

Guidance Documents

For

Police

Judiciary

Public Prosecutor

Demystifying Medical Evidence

**Enabling Access to Justice for
Survivors/Victims of Sexual Violence**



Demystifying Medical Evidence : Guidance Document for Police

Enabling Access to Justice for Survivors/Victims of Sexual Violence

Introduction

Any form of violence against women and children is a serious violation of human rights leading to physical, psychological, financial and social implications. In the Indian context; gaps in responding to "sexual violence" came to the fore with the rape and murder of a young medical professional in New Delhi. This episode compelled the Government of India to review existing lacunae in the response to sexual violence.

For the first time in India, National Guidelines for Health sector to respond to sexual violence were issued. These guidelines recognise the right to health care for survivors of sexual violence and recommend that psychological first aid must be provided by the health sector. This has paved way for a public health response to Violence Against Women (VAW) in the country. At this juncture, it is essential that a dialogue with other ministries be established so that inter-sectoral collaboration is fostered while dealing with survivors of VAW. At the same time, the existing misconceptions about forensic evidence need to be removed through consultations where evidence from India and other countries is presented. The new definition of Rape in the laws needs discussion as it changes the scope of medical evidence substantially. Therefore, joint meetings of public prosecutors, doctors and police need to be organised so that there is a platform for discussing access to justice for survivors.

CEHAT-MCGM¹ collaborative model of responding to sexual violence brought forth challenges in the interface with law enforcement agencies. Police requisitions consistently ask doctors to opine on

virginity of survivors, whether they are habituated to sexual violence, whether the hymen is intact and the like. Similar experiences were described by doctors in their interface with the Public prosecutors and Judiciary. All the three law enforcement agencies only focus on the determination of virginity, habituation to sexual acts and hymenal injuries. The thread of investigation is not acquainted with the limitations of medical evidence.

Thus experiences of medical professionals vis a vis the law enforcement agencies clearly indicate a need for clarity on role, scope and limitations of medical evidence. Prosecution agencies have a critical role to play in dispensing justice to survivors of sexual violence. If Police, Prosecutors and Judiciary acquire a scientific understanding on the role of medical professionals in sexual violence and its limitations, it would play an important role in the justice delivery process.

The Guidance Documents for Police, Public Prosecutors and Judiciary were developed by CEHAT. A Task Force was setup by CEHAT and UNDP that comprised of senior experts such as feminist lawyers, mental health experts, forensic experts, health researchers and representatives from the health ministry. Members were Sr (Adv) Indira Jaising, Dr Jagadeesh N Reddy, Dr Kiran Sharma (WHO), Dr Manisha Gupte, Mr Sanjay Pant (Member MoHFW), Dr Shekhar Seshadri and Dr Sundari Ravindran. We acknowledge their contributions to the development of these Guidance documents. Sangeeta Rege and Padma Deosthali developed these guidelines on behalf of CEHAT.

¹ CEHAT-MCGM established a comprehensive health care response since 2008 for survivors of sexual violence. The components include seeking informed consent, carrying out gender sensitive medical examination and evidence collection, providing psychological first aid and provision of reasoned medical opinion. This response has been provided to over 800 survivors of sexual violence across three municipal hospitals.

Objective

The objective of the guidance document is to provide a scientific understanding about medico legal care to police in the context of sexual violence. This document will:

- Equip police with a scientific understanding of medical evidence as well as its limitations.
- Enable the police to frame requisitions to the health professionals regarding medico-legal examination and evidence

Rationale

India has witnessed changes in laws related to sexual violence since 2012. There has been an enactment of a law protecting children from sexual violence and second is the amendment to existing rape law governing adult women. The enactment of Protection of children from sexual offences (POCSO) 2012 has broadened the definition of rape and has brought under its ambit all forms of sexual violence such as penetrative and non-penetrative forms of violence. Penetrative sexual violence includes attempt to penetrate in any of the orifices such as mouth, anus, vagina, either by penis or with use of objects. Non penetrative violence includes touching with sexual intent, showing pornography, masturbation and the like. This act protects both sexes of children from sexual offences.

The rape law (Sec 375) too was modified as Criminal law amendment to Rape (CLA) in 2013 and here too an expansion of the definition of rape was made. The offence now includes penetration by use of objects on any body orifices such as anus, vagina and mouth and making the woman do any of these acts against her will. A separate offence of gang rape (Sec 376 D) with a higher punishment was also enacted.

