

Answers to Frequently Asked Questions by Medical Professionals During Medical Examination of Survivors and Accused of Sexual Violence



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This compilation is an outcome of a series of capacity building programs on Health sector response to violence against women and medico-legal care of survivors of sexual violence, organized for Civil Surgeons, Medical Superintendents and Gynecologists from District and Sub District hospitals of Maharashtra conducted by UNFPA in collaboration with Public Health Department and National Health Mission, Government of Maharashtra. In this document, questions raised during the training programs have been compiled. The compilation will be useful to medical professionals for examining survivors and accused of sexual violence. It will also prove useful for hospital administrators. It is to be used together with the MOHFW Guidelines and Protocols for medico- legal care for survivors/victims of sexual violence, 2014.

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Answers to Frequently Asked Questions by Medical Professionals During Medical Examination of Survivors and Accused of Sexual Violence

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MESSAGE

Every woman has the right to dignity, optimal growth and a violence free life. These are basic human rights guaranteed by our Constitution. The increasing incidents of violence against women, make it necessary to develop institutional and community mechanisms to address this issue. Violence manifests itself in different forms, all of which greatly impacts the health status of women. It affects women's physical, mental, sexual and reproductive health. It also impacts their self esteem and ability to work and make decisions about their life. Hence it is important that medical professionals are trained to identify and care for women survivors of violence and also equipped with perspectives and skills for providing survivor centric care.

In Maharashtra, we have trained our Civil Surgeons, Medical Superintendents, Gynaecologists and Casualty Medical Officers on their role in dealing with women survivors of violence especially sexual violence. I would like to congratulate United Nations Population Fund for providing not only the necessary financial support but also technical support to conduct these trainings and for bringing out reading/learning materials on the issue.

This booklet compiles a set of frequently asked questions by medical professionals. I hope it would be a useful reference document for doctors while providing care to survivors of sexual violence.

Pradeep Vyas
(Dr. Pradeep Vyas)





Dr. Sanjeev Kumar, I.A.S.
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MESSAGE

Discrimination against women and girls continues to be rampant even after over six and a half decades of the formation of our constitution that conferred equal rights and opportunities on women and denounced practices derogatory to the dignity of women.

Discrimination is visible in various forms ranging from gender biased sex selection, infanticide, neglect, lack of access to health, education and nutrition, early marriages, repeated and frequent pregnancies and violence. Violence denies women the right to survival, well being and development, yet the fact is that most violence occurs within the home and in the most intimate and trusted relationships, because of which women often hide it and continue to suffer in silence.

In collaboration with United Nations Population Fund (UNFPA) we have trained our doctors to identify and provide treatment, psycho-social support and medico-legal care to survivors of violence who approach health facilities.

With change in the laws on rape and sexual assault in 2013, the procedure for medical examination of survivors has also changed. Doctors doing such examination and providing care to women survivors of violence face several queries. This booklet makes an attempt to answer their questions.





I hope it proves to be an important reference document for doctors handling cases of sexual violence.


Dr. Sanjeev Kumar

Commissioner, Health Services and Mission Director,
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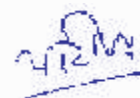
		
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FOREWORD

Violence against women is a major public health issue and a major cause of disability amongst women. Health institutions are an important and often the first entry point for women facing violence, because of this, health Care providers are strategically placed to identify and help women survivors of violence. They can offer support, counseling, information and services to women who have suffered violence.

We have provided skill based training to our Medical Officers in District and Sub District hospitals for Medico-legal examination, documentation, preservation of evidence and for provision of quality physical and psychological care to a survivor.

I would like to thank UNFPA especially Ms.Anuja Gulati, State Program Coordinator, for providing the necessary technical and financial support for conducting the trainings and bringing out this booklet, which is an outcome of the series of trainings. I would also like to thank Dr. Jagadeesh Narayana Reddy, Professor of Forensic Medicine, Vydehi Institute of Medical Science and Research Centre, for compiling this document. I am sure it would prove to be useful in training of Medical Officers not just in Maharashtra but also in other states.



Dr. Archana Patil





Acknowledgements

I take this opportunity to thank the Ministry of Health and Family Welfare, Government of India for providing me an opportunity to be part of the expert group involved in forming the Guidelines and Protocols, Medical examination of survivor / victim of sexual violence which forms the basis for this book.

I would like to express my gratitude to UNFPA and the Government of Maharashtra for giving me a chance to facilitate sessions as part of the capacity building of doctors and also for providing me an opportunity to pen my thoughts in providing solutions to frequently encountered questions in medical examination of survivor / accused in sexual violence.

I whole heartedly thank Ms. Aunja Gulati, State Coordinator, UNFPA Maharashtra for visualizing the need for such a book, getting me to meet the deadlines in finalizing the drafts of this book and supporting the project. I would also like to thank her and Adv. Ujwala Kadrekar for having reviewed the initial document and for editing the same.

