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Recent Changes in Medical Examination of Sexual Violence Cases

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Abstract

Since several decades there are efforts to have positive reforms to curb the menace of sexual violence. It gained momentum post Nirbhaya case. Though there were several amendments to the Indian Penal Code, Criminal Procedure Code and Indian Evidence Act in the past, the changes brought out by the Criminal Law Amendment Act, 2013 and the Protection of Children from Sexual Offences Act, 2012 are very significant and impact the medical examination of sexual violence cases.

It took several decades of struggle to shift the focus of medical examination of sexual violence cases from the evidence collection model to the model of that to provide comprehensive care and treatment. Today we have moved far from the traditional approach of insisting on police requisition to conduct a medical examination for sexual violence cases to recognize the right of such survivors of sexual violence to approach the hospitals voluntarily (without police requisition). This major shift in recognizing that they need immediate treatment and collection of evidence if delayed, it will get lost; has made in recognizing medical examination of sexual violence cases as a Medico-legal emergency. The other change is in the 'medical opinion', with today's amended definitions of Rape and Sexual Assault, there is no necessity of having always positive medical evidence to prove such charges. One more positive development in this direction is that any hospital irrespective of whether it's a government hospital or public hospital or private hospital should carry out this examination and cannot refuse, if they refuse to treat these cases then it's a punishable offence.

Key words: *Medical examination, Sexual Violence, Doctor, Hospital*

Introduction

The recent legal changes post Nirbhaya incident has posed many questions in the minds of health care providers while dealing with the Victims / Survivors of Sexual Violence. Let's look into those queries with possible solutions one by one.

Can you examine without a police requisition?

Yes. The Supreme Court had observed in State of Karnataka V Manjanna¹ (in the year 2000) that the medical examination of Sexual violence victim should be done immediately and no hospital/doctor should delay examination for want of police requisition. Now Section 27 POCSO Act²

(Protection of Children from Sexual offences Act) (in the year 2012) and Rule 5 of POCSO Rules specify not to insist for police requisition or Magistrate order before conducting medical examination. Section 357 C CrPC³ (Criminal Procedure Code) (in the year 2013) also states that the hospital first conduct the examination. All these legal changes thus ensures the right of sexual violence victim to voluntary report to the hospital instead of to the Police/ Court after sexual violence and also that the medical examination of Sexual violence victim is a Medico-legal emergency.

Is it mandatory to inform police?

Yes. Section 19 POCSO Act² and Section 357 C CrPC both instruct the doctor/ hospital to mandatorily inform the police when they are examining a case of Sexual Violence.

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Section 21 POCSO Act² and Section 166 B IPC³ (Indian Penal Code) prescribe punishment for not following the directions of Section 19 POCSO Act and Section 357 C CrPC.

Are there any problems in Mandatory reporting?

Yes. On one end we have Section 164A CrPC (specific law for medical examination of the victim of rape)³ which insists that no part of examination is lawful without the consent of woman. But today if a woman claims she needs time to make up her mind to inform police or to initiate police investigation and asks the doctor to refrain from informing police- the doctor is in a dilemma, whether to follow the mandatory law or the ethical requirement / legal requirement of Informed consent. Section 357 C CrPC and Rule 5 POCSO Rules specify that treatment is a must and no hospital/doctor to deny this. But unfortunately the ‘right to treatment’ and ‘mandatory reporting’ even when the woman has not agreed/ consented for the same are enshrined in the same section of the law. It took several decades of struggle to recognize legally the right to treatment of the Victim / Survivor of sexual violence. But with these mandatory reporting laws women seeking treatment and care are going to be jeopardized.

The MTP Act 1971 (Medical Termination of Pregnancy Act) recognizes the right of the woman to MTP when her pregnancy is as a result of Sexual violence. It also guarantees privacy and confidentiality of her information. But with the mandatory reporting laws of sexual violence now all these rights of the woman are being denied/affected because now such pregnancies as a result of sexual violence have to be mandatorily reported to police (even if the lady does not want that).

Is it mandatory to go to Government hospital for Sexual Violence examination?

No, Section 357 C CrPC now mandates all hospitals irrespective of being Government,

public sector or private sector the responsibility of immediately providing first aid or medical treatment free of cost; thus removing the major barrier which existed earlier of insisting Government hospitals only.