The changes in the laws related to sexual violence require different stake holders such as police, CWCs, Prosecutors and courts to take cognizance of the changes. It also requires them to develop a comprehensive response in order to address the issue of sexual violence. A step in this direction has been taken by Ministry of health and family welfare (MOHFW) Union govt of India in 2014 by drafting procedural guidelines along with a protocol for medical professionals. The protocol assists them to respond to the issue of sexual violence in a gender sensitive and scientific manner.

Role of the Police

Police play a vital role in the investigation of crimes related to sexual violence. They are vested with specific responsibilities vis a vis survivors ;escorting them to health system for medico legal care, recording a first information report (FIR) based on the testimony of the survivor, circumstantial evidence and medico legal records and dispatching medico legal evidence to the Forensic lab besides other responsibilities. Understanding medico legal evidence is therefore important for police.

Understanding components of medical and forensic evidence

Components of Medical Evidence

Medical and forensic evidence comprises of Trace evidence in the form of Semen, Spermatozoa, Blood, Hair, Cells, Dust, Paint, Grass, Lubricant, Fecal matter, Body fluids, and Saliva. Such evidence is collected from the clothes and body of the survivor and sent to forensic science laboratory (FSL) for testing.

Medical evidence on the body can be found in the form of injuries on the body and genitals.

Limitations of Medical evidence

Due to the dynamics of sexual violence, it is rare to get positive forensic results from FSL for most collected evidence due to specific reasons.

- Evidence from body rapidly erodes with time. Delay in reaching the health facility substantially reduces the chances of finding any evidence on the body. Besides delay in reporting, activities such as urinating, gargling, bathing and changing clothes, menstruating at the time of violence substantially reduce chances of finding positive evidence. If the perpetrator has not emitted semen or has a disease of vas, sperms will not be found in the evidence collected.

It is important to understand that most survivors do not sustain injuries after sexual violence. Reasons for lack of injuries on survivors are:

- Being too scared to resist due to fear of being harmed or killed or fear of a loved one being harmed
- Survivor being rendered unconscious by use of drugs or any stupefying agent.
- Delay in reporting to a health facility may also lead to injuries being healed with time. Evidence from WHO multi country study (Medico legal guidelines for victims of sexual violence 2002) shows that only 1 in 3 survivors may sustain any injury. The CLA 2013 states, "a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity." Thus recognizing that lack of physical resistance to the act of rape is not equivalent to consent.

Components of Medical Evidence

Medical evidence can be in the form of health consequences such as unwanted pregnancies, pain in urination, pain in defecation, tenderness, swelling and sexually transmitted infections (STI) that the perpetrator has transferred to the survivor in the form of HIV, Hepatitis, Gonorrhea etc.

Doctors can provide medical evidence of age when survivor is a minor and does not have documented proof of age. Courts also direct doctors to do age estimation. Doctors can provide medical evidence to determine intellectual or mental disability.

Limitations of Medical evidence

Existence of an unwanted pregnancy or STI can be only confirmed if the survivor reports to the hospital for a follow up as such evidence cannot be found immediately after sexual violence. Following up for treatment is often difficult because of lack of resources such as money for travel, loss of daily wages amongst others.

It is important to know that physical development of a survivor is dependent on socio-economic and other factors to which she belongs and so no two survivors may look the same age if they are from different states. Age estimation is an average of three tests namely - physical tests, radiological tests and dental tests.

Role of police in interpretation of Medical Evidence -

- Police shall formulate requisitions to the examining doctors based on the explanation offered in the table on medical evidence and its limitations. The term "Rape" is a legal term, so the police should refrain from asking questions such as "whether rape occurred Whether the victim / survivor is capable of sexual intercourse"? in the requisitions to doctors.
- The police can ask the doctor to provide provisional opinion as soon as the medico legal care is completed. Sec 164 A CrPC expects examining doctors to provide a reasoned medical opinion. A doctor drafts provisional opinion immediately after examination and evidence collection.
- A final opinion is drafted upon receipt of the FSL results after testing evidence. It is often noted that the doctor due to absence of FSL reports cannot record the final opinion. In such situations, the police can ask the FSL to provide results of the samples sent by the doctor before

the doctor's court appearance. This would enable the doctor to record a final opinion and subsequently present it in the court

- Repeat medico legal examination: If the investigating officer suspects a foul play in the medico legal examination of a survivor, in a specific hospital, she must document the nature of procedural lapse at the hospital and the reasons for seeking a repeat examination. Consent of the survivor/ victim is imperative. Even in a repeat medico legal examination the procedures should be well laid out as in instances of repeat post mortem cases.