I feel this book would be an essential companion for all doctors dealing with survivors/victims of sexual violence. It would enrich their knowledge in providing comprehensive care and performing medico-legal duties effectively, timely and sensitively and also work towards justice for victims of sexual violence

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Abbreviations

CrPC	–	Criminal Procedure Code
CWC	–	Child Welfare Committee
DNA	–	Deoxyribo Nucleic Acid
FSL	–	Forensic Science Laboratory
IEA	–	Indian Evidence Act
IPC	–	Indian Penal Code
MoHFW	–	Ministry of Health and Family Welfare
MWCD	–	Ministry of Women and Child Development
MTP	–	Medical Termination of Pregnancy
POCSO	–	Protection of Children from Sexual Offences Act
RMP	–	Registered Medical Practitioner
STIs	–	Sexually Transmitted Infections
SV	–	Sexual Violence





Introduction

Following the brutal rape of a college girl in Delhi in December 2012, there is an increased awareness about sexual violence and an increase in the number of reported cases of sexual violence in the Country.

Violence against women leads to a number of fatal and non fatal health consequences, which require intervention from hospitals and health care providers. With the passing of the Protection of Children from Sexual Offences (POCSO) Act, 2012 and the Criminal Law (Amendment) Act, 2013, which brought changes in some of the sections of Indian Penal Code, Criminal Procedure Code, Indian Evidence Act, several procedural changes have been mandated in the role of health care providers. These have become pivotal in the care and rehabilitation of survivors of sexual violence.

Further, with the changes in definitions of rape and sexual assault to include both penetrative and non-penetrative assaults and penetrative assaults to include oral, urethral, anal and vaginal penetration in addition to use of objects or any other body parts such as fingering, also being classified as rape, the nature of medical examination and evidence collection would also mandate a change. The Law further shifted the focus from evidence to treatment and psycho-social support of the survivor/victim.

In order to equip medical professionals and health care providers to deal with women and children survivors of sexual violence, the Ministry of Health and Family Welfare, Government of India in 2014, brought out a set of Guidelines and Protocols for medico legal care of survivors/victims of sexual violence. These protocols detail the process required for provision of comprehensive care including consent, history taking and documentation, medical examination and treatment, evidence collection, psycho-social support, rehabilitation and mandatory police reporting.

Government of Maharashtra decided to adopt the MOHFW guidelines through a Government resolution dated 7th August 2015. In view of this, the Public Health Department in collaboration with UNFPA organized a series of capacity building programs for all doctors from District and Sub District hospitals for conducting examination, providing treatment, evidence collection, mandatory police reporting and deposition in the Court to present this medical evidence properly and timely to the Court for judicial interpretation. These trainings raised many concerns, dilemmas and practical difficulties that medical professionals face while dealing with survivors/victims of sexual violence.

This booklet attempts to list out all such frequently encountered questions with solutions, which are ethically, legally, scientifically correct and gender nuanced. The booklet would definitely



equip health care providers who are handling cases of sexual violence and enable them to provide care and rehabilitative services more confidently and correctly and would also serve towards providing justice to the survivors / victims of sexual violence.

The issues which are discussed in the booklet include:

- Operational issues in Medical examination of survivor / victim of sexual violence;
- Seeking of informed consent from survivor / victim;
- Collection of Medical evidence during examination of survivor / victim;
- Framing medical opinion following examination of survivor / victim;
- Medical examination of accused of sexual violence;

The frequently encountered questions in the Court room with relation to sexual violence cases with appropriate answers are listed in a separate chapter at the end.

The references list at the end would be useful for readers who wish to have additional information on the above issues.

This booklet should be read along with the MOHFW Guidelines and Protocols for medico- legal care for survivors/victims of sexual violence, 2014 and not as an independent document. It is hoped that the booklet would equip health care providers to confidently deal with women and child survivors/victims of sexual violence.





Operational issues in medical examination of a survivor/victim of sexual violence

1. Can doctors medically examine a survivor / victim of sexual violence without a police requisition?

The medical examination of a survivor / victim of sexual violence is a medico-legal emergency and needs to be conducted immediately to provide therapeutic care as well as evidence collection.

- In *State of Karnataka v.s. Manjanna*,¹ the Supreme Court directed that the medical examination of a survivor / victim of sexual violence should be done immediately and no hospital/doctor should delay examination for want of police requisition.
- Section 27 and Rule 5 of POCSO Act (Protection of Children from Sexual offences Act²) clearly state that doctors should not insist for police requisition or Magistrate order before conducting medical examination.
- Section 357 C of CrPC (Criminal Procedure Code³) states that hospital shall conduct medical examination immediately without any delay.

2. Is it mandatory to inform police when a survivor/victim of sexual violence reports to a hospital?

- Section 19 of POCSO Act and Section 357 C of CrPC, direct the doctor/ hospital to mandatorily inform the police, if a survivor/victim of sexual violence reports directly to the hospital.
- Section 21 of POCSO Act and Section 166 B of IPC (Indian Penal Code⁴) prescribe punishment for not following the directions of mandatory reporting to police.

3. Is it mandatory for a survivor/victim of sexual violence to go to a Government hospital for medical examination?

- It is not mandatory for a survivor/victim of sexual violence to go to a government hospital for medical examination. Section 357C of CrPC mandates all hospitals, irrespective of whether they are Government, public sector or private sector, to immediately provide first aid and medical treatment free of cost.



4. Is it necessary that only a female doctor examines a survivor/victim of sexual violence?

- In 2005, Section 164 A was inserted in CrPC which stated that when an offence of rape or attempt to commit rape is reported to the hospital then the victim shall be examined by a Registered Medical Practitioner (RMP) employed in a Government hospital or a local authority or any other RMP, with the consent of such women or of a person competent to give such consent on her behalf.
- Section 27 POCSO Act states that a female doctor should examine a girl child (less than 18 years).
- The Ministry of Health and family Welfare (MOHFW) issued Guidelines and Protocols for medico-legal care for survivor/victim of sexual violence 2014, state that in the absence of a female doctor, a male doctor can conduct examination with the consent of the survivor/victim in the presence of female attendant.

