *Healing Myself: A Woman Recounts Her Struggles after a Court Acquitted the Man She Accused of Rape*, SCROLL.IN (April 26-2018), <https://scroll.in/article/876788/healing-myself-a-woman-recounts-her-struggles-after-a-court-acquitted-the-man-she-accused-of-rape>.

Supreme Court focused on the fact that Farooqui may not have known that the complainant had not consented to the sexual act, although this defence had not been raised in the trial court. Whether there is indeed a *mens rea* requirement under Section 375 as it stands after the 2013 amendments to the criminal law is not apparent; some believe that the requirement has been done away with,<sup>2</sup> although neither the High Court nor the Supreme Court seemed to even entertain this possibility.

My intention here is not to explore this doctrinal question or to propose a ‘correct’ interpretation of the legal provision, but rather to examine the High Court’s judgment and the Supreme Court’s oral observations as instances of legal discourse in which the judges reconstruct the facts of a case through a form of narrative-building. There has been a fair amount of recent scholarship on the centrality of narrative to law, and in particular to adjudication.<sup>3</sup> As observed by Peter Brooks,

“the law is in a very important sense all about competing stories, from those presented at the trial court – elicited from witnesses, rewoven into different plausibilities by prosecution and defense, submitted to the critical judgment of the jury – to their retelling at the appellate level – which must pay particular attention to the rules of storytelling, the conformity of narratives to norms of telling and listening...”<sup>4</sup>

In a criminal trial, while prosecution and defence are clearly putting forward competing narratives, the judicial recounting of the facts of the case is itself a story told in a ‘neutral’, omniscient voice. In the Farooqui case, both appellate courts reconstruct the circumstances of the sexual act in a manner

<sup>2</sup> M. SATISH, DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA 35 (2016). I am also indebted to Prof. Satish for his discussion of this issue in a talk given at Jindal Global Law School in March 2018, where he explained the High Court’s errors of legal reasoning in great detail. The question of mens rea and rape has of course been a complex one in other jurisdictions as well: see e.g. T. Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime*, 30(1) THE UNIVERSITY OF TORONTO L. J. 75-98 (1980); C.T. Byrnes, *Putting the Focus Where it Belongs: Mensrea, Consent, Force, and the Crime of Rape*, 10 YALE J.L. & FEMINISM 277 (1998); R. Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 FORDHAM L. REV. 263 (2002); K. Kinports, *Rape and Force: The Forgotten Mens Rea*, 4(2) BUFFALO CRIMINAL L. REV. 755-799 (2001).

<sup>3</sup> See e.g. P. Brooks, *Law’s Stories: Narrative and Rhetoric in the Law*, in A COMPANION TO NARRATIVE THEORY 415-426 (J. Phelan & P.J. Rabinowitz eds., 2005); P. BROOKS, *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (1996); A.B. Bricker, *Is Narrative Essential to the Law?: Precedent, Case Law and Judicial Emplotment*, LAW, CULTURE AND THE HUMANITIES 1-13 (2016); A.G. AMSTERDAM AND J. BRUNER, *MINDING THE LAW* 110-164 (2001); M. Fludernik, *A Narratology of the Law? Narratives in Legal Discourse*, 1 CRITICAL ANALYSIS OF LAW 1 (2014); *NARRATIVE AND METAPHOR IN THE LAW* (M. Hanne and R. Weisberg eds., 2018); J.C. Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 LEGAL COMMUNICATION AND RHETORIC: JALWD 67 (2013); G. Olson, *Narration and Narrative in Legal Discourse*, in THE LIVING HANDBOOK OF NARRATOLOGY (P. Hühn et al. eds.).

<sup>4</sup> P. BROOKS, *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW*, 416.

that not only accepts but reinforces the story put forward by the defence while discrediting the story proposed by the prosecution. While this in itself may be inevitable when the decision is made in favour of the defence, the linguistic and rhetorical mechanisms deployed are of particular interest because the manner in which the behaviour of the accused and that of the accuser is represented conforms to certain recognizable tropes.

Secondly, I wish to show that both the High Court and the Supreme Court rely on implicit background narrative scripts that are themselves based on patriarchal, cultural assumptions and traditional 'rape myths'. The judicial voice in some parts of the High Court's judgment and in the entirety of the Supreme Court's oral observations operates in the discursive register of typical defence arguments in rape trials, where agency, pleasure, and rationality are rhetorically and grammatically aligned to produce the image of a confused and unreliable accuser who desires sexual pleasure but denies it later. The rape myths evoked are widely known:<sup>5</sup> the idea that most rapes occur between strangers; that most rapes involve a violent struggle in which the woman is physically overpowered; that women secretly enjoy rape; that the male sexual urge is uncontrollable; that only those women get raped who 'invite' it through their dress, conduct etc.; that consent cannot be withdrawn or qualified; that most rape allegations are false. These myths manifest themselves in the cultural imagination of 'real' rape<sup>6</sup>: a real rape is one committed by a stranger, who uses physical force or threats, usually involving a weapon, and where the woman physically resists her assailant as much as she can before submitting in order to save her life. Rapes that don't fit this description are in some sense not *really* rape.

These cultural beliefs provide the discursive and narrative frameworks in which rape adjudication typically operates.<sup>7</sup> The superior courts'

<sup>5</sup> See generally M.R. Burt, *Cultural Myths and Supports for Rape*, 38(2) JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 217-230 (1980); K. Weis and S.S. Borges, *Victimology and Rape: The Case of the Legitimate Victim*, 8(2) ISSUES IN CRIMINOLOGY 71-115 (1973); K.M. Ryan, *The Relationship between Rape Myths and Sexual Scripts: The Social Construction of Rape*, 65(11-12) SEX ROLES 774-782 (2011); K.A. Lonsway and M.F. Fitzgerald, *Rape Myths: In Review*, 18 PSYCHOLOGY OF WOMEN QUARTERLY 133-164 (1994); M.W. Stewart, S.A. Dobbin and S.I. Gatowski, 'Real Rapes' and 'Real Victims': *The Shared Reliance on Common Cultural Definitions of Rape*, 4(2) FEMINIST LEGAL STUDIES 159-177 (1996); G. Bohner et al., *Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator*, in RAPE: CHALLENGING CONTEMPORARY THINKING 17-45 (M. Horvath and J. Brown eds. 2011).