Role of Police vis a vis the health sector : A standard operating protocol can enable a smooth interface between health professionals and police. The protocol should incorporate the elements listed below -

Steps to ensure Health Services for Survivors -

- Whenever a survivor reaches a police station she shall be brought to the hospital without any delay and within the span of 24 hours as stated

in Sec 164A CrPC. Delay in reaching the hospital can jeopardise the health of survivors.

- Police shall take the survivor to the hospital or health facility nearest to the police station. It could be a public or private hospital. No health facility can refuse medico legal care. Such a refusal is punishable with a fine and imprisonment for 6 months. This change was introduced by way of Sec 166 B of the Indian penal code read with section 357 C of the code of Criminal procedure.
- Police shall keep a resource diary of female medical practioners in the vicinity at the police station for medico legal examination of rape in children. POCSO section 27(2) states that only a female doctor can examine a female child survivor. As far as possible this may be followed. But female doctors may not be available in smaller towns or villages. In such instances locating a female practioner may delay the entire procedure. If the child survivor and family consent for examination by a male doctor, police must ensure that a female health care attendant is present along with the male examining doctor.

Recording statement of the survivor-

- In instances where survivors have reached the hospital on their own, the hospital shall intimate the police station. A police officer of the level of a senior police inspector as far as possible must record her statement¹
- For survivors reporting to the hospital on their own a zero FIR must be recorded and there should be no insistence on jurisdiction²
- If the survivor wishes, her statement can be recorded in the hospital itself with her consent. Police can ask the hospital authorities to provide such a space in order to ensure comfort of the survivor and also provide privacy for recording the statement.

Informed Consent in cases of unaccompanied survivors

- Police often encounter unaccompanied children or adults. It may be difficult for the police to ascertain if they have been sexually abused or not. Police bring such people to the hospital for medico legal examination of sexual violence. Consent for medico legal care is required in such instances. MOHFW (Union govt) protocol has stated that a survivor of the age 12 years or more, can consent for medical care and treatment. If the survivor is below 12 years old, or if survivor is an adult but is suffering from a mental health problem and unable to consent, then the Medical superintendent of the hospital or a senior medical officer has the authority to provide consent for medico legal examination, evidence collection and treatment.

Specific instances encountered by Police and Health professionals

As per POSCO, The definition of a "child" is "a person under 18 years of age". Girls and boys under 18 years of age could be in a sexual relationship. In cases where there is a love affair and parents disagree with their choice of partners, children run away. Parents file a police complaint and trace them.

Once traced and found, such survivors are brought for medico legal examination. Many girls confide in both the police and the examining doctor that they had engaged in a relation in a consensual manner. Police must take cognizance of this information and not insist or force the girl to undergo a medico legal examination, if the girl is not willing. She has the scope to provide consent or refuse for medico legal care if she is 12 years and above. The police will receive documentation from doctor about the details as stated by the survivor and nature of treatment offered.

¹ Monitoring Guidelines for NCPCR/ SCPCR for roles and functions of various stakeholders. Role and functions of the police under POCSO act and role of NCPCR/SCPCR for monitoring it(Pg26)

² Mumbai Police Rulebook Part 3 Rule no. 119-A

The police should not insist on a medico legal examination if a survivor has not consented to it and neither should they discourage a doctor from writing down the history given by the survivor. Carrying out medico legal examination against the consent of a survivor is a violation.

Maintaining chain of custody and coordination with forensic science laboratory (FSL)

- Just as the hospital maintains a chain of custody for the medico legal evidence, police should maintain a foolproof chain of custody from the time they collect evidence from the hospital till its dispatch to the FSL. The police personnel receiving the medico legal evidence should also record the time and date of receiving the evidence and dispatching it to the FSL. A well-documented chain of custody prevents tampering of evidence.
- Police are the critical link between the hospital and the forensic science laboratory (FSL). Delays in collection of medico legal evidence from the hospital and dispatching it to the FSL can reduce its utility. Evidence in the form of blood, semen stains, body fluids, lubricants etc have limited shelf life and have high chances of being contaminated and developing fungus. Hence it is pertinent that the police coordinate for collection of medico legal evidence and its dispatch within a week of the survivor's examination in the hospital.