5. Is treatment to the survivor/victim of sexual violence a must as part of the doctor's role?

In Sexual Violence cases there is a major shift from the model of mere evidence collection to the present model of giving treatment by doctors. Every doctor / hospital should provide comprehensive care including psycho-social support and follow up care.

- Rule 5 of POCSO specify that treatment should include care for Injuries, STIs, 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 enables penalty to the doctor with one year imprisonment and/or fine under Section 166 B of IPC.

6. Are past sexual practices still documented in examination of survivor/victim of sexual violence?

Despite the law prohibiting questioning a woman of her past sexual history, doctors continue to conduct insensitive practices like the two finger test, documentation of old hymenal injuries, past abortions, past contraceptive use, etc. which have no relevance to current episode of sexual violence. These old injuries need to be documented only in cases of chronic sexual abuse and if consensual sexual intercourse is within one week of the medical examination.



Section 146 of IEA (Indian Evidence Act⁵) does not permit to adduce evidence or to put questions in the cross examination of the victim as to her general moral character, or previous sexual experience for proving consent.

7. Is it necessary to do age estimation of the survivor/victim of sexual violence in every case?

In the case of Ashwani Kumar Saxena v.s. State of M.P.⁶, the Supreme Court ruled 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”*.

Medically, doctors cannot accurately give opinion on the real age and can only give an age range. Unfortunately, the investigating authorities insist on medical age estimation from doctors, even when they have clear documentary proof of age. Section 164 A CrPC and section 15 (5A) of ITPA (Immoral Traffic Prevention Act 1956) insist on medical age estimation from doctors. When authentic documentary proof of age exists, doctors need not conduct this age estimation.

8. Is it relevant to document when the medical examination of a survivor/victim of sexual violence was done?

Yes, it is very important, because delay in examination and post assault activities affect the outcome of medical examination. For e.g. post assault activities in the form of urination, defecation, washing, bathing, douching, etc. affect the medical evidence. Further many mucosal injuries heal within hours⁷. Hence, medical examination should be treated as a medico-legal emergency and priority be given by doctors / hospitals to this. Hence it is important to document the time lapse between incident of sexual violence and medical examination. Documentation of when the medical examination was conducted helps doctors in framing better medical opinion.

9. Who can be present while the doctor conducts medical examination of a survivor/victim of sexual violence?

Section 27 of POCSO Act states that whenever a doctor examines a child there should be a parent or any person whom she/he trusts to be present. If such persons are not available then it is the duty of the hospital to provide such a person. Also, if a male doctor is conducting examination of a female survivor, then a female attendant should be present.



10. Are there any uniform Guidelines and Protocols for dealing with cases of sexual violence?

MOHFW, Government of India issued Guidelines and Protocols for medico-legal care for survivors/victims of sexual violence⁸ which addresses issues including medical examination, evidence collection, psycho-social care, treatment, while dealing with children, disabled, transgender and intersex persons, persons with alternate sexual orientation, sex workers and people facing caste, class or religion based discrimination. The MOHFW protocols have removed the conduct and documentation of 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.

11. Is it necessary for the doctor to inform/report to the CWC while dealing with a child survivor/victim of sexual violence?

Whenever a sexually assaulted child requires immediate care and protection, the doctor through police has to inform /report to the CWC, and act in the best interest of the child. This should be done especially in cases when there is no safe place for the child to stay; the perpetrator is in the same household; there is nobody available to consent for seeking health care for the child.

12. Can a doctor administer anesthesia to every survivor/victim of sexual violence so as to enable medical examination?

The doctor cannot administer anesthesia to every survivor/victim of sexual violence (Rape/Sexual assault). Anesthesia can be administered only in those cases to enable medical examination which are done in the best interest of the survivor (like in cases where there are bleeding injuries or when the survivor is a child, who is uncooperative).

13. Can a doctor administer HIV prophylaxis to every survivor/victim of sexual violence (Rape/ Sexual assault)?

The doctor has to assess whether there is high risk of possible HIV transmission as a result of sexual violence, before deciding whether to administer HIV prophylaxis and only when a survivor reports within 72 hours of the assault.



14. Should a doctor conduct a urine pregnancy test on every child survivor/victim of sexual violence (Rape/Sexual assault)?

Based on the age of the child, if she has already attained menarche then decision to do urine pregnancy test has to be taken depending on the phase of menstrual cycle she is in (like whether in menstrual bleeding or proliferative phase or secretory phase). If it is a case of a pre-pubertal girl around the age of menarche, it is better to do urine pregnancy test so as to not miss any possible pregnancy in her first menstrual cycle itself.





Seeking informed consent from survivor / victim

1. What is the minimum age of a person for giving valid consent for sexual intercourse?

The minimum age of a person for giving valid consent for sexual intercourse is 18 years as per section 375 of IPC.

2. What is the minimum age of survivor/victim of sexual violence for giving valid consent for medical examination?

The minimum age of survivor/victim of sexual violence for giving valid consent for medical examination is 12 years, as per sections 89 and 90 of IPC. In case the child is under 12 years of age, consent should be sought from the parent or guardian.