<sup>6</sup> See generally Burt, *id.*; Stewart et al., *id.*; S. Estrich, *Rape*, 95(6) YALE L.J. 1087-1184 (1986); L.S. Williams, *The Classic Rape: When Do Victims Report?*, 31(4) SOCIAL PROBLEMS 459-467 (1984).

<sup>7</sup> See generally Estrich, *id.*; Stewart et al., *supra* note 5; Satish, *supra* note 2, 106-114; M. Torrey, *When Will We be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L.R. 1013-1071 (1991); A.E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM (1999); S. EHRLICH, REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT (2001); V. Das, *Sexual Violence, Discursive Formations and the State*, 31(35/37) ECON. & POL. WEEKLY 2411-2423 (1996); C. Rayburn, *To Catch A Sex Thief: The Burden of Performance*

pronouncements in the Farooqui case are fundamentally rooted in these very frameworks. I intend to focus here first on the text of the High Court's judgment<sup>8</sup> in order to highlight some elements that operate to present a particular narrative. I will then examine in some detail the available record of the Supreme Court's brief comments in the SLP hearing.

## I. IN THE HIGH COURT: THE FEEBLE 'NO'

### A. The judicial narration of events

A not-guilty verdict in a rape trial, where there is no question of mistaken identity, states that, in the eyes of the law, no rape took place; someone was not raped. An important narrative element is usually missing: *someone* was not raped. I wanted to begin by speaking not only of Farooqui but also of his accuser; however, the judgment names every character in the story except her. She is referred to as 'victim', 'witness', 'complainant', and mainly as 'the prosecutrix'. From the outset, we know her purely as embodying a legal category, her appearance to us mediated by the language of the law.

Legal categories work as abstractions, and hence, necessarily create a certain distance between the reader/listener and the story being told (or rather, further widens the already irreducible distance). Indeed, a certain amount of this abstraction is unavoidable in any legal setting because this is how law operates, bringing the particular into the general concept, reducing context to text. The question of whether or not the law should disclose the names of alleged victims of sexual violence involves a conflict between the right to privacy and the concern for protecting the victim on the one hand and, on the other, the claim that non-disclosure only perpetuates the stigma of rape and reinforces patriarchal discourses of shame and sexual honour.<sup>9</sup> While my sympathies lie with the latter argument, I do not wish to explore it here. I want to merely point out how the non-naming of the woman operates to create a strange absence at the heart of the narrative.<sup>10</sup> Pratiksha Baxi notes that "the

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*in Rape and Sexual Assault Trials*, 15(2) COLUMBIA J. OF GENDER & L. 436-483 (2006); G.M. MATOESIAN, LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH RAPE TRIAL (2001); A. Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585-1608 (2007); A. Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49(3) HASTINGS L.J. 663-716 (1998).

<sup>8</sup> I do not intend to discuss the trial judgment, nor to examine in detail the differences between the original narratives put forward by the prosecution and the defence: both the trial court and the High Court discuss the relevant testimonies, call records, etc., and both come to the conclusion that some apparent discrepancies in timings do not in themselves necessarily undermine the prosecution case. The trial court judgment is *State v. Mahmood Farooqui*, Unique Case ID No. 02406R0238772015, Additional Sessions Judge, Special Fast Track Courts, Saket, New Delhi, <https://indiankanoon.org/doc/121239495/>.

<sup>9</sup> See D.W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61(5) FORDHAM L. REV. 1113-1131, (1993); A. Orenstein, *Special Issues Raised by Rape Trial*, *supra* note 7, 1593-1594.

<sup>10</sup> As already mentioned, (*supra* note 1), she has made her identity public. However, I would like to base this essay on my reading of the judicial text; I will thus maintain her absence.

characterization of a rape survivor as a prosecutrix captures the experience of being positioned outside the trial.<sup>11</sup> A name gives identity, immediacy, presence. In the judgment's retelling of the story, indeed of the multiple stories given by multiple witnesses, the woman is both the central figure and the absent Other. Her not *being* there in these retellings further distances us from the immediacy of her experience. If the violence of a finding in a rape trial that there was, in fact, consent, lies in its denial of the meaning of a sexual encounter to the woman,<sup>12</sup> the judicial recounting of the facts without giving us her name reinforces this denial; nameless and absent, she cannot speak to us of her meaning. It can never be *her* story.

Let us take up the narratives that do appear. The bulk of the High Court's judgment consists of a recap of witness testimonies, and the arguments made by the prosecution and the defence. It starts with a detailed description of the facts of the case as alleged by the complainant. Briefly, she was in India for her doctoral research work and had been introduced to Farooqui through some academic connections. They had met a couple of times and once shared a kiss. On the evening in question, she had gone to Farooqui's house with the intention of going with him and a few others to a wedding. She met some other students and friends there. Farooqui was drunk and apparently very upset about something. At one point, she found herself alone with him – his wife was in the next room – and he kissed her, forcibly held her down, and performed oral sex on her against her will. She struggled before giving up out of fear, and feigned an orgasm in order to end the ordeal. Soon, they were joined by others and after a while she called a taxi and left. Counsel for the defence claimed that the two had never been left alone and hence the alleged incident could not have taken place. He also offered an alternate defence that had not been raised at the trial: even if the alleged sexual contact had taken place, it was with the woman's consent.

After a lengthy summary of the opposing arguments, the High Court begins its own appreciation of the case by emphasizing the existing relationship between accuser and accused.

73. From a conspectus of the entire of facts and circumstances and the arguments advanced on behalf of the parties, what is clearly indicated is that the prosecutrix had become very familiar with the appellant in recent past and had opportunity to interact with him on several occasions. The alcoholism of the appellant was not a secret for the prosecutrix.
74. The relationship extended beyond a normal friendship or a relationship between a guide and a researcher. According to her own version, physical contact with the appellant in the nature of a kiss or a hug was being

<sup>11</sup> P. BAXI, *PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA* 10 (2013).

<sup>12</sup> C. MACKINNON, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8(4) *SIGNS* 635-658, 651-652 (1983).

accepted by the prosecutrix without any protest. In fact, on one occasion, while the prosecutrix was in the company of the appellant and his wife and the wife of the appellant had been moving from one room to another, the prosecutrix and the appellant both had taken a bold step of kissing each other. True it is that such past conduct will definitely not amount to consent for what happened in the night of 28.03.2015, if at all it had happened, as for every sexual act, every time, consent is a must. The consent does not merely mean hesitation or reluctance or a “No” to any sexual advances but has to be an affirmative one in clear terms.