Understanding components of medico legal examination of Accused

- Perpetrator of the sexual violence shall be taken to the nearest health facility for medico legal examination and evidence collection. Delay in examination can lead to loss of forensic evidence. Ideally the forensic examination of perpetrator should be done in the same hospital as that of the survivor for corroboration.

- In situations of child sexual abuse, the law (POCSO 2012) states that a female can also be the perpetrator of sexual violence. Police must know that the examination of a female perpetrator should be carried out by female doctor only.
- As per 164 A of CrPC, examination of the perpetrator must be done after consent is sought. If he refuses to consent for medico legal examination, it should be explained that refusal to undergo such an examination can be perceived by the court as evidence against him. The police should not compel the doctor to carry out any medico-legal examination against the consent of the perpetrator.
- Police should be aware of the components of medico legal examination of a perpetrator. The examining doctor shall carry out general and genital examination. Examination shall document the time of examination, gap in reporting to the hospital since episode, physical and genital injuries if any. Evidence collection may be carried out by the doctor depending upon the number of days lapsed since the episode. Doctors shall also take swabs and collect blood for grouping and test urine for presence of drugs and alcohol depending on the history.
- Potency tests have not been listed under 164A of CrPc as component of medico legal examination. Police shall refrain from asking doctors to carry out potency tests. POCSO 2012 and CLA 2013 have expanded the rape definition to include non-penetrative violence such as forced masturbation, touching and fondling of genitals as well as non - penile penetration such as use of objects and fingers to penetrate. Therefore unscientific tests such as status of penis, systemic examination, cremastic reflex, potency of the perpetrator are not relevant to constitute offence of sexual violence.

Table indicative of type of evidence to be collected

History of sexual violence	Type of swab	Purpose	Points to consider
Peno-vaginal	Vaginal swabs	Semen/sperm detection Lubricant DNA	Whether ejaculation occurred inside vagina or outside Whether condom was used
	Body swabs	Semen/sperm detection Saliva (in case of sucking/licking)	Whether ejaculation occurred outside
Peno anal	Anal swabs	Semen/sperm detection DNA Lubricant Faecal matter	Whether ejaculation occurred inside anus or outside Whether condom was used
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Peno oral	Oral swabs	Semen/sperm detection DNA Saliva	Whether ejaculation occurred inside mouth or outside Whether condom was used
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Use of objects	Swab of the orifice (anal, vaginal and/or oral)	Lubricant	Detection of lubricant used if any
Use of body parts (fingering)	Swab of the orifice (anal, vaginal and/or oral)	Lubricant	
Masturbation	Swab of the orifice/ body part	Semen/sperm detection DNA Lubricant	Whether ejaculation occurred or not. Whether ejaculated in orifice or body parts



Demystifying Medical Evidence : Guidance Document for Judiciary

Enabling Access to Justice for Survivors/Victims of Sexual Violence

Introduction

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For the first time in India, National Guidelines for Health sector to respond to sexual violence were issued. These guidelines recognise the right to health care for survivors of sexual violence and recommend that psychological first aid must be provided by the health sector. This has paved way for a public health response to Violence Against Women (VAW) in the country. At this juncture, it is essential that a dialogue with other ministries be established so that inter-sectoral collaboration is fostered while dealing with survivors of VAW. At the same time, the existing misconceptions about forensic evidence need to be removed through consultations where evidence from India and other countries is presented. The new definition of Rape in the laws needs discussion as it changes the scope of medical evidence substantially. Therefore, joint meetings of public prosecutors, doctors and police need to be organised so that there is a platform for discussing access to justice for survivors.

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virginity of survivors, whether they are habituated to sexual violence, whether the hymen is intact and the like. Similar experiences were described by doctors in their interface with the Public prosecutors and Judiciary. All the three law enforcement agencies only focus on the determination of virginity, habituation to sexual acts and hymenal injuries. The thread of investigation is not acquainted with the limitations of medical evidence.

Thus experiences of medical professionals vis a vis the law enforcement agencies clearly indicate a need for clarity on role, scope and limitations of medical evidence. Prosecution agencies have a critical role to play in dispensing justice to survivors of sexual violence. If Police, Prosecutors and Judiciary acquire a scientific understanding on the role of medical professionals in sexual violence and its limitations, it would play an important role in the justice delivery process.