3. Is it mandatory to seek informed consent and for what purpose?

Yes, it is important to seek informed consent for the following purposes:

- Medical examination for treatment
- Medico-legal examination
- Sample collection for clinical and forensic examination
- Information to be reported to the police.

It is also essential that the doctor makes the survivor understand the purpose and the procedure of examination including the risk and benefit and that there is no precondition for treatment. The examining doctor should know that the survivor has the right to refuse examination at any stage and informed refusal also needs to be documented.

4. What is the minimum age of survivor/victim of sexual violence for giving valid consent for Medical Termination of Pregnancy (MTP)?

The minimum age of survivor/victim of sexual violence for giving valid consent for MTP is 18 years as per section 87 of IPC.



5. From whom can informed consent for medical examination of a child be obtained when there are no natural guardians (parents) or local guardian in following circumstances:

a) A destitute child who is 10 years of age is and brought by police?

Informed consent can be obtained from a panel of senior doctors in administrative positions in the hospital who will act in the best interest of the child. For this reason a hospital policy has to be in place.

b) A pregnant girl who is 14 years of age who has come for MTP with gestational age of 18 weeks?

Informed consent can be obtained from a panel of senior doctors in administrative positions in the hospital who will act in the best interest of the child. For this reason a hospital policy has to be in place. Alternatively consent can also be sought from the Child Welfare Committee. (As per section 5 of the MTP Act of 1971, if the continuation of the pregnancy is a threat to the life of the mother then it can be terminated by any doctor, in any hospital, at any duration of gestational age.)

c) A pregnant girl who is 14 years of age who has come for MTP and the gestational age is 21 weeks?

Informed consent has to be obtained from the jurisdictional Court for MTP as the gestational age is beyond 20 weeks (Beyond the provisions of permissible limit [20 weeks of gestational age] of MTP Act of 1971).

6. In case of an emergency lifesaving procedure which has to be performed by a doctor on a survivor/victim of sexual violence, who will consent and how can consent be obtained?

As per section 92 of IPC, any act done in good faith for the benefit of the person even without consent is not an offence. The doctor can directly conduct the emergency lifesaving procedure.

7. In case of a mentally challenged, hearing and / or speech impaired or drugged survivor/ victim of sexual violence who would consent for medical examination?

In the above situations, consent for medical examination can be obtained from:

- The parents or local guardian acting in the best interest of the survivor/victim.



- In absence of parents or guardians, informed consent can be obtained from a panel of senior doctors in administrative positions in the hospital.
- In case of a child, informed consent can also be obtained from CWC or from Jurisdictional Courts if it is not an emergency.

8. Is it necessary to obtain a Court order or can police give consent for medical examination of a survivor/victim of sexual violence who does not consent?

No Court or person can force a medical examination on a survivor/victim, when the survivor/victim of sexual violence does not consent for the same. Police consent should never be taken for medical examination as he/she appears for the prosecutrix.





Collection of medical evidence during examination of survivor/victim

1. Are injuries present in all cases of sexual violence?

The WHO evidence⁹ states that injuries are present only in 33% cases of sexual violence. The absence of injuries could either be due to the victim being unconscious because of having been drugged or intoxicated. The absence of injuries could also be because the survivor/victim was overpowered or silenced with threat or harm to her or her family. Injuries may also not be present because the accused used a lubricant.

Point to remember: Explanation 2 to Section 375 of IPC states that if someone does not resist sexual violence, it cannot be construed as offering consent to the act.

2. What is the relevance of special tests and investigations during medical examination of survivor/victim of sexual violence?

With research evidence divided on the use of colposcopy to detect microinjuries^{10,11}, with toluidine dye test having its own limitations in detecting micro injuries related to sexual violence and with false positive results appearing with the use of Wood's lamp examination^{12,13,14} for detecting semen, these special tests and investigations should be done with caution in cases of sexual violence.

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

DNA profiling¹⁵ is crucial comparable evidence in sexual violence cases if collected and profiled properly. But unfortunately in several sexual violence cases, the accused is either not caught or not arrested or not arrested immediately, thus the comparable sample from accused for DNA examination cannot be put to use.

Point to remember: Section 164A of CrPC and section 53A of CrPC insist on collection of DNA evidence in all cases of sexual violence.

DNA could be extracted from products of conception or from foetus in sexual violence cases. DNA can also be extracted from seminal stains, swabs and/or vaginal smears through the nucleated cells of semen, that is spermatozoa. But in all those cases of vasectomy, azoospermia, necropermia and in cases of disease of vas deferens there may not be DNA to compare. Same may be true in old stains or denatured stains as DNA may get destroyed. So DNA profiling in sexual violence cases have to be understood with these limitations in mind.



4. Should a doctor do a medical examination and collect evidence if woman is menstruating?

There are always chances of losing trace evidence in cases of menstrual blood flow occurring at the time of assault, as well as at the time of medical examination. But it is wise to collect whatever evidence is available at the time of medical examination even if the woman is menstruating. It would be wrong to delay the medical examination because the survivor/victim is menstruating as this would affect not only evidence collection, but would also delay the commencement of treatment of STIs, injuries, psychological counseling, etc.

5. Is it necessary to collect all medical evidence in all cases of sexual violence even when there is delayed reporting after the alleged sexual violence?