## **B. Consent, communication and the prior relationship**

There are several elements to highlight in these paragraphs. Firstly, the emphasis on the accused’s alcoholism is relevant: as we will see later, alcohol plays a particular role in the attribution of responsibility in rape cases. Secondly, while the High Court does not appear to be reproducing the ‘real rape’ standard in terms of distinguishing between strangers and acquaintances, the degree of relationship between the woman and Farooqui does seem to be a particularly important factor here. The fact that the ‘closeness’ of a relationship tends to invalidate a rape accusation is manifest most vividly in the impossibility of rape in the most intimate relationship of all, marriage – there is still an exception for marital rape in Section 375. This tendency is clear in judicial discourse even where there is no formal provision. Here, the distinction made is between a ‘normal friendship’ and/or professional relationship and the especially close relationship in this case in which there was prior physical contact (that had been *accepted by the prosecutrix without any protest*). I will show later that these same factors appear to play an even more determinative role in the Supreme Court’s refusal to admit an appeal against this judgment. Further, the High Court performs a peculiar rhetorical gesture in which this prior physical contact is simultaneously granted unique narrative significance and denied any analytical, ‘legal’ significance: “True it is that such past conduct will definitely not amount to consent...” The Court walks a tightrope between foregrounding the story of the past interactions that involves hugs and *bold* kisses, while insisting on the technical, legal interpretation that would not permit this past relationship to influence the judicial construction of the accused’s guilt or innocence. Despite being devoid of legal force, however, the prior relationship is clearly fundamental to the Court’s imagination of the events, and is discursively brought to prominence through the renewed emphasis given to it in the text. The adjective ‘bold’ colours the narrative and prefigures transgressive sexual activity.

The Court then reproduces Section 375 in its entirety, and highlights that as per Explanation 2, ‘consent’ involves a clear and unequivocal communication, by word or gesture, of willingness to participate in the particular sexual act. Once again, the judgment proceeds to reposition the legal provision within a

larger narrative of the relationship between accuser and accused in which the past physical contact is emphasized:

77. The WhatsApp communication between the prosecutrix and the appellant on 30.03.2015 signifies that what happened in the night of 28.03.2015 was not acceptable to her because it was something which she never wanted. The communication further reads that the appellant, on that night went too far. This obviously means that there were some earlier encounters which may not have been of such intensity or passion but physical contact in some measure was accepted. Under such circumstances, this Court is required to see as to what was communicated to the appellant. It is a matter of common knowledge that different persons have different inclinations for sexual activity and immediately preceding the act, there are different ways of people of responding to the advances, entreaties or request.

“78. 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 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, mere reluctance would also amount to negation of any consent. But same would not be the situation when parties are known to each other, are persons of letters and are intellectually/academically proficient, and if, in the past, there have been physical contacts. In such cases, it would be really difficult to decipher whether little or no resistance and a feeble “no”, was actually a denial of consent.

The full significance of the narrative of past physical contact begins to emerge here. Through a careful rhetorical manoeuvre, the woman’s prior conduct in ‘accepting’ some contact is brought to bear on the question of determining what she communicated to the accused. This move allows the Court to seemingly reverse the affirmative consent standard that appears to be incorporated in the legal provision and which the Court had itself stressed two paragraphs earlier, i.e. the idea that consent needs to be communicated clearly. Through the Court’s narrative, the prior close relationship now means that not consent, but *non-consent* needs to be communicated *clearly*. In the absence of such a clear communication, consent is presumed. The burden of preventing rape begins to shift onto the victim.

It is evident that numerous rape myths condition the Court’s reasoning here. Firstly, the idea that consent for some actions involves consent for others, and that consent on one occasion involves consent on others. The shared kiss in the past is thus relevant to the alleged forced oral sex. Secondly, the



relevance of the relationship between accuser and accused. Let us leave aside the assumption that ‘persons of letters’ are more familiar with the (sexual) ways of the world. This assumption operates here in conjunction with the recognition of past physical contacts (*sic*) and the assertion that consent is to be construed differently when the parties are not strangers to each other. The real vs. acquaintance rape discourse haunts the Court’s reasoning here: once again, while the Court does not straightforwardly reject the possibility of rape in cases where the accused and the complainant know each other, it determines a different standard of proof for non-consent to be applied in them.

Thirdly, the statement “a feeble ‘no’ may mean a ‘yes’ ” is of course nothing but a slightly qualified version of a stock rape excuse/justification. The idea that ‘no means yes’ reflects both the stereotype of the bashful and coy woman seduced by the man, and the rape myth that the victim ends up enjoying the act (we shall see this myth reappear elsewhere in the judgment). Further, the underlying patriarchal conception of sexual relationships is clear: the claim that ‘no means yes’ negates the very possibility of non-consent; female sexuality is automatically at the man’s disposal. The line between *sex* and *rape* begins to blur in the judicial imagination;<sup>13</sup> a louder and clearer resistance/refusal would have turned what was determined to be *sex* into *rape*; a feeble *no* means sex; a stronger, assertive *no* means rape. But strength and assertiveness are culturally presumed to be masculine characteristics; paradoxically, then, for the law to recognise the woman’s harm, she needs to act more like a man.<sup>14</sup> If she acts as a woman is supposed to act – *feebly* – then she has not been harmed at all, because what has taken place is not rape but sex; the *no* is not really a *no*.

Finally, the proposition that ‘*she said no but meant yes*’ also evokes the myth of the fabricated rape charge: if she meant *yes*, she did indeed consent, in which case the rape accusation is a lie or is at least an instance of *post facto* irrational behaviour.<sup>15</sup> As is typical for this sort of rape myth, the Court appears to rely on common knowledge of these “instances of woman behaviour” (*sic*); no source or authority is referred to. Judicial discourse thus, merges seamlessly with the mythical discourse of rape.

The Court itself asserts in a later passage<sup>16</sup> – while observing that consent is often non-verbal – that its interpretation of the events relies on socially constructed gender roles:

<sup>13</sup> I am relying here on Catherine Mackinnon’s influential argument regarding the difficulty, under conditions of male domination, in distinguishing rape from sex. Mackinnon, *ibid.*, 646-655.

<sup>14</sup> Estrich, *supra* note 6, 1105-1114; J. McGregor, *Why When She Says No She Doesn’t Mean Maybe and Doesn’t Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law*, 2 LEGAL THEORY 175-208, 5-6 (1996).