The Guidance Documents for Police, Public Prosecutors and Judiciary were developed by CEHAT. A Task Force was setup by CEHAT and UNDP that comprised of senior experts such as feminist lawyers, mental health experts, forensic experts, health researchers and representatives from the health ministry. Members were Sr (Adv) Indira Jaising, Dr Jagadeesh N Reddy, Dr Kiran Sharma (WHO), Dr Manisha Gupte, Mr Sanjay Pant (Member MoHFW), Dr Shekhar Seshadri and Dr Sundari Ravindran. We acknowledge their contributions to the development of these Guidance documents. Sangeeta Rege and Padma Deosthali developed these guidelines on behalf of CEHAT.

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Objective

The objective of the guidance document is to provide a scientific understanding about medico-legal care to the court. This document builds upon the Ministry of health and family welfare (MOHFW,) Guidelines and protocols for effective interface between the police and health system.

Specifically, this document aims to:

- Assist courts with a scientific understanding of medical evidence as well as its limitations.
- Enable the courts to frame questions for doctors as expert witnesses in instances of sexual violence

Rationale

India has witnessed changes in laws related to sexual violence since 2012. There has been an enactment of a law protecting children from sexual violence and second is the amendment to existing rape law governing adult women. The enactment of Protection of children from sexual offences (POCSO) 2012 has broadened the definition of rape and has brought under its ambit all forms of sexual violence such as penetrative and non-penetrative forms of violence. Penetrative sexual violence includes attempt to penetrate in any of the orifices such as mouth, anus, vagina, either by penis or with use of objects. Non penetrative violence includes touching with sexual intent, showing pornography, masturbation and the like. This act protects both sexes of children from sexual offences.

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The changes in the laws related to sexual violence require different stake holders such as police, CWCs , Prosecutors and courts to take cognizance of the changes. It also requires them to develop a comprehensive response in order to address the issue of sexual violence. A step in this direction has been taken by Ministry of health and family welfare (MOHFW) Union govt of India in 2014 by drafting procedural guidelines along with a protocol for medical professionals. The protocol assists them to respond to the issue of sexual violence in a gender sensitive and scientific manner.

Role of the Courts

Courts plays a critical role in securing justice for survivors of sexual violence. The guidance document aims to facilitate a scientific interpretation of medico-legal evidence to secure justice for survivors of sexual violence and assists in understanding the scope of medical evidence and its limitations.

Understanding components of medical and forensic evidence

Components of Medical Evidence

Medical and forensic evidence comprises of Trace evidence in the form of Semen, Spermatozoa, Blood, Hair, Cells, Dust, Paint, Grass, Lubricant, Fecal matter, Body fluids, and Saliva. Such evidence is collected from the clothes and body of the survivor and sent to forensic science laboratory (FSL) for testing.

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Limitations of Medical evidence

Due to the dynamics of sexual violence, it is rare to get positive forensic results from FSL for most collected evidence due to specific reasons.

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It is important to know that physical development of a survivor is dependent on socio-economic and other factors to which she belongs and so no two survivors may look the same age if they are from different states. Age estimation is an average of three tests namely - physical tests, radiological tests and dental tests.

Role of Courts and Interpretation of Medical evidence

- Analysis of court judgments indicates defense counsel often asking questions to the doctors about the status of hymen. Such questions are asked with the intention of assessing if the survivor has been sexually active. MOHFW guidelines (2014) clarify that hymen may be broken because of any vigorous activities such as cycling, swimming, and not just because of sexual activity. So old tears in the hymen have no scientific relevance. Hymenal status is relevant only in instances where there is a fresh tear with bleeding, redness and edema. Courts can prevent the defense from posing questions to the doctor. Courts can use Sec 146 of Indian evidence Act which prevents such questions and protects the privacy of the survivor and prevents any discussion on the past sexual life of survivors.
- The 2-finger test and its results often enter the courtroom, either by way of doctor's providing expert witness or by questions asked from the defense counsel. The finger test is a forensic practice to determine laxity of vaginal walls and deduce that survivors are accustomed to sexual acts. Several precedents related to banning of the finger test are in place from several judgments of the Honourable Supreme Court. An important consideration for the courts is the difference between the per vaginal (PV) examination and 2-finger test. Per vaginal examination is done with the purpose of identifying clinical causes underlying a specific medical condition requiring treatment. A survivor may require such an examination depending upon the nature of sexual violence and whether she is experiencing bleeding, vaginal pain, discharge etc, after which treatment would be offered for this condition.
- Under Sec 164 A CrPC doctors are expected to provide a reasoned medical opinion. But often the final medical opinion is not formulated by doctors. This is because they do not receive timely FSL reports of the evidence that was sent for testing. In such instances, courts can direct the FSL to provide the test reports so that doctors are equipped to provide a final medical opinion to the courts.
- Normal medical examination findings neither confirm nor refute whether "Rape" took place. This is because "Rape" is a legal term and hence outside the purview of examining doctors. Courts should direct their questions to doctors only for presence/absence of medical evidence based on the history documented and clinical findings and not whether rape occurred or not.
- In instances where age estimation is provided by doctors, courts can ask the doctors whether they have used the MOHFW protocol for age estimation it is an average of physical, radiological and dental age. Using just any one method of estimating age will not provide accuracy of range of age.
- Doctors are called to the court as expert witnesses. Evidence suggests that they are often made to answer in "yes" or "no". Most commonly asked question to a doctor is about whether a genital injury can happen because of falling on a sharp surface or instrument and she is expected to answer as yes or no. In such instances the court can ask defense to allow the doctor to answer questions in a detailed manner.
- Medico legal examination of perpetrators of sexual violence is also presented in the court. It is a known fact that perpetrators claim impotency and physical inability to be able to have sexual contact. Doctors routinely conduct potency tests