Is it necessary for a female doctor only to examine sexual Violence victims?

Over the past decades, several High Courts liberally interpreted section 53 (2) CrPC³ and proposed that when we are insisting a female doctor to examine a female accused why can’t we extend the same privilege when the female is a victim– and thus insisted sexual violence victims to be only examined by female doctors wherever available. But this change had its own problems. With only few female doctors working that too in rural hospitals, several sexual violence victims had to wait for their turn to get examined by the female doctors who were often busy with their duties to provide obstetric / maternity services. This delay in examination led to loss of crucial medical evidence. The 2005 Criminal law amendment in section 164 A CrPC put an end to this insistence of female doctor, by stating any doctor with whom the female victim consented can carry out this examination. But the problem again resurfaced with the present section 27 POCSO Act insisting a female doctor only to examine a girl child (less than 18 years)².

Is it necessary for presence of injuries in all sexual violence cases?

No the research evidence speaks contrary. The WHO evidence states that in only 33% of cases⁴ of sexual violence there are injuries; that means out of 3 cases of sexual violence you do not find injuries in 2 cases. This absence of injuries could be due to various reasons⁵ – the victim being unconscious either due to trauma or being drugged / intoxicated, overpowered, silenced with fear. Even use of lubricant in sexual violence decreases the injuries. Now the explanation 2 to section 375 IPC states that if someone does not resist the sexual violence that alone cannot be construed as offering

consent to the act³. Thus now the law also does not insist the woman for offering resistance (thus presence of resistance injuries).

Is treatment part of Doctor's role?

There is a major shift from the past model of mere evidence collection in such cases to the present model of insisting on treatment by doctors. Rule 5 of POCSO Rules specify that treatment should include care for Injuries, STD, HIV, Pregnancy testing, Emergency contraception, psychological counselling. Section 357 C CrPC insists that such treatment should be free of cost and noncompliance of such treatment can drag the doctor to one year imprisonment and/or fine. Ideally speaking every doctor / hospital should provide comprehensive care which also includes rehabilitation and follow up care.

Are past sexual practices still documented in Sexual violence examination?

Unfortunately yes. Though the section 146 IEA (Indian Evidence Act)³ prohibits the debate on previous sexual experience/ past sexual practices in the witness box. But such insensitive things are being documented in medical practices / protocols in the form of documenting two finger test, old hymenal injuries, past abortions, past contraceptive practices. Such documentation should stop immediately (except rarely only in cases of chronic sexual abuse and if consensual sexual intercourse is within one week of the medical examination may require such documentation).

Is it necessary to do age estimation?

The opinion is divided, when medically you can't accurately opine the real age and can only possibly give a age range, why are the investigating authorities insisting on medical age estimation from doctors, even when they have clear documentary proof of age. But section 164 A CrPC and section 15 (5A) of ITPA (Immoral Traffic Prevention Act 1956) insist on medical age estimation from doctors. Recently the Supreme Court is of

the opinion in Ashwani Kumar Saxena V State of M.P that- 'only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the Committee need to go for medical report for age determination', thus again opening up the debate should there be medical age estimation when clear documentary proof of age exists⁶.

Is it relevant to document when was the examination done?

Yes it is very important because delay in examination and post assault activities affect the outcome of medical examination. Mere non detection in medical examination does not mean that sexual violence / crime did not occur. Each hour delay in the medical examination affects the medical evidence being detected. Many mucosal injuries heal within hours. Post assault activities in the form of urination, defecation, washing, bathing, douching affect the medical evidence that is going to be detected. Thus this examination should be treated as Medico-legal emergency and priority be given by doctors / hospitals.

Is it difficult / not possible to issue Provisional Opinion?

The doctor can provide provisional opinion about presence of Spermatozoa if any, injuries if any, and then age of injuries. But as a defensive practice the doctor only opines – 'reserved pending for want of FSL/laboratory reports', thus fixing the Investigating officer in a spot of bother to proceed further in the case and worst the accused gets the benefit and may even get a bail as an outcome of defensive practices of doctors.

How should the Final Opinion be furnished?

Section 164 A CrPC insists the doctor provide a reasoned opinion. Thus the negative evidence - for example, absence of semen whether it's due to use of condom or the woman was menstruating or due to

washing of genitals / bathing or due to delay in medical examination etc, has to be explained. It is always better if the doctor provides/ finalizes the final opinion well before getting into the witness box.