<sup>15</sup> See below for a further discussion of this point in the context of the Supreme Court’s observations.

<sup>16</sup> *Mahmood Farooqui v. State ( NCT of Delhi)*, 2017 SCC Online Del 6378 : (2017) 243 DLT 310, ¶ 85.

Consent cannot also be analyzed without taking into account the gender binary. There are differences between how men and women initiate and reciprocate sexual consent. The normal construct is that man is the initiator of sexual interaction. He performs the active part whereas a woman is, by and large, non-verbal.

There is thus no hesitation in admitting that the determination of the presence or absence of consent is being carried out on the basis of these gender stereotypes. The Court appears to accept them uncritically; there is of course, no discussion of their fundamentally patriarchal foundation. The fact that the active is here opposed not just to the passive but to the *non-verbal* is curious; if the non-verbal is connected to the irrational, there is perhaps a hint in this passage of the equation of the male with the rational. Further, the affirmation of the active male vs. passive female dichotomy becomes particularly interesting in the context of the problem of *agency* and the discursive construction of guilt and rationality, which I discuss in the next section.

### C. The grammar of non-agency

After a further exposition of the meaning of ‘consent’, the Court retells the facts of the case. Let us examine the narrative once again, with close attention to the Court’s grammatical and semantic choices:

81. The fact situation with which this Court is faced is like this: The prosecutrix has come to the house of the appellant on his invitation. Both the prosecutrix and the appellant have consumed liquor in varying measures. The appellant has been displaying drunken-cum-lachrymose behaviour from before the arrival of the prosecutrix. The prosecutrix, out of concern for the appellant, mixes a light drink of vodka for the appellant. ... The prosecutrix continues to chat with the appellant and at times has been asking personal questions regarding the cause of trouble of the appellant to which the appellant responded that it was his wife and mother. There are some exchanges between the parties regarding their being good persons in their individuals (sic) rights. The prosecutrix starts feeling motherly towards the appellant. Then the appellant communicates his desire to suck her. The prosecutrix says “No” and gives a push but ultimately goes along. In her mind, the prosecutrix remembers a clip from the case of Nirbhaya, a hapless girl who was brutally raped and killed, when the maefactor (sic) had declared that if she (Nirbhaya) did not resist, she might have lived.

The first part of the Court’s narration here emphasizes the accuser’s agency while diminishing that of the accused. The woman appears everywhere as the active agent: she came to the accused’s residence; she chatted with him; not only did she drink with him, she even mixes him a drink. Meanwhile, the accused is both more passive and less in control: he is merely present in his

own house; his behaviour is *drunken-cum-lachrymose*; he is upset about his wife and his mother. Indeed, the only agency he exercises is in drinking and in *communicating his desire* (note the contrast here with the woman's failure to sufficiently communicate her lack of desire).

This form of narration has been identified by Susan Ehrlich as being a typical defence strategy in rape trials.<sup>17</sup> Ehrlich shows how the defence often employs discursive formations – which she calls “the accused’s grammar of non-agency” – that attempt to diminish the accused’s role as an active participant in the circumstances of the case. This is often accomplished by the use of the passive voice and by seemingly ‘neutral’ descriptions of sexual activity. Ehrlich cites striking examples from rape trials where the accused use formulations such as “my shirt came off” and “there might have been some kissing”.<sup>18</sup>

In contrast with the accused’s grammar of non-agency, the defence tends to emphasize the agency of the female accusers; they must be portrayed as having actively courted sexual attention and/or having initiated some kind of activity suggestive of sexual interest in the accused. A consent-based defence quite naturally relies on constructing a narrative in which the accuser was the active agent, or at least an equal participant. Pre-figuring this active/passive dynamic emphasized in the sexual activity itself, agency is transferred from the accused to the accuser – or shared between the two – in the circumstances leading up to it. This becomes particularly relevant when the man and the woman knew each other and were engaged in some kind of social activity prior to the alleged rape.

The High Court’s narration of the facts of the case perfectly reproduce these discursive gestures. The grammar of agency and non-agency that Ehrlich identifies in trial proceedings reappears in the judgement itself. That the language used by lawyers and witnesses reappears and circulates in the judicial text is perhaps inevitable; further, the judicial reinterpretation of the facts is yet another linguistically constructed reality: the judgement produces its own narrative. What is striking in the above passage is the extent to which the story that emerges from the judicial re-imagining of the facts, uses the techniques of a defence strategy. The Court does not merely agree with the defence’s conclusions but reproduces its proposed normative framework and the underlying mythical conceptions of male and female sexual conduct.

There is one aspect of the accused’s conduct where he retains agency – he does appear to be actively drinking. Alcohol plays an interesting role in the allocation of responsibility in rape cases. Studies have shown that evidence that the male accused was drunk tends to diminish his perceived responsibility, whereas evidence that the female victim had been drinking tends to increase

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<sup>17</sup> Ehrlich, *supra* note 7, 36-61.

<sup>18</sup> *Id.*

the blame attached to her.<sup>19</sup> It is thus, a significant element in favour of the defence in rape cases. Here again the judicial narration matches a defence technique: the Court repeatedly emphasizes the presence of alcohol, noting that both the man and the woman had been drinking, that he was ‘displaying’ drunken behaviour, and that the woman made him a drink. (This will be focused on again by the Supreme Court.)

The High Court then returns to the (mis)communication of consent:

82. There is no communication regarding this fear in the mind of the prosecutrix to the appellant. The prosecutrix makes a mental move of feigning orgasm so as to end the ordeal. What the appellant has been communicated is, even though wrongly and mistakenly, that the prosecutrix is okay with it and has participated in the act. The appellant had no opportunity to know that there was an element of fear in the mind of the prosecutrix forcing her to go along.

The woman’s lack of communication is thus established as the reason for the sexual assault. This classic victim-blaming has already been prepared for in the construction of the accuser as an active agent prior to this moment: she was actively entering the house, chatting, drinking, mixing drinks – her apparent non-action (i.e. the non-communication) appears as either irrational or simply unbelievable. (The positive action of saying ‘no’ and pushing the accused away has already been reduced to insignificance.) The judicial narration thus represents the woman as being least reliable at the crucial moment. This is in contrast to the man, who has so far appeared as passive, drunk, in tears, but who at the crucial moment *communicates* his desire to perform the sexual act.