on perpetrators despite changes in the statutory definition of rape. Medical tests to verify the perpetrator's "potency" are unscientific. Medically the doctor also cannot state in positive terms that a person is potent by doing physical examinations. Courts need to be informed about the unscientific nature of potency tests.

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Objective

The objective of the guidance document is to provide a scientific understanding about the medico legal care and evidence in instances of sexual violence. This document builds on the Ministry of health and family welfare (MOHFW,) Guidelines and protocols for medico legal care for victims/ survivors of sexual violence. The guidelines acknowledge the critical interface between the public prosecutors and health system.

Specifically this document aims to -

- Assist public prosecutors (PPs) in presenting the medical evidence in the courts in a scientific manner and recognise its limitations.
- Guide PPs in specific ways so as to enable presenting medical professionals as expert witnesses.
- Enable PPs to prevent irrelevant and unscientific questions related to medical evidence in the court proceedings.

Rationale

India has witnessed changes in laws related to sexual violence since 2012. There has been an enactment of a law protecting children from sexual violence and second is the amendment to existing rape law governing adult women. The enactment of Protection of children from sexual offences (POCSO) 2012 has broadened the definition of rape and has brought under its ambit all forms of sexual violence such as penetrative and non-penetrative forms of violence. Penetrative sexual violence includes attempt to penetrate in any of the orifices such as mouth, anus, vagina, either by penis or with use of objects. Non penetrative violence includes touching with sexual intent, showing pornography, masturbation and the like. This act protects both sexes of children from sexual offences. The rape law (Sec 375) too was modified as Criminal law amendment to Rape (CLA) in 2013 and here

too an expansion of the definition of rape was made. The offence now includes penetration by use of objects on any body orifices such as anus, vagina and mouth and making the woman do any of these acts against her will. A separate offence of gang rape (Sec 376 D) with a higher punishment was also enacted .

The changes in the laws related to sexual violence required different stake holders such as police, CWCs, Prosecutors and courts to take cognizance of the changes. It also requires them to develop a comprehensive response in order to address the issue of sexual violence. A step in this direction has been taken by Ministry of health and family welfare (MOHFW) Union govt of India in 2014 by drafting procedural guidelines along with a protocol for medical professionals. The protocol assists them to respond to the issue of sexual violence in a gender sensitive and scientific manner.

Role of Public Prosecutors

Public prosecutors(PP) have a vital role to play within the criminal justice system (CJS). Their role is focused on ensuring successful prosecution and conviction of the perpetrators of sexual violence. In the course of trial, prosecutors interact with health professionals so as to present medico-legal facts of a case in the court.

Understanding components of medical and forensic evidence

Components of Medical Evidence

Medical and forensic evidence comprises of Trace evidence in the form of Semen, Spermatozoa, Blood, Hair, Cells, Dust, Paint, Grass, Lubricant, Fecal matter, Body fluids, and Saliva. Such evidence is collected from the clothes and body of the survivor and sent to forensic science laboratory (FSL) for testing.

Medical evidence on the body can be found in the form of injuries on the body and genitals.

Limitations of Medical evidence

Due to the dynamics of sexual violence, it is rare to get positive forensic results from FSL for most collected evidence due to specific reasons.