The type/s of evidence to be collected in each case depends on the following:

- o The nature of sexual violence (penetrative or non penetrative; penile or non penile; orifice penetrated – vagina, anus, mouth, urethra; ejaculation occurred or not)
- o Post sexual assault activities undertaken by the survivor/victim (bathing, douching, washing, urination, defecation, etc) and
- o The actual time of medical examination post sexual violence (keeping in mind the fact that there could be several delays in reaching a medical facility for medical examination due to various social issues and barriers).

Points to remember:

- o Clothes which were worn at the time of assault are to be collected even in delayed medical examination.
- o Swabs / Slides for evidence of motile spermatozoa should be collected if the survivor/victim reports within 12 to 24 hours post assault;
- o Swabs / Slides for evidence of spermatozoa should be collected if the survivor/victim reports up to 24 to 48 hours post assault;
- o Swabs for evidence of semen, blood stain, lubricant should be collected if the survivor/victim reports even up to four to five days post assault;
- o Loose hair and any other trace evidence (buttons, paint, etc) should be collected whenever present along with nail clippings during the time of medical examination⁸. (Please refer to MOHFW Guidelines and Protocols for medico legal care for survivors/victims of sexual violence, 2014, Page 59 – Annexure 4)



6. What should the doctor or a hospital do in case there is a delay on the part of police in collecting the sealed evidentiary materials or packets?

The doctor should always pack, seal and label all the evidentiary materials, packets and hand them over to the police along with the report for onward transfer to FSL and/or hospital laboratory for testing and opinion/s. In case of delay, a reminder letter can be sent to the police, to speed up the process. If they still fail to collect the evidentiary material, then a letter can be sent to the superior police officers, explaining about the urgent need of collection of evidentiary materials/packets from the doctor or hospital for onward transfer to laboratories.

7. For how long should the products of conception be kept in the hospital?

Products of conception are collected for doing the DNA profiling and to ascertain whether they match with that of the accused. Ideally speaking it has to be sent to the DNA laboratory immediately. If this is not possible, then the products of conception should be stored in a container and maintaining the cold chain/ cold storage (at 4°C) and should be sent to the DNA laboratory as early as possible.

8. In case of a full term delivery, what samples of the foetus should be collected to be sent for DNA analysis?

Some of the DNA laboratories prefer the whole foetus to be sent to them if it can be sent immediately. If there is a delay, laboratories prefer femur bone sample/blood sample. It is better to refer to the standard operating procedures (SOPs) of each of the FSL doing the DNA profiling so as to decide what sample / how much sample / transit or transportation time / preservative to be used, etc. for DNA analysis.





Framing medical opinion after medical examination of survivor / victim

1. What all constitutes medical opinion?

Medical opinion consists of any of the following evidence:

- o Sexual violence (penetration by penis, body part, object or non penetrative);
- o Ascertaining mental incapacity of the survivor/victim to give consent due to the effect of disease, ethyl alcohol, narcotic drugs or psychotropic substances;
- o Medical age determination which would be crucial in deciding incapacity to give consent and /or increase in the punishment;
- o Identification of assailants through medical examination of survivor/victim by collection of DNA material like hair, semen, blood, nail clippings etc.

Point to remember: Non availability of medical evidence does not mean that sexual violence has not occurred.

2. What are the limitations of medical opinion?

Medical opinion cannot be framed in certain circumstances due to limitations such as:

- o Post assault activities like bathing, douching, washing, urination, defecation, etc, undertaken by the survivor/victim
- o Delay in reporting for medical examination;
- o Healing of injuries and STIs post assault;
- o Use of condom and
- o Non-availability of documents to prove treatment received (case sheet / discharge slip/ prescription copy / hospital and pharmacy bills).



3. Can the doctor give opinion on whether rape or sexual assault occurred?

Doctors cannot give opinion on whether rape or sexual assault occurred, as these are legal terms to be decided by the Court.

4. Should a doctor give provisional opinion in every case examined?

Yes, whenever the doctor has got positive examination findings such as presence of injuries, STIs or when wet smear examination is positive for spermatozoa, the doctor should give provisional opinion immediately.

Point to remember: In every case of medical examination there may not be an affirmative provisional opinion for reasons such as delay in reporting for medical examination, post assault activities, type of sexual violence, facilities available at the time of medical examination, etc. It is important to furnish provisional opinion otherwise the Investigating Officer gets stranded being unable to frame charges against the accused and / or to arrest the accused.

5. Is it difficult or not possible to issue Provisional Opinion?

It is not difficult for a doctor to provide a provisional opinion. The doctor can always provide provisional opinion about presence of spermatozoa, injuries, etc. As a defensive practice, doctors mostly opine in the following manner:

‘opinion reserved / pending for want of FSL/laboratory reports’.

In such cases, the Investigating officers are unable to proceed further and the accused generally gets the benefit of doubt and may even get bail as an outcome of such practices of doctors.

Point to remember: Doctors to provide a reasoned opinion in all cases of sexual violence as they have a legal mandate to do so as per Section 164 A of CrPC.

6. When can a doctor issue final opinion?

A doctor can issue a final opinion immediately after the receipt of the laboratory investigative reports either from the hospital laboratory and/or FSL or both.