This evokes another pattern that Ehrlich has identified in rape adjudication, regarding the deficiency in communication between the man and the woman.<sup>20</sup> She argues that while in the past the emphasis was on the presence of active physical resistance by the victim in order to prove that she had been raped,<sup>21</sup> there is a later trend that does not expressly focus on physical resistance but rather insists on the requirement that the victim clearly communicate her lack of consent; this requirement operates through a discursive production of *miscommunication* or *mixed signals* ‘sent’ by the victim. In addition to its highlighting the contrast between her prior agency and the absence of (sufficient) active communication, the Court echoes this discursive technique through its

<sup>19</sup> D. Richardson and J.L. Campbell, *Alcohol and Rape: The Effect of Alcohol on Attributions of Blame for Rape*, 8(3) PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 468-476 (1982); C.M. Sims et al., *Rape Blame As a Function of Alcohol Presence and Resistance Type*, 32 ADDICTIVE BEHAVIOURS 2766-2775 (2007); A. Grubb and E. Turner, *Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming*, 17(5) AGGRESSION AND VIOLENT BEHAVIOUR 443-452 (2012).

<sup>20</sup> S. Ehrlich, *The Discursive Reconstruction of Sexual Consent*, 9(2) DISCOURSE & SOCIETY 149-171 (1998).

<sup>21</sup> This emphasis is still often encountered in Indian judgments, and even in medical textbooks. Satish, *supra* note 2, 48-50.

discussion of the feigned orgasm. The apparent orgasm is the ultimate ‘mixed signal’. It appears here as an important element in the acquittal. The High Court (and later the Supreme Court) adopts the following reasoning: if she feigned an orgasm, how was Farooqui to know that she wasn’t actually consenting to the sexual activity?<sup>22</sup> The rapist’s lack of knowledge is thus, an element of his power. This of course assumes a requirement of *mens rea*: if there was no such requirement, the fact that Farooqui might have *thought* she was consenting is quite irrelevant to his guilt.

As I have already indicated, however, I do not intend to explore the doctrinal question of whether or not there is a *mens rea* requirement in Section 375. I would like to evoke instead, how the use of the feigned orgasm by both courts again fits into typical patriarchal discourses of rape, this time into the *she enjoyed it* myth. Catherine Mackinnon points out “rapists typically believe the victim loved it”<sup>23</sup>, and how this belief follows from a male-oriented construct of sexuality. Studies involving convicted rapists do show that a sizeable number maintain that their victims ended up enjoying the experience of rape even when they had initially resisted<sup>24</sup>; indeed, as in this case, the perception of enjoyment is often used as proof of the presence of initial desire (and thus of consent) – she enjoyed it, therefore she must have wanted it.

The trope of the accused’s lack of agency returns later in the judgment in more unusual fashion. Reflecting on the fact that the accused suffered from bipolar disorder, the Court discusses the nature of the condition and then proceeds as follows:<sup>25</sup>

Though no specific plea has been taken about the bipolar disorder of the appellant but from the evidence available on record, there appears to be some hint that the appellant suffered from the same. The appellant has been stated to be, on the day of the incident, crying and crying so loud and bitterly that nasal mucus was dripping down till his moustache. This is how the prosecutrix has described the state of the appellant sometimes prior to the alleged incident. On the asking of

<sup>22</sup> Both Courts assume that orgasm is proof of consent, and that the feigned orgasm is relevant because it communicates this consent to the accused. The possibility of involuntary orgasm despite lack of consent does not seem to exist in the judicial imagination here. This of course plays into the ‘*she enjoyed it*’ myth. On involuntary orgasm and rape, see R.J. Levin and W. Van Berlo, *Sexual Arousal and Orgasm in Subjects Who Experience Forced or Non-Consensual Sexual Stimulation – A Review*, 11 J. of Clinical Forensic Medicine 82-88 (2004).

<sup>23</sup> Mackinnon, *supra* note 12, 653.

<sup>24</sup> J. Scully and J. Marolla, *Convicted Rapists’ Vocabulary of Motive: Excuses and Justifications*, 31(5) SOCIAL PROBLEMS 530, esp. 535-536 (1984). See also R. Wegner, et al., *Sexual Assault Perpetrators’ Justifications for Their Actions: Relationships to Rape Supportive Attitudes, Incident Characteristics, and Future Perpetration*, 21(8) VIOLENCE AGAINST WOMEN, 1018-1037 (2016).

<sup>25</sup> *Mahmood Farooqui v. State (NCT of Delhi)*, 2017 SCC OnLine Del 6378 : (2017) 243 DLT 310, ¶ 101.

the prosecutrix about the reason for his sadness, the appellant is said to have told her that it concerns his wife and mother. Though the mental makeup/condition of the appellant may not be a ground to justify any act which is prohibited under law, but the same can be taken into consideration while deciding as to whether the appellant had the correct cognitive perception to understand the exact import of any communication by the other person. Since no evidence has been led on this aspect, any foray into this field would only be fraught with speculative imagination, which this Court does not intend to undertake.

The Court here explores an issue of mental health but does not engage with the larger framework of criminal responsibility and the positioning of insanity within legal discourse. Section 84 of the Indian Penal Code provides the ‘unsoundness of mind’ excuse for all offences under the Code, and has been interpreted in a large body of case-law. The deliberate refusal to enter this juridical framework and engage in a traditional doctrinal analysis here – the statutory provision is not even mentioned – coupled with the recognition that the issue of the defendant’s mental condition was not raised/argued/evidenced in any way and hence could not be considered a relevant *legal* issue, means that the Court is operating entirely within the realm of story. The Court fully recognises the ‘speculative imagination’ involved in this passage, but the mere fact that it occurs in the text at all disproves the Court’s claim that it “does not intend to undertake” such a speculation. Its discursive effect is to introduce yet another narrative element that acts as an alternate defence, or – since it is not even proposed as a *legal* defence – a *moral* defence or excuse. The defendant’s agency is denied even further through the excursion into his mental health.