- Evidence from body rapidly erodes with time. Delay in reaching the health facility substantially reduces the chances of finding any evidence on the body. Besides delay in reporting, activities such as urinating, gargling, bathing and changing clothes, menstruating at the time of violence substantially reduce chances of finding positive evidence. If the perpetrator has not emitted semen or has a disease of vas, sperms will not be found in the evidence collected.

It is important to understand that most survivors do not sustain injuries after sexual violence. Reasons for lack of injuries on survivors are:

- Being too scared to resist due to fear of being harmed or killed or fear of a loved one being harmed
- Survivor being rendered unconscious by use of drugs or any stupefying agent.
- Delay in reporting to a health facility may also lead to injuries being healed with time. Evidence from WHO multi country study (Medico legal guidelines for victims of sexual violence 2002) shows that only 1 in 3 survivors may sustain any injury. The CLA 2013 states, "a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity." Thus recognizing that lack of physical resistance to the act of rape is not equivalent to consent.

Components of Medical Evidence

Medical evidence can be in the form of health consequences such as unwanted pregnancies, pain in urination, pain in defecation, tenderness, swelling and sexually transmitted infections (STI) that the perpetrator has transferred to the survivor in the form of HIV, Hepatitis, Gonorrhea etc.

Doctors can provide medical evidence of age when survivor is a minor and does not have documented proof of age. Courts also direct doctors to do age estimation. Doctors can provide medical evidence to determine intellectual or mental disability.

Limitations of Medical evidence

Existence of an unwanted pregnancy or STI can be only confirmed if the survivor reports to the hospital for a follow up as such evidence cannot be found immediately after sexual violence. Following up for treatment is often difficult because of lack of resources such as money for travel, loss of daily wages amongst others.

It is important to know that physical development of a survivor is dependent on socio-economic and other factors to which she belongs and so no two survivors may look the same age if they are from different states. Age estimation is an average of three tests namely - physical tests, radiological tests and dental tests.

Role of Public Prosecutors in interpretation of medical evidence :

- PPs should be cognizant of the changes in the law with regards to lack of injuries and present it before the court. Section 375, Explanation (II) recognizes that lack of physical resistance to the act of rape is not equivalent to consent. It states, "a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity." This is significant as it means that lack of injuries is no longer considered to imply consent. PPs can therefore state that medical evidence is only corroborative in nature.
- Despite medical evidence being negative, PP must present medical evidence and its limitations before the Court so that negative medical evidence does not become prejudicial to the prosecution's case. Infact the PP must ask doctor to focus on the reasons for lack of medical evidence. PP should focus on all forms of forensic and medical evidence possible and not restrict their understanding to injuries alone.
- PP should prepare the doctor for the nature of questions that the defence counsel could ask. This would enable doctors to understand what to answer and which ones not to answer. Defence counsel invariably asks about status of vaginal opening. An important aspect for prosecutor's knowledge is the difference between the per vaginal (PV) examination and 2-finger test. Per vaginal examination is done with the purpose of identifying clinical causes underlying a specific medical condition. This is followed up with a treatment plan. A survivor may require such an examination depending upon the nature of sexual violence and whether she is experiencing bleeding, vaginal pain, discharge etc, after which treatment would be offered for these conditions. But this is different from the finger test, which is done to determine laxity of vaginal walls and

habituation of a victim to sexual activity. Prosecutors must equip the doctor from refusing to answer questions about the finger test.

- Prosecutors must ensure that questions such as - status of hymen, height - weight of the survivor, elasticity of vagina and results of a finger test are not asked in the court room. Each of these findings point to the survivor's past sexual practices. Several judgements have clarified that such questions are irrelevant and not scientific.

The Supreme Court has ruled the two-finger test as unconstitutional in the case of *Lillu @ Rajesh and Anr vs. State of Haryana* AIR 2013 SC 1784. The Court held that this test violated the constitutional rights of privacy and bodily integrity.

In a recent judgment in *Akhtar vs. State of UP* (2014) 87 ALLCC 482, directions were issued prohibiting two-finger test without consent "... and to employ modern gadget based or other techniques for ascertaining whether the victim has been subjected to forcible or normal intercourse." It must be clarified that finger test examination with consent or without consent is a violation of the law. Usage of the finger test and medico legal documentation leads to questioning the character of the victim. Such a test will result in to stating whether one finger or 2 fingers are passed easily in the vagina, which will result in to commenting on past sexual life of the victim. Such information has been stated as being inadmissible in the court of law by the Indian Evidence Act 1872. Hence it is irrelevant to state that if a victim consents to finger test, it should be carried out. In view of the expanded definition of rape and sexual assault as per CLA Act, 2013, law also recognizes non-penetrative assault. Thus, the presumption that all sexual assault is peno-vaginal should be discarded.