7. Is it necessary that the final opinion is affirmative in every case?

In every case of medical examination there may not be an affirmative final opinion for reasons such as delay in reporting for medical examination, post assault activities, type of sexual violence, facilities available at the time of medical examination, etc.

8. How should the Final Opinion be furnished?

Section 164 A of CrPC insists that the doctor provides reasoned opinion. Thus negative evidence due to absence of semen because of use of condom or because the survivor was menstruating at the time of assault or washing of genitals, bathing by the survivor or delay in medical examination etc, has to be explained and documented. It is always better if the doctor finalizes the final opinion well before getting into the witness box.

9. What is the relevance of Medical Opinion vis. a vis. current Law?

As per the amendments to the Criminal Law in 2013, the definition of rape and sexual assault has expanded to include both penetrative and non penetrative acts like penetration into orifices such as anus, mouth, urethra, vagina by either penis or objects or body parts (fingering). In cases of non penetrative sexual violence or Penetration by objects or bodyparts, there may be no medical evidence at all. This has to be clearly understood by Doctors, Police, Lawyers, Courts and all other stakeholders in providing justice to survivors/victims of sexual violence.

10. Are there any templates for issuing reasoned medical opinion/s?

The MOHFW Guidelines and Protocols for medico-legal care of survivors/victims of sexual violence, 2014⁸, provides standardized templates for giving reasoned medical opinion/s after medical examination. (Pages 32, 35 and 36)

11. How to opine about sexual violence when both physical and genital injuries are absent and if FSL reports are negative for presence of semen, alcohol, drugs or lubricants?

In such cases if history of sexual violence is reported but medical examination does not find any injuries nor does the FSL report detect any presence of semen, alcohol, drug or lubricant, then the medical opinion could be as follows:



‘the possibility of sexual violence cannot be ruled out on account of history provided by the survivor / victim in relation to nature of assault, activities undertaken after the assault and time lapse between assault and medical examination.’

Hence, in such cases, the investigating officer has to look for other corroborative or circumstantial evidence/s beyond medical evidence.

12. How should the doctor respond to the police requisition asking to ‘rule out rape’ after medical examination of the survivor/victim?

As per law, the police are empowered to ask any question to the doctor based on their investigation in a case of sexual violence, however doctor cannot ‘rule out rape’ by medical examination as rape is a legal term. But the doctor can draw inferences from medical examination of the survivor, based on positive or negative findings of the examination. Thus, Doctors should clarify their inability to ‘rule out rape’ by medical examination of the survivor/victim.

13. How should the doctor respond to the police requisition asking to find out whether the person is ‘habituated to sex’ after medical examination of the person?

As per section 146 of IEA, it is illegal to ask questions related to past sexual acts of the survivor / victim. That means past consensual sexual acts are immaterial when the current act of sexual violence is being examined. Hence the doctor need not give an opinion to the question of the police requisition asking to find out whether the person is ‘habituated to sex’.





Medical examination of accused of sexual violence

1. Is it ok to use reasonable force during medical examination of accused?

As per section 53A of CrPC, reasonable force can be used during medical examination of accused. But nowhere in the IPC or any other law has reasonable force been defined.

2. Can you force a medical examination on a person accused of sexual violence?

- o Section 53A of CrPC provides for use of reasonable force for medical examination of accused of rape. However all doctors have to seek informed consent before doing such examinations which includes collection of blood, semen, saliva, hair, body fluids, etc, (trace evidence/ evidentiary materials).
- o If the accused consents for medical examination, it means that the consent includes consent for collection of evidentiary materials also.
- o If an accused does not give consent (inspite of being explained the consequences of not getting medically examined and its possible adverse inferences by the Courts against the accused) then informed refusal of the accused has to be documented.

3. Is potency examination always to be conducted as part of medical examination of accused?

With the change in the definition of rape/sexual assault as per the Criminal Law amendment, 2013, which includes both penetrative and non-penetrative assault, practices such as potency examination should be discontinued. Section 53 A of CrPC which specifically deals with medical examination of accused of rape does not mention anything about potency examination. Moreover, medically a definitive opinion cannot be given 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 need not be conducted and is largely irrelevant today.



4. Is it necessary for a doctor to mandatorily collect semen samples (by making the accused masturbate) during accused examination?

There is no scientific basis for a doctor to mandatorily collect semen sample (by making the accused masturbate) during accused examination. Even if the investigating officer makes a request for comparing the semen samples of the accused with samples available at the scene of crime, the answer of the doctor should be that – *“for DNA profiling any body material can be used and material such as blood are easier to obtain for DNA comparison”*.

Point to remember : It would be inhuman and unethical to make the accused to masturbate by showing pornography or other such material.

5. Is it necessary to document the size of the genitals of the accused during examination?

Section 375 of IPC describes penetration of penis to any extent into woman's genitals as constituting of rape and does not insist on erected penis, complete penetration or ejaculation. Thus, mere touching of the penis to the female genitals is enough to constitute the offence of rape and is not dependent on the size of the penis. So, it is not necessary to document the size of the genitals of the accused during examination.

6. Can we use Colour Doppler examination of the penis or papaverine injection to certify potency in medico-legal cases?

Use of colour Doppler examination of the penis or papaverine injection to certify potency for therapeutic purposes is done in erectile dysfunction cases for the benefit of that person. But in a medico-legal case, performing such examinations without the consent of the accused would be illegal. Further in such cases the evidence obtained through these tests may go against the interests of the accused. According to Article 20 sub clause 3 of the Indian Constitution, an accused need not provide evidence to incriminate themselves¹⁶.