With this passage, the High Court’s narrative reconstruction is complete. We now have a picture of the defendant as a snivelling, crying infant, upset about his mother, whose cognitive faculties could not possibly extend to knowing that the affection and human touch it seeks – albeit of a sexual nature – was in any way a *harm*, a violence. Farooqui is portrayed as mentally incompetent in several respects: he is drunk (not just on that evening but habitually), he suffers from a mental illness, he is overwhelmed with emotion. His agency has been almost completely denied. I will not explore this further here, but it is worth noting that the maternal role given to the accuser has already been inscribed in the narrative when we learn that she was feeling maternal towards him, and that after the assault Farooqui’s friend had asked her to stay back in the house so that she could feed Farooqui in case his wife did not return. At the same time, we have seen how the text has constructed her as the active agent, boldly kissing, asking personal questions, drinking, showing sexual pleasure. The High Court’s brief description thus somehow combines the grammar of sexual agency with a reliance on the cultural gender role of the woman as care-giver; she is at once mother and whore.

## II. IN THE SUPREME COURT: “I DO LOVE YOU”

### A. Non-written judicial pronouncements

The Supreme Court rejected the Special Leave Petition filed to appeal the High Court judgment.<sup>26</sup> The Court did not give a ‘speaking order’ and there is no official record of the oral hearing. However, as journalists were allowed in the courtroom, there are multiple news reports in which the discussion between the judges on the bench and the petitioner’s lawyer is reproduced, at least in part.<sup>27</sup>

This context of not-recorded-but-still-public arguments provides an unusual framework for judicial utterances. What the judges say is not *written*, it cannot be cited or quoted in a legal document. At the same time, they are still speaking as *judges*, in the setting of a courtroom, and their statements represent the reasoning for the final pronouncement – the order - which is written and which has ‘real’ institutional and normative significance.<sup>28</sup> The courtroom operates as the site of legal knowledge production and its discourse informs that knowledge. Given this context, the pronouncements made by judges on the bench, which then circulate in the public sphere are not without significance.<sup>29</sup> At the same time, while there is enough coherent reported material for us to get a clear idea of what the judges said, there are slight discrepancies in the different versions reproduced in different sources. The absence of a written text means that the judicial language offers itself to us in multiple translations. I have chosen to rely on the account that appeared richer in detail.

Here are some comments made by the Court. These form almost the entirety of what has been reported:

<sup>26</sup> *X v. Mahmood Farooqui*, 2018 SCC OnLine SC 3353, [www.sci.gov.in/supreme-court/2017/42460/42460\\_2017\\_Order\\_19-Jan-2018.pdf](http://www.sci.gov.in/supreme-court/2017/42460/42460_2017_Order_19-Jan-2018.pdf).

<sup>27</sup> See e.g. *SC Rejects Victim’s Plea Against Acquittal of “Peepli Live” Director Mahmood Farooqui in Rape Case*, LIVE LAW, (Jan. 19, 2018), [www.livelaw.in/sc-rejects-victims-plea-acquittal-peepli-live-director-mahmood-farooqui-rape-case/](http://www.livelaw.in/sc-rejects-victims-plea-acquittal-peepli-live-director-mahmood-farooqui-rape-case/); *She Later Said I Love You”: Top Court Confirms “Peepli Live” Maker’s Acquittal*, NDTV, (Jan. 19, 2018), [www.ndtv.com/india-news/court-rejects-challenge-to-peepli-live-maker-mahmood-farooqui-acquittal-in-sex-assault-case-1802078](http://www.ndtv.com/india-news/court-rejects-challenge-to-peepli-live-maker-mahmood-farooqui-acquittal-in-sex-assault-case-1802078); *Initially She Said ‘Yes’: SC Upholds Mahmood Farooqui’s Acquittal in Rape Case*, HINDUSTAN TIMES, (Jan. 19, 2018), [www.hindustantimes.com/india-news/initially-she-said-yes-sc-upholds-mahmood-farooqui-s-acquittal-in-rape-case/story-BstYZzB3S1xlh97ao4fx7L.html](http://www.hindustantimes.com/india-news/initially-she-said-yes-sc-upholds-mahmood-farooqui-s-acquittal-in-rape-case/story-BstYZzB3S1xlh97ao4fx7L.html).

<sup>28</sup> But no doctrinal significance. The consequence of such an order is in principle limited to the case at hand; the absence of recorded reasons is meant to not prejudice any issue of law that arose in the case but, which the judges did not deem necessary to examine in this particular context.

<sup>29</sup> Perhaps they may be considered a form of obiter dicta and thought of in the same manner as one thinks of “informal” remarks made in the body of a judgment; as one commentator has observed, “Like gossip, these remarks take on a life of their own. Trying to silence dicta is like trying to unring a bell”; F.C. Johnson, *Judicial Magic: The Use of Dicta as Equitable Remedy*, 46 UNIVERSITY OF SAN FRANCISCO L. REV. 883-951, 898 (2012).

“Let us take it in the correct perspective. The present petitioner and the accused were no strangers to each other. They had a close relationship”.

“We are not using the term ‘relationship’ colloquially. We mean that they met willingly, made and had drinks together gladly. But we are not judging or saying that any such act amounts to waiver of the right to be protected against rape.”

“You are an experienced lawyer. How many instances of rape have you come across where the victim says ‘I love you’ to the assailant after the incident?”

“Please tell us how many times did the present petitioner meet with the respondent alone prior to the incident? Not that we are implying that being friends with the respondent or meeting with him alone means that the petitioner has given up the right to be protected against rape.”

“There is a positive response from her end which she says was fake. How was the respondent to know that the response is false?... She may have been afraid, but what she did was opposite of being afraid. She responded to the allegedly forced sexual act in a positive manner.”

“This kind of behaviour is not acceptable between persons who are just friends.”

## **B. Narrative scripts and the logic of sexual rationality**

These short comments give us a lot to analyse in terms of rape myths, victim-blaming, and linguistic formulations that prepare the ground for an acquittal. Let me begin with the latter point. The Supreme Court here repeats some of the rhetorical techniques used by the High Court to describe the prior interactions between complainant and accused. It notes that the two parties met *willingly*, that they shared drinks *gladly*. The adverbs here are of course, operating in the register of a consent-based defence to an accusation of rape. Rape is an act against the victim’s *will*. Further, the feigned orgasm and the trope of miscommunication – and the underlying *she enjoyed it* narrative – is again brought into focus; we have seen the significance of these in the High Court’s verdict and I will not repeat that analysis here.

Note that even before the issue of the feigned orgasm is discussed, the word ‘*gladly*’ already inscribes the *pleasure* that the woman obtained from Farooqui’s company into the Court’s language. Nor was this an innocent glad enjoyment, it was a pleasure in the making and sharing of alcoholic drinks. Finally, the Court sees fit to mention that that the woman had met Farooqui alone prior to the incident; this itself occurs in the form of an accusatory cross-examination: “Please tell us how many times...”