- While presenting examining doctor as an expert witness, PPs must assess if a provisional opinion and final opinion is recorded. Under Sec 164 A CrPC doctors are expected to provide a reasoned medical opinion. Provisional opinion is drafted by a doctor immediately after examination and evidence collection. A final opinion is drafted upon receipt of the FSL reports after testing evidence. If the final opinion is not recorded by the doctor due to absence of FSL reports, PP can seek a court direction thereby asking the FSL to provide reports of the samples sent by the doctor. This would enable the doctor to record a final opinion and subsequently present it in the court.
- The Prosecutor should ensure that examining doctors are not asked "Yes" or "No" questions. Instead, they should be allowed to describe medical evidence. Often the defense asks questions such as can a genital injury be caused due to a fall in " yes" and "no". In such instances the doctor because he/she is an expert should be allowed to explain and answer the question in a systematic and evidentiary manner.
- The Prosecutor must review the case details in terms of history of sexual violence documented by examining doctor, investigating officer as well as statement provided to the magistrate, Sec 161 of 164 (5). In case of any discrepancies, the prosecutor should seek clarifications before the court hearing. It is possible that a survivor may reveal additional information to a doctor depending on her comfort rather than to the Investigating officer or while making a statement to the magistrate.
- Examination and evidence collection in perpetrator of sexual violence. The Prosecutor should be aware about components of medico-legal examination of perpetrator. Often perpetrators claim lack of potency by way of medical tests such as testicular reflex, cremastic reflex, disease of the vas, systemic examination, deformity from other diseases etc. However the Prosecutor should be aware that these medico-legal tests are unscientific and do not form a part of medico-legal examination as mentioned in Section 164A of CrPC. The definition of rape under IPC as per CLA Act 2013 and POCSO Act 2012 has also gone beyond penetration by penis and mentions use of objects, and other forms of assault. Thus it makes the tests related to potency redundant.

Table indicative of type of evidence to be collected

History of sexual violence	Type of swab	Purpose	Points to consider
Peno-vaginal	Vaginal swabs	Semen/sperm detection Lubricant DNA	Whether ejaculation occurred inside vagina or outside Whether condom was used
	Body swabs	Semen/sperm detection Saliva (in case of sucking/licking)	Whether ejaculation occurred outside
Peno anal	Anal swabs	Semen/sperm detection DNA Lubricant Faecal matter	Whether ejaculation occurred inside anus or outside Whether condom was used
	Body swabs	Semen/sperm detection Saliva (in case of sucking/licking)	Whether ejaculation occurred outside
Peno oral	Oral swabs	Semen/sperm detection DNA Saliva	Whether ejaculation occurred inside mouth or outside Whether condom was used
	Body swabs	Semen/sperm detection Saliva (in case of sucking/licking)	Whether ejaculation occurred outside
Use of objects	Swab of the orifice (anal, vaginal and/or oral)	Lubricant	Detection of lubricant used if any
Use of body parts (fingering)	Swab of the orifice (anal, vaginal and/or oral)	Lubricant	
Masturbation	Swab of the orifice/ body part	Semen/sperm detection DNA Lubricant	Whether ejaculation occurred or not. Whether ejaculated in orifice or body parts



Centre for Enquiry Into Health And Allied Themes

CEHAT is the research centre of Anusandhan Trust, conducting research, action, service and advocacy on a variety of public health issues. Socially relevant and rigorous academic health research and action at CEHAT is for the well-being of the disadvantaged masses, for strengthening people's health movements and for realizing the right to health care. CEHAT's objectives are to undertake socially relevant research and advocacy projects on various socio-political aspects of health; establish direct services and programmes to demonstrate how health services can be made accessible equitably and ethically; disseminate information through databases and relevant publications, supported by a well-stocked and specialised library and a documentation centre.

CEHAT's projects are based on its ideological commitments and priorities, and are focused on four broad themes, (1) Health Services and Financing (2) Health Legislation, and Patients' Rights, (3) Women and Health, (4) Violence and Health