What is the relevance of Medical Opinion & current Law?

Earlier courts were giving lot of credit to the medical evidence for proving a charge of Rape/ Sexual assault when the law of rape was looking for penetrative peno-vaginal sexual intercourse. Now that the law of Rape / Sexual assault is changed from recognizing even non penetrative acts and also penetrative acts into anus / oral / urethra/ vagina by either penis or objects or body parts (fingering) there could be several situations of rape / sexual assault with no medical evidence at all. This has to be clearly understood by doctors, Police, Lawyers, Courts and all stakeholders in providing justice to the sexual violence victims.

Who can be present while the doctor conducts examination?

All these days, when a male doctor was conducting the examination of a female we were insisting on the presence of disinterested, sound, major female person as a witness. Now section 27 POCSO Act insists that whenever you examine a child there should be a parent or any person whom she/he trusts to be present throughout the examination. If such persons are not available then it is the duty of the hospital to provide one.

What is the relevance of special tests /investigations?

With the research evidence divided on the use of colposcopy to detect microinjuries^{7,8}, Toluidine dye test having its own limitations in detecting micro injuries of only sexual violence, false positive results with use of Wood's lamp examination for detecting semen^{9,10,11}, insisting for use of these special tests/ investigations should be done with caution.

What is the relevance of DNA examination in sexual violence cases?

Yes, DNA is crucial comparable evidence in sexual violence cases if collected and profiled properly. But unfortunately in Indian scenario the accused is not caught/arrested at all or immediately not caught/arrested. Thus this comparable evidence cannot be put to use at all. The other problem is with both section 164A CrPC and section 53A CrPC³ insisting for collection of DNA evidence in all cases of sexual violence, nobody has thought of the workload it puts on our understaffed Forensic Science Laboratories (FSL). Other problems with India is that we don't have DNA database of population or atleast criminals; nor do we have more government Forensic Science Laboratories neither atleast private laboratories to test DNA.

Can you force a medical examination on the Accused of a Sexual violence?

Though section 53 A CrPC states that use of reasonable force is allowed for medical examination of accused of rape, nowhere it is stated in law that what constitutes reasonable force. Hence all doctors (to be both ethical and legal) in their practice have to seek informed consent before doing such examinations. If any accused does not give consent (inspite of being explained the consequences of not getting medically examined and its possible adverse inferences by the Courts) then documenting informed refusal is to be done. The doctor should also keep in mind 'medical examination' as per explanation to section 53 CrPC shall include collection of blood, semen, saliva, hair, body fluids, etc, hence such information has to be given to the accused before seeking informed consent.

Is it relevant to document the POTENCY of the Accused?

Contrary to the earlier law we now have penetration by fingering or by objects and also non penetrative acts under the definition of Rape/ Sexual assault. Section 53 A CrPC which specifically deals with medical

examination of accused of rape does not mention anything about potency examination. Section 375 IPC describes penetration of penis to any extent into woman's genitals constitutes rape and does not insist on erected penis nor complete penetration. Medically you cannot give a definitive opinion on whether a person is potent or not because of the limitation of not ruling out psychological impotence by physical examination. Thus doing a potency examination of the accused is not acceptable/relevant.

Are there any Uniform guidelines & Protocols for dealing with such cases?

Yes today we have the Ministry of Health and Family Welfare, Government of India Guidelines & Protocols- Medicolegal care for survivors/ Victims of Sexual violence. These guidelines address all issues including medical examination, psychosocial care, treatment, issues when dealing with children, disabled, transgender & intersex persons, persons with alternate sexual orientation, sex workers, people facing caste, class or religion based discrimination¹². They also have removed the insensitive practices in medical examination like two finger tests, over emphasis on hymen, built of the woman, past contraceptive practices, past consensual sexual acts, past abortions, etc.

Conclusion

Today with a lot of changes in the medical examination of sexual violence victims/survivors, adequate dissemination of this information to all stakeholders of health care sector along with proper training is required. I hope health care sector would raise to the occasion in dealing with this problem by both being ethical and legal and also being

gender sensitive to the concerns of all sexual violence victims/ survivors.

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