Emerging clearly from these utterances is the trope of the ‘easy’ and immoral woman, enjoying alcohol alone with a man; the archetypal ‘bad’ rape victim.<sup>30</sup> Just as we have seen with the High Court, this is presented to us through language that emphasizes the woman’s agency and diminishes that of the accused. Further, this agency is again evoked in the particular context of shared social interactions. The comment on the *making* of drinks together re-emphasizes the sharing of a pleasurable activity that is here also a *productive* one with a touch of intimacy: more than merely *sharing* drinks, here the man and the woman are actively doing/making something together, in an intimate space, thus symbolically pre-figuring sexual activity. Highlighting the fact that the woman participated in making the drinks – as opposed to merely accepting a drink the man had made – also emphasises that she was an active agent in the situation, not a passive victim. Note how the formulation “Please tell us how many times did the present petitioner meet with the respondent alone” also employs a grammar in which the woman is the active agent. The image of the petitioner “meeting with” the respondent again emphasizes her willing participation in a shared activity. These linguistic elements operate synergistically to construct a powerful narrative through which the Supreme Court reaffirms the High Court’s interpretation and reproduces the logic of the traditional, mythical defences to an allegation of rape: *she asked for it, she wanted it, she enjoyed it.*

The coherence of the narrative is not affected by the brevity of the Court’s observations, because the presentation of events here relies on an underlying script that ‘fills in’ the missing information in accordance with a stock story.<sup>31</sup> “When we encounter a story or a telling of events we frame that telling within a scripted narrative arc, one that establishes a certain set of relationships between the events.”<sup>32</sup> The narrative script itself is culturally determined and involves a host of implicit or explicit assumptions, expectations, and interpretations; the ‘facts of the case’ do not exist prior to the operation of the script but are constructed in accordance with it. The script here is informed by the patriarchal imagination in which a woman kissing a man, meeting him alone, in the presence of alcohol, in the absence of others (including his wife!), *wants it.*

As already noted, the involvement of alcohol and other intoxicating substances typically plays a role in the attribution of responsibility in cases of sexual assault. Given the scenario in which the accused is male and the victim is female, while evidence of alcohol use by the man tends to diminish the

<sup>30</sup> The character of the rape victim has of course always been on trial; the “legitimate” victim is more likely to have been “really” raped: Das, *supra* note 7, 2417-2418; Orenstein, *supra* note 7, 679-682; Weis & Borges, *supra* note 5; Stewart et al., *supra* note 5.

<sup>31</sup> On how narrative scripts or “stock stories operate to lend plausibility and coherence in legal narrative-building, see Rideout, *supra* note 3, 72-74; Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 *LEGAL WRITING* 53, esp. 66-69 (2008); Amsterdam & Bruner, *supra* note 3, 45-48, 121-122; R.K. Sherwin, *The Narrative Construction of Legal Reality*, 18 *VERMONT L. REV.* 681, 700-703 (1994).

<sup>32</sup> Rideout, *supra* note 3, 73.

blame apportioned to him, evidence that the woman was drinking increases her responsibility in the alleged offense.<sup>33</sup> The Supreme Court's mention of the alcohol thus, follows the High Court in conforming to this victim-blaming narrative script.

This script itself involves an implicit appeal to what Gregory Matoesian has described as “the patriarchal logic of sexual rationality”,<sup>34</sup> under which female conduct is interpreted according to male norms of sexual desire: a shared drink, a kiss, an intimate conversation may thus be construed as necessarily displaying an interest in sexual activity, because this is what such conduct is conventionally presumed to mean from the male point of view. More, this involves the construction of such a point of view as the only *rational* approach to social and sexual relationships; it is contrasted with “the female logic of sexual irrationality”.<sup>35</sup> Finally, the entire transaction (!) is bound by the logic of contract: once this sexual interest has been expressed, it is hardly fair for the woman to then ‘cry rape’ (especially given the myth of the uncontrollable male sexual urge). The bad rape victim is bad not only because she is somehow ‘immoral’, but because she is not really a victim at all: the allegation of rape itself is fundamentally dishonest, once she had behaved in a manner that would most naturally be interpreted by men to be an expression of sexual interest.

In the space of a few sentences, the Supreme Court successfully deploys this patriarchal logic to construct the sexual-rational female who then, *post facto*, switches to feminine irrationality in making a rape accusation. In this case, the *post facto* irrationality is further complicated by one of the emails she sent to Farooqui in which she writes “I do love you” – itself an irrational statement and made more so, when it is made in the context of the rape accusation. Paradoxically, this irrational statement is then used against the accuser in a straightforwardly rational argument when the Supreme Court asks the petitioner's lawyer: “You are an experienced lawyer. How many instances of rape have you come across where the victim says ‘I love you’ to the assailant after the incident?” The logic of rationality here works not to somehow explain or relativize the statement but to separate it from its context and use it to infer that the rape accusation itself is irrational. The ultimate irrationality of the declaration of love is here repositioned within the law's patriarchal rational discourse. Putting the declaration back into the context of the actual email sent by complainant to accuser, a more nuanced picture emerges. Here are some passages from it:<sup>36</sup>

“You know that I consider you a good friend and I respect you, but what happened the other night wasn't right. I know

<sup>33</sup> *Supra* note 17.

<sup>34</sup> Matoesian, *supra* note 7, esp. 39-41.

<sup>35</sup> *Id.*, esp. 41-46.

<sup>36</sup> The entire e-mail is quoted in para 16 of the High Court judgment. *Mahmood Farooqui v. State (NCT of Delhi)*, 2017 SCC OnLine Del 6378 : (2017) 243 DLT 310, ¶ 16.

you were in a very difficult space and you are having some issues right now, but Saturday you really went too far. You kept asking me if you could suck me and I knew you were drunk and sad and things were going awful. I knew that this wasn't going to help things and I told you many times I didn't want to. But you did become forceful. I went along, because I did not want things to escalate, but it was not what I wanted. I was just afraid that something bad would happen if I didn't. ... In the end I consented, but it was because of pressure and your own force physically on me. I did not want things to go bad. ... I do love you and wish you well. I want the best for you, whatever that is, but I also need you to know doing what you did the other night is unacceptable."