7. Can an accused report to the doctor voluntarily without police requisition for medico-legal examination?

It may be possible that an accused reports voluntarily to the doctor/hospital for treatment of either injuries sustained during sexual violence, treatment of STIs or for psychological counseling. In such situations, the doctor should provide treatment, mandatorily inform police (nearest/jurisdictional police station) and also carry out medico-legal examination.



8. Should the doctor provide treatment to the accused after medical examination?

Yes, the doctor should provide treatment to the accused following medical examination. This is because post sexual violence there are possibilities of accused also sustaining injuries, contracting STIs (including HIV, HBsAg) or even suffering from psychological disturbances.

9. Should the doctor verify the age of the accused during medical examination by conducting age verification tests?

Based on Supreme Court judgement⁶ in the Ashwani Kumar Saxena vs State of M.P, 2013 it was held that, “....*Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the J.J. Board or the Child Welfare Committee need to go for medical report for age determination.....*”. Hence, only in those cases where documentary proof of age is not available or seems fabricated or manipulated, medical age verification tests need to be conducted.

10. Should we verify the sex of the accused during medical examination by conducting sex verification tests?

Routinely sex verification tests need not be done. In some cases however, there may be requests from the Investigating Officers for verifying the sex of the accused if he/she is an intersex / transgender person. But by a single medical examination it is not possible to accurately verify the sex of the individual¹⁷. Now with the Supreme Court recognizing that transgender persons are the third sex¹⁸, there is no requirement for strictly grouping every individual as either male or female.

11. What are sex verification tests?

Tests to verify the biological sex of a person are known as Sex verification tests¹⁷. These include tests like Nuclear sexing or Microscopic tests or Sex chromatin test; detection of ‘Y-linked SRY gene’; chromosomal studies and hormonal assays.

12. Is there increased punishment for accused between ages 16 years to 18 years who have been involved in heinous crimes? How will the legal system identify whether a child acting as an adult has committed a heinous offence?

- Section 19 of the Juvenile Justice Act, 2015 made provisions for increased punishment for the accused in the age range 16 to 18 years involved in heinous crimes acting as an adult¹⁹. However as per section 21 of the Act, the Court is barred from awarding death sentence/life imprisonment without the possibility of release to such an accused.
- As per section 15 of the Juvenile Justice Act, the Juvenile Justice Board may take the assistance of experienced psychologists or psycho-social workers or other experts to identify whether a child has committed a heinous offence acting as an adult.





Deposition in Court in cases of sexual violence

1. Is the doctor an expert witness?

Yes, whenever a doctor is opining on matters of Science (Medical Science), he/she is an expert witness according to section 45 of IEA.

2. Is it mandatory to inform the police immediately when a survivor/victim of sexual violence reports to a hospital?

It is mandatory to inform the police immediately through MLC intimation when a survivor/victim of sexual assault reports to a hospital.

Point to remember: Doctors should not delay treatment of the survivor and that should be done even before reporting to police.

3. How should a doctor respond to the following Court questions

“Did you inform police and wait till arrival of police before doing MTP”?

- “Yes, as this pregnancy was a result of rape/sexual assault, I informed police before doing MTP under mandatory reporting provision”. OR “As the age of the survivor/victim is less than 18years, I informed police before doing MTP as the minimum legal age for consenting for sexual intercourse by a woman is 18 years”.
- “I could not wait till arrival of the police since it is not a requirement in law”. OR “Since this was a case of threatened abortion, I had no choice but to treat the person and perform MTP.”

“Whether rape occurred or not?”

The doctor should respond saying that “Rape is a legal term and as a doctor I cannot opine on whether rape occurred or not.”

“Whether the victim is habituated to sexual intercourse or not”?

As per sec 146 of IEA it is not required to know whether the victim is habituated to sexual intercourse or not. Further as per the MOHFW Guidelines and Protocols on medico legal care for survivors/victims of sexual violence, 2014⁸, the doctor should not comment on past



sexual history of survivor. Hence a doctor should respond stating that “I am not supposed to comment on whether the victim is habituated to sexual intercourse or not.”

“Could these injuries be caused by any other means, other than rape/sexual assault? Can these injuries be self-inflicted?”

The doctor should respond stating:

“No, these injuries could not have been caused by any other means as they appear on both sides of the survivor’s body as well as at multiple sites”, OR

“As the injuries are on one side of the body, the possibility of these injuries being sustained by a fall cannot be ruled out.”

Point to remember: Self Inflicted injuries are those which are superficial, multiple, often parallel, in accessible parts of the body, mainly directed towards the centre of the body and mostly abrasions or incised injuries in nature. If the injuries noted on the body of the victim or accused match with these features then the possibility of such injuries being self-inflicted cannot be ruled out.

“Why are there no injuries in this case or in this gang rape case?”

The doctor should corroborate history given by the survivor/victim with absence of injuries and can respond by stating that “The victim was unconscious or overpowered or victim did not offer resistance as there was a threat/ fear to her/her family or there was use of lubricant in this case hence there are no injuries.”

“Did you actually notice injuries on the body of the survivor / accused?”