While ignoring the repeated assertion by the complainant that she did not consent (or only 'consented' because of the accused's physical force) and completely decontextualising the "I do love you", the Supreme Court takes up another typical defence strategy: the selective focus on certain aspects of the accuser's conduct not just before but *after* the alleged rape.

### C. The accuser's *post facto* conduct

Someone was *not raped*. The negation in this statement applies not just to the action of raping, but to the very condition of having been raped. To say that someone was *not raped* is to assert an entire state of being, the opposite of a state in which one has, indeed, been raped. More than in other criminal law contexts, the discourse surrounding a rape trial often revolves around the construction of these states of being for the complainant. As Susan Estrich puts it, "the issue for determination shifts from whether the man is a rapist to whether the woman was raped."<sup>37</sup> This is why the complainant's conduct after the alleged rape is directly or indirectly given such importance. If the conduct of the complainant is that of a person who has not been raped, the logical inference is that the rape did not take place. Thus, the demonstration of the person being *not raped* in itself provides one with the necessary defence against the rape accusation. The conduct is of course interpreted using typical rape narratives. In this case, while the High Court accepted that the victim's testimony itself without any corroboration could lead to a conviction, and also specifically declared that it was not concerned with the victim's later conduct<sup>38</sup>, it stressed that the testimony needed to be believable.<sup>39</sup> Here again it is the witness that is on trial, and here again the standard of believability is determined

<sup>37</sup> S. Estrich, *supra* note 6, 1100.

<sup>38</sup> *Mahmood Farooqui v. State (NCT of Delhi)*, 2017 SCC OnLine Del 6378 : (2017) 243 DLT 310, ¶¶ 89-91. The High Court appears to carry out a fairly sensitive analysis of the victim's conduct as possibly reflecting rape trauma syndrome.

<sup>39</sup> *Mahmood Farooqui v. State (NCT of Delhi)*, 2017 SCC OnLine Del 6378 : (2017) 243 DLT 310, ¶ 96.

by patriarchal norms. The patriarchal logic of rationality then operates to evaluate how credible the woman's complaint is; the greater the discord between what is deemed to be the rational, 'normal' conduct for a rape victim and the complainant's actual conduct, the less believable the accusation of rape.

The Supreme Court's remark about the "I do love you" in the email may also be understood in this perspective. The phrase "I love you" is not culturally associated with non-romantic relationships outside the family; it is certainly not expected in an adversarial context. Here the oppositional logic of the legal system is projected retrospectively on an exchange that occurred before the complainant had engaged with it. "I do love you" is an incomprehensible statement in an adversarial context involving a complaint – unless the complaint is a lie. The multivalent, conflicted nature of the relationship between the complainant and the accused (as clear from the entirety of the email) is not unusual in acquaintance or family rape accusations; the cold adversarial logic of the criminal justice system is inherently hostile to this multivalence.

The real vs. unreal rape dichotomy represents this tension. That the Supreme Court is operating within the normative framework of the stranger rape myth is reflected in its assertion that the woman and Farooqui "had a close relationship" and that "they were no strangers to each other." The implication is clear – how could there have been rape when the man and the woman knew each other well and had even kissed, and indeed were close enough for the woman to declare her love for him even after the alleged incident?

The Court also presents us with another example of judicial rhetorical technique in the qualifications added to its comments. Just as the High Court had immediately stepped back from its 'bipolar' narrative by asserting its lack of *legal* foundation, the Supreme Court retreats from its construction of the bad rape victim, denying the implications of its own utterances: "But we are not judging or saying that any such act amounts to waiver of the right to be protected against rape"; and again: "Not that we are implying that being friends with the respondent or meeting with him alone means that the petitioner has given up the right to be protected against rape." The formulation here is curious. 'Waiver' is a technical legal term, but there is no legal concept of a "waiver of the right to be protected against rape". The very fact that the Supreme Court mentions it seems to assert the possibility of such a waiver, while holding that it does not arise in this case— *this* woman is still worthy of the law's protection, despite her willing and glad enjoyment of the accused's company and his liquor, but perhaps in some situations a woman's behaviour would indeed constitute a waiver, depriving her of this protection. Its mention in a judicial proceeding by judges of the Supreme Court constitutes the legal object, a "waiver of the right to be protected against rape". And this waiver is discursively associated with the complainant's prior conduct.

## CONCLUSION

The Supreme Court's oral rejection of the SLP is a remarkable text because of the perfectly concise and concentrated manner in which it reproduces the patriarchal narrative scripts and rape myths already relied upon by the High Court. Almost every single word the Supreme Court utters echoes a rape myth: rape is usually committed by strangers; certain kinds of conduct invites rape; women typically enjoy rape; women tend to make false accusations of rape after consensual sexual activity. Almost every single word the Court utters correspond to a typical argument or trope used by the defence in rape trials, which are themselves constructed on these myths. Let us list them out again: prior close relationship between the accused and victim; the victim's prior sexual interest as interpreted by male sexual rationality in the willingly and gladly shared social activities; the emphasis on the victim's agency and the accused's non-agency; the importance of the (feigned) orgasm; the presence of alcohol and its tendency to increase the victim's responsibility; the apparent *post facto* irrationality in the victim's conduct as evidenced by the "I do love you." One would be hard pressed to find a more precise evocation of the logic of typical defensive strategies against an accusation of rape.

I do not think the relevance of these comments should be denied due to their informal status. Within the juridical sphere, the Supreme Court's utterances have particular significance due to its position as the 'apex court', the ultimate authority in the legal world and its most politically visible representative. What the Supreme Court *says* gains unique currency within juridical discourse and also forms the elements of this discourse that reach the furthest into public consciousness. The Court's comments in the oral hearing, reported in popular newspapers, reinforce traditional rape myths, and maintain their circulation in the public sphere. Through its grammatical formulations and rhetorical techniques, the High Court has already inscribed these narratives within a formal legal text.

This wider discursive consequence is, of course, accompanied by the more 'concrete' legal consequence of the appeal being denied and there being no further legal recourse for the complainant. Meanwhile, the judicial imagination has reconstituted her in the persona of the bad rape victim. Her narrative has been retold and reconstructed in culturally accessible form, and her experience inscribed in a pre-existing mythical framework where it is both abstracted and falsified. At the same time, almost in spite of themselves, the judicial accounts do fulfil a historiographic function through this very process of inscription; by bringing them to the law's notice, the woman has created a record of the evening's events. Close attention to the legal translation of her story might allow us, in whatever tertiary and fragmented fashion, to see it in a different light.