The doctor should respond stating:

“Yes I noticed these injuries while I did the medical examination of the survivor / accused”. Doctor should substantiate this statement by presenting the pictorial representation (body chart diagrams) and description of the injuries in the medical report submitted immediately after the medical examination of the survivor / accused.

“What is the time since injuries”

The doctor should respond to this question based on the characteristic features of the abrasions, contusions, lacerations, incised injuries, fractures and also based on the table given in MOHFW Guidelines and Protocols for medico legal care of survivors/victims of sexual violence, 2014^s (Page No 55 Annexure 2).



“Did you send any samples for further investigation? Where? When? Why?”

The doctor can respond stating:

“Yes, I sent the samples of swabs/slides/clothes/blood/nail clippings for further investigations to Central/State/Regional FSL immediately after the medical examination through police for finding/detecting semen/spermatozoa/blood/lubricant/drug/alcohol/ hair /other trace evidence etc, if any. **OR**

Yes, I sent the samples of swabs / slides / blood for further investigations to hospital laboratory immediately after the medical examination directly or through police for finding/detecting evidence of motile spermatozoa/STIs/blood grouping etc.

“When there is no semen, how do you say it is a case of rape / sexual assault?”

The doctor should respond stating that:

“It is not necessary that in every case of rape / sexual assault we would find semen. Semen may not be found in the following cases and give the scenario which is applicable in the current case.

- o Non-penile penetration (penetration by objects or body parts)
- o penile penetration but ejaculation did not occur
- o Penile penetration but ejaculation occurred outside the body
- o Penile penetration but a condom was used and was not recovered
- o The accused was azoospermic
- o The accused had a disease of vas deferens
- o There is inordinate delay between the commission of sexual violence and medical examination that even if spermatozoa were present at the time of sexual violence – they would have disintegrated and are beyond recognition.

“Why did you conclude your provisional opinion/final opinion in this manner?”

The doctor should respond by stating that:

- Based on the history of assault and examination findings I have concluded my provisional opinion in this manner.
- Based on the history, examination findings and the reports of the laboratory investigations/FSL, I have concluded my final opinion in this manner.



“Did you refer to any authority before concluding your Provisional / Final Opinion in this manner?”

The doctor should respond stating that

“Yes I referred to the MOHFW Guidelines and Protocols for medico-legal care for survivors / victims of sexual violence before concluding my provisional (**Page no 32**) / final Opinion (**Page no 35 & 36**) in this manner.”

“Is your opinion being tutored by somebody?”

The doctor could respond stating that:

“No, the opinion given by me is not tutored by anyone. Though I consulted a senior colleague of mine in this case but the final opinion is based on my observation and conclusions only. “

“Are you qualified to give this opinion?”

The doctor should respond stating that:

“Yes, my qualifications are as follows (MBBS / MD / MS) and I am adequately qualified and trained to do this examination. I also have experience in handling similar cases and thus I am qualified to give this opinion.”

“Was there a female assistant during medical examination?”

This may be relevant whenever a male doctor is examining a female survivor / victim. Accordingly, it can be answered Yes or No depending on whether a male doctor or female doctor does the medical examination of female survivor / victim.

4. Can the doctor ascertain whether forceful sexual intercourse has taken place or not?

The doctor can ascertain whether forceful intercourse had taken place or not based on signs of sexual intercourse along with signs of physical and/or genital injuries on the body.

5. Can the Judges/Lawyer/ Police ask doctors to comment on the status of the hymen? Is it relevant in all cases?

Old injuries or scars of the hymen may be immaterial in the adjudication of the current forceful act of sexual violence. However, fresh injuries on the hymen help in interpreting use of force. In cases of chronic, repetitive, non-consensual sexual violence even the documentation of old hymenal injuries / scars is necessary. Depending on the case, the Judges/Lawyers/Police can ask the doctors to comment on the status of the hymen.



6. Can the defense lawyer ask very offending questions to the doctor in the witness box, which often makes the doctor feel humiliated?

As per Section 146 of IEA, the defense lawyer can aggressively question any witness including doctor in the witness box for any duration, to bring out the truth and veracity. Aggressive questioning can also be done to shake the doctor's confidence. But if such questions are offending and the doctor feels uncomfortable, then the Public Prosecutor could object at any time and the Judge could disallow the defense lawyer from asking such offensive questions. But if the Judge does not refrain the defense lawyer from such questioning then the doctor is forced to answer these questions in the witness box.

7. Should the Courts always treat evidence given by doctors as evidence deposited by an expert witness?

As long as the doctor is deposing evidence on matters of science (medical science) the Court considers the evidence deposited by the doctor as that of one by an expert witness.

8. What should a doctor do if there are typographical errors on the copy of evidence deposited in the Court? Should the doctor sign the typed copy of evidence deposited even with the typographical errors?

Once the doctor steps out of the witness box, he/she has to wait to sign the typed deposited copy. In case of any typographical errors, the doctor should bring it to the knowledge of the presiding Magistrate/Judge before signing, as this could lead to misinterpretation of his/her evidence.

9. Can a Court directly warrant a doctor's presence without summoning them earlier?

Usual practice of Courts is that they summon the witnesses first (including doctor) and if they fail to appear for summon /s, then compels the witnesses' attendance to the court by issuing warrants. If in case the depositions of all other witnesses' are over and only one witness remains, then the courts may directly warrant the witness (including doctor) without summoning them earlier in the interest of delivering speedy justice.





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